COMMENTARIES

ON

EQUITY JURISPRUDENCE

VOLUME II

COMMENTARIES

ON

EQUITY JURISPRUDENCE

AS ADMINISTERED IN

ENGLAND AND AMERICA

By JOSEPH STORY, LL.D.

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"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 elicere, pertentando unamquamque partem juris, oportebit." — Cic. De Invent. Lib. 2, cap. 22.

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COMMENTARIES

ON

EQUITY JURISPRUDENCE

VOLUME TWO

CHAPTER VIII

ACCOUNT

§ 580. **Account.** — Having disposed of these three great heads of concurrent equitable jurisdiction in matters of accident, mistake, and fraud, the undisputed possession of which has belonged to Courts of Equity from the earliest period which can be traced out in our juridical annals, we may now pass to others of a different and less extensive character. We allude to the heads where the jurisdiction, although it may attach upon any or all of the grounds above mentioned, is not necessarily dependent upon them, and in fact is exercised in a variety of cases where they do not apply, upon another distinct ground; namely, that the subject-matter is per se within the scope of equitable jurisdiction. Among these are Matters of Account, and as incident thereto Matters of Apportionment, Contribution, and Average; Liens, Rents and Profits; Tithes, and Moduses, and Waste; Matters of Administration, Legacies, and Marshalling of Assets; Confusion of Boundaries; Matters of Dower; Marshalling of Securities; Matters of Partition; Matters of Partnership; and, lastly, Matters of Rent so far as they are not embraced in the preceding head of Account.

§ 581. **History of Action of Account.** — Let us begin with matters of Account. One of the most ancient forms of action at the common law is the action of account. But the modes of proceeding in that action, although aided from time to time by statutable provisions, were found so very dilatory, inconvenient,

and unsatisfactory, that as soon as Courts of Equity began to assume jurisdiction in matters of account, as they did at a very early period, the remedy at law began to decline; and although some efforts have been made in modern times to resuscitate it, it has in England fallen into almost total disuse.[1] Courts of Equity have for a long time exercised a general jurisdiction in all cases of mutual accounts, upon the ground of the inadequacy of the remedy at law, and have extended the remedy to a vast variety of cases (such as to implied and constructive trusts) to which the remedy at law never was applied.[2] So that now the jurisdiction extends not only to cases of an equitable nature, but to many cases where the form of the account is purely legal, and the items constituting the account are founded on obligations purely legal. Upon such legal obligations however suits, although not in the form of actions of account, yet in the form of assumpsit, covenant, and debt, are still daily prosecuted in the Courts of Common Law,[3] and legal defences are there brought forward. But even in these cases, as the courts possess no authority to stop the ordinary progress of such suits for the purpose of subjecting the matters in dispute to the investigation of a more convenient tribunal than a jury, unless the parties agree to a voluntary arrangement for this purpose the cause often proceeds to trial in a manner wholly unsuitable to its real merits.[4]

[1] In Godfrey *v.* Saunders (3 Wilson, R. 73, 113, 117), which is one of the few modern actions of account in England, Lord Chief Justice Wilmot said (p. 117), "I am glad to see this action of account is revived in this court." Mr. Gwillim, in his edition of Bac. Abridg. title, Accompt, p. 31, note (*a*), seemed to think that the action of account did not deserve the character usually given of it. But the Parliamentary Commissioners, in their second report on the common law (8 March, 1830, pp. 9, 25, 26), have no scruple to admit its inconvenience and dilatoriness, and that it has gone into disuse. See also Buller, N. P. 217; 2 Reeves, Hist. of the Law, 73, 178, 337; 3 Reeves, Hist. L. 388; 4 Reeves, Hist. L. 378; Crousillat *v.* McCall, 5 Binn. 433; 3 Black. Comm. 164.

[2] See Corporation of Carlisle *v.* Wilson, 13 Ves. 275; 1 Fonbl. Eq. B. 1, ch. 1; § 3, note (*f*), pp. 13, 14; Bac. Abridg. Accompt B.

[3] It was at one time doubted whether an action of assumpsit would lie for the balance of an account where there are items on both sides. But it is now fully established that however numerous the items may be, still if there appears anything due on one side, an action of assumpsit will lie for the balance. Tompkins *v.* Willshear, 5 Taunt. R. 431; s. c. 1 Marsh, R. 115, and the cases there cited; 2 Saund. 127, William's note (*d*). The use of the old action of account is there said to be where the plaintiff wants an account and cannot give evidence of his right without it. Ibid.

[4] 2 Parl. Common Law Rep. 1830, pp. 25, 26; Wilkin *v.* Wilkin, Salk. 9; 3 Black. Comm. 184. The Parliamentary Commissioners, in their second report on the common law (8 March, 1830, p. 26), proposed to

§ 582. **Advantages Given by Court of Equity in Matters of Account.** — The difficulties in the modes of proceeding in actions of account, and the convenience of the modes of proceeding in suits in equity, to attain the ends of substantial justice, are stated in an elementary work of solid reputation, with great clearness and force. The language of the learned author is as follows: "The proceedings in this action being difficult, dilatory, and expensive, it is now seldom used, especially if the party have other remedy, as debt, covenant, case, or if the demand be of consequence and the matter of an intricate nature; for in such case it is more advisable to resort to a Court of Equity, where matters of accompt are more commodiously adjusted and determined more advantageously for both parties, the plaintiff being entitled to a discovery of books, papers, and the defendant's oath; and on the other hand the defendant being allowed to discount the sums paid or expended by him, to discharge himself of sums under forty shillings by his own oath, and if by answer or other writing he charges himself, by the same to discharge himself, which will be good if there be no other evidence. Further all reasonable allowances are made to him; and if after the accompt is stated anything be due to him upon the balance, he is entitled to a decree in his favor." [1]

§ 583. **A Review of the Old Action of Account.** — To expound and justify the truth of these remarks, it may be well to take a short review of the old action of account, and to see to what narrow boundaries it was confined and by what embarrassments it was surrounded.

§ 584. **Same.** — At the common law an action of account lay only in cases where there was either a privity in deed by the consent of the party as against a bailiff or receiver appointed by the party, or a privity in law, ex provisione legis, as against a guardian in socage.[2] An exception indeed, or rather an extension of the

invest the Courts of Common Law with power to refer such accounts to auditors in such cases; a suggestion which has since been adopted, as indeed it had been adopted before in some of the American States. See Duncan *v.* Logan, 3 John. Ch. R. 361; Act of Massachusetts, 20th Feb. 1818, ch. 142. The decision as to the proper tribunal is governed largely by the question of convenience in taking the accounts. Shepard *v.* Brown, 4 Giff. 208. Compare Jones *v.* Newhall, 115 Mass. 244, 251; editor's note to § 33, ante, near end.

[1] Bac. Abridg. Accompt. See also 1 Eq. Abridg. p. 5, note (*a*); Anon. 1 Vern. 283; Wicherly *v.* Wicherly, 1 Vern. 470; Marshfield *v.* Weston, 2 Vern. 176.

[2] Co. Litt. 90 *b*; Id. 172 *a*; 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note; Bac. Abridg. Accompt A.; Com. Dig. Accompt A. 1; 2 Inst. 379.

rule, was for the benefit of trade and the advancement of commerce allowed in favor of and between merchants; and therefore by the law merchant, one naming himself a merchant might have an account against another naming him a merchant, and charge him as receiver.[1] But in truth in almost every supposable case of this sort there was an established privity of contract. With this exception however (if such it be) the action was strictly confined to bailiffs, receivers, and guardians in socage.[2] So strictly was this privity of contract construed, that the action did not lie by or against executors and administrators. The statute of 13th of Edw. III. ch. 23, gave it to the executors of a merchant; the statute of 25th of Edw. III. ch. 5, gave it to the executors of executors; and the statute of 31st of Edw. III. ch. 11, to administrators.[3] But it was not until the statute of 3d and 4th of Anne, ch. 16, that it lay against executors and administrators of guardians, bailiffs, and receivers.[4]

§ 585. **Same.** — But in all cases of this latter sort, although there was no remedy at the common law, yet a bill in equity might be maintained for an account against the personal representatives of guardians, bailiffs, and receivers; and such was the usual remedy prior to the remedial statute of Anne.[5] And no action of account lay at the common law against wrong-doers;[6] or by one joint tenant or tenant in common or his executors or administrators against the other as bailiff for receiving more than his share, or against his executors or administrators, unless there was some special contract between them whereby the one made the other his bailiff; for the relation itself was held not to create any privity of contract by operation of law.[7] This defect was afterwards cured by the statute of 3d and 4th of Anne, ch. 16.[8] The

[1] Co. Litt. 172 *a*; Earl of Devonshire's Case, 11 Co. R. 89.

[2] Buller's N. P. 127; 1 Eq. Abridg. 5, note (*a*); 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note (*n*); Co. Litt. 172 *a*; 2 Inst. 379; Sargent *v.* Parsons, 12 Mass. 149.

[3] Co. Litt. 90 *b*; 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note (*n*).

[4] Ibid.; Bull. N. P. 127; Earl of Devonshire's Case, 11 Co. R. 89.

[5] 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*n*); 1 Eq. Abridg. 5, note (*a*).

[6] Bac. Abridg. Accompt B. We shall presently see that Courts of Equity frequently administer relief in cases of account against wrong-doers. See Bac. Abridg. Accompt B.; Bosanquet *v.* Dashwood, Cas. T. Talb. 38, 41.

[7] Co. Litt. 172, and Harg. note (8); Co. Litt. 186 *a*, 119 *b*, and Harg. note (83); Wheeler *v.* Horne, Willes, R. 208; 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*n*); Bac. Abridg. Accompt A.; 1 Saund. R. 216, William's note.

[8] Ibid.; 3 Black. Comm. 164.

common law was strict as to who was to be accounted a bailiff or receiver; for a bailiff was understood to be one who had the administration and charge of lands, goods, and chattels, to make the best benefit for the owner, and against whom therefore an action of account would lie for the profits which he had made, or might by his industry or care have reasonably made, his reasonable charges and expenses being deducted.[1] A receiver was one who received money to the use of another to render an account; but upon his account he was not allowed his expenses and charges, except in the case of merchant receivers. And this exception was provided (as it was said) by the law of the land in favor of merchants and for the advancement of trade and traffic.[2] So that it will be at once perceived from these cases (and many others might be mentioned) [3] that the remedy at the common law was very narrow; and although it was afterwards enlarged, that would not of itself displace the jurisdiction originally vested in Courts of Equity.

§ 586. **Same.** — In the next place as to the modes of proceeding in actions of account. At the common law, before either the statute of Marlebridge, ch. 23, or of Westminster 2d, ch. 11, there were two methods of proceedings against an accountant: one by which the party to whom he was accountable might by consent of the accountant either take the account himself or assign an auditor or auditors to take it, and then have his action of debt for the arrearages; or in more modern times an action on the case, or insimul computassent. And the accountant, if aggrieved, might have his writ of ex parte talis, to re-examine the account in the Exchequer. The other proceeding of the plaintiff was, in the first instance, by way of a writ of account. The process by which this latter remedy might be made more effectual is particularly described in the statute of Marlebridge and the statute of Westminster 2d, upon which it is unnecessary to dwell.[4]

§ 587. **Two Distinct Courses of Proceeding in Action of Account.** — In the action of account there are two distinct courses of proceeding. In the first place the party may interpose any matter in abatement or bar of the proceeding, and if he fails in it then there is an interlocutory judgment that he shall account

[1] Co. Litt. 172 *a*; 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note (*n*).

[2] Co. Litt. 172 *a*.

[3] See Bac. Abridg. Accompt B., C.; Com. Dig. Accompt A., B., D.; 3 Reeves, Hist. Law, 337, 338, 339; 3 Reeves, Hist. Law, 75; 4 Reeves, Hist. Law, 388.

[4] Com. Dig. Accompt A. and note (*a*); 3 Reeves, Hist. Law, 75, 76.

(quod computet) before auditors.[1] After this judgment is entered it is the duty of the court to assign auditors, who are armed with authority to convene the parties before them de die in diem, at any time or place they shall appoint, until the accounting is determined. The time by which the account is to be settled is prefixed by the court. But if the account be of a long or confused nature, the court will, upon the application of the parties, enlarge the time. In taking the account the auditors in an action of account at the common law could not administer an oath except in one or two particular cases. But under the statute of 3d and 4th Anne, ch. 16, the auditors are empowered to administer an oath and examine the parties touching the matters in question in cases within that act.[2]

§ 588. **Hearing before Commissioner.** — If in the progress of the cause before the auditors when the items are successively brought under review, any controversy should arise before the auditors as to charging or discharging any items, the parties have a right, if the points involve matters of fact, to make up and join issues upon such items respectively; and if the point involve matters in law, they have a right in like manner to put in and join demurrers upon each distinct item. These issues, when so made up, are to be certified by the auditors to the court; and then the matters of law will be decided by the court, and the matters of fact will be directed to be tried by a jury, after which the accounts are to be settled by the auditors according to the results of these trials. From the circumstance the proceedings before the auditors are often tedious, expensive, and inconvenient.[3] And indeed as different points both of fact and law may arise in different stages of the suit, and in different examinations before the auditors as well after as before such issues have been joined and tried, it ought not to be surprising that the cause should be procrastinated for a great length of time by its transition from one tribunal to another, for the various purposes incident to a due settlement of its merits. And besides these difficulties there are many actions of account in which the defendant may wage his law, and thus escape from answering his adversary's claim.[4]

[1] 3 Black. Comm. 164; O'Conner *v.* Spaight, 1 Sch. & Lefr. 309.

[2] Co. Litt. 199, and Harg. note (83); Wheeler *v.* Horne, Willes, R. 208, 210; 1 Selwyn, N. P. 6; Buller, N. P. 127; Bac. Abridg. Wager of Law, C.

[3] Ex parte Bax, 2 Ves. 388; Bac. Abridg. Accompt F.; Bull. N. P. 127, 128; Crousillat *v.* McCall, 5 Binn. 433; Com. Dig. Accompt E. 11; Yelverton, R. 202, Metcalf's note (1).

[4] Com. Dig. Pleader, 2 W. 45; Co. Litt. 90 *b*; Ib. 295 *b*; 2 Saund.

§ 589. **Most Effectual Way of Settling Matters of Account Is by Bill in Equity.** — This summary view of the modes of proceeding in the action of account is sufficient to show that it was a very unfit instrument to ascertain and adjust the real merits of long, complicated, and cross accounts. In the first place it was inapplicable to a vast variety of cases of equitable claims, of constructive trusts, of fraudulent contrivances, and of tortious misconduct.[1] In the next place there was a want of due power to draw out the proper proofs from the party's own conscience, so that if evidence aliunde was unattainable, there was and there could be no effective redress.[2] And it has been well observed by Mr. Justice Blackstone that, notwithstanding all the legislative provisions in aid of the common-law action of account, "It is found by experience that the most ready and effectual way to settle these matters of account is by a bill in a Court of Equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce." [3]

Rep. 65 *a*; Archer's Case, Cro. Eliz. 579; Bac. Abridg. Wager of Law, D., G.

[1] See 1 Fonbl. B. 1, ch. 1, § 3, note (*f*), pp. 13, 14; 2 Fonbl. Eq. B. 2, ch. 7, § 67.

[2] Mr. Chancellor Kent, in Duncan *v.* Lyon (3 John. Ch. R. 361), said: "I have not been able to find any good reason why that action [account] has so totally fallen into disuse," assigning as a ground of his remark, that "in that action the auditors have all the requisite powers; for they can compel the parties to account and be examined under oath." If what is stated in the text be correct, it is manifest that the action of account, as administered in England, cannot be admitted to be equivalent for a Court of Equity. It is perhaps uncertain whether the learned Chancellor did not mean to confine his remarks to the actual state of the action in New York. See on this point the opinion of the same learned judge in Ludlow *v.* Simond, 2 Cain. Cas. Err. 52, 53.

[3] 3 Black. Comm. 164; ante, § 67. Lord Redesdale, in Attorney-Gen. *v.* Mayor, &c. of Dublin, 1 Bligh, R. (N. S.) 336, 337, gives a summary statement of the old action of account, and of the reasons of its discontinuance. He said: "There has not been in this case a sufficient investigation of the ancient law and practice on the subject of account. It seems to have been conceived that the common law had provided sufficient means for calling to account all persons liable to account. But it was found by experience that the writ of account was a very imperfect and inefficient mode of proceeding. In the case of an individual there can be no doubt that if a person had received the rents of an estate belonging to a minor for which he would be accountable, the law provided a writ to call such person to account, and to compel payment of what should be found due upon the account. Yet it is every day's practice, although the common law has provided this remedy, for Courts of Equity to take upon themselves the investigation of accounts on behalf of infants suing by their next friends. The writ of account at common law did not

§ 590. **Reference of Matter to a Master.** — Courts of Equity in suits of this nature proceed in many respects in analogy to what is done at law. The cause is referred to a master (acting as an auditor), before whom the account is taken; and he is armed with the fullest powers not only to examine the parties on oath, but to make all the inquiries by testimony under oath, and by documents and books and vouchers, to be produced by the parties, which are necessary for the due administration of justice. And when his report is made to the court, any objections which have been made before the master, and any exceptions taken to his report, may be re-examined by the court at the instance of the parties, and the whole case is moulded as ex æquo et bono may be required.[1] The court may besides bring all the proper parties in interest before it, where there are different parties concerned in interest; and if any doubt arises upon any particular demand, it may direct the same to be ascertained by an issue and verdict at law.[2] So that there cannot be any real doubt that the remedy in equity in cases of account is generally more complete and adequate than it is or can be at law.[3]

§ 591. **Same.** — This has accordingly been considered in modern times as the true foundation of the jurisdiction.[4] Mr. Justice Blackstone has indeed placed it upon the sole ground of the right

exclude but rather was superseded by the jurisdiction of the Courts of Equity on this subject; because the proceeding in equity was found to be the more convenient mode of calling parties to account, — partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of Courts of Equity. There is on this subject a writ in the Register (Reg. Brev. p. 138), which recites that the King had been given to understand that his predecessors had granted certain rates on all merchandise brought into a town, to be applied to the walling of the town, and the inhabitants having complained that the rates collected had not been duly applied, the writ proceeds in the nature of a commission for taking the account. Under such circumstances an information at this moment would lie at the suit of the Attorney-General for taking such account. The practice of proceeding by information rather than by the writ of account has prevailed in consequence of the difficulty of proceeding under the writ. That persons under such circumstances should be rendered accountable by virtue of the writ, is said to be according to the law and custom of England."

[1] Ex parte Bax, 2 Ves. 388.

[2] 1 Eq. Abridg. A., p. 5, note (*a*).

[3] See Mitford on Eq. Pl. by Jeremy, 120; Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279; ante, § 67.

[4] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 504; Mitf. Eq. Pl. by Jeremy, 120; Ludlow *v.* Simond, 2 Cain. Cas. Err. 38, 52; Rathbone *v.* Warren, 10 John. R. 595, 596; Post *v.* Kimberly, 9 John. R. 493; Duncan *v.* Lyon, 3 John. Ch. R. 361.

of Courts of Equity to compel a discovery. "For want," said he, "of this discovery at law, the Courts of Equity have acquired a concurrent jurisdiction with every other court in matters of account." [1] But this although a strong yet is not the sole ground of the jurisdiction. The whole machinery of Courts of Equity is better adapted to the purpose of an account in general, and in many cases independent of the searching power of discovery, and supposing a Court of Law to possess it, it would be impossible for the latter to do entire justice between the parties; for equitable rights and claims not cognizable at law are often involved in the contest.[2] Lord Redesdale has justly said that in a complicated account a Court of Law would be incompetent to examine it at Nisi Prius with all the necessary accuracy.[3] This is the principle on which Courts of Equity constantly act by taking cognizance of matters which though cognizable at law are yet so involved with a complex account that it cannot be properly taken at law; [4] and until the result of the account is known, the justice of the case cannot appear.[5] Matters of account, he has added, may indeed be made the subject of an action; but an account of this sort is not a proper subject for this mode of proceeding. The old mode of proceeding upon the writ of account shows it. The only judgment was that the party should account; and then the account was taken by the auditors. The court never went into it.[6]

§ 592. **Equity Assumes Jurisdiction on Account of Inadequacy of Remedy at Law.** — It is not improbable that originally in cases of account which might be cognizable at law, Courts of Equity

[1] 3 Black. Comm. 437. See also 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 12. Mr. Fonblanque too seems to consider that the greater portion of the concurrent jurisdiction of Courts of Equity stands upon a similar ground; for he says that the Courts of Equity having acquired cognizance of the suit, for the purposes of discovery, will entertain it for the purpose of relief in most cases of fraud, account, accident, and relief. 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 12. This might justify the jurisdiction, but it does not appear to me to include the whole ground on which it is maintainable. Mr. Justice Blackstone also traces to the same compulsive power of discovery the jurisdiction of Courts of Equity in all matters of fraud. 3 Black. Comm. 439. This, as the original or sole ground for the jurisdiction in matters of fraud, admits of still more question.

[2] Ante, § 67.

[3] O'Conner *v.* Spaight, 1 Sch. & Lefr. 309. See White *v.* Williams, 8 Ves. 193; Mitf. Eq. Pl. by Jeremy, 119, 120.

[4] See Harrington *v.* Churchward, 6 Jur. N. S. 576; Kaston *v.* Paxton, 46 Oreg. 308, 80 Pac. 209, 114 Am. St. Rep. 871.

[5] O'Conner *v.* Spaight, 1 Sch. & Lefr. 309; Id. 205; Mitf. Eq. Pl. by Jeremy, 120; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 504.

[6] Cooper Eq. Pl. 134.

interfered upon the special ground of accident, mistake, or fraud. If so, the ground was very soon enlarged, and embraced mixed cases not governed by these matters. The courts soon arrived at the conclusion that the true principle upon which they should entertain suits for an account in matters cognizable at law was, that either a Court of Law could not give any remedy at all, or not so complete a remedy as Courts of Equity. And the moment this principle was adopted in its just extent, the concurrent jurisdiction became almost universal, and reached almost instantaneously its present boundaries.[1]

§ 593. **Jurisdiction over Matters Incidental to Account.** — In virtue of this general jurisdiction in matters of account Courts of Equity exercise a very ample authority over matters apparently not very closely connected with it; but which naturally if not necessarily attach to such a jurisdiction. Mr. Justice Blackstone has said: "As incident to accounts, they take a concurrent cognizance of the administration of personal assets; consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts they also take the concurrent jurisdiction of tithes and all questions relating thereto, of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts."[2] But it is far from being admitted that the sole origin of equity jurisdiction on these subjects arises from this source. It is one, but not the sole source. In many of these cases, as well as in others which will hereafter be considered, in which accounts may be taken as incidents to the relief granted, there are other distinct if not independent sources of jurisdiction; and especially one source which is the peculiar attribute of Courts of Equity, — the jurisdiction over trusts not merely express, but implied and constructive.[3]

§ 594. **Jurisdiction in Equity Is Absolutely Universal Whenever It Attaches.** — One of the most difficult questions arising under this head (and which has been incidentally discussed in another place)[4] is to ascertain whether there are any, and if any, what are the true boundaries of equity jurisdiction in such matters of

[1] Ante § 108; corporation of Carlisle *v.* Wilson, 13 Ves. 278.

[2] 3 Black. Comm. 437.

[3] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 522, 523, 543; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); 2 Fonbl. Eq. B. 2, ch. 7, § 6, and notes.

[4] Ante, § 108.

account as are cognizable at law. We say cognizable at law; for wherever the account stands upon equitable claims, or has equitable trusts attached to it, there is no doubt that the jurisdiction is absolutely universal and without exception, since the party is remediless at law.[1]

§ 595. **Same.** — But in cases where there is a remedy at law there is no small confusion and difficulty in the authorities. The jurisdiction in matters of this sort has been asserted to be maintainable upon two grounds, distinct in their own nature and yet often running into each other.[2] In the first place it has been asserted that where in a matter of account the party seeks a discovery of facts and these appear upon his bill to be material to his right of recovery, there, if the answer does in fact make a discovery of such material facts (for it would be no ground of jurisdiction if the discovery failed),[3] the court having once a rightful jurisdiction of the cause ought to proceed to give relief in order to avoid multiplicity of suits.[4] And this plain ground is asserted by the learned author of the Treatise of Equity in a passage already cited; and it has been often maintained in the English Courts of Equity.[5] But (as we have already seen)[6] there are other au-

[1] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 504, 505, 506.

[2] See ante, §§ 64 to 110, and note to § 110; Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279. Lord Chancellor Erskine, in Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279, maintained the concurrent jurisdiction of Courts of Equity in matters of account to a very broad extent. He said: "The principle upon which Courts of Equity originally entertained suits for an account, where the party had a legal title, is, that though he might support a suit at law, a Court of Law either cannot give a remedy or cannot give so complete a remedy as a Court of Equity; and by degrees Courts of Equity assumed a concurrent jurisdiction in cases of account; for it cannot be maintained that this court interferes only when no remedy can be had at law. The contrary is notorious." "The proposition asserted against this bill is, that this court ought to refuse to interfere by directing an account, if an action for money had and received, or an indebitatus assumpsit, can be maintained. That proposition cannot be maintained," &c. "The proposition is not that an account may be decreed in every case where an action for money had and received, or indebitatus assumpsit, may be brought (and certainly indebitatus assumpsit lies for tolls); but that, where the subject cannot be so well investigated in those actions, this court exercises a sound discretion in decreeing an account." See what was said by Mr. Vice-Chancellor Wigram in Pearce *v.* Cresswick, 2 Hare, R. 286, 293, cited ante, § 64 *k*, note.

[3] Ante, §§ 112, 116; Russell *v.* Clarke's Execrs, 7 Cranch, 69; Dinwiddie *v.* Bailey, 6 Ves. 140, 141.

[4] Ryle *v.* Haggie, 1 Jac. & Walk. 237.

[5] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); ante, §§ 64, 66; 2 Fonbl. Eq. B. 6, ch. 3, § 6; Lee *v.* Alston, 1 Bro. Ch. R. 195, 196; Barker *v.* Dacie, 6 Ves. 688; Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279.

[6] Ante, §§ 64 *k*, 65, 66; 1 Fonbl. Eq. B. 1, ch. 3, note (*f*); note (*r*);

thorities in the English courts which conflict with this doctrine, and which, without attempting to lay down any rule for a practical discrimination as to cases within and cases without the jurisdiction, seem to deliver over the subject to interminable doubts.[1]

§ 596. **If Discovery Is Effectual, Court Will Proceed to Grant Full Relief.** — The doctrine now generally (perhaps not universally) held in America is (as we have seen),[2] that in all cases where a Court of Equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full relief. In other words where the court has legitimately acquired jurisdiction over the cause for the purpose of discovery it will, to prevent multiplicity of suits, entertain the suit also for relief.[3]

Parker *v.* Dee, 2 Ch. Cas. 200, 201; 1 Eq. Abridg. A., p. 5; 2 Eq. Abridg. A., p. 4; Ryle *v.* Haggie, 1 Jac. & Walk. 237.

[1] See ante, §§ 64 to 110, and note to § 110. Many of the cases on this head have been already commented on at large in note 1 to § 69. The difficulty of reconciling the authorities is very great. Is there any distinction between cases of account founded in privity, and those founded in tort (such as a waste, &c.)?

[2] Ante, §§ 67, 71, 74; Middletown Bank *v.* Russ, 3 Connect. R. 135.

[3] See ante, §§ 64 to 69, 71; Armstrong *v.* Gilchrist, 2 John. Cas. 424; Rathbone *v.* Warren, 10 John. R. 587; King *v.* Baldwin, 17 John. R. 384; Ludlow *v.* Simond, 2 Cain. Cas. Err. 1, 38, 39, 51, 52; Stanley *v.* Cramer, 4 Cowen, R. 727, 728. In Fowle *v.* Lawrason, 30 U. S. 495, 8 L. Ed. 204, Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "That a Court of Chancery has jurisdiction in matters of account cannot be questioned, nor can it be doubted that this jurisdiction is often beneficially exercised; but it cannot be admitted that a Court of Equity may take cognizance of every action, for goods, wares, and merchandise sold and delivered, or of money advanced, where partial payments have been made, or of every contract, express or implied, consisting of various items, on which different sums of money have become due and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a Court of Chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a Court of Equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a Court of Chancery to exercise jurisdiction. 1 Madd. Chan. 86; 6 Ves. 136; 9 Ves. 437. In the case at bar these difficulties do not occur. The plaintiff sues on a contract by which real property is leased to the defendant, and admits himself to be in full possession of all the testimony he requires to support his action. The defendant opposes to this claim, as an offset, a sum of money due to him for goods sold and delivered, and for money advanced, no item of which is alleged to be contested. We cannot think such a case proper for a Court of Chancery."

§ 597. [**Who Entitled to Account.** — It is said that under the English common law, equity may have concurrent jurisdiction with Courts of Law in all cases where the common law action of account would lie. In all cases where the accounts are intricate and a discovery is demanded, or where there should be an accounting for money held in trust, equity will take jurisdiction. Where a contract provided that one party was to receive a percentage of gate receipts, or a commission on goods sold, he is entitled to an accounting. The jurisdiction for accounting covers all fiduciary relations where the duty of keeping and rendering accounts exists, and while there are cases in which the common law remedy may be adequate, yet where one is in a Court of Equity and it appears that he has shipped a quantity of lumber to defendants under a contract with them, he will be required to account to plaintiff for the profits from the venture.[1] A tenant in common is likewise chargeable with that part of the ancestor's property which is in excess of his share, and for this he is liable to account.[2]]

§ 598. [**The Right to Account Does Not Lie as a Matter of Course Where There Have Been Mutual Dealings.** — It does not follow that the right to an accounting lies in favor of one party to a contract in every case where there have been mutual dealings. In order to sustain the jurisdiction of a Court of Equity, it ought to appear in the complaint that the defendant has in his hands property or profits in which the plaintiff is entitled to share, or

See Russell *v.* Madden, 95 Ill. 485. Where a bill seeks both discovery and an accounting, the discovery must be regarded, prima facie, as incidental to the accounting, and, if there is no right to the accounting, the bill will be held bad upon demurrer. Grieb *v.* Equitable Life Ass. Soc. of United States, 189 Fed. 498; Babbatt *v.* Tewkesbury, 46 Fed. 86.

The United States courts have jurisdiction of accounting in equity, certainly in cases of discovery, where there are complicated accounts, and a fiduciary or trust relationship exists between the parties. Morris & Co. *v.* Whitley, 183 Fed. 764.

[1] Empire Circuit Co. *v.* Sullivan, 169 Fed. 1009; Johnston *v.* Frederick Stearns & Co., 160 Mich. 247, 125 N. W. 29, 16 Detroit Leg. N. 1076; Clarke *v.* Pierce, 52 Mich. 157, 17 N. W. 780.

Not necessary to establish a partnership relationship, Coward *v.* Clanton, 122 Cal. 451, 55 Pac. 147.

An accounting is proper where one party received the property of another, and out of the income agreed to pay the taxes and mortgage debt, all of which he failed to do, and on account thereof the property was sold. Fox *v.* Hall, 164 Cal. 287, 128 Pac. 749.

But an accounting will not be had where defendant simply holds moneys sought to be recovered in a fiduciary or trust relation, he having an adequate remedy at law. Getman *v.* Dorr, 28 Misc. Rep. 654, 59 N. Y. Supp. 788.

[2] Fry *v.* Payne, 82 Va. 759, 1 S. E. 197.

that there are mutual or unsettled accounts, or that the accounts are so complicated that an accounting is necessary, and where it does not appear that defendant has property in his hands as trustee for plaintiff, or that a fiduciary relationship exists between them, the jurisdiction of the equity court is concurrent and where the action is pending in the law court, it will proceed to adjudicate the rights of the parties.[1] An action does not lie where the bill shows that there are no mutual accounts, but that the account in question is so complicated that respondent's liability cannot be expediently ascertained in a Court of Law; nor does an action lie upon a stock brokerage contract, it being in the nature of a contract to sell certain stock at a given price, no money being paid, but a bare option to be exercised at the will of one of the parties. To sustain an action for an accounting in equity, it must appear that there is some trust or fiduciary relation existing between the parties.[2]]

§ 599. **A Ground of Jurisdiction in Equity Is That That Court Affords a More Complete Relief.** — Another and more general ground has been asserted for the jurisdiction; and that is, not that there is not a remedy at law, but that the remedy is more complete and adequate in equity, and besides that it prevents a multiplicity of suits. This is indeed a very broad and general ground of jurisdiction; and especially as applied to cases founded in privity of contract, where it is contemplated that the matter should give rise to an account.[3] Upon this ground Lord Hardwicke expressed himself in favor of the jurisdiction generally in a case then before him, saying, "It is a matter of contract and account and consequently a proper subject for the jurisdiction of this court."[4] And this is manifestly the doctrine maintained by Lord Redesdale, who said that in matters of account, "A Court of Equity will entertain jurisdiction of a suit, though a remedy might perhaps be had in the Courts of Common Law. The ground upon which Courts of Equity first interfered in these cases seems

[1] Church *v.* Anti-Kalsomine Co., 118 Mich. 219, 76 N. W. 383, 5 Detroit Leg. N. 486.

[2] Harle *v.* Haggin, 131 App. Div. 742, 116 N. Y. Supp. 51; Moore *v.* Coyne & Delaney Mfg. Co., 113 App. Div. 52, 98 N. Y. Supp. 892; Wilson *v.* Kennedy, 63 W. Va. 1, 59 S. E. 736.

[3] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5; Barker *v.* Dacie, 6 Ves. 688; 3 Black. Comm. 437. See Shepard *v.* Brown, 4 Giff. 208; Smith *v.* Laveaux, 2 DeG. J. & S. 1; Flockton *v.* Peake, 12 Week. R. 562; Dabbs *v.* Nugent, 11 Jur. (N. S.) 943; Birmingham Gas Co. *v.* Ratcliffe, L. R. 6 Ex. 224; Badger *v.* McNamara, 123 Mass. 117.

[4] Billion *v.* Hyde, 1 Atk. 127, 128.

to have been the difficulty of proceeding to the full extent of justice in the Courts of Common Law." And in a note it is added, "Perhaps in some of these cases the jurisdiction was first assumed to prevent multiplicity of suits." [1] He subsequently said: "The Courts of Equity having gone the length of assuming jurisdiction in a variety of complicated cases of account, &c., seem by degrees to have been considered as having on these subjects a concurrent jurisdiction with the Courts of Common Law in cases where no difficulty could have attended the proceedings in those courts." [2] In cases of mutual [3] accounts founded in privity of contract this doctrine is, in the English courts, acted upon in the most ample manner in our day without any limitation,[4] as it certainly is fully maintained in America.[5]

§ 600. **Jurisdiction in Cases Where Account Is to Be Examined on One Side Only.** — Courts of Equity will also entertain jurisdiction in matters of account not only when there are mutual accounts, but also when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account and is obtained.[6] But in such a case if no discovery is asked or required

[1] Mitford on Eq. Pl. by Jeremy, 119, 120; Barker *v.* Dacie, 6 Ves. 688; Mackenzie *v.* Johnson, 4 Madd. R. 374. See White *v.* Hampton, 10 Iowa, 238; Wilson *v.* Riddle, 48 Ga. 609; Biddle *v.* Ranney, 52 Mo. 153.

[2] Mitf. Eq. Pl. by Jeremy, 123. See also O'Conner *v.* Spaight, 1 Sch. & Lefr. 309; Barker *v.* Dacie, 6 Ves. 688; Corporation of Carlisle *v.* Wilson, 13 Ves. 276; Coop. Eq. Pl. Introd. 31; Duke of Leeds *v.* Radnor, 2 Bro. Ch. R. 338, 518.

[3] See Haywood *v.* Hutchins, 65 N. C. 574 (as to disconnected accounts of both parties); Frue *v.* Loring, 120 Mass. 507.

[4] Dinwiddie *v.* Bailey, 6 Ves. 140, 141; 2 Parl. Rep. of Common Law Commissioners, 1830, p. 26; Courtenay *v.* Godshall, 9 Ves. 473.

[5] Armstrong *v.* Gilchrist, 2 John. Cas. 424; Rathbone *v.* Warren, 10 John. R. 587; King *v.* Baldwin, 17 John. R. 384; Ludlow *v.* Simond, 2 Cain. Cas. Err. 1, 38, 39, 51, 52; Post *v.* Kimberly, 9 John. R. 493; Hawley *v.* Cramer, 4 Cowen, R. 727, 728; 2 Parl. Report of the Common Law Commissioners, 1830, p. 26; Porter *v.* Spencer, 2 John. Ch. R. 171. Mere complication of accounts, without any relation of trust, is enough to give equity jurisdiction. Kimberley *v.* Dick, L. R. 13 Eq. 1; Watford Ry. Co. *v.* London Ry. Co., L. R. 8 Eq. 231; Seymour *v.* Long Dock Co., 5 C. E. Green, 396.

[6] Barker *v.* Dacie, 6 Ves. 687, 688; Frietas *v.* Don Santos, 1 Y. & Jerv. 574; Courtenay *v.* Godshall, 9 Ves. 473; Mackenzie *v.* Johnston, 4 Madd. R. 374; Massey *v.* Banner, 4 Madd. R. 416, 417; Ludlow *v.* Simond, 2 Cain. Cas. Err. 1, 38, 52; Post *v.* Kimberly, 9 John. R. 470, 493. The Vice-Chancellor (Sir John Leach) has held generally that in all cases of agency a bill will lie in equity for an account by the principal against his agent. Mackenzie *v.* Johnston, 4 Madd. R. 374; Massey *v.* Banner, 4 Madd. R. 416. The ground seems to be, though not explicitly stated by him, that there being a necessity for a discovery, the relief is consequent on that; and that it would be most unreasonable that he should

by the frame of the bill, the jurisdiction will not be maintainable.[1] And a fortiori where there are no mutual demands but a single matter on one side, and no discovery is required, a Court of Equity will not entertain jurisdiction of the suit, although there may be payments on the other side which may be set off; for in such a case there is not only a complete remedy at law, but there is nothing requiring the peculiar aid of equity to ascertain or adjust the claim.[2] To found the jurisdiction in cases of a claim of this sort there should be a series of transactions on one side and of payments on the other.

§ 601. **Vague General Allegation Which Renders Right to Accounting Uncertain, Will Be Struck Out of Bill.** — So it has been said that "if there be a bill for an account in respect of particular items or any number of particular items, and the plaintiff fails in sustaining the demand upon those particular items, and the bill happens to contain a general vague charge that there are voluminous and intricate accounts between the parties, and which charge is inserted merely as a pretext for the purpose of bringing the case within the jurisdiction of a Court of Equity, the court in so vague and uncertain a case will disregard that general allegation, will consider it as struck out of the bill, and

pay his agent for a discovery, and then be turned round to a suit at law, which would be the case if he could not have relief on his bill. The case of Hoare *v.* Contencin (1 Bro. Ch. R. 27) is distinguishable; for there the bill was to recover back money lent, and no discovery seemed necessary. Lord Thurlow there said: "As to an account, this is only of a repayment of money, and that the money for which the teas sold should be deducted. As it stood originally therefore the bill could not have been supported." In Frietas *v.* Don Santos (1 Y. & Jerv. 574) the Court of Exchequer said: "It is the settled practice at this time that if a bill be filed for a discovery the relief is made ancillary to it; and the party must stand or fall by the discovery, &c. It is not every account which will entitle a Court of Equity to interfere. It must be such an account as cannot be taken, justly and fairly, in a Court of Law." The same doctrine was asserted in King *v.* Rossett (2 Y. & Jerv. 33), which was a bill by a principal against his agent for discovery and relief. Lord Chief Baron Comyns, in his invaluable Digest (Chancery, 2 A.), lays down the principle broadly upon his own authority that "chancery will oblige any one to give an account for money by him received." Stitzer *v.* Fonder, 214 Pa. 117, 63 Atl. 421; Dallas *v.* Timberlake, 54 Ala. 403.

[1] Dinwiddie *v.* Bailey, 6 Ves. 136; Frietas *v.* Don Santos, 1 Y. & Jerv. 574; King *v.* Rossett, 2 Y. & Jerv. 33; Cooper, Eq. Pl. 134; but see Mackenzie *v.* Johnston, 4 Madd. R. 374; Massey *v.* Banner, 4 Madd. R. 416; Com. Dig. Chancery, 2 A; Safe Deposit & Trust Co. *v.* Mehaffey, 227 Pa. 48, 75 Atl. 862.

[2] Wells *v.* Cooper, cited in Dinwiddie *v.* Bailey, 6 Ves. 139; Foster *v.* Spencer, 2 John. Ch. R. 171; Moses *v.* Lewis, 12 Price, R. 502; King *v.* Rossett, 2 Y. & Jerv. 33; 1 Madd. Ch. Pr. 70, 71.

not allow it to protect the bill against a demurrer for want of equity." [1]

§ 602. **Courts of Equity Have General Jurisdiction Where There Are Mutual Accounts.** — So that on the whole it may be laid down as a general doctrine that in matters of account growing out of privity of contract Courts of Equity have a general jurisdiction where there are mutual accounts (and a fortiori where these accounts are complicated),[2] and also where the accounts are on one side, but a discovery is sought and is material to the relief.[3] And on the other hand where the accounts are all on one side and no discovery is sought or required, and also where there is a single matter on the side of the plaintiff seeking relief, and mere set-offs on the other side and no discovery is sought or required, — in all such cases Courts of Equity will decline taking jurisdiction of the cause.[4] The reason is, that no peculiar remedial process or functions of a Court of Equity are required; and if under such circumstances the court were to entertain the suit, it would merely administer the same functions in the same way as a Court of Law would in the suit. In short it would act as a Court of Law.

§ 603. **The Rule as to Application of Payments Stated.** — In matters of account, where several debts are due by the debtor to the creditor, it often becomes material to ascer-

[1] Darthez *v.* Clemens, 6 Beav. R. 165, 169. On this occasion Lord Langdale said: "It therefore comes to this, Does this bill contain such vague and general statements, — statements put in merely as a pretext for transferring the jurisdiction from the Court of Law to this court? If the account can be fairly taken in a Court of Common Law, this court will not interfere, even in the case of merchants' accounts consisting of mutual dealings; but in this case I am persuaded not only that the accounts between these parties could not be advantageously taken in a Court of Law, but that they could not be taken at all there. Everybody knows how an action upon such an account would necessarily end; it would end in the account being taken in this court or by a reference."

[2] Boyd *v.* Lewis, 42 Ga. 626; Southampton Dock Co. *v.* Southampton Board, L. R. 11 Eq. 254.

[3] Mackenzie *v.* Johnston, 4 Madd. R. 374; Massey *v.* Banner, 4 Madd. R. 416, 417; Pendleton *v.* Wambersie, 8 U. S. 73, 2 L. Ed. 554.

[4] See ante, § 536, and cases there cited. But see Com. Dig. Chancery, 2 A.; Frue *v.* Loring, 120 Mass. 507; Appeal of Passyunk Build. Assoc., 83 Pa. St. 441; Smith *v.* Laveaux, 2 DeG. J. & S. 1; Scott *v.* Liverpool, 5 Jur. (N. S.) 105. But as to this last case see Jurist, March 26, 1859. It is there shown that jurisdiction rests on one of the three following grounds: (1) Mutual accounts; (2) Dealing so complicated that they cannot properly be adjusted in a court of law; (3) The existence of a fiduciary relation between the parties. See Badger *v.* McNamara, 123 Mass. 117; Avery *v.* Ware, 58 Ala. 475; Knotts *v.* Tarver, 8 Ala. 743.

tain to what debt a particular payment made by the debtor is to be applied. This is called in our law the appropriation of payments. It is called in the foreign law the imputation of payments,[1] a phrase apparently borrowed from the Roman law, where the doctrine of the appropriation of payments is carefully examined and the leading distinctions applicable to it amply discussed.[2] The doctrine may of course find a place wherever there exist separate and independent debts between the parties;[3] but it is chiefly in cases of running accounts between debtor and creditor, where various payments have been made and various credits have been given at different times, that its application is felt in its full force and importance, especially where the dealings have been with a firm, as for example with bankers, and one or more of the partners have deceased and the customer still continues his dealings with the new firm or the survivors of the old firm, and moneys have been paid in and drawn out from time to time.[4] The same question also often occurs in cases of public officers, where they have given different bonds at different times with different sureties for the faithful performance of their duties, and moneys have been received by them at different periods embracing one or more of the bonds. How in such cases, where running accounts are kept of debts and payments, of credits and receipts, are the payments, made at different times before and after the change of the firm or the change of sureties, to be appropriated? This in former times was a matter of no inconsiderable embarrassment and difficulty. At present the following propositions may be deemed well settled. In the first place in the case of running accounts between parties where there are various items of debt on one side and various items of credit on the other side occurring at different times, and no special appropriation of the payments is made by either party, the successive payments or credits are to be applied to the discharge of the items of debit antecedently due in the order of time in which they stand in the account; or in other words each item of payment or credit is applied in extinguishment of the earliest items of debt standing in the account, until the whole payment or credit

[1] Pothier on Oblig. by Evans, n. 528; Id. n. 561 (Fr. edit. 1824).

[2] Pothier, Pand. Lib. 46, tit. 3, n. 89 to n. 103.

[3] The holder of collateral security with power to convert it into money must apply the proceeds of any sale thereof to the debt which it secures. Cilley *v.* Fenton, 130 Mass. 323. See Carr *v.* Hodge, Ib. 55, 58; Fowley *v.* Palmer, 5 Gray, 549.

[4] Bank of Scotland *v.* Christie, 8 Clark & Finnell. R. 214.

is exhausted.[1] In the next place where there are no running accounts between the parties, and the debtor himself makes no special appropriation of any payment, there the creditor is generally at liberty to apply that payment to any one or more of the debts which the debtor owes him, whether it be upon an account or otherwise.[2]

§ 604. [**Debtor Has First Right to Apply Payment.** — The debtor has the prior right to direct to what debt his payment shall be applied, and when he has once made the application the creditor has no right to credit the payment otherwise than as directed. And so the debtor has the right at any time to change the payment from a debt of one sort and apply it upon another debt, unless the rights of third parties have intervened and they would be prejudiced thereby. It is not necessary that the debtor should direct the application of the payments at the precise time that the payments were made or credits entered. This he could do beforehand. Having once notified the creditor upon what debt

[1] Clayton's Case, 1 Meriv. R. 572, 604, 608; Devaynes *v.* Noble, 1 Meriv. R. 585; Bodenham *v.* Purchase, 2 Barn. & Ald. 39; Simson *v.* Cooke, 1 Bing. R. 452; Simson *v.* Ingham, 2 Barn. & Cressw. 65; Pemberton *v.* Oakes, 4 Russ. R. 154; Bank of Scotland *v.* Christie, 3 Clark & Finn. R. 214, 229; United States *v.* Kirkpatrick, 9 Wheat. 720, 737, 738; United States *v.* Wardwell, 5 Mason, R. 82, 87; McDowell *v.* The Blackstone Canal Co., 5 Mason, R. 11; The Postmaster-General *v.* Furber, 4 Mason, R. 333, 335; Gass *v.* Stinson, 3 Sumner, R. 99, 110, 111, 112; Williams *v.* Griffith, 5 Mees. & Welsb. 300; Campbell *v.* Hodgson, Gow. R. 74; Hall *v.* Wood, 14 East, R. 243, n.; Thompson *v.* Brown, Mood. & Malk. 40; Taylor *v.* Kymer, 3 Barn. & Adolph. 320, 333; Copland *v.* Tentman, 1 West (H. of L.), R. 364; s. c. 7 Clark & Finnell. See Crompton *v.* Pratt, 105 Mass. 255; Hill *v.* Robbins, 22 Mich. 475.

[2] Lysaght *v.* Walker, 3 Bligh, R. (N. S.) 1, 28; Bosanquet *v.* Wray, 6 Taunt. R. 597; Brooke *v.* Enderby, 2 Brod. & Bing. R. 10; post, § 548.

A creditor has no right to apply a general payment to any item of account which is illegal, as a claim for usurious interest, or a charge for articles sold contrary to law; though if the debtor himself apply the payment to an illegal demand knowingly, he cannot afterwards revoke it. Caldwell *v.* Wentworth, 14 N. H. 431; Bancroft *v.* Dumas, 21 Vt. 456; Parchman *v.* McKinney, 12 Smedes & M. 631; Ayer *v.* Hawkins, 19 Vt. 26; Rohan *v.* Hanson, 11 Cush. 44. But a payment may be applied by the creditor to a debt barred by limitation. Ramsay *v.* Warner, 97 Mass. 8; Jackson *v.* Burke, 1 Dill. 311. Or to a debt within the Statute of Frauds. Haynes *v.* Nice, 100 Mass. 327. See Philpott *v.* Jones, 4 Nev. & M. 14; s. c. 2 Ad. & E. 41; Rohan *v.* Hanson, supra; Mills *v.* Fowkes, 5 Bing. N. C. 455; s. c. 7 Scott, 444. It is enough that the demand itself is of a lawful nature. See Haynes *v.* Nice, supra.

Equity has no jurisdiction, on behalf of a single creditor who has not recovered a judgment against his debtor, and whose debtor has ceased to exist, to apply to the payment of his debt property of the debtor in the hands of a third person. Thornton *v.* Marginal Ry. Co., 123 Mass. 32.

the credits should be entered, it was unnecessary to repeat this notice where the payments were made in instalments from month to month;[1] but the right is lost if the particular application is not directed at the time of the payment.[2] The court will not permit the creditor to apply the payment to whatever debt he pleases, where the circumstances are such that it would render it unreasonable and unjust to the debtor;[3] and where the debtor has directed the application of his payment, the refusal of his creditor to return drafts after explicit direction as to their application ought to be regarded as an election to accept them for the purpose for which they were offered.[4] A debtor is not bound by the statement in a receipt that the payment is "upon account", where at the time he had a mortgage debt and an open account due the same creditor, he having directed that the payment in question be applied to his mortgage debt.[5]]

§ 605. [**The Creditor May Appropriate the Payment if the Debtor Does Not.** — The debtor has the first right to direct the manner in which his payment shall be applied, but if he fails to designate the debt whether it be secured or unsecured, due or overdue, the creditor may exercise his own judgment and apply it to whichever debt he sees fit. As a general rule, however, as will be seen in the next succeeding section, the creditor must apply the payment, in the absence of a direction from the debtor, to the oldest debt or that one which is most precarious. While as between the debtor owing several debts, and his creditor, where the former, at the time of payment of a sum of money, fails to designate the debt on which it is to be applied, the latter may do so, yet there is an exception to this rule, as, where the money was received by the debtor from a third party, whose property would be liable for the debt in case the money was not applied upon the third party's liability.[6] Money paid by one debtor to a creditor holding debts against several debtors, and in the absence of an appro-

[1] Milwaukee Boston Store *v.* Katz, 153 Wis. 492, 140 N. W. 1038; Carson *v.* Cook County Liquor Co., 37 Okla. 12, 130 Pac. 303; Conduitt *v.* Ryan, 3 Ind. App. 1, 29 N. E. 160; Lee *v.* Manley, 154 N. C. 244, 70 S. E. 385; Cowgill *v.* Robberson, 75 Mo. App. 412.

[2] Stone Co. *v.* Rich, 160 N. C. 161, 75 S. E. 1077.

[3] Dorris *v.* Cummins, 157 Ill. App. 10.

[4] Christman *v.* Martin, 7 Pa. Super. Ct. 568, 42 W. N. C. 573.

[5] Massengale *v.* Pounds, 108 Ga. 762, 33 S. E. 72.

[6] Lee *v.* Storz Brewing Co., 75 Neb. 212, 106 N. W. 220; Burnett *v.* Sledge, 129 N. C. 114, 39 S. E. 775; Brinckerhoff *v.* Greenan, 85 Ill. App. 253.

priation by the debtor who made the payment, it is the duty of the creditor to apply the payment to that particular debt for which the paying debtor was liable.[1] When the creditor has several debts against the debtor, he may, as a general rule, apply the payment to whichever debt he chooses, except that he may not apply it in part payment of or as a credit on a note that is barred by limitation, and thereby restore life to the note;[2] nor can the creditor apply the payment in part to a debt which he does not own or does not have in his hands for collection.[3] If the creditor has applied the payment to a particular debt and notified the debtor of its application, in which he acquiesces, he cannot afterwards claim the right to appropriate the payment.[4] The payment of a general dividend by the bankrupt court may be credited by the creditor upon the unsecured debts of the debtor rather than the mortgage debt, where this course was not objected to by the bankrupt at the time.[5]]

§ 606. [**Payment Should Be Applied to the Oldest Debt in Absence of Direction from Debtor.** — The policy of the law is that the most burdensome debts shall be first liquidated, especially where the debtor has failed to instruct how the payment shall be applied, as, for instance, where one of two debts bears interest and the other does not, the payment should be applied upon the interest bearing debt; and where there are several past due accounts, the debtor or creditor may apply the payment to such past due accounts as will be most advantageous to himself, and if neither makes the application, the law will apply it as justice and equity of the case may require. When the money given in payment arises from some property or fund, the court will

[1] First Natl. Bank *v.* Scott, 123 N. C. 538, 31 S. E. 819; Commercial City Bank *v.* Hall, 203 Fed. 366; Thacher *v.* Tillory, 30 Tex. Civ. App. 327, 70 S. W. 782; Cox *v.* Sloan, 158 Mo. 411, 57 S. W. 1052; American Woolen Co. *v.* Maaget, 86 Conn. 234, 85 Atl. 583.

[2] Samuel *v.* Samuel's Admr., 151 Ky. 235, 151 S. W. 676; Estes *v.* Fry, 166 Mo. 70, 65 S. W. 741.

Where suit was brought upon a series of four notes, the oldest of which was barred by the statute of limitations, and the debtor made a payment "on the suit", the creditor in the absence of instructions, applied the payment to the old note and the collateral security attached, and returned these two papers to the debtor, who held them for a year without objection as to the method of application of the payment. It was then too late for him to object. Sawyer *v.* Howard, 86 Vt. 63, 83 Atl. 535.

[3] Turner *v.* Hill, 56 N. J. Eq. 293, 39 Atl. 137.

[4] Risher *v.* Risher, 194 Pa. St. 164, 45 Atl. 71.

[5] Mahaska County State Bank *v.* Brown, 159 Iowa 577, 141 N. W. 459.

apply it to discharge or reduce an indebtedness resting against such property or fund.[1]]

§ 607. [**The Law Will Apply the Payment, When.** — If neither the debtor nor the creditor applies the payment, then the law will apply it as the equities of the situation may demand, and especially where no application has been made by either of the parties before suit is brought. The law applies a payment first to a debt with the least security, unless there be peculiar equities calling for a different appropriation; but the law would certainly not sanction the application of a payment made by a third person, at the instance of and for the benefit of another, to an obligation upon which neither the person nor the debtor for whose benefit the arrangement had been made was liable.[2] Where a general payment made upon a building contract is not applied by the parties upon any specific part of the account, a court of equity may apply the payment upon the contract so as to include an item for extra work for which the creditor would not, under the contract, be entitled to a mechanic's lien and thus give him the security of his mechanic's lien upon the amount remaining unpaid.[3] A payment will be applied by the law to a contract debt, rather than to a possible contingent liability,[4] and to the discharge of interest due rather than to the principal debt.[5]]

§ 608. **Debtor Has the First Right to Appropriate the Payment.** — The doctrine here stated proceeds partly upon the presumed intention of the parties and partly upon a rule which has been assumed in our law, that the debtor has a right to appropriate any payments which he makes, to whatever debt due to his creditor he may choose to apply it. If the debtor omits to make any such appropriation, then the creditor has a right to appropriate the payment to such debts due to him by the debtor

[1] Brinckerhoff *v.* Greenan, 85 Ill. App. 253; Lowenstein *v.* Meyer, 114 Ga. 709, 40 S. E. 726; People *v.* Sheehan, 118 Mich. 539, 77 N. W. 88, 5 Detroit Leg. N. 616; In re Lindau, 183 Fed. 608; National Deposit Bank of Philadelphia *v.* Mawson, 46 Pa. Super. Ct. 85; Commercial City Bank *v.* Hall, 203 Fed. 366.

[2] Raymond *v.* Newman, 122 N. C. 52, 29 S. E. 353; In re Milligan's Estate, 112 App. Div. 373, 98 N. Y. Supp. 480; Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. 537.

The court will direct payments to be applied in such manner as to give the creditor the best security for obligations remaining unpaid. Zuelly *v.* Caspar, 46 Ind. App. 430, 92 N. E. 785; Clark *v.* Boarman, 89 Md. 428, 43 Atl. 926.

[3] Schmeling *v.* Rockford Amusement Co., 154 Ill. App. 308.

[4] Missouri Central Lumber Co. *v.* Stewart Bros., 78 Mo. App. 456.

[5] Jacobs *v.* Ballinger, 130 Ind. 231, 29 N. E. 782, 15 L. R. A. 169.

as he may choose. And if neither party has made any appropriation thereof, then the law will make the appropriation according to its own notion of the equity and justice of the case, and so that it may be most beneficial to both the parties.[1] In this view the appropriation of payments upon running accounts as above stated seems most consonant to the intentions and interests of both of the parties, and is full of equity and justice.[2]

§ 609. **Election to Appropriate Should Be Made at the Time of Payment.** — The Roman law proceeded in a great measure, if not altogether, upon similar principles. But according to that law the election was to be made at the time of payment as well in the case of the creditor as in that of the debtor: "In re præsenti, hoc est statim atque solutum est, — cæterum postea non permittitur."[3] If neither applied the payment, the law made the appropriation according to certain rules of presumption depending on the nature of the debts or the priority in which they were incurred. And as it was the actual intention of the debtor that would in the first instance have governed, so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence therefore of any express declaration by either the inquiry was, What application would be most beneficial to the debtor? The payment was consequently applied to the most burdensome debt, — to one that carried interest rather than to that which carried none; to one secured by a penalty rather than to that which rested on a simple stipulation; and if the debts were equal,

[1] United States *v.* January & Pattleson, 7 Cranch, R. 572; United States *v.* Kirkpatrick, 9 Wheat. R. 720, 737; United States *v.* Wardwell, 5 Mason, R. 82; Postmaster-General *v.* Furber, 4 Mason, R. 333; Gass *v.* Stinson, 3 Sumner, R. 99, 110 to 112; post, § 545; Smith *v.* Lloyd, 11 Leigh, R. 512; Seymour *v.* Van Slyck, 8 Wend. R. 403; United States *v.* Eckford's Ex'ors, 1 Howard, 250; s. c. 17 Peters, R. 251; 2 Greenleaf on Evid. §§ 530 to 535.

[2] Ibid. As to what circumstances will amount to an appropriation or not, see Taylor *v.* Kymer, 3 Barn. & Adolph. 320, 333, 334; Marryatts *v.* White, 2 Starkie, R. 101; Goddard *v.* Hodges, 1 Crompt. & Mees. 33; Wright *v.* Laing, 3 Barn. & Cressw. 165; Birch *v.* Talbott, 2 Starkie, R. 74; Simson *v.* Ingham, 2 Barn. & Cressw. 65.

[3] Dig. Lib. 46, tit. 3, l. 5. The text of the Roman law on this whole subject will be found in the American Law Magazine for April, 1843 (Philad.), pp. 36, 37, 38, with a learned dissertation on the whole subject. Mr. Chief Justice Gibson has contested the leading doctrines of that article, whether satisfactorily or not, it will be for the profession to decide. But it may be affirmed without scruple that whoever studies the subject the most profoundly will be very likely to find that all the difficulties are not as easily solved as he, upon a slight examination, might be led to suppose.

then to that which had been first contracted. "In his vero quæ præsenti die debentur, constat quotiens indistincte quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet, — id est, si omnia nomina similia fuerint, — in antiquiorem."[1] Pothier, in his edition of the Pandects, has collected together all the texts of the Roman law on this subject;[2] and he has summed up the general results in his Treatise on Obligations.[3]

[1] Dig. Lib. 46, tit. 3, Qu. 5; Clayton's case, 1 Meriv. R. 604, 605.

[2] Pothier, Pand. lib. 46, tit. 3, art. 1, n. 89 to 99. The doctrine of the Roman law is still more fully shown and compared with the common-law decisions in a very able note to the case of Pattison *v.* Hull, 9 Cowen, R. 773 to 777, to which I gladly refer.

[3] Pothier, Oblig. by Evans, n. 528 to 535; Id. n. 561 to n. 572 (French, 2d ed. 1829); Gass *v.* Stinson, 3 Sumner, R. 98, 111. It may not be without use to insert here the leading rules stated by Pothier: "First Rule. The debtor has the power of declaring on account of what debt he intends to apply the sum which he pays. The reason which Ulpian gives is evident, 'possumus enim certam legem dicere, ei quod solvimus.' According to our rule, although regularly the interest should be paid before the principal, yet if the debtor of the principal and interest, upon paying a sum of money, has declared that he paid on account of the principal, the creditor who has agreed to receive it cannot afterwards contest such application. Second Rule. If the debtor, at the time of paying, makes no application, the creditor to whom the money is due, for different causes, may make the application by the acquittance which he gives. It is requisite, 1st, that this application be made at the instant; 2d, that it be equitable. Third Rule. When the application has neither been made by the debtor nor by the creditor, it ought to be made to that debt which the debtor at the time had the most interest to discharge. The application should rather be made to a debt which is not contested than to one that is; rather to a debt which was due at the time of payment than to one which was not. Among several debts which are due the application ought rather to be made to the debt for which the debtor was liable to be imprisoned than to debts merely civil, in respect of which process could only issue against his effects. Among civil debts the application should rather be made to those which produce interest than to those which do not. The application ought rather to be made to an hypothecatory debt than to another. The application ought rather to be made to the debt for which the debtor had given sureties than to those which he owed singly. The reason is that in discharging it he discharges himself from two creditors, — from his principal creditor, and from his surety, whom he is obliged to indemnify. Now a debtor has more interest to be acquitted against two than against a single creditor. The application ought rather to be made for a debt of which the person who has paid was principal debtor, than to those which he owed as surety for other persons. Fourth Rule. If the debts are of an equal nature, and such that the debtor had no interest in acquitting one rather than the other, the application should be made to that of the longest standing. Observe, that of two debts contracted the same day, but with different terms, which are both expired, the debt of which the term was the shorter, and consequently which expired sooner, is understood to be the more ancient. Fifth Rule. If the different debts are of the same date, and in other respects equal, the application should be made proportionately to each. Sixth Rule. In debts which are of a nature to produce

§ 610. **The Doctrine Depends upon the Intention of the Debtor.** — Now the whole of this doctrine of the Roman law turns upon the intention of the debtor, either express, implied, or presumed: express, when he has directed the application of the payment, as in all cases he had a right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of payment without objection; presumed, when in the absence of any such special appropriation it is most for his benefit to apply it to a particular debt. And notwithstanding there are contradictory and conflicting authorities on this subject in the English and American courts, one should think that the doctrine of the Roman law is or at least ought to be held, and may well be held, to be the true doctrine to govern in our courts. There is a great weight of common-law authority in its favor; and in the conflict of judicial opinion that rule may fairly be adopted which is most rational, convenient, and consonant to the presumed intention of the parties. If the creditor has a right in any case to elect to what debt to appropriate an indefinite payment, it seems proper that he should have it only when it is utterly indifferent to the debtor to which it is applied, and then perhaps his consent that the creditor may apply it as he pleases may fairly be presumed.[1]

interest, the application is made to the interest before the principal. This holds good even if the acquittance imported that the sum was paid to the account of the principal and interest, 'in sortem et usuras.' The clause is understood in this sense, that the sum is received to the account of the principal after the interest is satisfied. Observe, that if the sum paid exceeds what is due for interest, the remainder is applied to the principal, even if the application had been expressly made to the interest without mentioning the principal."

[1] Ante, §§ 543, 545; Gass *v.* Stinson, 3 Sumner, R. 98, 111; Pattison *v.* Hull, 9 Cowen, R. 747, 765 to 773; Clayton's Case, 1 Meriv. R. 605, 606, 607, 608. But see Hall *v.* Wood, 14 East, 243, n.; Kirby *v.* Duke of Marlborough, 2 Maule & Selw. 19; Marryatts *v.* White, 2 Starkie, R. 101; Peters *v.* Anderson, 5 Taunt. R. 596; Bosanquet *v.* Wray, 6 Taunt. R. 597; Shaw *v.* Picton, 4 Barn. & Cressw. 715. See an elaborate article on the question of the Appropriation of Payments in the American Law Magazine (Philadelphia), No. 1, for April, 1843, pp. 31 to 52.

Sometimes the interests of third persons, such as other creditors, are so concerned as to require protection against the creditor to whom the payment has been made. Thompson *v.* Hudson, L. R. 6 Ch. 320. Thus if a mortgagee of one who dies insolvent should, on foreclosure, find a surplus in his hands, he could not retain the same and apply it to simple contract debts owed him by the mortgagor; he must pay such surplus over to the representative of the mortgagor for distribution among all the creditors. Talbot *v.* Frere, 9 Ch. D. 569, Jessel, M. R. denying Spalding *v.* Thompson, 26 Beav. 637; In re Haselfoot, L. R. 13 Eq. 327; Ex parte National Bank,

§ 611. **Liability of Estate of Deceased Partner.** — Be this however as it may, in the actual application of the doctrine to cases of partnership where a change of the firm has occurred by a dissolution by death or otherwise, the rule is that the estate of the deceased or retiring partner is liable only to the extent of the balance due to any creditor at the time of the dissolution; and that if the creditor continues to keep a running account with the survivors or the new firm, and sums are paid to them by the creditor, and sums are drawn on their firm and paid by them and are charged and credited to the general account, and blended together as a common fund without any distinction between the sums due to the creditor by the old firm and the new, — in such a case the sums paid to the creditor are deemed to be paid upon the general blended account and go to extinguish, pro tanto, the balance of the old firm in the order of the earliest items thereof. "In such a case," it has been said by a very able judge, "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards and strike the balance at the head instead of the foot of it. A man's banker breaks, owing him on the whole account a balance of £1000. It would surprise one to hear the customer say: 'I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1000, which I paid in five years ago, that I hold myself never to have drawn out; and therefore if I can find anybody who was answerable for the debts of the banking-house such as they stood five years ago, I have a right to say that it

L. R. 14 Eq. 507. This is not properly a case of appropriation of payments, but the result would no doubt be the same if it were, unless the debt to which the surplus was to be applied was a specialty debt. Lee *v.* Manley, 154 N. C. 244, 70 S. E. 385.

is that specific sum which is still due to me, and not the £1000 that I paid in last week.'"[1]

§ 612. **Same.** — On the other hand if under the like circumstances moneys have been received by the new firm and drawn out by the creditor from time to time, and upon the whole the original balance due to the creditor has been increased but never at any time been diminished in the hands of the firm, — in such a case the items of payment made by the new firm are still to be applied to the extinguishment of the balance of the old firm, and will discharge the share of the deceased or retiring partner to that extent, but no further; for in such a case the general rule as to running accounts is applied with its full force.[2] A fortiori where payments have been made and no new sums have been deposited by the creditor with the new firm, the payments will be applied in extinguishment, pro tanto, of the balance due by the old firm in the order of the items thereof.[3]

§ 613. **Application of Payments.** — The cases which we have hitherto been considering are cases of running accounts; and under such circumstances the rule will apply equally to cases where a part of the debt is secured by a guaranty or by sureties, as well as where there are no such parties.[4] But where there are no such running accounts, if no special appropriation is made by the debtor, the creditor may, as we have seen,[5] apply the money to any demand which he has against the debtor, whether it be a balance of an old account or of a new account; for in such a case the interest of third persons is not concerned, and the case of running accounts constitutes as it were an implied appropriation by the parties to the account generally.[6] And payments made generally by a

[1] Sir William Grant, in Clayton's Case, 1 Meriv. R. 608, 609; Johnes's Case, 1 Meriv. R. 619; Smith *v.* Wigley, 3 Moore & Scott, 174; Sterndale *v.* Hankinson, 1 Simons, R. 393; Bodenham *v.* Purchas, 2 Barn. & Ald. 39; Pemberton *v.* Oakes, 4 Russ. R. 154; Bank of Scotland *v.* Christie, 8 Clark & Finn. R. 214, 227, 228. So where the first deposit is a trust fund, but more than the amount thereof has been drawn out, the balance in bank cannot be followed as such fund. Brown *v.* Adams, L. R. 4 Ch. 764.

[2] Palmer's Case, 1 Meriv. R. 623, 624; Sleech's Case, 1, Meriv. R. 538; Bodenham *v.* Purchas, 2 Barn. & Ald. 39. See In re Mason, 3 Mont. Deac. & De Gex, R. 490; Law Magazine, May, 1845, p. 184.

[3] Sleech's Case, 1 Meriv. R. 538, &c.

[4] United States *v.* Kirkpatrick, 9 Wheat. R. 720, 737, 738; United States *v.* Wardwell, 5 Mason, R. 82, 87; Postmaster-General *v.* Furber, 4 Mason, R. 333, 335. But see United States *v.* Eckford's Exec'ors, 1 Howard, Sup. Ct. R. 250; s. c. 17 Peters, R. 251; United States *v.* January, 7 Cranch, 572.

[5] Ante, § 538.

[6] Lysaght *v.* Walker, 5 Bligh, R. (N. S.) 1, 28; Bosanquet *v.* Wray, 6

debtor to his creditor may be applied by the creditor to a balance due to the creditor, although other debts have since been incurred upon which the debtor has given a bond with a surety for security thereof.[1] By the Scotch law a creditor having several debts due from the same debtor has a right to ascribe a payment made indefinitely and without appropriation by his debtor to whichever debt he may see fit to apply it, and is entitled to make this appropriation and election even at the latest hour.[2] The rule of our law seems (as we have seen) more qualified, and to omit the right of election of the creditor to a reasonable period after the payment, or to cases where the appropriation may be presumed to be indifferent to the debtor.[3]

§ 614. **Same.** — In cases of account not founded in any such privity of contract, but founded upon relations and duties required by law or upon torts and constructive trusts for which equitable redress is sought, it is more difficult to trace out a distinct line where the legal remedy ends and the equitable jurisdiction begins.

§ 615. **Jurisdiction in Matters of Partnership.** — In our subsequent examination of this branch of jurisdiction it certainly would not be going beyond its just boundaries to include within it all subjects which arise from the two great sources already indicated and terminate in matters of account; namely, first, such as have their foundation in contract or quasi contract; and secondly, such as have their foundation in trusts actual or constructive, or in torts affecting property. But as many cases included under one head are often connected with principles belonging to the other, and as the jurisdiction of Courts of Equity is often exercised upon various grounds not completely embraced in either, or upon mixed considerations, it will be more convenient,

Taunt. R. 597; Brooke *v.* Enderby, 2 Brod. & Bing. R. 70. In United States *v.* January, 7 Cranch, R. 572, it seems to have been thought by a majority of the court that "the rule adopted in ordinary cases is not applicable to a case where different sureties under different obligators are in interest." But that case was one of a public officer who had given bonds at different times. The case is very obscurely reported, but its true bearing is stated in a note to United States *v.* Wardwell, 5 Mason, R. 87. It is true that the case of United States *v.* January has been recognized as good law in United States *v.* Eckford's Execors, 1 How. Sup. Ct. R. 250, 261. But there were peculiar circumstances in this last case; and United States *v.* Kirkpatrick expressly recognizes the general doctrine of appropriation.

[1] Kirby *v.* Duke of Marlborough, 2 M. & Selw. 18; Williams *v.* Rawlinson, 3 Bing. R. 71.

[2] Campbell *v.* Dent, 2 Moore, Priv. Coun. R. 292.

[3] Ante, §§ 538 & 543.

and perhaps not less philosophical, to treat the various topics under their own appropriate heads, without any nice discrimination between them. We may thus bring together in this place such topics only as do not seem to belong to more enlarged subjects, or such as do not require any elaborate discussion, or such as peculiarly furnish matter of illustration of the general principles which regulate the jurisdiction.

§ 616. **Cases Involving Accounts.** — Let us then in the first place bring together some cases arising ex contractu, or quasi ex contractu, and involving accounts. And here one of the most general heads is that of AGENCY, where one person is employed to transact the business of another for a recompense or compensation. The most important agencies of this sort which fall under the cognizance of Courts of Equity are those of attorneys, factors, bailiffs, consignees, receivers, and stewards.[1] In most agencies of this sort there are mutual accounts between the parties; or if the account is on one side, as the relation naturally gives rise to great personal confidence between the parties, it rarely happens that the principal is able in cases of controversy to establish his rights or to ascertain the true state of the accounts without resorting to a discovery from the agent. Indeed in cases of factorage and consignments and general receipts and disbursements of money by receivers and stewards it can scarcely be possible, if the relation has long subsisted, that very intricate and perplexing accounts should not have arisen where, independently of a discovery, the remedy of the principal would be utterly nugatory or grossly defective. It would be rare that specific sales and purchases, and the charges growing out of them, could be ascertained and traced out with any reasonable certainty; and still more rare

[1] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 513 to 515. In general a bill will not lie by an agent against his principal for an account unless some special ground is laid, as the incapacity to get proof unless by discovery. Dinwiddie *v.* Bailey (6 Ves. 136). But in the case of stewards a discovery from his principal is ordinarily necessary for the reasons stated by Lord Eldon in the same case (6 Ves. 141): "The nature of this dealing is that money is paid in confidence without vouchers, embracing a great variety of accounts with the tenants; and nine times in ten it is impossible that justice can be done to the steward," without going into equity for an account against his principal. See Middleditch *v.* Sharland, 5 Ves. 87; Moses *v.* Lewis, 12 Price, R. 502. In this last case the court refused to entertain jurisdiction for an account, it appearing that the whole matter was a set-off or other defence at law. The court admitted the general jurisdiction of Courts of Equity in matters of account, but denied that it was applicable to cases of this sort. Id. 510. See also Frietas *v.* Don Santos, 1 Y. & Jerv. 574.

that every receipt and disbursement could be verified by direct and positive evidence. The rules of law in all such agencies require that the agent should keep regular accounts of all his transactions, with suitable vouchers.[1] And it is obvious that if he can suppress all means of access to his books of account and vouchers, the principal would be utterly without redress, except by the searching power of a bill of discovery and the close inspection of all books under the authority and guidance of a Master in Chancery. Besides, agents are not only responsible for a due account of all the property of their principals, but also for all profits which they have clandestinely obtained by any improper use of that property. And the only adequate means of reaching such profits must be by such a bill of discovery.[2] In cases of fraud also it is almost impracticable to thread all the intricacies of its combinations except by searching the conscience of the party and examining his books and vouchers; neither of which can be done by the Courts of Common Law.[3]

[1] Pearce *v.* Green, 1 Jac. & Walk. 135; Ormond *v.* Hutchinson, 13 Ves. 53; Zettelle *v.* Myers, 19 Gratt. 62; Makepiece *v.* Rogers, 11 Jur. (N. S.) 314; S. C. 34 L. J. Ch. 396. Secus where the relation is only that of servant. Rich *v.* Austin, 40 Vt. 416. And see Hunter *v.* Belcher, 9 L. T. N. S. 501.

Actions for accounting lie against those who deal with others in confidential or fiduciary relationship:

Brokers. Haight *v.* Haight & Freese Co., 92 N. Y. Supp. 934, 46 Misc. Rep. 501; affirmed 112 App. Div. 475, 98 N. Y. Supp. 471, 83 N. E. 1126; Greene *v.* Cory, 210 Mass. 536, 97 N. E. 70.

Factors. Armour *v.* Gaffey, 165 N. Y. 630, 59 N. E. 1118.

Guardians. In re Nutting, 74 App. Div. 468, 77 N. Y. Supp. 696, 33 Civ. Proc. 145.

Mortgagor and mortgagee. Long *v.* Richards, 170 Mass. 120, 48 N. E. 1083, 64 Am. St. Rep. 281.

Partners. Daniels *v.* Gillespie, 65 W. Va. 366, 64 S. E. 254.

A bill in equity to compel agent to account does not lie where the agent fully accounted for his dealings before his agency was terminated, and he has since done no business for the principal. Phillips *v.* Birmingham Industrial Co., 180 Ala. 311, 60 So. 896.

The burden of proof is on the agent to account for money or property of the principal's that has come into his hands. Little *v.* Phipps, 208 Mass. 331, 94 N. E. 260; Wells *v.* Cochran, 84 Neb. 278, 120 N. W. 1123; Holthouse *v.* Poling, 52 Ind. App. 568, 99 N. E. 810.

[2] East India Company *v.* Henchman, 1 Ves. Jr. 289; Massey *v.* Davies, 2 Ves. Jr. R. 318; Borr *v.* Vandall, 1 Ch. Cas. 30.

[3] Earl of Hardwicke *v.* Vernon, 14 Ves. 510; Thornton *v.* Thornton, 31 Gratt. 212. See Turner *v.* Burkinshaw, L. R. 2 Ch. 488, where fraud was charged upon the plaintiff's steward and confidential agent in transactions running through a period of nearly twenty years, with accounts rendered for ten years regularly, then not at all for five years, and then yearly for the rest of the time. The court held that there had been no fraud.

§ 617. [**Agent Not Generally Entitled to Accounting by Principal.** — It is well settled that a Court of Equity, under its general jurisdiction for the enforcement of trusts, has jurisdiction to settle and adjust accounts between principal and agent at the suit of the principal against his agent, where confidence is reposed in him by the principal. But while the principal has the right to come into a Court of Equity under the circumstances indicated, and sometimes under other circumstances, it seems to be equally well settled that a bill for an account by an agent against his principal will not generally lie. There are usually exceptions to all rules, and where the principal has kept the accounts between him and his agent and the matters and things transacted in the course of the agency are within his own peculiar knowledge, the agent may ask for the accounting. If the agent is entitled to an accounting, the principal will not be permitted to set up a cause of action on the contract of agency, it being essentially an action at law, and thus defeat the agent of his equitable remedy. The reason for the rule is that the agent usually keeps the accounts between him and his principal, and therefore he generally knows more of the true status of the account than the principal.[1]]

§ 618. **Equitable Remedies in Actions of Account.** — In agencies also of a single nature, such as a single consignment, or the delivery of money to be laid out in the purchase of an estate or of a cargo of goods, or to be paid over to a third person, although a

Whether the bare relation of principal and agent will entitle the principal to call for an account is not clear. The contrary appears from Barry *v.* Stevens, 31 Beav. 258. But in Makepiece *v.* Rogers, 11 Jur. (N. S.) 314; s. c. 34 L. J. Ch. 396, Lord Justice Turner in the Court of Appeal declares that there is no authority for saying that a bill will not lie at any time by a principal against an agent for an account; and he declared that there was nothing to the contrary in Phillips *v.* Phillips, 9 Hare, 471. See also Hunter *v.* Belcher, 9 L. T. (N. S.) 501, where the plaintiff was held entitled to an account against his agent, a commercial traveller, only from the time of requiring the agent to keep an account.

An agent cannot maintain a bill for an account upon the mere ground of being entitled to commissions. Smith *v.* Leveaux, 1 Hem. & M. 123; s. c. 2 DeG. J. & S. 1. Nor can one who is merely entitled to a royalty on sales of patented articles for that reason have an account in equity. Moxon *v.* Bright, L. R. 4 Ch. 292. But if the party's compensation is measured by profits, the rule is otherwise. Pratt *v.* Turtle, 136 Mass. 233; Badger *v.* McNamara, 123 Mass. 117; Hargrave *v.* Conroy, 4 C. E. Green, 281. If the inquiry into profits is collateral, there may be no jurisdiction unless discovery is sought. Haskins *v.* Burr, 106 Mass. 48.

An administrator of a principal may call the latter's general agent to account in equity. Simmons *v.* Simmons, 33 Gratt. 451.

[1] Davis *v.* Marshall, 114 Va. 193, 76 S. E. 316; Schultz *v.* Wise, 93 Neb. 718, 141 N. W. 813.

suit at law may be often maintainable, yet if the thing lie in privity of contract and personal confidence, the aid of a court of equity is often indispensable for the attainment of justice.[1] Even when not indispensable it may often be exceedingly convenient and effectual, and prevent a multiplicity of suits. The party in such cases often has an election of remedy. This doctrine was expounded with great clearness and force by Lord Chief Justice Willes, in delivering the opinion of the court in a celebrated case. Speaking of the propriety of sometimes resorting to a suit at law, he said: "Though a bill in equity may be proper in several of these cases, yet an action at law will lie likewise. As if I pay money to another to lay out in the purchase of a particular estate or any other thing, I may either bring a bill against him considering him as a trustee, and praying that he may lay out the money in that specific thing, or I may bring an action against him as for so much money had and received for my use. Courts of Equity always retain such bills when they are brought under the notion of a trust; and therefore in this very case (a consignment to a factor for sale) they have often given relief where the party might have had his remedy at law if he had thought proper to proceed in that way."[2]

§ 619. **Proper Relief Will Be Granted to Avoid Multiplicity of Suits.** — Perhaps the doctrine here laid down, although generally true, is a little too broadly stated. The true source of jurisdiction in such cases is not the mere notion of a virtual trust, for then equity jurisdiction would cover every case of bailment. But it is the necessity of reaching the facts by a discovery; and having jurisdiction for such a purpose, the court, to avoid multiplicity of suits, will proceed to administer the proper relief.[3] And hence it is that in the case of a single consignment to a factor for sale a Court of Equity will, under the head of discovery, entertain the suit for relief as well as discovery; there being accounts and disbursements involved which, generally speaking, cannot be so thoroughly investigated at law,[4] although (as we

[1] See Navulshaw *v.* Brownrigg, 1 Sim. (N. S.) 573; Coquillard *v.* Suydam, 8 Blackf. 24.

[2] Scott *v.* Surman, Willes R. 405.

[3] Ante, § 71; 3 Black. Comm. 437; Ludlow *v.* Simond, 2 Cain. Cas. in Err. 1, 38, 52; Mackenzie *v.* Johnston, 4 Madd. R. 374; Pearce *v.* Green, 1 Jac. & Walk. 135. Where a pledge is held as general security, and the account contains several items, the pledgor may maintain a bill for account. Conyngham's Appeal, 57 Pa. St. 474. See Durant *v.* Einstein, 5 Rob. (N. Y.) 423.

[4] Ludlow *v.* Simond, 2 Cain. Err. 1, 38, 52; Post *v.* Kimberly, 9 John. R. 493; Mackenzie *v.* Johnston, 4 Madd. R. 375.

have seen) a Court of Equity is cautious of entertaining suits upon a single transaction where there are not mutual accounts.[1] Nay, so far has the doctrine been carried, that even though the case may appear as a matter of account to be perfectly remediable at law, yet if the parties have gone on to a hearing of the merits of the cause without any preliminary objection being taken to the jurisdiction of the court upon this ground, the court will not then suffer it to prevail, but will administer suitable relief.[2]

§ 620. **Accounting between Trustee and Cestui Que Trust.** — Cases of account between trustees and cestuis que trust may properly be deemed confidential agencies, and are peculiarly within the appropriate jurisdiction of Courts of Equity.[3] The same general rules apply here as in other cases of agency. A trustee is never permitted to make any profit to himself in any of the concerns of his trust.[4] On the other hand he is not liable

[1] Porter *v.* Spencer, 2 John. Ch. R. 171; Wells *v.* Cooper, cited 6 Ves. 136; ante, § 535.

[2] Post *v.* Kimberly, 9 John. R. 493.

[3] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 522, 523.

[4] Docker *v.* Somes, 2 Mylne & Keen, 664. In this case it was decided that if a trustee mixes trust funds with his private moneys, and employs both in a trade or adventure of his own, the cestui que trust may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. On this occasion Lord Brougham delivered an elaborate judgment, from which I have made the following extracts, as they strikingly exemplify the doctrine of the text. His Lordship said: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is that he shall account to the cestui que trust for all the gain which he has made. Thus if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go, not to the trustee who has so applied the money, but to the cestui que trust, whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make, he shall be accountable to the trust estate. So if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, — although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases it is easy to tell what the gains are; the fund is kept distinct from the trustee's other moneys, and whatever he gets, he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property, and go to the proprietor. So it is also where one not expressly a trustee has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable. If a person has purchased land in his own name with my money, there is a resulting

trust for me; if he has invested my money in any other speculation, without my consent, he is held a trustee for my benefit. And so an attorney, guardian, or other person, standing in a like situation to another, gains not for himself, but for the client, or infant, or other party, whose confidence has been abused. Such being the undeniable principle of equity, such the rule by which breach of trust is discouraged and punished, — discouraged, by intercepting its gains, and thus frustrating the intentions that caused it; punished, by charging all losses on the wrong-doer, while no profit can ever accrue to him, — can the court consistently draw the line, as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent; those instances where the trustee is most likely to misappropriate; namely, those in which he uses the trust funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required to understand how the court could ever, even in appearance, countenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only I take to have been this. They could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult where a great proportion of the gains proceeded from skill or labor employed upon the capital. In cases of separate appropriation there was no such difficulty, as where land or stock had been bought, and then sold again at a profit. And here accordingly there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied, from those which came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavoring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits, and assign that to the trust estate. This principle is undoubtedly attended with one advantage; it avoids the necessity of an investigation of more or less nicety in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and expediency are made for this convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation; all profit equally, whatever may be the real gain derived by the trustee from his breach of duty; nor can any amount of profit made be reached by the court, or even the most moderate rate of mercantile profit, that is, the legal rate of interest be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest; and this without the least regard to the profits actually realized. For in the most remarkable case in which this method has been resorted to, Raphael *v.* Boehm (which indeed is always cited to be doubted, if not disapproved), the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it. But the principal objection which I have to the rule is founded upon its tendency to cripple the just power of this court, in by far the most wholesome and indeed necessary exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversations, that the contrivers of sordid injustice feel the power of the court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the court's arm being long enough to reach them and strong enough to hold them, if they know that a

for any loss which occurs in the discharge of his duties, unless he has been guilty of negligence, malversation, or fraud.[1] The

certain delicacy of touch is required, without which the hand might as well be paralyzed or shrunk up. The distinction, I will not say sanctioned, but pointed at, by the negative authority of the cases, proclaims to executors and trustees that they have only to invest the trust money in the speculations, and expose it to the hazards of their own commerce, and be charged 5 per cent on it; and then they may pocket 15 or 20 per cent by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction. Even if cases were more likely to occur than I can think they are, of inextricable difficulties in pursuing such inquiries, I should still deem this the lesser evil by far, and be prepared to embrace it. Mr. Solicitor-General put a case of a very plausible aspect, with the view of deterring the court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with £100 of trust money, and earning £1000 a year by selling them to his patients; and so he might have taken the case of trust money laid out in purchasing a piece of steel, or skein of silk and these being worked up into goods of the finest fabric, Birmingham trinkets, or Brussels lace, where the work exceeds by 10,000 times the material in value. But such instances in truth prove nothing, for they are cases not of profits upon stock, but of skilful labor very highly paid; and no reasonable person would ever dream of charging a trustee, whose skill, thus bestowed, had so enormously augmented the value of the capital, as if he had only obtained from it a profit; although the refinements of the civil law would certainly bear us out even in charging all gains accruing upon those goods as in the nature of accretions belonging to the true owners of the chattels." See Wedderburn *v.* Wedderburn, 4 Mylne & Craig, 41.

It is the duty of the agent to fully account to the principal for all sums received by him. He has no right to accept any secret profit or advantage from the other party, and if he does it is his principal's property. Wells *v.* Cochran, 84 Neb. 278, 120 N. W. 1123; Raleigh Real Estate & Trust Co. *v.* Adams, 145 N. C. 164, 58 S. E. 1008; Briggle *v.* Cox, 72 Wash. 574, 131 Pac. 209.

[1] Wilkinson *v.* Stafford, 1 Ves. Jr. 32, 41, 42; Shepherd *v.* Towgood, 1 Turn. & R. 379; Adair *v.* Shaw, 1 Sch. & Lefr. R. 272; Caffrey *v.* Darby, 6 Ves. 488.

The trustee is not liable for failure to pay taxes on property, which taxes ought to have been paid by the executor instead of him, and where he gave the entire proceeds of collections from the property to the cestui que trust, and she has had the use and benefits of the amounts thus paid. Denvie *v.* Park, 169 Mo. App. 335, 152 S. W. 604.

A trustee who legally holds property for the use of a wife cannot be held responsible for the loss of it when it is taken in execution for a debt of her husband for which it is legally liable. Guhl *v.* Frank, 22 Pa. Super. Ct. 531.

While the language of the instrument conferring power to deal with respect to the property entrusted to the hands of the trustee is broad, to the extent of permitting him to deal with it as he chooses, it does not discharge him from the obligation of good faith in dealing, nor is he discharged from fairly accounting for all he received, or from protecting the rights and interests of the associates whom he represents. Spier *v.* Hyde, 92 App. Div. 467, 87 N. Y. Supp. 285.

same doctrine is applicable to cases of guardians and wards, and other relations of a similar nature.[1]

§ 621. [**Rights of Owners of Contingent Interests.** — The relation of trust between a bank and its cashier gives equity jurisdiction to compel an accounting for money misappropriated, or other breach of trust, and where an agent is entrusted with money to be disbursed, his principal may sustain a bill against him for an account of his agency, and in some instances although no discovery is sought. While one co-partner had no action at law against another to recover the partnership property to which each had equal title, the equitable jurisdiction to compass a dissolution of the partnership and an administration of its effects has always existed.[2] In order for one to be entitled to an accounting, it is necessary that he had some real, present interest in the estate, and such as he is now entitled to have protected, but it is manifest that a person only contingently interested has no standing to require an accounting by a testamentary trustee without showing some mismanagement or other facts from which it may be inferred that such trustees have been guilty of waste or that a property right under the trust is likely to be dissipated or wasted; or that an accounting is necessary in order to preserve the corpus of the trust property.[3]]

Trustee who mixed the trust estate with his own is not relieved because of subsequent depreciation of Confederate money. Dunn *v.* Dunn, 137 N. C. 533, 50 S. E. 212.

If trustee acts in good faith and exercises such care as a man of ordinary prudence would exercise in the management of his own affairs, he is not liable for losses arising out of the management of the trust fund in a legal manner. Bates *v.* Hamilton, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407; Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009; Beam *v.* Patterson Safe Deposit & Trust Co., 80 N. J. Eq. 195, 86 Atl. 369.

A trustee who has squandered the trust funds is liable, in equity, for the entire amount, and it makes no difference how he spent it or who was benefited thereby. Davis *v.* Hoffman, 167 Mo. 573, 67 S. W. 234.

Where defendant held plaintiff's stock in trust, and subsequently the corporation was dissolved and the value of the stock distributed to defendant, he was liable to account to plaintiff for what he received. Loetscher *v.* Dillon, 119 Iowa, 202, 93 N. W. 98.

[1] See Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 543, 544, 545; Id. pp. 522, 523.

[2] Dunn *v.* Johnson, 115 N. C. 249, 20 S. E. 390; Chalk *v.* Traders Natl. Bank, 87 N. C. 200; Barnes *v.* Gardiner, 140 App. Div. 395, 125 N. Y. Supp. 433; Cady *v.* Ridenour, 158 Ill. App. 97; Maekotter *v.* Maekotter, 74 Misc. Rep. 214, 131 N. Y. Supp. 815.

[3] Furniss *v.* Furniss, 148 App. Div. 211, 133 N. Y. Supp. 535; but where one is to receive the income "at such times and in such amounts as may, according to the judgment and discretion of the trustee, seem best", he has such an interest in the estate as entitles him to an accounting. Bar-

§ 622. **Accounting between Other Parties Occupying Fiduciary Relations.** — Cases of account between tenants in common,[1] between joint-tenants, between partners,[2] between part-owners of ships,[3] and between owners of ships and the masters, fall under the like considerations. They all involve peculiar agencies, like those of bailiffs or managers of property, and require the same operative power of discovery and the same interposition of equity.[4] Indeed in all cases of such joint interests, where one party receives all the profits, he is bound to account to the other parties in interest for their respective shares, deducting the proper charges and expenses, whether he acts expressly by their authority as bailiff, or only by implication as manager without dissent jure domini over the property.[5]

§ 623. **Trustee Not Allowed to Make Any Profit Out of His Office.** — Trustees, directors of private companies, and other persons standing in a similar situation are not only not allowed to make any profit out of their offices, but it is prima facie a breach of trust on their part to take upon themselves the management of any part of the concern for a compensation or profit by way of commission, or brokerage, or salary. Thus for example a director of a company created to employ steamships for the benefit of the company cannot assume to himself with the consent of the other directors the situation of a ship's husband, so as to charge the ship's company for such a compensation as a stranger acting in the same office might.[6]

bour *v.* Cummings, 26 R. I. 201, 58 Atl. 660. But see, In re Wagner's Estate, 190 Pa. St. 513, 42 Atl. 955.

[1] Leach *v.* Beattie, 33 Vt. 195; Darden *v.* Cowper, 7 Jones, 210; Picot *v.* Colombet, 12 Cal. 414.

[2] Near *v.* Lowe, 49 Mich. 482; Gordon *v.* Gordon, Ib. 501; Harrison *v.* Dewey, 46 Mich. 173.

[3] McLellan *v.* Osborne, 51 Maine, 118; Dyckman *v.* Valiente, 42 N. Y. 549.

[4] See Abbott on Shipp. B. 1, ch. 3, §§ 4, 10, 11, 12; Doddington *v.* Hallet, 1 Ves. 497; Ex parte Young, 2 Ves. & Beam. 242; Com. Dig. Chan. 3 V. 6, 2 A. 1; Drury *v.* Drury, 1 Ch. Rep. 49; Strelly *v.* Winson, 1 Vern. R. 297.

[5] Strelly *v.* Winson, 1 Vern. 297; Horn *v.* Gilpin, Ambl. R. 255; Pulteney *v.* Warren, 6 Ves. 73, 78; Field *v.* Craig, 8 Allen, 357.

[6] A secret additional consideration paid to one of the tenants in common cannot be held by him as against his co-tenants, and they are entitled to an accounting for the amount thus received. Briggle *v.* Coe, 72 Wash. 574, 131 Pac. 209.

Benson *v.* Heathorn, 1 Younge & Coll. N. R. 326, 340, 341. In this case Mr. Vice-Chancellor Knight said: "The next point relates to the commissions and the discounts. It may be right, and probably is fair, to assume, for the purpose of the argument, that all these

§ 624. **Remedy in Action for Fraud Where Agent Dies Pendente Lite.** — In many cases of frauds by an agent a Court of Common Law cannot administer effectual remedies; as for instance it cannot give damages against his estate for a loss arising from his torts when such torts die with the person; and a fortiori the rule will apply to Courts of Equity which do not entertain suits

charges and allowances to Mr. Heathorn were such as would have been according to usage, and proper in the case of a stranger. His position however was very different. He was one of six directors of this company, to whom exclusively the entire management of its affairs was entrusted. I say exclusively, because, as is obviously necessary in companies of this description, the shareholders in general were prohibited from interfering. These six directors, being so entrusted, receive among them from the funds of the company, as a remuneration for their trouble in being the exclusively acting partners in this concern, a sum of no less than £650 per annum, capable, as I read the deed, of increase, but not liable to diminution; this sum they are to divide between themselves as they think fit. Now it is obvious that persons so circumstanced were under an obligation to the shareholders at large to use their best exertions in all matters which related to the affairs of the company for the welfare of the concern thus entrusted, not gratuitously, to their charge. I apprehend that, without any special provision for the purpose, it was by law an implied and inherent term in the engagement that they should not make any other profit to themselves of that trust or employment, and should not acquire to themselves, while they remained directors, an interest adverse to their duty. The main or only business of this company consisted in acquiring, managing, and working steam-vessels. It may have been that a ship's husband was necessary. It is the defendants' case, or the case at least of Mr. Heathorn, that a ship's husband was necessary. This is denied on the part of the plaintiffs, who say that the directors might very well have performed such duty as the management of the vessels required, without the interposition of a ship's husband. On that I give no opinion; but if a ship's husband was necessary, it is obvious he would become the responsible servant of the direction in an onerous office, — that he would become an accounting party to them, and that his conduct as well as his accounts, however respectable he might be, would require a constant and vigilant superintendence and control. That constant and vigilant superintendence and control one and all of the directors had, for value, contracted to give; and what is done? One of these very directors becomes himself the person whose conduct and accounts it is his duty to superintend, to check, and to watch: at once, therefore, to put the case at the very lowest, and in a manner most favorable to Mr. Heathorn, paralyzing him as a director in this respect, and leaving the company, as far as these important matters were concerned, under the protection of but five, while they believed themselves to be under the protection of six. But it does not rest there. The five remaining directors were placed in the difficult and invidious position of having to check and control the accounts of one of their own body with whom they were associated on equal terms in the management of every other part of the affairs of the concern. It has been nevertheless, with an appearance of seriousness, treated as an arguable question whether I can allow this gentleman to receive profits, however reasonable in amount, if they had been claimed by another person, which he has made by this employment, in which he ought never to have embarked. If the

for damages. But where the tort arises in the course of an agency from a fraud of the agent and respects property, Courts of Equity will treat the loss sustained as a debt against his estate.[1]

§ 625. **Agent Must Keep and Render Proper Accounts.** — Courts of Equity adopt very enlarged views in regard to the rights and duties of agents; and in all cases where the duty of

court were to do so, if the court were to allow to a person so circumstanced that which might fairly be allowed to a stranger, it would obviously afford the strongest encouragement to a departure from what is the right and regular course in every similar establishment. A party would take a situation of this nature with the certainty of having a fair remuneration, and with the probable advantage of retaining what was unfair. It is mainly this danger, the danger of the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in the case of trustees and all parties whose character and responsibilities are similar (for there is no magic in the word), induces the court (not only for the sake of justice in the individual case, but for the protection of the public generally, and with a view to assert and vindicate the obligation of plain and direct dealing between man and man in all cases, but especially in those where one man is trusted by another) to adhere strictly to the rule that no profit of any description shall be made by a person so circumstanced, — saying to the person complaining that he has thus employed his time and skill without remuneration, that he has elected so to treat the matter; that he has had his reward, for he has had the possibility, nay, the probability, of retaining to himself that which he never ought to have retained; that he has been willing to run and cannot complain if he happens to lose the stake. It is on this principle that Lord Eldon proceeded in the cases so familiar to us all, of purchases by trustees. It is only an instance of the application of the rule, not the rule itself. In those cases Lord Eldon said (I allude particularly to Ex parte Lacey (6 Ves. 627), which occurred soon after Lord Eldon first received the seal): 'The rule is founded on this; that though you may see in a particular case that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the court — by which I mean, in the power of the parties in ninety-nine cases out of a hundred — whether he has made advantage or not.' If in the present case Mr. Heathorn had openly and directly brought forward the matter before the body of shareholders generally, I consider it possible, if not probable, that he would have been allowed to receive, and would now have been entitled to retain, all the sums in question paid for commission. He has not elected to take that open and straightforward course; he has chosen that the matter should be undisclosed, and he must abide the inevitable result."

Morrison *v.* Hunter, 74 Neb. 559, 105 N. W. 88, in which defendant received larger price in sale of land than he reported to owner; and in Carroll *v.* McKale, 111 Mich. 348, 69 N. W. 644, 3 Detroit Leg. No. 726, agent traded in a better bicycle but gave principal instead an inferior bicycle; Hammond *v.* Bookwalter, 12 Ind. App. 177, 39 N. E. 872; Leigh *v.* American Brake Beam Co., 107 Ill. App. 444, 205 Ill. 147, 68 N. E. 713; Triplett *v.* Woodward's Admr., 98 Va. 187, 35 S. E. 455; Dorr *v.* Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348.

[1] Lord Hardwicke *v.* Vernon, 4 Ves. 418; Bishop of Winchester *v.* Knight, 1 P. Will. 406. But see Jesus College *v.* Bloom, Ambler, R. 55.

keeping regular accounts and vouchers is imposed upon them, they will take care that the omission to do so shall not be used as a means of escaping responsibility or of obtaining undue recompense. If therefore an agent does not under such circumstances keep regular accounts and vouchers, he will not be allowed the compensation which otherwise would belong to his agency.[1] Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own, if he mixes it up with his own the whole will be taken both at law and in equity to be the property of the principal until the agent puts the subject-matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part.[2] In other words the agent is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of his principal.[3] Courts of Equity do not in these cases proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done, and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal.[4]

§ 626. **Apportionment, Contribution, and General Average.** — Another head is that of APPORTIONMENT, CONTRIBUTION, and GENERAL AVERAGE, which are in some measure blended together and require and terminate in Accounts. In most of these cases a discovery is indispensable for the purposes of justice; and where this does not occur, there are other distinct grounds for the exercise of equity jurisdiction in order to avoid circuity and multiplicity of actions. Some cases of this nature spring from contract; others again from a legal duty independent of contract; and others again from the principles of natural justice confirming the known maxim of the law, "Qui sentit commodum, sentire debet et onus." The two latter may therefore properly

In many cases of tort a remedy would lie at law against the personal representative of the party, as for instance where a tenant has tortiously dug ore and sold it during his lifetime; if the ore or the proceeds of it come to the possession of his administrator or executor, or he has assets, a suit will lie at law for the same. 1 P. Will. 407. See Jesus College *v.* Bloom, Ambler, R. 54; Hambley *v.* Trott, Cowp. R. 374.

[1] White *v.* Lady Lincoln, 8 Ves. 363; S. P. 15 Ves. 441; Boyce *v.* Boyce, 124 Mich. 696, 83 N. W. 1013, 7 Detroit Leg. N. 401.

[2] Lufton *v.* White, 15 Ves. 436, 440.

[3] Panton *v.* Panton, cited 15 Ves. 440; Chadworth *v.* Edwards, 8 Ves. 46.

[4] Lufton *v.* White, 15 Ves. 441; post, § 623.

be classed among obligations resulting quasi ex contractu.[1] This will abundantly appear in the sequel of these Commentaries.[2]

§ 627. **Nature of the Right of Apportionment.** — And first as to APPORTIONMENT and CONTRIBUTION, which may conveniently be treated together. Lord Coke has remarked that the word Apportionment "cometh of the word Portio, quasi Partio, which signifieth a part of the whole, and apportion signifieth a division of a rent, common, &c., or a making of it into parts."[3] It is sometimes used to denote the distribution of a common fund or entire subject among all those who have a title to a portion of it.[4] Sometimes indeed in a more loose but an analogous sense it is used to denote the contribution which is to be made by different persons having distinct rights towards the discharge of a common burthen or charge to be borne by all of them. In respect then to apportionment in its application to contracts in general it is the known and familiar principle of the common law that an entire contract is not apportionable. The reason seems to be that as the contract is founded upon a consideration dependent upon the entire performance of the act, and if from any cause it is not wholly performed, the casus fœderis does not arise, and the law will not make provisions for exigencies which the parties have neglected to provide for themselves. Under such circumstances it is deemed wholly immaterial to the rights of the other party whether the non-performance has arisen from the design or negligence of the party bound to perform it, or to inevitable casualty or accident. In each case the contract has not been completely executed.[5] The

[1] Deering *v.* Earl of Winchelsea, 1 Cox, R. 318; s. c. 2 Bos. & Pull. 270.

[2] Mr. Chancellor Kent has in several of his judgments treated the subject of Contribution, and insisted strongly that it is not necessarily founded upon contract, but upon principles of natural justice, independent of contract. See Cheeseborough *v.* Millard, 1 John. Ch. R. 409; Stearns *v.* Cooper, 1 John. Ch. R. 425; Campbell *v.* Mesier, 4 John. Ch. R. 334. In this opinion he is not only fully borne out by the doctrines of the English law (Deering *v.* Earl of Winchelsea, 1 Cox, R. 318; s. c. 2 Bos. & Pull. 270), but by the Roman and foreign law, which he has, with his usual ability and learning, commented upon. And he has applied it to the case of an old party wall which divided two estates, and was necessary to be rebuilt and was rebuilt by the owner of one, who claimed contribution from the other and had a decree in his favor. There is a most persuasive course of reasoning used to support this judgment; but it is mainly rested upon principles of equity derived from the civil and foreign law. See Campbell *v.* Mesier, 4 John. Ch. R. 334; s. c. 6 John. R. 21.

[3] Co. Litt. 147 *b*.

[4] Ex parte Smyth, 1 Swanst. R. 338, 339, the Reporter's note.

[5] Paradine *v.* Jane, Aleyn, R. 26, 27; Story on Bailments, § 36; Ex parte Smyth, 1 Swanst. R. 338, 339, the Reporter's note, and cases cited; Ibid. 1 Fonbl. Eq. B. 1, ch. 5, § 9, notes (*m*) to (*r*).

same rule is applied to cases where the payment is to be made under a contract upon the occurrence of a certain event or upon certain conditions. In the application of this doctrine of the common law, Courts of Equity have generally, but not universally, adopted the maxim, "æquitas sequitur legem."[1] Whether rightly or wrongly, it is now too late to inquire; although as a new question there is much doubt whether in so adopting the maxim they have not in many cases deserted the principles of natural justice and equity, as well as the analogies by which they were governed in other instances in which they have granted relief.[2] We have already had occasion to cite cases in which this rigid doctrine as to non-apportionment has been applied.[3] There are however some exceptions to the rule both at law and in equity, which we shall presently have occasion to consider, and some in which Courts of Equity have granted relief where it would at least be denied at law.[4]

§ 628. **Right of Apportionment Not Allowed at Common Law unless Stipulated For.** — Some cases of apportionment in equity arising under contract or quasi contract have already been mentioned under the head of Accident. But at the common law the cases are few in which an apportionment under contracts is allowed, the general doctrine being against it unless specially stipulated by the parties.[5] Thus for instance where a person was appointed collector of rents for another, and was to receive £100 per annum for his services, and he died at the end of three quarters of the year while in the service, it was held that his executor could not recover £75 for the three quarters' service, upon the ground that the contract was entire, and there could be no apportionment; for the maxim of the law is, "Annua nec debitum judex non separat ipsum."[6] So where the mate of a ship engaged for

[1] Post, §§ 574, 577 to 582.
[2] Ibid. Ante, §§ 144 to 148.
[3] Post, §§ 565, 566, 576.
[4] Ante, § 134.
[5] So in regard to dividends on shares. Dexter *v.* Phillips, 121 Mass. 178; Granger *v.*Bassett, 98 Mass. 462; Clive *v.* Clive, Kay, 600; In re Maxwell, 1 Hem. & M. 610. And of interest coupons on United States bonds. Sargent *v.* Sargent, 103 Mass. 297; Dexter *v.* Phillips, supra. Interest on promissory notes however, given for money lent, whether or not secured by mortgage or pledge, is apportionable between the days on which payment is due. Dexter *v.* Phillips, 121 Mass. 178. This case contains a general consideration of the subject and authorities thereon. The question of apportionment of a written contract often turns upon construction. See e. g. Gale *v.* Nourse, 15 Gray, 300; Thompson *v.* Saco Water Power Co., 114 Mass. 159. In these cases the contracts had been terminated by the defendant under provisions therein.
[6] Co. Litt. 150 *a*; Countess of Plymouth *v.* Throgmorton, 1 Salk. 65; 3 Mod. R. 153.

a voyage at thirty guineas for the voyage, and died during the voyage, it was held that at law there could be no apportionment of the wages.[1]

§ 629. **Entire Contract Cannot Be Apportioned.** — In its familiar practical applications the principle that an entire contract cannot be apportioned seems founded on reasoning of this nature, — that the subject of the contract being a complex event constituted by the performance of various acts, the imperfect completion of the event by the performance of some only of those acts (as service during a portion of the specified period, navigation to an extent less than the voyage undertaken) cannot by virtue of that contract of which it is not the subject afford a title to the whole or to any part of the stipulated benefit. Whatever be the origin or the policy of the principle, it has unquestionably been established as a general rule from the earliest period of our judicial history.[2]

§ 630. **Same.** — Courts of Equity to a considerable extent act, as we have seen, upon this maxim of the common law in regard to contracts. But where equitable circumstances intervene they will grant redress. Thus if an apprentice fee of a specific sum be given, and the master afterwards becomes bankrupt, equity will, as we have seen, decree an apportionment.[3] So where an attorney

[1] Cutter *v.* Powell, 6 T. R. 320. See also Appleby *v.* Dodd. 8 East, R. 300; Jesse *v.* Roy, 1 Cromp. Jerv. & Rosc. 316, 329, 339.

Plaintiff's testator was given a salary of $2000 for legal services to be performed in administration upon a client's estate, and in two months after the client died, plaintiff's intestate died, and the estate was never settled during that time. As the time for the payment of the $2000 was not fixed by the will, it is impossible to prorate it. Ellington *v.* Durfey, 156 N. C. 253, 72 S. E. 194.

[2] Ex parte Smyth, 1 Swanst. R. p. 338, note. "The following are some of the authorities by which it is enforced or qualified: Bro. Abr. Apportion, pl. 7, 13, 22, 26; Id. Contract, pl. 8, 16, 30, 31, 35; Id. Laborers, pl. 48, 10 H. 6, 23, 3 Vin. Abr. 8, 9; Finch, Law, lib. 2, c. 18; Countess of Plymouth *v.* Throgmorton, 1 Salk. 65; Tyrie *v.* Fletcher, Cowp. 666; Robinson *v.* Bland, 2 Burr. 1077, 1 Bl. 234; Loraine *v.* Thomlinson, Doug. 585; Bermon *v.* Woodbridge, Doug. 781; Rothwell *v.* Cook, 1 B. & P. 172; Meyer *v.* Gregson, Marsh. on Insurance, 658; Chater *v.* Becket. 7 T. R. 201; Cook *v.* Jennings, 7 T. R. 381; Cuttler *v.* Powell, 6 T. R. 320; Wiggins *v.* Ingleton, Lord Raym. 1211; Cook *v.* Tombs, 2 Anstr.; Lea *v.* Barber, 2 Anstr. 425, n.; Mulloy *v.* Backer, 5 East, 316; Liddard *v.* Lopes, 10 East, 526; How *v.* Synge, 15 East, 440; Fuller *v.* Abbott, 4 Taunt. 105; Stevenson *v.* Snow, 3 Burr. 1237; Long *v.* Allen, Marsh. on Insurance, 660; Park on Insurance, 529; Ritchie *v.* Atkinson, 10 East, 295; Waddington *v.* Oliver, 2 N. R. 61; and see Abbott's Law of Merchant Ships, p. 292, et seq."

[3] Ante, § 134; Hale *v.* Webb, 2 Bro. Ch. R. 78; Ex parte Sandby, 1 Atk. 149.

while he lay ill received the sum of 120 guineas for a clerk who was placed with him, and he died within three weeks afterwards, the court decreed a return of 100 guineas, notwithstanding the articles provided that in case of the attorney's death £60 only should be returned.[1] This case, upon the statement in the report, is certainly open to the objection taken to it by Lord Kenyon, who said that it carried the jurisdiction of the court as far as it could be,[2] for it overturned the maxim, "Modus et conventio vincunt legem." But in truth the case (according to the Register's Book) seems to have been very correctly decided; for in the pleadings it was stated that the plaintiff at the time was unwilling to sign the articles, or to pay the 120 guineas, until the attorney had declared that in case he should not live to go abroad, the 120 guineas should be returned to him, and that he was only troubled with a cold, and hoped to be abroad in two or three days, and thereupon the plaintiff signed the articles.[3] This allegation was in all probability proved, and was the very turning-point of the case. If so, the case stands upon a plain ground of equity, — that of mutual mistake or misrepresentation or unconscientious advantage.

§ 631. **Apportionment of Fees of Apprentices.** — Other cases of apprentice fees may exemplify the same salutary interposition of Courts of Equity. Thus where an apprentice had been discharged from service in consequence of the misconduct of the master, it was decreed that the indentures of apprenticeship should be delivered up, and a part of the apprentice fee paid back.[4] So where the master undertook, in consideration of the apprentice fee, to do certain acts during the apprenticeship which by his death were left undone and could not be performed, an apportionment of the apprentice fee was decreed.[5]

§ 632. **Same.** — These are cases where an apportionment might not always be reached at the common law, but yet which belong to the recognized principles of equity. But on the other hand where an apprentice fee has been paid and the apprenticeship has been dissolved at the request of the friends of the apprentice, but without any default in the master and without any agreement for a return of any part of the fee, there a Court of Equity will not

[1] Newton *v.* Rowse, 1 Vern. 460, and Raithby's note (2).
[2] Hale *v.* Webb, 2 Bro. Ch. R. 80; 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*g*).
[3] Mr. Raithby's note to 1 Vern. 460. Ante, § 134.
[4] Lockley *v.* Eldridge, Rep. Temp. Finch, 128. See Therman *v.* Abell, 2 Vern. 64.
[5] Savin *v.* Bowdin, Rep. Temp. Finch, 396.

interfere; for there is no equity attaching itself to the transaction, and the contract does not import any return.[1]

§ 633. **No Apportionment of Rents at Common Law.** — In regard to rents the general rule at the common law leaned strongly against any apportionment thereof.[2] Hence it was well established that in case of the death of a tenant for life in the interval between two periods at each of which a portion of rent becomes due from the lessee, no rent could be recovered for the occupation since the first of those periods.[3] The rule seems to have been rested on two propositions: 1st, that an entire contract cannot be apportioned; 2d, that under a lease with a periodical reservation of rent the contract for the payment of such portion is distinct and entire.[4] Hence it followed that on the determination of a lease by the death of the lessor before the day appointed for payment of the rent, the event on the completion of which the payment was stipulated, namely, occupation of the lands during the period stipulated, never occurring, no rent became payable, and in respect of time apportionment was not in any case permitted.[5]

§ 634. **Same.** — Some exceptions and some qualifications were however in certain cases and under certain circumstances incor-

[1] Hall *v.* Webb, 2 Bro. Ch. 78.

[2] As where rent is payable at the end of each month or quarter. Dexter *v.* Phillips, 121 Mass. 178; Sohier *v.* Eldredge, 103 Mass. 345; In re Markby, 4 Mylne & C. 484; Brown *v.* Amyot, 3 Hare, 173; In re Clulow, 3 Kay & J. 689. See upon this subject of apportioning rent the note at end of § 482.

The general rule is that even an appointment of rent is never made, under common law, in reference to length of time of occupation; but, when the rent falls due, the owner of the reversion at that time is entitled to the entire sum. Lester *v.* Zink, 154 S. W. 1161; Hearne *v.* Lewis, 78 Tex. 276, 14 S. W. 572.

Where rent for a month became due before the tenant's eviction, the landlord was entitled to rent for the whole month, and the defendant might have been entitled to deduct from the rent reserved the reasonable value of the use of the premises for the remainder of the term, having been deprived of such use because of his eviction. Zbarazer Realty Co. *v.* Brandstein, 61 Misc. Rep. 623, 113 N. Y. Supp. 1078.

The tenant is liable for rent under a contract giving him an option to purchase within a given time, where the deed was passed between the first days of two months when rent was regularly due and payable. Withington *v.* Nichols, 187 Mass. 575, 73 N. E. 855.

[3] The settled doctrine as to apportionment of annuities, both by courts of law and equity, is that they are not proportioned in respect to time, so, where testator granted an annuity, without stating when it was to be payable, and he died two months later there could be no apportionment in favor of the annuitant. Henry *v.* Henderson, 81 Miss. 743, 33 So. 960, 63 L. R. A. 616. Ex parte Smyth, 1 Swanst. R. 338, and note.

[4] Ibid.

[5] Clun's Case, 10 Co. R. 127.

porated into the common law at an early period, in respect to rent growing out of real estate where there was a division or severance of the land from which the rent issued. In other cases the rent was held to be wholly extinguished.[1] A few examples of each sort may perhaps be usefully introduced in this place; but the full examination of the whole subject properly belongs to another department of the law.[2] Thus for instance if a man had a rent charge and purchased a part of the land out of which it issued, the whole rent charge was extinguished.[3] But if a part of the land came to him by operation of law, as by descent, then the rent charge was apportionable; that is, the tenant and the heir were to pay according to the value of the lands respectively held by them, and of course the part apportionable on the heir was extinguished.[4] But a rent service was in both cases apportionable.[5] So if a lessor granted part of a reversion to a stranger, the rent was to be apportioned.[6] On the other hand if part of the land out of which a rent charge issued was evicted by a title paramount, the rent was apportioned.[7] So although a rent charge is in its nature entire and against common right, yet if it descended to coparceners by this rule of law the rent was apportioned between them, and the tenant was subject to several distresses for the rent, and partition might be made before seisin of the rent.[8] So a rent

[1] If the act claimed to be an extinguishment was done in mistake, equity may apportion. Van Rensselaer *v.* Chadwick, 22 N. Y. 32.

[2] Co. Litt. 148 *a*; Com. Dig. Suspension, R. 6, D. 4; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes; Bac. Abridg. Rent, M.; Com. Dig. Chancery, 4 N. 5, 2 E.; Ex parte Smyth, 1 Swanst. R. 338, 339, the Reporter's note.

[3] Co. Litt. 147 *b*, 148 *a*, 148 *b*; Bac. Abr. Rent, M.; Com. Dig. Suspension, C. See also Averall *v.* Wade, 1 Lloyd and Goold, R. 252, and the Reporter's note, pp. 264, 265. But see 1 Swanst. R. 338, note (*a*). Mr. Swanston, in his note (*a*) to Ex parte Smyth, 1 Swanst. R. 338, says: "Apportionment frequently denotes, not division, but distribution; and in its ordinary technical sense the distribution of one subject in proportion to another previously distributed." There is some reason to question the accuracy of this statement. Apportionment does not refer to a distribution of one subject in proportion to another "previously distributed", but a distribution of a claim or charge among persons having different interests or shares in proportion to their interest or shares in the subject-matter to which it attaches.

[4] Co. Litt. 149 *b*; Bac. Abridg. Rent, M.; Com. Dig. Suspension, C.

[5] Ibid.; Com. Dig. Suspension, E. Voegtly *v.* Pittsburgh R. Co., 2 Grant, 243. See note to § 579, at end.

[6] Co. Litt. 148 *a*; Com. Dig. Suspension, E.; Ewer *v.* Moyle, Cro. Eliz. 771; Bac. Abridg. Rent, M. 1.

[7] Com. Dig. Suspension, E.; Co. Litt. 147 *b*; Bac. Abridg. Rent, M. 1, 2.

[8] Co. Litt. 164 *b*. See Conger *v.* McLaury, 41 N. Y. 219; editor's note at end of § 579.

service incident to the reversion might be apportionable by a grant of a part of the reversion.[1]

§ 635. **Same.** — "In some cases a rent charge may be apportioned by the act of the party; as if the grantee releases part of his rent to the tenant of the land, such release does not extinguish the whole rent. So if the grantee gives part of it to a stranger and the tenant attorns, such grant shall not extinguish the residue which the grantee never parted with, because such release or disposition makes no alteration in the original grant, nor defeats the intention of it as the purchase of part of the land does; for the whole rent is still issuable out of the whole land, according to the original intention of the grant. Besides since the law allowed of such sorts of grants and thereby established such sort of property, it would have been unreasonable and severe to hinder the proprietor to make a proper distribution of it for the promotion of his children, or to provide for the contingencies of his family, which were in his view. The objection that has been made to these sorts of apportionments or divisions of rent charges is this; that the tenant thereby would be exposed to several suits and distresses for a thing which in its original creation was entire, and recoverable upon one avowry." [2]

§ 636. **Apportionment of Rent upon Destruction of Property before Expiration of Term.** — And the question may also arise, "Whether the tenant shall pay the whole rent though part of the thing demised be lost and of no profit to him, or though the use of the whole be for some time intercepted or taken away without his default. And here it seems extremely reasonable that if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract; and therefore if part of the land be surrounded or covered with the sea, this being the act of God the tenant shall not suffer by it, because the tenant without his default wants the enjoyment of part of the thing which was the consideration of his paying the rent; nor has the lessor reason to complain, because if the land had been in his own hands he must have lost the benefit of so much as the sea had covered." [3]

[1] Bac. Abridg. Rent, M. 1. [2] Ibid.

[3] Bac. Abridg. Rent, M. 2. The passage is here given as it stands in Bacon's Abridgment. But whether the doctrine therein stated would now be supported, may perhaps admit of a doubt. See ante, §§ 144 to 147.

Under the general rule at common law the fact that the tenant after the beginning of the term was deprived of the beneficial enjoyment of the

§ 637. [**Exceptions to the Common Law Rule.** — The common law rule does not apply in all of the States in all of its extreme rigor, but it is now softened by numerous exceptions, and in the States of New York, Kansas, South Carolina, Nebraska, Ohio it does not apply at all, the courts in these States evidently seeking to mete out equal justice to all parties where the subject-matter of the contract has been destroyed, through no fault of the lessor or lessee, and where the subject-matter of the contract has ceased to exist, then liability for rent ceases. The harsh, technical rule of construction of the common law should change as the conditions of the race have changed; the conscience of the court and its intellect have been quickened; and this rule, however meritorious it may have been at the time and place of its origin, is opposed to the genius and spirit of the present age, and in conflict with its judgment and conscience. Where ice houses were leased and a substantial portion of the leased premises were destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction.[1]]

§ 638. **No Apportionment Where Lease Was Determined by Inevitable Casualty before Expiration of Term.** — However reasonable an apportionment may seem to be in the case last suggested, upon the ground that the tenant had not, by reason of inevitable casualty, enjoyed the full benefit of the lands demised

leased premises by inevitable accident, happening without the fault of either the landlord or tenant, would not entitle him to an apportionment of rent. Neither does the fact that a tenant's beneficial enjoyment of the premises is interrupted by an inundation affect his liability for rent. Meek *v.* Cunha, 8 Cal. App. 98, 96 Pac. 107.

The destruction of the leased premises by fire, without the fault of either of the parties, does not, as a matter of law, terminate the lease, but where the contract provided that in the event the premises were destroyed, that they should be re-built by the landlord, he was not entitled to rent during the time the new building was in course of erection. Lincoln Trust Co. *v.* Nathan, 175 Mo. 32, 74 S. W. 1607; P. H. Snook & Austin Furniture Co. *v.* Steiner *v.* Emery, 117 Ga. 363, 43 S. E. 775; Moran *v.* Bergin, 111 Ill. App. 313.

[1] Wattles *v.* South Omaha Ice & Coal Co., 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 429, 61 Am. St. Rep. 554. And where a sugar plantation was so inundated as to have the barns, cane and other property covered by water as to be ruined, by floods over which he had no control, he was entitled to have the lease cancelled, though the farm itself were not washed away. Viterbo *v.* Friedlander, 120 U. S. 730, 30 L. Ed. 776, 7 S. Ct. Rep. 962.

Destruction of leased premises by elements during the demised term. Meserole *v.* Sinn, 34 App. Div. 33, 53 N. Y. Supp. 1072; Affirmed Meserole *v.* Hoyt, 161 N. Y. 59, 55 N. E. 274; Utah Optical Co. *v.* Keith, 18 Utah 464, 56 Pac. 155.

to him, the same principle was not at the common law carried out in favor of the lessor, in case the lease by inevitable casualty determined before the entire rent was due. For in such a case the rule was inflexibly applied, that the rent should not be apportioned. If therefore the lease be determined by the death of the lessor (he having but a life estate in the land demised) before the day appointed for the payment of the rent, the event on which that payment was stipulated, namely, the occupation of the land demised during the period specified, no rent whatsoever was payable by the tenant, even although he had occupied the land up to a single day of the time when the rent would have become due; for no apportionment in respect to time was in any case admitted by the common law. The executor of the deceased was not entitled to any rent, because the contract was not completely performed; the remainder-man or reversioner was not entitled, because the rent was not due in his time.[1] And this severe doctrine of the common law, artificial and unjust as it seems to be, was, as we shall presently see, scrupulously followed in equity. It was to cure this manifest defect that the statute of 11 Geo. 2 (ch. 19, § 15) was passed; and the like remedial justice has been still more amply provided for by the statute of 4 and 5 Will. 4, ch. 22.[2]

[1] Clun's Case, 10 Co. R. 127. The principal reason there given is, "Because the rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee: for these words 'reddendo inde', or 'reservando inde', is as much as to say that the lessee shall pay so much of the issues and profits at such days to the lessor; for 'reddere inde nihil aliud est quam acceptum restituere, seu reddere est quasi retro dare', and 'redditus dicitur a reddendo, quia retro it, sc.' to the lessor, donor, &c., 'sicut provent, a proveniendo'; and 'obventus ab obveniendo.' And that is the reason that the rent so reserved is not due or payable before the day of payment incurred, because it is to be rendered and restored out of the issues and profits; and that is the reason that if the land is evicted, or if the lease determines before the legal time of payment, no rent shall be paid, for there shall never be an apportionment in respect of part of the time, as there shall be upon an eviction of part of the land; and therefore if tenant for life makes a lease for years, rendering rent at the feast of Easter, and the lessee occupies for three quarters of the year, and in the last quarter before the feast of Easter, the tenant for life dies, here shall be no apportionment of the rent for three quarters of the year, because no rent was due till the feast of Easter, and no apportionment shall be in respect of time; but in the same case if part of the land had been evicted before the feast of Easter, and the feast of Easter occurred in the life of the lessor, there shall be an apportionment of the rent, but not in respect of the time which well continued, but in respect that parcel of the land leased is evicted." 1 Fonbl. Eq. B. 1, ch. 5, § 90, note (*o*); Ex parte Smyth, 1 Swanst. R. 338, and the Reporter's note; Bissett on Estates for Life, ch. 11, pp. 268 to 272.

[2] See now 33 and 34 Vict. ch. 35.

§ 639. **Right of Contribution towards a Common Charge.** — On the other hand cases may easily be stated where apportionment of a common charge, or, more properly speaking, where contribution towards a common charge, seems indispensable for the purposes of justice, and accordingly has been declared by the common law in the nature of an apportionment towards the discharge of a common burthen. Thus if a man owning several acres of land is bound in a judgment, or statute, or recognizance, operating as a lien on the land, and afterwards he aliens one acre to A, another to B, and another to C, &c.; there, if one alienee is compelled, in order to save his land, to pay the judgment, statute, or recognizance, he will be entitled to contribution from the other alienees.[1] The same principle will apply in the like case where the land descends to parceners who make partition, and then one is compelled to pay the whole charge; contribution will lie against the other parceners.[2] The same doctrine will apply to co-feoffees of the land or of different parts of the land.[3] In all these cases (and others might be mentioned) a writ of contribution would lie at the common law or in virtue of the statute of Marlebridge.[4]

[1] Harbert's Case, 3 Co. R. 12, 13; Viner's Abridg. Contribution and Average, A. pl. 4, 6, 8, 9, 12, 25, 27. See also American Law Mag. for April, 1844, art. 5, pp. 64 to 82. But see post, § 1640, where the subject is discussed in another connection, and the authorities are shown to be not in harmony on the subject. There is a corresponding right to come in and share in the benefit of redemption, by contributing. Seymour *v.* Davis, 35 Conn. 264.

[2] Ibid.; Viner's Abridg. Contribution and Average, A. pl. 6, 7, 9, 22, 23, 24.

[3] Ibid.; Harbert's Case, 3 Co. R. 12; Deering *v.* Earl of Winchelsea, 1 Cox, R. 321; s. c. 2 Bos. & Pull. 276.

[4] See Harbert's Case, 3 Co. R. 12; Deering *v.* Earl of Winchelsea, 1 Cox, R. 321; s. c. 2 Bos. & Pull. 270; Co. Litt. 165 *a*; Fitzherbert Nat. Brev. 16. Lord Chief Baron Eyre, in one of his most luminous judgments, has expounded the general grounds of the doctrine of contribution, as known at the common law as well as in equity, in a manner so clear that it will be better to quote his own language than to risk impairing its force by any abridgment. "If we take a view," said he, "of the cases, both in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, as in Swain *v.* Wall, 1 Ch. Rep. 149. In the Register, p. 176 (*b*), there are two writs of contribution, one inter co-hæredes, the other inter co-feoffatos. These are founded on the statute of Marlebridge. The great object of the statute is to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet, in Fitz. N. B. 338, there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay. In the same page Fitzherbert takes notice of

§ 640. **Practice in Equity Where Parties Entitled to Contribution Are Numerous.** — But there are many difficulties in proceeding in cases where an apportionment of contribution is allowed at the common law; for where the parties are numerous, as each is liable to contribute only for his own portion, separate actions and verdicts may become necessary against each. And thus a multiplicity of suits may take place, and no judgment in one suit will be conclusive in regard to the amount of contribution in a suit against another person. The like difficulty may arise in cases where an apportionment is to be made under a contract for the payment of money or rent where the parties are numerous and the circumstances complicated. Whereas in equity all parties can at once be brought before the court in a single suit, and the decree apportioning the rent will thus be conclusive upon all the parties in interest.[1]

§ 641. **Jurisdiction in Cases of Apportionment of Rent.** — But the ground of equity jurisdiction, in cases of apportionment of rent and other charges and claims, does not arise solely from the defective nature of the remedy at common law, where such a remedy exists. It extends to a great variety of cases where no remedy at all exists in law, and yet where, ex æquo et bono, the party is entitled to relief.[2] Thus for instance where a plaintiff was lessee of divers lands upon which an entire rent was reserved, and afterwards the inhabitants of the town where part of the lands

contribution between co-heirs and co-feoffees; and as between co-feoffees, he supposes there shall be no contribution without an agreement. And the words of the writ countenance such an idea; for the words are 'ex eorum assensu;' and yet this seems to contravene the express provision of the statute. As to co-heirs the statute is express; it does not say so as to co-feoffees, but it gives contribution in the same manner. In Sir William Harbert's Case, 3 Co. 11 (*b*), many cases of contribution are put; and the reason given in the books is that in æquali jure the law requires equality. One shall not bear the burden in ease of the rest; and the law is grounded in great equity. Contract is never mentioned. Now the doctrine of equality operates more effectually in this court than in a Court of Law. The difficulty in Coke's cases was, how to make them contribute. They were put to their audita querela, or scire facias. In equity there is a string of cases in 1 Eq. Cas. Abr. tit. 'Contribution and Average.' Another case occurs in Hargrave's Law Tracts on the right of the king on the prisage of wine. The king is entitled to one tun before the mast, and one tun behind; and in that case a right of contribution accrues; for the king may take by his prerogative any two tuns of wine he thinks fit, by which one man might suffer solely. But the contribution is given, of course, on general principles, which govern all these cases." Deering *v.* Earl of Winchelsea, 1 Cox, R. 321; s. c. 2 Bos. & Pull. 270, 271, 272; Lord Redesdale in Stirling *v.* Forrester, 3 Bligh, R. 596, o. s.

[1] Post, §§ 582 to 593.

[2] Ante, §§ 565, 566.

lay claimed a right of common in part of the lands so let, and upon a trial succeeded in establishing their right, — in this case there could be no apportionment of the rent at law, because, although a right of common was recovered, there was no eviction of the land. But it was not doubted that in equity a bill was maintainable for an apportionment if a suitable case for relief were made out.[1] So where by an ancient composition a rent is payable in lieu of tithes, and the lands come into the seisin and possession of divers grantees, the composition will be apportioned among them in equity, though there may be no redress at law.[2] So where money is to be laid out in land, if the party who is entitled to the land in fee when purchased dies before it is purchased, the money being in the mean time secured on a mortgage and the interest made payable half-yearly, the interest will be apportioned in equity between the heir and the administrator of the party so entitled, if he dies before the half-yearly payment is due.[3] So where portions are payable to daughters at eighteen or marriage, and, until the portions are due, maintenance is to be allowed, payable half-yearly at specific times, if one of the daughters should come of age in an intermediate period, the maintenance will be apportioned in equity.[4]

§ 642. **Cases Where Apportionment of Rent Is Not Allowed.** — But still there are many cases in which Courts of Equity have refused to allow an apportionment of rent and other charges, acting (it must be admitted) not upon the principles which ordinarily govern them, but upon the notion of a strict obedience to the analogies of the law. Thus where a purchaser of an interest in New South Sea Annuities from a husband during his life, remainder to other persons (which had been originally secured upon a mortgage, but by order of the court had been transferred to government securities), insisted in a petition in equity that notwithstanding the husband died before the Christmas half-year became due, yet he was entitled to be paid proportionally for the time the husband lived, Lord Hardwicke said that if it had continued a mortgage the purchaser would have been entitled to the demand he now made, because there interest accrues every day for the forbearance of the principal, though notwithstanding it

[1] Com. Dig. Chancery, 2 E., 4 N. 5; Jew *v.* Thirkenell, 1 Ch. Cas. 31; s. c. 3 Ch. Rep. 11.

[2] Com. Dig. Chancery, 4 N. 5, cites Saville, R. 5. See Aynsley *v.* Woodsworth, 2 V. and Beam. 331.

[3] Edwards *v.* Countess of Warwick, 2 P. W. 176.

[4] Hay *v.* Palmer, 2 P. Will. 501. See also ante, §§ 565, 566.

is usual in mortgages to make it payable half-yearly; but that South Sea Annuities are considered as mere annuities, and therefore the purchaser is no more entitled than he would be in case of a common annuity payable half-yearly where the annuitant, in whose place he stands, dies before the half-year is completed.[1] This is certainly correct reasoning upon the course of the authorities; and yet it is difficult to see why, in reason, interest payable half-yearly should stand distinguished from an annuity payable half-yearly. Why, in such case, may not portions of the annuity be deemed in equity to accrue daily as much as interest, when the latter is, like the former, payable only half-yearly? The same principle has been adopted in cases where money is to be laid out in land upon a settlement, and in the mean time to be invested in government securities; if the tenant for life dies in the middle of the half-year, the reversioner is entitled to the whole dividend and there is no apportionment, although there would be if the money were laid out on mortgage.[2]

[1] Pearly *v.* Smith, 3 Atk. 261; 1 Fonbl. Eq. B. 1, ch. 5, § 9, note (*o*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 520, 521, 522. A life annuity was held apportionable in In re Lackawanna Canal Co., 37 N. J. Eq. 26. So in Heath *v.* Nugent, 29 Beav. 226, and in Wilkins *v.* Rotherham, 27 Ch. D. 703, under statute; and see Blight *v.* Blight, 51 Pa. St. 420. But if the annuity is not clearly intended for the daily support of the beneficiary, it cannot in absence of statute be apportioned. Phillips *v.* Dexter, 121 Mass. 178, 180, and cases cited. Under a statute providing for the apportionment of "income" given until a certain event, dividends of profits declared after the event have been held apportionable. Granger *v.* Bassett, 98 Mass. 462. See Jones *v.* Ogle, L. R. 14 Eq. 419. The English Apportionment Act applies not only to cases where the life estate is held under an instrument made after the act, but also to cases of leases made after the act under a settlement made before the act. Llewellyn *v.* Rous, L. R. 2 Eq. 27. See Heasman *v.* Pearse, L. R. 8 Eq. 599. Secus as to dividends of invested proceeds, when lands settled before the act were taken under the Lands Clauses Act. In re Lawton, L. R. 3 Eq. 469.

A trust to accumulate rents till A becomes twenty-one, when he is to be let into possession, falls within the English act. Wheeler *v.* Tootel, L. R. 3 Eq. 571. See Clive *v.* Clive, L. R. 7 Ch. 433; Donaldson *v.* Donaldson, L. R. 10 Eq. 635. The act does not apply to payments made under order of court. Jodrell *v.* Jodrell, L. R. 7 Eq. 461; In re Keogh, 112 App. Div. 414, 98 N. Y. Supp. 433; Mower *v.* Sanford, 76 Conn. 504, 57 Atl. 119, 63 L. R. A. 625, 100 Am. St. Rep. 1008; Nehls *v.* Sauer, 119 Iowa 440, 93 N. W. 346; Henry *v.* Henderson, 81 Miss. 743, 33 So. 960, 63 L. R. A. 616; Parker *v.* Seeley, 56 N. J. Eq. 110, 38 Atl. 280.

[2] Sherrard *v.* Sherrard, 3 Atk. 502; Rashleigh *v.* Master, 3 Bro. Ch. R. 99, 101; Webb *v.* Shaftesbury, 11 Ves. 361; Wilson *v.* Harman, Ambl. R. 279; s. c. 2 Ves. 672; 1 Fonbl. Eq. B. 1, ch. 5, § 9, note (*o*); Hay *v.* Palmer, 2 P. Will. 502, and Mr. Cox's note. See also ante, § 576. Mr. Swanston, in his learned note to the case of Ex parte Smyth, 1 Swanst. R. 338, 348, says: "The rule of law which refuses apportionment of rent in respect

§ 643. **Rent Not Apportioned According to Time.** — So where a tenant for life made a lease of the estate for years, rendering rent quarter-yearly, and died before the end of the quarter, an apportionment of the rent was denied in equity.[1] Upon this occasion the Lord Chancellor said: "There are several remedial statutes relating to rents,[2] but this is a casus omissus. The law

of time is applicable to all periodical payments becoming due at fixed intervals, not to sums accruing de die in diem. Annuities therefore (3 Atk. 261; 2 Bl. 1016) and dividends on money in the funds are not apportionable. Rashleigh *v.* Master, 3 Bro. C. C. 101; Wilson *v.* Harman, 2 Ves. 672; Ambl. 279; Pearly *v.* Smith, 3 Atk. 260; Sherrard *v.* Sherrard, 3 Atk. 502. But interest, whether the principal is secured by mortgage (Wilson *v.* Harman; Sherrard *v.* Sherrard) or by bond, notwithstanding that it is expressly made payable half-yearly (Banner *v.* Lowe, 13 Ves. 135), may be apportioned; for though reserved at fixed periods it becomes due de die in diem for forbearance of the principal, which the creditor is entitled to recall at pleasure. Thus a sum of money which it was covenanted in marriage-articles should be invested in lands, having been lent on mortgage at the death of the person entitled to an estate tail in the land, the interest was apportioned in favor of his administratrix. Edwards *v.* Countess of Warwick, 2 P. Will. 176; 1 Bro. P. C. ed. Toml. 207. In strictness these are not cases of apportionment (2 P. W. ed. Cox, 503, n. 1); they are not instances of the distribution of one entire subject among individuals entitled each to a part, but the appropriation of distinct subjects to the respective owners. A remarkable exception to the general rule has been introduced in the instance of annuities for the maintenance of infants (Hay *v.* Palmer, 2 P. W. 501; Rhenish *v.* Martin, 1746, MS.), or of married women living separate from their husbands (Howel *v.* Hanforth, 2 Bl. 1016; 2 Schoales & Lefr. 303); an exception supported by the necessity of the case and the consequent presumption of intention (2 Bl. 1017; 2 P. W. 503), and therefore not extending to an annuity for the separate use of a married woman living with her husband and maintained by him. Anderson *v.* Dwyer, 1 Schoales & Lefr. 301. An annuity payable quarterly, secured by the bond of a testator whose will charged his real in aid of his personal estate, being, under an order of the Court of Chancery, directed to be paid half-yearly at Midsummer and Christmas, and the annuitant having died between Lady-day and Midsummer, her representative was declared entitled to the arrears due at Lady-day. Webb *v.* Lady Shaftesbury, 11 Ves. 361."

[1] Jenner *v.* Morgan, 1 P. Will. R. 392; ante, § 573.

The same is true of a tenant pur autre vie. Mills *v.* Trumper, L. R. 4 Ch. 320. So where the whole annual tax is assessed to the life tenant. and he dies within the year, and the tax is paid by his executors, apportionment will be refused. Holmes *v.* Taber, 9 Allen, 246. See further Marshall *v.* Moseley, 21 N. Y. 280.

[2] Before the statute of 11 Geo. 2, ch. 19, § 15, if a tenant for life died before the rent day, the intermediate rent was lost. That statute has cured many hardships of the common law on this subject, but not all. Paget *v.* Gee, Ambler, R. 198; s. c. Id. App. p. 807 (Mr. Blunt's edition); Wykham *v.* Wykham, 3 Taunt. R. 331. The recent statute of 4 & 5 Will. ch. 22, has extended the like remedial justice to other analogous cases. Ante, § 476. It declares that all rent reserved and made payable in leases, which determine on the death of the person making them or on the death

does not apportion rent in point of time, and I do not know that equity ever did it."[1] This is an accident which the judgment creditor (the plaintiff) might have guarded against by receiving the rent weekly, so that it is his fault and becomes a gift in law to the tenant.[2] And yet if the tenant had actually paid the whole rent to the remainder-man, including this period, from a conscientious sense of duty, the party might, under such circumstances, have been entitled to his share pro rata. At least in the case where a tenant in tail made a lease, but not according to the statute, and died without issue between the days of payment, and afterwards the remainder-man received the whole rents, Lord Hardwicke decreed that the executors of the tenant were entitled against him to an apportionment, although in strictness the tenant could not have been compelled to pay it.[3]

§ 644. **Same.** — The distinction between this case and the former case is extremely thin, and the reasons given for it are rather ingenious and subtile than satisfactory. If it would not be unconscientious for the tenant to withhold the rent because

of the life or lives for which such person was entitled to the lands demised, shall be within the provisions of the statute of 11 Geo. 2, ch. 19. It also declares that all rent-service reserved in any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, and all rent-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every other description, made payable or coming due at a fixed period, shall be apportioned so, and in such manner, that on the death of any person interested therein, &c. &c., or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, and assigns, shall be entitled to a proportion of such rents and other payments. In the construction of this statute it has been held that it applies to cases in which the interest of the person interested in such rents and payments is terminated by his death or by the death of another person; but that it does not apply to the case of a tenant in fee, nor provide for apportionment of rent between the real and personal representatives of such person whose interest is not terminated by his death. Brown *v.* Amyott, 3 Hare, R. 173. See also Ex parte Smyth, 1 Swanston, R. 337, 338, and Mr. Swanston's learned note, ibid., where the principal cases are commented on at large. 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 519, 520, 521, 522.

[1] In Meeley *v.* Webber, cited 2 Eq. Abridg. 704, where a parson leased his tithes at a rent payable at Michaelmas, and died in September, the court decreed an apportionment. There is much good sense in the decision. See also Aynsley *v.* Woodsworth, 2 V. & Beam. R. 331.

[2] Jenner *v.* Morgan, 1 P. Will. 392. See Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 519, 520, 521.

[3] Paget *v.* Gee, Ambler, R. 198; s. c. App. (Mr. Blunt's edition), p. 807; Ex parte Smyth, 1 Swanst. R. 337, and note; Id. 355, 356; Aynsley *v.* Woodsworth, 2 V. & Beam. 331; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 520.

the executor of the tenant for life had no equity, it is difficult to perceive that there can spring up any equity against the remainder-man unless the tenant paid the rent with an express understanding that there should be an apportionment, which can hardly be pretended to have been proved in the cases on this point.[1] It would have been perhaps more consonant to the general principles of Courts of Equity to have decided that, as the tenant held his lease upon the terms of a compensatory contract, it was against conscience that he should be at liberty to treat the rent, under any circumstances of an involuntary departure from the terms of the lease, as a gift;[2] and that as the parties had omitted to provide in their contract for the exigency, equity would presume an intention of the parties to treat the rent as accruing, pro tanto, from day to day, and as a "debitum in præsenti solvendum in futuro." Lord Hardwicke, on one occasion, in discussing a question of apportionment, after quoting the maxim, "æquitas sequitur legem", added: "When the court finds the rules of law right, it will follow them; but then it will likewise go beyond them."[3]

[1] See Hawkins *v.* Kelly, 8 Ves. 308 to 312; Ex parte Smyth, 1 Swanst. R. 346, 347, 348, note.

[2] See Vernon *v.* Vernon, 2 Bro. Ch. R. 659, 662. Lord Thurlow seems to have proceeded upon a principle somewhat like this in Vernon *v.* Vernon (2 Bro. Ch. R. 659, 662), holding that where a person was a tenant from year to year, or a tenant at will under a tenant in tail, the demises being determinable at his death, and he dying before the half-year expired, the rent should be apportioned between the representatives of the tenant in tail and the remainder-man. His Lordship said that "the tenant holding from year to year, or period to period, from a guardian, without lease or covenant, cannot be allowed to raise an implication in his own favor that he should hold without paying rent to anybody." See Hawkins *v.* Kelly, 8 Ves. 312; Ex parte Smyth, 1 Swanston, R. 337, and ibid., Mr. Swanston's learned note; Clarkson *v.* Earl of Scarborough, cited 1 Swanston, R. 354, note (*a*).

[3] Paget *v.* Gee, Ambler, R. App. p. 810 (Mr. Blunt's edition). *Apportionment of Rent.* — The necessity for an apportionment of rent, apart from contract or statute, may arise under any of the following circumstances: (1) By division of the reversion, (2) by division of the leasehold premises, or (3) in certain cases by termination of the tenancy between rent days.

The first case may arise by the death of the lessor and the descent of the reversion upon his heirs. The rent must then be apportioned and paid to each of the heirs accordingly. Cole *v.* Patterson, 25 Wend. 456; Crosby *v.* Loop, 13 Ill. 625, 627; Bank of Pennsylvania *v.* Wise, 3 Watts, 404. And this as well in the case of a rent-charge. Cruger *v.* McLaury, 41 N. Y. 219, 223. It may also arise and be attended with the same result where the lessor grants or devises part of the land to one person, or the whole to several. Crosby *v.* Loop, supra; Bank of Pennsylvania *v.* Wise, supra; Reed *v.* Ward, 22 Pa. St. 144; Linton *v.* Hart, 25 Pa. St. 193. (As

§ 645. [**Apportionment of Boundaries.** — The rule of apportionment applies in cases of disputed boundaries, as where there is a deficit in the quantity of land conveyed, and in the location of the lines. For instance, where there is a shortage of half a mile

to rent-charges see infra.) And it matters not that the conveyance is involuntary. Nellis *v.* Lathrop, 22 Wend. 121; Buffum *v.* Deané, 4 Gray, 385. If however the rent be indivisible by nature, as where it is to be a specific article not severable, the result would probably be an extinguishment. See Van Rensselaer *v.* Bradley, 3 Denio, 135, 142.

If in a case of descent of the reversion to several, one of the heirs should enter wrongfully, before partition of the reversion, upon part of the demised estate, the tenant would be discharged from liability entirely, because the law will not apportion in favor of a wrong-doer. Reed *v.* Ward, 22 Pa. St. 144. Otherwise after partition; the wrongful entry would then affect only the part entered upon. Ib.; Linton *v.* Hart, 25 Pa. St. 193.

The reversion may be divided in another way; the tenant himself may acquire part of it either by descent or by purchase, and have apportionment. Voegtly *v.* Pittsburgh R. Co., 2 Grant, 243; Ingersoll *v.* Sergeant, 1 Whart. 337; Van Rensselaer *v.* Gifford, 24 Barb. 349. Thus where the tenant buys at sheriff's sale part of the landlord's reversion, he may demand an apportionment of the rent. Nellis *v.* Lathrop, 22 Wend. 121. See also Ingersoll *v.* Sergeant, 1 Whart. 337; Van Rensselaer *v.* Bradley, 3 Denio, 135; Coke, Litt. 149 *a*; Bruerton's Case, 6 Coke, 1 *b*.

Much question however has been made concerning the effect of a release by the landlord to the tenant of part of the reversion, — whether the act does not amount to an entire extinguishment of the claim to rent; though it is clear that if the estate of the landlord was not a rent-charge, the effect of the release in ordinary cases would be to give rise to a right of apportionment, and not to extinguish the right to rent altogether. Or if the lease is held by tenants in common who have had partition, a release to one will not extinguish the liability of the rest. Van Rensselaer *v.* Gifford, 24 Barb. 349. See Van Rensselaer *v.* Chadwick, ibid. 333; s. c. 22 N. Y. 32.

At common law a rent-charge could not be apportioned after a release of part by the grantee of the rent. (It is not so now in England. Booth *v.* Smith, 14 Q. B. D. 318, on Lord St. Leonard's Act 22 and 23 Vict. ch. 35, § 10.) This was one of the consequences attached to an estate which was considered dangerous to feudal institutions. A rent-charge was a grant by one seised in fee, in tail, or for life of rent out of his estate, with right to distrain for non-payment. Litt. § 218. It was always treated as contrary to "common right", because the tenant, by creating the charge, diminished by so much his ability to perform the services due by him to his lord. No relation of tenure was created; no enjoyment of an estate was connected with it. It was so unlike a feudal estate that an eviction would not discharge the debtor from liability. Ingersoll *v.* Sergeant, 1 Whart. 337, 342; Franciscus *v.* Reigart, 4 Watts, 98, 116.

The courts, in sympathy with the feudal tenures, improved every opportunity to discourage the creation of rent-charges, declaring the estate at an end whenever any act of the grantee of the rent was done which could possibly be construed into a release or an extinguishment of the charge. When e. g. the grantee released part of the land from the payment of rent, this was construed into a release of the whole, on the principle that the whole rent was due from every part of the land. Ingersoll *v.* Sergeant, 1 Whart. 337, 352; Van Rensselaer *v.* Chadwick, 22 N. Y. 32. The argu-

in a township and there are six sections along that line, the lines will be apportioned in a proper case, as where the original plats have been lost or destroyed, but where the section lines or corners

ment (which has been repeated by counsel in other cases cited in this note) is clearly unsound, as may be seen by supposing an estate rented "on shares" of the products. It would be absurd to say that the whole of the landlord's share was due from every part of the land. Rent is due by reason of enjoyment.

There was another kind of estate that came to be treated as a rent-charge after the Stat. of Quia emptores, to which the consequence just mentioned did not attach before the statute. That estate arose where a man made a gift in fee or for life, *reserving* rent. This was a feudal tenure, and before the statute was a rent-service, when not a fee-farm. It remains such still, where, as in Pennsylvania, that statute is not in force, and a release of part is not deemed an extinguishment of the whole. On the contrary the case is one for apportionment. Ingersoll *v.* Sergeant, 1 Whart. 337, 347; Voegtly *v.* Pittsburgh R. Co., 2 Grant, 243. Of this kind of estate are the ground rents of Philadelphia. Ingersoll *v.* Sergeant, supra; Voegtly *v.* Pittsburgh R. Co., supra; Kennedy *v.* Elliott, 9 Watts, 258, 262. See Franciscus *v.* Reigart, 4 Watts, 98, 116. But in New York, where the Stat. of Quia emptores has been declared to be in force, rent reserved upon a conveyance in fee is held to be a rent-charge and not a rent-service; and a release of part of the land from the rent, by act of the party entitled thereto, would in that State probably extinguish the whole rent. See Van Rensselaer *v.* Chadwick, 22 N. Y. 32.

It is apprehended that this would not be generally true in this country. It is probably safe to say that, except in New York and possibly some others of the colonies which became States, even if a rent in fee were *granted* out of an estate, so as to make a true rent-charge, release of part of the land from the burden would not be treated as a release of the whole, but would merely work an apportionment. A fortiori would this be true where, apart from the operation of the Stat. of Quia emptores, the rent would be rent-service, or where it would be fee-farm. Ingersoll *v.* Sergeant, 1 Whart. 337.

But even under the common law of England and of New York a rent-charge is not incapable of apportionment; extinguishment of the rent can occur only by act of the party entitled to it. Descent of the land charged, upon the heirs of the tenant, with partition and interchange of conveyances, concurred in by the owner of the rent, and *then* followed by release of one of the parcels to the tenant thereof, will not extinguish the rent due from the other tenant. Van Rensselaer *v.* Chadwick, 22 N. Y. 32; Cruger *v.* McLaury, 41 N. Y. 219 (as to descent and partition). Indeed a *condition* in a rent-charge, though not apportionable by act of the tenant, unless that act is wrongful, or by the act of the parties (Cruger *v.* McLaury; Dumpor's Case, 4 Coke, 119 *b*, 120 *a*), may be apportioned by act of law severing the reversion. Dumpor's Case, 4 Coke, 120 *b*, and note, where some qualification of the rule is stated. And by the Stat. 32 Hen. 8, ch. 34, a grantee of part of the estate of the *reversion* may take advantage of a condition. Cruger *v.* McLaury, at p. 226; Smith, Real and Personal Property, 55, n. Perhaps it would be more accurate to say of such cases that the condition is multiplied, though the rent is divided; for commonly a condition is by nature indivisible. Compare Van Rensselaer *v.* Bradley, infra.

The second case for apportionment — division of the leasehold prem-

were never marked at all or where such lines and markings have become so completely lost that they cannot be retraced or replaced by the aid of any known or recognized natural object or

ises — occurs oftenest perhaps where the lessee has assigned part of a lease with covenants running with the land. Thus in an action of covenant or debt against the assignee, or upon avowry in replevin by the assignee, while he cannot set up the severance of the leasehold in bar of the whole demand for rent, he can avail himself of the fact for the purpose of an apportionment. Stevenson *v.* Lombard, 2 East, 575; Merceron *v.* Dowson, 5 Barn. & C. 479, 483; Wollaston *v.* Hakewill, 3 Man. & G. 297; Astor *v.* Miller, 2 Paige, 68, 78; Touchstone, 199; Coke, Litt. 385 *a*; Van Horne *v.* Crain, 1 Paige, 455; Demainville *v.* Mann, 32 N. Y. 197; Van Rensselaer *v.* Gallup, 5 Denio, 454, 461; Van Rensselaer *v.* Bradley, 3 Denio, 135. Damages for want of repair will also be apportioned in such a case. Merceron *v.* Dowson, supra; Wollaston *v.* Hakewill, supra. But if the rent is indivisible in kind, it now multiplies by the number of tenants. Van Rensselaer *v.* Bradley, 3 Denio, 135, 142; Ingersoll *v.* Sergeant, 1 Whart. 337. And of course if the party has become a sub-tenant instead of an assignee, there will be no apportionment. Van Rensselaer *v.* Gallup, 5 Denio, 454.

A division of the leasehold may also occur by partition between tenants in common; and this too gives, or at least by concurrence on the part of the lessor may give, ground against the reversioner for an apportionment on the terms of the partition-adjustment. Van Rensselaer *v.* Chadwick, 24 Barb. 333; s. c. 22 N. Y. 32. It may be that there is a case for apportionment in favor of co-tenants without partition, when they are in actual possession together in several parts; but if only one of them has possession, he cannot have the rent apportioned. Demainville *v.* Mann, 32 N. Y. 197, where the lease had been assigned by the lessee to tenants in common, one, the defendant, being now alone in possession.

The leasehold premises may also be divided by the landlord's reacquiring part of the demised estate; and this too furnishes ground for apportionment, assuming that the rent is of a kind capable of being severed. Van Rensselaer *v.* Bradley, 3 Denio, 135, 142. But where tenants in common have made partition, purchase of the interest of one will have no effect upon the obligation of the rest. Van Rensselaer *v.* Gifford, 24 Barb. 349, where the landlord purchased the interest of one of the parceners at execution sale. This assumes of course that the rent has been apportioned between the co-tenants; if it has not, and each is still liable in solido, the release of one part will reduce the rent due from the others. Van Rensselaer *v.* Chadwick, 24 Barb. 333, 336.

The premises again may be divided so as to raise a case for apportionment by an eviction of the tenant from part of the land subject to rent by a third person under title paramount. Lansing *v.* Van Alstyne, 2 Wend. 561; Poston *v.* Jones, 2 Ired. Eq. 350; Manville *v.* Gay, 1 Wis. 250, 257. Secus if no rent issue from the part out of which the tenant has been evicted. Saunderson *v.* Harrison, Cro. Jac. 679.

Another case of division with the same result occurs where part of the demised premises is taken under the law of eminent domain. Kingsland *v.* Clark, 24 Mo. 24; Biddle *v.* Hussman, 23 Mo. 597; Gillespie *v.* Thomas, 15 Wend. 464. This is because the rent passes with the reversion, as an incident thereto, to him who takes the land.

If however in the case of a fee-farm rent — that is, where the owner of an estate holds from another subject to the payment of a certain rent in

permanent monuments. And to be lost, when applied to section or township corners, means more than that they have been merely obliterated, tampered with or changed. They must be so completely lost that they cannot be replaced by reference to any

fee — part of the land out of which the rent issues is taken for public purposes, and compensation made to the owner of the estate in full, he will not be entitled to apportionment unless he pays or offers to pay to the one entitled to the rent his proper proportion of the sum received. Cuthbert *v.* Kuhn, 3 Whart. 357; Voegtly *v.* Pittsburgh R. Co., 2 Grant, 243; Workman *v.* Mifflin, 30 Pa. St. 362.

The third case, where the lease has been legally determined between rent days, is seen where the lease has been rescinded, as for fraud on the part of the lessee. An implied obligation will now arise, it should seem, against the tenant to pay for use and occupation during the whole period of enjoyment, when the rescission has been made at a proper time, and not with a view to oppress the tenant. The obligation arises on the ground that the special contract is out of the way under circumstances such as to raise a just claim to rent for the period of occupancy. See Zule *v.* Zule, 24 Wend. 76.

This principle, it seems, will extend generally to cases in which, by reason of the wrongful conduct of the tenant between rent days, the landlord has become entitled, either by the terms of the lease or by law, to terminate the tenancy, and has terminated it. See Cruger *v.* McLaury, 41 N. Y. 219, 226. Thus if a tenant at will or at sufferance should commit waste between rent days, and the landlord should thereupon put an end to the tenancy, it would be consistent with law as well as with justice to permit him to claim rent down to that time. Dumpor's Case, 4, Coke, 119 *b*, 120 *b*. If a wrongful act, intermediate rent days, on the part of the landlord, justifying the tenant in throwing up the lease prevents, as it does prevent, the landlord from demanding apportionment, then by parity of reasoning a wrongful intermediate act of the tenant, justifying the landlord in terminating the tenancy, should give him a right to apportionment. Indeed if a tenant hold over after his term, on a parol agreement that either party may give notice of the termination of the tenancy, the rent may be apportioned. May *v.* Rice, 108 Mass. 150. See also Gale *v.* Nourse, 15 Gray, 300; Thompson *v.* Saco Water Power Co., 114 Mass. 159, — cases of construction of contracts terminated by the defendant.

Whether the taking the whole of the leased premises for public purposes between rent days would give the lessor a right to rent down to the day of taking, or only to the last rent day, query? If the *lessor* has put an end to the tenancy at such a time, he clearly cannot demand apportionment, except in such a case as that mentioned in the last paragraph, unless there has been a valid agreement for it; he can claim only to the last rent day. Zule *v.* Zule, 24 Wend. 76. And the same appears to be true though the tenancy was determined by the act of God. Ib. Thus if a tenant for life demise a term, and then die before the rent becomes due, his administrator cannot have apportionment. Gee *v.* Gee, 2 Dev. & B. Eq. 103, 113. Supra, §§ 568, 578. For the like rule in the case of annuities payable on fixed days see Wiggin *v.* Swett, 6 Met. 194, 201. But now see Mass. Pub. Stats., ch. 136, § 25, as to such cases. Haraden *v.* Larrabee, 113 Mass. 430. The case of Ripley *v.* Wightman, 4 McCord, 447, which holds that if a house rented for a year is made untenantable by a storm during the term, the rent is to be apportioned, seems to be opposed

existing data or other sources of information.[1] And where lots were laid out upon a square, supposed to be 400 feet in length, but it is in fact 433 feet, the owner at the street intersections would not be forced to begin his line 33 feet from the true line, but he would get the lot that he bought and his proportionate part of the over-plus. It only follows that each lot must be run out a little wider than it is plotted; in other words, the surplus land would be divided between the lots, as each purchaser would be entitled to his lot located as shown by the plot.[2] In a certain plot there were a number of regular sized lots and one irregular shaped lot, and upon an actual measurement it would be ascertained that none of the regular shaped lots had their full frontage; in other words, there was a deficiency of land, and all the lots with their frontages could not be accounted for. In such a case the most the court is authorized to do, in the form of correcting the apparent mistake, is to apportion the deficiency among the several lots, and not eliminate one of them entirely.[3]]

§ 646. [**Apportionment of Salary for Services Rendered.** — There can be no apportionment of salary earned under an agreement for the performance of given services, where the contract is an entire and indivisible one, and if the servant fails to get his wages because he has failed in the complete performance of his contract on account of unavoidable matters, it is his misfortune. The manager of an apartment house is not entitled to recover for a full month's wages, where wages were to be paid by the month and the contract was to run for a definite length of time, where he was disobedient and behaved in an unbecoming way, and his discharge was legal on the part of his employer.[4] The servant cannot recover where the contract was an entire one and he voluntarily abandoned his employment before the end of the term. There can be no doubt that one who sues upon a con-

to the current of authority; though as a new question apportionment would seem reasonable in all such cases. It is held that there can be no apportionment on account of fire where the rent is payable and paid in advance, even though there is a covenant to *deduct* rent proportionally in case of part destruction; such not being a covenant to pay back rent received. Cross *v.* Button, 4 Wis. 468.

[1] Mason *v.* Braught, 33 S. Dak. 559, 146 N. W. 687.

[2] Coppin *v.* Mason, 144 Ky. 634, 139 S. W. 860.

[3] Barrett *v.* Perkins, 113 Minn. 480, 130 N. W. 67; Brooks *v.* Stanley, 66 Neb. 826, 92 N. W. 1013; Anderson *v.* Wirth, 131 Mich. 183, 91 N. W. 157, 9 Detroit Leg. N. 254; City of Maysville *v.* Truex, 235 Md. 619, 139 S. W. 390.

[4] Parker *v.* Farlinger, 122 Ga. 315, 50 S. E. 98; Linder *v.* Cape Brewery & Ice Co., 131 Md. 680, 111 S. W. 600.

tract for personal services must show that the services have been fully performed, or that their performance has been prevented by the act of God or the unwarranted act of the employer. In case of an abandonment of the contract by the servant, there can be no apportionment of the contract.[1] Nor can a servant, employed by the month, recover for actual time lost on account of sickness. He may recover pro rata for the service actually performed, less any damage caused by reason of failure of complete performance.[2] Under a contract for service it was agreed that the earnings each year should be as much as $1,000, and in that event a certain compensation was to be paid, but this does not mean that the earnings for several years can be added together, the average earnings then being more than $1,000 per year, so as to entitle the employee to the extra compensation.[3] Where the parties expressly agree that services for the entire term of contract shall be rendered as a condition precedent to the payment of any part of the wages, the entire contract must be performed in order to enable the servant to recover the wages earned; but where the agreement is for payment from time to time during the term, recovery can be had for the wages earned, though the servant abandons the service before the expiration of the term without cause. In this event it cannot be said full compliance with the contract is a condition precedent to the payment of the part of the wages earned.[4]]

§ 647. **Apportionment of Incumbrances and Charges on Land.** — But a far more important and beneficial exercise of equity jurisdiction in cases of apportionment and contribution is where incumbrances, fines, and other charges on real estate are required to be paid off or are actually paid off by some of the parties in interest.[5] This subject has already come incidentally under our notice,[6] but it requires a more ample examination in this place.

[1] Walden *v.* American Bankers Assur. Co., 183 Mo. App. 376, 166 S. W. 1111.

[2] MacFarlane *v.* Allan-Pfeiffer Chem. Co., 59 Wash. 154, 109 Pac. 604.

[3] Herald Dispatch Co. *v.* Hostetler, 130 Ill. App. 179.

[4] Mernaugh *v.* Nichols, 132 App. Div. 509, 118 N. Y. Supp. 59.

[5] Com. Dig. Chancery, 2 J., 2 S.; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes; Ritson *v.* Brumlow, 1 Ch. Rep. 91; Cheeseborough *v.* Millard, 1 John. Ch. R. 409; Scribner *v.* Hitchcock, 4 John. Ch. R. 530; Averall *v.* Wade, Lloyd & Goold, R. 252, and the Reporter's note, 264, 265, 266. See Lipscom *v.* Lipscom, L. R. 7 Eq. 501; Ley *v.* Ley, L. R. 6 Eq. 174; Caldwell *v.* Cresswell, L. R. 6 Ch. 278; Bradford *v.* Brownjohn, L. R. 3 Ch. 711.

[6] Ante, § 574.

In most cases of this sort there is no remedy at law from the extreme uncertainty of ascertaining the relative proportions which different persons, having interests of a very different nature, quality, and duration, in the subject-matter, ought to pay. And where there is a remedy it is inconvenient and imperfect, because it involves multiplicity of suits and opens the whole matter for contestation anew in every successive litigation.[1]

§ 648. [**Contribution Considered Generally.** — We now come to the consideration of the equitable doctrine of contribution, or the apportioning of the ratable payment to be made by each of several debtors or properties where one debtor or piece of property has paid or become charged with more than its proportionate part. Sometimes the order in which payments should be made by debtors has become temporarily changed, and one surety has been required to pay off the entire debt; he is then entitled to recover from each of his co-sureties their ratable part of the amount so paid.

This right of contribution is one which belongs to one of two or more joint obligors. It is a right which grows out of the relation of the parties to the contract. It is a right given to protect one of the joint obligors in the event he has been compelled to discharge the whole debt, or more than his proportionate part of the whole debt. The right of contribution is an individual and personal right. It grows out of what the individual himself does. It is a right which accrues to one or more individuals (out of the whole number bound) who pay the debt for which they are all bound. Each one paying is entitled to recover from the others the amount which he has paid in excess of his own proportionate part. His right to recover is dependent upon the excess which he himself pays. In other words, the act is individual, and the right of contribution is individual. The right of contribution rests upon an implied contract to repay, which contract the law itself implies from the relationship of the parties. The right of contribution does not inure to the voluntary party who pays. The doctrine rests upon compulsory payment; there must be an obligation to pay.[2]]

[1] Ante, §§ 574, 575.

[2] Yore *v.* Yore, 240 Mo. 451, 144 S. W. 847.

The right of contribution does not arise out of any contract or agreement between cosureties to indemnify each other, but on the principle of equity, which courts of law enforce, that where two persons are subject to a common burden it shall be borne equally between them. Sledge *v.* Dobbs, 254 Ill. 130, 98 N. E. 243; Vandiver *v.* Pollak, 107 Ala. 547, 19

§ 649. **Contribution Lies Where Owner of One Property Subject to a Common Incumbrance Fully Discharges It.** — The subject may be illustrated by one of the most common cases, that of an apportionment and contribution towards a mortgage upon an estate where the interest is required to be kept down or the incumbrance to be paid. Let us suppose a case where different parcels of land are included in the same mortgage, and these different parcels are afterwards sold to different purchasers, each holding in fee and severalty the parcel sold to himself. In such a case each purchaser is bound to contribute to the discharge of the common burden or charge in proportion to the value which his parcel bears to the whole included in the mortgage.[1] But

So. 180, 54 Am. St. Rep. 118; Lee *v.* Larkin, 125 App. Div. 302, 109 N. Y. Supp. 480.

[1] Cheeseborough *v.* Millard, 1 John. Ch. R. 409, 415; Stevens *v.* Cooper, 1 John. Ch. R. 425; Harris *v.* Ingledew, 3 P. Will. 98, 99; Harbert's Case, 3 Co. R. 14; Taylor *v.* Porter, 7 Mass. R. 355. But see § 1233 *a*, post. The rule that where two properties subject to one common charge are given to two persons they must contribute, applies only where the two properties are equally charged. Thus the rule does not apply where one of the properties is primarily charged, in exoneration of the other. In re Dunlop, 21 Ch. D. 583 (C. A.); Bute *v.* Cunynghame, 2 Russ. 275, 299. See Averall *v.* Wade, Lloyd & G. 252.

Where a certain tract of land, which was owned by a number of persons in severalty, was assessed for civic improvements, any one tenant who had paid off the lien for improvements is entitled to contribution against the others, and the court will enforce the doctrine according to the equities of the several owners. Napieralski *v.* West Chicago Park Commrs., 260 Ill. 628, 103 N. E. 547; Ellis *v.* Witmer, 148 Cal. 528, 83 Pac. 800; Henderson *v.* Truitt, 95 Ind. 309.

The lands of an insolvent decedent were conveyed by the heirs before the debts had been paid. The plaintiff owned a portion of the land and so did the defendant, and in order to prevent a sale of the property, plaintiff paid off the debts, and is entitled to recover from defendant his ratable proportion. Falley *v.* Gribling, 128 Ind. 110, 26 N. E. 794.

Where two parties purchase land together, and execute their joint bond and mortgage to secure the purchase price, the entire property is subject to the entire debt, without regard to the interest of the purchasers, and they are each equitably bound to discharge one-half of the joint debt, and if either voluntarily or under compulsion of law paid more than one-half, he was entitled to contribution from the other for the excess. Walker *v.* Sarven, 41 Fla. 210, 25 So. 885.

A court of equity has power to render a moneyed judgment or may decree a charge upon the land in favor of one who has been compelled to pay a mortgage which covered his land and that of another party. Wilkerson *v.* Bacon, 35 Tex. Civ. App. 44, 79 S. W. 348.

But the right to enforce demands of this character do not accrue until suit for partition is instituted, and statutes of limitation have no application to such suits. Grove *v.* Grove, 100 Va. 556, 42 S. E. 312.

Where the contract is to convey 80 acres for $1000, and the joint tenants have abandoned their contract, one of the joint tenants cannot

to ascertain the relative values of each is a matter of great nicety and difficulty; and unless all the different purchasers are joined in a single suit, as they can be in equity, although not at law, the most serious embarrassments may arise in fixing the proportion of each purchaser and in making it conclusive upon all others.

§ 650. **Same.** — So if there are different persons having different interests in an estate under mortgage, as for instance parceners,[1] tenants for life or in tail, remainder-men, tenants in dower or for a term of years, or for other limited interests, it is obvious that the question of apportionment and contribution in redeeming the mortgage, as well as in payment of interest, may involve most important and intricate inquiries; and, to do entire justice, it may be indispensable that all the parties in interest should actually be brought before the court. Now in a suit at the common law this is absolutely impossible; for no persons can be made parties except those whose interest is joint and of the same nature and character, and is immediate and vested in possession. So that a resort to a Court of Equity, where all these interests can be brought before the court and definitely ascertained and disposed of, is indispensable. If to this we add that in most cases of mortgage an account of what has been paid upon the mortgage, either by direct payments or by perception of the rents and profits of the estate, is necessary to be taken, we shall at once see that the machinery of a Court of Common Law is very ill adapted to any such purpose. But if we add further to all this that there may be mesne incumbrances and other cross equities between some of the parties, all of which are required to be adjusted in order to arrive at a just result and to attain the full end of the law by closing up all future litigation, we shall not fail to be convinced that the only appropriate, adequate, and effectual remedy must be administered in equity. Indeed from its very nature, as we shall have occasion to see fully hereafter, the jurisdiction over mortgages belongs peculiarly and exclusively to Courts of Equity.[1]

pay for and compel specific performance of his one-half interest in the contract, the contract being an entire one. Neuforth *v.* Hall, 5 Kans. App. 726, 46 Pac. 982.

Tenant who discharges mortgage, taxes or other lien upon the joint property may recover the excess of his co-tenant, but only such a debt as effects the joint property. Oliver *v.* Lansing, 57 Neb. 352, 77 N. W. 802; McClintock *v.* Fontaine, 119 Fed. 448; Glos *v.* Clark, 97 Ill. App. 609; Koboliska *v.* Swehla, 107 Iowa 124, 77 N. W. 576.

[1] Stirling *v.* Forrester, 3 Bligh, 590.

§ 651. **Right to Contribution Is Extinguished Where Tenant for Life Pays Off and Cancels the Incumbrance.** — Very delicate and often very intricate questions arise in the adjustment of the rights and duties of the different parties in interest in the inheritance. In the first place in regard to the paying off of incumbrances. If a tenant in tail in possession pays off an incumbrance, it will ordinarily be treated as extinguished; and the remainder-man cannot be called upon for contribution unless the tenant in tail has kept alive the incumbrance, or preserved the benefit of it to himself by some suitable assignment, or has done some other act or thing which imports a positive intention to hold himself out as a creditor of the estate in lieu of the mortgagee. The reason for this doctrine is, that a tenant in tail can, if he pleases, by fine or recovery, become the absolute owner of the estate; and therefore his discharge of incumbrances is treated as made in the character of owner unless he clearly shows that he intends to discharge them and become a creditor thereby.[1] But the like doctrine does not apply to a tenant in tail in remainder whose estate may be altogether defeated by the birth of issue of another person; for it must be inferred that such a tenant in tail, in paying off an incumbrance without an assignment, means to keep the charge alive.[2] A fortiori, the doctrine would not apply to the case of a tenant for life paying off an incumbrance; for if he should pay it off without taking an assignment, he would be deemed to be a creditor to the amount paid, upon the ground that there can be no presumption that, with his limited interest, he could intend to exonerate the estate.[3] He cannot be presumed, prima facie, to discharge the estate from the debt; for that would be to discharge the estate of another person from the debt. But in both cases the presumption may be rebutted by circumstances which demonstrate a contrary intention.[4]

§ 652. [**Contribution between Life Tenant and Remainder-man.** — As a general rule, it is the duty of the life tenant to pay the

[1] Wigsell *v.* Wigsell, 2 Sim. & Stu. R. 364; Jones *v.* Morgan, 1 Bro. Ch. R. 206; Kirkham *v.* Smith, 1 Ves. 258; Amesbury *v.* Brown, 1 Ves. 477; Shrewsbury *v.* Shrewsbury, 3 Bro. Ch. R. 120; s. c. 1 Ves. Jr. 227; St. Paul *v.* Viscount Dudley and Ward, 15 Ves. 173; Faulkner *v.* Daniel, 3 Hare, R. 199, 217.

[2] Wigsell *v.* Wigsell, 2 Sim. & Stu. R. 364.

[3] Saville *v.* Saville, 2 Atk. 463, 464; Jones *v.* Morgan, 1 Bro. Ch. R. 218; Shrewsbury *v.* Shrewsbury, 1 Ves. Jr. 233; s. c. 3 Bro. Ch. R. 120; Ex parte Digby, Jacob, R. 235.

[4] Jones *v.* Morgan, 1 Bro. Ch. R. 218, 219; St. Paul *v.* Viscount Dudley and Ward, 15 Ves. 173; Redington *v.* Redington, 1 B. & Beatt. R. 141, 142.

taxes assessed upon the property during his term, as well as the interest upon a mortgage covering the property. In determining what is meant by the expression "taxes assessed", as between the life tenant and reversioner or remainder-man, some very interesting questions will arise as to the liability of the respective parties for the payment of these charges. Taxes, as the term is commonly employed, simply means what the word would fairly imply, that is, the proportionate part of the expenses of the government as applied to a particular piece of property. The life tenant gets the present benefit of the property, and he ought to discharge the current dues assessed against the property for the purpose of the support of the government, but beyond this, it is always a question as to who should pay and the proportion that should be borne by the respective parties.[1]]

§ 653. [**Improvements Not Classed as Taxes within the Rule.** — It may be generally stated that any civic improvement of the property, permanently made and which adds to the material enhancement of the value, is not a tax within the meaning of the rule which requires the life tenant to defray the ordinary taxes assessed against the property. The use of the expression in a will that the life tenant "shall pay all necessary taxes and repairs", does not make it obligatory upon the life tenant to pay for permanent improvements such as a tax for the construction of a sewer or for curbing.[2]; or the laying of a concrete sidewalk at

[1] Chambers *v.* Chambers, 20 R. I. 370, 39 Atl. 243; Troy *v.* Protestant Episcopal Church, 173 Ala. 468, 56 So. 982; Arthur *v.* Arthur, 76 App. Div. 330, 78 N. Y. Supp. 486; Chamberlin *v.* Gleason, 136 N. Y. 214, 57 N. E. 487, 20 App. Div. 624, 46 N. Y. Supp. 1090.

Life tenant is not entitled to contribution from remainder-man for taxes on property, where it has been rented by him and rents appropriated to his own use, without the consent of the remainder-man. Downey *v.* Strouse, 101 Va. 226, 43 S. E. 348.

But where remainder-man voluntarily had premises assessed in his name, he is not entitled to recover taxes from life tenant, there being no payment under compulsion and no request by life tenant for him to pay. Huddleson *v.* Washington, 136 Cal. 514, 69 Pac. 146.

The life tenant is entitled to recover of the remainder-man his share in the mortgage debt covering the entire estate, where she has been compelled to pay the whole debt. Kerse *v.* Miller, 169 Mass. 44, 47 N. E. 504; in the absence of an intention to hold the remainder-man for his proportional part of the mortgage debt, the life tenant should have the mortgage transferred to another to hold for his benefit, otherwise it may be presumed that he intended to cancel the debt. Downing *v.* Hartshorn, 9 Neb. 364, 95 N. W. 801, 111 Am. St. Rep. 550.

[2] Chambers *v.* Chambers, 20 R. I. 370, 39 Atl. 243; Thiele *v.* Thiele, 59 N. J. Eq. 98, 40 Atl. 446; Rhode Island Hospital Trust Co. *v.* Babbitt, 22 R. I. 113, 46 Atl. 403; Hay *v.* McDaniel, 26 Ind. App. 683, 60 N. E. 729.

the expense of the abutting owners [1]; or the paving of an abutting street.[2]]

§ 654. [**Life Tenant May Complete Permanent Improvements Begun by Grantor and Recover His Part from Remainder-man.** — While it is not the duty of the life tenant to expend his own property in permanently adding to the value of the life estate, and later to enure to the benefit of the reversioner or remainder-man, he may complete permanent improvements which had been begun by the grantor, and which he had never finished, and recover of the reversioner or remainder-man his proportionate part of the expenses of such improvements. There is no duty on the life tenant to add any value to the property, and ordinarily when he does make improvements, he cannot charge against the succeeding owner any portion of their cost or value, but there are exceptions to the rule, as above stated. The corpus or principal of the trust estate is chargeable with expenses or improvements made necessary by municipal regulations, and where the property was in an inproductive and untenantable condition when it came into the hands of the trustees, and when the corpus of the estate is in such condition as to be untenantable or unprofitable to the life tenant, he may use the property to such an extent as would otherwise be waste.[3]]

§ 655. [**Cost of Permanent Improvements Should be Equitably Charged against Life Tenant and Remainder-man.** — The life tenant is required to make only such improvements as may be necessary to keep the premises in habitable condition and so as not to cause permissive waste, but at the same time where permanent improvements are to be made, such as the building of sewers, tile farm drains and the like, the burden of these improvements should be equitably proportioned among the life tenant and the remainder-man, and this must depend, in a great measure, upon the age of the life tenant and the probable duration of his life and other relevant facts.[4] While it is equitable and the rule

[1] Troy *v.* Protestant Episcopal Church, 173 Ala. 468, 56 So. 982; Kirchner *v.* Kirchner, 71 Misc. Rep. 57, 127 N. Y. Supp. 399.

[2] Chamberlin *v.* Gleason, 163 N. Y. 214, 57 N. E. 487, 20 App. Div. 624, 46 N. Y. Supp. 1090; In re Whitney, 75 Misc. Rep. 610, 136 N. Y. Supp. 633.

Contra: — Reyburn *v.* Wallace, 93 Mo. 326, 3 S. W. 482.

[3] Jacobs *v.* Steinbrink, 164 App. Div. 715, 149 N. Y. Supp. 337; Norris *v.* Laws, 150 N. C. 599, 64 S. E. 499; Stahl *v.* Schwarz, 81 Wash. 293, 142 Pac. 651.

[4] Kline *v.* Dowling, 176 Ind. 521, 96 N. E. 579; Troy *v.* Protestant Episcopal Church, 173 Ala. 468, 56 So. 982; Kirchner *v.* Kirchner, 71

that the life tenant shall pay expenses of the actual up-keep of the property, it is not equitable that he should be required to pay expenditures which go to the permanent improvement of the property, beyond the proportion which the value of his life estate bears to the value of the whole estate. For instance, where the assessment for sewers on the unimproved lots was paid by the complainant out of the price received for certain unimproved lands of the trust estate sold by the complainant, which price, after the sale, formed part of the principal of the trust estate, to the income of which the life tenant was entitled during her life, such payment by the trustee was in itself an equitable apportionment of the assessment between herself and the remainder-men, since by such payment she loses during life the income of the sum paid, and the increased value given by the betterment to the trust estate takes the place of the sum paid, and enures to the benefit of the remainder-men.[1]]

§ 656. [**Right of Life Tenant to Insurance upon Property in Event of a Loss.** — The life tenant as a general rule in the various States has such an interest in the property as is capable of being insured. The remainder man has a greater interest in the property than the life tenant and he ought to see to it that the premises are kept fully insured, but if he fails in this, the life tenant himself may insure the premises for his own protection, and where he has a homestead worth $1,000 he may insure the entire property for its full value, and in the event of a fire the proceeds from the insurance policy would belong entirely to him and no trust would result either in the whole amount or in that part of it in excess of the value of the life estate, for the benefit of the remainder-man.[2] The direction in a will that the life tenant shall "keep in repair", imposes no liability upon the tenant to rebuild the property after it has been accidentally burned, nor is he under any obligation to rebuild the property out of the insurance money obtained by him.[3] But where there is no covenant on the part of

Misc. Rep. 57, 127 N. Y. Supp. 399; In re Whitney, 75 Misc. Rep. 610, 136 N. Y. Supp. 633.

Life tenant will not be required to pay an assessment of $1,500, for construction of a ditch for drainage of property worth $8,000, the tenant being at the time 68 years of age. Huston *v.* Tribbetts, 69 Ill. App. 340, 49 N. E. 711, 171 Ill. 547, 63 Am. St. Rep. 275; Chamberlin *v.* Gleason, 163 N. Y. 214, 57 N. E. 487, 20 App. Div. 624, 46 N. Y. Supp. 1090; Thomas *v.* Evans, 105 N. Y. 601, 12 N. E. 571.

[1] Rhode Island Hospital Trust Co. *v.* Babbitt, 22 R. I. 113, 46 Atl. 403.

[2] Spalding *v.* Miller, 103 Ky. 405, 45 S. W. 462, 20 Ky. L. Rep. 131.

[3] Sampson *v.* Grogan, 21 R. I. 174, 42 Atl. 712, 44 L. R. A. 711.

the life tenant to repair in the event the estate is damaged by fire, he is not required to rebuild the burned property, nor will a receiver appointed to collect the proceeds from a fire insurance policy issued in his favor have the right to apply the insurance money towards rebuilding the premises.[1]]

§ 657. **Rule as to Proportion of Payment to Be Made by Life Tenant and Remainder-man.** — In respect to the discharge of incumbrances it was formerly a rule in equity that the tenant for life and the reversioner or remainder-man were bound to contribute towards the payment of incumbrances in a positive proportion fixed by the court, so that they paid a gross sum in proportion to their interests in the estate. The usual proportion was for the tenant for life to pay one third and the remainder-man or reversioner to pay two thirds of the charge.[2] A similar rule was applied to cases of fines paid upon the renewal of leases.[3] But the rule is now in both cases entirely exploded in England, and a far more reasonable rule is adopted. It is this: that the tenant shall contribute beyond the interest in proportion to the benefit he derives from the liquidation of the debt, and the consequent cessation of annual payments of interest during his life (which of course will depend much upon his age and the computation of the value of his life); and it will be referred to a Master to ascertain and report what proportion of the capital sum due, the tenant for life ought upon this basis to pay, and what ought to be borne by the remainder-man or reversioner.[4] If the estate is sold to discharge incumbrances (as the incumbrancer may insist that it shall be), in such as case the surplus beyond what is necessary to discharge the incumbrances is to be applied as follows: the income thereof is to go to the tenant for life during his life, and then the whole capital is to be paid over to the remainder-man or reversioner.[5]

[1] Sawyer *v.* Adams, 140 App. Div. 756, 126 N. Y. Supp. 128.

[2] Powell on Mortg. ch. 11, p. 311; Ballett *v.* Sprainger, Prec. Ch. 62; Shrewsbury (County of) *v.* Earl of Shrewsbury, 1 Ves. Jr. 233; Rives *v.* Rives, Prec. Ch. 21; 1 Fonbl. Eq. B. 1, ch. 5, § 9, note (*a*), 3d ed.; Faulkner *v.* Daniel, 3 Hare, R. 199, 217.

[3] White *v.* White, 4 Ves. 33; Verney *v.* Verney, 1 Ves. 428; s. c. Amb. R. 88; Nightingale *v.* Lawson, 1 Bro. Ch. R. 440.

[4] See 1 Powell on Mortg. ch. 11, pp. 311, 312, Mr. Coventry's note, M.; Penrhyn *v.* Hughes, 5 Ves. 107; White *v.* White, 4 Ves. 33, 9 Ves. 554; Allan *v.* Backhouse, 2 Ves. & B. 70, 79.

[5] Penrhyn *v.* Hughes, 5 Ves. 107; White *v.* White, 4 Ves. 33; 3 Powell on Mortg. ch. 19, p. 922, Mr. Coventry's note, H.; Id. 1043, note, O.; Lloyd *v.* Johnes, 9 Ves. 37; Foster *v.* Hilliard, 1 Story, R. 77. Many cases may occur of far more complicated adjustments than are here stated;

§ 658. **Duty of Life Tenant to Pay Interest on Mortgage Debt.** — In regard to the interest due upon mortgages and other incumbrances the question often arises, by whom and in what manner it is to be paid. And here the general rule is that a tenant for life of an equity of redemption is bound to keep down and pay the interest, although he is under no obligation to pay off the principal.[1] But a tenant in tail is not bound to keep down the interest; and yet, if he does, his personal representative has no right to be allowed the sums so paid as a charge on the estate.[2] The reason of this distinction is that a tenant in tail discharging the interest is supposed to do it as owner for the benefit of the estate. He is not compellable to pay the interest, because he has the power at any time to make himself absolute owner against the remainder-man and reversioner. The latter have no equity to compel him in their favor to keep down the interest, inasmuch as if they take anything it is solely by his forbearance, and of course they must take it cum onere.[3]

§ 659. **Apportionment of Proceeds from Sale of Land between Life Tenant and Remainder-man.** — Similar questions may arise as to the apportionment of the money between a tenant for life and a remainder-man in fee, who have united in a sale of the estate without providing for the manner of apportioning the purchase-

but in a treatise like the present little more than the general rules can be indicated. See Rives *v.* Rives, Prec. Ch. 21; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and note. See also Gibson *v.* Crehore, 5 Pick. R. 146. The converse case of that stated in the text will readily occur to the learned reader; namely, where mortgage money or a mortgage is devised to a tenant for life with a remainder over, and the mortgage money is paid by the mortgagor. The old rule used to be to divide it between the tenant for life and the remainder-man in the proportion of one third and two thirds. But it would probably now be governed by the same rules as those in the text. 3 Powell on Mortg. 1043, Mr. Coventry's note, O. See Thomas *v.* Thomas, 2 C. E. Green, 356, 359.

[1] Saville *v.* Saville, 2 Atk. 463, 464; Shrewsbury *v.* Shrewsbury, 1 Ves. Jr. 233. Chambers *v.* Chambers, 20 R. I. 370, 39 Atl. 243; Troy *v.* Protestant Episcopal Church, 173 Ala. 468, 56 So. 982; Arthur *v.* Arthur, 76 App. Div. 330, 78 N. Y. Supp. 486; Chamberlin *v.* Gleason, 136 N. Y. 214, 57 N. E. 487, 20 App. Div. 624, 46 N. Y. Supp. 1090.

[2] Amesbury *v.* Brown, 1 Ves. 480, 481; Redington *v.* Redington, 1 Ball & B. 143; Chaplin *v.* Chaplin, 3 P. Will. 234, 235.

[3] Ibid. There is an exception to the general rule that a tenant in tail is not bound to keep down the interest, which confirms rather than impugns the general rule. If the tenant in tail is an infant, his guardian or trustee will in that case be required to keep down the interest. The reason is that the infant of his own free will cannot bar the remainder and make himself absolute owner. See Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, p. 187; Sergeson *v.* Sealey, 2 Atk. 416, and Mr. Saunders's note (1), ibid.; Amesbury *v.* Brown, 1 Ves. 479, 480, 481; Bertie *v.* Lord Abingdon, 3 Meriv. R. 560.

money between them, and one of them has died before any apportionment has been made. In such a case how is the money to be divided? Is the tenant for life to be deemed entitled to the income of the whole fund during his life, and then the whole fund to go to the remainder-man? Or is the value of the estate of each party to be ascertained, calculating that of the tenant for life, according to the common tables respecting the probabilities of life, and the principal of the fund to be apportioned between them accordingly? It has been held upon deliberate consideration that the latter is the true rule applicable to such cases, upon the ground that it must be presumed in such cases of a joint sale that the parties mean to share the purchase-money according to their respective interests in the estate at the time of the sale, and not merely to substitute one fund for another.[1]

§ 660. **Same.** — These remarks may suffice to show (for it is not our purpose to bring the minute distinctions upon these important subjects under a full review) [2] the beneficial operation of Courts of Equity in apportionments and contributions upon this confessedly intricate subject; and also how utterly inadequate a Court of Common Law would be to do complete justice in a vast variety of cases which may easily be suggested. Without some proceedings in the nature of an account before a Master, there would be no suitable elements upon which any court of justice could dispose of the merits of such cases so as to suppress future litigation, or to administer to the conflicting rights of different parties.

§ 661. **General Average Defined.** — Another class of cases which still more fully illustrates the importance and value of this branch of equity jurisdiction is that of GENERAL AVERAGE, a subject of daily occurrence in maritime and commercial operations. General Average, in the sense of the maritime law, means a general contribution that is to be made by all parties in interest towards a loss or expense which is voluntarily sustained or incurred for the benefit of all.[3] The principle upon which this contribution is founded is not

[1] Foster *v.* Hilliard, 1 Story, R. 77, where the subject was discussed at large. See also Brent *v.* Brent, 1 Vern. R. 69; Thynn *v.* Duvall, 2 Vern. R. 117; Houghton *v.* Hapgood, 13 Pick. R. 154. But see Penrhyn *v.* Hughes, 5 Ves. 99, 107; Steiner *v.* Berney, 130 Ala. 289, 30 So. 570; Atkins *v.* Kron, 43 N. C. 1; Marshall *v.* Marshall, 252 Ill. 568, 96 N. E. 907.

[2] See 1 Bridgman's Digest, Average and Contribution, I., II.; 1 Chitty, Eq. Dig. Apportionment.

[3] Abbott on Shipp. Pt. 3, ch. 8, § 1, p. 342; Moore's Rep. 297; Viner's Abridg. Contribution and Average, A. pl. 1, 2, 26.

the result of contract, but has its origin in the plain dictates of natural law.[1] It has been more immediately derived to us from the positive declarations of the Roman law, which borrowed it from the more ancient text of the Rhodian Jurisprudence. Thus the Rhodian law in cases of jettison declared that, "If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all. 'Lege Rhodia,' says the Digest, 'cavetur, utsi levandæ navis gratia jactus mercium factus est, ominium contributione sarciatur, quod pro omnibus datum est.'"[2] But the principle is by no means confined to cases of jettison; but it is applied to all other sacrifices of property, sums paid, and expenses voluntarily incurred in the course of maritime voyages for the common benefit of all persons concerned in the adventure. The principle has indeed been confined to a sacrifice of property, and the contribution confined to the property saved thereby; although it certainly might have gone further and have required a corresponding apportionment of the loss or sacrifice of property upon all persons whose lives have been preserved thereby, upon the same common sense of danger and purchase of safety alluded to by Juvenal, when in a similar case his friend desired his life to be saved by a sacrifice of his property: "Fundite quæ mea sunt, etiam pulcherrima."

§ 662. [**Elements Necessary to Constitute General Average.** — In order to constitute general average, three things are necessary: (1) that the ship and cargo should be placed in a common imminent peril; (2) that there should be a voluntary sacrifice of property to avert that peril; (3) that by that sacrifice the safety of the other property should be presently and successfully attained.[3] The obligation to contribute to a general average loss or to general average expenses springs from the law itself, and not from any contract between the parties concerned. The obligation rests upon the vessel, the cargo and the freight, in proportion to their respective values, and upon the owners of each in proportion to the value of his property at risk; and it may be enforced by resorting to a lien upon the property saved from the common peril, or by action against the persons bound to contribute.[4]]

[1] Id.; Deering *v.* Earl of Winchelsea, 1 Cox, R. 318, 323; s. c. 2 Bos. & Pull. 270, 274; Stirling *v.* Forrester, 3 Bligh, R. 590, 596.

[2] Dig. Lib. 14, tit. 2, 1.

[3] Fagan Iron Works *v.* Calumet Const. Co., 82 N. J. Eq. 345, 88 Atl. 1069.

[4] Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436.

§ 663. **Illustrations of the Doctrine of General Average.** — General Average being then, as has been already stated, not confined to cases of jettison, but extending to other losses and expenditures for the common benefit, it may readily be perceived how difficult it would be for a Court of Law to apportion and adjust the amount which is to be paid by each distinct interest which is involved in the common calamity and expenditure. Take for instance the common case of a general ship or packet trading between Liverpool and New York, and having on board various shipments of goods not unfrequently exceeding a hundred in number, consigned to different persons as owners or consignees; and suppose a case of general average to arise during the voyage, and the loss or expenditure to be apportioned among all these various shippers according to their respective interest and the amount which the whole cargo is to contribute to the reimbursement thereof. By the general rule of the maritime law in all cases of general average, the ship, the freight for the voyage, and the cargo on board are to contribute to such reimbursement according to their relative values. The first step in the process of general average is to ascertain the amount of the loss for which contribution is to be made; as for instance in the case of jettison, the value of the property thrown overboard or sacrificed for the common preservation. The value is generally indefinite and unascertained, and from its very nature rarely admits of an exact and fixed computation. The same remark applies to the case of ascertainment of the value of the contributory interests, — the ship, the freight, and the cargo. These are generally differently estimated by different persons, and rarely admit of a positive and indisputable estimation in price or value. Now as the owners of the ship and the freight and the cargo may be and generally are, in the supposed case, different persons having a separate interest, and often an adverse interest to each other, it is obvious that unless all the persons in interest can be made parties in one common suit, so as to have the whole adjustment made at once and made binding upon all of them, infinite embarrassments must arise in ascertaining and apportioning the general average. In a proceeding at the common law every party having a sole and distinct interest must be separately sued;[1] and as the verdict and judgment in one case will not only not be conclusive, but not even be admissible evidence in another suit, as it is res inter alios acta, and as the amount to be recovered must in each case depend

[1] Abbott on Shipp. Pt. 3, ch. 8, § 17.

upon the value of all the interests to be affected, which of course might be differently estimated by different juries, it is manifest that the grossest injustice or the most oppressive litigation might take place in all cases of general average on board of general ships. A Court of Equity having authority to bring all the parties before it and to refer the whole matter to a Master to take an account and to adjust the whole apportionment at once, affords a safe, convenient, and expeditious remedy. And it is accordingly the customary mode of remedy in all cases where a controversy arises and a Court of Equity exists in the place capable of administering the remedy.[1]

§ 664. [**Recovery of Average Where Master Has Been Negligent.** — The execution of a general average bond by the owner of part of the cargo of a vessel does not preclude such owner from setting up, in defence of liability on the bond, that the wreck occurred from the negligence of the owner of the vessel and is not the subject of general average. Perhaps, in some particulars, the execution of such a bond might compromise the rights of the owner of the cargo; but it does not in any way impair his right to resist payment of contribution on the ground that the expense to which he was asked to contribute occurred from the unseaworthiness of the vessel or the crew's lack of skill, or any other cause for which the law casts the entire loss on the owner of the vessel.[2] The cargo is not liable for salvage where the owners of the vessel were responsible for her seaworthiness, and the disaster which made the salvage necessary occurred by reason of unseaworthiness; and on the same principle salvage payable by cargo owners in consequence of negligence of the master of the vessel, is recoverable against the vessel.[3]]

§ 665. [**Right to Recover for Salvage and Average.** — In case part of a cargo has been jettisoned or expense incurred in saving it, it is the duty of the master to make a general average so that those whose property has been saved shall contribute ratably to the owner of the goods which were sacrificed for the common benefit; and for that purpose he has a lien upon the cargo and may retain it until the amount is paid or secured. But the rule is different in a case of salvage where the lien is in favor of the

[1] Abbott on Shipp. Pt. 3, ch. 8, § 17; Shepherd *v.* Wright, Shower, Parl. Cas. 18; Hallett *v.* Bonsfield, 18 Ves. 190.

[2] Berry Coal & Coke Co. *v.* Chicago, P. & St. L. Ry. Co., 116 Mo. App. 214, 92 S. W. 714; Conrad *v.* De Montcourt, 138 Mo. 311, 39 S. W. 805.

[3] Pettijohn *v.* Oregon Coal & Navigation Co., 58 Oreg. 392, 113 Pac. 438.

salvors only, and the owner of the vessel is not personally liable to the salvors for salvage upon the cargo, if occasioned by a peril of the sea. The cargo is not liable for salvage where the owners of the vessel were responsible for her seaworthiness, and the disaster which made the salvage necessary occurred by reason of unseaworthiness.[1] Where two vessels collided and the owners of the cargo of one of the vessels had a policy eliminating negligence as a part of the risk, each vessel contributing towards the loss to the cargo owners of the other vessel, and where one of the owners recovered on his policy, in addition to the contribution from the other party, the fact that the general average contribution has been paid does not make any difference. A court of admiralty acts as a court of equity, and in equity the transaction is not finally closed until complete justice is done.[2]]

§ 666. **Contribution between Sureties.** — Another class of cases to illustrate the beneficial effects of Equity Jurisdiction over matters account is that of CONTRIBUTION BETWEEN SURETIES who are bound for the same principal, and upon his default one of them is compelled to pay the money or to perform any other obligation for which they all became bound.[3] In cases of this sort the surety who has paid the whole is entitled to receive contribution from all the others for what he has done in relieving them from a common burden.[4]

§ 667. **Foundation of the Principle.** — The claim certainly has its foundation in the clearest principles of natural justice; for as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim, "Qui sentit commondum, sentire debet et onus."[5] And the doctrine has an equal foundation in morals, since no one ought to profit by another

[1] Pettijohn *v.* Oregon Coal & Navigation Co., 58 Oreg. 392, 113 Pac. 438. Value of cargo for purposes of contribution is to be reckoned as of the port of destination. Shoe *v.* Craig, 189 Fed. 227.

[2] Ralli *v.* Societa Anonima Di Navigazione, 222 Fed. 994.

[3] Com. Dig. Chancery, 4 D. 6.

[4] Layer *v.* Nelson, 1 Vern. 456. On the subject of contribution there is a valuable note of the Reporters to the case of Averall *v.* Wade, Lloyd & Goold, Rep. 264 to 266; Spencer *v.* Parry, 3 Adolph. & Ell. 331; Davies *v.* Humphreys, 6 Maule & Selw. 153; Cowell *v.* Edwards, 2 Bos. & Pull. 268; Brown *v.* Lee, 6 Barn. & Cres. 689; Kemp *v.* Finden, 12 Mees. & Welsb. 421. A surety may pay before judgment, but if he does, he must show that he was bound to pay. Fishback *v.* Weaver, 34 Ark. 569.

[5] See Shelley's Case, 1 Co. Rep. 99; Deering *v.* Earl of Winchelsea, 1 Cox, R. 318, 322; s. c. 2 Bos. & Pull. 270, 274; Craythorne *v.* Swinburne, 14 Ves. 159; Rogers *v.* Mackenzie, 4 Ves. 752.

man's loss where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim, and upon motives of mere caprice or favoritism to make a common burden a most gross personal oppression. It would be against equity for the creditor to exact or receive payment from one and to permit or by his conduct to cause the other debtors to be exempt from payment. And the creditor is always bound in conscience, although he is seldom bound by contract, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound.[1] It can be no matter of surprise therefore to find that Courts of Equity at a very early period adopted and acted upon this salutary doctrine as equally well founded in equity and morality.[2] The ground of relief does not therefore stand upon any notion of mutual contract express or implied, between the sureties to indemnify each other in proportion (as has sometimes been argued), but it arises from principles of equity independent of contract.[3] If the doctrine were otherwise, a surety would be utterly without relief; because (as we shall presently see) he has not either in equity or at law any title to compel the obligee to assign over the bond to him upon his making payment or otherwise discharging the obligation.[4]

[1] Stirling *v.* Forrester, 3 Bligh, Rep. 590, 591.

[2] Com. Dig. Chancery, 4 D. 6, S. 2; Peter *v.* Rich, 1 Ch. R. 34; Morgan *v.* Seymour, 1 Ch. R. 121; Stirling *v.* Forrester, 3 Bligh, R. 590, 591.

[3] Deering *v.* Earl of Winchelsea, 1 Cox, R. 318; s. c. 2 Bos. & Pull. 270; Ex parte Gifford, 6 Ves. 805; Craythorne *v.* Swinburne, 14 Ves. 159; Stirling *v.* Forrester, 3 Bligh, R. 590, 596; Campbell *v.* Mesier, 4 John. Ch. R. 334, 338; Onge *v.* Truelock, 2 Molloy, R. 31, 42; Copis *v.* Middleton, 1 Turn. & Russ. 224; Hodgson *v.* Shaw, 3 Mylne & Keen, 191. In Stirling *v.* Forrester, 3 Bligh, R. 496, Lord Redesdale said: "The decision in Deering *v.* Lord Winchelsea (1 Cox, 318; 2 Bos. & Pull. 270) proceeded on a principle of law which must exist in all countries, that where several persons are debtors all shall be equal. The doctrine is illustrated in that case by the practice in questions of average, &c., where there is no express contract, but equity distributes the loss equally. On the prisage of wines it is immaterial whose wines are taken; all must contribute equally. So it is where goods are thrown overboard for the safety of the ship. The owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation." Post, § 669, note 2. But see Johnson *v.* Johnson, 11 Mass. R. 359; Taylor *v.* Savage, 12 Mass. R. 98; Chipman *v.* Morrill, 20 Cal. 130; Harts *v.* Latham, 84 Ill. App. 483.

[4] Gammon *v.* Stone, 1 Ves. 339; Woffington *v.* Sparks, 2 Ves. 569, 570. But see Morgan *v.* Seymour, 1 Ch. R. 120, and Ex parte Crisp. 1 Atk. 135; Copis *v.* Middleton, 1 Turn. & Russ. R. 224; Hodgson *v.* Shaw, 3 Mylne & Keen, 189; Dowbiggin *v.* Bourne, 2 Younge & Coll. 471; Reed *v.* Norris, 2 Mylne & Craig, 361. Mr. Chancellor Kent, in Cheeseborough *v.* Millard

§ 668. **Same.** — In the Roman law analogous principles existed, although from the different arrangements of that system they were developed under very different modifications. By that law sureties were liable indeed for the whole debt due to the creditor; but this liability was subject to three modifications. In the first place the creditor was generally bound to proceed by process of discussion (as it is now called), in the first instance against the principal debtor, to obtain satisfaction out of his effects before he could resort to the sureties. In the next place, in a suit against one surety, although each surety was bound for the whole debt after the discussion of the principal debtor, yet the surety in such suit had a right to have the debt apportioned among all the solvent sureties on the same obligation, so that he should be compellable to pay his own share only; and this was called the benefit of division.[1] But if a surety should pay the whole debt without insisting upon the benefit of division, then he had no right of recourse over against his co-sureties unless (which is the third case) upon the payment he procured himself to be substi-

(1 John. Ch. R. 413) seems to have thought that a surety paying off a debt is entitled to a cession or assignment of the debt to enable him to have satisfaction from the principal and his co-sureties. He relied on the cases in 1 Ch. R. 20, and 1 Atk. 35; but he did not cite the cases in 1 Ves. 339, and 2 Ves. 569, 570. However the point was not decided by him. See also Avery *v.* Petten, 7 John. Ch. R. 211, where the same learned chancellor acted upon the ground that an assignment might be decreed; but upon very satisfactory grounds he refused it in that case. His grounds however seem equally applicable against any assignment in any case where all the parties in interest are not before the court; and if they are, there seems no necessity for the assignment, since there may be a direct decree for contribution without it. It is one thing to decide that a surety is entitled, on payment, to have an assignment of the debt, and quite another to decide that he is entitled to be subrogated or substituted, as to other equities and securities, in the place of the creditor against the debtor and his co-sureties. See King *v.* Baldwin, 2 John. Ch. R. 560; Hayes *v.* Ward, 4 John. Ch. R. 123. See also Himes *v.* Keller, 3 Watts & Serg. 401; Bowditch *v.* Green, 3 Metc. R. 310; Powell's Ex'ors *v.* White, 11 Leigh, R. 309. In Stirling *v.* Forrester, 3 Bligh, R. 590, 591, Lord Redesdale said: "If several persons are indebted, and one makes payment, the creditor is bound in conscience, if not by contract, to give the party paying the debt all his remedies against the other debtors." Mr. Theobald, in his Treatise on Principal and Surety, ch. 10, § 270, has by mistake attributed a remark of Sir Samuel Romilly, arguendo, to the Lord Chancellor. It bears on this very point, and therefore the error should be corrected. See post, §§ 709 to 716, and notes, ibid.; and Wright *v.* Morley, 11 Ves. 12, 22; Butcher *v.* Churchill, 14 Ves. 568, 575, 576; post, §§ 856, 857.

[1] 1 Domat, B. 3, tit. 4, § 2, art. 1, 6; Pothier on Oblig. by Evans, n. 407; Pothier, Pand. Lib. 46, tit. 1, § 5, art. 1, n. 41 to 45; Id. art. 3, n. 51 to 61; Cheeseborough *v.* Millard, 1 John. Ch. R. 414; Hayes *v.* Ward, 4 John. Ch. R. 131, 132; post, § 857.

tuted to the original debt (which he might insist on) by a cession thereof from the creditor; in which case he might insist upon a payment of a proper proportion from each of his co-sureties.[1] And in case of the insolvency of either of the sureties the share of the insolvent was to be apportioned upon all the solvent sureties pro rata.[2] The same principles in a great measure, but not in all cases, now regulate the same subject among the continental nations of Europe whose jurisprudence is derived from the civil law.[3]

[1] 1 Domat. B. 3, tit. 4, art. 1; Pothier on Oblig. by Evans, n. 407, 519, 520, 521 (556, 557, 558, of the French editions); Pothier, Pand. Lib. 46, tit. 1, art. 2, n. 45 to 51.

[2] 1 Domat, B. 3, tit. 4, art. 2; Pothier on Oblig. by Evans, n. 407, 415, 418, 419, 420, 421, 445, 518, 519, 520, 521 (555 to 559, of French editions); Id. 282; Pothier, Pand. Lib. 46, tit. 1, art. 2, n. 45 to 51; Dig. Lib. 46, tit. 1, l. 26; Cod. Lib. 8, tit. 14, l. 2. See also 1 Bell, Comm. B. 3, Pt. 1, ch. 3, § 3, art. 283 to 286; Ersk. Inst. B. 3, tit. 3, art. 61 to 74; 1 Domat. B. 3, tit. 1, § 3, art. 6, and Domat's note; post, § 856.

[3] Merlin, Repert. art. Discussion; Id. Division; Pothier on Oblig. by Evans, Pt. 2, ch. 6, art. 2, n. 407, 415, 416; Id. Pt. 2, ch. 3, art. 8, n. 280; Id. Pt. 3, ch. 1, art. 6, § 2, n. 519 to 524 (556 to 559, of the French editions); 1 Domat, B. 3, tit. 1, § 3, art. 6, and Domat's note, ibid.; Cod. Lib. 8, tit. 14, l. 2. The same principle in regard to the necessity of the creditor's discussing the principal debtor before resorting to the surety, has been adopted in most countries deriving their jurisprudence from the civil law; but it is not universally adopted. It prevails in France, Holland, and Scotland, but not (as it seems) generally in Germany. See Mr. Chancellor Kent's learned opinion in Hayes *v.* Ward, 4 John. Ch. R. 130 to 135, where he cites the foreign authorities on this point. These authorities fully justify his statement. The following extract from that opinion may be acceptable: "According to the Roman law in use before the time of Justinian, the creditor, as with us, could apply to the surety before applying to the principal. 'Jure nostro est potestas creditori, relicto reo, eligendi fidejussores' (Code, Lib. 8, tit. 41, § 5); and the same law was declared in another imperial ordinance (Code, Lib. 8, tit. 41, § 19). But Justinian, in one of his Novels (Nov. 4, c. 1, entitled 'Ut Creditores primo loco conveniant principalem'), allowed to sureties the exception of discussion, or beneficium ordinis, by which they could require that before they were sued the principal debtor should, at their expense, be prosecuted to judgment and execution. It is a dilatory exception, and puts off the action of the creditor against the surety until the remedy against the principal debtor has been sufficiently exhausted. This provision in the Novels has not been followed in the states and cities of Germany, except in Pomerania (Heinecc. Elem. Jur. Germ. lib. 2, tit. 16, §§ 449, 450, 451, 465); but it has been adopted in those other countries in Europe, as France, Holland, Scotland, &c., which follow the rules of the civil law (Pothier, Trait. des Oblig. No. 407–414; Code Napoléon, No. 2021, 2, 3; Voet, Com. ad Pand. tit. De Fidejussoribus, 46, 1, 14–20; Hub. Prælec. lib. 3, tit. 21, § 6; Ersk. Inst. 504, § 61). A rule of such general adoption shows that there is nothing in it inconsistent with the relative rights and duties of principal and surety, and that it accords with a common sense of justice and the natural equity of mankind." It may be well here to state that I generally cite Pothier on Obligations from Mr. Evans's edition. It is important to remark that after n. 456, in Evans's edition, the subsequent

§ 669. **Contribution Will Be Enforced in Absence of Positive Contract of Liability.** — Originally it seems to have been questioned whether contribution between sureties, unless founded upon some positive contract between them incurring such liability, was a matter capable of being enforced at law. But there is now no doubt that it may be enforced at law as well as in equity, although no such contract exists.[1] And it matters not, in case of a debt, whether the sureties are jointly and severally bound, or only severally; or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments,[2] if all the instruments are for the same identical debt.[3] [Where a new bond was given as additional security to the same debt secured by the original bond which was given ten

numbers differ from the common French editions, owing to Pothier having, in his later editions, inserted between that number and number 457 a new section containing thirty-five numbers, so that No. 457, in Evans's edition, stands, in the common editions of Pothier, No. 493. See Mr. Evans's note (*a*) to Pothier on Oblig. Pt. 2, ch. 6, § 9, p. 306. This explanation may be useful to the reader, to prevent mistakes or supposed mistakes in the references usually made in English and American works to Pothier. Post, §§ 856 to 861.

[1] See Kemp *v.* Finden, 12 Mees. & Welsb. 421. See Cooper *v.* Evans, L. R. 4 Eq. 45.

[2] Armitage *v.* Pulver, 37 N. Y. 494; Whiting *v.* Burke, L. R. 6 Ch. 342. See however § 675; Coope *v.* Twynam, Turn. & R. 426; Keller *v.* Williams, 10 Bush, 216; Hartwell *v.* Smith, 15 Ohio St. 200, that this is true only where the sureties stand in æquali jure.

[3] Deering *v.* Earl of Winchelsea, 1 Cox, R. 318; s. c. 2 Bos. & Pull. 270; 1 Saund. R. 264 (*a*), Mr. Williams's note (*c*); Craythorne *v.* Swinburne, 14 Ves. 159, 169. In Stirling *v.* Forrester (3 Bligh, R. 590, o. s.), Lord Redesdale said: "The principle established in the case of Deering *v.* Lord Winchelsea is universal, that the right and duty of contribution is founded in doctrines of equity. It does not depend upon contract. If several persons are indebted and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in Deering *v.* Lord Winchelsea; and in that case there was no evidence of contract as in this. So in the case of land descending to coparceners subject to a debt, if the creditor proceeds against one of the coparceners, the others must contribute. If the creditor discharges one of the coparceners, he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions." His Lordship afterwards, in pronouncing judgment, added the words which have already been cited in § 667, note. See also post, § 675, in what cases no contribution is allowed. It matters not whether the sureties have had communication with each other. Norton *v.*

years before, and upon the giving of the new bond the old sureties did not ask leave to be released, and one of them subsequently paid the entire debt, he is entitled to contribution from his co-sureties. The rule is that if the sureties signed the same instrument there would be equal contribution among them, but where the sureties are bound by different sums in different instruments, they are liable in the proportion of the amounts of the obligations signed by them respectively.[1] So, where plaintiff became surety upon three separate bonds of a court officer, and defendant's intestate became a surety upon a fourth bond, and the principal subsequently defaulted, the surety who has paid the entire debt to recover one-half of the amount paid from his co-surety, rather than one-fourth, the amount due upon the bond upon which he alone was surety, it appearing that all four of the bonds were given for the same general purpose.[2]]

§ 670. [**Contribution as a Matter of Right.** — Compulsory contribution between co-sureties does not rest in mere equity though, true, such is the origin of the law. The individual chancellor cannot, as an original proposition, do in each case what he may think will fit the facts from the standpoint of justice in the abstract. He cannot merely seize upon his ideal in the moral sense and vitalize it by a decree. That would make contribution depend on arbitration in the habiliments of judicial administration. Now the logic of the enforceability of contribution at law as well as in equity, is that there is a real right of contribution growing out of the relations of the parties, not a mere privilege to be extended or not in judicial discretion. The right may be contracted away or lost by violation of some correlative right, but it is not within the province of the court, as an original matter, to give it or take it away. The idea is not that any express contract exists between co-sureties upon which an action will lie, but that there is a contract implied, growing out of the relations of the parties, — a contract which is contempora-

Coons, 2 Seld. 33. A surety is not ordinarily entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt, even though the co-surety has not been required by the creditor to pay anything, provided the co-surety has not been released by the creditor. Ex parte Snowdon, 17 Ch. D. 44; Davies *v.* Humphreys, 6 Mees. & W. 153, 168. Nor can a surety, in the absence of contract, require surrender from his principal of collaterals before payment of all the debts to secure which they were given. Farebrother *v.* Wodehouse, 23 Beav. 18.

[1] Fidelity & Deposit Co. *v.* Phillips, 235 Pa. 469, 84 Atl. 432.

[2] United States Fidelity & Guaranty Co. *v.* McGinnis' Admr., 147 Ky. 781, 145 S. W. 1112.

neous with the signing of the guaranty, not which springs up by overpayment by a surety. The latter merely fixes the right in accordance with the implied contractual obligation made at the start, that the solvent resident guarantors will share equally any loss resulting from the suretyship.[1]]

§ 671. [**Right of a Surety Who Has Paid the Common Debt to Contribution from Co-surety.** — A surety has no right to obtain an indemnity upon his indorsement and hold it as against a co-surety who has been compelled to pay the common debt. If one of the sureties was an officer of the corporation, whose debt was indorsed, and if he holds the property under such circumstances as to make him a trustee, and which he has no right to withhold from the corporation, it not only inures to the benefit of all directly interested therein, but also and eventually inures to the benefit of all sureties of the corporation. It is well settled that, where one surety obtains an indemnity, it inures to the benefit alike of himself and his co-surety.[2] The right to contribution does not lie where the payment was voluntary, or where there was no indebtedness. But where one of several parties, who were liable upon a common obligation, discharged that obligation for the benefit of all, this gave to the one who made the payment the right to recover from each of his co-sureties his proportionate share of the common burden. The payment was compulsory in that there was a clear legal duty to pay which might have been enforced by judgment and execution. Even where payment has been made by one legally bound therefor before the maturity of the debt, contribution has been enforced.[3] And the fact that the surety who is now called upon to contribute was merely an accommodation indorser, makes no difference.[4] Contribution cannot be enforced and maintained by one of several joint obligors until payment of the joint obligation has been made, or something done equivalent thereto.[5] In order for the surety

[1] In re Koch's Estate, 148 Wis. 548, 134 N. W. 663.

[2] Broussard *v.* Mason, 187 Mo. App. 281, 173 S. W. 698.

[3] A. Guckenheimer & Bros. Co. *v.* Kann, 243 Pa. 75, 89 Atl. 807; Fales *v.* McDonald, 32 R. I. 406, 79 Atl. 969.

Discharge of obligation two days before it was due does not make it a voluntary payment. Hotham *v.* Berry, 82 Kans. 412, 108 Pac. 801; Fanning *v.* Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946.

[4] United States Fidelity & Guaranty Co. *v.* McGinnis' Admr., 147 Ky. 781, 145 S. W. 1112.

[5] Ladd *v.* Chamber of Commerce, 37 Oreg. 49, 60 Pac. 713; Hall *v.* Gleason, 158 Ky. 789, 166 S. W. 608.

to recover his ratable part from a co-surety, it is necessary for him to show that the debt that he has discharged was a binding and subsisting obligation for which he was jointly liable with his co-surety, and if he pays a debt for which the co-surety was not liable, or a debt which was barred by the statute of limitations, he is not entitled to contribution from his co-surety.[1] A surety upon a new bond required to be executed, on account of insufficiency of the original bond, there being an order made requiring the surety to justify, which he refused to do, no contribution lies, and the refusal to justify was the same as if the surety had never executed the undertaking.[2] The plaintiff surety was compelled to pay a note, which had passed into the hands of a third party, prior to maturity and for value. The plea of a failure of consideration was no defence in an action brought to enforce contribution between the sureties.[3]]

§ 672. [**Measure of Recovery.** — Under our former system a surety was liable for his aliquot proportion, to be ascertained by the number of co-sureties, and without regard to their solvency or the availability of their property, but in a court of equity and the principles now regarded as controlling, the liability of sureties is made dependent on the principle of equality arising out of a common risk, and, in case of insolvency or non-residence, these rights are adjusted by reference to the number of sureties who are solvent or have property available to process within the jurisdiction of the court.[4] The right to contribution results from natural equity, and its enforcement is an application of the principle that one should be compelled to do that which, in equity and good conscience, he ought to do. That being true, it should be enforced according to the rules of equity, and its enforcement should stop short of the point where it becomes unjust and oppressive.[5] Where two of the three sureties are solvent, they should pay the debt, each paying one-half, and provide in the judgment that they should afterwards have their remedy against the present insolvent surety, if he should subsequently become able to pay.[6]]

[1] McLin *v.* Harvey, 8 Ga. App. 360, 69 S. E. 123.

[2] Finckelstein *v.* Punie, 162 App. Div. 119, 147 N. Y. Supp. 317.

[3] Cummins *v.* Line, 43 Okla. 575, 143 Pac. 672.

[4] Fowle *v.* McLean, 168 N. C. 537, 84 S. E. 852. Payment of debt by surety at once vested in him a right of action against his co-surety to the extent of his primary liability. Pully *v.* Pass, 123 N. C. 168, 31 S. E. 478.

[5] First Natl. Bank *v.* Avery Planter Co., 69 Neb. 329, 95 N. W. 622, 111 Am. St. Rep. 541.

[6] Kimball *v.* Williams, 51 App. Div. 616, 65 N. Y. Supp. 69.

§ 673. **Jurisdiction of Court of Law Does Not Affect the Original Jurisdiction of the Court of Equity.** — But still the jurisdiction now assumed in Courts of Law upon this subject in no manner affects that originally and intrinsically belonging to equity.[1] Indeed there are many cases in which the relief is more complete and effectual in equity than it can be at law; as for instance where an account and discovery are wanted, or where there are numerous parties in interest which would occasion a multiplicity of suits.[2] In some cases the remedy at law is now utterly inadequate. As if there are several sureties and one is insolvent and another pays the debt, he can at law recover from the other solvent sureties only the same share as he could if all were solvent. Thus if there are four sureties and one is insolvent, a solvent surety who pays the whole debt can recover only one fourth part thereof (and not a third part) against the other two solvent sureties.[3] But in a Court of Equity he will be entitled to recover one third part of the debt against each of them; for in equity the insolvent's share is apportioned among all the other solvent sureties.[4]

§ 674. **Remedy Lies against Surviving Parties upon Death of the Surety.** — And upon the like grounds if one of the sureties dies, the remedy at law lies only against the surviving parties; whereas in equity it may be enforced against the representative of the deceased party, and he may be compelled to contribute his share to the surviving surety who shall pay the whole debt.[5]

[1] Wright *v.* Hunter, 5 Ves. 792; Broughton *v.* Wimberley, 65 Ala. 549; Couch *v.* Terry, 12 Ala. 225; Buckner *v.* Stewart, 34 Ala. 529; Cooper *v.* Evans, L. R. 4 Eq. 45.

[2] Craythorne *v.* Swinburne, 14 Ves. 159; Cornell *v.* Edwards, 2 Bos. & Pull. 268; Wright *v.* Hunter, 5 Ves. 792.

[3] Cornell *v.* Edwards, 2 Bos. & Pull. 268; Brown *v.* Lee, 6 B. & Cressw. 697. See also Rogers *v.* Mackenzie, 4 Ves. 752; Wright *v.* Hunter, 5 Ves. 792.

[4] Peter *v.* Rich, 1 Ch. Rep. 34; Cornell *v.* Edwards, 2 Bos. & Pull. 268; Hale *v.* Harrison, 1 Ch. Cas. 246; Deering *v.* Earl of Winchelsea, 2 Bos. & Pull. 270; s. c. 1 Cox, R. 318. But see Swain *v.* Wall, 1 Ch. Rep. 149, 150, 151. See also Pothier on Oblig. n. 275, 281, 282, 428, 521 (n. 556, of the French editions), the same principles.

See Armitage *v.* Pulver, 37 N. Y. 494. Courts of Law in some of the States follow the rule in equity. Mills *v.* Hyde, 19 Vt. 59; Henderson *v.* McDuffee, 5 N. H. 38; Chitty, Contracts, 584 (Perkins), and note. See also Jones *v.* Blanton, 6 Ired. Eq. 116; Aiken *v.* Peay, 5 Strob. 15; Johnson *v.* Vaughn, 65 Ill. 425; Whiting *v.* Burke, L. R. 10 Eq. 539; s. c. 6 Ch. 342. If the cause of action is barred against one surety, he cannot be compelled to contribute. Shelton *v.* Farmer, 9 Bush, 314. But see Camp *v.* Bostwick, 20 Ohio St. 337; ante, § 449.

[5] Egbert *v.* Hanson, 34 Misc. Rep. 596, 70 N. Y. Supp. 383; Pace *v.* Pace's Admr., 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459; Faulkner *v.* Thomas, 48 W. Va. 148, 35 S. E. 915; Primrose *v.* Bromley, 1 Atk. 89.

Where there are several distinct bonds with different penalties and a surety upon one bond pays the whole, the contribution between the sureties is in proportion to the penalties of their respective bonds. But as between the sureties to the same bond the general rule is that of equality of burden inter sese.[1]

§ 675. **Sureties May Exempt Each Other from Contribution by Special Contract.** — These are cases of contribution of a simple and distinct character. But in cases of suretyship others of a very complicated nature may arise from counter equities between some or all of the parties, resulting from contract, or from equities between themselves, or from peculiar transactions regarding third persons.[2] Thus for instance although the general rule is that there shall be a contribution between sureties by the rule of equality, that may be modified by express contract between them; and in such a case Courts of Equity will be governed by the terms of such contract in giving or refusing contribution.[3] In like manner there may arise by implication, from the very nature of the transaction, an exemption of one surety from becoming liable to contribution in favor of another. Thus if one surety should not upon his own mere motion, but at the express solicitation of his co-surety, become a party to the instrument, and such co-surety should afterwards be compelled to pay the whole debt, — in such a case he would not be entitled to contribution unless it clearly appeared that there was no intention to vary the general right of contribution in the understanding of the parties.[4] So if different sureties should be bound by different instruments for equal portions of the debt of the same principal, and it clearly appeared that the suretyship of each was a separate and distinct transaction, there would be no right of contribution of one against the other.[5] So if there should be separate bonds given with different

[1] See Deering *v.* Earl of Winchelsea, 1 Cox, R. 318; s. c. 2 Bos. & Pull. 270.

[2] See Hyde *v.* Tracey, 2 Day, Cas. 422; Ransom *v.* Keyes, 9 Cowen, R. 128.

[3] Swain *v.* Wall, 1 Ch. R. 149; Craythorne *v.* Swinburne, 14 Ves. 159, 169; Deering *v.* Earl of Winchelsea, 1 Cox, R. 318; s. c. 2 Bos. & Pull. 270.

[4] Turner *v.* Davies, 2 Esp. R. 478; Mayhew *v.* Crickett, 2 Swanst. R. 193; Taylor *v.* Savage, 12 Mass. R. 98, 102; Cutter *v.* Emery, 37 N. H. 567; Hartwell *v.* Smith, 15 Ohio St. 200. See also Bagott *v.* Mullen, 32 Ind. 332; Hendrick *v.* Whittemore, 105 Mass. 23; Tucker *v.* Campbell, 27 Mich. 497; Nash *v.* Burchard, 87 Mich. 85, 49 N. W. 492; Cramer *v.* Redman, 10 Wyo. 328, 68 Pac. 1003; Rudolf *v.* Malone, 104 Wis. 470, 80 N. W. 743.

[5] Coope *v.* Twynam, 1 Turn. & Russ. 426. It would be different if it should appear that it was the same transaction split into different parts by

sureties, and one bond is intended to be subsidiary to and a security for the other in case of a default in payment of the latter, and not to be a primary concurrent security, — in such a case the sureties in the second bond would not be compellable to aid those in the first bond by any contribution.[1]

§ 676. **Discharge of One Surety by the Creditor as Affecting Rights of Co-sureties.** — A question of another sort has arisen: How far and under what circumstances the discharge of one surety by the creditor would operate as a discharge of the other sureties from their liability. It seems now clearly established at law that a release or discharge of one surety by the creditor will operate as a discharge of all the other sureties,[2] even though it may be founded on a mere mistake of law.[3] But it may be doubtful whether the same rule will be allowed universally to prevail in equity. Thus if a creditor has accepted a composition from one

the agreement of all the parties. Ibid. See Keller *v.* Williams, 10 Bush, 216; Armitage *v.* Pulver, 37 N. Y. 494; Hartwell *v.* Smith, 15 Ohio St. 200.

[1] Craythorne *v.* Swinburne, 14 Ves. 159. See Cooke *v.* ——, 2 Freem. R. 97. But see a special case in Whiting *v.* Burke, L. R. 10 Eq. 539; s. c. 6 Ch. 342, where contribution was allowed.

[2] Extension of time for payment will release surety, in absence of notice to him, and where one surety pays interest and procures extension, his co-surety is discharged and he is liable for his one-half of the debt. Hallock *v.* Yankey, 102 Wis. 41, 78 N. W. 156, 72 Am. St. Rep. 861; Sherman County *v.* Nichols, 65 Neb. 250, 91 N. W. 198.

Neglect to prosecute a claim against the estate of a deceased surety did not operate as a release or discharge from liability of the co-sureties. Clark *v.* Douglas, 58 Neb. 571, 79 N. W. 158.

Any variation in the instrument signed by the surety, or the substitution of a new instrument for the original one, will effect a discharge. Cass County *v.* American Exchange State Bank, 11 N. Dak. 238, 91 N. W. 59; Ayer *v.* Hughes, 97 S. C. 255, 81 S. E. 510.

Where one surety consents to the investment of the fund in securities that were not authorized to be purchased, this will release a co-surety who had no knowledge of such investment. Fidelity & Deposit Co. *v.* Phillips, 235 Pa. 469, 84 Atl. 432. But not if the creditor reserve his rights against the surety not discharged. Ante, § 449, editor's note at end.

It has sometimes been held that the holder of a bill of exchange accepted for accommodation of the drawee, if taken for value and without notice, may discharge the drawee notwithstanding the fact that after taking the paper he received notice of the nature of the acceptance. Ex parte Graham, 5 DeG. M. & G. 356; Farmers' Bank *v.* Rathbone, 26 Vt. 19. But this probably is not good law. Oriental Co. *v.* Overend, L. R. 7 Ch. 142. Clearly if the fact is known to the creditor on taking the bill, he must deal with the parties according to their real, and not according to their apparent, relation to each other. Davies *v.* Stainbank, 6 DeG. M. & G. 679; Wythes *v.* Labouchere, 3 DeG. & J. 593.

[3] Nicholson *v.* Revell, 4 Adolph. & Ellis, 675; s. c. 6 Nev. & Mann. R. 200; ante, § 174.

surety and discharged him, it has been thought that he might still recover against another surety his full proportion of the original debt without deducting the composition paid, if it did not exceed the proportion for which the surety was originally liable. In other words each surety, notwithstanding such discharge, might be held liable in equity to pay his share of the original debt, treating each as liable for his equal or pro rata proportion upon an equitable apportionment of it.[1]

[1] In Ex parte Gifford (6 Ves. 805), Lord Eldon held that a discharge of one surety did not discharge the other sureties; and that as each surety was bound to contribute his share towards the general payment, no one could recover over against another who had been discharged, unless for the excess paid by him beyond his due proportion. The creditor might therefore accept a composition from one surety, and still proceed against another to recover his full proportion of the original debt without deducting the composition paid, if it did not exceed the proportion for which the surety was originally liable. Mr. Theobald, in his Treatise on Principal and Surety (ch. 11, § 283, note (i), p. 267), thinks this decision could not have been made, and that it is misreported. I see no reason to question either the accuracy of the report or the soundness of the doctrine. If the discharge of one surety is not the discharge of another, it seems difficult to see how the sum paid by one surety shall take away the obligation of another to pay his proportion of the original debt, if upon the discharge the right to proceed against such surety for his proportion was expressly or by implication reserved to the extent of that proportion. This seems to have been the ground of Lord Eldon's decision. In Stirling *v.* Forrester (3 Bligh, R. 591), Lord Redesdale said: "If the creditor discharges one of the coparceners, he cannot proceed for his whole debt against the others; at the most they are only bound for their proportions." The same principle would apply to co-sureties; and indeed Stirling *v.* Forrester (3 Bligh, R. 591, 596) seems mainly to have been decided upon this ground. The distinction is between a discharge of the principal and a discharge of the surety; between a part payment by a surety and a part payment by the principal. In the recent case of Nicholson *v.* Revill (4 Adolph. & Ellis, 675; s. c. 6 Nev. & Mann. 192, 200), the Court of King's Bench decided that the creditor's discharge of one debtor on a joint and several note was in law a discharge of all the debtors. Lord Denman, in delivering the judgment of the court, said: "This view cannot perhaps be made entirely consistent with all that is said by Lord Eldon in the case Ex parte Gifford, where his Lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have adverted was not presented to his mind in its simple form, and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down that a joint debate might release one of his debtors, and yet by using some language of reservation in the agreement between himself and such debtor keep his remedy entire against the others, even without consulting them. If Lord Eldon used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him which he was accustomed to afford. We do not find that any other authority clashes

§ 677. **Extension of Time by Mortgagee to Grantee of Mortgagor, Releases Mortgagor.** — Indeed circumstances may exist under which even a release of the principal might not release the surety from the debt where it was clear, from the whole transaction, that it was intended that the surety should remain bound. Thus where, before the release to the principal, the surety had paid part of the debt and given a security (an acceptance) for the remainder, it was held that it was not a release of the surety in the absence of all evidence to establish the contrary intent.[1] [An extension of the time of payment of a mortgage debt, made by the mortgagee to the grantee of the mortgagor, after the assump-

with our present judgment, which must be in favor of the defendant." It is however to be remembered that his Lordship was here dealing with the question at law; but it by no means follows that because a security is extinguished at law, therefore it is extinguished in equity, if it is the clear intention of the parties that it shall not be extinguished. See 2 Story on Eq. Jurisp. §§ 1370, 1372. Pothier adopts very much the same principles and reasoning as Lord Eldon; asserting that the release of the creditor of one debtor would liberate all the others if the creditor meant thereby to extinguish the debt, but not if the creditor meant to reserve his rights against the other co-debtors for their proportions. 1 Pothier on Oblig. by Evans, n. 275, 278, 279, 280, 281; Id. n. 521 [556]. Pothier has also treated the point of a discharge of one surety; and he holds that a discharge of one surety discharges the other sureties for such proportion of the debt as upon payment of the whole debt they could have had recourse to him for. Pothier on Oblig. by Evans, n. 275, 277, 280, 281, 428, 429, 445, 519, 520, 521, 521 B., 523 [n. 556–560, of the French editions]. The rule of the Civil Law is the same. "Si ex duobus, qui apud te fidejusserant in *viginti*, alter, ne ab eo peteres, *quinque* tibi deberit, vel promiserit; nec alter liberabitur. Et si ab altero *quindecim* petere institueris, nulla exceptione (cedendarum actionum) summoveris. Reliqua autem *quinque*, si a priori fidejussore petere institueris, doli mali exceptione summoveris." Dig. Lib. 46, tit. 1, l. 15, § 1; Pothier, Pand. Lib. 46, tit. 1, n. 47.

But see Evans *v.* Bremridge, 2 Kay & J. 174, 183, where it is said that the dicta in Ex parte Gifford, 6 Ves. 805, referred to by the author, have not been followed. The obligation of one of two co-sureties is to pay the whole debt, and if he does so he may recover of his co-surety one-half. If he pays less than the whole debt, he can only recover from the co-surety the amount which he has paid in excess of his moiety. When a co-surety has, by the conduct of the creditor, been released from liability, another co-surety will be held to be exonerated only as to so much of the original debt as the one so discharged should have been compelled to pay. Wanamaker *v.* Powers, 102 App. Div. 485, 93 N. Y. Supp. 19, 74 N. E. 1126, 182 N. Y. 515, 79 N. E. 1118, 186 N. Y. 562.

[1] Hall *v.* Hutchens, 3 Mylne & Keen, 426; in Pearl *v.* Deacon, 1 DeG. & J. 461, it was held that a landlord, having a note with surety for money loaned his tenant, and also a security for this and other money afterwards loaned, in the way of a mortgage on the tenant's furniture, released the surety by taking the furniture under a distress for rent in arrear. Kinnaird *v.* Webster, 10 Ch. D. 139, 144.

tion of the mortgage debt by the grantee, will operate to release the mortgagor from obligation as surety for the payment of the debt, but where the surety procures an extension of time, or consents that it be given, this will not release him. If he consent to the extension, he is still bound by the obligation, changed in its terms with his consent.[1]]

§ 678. **Contribution Enforced in Order to Accomplish Purposes of Justice.** — There are many other cases of contribution in which the jurisdiction of Courts of Equity is required to be exercised in order to accomplish the purposes of justice. Thus for instance in cases of a deficiency of assets to pay all debts and legacies, if any of the legatees have been paid more than their proportion before all the debts are ascertained, they may be compelled to refund and contribute in favor of the unpaid debts, at the instance of creditors, at the instance of other legatees, and in many cases, although not universally, at the instance of the executor himself.[2]

§ 679. **Contribution Lies as between Partners Where One Has Paid More than His Share.** — In like manner contribution lies between partners for any excess which has been paid by one partner beyond his share against the other partners, if upon a winding up of the partnership affairs such a balance appears in his favor; or if upon a dissolution he has been compelled to pay any sum for which he ought to be indemnified. The cases in which a recovery can be had at law by way of contribution between partners are very few, and stand upon special circumstances. The usual and indeed almost the only effectual remedy is in equity, where an account of all the partnership transactions can be taken; and the remedy to ascertain and adjust the balance is, in a just sense, plain, adequate, and complete.[3] It is under the same circum-

[1] Johnston *v.* Paltzer, 100 Ill. App. 171; Robertson's Admr. *v.* Meredith, 20 Ky. L. Rep. 70, 45 S. W. 103.

[2] Ante, §§ 90, 92; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 364; Id. B. 3, Pt. 2, ch. 5, p. 518; Noel *v.* Robinson, 1 Vern. 94, and Mr. Raithby's notes, ibid.; Walcott *v.* Hall, 2 Bro. Ch. R. 305; Anon. 1 P. Will. 495, and Mr. Cox's note; Newman *v.* Barton, 2 Vern. 265, and Mr. Raithby's note; Edwards *v.* Freeman, 2 P. Will. 447; Hardwick *v.* Wynd, 1 Anst. 112; Davis *v.* Davis, 1 Dick. R. 32; Jewson *v.* Grant, 3 Swanst. R. 659; Com. Dig. Chancery, 3 V. 6. See also, on the subject of contribution, the Reporters' note to Averall *v.* Wade, Lloyd & Goold, Rep. 264; ante, § 492; Succession of Henry, 45 La. Ann. 156, 12 So. 365; Succession of Finegan, 135 La. 473, 65 So. 614.

[3] Where partners agreed that each should have a given drawing account each week, and the profits did not justify taking this much out of the business, the partner's profits are first liable to the repayment of any excess drawn out; then his share of stock, and if that is insufficient, then

stances that an action of account at the common law lies; but that, as we have already seen, is in most cases a very cumbersome, inconvenient, and tardy remedy. The same remark applies to an action of covenant on sealed articles of partnership or an action of assumpsit upon unsealed articles where there have been any breaches of the articles; for there may be many breaches of them during the continuance of the partnership which scarcely admit of adequate redress in this way.[1] This subject will however hereafter present itself in a more enlarged form.[2]

§ 680. **Joint Tenants and Tenants in Common Entitled to Contribution.** — Contribution also lies between joint tenants, tenants in common and part owners of ships and other chattels for all charges and expenditures incurred for the common benefit. But it seems unnecessary to dwell upon these cases and others of a like nature, as they embrace nothing more than a plain application of principles already fully expounded.[3] We may conclude this head

he is personally liable. Sandias *v.* Mustacchi, 153 App. Div. 810, 138 N. Y. Supp. 875.

Upon dissolution, the partner who has paid more than his share of the firm debts is entitled to contribution from his co-partners. Gorman *v.* Madden, 27 S. Dak. 319, 131 N. W. 290; Huey *v.* Christ, 232 Pa. 131, 81 Atl. 159.

Notes given by complainant for his part of the firm property were indorsed to defendant, and afterwards they became equal partners in the business, and hence, complainant's subsequent use of his own credit for partnership business would not be construed to be his contribution to the partnership, but his partner would be liable for his half. Hake *v.* Coach, 114 Mich. 558, 72 N. W. 623, 4 Detroit Leg. N. 700.

One partner is liable for his proportionate part of attorney's fees paid by his co-partner for the benefit of the firm. Whitney *v.* Whitney, 27 Ky. L. Rep. 1197, 88 S. W. 533.

Premiums paid by one partner upon a note given in payment of premium and which became due after the death of the insured, may be charged by the surviving partner in his accounting with the firm property. Ruth *v.* Flynn, 25 Colo. App. 14, 142 Pac. 194.

See Collyer on Partnership, ch. 8, §§ 2, 4, pp. 143, 157, 162; Gow on Partn. ch. 2, §§ 3, 4, pp. 92 to 141. See Wright *v.* Hunter, 1 East, R. 20; Wells *v.* Hubbell's Administrators, 2 John. Ch. R. 397; Wright *v.* Hunter, 5 Ves. 792.

[1] See Duncan *v.* Lyon, 3 John. Ch. R. 362; Neven *v.* Speckerman, 12 John. R. 401; Gow on Partn. ch. 2, § 3, p. 92; Dunham *v.* Gillis, 8 Mass. R. 462.

[2] Post, §§ 895 to 926; Story on Partn. §§ 219 to 242.

[3] Com. Dig. Chancery, 3 V. 6; Rogers *v.* Mackenzie, 4 Ves. 752; Lingard *v.* Bromley, 1 V. & Beam. 114. As to contribution between cestuis que trust, see Gardner *v.* Diedricks, 41 Ill. 158. Between tenants in common, see Calvert *v.* Aldrich, 99 Mass. 74; Husband *v.* Aldrich, 135 Mass. 317; Victoria Copper Mining Co. *v.* Rich, 193 Fed. 314, 113 C. C. A. 238; Cooper *v.* Brown, 143 Iowa, 482, 122 N. W. 144.

with the remark that the remedial justice of Courts of Equity in all cases of apportionment and contribution is so complete and so flexible in its adaptation to all the particular circumstances and equities, that it has in a great measure superseded all efforts to obtain redress in any other tribunals.

§ 681. **Nature of Liens.** — Liens also give rise to matters of account, and although this is not the sole or indeed the necessary ground of the interference of Courts of Equity, yet directly or incidentally it becomes a most important ingredient in the remedial justice administered by them in cases of this sort. The subject as a general head of equity jurisdiction will more properly fall under discussion in another place. But a few considerations touching matters of account involved in it may be here glanced at. A lien is not in strictness either a jus in re or a jus ad rem, but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged.[1] It generally exists in favor of artisans and others who have bestowed labor and services upon the property in its repair, improvement, and preservation.[2] It has also an existence in many other cases by the usages of trade; and in maritime transactions, as in cases of salvage and general average.[3] It is often created and sustained in equity where it is unknown at law, as in cases of the sale of lands where a lien exists for the unpaid purchase-money.[4] It is not confined to cases of mere labor and services on the very property, or connected therewith, but it often is by the usage of trade extended to cases of a general balance of accounts in favor of factors and others.[5] Now it is obvious that most of these cases must give rise to matters of account; and as no suit is maintainable at law for the property by the owner until the lien is discharged, and as the nature and amount of the lien often are involved in great uncertainty, a resort to a Court of Equity to ascertain and adjust the account seems in many cases absolutely indispensable for the purposes of justice; since if a tender were made at law it would be at the peril

[1] Brace *v.* Duchess of Marlborough, 2 P. Will. 491; Gilman *v.* Brown, 1 Mason, R. 221; Ex parte Heywood, 2 Rose, R. 355, 357; post, §§ 1215, 1216.

[2] Abbott on Shipping, Pt. 2, ch. 3, §§ 1, 17; Chase *v.* Westmore, 5 M. & Selw. 180.

[3] Abbott on Shipping, Pt. 2, ch. 3, §§ 1, 17; Pt. 3, ch. 3, § 11; Id. ch. 10, §§ 1, 2.

[4] Sugden on Vendors, ch. 12, § 1, p. 541 (7th ed.); Id. ch. 12, § 1, vol. 2, p. 57 (9th ed.).

[5] Paley on Agency, ch. 2, § 3; Kruger *v.* Wilcocks, Ambler, R. 252, and Mr. Blunt's note; Green *v.* Farmer, 4 Burr. 2218.

of the owner; and if it was less than the amount due, he would inevitably be cast in the suit and be put to the necessity of a new litigation under more favorable circumstances. So in many cases where a lien exists upon various parcels of land, some parts of which have been afterwards sold to different purchasers, and the lien is sought to be enforced upon the lands of the purchaser, it may often become necessary to ascertain what parcels ought primarily to be subjected to the lien in exoneration of others; and a bill for this purpose, as well as for an account of the amount of the incumbrance, may be indispensable for the purposes of justice.[1] Cases of pledges present a similar illustration whenever they involve indefinite and unascertained charges and accounts.

§ 682. **Cases of Account Arising from Privity of Relation.** — Let us in the next place bring together some few cases involving accounts which may arise either from privity of contract or relation, or from adverse or conflicting interests.

§ 683. **Accounts between Landlord and Tenant.** — Under this head the jurisdiction of Courts of Equity in regard to RENTS AND PROFITS may properly be considered. A great variety of cases of this sort resolve themselves into matters of account, not only when they arise from privity of contract, but also when they arise from adverse claims and title asserted by different persons.[2] Between landlord and tenant accounts often extend over a number of years where there are any special terms or stipulations in the lease requiring expenditures on one side and allowances on the other. In such cases, where there are any controverted claims, a resort to Courts of Equity is often necessary to a due adjustment of the respective rights of each party.[3]

§ 684. **Same.** — Mr. Fonblanque asserts that Courts of Equity when resorted to for the purpose of an account of mesne profits will in many cases consult the principle of convenience, and will therefore sometimes decree it where the party has not already established his right at law.[4] To some extent, as in cases of shareholders in real property of a peculiar nature (such as shareholders in the New River Water-works in England), he is borne

[1] Skeel *v.* Spraker, 8 Paige, R. 182; Patty *v.* Pease, 8 Paige, R. 277; post, §§ 855, 1640, where the marshalling of securities and priority as to contributions is more fully considered.

[2] See 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (*k*); Id. B. 1, ch. 1; Id. B. 1, ch. 1, § 3, note (*f*); Bac. Abridg. Accompt, B.

[3] O'Conner *v.* Spaight, 1 Sch. & Lefr. 305. See The King *v.* The Free Fishers of Whitstable, 7 East, R. 353, 356.

[4] 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*k*).

out by authority. But there is great reason to question whether the doctrine is generally admissible as a rule in equity resulting from mere convenience.[1] It seems rather to result from the peculiar character of the property where there are many proprietors in the nature of partners having a common title to the profits, and therefore the whole becomes appropriately a matter of account.[2]

§ 685. [**Mortgagee Liable to Account.** — The same rule requiring an accounting as between trustees, sureties, partners, tenants in common, and the like, applies equally to transactions and dealings between mortgagor and mortgagee. Ordinarily, and in the absence of an express agreement, the mortgagor is entitled to the possession and income from the mortgaged premises during the continuance of the debt and until its maturity, but where the mortgagee assumes to take possession before maturity of the debt, or after default, he is chargeable with the utmost of good faith in his dealings with the property and it is his duty to rent the property to the best advantage, and having done so, the mortgagor has the right to go into a court of equity and demand an accounting and settlement of his debt, and the mortgagee should be charged with the amount of rent which he has actually received, or which he might have received with the exercise of reasonable care and diligence. But if the mortgagee reduces the rent a dollar a month in order to keep the premises occupied, this is no evidence of want of due care.[3] The mortgagee is not indebted to the mortgagor at all where nothing was received from the property, although the mortgagee exercised due care to rent the property, and he failed to secure a tenant on account of the hostile attitude and threats made by the mortgagor.[4] It is, however, essential, before there is an accountability as mortgagee in posses-

[1] Townsend *v.* Ash, 3 Atk. 336. See Pulteney *v.* Warren, 6 Ves. 91, 92; Norton *v.* Frecker, 1 Atk. 524, 525.

[2] Adley *v.* Whitstable Comp. 17 Ves. 324; Lorimer *v.* Lorimer, 5 Madd. R. 369.

[3] Chapman *v.* Cooney, 25 R. I. 657, 57 Atl. 928; Watson *v.* Perkins, 88 Miss. 64, 40 So. 643; Walter *v.* Calhoun, 88 Kans. 801, 129 Pac. 1176; Harris *v.* Jones, 188 Ala. 633.

Mortgagee should keep premises in tenantable condition where he assumes charge, but he ought not to build a house upon the land without mortgagor's consent. But where he does, the mortgagor is not entitled to rent for the house. Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132; Howard *v.* Clark, 72 Vt. 429, 48 Atl. 656.

[4] La Forest *v.* Wm. L. Blake Co., 100 Me. 218, 60 Atl. 899. But mortgagee is chargeable with fair rental value where he has been negligent. Millis *v.* Day, 206 Mass. 530, 92 N. E. 803.

sion, that the possession must be taken under and by reason of the mortgage, or under such circumstances as would justify a court in treating the possession as being under the mortgage. So, where the first mortgagee entered as tenant of the administrator, and this tenancy was created in good faith, and not for the purpose of avoiding accountability for the rents, the junior mortgagee has no right to require the senior mortgagee to account.[1]]

§ 686. **Debtor Is Entitled to Accounting Where Execution Creditor Has Received Rents in Payment of Execution.** — But another class of cases is still more frequent, arising from tortious or adverse claims and titles.[2] Thus where a judgment creditor or a conusee of a recognizance or other statute security has had his execution levied upon the real estate of the judgment debtor or conusor, it may often be necessary to take an account of the rents and profits in order to ascertain whether, and when, the debt has been satisfied by a perception of those rents and profits.[3] At law the tenant under an elegit is not bound to answer in account except for the extended value. But in Courts of Equity, as the elegit is a mere security for the debt, the tenant will be compelled to account for the rents and profits which he has actually received, deducting of course all reasonable charges.[4]

§ 687. **Guardian or Trustee Entitled to Accounting as against a Trespasser.** — It is observable that in these cases of elegit there exists a privity in law, and there is an implied trust between the parties. In the ordinary cases of mesne profits, where a clear remedy exists at law, Courts of Equity will not interfere, but will leave the party to his remedy at law. Some special circumstances are therefore necessary to draw into activity the remedial interference of a Court of Equity;[5] and when these exist it will interfere, not only in cases arising under contract, but in cases arising under direct or constructive torts. Thus for instance if a man

[1] Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Attwood *v.* Warner, 92 Neb. 370, 138 N. W. 605.

Mortgagee in possession is liable to account to purchaser of equity of redemption for any rents received. Banks *v.* Walters, 95 Ark. 501, 130 S. W. 519.

[2] Bac. Abridg. Accompt, B. The gradual development of equity jurisdiction in cases of tort and mesne profits arising under contracts, trusts, and torts, is well stated in Bac. Abridg. Accompt, B.

[3] Yates *v.* Hambley, 2 Atk. 362, 363; Owen *v.* Griffith, Ambl. R. 520; s. c. 1 Ves. 250.

[4] Owen *v.* Griffith, 1 Ves. 250; Yates *v.* Hambley, 2 Atk. 362, 363. See 3 Black. Comm. 418 to 420; Taylor *v.* Earl of Abington, Doug. R. 472; Com. Dig. Execution, C. 14.

[5] Tilley *v.* Bridges, Prec. Ch. 252; 1 Eq. Abridg. 285.

intrudes upon an infant's lands and takes the profits, he is compellable to account for them, and will be treated as a guardian or trustee for the infant.[1] And this is but following out the rule of law in the like case; for so greatly does the law favor infants, that if a stranger enters into and occupies an infant's lands, he is compellable at law to render an account of the rents and profits, and will be chargeable as guardian or bailiff.[2]

§ 688. **Similar Cases Illustrated.** — Other cases may be easily put where a like remedial justice is administered in equity.[3] But in all these cases it will be found that there is some peculiar equitable ground for interference, such as fraud or accident or mistake, the want of a discovery, some impediment at law, the existence of a constructive trust, or the necessity of interposing to prevent multiplicity of suits.[4] It is perfectly clear that if there is a trust estate, and the cestui que trust comes into equity upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits.[5] So in the case of bond creditors who come in for a distribution of assets, they may have an account of rents and profits against the heir in equity; for it is clear that they have an equity, and yet they are without remedy at law.[6] So in the case of dower (of which more will presently

[1] Newburgh *v.* Bickerstaffe, 1 Vern. 295; Carey *v.* Bertie, 2 Vern. 342; Hutton *v.* Simpson, 2 Vern. 724; Lockey *v.* Lockey, Prec. Ch. 518, 129; 1 Eq. Abridg. 7 Pl. 10, 11; Id. 280, A.; Bennet *v.* Whitehead, 2 P. Will. 644; 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (*k*); Dormer *v.* Fortescue, 3 Atk. 129, 130.

[2] Littleton, § 124; Co. Litt. 89 *b*, 90 *a*; Pulteney *v.* Warren, 6 Ves. 88, 89; Com. Dig. Accompt, A. 2; Dormer *v.* Fortescue, 3 Atk. 129, 130; Curtis *v.* Curtis, 2 Bro. Ch. 628, 632; Townsend *v.* Ash, 3 Atk. 337; Phillips *v.* Stewart, 87 Mo. App. 486; Jacob Tome Inst. of Port Deposit *v.* Cruthers, 87 Md. 569, 40 Atl. 261.

[3] For example the case of a mortgagee in possession who must account for net rents and profits. Post, vol. 2, § 1016; Scruggs *v.* Memphis R. Co., 108 U. S. 368, 27 L. Ed. 756, 2 S. Ct. Rep. 780; Shepard *v.* Jones, 21 Ch. D. 469; Mayer *v.* Murray, 8 Ch. D. 424. The case of a deed set aside for actual fraud practised on the grantor may furnish another example. See Hack *v.* Norris, 46 Mich. 587. A purchaser who before completion of the purchase exercises acts of ownership over the land to be purchased must pay interest on the price pending delay in the completion of the sale, and this though the delay is caused by the vendor, and the land is not occupied, so that he does not derive rents or profits from it. Ballard *v.* Shutt, 15 Ch. D. 122. See Rhys *v.* Dare Ry. Co., L. R. 19 Eq. 93; Fludyer *v.* Cocker, 12 Ves. 25; Attorney-Gen. *v.* Christ Church, 13 Sim. 214.

[4] Sayer *v.* Pierce, 1 Ves. 232; Curtis *v.* Curtis, 2 Bro. Ch. R. 628, 632, 633; Tilley *v.* Bridges, Prec. Ch. 252.

[5] Dormer *v.* Fortescue, 3 Atk. 129; Coventry *v.* Hall, 2 Ch. Rep. 259.

[6] Curtis *v.* Curtis, 2 Bro. Ch. R. 628, 629, 633.

be said); if the widow is entitled to dower and her claim is merely upon a legal title, but she cannot ascertain the lands out of which she is dowable, and comes into equity for discovery and relief, she will be entitled to an account of the rents and profits upon having her title established.[1] So if an heir or devisee is compelled to come into equity for a discovery of title deeds and the ascertainment of his title, or to put aside some impediments to his recovery, there he will be entitled to an account of the rents and profits.[2]

§ 689. **Party in Possession of Property Is Liable to Account though the Title Originated in a Tort.** — Another case illustrative of the same doctrine as connected with torts, is where a recovery has been had in an ejectment brought to recover lands, and afterwards the plaintiff is prevented from enforcing his judgment by an injunction obtained on a bill brought by the tenant, who dies before the bill is finally disposed of. In such a case at law the remedy by an action of trespass for the mesne profits is gone by the death of the tenant, as actions of tort do not survive at law. But a Court of Equity will, in such a case, entertain a bill for an account of the mesne profits in favor of the plaintiff in ejectment, against the personal representatives of the tenant; for it is inequitable that his estate should receive the benefit and profits of the property of another person. It would be a reproach to equity if a man who has taken the property of another and disposed of it in his lifetime should, by his death, throw the proceeds into his own assets and leave the injured party remediless.[3] It is true that the death of the tenant cannot be treated as the case of an accident against which a Court of Equity will relieve.[4] But there seems the most manifest justice in holding that where property or its proceeds has come to the use of a party,

[1] Curtis *v.* Curtis, 2 Brown, Ch. R. 620; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*k*).

[2] Dormer *v.* Fortescue, 3 Atk. 124; Coventry *v.* Hall. 2 Ch. Rep. 259; Bennet *v.* Whitehead, 2 P. Will. 644; Pulteney *v.* Warren, 6 Ves. 88, 89.

The courts have inherent jurisdiction to enforce valid trusts and to require trustees to account, which may be exercised at the instance not only of the cestui que trust or those having a vested or even a contingent interest in remainder, but also, in proper case for the protection of others having an estate in reversion. Furniss *v.* Furniss, 148 App. Div. 211, 133 N. Y. Supp. 535; Barnes *v.* Gardner, 140 App. Div. 395, 125 N. Y. Supp. 433.

[3] Bishop of Winchester *v.* Knight, 1 P. Will. 407; Lansdowne *v.* Lansdowne, 1 Madd. R. 116.

[4] Pulteney *v.* Warren, 6 Ves. 88; Garth *v.* Cotton, 3 Atk. 755; s. c. 1 Ves. 524; Id. 546.

the mere fact that the title has originated in a tort should not prevent the party and his personal representatives from rendering an account thereof. And in truth this is but following out the principles now adopted in Courts of Law, where the action for a tort dies with the person, but the right of property in the thing or its proceeds survives against the personal representatives.[1]

§ 690. **Same.** — There is also another distinct ground which, although not always followed out by the Courts of Equity in England, is of itself sufficient to maintain the jurisdiction; and that is, that in these cases a discovery is sought, and if it is effectual, then, to prevent multiplicity of suits, the court ought to decree at once the payment of the mesne profits which have been thus ascertained.[2] But a definite and very satisfactory ground to maintain the jurisdiction in such cases is, that it is inequitable that a party who suspends the just operation of a suit or judgment by an injunction should thereby deprive the other party of his rights and profits belonging to the suit or judgment, if the merits turn out to be ultimately in favor of the latter. He ought, under such circumstances, to be compelled to put the plaintiff in the original suit in the same situation as if no such injunction had intervened.[3]

§ 691. **Tenant Who Has Committed Waste is Liable to Account.** — Cases of WASTE by tenants and other persons afford another illustration of the same doctrine.[4] Thus where one

[1] Hambley *v.* Trott, Cowp. R. 371; Lansdowne *v.* Lansdowne, 1 Madd. R. 116. There are recent statutes both in England and America which alter the common law in this respect; but this change has not taken away the original jurisdiction in equity.

[2] See Jesus College *v.* Bloom, 3 Atk. 262; s. c. Ambler, R. 54; Whitfield *v.* Bewit, 2 P. Will. 240; s. c. 3 P. Will. 267; Dormer *v.* Fortescue, 2 Atk. 282; s. c. 3 Atk. 124; Townsend *v.* Ash, 3 Atk. 336, 337.

[3] Pulteney *v.* Warren, 6 Ves. 88, 92.

[4] We here speak of legal waste; for, if the waste be equitable only, of course a remedy lies in equity. Lansdowne *v.* Lansdowne, 1 Madd. R. 116; Marquis of Ormond *v.* Kynersley, 5 Madd. R. 369 (*a*). An injunction to stay waste will lie in favor of one tenant in common against another. Hawley *v.* Clowes, 2 John. Ch. R. 122. Where timber is of a growth or in a state to make it good husbandry to cut it, this it seems may be done by a tenant without incurring liability, at least in this country. Drown *v.* Smith, 52 Maine, 141; Bond *v.* Lockwood, 33 Ill. 212. As to the law of England see Seagram *v.* Knight, L. R. 2 Ch. 628; s. c. 3 Eq. 398; Higginbotham *v.* Hawkins, L. R. 7 Ch. 676; Gent. *v.* Harrison, Johns. 517; Harcourt *v.* White, 6 Jur. N. S. 1087. And what shall be done with the same after it has been cut may raise a question for equity. As timber is not annual profit of the estate, it cannot be appropriated, or at any rate consumed further than is necessary, by the life tenant. It should be sold and the price invested in favor of the remainder-man, the annual interest being made payable to the tenant during the con-

held customary lands of a manor and opened a copper mine in the lands and dug the ore and sold great quantities of it in his lifetime, and then died and his heir continued digging and disposing of the ore in like manner, upon a bill brought against the executor for an account and against the heir also for an account, it was decided that the bill was maintainable both against the executor and the heir. Lord Cowper seems to have entertained the jurisdiction upon general principles, and especially upon the ground that the tenant was a sort of fiduciary of the lord; and it was against conscience that he should shelter himself or his representative from responsibility for a breach of trust in a Court of Equity.[1]

§ 692. **Same.** — This case has been supposed to have been decided upon the ground that, as to the executor, there was no remedy at law; and that, as to the heir, there was some fraud or concealment, and a necessity for a discovery; or that, as to him, an injunction was sought. Without some one of these ingredients it would be difficult to maintain the case in its apparent extent, for there would otherwise be a complete and perfect remedy at law. And in the later commentaries upon this case this has been the distinctive ground upon which its authority has been admitted.[2] Lord Hardwicke seems to have thought that it being the case of a mine might distinguish it from other cases of waste, as the digging of mines is a sort of trade; and then it would fall within the general doctrine as to an account in matters of trade.[3]

§ 693. **In Order to Maintain Jurisdiction for an Account, There Should be a Prayer for Injunction.** — Cases of waste by the cutting down of timber by tenants have given rise to questions of the same sort in regard to jurisdiction. In some of the cases upon this subject it seems to have been maintained that, although

tinuance of his estate, and then to the remainder-man. See Gent *v.* Harrison, Johns. 517. If the money is not invested, the proceeds are held in trust for the benefit of the inheritance, and equity will enforce the trust and require an account. Phillips *v.* Allen, 5 Allen, 85.

Equity may enjoin waste after a decree for partition. Bailey *v.* Hobson, L. R. 5 Ch. 180. And it may stay waste during the suit for partition. Coffin *v.* Loper, 25 N. J. Eq. 443; Lippincott *v.* Barton, 42 N. J. Eq. 272, 10 Atl. 884.

[1] Bishop of Winchester *v.* Knight, 1 P. Will. 407; s. c. 2 Eq. Abridg. 226.

[2] Pulteney *v.* Warren, 6 Ves. 89, 90; Jesus College *v.* Bloom, 3 Atk. 262; s. c. Ambler, R. 54.

[3] Jesus College *v.* Bloom, 3 Atk. 262; s. c. Ambler, R. 54; Story *v.* Lord Windsor, 2 Atk. 630; Sayer *v.* Pierce, 1 Ves. 232. But see Kingham *v.* Lee, 15 Sim. 396, as to Marquis of Ormond *v.* Kynersley.

the remedy for waste is ordinarily at law, yet if a discovery is wanted, that alone, if it turns out to be important and is obtained, will carry the ulterior jurisdiction to account in order to prevent multiplicity of suits;[1] a ground the sufficiency of which it seems difficult to resist upon general principles.[2] But other decisions, and those which are relied on as constituting the established doctrine of the court, are differently qualified, and seem to require, in order to maintain the jurisdiction for an account, that there should be a prayer for an injunction to prevent future waste.[3]

§ 694. **Same.** — Lord Hardwicke upon one occasion expounded this ground of jurisdiction very clearly (although he does not seem himself afterwards to have been satisfied with so limiting it[4]), and said: "Waste is a loss for which there is a proper remedy by action. In a Court of Law the party is not necessitated to bring an action of waste, but he may bring trover.[5] These are the remedies, and therefore there is no ground of equity to come into this court. For satisfaction of damages is not the proper ground for the court to admit of these sorts of bills, but the staying of waste; because the court presumes, when a man has done waste, he may do the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time for an account of the waste done. And it is upon this ground, to prevent multiplicity of suits, that this court will decree an account of waste done, at the same time with an injunction. Just like the case of a bill for a discovery of assets; an account may be prayed for at the same time. And though originally the bill was only brought for a discovery of assets, yet to prevent a multiplicity of suits the court will direct an account to be taken."[6] Now if this reasoning be well founded either in itself or upon the analogy of the case put of assets, it

[1] Whitfield *v.* Bewit, 2 P. Will. 240; Garth *v.* Cotton, 3 Atk. 756; s. c. 1 Ves. 524, 546; Lee *v.* Alston, 1 Bro. Ch. R. 194; Eden on Injunct. ch. 9. p. 206, &c.

[2] See Barker *v.* Dacie, 6 Ves. 688; Jeremy on Eq. Jurisd. B. 3, Pt. 2. ch. 5, p. 510.

[3] See Pulteney *v.* Warren, 6 Ves. 89, 90; Gherson *v.* Eyre, 9 Ves. 89; Richards *v.* Noble, 3 Meriv. R. 673. But see Lansdowne *v.* Lansdowne, 1 Madd. R. 116; Eden on Injunct. ch. 9, p. 206, &c. Higginbotham *v.* Hawkins, L. R. 7 Ch. 676. See Birch-Wolfe *v.* Birch, L. R. 9 Eq. 683.

[4] See Garth *v.* Cotton, 3 Atk. 756; s. c. 1 Ves. 524, 546.

[5] Or an action for money had and received if the timber is sold. Gent *v.* Harrison, Johns. 517.

[6] Jesus College *v.* Bloom, Ambler, R. 54; s. c. 3 Atk. 262; Pulteney *v.* Warren, 6 Ves. 89; Bishop *v.* Church, 2 Ves. 104; Yates *v.* Hambley, 2 Atk. 362; Watson *v.* Hunter, 5 John. Ch. R. 169; Smith *v.* Cooke, 3

goes clearly to show that where discovery is sought and is obtained, there also, to prevent multiplicity of suits, an account ought to be decreed without the additional ingredient of an injunction to stay future waste. And Lord Thurlow seems to have acted upon this ground.[1]

§ 695. **The English Doctrine in Regard to Tithes Stated.** — In regard to TITHES also, and incidentally to MODUSES and

Atk. 381. It may be said that on a bill for a discovery of assets an account is necessary to ascertain the assets; and when taken, the court ought to proceed to decree satisfaction in order to prevent multiplicity of suits. But precisely the same thing may occur on a bill for an account of waste. Before the waste can be ascertained it may be indispensable to have an account; and when taken, the court ought to proceed to decree satisfaction. In Jesus College *v.* Bloom (Ambl. R. 54), the term was gone by an assignment to another tenant, and no injunction was asked as to future waste.

[1] Lee *v.* Alston, 1 Bro. Ch. R. 194, 195; s. c. 1 Ves. Jr. 78. See also Eden on Injunct. ch. 9, p. 206, &c., 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*). It seems clear that there may be cases of waste over which equity will assume jurisdiction on a bill for an account though there be no prayer for injunction against future waste. But the jurisdiction in such a case is founded, it seems, on the demand for an account; and it may be denied where the bill does not make a proper case for an account in accordance with the general principles of equity relating to that subject. It seems that if the bill fail in this respect, it will not help the case that at one stage of the wrong the situation was such as to have justified an injunction at that time. In Morris *v.* Morris, 3 DeG. & J. 323, a tenant for life without impeachment for waste pulled down the mansion house of the estate and built a better, in a more desirable situation, upon the premises. Those entitled in remainder filed a bill for an account of waste; but on proof that the bulk of the materials of the old house had been used in building the new, and no evidence that any of the old materials had been sold, the bill was held to have been properly dismissed. But the opinion was expressed that if the materials of the old house had been sold, a bill for an account would have been proper. See also Morris *v.* Morris, 15 Sim. 505; Leeds *v.* Amherst, 2 Phil. 117; Micklethwait *v.* Micklethwait, 1 DeG. & J. 504.

That an injunction is maintainable to restrain equitable waste — waste which a prudent man would not commit in the management of his own estate — is clear, though the tenant is "not impeachable of waste", which means legal waste. Turner *v.* Wright, Johns. 740; s. c. 6 Jur. (N. S.) 809; Ib. 647; Gent. *v.* Harrison, Johns. 517; Baker *v.* Sebright, 13 Ch. D. 179; Micklethwait *v.* Micklethwait, 1 DeG. & J. 504. The reason is that the tenant is using his legal powers unfairly. Baker *v.* Sebright. Whether such proceeding may be had over unpermitted legal waste is not so clear. See the first two cases just cited, and see Jurist, July 12, 1860, where, doubting Turner *v.* Wright, supra, it is maintained that there is no distinction in principle between legal and equitable waste concerning the right of equity to interfere by injunction, and that a tenant for life should be restrained from committing either.

Equity will enjoin waste by a mortgagor if alleged to be such as will impair the security. Coker *v.* Whitlock, 54 Ala. 180; King *v.* Smith, 2 Hare, 244.

other compositions, Courts of Equity in England exercise an extensive jurisdiction of an analogous nature.[1] There is a very ancient jurisdiction in the Court of Exchequer in the matter of tithes. Lord Nottingham is said to have stated that the jurisdiction in the Exchequer over tithes by bill in equity is not earlier than the reign of Henry VIII., and that it took its rise from the statute of augmentations in his reign (33 Hen. VIII. ch. 39).[2] But other persons assert that it had a more early origin; and in respect to extra-parochial tithes, which are a part of the ancient inheritance of the Crown, they insist that suits for tithes must always have fallen within the compass of the direct and substantial jurisdiction of the Court of Exchequer, as a Court of Revenue, and that the proper jurisdiction of tithes belongs there.[3] Be this as it may, the jurisdiction of the Court of Chancery over the same subject seems to have been of a much later origin, or at least to have been matter of doubt and controversy to a much later period, the jurisdiction not having been firmly established until after the restoration of Charles II.[4] The Court of Chancery has ever since been held to have a concurrent jurisdiction with the Court of Exchequer.[5] This concurrent jurisdiction in both courts is now generally considered to be merely incidental and collateral, arising from the general equitable jurisdiction of these courts in matters of account and in compelling a discovery.[6] And therefore wherever the right to tithes is clearly established, an account is consequential; for it would be otherwise impossible to give full effect to that right unless upon a discovery and account.[7] If the right is disputed, it must be first ascertained at law before an account will be decreed.[8] Indeed it may be truly said that in all matters of tithes a Court of Equity is far more competent than a Court of Law to administer an appropriate remedy.[9]

[1] Com. Dig. Chancery, 3 C., Id. Dismes. M. 13; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 1.

[2] Harg. note to Co. Litt. 159 *a*, note 290; Anon. 1 Freem. R. 303.

[3] Harg. note to Co. Litt. 159 *a*, note 290; Anon. 1 Freem. R. 303, Hardcastle *v.* Smithson, 3 Atk. 247.

[4] Ibid.; Anon. 1 Freem. R. 203; Anon. 2 Ch. Cas. 337; s. c. 2 Freem. R. 27; 1 Madd. Ch. Pr. 84.

[5] Bacon, Abridg. Tythes, B. 6; Com. Dig. Chancery, 3 C., Id. Dismes, M. 13.

[6] 3 Black. Comm. 437; Co. Litt. 159 *a*, Hargrave's note, 290; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 510, 511.

[7] Foxcraft *v.* Parris, 5 Ves. 221; 1 Madd. Ch. Pr. 84 to 88; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 510, 511.

[8] Ibid.; Hughes *v.* Davies, 5 Sim. R. 349.

[9] Mitford, Pl. Eq. by Jeremy, 125; Pulteney *v.* Warren, 6 Ves. 89.

§ 696. **Same.** — Courts of Equity in England will not only enforce an account in cases of tithes, but they will also exercise jurisdiction to establish a modus or composition in cases where the party insisting on the modus has been disturbed by proceedings at law, or in equity, or in the Ecclesiastical Courts as to tithes, but not otherwise. The peculiarities belonging to the law of tithes, and the doctrines respecting moduses, are the less important to be dwelt on in this place because they do not in any important manner illustrate any of the general doctrines of equity; but they turn upon considerations eminently of an ecclesiastical nature, and are more suitable for a general treatise on tithes.[1]

§ 697. **Other Cases of Account.** — Having passed under review some of the principal heads of equity jurisdiction in matters of account which do not require a very elaborate examination or belong to subjects which peculiarly illustrate the nature of it, we may conclude this examination with some few matters which appropriately belong to the head of Account, and are incident to the exercise of this remedial jurisdiction in all its forms.

§ 698. **In Bills in Equity for an Account, Both Parties are Deemed Actors.** — In the first place in all bills in equity for an account both parties are deemed actors when the cause is before the court upon its merits. It is upon this ground that the party defendant, contrary to the ordinary course of equity proceedings, is entitled to orders in a cause to which a plaintiff alone is generally entitled. As for instance in such a case a defendant may have an order for a ne exeat regno even against a co-defendant.[2] So it is a general rule that no person but a plaintiff can entitle himself to a decree. But in bills for an account, if a balance is ultimately found in favor of the defendant, he is entitled to a decree for such balance against the plaintiff. And for a like reason, although a defendant cannot ordinarily revive a suit which has not proceeded to a decree, yet in a bill for an account, if the plaintiff dies after an interlocutory decree to account, the defendant is entitled to revive the suit against the personal representatives of the plaintiff.[3]

[1] Earl of Coventry *v.* Burslen, 2 Anst. R. 567, note; Gordon *v.* Simpkinson, 11 Ves. 509; Stawell *v.* Atkyns, 2 Anst. R. 564; 1 Madd. Ch. Pr. 202; Mayor of York *v.* Pilkington, 1 Atk. 282, 283; Warden &c. of St. Paul's *v.* Morris, 9 Ves. 155. See also Whaley *v.* Dawson, 2 Sch. & Lefr. 370, 371; Daws *v.* Benn, 1 Jac. & Walk. 493.

[2] Done's Case, 1 P. Will. 263.

[3] 1 Eq. Abridg. 3 Pl. 5; Anon. 3 Atk. 691, 692; Ludlow *v.* Simond, 2 Cain. Cas. Err. 39; Lord Stowell *v.* Cole, 2 Vern. 219, and Mr. Raithby's note; Harwood *v.* Schmedes, 12 Ves. 316; Sowles *v.* Hall, 73 Vt. 55, 50 Atl. 550.

And if the defendant dies, his personal representatives may revive the suit against the plaintiff.[1] The good sense of the doctrine seems to be that wherever a defendant may derive a benefit from further proceedings, whether before or after a decree, he may be said to have an interest in it, and consequently ought to have a right to revive it.[2]

§ 699. **Matters of Defence Peculiar to Account.** — In the next place there are some matters of defence either peculiarly belonging to cases of account or strikingly illustrative of some of the principles already alluded to under the head of Accident, Mistake, or Fraud. Thus it is ordinarily a good bar to a suit for an account, that the parties have already in writing stated and adjusted the items of the account and struck the balance.[3] In such a case a Court of Equity will not interfere; for under such circumstances an indebitatus assumpsit upon an insimul computassent lies at law, and there is no ground for resorting to equity. If therefore there has been an account stated, that may be set up by way of plea as a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a Court of Equity.[4] But if there has been any mistake, or omission, or accident, or fraud, or undue advantage by which the account stated is in truth vitiated and the balance is incorrectly fixed, a Court of Equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined.[5] In some

[1] Kent *v.* Kent, Prec. Ch. 197.

[2] Williams *v.* Cooke, 10 Ves. 406; Harwood *v.* Schmedes, 12 Ves. 311, 316.

[3] Dawson *v.* Dawson, 1 Atk. 1; Taylor *v.* Haylin, 2 Bro. Ch. R. 310; Johnson *v.* Curtis, cited 2 Bro. Ch. R. 310, Mr. Belt's note; s. c. 3 Bro. Ch. 266, and Mr. Belt's note; Burk *v.* Brown, 2 Atk. 397, 399; Sumner *v.* Thorpe, 2 Atk. 1; Story on Equity Plead. §§ 798 to 802. As in the case of a fair compromise between partners. Harrison *v.* Dewey, 46 Mich. 173.

[4] Dawson *v.* Dawson, 1 Atk. 1; Anon. 2 Freeman, R. 62; Chambers *v.* Goldwin, 9 Ves. 265, 266; Taylor *v.* Hayling, 1 Cox, R. 435; s. c. 3 Bro. Ch. R. 310; Chappedelaine *v.* Dechenaux, 4 Cranch, R. 306; Perkins *v.* Hart, 11 Wheat. R. 237; Story on Equity Plead. §§ 798 to 802.

[5] A settled account between client and attorney, or between other persons standing in confidential relations to each other, will be more readily opened than any others; and even it is said upon general allegations of error, without any specific errors being pointed out, where the answer admits errors. Matthews *v.* Wolwyn, 4 Ves. 125; Newman *v.* Payne, 2 Ves. Jr. 199. See also Beaumont *v.* Boultbee, 5 Ves. 485; Story on Equity Plead. § 800; La Trobe *v.* Hayward, 13 Fla. 190; Shirk's Appeal, 3 Brewst. 119; Paulling *v.* Creagh, 54 Ala. 646; Williamson *v.* Barbour, 9 Ch. D. 529; Chatham *v.* Niles, 36 Conn. 403; Floyd *v.* Priester, 8 Rich. Eq. 248; Bankhead *v.* Alloway, 6 Cold. 56. Where accounts

cases, as of gross fraud, or gross mistake, or undue advantage or imposition, made palpable to the court, it will direct the whole account to be opened and taken de novo.[1] In other cases, where the mistake, or omission, or inaccuracy, or fraud, or imposition is not shown to affect or stain all the items of the transaction, the court will content itself with a more moderate exercise of its authority.[2] It will allow the account to stand with liberty to the plaintiff to surcharge and falsify it; the effect of which is to leave the account in full force and vigor as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes.[3] Some-

are impeached and it is shown that they contain errors of considerable extent in number and amount, the court, whether the errors are due to mistake or fraud, will order the accounts to be opened though they extend over many years, and will not merely give leave to surcharge and falsify. And if a fiduciary relation, such as principal and agent, exist, the court will make a similar order where the accounts contain a less number of errors or any fraudulent entries. Williamson *v.* Barbour, supra. If an account is opened, errors on both sides may be corrected. Floyd *v.* Priester, 8 Rich. Eq. 248.

For a single error, without fraud, an account will not be opened entirely, though the error is important, but liberty to surcharge and falsify will be granted. Gething *v.* Keighley, 9 Ch. D. 547, Jessel M. R. But see Taylor *v.* Haylin, 2 Bro. C. C. 310; Coleman *v.* Mellersh, 2 Macn. & G. 309; Pritt *v.* Clay, 6 Beav. 503, where accounts were allowed to be opened for a single error.

Where both parties have equal knowledge of the facts, and precise accuracy is not contemplated, the settlement will not be opened for an unimportant error. Hamilton Woollen Co. *v.* Goodrich, 6 Allen, 191. See Harrison *v.* Dewey, 46 Mich. 173; Hager *v.* Thomson, 1 Black, 80; Bankhead *v.* Alloway, 6 Cold. 56. If however the parties are not on equal footing in settling the account, equity will more readily open it and often disregard it entirely; as where the subject-matter of an account grows out of the relation of attorney and client. Kennedy *v.* Brown, 13 C. B. (N. S.) 677.

Montgomery *v.* Fritz, 7 N. Dak. 348, 75 N. W. 266; State *v.* Illinois Central R. R. Co., 246 Ill. 188, 92 N. E. 814; Batson *v.* Findley, 52 W. Va. 343, 43 S. E. 142; Chapman *v.* Liverpool Salt & Coal Co., 57 W. Va. 395, 50 S. E. 601; Fordyce *v.* Dillaway, 212 Mass. 404, 99 N. E. 166; Stiebel *v.* Lissberger, 166 App. Div. 164, 151 N. Y. Supp. 822.

The chancery rules with reference to surcharging or falsifying an account apply only where an account has been stated between the parties, or where something legally equivalent has been done. Jackson *v.* White, 188 Fed. 775, 110 C. C. A. 481, 194 Fed. 677.

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Vernon *v.* Vawdry, 2 Atk. 119; Barrow *v.* Rhinelander, 1 John. Ch. R. 550; Piddock *v.* Brown, 3 P. Will. 288; Wharton *v.* May, 5 Ves. 27, 48, 49; Story on Equity Plead. §§ 800 to 802.

[2] Ibid.; Johnson *v.* Curtis, 2 Bro. Ch. R. 310, Mr. Belt's note; s. c. 3 Bro. Ch. R. 266, Mr. Belt's note.

[3] Pitt *v.* Cholmondeley, 2 Ves. 565, 566; Perkins *v.* Hart, 11 Wheat. R. 237; Story on Equity Plead. §§ 801, 802.

times a still more moderate course is adopted, and the account is simply opened to contestation as to one or more items which are specially set forth in the bill of the plaintiff as being erroneous or unjustifiable; and in all other respects it is treated as conclusive.[1]

§ 700. **Procedure before Master in Chancery.** — When upon a bill to open a stated account liberty is given to surcharge and falsify, the cause is referred to a master. The examination of the account then takes place before him, and upon his report the court finally acts; for in matters of account it never acts directly, but only through the instrumentality of a master, by whom the whole matter is thoroughly sifted. The liberty to surcharge and falsify includes not only an examination of errors of fact, but of errors of law.[2]

§ 701. **"Surcharge" and "Falsify" Defined.** — These terms, "surcharge" and "falsify", have a distinct sense in the vocabulary of Courts of Equity a little removed from that which they bear in the ordinary language of common life. In the language of common life we understand "surcharge" to import an overcharge in quantity, or price, or value, beyond what is just, correct, and reasonable. In this sense it is nearly equivalent to "falsify"; for every item which is not truly charged as it should be is false, and by establishing such overcharge it is falsified. But in the sense of Courts of Equity these words are used in contradistinction to each other. A surcharge is appropriately applied to the balance of the whole account, and supposes credits to be omitted which ought to be allowed. A falsification applies to some item in the debits, and supposes that the item is wholly false, or in some part erroneous. This distinction is taken notice of by Lord Hardwicke, and the words used by him are so clear that they supersede all necessity for further commentary. "Upon a liberty to the plaintiff to surcharge and falsify," says he, "the onus probandi is always on the party having that liberty; for the court takes it as a stated account and establishes it. But if any

[1] Brownell *v.* Brownell, 2 Bro. Ch. R. 62, 63; Consequa *v.* Fanning, 3 John. Ch. R. 587; s. c. 17 John. R. 511; Twogood *v.* Swanston, 6 Ves. 484, 486; Paulling *v.* Creagh, 54 Ala. 646.

[2] Roberts *v.* Kuffin, 2 Atk. 112; Daniell *v.* Sinclair, 6 App. Cas. 181. There is no imperative rule of chancery practice that requires the case to be submitted to a master for the stating of the account. Glover *v.* Jones, 95 Me. 303, 49 Atl. 1104; Davis *v.* Hofer, 38 Oreg. 150, 63 Pac. 56; Darby *v.* Gilligan, 43 W. Va. 755, 28 S. E. 737. Or the account may be taken by the court itself, without reference to a master. McCarthy *v.* Gordon, 211 Mass. 115, 97 N. E. 88; Fox *v.* Hall, 164 Cal. 287, 128 Pac. 749.

of the parties can show an omission for which credit ought to be, that is a *surcharge;* or if anything is inserted that is a wrong charge, he is at liberty to show it, and that is a *falsification.* But that must be by proof on his side. And that makes a great difference between the general cases of an open account, and where [leave is given] only to surcharge and falsify; for such must be made out." [1]

§ 702. **What is Sufficient as an Account Stated.** — What shall constitute in the sense of a Court of Equity a stated account, is in some measure dependent upon the particular circumstances of the case. An account in writing examined and signed by the parties will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause that errors are excepted.[2] But in order to make an account a stated account, it is not necessary that it should be signed by the parties.[3] It is sufficient if it has been examined and accepted by both parties. And this acceptance need not be express, but may be implied from circumstances.[4] Between merchants at home, an account which has been presented and no objection made thereto after the lapse of several posts is treated under ordinary circumstances as being by acquiescence a stated account.[5] Between merchants in different countries, a rule founded in similar considerations prevails. If an account has been transmitted from the one to the other, and no objection is made after several opportunities of writing have occurred, it is treated as an acquiescence in the correctness of the account transmitted, and therefore it is deemed a stated account.[6] In truth in each case the rule admits or rather requires the same

[1] Pitt *v.* Cholmondeley, 2 Ves. 565, 566. See also Perkins *v.* Hart, 24 U. S. 237, 6 L. Ed. 463.

[2] See Johnson *v.* Curtis, cited 2 Brown, Ch. R. 310; 3 Brown, Ch. R. 266, and Mr. Belt's notes.

[3] Willis *v.* Jernegan, 2 Atk. 251, 252. [4] Ibid.

[5] Sherman *v.* Sherman, 2 Vern. 276; s. c. 1 Eq. Abridg. 12, Pl. 10, 11; Irving *v.* Young, 1 Sim. & Stu. 333; Wiggins *v.* Burkam, 77 U. S. 129, 19 L. Ed. 884.

[6] Willis *v.* Jernegan, 2 Atk. 252; Tikel *v.* Short, 2 Ves. R. 239; Murray *v.* Toland, 3 John. Ch. R. 569, 575; Freeland *v.* Heron, 11 U. S. 147, 3 L. Ed. 297; Watkins *v.* Ford, 69 Mich. 357, 37 N. W. 300; Charlesworth *v.* Whitlow, 74 Ark. 277, 85 S. W. 423.

An account stated must be based upon previous dealings and transactions between the parties, and while it is not necessary, in order to support a count upon account stated, to show the nature of the original debt, or to prove the specific items constituting the account, it must appear that at the time of the accounting there had been previous transactions and dealings between the parties of and concerning which an account was stated. Daytona Bridge Co. *v.* Bond, 47 Fla. 136, 36 So. 445.

general exposition. It is, that an account rendered shall be deemed an account stated from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time. That reasonable time is to be judged of in ordinary cases by the habits of business at home and abroad; and the usual course is required to be followed, unless there are special circumstances to vary it or to excuse a departure from it.[1]

§ 703. **A Settled Account Is Deemed Conclusive between the Parties in Absence of Fraud or Mistake.** — Upon like grounds a fortiori a settled account will be deemed conclusive between the parties, unless some fraud, mistake, omission, or inaccuracy is shown.[2] For it would be most mischievous to allow settled accounts between the parties, especially where vouchers have been delivered up or destroyed, to be unravelled unless for urgent reasons and under circumstances of plain error which ought to be corrected.[3] And in cases of settled accounts the court will not

Where a statement of account is signed, subject to errors hereafter to be found, makes it a stated account. Wonderly *v.* Christian, 91 Mo. App. 158.

Account stated need not necessarily be in writing. Lallande *v.* Brown, 121 Ala. 513, 25 So. 997.

In the absence of an express promise, acquiescence at least must be shown (Christian & Craft Grocery Co. *v.* Hill, 122 Ala. 490, 26 So. 149); and it is sufficient if the acknowledgment of the debt is made to creditor's attorney. It is only necessary that there be an acknowledgment, express or implied, by the party to be charged. Leiser *v.* McDowell, 69 App. Div. 444, 74, N. Y. Supp. 1021.

It is not enough to constitute an account stated that it may contain some items conceded to be correct, when at the same time the account as a whole is in dispute. King *v.* Machesney, 88 Ill. App. 341.

Silence and failure to object to an account, prepared by an accountant at the instance of both parties, is an acceptance (Leinbach *v.* Wolle, 211 Pa. 629, 61 Atl. 248); or where one looks at the book in which the original entries are made, examines the account and makes no objection to it, it becomes an account stated. Raub *v.* Nisbett, 118 Mich. 248, 76 N. W. 393, 5 Detroit Leg. N. 488.

Parties must understand that the account as rendered is a just, complete statement of debt, and their minds must meet upon this point. Haish *v.* Dillon, 71 Neb. 290, 98 N. W. 818.

[1] Wiggins *v.* Burkam, 10 Wall. 129; Lockwood *v.* Thorne, 11 N. Y. 170; s. c. 18 N. Y. 285; Towsley *v.* Denison, 45 Barb. 490; Mansell *v.* Payne, 18 La. Ann. 124.

[2] Lockwood *v.* Thorne, 11 N. Y. 170; s. c. 18 N. Y. 285; Harrison *v.* Dewey, 46 Mich. 173; Bull *v.* Harris, 31 Ill. 487; Sutphen *v.* Cushman, 35 Ill. 186; Town *v.* Wood, 37 Ill. 512; Dickinson *v.* Lewis, 34 Ala. 638; Badger *v.* Badger, 2 Cliff. 137. Charges of fraud should be specific. Badger *v.* Badger.

[3] Wier *v.* Tucker, L. R. 14 Eq. 25, 30; Brownell *v.* Brownell, 2 Bro.

generally open the account, but will at most only grant liberty to surcharge and falsify unless in cases of apparent fraud.[1]

§ 704. **Acquiescence in a Stated Account Does Not, Alone, Establish the Fact of Its Having Been Settled.** — In regard to acquiescence in stated accounts, although it amounts to an admission or presumption of their correctness, it by no means establishes the fact of their having been settled, even though the acquiescence has been for a considerable time. There must be other ingredients in the case to justify the conclusion of a settlement.[2]

§ 705. **Courts of Equity Refuse to Interfere in Actions of Account after a Considerable Lapse of Time.** — It is too a most material ground, in all bills for an account, to ascertain whether they are brought to open and correct errors in the account recenti facto, or whether the application is made after a great lapse of time. In cases of this sort, where the demand is strictly of a legal nature or might be cognizable at law, Courts of Equity govern themselves by the same limitations as to entertaining such suits as are prescribed by the Statute of Limitations in regard to suits in Courts of Common Law in matters of account. If therefore the ordinary limitation of such suits at law be six years, Courts of Equity will follow the same period of limitation.[3] In so doing they do not act in cases of this sort (that is, in matters of concurrent jurisdiction) so much upon the ground of analogy to the Statute of Limitations as positively in obedience to such statute.[4] But where the demand is not of a legal nature but is purely equitable, or where the bar of the statute is inapplicable, Courts of Equity have another rule, founded sometimes upon the analogies of the law, where such analogy exists, and sometimes

Ch. R. 62; Taylor *v.* Haylin, 2 Bro. Ch. R. 310; Johnson *v.* Curtis, cited 2 Bro. Ch. R. 310; s. c. 3 Brown, Ch. R. 266, Mr. Belt's notes; Chambers *v.* Goldwin, 8 Ves. 837, 838; Pitt *v.* Cholmondeley, 2 Ves. 566; State *v.* Illinois Central R. R. Co., 246 Ill. 188, 92 N. E. 814; Leidigh *v.* Keever, 2 Neb. 345, 96 N. W. 106; Long-Bell Lumber Co. *v.* Stump, 86 Fed. 574, 30 C. C. A. 260; Bergen *v.* Hitchings, 22 App. Div. 395, 48 N. Y. Supp. 96; Gordon *v.* Frazer, 13 App. D. C. 382.

[1] Vernon *v.* Vawdry, 2 Atk. 119; Chambers *v.* Goldwin, 8 Ves. 265, 266; Drew *v.* Power, 1 Sch. & Lefr. 192.

[2] Lord Clancarty *v.* Latouche, 1 B. & Beatt. R. 428; Irving *v.* Young, 1 Sim. & Stu. 333; Peebles *v.* Yates, 88 Miss. 289, 40 So. 996.

[3] Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 629; Smith *v.* Clay, 3 Brown, Ch. R. 639, n.; Randel *v.* Ely, 3 Brewst. 270; German Seminary *v.* Keifer, 43 Mich. 105.

[4] Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 629, 630, 631; Spring *v.* Gray, 5 Mason, R. 527, 528; Sherwood *v.* Sutton, 5 Mason, R. 143, 146; ante, § 55 *a*.

upon its own inherent doctrine not to entertain stale or antiquated demands, and not to encourage laches and negligence.[1] Hence in matters of account, although not barred by the Statute of Limitations, Courts of Equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, "Vigilantibus, non dormientibus, jura subveniunt."[2] Under peculiar circumstances however, excusing or justifying the delay, Courts of Equity will not refuse their aid in furtherance of the rights of the party, since in such cases there is no pretence to insist upon laches or negligence as a ground for dismissal of the suit.[3]

[1] Sherman *v.* Sherman, 2 Vern. R. 576; s. c. 1 Eq. Abridg. 12; Bridges *v.* Mitchell, Bunb. 217; s. c. Gilb. Eq. R. 217; Foster *v.* Hodgson, 19 Ves. 180, 184; Sturt *v.* Mellish, 2 Atk. 610; Pomfret *v.* Lord Windsor, 2 Ves. 472, 476, 477; Bond *v.* Hopkins, 1 Sch. & Lefr. 428; Smith *v.* Clay, Amb. R. 647; 3 Bro. Ch. R. 639, note; Stackhouse *v.* Barnston, 10 Ves. 466, 467; Moore *v.* White, 6 John. Ch. R. 360; Rayner *v.* Pearsall, 3 John. Ch. R. 578; Ray *v.* Bogart, 2 John. Cas. 432; Ellison *v.* Moffat, 1 John. Ch. R. 46; Sherwood *v.* Sutton, 4 Mason, R. 143, 146; Robinson *v.* Hook, 4 Mason, R. 139, 150, 152; Piatt *v.* Vattier, 9 Peters, R. 405; Willison *v.* Watkins, 3 Peters, R. 44; Miller *v.* McIntire, 6 Peters, R. 61, 66; 1 Fonbl. Eq. B. 1, ch. 4, § 27, and notes; Brownell *v.* Brownell, 2 Bro. Ch. R. 62.

[2] 1 Fonbl. Eq. B. 1, ch. 4, § 27, and notes; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 549, 550; 1 Madd. Ch. Pr. 79, 80; Holtscomb *v.* Rivers, 1 Ch. Cas. 127. Mr. Fonblanque's collection of principles and authorities to illustrate this doctrine is very comprehensive, and characterized by his usual acuteness and strong sense. 1 Fonbl. Eq. B. 1, ch. 4, § 27, and notes. Mr. Jeremy also upon this subject has given us a very ample and discriminating collection of authorities. Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 549, 550.

[3] Lopdell *v.* Creagh, 1 Bligh (N. S.), 255.

CHAPTER IX

SUBROGATION

§ 706. [**The Nature of Subrogation.** — The doctrine of subrogation is derived from the civil law, and has been adopted by our Courts of Equity. It is treated as a creature of equity, and administered so as to secure real and essential justice without regard to form, and is independent of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it would work any injustice to others.[1] The doctrine of subrogation rests on the principle of equity, and privity of contract is not necessary to its support. It requires (1) that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; (2) and in doing this he must not act as a volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in case of sureties, prior mortgages, and the like.[2] Subrogation is either legal, — that is, given by the law, — or it arises out of convention or contract. Legal subrogation is allowed only in cases where the person advancing money to pay the debt of a third person stands in the situation of a surety or is compelled to pay the debt to protect his own rights. Conventional subrogation results from an agreement, made either with the debtor or the creditor, that the person paying shall be subrogated.[3]]

[1] M'Neil *v.* Miller, 29 W. Va. 480, 2 S. E. 335; Journal Pub. Co. *v.* Barber, 165 N. C. 478, 81 S. E. 694.

[2] Tarver *v.* Land Mortgage Bank, 7 Tex. Civ. App. 425, 27 S. W. 40.

[3] First Natl. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333; Kocher *v.* Kocher, 56 N. J. Eq. 547, 39 Atl. 536.

§ 707. [**Meaning of the Doctrine.** — Subrogation is the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all of the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor in the same rank with himself. To entitle a party to subrogation, his equity must be strong and his case clear. It is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may then be made whole. For instance, a partner who retires from the firm, and for a valuable consideration is indemnified by the remaining partners against all debts and liabilities of the firm, will in equity be considered a surety for them, and subrogated to the rights of a creditor to whom he has been compelled to pay a firm debt.[1] There can be no right of subrogation in one whose duty it is to pay, or in one claiming under him against one who is secondarily liable, or one not liable at all. In such a case payment is extinguishment. Nor will subrogation ever be enforced where the equities are equal, or the rights not clear, nor to the prejudice of the legal or equitable rights of others.[2] Subrogation is the substitution of one person in place of another, where as a creditor or the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities. The party subrogated requires no greater rights than those of the party for whom he is substituted.[3]]

§ 708. [**Doctrine Is Not Applicable to All Cases.** — The doctrine of subrogation does not apply every time when a surety has discharged a debt which another ought to pay, for after all equity requires that one should do what in good conscience he ought to do, and having done this it affords him no right to inflict a needless hardship upon the rights of others. The right of subrogation is primarily a doctrine of equity, and when the surety has ob-

[1] Sands Admr. *v.* Durham, 98 Va. 392, 36 S. E. 472, 54 L. R. A. 614. Generally, this case was reversed, 99 Va. 263, 3 Va. Sup. Ct. 189, 38 S. E. 145, 54 L. R. A. 614, 86 Am. St. Rep. 884.

[2] Grand Council Royal Arcanum *v.* Cornelius, 198 Pa. 46, 47 Atl. 1124.

[3] Leavitt *v.* Canadian Pacific Ry. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152; Brown *v.* Rouse, 125 Cal. 645, 58 Pac. 267; Fuller *v.* John S. Davis' Sons Co., 184 Ill. 505, 56 N. E. 791; Mansfield *v.* New York, 165 N. Y. 208, 58 N. E. 889; Swarts *v.* Siegel, 117 Fed. 13, 54 C. C. A. 399.

tained otherwise all that this right could possibly secure to him, he is not injured, and therefore is not discharged.[1] For instance, the purchaser of school bonds upon the open market is a volunteer and not entitled to subrogation as against the original holders.[2]]

§ 709. **The Right of Sureties to Subrogation.** — Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities.[3] Courts of Equity have gone further in their favor, and held them entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities both of a legal and an equitable nature which the creditor has taken as an additional pledge for his debt.[4] Thus for example

[1] Marshall *v.* Dixon, 82 Ga. 435, 9 S. E. 167.

[2] Beardsley *v.* Lampasas, 127 Fed. 819, 62 C. C. A. 126; O'Brien *v.* Wheelock, 78 Fed. 673.

But see Irvine in Board of Comrs. 75 Fed. 765.

[3] See Theobald on Principal and Surety, ch. 11, § 283; Swain *v.* Wall, 1 Ch. Rep. 149. But see Bowditch *v.* Green, 3 Metc. R. 360; Himes *v.* Keller, 3 Watts & Serg. R. 401; Commercial Bank of Lake Erie *v.* Western Reserve Bank, 11 Ohio (Stanton) R. 444; Wiggin *v.* Dorr, 3 Sumner, R. 410; Steel *v.* Dixon, 17 Ch. D. 825, 831; Guild *v.* Butler, 127 Mass. 386; Newton *v.* Chorlton, 10 Hare, 646; Forbes *v.* Jackson, 19 Ch. D. 615, 620; Wooldridge *v.* Norris, L. R. 6. Eq. 410; Fishback *v.* Weaver, 34 Ark. 569, 580; Gilbert *v.* Neely, 35 Ark. 24; Miller *v.* Sawyer, 30 Vt. 412; Hall *v.* Robinson, 30 N. C. 56; Leary *v.* Cheshire, 56 N. C. 170; McCune *v.* Belt, 45 Mo. 174; Aldrich *v.* Hapgood, 39 Vt. 617; Furnold *v.* Bank of Missouri, 44 Mo. 336. This right of subrogation arises without contract but may be defeated by contract. Fishback *v.* Weaver, supra. But a stranger cannot claim subrogation. Young *v.* Morgan, 89 Ill. 199; Webster's Appeal, 86 Pa. St. 409. The creditor must not with knowledge that one of the debtors is a surety surrender securities to the principal debtor. Guild *v.* Butler, supra. In some cases the surety may, before he has paid anything, look to the indemnity provided for him. Wooldridge *v.* Norris, supra.

[4] Craythorne *v.* Swinburne, 14 Ves. 159; Wright *v.* Morley, 11 Ves. 12, 22; Copis *v.* Middleton, 1 Turn. & Russ. R. 224; Jones *v.* Davis, 4 Russ. R. 277; Dowbiggin *v.* Bourne, 1 Younge, R. 111; s. c. 2 Younge & Coll. 462, 470; Hodgson *v.* Shaw, 3 Mylne & Keen, 183; Reed *v.* Norris, 2 M. & Craig, R. 361; ante, § 451; Ex parte Rushworth, 10 Ves. 409, 420, 422; Mayhew *v.* Crickett, 2 Swanst. R. 191; Wade *v.* Coope, 2 Sim. R. 155. But see Bowditch *v.* Green, 3 Metc. R. 360, contra. But a surety for a part of a debt is not entitled to the benefit of a security given by the debtor to the creditor at a different time for another part of the debt. Wade *v.* Coope, 2 Simons, R. 155 (*c*). It was formerly supposed that the surety's right extended only to securities held by the creditor at the date of the contract. Farebrother *v.* Wodehouse, 23 Beav. 18; Williams *v.* Owen, 13 Sim. 597; Newton *v.* Chorlton, 10 Hare, 646. But it is now held that

if at the time when the bond of the principal and surety is given a mortgage also is made by the principal to the creditor as an additional security for the debt, there, if the surety pays the debt, he will be entitled to have an assignment of that mortgage and to stand in the place of the mortgagee.[1] And as the mortgagor cannot get back his estate again without a reconveyance, that assignment and security will remain a valid and effectual security in favor of the surety notwithstanding the bond is paid.[2] This indeed is but an illustration of a much broader doctrine established by Courts of Equity; which is that a creditor shall not, by his own election of the fund out of which he will receive payment,

the surety is entitled to the benefit of after-acquired securities. Forbes *v.* Jackson, 19 Ch. D. 615; Lake *v.* Brutton, 8 DeG. M. & G. 441; Pledge *v.* Buss, Johns. 663. See also Mayhew *v.* Crickett, 2 Swab. 185; Hall *v.* Cushman, 16 N. H. 462. But the surety would not be entitled to the benefit of future securities given on advances not covered by his own engagement; though such a state of things would not affect his right to the securities which without the new advances he woud be entitled to. Forbes *v.* Jackson, 19 Ch. D. 615, 621. After ratable payment by the sureties whatever an individual surety recovers from the principal he may hold without division among them all. For an exception see Harrison *v.* Phillips, 46 Mo. 520.

[1] Gedye *v.* Matson, 25 Beav. 310. Secus if he pay the whole debt. Wilcox *v.* Fairhaven Bank, 7 Allen, 270. See York *v.* Landis, 65 N. C. 535; Berthold *v.* Berthold, 46 Mo. 557.

[2] Ante, § 556; Williams *v.* Owen, The (English) Jurist, 30 Dec. 1843, p. 1145, and the learned note of the Reporter, pp. 1146, 1147; Copis *v.* Middleton, 1 Turn. & Russ. 224, 229, 231; Dowbiggin *v.* Bourne, 2 Younge & Coll. 471, 472. Lord Brougham, in the case of Hodgson *v.* Shaw, 3 Mylne & Keen, 190, 191, 192, puts this doctrine in a strong light. "The rule here," says he, "is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor and have all the rights which he has for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract or quasi contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court in this respect was luminously expounded in the argument of Sir Samuel Romilly in Craythorne *v.* Swinburne (14 Ves. 159); and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval. 'A surety,' to use the language of Sir S. Romilly's reply, 'will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor.'" See also Boultby *v.* Stubbs, 16 Ves. R. 20; Stokes *v.* Mendon, 3 Swanst. R. 130, note; Mayhew *v.* Crickett, 2 Swanst. R. 185, 190, note; Beckett *v.* Booth, 1 Eq. Abridg. 595.

prejudice the rights which other persons are entitled to; but they shall either be substituted to his rights, or they may compel him to seek satisfaction out of the fund to which they cannot resort.[1] It is often exemplified in cases where a party having two funds to resort to for payment of his debt elects to proceed against one, and thereby disappoints another party who can resort to that fund only. In such a case the disappointed party is substituted in the place of the electing creditor, or the latter is compelled to resort in the first instance to that fund which will not interfere with the rights of the other.[2]

§ 710. **Same.** — The principle seems in former times to have been carried further by Courts of Equity, and to have authorized the surety to insist upon an assignment, not merely of collateral securities properly speaking, but of collateral incidents and dependent rights growing out of the original debt. Thus where the principal in a bond had been sued, and gave bail, and judgment was obtained against the principal and also against the bail by the creditor, and afterwards the sureties on the original bond (who had counter bonds) were compelled to pay it, and then brought

[1] Wright *v.* Morley, 11 Ves. 12; Ex parte Gifford, 6 Ves. 805, 807. See Rumbold *v.* Rumbold, 3 Ves. 63; Mayhew *v.* Crickett, 2 Swanst. R. 186, 191; Miller *v.* Ord, 2 Binn. 382; Cheeseborough *v.* Millard, 1 John. Ch. R. 409, 412; Stevens *v.* Cooper, 1 John. Ch. R. 430; Lawrence *v.* Cornell, 4 John. Ch. R. 545; King *v.* Baldwin, 2 John. Ch. R. 554; Hayes *v.* Ward, 4 John. Ch. R. 123; Clason *v.* Morris, 10 John. R. 524; Evertson *v.* Booth, 19 John. R. 486; Averall *v.* Wade, Lloyd & Goold, R. 252; ante, §§ 448, 450, 667; post, § 716; Stirling *v.* Forrester, 3 Bligh, R. 590, 591; post, §§ 853 to 861; Selby *v.* Selby, 4 Russ. R. 336; Gwynne *v.* Edwards, 2 Russ. R. 289 *n*; Bute *v.* Cunynghame, 2 Russ. R. 275; post, §§ 758, 759, 760 to 770; Boazman *v.* Johnson, 3 Sim. R. 377. The rules as to a surety's right to securities on payment of the debt seem to apply to indorsers as such of negotiable paper. Duncan *v.* North Wales Bank, 6 App. Cas. 1, reversing 11 Ch. D. 88.

[2] Sagittary *v.* Hyde, 1 Vern. 455, and Mr. Raithby's note; Mills *v.* Eden, 10 Mod. R. 488; Aldrich *v.* Cooper, 8 Ves. 388; Trimmer *v.* Bayne, 9 Ves. 209; Robinson *v.* Wilson, 2 Madd. R. 437; Cheeseborough *v.* Millard, 1 John. Ch. R. 412, 413; King *v.* Baldwin, 2 John. Ch. R. 554; Hayes *v.* Ward, 4 John. Ch. R. 123; 1 Madd. Ch. Pr. 202, 203; post, §§ 758, 759, 853, 854, 855, 856. Heyman *v.* Dubois, L. R. 13 Eq. 158. When a creditor has two securities from his debtor for different debts, the fact that one of the securities may be insufficient to meet the debt for which it is held will not justify the creditor in taking the other security before default in respect of the debt to which that belongs. Cummins *v.* Fletcher, 14 Ch. D. 699 (C. A.), explaining Selby *v.* Pomfret, 1 Johns. & H. 339. The case of Beevor *v.* Luck, L. R. 4 Eq. 537, in which it was held that a security given by a partner for his own private debt could be consolidated with a security given by two or more partners for a partnership debt, was denied.

their bill in equity to have the benefit of the judgment of the creditor against the bail by having it assigned to them, it was decreed by the court accordingly. So that although the bail were themselves but sureties, as between themselves and the principal debtor, yet coming in the room of the principal debtor as to the creditor, it was held that they likewise came in the room of the principal debtor as to the sureties on the original bond.[1] This decision consequently established that the original sureties had precisely the same rights that the creditor had, and were to stand in his place. The original sureties had no direct contract or engagement by which the bail were bound to them; but only a claim against the bail, through the medium of the creditor, to all whose rights, and the power of enforcing them, they were held to be entitled.[2] This decision has been much questioned; and although it may be distinguishable in its circumstances from others on which we shall have occasion to comment, yet it must now be deemed to be much shaken in point of authority.[3] But however this may be, it seems certain that a surety upon a second bond given as collateral security for the original bond has a right, upon payment of his own bond, to be substituted to the original creditor as to the first bond, and to have an assignment thereof as an independent subsisting obligation for the debt.[4]

§ 711. **The English Theory of the Surety's Right to Subrogation Stated.** — Another point of more extensive importance in practice is, whether a surety, who pays off the debt of the principal, for which he is bound, is entitled to require the creditor, upon such payment, to make an assignment to him of the debt and of the instrument by which it is evidenced. It seems formerly to have been thought that he had such a right; and the general language of some of the authorities, that the surety is in such cases entitled to every remedy which the creditor had against the principal, was supposed fully to justify and support this conclusion.[5]

[1] Parsons *v.* Briddock, 2 Vern. R. 608; Wright *v.* Morley, 11 Ves. 22.

[2] Wright *v.* Morley, 11 Ves. 22; Schnitzel's Appeal, 49 Pa. St. 23.

[3] Hodgson *v.* Shaw, 3 Mylne & Keen, 189. But see Wright *v.* Morley, 11 Ves. 22; Dowbiggin *v.* Bourne, 1 Younge, R. 111, 114, 115; s. c. 2 Younge & Coll. 462, 472, 473.

[4] Hodgson *v.* Shaw, 3 Mylne & Keen, 183, 193; ante, § 667, note; Cheeseborough *v.* Millard, 1 John. Ch. R. 413; Avery *v.* Petten, 7 John. Ch. R. 211. See Himes *v.* Keller, 3 Watts & Serg. 401.

[5] Ex parte Crispe, 1 Atk. 135; Parsons *v.* Briddock, 2 Vern. R. 608; Wright *v.* Morley, 11 Ves. 12, 21, 22; Dowbiggin *v.* Bourne, 1 Younge, R. 111; s. c. 2 Younge & Coll. 464; Butcher *v.* Churchill, 14 Ves. 567, 575, 576; Ex parte Rushforth, 10 Ves. 409, 414; Robinson *v.* Wilson, 2 Madd.

But the doctrine is now fully established that the surety has no such right to be enforced in equity, and that he cannot insist upon any such assignment.[1] The ground is, that by the payment of the debt the title derived under the instrument has become extinguished and functus officio, and therefore an assignment thereof would be utterly useless; and if the surety should afterwards sue for the debt at law in the name of the creditor, the principal might plead such payment in bar of the action.[2] In such a case it would make no difference in the right of the surety to sue that, upon payment of the debt, he had procured an assignment thereof to be made to a third person instead of to himself for his benefit.[3] Neither would it make any difference that several judgments had been obtained by the creditor against the principal and surety, and that the latter had paid the debt on the judgment against him,

R. 464; Craythorne *v.* Swinburne, 14 Ves. 160, 162. See also Hodgson *v.* Shaw, 3 Mylne & Keen, 183, 185; Hotham *v.* Stone, 1 Turner & Russ. R. 226, note.

[1] It is more generally held in this country that though the debt is paid by the surety, he will still be entitled to treat the same, with all the securities behind it, as existing in equity for the purpose of relief to himself. See Lewis *v.* Palmer, 28 N. Y. 271; Lathrop's Appeal, 1 Barr, 512; Powell *v.* White, 11 Leigh, 309; Speiglemyer *v.* Crawford, 6 Page, 254; Rodgers *v.* McCluer, 4 Gratt. 81; McCleary *v.* Beirne, 10 Leigh, 395; Perkins *v.* Kershaw, 1 Hill, Ch. 344; Watkins *v.* Worthington, 2 Bland, 509; Tinsley *v.* Anderson, 3 Call, 329; Burns *v.* Huntington Bank, 1 Pa. 395; Fleming *v.* Beaver, 2 Rawle, 132; Dempsey *v.* Bush, 18 Ohio St. 376; Wilson *v.* Stewart, 26 Ohio St. 504; Craft *v.* Moore, 9 Watts, 417; Cuyler *v.* Ensworth, 6 Paige, 32; Matthews *v.* Aiken, 1 Const. 595; Ellsworth *v.* Lockwood, 42 N. Y. 89; York *v.* Landis, 65 N. C. 535; Berthold *v.* Berthold, 46 Mo. 557. By the English Mercantile Law Amendment Act, 19 & 20 Vict. ch. 97, the surety is entitled to an assignment on paying the debt. In re Cochran's Estate, L. R. 5 Eq. 209. But it is held that a surety who pays a judgment is not entitled to treat it as existent. Hull *v.* Sherwood, 59 Mo. 172. See Holmes *v.* Day, 108 Mass. 563, where however there was no suretyship proper. And compare Milligan's Appeal, 104 Penn. St. 503. Between joint debtors payment of the judgment is an extinguishment of the same towards all. Holmes *v.* Day.

It will be observed that the doctrine of Lord Eldon, in Copis *v.* Middleton (see author's note, supra), applies at most only to cases in which payment of the debt would per se *destroy* the security, without further action; if the security does not at once return functus officio to the hands of the principal debtor, as where it is a mortgage by him, or a fortiori where it is the instrument of a third person, the rule would not apply.

[2] Woffington *v.* Shaw, 2 Ves. 569; Gammon *v.* Stone, 1 Ves. 339; Copis *v.* Middleton, 1 Turn. & Russ. 224, 229; Jones *v.* Davids, 4 Russ. R. 297; Hodgson *v.* Shaw, 3 Mylne & Keen, 183; Hudson *v.* Stalwood, Cas. Temp. Hard. 133; Armitage *v.* Baldwin, 5 Beav. R. 278.

[3] See Reed *v.* Norris, 2 Mylne & Craig, 361; Jones *v.* Davids, 4 Russ. R. 277; Copis *v.* Middleton, 1 Turn. & Russ. 224, 229. But see Butcher *v.* Churchill, 14 Ves. 568, 575, 576.

and then sought an assignment to be made of the judgment against the principal; for the judgment would be effectually extinguished by such payment, and the surety would not be permitted to avail himself of it against the principal.[1]

§ 712. **Same.** — The error of the contrary opinion, if indeed upon the principles of enlarged equity any there be, seems to have arisen from confounding the right of the surety on payment of the debt to be substituted for the creditor, and to have an assignment of any independent collateral securities, with the supposed right to have the original debt assigned. Such independent collateral securities may well be required to be assigned by the creditor in favor of the surety; because in many cases the principal would not be entitled to have a re-transfer thereof from the surety, without paying him the sums advanced by him to the creditor as a matter of equity between the parties. But the assignment of the debt itself, which had been already paid, would be a mere nullity in equity as well as at law, since it could not have, in the hands of the surety, any subsisting obligation.[2]

[1] Dowbiggin *v.* Bourne, 2 Younge & Coll. 464. But see Hill *v.* Kelly, 1 Ridg. L. & Schoales, R. 265.

[2] This whole subject is examined in a masterly manner by Lord Eldon, in Copis *v.* Middleton, 1 Turn. & Russ. R. 224, 229, 231, and by Lord Brougham in Hodgson *v.* Shaw, 3 Mylne & Keen, 183. In a former case Lord Eldon said: "It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal. But then the nature of those securities must be considered. When there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished. The general rule therefore must be qualified by considering it to apply to such securities as continue to exist, and do not get back, upon payment, to the person of the principal debtor. In the case for instance where in addition to the bond there is a mortgage with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say: I have lost the benefit of the bond; but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the debtor." Lord Brougham, speaking on the same subject, said: "The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from equity than from contract or quasi contract; unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court, in this respect, was luminously expounded in the argument of Sir Samuel Romilly in Craythorne *v.* Swinburne; and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval. "A surety," to use the language of Sir Samuel Romilly's reply, "will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all

§ 713. **Same.** — Upon reasoning somewhat analogous to that, the supposed error of which we have been considering, it was formerly held that if a surety upon a bond debt should discharge it, he would be entitled to be considered as substituted for the original creditor as a specialty creditor of his principal; and consequently, in the marshalling of the assets of the principal, he would, as to the debt so paid, have a priority over simple contract credi-

means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor. I have purposely taken this statement of the right, because it is there placed as high as it ever can be placed; and yet it is quite consistent with the principle of Copis *v.* Middleton. Thus the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty after the bond is gone by payment? The surety may enforce any security against the debtor which the creditor has; but by the supposition there is no security to enforce, for the payment has extinguished it. He has a right to have all the securities transferred to him; but there are, in the case supposed, none to transfer. They are absolutely gone. He may avail himself of all those securities against the debtor, but his own act of payment has left none of which he can take advantage." See also Dowbiggin *v.* Bourne, 2 Younge & Coll. 462, 471. It is observable that the whole of this reasoning proceeds upon the ground that by the payment by the surety the original debt is extinguished. Now that is precisely what the Roman law (as we shall presently see) denied; and it treated the transaction between the surety and the creditor according to the presumed intention of the parties to be not so much a payment as a sale of the debt. 1 Domat, B. 3, tit. 1, § 6, art. 1; post, § 500, and §§ 635, 636, 637. It is not wonderful that Courts of Equity, with this enlarged doctrine in their view, which is in entire conformity to the intention of the parties as well as to the demands of justice, should have struggled to adopt it into the Equity Jurisprudence of England. The opposing doctrine is founded more on technical rules than on any solid reasoning founded in general equity. In truth Courts of Equity in many cases do adopt it and act upon it; as in cases where they give the right of substitution to particular parties, where there are two funds, out of one of which a creditor has insisted upon receiving satisfaction to the disappointment of the parties who have no claim upon the other fund. Ante, § 709, 853 to 861. Whether it might not have been as wise for Courts of Equity to have followed out the Roman law to its full extent, instead of adopting a modified rule, which stops, or may stop, short of some of the purposes of reciprocal justice, it is now too late to inquire, and therefore the discussion would be useless. See Cheseborough *v.* Millard, 1 John. Ch. R. 409, 412, 413, 414; ante, § 493, note. Sir William Grant, in Butcher *v.* Churchill (14 Ves. 568, 575, 576), seems to have proceeded upon the principle of the Roman law, in holding that the assignment of a bond to a surety who had compounded the debt with the creditor and taken the assignment ought to be upheld in equity, however it might be at law, for the purpose of securing to him the amount he had paid on the bond and interest. But see Armitage *v.* Baldwin, 5 Beav. R. 278, where the surety paid the debt due to the creditor after the creditor had obtained judgment for it against the principal debtor, and also another

tors.[1] But upon this point also a different doctrine is now established; and it is held that a surety so paying a bond debt will be treated, in marshalling assets, as a mere simple contract creditor.[2] The ground of this doctrine is, that the surety is not subrogated to the rights of the creditor in such a case (whether he has procured an assignment of the bond when paid or not); but he is in fact as well as in law to be deemed only as having paid money for the principal upon the footing of an implied contract of indemnity subsisting between them.[3] Yet there are many cases in

judgment against his bail in that action, and upon such payment the surety took an assignment from the creditor of both judgments, — Lord Langdale thought that as the bill alleged that the surety had "duly paid and satisfied the original judgment", he could not maintain a bill against the bail on the judgment against him to charge the estate of the bail. But his Lordship suggested that the plaintiff might, by a proper proceeding, ultimately succeed in establishing a right against the estate of the bail.

[1] Hotham *v.* Stone, 1 Turn. & Russ. R. 226, note; Robinson *v.* Wilson; 2 Madd. R. 464; Wright *v.* Morley, 11 Ves. 22; Powell's Ex'ors *v.* White, 11 Leigh, R. 309, fully approves this same doctrine.

[2] Copis *v.* Middleton, 1 Turn. & Russ. 224, 229, 231; Jones *v.* Davids, 4 Russ. R. 277; Hodgson *v.* Shaw, 3 Mylne & Keen, 183. Contra in most of the States. See Eppes *v.* Randolph, 2 Call, 125; Tinsley *v.* Anderson, 3 Call, 329; West *v.* Belches, 5 Munf. 187; McMahon *v.* Fawcett, 2 Rand. 514; Watts *v.* Kinney, 3 Leigh, 272; Wheatley *v.* Calhoun, 12 Leigh, 264; Litterdale *v.* Robinson, 2 Brock. 159; s. c. 25 U. S. 594, 6 L. Ed. 740; Pride *v.* Boyce, Rice, Eq. 276; Schultz *v.* Carter, 1 Speer, Eq. 534; Croft *v.* Moore, 9 Watts, 451; Lathrop's Appeal, 1 Barr, 512; Enders *v.* Brune, 4 Rand. 438; Grider *v.* Payne, 9 Dana, 188; Dias *v.* Bouchaud, 3 Edw. Ch. 485; United States *v.* Hunter, 5 Mason, 62.

[3] Lord Eldon, in Copis *v.* Middleton, 1 Turn. & Russ. 228, said: "I take the present case to be simply this. Upon loans of money to A, joint bonds were given by A and B, B being surety for A; two of the bonds were paid off by B in the lifetime of A: now, if one of two joint obligors, being a surety, pays off the debt in the lifetime of the principal, he is at law merely a simple contract creditor of the principal; and if the principal lives for twenty years after the payment of the debt, he continues during all that time to be at law a simple contract creditor only. Then the question is, Whether, by the death of the principal, he is to be converted in a Court of Equity into a specialty creditor against his assets. With respect to the bond paid off after the death of the principal the questions are: Whether, inasmuch as at the death of the principal, there was money due upon the bond, there was an equity on the part of the surety to compel the creditor to go in against the assets of the principal; and Whether, there having been no interposition for that purpose, the right of the surety to stand in the place of the creditor can now be maintained. When it is considered that this was a joint bond, and that no action at law could be maintained except against the surety, the surviving debtor, it is a strong proposition to say that the surviving debtor is to be considered in equity as a specialty creditor against the assets of the deceased debtor." And again, in pp. 230, 231, 232, he said: "The facts of this case are simply these. Two individuals gave a bond, the one as principal, and the other as surety; no other assurance was executed at the time; no mortgage was made to secure the debt;

which a surety, paying a debt, will be entitled to stand in the place of the creditor or to obtain the full benefit of all the proceedings of the creditor against the principal. Thus for example if the creditor, in case of the bankruptcy of the principal, has proved his debt before the commissioners, and then the surety pays the debt, the latter will be entitled to the dividends declared on his estate, and the creditor will be held to be his

no counter bond was given by the principal to the surety; and the question to be decided is, Whether the surety, having paid the bond after it was due, is a simple contract, or a specialty, creditor. I understand it to have been the opinion of the Master, an opinion founded on one or two cases which have been stated, that the surety was to be considered as a specialty creditor, to stand in the place of the person whom he paid. That doctrine appears to me to be contrary to all that has been settled during the whole time I have been in this court. Everything that was arranged in bankruptcy before the late statute, enabling the surety to prove everything determined before, appears to me to have authorized the court to consider it quite clear, that if there was nothing in the case beyond what I have stated, the surety, having paid the bond, could be nothing more than a simple contract creditor in respect of that payment. The bond was not assigned to anybody in consideration of a sum of money paid, which was one way we used to manage these things; there was no counter bond given, which was another way in which we used to manage these things; so that if the surety paid one bond he became instantly a specialty creditor by virtue of the other bond. If any suit was now instituted, I apprehend the payment of the bond would show that the bond was gone. There has been a case cited, where upon the general ground that a surety is entitled to the benefit of all securities which the creditor has against the principal, it seems to have been thought that the surety was entitled to be as it were a bond creditor, by virtue of the bond. I take it to be exceedingly clear, if, at the time a bond is given, a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee; and as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid. But if there is nothing but the bond, my notion is that, as the law says that bond is discharged by the payment of what was due upon it, the bond is gone and cannot be set up." Lord Brougham, in Hodgson *v.* Shaw, 3 Mylne & Keen, 190, 191, 192, still more elaborately expounded the doctrine. "When," said he, "a person pays off a bond in which he is either co-obligor or bound subsidiarié, he has, at law, an action against the principal for money paid to his use, and he can have nothing more. The joint obligation towards the creditor is held to give to the principal notice of the payment, and also to prove his consent or authority to the making that payment. This is necessary for enabling any man who pays another's debt to come against that other; because a person cannot make himself the creditor of another by volunteering to discharge his obligations. But beyond this claim, which is on simple contract merely, there exists none against the principal by the surety who pays his debt; nor, when the matter is closely viewed, ought there to exist any other. The obligation by specialty is incurred, not towards the surety, even in the event of his paying, but only towards the obligee. And there is no natural reason why, because I bind myself under seal to pay another person's debt, the creditor requiring a security of that high nature, I should

trustee for this purpose.[1] So the surety may compel the creditor to go in and prove his debt before the commissioners; and then, if he pays the whole debt, the creditor will in like manner become a trustee of the dividends for him.[2] In cases of this sort Courts of Equity seem to be regulated by the same principles which govern their interference in favor of sureties to compel creditors to proceed in the first instance against the principal for the recovery of their debts.[3]

therefore have as high a security against the principal debtor. If I had chosen to demand it, I might have taken a similar obligation when I became so bound. And if I omitted to do so, I can only be considered as possessing the rights which arise from having paid money for him, which I had voluntarily, and without consideration, undertaken to pay. The case standing thus at law, do considerations of equity make any alteration in its aspect?" His Lordship then proceeded to state what is contained in the passage already cited, ante, § 499 *c.* note 1, p. 520, and then added: "Living the principal debtor, the surety could only bring indebitatus assumpsit for the money he had paid to that principal's use. The death of that debtor cannot clothe him with a higher title. Living the debtor, the creditor could not have assigned the bond on payment by the surety; for there was no longer anything to assign. The death of the debtor cannot surely operate a revivor of the specialty, enable the creditor to assign it or the court to hold it assigned in equity, and empower the surety to sue upon it the executors or administrators of him who, had he chanced to survive, never could have been sued except upon the money counts in an action of assumpsit. Observe the consequence that would have followed from any other principles, while the law of debtor and creditor continued, as it was till the recent alteration, and when landed estates were not real assets for payment of simple contract debts. If the principal debtor continued alive, the surety could not in any way touch his real estates, except through the medium of a judgment. But if he happened to die, his real estates became assets, although the law had never been changed. There can be no doubt therefore with respect to the principle of Copis *v.* Middleton; and Lord Eldon expressed himself without any hesitation in that case, though pressed with the authority of Sir William Grant in Hotham *v.* Stone, upon which he remarked that the case had been appealed and compromised without coming to an argument." But see in America the case of Powell's Ex'ors *v.* White, 11 Leigh, R. 309, which upholds the old doctrine.

[1] If the surety has paid but part of the debt proved, the dividends will be apportioned accordingly. Hobson *v.* Bass, L. R. 6 Ch. 792. See Gray *v.* Seckham, L. R. 7 Ch. 680. A surety will be restrained from stripping himself of his property so as to throw the burden of the debt on a co-surety. Bowen *v.* Hoskins, 45 Miss. 183. Ex parte Rushforth, 10 Ves. 409; Wright *v.* Morley, 11 Ves. 12, 22, 23; Watkins *v.* Flanagan, 3 Russ. R. 421; Ex parte Houston, 2 G. & Jamieson, 36; Ex parte Gee, 1 G. & Jamieson, 330.

[2] Ex parte Rushforth, 10 Ves. 409, 414; Wright *v.* Simpson, 6 Ves. 734.

[3] Ante, § 451; post, § 860. A surety for the purchase-price of land on payment of the debt will be subrogated to the vendor's lien on the land for the unpaid money. Eddy *v.* Traver, 6 Paige, 521; Welch *v.* Parran, 2 Gill, 320; Magruder *v.* Peter, 11 Gill & J. 219; Kleiser *v.* Scott, 6 Dana, 137; Burk *v.* Chishman, 3 B. Mon. 50; In re McGill, 6 Barr, 504; David-

§ 714. **Same.** — Upon this subject a far more liberal and comprehensive doctrine pervades the Roman law. Not only is the surety by that law entitled in such cases to the benefit of all the collateral securities taken by the creditor, but he is also entitled to be substituted, as to the very debt itself, to the creditor by way of cession or assignment. And upon such cession or assignment upon payment of the debt by the surety, the debt is, in favor of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its original obligatory force against the principal.[1] Here we have the doctrine distinctly put, the objection to it stated, and the ground upon which its solution depends, affirmed. The reasoning may seem a little artificial, but it has a deep foundation in natural justice. The same doctrine stands in substance approved in all the countries which derive their jurisprudence from the civil law.[2]

§ 715. **Same.** — The Roman law carried its doctrines yet further in furtherance of the great principles of equity. It held the creditor bound not to deprive himself of the power to cede his rights and securities to the surety who should pay him the debt; and if by any voluntary and unnecessary act of his own such a cession became impracticable, the surety might, by what was technically called "exceptio cedendarum actionum", bar the creditor of so much of his demand as the surety might have received by a cession or assignment of his liens and rights of action against the principal debtor.[3] But this qualification should be

son *v.* Carroll, 20 La. An. 199; Tuck *v.* Calvert, 33 Md. 209. If a creditor who is also a surety takes security both for the debt due him and for his liability as surety, he will be entitled to have his own debt paid first in full before applying any portion of the security for the benefit of his co-sureties. Brown *v.* Ray, 18 N. H. 102; Hess's Estate, 69 Penn. St. 272; Field *v.* Hamiton, 45 Vt. 35; Magee *v.* Leggett, 48 Miss. 139; Allison *v.* Sutherlin, 50 Mo. 274. In some States it must be shown that the principal is insolvent before a surety who has paid can require his co-surety to share the burden with him. Bolling *v.* Doneghy, 1 Duv. 220.

[1] Pothier on Oblig. by Evans, n. 275, 280, 281, 428, 429, 430, 519, 520, 521, 522 [n. 556, 557, 558, 559, of the French editions].

[2] Voet, ad Pand. Lib. 46, tit. 1, §§ 27, 29, 30; Pothier on Oblig. by Evans n. 275, 280, 281, 427, 428, 429, 430, 519, 520, 522 [n. 555, 556, 557, of the French editions]; Huber, Prælect. Inst. Lib. 3, tit. 21, n. 8; 1 Bell, Comm. B. 3, Pt. 1, ch. 3, § 3, p. 264, &c., art. 283, 4th ed.; Ersk. Inst. B. 3, tit. 3, art. 68; 1 Kaimes, Eq. 122, 124.

[3] Dig. Lib. 46, tit. 2, l. 95, § 11; Pothier, Pand. Lib. 46, tit. 1, n. 46, 47; Pothier on Oblig. by Evans, n. 275, 280, 428, 429, 430, 519, 520, 521, 521 B., 522 [n. 555, 556, 557, 558, 559, 560, of the French editions]; Cheeseborough *v.* Millard, 1 John. Ch. R. 414; Stevens *v.* Cooper, 1 John. Ch. R. 430, 431; Hayes *v.* Ward, 4 John. Ch. R. 130. In this last case Mr. Chancellor Kent said: "According to the doctrine of the civil law, the surety may, 'per ex-

added, that a mere omission by the creditor to collect the debt due of the hypothecated property, so that it is lost by his laches, will not discharge the sureties; but the creditor must be guilty of some wrongful act, as by a release or fraudulent surrender of the pledge, in order to discharge the surety.[1]

§ 716. **Same.** — The same doctrine has been in some measure transfused into the English law in an analogous form; not indeed by requiring an assignment or cession of the debt to be made, but by putting the surety paying the debt [2] under some circumstances in the place of the creditor.[3] And if the creditor should knowingly have done any act to deprive the surety of this benefit, the surety as against him would be entitled to the same equity as if the act had not been done.[4] On the other hand if a surety has a counter bond or security from the principal, the creditor will be entitled to the benefit of it, and may in equity reach such security to satisfy his debt.[5]

ceptionem cedendarum actionum', bar the creditor of so much of his demand as the surety might have received by an assignment of his lien and right of action against the principal debtor; provided the creditor had by his own unnecessary or improper act deprived the surety of that resource. The surety by his very character and relation of surety has an interest that the mortgage taken from the principal debtor should be dealt with in good faith, and held in trust not only for the creditor's security but for the surety's indemnity. A mortgage so taken by the creditor is taken and held in trust as well for the secondary interest of the surety as for the more direct and immediate benefit of the creditor; and the latter must do no wilful act either to poison it in the first instance or to destroy or cancel it afterwards. These are general principles founded in equity, and are contained in the doctrines laid down in Pothier's Treatise on Obligations, No. 496, 519, 520, to which reference has been made in the former decisions of this court." See also post, §§ 856, 857. The case of Macdonald *v.* Bell, 3 Moore, Privy Council, Rep. 315, 332, fully recognizes the same doctrine.

[1] Macdonald *v.* Bell, 3 Moore, Privy Council, Rep. 315, 332.

[2] The surety must ordinarily have paid the whole debt before he can have surrogation. McConnell *v.* Beattie, 34 Ark. 113. See Pool *v.* Doster, 59 Miss. 258. But not always. Wooldridge *v.* Norris, L. R. 6 Eq. 410.

[3] Robinson *v.* Wilson, 2 Madd. 437. In the case of a Crown debtor, a surety is substituted to the prerogative of the Crown in regard to the debt, and then is admitted to use the Crown remedies. The King *v.* Bennet, Wightwick, R. 2 to 6; ante, §§ 709 to 713, notes.

[4] See Hoysradt *v.* Holland, 50 N. H. 433; Hayes *v.* Ward, 4 John. Ch. R. 130; Cheeseborough *v.* Millard, 1 John. Ch. R. 413, 414; Stevens *v.* Cooper, 1 John. Ch. R. 430; Miller *v.* Ord, 2 Binn. 382; Aldrich *v.* Cooper, 8 Ves. 388, 391, 395; Ex parte Rushforth, 10 Ves. 409; Wright *v.* Morley, 11 Ves. 22.

[5] 1 Eq. Abridg. p. 93, K. 5. See also Com. Dig. Chancery, 4 D. 6. New Bedford Sav. Inst. *v.* Fairhaven Bank, 9 Allen, 175, 178; Kelly *v.* Herrick, 131 Mass. 373; Eastman *v.* Foster, 8 Met. 19; Rice *v.* Dewey, 13 Gray, 47; Lane *v.* Stacey, 8 Allen, 41; Paris *v.* Hulett, 26 Vt. 308;

§ 717. [**The Right of Subrogation Generally.** — It may be stated, as a general rule, that where a surety, or a party secondarily liable, discharges an obligation for which another is primarily liable, the party who pays is entitled to be subrogated to all of the rights that the creditor had against the primary debtor. Subrogation is a substitution for the position of the party who pays to the position of the creditor, and he takes any securities, collaterals or other things of value and holds them for his own benefit and to the

Saffold *v.* Wade, 51 Ala. 214; Chamberlain *v.* St. Paul R. Co., 92 U. S. 299, 23 L. Ed. 715; Brown *v.* Ray, 18 N. H. 102; Carpenter *v.* Bowen, 42 Miss. 28; post, § 859. And see Jones *v.* Quinipiack Bank, 29 Conn. 25 (holding a qualified doctrine). Thus securities given by a former guardian to indemnify his sureties in case they should be compelled to pay debts of his to the ward's estate, may be sold, and the proceeds applied by a later guardian to the payment of such debt, where the former guardian has become insolvent and a portion only of the debt has been paid by the sureties. The sureties hold such property in trust for the creditors. Kelly *v.* Herrick, 131 Mass. 373.

Nor can the sureties come in as general creditors of the principal and be reimbursed out of the collateral securities for their partial payments. The creditors must first be paid in full. Kelly *v.* Herrick, supra; Ohio Ins. Co. *v.* Ledyard, 8 Ala. 866; Ten Eyck *v.* Holmes, 3 Sandf. Ch. 428; Clark *v.* Ely, 2 Sandf. Ch. 166. The creditor need not exhaust his legal remedies before being entitled to the securities. Saffold *v.* Wade, 51 Ala. 214. But the security in question must have been given by the principal debtor; a creditor is not entitled to be subrogated to a security given by one of two co-sureties to the other. Hampton *v.* Phipps, 108 U. S. 260, 27 L. Ed. 719, 2 S. Ct. Rep. 622.

In some States a distinction is made between securities given by the principal debtor to his surety as a personal indemnity to him and securities given for debt. In the first case it is held that there can be no resort to the security except as a means to indemnify the surety according to the terms of the instrument creating it; in the second case the security is available by the creditor as a trust for the payment of his demand. Pool *v.* Doster, 59 Miss. 258. This distinction is not generally taken.

If a surety make a new and an independent arrangement with the creditor in regard to the security for the debt, and put himself in the situation of a principal debtor, he cannot complain of the creditor for treating him to a certain extent in that light. An example occurs where a surety, after judgment against him, makes an arrangement with the creditor, without regard to the principal debtor, for a stay of execution, so long as he shall keep up certain policies for securing the debt, and afterwards the creditor, having taken the principal debtor in execution, discharges him without payment. Reade *v.* Lowndes, 23 Beav. 361.

Again if the surety has been fully indemnified by the principal, he will not be released by any new contract made with the principal debtor; the surety being now treated as a virtual co-principal. Smith *v.* Steele, 25 Vt. 427. And if a surety so indemnified should procure the assignment of the debt to a third person for his benefit, equity would restrain any suit by such person against a co-surety. Silvey *v.* Dowell, 53 Ill. 260. Of course the fully indemnified surety may be compelled, by his co-surety on payment, to pay the debt. Parham *v.* Green, 64 N. C. 436.

same purpose as if he were the original creditor. If a surety deposits collaterals, without the knowledge of his co-surety at the time, the co-surety is not entitled to the benefit of these collaterals unless he pays the whole debt.[1] In subrogation the surety who has paid the debt has only the same rights against the principal, as the creditor himself would have had. If the principal had given collaterals to the creditor, clearly those must be deemed to be specifically so devoted, and the surety may treat them as collaterals in his favor just as the principal might have done. If, on the contrary, the only collaterals are those of the surety himself, then although the creditor has applied these on the debt, the surety must take his place along with the other creditors of the principal, just as the creditor himself would have had to do without the surety's collaterals. Where the principal has given collaterals to the creditor, upon the understanding that they shall be used to the extent of any deficiency of the surety's collaterals, the principal has secured the creditor's debt only to the extent of the surety's deficiency, and obviously the surety, who must pay the debt to obtain the right of subrogation, by the very act of payment prevents the occurrence of the condition upon which alone the creditor could have had recourse to the security.[2] Where a debt has been only partially paid, the surety who has made such payment does not take the position of the creditor as to that part of the debt which he has paid, that is, become a first mortgage creditor to that extent. No claim by subrogation, whether conventional or by operation of law, to the securities held or to the remedies enjoyed by a creditor for the collection of his demand, can be enforced until the whole demand of the creditor has been satisfied.[3]]

§ 718. [**Public Officers and Fiduciaries Are Entitled to Subrogation.** — A public officer who has discharged a liability owing by a debtor to a creditor is entitled to be subrogated to all of the

[1] Gilbert *v.* Adams, 99 Iowa 519, 68 N. W. 883; North Ave. Savings Bank, 188 Mass. 135, 74 N. E. 311; Lyth *v.* Green, 21 App. Div. 300, 47 N. Y. Supp. 478; Sexton *v.* Fensterer, 154 App. Div. 542, 139 N. Y. Supp. 811; Dudley *v.* Buckley, 68 W. Va. 630, 70 S. E. 376; Wilks *v.* Vaughan, 73 Ark. 174, 83 S. W. 913; Knickerbocker Trust Co. *v.* Carteret Steel Co., 79 N. J. Eq. 501, 82 Atl. 146.

The right does not depend upon any request or contract between debtor or surety, but grows out of relations existing between surety and creditor, and springs from the most obvious principles of natural justice. Bankers' Surety Co. *v.* Linder, 156 Iowa 486, 137 N. W. 496.

[2] In re H. B. Hollins & Co. 225 Fed. 618.

[3] Darrow *v.* Summerhill, 24 Tex. Civ. App. 208, 58 S. W. 158; Cason *v.* Westfall, 83 Tex. 26, 18 S. W. 668.

rights and remedies that the creditor had. And where an agent has discharged a debt which it was the duty of his principal to pay, he is entitled to any securities that the creditor held against the principal and to the same extent. Privity of contract is not necessary to support the right. An agent who wrote insurance upon a given property, which was encumbered by trust deed and notes, is entitled to be subrogated to the rights of the holders of the notes and trust deeds where he has paid the premiums to the company, and an action lies in his own name to enforce his rights.[1] A creditor who was induced to make a loan to another by his own agent, afterwards required the agent to take up the loan. Upon this being done he was entitled to the same securities that his principal held.[2] But where loan agents advanced to their principal, who owned the mortgage deed and interest coupons, interest in advance upon the coupons yet to become due, they were not entitled to be subrogated to the rights of the mortgagee as against the mortgagor for the repayment of the interest coupons which they had paid, there being no evidence that either the mortgagor or mortgagee knew of the advance of this interest until some time after the payment. In such a case the agents were mere volunteers.[3]]

§ 719. [**Same.** — The right to subrogation extends equally to personal representatives where they have necessarily discharged obligations for which their testator was liable. But it must be borne in mind that voluntary payments of debts due by the estate will not support the equitable remedy, but where an administrator paid off an obligation which had been guaranteed by his intestate, he is entitled to be subrogated to the rights of the claimant.[4] An executor who has disposed of property and paid debts of the estate is entitled to subrogation and to collect any amounts paid by him out of other property undisposed of, where the property sold was liable to be set apart to the widow as her own prop-

[1] Boston Safe Deposit & Trust Co. *v.* Thomas, 59 Kans. 470, 53 Pac. 472.

[2] Freeburg *v.* Eksell, 123 Iowa 464, 99 N. W. 118.

[3] Bennett *v.* Chandler, 199 Ill. 97, 64 N. E. 1052; see also 101 Ill. App. 409.

But where trustees under a deed of assignment, supposed to be valid, and in order to carry out the purpose and intent of the assignor, borrowed money upon their own notes, with which to pay creditors, they are entitled to subrogation. New York Public Library *v.* Tilden, 39 Misc. Rep. 169, 79 N. Y. Supp. 161.

[4] Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Suydam *v.* Voorhees, 58 N. J. Eq. 157, 43 Atl. 4.

erty and share of the estate of her deceased husband.[1] But where administratrix voluntarily paid off a mortgage due by the estate, without a demand or request of any kind being made upon her, and no transfer or assignment of the notes or mortgage were taken, by voluntarily discharging a debt of the estate and paying with her own individual money, such a person cannot thereby become a creditor of the estate. When the mortgage was cancelled that was an end of the debt and there was no right to subrogation.[2] The same principle applies where a guardian has invested the funds of his ward in lands, and the deed was prepared in such a way as not to convey the property or estate intended, and upon the arrival at majority the ward disaffirmed the purchase and sought to charge the guardian with the funds thus used, and the guardian is liable to account and is not entitled to subrogation. There is no principle of equity which recognizes the right of a trustee whose wrongful act in investing moneys has been repudiated by the cestuis que trustent, to be subrogated to their equities, and to enforce the trust for his own benefit to the same extent they could have done had they not repudiated the wrongful act. A tort-feasor cannot make his own wrongful act the basis of an equity in his favor.[3] But if guardian discharged a purchase money lien with her own moneys, she not being a volunteer but having a duty in relation to such debts, she would be entitled to subrogation to the rights of creditors.[4]]

§ 720. [**Debtor Paying under Compulsion, or Having an Interest in the Property, Is Entitled to Subrogation.** — It may be stated as the general rule that in order for a surety or debtor to become entitled to subrogation, he must have been under obligation to pay the debt and he must have paid it to save his own property, for otherwise if a mere intermeddler comes in and discharges an obligation for which he is in no way responsible, there is no equity which avails him. But if one is bound for the debt of another, he has the right to discharge it, and when he does so, an implied liability arises in his favor against the debtor, and he will be subrogated to the rights of the creditor, as where the father and his children owned land and the children mortgaged their interest in the land for the benefit of their father. Their subsequent payment of the father's debt subrogated them to all of the rights the

[1] Franzell's Execr. *v.* Franzell, 153 Ky. 171, 154 S. W. 912.

[2] In re Rider's Estate, 68 Misc. Rep. 270, 124 N. Y. Supp. 1001; see Buskirk *v.* Sanders, 70 W. Va. 363, 73 S. E. 937.

[3] Rowley *v.* Towsley, 53 Mich. 329, 19 N. W. 20.

[4] Buskirk *v.* Sanders, 70 W. Va. 363, 73 S. E. 937.

original creditor held.[1] The same is true of a life tenant who pays a mortgage covering the property in order to protect his own estate, and he is entitled to all of the rights and remedies of the mortgagee against the reversioner or remainder-man.[2] A tenant in common is entitled to the same rights where his property which was jointly mortgaged with that of a co-tenant was sold and he was required to pay in order to relieve the land of the common burden.[3]]

§ 721. [**Right of Purchaser of Outstanding Liens to Subrogation.** — The right of subrogation can be invoked only for the protection of one who has paid the debt of another because he had made himself legally liable in connection therewith. When one under no liability himself in connection with the debt voluntarily pays it, no equity can arise from the transaction calling for protection. In such case payment extinguishes the debt, except as the creditor receives the money upon the understanding that the debt is to be assigned to the party paying. In such case, the transaction being one of purchase and not payment, the debt survives. It is manifest, however, that the transaction can take this shape only as the creditor assents. All that the debtor can demand of the creditor is a discharge of his liability upon payment. He is in no position to require a transfer of it to another. A volunteer who steps in and pays the debt has no higher rights. So it is evident that the right to subrogation can result only when the party paying was not a primary debtor, but yet a party legally liable for the debt at the suit of the creditor.[4] Where the owner

[1] Fort Jefferson Imp. Co. *v.* Dupoyster, 24 Ky. L. Rep. 1199, 112 Ky. 792, 66 S. W. 1048, 2 L. R. A. (N. S.) 263; Darrow *v.* Summerhill, 93 Tex. 92, 53 S. W. 680, 77 Am. St. Rep. 833; Roberts *v.* Best, 172 Mo. 67, 72; S. W. 657; Phœnix Mut. Life Ins. Co. *v.* Beaman, 5 Kans. App. 772, 48 Pac. 1007; Backer *v.* Payne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; Weiss *v.* Guerinean, 109 Ind. 438, 9 N. E. 399.

[2] Kocher *v.* Kocher, 56 N. J. Eq. 545, 39 Atl. 535.

Payment by one who has no present interest in mortgaged premises, but who expected to inherit the property, gives no right to subrogation. Blydenburgh *v.* Seabury, 104 App. Div. 141, 93 N. Y. Supp. 330.

[3] Sprowls *v.* Sprowls, 34 S. Dak. 140, 147 N. W. 645; Rich *v.* Smith, 26 Cal. App. 775, 148 Pac. 545.

Payment of a mortgage which one supposed covered his property but in fact did not, gives no right to subrogation. Martin *v.* Lesan, 129 Iowa 573, 105 N. W. 996.

[4] Lackawanna Trust & Safe Deposit Co. *v.* Gomeringer, 236 Pa. 179, 84 Atl. 757; Nelson *v.* Brown, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755; De Roberts *v.* Stiles, 24 Wash. 611, 64 Pac. 795; Isensee *v.* Austin, 15 Wash. 352, 46 Pac. 394; Gulling *v.* Washoe County Bank, 24 Nev. 477, 56 Pac. 580; Kahn *v.* McConnell, 37 Okla. 219, 131 Pac. 682.

or purchaser of property subject to several incumbrances pays off a prior incumbrance by his own money, the payment inures to the benefit of the subsequent incumbrances, and as against them the prior incumbrances cannot be kept alive for the owner's benefit, even by express agreement. A fortiori, on such payment by the owner without any agreement for subrogation or keeping the security alive, a court of equity will not revive the prior incumbrance against subsequent incumbrances by the application of the equitable doctrine of subrogation in favor of the owner.[1]]

§ 722. [**One Furnishing Necessaries to Another Is Entitled to Subrogation.** — A party who has furnished necessaries to another, at his instance and request, and for which he promises to pay, is entitled to be subrogated to the rights of the party to whom aid has been supplied, and furnishing support by such third party is not to be considered as a mere voluntary gift. An attorney employed by the wife to prosecute her suit for divorce and alimony, who has furnished moneys to the client pending the institution of the suit, and prior to the allowance of the alimony, is subrogated to the rights of the wife for so much advances as he may have made upon the faith of the alimony.[2] And a man who in good faith believed that a widow took a fee simple conveyance under a will, which in fact was but a life estate, and he accepted a conveyance from her, and as a consideration for the conveyance he agreed to care for and did care and provide for her, in equity he would be entitled to be subrogated to her rights under the will to the extent he so provided for her over and above the value of the use of the property, and might be adjudged a lien upon the property for such amount as was reasonably necessary for her support.[3]]

§ 723. [**Volunteers or Intermeddlers Are Not Entitled to Subrogation.** — The doctrine of subrogation applies to a surety who has paid a debt for which he might be liable, which was the direct obligation of another, the primary debtor, and it applies in favor of one who has discharged an obligation upon property in which

[1] Avon-by-the-Sea Land & Imp. Co. *v.* McDowell, 71 N. J. Eq. 116, 62 Atl. 865. But otherwise, where the prior mortgage was paid off through a mistake of a fact, a subsequent incumbrance being upon the record, but not apparent upon an examination of the records. Zimmerman *v.* Haller, 91 Misc. Rep. 273, 154 N. Y. Supp. 673.

Contra: Darrough *v.* Herbert Kraft Company Bank, 125 Cal. 272, 57 Pac. 983.

[2] Turner *v.* Woolworth, 165 App. Div. 70, 151 N. Y. Supp. 93.

[3] Hickman *v.* Moore, 160 Ky. 474, 169 S. W. 827; Clark *v.* Marlow, 149 Ind. 41, 48 N. E. 359.

he had an interest, or it applies in favor of one who has no direct interest in the debt or the property, and who otherwise would be a volunteer, but for a special request to him to pay the debt and an assignment of the debt and security is taken in his own name. The question as to who is a volunteer is not very hard to determine. The right to invoke the equitable principle depends largely upon the facts in a given case and whenever it appears that the third party has paid the debt, which he was not responsible for and in which he had no interest, as a general rule he will lose what he has paid.[1]]

§ 724. [**Volunteer Entitled to Subrogation by Contract.** — Conventional subrogation may result from a direct agreement between a debtor and a third person who pays the debt that he shall be subrogated to all the rights and securities existing in behalf of the creditor whose debt is paid off. But nothing short of an express agreement to that effect will move a court of equity in behalf of such a creditor. A mere understanding upon the part of such a third person, under no obligation to pay the debt, that he by such payment will be subrogated to the liens of the creditor,

[1] Newell *v.* Hadley, 206 Mass. 335, 92 N. E. 507, 29 L. R. A. (N. S.) 908; Mavity *v.* Stover, 68 Neb. 602, 94 N. W. 834; Journal Pub. Co. *v.* Barber, 165 N. C. 478, 81 S. E. 694; Wilson *v.* Wilson, 6 Idaho 597, 57 Pac. 708; Hutchinson *v.* Rice, 105 La. 474, 29 So. 898; McKinnon *v.* New York Assets Realization Co., 217 Fed. 339, 133 C. C. A. 255; Vose *v.* Conkling, 153 App. Div. 40, 137 N. Y. Supp. 1066, reversing 75 Misc. Rep. 13, 134 N. Y. Supp. 718; Pollock *v.* Wright, 15 S. Dak. 134, 87 N. W. 584; In re Commonwealth Trust Co., 247 Pa. 508, 93 Atl. 766; Bank of Ackley *v.* Porter, 116 Iowa 377, 89 N. W. 1094; McNally *v.* Georgia Lumber Co., 146 App. Div. 456, 131 N. Y. Supp. 295; Contoocook Fire Precinct *v.* Hopkinton, 71 N. H. 574, 53 Atl. 797.

Subrogation to a prior mortgage cannot be claimed on account of a payment thereof, without the mortgagor's knowledge or consent, out of the proceeds of a subsequent invalid mortgage executed by the agent of the mortgagor without authority. Gray *v.* Zelmer, 66 Kans. 514, 72 Pac. 228.

Where one has paid off a tax lien upon land, and the payment was made through mistake, the defendant will not be allowed to retain the benefit of the mistake when she had full notice of its having been made. Lee *v.* Newell, 96 Neb. 209, 147 N. W. 684.

A party who pays a debt that he is under no legal liability to pay, and he has no interest in making the payment, and the debt is paid without any request from the debtor to make payment, and no assignment is contemplated, he cannot afterwards secure an assignment and enforce collection from the debtor. Cape Girardeau Bell Telephone Co. *v.* Hamil's Estate, 160 Mo. App. 521, 134 S. W. 1103.

And where a school teacher purchased a piano upon instalments and gave up her work before she had fully paid for the instrument, and a third party paid the balance due without her consent, he was a volunteer. Town of Grand Isle *v.* McGowan, 88 Vt. 140, 92 Atl. 6.

is not enough. The right is enforced only when the agreement creates equitable rights as against the debtor, which will not impair or overthrow equitable rights of the creditor or of innocent third persons. When, therefore, subrogation depends wholly upon an agreement with the debtor, the rights of the creditor to the remainder of his debt must not be prejudiced.[1]]

§ 725. [**Measure of Right to Subrogation.** — One who is entitled to be subrogated to the rights of another is entitled to the securities as he finds them, and to such interest as the primary debtor had in the property at the time of the payment of the debt. And where a third party buys in a judgment, he is limited to the rights adjudicated in the decree and no further. Of course if the third party has been fully reimbursed the amount that he paid, then he has received the full measure of the damage that he sustained, and there is no right to subrogation.[2]]

§ 726. [**Right to Subrogation Should Be Pursued Promptly.** — When one is entitled to be subrogated to the rights of the creditor against the debtor, whose debt has been paid, there is another equitable principle involved which requires that he should seek his remedy promptly, and not wait until after the rights of innocent third persons have accrued. The right may be plain and the remedy at law inadequate, but where other parties would suffer in order to entitle the party who has paid the debt to subrogation, the statute of limitations will defeat a recovery.[3]]

[1] J. P. Browder & Co. *v.* Hill, 136 Fed. 821, 69 C. C. A. 499; Platte Valley Co. *v.* Bosserman Live Stock Co., 202 Fed. 692, 121 C. C. A. 102; McCowan *v.* Brooks, 113 Ga. 532, 39 S. E. 115; Brown *v.* Rash, 40 Tex. Civ. App. 203, 89 S. W. 438; Peager *v.* Davis, 143 Ga. 11, 84 S. E. 59; Watson *v.* Bowman, 142 Iowa 528, 119 N. W. 623; Walter Baker & Co. *v.* New York, New Haven & Hartford R. Co., 162 Fed. 496, Affirmed 168 Fed. 248.

[2] Central Trust Co. *v.* Third Ave. R. Co., 180 Fed. 710, 103 C. C. A. 492; Culbertson *v.* Salinger, 131 Iowa 307, 108 N. W. 454; Poe *v.* Philadelphia Casualty Co., 118 Md. 347, 84 Atl. 476; Beville *v.* Boyd, 16 Tex. Civ. App. 491, 41 S. W. 670; Maffatt *v.* Greene, 149 Mo. 48, 50 S. W. 809; Smith *v.* Davis, 71 W. Va. 316, 76 S. E. 670; United States F. & G. Co. *v.* Borough Bank, 161 App. 479, 146 N. Y. Supp. 870.

[3] Hargis *v.* Robinson, 63 Kans. 686, 66 Pac. 988; Darrow *v.* Summerhill, 93 Tex. 92, 53 S. W. 680, 79 Am. St. Rep. 833; Hutcheson *v.* Reash, 15 Pa. Super. Ct. 96; Anthes *v.* Schroeder, 74 Neb. 172, 103 N. W. 1072.

CHAPTER X

ADMINISTRATION

§ 727. **Administration.** — Having thus gone over some of the more important cases in which matters of account are involved as the principal and sometimes as the exclusive ground of jurisdiction, we shall now take leave of this part of the subject and proceed to the consideration of other branches of concurrent jurisdiction in equity; in which, although accounts are sometimes involved, yet the jurisdiction is derived from or essentially connected with other sources of jurisdiction, and accounts whenever taken are mere incidents to other relief.

§ 728. **Nature of Jurisdiction in Cases of Administration.** — And in the first place the jurisdiction of Courts of Equity in the administration of the assets of deceased persons.[1] The word assets is derived from the French word *assez*, which means sufficient, or enough; that is, sufficient or enough in the hands of the executor or administrator to make him chargeable to the creditors, legatees, and distributees of the deceased so far as the personal property of the deceased extends, which comes to the hands of the executor or administrator for administration. In an accurate and legal sense all the personal property of the deceased, which is of a salable nature and may be converted into ready money, is deemed assets.[2] But the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies and is applicable to that purpose is in a large sense assets.[3]

§ 729. **Same.** — It has been said that the whole jurisdiction of Courts of Equity in the administration of assets is founded on the

[1] Equity has no jurisdiction to set up or to set aside wills. Broderick's Will, 88 U. S. 504, 22 L. Ed. 599; Meluish *v.* Milton, 3 Ch. D. 27; ante, §§ 247–261 and notes.

[2] 2 Black. Comm. 510; Toller on Executors, B. 2, ch. 1, p. 137.

[3] 2 Black. Comm. 244, 340; Toller on Executors, B. 3, ch. 8, p. 409.

principle that it is the duty of the court to enforce the execution of trusts; and that the executor or administrator who has the property in his hands is bound to apply that property to the payment of debts and legacies, and to apply the surplus according to the will of the testator, or, in case of intestacy, according to the Statute of Distributions. So that the sole ground on which Courts of Equity proceed in cases of this kind is to be deemed the execution of a trust.[1]

§ 730. **Same.** — This is certainly a very satisfactory foundation on which to rest the jurisdiction in many cases; for under many circumstances, as an execution of a trust, the subject would be properly cognizable in equity and especially if the party would not be chargeable at law, since it is the ordinary reason for a Court of Equity to grant relief that the party is remediless at law. It has also been truly said that the only thing inquired of in a Court of Equity is whether the property bound by a trust has come into the hands of persons who are either bound to execute the trust or to preserve the property for the persons entitled to it. If we advert to the cases on the subject, we shall find that trusts are enforced, not only against those persons who are rightfully possessed of trust property, as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust. And whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust.[2]

§ 731. **Same.** — Certainly to no persons can these considerations more appropriately apply than to executors and administrators and those claiming under them with notice of the administration and assets. But if it were the sole ground of sustaining the juris-

[1] Adair *v.* Shaw, 1 Sch. & Lefr. 262. See also Farrington *v.* Knightley, 1 P. Will. 548, 549; Rachfield *v.* Careless, 2 P. Will. 161; Duke of Rutland *v.* Duchess of Rutland, 2 P. Will. 210, 211; Elliot *v.* Collier, 1 Ves. 16; Anon. 1 Atk. 491; Wind *v.* Jekyll, 2 P. Will. 575; Nicholson *v.* Sherman, 1 Cas. Ch. 57; Bac. Abridg. Legacy, M.; 1 Madd. Ch. Pr. 466, 467. As to the jurisdiction of equity to require an executor or administrator to account, see Carswell *v.* Spencer, 44 Ala. 204; Finger *v.* Finger, 64 N. C. 183. It is held in some cases that there must be a judgment at law before filing a bill to have equitable assets applied. Harrison *v.* Hallum, 5 Cold. 525. But see Steere *v.* Hoagland, 39 Ill. 264; Ragsdale *v.* Holmes, 1 S. C. 91.

[2] See Thorndike *v.* Hunt, 3 DeG. & J. 563; Hopper *v.* Conyers, 12 Jur. (N. S.) 328. A stranger who has received assets from an executor de son tort cannot be called to account as executor de son tort though the assets may be followed into his hands. Hill *v.* Curtis, L. R. 1 Eq. 90. See Rayner *v.* Koehler, L. R. 14 Eq. 264.

diction, that it is the case of a trust cognizable in equity alone, it would follow that, instead of being a matter of concurrent jurisdiction, it would be a matter belonging to the exclusive jurisdiction of equity. For although equity does not purport to entertain jurisdiction of all trusts, some of them, such as cases of bailments, being ordinarily cognizable at law,[1] yet of such trusts as are peculiar to Courts of Equity the jurisdiction is exclusive in such courts. Now we all know that both the Courts of Common Law and the Ecclesiastical Courts have cognizance of administrations, and many suits respecting the administration of assets are daily entertained therein. Courts of Equity therefore in assuming general jurisdiction over cases of administration do indeed in some measure found themselves upon the notion of a constructive trust in the executors or administrators.[2] But the fact of there being a constructive trust is not the sole ground of jurisdiction. Other auxiliary grounds also exist, such as the necessity of taking accounts and compelling a discovery,[3] and the consideration that the remedy at law when it exists is not plain, adequate, and complete. The jurisdiction therefore now assumed by Courts of Equity to so wide an extent over all administrations and the settlement of estates in cases of testacy and intestacy, is not (as it should seem) exclusively referable to the mere existence of a constructive trust (which is often sufficiently remediable at law), but it is referable to the mixed considerations already adverted to, each of which has a large operation in equity.[4]

§ 732. **Same.** — A little attention to the nature of the jurisdiction exercised in the Courts of Common Law and the Ecclesiastical Courts in cases of administrations will abundantly show the necessity of the interposition of Courts of Equity. In the first place in suits at common law nothing more can be done than to establish the debt of the creditor; and if there is any controversy as to the existence of the assets and a discovery is wanted, or if the assets are not of a legal nature, or if a marshalling of the assets is indispensable to a due payment of the creditor's claim, it is obvious that the remedy at law cannot be effectual. But there may be other interests injuriously affected by the judgment of a

[1] 3 Black. Comm. 431, 432; 1 Wooddeson, Lect. vii., pp. 208, 209.
[2] Bac. Abridg. Legacy, M.
[3] Com. Dig. Chancery, 2 A. 1; 3 Black. Comm. 98.
[4] See Mitford, Pl. Eq. by Jeremy, pp. 125, 126, 136. Where equity has taken jurisdiction of an administration, it may proceed to distribution and relief as in probate. Key *v.* Jones, 52 Ala. 238.

Court of Common Law in a suit by a creditor, which injury that court could not redress or prevent, but which Courts of Equity could completely redress or prevent.

§ 733. **Same.** — In the next place as to the Ecclesiastical Courts. They have, it is true, an ancient jurisdiction over the probate of wills and the granting of administrations, and as incident thereto an authority to enforce the payment of legacies of personal property.[1] But by the common law, although an executor was compellable to account before the ordinary or ecclesiastical judge, and so was an administrator, yet the ordinary was to take the account as given in by the executor or administrator, and could not oblige him to prove the items of it or to swear to the truth of it.[2]

§ 734. **Accounting Required of Personal Representatives.** — The statute of 31st of Edward III., ch. 11, put executors and administrators upon the same footing as to accounting for assets, but it in no manner whatsoever changed the mode of accounting by either of them.[3] A legatee might falsify the account of an executor or administrator in the Spiritual Court, as may also the next of kin, since the Statute of Distributions of 22d and 23d of Car. II., ch. 10. But a creditor of the estate could not falsify the account in the Ecclesiastical Court, for his proper remedy was held to be at the common law.[4] By the statute of 21st of Henry VIII., ch. 5, § 4, executors and administrators were bound to deliver an inventory of the effects of the deceased upon oath to the ordinary. But the inventory could not be controverted in the Ecclesiastical Courts by a creditor, but only by a legatee.[5] Even an administration bond will not be broken by an omission to pay a creditor's debt, but it is a security merely for those who are interested

[1] 2 Black. Comm. 494; 3 Black Comm. 98; Bac. Abridg. Legacies, M.; 2 Fonbl. Eq. B. 4, ch. 1, § 1, and notes; Marriott *v.* Marriott, 1 Str. Rep. 666.

[2] 2 Fonbl. Eq. B. 4, ch. 3, § 2, and note (*d*); Archbishop of Canterbury *v.* Wills, 1 Salk. 315.

[3] 2 Black. Comm. 496; 4 Burns, Eccles. Law, Wills, Distribution, Account, viii., p. 368; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (*d*).

[4] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (*d*); Hinton *v.* Parker, 8 Mod. 168; Catchside *v.* Ovington, 3 Burr. R. 1922; Archbishop of Canterbury *v.* Wills, 1 Salk. 315.

[5] Hinton *v.* Parker, 8 Mod. 168; Catchside *v.* Ovington, 3 Burr. 1922; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2. Mr. Fonblanque is in an error when he says, "The inventory could not be controverted in the Spiritual Court." The authorities cited by him show that it could be by a legatee but not by a creditor. 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2.

in the estate.[1] Indeed before the Statute of Distributions it was a matter greatly debated whether an administrator could be compelled to make any distribution of an intestate's estate; and for a great length of time it was held that an executor was in all cases entitled to the personal estate of his testator not disposed of by his will.[2]

§ 735. **Creditors May Compel Discovery of Assets.** — The jurisdiction of the Ecclesiastical Courts being so manifestly defective in the case of creditors, resort was almost necessarily had to Courts of Equity to compel a discovery of assets and an account. And where a creditor did not seek a general settlement of the estate by a suit in behalf of himself and all other creditors, still he was entitled to a discovery in Courts of Equity to enable him to recover his own debt in an action at law.[3]

§ 736. **Same.** — In regard to legatees also the remedy was in many cases quite as defective. No remedy lies at the common law in cases of pecuniary legacies,[4] and although (as has been stated) a remedy does lie in the Spiritual Courts, yet in a great variety of cases that remedy is insufficient and imperfect. Thus if payment of a legacy should be pleaded to a suit in the Ecclesiastical Courts, and there is but one witness of the fact (which the Ecclesiastical Courts will not admit as sufficient proof, for their law requires two), there the Temporal Courts will grant a prohibition to further proceedings.[5] So if a husband should sue for a legacy in the Ecclesiastical Courts, the Court of Chancery will prohibit him; because the Ecclesiastical Courts cannot compel him to make any settlement on his wife in consideration of the legacy.[6] So if a legacy is due to an infant, the Court of Chancery will interfere at the instance of the executor and prevent the Spiritual Courts from proceeding, because the executor may be entitled to a bond to indemnify him, and to refund in case of a deficiency of assets.[7] Many other cases might be put of a like nature.

[1] Archbishop of Canterbury *v.* Wills, 1 Salk. 315; Greenside *v.* Benson, 3 Atk. 248, 252; Ashley *v.* Baillie, 3 Ves. 268; Wallis *v.* Pipon, Ambler, R. 183; Archbishop of Canterbury *v.* House, Cowp. R. 140; Thomas *v.* Archbishop of Canterbury, 1 Cox, R. 399.

[2] 2 Black. Comm. 514, 515; Toller on Ex'ors, B. 3, ch. 6, p. 369.

[3] Com. Dig. Chancery, 2 C. 3; Id. 3 B. 1.

[4] Decks *v.* Strutt, 5 Term R. 690; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2.

[5] Bacon, Abridg. Legacy, M.; 3 Black. Comm. 112.

[6] 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, and note (*d*).

[7] Horrell *v.* Waldron, 1 Vern. R. 26; Noel *v.* Robinson, 1 Vern. R. 91. But see Anon. 1 Atk. R. 491; Hawkins *v.* Day, Ambler, R. 162; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2.

§ 737. **Executor Is Trustee for Legatee and He May Be Compelled to Assent to Payment of Legacy.** — But a stronger instance may be stated. If the testator does not dispose of the residue of his estate, and yet from the circumstances of the will the executor is plainly not entitled to the residue, there he will be held liable to distribute it as a trustee for the next of kin. But the Spiritual Courts have no jurisdiction whatsoever in such a case to enforce a distribution; for trusts are not cognizable in those courts and cannot be enforced by them.[1] Even in the common case of a legacy of personal estate the legacy does not vest in the legatee until the executor assents to it; and until he assents, it would seem not to be suable in the Spiritual Courts. But Courts of Equity consider the executor to be a trustee of the legatee, and will compel him to assent to and pay the legacy as a matter of trust.[2] And if there are no legal assets to pay a legacy, although there are ample equitable assets, the Spiritual Courts cannot enforce payment of the legacy; for they have no jurisdiction over equitable assets.[3]

§ 738. **Same.** — In cases of distribution of the residue of estates the remedy in the Spiritual Courts is also on other accounts exceedingly defective; for those courts do not possess any adequate means for a perfect ascertainment of all the debts; or to compel a payment of them, when ascertained, so as to fix the precise residuum; or to protect the executor or administrator in his administration according to their decree.[4] Besides, the interposition of a Court of Equity may be required for many other purposes before a final settlement and distribution of the estate; as for instance to compel an executor to bring the funds into court; or to give security for the payment of debts, legacies, and distributive shares where there is danger of insolvency or he is wasting the assets; or where the debts, legacies, and distributive shares are not presently payable or payment cannot be presently enforced.[5]

§ 739. **History of the Equitable Remedy.** — The jurisdiction of Courts of Equity to superintend the administration of assets and decree a distribution of the residue after payment of all debts

[1] Farrington *v.* Knightly, 1 P. Will. 545, 548.

[2] Wind *v.* Jekyll, 1 P. Will. 575.

[3] Barker *v.* May, 9 B. & Cressw. 489. See also Paschall *v.* Ketterich, Dyer, 151 *b*; Edwards *v.* Graves, Hob. R. 265; Bac. Abridg. Legacy, M.

[4] See 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (*d*); Id. B. 4, Pt. 1, ch. 1, § 2, and note (*d*).

[5] See 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, and note (*d*); Duncumban *v.* Stint, 1 Ch. Cas. 121; Strange *v.* Harris, 3 Bro. Ch. R. 365; Blake *v.* Blake, 2 Sch. & Lefr. 26.

and charges among the parties entitled either as legatees or as distributees, does not seem to have been thoroughly established until near the close of the reign of Charles II. The objection was then made that the Spiritual Courts had full authority, under the Statute of Distributions, to decree a distribution of the residue. But upon a demurrer filed to a bill for a distribution it was held by the Lord Chancellor that there being no negative words in the Act of Parliament (the Statute of Distributions), the jurisdiction of the Court of Chancery was not taken away; for the remedy in chancery was more complete and effectual than that in the Spiritual Courts; or to use the language of the court upon that occasion, the Spiritual Court in that case had but a lame jurisdiction.[1] And although ordinarily in cases of concurrent jurisdiction the decree of the court first having possession of the cause is held conclusive, yet Courts of Chancery have not held themselves bound by decrees of the Spiritual Courts in cases of distribution from their supposed inability to do entire justice.[2]

§ 740. **Same.** — For a great length of time the usual resort has been to the Court of Chancery to settle the administration of estates; so that, practically speaking, in cases of any complication or difficulty it has acquired almost an exclusive jurisdiction. In many cases indeed besides those which have been already mentioned it is impossible for any other court than a Court of Equity to administer full and satisfactory justice among all the parties in interest; and especially where equitable assets are to be administered or the assets are to be marshalled, as we shall abundantly see in the further progress of these Commentaries.[3]

§ 741. **Executor May Institute Suit for Adjustment of Claims.** — The application for aid and relief in the administration of

[1] Matthews *v.* Newby, 1 Vern. 133; Howard *v.* Howard, 1 Vern. 134; Buccle *v.* Atleo, 2 Vern. R. 37; Gibbons *v.* Dawley, 2 Ch. Cas. 198; Pamplin *v.* Green, 2 Ch. Cas. 95; Lord Winchelsea *v.* Duke of Norfolk, 2 Ch. R. 367; 2 Fonbl. Eq. B. 4, ch. 1, § 2; Digby *v.* Cornwallis, 3 Ch. R. 72; Petit *v.* Smith, 1 P. Will. 7; 1 Madd. Ch. Pr. 467.

[2] See Bissell *v.* Axtell, 2 Vern. 47, and Mr. Raithby's note; 1 Eq. Abridg. E., p. 136, Pl. 2, 3, 4.

[3] Upon the jurisdiction of equity see Tichborne *v.* Tichborne, L. R. 2 P. & M. 41; Harding *v.* Harding, L. R. 13 Eq. 493; Adams *v.* Adams, 22 Vt. 50; Stewart *v.* Stewart, 31 Ala. 207; Seymour *v.* Seymour, 4 Johns. Ch. 409; Van Meter *v.* Sickler, 1 Stockt. 483; Clarke *v.* Johnston, 2 Stockt. 287; Fleming *v.* McKesson, 56 N. C. 316; Heward *v.* Slagle, 52 Ill. 336; Humphreys *v.* Burleson, 72 Ala. 1; McNeill *v.* McNeill, 36 Ala. 109; Graffam *v.* Ray, 91 Me. 234, 39 Atl. 569; Sargent *v.* Sargent, 168 Mass. 420, 47 N. E. 121; Fingleton *v.* Grove, 116 Mich. 211, 74 N. W. 473, 4 Detroit Leg. N. 1107; Boales *v.* Ferguson, 55 Neb. 565, 76 N. W. 18; Pfister *v.* Writer, 33 Misc. Rep. 701, 68 N. Y. Supp. 976.

estates is sometimes made by the executor or administrator himself, when he finds the affairs of his testator or intestate so much involved that he cannot safely administer the estate except under the direction of a Court of Equity. In such a case it is competent for him to institute a suit against the creditors generally, for the purpose of having all their claims adjusted, and a final decree settling the order and payment of the assets.[1] These are sometimes called Bills of Conformity (probably because the executor or administrator in such case undertakes to conform to the decree, or the creditors are compelled by the decree to conform thereto); and they are not encouraged, because they have a tendency to take away the preference which one creditor may gain over another by his legal diligence. Besides it has been said that these bills may be made use of by executors and administrators to keep creditors out of their money longer than they otherwise would be.[2] However correct these reasons may be for a refusal to interfere in ordinary cases involving no difficulty, they are not sufficient to show that the court ought not to interfere in behalf of an executor or administrator under special circumstances where injustice to himself or injury to the estate may otherwise arise.[3]

§ 742. **Same.** — A doubt has indeed been suggested whether a bill can be maintained against all the creditors.[4] But if the bill is brought against certain known creditors who are proceeding at law, it may be asked, What is the difficulty of proceeding in the same way as is done as to all creditors upon a bill brought by one or more creditors in behalf of themselves and all other creditors? Upon a decree for the executor or administrator to account, all the creditors are, or may be, required to present and prove their debts before the master in the first case as they are now required to do in the last case. But upon such a bill, brought by an executor or administrator, the court will not interpose by way of

[1] Com. Dig. Chancery, 3 G. 6; Buccle *v.* Atleo, 2 Vern. 37. See Rush. *v.* Higgs, 4 Ves. Jr., 638, 643; Jackson *v.* Leap, 1 Jac. & Walk. 231; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 4, note (*u*). It is not enough that there are numerous claims to be settled; there must be complications that cannot be adequately dealt with at law. Bryan *v.* Hickson, 40 Ga. 405. See Irvin *v.* Bond, 41 Ga. 630; Jeter *v.* Barnard, 42 Ga. 43.

[2] Morrice *v.* Bank of England, Cas. Temp. Talb. 224; Blackwell's case, 1 Vern. 153, 155; 1 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 3, note (*u*).

[3] Com. Dig. Chancery, 3 G. 6. A bill of conformity will not lie when it appears that by due diligence in the payment of the decedent's debts there would have been enough to pay all. Weakley *v.* Gurley, 60 Ala. 399.

[4] Rush *v.* Higgs, 4 Ves. Jr. 638, 643.

injunction to prohibit creditors proceeding at law, until there has been a decree against the executor or administrator to account in that suit; for otherwise the latter might without reason make it a ground of undue delay of the creditors.[1]

§ 743. **Creditors May File a Bill for Payment of Their Debts and for Discovery of Assets.** — But the more ordinary case of relief sought in equity in cases of administration is by creditors. A creditor may file his bill for payment of his own debt and seek a discovery of assets for this purpose only.[2] If he does so, and the

[1] Rush *v.* Higgs, 4 Ves. Jr., 638, 643.

[2] Clark *v.* Hogle, 52 Ill. 427; Fairfield *v.* Fairfield, 15 Gray, 596; Carter *v.* Hampton, 77 Va. 631; Kennedy *v.* Cresswell, 101 U. S. 641, 25 L. Ed. 1075. Secus in North Carolina. Wilkins *v.* Finch, 62 N. C. 355. And in Alabama. Scott *v.* Ware, 64 Ala. 174. Filing a creditor's bill, or at least service of process, gives the plaintiff a lien upon the judgment debtor's property by placing it under control of court. First National Bank *v.* Gage, 93 Ill. 172. And this lien survives the debtor's death and is available in the hands of his representative. Ib., Brown *v.* Nichols, 42 N. Y. 26. As to equitable interests and choses in action the rule appears to be that the lien is fixed by the commencement of the suit. But in regard to chattels liable to execution at law the lien may be defeated by seizure of the goods on execution in favor of another creditor before the appointment of a receiver. First Nat. Bank *v.* Gage, supra; Davenport *v.* Kelley, 42 N. Y. 193. The lien extends only to property which the debtor had at the commencement of the suit. First Nat. Bank *v.* Gage.

A creditor's bill to subject his debtor's interest in property must show that all remedy at law has been exhausted. Case *v.* Beauregard, 101 U. S. 688, 25 L. Ed. 370; Smith *v.* Railroad Co., 99 U. S. 398, 25 L. Ed. 437. See Shufeldt *v.* Boehm, 96 Ill. 560. Generally speaking it should appear that judgment has been rendered, and execution issued and returned nulla bona. But it is enough to allege that the debtor is insolvent, and that an execution would be of no avail. Case *v.* Beauregard, 101 U. S. 688, 25 L. Ed. 370. This is certainly true where the creditor has a lien or a trust in his favor. Ib.; Tappan *v.* Evans, 11 N. H. 311; Holt *v.* Bancroft, 30 Ala. 193.

When the property of a corporation has been divided among the stockholders before its debts are all paid, a creditor may have a bill against an individual stockholder to subject the property which has fallen to him without making the rest of the stockholders parties. Bartlett *v.* Drew, 57 N. Y. 587; Hatch *v.* Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie *v.* Knox Ins. Co., 63 U. S. 380, 16 L. Ed. 349; Montgomery R. Co. *v.* Branch, 59 Ala. 139, 153; Huckabee *v.* Smith, 53 Ala. 191. See Pierce *v.* Milwaukee Constr. Co., 38 Wis. 253. And an individual stockholder who has not paid up in full his subscription may be proceeded against in the same way. Hatch *v.* Dana, supra, distinguishing Pollard *v.* Bailey, 87 U. S. 156, 22 L. Ed. 376; Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537; Pierce *v.* Milwaukee Constr. Co., supra; Marsh *v.* Burroughs, 1 Woods, 468; Wetherbee *v.* Baker, 35 N. J. Eq. 501; Dalton R. Co. *v.* McDaniel, 56 Ga. 191. It is not necessary that there should have been calls to pay up by the corporation. Hatch *v.* Dana, supra; Henry *v.* Railroad Co., 17 Ohio, 187. As to the mode of proceeding to enforce special individual liability of stockholders, see Terry *v.* Little, 101 U. S. 216, 25 L. Ed. 864.

bill is sustained, and an account is decreed to be taken, the court will, upon the footing of such an account, proceed to make a final decree in favor of the creditor without sending him back to law for the recovery of his debt; for this is one of the cases in which a court of equity, being once in rightful possession of a cause for a discovery and account, will proceed to a final decree upon all the merits.[1] Upon a bill thus brought by a single creditor for his own debt only, no general account of debts is usually directed to be taken; but the common course is, to direct an account of the personal estate and of that particular debt which is ordered to be paid in the due course of administration.[2]

§ 744. **Same.** — The more usual course however pursued in the case of creditors is for one or more creditors to file a bill (commonly called a creditor's bill) by and in behalf of him, or themselves, and all other creditors who shall come under the decree, for an account of the assets and a due settlement of the estate.[3] And

In ordinary cases the plaintiff should, it seems, show that he has exhausted his legal remedies against the corporation by judgment, execution, and return of nulla bona before seeking to compel a stockholder to pay up his subscription. Wetherbee *v.* Baker, 35 N. J. Eq. 501; Paxton *v.* Rich, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639; Whaley *v.* Rothschild & Co., 176 Ala. 69, 57 So. 707; Davis' Admr. *v.* Auxier, 19 Ky. L. Rep. 719, 41 S. W. 767; First Natl. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333; Hanna *v.* Galford, 55 W. Va. 160, 47 S. E. 359; Metropolitan Trust Co. *v.* Stallo, 166 App. Div. 639, 152 N. Y. Supp. 183.

[1] Attorney-Gen. *v.* Cornthwaite, 2 Cox, 44. See McKay *v.* Green, 3 John. Ch. R. 58; Thompson *v.* Brown, 4 John. R. 619, 630 to 643; Morrice *v.* Bank of England, Cas. Temp. Talb. 220; Kennedy *v.* Cresswell, 101 U. S. 641, 646; 25 L. Ed. 1075.

[2] Where the personalty is insufficient, permission will be given to sell real estate. Clark *v.* Hogle, 52 Ill. 427. But see Eno *v.* Calder, 14 Rich. Eq. 154. See further Wadsworth *v.* Davis, 63 N. C. 251.

Attorney-Gen. *v.* Cornthwaite, 2 Cox, R. 44; Morrice *v.* Bank of England, Cas. Temp. Talb. 217; Anon. 3 Atk. 572; Perry *v.* Phelips, 10 Ves. 38. Although this is the usual course in the case of a creditor seeking an account and payment of his own debt only, it is not therefore to be considered that the court itself is absolutely incompetent upon such a bill to make a more general decree in the form of a decree upon a general creditors' bill. On the contrary a case may be made out upon the answer and proofs, which might render it, if not indispensable, at least highly expedient for the purposes of justice, to adopt the latter course. See Ram on Assets, &c., ch. 24, § 2; Martin *v.* Martin, 1 Ves. 213, 214; Sheppard *v.* Kent, Prec. Ch. 190, 193; s. c. 2 Vern. 435; Anon. 3 Atk. 572; Perry *v.* Phelips, 10 Ves. 38, 40, 41; Rush *v.* Higgs, 4 Ves. 638; Thompson *v.* Brown, 4 John. Ch. R. 610, 630, 643, 646. Real property will be applied to payment of debts when personal estate is insufficient. Hinton *v.* Whitehurst, 68 N. C. 316; Tuck *v.* Walker, 106 N. C. 288, 11 S. E. 183; Lee *v.* McKoy, 118 N. C. 525, 24 S. E. 210.

[3] See the case of The Creditors of Sir Charles Cox, 3 P. Will. 343. The creditors are entitled to require the debtor to discover his assets

this applies as well when the party suing is a creditor whose debt is payable in presenti, as when his debt is due in futuro, if it be "debitum in presenti, solvendum in futuro",[1] and whether he has a mortgage or not.[2] Bills of this sort have been allowed upon the mere principle that, as executors and administrators have vast powers of preference at law, Courts of Equity ought, upon the principle that equality is equity, to interpose upon the application of any creditor by such a bill to secure a distribution of the assets without preference to any one or more creditors.[3] And as a decree in equity is held of equal dignity and importance with a judgment at law, a decree upon a bill of this sort, being for the benefit of all creditors, makes them all creditors by decree upon an equality with creditors by judgment so as to exclude, from the time of such decree, all preferences in favor of the latter.[4]

§ 745. **Proceedings in Suit by Creditors.** — The usual decree in the case of creditors' bills against the executor or administrator is (as it is commonly phrased) quod computet; that is to say, it directs the master to take the accounts between the deceased and all his creditors, and to cause the creditors, upon due public notice, to come before him to prove their debts at a certain place and within a limited period; and it also directs the master to take an account of all the personal estate of the deceased in the hands of the executor or administrator, and the same to be applied in payment of the debts and other charges in a due course of administration.[5] In all cases of this sort each creditor is entitled to

so that they may be reached by the execution, Newlove *v.* Pennock, 123 Mich. 260, 6 Detroit Leg. N. 1036, 82 N. W. 54; and where it is necessary to make the judgment effectual, an injunction will issue restraining a conveyance or disposition of the property by the debtor, and a receiver will be appointed. Saginaw Bank *v.* Duffield, 157 Mich. 522, 122 N. W. 186, 16 Detroit Leg. N. 431; James H. Rice Co. *v.* Agnew, 147 Ill. App. 468; Heyl *v.* Taylor, 137 App. Div. 641, 122 N. Y. Supp. 279; Dunfee *v.* Childs, 45 W. Va. 155, 30 S. E. 102; Howard *v.* Stephenson, 33 W. Va. 116, 10 S. E. 66; Fraser *v.* Cole, 214 Fed. 556.

[1] Whitmore *v.* Oxborn, 2 Younge & Coll. (N. R.) 13, 17.

[2] Greenwood *v.* Firth, 2 Hare, R. 241, note; Aldridge *v.* Westbrook, 5 Beav. R. 138; Shey *v.* Bennett, 2 Younge & Coll. (N. R.) 405; White *v.* Hillacre, 3 Younge & Coll. 597, 609, 610; Story, Eq. Pl. §§ 101, 158.

[3] Rush *v.* Higgs, 4 Ves. Jr. 638, 643; Gilpin *v.* Lady Southampton, 18 Ves. 469; Martin *v.* Martin, 1 Ves. 210; Thompson *v.* Brown, 4 John. Ch. R. 619, 630, 643.

[4] Ibid.; Morrice *v.* Bank of England, Cas. T. Talb. 217; Perry *v.* Phelips, 10 Ves. 38, 39, 40; Brooks *v.* Reynolds, 1 Bro. Ch. R. 183; Paxton *v.* Douglas, 8 Ves. 520; Thompson *v.* Brown, 4 John. Ch. R. 619.

[5] Van Heythuysen, Eq. Draft. Title, Decrees, p. 647; The Creditors of Sir Charles Cox, 3 P. Will. 343; Sheppard *v.* Kent, Prec. Ch. 190;

appear before the master, and may there, if he chooses, contest the claim of any other creditor in the same manner as if it were an adversary suit.[1]

§ 746. **Practice Where Executor Admits Assets and Validity of Plaintiff's Claim.** — But although the usual decree is as above stated upon a bill by a creditor in behalf of himself and all other creditors, this decree is not applicable (as it seems) to cases where the executor or administrator admits assets; for he thereby admits himself liable for the payment of the debt, and in such a case the plaintiff may have a decree for the payment of his own debt only, without any decree for a general account; for the other creditors are not prejudiced by such a decree for the payment of the plaintiff's debt under such circumstances.[2]

§ 747. [**Creditor Who Has Been Paid May Not Dismiss Bill**

s. c. 2 Vern. 435; Kenyon *v.* Worthington, 2 Dick. R. 668; Thompson *v.* Brown, 4 John. Ch. R. 619.

[1] Owens *v.* Dickenson, 1 Craig & Phil. 48, 56. See as to the form of a decree in an administration suit, in case all the parties interested should not be parties at the hearing. Fisk *v.* Norton, 2 Hare, R. 381.

[2] Woodgate *v.* Field, 2 Hare, R. 211, 212. Mr. Vice-Chancellor Wigram on that occasion said: "The reason for and the principle of the usual form of decree are stated in Owens *v.* Dickenson (Cr. & Ph. 48), but that reasoning has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case the other creditors cannot be prejudiced by a decree for payment of the plaintiff's debt, and the object of the special form of the decree in a creditors' suit fails. I entertained no doubt upon this point, nor can I, upon inquiry, find that it was ever doubted in the other branches of the court. In effect the rule is proved by the fact that the creditor and defendant, the executor, may settle the matter pending the suit by the latter paying the debt and costs of the suit. And it has twice been decided at the Rolls, that the court will order the same thing to be done, even when the suit had proceeded to a considerable extent. If then the court would compel a creditor to accept payment of his debt when the executor offers to pay it, with the costs of suit, where is the line to be drawn beyond which the plaintiff cannot be allowed to have the exclusive benefit of his own suit? I am satisfied that in this case there ought to be a decree for immediate payment. It was objected however that in Sterndale *v.* Hankinson, Sir A. Hart said that on the filing of a creditors' bill every creditor has an inchoate right in the suit; the meaning of that expression is, that a right then commences which may indeed fail, but may also be perfected by decree, and it is not inaccurately called an inchoate right. After the decree every creditor has an interest in the suit; but the question is whether the plaintiff, until decree, is not 'dominus litis', so that he may deal with the suit as he pleases. There is nothing to prevent other creditors from filing bills for a like purpose; and there is nothing more common than for several suits to exist together, and the court permits them to go on together until a decree in one of them is obtained, because it is possible before the decree that the litigating creditor may stop his suit."

to Prejudice of Rights of Other Creditors. — A creditor who institutes an action in the nature of a creditors' bill may generally submit to a discontinuance of the action where his debt or demand has been fully satisfied, before final judgment; but where a general creditors' bill has been brought, for the benefit of all creditors who might desire to come in and make themselves parties to the proceeding, there is a strong tendency, and upon good reason, to deny the right of the original complainant to do more than to discontinue the action as to his own claim, and the special relief to which he may be entitled thereon, especially where the rights of intervening claimants might be prejudiced thereby beyond the necessity merely of instituting an independent suit. The original plaintiff does not own the suit and as such have complete dominion over it to the exclusion of the rights of other creditors, and where they come in and exhibit their claims, they may assume the control and direction of the litigation, and they have such an interest in the proceeding as the court is bound to recognize in any further actions that may be taken.[1]]

§ 748. **Executor Is Entitled to Injunction against Further Proceedings at Law, upon Filing of Creditors' Bill.** — As soon as the decree to account is made in such a suit brought in behalf of all the creditors, and not before, the executor or administrator is entitled to an injunction out of chancery to prevent any of the creditors from suing him at law or proceeding in any suits already commenced except under the direction and control of the Court of Equity where the decree is passed.[2] The object of the court under such circumstances is to compel all the creditors to come in and prove their debts before the master, and to have the proper payments and discharges made under the authority of the court, so that the executor or administrator may not be harassed by multiplicity of suits, or a race of diligence be encouraged between

[1] La Tourette *v.* Fletcher, 6 App. D. C. 324; Deane *v.* Perkins, 155 Mich. 644, 119 N. W. 1093, 15 Detroit Leg. N. 1084; Honesdale Shoe Co. *v.* Montgomery, 56 W. Va. 397, 49 S. E. 434. But see Hirshfeld *v.* Bopp, 27 App. Div. 180, 50 N. Y. Supp. 676, reversed 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

[2] Morrice *v.* Bank of England, Cas. Temp. Talb. 217; Martin *v.* Martin, 1 Ves. 211, 212; Perry *v.* Phelips, 10 Ves. 38, 39; Brooks *v.* Reynolds, 1 Bro. Ch. R. 183, and Mr. Belt's note; Douglas *v.* Clay, 1 Dick. R. 393; Kenyon *v.* Worthington, 2 Dick. R. 668; Paxton *v.* Douglas, 8 Ves. 520; Jackson *v.* Leap, 1 Jac. & Walk. 231, and note; McKay *v.* Green, 3 John. Ch. 58; Burles *v.* Popplewell, 10 Sim. R. 383. See Underwood *v.* Hatton, 5 Beav. R. 31. As to enjoining the executor from paying debts see Wadsworth *v.* Davis, 63 N. C. 251.

different creditors each striving for an undue mastery and preference.[1] And this action of the court presupposes that all the legal rights of every creditor and the validity of his debt may be and indeed must be determined in equity upon the same principles as it would be at law.[2] But in order to prevent any abuse of such bills by connivance between an executor or administrator and a creditor, it is now a common practice to grant an injunction only when the answer or affidavit of the executor or administrator

[1] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 538 to 543.

[2] Whitaker *v.* Wright, 2 Hare, R. 310. On this occasion Mr. Vice-Chancellor Wigram said: "With respect to the form of a decree in a creditors' suit the court does not treat the decree as conclusive proof of the debt. It is clear that it is not so treated for all purposes, for any other creditor may challenge the debt, Owens *v.* Dickenson (1 Cr. & Ph. 48); and it is equally clear that in practice the executor himself is allowed to impeach it. If, in a case where the plaintiff sues on behalf of himself and all the other creditors, and the defendants, who represent the estate, do not admit assets (see Woodgate *v.* Field), it is objected at the hearing that the debt is not well proved, — the court tries the question only whether there is sufficient proof upon which to found a decree; and however clearly the debt may be proved in the cause, the decree decides nothing more than that the debt is sufficiently proved to entitle the plaintiff to go into the master's office; and a new case may be made in the master's office, and new evidence may be there tendered. The real question is, in what way the new case is to be tried, or what is the course to be pursued in the master's office? The plaintiff says that the course should be the same as at law, and that he brings his legal rights with him into equity; and, subject to some qualification, I cannot refuse my assent to the plaintiff's proposition. When a decree is made in a creditors' suit, under which all the creditors may come in, this court will not permit the estate to be embarrassed by proceedings which might conflict with each other, to the prejudice of the executor or administrator, Perry *v.* Phelips (10 Ves. 34); but nothing would be more unjust than that the court should restrain the creditor from proceeding to enforce his rights at law, except upon the principle of allowing him to bring his legal rights with him into the office of the court, which it substitutes for the proceedings at law, Dornford *v.* Dornford (12 Ves. 127); Berrington *v.* Evans (1 You. 276); and the circumstance that the creditor is also the plaintiff in the suit in equity makes no difference in that respect. The only qualifications which now occur to me of the general rule that a legal creditor brings all his legal rights with him, are founded, first, upon the circumstance that in certain special cases a Court of Equity in the ordinary course of administering assets will distinguish a voluntary bond from one given for value, Lady Cox's case (3 P. Wms. 339); Jones *v.* Powell (Eq. Cas. Abr. 84, pl. 2); Gilham *v.* Locke (9 Ves. 612); Assignees of Gardiner *v.* Shannon (2 Sch. & Lefr. 228); and secondly, that in all cases this court requires an affidavit of the truth of the debt from the creditor, which at law is not required. This affidavit is required to extend to the consideration of a simple-contract debt, but not to the consideration of bond or other specialty debts. The third qualification — if indeed there be any other than those which I have mentioned — is that which is said to be introduced by the case of Rundell *v.* Lord Rivers (Phillips, 88)."

states the amount of the assets, and upon the terms of his bringing the assets into court or obeying such other order of the court as the circumstances of the case may require.[1] The same remedial

[1] Gilpin *v.* Lady Southampton, 18 Ves. 469; Clarke *v.* Ormonde, Jac. Rep. 122, 123, 124, 125; Mitford, Eq. Pl. by Jeremy, p. 311. In Lee *v.* Park, 1 Keen, R. 714, 719 to 724, Lord Langdale (Master of the Rolls) went into an elaborate examination of the doctrine on this subject, and refused to stay the execution of a creditor who had obtained a judgment before the decree to account in chancery. Although it is long, yet it gives so full an account of the history, progress, and present state of the jurisdiction, that it seems proper to be here given at large. "It has been argued," says he, "that in cases of this nature the court pays no regard to the question whether the decree or judgment has priority in time, but considers only the quality of the judgment, and that the judgment in this case being a judgment to recover de bonis testatoris the executors are, as of course, entitled to restrain the judgment creditors from issuing execution. I do not accede to that argument. The jurisdiction in these cases was first established upon questions which arose between judgments at law and decrees in equity for payment of ascertained debts out of the assets. It was determined that such decrees and such judgments were in the administration of legal assets to be considered of equal value, and that the one which was prior in time (whether decree or judgment) should be first satisfied out of the assets. Morrice *v.* The Bank of England, Cas. Temp. Talb. 217; s. c. more fully, 3 Swanst. 575, and 2 Bro. P. C. 465, edit. Toml.; Martin *v.* Martin, 1 Ves. sen., 211. In the beginning a judgment obtained after a decree quod computet (not being a decree for payment of an ascertained sum out of the assets) was preferred. Ferrers *v.* Shirley, cited 10 Ves. 39. But subsequently Lord Thurlow put the jurisdiction on this, — that the court, having decreed an account of debts and assets, and ordered payment in a due course of administration, must be considered to have taken the fund into its own hands, and could not suffer its decree to be rendered nugatory by altering the course of administration, but ought to protect the executor in obeying its decrees. And he therefore granted injunctions to restrain proceedings at law after a decree quod computet. Kenyon *v.* Worthington, 2 Dick. 686. And as it was the practice in creditors' suits for the plaintiff, suing for himself and others, to prove his own debt prior to the hearing, there was perhaps not much difficulty in considering a decree for the administration of assets in such a suit, as in the nature of a judgment for all the creditors. But Lord Thurlow, acting on the principle to which he attributed the jurisdiction, gave the like authority to a decree quod computet which was obtained in a suit instituted by the trustees under a testator's will, and to which no creditor was a party; Brooks *v.* Reynolds, 1 Bro. C. C. 183. It was however contended that the creditor was not to be deprived of the benefit of a judgment which he had obtained prior to the decree; Goate *v.* Fryer, 2 Cox, 201; Largan *v.* Bowen, 1 Sch. & Lefr. 296. In the case of Paxton *v.* Douglas (8 Ves. 520) the creditor had obtained an interlocutory judgment prior to the application for an injunction. What was the state of the proceeding at law at the date of the decree is not stated, and no question on the subject appears to have been raised. In some subsequent cases, where the decree had priority in point of time, a question was raised whether the executor by improper pleading, or by confessing judgment, did not lose his right to be protected by an injunction; and upon these cases it has been considered that if the executor

so pleaded as to entitle the creditor, plaintiff at law, to a judgment to recover his demand de bonis propriis, this court could not restrain the execution; Brook *v.* Skinner, 2 Mer. 481, n.; Terrewest *v.* Featherby, 2 Mer. 480; Drewry *v.* Thacker, 3 Swanst. 529; Clarke *v.* Lord Ormonde, Jac. 108; Lord *v.* Wormleighton, Jac. 148. In the cases of Price *v.* Evans (4 Sim. 514), and Kent *v.* Pickering (5 Sim. 569), the vice-chancellor granted injunctions which only restrained the creditor from taking out execution against the assets of the intestate or testator. But it has been held that suffering judgment to go by default, or putting in pleas considered false, if done merely for the purpose of gaining time to apply to this court, did not deprive the executor of his right to protection. Dyer *v.* Kearsley, 2 Mer. 482, n.; Fielden *v.* Fielden, 1 Sim. & Stu. 225. In a useful work on the Law of Executors (Williams's Law of Executors, 1181) it has been observed that in the consideration of some of these cases some misconception seems to have prevailed respecting the effect of the executor's pleas and of the judgment against him; and considering what in the argument of this case has been called the quality of the judgment, it seems proper to notice that a judgment against an executor, whether by default or on demurrer, or upon verdict on any plea pleaded, except a general or special plene administravit, is conclusive upon him that he has assets to answer the demand; Leonard *v.* Simpson, 2 Bing. N. C. 176; Palmer *v.* Waller, 1 Mees. & Wel. 689. If the action can only be supported against him in his character of executor, and he pleads any plea which admits that he has acted as such (except a release to himself), the judgment against him is that the plaintiff do recover the debt and costs to be levied out of the assets of the testator, if the defendant have so much; but if not, then the costs out of the defendant's own goods. Such is the form of the judgment where the defendant has pleaded non est factum testatoris, non assumpsit, or release to the testator, although all of these pleas are held to admit assets. But upon a subsequent deficiency of assets the executor has to pay out of his own goods, because in law the judgment is held to be a proof that he had assets to satisfy it. Upon the sheriff's return of nulla bona the plaintiff may issue a scire facias, or bring an action of debt on the judgment, suggesting a devastavit. In the proceedings on the scire facias the plaintiff has not to prove that the executor has property of the testator in his hands, and in the action the executor cannot plead plene administravit, but only deny the devastavit, and of that the judgment against him and the sheriff's return of nulla bona are evidence; and in this action the creditor obtains judgment to recover his demand de bonis propriis. The case of Drewry *v.* Thacker (3 Swanst. 529) is, as far as I am aware, the only case in which the executor has been in any degree protected against execution upon a judgment obtained prior to the decree. The administratrix in that case had given cognovits to Stanley and Lucas, two bond creditors, with stay of execution if payment was made by instalments at certain times. After default had been made a decree for administration was obtained, and after the plaintiff at law had notice of the decree the sheriff took the intestate's goods in the hands of the administratrix in execution. The vice-chancellor, Sir John Leach, ordered the sheriff to restore the goods on payment of costs; and further that if upon the administration of the estate by the court there should be a deficiency of assets to pay Stanley and Lucas in full, they were to be at liberty to proceed at law against the administratrix, as if the sheriff had returned nulla bona præter the sum received by Stanley and Lucas upon the administration of the assets in this case, she by her counsel undertaking not to dispute the suggestion of such return in the writ at law. Now Lord Eldon very recently, before the date of

justice is applied where the application, instead of being made by creditors, is made by legatees or trustees.[1]

§ 749. **Jurisdiction of Equitable Assets.** — The considerations already mentioned apply to cases where the assets are purely of a legal nature, and no peculiar circumstances require the interposition of Courts of Equity except those appertaining to the necessity of taking an account, and having a discovery and decreeing a final settlement of the estate. But in a great variety of cases the jurisdiction of Courts of Equity becomes indispensable from the fact that no other courts possess any adequate jurisdiction to reach the entire merits or dispose of the entire merits. This must necessarily be the case where there are equitable assets as well as legal assets, and also where the assets are required to be marshalled in order to a full and perfect administration of the estate and to prevent any creditor, legatee, or distributee from being deprived of his own proper benefit by reason of any prior claims which obstruct it.

§ 750. **Distinction between Legal and Equitable Assets.** — And first in relation to equitable assets. That portion only

this order, in the case of Terrewest *v.* Featherby had observed that 'the creditor's judgment would be of no service to him if he were delayed here until it could be ascertained whether there were assets of the testator to answer his demand, which might not be till after all chance of recovering against the executor de bonis propriis was entirely gone.' The order of the vice-chancellor in Drewry *v.* Thacker did however so delay the creditor; and on a motion before Lord Eldon to discharge the order, he seems to have found considerable difficulty in dealing with it. He clearly considered that if the administratrix was liable at law she was liable to a greater extent than she was left by the vice-chancellor's order; and that there had been no instance where the proceedings at law had been restrained after judgment de bonis testatoris, and si non de bonis propriis of an executor, and execution issued on a decree subsequently obtained for an administration of the assets; and he said that his memory furnished him with the recollection of no case in which the court had interposed, as in the vice-chancellor's order, namely, by restraining the proceedings at law for a time, but considering those proceedings effectual for some purposes, to be carried into execution at a future time when the fruits to be collected from them had been ascertained by the result of certain proceedings in equity. In the result he made no order upon the motion before him; so that the order of the vice-chancellor was in effect left undisturbed, but under circumstances which prevent it from being regarded as an authority. In the subsequent case of Clarke *v.* Lord Ormonde (Jac. 108), in which the point was not raised, Lord Eldon is reported to have said that even if a creditor has got a judgment before a decree, though he may come in and prove as such, he must not take out execution; and in reference to the conduct of the parties and perhaps to the nature of the claim there may be such cases, but such is not the ordinary rule."

[1] Perry *v.* Phelips, 10 Ves. 38; Brooks *v.* Reynolds, 1 Bro. Ch. R. 183; Jackson *v.* Leap, 1 Jack. & Walker, 231, and note.

of the assets of the deceased party is deemed legal asset which by law is directly liable, in the hands of his executor or administrator, to the payment of debts and legacies.[1] It is not within the design of these Commentaries to enter into a minute examination of what are deemed legal assets. But generally speaking they are such as can be reached in the hands of an executor or administrator by a suit at law against him, either by a common judgment or by a judgment upon a devastavit against him personally.[2] But it is perhaps more accurate to say that legal assets are such as come into the hands and power of an executor or administrator, or such as he is entrusted with by law, virtute officii, to dispose of in the course of administration.[3] In other words whatever an executor or administrator takes qua executor or administrator, or in respect to his office, is to be considered as legal assets.[4]

§ 751. **Same.** — Equitable assets are on the other hand all assets which are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets. They are called equitable assets because, in obtaining payment out of them, they can be reached only by the aid and instrumentality of a Court of Equity.[5] They are also called

[1] 1 Madd. Ch. Pr. 473; Ram on Assets, ch. 8, p. 143; Id. ch. 27, p. 317; 3 Wooddeson, Lect. 59, pp. 482 to 488. See in the English Law Mag. for Feb. 1844, p. 27, a dissertation on what constitutes the true distinction and test between legal and equitable assets.

[2] See Farres *v.* Newnham, 4 T. Rep. 621; Whale *v.* Booth, 4 T. Rep. 625, note; s. c. 4 Doug. R. 36. In some cases it is necessary to go into a Court of Equity to enforce payment out of what are properly legal assets. Thus for instance if there should be a lease for years, or a bond debt, or an annuity in a trustee's name, belonging to the deceased, there, although a creditor could not come at it without the aid of a Court of Equity, yet the assets would be treated as legal assets, and should be applied in the course of administration as such. Wilson *v.* Fielding, 2 Vern. R. 763; The case of Sir Charles Cox's Creditors, 2 P. Will. 342, 343; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*f*). So a term of years taken in the name of A, in trust for B, is legal assets, although recoverable in equity only. Ibid.; 3 P. Will. 342, 343, and Mr. Cox's note (2); Hartwell *v.* Chitters, Ambler, R. 308, and Mr. Blunt's note. By the statute of 29 Charles II., ch. 3, the trusts of an inheritance in land are liable for the payment of bond debts, which makes such trust estates legal assets, although they can be enforced only in equity. See 2 Freeman, Rep. 150, C. 130; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*f*); Moses *v.* Murgatroyd, 1 John. Ch. R. 119, 130.

[3] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1; Bac. Abridg. Executors and Administrators, J.; 3 Wooddes. Lect. 59, pp. 484 to 488.

[4] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and note (*e*); Deg *v.* Deg, 2 P. Will. 416, and Mr. Cox's note.

[5] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and notes (*e*), (*f*), (*g*); Wilson *v.*

equitable for another reason; and that is, that the rules of distribution by which they are governed are different from those of the distribution of legal assets. In general it may be said that equitable assets are of two kinds: the first is where assets are created such by the intent of the party; the second is where they result from the nature of the estate made chargeable. Thus for instance if a testator devises land to trustees to sell for the payment of debts, the assets resulting from the execution of the trust are equitable assets upon the plain intent of the testator, notwithstanding the trustees are also made his executors; for by directing the sale to be for the payment of debts generally, he excludes all preferences, and the property would not otherwise be liable to the payment of simple contract debts.[1] The same principle applies if the testator merely charges his lands with the payment of his debts.[2] On the other hand if the estate be of an equitable nature and be chargeable with debts, the fund is to be deemed equitable assets, unless by some statute it is expressly made legal assets; for it cannot be reached except through the instrumentality of a Court of Equity.[3] And it may be laid down as a general principle that everything is considered as equitable assets which the debtor has made subject to his debts generally, and which without his act would not have been subject to the payment of his debts generally.[4]

§ 752. **Change of Legal Assets to Equitable by Will.** — Wherever real estate is by statute made liable for the payment of the

Fielding, 2 Vern. 763; Gott *v.* Atkinson, Willes, R. 523, 524; 1 Madd. Ch. Pr. 473; Ram on Assets, ch. 27, p. 317; 3 Wooddes. Lect. 59, pp. 486, 487.

[1] Lewin *v.* Oakley, 2 Atk. 50; Newton *v.* Bennet, 1 Bro. Ch. R. 135; Silk *v.* Prime, 1 Bro. Ch. R. 138, note; Bailey *v.* Ekins, 7 Ves. 319; Shiphard *v.* Lutwidge, 8 Ves. 26, 30; Benson *v.* Leroy, 4 John. Ch. R. 651; Clay *v.* Willis, 1 B. & Cressw. 364; Barker *v.* May, 9 B. & Cressw. 489.

[2] Ibid. [3] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*g*).

[4] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*e*); Ram on Assets, ch. 17, p. 317. In Silk *v.* Prime, 1 Bro. Ch. R. 138, note, Lord Camden took notice of the early cases, which had decided that where land is devised to be sold by executors qua executors, or devised to executors qua executors, to be sold for payment of debts, the assets were purely legal (Co. Litt. 112 *b*, 113 *a*); and he added: "I can hardly now suggest a case where the assets would be legal, but where the executor has a naked power to sell qua executor." See also Girling *v.* Lee, 1 Vern. R. 63, and Raithby's notes. It is questionable whether even in this latter case the assets would now be held to be legal. See Barker *v.* May, 9 B. & Cressw. 489, 493; Paschall *v.* Ketterich, Dyer, R. 151 *b*; Anon. Dyer, R. 264 *b*; Bac. Abridg. Legacy, M.; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*e*); Deg *v.* Deg, 2 P. Will. 416, Cox's note.

debts of the deceased, there it constitutes legal assets.[1] But notwithstanding such provision, if the testator should by his will charge his real estate with his debt, there the real estate so charged would be equitable assets.[2]

§ 753. **Courts of Law and Equity Follow the Same Rules as to Priority of Payment in Regard to Legal Assets.** — In the course of the administration of assets Courts of Equity follow the same rules in regard to legal assets which are adopted by Courts of Law, and give the same priority to the different classes of creditors which is enjoyed at law, thus maintaining a practical exposition of the maxim, "æquitas sequitur legem."[3] In the like manner Courts of Equity recognize and enforce all antecedent liens, claims, and charges, in rem, existing upon the property, according to their priorities, whether these charges are of a legal or of an equitable nature, and whether the assets are legal or equitable.[4]

§ 754. **Equitable Assets Distributed Equally without Regard to Priority or Dignity of Debts.** — But in regard to equitable assets (subject to the exception already stated) Courts of Equity, in the actual administration of them, adopt very different rules from those adopted in courts of law in the administration of legal assets. Thus in equity it is a general rule that equitable assets shall be distributed equally and pari passu among all the creditors without any reference to the priority or dignity of the debts; for courts of equity regard all debts in conscience as equal jure naturali and equally entitled to be paid; and here they follow their own favorite maxim that equality is equity: "Æquitas est quasi æqualitas."[5] And if

[1] Goodchild *v.* Ferrett, 5 Beav. R. 398.

[2] Charlton *v.* Wright, 12 Simons, R. 274. In Attorney-Gen. *v.* Brunning, 8 H. L. Cas. 243, 258, Lord Cranworth declared that nothing which an administrator is entitled to receive as such can be equitable assets; and he said that in considering whether assets were legal or equitable the question was not whether the estate was recoverable at law or in equity, but whether it was money which the personal representative was entitled to recover regardless of any directions by the testator.

[3] See 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, §§ 1, 2; Wride *v.* Clarke, 1 Dick. R. 382; Morrice *v.* Bank of England, Cas. Temp. Talb. 220, 221.

[4] Freemoult *v.* Dedire, 1 P. Will. 429; Finch *v.* Earl of Winchelsea, 1 P. Will. 277, 278; Burgh *v.* Francis, 1 Eq. Abridg. 320, Pl. 1; Girling *v.* Lee, 1 Vern. 63, and Raithby's notes; Plunkett *v.* Penson, 2 Atk. 290; Pope *v.* Gwinn, 8 Ves. 28, note; Morgan *v.* Sherrard, 1 Vern. 273; Colé *v.* Warden, 1 Vern. 410, and note; Wilson *v.* Fielding, 2 Vern. 763, 764; Foly's Case, 2 Freem. R. 49; Wride *v.* Clarke, 1 Dick. R. 382; Sharpe *v.* Earl of Scarborough, 4 Ves. 538.

[5] Co. Litt. 24; Hixam *v.* Witham, 1 Cas. Ch. 248; Gott *v.* Atkinson, Willes, R. 521; Turner *v.* Turner, 1 Jac. & Walk. 45; Creditors of Sir

the fund falls short, all the creditors are required to abate in proportion.[1]

§ 755. **Legacies Abate in Proportion Where Equitable Assets Are Insufficient to Fully Pay All Donations.** — It frequently happens also that lands and other property not strictly legal assets are charged not only with the payment of debts but also with the payment of legacies. In that case all the legatees take pari passu; and if the equitable assets (after payment of the debts) are not sufficient to pay all the legacies, the legatees are all required to abate in proportion, unless some priority is specially given by the testator to particular legatees; for prima facie the testator must be presumed to intend that all his legacies shall be equally paid.[2] But suppose the case to be that the equitable assets are sufficient to pay all the debts, but after such payment not sufficient to pay any of the legacies, and the property is charged with the payment of both debts and legacies; in such a conflict of rights the question must arise whether the creditors and legatees are to share in proportion pari passu, or the creditors are to enjoy a priority of satisfaction out of the equitable assets. This was formerly a matter of no inconsiderable doubt; and it was contended, with much apparent strength of reasoning, that as both creditors and legatees in such a case take out of the fund by the bounty of the testator, and not of strict right, they ought to share in proportion pari passu. After some struggle in the Courts of Equity upon this point,[3] it is

Charles Cox, 3 P. Will. 343, 344; Deg *v.* Deg, 2 P. Will. 412, 416; Wride *v.* Clarke, 1 Dick. 382; Morrice *v.* Bank of England, Cas. Temp. Talb. 220; Wilson *v.* Paul, 8 Sim. R. 63.

[1] Hixam *v.* Witham, 1 Freem. R. 301; s. c. 1 Ch. Cas. 248; Deg *v.* Deg, 2 P. Will. 412; Wride *v.* Clarke, 1 Dick. 382; Foly's Case, 2 Freem. 49; Woolstonecroft *v.* Long, 2 Freem. R. 175; s. c. 2 Eq. Abridg. 459; 1 Cas. Ch. 32; 3 Ch. Rep. 12. The civil law, like the common law, had different classes of debts to which it annexed different privileges or priorities founded indeed upon principles more general and more sound than those of the common law in its classification. There were in the civil law three orders of creditors: (1) Those who go before all others and take priority among themselves, according to the distinctions of their privileges. (2) Those who have mortgages, and rank after the privileged creditors according to the dates of their respective mortgages. (3) Those who are creditors by bonds, or others, who have only personal actions (the two first have liens or privileges in rem), and who come in therefore together, and share equally in proportion to their debts. 1 Domat, B. 3, tit. 1, § 5, and especially art. 34. Including the executor as a creditor. Bain *v.* Sadler, L. R. 12 Eq. 570. Nor is the rule as to equitable assets affected by the law of place. Pardo *v.* Bingham, L. R. 6 Eq. 485.

[2] Brown *v.* Brown, 1 Keen, R. 275.

[3] See Anon. 2 Vern. 133; Hixam *v.* Witham, 1 Cas. Ch. 248; s. c. 1 Freem. R. 305; Walker *v.* Meager, 2 P. Will. 550.

at length settled, that although as between themselves in regard to equitable assets the creditors are all equal, and are to share in proportion pari passu, yet as between them and legatees the creditors are entitled to a priority and preference, and that legatees are to take nothing until the debts are all paid.

§ 756. **Same.** — The ground of this decision is that it is the duty of every man to be just before he is generous; and no one can well doubt the moral obligation of every man to provide for the payment of all his debts. The presumption therefore, in the absence of all other words showing a different intent (which intent would in such a case still prevail), is, that a testator means to provide first for the discharge of his moral duties, and next for the objects of his bounty, and not to confound the one with the other. For otherwise the testator would in truth and in foro conscientiæ be disposing of another's debt, and not making gifts ultra æs alienum.[1] The good sense of this latter reasoning can scarcely escape observation. It proceeds upon the just and benignant interpretation of the intention of the party to fulfil his moral obligations in the just order which natural law would assign to them.

§ 757. **Court of Equity Will Not Take Away from Creditor His Prior Right to Legal Assets, Where Assets Are Partly Legal and Equitable.** — In cases where the assets are partly legal and partly equitable, Courts of Equity will not interfere to take away the legal preference of any creditors to the legal assets. But if any creditor has been partly paid out of the legal assets by insisting on his preference, and he seeks satisfaction of the residue of his debt out of the equitable assets, he will be postponed till all the other creditors not possessing such a preference have received out of such equitable assets an equal proportion of their respective debts.[2] This doctrine is founded upon and flows from that which we have been already considering, that in natural justice and conscience all debts are equal, that the debtor himself is equally bound to satisfy them all,[3] and that equality

[1] Hixam *v.* Witham, 1 Cas. Ch. 258; s. c. 1 Freem. R. 305; Walker *v.* Meager, 2 P. Will. 551, 552; s. c. Moseley, R. 204; Petre *v.* Bruen, cited ibid.; Greaves *v.* Powell, 2 Vern. R. 248, and Mr. Raithby's note (2); 1 Eq. Abridg. 141, Pl. 3; Kidney *v.* Cousmaker, 12 Ves. 154.

[2] Sheppard *v.* Kent, 2 Vern. R. 435; Deg *v.* Deg, 3 P. Will. 417; Haslewood *v.* Pope, 3 P. Will. 323; Morrice *v.* Bank of England, Cas. Temp. Talb. 220; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1; Bain *v.* Sadler, L. R. 12 Eq. 570.

[3] Morrice *v.* Bank of England, Cas. Temp. Talb. 219, 220, 221; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1.

is equity. When therefore a Court of Equity is called upon to assist a creditor, it has a right to insist, before relief is granted, that he who seeks equity shall do equity; that he shall not make use of the law in his own favor to exclude equity, and at the same time insist that equity shall aid the defects of the law to the injury of equally meritorious claimants. The usual decree in cases of this sort is, that "If any of the creditors by specialty have exhausted (or shall exhaust) any part of the testator's personal estate in satisfaction of their debts, then they are not to come upon or receive any further satisfaction out of the testator's real estate (or other equitable assets) until the other creditors shall thereout be made up equal with them."[1] This is sometimes called marshalling the assets.[2] But that appellation more appropriately belongs (as we shall immediately see) to another mode of equitable interference. The present is rather an exercise of equitable jurisdiction in refusing relief, unless upon the terms of doing equity.

§ 758. **Nature of Doctrine of Marshalling as Applied to Administration.** — In the next place, as to marshalling assets (strictly so called) in the course of administration.[3] In the sense of lexicographers, to marshal is to arrange or rank in order; and in this sense the marshalling of assets would be to arrange or rank assets in the due order of administration. This primary sense of the language has been transferred into the vocabulary of Courts of Equity, and has there received a somewhat peculiar and technical sense, although still german to its original signification. In the sense of Courts of Equity the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds.[4] Thus where there exist two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund for satisfaction, but the others can come upon one only, there Courts of Equity exercise the authority to marshal (as it is called) the funds, and by this means enable the parties whose remedy at law is confined to one fund only to receive due satisfaction.[5] The general

[1] Plunket *v.* Penson, 2 Atk. 294; Wride *v.* Clarke, 1 Dick. R. 382.
[2] See Aldrich *v.* Cooper, 8 Ves. 388, 394.
[3] Aldrich *v.* Cooper, 8 Ves. 388, 394; post, §§ 853 to 864.
[4] See 3 Wooddes. Lect. 59, pp. 488, 489; post, §§ 853 to 863.
[5] 1 Madd. Ch. Pr. 499; Ram on Assets, ch. 28, § 1, p. 329; Aldrich *v.*

principle upon which Courts of Equity interfere in these cases is, that without such interference he who has a title to the double fund would possess an unreasonable power of defeating the claimants upon either fund by taking his satisfaction out of the other, to the exclusion of them. So that in fact it would be entirely in his election whether they should receive any satisfaction or not. Now Courts of Equity treat such an exercise of power as wholly unjust and unconscientious, and therefore will interfere, not indeed to modify or absolutely to destroy the power, but to prevent it from being made an instrument of caprice, injustice, or imposition. Equity in affording redress in such cases does little more than apply the maxim: "Nemo ex alterius detrimento fieri debet locupletior." [1]

§ 759. **Same.** — And this principle is by no means confined to the administration of assets, but it is applied to a vast variety of other cases (as we shall hereafter see); as for instance to cases of two mortgages, where one covers two estates and the other but one, to cases of extents by the Crown, and indeed to cases of double securities generally.[2] It may be laid down as the general rule of the Courts of Equity in cases of this sort, that if a creditor has two funds, he shall take his satisfaction (if he may) out of that fund upon which another creditor has no lien; and the like rule is applied to other persons standing in a similar predicament.[3]

§ 760. **Doctrine Is Never Applied Where It Will Do Injustice to the Creditor and to the Common Debtor.** — But although the rule is so general, yet it is not to be understood without some qualifications. It is never applied except where it can be done

Cooper, 8 Ves. 388, 398; Lanoy *v.* Duke of Athol, 2 Atk. 446; Attorney-Gen. *v.* Tyndall, Ambl. R. 614; 2 Fonbl. Eq. B. 3, ch. 2, § 6; Selby *v.* Selby, 4 Russ. R. 336, 341. See the Reporter's Note to Phillips *v.* Parker, 1 Tamlyn, R. 136, 143.

[1] 2 Fonbl. Eq. B. 3, ch. 2, § 6, and note (*i*). See Mills *v.* Eden, 10 Mod. 499; ante, §§ 451, 709; post, §§ 853 to 863.

[2] 1 Madd. Ch. Pr. 202, 203; Lanoy *v.* Duke of Athol, 2 Atk. 446; Aldrich *v.* Cooper, 8 Ves. 382, 388; Kempe *v.* Antill, 2 Bro. Ch. R. 11; Wright *v.* Simpson, 6 Ves. 714; 2 Fonbl. Eq. B. 3, ch. 2, § 6; ante, §§ 451, 709; post, §§ 853, 859, 863.

[3] Lanoy *v.* Athol, 2 Atk. 446; Colchester *v.* Stamford, 2 Freem. R. 124; Lacam *v.* Mertins, 1 Ves. 312; Ex parte Kendall, 17 Ves. 514, 520; Aldrich *v.* Cooper, 8 Ves. 388, 395; Trimmer *v.* Bayne, 9 Ves. 210, 211; Rumbold *v.* Rumbold, 3 Ves. 64; Dorr *v.* Shaw, 4 John. Ch. R. 17; Cheeseborough *v.* Millard, 1 John. Ch. R. 412; Greenwood *v.* Taylor, 1 Russell & Mylne, 185; Gwynne *v.* Edwards, 2 Russ. R. 289, n.; Bute *v.* Cunninghame, 2 Russ. R. 275; Boazma *v.* Johnston, 3 Sim. R. 377; ante, §§ 451, 709; post, §§ 853, 859, 863.

without injustice to the creditor or other party in interest having a title to the double fund,[1] and also without injustice to the common debtor.[2] Nor is it applied in favor of persons who are not common creditors of the same common debtor, except upon some special equity. Thus a creditor of A has no right, unless some peculiar equity intervenes, to insist that a creditor of A and B shall proceed against B's estate alone for the satisfaction of this debt, so that he may thereby receive a greater dividend from A's estate.[3] So where a creditor is a creditor upon two estates for the same debt, he will be entitled to receive dividends to the full amount from both estates, until he has been fully satisfied for his debt; for his title in such a case is not to be made to yield in favor of either estate, or the creditors of either, to his own prejudice.[4] It has indeed been said by Lord Hardwicke that Courts of Equity have no right to marshal the assets of a person who is alive, but only the real and personal assets of a person deceased; for the assets are not subject to the jurisdiction of equity until his death.[5] But this language is to be understood with reference to the case in which it was spoken; for there is no doubt that there may be a marshalling of the real and personal assets of living persons under particular circumstances where peculiar equities attach upon the one or the other, although such cases are very rare.[6]

§ 761. **Every Claimant Shall Be Satisfied so Far as the Assets Can Be Consistently Arranged with Regard to Respective Claims.** — The rule of Courts of Equity in marshalling assets in the course of administration is, that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement consistent with the nature of their respective claims, be applied in satisfaction thereof.[7] The rule must

[1] See ante, § 633, note; Van Meter *v.* Ely, 1 Beasl. 271; Kidder *v.* Page, 48 N. H. 380; Emmons *v.* Bradley, 56 Me. 333; Dodds *v.* Snyder, 44 Ill. 53.

[2] See Earl of Clarendon *v.* Barham, 1 Younge & Coll. N. R. 688, 709. See Marr *v.* Lewis, 31 Ark. 203. But it seems that the debtor himself cannot ask for marshalling to save an estate, e. g. his homestead, mortgaged. White *v.* Polleys, 20 Wis. 503. See post, §§ 853, 361.

[3] Ex parte Kendall, 17 Ves. 514, 520; post, §§ 863 to 865.

[4] Bense *v.* Cox, 6 Beav. R. 84.

[5] Lacam *v.* Mertins, 1 Ves. 312.

[6] See Ex parte Kendall, 17 Ves. 514; Aldrich *v.* Cooper, 8 Ves. 388, 389, 394; Dorr *v.* Shaw, 4 John. Ch. R. 17; Sneed *v.* Lord Culpepper, 2 Eq. Abridg. 255, 260.

[7] See Clifton *v.* Burt, 1 P. Will. 679. Mr. Cox's valuable note (1), from which I have freely drawn; 2 Fonbl. Eq. B. 3, ch. 2, § 6; post, § 853, note.

necessarily, in its application to the actual circumstances of different cases, admit, nay must require, very different modifications of relief. It may be illustrated by the suggestion of a few cases which present its application in a clear view and show the limitations belonging to it.

§ 762. **Illustrations of the Rule.** — In the first place if a specialty creditor whose debt is a lien on the real estate receive satisfaction out of the personal assets of the deceased, a simple contract creditor (who has no claim except upon those personal assets) shall in equity stand in the place of the specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debts, and no farther.[1] But the court will not in cases of this sort extend the relief to creditors further than the nature of the contract will justify it. Therefore it must be a specialty creditor of the person whose assets are in question; such a one as might have a remedy against both the real and personal estate of the deceased debtor or against either of them. For it is not every specialty creditor in whose place the simple contract creditors can come to affect the real assets. If the specialty creditor himself cannot affect the real estate, as if the heirs are not bound by the specialty, or if there is no personal covenant binding the party to pay, or if the creditors are not creditors of the same person and have not any demand against both funds as being the property of the same person, — in these and the like cases there is no ground for the interposition of Courts of Equity.[2]

§ 763. **Same.** — On the other hand if a specialty creditor having a right to resort to two funds has not as yet received satisfaction out of either, a Court of Equity will interfere, and either throw him, for satisfaction, upon the fund which can be affected by him only to the intent that the other fund shall be clear for him who can have access to the latter only,[3] or it will put the cred-

[1] Anon. 2 Ch. Cas. 4; Sagittary *v.* Hyde, 1 Vern. 455; Neave *v.* Alderton, 1 Eq. Abridg. 144; Galton *v.* Hancock, 2 Atk. 436; Clifton *v.* Burt, 1 P. Will. 679, Cox's note (1); Cheeseborough *v.* Millard, 1 John. Ch. R. 413.

[2] Lacam *v.* Mertins, 1 Ves. 312, 313; Aldrich *v.* Cooper, 8 Ves. 388, 389, 390, 394; Ex parte Kendall, 17 Ves. 520.

[3] Sagittary *v.* Hyde, 1 Vern. 455; Lanoy *v.* Duke of Athol, 2 Atk. 446; Pollexfen *v.* Moore, 3 Atk. 272; Attorney-Gen. *v.* Tyndall, Ambler, R. 615. See Sproule *v.* Pryor, 8 Sim. 189.

See post, § 853, and notes, from which it will appear that there are doubts of the soundness of this position as applied to the case of a creditor having two securities of varying availability. If the only remedy of

itor to his election between the one fund and the other. And if the creditor resorts to the fund upon which alone the other party has any security, it will decree satisfaction pro tanto to the latter out of the other fund.[1] The usual decree in such cases is, that "In case any of the specialty creditors shall exhaust any part of the personal estate, then the simple contract creditors are to stand in their place and receive a satisfaction pro tanto out of" the real assets.[2]

§ 764. **Same.** — The same principle applies to the case of a mortgagee who exhausts the personal estate in the payment of his debt. In such a case the simple contract creditors will be allowed to stand in the place of the mortgagee in regard to the real estate bound by the mortgage.[3] And where the personal assets have been so applied in discharge of a mortgage, the simple contract creditors may, in furtherance of the same principle, compel the heir to refund so much of the personal assets as have been applied to pay off the mortgage.[4]

§ 765. **Same.** — It was formerly doubted whether the same principle applied to the case of a vendor of an estate whose unpaid purchase money was, after the death of the purchaser, paid out of his personal estate. But it is now settled that, in such a case, the simple contract creditors of the purchaser shall stand in the place of the vendor, with respect to his lien on the estate so sold, against the devisee as well as against the heir of the same estate. For the established rule being that simple contract creditors are, as against a devisee, to stand in the place of specialty creditors who have exhausted the personal assets, because the specialty creditor had the two funds of real and personal estate to resort to; by analogy, the simple contract creditors ought to be entitled to stand in the place of the vendor against the devisees, because

the first of two mortgagees e. g. is foreclosure in equity, the only course for the second mortgage perhaps is to redeem the first mortgage and so take the position of the prior incumbrancer. But if the first mortgagee has a power of sale, and a sale of the security not mortgaged to the other incumbrancer will suffice in all respects, then the doctrine of the text will be applied. See Warren *v.* Warren, 30 Vt. 530; Lloyd *v.* Galbraith, 32 Pa. St. 103.

[1] Aldrich *v.* Cooper, 8 Ves. 389, 394, 395; Trimmer *v.* Bayne, 9 Ves. 210, 211.

[2] Westfaling *v.* Westfaling, 3 Atk. 467; Davies *v.* Topp, 1 Bro. Ch. R. 526; ante, § 757.

[3] Aldrich *v.* Cooper, 8 Ves. 388, 395, 396; Lutkins *v.* Leigh, Cas. Temp. Talb. 53; Wilson *v.* Fielding, 2 Vern. 763; Selby *v.* Selby, 4 Russ. 336, 341.

[4] Wilson *v.* Fielding, 2 Vern. 763.

the vendor has equally a charge upon the double fund of real and personal estate. Indeed if the charge or lien of the vendor is to be considered in the same manner as if it were secured by mortgage, or in the nature of a mortgage (as it well may be), the principle above stated would clearly apply in favor of the simple contract creditors.[1]

§ 766. **Legatees Are Entitled to the Same Equities as Specialty Creditors Where the Personal Estate Has Been Exhausted by the Latter.** — In general, legatees are entitled to the same equities where the personal estate is exhausted by specialty creditors,[2] for they would otherwise be without any means of receiving the bounty of the testator.[3] They are therefore permitted to stand in the place of the specialty creditors against the real assets descended to the heir.[4] So they are permitted in like manner to stand in the place of a mortgagee who has exhausted the personal estate in paying his mortgage.[5] And their equity will prevail, not only in cases where the mortgaged premises have descended to the heir at law, but also where they have been devised to a devisee who is to take subject to the mortgage.[6] But their equity will not generally prevail against a devisee of the real estate not mortgaged, whether he be a specific or a residuary devisee, for he also takes by the bounty of the testator; and between persons equally taking by the bounty of the testator equity will not interfere, unless the testator has clearly shown some ground of preference or priority of the one over the

[1] Selby *v.* Selby, 4 Russ. R. 336, 340, 341; Trimmer *v.* Bayne, 9 Ves. 209. But see Pollexfen *v.* Moore, 3 Atk. 272, which is said in Sproule *v.* Pryor, 8 Sim. R. 189, to be overruled. The same rule is now applied in favor of legatees. Sproule *v.* Pryor, 8 Sim. R. 189.

[2] Rice *v.* Harbeson, 63 N. Y. 493; Lilford *v.* Powys-Keck, L. R. 1 Eq. 347. It was there held that a pecuniary legatee could stand in the place of the vendor, with a lien for unpaid purchase-money, where realty contracted for by the testator had been paid for out of assets.

[3] Arnold *v.* Chapman, 1 Ves. 110; Mogg *v.* Hodges, 2 Ves. 51; Aldrich *v.* Cooper, 8 Ves. 396; Lomas *v.* Wright, 2 Mylne & Keene, 769, 775.

[4] Herne *v.* Meyrick, 1 P. Will. 201, 202; Culpepper *v.* Aston, 2 Ch. Cas. 117; Bowaman *v.* Reeve, Prec. Ch. 578; Tipping *v.* Tipping, 1 P. Will. 729, 730; Clifton *v.* Burt, 1 P. Will. 679, Cox's note; Fenhoulhet *v.* Passavant, 1 Dick. R. 253; Pollexfen *v.* Moore, 3 Atk. 272; Wythe *v.* Henniker, 2 Mylne & Keen, 645, 646; Selby *v.* Selby, 4 Russ. 336, 341; Lomas *v.* Wright, 2 Mylne & Keen, 769.

[5] Lutkins *v.* Leigh, Cas. Temp. Talb. 53; Forrester *v.* Leigh, Ambl. R. 171; Selby *v.* Selby, 4 Russ. R. 336, 341; Sproule *v.* Pryor, 8 Sim. R. 189.

[6] Lutkins *v.* Leigh, Cas. Temp. Talb. 53, 54; Forrester *v.* Leigh, Ambl. R. 171; Norris *v.* Norris, 2 Dick. R. 542; Wythe *v.* Henniker, 2 Mylne & Keen, 644; Selby *v.* Selby, 4 Russ. 336, 340, 341.

other.[1] So that there is a distinction between the case where the estate is devised and there are specialty creditors, and the case where it is devised and there is a mortgage on it. In the latter case the legatees stand in the place of the mortgagee if he exhausts the personal assets; in the former case they do not stand in the place of the specialty creditors. The reason assigned is that a specialty debt is no lien on land in the hands of the obligor, or his heir or devisee. But a mortgage is a lien, and an estate in the land. By a devise of land mortgaged nothing passes but the equity of redemption, if it is a mortgage in fee; if it is for years, the reversion and equity of redemption pass.[2]

[1] Clifton *v.* Burt, 1 P. Will. 679, 680, and Cox's note; Haslewood *v.* Pope, 3 P. Will. 322, 324; Scott *v.* Scott, Ambl. R. 383; s. c. 1 Eden, R. 458; Forrester *v.* Leigh, Ambler, 171; Aldrich *v.* Cooper, 8 Ves. 396, 397. Such preference or priority may be shown in various ways. Thus if real estate is devised for or subject to the payment of debts, if the personal estate is exhausted in payment of debts, the legatees will stand in place of creditors on the real assets. 2 Fonbl. Eq. B. 3, ch. 2, § 7, note (*k*); Foster *v.* Cook, 3 Bro. Ch. R. 347; Haslewood *v.* Pope, 3 P. Will. 323; Aldrich *v.* Cooper, 8 Ves. 396, 397. Such preference or priority may be shown in various ways. Thus if real estate is devised for or subject to the payment of debts, if the personal estate is exhausted in payment of debts, the legatees will stand in the place of creditors on the real assets. 2 Fonbl. Eq. B. 3, ch. 2, § 7, note (*k*); Foster *v.* Cook, 3 Bro. Ch. R. 347; Haslewood *v.* Pope, 3 P. Will. 323; Aldrich *v.* Cooper, 8 Ves. 396, 397. Such preference or priority may also be rebutted by circumstances. Thus it has been said that there is no rule, that, where real and personal estate is charged with the payment of debts, and the residue is given to a legatee or children, the court would in such case turn the charge on the real estate, to give the whole personal estate to the legatee. Arnold *v.* Chapman, 1 Ves. 110. See also Wythe *v.* Henniker, 2 Mylne & Keen, 635, 644, 645; Lomas *v.* Wright, 2 Mylne & Keen, 769. In this last case it was held that creditors by specialty who are mere volunteers are not entitled to compete with creditors on simple contract for a valuable consideration. But as against the devisees they have a right to stand in the place of the mortgagees, who have exhausted the fund provided by the testator for the payment of debts.

It is laid down in Hensman *v.* Fryer, L. R. 3 Ch. 420, that a pecuniary legatee and a residuary devisee must contribute ratably to the payment of debts, where the personal estate is insufficient. But see Dugdale *v.* Dugdale, L. R. 14 Eq. 234, and Collins *v.* Lewis, L. R. 8 Eq. 708, where Hensman *v.* Fryer was commented on and not followed. A residuary devise remains specific in England even since the Wills Act. See Gibbens *v.* Eyden, L. R. 7 Eq. 371; Hensman *v.* Fryer, supra.

[2] Forrester *v.* Leigh, Ambl. R. 171, 174. See also Lutkins *v.* Leigh, Cas. Temp. Talb. 53; 2 Fonbl. Eq. B. 3, ch. 2, § 7, and note (*k*); Aldrich *v.* Cooper, 8 Ves. 396, 397. This distinction between the heir and the devisee makes it very important in many cases to ascertain whether under a will an heir takes by descent or by purchase. See Herne *v.* Meyrick, 1 P. Will. 201; Scott *v.* Scott, 1 Eden, R. 458; s. c. Ambl. R. 383; Clifton *v.* Burt, 1 P. Will. 678, 679, Cox's note (1).

§ 767. **Legatees Stand in Place of Simple Contract Creditors as to Land, Where They Have Exhausted Personal Estate.** — In like manner where lands are subjected to the payment of all debts, legatees are permitted to stand, in regard to such lands, in the place of simple contract creditors who have come upon the personal estate and exhausted it so far as to prevent a satisfaction of their legacies.[1] So where legacies given by a will are charged on real estate but legacies by a codicil are not, the former legatees will be compelled to resort to the real assets if there is a deficiency of the personal assets to satisfy both.[2]

§ 768. **Specific Legatee Is Entitled to Have Specific Legacy Redeemed Where Property Has Been Pledged by Testator.** — Upon analogous grounds if a specific legacy is pledged by the testator, the specific legatee is entitled to have his specific legacy redeemed; and if the executor fail to perform that duty, the specific legatee is entitled to compensation to the amount of the legacy out of the general assets of the testator. So if a specific legacy is incumbered with a mortgage or other charge, the specific legatee is entitled to have it paid off by the executor out of the general assets of the testator; and if that be not done, he is entitled to stand in the same situation as if the duty of the executor had been faithfully performed. Indeed the same principle applies to specific legatees as to devisees in respect to the redemption of the subject-matter of the gift out of the general assets of the testator.[3]

§ 769. **Same.** — The doctrine adopted in all these cases of allowing one creditor to stand in the place of another, having two funds to resort to, and electing to take satisfaction out of one to which alone another creditor can resort, was probably transferred from the civil law into Equity Jurisprudence. It is certainly founded in principles of natural justice, and it early worked its way, under the title of substitution, into the civil law, where it was

[1] Clifton *v.* Burt, 1 P. Will. 678, 679, and Cox's note; Haslewood *v.* Pope, 3 P. Will. 323.

[2] Hyde *v.* Hyde, 3 Ch. Rep. 155; Masters *v.* Masters, 1 P. Will. 422; Bligh *v.* Earl of Darnley, 2 P. Will. 620; Clifton *v.* Burt, 1 P. Will. 679, Cox's note; Norman *v.* Morrill, 4 Ves. 769. So where an annuity is charged on real and personal estate, and other legacies are not, the legatees may require the annuity to be paid out of the real estate descended upon a deficiency of personal estate. Allen *v.* Allen, 3 Wall. Jr. 289.

[3] Knight *v.* Davis, 3 Mylne & K. 358, 361. See Lewis *v.* Lewis, L. R. 13 Eq. 218. It is held that marshalling should not be adopted where property specifically bequeathed to several is subject to an incumbrance paramount to the testator's title, and the share of one is seized. Peoples *v.* Horton, 39 Miss. 406.

applied in a very large and liberal manner. But upon this subject we shall have occasion to speak hereafter in another place.[1]

§ 770. **Rights of Widow as against Creditors of Her Deceased Husband.** — There are other cases in which the marshalling of assets is in like manner enforced in Courts of Equity; as for instance in favor of the widow of a person deceased. After the death of the husband his creditors cannot take his widow's necessary apparel in satisfaction of their debts.[2] With this exception a widow's paraphernalia are generally subject to the payment of the debts of her husband.[3] But in favor of the widow, and to preserve her paraphernalia, Courts of Equity will interfere by turning creditors, entitled to proceed against real assets or funds, over to these assets and funds for satisfaction. And if the paraphernalia have been actually taken by creditors in satisfaction of their debts, the widow will be allowed to stand in their place, and the assets will be marshalled so as to give her a compensation pro tanto.[4]

§ 771. **The Right of Marshalling as Applied to Legacies for Charity.** — In speaking of the marshalling of assets in cases of legacies, whether specific or residuary (when the latter are entitled to the benefit), it must be understood that the legacies are to private persons taking for their own benefit, and not legacies for charity, either directly or through the instrumentality of a trustee or legatee. In general legacies of personal property to charitable uses are valid in point of law. But since the statute of 9th George II., ch. 36, in England, legacies or bequests by will to charitable uses, payable out of real estate, or charged on real estate, or to arise from the sale of real estate, are utterly void. And Courts of Equity, following out the intent and object of the statute, have refused to interfere in favor of legatees of personal property for charity by marshalling assets for this purpose in any case whatever; as by throwing the debts or legacies on real assets for payment, or by allowing the charity legatees to stand in the place of any creditor or legatee who has exhausted the personal estate against the real assets.[5]

[1] See Cheeseborough *v.* Millard, 1 John. Ch. R. 412, 413, and ante, § 668, on the subject of contribution between sureties. Post, §§ 853, 854, 856.

[2] 2 Black. Comm. 436; Noy's Maxims, ch. 49; Townshend *v.* Windham, 2 Ves. 7.

[3] Ram on Assets, ch. 10, § 1; 2 Black. Comm. 436; Toller on Executors, B. 3, ch. 8, pp. 421, 422, 423.

[4] Ram on Assets, ch. 18, pp. 353, 354, and the cases there cited; Aldrich *v.* Cooper, 8 Ves. 397; Incledon *v.* Northcote, 3 Atk. R. 438.

[5] Ram on Assets, ch. 18, § 3, pp. 346 to 353; Mogg *v.* Hodges, 2 Ves.

§ 772. **Heirs and Devisees Are Entitled to Have Assets Marshalled.** — Hitherto we have been speaking of marshalling assets in favor of creditors, legatees, or widows. But it is not to be understood that these are the only persons entitled to the benefit of this wholesome doctrine of Courts of Equity. Heirs at law and devisees are, in a great variety of cases, entitled to the protection of it. Thus for instance if an heir or devisee of real estate is sued by a bond creditor, he may, in many cases, be entitled to stand in the place of such specialty creditor against the personal estate of the deceased testator or intestate.[1]

§ 773. [**Distinction between Legal and Equitable Assets Generally Abolished.** — The apparent distinction between legal and equitable assets under the English common law has been very generally changed in this country and it is the policy of the law now that all assets belonging to the decedent be applied to the payment of debts, the personal property to be first applied, so far as it will extend, and upon a deficiency of assets, then the realty will be subjected, and in all cases the debts are to be paid according to the order of distribution as is usually provided by statute in the various States. The precise, yet simple and effective provisions of our administration law, whereby the whole estate of a decedent, both real and personal, may be subjected to the payment of his debts, were designed to entirely supersede the more cumbrous machinery of the common law, and that the whole doctrine of equitable assets, marshalling assets in equity for the payment of debts, and bills for discovery of assets and account, is without application now, save in so far as the principles underlying those proceedings may be invoked in illustration or explanation of analogous remedies afforded by the statutes.[2]]

§ 774. **Creditors Are Preferred to Legatees, and Specific Legatees to Heirs.** — In order more fully to comprehend the nature and limitations of this doctrine, it is necessary to state that, in the

52; Attorney-Gen. *v.* Tyndall, Ambl. R. 614; s. c. 2 Eden, R. 207; Clifton *v.* Burt, 1 P. Will. 670, Cox's note; Ridges *v.* Morrison, 1 Cox, R. 189; Toller on Executors, B. 3, ch. 8, p. 423; Attorney-Gen. *v.* Winchelsea, 3 Bro. Ch. R. 380, and Belt's note (3); Attorney-Gen. *v.* Hurst, 2 Cox, R. 364; post, 2 Eq. Jur. § 1569. But see Wigg *v.* Nicholl, L. R. 14 Eq. 92, where assets were marshalled according to the testator's direction so as to give the impure personalty to such of several charities named as legatees as could take it. And see Gaskins *v.* Rogers, L. R. 2 Eq. 284; Macdonald *v.* Macdonald, L. R. 14 Eq. 60; Beaumont *v.* Oliveira, L. R. 6 Eq. 534; s. c. 4 Ch. 309; Robinson *v.* Geldard, 3 Macn. & G. 735.

[1] Mogg *v.* Hodges, 2 Ves. 52; Galton *v.* Hancock, 2 Atk. 424, 425.

[2] Titterington *v.* Hooker, 58 Mo. 597; Revisal of 1905 of North Carolina, § 45.

view of Courts of Equity, the personal estate of the deceased constitutes the primary and natural fund for the payment of his debts; and they will direct it to be applied in the first instance to that purpose, unless, from the will of the deceased or from some other controlling equities, it is clear that it ought not to be so applied.[1] But in the order of satisfaction out of the personal estate of the deceased, if it is not sufficient for all purposes, creditors are preferred to legatees; specific legatees are preferred to the heir and devisee of the real estate charged with specialties or with the payment of debts;[2] and specific legacies are liable to be applied in payment of specialty debts in priority to real estate devised;[3] the devisee of mortgaged premises is preferred to

[1] Morse *v.* Bassett, 132 Mass. 502; Johnson *v.* Goss, 128 Mass. 433; Richardson *v.* Hall, 124 Mass. 228. See post, § 1656, and notes. See Co. Litt. 208 *b*, Butler's note, 106.

[2] 2 Fonbl. Eq. B. 3, ch. 2, §§ 3, 4, 5, and notes (*e*), (*f*), (*g*), (*h*); Cope *v.* Cope, 2 Salk. 449.

[3] Cornwall *v.* Cornwall, 12 Sim. & Stu. 298. But see Tombs *v.* Roch, 2 Colly. 490; Gervis *v.* Gervis, 14 Sim. 654 (where Cornwall *v.* Cornwall is overruled); Hensman *v.* Fryer, L. R. 3 Ch. 420. Contra, Dugdale *v.* Dugdale, L. R. 14 Eq. 234; Collins *v.* Lewis, L. R. 8 Eq. 708; Farquharson *v.* Floyer, 3 Ch. D. 109; Tomkins *v.* Colthurst, 1 Ch. D. 626; Mirehouse *v.* Scaife, 2 Mylne & C. 695, following the older rule of the text.

The rule of the text is based on the ground that in England land is not regarded as general assets for the payment of simple contract debts, which has not been true in the United States to any considerable extent. The rule itself that specific devises are to be preferred over specific legacies never applied to specialty debts, because land might be liable to them; as to these, devises contributed ratably with specific legacies. In like manner in those States in which no distinction exists between simple contract debts and specialty debts no preference of specific devises exists. Brant *v.* Brant, 40 Mo. 266; Grim's Appeal, 89 Pa. St. 333; Loomis's Appeal, 10 Barr, 387; Teas's Appeal, 23 Pa. St. 223; Armstrong's Appeal, 63 Pa. St. 312; Knecht's Appeal, 71 Pa. St. 333; Snyder's Appeal, 75 Pa. St. 191; 2 Jarman, Wills, 622, note (Bigelow's ed.).

The general rule applicable between different kinds of legacies in regard to abatement for the payment of debts is that residuary legacies are first to be taken, then general or pecuniary legacies, then specific legacies. Alsop *v.* Bowers, 76 N. C. 168. But this may be varied either by the actual or presumable intention of the testator. Thus the courts will take into account the situation of the beneficiaries, giving a preference to those who are required to forego some benefit on accepting the gift. Such are treated in the light of purchasers, and are preferred over pure beneficiaries. A legacy to the testator's widow in lieu of dower is a case in point; in marshalling this would be preferred over a simple gift to a child of the testator. Farnum *v.* Bascom, 122 Mass. 282; Heath *v.* Dendy, 1 Russ. 543; Norcott *v.* Gordon, 14 Sim. 258; Towle *v.* Swasey, 106 Mass. 100. This is true though the legacies are specific, at least if the gift to the widow is also specific. Farnum *v.* Bascom; Towle *v.* Swasey. But courts do not incline to declare gifts specific; a clear in-

the heir at law of descended estates;[1] and a fortiori the devisee of premises not mortgaged is preferred to the heir at law.[2] In case unincumbered lands and mortgaged lands are both specifically devised, but expressly after the payment of all debts, they are to contribute proportionally in discharge of the mortgage.[3] Where the equities of the legatees and devisees are equal, which (as we have seen) is sometimes the case, Courts of Equity remain neutral and silently suffer the law to prevail.[4] But where the

tention in the will must appear to make them do so. Wilcox *v.* Wilcox, 13 Allen, 252, 256; Newton *v.* Stanley, 28 N. Y. 61.

So too near relationship may be a decisive ground of preference, with other indications in the will pointing the same way. See Richardson *v.* Hall, 127 Mass. 64, 66; s. c. 124 Mass. 233; Towle *v.* Swasey, 106 Mass. 100. For other considerations of a similar kind see King *v.* Gridley, 46 Conn. 555; Grim's Appeal, 89 Pa. St. 333; McFarland's Appeal, 37 Pa. St. 300; Wilson *v.* McKeehan, 53 Pa. St. 79. But to overcome the presumption that the testator designed to have all general legacies abate ratably in case of necessity, there must be clear evidence in the will of a different purpose. Titus *v.* Titus, 26 N. J. Eq. 111; Shepherd *v.* Guernsey, 9 Paige, 357.

The English order of application of all the several funds liable to the payment of the decedent's debts is thus stated in Jarman on Wills, 622 (5th ed.):—

1. The general personal estate not expressly or by implication exempted.

2. Lands expressly devised to pay debts, whether the inheritance or a term carved out of it be so limited.

3. Estates which descend to the heir, whether acquired before or after making the will. See Hurst *v.* Hurst, 28 Ch. D. 159, where the estate descended to the testator's heir by reason of a forfeiture.

4. Real or personal property devised or bequeathed, either to the heir or to a stranger, charged with debts, and disposed of subject to such charge.

5. General pecuniary legacies pro rata.

6. Specific legacies and real estate devised, whether in terms specific or residuary, pro rata.

7. Real and personal property which the testator has power to appoint, and which he has appointed by will. See infra, § 780.

[1] Toller on Executors, B. 3, ch. 8, p. 418; Howell *v.* Price, 1 P. Will. 294, Mr. Cox's note; Cope *v.* Cope, 2 Salk. 449, Mr. Evans's note. Lord Hardwicke at first decided otherwise in Galton *v.* Hancock, 2 Atk. 424, but afterwards altered his opinion; Id. 2 Atk. 430.

[2] Chaplin *v.* Chaplin, 3 P. Will. 364; Davies *v.* Topp, 1 Bro. Ch. R. 524; Manning *v.* Spooner, 3 Ves. 114; Livingston *v.* Newkirk, 3 John. Ch. R. 319; 2 Fonbl. Eq. B. 3, ch. 2, §§ 3, 4, 5, and notes.

[3] Carter *v.* Bernardiston, 2 P. Will. 505; 2 Bro. Par. Cas. 1; Howell *v.* Price, 1 P. Will. 294, Cox's note.

[4] The whole subject was largely discussed in Davies *v.* Topp, 1 Bro. Ch. R. 524, Appx.; Donne *v.* Lewis, 2 Bro. Ch. R. 257; Manning *v.* Spooner, 3 Ves. 114; Galton *v.* Hancock, 2 Atk. 424, 430; Harwood *v.* Oglander, 8 Ves. 106, 124; Milnes *v.* Slater, 8 Ves. 294, 303; and in Mr. Cox's note to Howell *v.* Price, 1 P. Will. 294; and Evelyn *v.* Evelyn, 2

personal assets are sufficient to pay all the debts and legacies and other charges, there the heir or devisee, who has been compelled to pay any debt or incumbrance of his ancestor or testator binding upon him, is entitled (unless there be some other equity which repels the claim) to have the debt paid out of the personal assets in preference to the residuary legatees or distributees. Thus for instance if a specialty debt or mortgage of an ancestor or testator is paid by the heir or devisee, he is entitled to have it paid out of the personal assets in the hands of the executor, unless the testator, by express words or other manifest intention, has clearly exempted the personal assets from the payment.[1] And the personal assets are liable in such cases of mortgage even although there may not be any personal covenant for the payment of the debt or collateral bond.[2] And lands subject to or devised for the payment of debts are in like manner liable to discharge such mortgage in favor of the heir or devisee to whom the mortgaged lands may belong.[3]

§ 775. **Real Property Primarily Liable for Debts Only When so Provided by Will.** — What shall constitute proof of such an intended exemption by the testator is not, in many cases, ascertainable upon abstract principles, but must depend upon circumstances. It is certain however that a devise of all the testator's real estate subject to the payment of his debts, or a devise of a particular estate subject to the payment of debts, will not alone be sufficient to exempt the personal estate.[4] But on the other hand, if the real estate be directed to be sold for the payment of debts and the personal estate is expressly bequeathed

P. Will. 664; Bootle *v.* Blundell, 1 Meriv. R. 215 to 238; Ram on Assets, ch. 28, §§ 1 to 4, ch. 29, §§ 1 to 4. See the Reporter's note to Phillips *v.* Parker, 1 Tamlyn, R. 136, 143.

[1] 2 Fonbl. Eq. B. 3, ch. 2, § 1, and note (*a*); 1 Madd. Ch. Pr. 474, 475; Toller on Executors, B. 3, ch. 8, p. 418; Howell *v.* Price, 1 P. Will. 291, 294, and Cox's note (1); Cope *v.* Cope, 2 Salk. 449; Ancaster *v.* Mayor, 1 Bro. Ch. R. 454.

[2] Ibid.

[3] Bartholomew *v.* May, 1 Atk. 487; Tweedale *v.* Coventry, 1 Bro. Ch. R. 240; Howell *v.* Price, 1 P. Will. 294, Cox's note; Serle *v.* St. Eloy, 2 P. Will. 386; Andrews *v.* Bishop, 5 Allen, 490; Plimpton *v.* Fuller, 11 Allen, 139; Thomas *v.* Thomas, 2 C. E. Green, 356, 359; Towle *v.* Swasey, 106 Mass. 100. See Glass *v.* Dunn, 17 Ohio St. 413; editor's note at end of § 1656.

[4] Bridgman *v.* Dove, 3 Atk. 201, 202; Haslewood *v.* Pope, 3 P. Will. 325; Inchinquin *v.* French, Ambl. R. 33; s. c. 1 Cox, R. 1; 1 Wils. R. 82; 1 Bro. Ch. R. 458; Lupton *v.* Lupton, 2 John. Ch. R. 628; Livingston *v.* Newkirk, 3 John. Ch. R. 319; Walker *v.* Jackson, 2 Atk. 625; Ancaster *v.* Mayor, 1 Bro. Ch. R. 454; Bootle *v.* Blundell, 1 Meriv. R. 194, 210.

to legatees, there the personal estate will, by necessary implication, be exempted.[1]

§ 776. **Personal Estate Is Primary Fund for Payment of Debts.** — The doctrine of the court in all cases of this sort is founded upon the same principle, that is, to follow out the intention of the testator. The personal estate is deemed the natural and primary fund for the payment of all debts, and the testator is presumed to act upon this legal doctrine until he shows some other distinct and unequivocal intention. The general rule therefore of Courts of Equity, although sometimes delivered in one form and sometimes in another, is (as Lord Hardwicke has expressed it), that the personal estate shall be first applied to the payment of debts, unless there be express words or a plain intention of the testator to exempt his personal estate or to give his personal estate as a *specific* legacy; for he may do this, as well as give the bulk of his real estate by way of specific legacy.[2]

§ 777. **Where Debt Is upon Land, It Should First Be Applied in Satisfaction.** — But although the personal estate is thus deemed the general and primary fund for the payment of debts, and still remains so notwithstanding the real estate is also collaterally chargeable, yet the rule is otherwise, or rather is differently applied, where the charge of the debt is principally and primarily upon the real estate and the personal security or covenant is only collateral; for the primary fund ought in conscience in all cases to exonerate the auxiliary fund.[3] The debt or incumbrance may be in its nature real, or it may become so by the act of the person who has the power of charging both the real and the personal funds; or the land, although it be auxiliary only to the personal estate of the original contractor of the debt or incumbrance, may yet become the primary fund as between itself and the personal estate of another person who may take the land either by descent or purchase subject to the charge. In both these cases the personal estate is charged (if at all) only as a security for the land, and it ought to have the same measure of equity as the land is entitled to when it is pledged as a security for a personal debt.[4]

[1] 2 Fonbl. Eq. B. 3, ch. 2, § 1, and note (*a*); Id. § 3, and notes (*e*), (*a*); Wainwright *v.* Bendlowes, 2 Vern. 718; s. c. Prec. Ch. 451; Bamfield *v.* Wyndham, Prec. Ch. 101; Walker *v.* Jackson, 2 Atk. 624, 625; Gray *v.* Mianethorp, 3 Ves. 103; Bootle *v.* Blundell, 1 Meriv. R. 194, 210, 224; Milnes *v.* Slater, 8 Ves. 293, 303.

[2] Walker *v.* Jackson, 2 Atk. 625.

[3] See Co. Litt. 208 *b*, Butler's note, 106; Lechmere *v.* Charlton, 15 Ves. 197, 198.

[4] See Earl of Clarendon *v.* Barham, 1 Younge & Coll. N. R. 688, 711,

§ 778. **Same.** — The first class of cases may be illustrated by the case of a jointure or portion to be raised out of lands by the execution of a power. In such a case, notwithstanding there may be a personal covenant or agreement to raise the jointure or portion to the stipulated amount, yet the charge when raised is to be deemed a primary charge on the lands, and the personal estate of the covenantor only security therefor. In other words, although the covenantor is the original contractor, yet the charge being in its nature real and the covenant only an additional security, the land will be decreed to bear the burden in exoneration of the personal estate.[1] The same principle will apply to pecuniary portions to be raised in favor of daughters in a marriage settlement out of lands placed in the lands of trustees for this purpose, although there be a personal covenant also of the settler to have the portion thus raised.[2]

§ 779. **Same.** — The second class of cases may be illustrated by the common case of a mortgage created by an ancestor and the mortgaged estate descending upon his heir. There although the

712, where Scott *v.* Beecher, 5 Madd. R. 96, and Lord Ilchester *v.* Carnarvon, 1 Beav. R. 209, are remarked on. I borrow this language, and the cases which illustrate it, from the valuable note of Mr. Cox to Evelyn *v.* Evelyn, 2 P. Will. 664, note (1). See also Mr. Cox's note to Howell *v.* Price, 1 P. Will. 294, note (1).

While the personal estate generally is not liable to be applied towards the satisfaction of a debt due on the land, yet where the administratrix paid a year's interest on a mortgage which went to benefit her son, the only heir, she is entitled to credit for the amount paid. Birkholm *v.* Wardell, 42 N. J. Eq. 337, 7 Atl. 569; State *v.* Kelso, 94 Ind. 587; Lake *v.* Weaver, 80 N. J. Eq. 395–554, 86 Atl. 817–821; Hetzel *v.* Easterly, 96 App. Div. 517, 89 N. Y. Supp. 154.

[1] Coventry *v.* Coventry, 9 Mod. 13; s. c. 2 P. Will. 222; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note (*b*).

[2] Edwards *v.* Freeman, 2 P. Will. 435; Evelyn *v.* Evelyn, 2 P. Will. 664, Mr. Cox's note (1); Ward *v.* Dudley & Ward, 2 Bro. Ch. R. 316; s. c. 1 Cox, R. 438; Wilson *v.* Darlington, 1 Cox, R. 172; Duke of Ancaster *v.* Mayor, 1 Bro. Ch. R. 454, 464, and Belt's note (2); Bassett *v.* Percival, 1 Cox, R. 268; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note (*b*). See Lechmere *v.* Charlton, 15 Ves. 197, 198.

The personal liability of the heir is now controlled in North Carolina by statute, Revisal of 1905 of North Carolina, § 53, which is as follows: "No person shall be liable, under the preceding section (§ 52, for debts due upon real or personal property of the decedent) beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator, or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable."

See also to same effect, Crawford *v.* Turner, 58 W. Va. 600, 52 S. E. 716, 112 Am. St. Rep. 1014; Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807; Hay *v.* Boling, 162 Ill. App. 55.

heir should become personally bound to pay the mortgage, yet his personal estate would not be liable to be charged in favor of any person who should derive title by descent under him to the mortgaged premises subject to the mortgage. For the debt was not originally contracted by him, and it was as to him primarily chargeable on the land; and even his covenant to pay the mortgage would only be considered as a security for the debt.[1]

[1] Cope *v.* Cope, 2 Salk. 449; Evelyn *v.* Evelyn, 2 P. Will. 664, and Mr. Cox's note (1), and also his note (1) to Howell *v.* Price, 1 P. Will. 294; Leman *v.* Newnham, 1 Ves. 51; Lacam *v.* Mertins, 1 Ves. 312; Ancaster *v.* Mayor, 1 Bro. Ch. R. 454, 464, and Belt's note (2); Lawson *v.* Hudson, 1 Bro. Ch. R. 58, and Mr. Belt's note. Earl of Clarendon *v.* Barham, 1 Younge & Coll. N. R. 688, 711, 712. In this case Mr. Vice-Chancellor Bruce said: "I have, I think, only farther to consider whether the Island estate as it now stands is the prior or the secondary fund for the payment of the Island mortgage debt. To the discharge of an ordinary debt due from Mr. Joseph Foster Barham his personal estate ought, I apprehend, in the ordinary course to be first applied. It has been contended however by the plaintiffs that with regard to the sum secured on the Island estate this cannot be, and that to the payment of that sum the Island estate must primarily be applied. The first reason assigned for this is that there is evidence in the cause showing (as the plaintiffs insist) that in point of fact Mr. John Barham intended that, as between the personalty and the mortgaged realty liable to this debt, the latter should be the prior fund to be applied. I am unable however to discover any such evidence. It is true that in my opinion there was an absence of intention on his part that any part of the capital of his mother's fortune should be considered as either satisfied or extinguished. But this does not appear to me to amount to anything for the present purpose. He could not, as to the other persons interested in Lady Caroline's fortune, without their consent (a consent neither asked nor obtained, nor probably thought of) relieve any portion of his father's assets from the liability under which the whole of those assets was to make good that fortune, and I do not see any ground whatever for saying that he ever in fact indicated any wish or design that any one part should wholly or partially indemnify any other part of the assets in respect of it. The other assigned reason is that, independently of any proof of actual intention, the united characters of acting executor and sole residuary legatee, as well as heir and devisee of his father, having rendered Mr. John Barham solely and equally interested in the whole of the funds from which the fortune was due, it is a necessary consequence that the portion of those funds specifically pledged, though not exclusively liable for its payment, must bear the burthen of the pledge without indemnity or contribution. The necessity of such a consequence is not obvious to my apprehension. The general rule is that a pledge or security for a debt, though having its full operation in favor of the creditor, does not take away the character of debt, and neither excludes him from any other remedy nor changes or affects the mode in which, as between those who take the debtor's property subject to his debts, that property is to be applied. Generally with regard to such a question the case is dealt with as if the pledge or security did not exist. I do not forget the distinctions or exceptions established or recognized in Lutkins *v.* Leigh (Ca. temp. Talb. 53); Halliwell *v.* Tanner (1 Russ. & M. 633), Wythe *v.* Henniker (2 Myl. & K. 635), and the authorities to which ref-

Therefore where land descended to the wife, subject to a mortgage made by her father, and on an assignment of the mortgage the husband covenanted to pay the money to the assignee, it was decreed that the husband's personal estate should not exonerate the mortgaged premises; for the debt was originally the father's, and the husband's covenant was only collateral security there-

erence is there made, distinctions or exceptions proving the rule, but otherwise seeming to me to have no place in the present case. If the mere fact of the union of interests were material, it would have had its operation and effect though Mr. John Barham had died within an hour of his father's death, ignorant of it. In that case there might have arisen, and as matters are there may arise, an absolute necessity for deciding which is the first fund for paying an unsecured specialty debt due from Mr. Joseph Foster Barham. Suppose such a creditor in existence: it would be contrary to all principle to hold that his caprice or election should decide between real estate now belonging to one person, and personal estate now belonging to another, which of the two is finally to bear the burden. The court must decide in such a case. And on what ground could it be held that the personal estate ought not, as between that and the real estate, to be first applied? What could have taken place in the event that I have supposed, — what has in fact taken place to change the ordinary course as to such an unsecured debt? In my opinion nothing. If so, in the absence of proof of actual intention, why should the mortgage or pledge make any difference? Yet if the plaintiff's contention is right, they would in the event of the mortgagees recovering, as it is admitted that they are entitled to recover, their debt against the general personal estate of Joseph Foster Barham, be entitled to stand in the mortgagee's place against, or be indemnified by, the Island estate. The foundation of such a state of things in principle I am unable to see. Agreeing entirely with the doctrine laid down in Bagot *v.* Oughton (1 P. W. 347) and Evelyn *v.* Evelyn (2 P. W. 659), which has been recognized in many other cases (particularly one in this family, Barham *v.* Lord Thanet, 3 M. & K. 607), I do not see any clear and irresistible reason for not holding that an executor, who, being also sole residuary legatee, has received more personal estate than enough to pay all the funeral and testamentary expenses, and debts and liabilities of every description, as well as legacies, becomes himself substantially debtor to the creditors of the testator. And whether such an executor is sole executor or survived by a co-executor, I apprehend that the doctrine of Lord Chief Baron Gilbert, Lex Prætt. 315, equally applies in principle. The case also of Lord Belvedere *v.* Rochfort (5 Bro. P. C. 299) in the House of Lords (though I am aware of what Lord Thurlow has in Tweddell *v.* Tweddell (2 Bro. C. C. 101), and Lord Alvanley in Woods *v.* Huntingford (3 Ves. 130) said of that case) may be thought to have at least a considerable bearing the same way, and consequently against the plaintiffs. Lord Thurlow, who as leading counsel signed the case for the successful party, the respondent in Lord Belvedere *v.* Rochfort, appears to have considered that the House of Lords held, but ought not to have held, that the mortgage debt in question there had been made the debt of Robert Rochfort, the grandfather, as between his real and his personal estate; and he is reported to have said, "In that case George had a fee-simple in the estate; he was capable of giving it after the charges were extinguished." But I am not at all persuaded that he dissented from the doctrine to be found

for.[1] So where a mortgaged estate is purchased by an ancestor subject to the mortgage, and of course so much less is paid for it as the mortgage amounts to, there, upon a descent cast if it be fee, or upon devolution upon executors or legatees if it be a lease-

in Gilbert, and upon which doctrine the printed cases in Lord Belvedere *v.* Rochfort, and the statements of Lord Thurlow and Lord Alvanley in Tweddell *v.* Tweddell, and Woods *v.* Huntingford, show, if not the certainty, at least a very high degree of probability, that in Lord Belvedere's case both Lord Lifford and the House of Lords meant to act and did act independently of Lord Jocelyn's decree, and not by reason or in consequence of what Lord Jocelyn had done. Nor can I see that Perkyns *v.* Bayntun (2 P. W. 664, n.), as to which I have examined the Registrar's book, is at variance with this doctrine. In Perkyns *v.* Bayntum no account was sought of the personal estate of Sir William Osbaldistone, who had died a quarter of a century before the suit. What was its amount, whether it was considerable or inconsiderable, whether as to his personal estate in fact he died solvent or insolvent, was not stated and does not appear. The point in Gilbert seems not to have been raised or touched in that case. Upon the whole thinking the opinion of Lord Chief Baron Gilbert well founded in principle, and corroborated, if touched, by Lord Belvedere's case, I should, had the cases of Scott *v.* Beecher (5 Madd. 96), Evans *v.* Smithson (not reported), and Lord Ilchester *v.* Lord Carnarvon (1 Beav. 209) not existed, have held and decided that the personal estate of Joseph Foster Barham, and therefore in substance the personal estate of John Barham, is the first fund for the payment of the mortgage on the Island estate. Consistently however with the opinions which appear to have been expressed judicially by Sir John Leach, Lord Lyndhurst, and Lord Langdale in these three cases, I apprehend that I cannot so decide. Feeling the respect due from me to these authorities, independently of Lord Lyndhurst's present position, deferring to them, and not upon this point acting in accordance with my own opinion, I direct the insertion in the decree of a declaration that the Island estate is the first fund for the payment of the Island mortgage. The property which I have called the Island estate, subjected to this mortgage for 10,773*l.* 6*s.* 2*d.*, may possibly not be wholly real estate. It may include some personalty, — a remark which I do not mean as extending to the Island compensation-money, which as I have said I cannot hold to have been or to be ascribed or applied or applicable, otherwise than merely as part of the general mass of the general assets of Joseph Foster Barham, or general personal estate of John Barham, this being as it seems to me a consequence of the manner in which and expressed title under which he received it, and of his conduct in all respects. His father had nothing more than a life interest in the benefit of the Island mortgage. Before concluding I may observe that the reference which I have made to Evans *v.* Smithson has been occasioned by my entire reliance upon the authenticity of the information from which Mr. Tinney's statement of that case was made, and my supposition that Lord Lyndhurst's view of the law, as to a vendor's lien, agreed with that of Sir W. Grant, in Trimmer *v.* Bayne (9 Ves. 209), and of Sir L. Shadwell, in Sproule *v.* Prior (8 Sim. 189). It seems that the passage in Gilbert was brought under his Lordship's notice, but not Lord Belvedere's case, and that neither was cited before Sir J. Leach or the present Master of the Rolls." Hewes *v.* Dehon, 3 Gray, 205, 208; post, § 1248.

[1] Bagot *v.* Oughton, 1 P. Will. 347.

hold estate, the personal estate of the purchaser will not be held bound to exonerate the mortgaged premises from the mortgage; for it is not the personal debt of the purchaser.[1]

§ 780. **Order of Marshalling of Assets Stated.** — These illustrations may suffice to explain some of the more important doctrines of Courts of Equity upon this complicated subject of the marshalling of assets (for in a work like the present it is impossible to examine all of them minutely),[2] and to show upon what nice presumptions and curious analogies they sometimes proceed, some of which (to say the least of them) are sufficiently artificial and elaborate and subtile. The manner in which assets are now generally marshalled in the payment of debts may be arranged in the following order. First, the general personal estate is applied to the payment of debts, unless exempted expressly or by plain implication. Secondly, any estate particularly devised for the payment of debts, and only for that purpose. Thirdly, estates descended to the heir. Fourthly, estates specifically devised to particular devisees, although charged with the payment of debts.[3]

§ 781. **Same.** — This review of the jurisdiction of Courts of Equity over the administration of assets, however imperfect and brief, is quite sufficient to establish the truth of the remarks already stated, that the jurisdiction is not wholly and solely dependent upon the mere fact that there exists a constructive trust of the funds in the hands of the personal representative requiring them to be properly applied and distributed. But there are other and numerous sources of jurisdiction collaterally connected with it; such as the necessity of a discovery, and taking accounts, and cross equities by substitution and otherwise, existing in a great

[1] Ancaster *v.* Mayor, 1 Bro. Ch. R. 454, and Mr. Belt's note (2); Tweddell *v.* Tweddell, 2 Bro. Ch. R. 101, and Mr. Belt's note; Butler *v.* Butler, 5 Ves. 534, 538; Cumberland *v.* Codrington, 3 John. Ch. R. 229; Mr. Cox's note to Howell *v.* Price, 1 P. Will. 294, and his note to Evelyn *v.* Evelyn, 2 P. Will. 664; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note (*b*); 4 Kent, Comm. Lect. 65, p. 420, 421 (4th ed.).

[2] See other cases, 2 Fonbl. Eq. B. 3, ch. 2, § 1, 2, 3, and notes; Harwood *v.* Oglander, 8 Ves. 106, 124; Milnes *v.* Slater, 8 Ves. 293, 303.

[3] Davies *v.* Topp, 1 Bro. Ch. R. 526; Donne *v.* Lewis, 2 Bro. Ch. R. 263; Harwood *v.* Oglander, 8 Ves. 106, 124; Milnes *v.* Slater, 8 Ves. 293, 303; Livingston *v.* Newkirk, 3 John. Ch. R. 319; 4 Kent, Comm. Lect. 65, p. 420, 421 (4th ed.); 1 Madd. Ch. Pr. 474; Ram on Assets, ch. 30, p. 374; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 524, 537 to 543. See supra, note to § 774; Thomas *v.* Thomas, 2 C. E. Green, 356, 358; Gully *v.* Holloway, 63 N. C. 84; Verdier *v.* Verdier, 12 Rich. Eq. 138; Mitchell *v.* Mitchell, 21 Md. 244.

variety of cases in very complicated forms, all of which are or may be necessary to be examined in order to a full and due administration of the estate. Indeed the whole topic of marshalling assets seems properly to belong rather to the peculiar doctrines of Courts of Equity in regard to conflicting rights and equities than to any notion of trust in the parties.

§ 782. **Judgment against Administrator Simply States the Debt and Does Not Fix Him with Assets.** — Before quitting this subject it may be useful to take notice of the interposition of Courts of Equity in regard to the administration of assets in cases where there is any alienation or waste of them on the part of the personal representative of the deceased. At common law the executor or administrator is treated for many purposes as the owner of the assets, and has a power to dispose of and aliene them.[1] There is no such thing known as the assets in the hands of an executor being the debtor, or as a creditor's having a lien on them; but the person of the executor, in respect to the assets which he has in his hands, is treated as the debtor.[2] At law the assets of the testator may perhaps, at least under special circumstances, be taken in execution for the personal debt of the executor, unless indeed there be some fraud or collusion between the execution creditor and the executor;[3] [nor may they be taken in execution against the personal representative. The policy of the law is that the estate of the decedent ought not to be gobbled up by the creditor who happens to be the most diligent in the enforcement of his debt, and without regard to the order of distribution of the estate. And so if the creditor sees fit to institute an action against the personal representative, a judgment does not fix him with assets, but simply states a debt of the amount of the judgment,[4] for the debts of the testator.[5] But in Courts of Equity the assets are treated as the debtor, or in other words as a trust fund to be administered by the executor for the benefit of all persons who are interested in it, whether they are creditors, or legatees,

[1] Hill *v.* Simpson, 7 Ves. 166; McLeod *v.* Drummond, 14 Ves. 353; s. c. 17 Ves. 154, 168.

[2] Farr *v.* Newnham, 4 T. Rep. 621, 634; Whale *v.* Booth, 4 T. R. 625, note; s. c. 4 Doug. R. 36; Nugent *v.* Gifford, 1 West, Rep. 496, 497; s. c. 1 Atk. 463; s. c. Ves. 269. But see Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 14 Ves. 361; s. c. 17 Ves. 154, 168.

[3] Whale *v.* Booth, 4 T. R. 623, note; s. c. 4 Doug. R. 36; Farr *v.* Newnham, 4 T. R. 621; McLeod *v.* Drummond, 17 Ves. 154; Ray *v.* Ray, Cooper, R. 264.

[4] Grant *v.* Bell, 91 N. C. 495; Holmes *v.* Foster, 78 N. C. 35.

[5] Contra, McLeod *v.* Drummond, 17 Ves. 154, 168.

or distributees, or otherwise interested, according to their relative priorities, privileges, and equities.[1]

§ 783. **Sales by Administrator as Affecting Rights of Creditors.** — Still however Courts of Equity do not supersede the principles of law upon the same subject. And therefore a sale made bona fide by the executor for a valuable consideration,

[1] Farr *v.* Newnham, 4 T. R. 636, per Buller, J.; Whale *v.* Booth, 4 T. R. 625, note; s. c. 4 Doug. R. 36. *Retainer of an Executor.* — In regard to retainer in administration, a subject not considered by the author, it is said in a well-known work: "As an executor or administrator among creditors of equal degree may pay one in preference to another, so it is another of his privileges that he has a right to retain for his own debt due to him from the deceased in preference to all other creditors of *equal* degree. This remedy arises from the mere operation of law, on the ground that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt. And therefore he may appropriate a sufficient part of the assets in satisfaction of his own demand." 2 Williams, Executors, 1043 (8th Eng. ed.).

But this does not apply to assets which are merely equitable; "for in equity all debts are equal, and a Court of Equity will never," it is said, "assist a retainer." Ib. p. 1045. It does not apply therefore, at least in this country, to lands devised to be sold for the payment of debts. Harrison *v.* Henderson, 7 Heisk. 315.

The following special cases of the right of retainer are among others given in 2 Williams, Executors, 1045, et seq.: For debts due to the executor or administrator as trustee. Plumer *v.* Marchant, 3 Burr. 1380 (cited 3 Ad. & E. 858); Sander *v.* Heathfield, L. R. 19 Eq. 21. See also Bain *v.* Sadler, L. R. 12 Eq. 570. And conversely for debts due to him as cestui que trust. Cockroft *v.* Black, 2 P. Wms. 298; Franks *v.* Cooper, 4 Ves. 763; Loomes *v.* Stotherd, 1 Sim. & S. 461; Roskelly *v.* Godolphin, T. Raym. 483; Marriot *v.* Thompson, Willes, 186. An executor of an executor may also retain. Hopton *v.* Dryden, Prec. Ch. 180; Thomson *v.* Grant, 1 Russ. C. C. 540, note. So may an executor of an administrator. Weeks *v.* Gore, 3 P. Wms. 184. Or for a debt to his wife. Prince *v.* Rowson, 1 Mod. 208; 2 Mod. 51. But an executor de son tort cannot retain except in a single case provided for by Stat. of 43 Eliz. ch. 8.

It has also been held that an executor may retain the amount of a debt barred by the Statute of Limitations. Hill *v.* Walker, 4 Kay & J. 166. Further see Birt *v.* Birt, 22 Ch. D. 604; Wison *v.* Coxwell, 23 Ch. D. 764; Walters *v.* Walters, 18 Ch. D. 182; Richmond *v.* White, 12 Ch. D. 361; s. c. 10 Ch. D. 727; Crowder *v.* Stewart, 16 Ch. D. 300.

The subject of the right of an executor or an administrator in this country to retain is often regulated by statute. See Willey *v.* Thompson, 9 Met. 329; Henderson *v.* Ayres, 23 Tex. 96; Hubbard *v.* Hubbard, 16 Ind. 25; Wright *v.* Wright, 72 Ind. 149; Williams *v.* Purdy, 6 Paige, 166. In the absence of statute the English rule of retainer will probably be upheld. See Page *v.* Patton, 5 Peters, 303; Shields *v.* Alsup, 5 Lea, 508, 519; Smith *v.* Watson, 8 Humph. 340; Chaffin *v.* Chaffin, 2 Dev. & B. Eq. 255; Adams *v.* Adams, 22 Vt. 50; Foote *v.* Foote, 61 Mich. 181, 28 N. W. 90; Byers *v.* Weeks, 105 Mo. App. 72, 79 S. W. 485; In re Chapman's Estate, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204; Randolph *v.* Vails, 180 Ala. 82, 60 So. 159.

even with notice of there being assets, will be held valid; so that they cannot be followed by creditors or others into the hands of the purchaser.[1] In this respect there is a manifest difference between the case of an ordinary trust where notice takes away the protection of a bona fide purchase from the party, and this peculiar sort of trust mixed up in some measure with general ownership.[2] To affect a sale or other transaction of an executor attempting to bind the assets so as to let in the claim of creditors and others who are principally interested, there must be some fraud, or collusion, or misconduct, between the parties.[3] A mere secret intention of the executor to misapply the funds unknown to the other party dealing with him, or a subsequent unconnected misapplication of them, will not affect the purchaser. He must be conusant of such intention, and designedly aid or assist in its execution.[4] But in the view of Courts of Equity there is a broad distinction between cases of a sale or pledge of the testator's assets for a present advance, and cases of such a sale or pledge for an antecedent debt of the executor;[5] for in the latter case the parties must be generally understood to co-operate in a misapplication of the assets from their proper purpose, unless that inference is repelled by the circumstances.[6]

§ 784. [**Duties and Liabilities of Personal Representative.** — It is the duty of the personal representative to use the utmost of good faith in his dealings with decedent's estate, for he is but the agent of the decedent, and a trustee for the general creditors. He has no right to make any additional profits out of the estate, other than as are allowed by law, nor can he reap any personal benefits from his trust position. If he wastes or fraudulently misapplies the funds, or if he improperly converts them, he is

[1] McLeod *v.* Drummond, 17 Ves. 154, 155, 168; Keane *v.* Roberts, 4 Madd. 357.

[2] Mead *v.* Lord Orrery, 3 Atk. 238, 239, 240.

[3] Hill *v.* Simpson, 7 Ves. 152; Nugent *v.* Gifford, 1 Atk. 463, cited 4 Bro. Ch. R. 136, and 17 Ves. 160, 163; Andrews *v.* Wrigley, 4 Bro. Ch. R. 125; Mead *v.* Lord Orrery, 3 Atk. 235, 238, 239; McLeod *v.* Drummond, 14 Ves. 355, 17 Ves. 154, 168, 169, 170, 171.

[4] McLeod *v.* Drummond, 14 Ves. 355; s. c. 17 Ves. 154, 158, 169, 170, 171; Andrews *v.* Wrigley, 4 Bro. Ch. R. 125; Scott *v.* Tyler, 2 Bro. Ch. 431; 2 Dick. R. 724; Keane *v.* Roberts, 4 Madd. R. 357.

[5] McLeod *v.* Drummond, 14 Ves. 361, 362; s. c. 17 Ves. 154, 155, 158 to 171; Hill *v.* Simpson, 7 Ves. 152.

[6] See also Mr. Roscoe's learned note to Whale *v.* Booth, 4 Doug. R. 47, note (66).

Though an executor may pledge assets for an advance, it seems that he cannot create a debt against the estate for any excess beyond the value of the pledge. Farhall *v.* Farhall, L. R. 7 Ch. 123.

liable.[1] The same is true where he negligently causes a loss of assets, or if by his failure to exercise the care of an ordinarily prudent person in the management of the estate, a loss occurs, he is bound to make good the loss. In all of these instances, the personal representative is but a trustee, and to a certain extent, and the test of liability for loss is usually the degree of care required and that bestowed, for it is not every loss for which the personal representative is chargeable. It is usually where there is some evidence of a lack of good faith, or the failure to use ordinary care and due diligence, or a wanton disregard of the rights of the parties in interest.[2]]

§ 785. A Trust Will Attach upon Property Derived by Owner through Fraudulent Misappropriation of Assets of Which He Has

[1] Beardsley *v.* Marsteller, 120 Ind. 319, 22 N. E. 315; In re Skeer's Estate, 236 Pa. 404, 84 Atl. 787; In re Scott's Estate, 1 Cal. App. 740, 83 Pac. 85; Kelly *v.* Pratt, 41 Misc. Rep. 31, 83 N. Y. Supp. 636.

[2] Where executor had short scale of lumber made for purpose of defrauding the estate, he is chargeable with correct amount. Porter *v.* Long, 124 Mich. 584, 83 N. W. 601, 7 Detroit Leg. N. 337.

Loss on account of failure of bank is not chargeable to executors where they used due diligence. They are not generally liable beyond what they have received, except for gross negligence. In re Dauler's Estate, 247 Pa. 356, 93 Atl. 511.

Executor is liable for losses resulting, where will directed that estate be settled within three years, but investments were made that kept estate open for several years, during which time losses were sustained. In re Fulmer's Estate, 243 Pa. 226, 89 Atl. 974.

But where the administrator paid certain small amounts, upon a consideration deemed by him to be sufficient, but the debts were not such as he was compelled to pay, he will not be charged with negligence. Beale *v.* Barnett, 23 Ky. L. Rep. 1118, 64 S. W. 838.

He assumes the risk of any loss to the estate, where he causes the estate to be kept open for a number of years, contrary to the terms of the will. In re Cunningham's estate, 212 Pa. 441, 61 Atl. 993.

Generally, see Brewer *v.* Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804; In re Hall's Estate, 70 Vt. 458, 41 Atl. 508; Hill *v.* Evans, 114 Mo. App. 715, 91 S. W. 1022; Cheever *v.* Ellis, 134 Mich. 645, 96 N. W. 1067, 10 Detroit Leg. N. 624; Calnan *v.* Savidge, 68 Kans. 620, 75 Pac. 1010; Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 727.

Though the executor did not get the highest price for property, and this was not the result of his own negligence, but there was evidence that he used care and judgment, he is not liable for the loss. In re Brower, 71 Misc. Rep. 398, 130 N. Y. Supp. 191.

Nor is the executor liable for value of bank stock (dividends thereon having been specifically devised), where bank failed and stock became worthless through no fault of executor. Northrup *v.* Browne, 204 Fed. 224. Nor is he liable where the estate consisted of a large number of cattle, of which he took care until a sale could be advantageously made. In re Fernandez's Estate, 119 Cal. 579, 51 Pac. 851.

The executor is not chargeable with the depreciation of bank stock where he held it three or four years awaiting the termination of a dispute

Knowledge. — The general doctrine now maintained by Courts of Equity upon this subject cannot be better summed up than it is by a learned judge (Sir John Leach) in an important case.[1] "Every person," said he, "who acquires personal assets by a breach of trust or a devastavit by the executor is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking he does not become a party to the breach of trust by buying or receiving as a pledge for money advanced to the executor at the time any part of the personal assets whether specifically given by the will or otherwise; because this sale or pledge is held to be prima facie consistent with the duty of an executor. Generally speaking he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledge is prima facie inconsistent with the duty of an executor. I preface both of these propositions with the term 'generally speaking', because they both seem to admit of exceptions." And it may be added that whenever there is a misapplication of the personal assets, and the assets or their proceeds can be traced into the hands of any persons affected with notice of such misapplication, there the trust will attach upon the property or proceeds in the hands of such persons, whatever may have been the extent of such misapplication or conversion.[2]

about another estate, in which the distributees of his trust estate were interested, and the stock was purposely held by him for their benefit. In re Thorp's Estate, 31 Misc. Rep. 581, 65 N. Y. Supp. 575.

The executor is only required to exercise the judgment of a good business man in the administration of the estate, and where an intricate question arises as to the collection of a debt and he seeks the advice of a competent attorney, and he acts upon that advice and loss results, he is not personally liable. In re Joost's Estate, 50 Misc. Rep. 78, 100 N. Y. Supp. 378; In re Sharp's Estate, 61 N. J. Eq. 601, 48 Atl. 327.

Administrator is liable for loss occurring in stock speculation business, where the stocks were not disposed of within a reasonable time, and it is no answer that he conducted the affairs with good judgment, but the assent of the beneficiaries may relieve him. Appeal of Matthews, 76 Conn. 654, 57 Atl. 694, 100 Am. St. Rep. 1017.

[1] Keane *v.* Roberts, 4 Madd. Rep. 357, 358. See also Ram on Assets, ch. 37, § 4, p. 484; 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*l*); Watkins *v.* Cheek, 2 Sim. & Stu. 265.

[2] See Ram on Assets, ch. 37, § 4, pp. 491, 492; Adair *v.* Shaw, 1 Sch. & Lefr. 261, 262. The same principle may be further illustrated by the cases already mentioned, where creditors and others are permitted to sue the debtors of the deceased when they collude with the executor or administrator, although they are not suable except by the executor or administrator. Lord Brougham, in Holland *v.* Prior, 7 Mylne & Keen,

§ 786. **Husband's Estate Liable Where He Wasted Funds of Wife's.** — In cases where during coverture the assets of a feme covert executrix are wasted by the husband and he then dies, no action at law lies by the creditors against the assets of the husband. But Courts of Equity will in such a case interfere and relieve the creditors upon the ground of the breach of trust in the husband, and his conversion of the assets of the wife's testator into funds in aid of his own assets.[1]

§ 787. **Proceedings in Ancillary Administration.** — And here we might treat of the nature and extent of the jurisdiction which Courts of Equity will exercise in regard to the assets of foreigners,[2] collected under what is called an ancillary administration (because it is subordinate to the original administration), taken out in the country where the assets are locally situate. This subject however has been largely discussed in another place, in considering the

240, said: "Although the general principle of the court for preventing multiplicity of suits and avoiding circuity of proceeding is to bring all the parties concerned in the subject-matter before it, and to adjudicate once for all among them; and although this would lead in administering the assets of deceased persons to going beyond the personal representatives, following the estate of the deceased and taking note of his credits and consequently bringing forward his debtors; yet the practice of the court has prescribed bounds to the inquiry, and accordingly the rule is, to stop short at the personal representatives, unless where there is insolvency or where other parties stand in such relation to the deceased, or his estate, or his representative, that they may be said either to have been mixed with him and his affairs during his lifetime, or to have aided his representative after his decease, in withdrawing his estate from his creditors, or to have undertaken more directly quasi representative of him." Story on Eq. Pleadings, §§ 178, 514; Newland *v.* Champion, 1 Ves. 106; Doran *v.* Simpson, 4 Ves. 651; Alsager *v.* Rowley, 6 Ves. 748; Beckley *v.* Dorington, West, Rep. 169; White *v.* Parnther, 1 Knapp, R. 179, 226; Troughton *v.* Binkes, 6 Ves. 572. See Burwell *v.* Fauber, 21 Gratt. 446, real estate subject to a charge.

[1] Adair *v.* Shaw, 1 Sch & Lefr. 261, 262, 263.

[2] Equity may exercise jurisdiction generally over the assets of non-residents, if such assets are within its jurisdiction; as in a proper case by restraining the payment of them to the non-resident owner or claimant. Tomson *v.* Tomson, 31 N. J. Eq. 464; Felch *v.* Hooper, 119 Mass. 52 (statute). On the other hand equity will in England restrain the representatives and legatees of an estate of a resident from taking proceedings in a foreign court to administer the personalty; nor will they be allowed to take proceedings for administering the realty abroad, if by so doing the administration of the personalty in the domestic forum would be embarrassed. Hope *v.* Carnegie, L. R. 1 Ch. 320. See also as to jurisdiction over foreign property, Mead *v.* New York R. Co., 45 Conn. 199, 223; Davis *v.* Morriss, 76 Va. 21. In some cases equity will entertain a bill in aid of proceedings in a foreign court. Transatlantic Co. *v.* Pietroni, 6 Jur. (N. S.) 532. But not unless there is special need. Ib.; Bent *v.* Young, 9 Sim. 180, 190.

conflict of the laws of different countries upon the subject of administrations of property situate therein, and therefore it will be but very briefly taken notice of here.[1] In general it may be said that where a domestic executor or administrator collects assets of the deceased in a foreign country without any letters of administration taken out or any actual administration accounted for in such foreign country, and brings them home, they will be treated as personal assets of the deceased, to be administered here under the domestic administration.[2] But where such assets have been collected abroad under a foreign administration and such administration is still open, there seems much difficulty in holding that the executor or administrator can be called upon to account for such assets under the domestic administration, unless perhaps under very peculiar circumstances; since it would constitute no just bar to proceedings under the foreign administration in the courts of the foreign country.[3] And indeed probates of wills and letters of administration are not granted in any country in respect to assets generally, but only in respect to such assets as are within the jurisdiction of the country by which the probate is established or the administration granted.[4]

§ 788. **Ancillary Administration Is Subordinate to Original Administration.** — Where there are different administrations [5] granted in different countries, those which are in their nature ancillary are, as we have seen, generally held subordinate to the original administration.[6] But each administration is deemed so far independent of the other that property received under one cannot be sued for under another, although it may at the moment be locally situate within the jurisdiction of the latter. Thus if property is received by a foreign executor or administrator abroad, and afterwards remitted here, an executor or administrator ap-

[1] See Story, Comm. on Conflict of Laws, ch. 13, § 646.

[2] Dowdale's case, 6 Co. Rep. 47, 48; s. c. Cro. Jac. 55; Attorney-Gen. *v.* Dimond, 1 Cromp. & Jervis, 370; Erving's Case, 1 Cromp. & Jerv. R. 151; s. c. 1 Tyrw. R. 91.

[3] See Story, Comm. on Conflict of Laws, ch. 13, §§ 688 to 695. But see Attorney-Gen. *v.* Dimond, 1 Cromp. & Jerv. 370; Erving's Case, 1 Cromp. & Jerv. 151; 1 Tyrw. R. 191.

[4] Ibid.

[5] This and the following sections are taken almost verbatim from Story's Conflict of Laws, §§ 518, 524, 525, 528.

[6] Shegogg *v.* Perkins, 34 Ark. 117. But see Carroll *v.* McPike, 53 Miss. 569; Carr *v.* Lowe, 7 Heisk. 84, under statutory law; Ramsay *v.* Ramsay, 97 Ill. App. 270; In re Williams Estate, 130 Iowa 553, 107 N. W. 608; Baltimore & Ohio R. Co. *v.* Evans, 188 Fed. 6, 110 C. C. A. 156.

pointed here could not assert a claim to it here, either against the person in whose hands it might happen to be, or against the foreign executor or administrator. The only mode of reaching it, if necessary for the purposes of due administration here, would be to require its transmission or distribution after all claims against the foreign administration had been ascertained and settled abroad.[1]

§ 789. [**Authority of Foreign Administrator.** — An administrator qualified in a foreign State has no rights as such in any State other than that of his appointment, and if there are any extra-territorial rights which belong to the estate, the customary method of procedure is to have an administrator appointed in that other State. It is obvious that a foreign administrator has no official capacity in another State, and hence no action could be maintained by him in his representative capacity for the purpose of collecting in the assets due the estate, nor can he be sued as administrator by a creditor residing in such foreign State. He is only liable to account to the courts of the State in which he was appointed, and if he were allowed to receive assets, as administrator in a foreign State, the estate that he might thus collect might be wasted by him and he would not be liable to account to the courts of that State or to the courts of the State in which he was appointed.[2]]

§ 790. [**When Will Ancillary Administrator Be Appointed.** — An ancillary administrator will not be appointed in every case simply because one is applied for. It must first be made to appear to the court by satisfactory proof that the decedent had or was entitled to a property right or interest of some description within the jurisdiction of the court. What is a sufficient vestige of property will depend upon the facts of each particular case. Ancillary administration will lie where the decedent left real estate in the foreign State;[3] and where the decedent was a mortgagee, his legal title and right of foreclosure is sufficient,[4] as well as his in-

[1] Story's Conflict of Laws, § 518. See Lynes *v.* Coley, 1 Redf. 407; Banta *v.* Moore, 2 McCart. 97, 101.

[2] Burton *v.* Williams, 63 Neb. 431, 88 N. W. 765; Mansfield *v.* McFarland, 202 Pa. 173, 51 Atl. 763; Ellis *v.* Northwestern Mut. Life Ins. Co., 100 Tenn. 177, 43 S. W. 766; Marrett *v.* Babb's Execr., 91 Ky. 88, 15 S. W. 4, 12 Ky. L. Rep. 652.

[3] Scott *v.* Blades Lbr. Co., 144 N. C. 44, 56 S. E. 548; Miller *v.* Blinn, 219 Mass. 266, 106 N. E. 985.

[4] In re Daughaday's Estate, 168 Cal. 63, 141 Pac. 929; Bliss *v.* Bliss, 221 Mass. 201, 109 N. E. 148. Transfer of stock of a corporation of New Jersey cannot be demanded in that State by a New York administrator,

terest in evidences of debt. In order for an action to be brought in one State for injuries received by the decedent in that State which resulted in his death, such right of action is not, strictly speaking, an interest in personal property; yet, a cause of action of this sort was not recognized at the common law, and generally by statute it is necessary for the action to be brought by the personal representative, and it is now generally held that this is such an estate or interest, belonging to the decedent, that will authorize the appointment of an ancillary administrator. Otherwise, a foreign administrator having no right to sue as such in the courts of the State wherein the cause of action arose, this interest or property right would be lost to the estate of the decedent.[1] It is only upon property that has a bona fide situs in the State where the application for the ancillary administration is sought, and if the domiciliary administrator happens for a short space of time to carry personal property, railroad bonds in this case, into another State, this will not authorize the appointment of an ancillary administrator.[2]]

§ 791. **Administration of Assets Is Governed by Law of the State in Which the Administrator Acts.** — In relation to the mode of administering assets by executors and administrators there are in different countries very different regulations. The priority of debts, the order of payments, the marshalling of assets for this purpose, and in cases of insolvency the modes of proof as well as of distribution, differ in different countries. In some countries all debts stand in an equal rank; and in cases of insolvency the creditors are to be paid pari passu. In others there are certain classes of debts entitled to a priority of payment and therefore deemed privileged debts. Thus in England bond debts and judgment debts possess this privilege; and the like law exists in some of the States of this Union. Similar provisions may be found in the law of France in favor of particular classes of creditors. On the other hand, in Massachusetts and in many other States of the Union all debts except those due to the government

Lockwood *v.* United States Steel Corp., 153 App. Div. 655, 138 N. Y. Supp. 725.

[1] Hall *v.* Southern R. Co., 146 N. C. 345, 59 S. E. 879; Moorefield *v.* Harris, 126 N. C. 626, 36 S. E. 125; Vance *v.* Southern R. Co., 138 N. C. 460, 50 S. E. 860. But see Cooper *v.* Gulf, C. & S. F. Ry. Co., 41 Tex. Civ. App. 596, 93 S. W. 201.

[2] In re McCabe, 84 App. Div. 145, 82 N. Y. Supp. 180, 177 N. Y. 584, 69 N. E. 1126. Ancillary administrator ought not to be unfriendly to domiciliary administrator and the estate. White *v.* Spaulding, 50 Mich. 22, 14 N. W. 684.

possess an equal rank and are payable pari passu. Let us suppose then that a debtor dies domiciled in a country where such priority of right and privilege exists, and that he has assets situate in a State where all debts stand in an equal rank, and administration is duly taken out in the place of his domicil and also in the place of the situs of the assets. What rule is to govern in the marshalling of the assets? The law of the domicil or the law of the situs? The established rule now is, that in regard to creditors the administration of the assets of deceased persons is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derives his authority to collect them, and not by that of the domicil of the deceased. The rule has been laid down with great clearness and force on many occasions.[1]

§ 792. **Same.** — The ground upon which this doctrine has been established seems entirely satisfactory. Every nation having a right to dispose of all the property actually situate within it has (as has often been said) a right to protect itself and its citizens against the inequalities of foreign laws which are injurious to their interests. The rule of a preference or of an equality in the payment of debts, whether the one or the other course is adopted, is purely local in its nature, and can have no just claim to be admitted by any other nation which in its domestic arrangement pursues an opposite policy. And in a conflict between our own and foreign laws the doctrine avowed by Huberus is highly reasonable, that we should prefer our own.[2]

§ 793. **Law of the Domicil of Testator Governs Out of What Property Debts Shall First Be Paid.** — In the course of administrations also in different countries questions often arise as to particular debts, whether they are properly and ultimately payable out of the personal estate, or whether they are chargeable upon the real estate of the deceased.[3] In all such cases the settled rule now is that the law of the domicil of the deceased will govern in cases of intestacy, and in cases of testacy, the intention of the testator.[4] A case illustrating this doctrine occurred in England many years ago. A testator who lived in Holland and was seised of real estate there, and of considerable personal estate in England, devised all his real estate to one person and all his personal

[1] Story's Conflict of Laws, § 524. See St. John *v.* Hodges, 9 Baxt. 334.

[2] Story's Conflict of Laws, § 524.

[3] See Rice *v.* Harbeson, 63 N. Y. 493.

[4] See Macdonald *v.* Macdonald, L. R. 14 Eq. 60; Lynch *v.* Paraguay, L. R. 2 P. & M. 268; Harrison *v.* Harrison, L. R. 8 Ch. 342.

estate to another, whom he made his executor. At the time of his death he owed some debts by specialty and some by simple contract in Holland, and had no assets there to satisfy those debts; but his real estate was, by the laws of Holland, made liable for the payment of simple contract debts as well as specialty debts, if there were not personal assets to answer the same. The creditors in Holland sued the devisee and obtained a decree for the sale of the lands devised for the payment of their debts; and then the devisee brought a suit in England against the executor (the legatee of the personalty) for reimbursement out of the personal estate. The court decided in his favor, upon the ground that in Holland as in England, the personal estate was the primary fund for the payment of debts, and should come in aid of the real estate and be charged in the first place.[1]

§ 794. [**Distribution Is According to Laws of State of Situs.** — Questions frequently arise as to the proper distribution of the fund derived by an ancillary administrator from a suit brought for the wrongful death of his decedent, the fund being claimed by the distributees under the laws of the State of the domicil and the State where the injury was inflicted. It has been held by a few of the courts that the recovery is to be distributed according to the laws of the State of the domicil,[2] but the better opinion seems to be that the fund will be distributed according to the laws of the State wherein the cause of action arose. The reason for this is apparent, there being a new administration, a new cause of action and the acquisition of a new estate caused by the appointment of the ancillary administrator, and hence, it is that court that has and should exercise its jurisdiction as to the final disposition of so much of the estate.[3]]

[1] Story's Conflict of Laws, § 528.

[2] Ramsay *v.* Ramsay, 97 Ill. App. 270; In re Dunn, 39 App. Div. 510, 57 N. Y. Supp. 444, 29 Civ. Proc. R. 243; Bedell *v.* Clark, 171 Mich. 486, 137 N. W. 627; Kingsbury *v.* Bazeley, 75 N. H. 13, 70 Atl. 916; Dickinson *v.* Ridgely, 188 Ill. App. 252.

An inheritance tax levied in England upon legacies, was properly deducted by the American executors in New York before paying the proceeds of the legacy to the devisee, there being a similar inheritance tax imposed by the State of New York. In re Hollins, 79 Misc. Rep. 200, 139 N. Y. Supp. 713.

[3] Leake *v.* Gilchrist, 13 N. C. 73; Hartness *v.* Pharr, 133 N. C. 566, 45 S. E. 901; Fabel *v.* Cleveland, C. C. & St. L. Ry. Co., 30 Ind. App. 268, 65 N. E. 929; Florida Central & P. R. Co. *v.* Sullivan, 120 Fed. 799, 61 L. R. A. 410; Morris *v.* Chicago, R. I. P. R. Co., 65 Iowa 727, 45 Am. Rep. 39, 23 N. W. 143; Nelson *v.* Southern Ry. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

§ 795. **Distribution of Estate in Ancillary Administration Is Governed by Law of Testator's Domicil.** — Every ancillary administration is, upon principles of international law, made subservient to the rights of creditors, legatees, and distributees in the country where such administration is taken out; although the distribution, as to legatees and distributees or heirs, is governed by the law of the place of the testator's or intestate's domicil. But a most important question often arises, — What is to be done as to the residue of the assets after discharging all the debts and other claims of the deceased due to persons resident in the country where the ancillary administration is taken out? Is it to be remitted to the forum of the testator's or intestate's domicil, to be there finally settled, adjusted, and distributed among all the claimants according to the law of the country of the domicil of the testator or intestate? Or may creditors, legatees, and distributees of any foreign country come into the Courts of Equity or other courts of the country granting such ancillary administration, and there have all their respective claims adjusted and satisfied according to the law of the testator's or intestate's domicil, or to any other law? And in cases of insolvency or other deficiency of assets, what rules are to govern in regard to the rights, preferences, and priorities of different classes of claimants under the laws of different countries seeking such distribution of the residue?

§ 796. **Same.** — These are questions which have given rise to very ample discussions in various courts in the present age, and they have been thought to be not unattended with difficulty. It seems now however to be understood as the general result of the authorities, that Courts of Equity of the country where the ancillary administration is granted (and other courts exercising a like jurisdiction in cases of administrations) are not incompetent to act upon such matters, and to decree a final distribution of the assets to and among the various claimants having equities or rights in the funds, whatever may be their domicil, whether it be that of the testator or intestate, or be in some other foreign country. The question whether the court, entertaining the suit for such a purpose, ought to decree such a distribution, or to remit the property to the forum of the domicil of the party deceased, is treated not so much as a matter of jurisdiction, as of judicial discretion dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals

for the purpose of enforcing the rights of all persons having a title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities, which may call upon such tribunals for abstinence in the exercise of the jurisdiction.[1]

[1] Harvey *v.* Richards, 1 Mason, R. 381; Dawes *v.* Head, 3 Pick. R. 128; Story's Conflict of Laws, ch. 13, § 513, and the cases in note (2), ibid.

CHAPTER XI

LEGACIES

§ 797. **Legacies.** — Another head of concurrent jurisdiction in equity is in regard to LEGACIES. This subject has been in part incidentally treated before, but it is proper to bring the subject more fully under review. It seems that originally the jurisdiction over personal legacies was claimed and exercised in the Temporal Courts of Common Law, or at least that it was a jurisdiction mixti fori, claimed and exercised in the County Court where the bishop and sheriff sat together.[1] Afterwards (at least from the reign of Henry the Third) the Spiritual or Ecclesiastical Courts obtained exclusive jurisdiction over the probate of wills of personal property; and as incident thereto they acquired jurisdiction (though not exclusive) over legacies.[2] This latter jurisdiction still continues in the Ecclesiastical Courts, though it is at present rarely exercised; a more efficient and complete jurisdiction being, as we shall presently see, exercised by Courts of Equity.[3]

§ 798. **Legatee May Maintain Action to Recover Specific Legacy after Executor Has Assented Thereto.** — In regard to legacies, whether pecuniary or specific, it is very clear that no suit will lie at the common law to recover them, unless the executor has assented thereto.[4] If no such assent has been given, the remedy is exclusively in the Ecclesiastical Courts or in the Courts of Equity. But in cases of specific legacies of goods and chattels

[1] Swinb. on Wills, Pt. 6, § 11, pp. 430, 431, 432; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 1, and notes (*a*) and (*b*); 2 Black. Comm. 491, 492; 3 Black. Comm. 61, 95, 96; Marriott *v.* Marriott, 1 Str. R. 667, 669, 670; 2 Roper on Legacies, by White, ch. 25, p. 685; 1 Reeves, Hist. of the Law, 92, 308.

[2] Ibid.; 3 Black. Comm. 98; Com. Dig. Prohibition, G. 17; Bac. Abridg. Legacies, M.; Atkins *v.* Hill, Cowp. 287.

[3] Bac. Abridg. Legacies, M.; 2 Roper on Legacies, by White, ch. 25, § 2, p. 693; 5 Madd. R. 357.

[4] Deeks *v.* Strutt, 5 T. Rep. 690.

Nor will an action lie in a Common-Law Court to recover a distributive share in an estate after decree of the Probate Court, unless it be upon the bond of the administrator or executor. Howard *v.* Brown, 11 Vt. 361.

after the executor has assented thereto the property vests immediately in the legatee, who may maintain an action at law for the recovery thereof.[1] The same rule has been attempted to be applied at law to cases of pecuniary legacies where the executor had *expressly* assented thereto; for it is agreed on all sides that the mere possession of assets without such assent will not support an action.[2] There are certainly decisions which establish that in the case of an express promise to pay a pecuniary legacy in consideration of assets, an action will lie at law for the recovery thereof.[3] But these cases seem not to have been decided upon satisfactory principles; and though they have not been directly overturned in England, they have been doubted and disapproved by judges as well as by elementary writers.[4]

§ 799. **Same.** — The ground upon which these decisions have been doubted or denied is the pernicious consequences which would follow from allowing such an action at law; for Courts of Law, if compellable to entertain the jurisdiction, cannot impose any terms upon the parties. Thus for instance a suit might be maintained by a husband for a legacy given to his wife, without making any provision for her or for her family; whereas a Court of Equity would require such a provision to be made.[5]

§ 800. **Pecuniary Legacy May Be Recovered from Executor.** — But whether a pecuniary legacy is recoverable at law or not after

[1] Doe *v.* Gay, 3 East, R. 120; Paramore *v.* Yardley, Plowd. 539; Young *v.* Holmes, 1 Str. 70; 4 Co. Rep. 28 *b*. Possession of land by a devisee for 39 years would be presumed to have been with the assent of the executor. Almand *v.* Almand, 141 Ga. 372, 81 S. E. 228; Haven *v.* Haven, 69 N. H. 204, 39 Atl. 972.

An admission by the executor that the estate in hand is subject to distribution is an admission that all debts are paid, and a practical assent to the bequest. Sloan *v.* Sloan, 117 Md. 141, 83 Atl. 38.

Generally, Jennings *v.* Sturdevant, 140 Ind. 641, 40 N. E. 61; Lester *v.* Stephens, 113 Ga. 495, 39 S. E. 109; Northrop *v.* Columbian Lbr. Co., 186 Fed. 770, 108 C. C. A. 640; Peoples Natl. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20; Watkins *v.* Gilmore, 121 Ga. 488, 49 S. E. 598.

[2] Deeks *v.* Strutt, 5 T. R. 690; Doe *v.* Gay, 3 East, R. 120.

[3] Atkins *v.* Hill, Cowp. R. 284; Hawkes *v.* Saunders, Cowp. R. 289.

[4] See Deeks *v.* Strutt, 5 T. R. 690; Doe *v.* Gay, 3 East, R. 120; 2 Roper on Legacies, by White, ch. 25, § 2, pp. 696, 697; Bac. Abridg. Legacies, M., Gwillim's note. See also 3 Dyer, Rep. 264 *b*; Beecker *v.* Beecker, 7 John. R. 99; Farish *v.* Wilson, Peake, Rep. 73; Mayor of Southampton *v.* Greaves, 8 T. Rep. 583; 2 Madd. Ch. Pr. 1, 2, 3.

[5] Deeks *v.* Strutt, 5 T. R. 692. An action at law for a pecuniary legacy has been maintained against an executor after his assent to the legacy, in some of the courts of America. In some of the States an action at law is expressly given by statute. See Dewitt *v.* Schoonmaker, 2 John. R. 243; Beecker *v.* Beecker, 7 John. R. 99; Farwell *v.* Jacobs, 4 Mass. R. 634; Bigelow's Digest, Legacy, C.

an assent thereto by an executor, it is very certain that Courts of Equity now exercise a concurrent jurisdiction with all other courts in cases of legacies, whether the executor has assented thereto or not.[1] The grounds of this jurisdiction are various. In the first place the executor is treated as a trustee for the benefit of the legatees; and therefore as a matter of trust legacies are within the cognizance of Courts of Equity, whether the executor has assented thereto or not. This seems a universal ground for the jurisdiction.[2] In the next place the jurisdiction is maintainable in all cases where an account or discovery or distribution of the assets is sought upon general principles. Indeed Lord Mansfield seems to have thought that the jurisdiction arose as an incident to discovery and account.[3] In the next place there is in many cases the want of any adequate or complete remedy in any other court.[4]

§ 801. **Rise of the Jurisdiction.** — Obvious as some of these grounds are to found a general jurisdiction in equity in cases of legacies, it does not appear that the jurisdiction was familiarly exercised until a comparatively recent period. Lord Kenyon indeed has said the jurisdiction over questions of legacies was not exercised in equity until the time of Lord Chancellor Nottingham.[5] In this remark Lord Kenyon was probably under some slight mistake; for traces are found of an exercise of the jurisdiction as early as the time of Lord Chancellor Ellesmere, in cases where the defendant answered the bill and took no exceptions; although he appears to have entertained the opinion that the Ecclesiastical Courts were more proper to give relief in cases of legacies.[6] But it is highly probable that the jurisdiction was not firmly established beyond controversy until Lord Nottingham's time.

§ 802. **Same.** — Indeed in many cases Courts of Equity exercise an exclusive jurisdiction in regard to legacies; as for instance where the bequest of the legacy involves the execution of trusts either express or implied; or where the trusts, engrafted on the bequest, are themselves to be pointed out by the court; for (as

[1] Franco *v.* Alvares, 3 Atk. 346; James *v.* Faulk, 54 Ala. 184.

[2] 2 Roper on Legacies, by White, ch. 25, p. 685; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 104; Farrington *v.* Knightly, 1 P. Will. 549, 554; Wind *v.* Jekyl, 1 P. Will. 575; Hurst *v.* Beach, 5 Madd. R. 360; 2 Madd. Ch. Pract. 1, 2; Langrick *v.* Gospel, 48 Mich. 185, 12 N. W. 38; Duffy *v.* Duffy, 114 Iowa 581, 87 N. W. 500.

[3] Atkins *v.* Hill, Cowper, R. 287; 2 Madd. Ch. Pr. 1, 2.

[4] 2 Madd. Ch. Pr. 1, 2, 3; Franco *v.* Alvares, 3 Atk. 346.

[5] Deeks *v.* Strutt, 5 T. Rep. 692.

[6] 2 Madd. Ch. Pr. 1, 2.

we have seen) the Spiritual Courts cannot, any more than the Temporal Common Law Courts, enforce the execution of trusts.[1]

§ 803. **Same.** — It is upon this account that where a testator by his will has not disposed of the surplus of his personal estate, the Spiritual Courts have no authority to decree distribution of it; for in such a case the executor is at law entitled to it; although under circumstances he may in equity be held to be a trustee for the next of kin.[2] And therefore it is that if the Spiritual Courts attempt to enforce the payment of a legacy which involves a trust, a Court of Equity will award an injunction in order to protect its own exclusive jurisdiction.[3]

§ 804. **Same.** — So where the jurisdiction in the Spiritual Courts cannot be exercised in a manner adequate to protect the just rights of all the parties concerned in the case of a legacy, Courts of Equity will assume an exclusive jurisdiction, and grant an injunction to stay proceedings of the Spiritual Courts for such

[1] 2 Roper on Legacies, by White, ch. 25, § 2, p. 693; Farrington *v.* Knightly, 1 P. Will. 549; Anon. 1 Atk. R. 491; Hill *v.* Turner, 1 Atk. 516; Attorney-Gen. *v.* Pyle, 1 Atk. 435.

When assumpsit will lie, and when a bill in equity, see Prescott *v.* More, 62 Maine, 447.

[2] 2 Madd. Ch. Pr. 1, 2, 3; Farrington *v.* Knightly, 1 P. Will. 549, 550, 553, 554, and Mr. Cox's note (1); Id. 550; Petit *v.* Smith, 1 P. Will. 7; Hatton *v.* Hatton, 2 Str. R. 865; ante, §§ 733, 734. At law the appointment of an executor is deemed to be a virtual gift to him of all the surplus of the personal estate after the payment of all debts and legacies. But in equity he is considered as a mere trustee of such surplus, for the benefit of the next of kin, if from the nature and circumstances of the will a presumption arises that the testator did not intend that the executor should take such surplus to his own use. The effect of the doctrine therefore is that the legal right of the executor will prevail unless there are circumstances which repel that conclusion. Wilson *v.* Ivat, 2 Ves. 165; Bennett *v.* Batchelor, 1 Ves. Jr. 67; Dawson *v.* Clarke, 18 Ves. 254; Haynes *v.* Littlefear, 1 Sim. & Stu. 496. What circumstances will be sufficient to turn the legal estate of the executor into a trust is a matter which would require a very large discussion in order to bring before the reader all the appropriate learning. It is in truth rather a matter of presumptive evidence than of equity jurisdiction. The subject is amply treated in Jeremy on Equity Jurisd. B. 1, ch. 1, § 2, pp. 122 to 135; and in 2 Roper on Legacies, by White, ch. 24, p. 579; Id. 590 to 640. It may however be generally stated that where there arises upon the face of the will a presumption that the executor is not to take the surplus for his own use, there parol evidence may be admitted on his part to repel the presumption, or on the part of the next of kin to confirm it. But if no such presumption arises on the face of the will, parol evidence is not admissible on the part of the next of kin to show that the executor was not intended to take beneficially. Ibid.; 1 Roper on Legacies, by White, ch. 6, § 2, pp. 337, 338; White *v.* Williams, 3 Ves. & B. 72, 73; Langham *v.* Sandford, 2 Meriv. R. 17, 18; Hurst *v.* Beach, 5 Madd. R. 360.

[3] 2 Roper on Legacies, by White, ch. 25, § 2, p. 693; Anon. 1 Atk. 591.

legacy. It was upon this account that injunctions were formerly granted by Courts of Equity to proceedings in the Spiritual Courts for a legacy, where there was no offer or requirement of security to refund it (which such courts might insist on or not)[1] in case of a deficiency of assets. For it was said that there is a difference between a suit for a legacy in a Court of Equity, and a suit for a legacy in the Spiritual Courts. If in the Spiritual Courts they would compel an executor to pay a legacy without security to refund, there a prohibition should go. But in a Court of Equity, though there be no provision made for refunding (which was formerly a usual provision, but is now discontinued), yet the common justice of the court would compel a legatee to refund.[2]

§ 805. **Same.** — But there are other instances, illustrative of the same principle of exclusive jurisdiction, of a more general character, and dependent upon the state of the legatee. Thus if a legacy is given to a married woman, and her husband sues therefor in the Spiritual Court, a Court of Equity will grant an injunction; for the Spiritual Court has no authority (as we have seen) to require him to make a suitable settlement on her and her family, as a Court of Equity has; and therefore to allow the suit in the Spiritual Court to proceed would enable the husband to do injustice to her rights, and to defeat her equity to a settlement.[3]

§ 806. **In Concurrent Jurisdiction, the Court That Is First in Possession Is Entitled to Go On with It, Where Same Remedial Justice Can Be Administered in Each Court.** — In general it is true that in cases of concurrent jurisdiction (as of legacies) that court which is first in possession of the cause is entitled to go on with it, and no other court ought to intermeddle with it. But this rule is applicable only to cases where the same remedial justice can be administered in each court, and the same protec-

[1] Nicholas *v.* Nicholas, Prec. Ch. 546, 547; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2; Horrell *v.* Waldron, 1 Vern. 26, 27; Mr. Cox's note B. to Slanning *v.* Style, 3 P. Will. 337.

[2] Noel *v.* Robinson, 1 Vern. 93, 94; Anon. 1 Atk. 491; Hawkins *v.* Day, Ambler, R. 161, 162; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*). In Anon. 1 Atk. 491, Lord Hardwicke said that the rule of the court was varied since the case in 1 Vern. 93; for legatees are not obliged to give security to refund upon a deficiency of assets. See ante, §§ 734, 735. In Hawkins *v.* Day, Ambler, R. 162, Lord Hardwicke said: "The rule of this court to grant prohibitions in case legatees sue in the Spiritual Court and refuse to give security is out of use now. But this court will decree a legatee to refund."

[3] Meals *v.* Meals, 1 Dick. R. 373; Anon. 1 Atk. 491; Hill *v.* Turner, 1 Atk. R. 516; Jewson *v.* Moulson, 2 Atk. 419, 420; Prec. Ch. 548; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*); 2 Madd. Ch. Pr. 2; ante, §§ 736, 799.

tion furnished by each to the rights of the parties.[1] In cases of married women it is obvious, from what has been above stated, that the same remedial justice cannot be administered in each court, and therefore Courts of Equity will insist upon making it exclusive.

§ 807. **Same.** — In like manner in the case of infants to whom legacies are given Courts of Equity will interfere, and exercise an exclusive jurisdiction, and prevent proceedings in the Spiritual Court by an injunction; for Courts of Equity can give proper directions for securing and improving the fund, which the Spiritual Court cannot do. And indeed it would be proper for the executor to resort to a Court of Equity in order to procure suitable indemnity for the payment of the legacy, and security to refund in case of a deficiency of assets.[2]

§ 808. **Same.** — In cases where a discovery of assets is required, or the due administration and settlement of the estate is indispensable to the rights of the legatees, as in the case of residuary legatees, it follows of course that Courts of Equity should entertain the exclusive jurisdiction, since they alone are competent to such an investigation. But this subject has been already sufficiently examined under the preceding head of the jurisdiction of Courts of Equity in cases of administrations.[3]

§ 809. **Same.** — In regard to legacies charged on land, Courts of Equity, for the reasons already stated, also exercise an exclusive jurisdiction; for the Spiritual Courts have no cognizance of legacies chargeable on lands but only of purely personal legacies.[4] In deciding upon the validity and interpretation of purely personal legacies Courts of Equity implicitly follow the rules of the civil law as recognized and acted on in the Spiritual Courts.[5] But in legacies chargeable on land they follow the rules of the common law as to the validity and interpretation thereof.[6]

§ 810. **Same.** — But the beneficial operation of the jurisdiction of Courts of Equity in cases of legacies is even more apparent

[1] Nicholas *v.* Nicholas, Prec. Ch. 546; Sweeny *v.* Williams, 36 N. J. Eq. 627; Hause *v.* Hause, 57 Ala. 262.

[2] Horrell *v.* Waldron, 1 Vern. R. 26; Nicholas *v.* Nicholas, Prec. Ch. 546, 547; 2 Roper on Legacies, by White, ch. 25, § 2, p. 694; ante, §§ 736, 806.

[3] Ante, § 534.

[4] Reynish *v.* Martin, 3 Atk. 333; see Sherman *v.* Sherman, 4 Allen, 392.

[5] Franco *v.* Alvares, 3 Atk. R. 346; Hurst *v.* Beach, 5 Madd. R. 360; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, and note (*h*). But see Cray *v.* Willis, 2 P. Will. 530.

[6] Reynish *v.* Martin, 3 Atk. 333, 334; Paschall *v.* Keterich, Dyer, 151 *b*, (5). But see Dyer, 264 *b*.

in some other cases, where the remedies are peculiar to such courts, and are protective of the rights and interests of legatees. Thus for instance in cases of pecuniary legacies due and payable at a future day (whether contingent or otherwise),[1] Courts of Equity will compel the executor to give security for the due payment thereof;[2] or what is the modern and perhaps generally the more approved practice, will order the fund to be paid into court, even if there be not any actual waste, or danger of waste, of the estate.[3]

§ 811. **Where Specific Legacy Is Given To One for Life, Remainder to Another, the Remainder-man Is Entitled to an Inventory of Property Bequeathed to Him.** — Another class of cases of the same nature is where a specific legacy is given to one for life, and after his death to another; there the legatee in remainder

[1] Formerly a distinction was taken between cases of contingent and cases of absolute legacies, payable in futuro; the latter were entitled to be made secure in equity, the former were not. See Palmer *v.* Mason, 1 Atk. R. 505; Heath *v.* Perry, 3 Atk. 101, 105. But that distinction is now overruled. See Mr. Saunders's note to Heath *v.* Perry, 3 Atk. 105, note (1); Mr. Blunt's note to Ferrand *v.* Prentice, Ambler, R. 273, note (1); Johnson *v.* De la Creuze, cited 1 Bro. Ch. R. 105; Green *v.* Pigott, 1 Bro. Ch. R. 103, 105; Flight *v.* Cook, 2 Ves. 619; Gawler *v.* Standerwick, 2 Cox, R. 15, 18; Carey *v.* Askew, 2 Bro. Ch. R. 55; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 2, pp. 351, 352; Studholme *v.* Hodgson, 3 P. Will. 300, 303, 304; Johnson *v.* Mills, 1 Ves. 282, 283; 1 Madd. Ch. Pr. 180, 181; post, §§ 1162, 1166.

[2] 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*); Rous *v.* Noble, 2 Vern. 249; s. c. 1 Eq. Abridg. 238, Pl. 22; Duncumban *v.* Stint, 1 Cas. Ch. 121. And this though there has been no misconduct on the part of the executor and there is no reason to apprehend any. Randle *v.* Carter, 62 Ala. 95.

[3] Johnson *v.* Mills, 1 Ves. R. 282; Ferrand *v.* Prentice, Ambler, R. 273; s. c. 2 Dick. R. 569; Phipps *v.* Annesley, 2 Atk. R. 58; Green *v.* Pigott, 1 Bro. Ch. R. 104; Webber *v.* Webber, 1 Sim. & Stu. R. 311; Johnson *v.* De la Creuze, 1 Bro. Ch. R. 105; Strange *v.* Harris, 3 Bro. Ch. 365; Yare *v.* Harrison, 2 Cox, R. 377; Slanning *v.* Style, 3 P. Will. 336; Batten *v.* Earnley, 2 P. Will. 163; Jeremy on Equity Jurisd. B. 3, ch. 2, § 2, pp. 351, 352; Blake *v.* Blake, 2 Sch. & Lefr. 26. In Slanning *v.* Style, 3 P. Will. 336, it was said by Lord Talbot: "Generally speaking, where the testator thinks fit to repose a trust, in such a case, until some breach of that trust be shown, or at least a tendency thereto, the court will continue to entrust the same hand, without calling for any other security than what the testator has required." Yet in that very case, where an annuity was charged on the residue of the personal estate of the testator, he ordered assets to the amount necessary to secure it to be brought into court. But where there is any danger of loss or deterioration of the fund, Courts of Equity in all cases used to require security. Rous *v.* Noble, 2 Vern. 249; s. c. 1 Eq. Abridg. 238, Pl. 22. But the modern practice seems to be (as stated in the text), to have the money paid into court; though it is certainly competent for the court to adopt either course. Dunn *v.* Travis, 56 App. Div. 317, 67 N. Y. Supp. 743; In re Davis' Estate, 27 Mont. 490, 71 Pac. 757.

was formerly entitled in all cases to come into a Court of Equity, and to have a decree for security from the tenant for life for the due delivery over of the legacy to the remainder-man. But the modern rule is, not to entertain such a bill unless there be some allegation and proof of waste, or of danger of waste, of the property. Without such ingredients the remainder-man is only entitled to have an inventory of the property bequeathed to him, so that he may be enabled to identify it; and when his absolute right accrues, to enforce a due delivery of it.[1]

[1] 1 Madd. Ch. Pr. 178, 179; Bracken *v.* Bentley, 1 Ch. Rep. 110; Anon. 2 Freem. R. 206; Feley *v.* Burnell, 1 Bro. Ch. 279; Slanning *v.* Style, 3 P. Will. 335, 336; Hyde *v.* Parrat, 1 P. Will. 1; Batten *v.* Earnley, 2 P. Will. 163; Leeke *v.* Bennett, 1 Atk. 471; Bill *v.* Kinaston, 2 Atk. 82; Covenhoven *v.* Shuler, 2 Paige, R. 122, 132. This last case involved the question, What was to be done in case of a bill bequeathing to a wife the one-third of the residue of the personal estate of the testator, and also the use of the residue during her widowhood; and it was held by Mr. Chancellor Wallworth that the widow was bound to account for the whole personal estate; and that the two-thirds of the residue of the personal estate, which was bequeathed over after the death of the wife, ought to be invested in permanent securities, and the income thereof paid to the wife during her widowhood, and after her death or marriage, to the legatees in remainder. The learned chancellor on that occasion said: "The modern practice in such cases is only to require an inventory of the articles, specifying that they belong to the first taker for the particular period only, and afterwards to the person in remainder; and security is not required unless there is danger that the articles may be wasted or otherwise lost to the remainder-man. Foley *v.* Burnell, 1 Bro. Ch. Cas. 279; Slanning *v.* Style, 3 P. Will. 336. Whether a gift for life of specific articles, as of hay, grain, &c., which must necessarily be consumed in the using, is to be considered an absolute gift of the property, or whether they must be sold, and the interest or income only of the money applied to the use of the tenant for life, appears to be a question still unsettled in England. 3 Ves. 314; 3 Mer. 194. But none of these principles, in relation to specific bequests of particular articles, whether capable of a separate use for life or otherwise, are applicable to this case. Where there is a general bequest of a residue for life with a remainder over, although it includes articles of both descriptions, as well as other property, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities and the interest or income only is to be paid to the legatee for life. This distinction is recognized by the Master of the Rolls in Randall *v.* Russell, 3 Mer. R. 193. He says if such articles are included in a residuary bequest for life, then they are to be sold, and the interest enjoyed by the tenant for life. This is also recognized by Roper and Preston as a settled principle of law in England. Prest. on Leg. 96; Roper on Leg. 209. See also Howe *v.* Earl of Dartmouth, 7 Ves. 137, and cases in the notes. The case of De Witt *v.* Schoonmaker (2 John. R. 243) seems to be in collision with this principle. But Mr. Justice Tompkins, who delivered the opinion of the court there, does not appear to have noticed the distinction between the bequest of a general residue and the bequest of specific articles. He says however it was the duty of the executors on the death of the widow to have paid and delivered the personal estate to the residuary legatee. If

§ 812. **Same.** — This may suffice, in this place, on the subject of the peculiar jurisdiction of Courts of Equity in cases of legacies where the relief sought and given is of a precautionary and protective nature. The subject will again come under review in the consideration of bills quia temet.[1]

§ 813. **Nature of Gift Causa Mortis Discussed.** — In regard to a donation mortis causa, which is a sort of amphibious gift, between a gift inter vivos and a legacy, it is not properly cognizable by the Ecclesiastical Courts; neither does it fall regularly within an administration; nor does it require any act of the executor to constitute a title in the donee.[2] It is properly a gift of personal property,[3] by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor

such was their duty, they were not bound to deliver the principal of the estate into her hands without requiring security that it should be preserved and paid over to the residuary legatee after her death. That case was correctly decided; for it was manifestly the intention of the testator that the property should be delivered over to the son after the death of the widow, and that he should pay the legacy to his sister. This court presumed he had received the property agreeably to the directions of the will, and the executors were held not to be liable to the legatee in a Court of Law. In the case before me the widow was not entitled to the use or possession of any specific article of the personal estate, but only to one-third of the principal, and the interest or income of two-thirds of the remainder of the general residue after the debts of the testator and the legacy to Mrs. Cady were paid or satisfied. The complainants are therefore entitled to an account of all the personal estate of the testator in value as it existed at the death of their father; and after deducting the legacy to Mrs. Cady, and the funeral charges and the expenses of administration, their share of the balance must be invested in permanent securities, and the income thereof paid to Lena Shuler during her life or widowhood; and the principal after her death or marriage must go to the complainants."

See Mills *v.* Mills, 7 Sim. 501; Fryer *v.* Butler, 8 Sim. 442; Benn *v.* Dixon, 10 Sim. 636; Cafe *v.* Bent, 5 Hare, 24, 36; Hunt *v.* Scott, 1 DeG. & S. 219; Howe *v.* Howe, 14 Jur. 359; Neville *v.* Fortescue, 16 Sim. 333; Morgan *v.* Morgan, 14 Beav. 72; s. c. 7 Eng. L. & E. 216.

Nor where personal property is given by will to A for life and then to B absolutely, can B, as mere matter of right, require the legacy to be brought into court and invested and the testator's estate administered by the court, for the purpose of security to himself. There must be some reasonable ground for an application of the kind, such as danger to the fund. In re Braithwaite, 21 Ch. D. 121. See Phipps *v.* Annesley, 2 Atk. 57; Ferrand *v.* Prentice, Ambl. 273; Freeman *v.* Fairlie, 3 Mer. 29; Vernon *v.* Vernon, 7 Lans. 492; In re Hamlin, 144 App. Div. 318, 126 N. Y. Supp. 396; In re Rowland, 153 App. Div. 327, 137 N. Y. Supp. 1010.

[1] Post, §§ 1162, 1163, 1164.

[2] 1 Roper, Leg. by White, ch. 1, § 2, p. 2; Thompson *v.* Hodgson, 2 Str. R. 777; Ward *v.* Turner, 2 Ves. 431; Miller *v.* Miller, 3 P. Will. 356; 3 Wooddeson, Lect. 60, p. 513; Hedges *v.* Hedges, Prec. Ch. 269; Gilb. Eq. R. 12; 2 Vern. 615.

[3] Meach *v.* Meach, 24 Vt. 591.

shall die, but not otherwise.[1] To give it effect, there must be a delivery of it by the donor;[2] and it is subject to be defeated by his subsequent personal revocation [3] or by his recovery or escape from the impending peril of death.[4] If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his lifetime, and therefore in no sense is it a testamentary act.[5] And this is the reason why the Ecclesiastical Courts have no jurisdiction, as they can interpose only in testamentary matters. Courts of Equity however maintain a concurrent jurisdiction in all cases of such donations where the remedy at law is not adequate or complete. But in such cases the jurisdiction stands upon

[1] Wells *v.* Tucker, 3 Binn. R. 366, 370; Edwards *v.* Jones, 1 Mylne & Craig, 226; s. c. 7 Sim. R. 325; 1 Williams on Executors, Pt. 2, B. 2, ch. 2, § 4, pp. 544 to 554 (ed. 1838); Duffield *v.* Elwes, 1 Bligh, R. 530 (N. S.); Lawson *v.* Lawson, 1 P. Will. 441; Hedges *v.* Hedges, Prec. Ch. 269; Gilb. Eq. Rep. 12; 2 Vern. R. 615; Tate *v.* Hilbert, 2 Ves. Jr. 121; s. c. 4 Bro. Ch. R. 290; Miller *v.* Miller, 3 P. Will. 357; Irons *v.* Smallpiece, 2 Barn. & Ald. 552, 553. The intention to give must be clear. See First National Bank *v.* Balcom, 35 Conn. 351; Prickett *v.* Prickett, 5 C. E. Green, 478; Taylor *v.* Harrison, 79 Ill. App. 380, Affirmed 179 Ill. 137, 53 N. E. 584; O'Brien *v.* Elmira Savings Bank, 99 App. Div. 76, 91 N. Y. Supp. 364; Hecht *v.* Shaffer, 15 Wyo. 34, 85 Pac. 1056; Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; Calvin *v.* Free, 66 Kans. 466, 71 Pac. 823; Johnson *v.* Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884; Barnes *v.* Barnes, 174 Ala. 160, 56 So. 958; Vosburg *v.* Mallory, 155 Iowa 165, 135 N. W. 577.

[2] Upon this point see Ellis *v.* Secor, 31 Mich. 185; infra, § 819.

[3] Parker *v.* Marston, 27 Me. 196; Stevens *v.* Stevens, 5 Thomp. & C. 87.

[4] 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, pp. 544, 545, 546, 547; Ward *v.* Turner, 2 Ves. 431; Jones *v.* Selby, Prec. Ch. 300.

Further upon the nature of this gift see Nicholas *v.* Adams, 2 Whart. 17; Raymond *v.* Sellick, 10 Conn. 480; Harris *v.* Clark, 2 Barb. 94; Parish *v.* Stone, 14 Pick. 198; Miller *v.* Jeffries, 4 Gratt. 472; Sims *v.* Walker, 8 Humph. 503; Brinckerhoff *v.* Lawrence, 2 Sandf. 401; Dole *v.* Lincoln, 31 Maine, 422.

[5] Mr. Williams, in his excellent work on the Law of Executors and Administrators, says that "to constitute a donatio mortis causa there must be two attributes: (1) The gift must be with a view to the donor's death. (2) It must be conditioned to take effect only on the death of the donor by the existing disorder. A third essential quality is required by our law, which according to some authorities was not necessary according to the Roman and civil law; namely, (3) There must be a delivery of the subject of the donation." 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, p. 544 (ed. 1838). See the remarks on this last point by Lord Hardwicke, in Ward *v.* Turner, 1 Ves. 439, 440, 441; Voet, ad Pand. Lib. 39, tit. 6, § 6; Tate *v.* Hilbert, 2 Ves. Jr., 111, 112.

Upon the proof of capacity to make such a gift, the rule differs from that applied to testamentary acts. Crum *v.* Thornley, 47 Ill. 192. Failing as a will, a written instrument is not to be construed as a gift mortis causa unless all the elements of such gift are present. McGrath *v.* Reynolds, 116 Mass. 566.

general grounds, and not upon any notion that a donation mortis causa is from its own nature properly cognizable therein.

§ 814. [**Property Subject to Gift Causa Mortis.** — We will now take up and consider in their order, the requisites for a good gift causa mortis. At the outset, it must be borne in mind that a gift causa mortis always refers to a gift of personal property while one is in extremis, and it never relates to land or to any interest therein. A gift of land must be by deed or by will and it makes no matter what the intention of the giver may have been, however serious or severe his sickness may have been, or how suddenly he may have been attacked with disease, this will not authorize or permit the conveyance of land by parol; otherwise, the registration laws would be nullified.[1]]

§ 815. [**Gift Must Have Been Made in Fear of Impending Death.** — Another requisite for a good gift causa mortis is that the gift should have been made at a time and under such circumstances that the giver was in fear of his impending death, and it makes no difference that his present condition was the result of an injury recently received or disease contracted by him. In determining whether the giver was in extremis at the time he made the gift, it is competent to offer in evidence his expressions as to his condition at the time the possession and control of the property passed. It is not sufficient to pass the title to the property that the giver at the time he gave the property really thought that he was about to die, but in fact he did not die of that disease or sickness, but regained his health, and without recalling the former gift or repossessing himself of the property, he subsequently died of another sickness.[2] It is the condition of the man's mind at present, actuated by his desire that a certain piece of personal property, wearing apparel, money, evidences of debt, ornaments to the person and the like, that are usually given in return on account of close ties of love, friendship, service, and reward, the policy of

[1] Johnson *v.* Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884; Vosburg *v.* Mallory, 155 Iowa 165, 135 N. W. 577; Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; In re Heiser's Estate, 85 Misc. Rep. 271, 147 N. Y. Supp. 557; Wentworth *v.* Shibes, 89 Me. 167, 36 Atl. 108; Mascarel *v.* Mascarel's Execr., 3 Cal. App. 501, 86 Pac. 617.

[2] "If anything happened to him, and he was planted," Taylor *v.* Harrison, 79 Ill. App. 380, Affirmed 179 Ill. 137, 53 N. E. 584; "Jesse, they are going to take me away and I don't want to go, and if I never get back, etc.," Barnes *v.* Barnes, 174 Ala. 160, 56 So. 958; "If I die, or anything happen to me," Johnson *v.* Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884; Fauley *v.* McLaughlin, 80 Wash. 547, 141 Pac. 1037; Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111; Dickinson *v.* Hoes, 33 N. Y. Civ. Proc. R. 101, 84 N. Y. Supp. 152.

the law allows to pass from the owner to another, rather than to the personal representative. If the condition of the gift be not fulfilled and the giver regain his health, the property is still his and he has the right to recall the gift, or to give the property to another if he sees fit, and in order to determine the real status of the property it is always material to ascertain at least the apparent physical condition and the real condition the giver believed himself to be in; the lapse of time intervening between the gift and his death, and the disease from which he died.[1]]

§ 816. [**Delivery as an Element.** — It is not only necessary that there be the intention to make a gift of the property, but there must be a delivery, either actual or constructive. A gift of money to a third person to be turned over to a servant upon the death of the giver, is a sufficient delivery of the possession, especially where it was immediately counted out in the presence of the giver and several witnesses, and taken away some distance to the home of such third person.[2] But where the donor handed to alleged donee a certificate of deposit and merely permitted the

[1] O'Neil *v.* First Natl. Bank, 43 Mont. 505, 117 Pac. 889; Calvin *v.* Free, 66 Kans. 466, 71 Pac. 823; Vosburg *v.* Mallory, 155 Iowa 165, 135 N. W. 577; Johnson *v.* Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884.

[2] Where donor went to bank with donee and in presence of cashier handed key to small box in vault to donee, telling her to keep it in case she did not come back from the hospital, and that the box and its contents were hers, there was no delivery of the property, the box and its contents being small and easily removed. Newsome *v.* Allen, 86 Wash. 678, 151 Pac. 111.

Delivery must be either actual, constructive, or symbolical. Keller *v.* McConville, 175 Mich. 479, 141 N. W. 652.

Symbolical delivery does not apply in North Carolina. Wilson *v.* Featherston, 122 N. C. 747, 30 S. E. 325.

Giving the keys to the house to the donee by the donor and telling her that she could have everything in the house, pointing out the clock, bureau, etc., but this would not pass the title to a life insurance policy and the proceeds arising from it. Newman *v.* Bost, 122 N. C. 534, 29 S. E. 848.

Where donor gave his keys to two trunks which were at the foot of his bed, he then being in extremis and the trunks being too bulky to permit of an actual delivery, this was sufficient to pass the title. Debinson *v.* Emmons, 158 Mass. 592, 33 N. E. 706; contra, see Knight *v.* Tripp, 121 Cal. 674, 54 Pac. 267, in which it is held that the giving of a bill of sale for articles of personal property is not a sufficient delivery.

Where donor and donee each had a key to the office, the giving of his key by the donor to donee and telling him he could have all of the furniture and other things in there, was not a sufficient delivery. Allen *v.* Allen, 75 Minn. 116, 77 N. W. 567; but where donee was already in possession of the property at the time of the gift, and his use of the property before and after donor's death was consistent with the gift, this was a sufficient delivery. Davis *v.* Kuck, 93 Minn. 262, 101 N. W. 165; Johnson *v.* Colley,

donee to retain possession of the paper for the donor and authorized him to collect the money and distribute it, in the event he failed to return is not sufficient.[1] A promise by a friend to take some things out of a pocketbook, then in a closet, and deliver to a faithful nurse, but actual possession not being taken until the next day, after the owner had died, the promise to take the things and pretended possession at the time made for purpose of fooling the owner, was not sufficient as a delivery.[2] And a letter written by one while at a hospital for a dangerous surgical operation, and while he thought he was in extremis, the letter was not mailed and the writer afterwards regained his health, and died a year and a half later of another disease, a mailing at that time of the original letter purporting to convey an interest in land, was not a sufficient delivery to constitute a gift causa mortis.[3] But where decedent had buried quantities of his money at various places about his premises, and just prior to his death he walked out in his garden and pointed out the places where the treasure was and then and there gave it to his daughter who accompanied him, this was a constructive delivery and sufficient to pass the title.[4]]

§ 817. [**Present Title to Property Must Pass.** — It is necessary that at the time the gift is made by the donor the property

101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884; Basket *v.* Hassell, 107 U. S. 609, 27 L. Ed. 500, 2 S. Ct. Rep. 415; Hecht *v.* Shaffer, 15 Wyo. 34, 85 Pac. 1056; Vosburg *v.* Mallory, 155 Iowa, 165, 135 N. W. 577.

[1] Barnes *v.* Barnes, 174 Ala. 160, 56 So. 958; Taylor *v.* Harrison, 79 Ill. App. 380, Affirmed 179 Ill. 137, 53 N. E. 584.

Delivery of bank deposit book is not a delivery of money and bonds referred to in a memorandum in the book. Wilson *v.* Featherson, 122 N. C. 747, 30 S. E. 325.

Delivery of keys to box and safe in bank vault with the statement that "all you find in this box and this safe is yours", is a constructive delivery of the box and its contents. Newman *v.* Bost, 122 N. C. 524, 29 S. E. 848; Lerche *v.* Kishpaugh, 180 Mich. 617, 147 N. W. 499.

[2] Stokes *v.* Sprague, 110 Iowa, 89, 81 N. W. 195; Donover *v.* Argo, 79 Iowa, 574, 44 N. W. 818.

[3] Fauley *v.* McLaughlin, 80 Wash. 547, 141 Pac. 1037; O'Neil *v.* First Natl. Bank, 43 Mont. 505, 117 Pac. 889.

[4] Waite *v.* Grubbe, 43 Oreg. 406, 73 Pac. 206, 99 Am. St. Rep. 764; Devol *v.* Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; Calvin *v.* Free, 66 Kans. 466, 71 Pac. 823; Gross *v.* Smith, 132 N. C. 604, 44 S. E. 111; Duckworth *v.* Orr, 126 N. C. 674, 36 S. E. 150.

Delivery means the passing over of the property with intent to transfer the right of property and possession, and the burden of showing this is on the donee. An intent to give or a promise to give will not be sufficient unless the subject-matter passes under the control of the donee free from any control of the donor. Wilson *v.* Featherston, 122 N. C. 747, 30 S. E. 325.

shall belong fully to the donee, in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not in the meantime revoked. The title to every gift causa mortis must vest in the donee at the time of the gift. It vests however subject to certain conditions subsequent. The donor may revoke the gift during his lifetime, or it will be defeated by operation of law if the donor should recover from the illness which induced the gift, or should survive the donee.[1] The delivery must be absolute, and the donor must part with all of his present and future interest and control over the property, and if the donor delivers his property to his agent or bailee, and without absolutely surrendering dominion over it, or directs that, in the event of his death, it shall be delivered to an intended donee, this is regarded as an attempted testamentary disposition and will not fulfill the requirements for a valid gift causa mortis.[2]]

§ 818. [**Validity of Gift Is Governed by Laws of the State in Which It Was Made.** — The cases that we have been considering have dealt with the rules of construction governing a gift made under the laws of the State in which the gift was made, and the place of residence of both donor and donee. It becomes material sometimes to consider how a gift is to be construed, and under the laws of what State it is to be governed, where the donor is temporarily absent from the State of his domicile. The validity of such a gift is determined by the law of the place where it is made, without reference to the domicile of the donor.[3]]

§ 819. **Gift Causa Mortis Distinguished from Legacy.** — We have had occasion to say that a donatio mortis causa is of an amphibious nature, — partaking of the character of a gift inter vivos and of a legacy. It differs from a legacy in these respects: (1) It need not be proved — nay, it cannot be proved — as a testamentary act in the Ecclesiastical Courts, for it takes effect as a gift from the delivery by the donor to the donee in his lifetime. (2) It requires no assent or other act on the part of the

[1] Vosburg *v.* Mallory, 155 Iowa, 165, 135 N. W. 577; Johnson *v.* Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884.

[2] Barnes *v.* Barnes, 174 Ala. 160, 56 So. 958; Taylor *v.* Harrison, 79 Ill. App. 380, Affirmed 179 Ill. 137, 53 N. E. 584; Calvin *v.* Free, 66 Kans. 466, 71 Pac. 823; Wilson *v.* Featherston, 122 N. C. 747, 30 S. E. 325; Stratton *v.* Athol Savings Bank, 213 Mass. 46, 99 N. E. 454.

Where no delivery is had at time gift is alleged to have been made, or where donee subsequently came into possession of property, this is not sufficient as a delivery. Dickeschied *v.* Exchange Bank, 28 W. Va. 340.

[3] O'Neil *v.* First Natl. Bank, 43 Mont. 505, 117 Pac. 889; Emery *v.* Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543.

executor or administrator to perfect the title of the donee. The claim is not from the executor or administrator, but against him. It differs from a gift inter vivos in several respects in which it resembles a legacy: (1) It is ambulatory, incomplete, and revocable during the donor's lifetime. (2) It may be made to the wife of the donor. (3) It is liable to the debts of the donor upon a deficiency of assets.[1]

§ 820. **Same.** — The notion of a donatio mortis causa was originally derived into the English law from the civil law. In that law it was thus defined: "Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat ut si quid humanitus ei contigisset, haberet is qui accepit. Sin autem super vixisset is qui donavit, reciperet; vel si eum donationis pœnituisset, aut prior decesserit is cui donatum sit."[2] It was a long time a question among the Roman lawyers whether a donation mortis causa ought to be reputed a gift or a legacy, inasmuch as it partakes of the nature of both (et utriusque causæ quædam habebat insignia); and Justinian finally settled that it should be deemed of the nature of legacies: "Hæ mortis causa donationes ad exemplum legatorum redactæ sunt per omnia."

§ 821. **Essentials to a Valid Gift Causa Mortis.** — We have already seen that by our law there can be no valid donatio mortis causa: (1) unless the gift be with a view to the donor's death; (2) unless it be conditioned to take effect only on the donor's death by his existing disorder or in his existing illness;[3] and (3) unless there be an actual delivery of the subject of the donation.[4] This last requisite has been thought by some learned judges

[1] 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, p. 552 (ed. 1838); 1 Roper on Legacies, by White, ch. 1, § 2, pp. 2, 3 (3d ed.); Chase *v.* Redding, 79 Mass. 418.

[2] Inst. Lib. 2, tit. 7, § 1; Tate *v.* Herbert, 2 Ves. Jr. 118.

[3] See Grymes *v.* Hone, 49 N. Y. 17. A gift conditioned on the donor's death in war, for service in which he is enlisted, has been held invalid. Irish *v.* Nutting, 47 Barb. 370; Gourley *v.* Linsinbigler, 51 Pa. St. 345; Dexheimer *v.* Gautier, 5 Rob. (N. Y.) 216. Contra, Gass *v.* Simpson, 4 Cold. 288; Baker *v.* Williams, 34 Ind. 547.

[4] See Coleman *v.* Parker, 114 Mass. 30; McGrath *v.* Reynolds, 116 Mass. 566; Parish *v.* Stone, 14 Pick. 198, 203; Sessions *v.* Moseley, 4 Cush. 87, 92; Marshall *v.* Berry, 13 Allen, 43; Grymes *v.* Hone, 49 N. Y. 17; Huntington *v.* Gilmore, 14 Barb. 243; Hitch *v.* Davis, 3 Md. Ch. 266; Jones *v.* Deyer, 16 Ala. 221; Tate *v.* Leithead, Kay, 658; Ellis *v.* Secor, 31 Mich. 185; Rhodes *v.* Childs, 64 Pa. St. 18. Delivery to an agent to hold for the *giver* would not be enough; the delivery must be to the donee or to some one for the donee. Farquharson *v.* Cave, 2 Colly, 356, 367. See Moore *v.* Darton, 20 L. J. Ch. 626; s. c. 7 Eng. L. & E. 134; Wells *v.* Tucker, 3 Binn. 366, 370; McGillicuddy *v.* Cook, 5 Blackf. 179; Sessions

to belong exclusively to our law, and not to have existed in the Roman law.[1] But a more important practical question is, what may be the subject of a donatio mortis causa. There is no doubt that there may be a good donation of anything which has a physical existence and admits of a corporal delivery; as, for example, of jewels, gems, a bag of money, a trunk of goods, and even of things of bulk which are capable of possession by a symbolical delivery,[2] such as goods in a warehouse by a delivery of the key of the warehouse.[3] But the question was formerly

v. Moseley, 4 Cush. 87. Delivery to one in trust for the donee will be good. Kemper *v.* Kemper, 1 Duv. 401; Baker *v.* Williams, 34 Ind. 547; Clough *v.* Clough, 117 Mass. 83. So where the chattel is already in the hands of a trustee, it may be given mortis causa without delivery. Sutherland *v.* Sutherland, 5 Bush, 591. And where money is already in the hands of the donee, a gift of the receipt will be effectual, it seems. Champney *v.* Blanchard, 39 N. Y. 111. So where a promissory note is in the hands of the donee, that is enough. Wing *v.* Merchant, 57 Me. 383. Indeed where the donor has done everything in his power to effect a delivery, and fully intends to make a complete gift, that is enough so far as delivery is concerned. Ellis *v.* Secor, 31 Mich. 185.

A husband may make this sort of gift to his wife. Whitney *v.* Wheeler, 116 Mass. 490; Whitehouse *v.* Whitehouse, 90 Me. 468, 38 Atl. 374, 60 Am. St. Rep. 278; Caldwell *v.* Goodenough, 170 Mich. 114, 135 N. W. 1057; but see Mason *v.* Gardiner, 186 Mass. 515, 71 N. E. 952; First Natl. Bank *v.* O'Byrne, 177 Ill. App. 473, check on bank; Sheedy *v.* Roach, 124 Mass. 472, 26 Am. Rep. 680, deposit in bank.

A draft payable to order will pass, even though not indorsed by the payee. Edwards *v.* Wagner, 121 Cal. 376, 53 Pac. 821.

The gift of a receipt for money on deposit, with direction that the donee pay the burial expenses of the donor and he could have the residue, is sufficient. Dickinson *v.* Hoes, 33 N. Y. Civ. Proc. R. 101, 84 N. Y. Supp. 152.

[1] See Bunn *v.* Markham, 7 Taunt. 224; Farquharson *v.* Cave, 2 Colly, 356; Ellis *v.* Secor, 31 Mich. 185, a striking case.

[2] "Symbolical" delivery as a means of getting the chattel is certainly good where it is the only practicable thing, or perhaps the most convenient thing, notwithstanding the broad dictum in McGrath *v.* Reynolds, 116 Mass. 566, 568. "There are many articles which might be made the subjects of a donatio mortis causa in which a manual delivery . . . might be inconvenient or impracticable. We have no doubt that a trunk with its contents might be effectually given and delivered in such a case by a delivery of the key, not as a symbolical delivery of the property but because it is the means of obtaining possession." Coleman *v.* Parker, 114 Mass. 30, 33, Ames, J.; Ward *v.* Turner, 2 Ves. Sr. 431, 433; Wing *v.* Merchant, 57 Maine, 383; Dole *v.* Lincoln, 31 Maine, 422; Bunn *v.* Markham, 7 Taunt. 224. See however as to the delivery of a key to a trunk containing stocks and bonds, Hatch *v.* Atkinson, 56 Me. 324, and qu. as to the decision. But the key must be given to the donee or to some one for him. Coleman *v.* Parker, supra; Powell *v.* Hellicar, 29 Beav. 261; Bunn *v.* Markham, 7 Taunt. 224. Properly this is actual delivery; it may give actual possession.

[3] See Ward *v.* Turner, 2 Ves. 443; 1 Williams on Executors and Ad-

mooted whether choses in action, bonds, and other incorporeal rights could pass by a donatio mortis causa. The doctrine now established is, that not only negotiable notes and bills of exchange payable to bearer, or indorsed in blank, exchequer notes, and bank notes, may be the subjects of a donatio mortis causa, because they may, and do, in the ordinary course of business, pass by delivery,[1] but that bonds and mortgages may also be the subjects of a donatio mortis causa, and pass by the delivery of the deeds and instruments by which they are created.[2] Bonds have been so held upon the ground that a bond could not be sued for at law without a profert; and that a Court of Equity would not, after a donatio mortis causa accompanied with a delivery of the bond to the donee, direct the latter to give it up to the personal representative of the donor, but would hold the title of the donee to it good.[3] And mortgaged deeds, when delivered, are treated but

ministrators, Pt. 2, B. 2, ch. 2, § 4, pp. 547, 548, 549; Bunn *v.* Markham, 7 Taunt. R. 224; Miller *v.* Miller, 3 P. Will. 356. See also Rankin *v.* Weguelin, at the Rolls, 14 June, 1832, cited in Chitty on Bills, Addenda, p. 791, 8th ed. 1833.

[1] A distinction is taken by the authorities between the paper of the donor and that of a third person. That the paper of a third person may be the subject of this peculiar kind of gift is clear. Westerlo *v.* De Witt, 36 N. Y. 340 (certificate of deposit); Boutts *v.* Ellis, 21 Eng. L. & E. 337 (bank check); Bedell *v.* Carll, 33 N. Y. 581; Gourley *v.* Linsinbigler, 51 Penn. St. 345; Ashbrook *v.* Ryon, 2 Bush, 228; House *v.* Grant, 4 Lans. 296. And this though the paper, e. g. a check, is payable to the donor's order and has not been indorsed by him. Wing *v.* Merchant, 57 Maine, 383; Clement *v.* Cheesman, 27 Ch. D. 631; In re Mead, 15 Ch. D. 654; Veal *v.* Veal, 27 Beav. 303; Bates *v.* Kempton, 7 Gray, 382; Chase *v.* Ridding, 13 Gray, 418, 420; Grymes *v.* Hone, 49 N. Y. 17, 23. On the other hand it seems equally clear that the donor's own note or check, unless paid before death, cannot, as such, unsupported by a consideration, be made the subject of a valid gift mortis causa. Starr *v.* Starr, 9 Ohio St. 74; Hamor *v.* Moore, 8 Ohio St. 239; Brown *v.* Moore, 3 Head, 671; Carr *v.* Silloway, 111 Mass. 24; Harris *v.* Clarke, 3 Comst. 93; Fiero *v.* Fiero, 5 Thomp. & C. 151; Johnson *v.* Spies, 5 Hun, 468; Kenestons *v.* Sceva, 54 Md. 24; Case *v.* Denison, 9 R. I. 88; Hewitt *v.* Kaye, L. R. 6 Eq. 198 (check, but good if presented before death); Second Nat. Bank *v.* Williams, 13 Mich. 282 (check). And it makes no difference, it is held, that the donor's pass-book was delivered with the check. In re Beak, L. R. 13 Eq. 489. See Ashbrook *v.* Ryon, 2 Bush, 228. But see Tillinghast *v.* Wheaton, 8 R. I. 536, that the delivery of a savings-bank book alone is good to pass the deposit.

[2] Drury *v.* Smith, 1 P. Will. 405; Miller *v.* Miller, 3 P. Will. 356. See also Pennington *v.* Gittings, 2 Gill & John. R. 208; Bradley *v.* Hunt, 5 Gill & John. 54; Hill *v.* Chapman, 2 Bro. Ch. R. 612; Jones *v.* Selby, Prec. Ch. 300; 1 Roper on Legacies, by White, ch. 1, § 2, pp. 13, 14, 15, 16 (3d ed.); Ward *v.* Turner, 1 Ves. 441, 442. So of stocks. Grymes *v.* Hone, 49 N. Y. 17.

[3] Gardner *v.* Parker, 3 Madd. R. 184; Snelgrove *v.* Bailey, 3 Atk. 214;

as securities for debts, and would, in the hands of the donee, be governed by the same rules. The delivery in the case of a mortgage is therefore treated, not as a complete act passing the property, but as creating a trust by operation of law in favor of the donee, which a Court of Equity will enforce in the same manner as it would the right of the donee to a bond.[1] In short in all cases in which a donatio mortis causa is carried into effect by a Court of Equity the court has not considered the interest as completely vested by the gift, but that it is so vested in the donee that the donee has a right to call on a Court of Equity for its aid, and in case of personal estate, to compel the executor or administrator of the donor to carry into effect the intention manifested by the person whom he represents; as for example if the donation be a bond, to compel the executor or administrator to allow the donee to use his name in suing the bond upon being indemnified, because it is a trust for the donee.[2]

Duffield *v.* Elwes, 1 Bligh, N. S. R. 542; Ward *v.* Turner, 2 Ves. 441, 442. In this last case Lord Hardwicke said: "In Bailey *v.* Snelgrove, determined by me, 11th March, 1774, it was urged, where a bond was given in prospect of death, the manner of gift was admitted, the bond was delivered, and I held it a good donation mortis causa. It was argued that there was a want of actual delivery there or possession, the bond being but a chose in action, and therefore there was no delivery but of the paper. If I went too far in that case, it is not a reason I should go farther; and I choose to stop here. But I am of opinion that decree was right, and differs from this case; for though it is true that a bond which is specialty is a chose in action, and its principal value consists in the thing in action, yet some property is conveyed by the delivery; for the property is vested; and to this degree, that the law-books say the person to whom this specialty is given may cancel, burn, and destroy it. The consequence of which is that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert in curia. Another thing made it amount to a delivery: that the law allows it a locality; and therefore a bond is bona notabilia, so as to require a prerogative administration where a bond is in one diocese and goods in another. Not that this is conclusive. This reasoning I have gone upon is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there I know not, but rather apprehend he applied it to a donation mortis causa; for if to a donation inter vivos, I doubt he went too far." See also Wells *v.* Tucker, 3 Binn. R. 366; Bradley *v.* Hunt, 5 Gill & John. R. 45.

[1] Duffield *v.* Elwes, 1 Bligh, N. S. R. 497, 530, 534, 535, 536, 541, 542, which overrules the decision of the vice-chancellor in the same case. 1 Sim. & Stu. 243.

[2] Duffield *v.* Elwes, 1 Bligh, N. S. R. 497, 530, 534; Gardner *v.* Parker, 3 Madd. R. 184. We have already extracted in another place (ante, § 433, note 4) a part of the opinion of Lord Eldon on this subject, which it may perhaps be useful here to repeat. "The question," said he, "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

§ 822. **Gift Causa Mortis of Bond and Mortgage by Mortgagee Is a Release of the Debt.** — The same doctrine is applicable to the case of a donatio mortis causa of a bond and mortgage by the mortgagee to the mortgagor consummated by the delivery of the bond and mortgage to him. In such a case it will operate as a release or discharge of the debt if the donor should die of his existing illness. For (it has been said) if it was a gift inter vivos, the mortgagee could not get back the deeds from the mortgagor; but by operation of law a trust would be created in the mortgagee to make good a gift of the debt to the mortgagor to whom he had

personalty, 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." His Lordship afterwards, in discussing the point whether a mortgage would pass by a delivery of it as a donation mortis causa, said: "Lord Hardwicke, with respect to the bond (and it is necessary that I should take some notice of this, because there has been a change in the law which that great judge did not foresee, but which in later times and in my own time has become very familiar in the Courts of Law), — Lord Hardwicke states as one ground of his opinion in the case of the bond that it is a good gift causa mortis, because he says he who has got the bond may do what he pleases with it. He certainly disables the person who has not got the bond from bringing an action upon it; for, says Lord Hardwicke, no man ever heard (and I have seen in the manuscript of the same Lord Hardwicke that he said no man will ever hear) that a person shall bring an action upon a bond without the profert of that bond. But we now have got into a practice of sliding from Courts of Equity into Courts of Law the doctrine respecting lost instruments; and I take the liberty most humbly of saying, that when that doctrine was so transplanted, it was transplanted upon the idea that the thing might be as well conducted in a Court of Law as in a Court of Equity, — a doctrine which cannot be held by any person who knows what the doctrine of Courts of Equity is as to a lost instrument. Then if the delivery of a bond would, as it is admitted (notwithstanding any change in the doctrine about profert), — if the delivery of a bond would give the debt in that bond so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question to which an answer is to be given: What are we to do with respect to the other securities if they are delivered? In the one case the bond and mortgage are delivered; in the other the judgment, which is to be considered on the same ground as a specialty, is delivered. With that the evidences of the debts are all delivered. The instrument

delivered the deeds.[1] But however this may be, it seems clear that in the case of such a donatio mortis causa the representatives of the donor would never be permitted to enforce the mortgage or bond against the donee.[2]

§ 823. **Chose in Action Not Subsisting in Any Specific Instrument Cannot Pass by Gift Causa Mortis.** — On the other hand as by our law there must be a delivery of the thing or of the instrument which represents it in order to make a good donatio mortis causa, if the thing is incapable of delivery it cannot be the subject of such donation; for, it is said, there must be a parting with the legal power and dominion over the thing which is evidenced only by the delivery. Thus a mere chose in action not subsisting in any specific instrument cannot pass by a donatio mortis causa. So it has been ruled that a promissory note or bill of exchange not payable to bearer or indorsed in blank cannot so take effect, inasmuch as no property therein can pass by the delivery of the instrument.[3] So it has been ruled that South Sea Annuity Receipts cannot be the proper subject of a donatio mortis causa, because the delivery thereof does not pass the property in the annuities; and stocks and annuities are by act of Parliament made capable of a transfer of the legal property.[4] But it

containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, Whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only? The opinion which I have formed is, that this is a good donatio mortis causa, raising by operation of law a trust; a trust which being raised by operation of law is not within the Statute of Frauds, but a trust which a Court of Equity will execute."

[1] Richards *v.* Symes, 2 Atk. 319; 2 Barnard. R. 90; 2 Eq. Abridg. 617; Duffield *v.* Elwes, 1 Bligh, Rep. 537, 538, 539, N. S.; Hurst *v.* Beach, 5 Madd. R. 351.

[2] Ibid.

[3] Miller *v.* Miller, 3 P. Will. 356, 358; Ward *v.* Turner, 2 Ves. 442, 443; Pennington *v.* Gittings, 2 Gill & John. R. 208; Bradley *v.* Hunt, 5 Gill & John. R. 54.

Contra, Veal *v.* Veal, 6 Jur. N. S. 527; S. C. 27 Beav. 303; Clement *v.* Cheesman, 27 Ch. D. 631; Wing *v.* Marchant, 57 Maine, 383; Bates *v.* Kempton, 7 Gray, 382; Chase *v.* Ridding, 13 Gray, 418, 420.

[4] Ward *v.* Turner, 2 Ves. Sr. 431, 442, 443. Lord Hardwicke on this occasion said: "Therefore from the authority of Swinburne, and all these cases, the consequence is that by the civil law, as received and allowed in England, and consequently by the law of England, tradition or delivery is necessary to make a good donation mortis causa; which brings it to the question, Whether delivery of the three receipts was a sufficient delivery of the thing given to effectuate the gift. I am of opinion it was not. It is argued that though some delivery is necessary, yet delivery of the thing is

may admit of doubt whether the doctrine of these last cases can now, upon principle, be supported; for the ground upon which Courts of Equity now support donations mortis causa is not that a complete property in the thing must pass by the delivery, but that it must so far pass by the delivery of the instrument as to give a title to the donee to the assistance of a Court of Equity to make the donation complete. The doctrine no longer pre-

not necessary, but delivery of anything by way of symbol is sufficient. But I cannot agree to that. Nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court delivery of the thing given is relied on, and not in the name of the thing, as in the delivery of sixpence in Shargold *v.* Shargold; if it was allowed any effect, that would have been a gift mortis causa, not as a will; but that was allowed as testamentary, proved as a will, and stood. The only case wherein such a symbol seems to be held good is Jones *v.* Selby. But I am of opinion that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore it was rightly compared to the cases upon 21 J. 1, Ryal *v.* Rowles and others. It never was imagined on that statute that delivery of a mere symbol, in name of the thing, would be sufficient to take it out of that statute; yet notwithstanding delivery of the key of bulky goods where wines, &c. are, has been allowed as delivery of the possession; because it is the way of coming at the possession, or to make use of the thing; and therefore the key is not a symbol, which would not do. If so, then delivery of these receipts amounts to so much waste-paper; for if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true they are of some avail as to the identity of the person coming to receive; but after that is over they are nothing but waste-paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, — that had not been a good delivery of the possession. There is no color for it; it is no evidence of the thing or part of the title to it. For suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration-money, that would not have been a good delivery of the possession, nor given the mortgage mortis causa by force of that act. Nor does it appear to me by proof that possession of these three receipts continued with Mosely from the time they were given in February to the time of Fly's death; for there is a witness who speaks that in some short time before his death, Fly showed him these receipts and said he intended them for his uncle Mosely. Therefore I am of opinion it would be most dangerous to allow this donation mortis causa from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance. And if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action; because stocks and annuities are capable of a transfer of the legal property by act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely; consequently this is merely legatary, and amounts to a nuncu-

vails that where a delivery will not execute a complete gift inter vivos it cannot create a donatio mortis causa, because it would not prevent the property from vesting in the executor; and as a Court of Equity will not inter vivos compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator.[1] On the contrary the doctrine, now established by the highest authority, is (as we have seen) that Courts of Equity do not consider the interest as completely vested in the donee, but treat the delivery of the instrument as creating a trust for the donee to be enforced in equity.[2]

§ 824. **A Gift Causa Mortis May Be Made Subject to a Trust or Condition.** — According to the civil law a donation mortis causa may be made subject to a trust or condition.[3] The point

pative will, and contrary to the Statute of Frauds, and would introduce a greater breach on that law than ever was yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative." The decision of Lord Eldon in Duffield *v.* Elwes, 1 Bligh, N. S. R. 498, very much shakes the reasoning of Lord Hardwicke on this particular point.

[1] Duffield *v.* Elwes, 1 Sim. & Stu. 238, overturned an appeal in 1 Bligh, N. S. R. 498.

[2] Duffield *v.* Elwes, 1 Bligh, N. S. R. 497, 530, 534. In Pennington *v.* Gittings, 2 Gill & John. R. 208, the Court of Appeals of Maryland held that a delivery of a certificate of bank stock, transferable at the bank only, personally or by attorney, indorsed in blank by the donor and delivered to the donee, could not pass as a donatio mortis causa. In Bradley *v.* Hunt, 5 Gill & John. R. 54, the same learned court decided that a promissory note or certificate of the profit, payable to the order of the donor, and delivered to the donee, was not a good donatio mortis causa. In each of these cases the court proceeded upon the same general ground that, to constitute a donatio mortis causa the gift should be full and complete at the time, passing from the donor the legal power and dominion over the thing intended to be given, and leaving nothing to be done by him or his executor to perfect it; and that in these cases the thing was not susceptible of such delivery, and the delivery of the instrument did not convey a perfect title to the thing. The court relied upon the cases of Miller *v.* Miller, 3 P. Will. 356, 358; Ward *v.* Turner, 2 Ves. 431; Tate *v.* Hilbert, 2 Ves. Jr. 112, and Duffield *v.* Elwes, 1 Sim. & Stu. 239, as in point. But since the decision in 1 Bligh, N. S. R. 497, these cases can no longer be deemed satisfactory authorities. On the other hand in Wright *v.* Wright, 1 Cowen, R. 598, the Supreme Court of New York held that a promissory note of the donor himself, executed in his last illness, and delivered by the maker to the donee (the payee) in contemplation of death, was a good donatio mortis causa, although no consideration passed. And in Coutant *v.* Schuyler, 1 Paige, R. 316, Mr. Chancellor Walworth held that a promissory note of a third person was a proper subject of a donatio mortis causa, and might be delivered to a third person for the benefit of the donee. The court said that there was no real difference between the delivery of a bond and the delivery of a note, as a donatio mortis causa. Each is valid. See also Wells *v.* Tucker, 3 Binn. 366, R.

[3] Dig. Lib. 31, tit. 1, l. 77, § 1, cited in Hambrooke *v.* Simmons, 4 Russ. R. 27; Cod. Lib. 6, tit. 42, l. 9, cited 4 Russ. 27.

does not seem to have been directly established in modern Equity Jurisprudence, but the manifest inclination of the courts is to sustain such a donation although it is coupled with a trust or condition.[1]

§ 825. **Same.** — It has been already stated that in the interpretation of purely personal legacies Courts of Equity follow the rules of the Spiritual Courts, and in those which are charged on lands, the rules of the common law.[2] But although this is generally true, it is not to be taken for granted that Courts of Equity do, in all cases, follow the rules of Courts of Common Law in deciding upon the nature, extent, interpretation, and effect of legacies. There are some cases in which Courts of Equity act upon principles peculiar to themselves in relation to legacies.[3] But any attempt to point them out in a satisfactory manner would require a general review of the whole doctrine of legacies; a task which is incompatible with the objects of the present Commentaries.[4]

§ 826. [**Nature of Nuncupative Will.** — Another gift that very much resembles a gift causa mortis, is a nuncupative will. The making of wills of this sort is of very ancient origin, and at the common law they were what were called mariner's or soldier's wills, and with us, they are usually designated as unwritten wills used for the purpose of conveying personal property where one is suddenly taken ill at his own home or his present place of dwelling, or while he is temporarily absent from home upon some journey. A nuncupative will, like a gift causa mortis, conveys only personal property and is never used for conveying real estate, for the same reason that real estate can only be conveyed by deed or written will and if title could be passed by an oral will it would

[1] See Drury *v.* Smith, 1 P. Will. 404; Blount *v.* Burrow, 4 Bro. Ch. R. 75; Hambrooke *v.* Simmons, 4 Russ. R. 25; 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, p. 548, note (*v*) (ed. 1838).

[2] Ante, § 809; Keily *v.* Monck, 3 Ridgw. Parl. Cas. 243.

[3] See 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, §§ 4, 5, and notes (*i*) and (*l*); 3 Wooddes. Lect. 59, pp. 479, 480, 481; Id. 494; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 106; Arnald *v.* Arnald, 1 Bro. Ch. R. 403.

[4] The whole subject of legacies is very amply discussed in Mr. Roper's Treatise on Legacies, as newly edited by Mr. White; in 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, 2; in Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 104 to 135, and in Wooddeson, Lect. 60, p. 509, &c. The most important topics are the description of the persons who are to take; when legacies are specific or not; when they are cumulative or not; when they lapse or merge; when there is an ademption of them; when an abatement of them; when conditional; when personal or chargeable on land; when they vest; when interest is allowed; and lastly, the marshalling of assets in favor of them.

in effect abrogate our registration laws.[1] The chief difference between a gift causa mortis and a nuncupative will, is that in the former there must be either an actual or a constructive delivery of the property at the time the gift is made and the fact that the gift has been made need not necessarily be reduced to writing; whereas, in the case of the will, it must be witnessed by at least two competent and disinterested witnesses, requested by the decedent as such to witness his testamentary declaration, the substance of which must be reduced to writing, usually in about ten days, and offered for probate within six months. In a nuncupative will, the actual or constructive delivery of the property need not take place at the time the will is executed. It will be readily seen that wills of this sort are not favored by the law, for it tends toward the passing of the title to one's property by perjured testimony of irresponsible and unscrupulous witnesses and wherever such a will is sought to be sustained, the statutes relating to the making of such a will are to be strictly construed and every fact material to the inquiry must be affirmatively shown.[2]]

§ 827. [**Intent to Make an Oral Will Must Be Clearly Shown.** — It is not sufficient that the decedent in his last sickness made requests as to the disposition of his estate. An alleged nuncupative will may never be probated as such on account of some accident in failing to have a written will properly executed. In order that an alleged nuncupative disposition of property be entitled to probate, it must clearly appear that the decedent intended to give his property by will and that an oral will was the form chosen by him for this purpose. A bare expression of one's

[1] Smithdeal *v.* Smith, 64 N. C. 52; Newman *v.* Bost, 122 N. C. 533, 29 S. E. 848.

[2] Rankin *v.* Rankin, 31 N. C. 156; Wester *v.* Wester, 50 N. C. 95; Smith *v.* Smith, 63 N. C. 637; Morgan *v.* Stevens, 78 Ill. 287; Dorsey *v.* Sheppard, 12 Gill & J. 192, 37 Am. Dec. 77; Brown *v.* State, 87 Wash. 44, 151 Pac. 81; In re Grossman's Estate, 75 Ill. App. 224, 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219; Scaife *v.* Emmons, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383; Godfrey *v.* Smith, 73 Neb. 756, 103 N. W. 450; Scales *v.* Thornton, 118 Ga. 93, 44 S. E. 857.

Decedent called her sister to her bed and undertook to give her certain articles of personal property, all of which was in the presence of two persons who were in the room, but who were not called upon to witness the will. This was not a compliance with the statute. Bundrick *v.* Haygood, 106 N. C. 468, 11 S. E. 423; Revisal of 1905 of North Carolina, § 3127; but where there were several competent witnesses in the room and the decedent stated his wishes, it was not necessary that he actually call two persons by name to witness his will. Long *v.* Faust, 109 N. C. 114, 13 S. E. 889.

intention to give his property, standing alone, will not suffice. Not only must there be the purpose and intent to give the property, by an oral will, but this fact must be clearly made known to a sufficient number of competent witnesses who are requested to take notice that such a will is being executed.[1] And so, where the decedent had dictated the terms of what he had intended to be his written will, but before its execution he had regained his strength to such an extent that he was then able to walk about unattended, and his nurse was discharged and he lived fifteen days afterwards, and the written will was never in fact signed, his statements made at the time the written will was dictated cannot be probated as a nuncupative will.[2] There may be an exception where the intention to make a written will is rendered clear, and deceased is prevented by sudden death or extreme sickness during the preparation of a written will from formally executing it, though the decisions are not in harmony in recognizing such exception.[3]]

§ 828. [**What Classes of Persons May Make a Nuncupative Will.** — As just stated above, statutes authorizing the making of oral wills and allowing them to be probated, are to be strictly adhered to and it is only such classes of persons as may be designated in the particular statute under consideration who can make a valid nuncupative will. As a rule these statutes refer to sailors, soldiers, or citizens temporarily absent from home upon a journey and when they are in fear of immediate death, and in any event, they never refer to persons engaged in farming or the ordinary callings in life.[4]]

[1] Scales *v.* Thornton, 118 Ga. 93, 44 S. E. 857.

[2] Brown *v.* State, 87 Wash. 44, 151 Pac. 81.

[3] Where decedent was about to dictate the terms of her written will "she had another stroke", and was unable to speak until the day before she died, when she stated what she wanted done with her property, in the presence of sufficient witnesses, and this statement was reduced to writing the next day, it was sufficient as a nuncupative will. In re Megary's Estate, 25 Pa. Super. Ct. Rep. 245.

And where decedent wrote a memorandum of what he desired done with his property, but the paper was not signed by him, and just before he died he stated that "I want you to see that it is carried out the way I want it to be", and this statement was witnessed properly and reduced to writing, it was a good nuncupative will. Baird *v.* Baird, 70 Kans. 564, 79 Pac. 163, 68 L. R. A. 627, 3 Ann. Cas. 312; Cruit *v.* Owen, 21 App. D. C. 378.

[4] Ray *v.* Wiley, 11 Okla. 720, 69 Pac. 809; In re Connor's Will, 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

CHAPTER XII

CONFUSION OF BOUNDARIES

§ 829. **Boundaries.** — Having disposed of the subject of Administrations and Legacies, we shall next proceed to the consideration of another head of concurrent jurisdiction, arising from the confusion of the boundaries of land, and the confusion or entanglement of other rights and claims of an analogous nature, calling for the interposition of Courts of Equity in order to restore and ascertain and fix them.

§ 830. **History of the Jurisdiction.** — In the first place in regard to CONFUSION OF BOUNDARIES. The issuing of commissions to ascertain boundaries is certainly a very ancient branch of equity jurisdiction.[1] A number of cases of this sort will be found in the earliest of the Chancery Reports. Thus in Mullineux *v.* Mullineux, in 14th Jac. 1, a commission was awarded, "to set out lands, that lye promiscuously, to be liable for the payment of debts." In Peckering *v.* Kimpton, 5 Car. 1,[2] a commission was awarded, "to set out copyhold lands free from land, which lye obscured; if the commissioners cannot sever it, then to set out so much in lieu thereof."

§ 831. **Same.** — It is not very easy to ascertain with exactness the origin of this jurisdiction. It has been supposed by Lord Northington and Lord Thurlow that consent was the ground upon which it was originally exercised.[3] There are two writs in the Register concerning the adjustment of controverted boundaries, from one of which (in the opinion of Sir William Grant) it is probable that the exercise of this jurisdiction in the Court of Chancery took its commencement.[4] The one is the writ De

[1] Jeremy on Eq. Jurisd. B. 3, ch. 1, § 3, n. 1, pp. 301, 302.

[2] Tothill, R. 39 (ed. 1649). See also Wake *v.* Conyers, 1 Eden, R. 337, note. See Co. Litt. 169 *a*; Hargrave's note 23, vii.

[3] Speer *v.* Crawter, 2 Meriv. 417.

[4] Ibid.; Regist. Brevium, 157 *b*.

Rationabilibus divisis, which properly lies where two men have lands in divers towns or hamlets, so that one is seised of the land in one town or hamlet, and the other of the land in the other town or hamlet by himself; and they do not know the boundaries of the towns or hamlets whereby to ascertain which is the land of one and which is the land of the other. In such a case, to set the bounds certain, this writ lies for the one against the other.[1] The other writ is De Perambulatione facienda. This writ is sued out with the assent of both parties, where they are in doubt of the bounds of their lordships or manors, or of their towns. And upon such assent the writ issues to the sheriff to make the perambulation and to set out the bounds and limits between them in certainty.[2] And it is added in Fitzherbert (in which he follows the rule of the Registrum Brevium) that the perambulation may be made for divers towns and in divers counties; and the parties ought to come into the chancery, and there acknowledge and grant that a perambulation be made betwixt them; and the acknowledgment shall be enrolled in the chancery; and thereupon a commission or writ shall issue forth.[3]

§ 832. **Same.** — Sir William Grant further supposes that the jurisdiction having thus originated in consent, the next step would probably be to grant the commission on the application of one party who showed an equitable ground for obtaining it; such as that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord.[4] And to its exercise on such an equitable ground no objection has ever been made;[5] and, it may be added, no just objection can be made.

§ 833. **Same.** — This account of the origin of the chancery jurisdiction seems highly probable in itself; but however satisfactory it may seem, it can scarcely be said to afford more than a reasonable conjecture, and is not a conclusive proof that such was the actual origin. In truth the recent discoveries made of the actual exercise of chancery jurisdiction in early times, as disclosed in the Report of the Parliamentary Commissioners, already referred to in a former part of these Commentaries, are sufficient to teach us to rely with a subdued confidence upon all such conjectural sources of jurisdiction.[6] It is very certain that

[1] Fitzherb. Nat. Brev. 300 [128]. [2] Fitzherb. Nat. Brev. 309 [133].

[3] Ibid.; Regis. Brev. 157, and Regula. ibid.

[4] It is then a case of trust. Attorney-Gen. *v.* Stephens, 6 DeG. M. & G. 111, 132; infra, § 840, and note (*a*).

[5] Speer *v.* Crawter, 2 Meriv. 417. [6] Ante, §§ 47, 48, and notes, ibid.

in some cases the Court of Chancery has granted commissions or directed issues on no other apparent ground than that the boundaries of manors were in controversy.[1] And Lord Northington seems to have assigned a different origin to the jurisdiction from that already suggested upon one important occasion at least; namely, that parties originally came into the court for relief in cases of confusion of boundaries under the equity of preventing multiplicity of suits.[2]

§ 834. **Same.** — The civil law was far more provident than ours upon the subject of boundaries. It considered that there was a tacit agreement or duty between adjacent proprietors to keep up and preserve the boundaries between their respective estates; and it enabled all persons having an interest, to bring a suit to have the boundaries between them settled; and this, whether they were tenants for years, usufructuaries, mortgagees, or other proprietors. The action was called "actio finium regundorum"; and if the possession was also in dispute, that might be ascertained and fixed in the same suit, and indeed was incident to it.[3] Perhaps it might not have been originally unfit for Courts of Equity to have entertained the same general jurisdiction in cases of confusion of boundaries, upon the ground of enforcing a specific performance of the implied engagement or duty of the civil law. Such a broad origin or exercise of the jurisdiction has however never been claimed or exercised.

§ 835. **Jurisdiction Does Not Attach because of a Mere Confusion of Boundaries.** — But whatever may have been the origin of this branch of jurisdiction, it is one which has been watched with a good deal of jealousy by Courts of Equity of late years; and there seems no inclination to favor it, unless special grounds are laid to sustain it. The general rule now adopted is, not to entertain jurisdiction, in cases of confusion of boundaries, upon the ground that the boundaries are in controversy,[4] but to require that there

[1] Ibid. See Lethulier *v.* Castlemain, 1 Dick. R. 46; s. c. 2 Eq. Abridg. 161; Sel. Cas. Ch. 60; Metcalfe *v.* Beckwith, 2 P. Will. 376.

[2] Wake *v.* Conyers, 1 Eden, R. 334; s. c. 1 Cox, R. 360.

[3] See 1 Domat, B. 2, tit. 6, §§ 1, 2, pp. 308, 309; Co. Litt. 169 *a*, Hargrave's note 23; Dig. Lib. 10, tit. 1, l. 1, per tot.

[4] But see Lethulier *v.* Castlemain, 1 Dick. R. 46; s. c. 2 Eq. Abridg. 161; Sel. Cas. in Ch. 60; Kilgannon *v.* Jenkinson, 51 Mich. 241; Haskell *v.* Allen, 23 Me. 448; Stuart *v.* Coalter, 4 Rand. 74; Hale *v.* Darter, 5 Humph. 79; Topp *v.* Williams, 7 Humph. 569; Wetherbee *v.* Dunn, 36 Cal. 249; Norris's Appeal, 64 Pa. St. 275; Tillmes *v.* Marsh, 67 Pa. St. 507; O'Hara *v.* Strange, 11 Ir. Eq. 262; Ireland *v.* Wilson, 1 Ir. Ch. 623; Dickerson *v.* Stoll, 4 Halst. Ch. 294; DeVeney *v.* Gallagher, 5 C. E. Green, 33, 34.

should be some equity superinduced by the act of the parties;[1] such as some particular circumstances of fraud; or some confusion, where one person has ploughed too near another; or some gross negligence, omission, or misconduct on the part of persons whose special duty it is to preserve or perpetuate the boundaries.[2]

§ 836. **No Jurisdiction unless Some Peculiar Equity Supervenes Not Cognizable in Court of Law.** — Where there is an ordinary legal remedy there is certainly no ground for the interference of Courts of Equity, unless some peculiar equity supervenes which a Court of Common Law cannot take notice of or protect. It has been said by Lord Northington that where there is no legal remedy it does not therefore follow that there must be an equitable remedy, unless there is also an equitable right. Where there is a legal right, there must be a legal remedy; and if there is no legal right, in many cases there can be no equitable one. On this account he dismissed a bill to settle the boundaries between manors, it appearing that there was no dispute as to the right of soil and freehold on both sides the boundary marks (which right was admitted by the bill to be in the defendant), and that the right of seigniory alone (an incorporeal heredita-

[1] Stuart *v.* Coalter, supra; Norris's Appeal, supra; Tillmes *v.* Marsh, supra; Beatty *v.* Dixon, 56 Cal. 619; Wetherbee *v.* Dunn, 36 Cal. 249; DeVeney *v.* Gallagher, 5 C. E. Green, 33. Equity may perhaps enforce an oral agreement to fix a boundary. Jamison *v.* Petit, 6 Bush, 669; sed qu. The necessity of discovery to ascertain and fix boundaries will give equity jurisdiction. Brown *v.* Wales, 42 L. J. Ch. 45. A mere confusion of boundaries of land is not sufficient to give a court of equity jurisdiction. If the ordinary legal remedies are adequate, they must be resorted to. McCreery Land & Inv. Co. *v.* Myers, 70 S. C. 282, 49 S. E. 848.

Equity will not assume jurisdiction where plaintiff is in peaceable possession of all the land he claims, and action is brought simply for purpose of settling boundary. Wilson *v.* Hart, 98 Mo. 618, 12 S. W. 249; but where the adjoining owners have through mistake agreed upon a division line and a fence is built, which improperly included an alley way, and plaintiff has built a valuable residence thereon and occupied the property for thirteen years, equity will take jurisdiction. Deiderich *v.* Simmons, 75 Ark. 400, 87 S. W. 649.

The jurisdiction of chancery to establish disputed boundaries of land is ancient and well defined, but it is not original or independent, and will not undertake to settle obscured or confused boundaries unless some equity is superinduced by the act of the parties or those under whom they claim. Hays *v.* Bouchelle, 147 Ala. 212, 41 So. 518; Sloan *v.* King, 33 Tex. Civ. App. 537, 77 S. W. 48; Collins *v.* Sutton, 94 Va. 127, 26 S. E. 415; Becker *v.* McGraw, 48 W. Va. 539, 37 S. E. 532; Eakin *v.* Taylor, 55 W. Va. 652, 47 S. E. 992.

[2] Wake *v.* Conyers, 1 Eden, R. 331; s. c. 1 Cox, R. 360. See Miller *v.* Warmington, 1 Jac. & Walk. 473; Eden on Injunctions, ch. 16, pp. 361, 362; O'Hara *v.* Strange, 11 Ir. Eq. 262; Speer *v.* Crawter, 2 Meriv. 410; Attorney-Gen. *v.* Stephens, 6 DeG. M. & G. 111, 133.

ment), and not that of the soil, was in dispute. And his Lordship on this occasion remarked that "all the cases where the court has entertained bills for establishing boundaries have been where the soil itself was in question, or where there might have been a multiplicity of suits."

§ 837. **Same.** — So in a case where a bill was brought by one parish against another to ascertain the boundaries of the two parishes in making their rates, and a number of houses had been built upon land formerly waste, and it was doubtful to which parish each part of the waste belonged, Lord Thurlow refused to interfere, and observed that the greatest inconvenience might arise from doing so. For if a commission were granted, and the bounds set out by commissioners, any other parties, on a different ground of dispute, might equally claim another commission. These other commissioners might make a different return; and so, in place of settling differences, endless confusion would be created.[1] In another report of the same case he is reported to have said if he should entertain the bill, and direct an issue in such a case as that, he did not see what case would be peculiar to the Courts of Law; and he did not know how to extract a rule from the Mayor of York *v.* Pilkington (1 Atk. R. 282).[2] Where there was a common right to be tried, such a proceeding was to be understood. The boundary between the two jurisdictions was apparent. That is the case where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried by trying the right of one. But in the case before him he saw no common right which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom on account of the poor-laws.[3] The ground of dismissing the bill seems, from these very imperfect statements of the case, to have been: first, that

[1] St. Luke's *v.* Leonard's Parish, or Waring *v.* Hotham, cited by Ch. Baron McDonald, in Atkins *v.* Hatton, 2 Anstr. R. 395; s. c. 2 Dick. 550.

[2] Waring *v.* Hotham, 1 Bro. Ch. R. 40, and Mr. Belt's note (2). The case of the Mayor of York *v.* Pilkington, 1 Atk. 282, was a bill brought to quiet the plaintiffs in a right of fishery in the river Ouse, of which they claimed the sole fishery, against the defendants, who (as was suggested in the bill) claimed *several* rights, either as lords of manors or as occupiers of the adjacent lands; and also for a discovery and account of the fish taken. The defendants demurred to the bill as being matter cognizable at law only. Lord Hardwicke at first sustained the demurrer, but afterwards overruled it. Lord Thurlow disapproved of this final decision; and to this a part of his reasoning in 1 Bro. Ch. R. 40, is addressed.

[3] Waring *v.* Hotham, or St. Luke's *v.* St. Leonard's Parish, 1 Bro. Ch. R. 40; s. c. 2 Dick. 550. See Metcalfe *v.* Beckwith, 2 P. Will. 376.

the proper remedy was at law; and secondly, that no equity was superinduced, for it would not even suppress multiplicity of suits.

§ 838. **Same.** — In Atkins *v.* Hatton (2 Anstr. R. 386) the court refused to entertain a bill brought by the rector of a parish principally for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe. The court said: "The plaintiff here calls upon the court to grant a commission to ascertain the boundaries of the parish, upon the presumption that all the lands which shall be found within those boundaries would be tithable to him. That is indeed a prima facie inference, but by no means conclusive. And there is no instance of the court ever granting a commission in order to attain a remote consequential advantage. It is a jurisdiction which the Courts of Equity have always been very cautious of exercising." It is observable that no special equity was here set up; but the party desired the commission solely upon the ground of founding a possible right against some persons for tithes, upon the ground that the land which they occupied was intraparochial and tithable. This was properly a matter at law, to be ascertained by a special suit against every owner or occupant of land severally, and not against them jointly, in a bill to ascertain boundaries.

§ 839. **Confusion of Boundaries Arising from Fraud is Sufficient to Bestow Jurisdiction.** — These cases are sufficient to show that the existence of a controverted boundary by no means constitutes a sufficient ground for the interposition of Courts of Equity to ascertain and fix that boundary. Between independent proprietors such cases would be left to the proper redress at law.[1] It is therefore necessary to maintain such a bill (as has been already stated), that some peculiar equity should be superinduced.[2] In other words there must be some equitable ground attaching itself to the controversy; and we may therefore inquire what will constitute such a ground? This has been in part already suggested. In the first place it may be stated that if the confusion of boundaries has been occasioned by fraud, that alone will constitute a sufficient ground for the interference of the court.[3]

[1] Speer *v.* Crawter, 2 Meriv. R. 410, 417; Miller *v.* Warmington, 1 Jac. & Walk. 472; Loker *v.* Rolle, 3 Ves. 4.

[2] Wake *v.* Conyers, 1 Eden, R. 331; s. c. 1 Cox, R. 360; Speer *v.* Crawter, 7 Meriv. R. 417, 418.

[3] This is understood to have been the ground of the decision of the House of Lords, in Rouse *v.* Barker, 3 Bro. Ch. Rep. 180, reversing the decree of the Exchequer in the same cause. See Atkins *v.* Hatton, 2 Anstruth. R. 396.

And if the fraud is established, the court will by commission ascertain the boundaries if practicable, and if not practicable, will do justice between the parties by assigning reasonable boundaries or setting out land of equal value.[1]

§ 840. **Jurisdiction Lies Where the Relation between the Parties Is Such That It Is the Duty of One of Them to Protect the Boundaries.** — In the next place it will be a sufficient ground for the exercise of jurisdiction that there is a relation between the parties which makes it the duty of one of them to preserve and protect the boundaries, and that by his negligence or misconduct the confusion of boundaries has arisen. Thus if through the default of a tenant[2] or a copyholder (who is under an implied obligation to preserve them) there arises a confusion of boundaries, the court will interfere as against such tenant or copyholder to ascertain and fix the boundaries.[3] But even in such cases it is further indispensable to aver and to establish by suitable proofs that the boundaries, without such assistance, cannot be found.[4] And the relation of the parties, entitling them to the redress, must also be clearly stated; for where the parties claim by adverse titles, without any superinduced equity, we have already seen that the remedy is purely at law.[5]

§ 841. **Bill Lies to Fix Boundaries When It Will Prevent a Multiplicity of Suits.** — In the next place a bill in equity will lie to ascertain and fix boundaries when it will prevent a multiplicity of suits. This is an old head of equity jurisdiction, and

[1] Speer *v.* Crawter, 2 Meriv. R. 418; Duke of Leeds *v.* Earl of Strafford, 4 Ves. 181; Grierson *v.* Eyre, 9 Ves. 345; Attorney-Gen. *v.* Fullerton, 2 Ves. & Beam. 263; Willis *v.* Parkinson, 2 Meriv. R. 507. The common form of a decree for a commission in a case of this nature will be found in Willis *v.* Parkinson, 2 Meriv. R. 506, 509; Duke of Leeds *v.* Strafford, 4 Ves. 186.

[2] The jurisdiction is based on a species of trust; it being the duty of the tenant to keep all boundaries clear between the demised premises and premises of *his own* immediately adjoining. Attorney-Gen. *v.* Stephens, 6 DeG. M. & G. 111, 133; Spike *v.* Harding, 7 Ch. D. 871; Southwell *v.* Thompson, 6 L. J. Ch. N. S. 196; Godfrey *v.* Littel, 2 Russ. & M. 630, 632; s. c. 1 Russ. & M. 59. And this duty exists throughout the term, giving equity a right to interfere at any time. Spike *v.* Harding, supra. In some cases relief may be granted where the confusion was due to the plaintiff or to one under whom he claims. See Hicks *v.* Hastings, 3 Kay & J. 701, where a testatrix, under whom the plaintiff claimed, had mixed up freehold and leasehold premises.

[3] Ashton *v.* Lord Exeter, 6 Ves. 293; Miller *v.* Warmington, 1 Jac. & Walk. 472; Attorney-Gen. *v.* Fullerton, 2 Ves. & Beam. 263; Speer *v.* Crawter, 17 Ves. 216.

[4] Miller *v.* Warmington, 1 Jac. & Walk. 472.

[5] Ibid.

it has been very properly applied to cases of boundaries.[1] Indeed in many cases of this nature, as for instance where the right affects a large number of persons, such as a common right in lands, or in a waste, claimed by parishioners, commoners, and others, where the boundaries have become confused by lapse of time, accident, or mistake, the appropriate remedy to adjust such conflicting claims and to prevent expensive and interminable litigation seems properly to be in equity.[2] And it will not constitute any objection to a bill to settle the boundaries between two estates, that they are situate in a foreign country, if in other respects the bill is from its frame properly maintainable.[3]

§ 842. **Same.** — There are cases of an analogous nature (which constitute the second class of cases, arising from confusion or entanglement of other rights and claims than to lands) where a mischief, otherwise irremediable, arising from confusion of boundaries, has been redressed in Courts of Equity. Thus where a rent is chargeable on lands and the remedy by distress is, by confusion of boundaries or otherwise, become impracticable, the jurisdiction of equity has been most beneficially exerted to adjust the rights and settle the claims of the parties.[4]

§ 843. **Jurisdiction Lies Where Agent Has Mixed His Property with That of His Principal.** — Other illustrations will present themselves more appropriately under other heads in the course of these Commentaries. One instance however may be mentioned in which Courts of Equity administer the most wholesome moral justice following out the principles of law; and that is, where an agent, by fraud or gross negligence, has confounded his own property with that of his principal, so that they are not distinguishable. In such a case the whole will be treated in equity as belonging to the principal so far as it is incapable of being distinguished.[5]

[1] Wake *v.* Conyers, 1 Eden, 331; s. c. 1 Cox, R. 360; Waring *v.* Hotham, 1 Bro. Ch. R. 40; s. c. cited 2 Anstruth. R. 395; Bouverie *v.* Prentice, 1 Bro. Ch. R. 200; Mayor of York *v.* Pilkington, 1 Atk. 282, 284. See Whaley *v.* Dawson, 2 Sch. & Lefr. 370, 371.

[2] See Ibid.

[3] Penn *v.* Lord Baltimore, 1 Ves. R. 444; Pike *v.* Hoare, 2 Eden, R. 182; Bayley *v.* Edwards, 3 Swanst. R. 703; Tulloch *v.* Hartley, 1 Younge & Coll. New Cas. in Chan. 114.

[4] Bowman *v.* Yeat, cited 1 Cas. Ch. 145, 146; Duke of Leeds *v.* Powell, 1 Ves. R. 171, and Belt's Supp. 98; Bouverie *v.* Prentice, 1 Bro. Ch. R. 200; North *v.* Earl of Strafford, 3 P. Will. 148, 149; Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, 518; Mitf. Pl. Eq. 117, by Jeremy; 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (*g*); post, § 928.

[5] Lupton *v.* White, 15 Ves. 432; Panton *v.* Panton, cited ibid.; Ched-

worth *v.* Edwards, 8 Ves. 46; Hart *v.* Ten Eyck, 2 John. Ch. R. 108; 2 Black. Comm. 405; Story on Bailm. § 40; ante, § 625; 2 Black. Comm. 405; 4 Burr. R. 2349; Colburn *v.* Simms, 2 Hare, R. 554; cited at large, post, § 1263, note. In re A. O. Brown & Co., 189 Fed. 432; Gault *v.* Hospital for Consumptives, 121 Md. 591, 89 Atl. 105; Treacy *v.* Powers, 112 Minn. 226, 127 N. W. 936.

When it appears that trust moneys have been deposited by the agent and mingled with the general account, and that a certain amount remains in the account at the end of a period, and that the account has not been, in the interval, depleted below the trust amount or final amount, that final amount will be presumed to include the trust amount or be part thereof. Southern Cotton Oil Co. *v.* Elliotte, 218 Fed. 567, 134 C. C. A. 295; Brennan *v.* Tillinghast, 201 Fed. 609, 120 C. C. A. 37.

When trust funds are mingled with private funds, the entire mixed fund will be impressed with the trust to the extent of the trust funds, except in so far as the owner of the private funds may be able to distinguish his own from the trust funds. Yellowstone County *v.* First Trust etc. Bank, 46 Mont. 439, 128 Pac. 596; Moore *v.* First Natl. Bank, 154 Mo. App. 516, 135 S. W. 1005; Fidelity & Deposit Co. of Maryland, 33 Okla. 7, 124 Pac. 71.

Strictly speaking, there is no such doctrine as the confusion of goods, but if one wrongfully mixes the goods of another with those of his own so that they cannot be readily separated, and he acts fraudulently or wrongfully, equity will grant relief. Stone *v.* Marshall Oil Co., 208 Pa. 85, 57 Atl. 183, 65 L. R. A. 218, 101 Am. St. Rep. 904.

CHAPTER XIII

DOWER

§ 844. **Dower.** — Another head of concurrent equitable jurisdiction is in matters of DOWER. As dower is a strictly legal right, it might seem at first view that the proper remedy belonged to Courts of Common Law. The jurisdiction of Courts of Equity in matters of dower for the purpose of assisting the widow by a discovery of lands or title-deeds or for the removing of impediments to her rendering her legal title available at law has never been doubted.[1] And indeed it is extremely difficult to perceive any just ground upon which to rest an objection to it which would not apply with equal force to the remedial justice of Courts of Equity in all other cases of legal rights in a similar predicament. But the question has been made how far Courts of Equity should entertain general jurisdiction to give general relief in those cases where there appeared to be no obstacle to her legal remedy.[2] Upon this question there has in former times been no inconsiderable discussion and some diversity of judgment. But the result of the various decisions upon this subject is, that Courts of Equity will now entertain a general concurrent jurisdiction with Courts of Law in the assignment of dower in all cases.[3] The ground most

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

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Huddlestone *v.* Huddlestone, 1 Ch. R. 38; Park on Dower, ch. 15, p. 317.

[3] Curtis *v.* Curtis, 2 Bro. Ch. R. 620; Mundy *v.* Mundy, 2 Ves. Jr. 122; s. c. 4 Bro. Ch. R. 294. I am aware that Mr. Park, in his excellent Treatise on Dower, doubts if the doctrine is maintainable to this full extent. But notwithstanding his doubts it appears to me the just result of the authorities, and maintainable upon principle. Indeed Mr. Park seems to admit that where a discovery or account is wanted, there seems no just objection to the jurisdiction. Park on Dower, ch. 15, pp. 317, 320, 325, 326, 329, 330; Strickland *v.* Strickland, 6 Beav. R. 77, 81; Badgley *v.* Bruce, 4 Paige, 98; Hartshorne *v.* Hartshorne, 2 N. J. Eq. 349; Palmer *v.* Casperson, 17 N. J. Eq. 204; Wells *v.* Beall, 2 Gill & J. 468; Brooks *v.* Woods, 40 Ala. 538; Blain *v.* Harrison, 11 Ill. 384; Campbell *v.* Murphy, 55 N. C. 357; Blunt *v.* Gee, 5 Call, 481; Naill *v.* Maurer, 25 Md. 532. Beeman *v.* Kitzman, 124 Iowa, 86, 99 N. W. 171; Bishop *v.* Woodward, 103 Ga. 281, 29 S. E. 968; Sprague *v.* Stevens, 32 R. I. 361, 79 Atl. 972.

commonly suggested for this result is, that the widow is often much embarrassed, in proceeding upon a writ of dower at the common law, to discover the titles of her deceased husband to the estates out of which she claims her dower (the title-deeds being in the hands of heirs, devisees, or trustees), to ascertain the comparative value of different estates, and to obtain a fair assignment of her third part.[1] In such cases where the title of the widow to her dower is not disputed the court proceeds directly to the assignment of dower; but if the title is disputed it is first required to be established by an issue at law or otherwise.[2]

§ 845. **Jurisdiction of Court of Equity in Dower Proceeding.** — There are some cases in which the remedy for dower in equity seems indispensable. At law, if the tenant dies after judgment and before damages are assessed, the widow loses her damages. And so if the widow herself dies before the damages are assessed, her personal representative cannot claim any. But a Court of Equity will in such cases entertain a bill for relief, and decree an account of rents and profits against the respective representatives of the several persons who may have been in possession of the estate since the death of the husband; provided at the time of filing the bill the legal right to damages is not gone.[3]

§ 846. **Where Jurisdiction Once Attaches, Court of Equity Will Give Dowress Full Relief.** — Upon principle there would not seem to be any real difficulty in maintaining the concurrent jurisdiction in Courts of Equity in all cases of dower; for a case can scarcely be supposed in which the widow may not want either a discovery of the title-deeds or of dowable lands, or some impediment to her recovery at law removed, or an account of mesne profits before the assignment of dower, or a more full ascertainment of the relative values of the dowable lands; and for any of these purposes (independent of cases of accident, mistake, or fraud, or other occasional equities) there seems to be a positive necessity for the assistance of a Court of Equity.[4] And if a

[1] Mitf. Pl. Eq. 121, 122, 123, by Jeremy, and note (*a*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 508, 509.

[2] Ibid.; Park on Dower, ch. 15, p. 329.

[3] Park on Dower, ch. 15, p. 330; Id. 309; Curtis *v.* Curtis, 2 Bro. Ch. R. 632; Dormer *v.* Fortescue, 3 Atk. 130; Mordant *v.* Thorold, 3 Lev. R. 275; 1 Salk. 252.

[4] The action of dower is now in consequence of the jurisdiction in equity being established less frequently resorted to at law than in former times. And the Parliamentary Commissioners, in their Report (2 Report of Common Law, p. 7, 1830), say: "The necessity for a discovery to ascertain the state of the legal title before a widow can safely resolve to commence an

Court of Equity has once a just possession of the cause in point of jurisdiction, there seems to be no reason why it should stop short of giving full relief instead of turning the dowress round to her ultimate remedy at law, which is often dilatory and always expensive.[1] Dower is favored as well in law as in equity.[2] And the mere circumstance that a discovery of any sort may be wanted to enforce the claim would, under such circumstances, seem to furnish a sufficient reason why the jurisdiction for discovery should carry the jurisdiction for relief.[3]

§ 847. **Same.** — Lord Eldon has put this matter in a strong light. After having remarked that he did not know any case in which an heir had claimed, merely as heir, an account (of mesne profits) without stating some impediment to his recovery at law, as that the defendant has the title-deeds necessary to maintain his title, that terms are in the way of his recovery at law, or other legal impediments which do or may probably prevent it, upon which probability or upon the fact the court might found its jurisdiction, he proceeded to say: "The case of the dowress is upon a principle somewhat and not entirely analogous to that of the heir. An indulgence has been allowed to her case upon the great difficulty of determining a priori whether she could recover at law ignorant of all the circumstances, and the person against whom she seeks relief, etc., having in his possession all the information necessary to establish her rights. Therefore it is considered unconscientious in him to expose her to all that difficulty to which, if that information was fairly imparted as conscience and justice require, she could not possibly be exposed." [4]

action against any person as tenant of the freehold, and the convenience of a commission for setting out her dower under the authority of a Court of Equity, generally make it expedient that a suit in equity should be instituted."

See McAllister *v.* McAllister, 37 Ala. 484; Boyd *v.* Hunter, 44 Ala. 705; Irvine *v.* Armistead, 46 Ala. 363; Donoghue *v.* Chicago, 57 Ill. 235; Ringhouse *v.* Keever, 49 Ill. 470; Badgley *v.* Bruce, 4 Paige, 98.

[1] See Park on Dower, ch. 15, p. 318.

[2] Com. Dig. Chancery, 3 E. 1, 2.

[3] See Dormer *v.* Fortescue, 3 Atk. 130, 131; Moor *v.* Black, Cas. Temp. Talb. 126; Herbert *v.* Wren, 7 Cranch, 370, 376; Curtis *v.* Curtis, 2 Bro. Ch. R. 620; Mundy *v.* Mundy, 2 Ves. Jr., 122; s. c. 4 Bro. Ch. 294; Graham *v.* Graham, 1 Ves. 262; D'Arcy *v.* Blake, 2 Sch. & Lefr. 389, 390; Powell *v.* The Monson Manuf. Co., 3 Mason, R. 347.

[4] Pulteney *v.* Warren, 6 Ves. 89. See Co. Litt. 208, Butler's note (105), as to dower in case of a mortgage for a term of years. Strickland *v.* Strickland, 6 Beav. R. 77, 80. In this case Lord Langdale said: "It was argued that if difficulties are shown to exist, and if from the nature of the case it appears to be in the power of the defendant to raise those difficulties, this

§ 848. **Same.** — But the propriety of maintaining a general jurisdiction in equity in matters of dower is still more fully vindicated in a most elaborate opinion of Lord Alvanley, when Master of the Rolls, in a case which now constitutes the polar star of the doctrine. After adverting to the fact that dower is a mere legal demand and the widow's remedy is at law, he said: "But then the question comes, Whether the widow cannot come either for a discovery of those facts which may enable her to proceed at law, and on an allegation of impediments thrown in her way in her proceedings at law this court has not a right to assume a jurisdiction to the extent of giving her relief for her dower; and if the alleged facts are not positively denied, to give her the full assistance of the court, she being in conscience as well as at law entitled to her dower." He then proceeded to state the reasons why the widow should have the assistance of the court by relief as well as by recovery; insisting that the case of the widow is not distinguishable from that of an infant, where the relief would clearly be granted, and that it would be unconscientious to turn her round to a suit at law for the recovery of her dower, which must be supposed to be necessary for her to live upon when she has been compelled to resort to equity for a discovery. And he finally concluded by saying that the widow labors under so many disadvantages at law, that she is fully entitled to every assistance that this court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained.[1]

court will not only restrain the defendant from raising the difficulties, but will assume the whole jurisdiction over the case; and if this were so, the plaintiff might be entitled to relief on this bill. But there is no such general rule; there are indeed some particular cases of legal right, such as dower and partition, in which the court has assumed a general jurisdiction, probably in consequence of the difficulties to which the plaintiff would be subjected in seeking to obtain complete justice at law; but in other cases the plaintiff is to show what the difficulties are, and how they impede him in a manner contrary to equity, and his bill ought to pray to be relieved from them."

[1] Curtis *v.* Curtis, 2 Bro. Ch. R. 620, 630 to 634. The judgment of the Master of the Rolls contains so masterly a view of the doctrine, that I venture to transcribe the material passages, as they cannot be abridged without injury to their force: "Dower therefore is a mere legal demand, and the widow's remedy is prima facie at law. But then the question comes, Whether the widow cannot come, either for a discovery of those facts which may enable her to proceed at law, and, on an allegation of impediments thrown in her way in her proceedings at law, this court has not a right to assume a jurisdiction to the extent of giving her relief for her dower, and if the alleged facts are not positively denied, to give her the full assist-

§ 849. **Same.** — Dower, as has been already suggested, is highly favored in equity. And as was said by the Master of the Rolls (Sir Thomas Trevor) on one occasion, the right that a dow-

ance of this court, she being in conscience as well as at law entitled to her dower. Her remedy at law is a writ of dower. Generally there are no damages in real actions; but so favorable was the law to this particular action that it provided a special relief for the widow by giving her damages. If the widow was disturbed in her quarantine, she had a particular writ penned for her relief. As to dower, the widow at first was only entitled to have an assignment of the land by metes and bounds. Then came the statute of Merton, which showed particular anxiety for the relief of widows. And it is curious to see that the attempt now is to drive the widow to that remedy as the least advantageous, though it is very evident the statute was meant to give her an additional remedy. The deforcers of dower are (by that statute) to be in mercy, or fined at the pleasure of the king, which in those days was a very serious thing, and was meant as a real punishment to deforcers. I own I think it an odd construction of this statute, that the damages given by it are to be considered strictly as damages, that is, as vindictive damages in the breast of a jury, and not capable of ascertainment by the court, and that therefore they are to die with the person. However so it has been determined. As to what is said in Sayer's Law of Damages, that a widow shall have no damages when her dower is assigned to her in chancery, it certainly is a mistake of the meaning of Co. Litt. 33 *a*; for Coke is there speaking of the writ 'de dote assignanda,' issued by the Court of Chancery, and not a decree of a Court of Equity. In Fitzherbert's Natura Brevium the nature of the writ 'de dote assignanda' appears very clear; and on this there are no damages, because there is no deforcement of the widow, who is put to no trouble, but has a summary remedy provided for her. Now as to the cases which have been cited, Hutton *v.* Simpson, 2 Vern. 722, does not seem to bear much upon this case. Tilley *v.* Bridges, Prec. Ch. 252, is also reported in 2 Vern. 519, and I have some doubt about the authority of that case; for it is more particularly stated in Vernon than in Prec. Ch.; and yet what is said in Vernon as to the injunction not preventing the entry certainly cannot be right. Duke of Bolton *v.* Deane, Norton *v.* Frecker, and other cases have been mentioned to show that there must be some fraud to give this court a jurisdiction, and that in the simple case of a widow claiming her dower no such jurisdiction exists. Dormer *v.* Fortescue is also brought to show that there must either be an infant concerned or some particular circumstances in the case to entitle this court to proceed. Now it seems difficult to distinguish the two cases of the infant and the widow. The principle in the case of the infant is, that he is thought not conusant of his rights at law sufficiently to enable him to proceed there, and therefore the Court of Equity will give him all the relief he could have at law, and something more; for on a bill by an infant for an account he will get the mesne profits, which would certainly be gone at law by the death of the party. I argue in the same manner for the widow. She comes here and says, 'The law gives me dower out of the estates of my husband and the mesne profits from his death; I do not know how to proceed; for if there should turn out to be any mortgage or term of years in my way, then I must pay the costs. The defendant has all the title-deeds in his hands, and knows what the estates are; his conscience is affected, and yet, instead of putting me in possession of my rights, he turns me out of doors and keeps all the title-deeds.' Now I think this argument is a strong one on the subject of fraud and concealment on the

ress has to her dower is not only a legal right and so adjudged at law, but it is also a moral right to be provided for and have a maintenance and sustenance out of her husband's estate to live

part of the heir, in not informing the widow of all that is necessary to enable her to proceed safely at law. If then she comes here for a discovery of these matters which the heir withholds from her, she shall have her complete relief in this court. If you deny her right to dower, the question must be tried at law; but when the fact is ascertained, she shall have her relief here. It must be supposed the dowress has nothing to live upon but her dower, and the mesne profits are her subsistence from the time of her husband's death; and the course of this court seems therefore to have been to assign her dower, and universally to give her an account from the death of her husband. I admit she has no costs where the heir has thrown no difficulties in her way; and if the heir admits the widow's case, he is safe. I wished to find, if I could, any instance of the widow's being turned round on such a case as this; but verily I believe there is no such instance. And indeed the case of Moor *v.* Black (Cas. Temp. Talb. 126) is pretty clear to show that Lord Talbot thought the widow's claim to be rightly made here, for he overruled the demurrer in that case on both points. It shows that the difficulty under which a widow labors is a reason for her coming here. Delver *v.* Hunter does not govern this case; for there the widow had recovered possession. Lucas *v.* Calcraft has also been mentioned, as showing that this court would give no other relief as to dower than such as the law would give the widow, and that the Lord Chancellor had refused to give costs in that case, because no costs were given at law. But in that case the heir had thrown no impediment in the widow's way, and therefore there were no costs on either side. Now taking it for granted that the widow, coming after the death of the heir, would not be entitled to her mesne profits, it by no means follows that when the widow is right in this court, but the heir happens to die before she has fully established her right, she is not entitled to her mesne profits; for unquestionably if the heir instead of contesting the widow's right had admitted it, she would have been entitled to her decree for mesne profits, and his having thrown an impediment in her way shall not make the difference. At the same time I must again admit that the widow's right at law is gone by the death of the party. Mordant *v.* Thorold is principally relied upon as to this point. It has been cited from Salkeld, tit. Dower; but it is also reported in 3 Lev. 275, and the result is stated differently in the latter book, though the state of the case seems copied from the other; for in Levinz it is said the court inclined to that opinion, but it being a new case they would advise, and no decision was given; and it is to be observed that Levinz was himself counsel in that case. Aleworth *v.* Roberts, 1 Lev. 38, is mentioned in the former case; there the action was against the heir of the heir and the alienee of the heir, and not against the heir's executor; and the ground of that case was that neither the heir nor the alienee were deforcers, and the damages were not a lien upon the land; and then the distinction is taken between the cases of tithes and dower: that in the first case the damages were certain, in dower uncertain. But surely in common sense they are equally certain. If it were not for the case of Mordant *v.* Thorold, I really should have doubted much the construction of this statute. I should have thought that the damages given by the statute were certain, and were not arbitrary, uncertain damages, to be ascertained by the discretion of a jury. However it does seem a settled point at law, and that at law the widow could not have recovered against the executor of Thomas Curtis. This being so, it is in-

upon. She is therefore in the care of the law and a favorite of the law. And upon this moral law is the law of England founded as to the right of dower.[1] So much is this the case that the widow will be aided in equity for her dower against a term of years which attends the inheritance, if it is not the case of a purchaser against whom she claims.[2] And if she has recovered her dower against an heir who is an infant, and there is a term to protect the inheritance which, by the neglect of his guardian, is not

sisted on the part of the widow that still she has a right to come here for full relief, and that she ought to be in the same situation as if the heir had admitted her claim at first (and to be sure in this case the heir has given every opposition to her claim that he possibly could); and that in this and many other cases this court gives a further remedy than the law will do. It is true where the law gives neither right nor remedy, however hard it may be, equity cannot assist. So in the case of damages for a personal injury which arises ex delicto, and not ex contractu, they are gone with the person. But it is not so clear in the case of a demand the recovery of which has been prevented by a difficulty unconscientiously thrown in the way of another person. There equity will give relief, and the relief it gives is beyond that which the party could obtain at law. It is the practice in equity that bond-creditors coming for a distribution of assets shall have an account of rents and profits, which they could not have at law. And yet the same argument might be used against that additional relief as has been used in this case. The law gives the creditor only the land to hold until he is satisfied. Equity goes further, and says, If the remedy at law is not sufficient, we will sell the inheritance of the estate; and if that will not do, we will direct an account of rents and profits against the heir. Dormer *v.* Fortescue certainly supports these ideas very strongly, though I am sure Lord Hardwicke's words must have been misconceived by Mr. Atkyns as to what he was supposed to have said in respect of the time from which the statute of 9 Henry III. gives the widow damages. But as far as one can collect Lord Hardwicke's sentiments from that case, he thought this court would expect the widow to establish her title at law, but she having so done, [this] would give her relief here as to the mesne profits. That is saying, Let the widow bring her action at law, out of form, for the purpose of determining her title to dower, and when she has done that we will give her an adequate remedy. Here I confess I agree most fully in thinking that the widow labors under so many disadvantages at law from the embarrassments of trust-terms, &c., that she is fully entitled to every assistance that this court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained." Curtis *v.* Curtis, 2 Bro. Ch. R. 630 to 634; Strickland *v.* Strickland, 6 Beav. R. 77.

[1] Dudley & Ward *v.* Dudley, Prec. Ch. 244; Banks *v.* Sutton, 2 P. Will. 703, 704. See Co. Litt. 208, Butler's note (105), when the widow is entitled to dower in case of a mortgage of the estate for years.

[2] Com. Dig. Chancery, 3 E. 1; Radnor *v.* Vandebendy, 1 Vern. R. 356; s. c. 2 Ch. Cas. 172; Prec. Ch. 65; 1 Eq. Abridg. 219; Dudley *v.* Dudley, 1 Eq. Abridg. 219; D'Arcy *v.* Blake, 2 Sch. & Lefr. 389, 390; Mole *v.* Smith, 1 Jac. 496, 497. See Anderson *v.* Pignet, L. R. 8 Ch. 180, reversing 11 Eq. 329; Maundrell *v.* Maundrell, 7 Ves. 567; Wynn *v.* Williams, 5 Ves. 130.

pleaded, the term will not be allowed in equity to be set up against her.[1]

§ 850. **Same.** — Indeed so highly favored is dower that a bill for a discovery and relief has been maintained even against a purchaser for a valuable consideration without notice, who is perhaps generally as much favored as any one in Courts of Equity.[2] The ground of maintaining the bill in such a case is that the suit for dower is upon a legal title and not upon a mere equitable claim, to which only the plea of a purchase for a valuable consideration has been supposed properly to apply.[3] This decision has often been found fault with, and in some cases the doctrine of it denied. It has however been vindicated with great apparent force upon the following reasoning. It is admitted that dower is a mere legal right, and that a Court of Equity in assuming a concurrent jurisdiction with Courts of Law upon the subject professedly acts upon the legal right; for dower does not attach upon an equitable estate. In so acting the court should proceed in analogy to the law where such a plea of a purchase for a valuable consideration without notice would not be looked at; and therefore as an equitable plea it should also be inadmissible. But this analogy will not hold where the widow applies for equitable relief, as for the removal of terms out of her way, or for a discovery. In the latter cases the equitable plea of a purchase for a valuable consideration without notice cannot be resisted. In the former case the widow proceeding upon the concurrent jurisdiction of the court merely enforces a right which the defendant cannot at law resist by such a mode of defence. In the latter case she applies to the equity of the court to take away from him a defence which at law would protect him against her demand.[4]

[1] Com. Dig. Chancery, 3 E. 1; Wray *v.* Williams, Prec. Ch. 151; s. c. 1 Eq. Abridg. 219; 1 P. Will. 137; 2 Vern. 378, and Mr. Cox's note; Dudley & Ward *v.* Dudley, Prec. Ch. 241; Banks *v.* Sutton, 2 P. Will. 706, 707, 708; D'Arcy *v.* Blake, 2 Sch. & Lefr. 389, 390; Swannock *v.* Lyford, Ambl. R. 6, 7; Hitchins *v.* Hitchins, 2 Freem. 242.

[2] Fishel *v.* Browning, 145 N. C. 71, 58 S. E. 759; ante, §§ 66, 152, 208, 235, 510, 542, 573, 575.

[3] Williams *v.* Lambe, 3 Bro. Ch. R. 264. In Collins *v.* Archer, 1 Russ. & Mylne, 284, Sir John Leach, following the case of Williams *v.* Lambe, held that a purchaser for a valuable consideration without notice had no defence in equity against a plaintiff relying upon a legal title. But in Payne *v.* Compton, 2 Younge & Coll. 457, 461, Lord Abinger seems to have thought that such a purchaser would be protected in equity against any claim by the owner of the legal estate. Neither of these cases was a claim of dower by the plaintiff.

[4] Roper on Husband and Wife, 446, 447; ante, § 57 *a*; Williams *v.* Lambe, 3 Bro. Ch. R. 264; Collins *v.* Archer, 1 Russ. & Mylne, R. 284.

§ 851. **Same.** — Other learned minds have however arrived at a different conclusion, and have insisted that upon principle the plea of a purchase for a valuable consideration without notice is a good plea in all cases against a legal as well as against an equitable claim, and that dower constitutes no just exception from the doctrine. They put themselves upon the general principle of conscience and equity, upon which such a plea must always stand, that such a purchaser has an equal right to protection and support as any other claimant, and that he has a right to say that having bona fide and honestly paid his money no person has a right to require him to discover any facts which shall show any infirmity in his title. The general correctness of the argument cannot be doubted; and the only recognized exception seems to be that of dower, if that can be deemed a fixed exception.[1]

§ 852. **Same.** — Generally speaking in America fewer cases occur in regard to dower, in which the aid of a Court of Equity is wanted, than in England, from the greater simplicity of our titles, and the rareness of family settlements and the general distribution of property among all the descendants in equal or in nearly equal proportions. Still however cases do occur in which a resort to equity is found to be highly convenient and sometimes indispensable.[2] Thus for instance if the lands of which dower

[1] The authorities are both ways. The case of Williams *v.* Lambe, 3 Bro. Ch. R. 264; Collins *v.* Archer, 1 Russ. & Mylne, 284; and Rogers *v.* Seale, 2 Freem. R. 84, are in favor of the doctrine that the plea is not good against a legal title. Against it is the decision in Burlace *v.* Cooke, 2 Freeman, R. 24; Parker *v.* Blythmore, 2 Eq. Abridg. 79, Pl. 1; Jerrard *v.* Saunders, 2 Ves. Jr. 454, and Payne *v.* Compton, 2 Younge & Coll. 457, 461; ante, § 850. Mr. Sugden, in a very late edition of his work on Vendors and Purchasers, ch. 18, pp. 762, 763 (1826), maintains that the authorities in favor of the sufficiency of the plea against a legal title preponderate, and that therefore we may venture to assert that it will protect the purchaser against a legal as well as against an equitable claim. On the other hand, Mr. Beames, Mr. Belt, and Mr. Roper maintain the opposite doctrine. Beam. Pl. Eq. 234, 245; 3 Bro. Ch. R. 264, Belt's note (1); 1 Roper on Husband and Wife, 446, 447. See also Medlicott *v.* O'Donell, 1 Ball & Beatt. 171; Mitford, Pl. Eq. 274, by Jeremy, and note (*d*); 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*h*); 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note. In a case of such conflict of learned opinions a commentator's duty is best performed by leaving the authorities for the reader's own judgment. See Park on Dower, ch. 15, pp. 327, 328, and the Reporter's note to 1 Russ. & Mylne, 289, n.

[2] As where the husband has made a mortgage, and the widow, having released dower therein, seeks to redeem, or seeks dower in the equity of redemption. Gibson *v.* Crehore, 5 Pick, 146; s. c. 3 Pick. 475, 481; Messiter *v.* Wright, 16 Pick. 151; Smith *v.* Eustis, 7 Greenl. 41; Chiswell *v.* Morris, 1 McCart. 101; Eldridge *v.* Eldridge, Ib. 195; Bank of Commerce *v.* Owens, 31 Md. 320; McCabe *v.* Swap, 14 Allen, 188; Wing *v.*

is sought are undivided, the husband being a tenant in common, and a partition or an account or a discovery is necessary, the remedy in equity is peculiarly appropriate and easy.[1] So where the lands are in the hands of various purchasers; or their relative values are not easily ascertainable, as for instance if they have become the site of a flourishing manufacturing establishment; or if the right is affected with numerous or conflicting equities, — in such cases the jurisdiction of a Court of Equity is perhaps the only adequate remedy.[2]

Ayer, 53 Maine, 138; Dawson *v.* Bank of Whitehaven, 4 Ch. D. 639; s. c. 6 Ch. D. 218. But see Meek *v.* Chamberlain, 8 Q. B. D. 31, distinguishing the last case.

[1] Herbert *v.* Wren, 11 U. S. 370, 3 L. Ed. 374.

[2] Powell *v.* Monson Manufacturing Company, 3 Mason, 347; Id. 459.

CHAPTER XIV

MARSHALLING OF SECURITIES

§ 853. **Marshalling Securities.** — Another head of concurrent jurisdiction in Courts of Equity is that of MARSHALLING SECURITIES.[1] We have already had occasion in another place to consider the topic of marshalling assets in cases of administration, to which the present bears a very close analogy; and also the doctrine of apportionment and contribution between sureties, to which it also has a near relation. The general principle is, that if one party has a lien [2] on, or interest in, two funds for a debt, and another party has a lien on, or interest in, one only of the funds for another debt; the latter has a right in equity to compel the former to resort to the other fund, in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties [3] whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund.[4] [It will

[1] See Aldrich *v.* Cooper, 8 Ves. 394; Eden on Injunct. ch. 2, pp. 38, 39, 40; ante, §§ 709, 758, 759, 760, 899.

[2] Moss *v.* Adams, 32 Ark. 562.

[3] Lanoy *v.* Duke of Athol, 2 Atk. 446; Aldrich *v.* Cooper, 8 Ves. 388, 395, 396; Ex parte Kendall, 17 Ves. 520; Trimmer *v.* Bayne, 9 Ves. 209; Cheeseborough *v.* Millard, 1 John. Ch. 413; Averall *v.* Wade, Lloyd & Goold, R. 252; Gwynne *v.* Edwards, 2 Russ. R. 289; Attorney-Gen. *v.* Tyndall, Ambler, R. 614; Selby *v.* Selby, 4 Russ. 336, 341; Trimmer *v.* Bayne, 9 Ves. 209; Greenwood *v.* Taylor, 1 Russ. & Mylne, 185; 2 Fonbl. Eq. B. 3, ch. 2, § 6; ante, §§ 757, 758, 759, 760, 863; Wiggin *v.* Dorr, 3 Sumner, R. 410, 414.

[4] The following cases will be found to contain useful illustrations of the rule: Rice *v.* Harbeson, 63 N. Y. 493; Ingalls *v.* Morgan, 10 N. Y. 178; Wiley *v.* Mahood, 10 W. Va. 206; Glass *v.* Pullen, 6 Bush, 346; Wolf *v.* Smith, 36 Iowa, 454; Witte *v.* Clarke, 17 S. C. 313; Sibley *v.* Baker, 23 Mich. 312; Applegate *v.* Mason, 13 Ind. 75; Warren *v.* Warren, 30 Vt. 530; Lyman *v.* Lyman, 32 Vt. 79; Gibson *v.* Seagrim, 20 Beav. 614; In re Lawder, 11 Ir. Ch. 346, 351; Tidd *v.* Lister, 3 DeG. M. & G. 857; In re Fox, 5 Ir. Ch. 541; In re Lynch, Ir. R. 1 Eq. 396.

From the rule of the text it follows that where a creditor with security on two funds releases, with notice of another creditor's rights, one of the

be noticed that under this rule the burden of action and diligence is imposed upon the holder of the second lien, not upon the owner of the first. It gives the former the right in equity to compel the latter to resort first to the fund subject to the single lien. But it does not impose upon him the duty to do so if the former does not exercise this right. Rights in equity do not enforce themselves. Nothing but good faith, conscience, and reasonable diligence can

funds, sufficient to pay him, to which the other creditor cannot resort, the releasing creditor can have recourse only to the surplus, if any, to be realized by the junior creditor out of the doubly-charged fund. Ingalls *v.* Morgan, 10 N. Y. 178; Lemay *v.* Johnson, 35 Ark. 225, 233. Reasonable notice however of the junior creditor's rights should be fixed upon the senior creditor. Clarke *v.* Bancroft, 13 Iowa, 320; Ingalls *v.* Morgan, supra.

Marshalling may be required in cases of judgments. Pittman's Appeal, 48 Pa. 315. See infra, § 854; In re Lawder, 11 Ir. Ch. 346, 352; In re Lynch, Ir. R. 1 Eq. 396. It may be required where mortgaged and unmortgaged personalty is taken in distress, though the tenant becomes bankrupt. Ex parte Stephenson, DeG. (Bankr.) 586. So where a pledge covers property of the pledgor and of his consignor. Broadbent *v.* Barlow, 3 DeG. F. & J. 570; Ex parte Alston, L. R. 4 Ch. 168. It may be invoked where a mechanics' lien exists. Hamilton *v.* Schwehr, 34 Md. 107. And it is applicable as well to the claims of legatees as to the mere situation of debtor and creditor. Rice *v.* Harbeson, 63 N. Y. 493; ante, § 565 et seq.

It is held too that marshalling may be applied where one of the estates in question is by law exempt from the claims of creditors, some of the creditors having the benefit of a waiver of the exemption and others not, as in the case of an estate embracing an exempt homestead. The non-favored creditors can for their own protection demand a marshalling. Pittman's Appeal, 48 Pa. St. 315. But on the other hand a mortgage of the non-exempt estate could not compel the mortgagee of both the non-exempt and the exempt estates to proceed first against the exempt estate, unless the mortgage provided that that should be resorted to first. The very fact that it is exempt furnishes a reason for not proceeding against it till the non-exempt property is exhausted. Dodds *v.* Snyder, 44 Ill. 53. The common debtor has or may have rights in such a case that deserve protection against such marshalling. Dickson *v.* Chorn, 6 Clarke (Iowa), 19. Still where the debtor, in a case of exempt property, is himself seeking protection in regard to the same, if it appears that other creditors may be injured by granting the relief sought, the bill will be dismissed. White *v.* Polleys, 20 Wis. 503; Jones *v.* Dow, 18 Wis. 241. This is but a particular expression of a general rule further noticed infra.

The rule of marshalling has been applied also in favor of volunteers. Thus it has been held that a donee under a voluntary settlement with covenants against incumbrances or for quiet enjoyment may compel a subsequent mortgagee of the settled and other estates to marshal his securities. Hales *v.* Cox, 32 Beav. 118. See Keaton *v.* Miller, 38 Miss. 630. But where a voluntary settlement of one estate was made by a testator, though with a covenant for further assurance, and another estate was devised by him, both estates being previously and then subject to a charge, it was held that the settled estate must contribute, no intention to the contrary on the part of the testator being shown. Ker *v.* Ker, Ir.

successfully appeal to a court of equity for relief, and, if the holder of an inferior lien upon a doubly incumbered fund intends to insist that the holder of the superior lien shall first resort to the fund subject to that lien alone for its satisfaction, good faith and reasonable diligence require that he shall give notice of his intention, and that he shall point out the course of action which he requires the holder of the first lien to take, before the latter has

R. 4 Eq. 15, distinguishing, on the grounds here stated, Hales *v.* Cox, supra. See also Dolphin *v.* Aylward, L. R. 4 H. L. 486, 501–503; In re Lawder, 11 Irish Ch. 346; In re Rorke, 15 Ir. Ch. 316; Hartley *v.* O'Flaherty, Lloyd & G. t. Plunket, 208; Stronge *v.* Hawkins, 4 DeG. & J. 632; Barnes *v.* Racster, 1 Younge & C. Ch. C. 401, 410.

Marshalling is generally restricted to cases in which there are two or more successive lien creditors of the same debtor. In the absence of agreement it will not be applied in favor of the *debtor* even then, except in special cases where the law itself extends a peculiar protection to him, as in the case of homestead above noticed. Rogers *v.* Meyers, 68 Ill. 72; In re Athill, 16 Ch. D. 211 (the fact that a security is spoken of as "collateral" to another does not make it secondary to the other); post, § 861. Nor will marshalling be applied between a mortgagee and a subsequent purchaser of the equity of redemption. Stevens *v.* Church, 41 Conn. 369. See Rogers *v.* Meyers, supra. Nor between mere attaching creditors. Shedd *v.* Bank of Brattleboro', 32 Vt. 709, 718. Nor can it be applied where the funds sought to be marshalled are not in existence; a call e. g. upon the stockholders of an insolvent company will not be ordered to create one of the funds. In re Professional Assur. Co., L. R. 3 Eq. 668. Nor where, as e. g. by reason of alienation of one of the funds, both funds are not in the hands of the common debtor. Lloyd *v.* Galbraith, 32 Pa. St. 103; McCormick's Appeal, 57 Pa. St. 54, 60. See Ayres *v.* Husted, 15 Conn. 504.

The rule of marshalling securities applies more certainly to cases where the single fund, being sufficient for the earlier claim, may be directly reduced to money. If this is not the case, — if e. g. there must be a process of foreclosure in the courts, — and if the doubly-charged fund is more directly available, it is very doubtful if the junior incumbrancer can require marshalling, unless that has been agreed to by the creditor in chief. Clearly, as the text and all the authorities declare, marshalling cannot be required to the hurt of the earlier creditor. Van Meter *v.* Ely, 1 Beasl. 271, and cases at the head of this note. Thus it is declared that marshalling will not be ordered where the fund to which it is sought to restrict the chief creditor is of doubtful validity, or is to be reached only by setting the courts in motion. Walker *v.* Covar, 2 S. C. 16; Witte *v.* Clarke, 17 S. C. 313; Kidder *v.* Page, 48 N. H. 380; Emmons *v.* Bradley, 56 Me. 333; Herriman *v.* Skillman, 33 Barb. 378; Dodds *v.* Snyder, 44 Ill. 53; Wolf *v.* Smith, 36 Iowa, 454. Or where the doubly-charged fund is in another jurisdiction. Denham *v.* Williams, 39 Ga. 312; Shedd *v.* Bank of Brattleboro', 32 Vt. 709, 717. Compare upon this point of prejudice to the chief creditor the difference which exists in England between the extent of proof open to a mortgagee or other secured creditor in bankruptcy and in winding up in chancery. Kellock's Case, L. R. 3 Ch. 769; Tuckley *v.* Thompson, 1 Johns. & H. 126; Mason *v.* Bogg, 2 Mylne & C. 443. It will be seen that the rule in chancery favors the rights of the secured creditor, in accordance with the engagement with the debtor,

changed his position and lost his opportunity to pursue it.[1]] Thus a mortgagee who has two funds as against the other specialty creditors who have but one fund, will in the case of the death of the mortgagor, and the administration of his assets, be compelled to resort first to the mortgage security, and will be allowed to claim against the common fund only what the mortgage, on a sale consented to by him, is deficient to pay.[2] So if A has a mortgage

conformably with the rule here set forth in regard to marshalling. The American courts of bankruptcy follow the English chancery rule. Ex parte Talcott, 9 Bankr. Reg. 502; In re Ellerhorst, 5 Bankr. Reg. 144; Downing *v.* Traders' Bank, 2 Dill. 136; Bigelow's L. C. Bills and Notes, 665.

Not only will marshalling not be ordered to the prejudice of the creditor in chief, — it will not be ordered to the prejudice of third persons having legal or equitable rights, as a third incumbrancer. Dolphin *v.* Aylward, L. R. 4 H. L. 486; In re Mower, L. R. 8 Eq. 110; Reilly *v.* Mayer, 1 Beasl. 55; White *v.* Polleys, 20 Wis. 503; Jones *v.* Dow, 18 Wis. 241; Mechanics' Assoc. *v.* Conover, 1 McCart. 219. See Herbert *v.* Mechanics' Assoc., 2 C. E. Green, 497; Sibley *v.* Baker, 23 Mich. 312. Thus it is held that a junior incumbrancer of one of the two estates cannot turn the chief creditor upon the other estate, charged in favor of another junior incumbrancer, to the latter's hurt. Dolphin *v.* Aylward, L. R. 4 H. L. 486, 501. Between the two junior incumbrancers the chief creditor must satisfy himself, principal, interest, and costs, out of the two estates ratably, according to their respective values, leaving the surplus proceeds of each estate to be applied in payment of the later incumbrances respectively. Gibson *v.* Seagrim, 20 Beav. 614, 619; In re Lawder, 11 Ir. Ch. 346, 352; Barnes *v.* Racster, 1 Younge & C. Ch. C. 401; Semmes *v.* Boykim, 27 Ga. 47; infra, § 855, However in South *v.* Bloxam, 2 Hem. & Mil. 457, securities were marshalled against a surety, in favor of a second mortgagee, in such a way as to deprive the surety of his right to the costs of his defence, which, against the principal debtor, he would have had the right to tack to his mortgage.

In marshalling the assets of decedents the English courts will not order a sale of an estate subject to mortgage, free from the mortgage, without the consent of the mortgagee. Wickenden *v.* Rayson, 6 DeG. M. & G. 210. But in this country such a sale may, it seems, be ordered in cases of insolvency, the lien being shifted to the proceeds. Foster *v.* Ames, 1 Lowell, 313. Compare cases of partition sales, Kilgour *v.* Crawford, 31 Ill. 249; editor's note to § 886, infra; Boone *v.* Clark, 129 Ind. 466, 21 N. E. 850, 5 L. R. A. 276; Clark *v.* Manufacturers' Mut. Fire Ins. Co., 130 Ind. 332, 30 N. E. 212; Bank of Orangeburg *v.* Kohn, 52 S. C. 120, 29 S. E. 625.

[1] First Natl. Bank *v.* Roder, 114 Fed. 451, 52 C. C. A. 253.

[2] Greenwood *v.* Taylor, 1 Russ. & Mylne, 185; Vogler *v.* Smith, 10 Ky. L. Rep. 364; Campbell *v.* J. I. Campbell Co., 117 La. 402, 41 So. 696; Bailey *v.* Wood, 71 S. C. 36, 50 S. E. 631; Clark *v.* Calvert, 72 App. Div. 630, 78 N. Y. Supp. 17.

Where the vendor of property reserved his lien and also received collateral security for the balance due, he may be required to resort to his security before selling the property. Kent *v.* Williams, 114 Cal. 457, 46 Pac. 462; Griffin *v.* Gingell, 25 Ky. L. Rep. 203, 79 S. W. 284.

A prior lienholder will be required to resort to property not covered by

upon two different estates for the same debt, and B has a mortgage upon one only of the estates for another debt, B has a right to throw A, in the first instance, for satisfaction upon the security which he, B, cannot touch, at least where it will not prejudice A's rights or improperly control his remedies.[1] The reason is obvious, and has been already stated; for by compelling A, under such circumstances, to take satisfaction out of one of the funds, no injustice is done to him in point of security or payment. But it is the only way by which B can receive payment. And natural justice requires that one man should not be permitted, from wantonness, or caprice, or rashness, to do an injury to another.[2] In

property attached by judgment creditors, before he will be allowed to sell the attached property. Jones *v.* Dulaney, 27 Ky. L. Rep. 702, 86 S. W. 657.

Failure of a chattel mortgagee to have his lien recorded within the proper time is no sufficient ground to require a subsequent creditor to resort to the sureties upon their note and thus leave exempt a portion of the property of the principal debtor for his benefit. Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004.

[1] Barnes *v.* Racster, 1 Younge & Coll. New R. 401; The York & Jersey Steam &c. Company *v.* Associates of the Jersey Company, Hopkins, Ch. R. 460; post, § 863; Conrad *v.* Harrison, 3 Leigh, R. 532.

[2] Lord Chancellor Sugden, in Averall *v.* Wade (Lloyd & Goold's Rep. 255), expressed an opinion which may be thought to imply a doubt whether the doctrine did apply to the case of two mortgages. His language was: "The general doctrine is this. Where one creditor has a demand against two estates, and another a demand against one only, the latter is entitled to throw the former on the fund that is not common to both. This is a narrow doctrine, and cannot generally be enforced against an incumbrancer who is a mortgagee. Whatever may be the equity of the creditor with only one security, the mortgagee of both estates has a right to compel the debtor to redeem, or he may foreclose." On the other hand Lord Hardwicke, in Lanoy *v.* The Duke of Athol, 2 Atk. R. 446, said: "Suppose a person who has two real estates mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons." Lord Eldon, in Aldrich *v.* Cooper, 8 Ves. 388, used language leading to the same conclusion as that of Lord Hardwicke. He said: "Suppose there was no freehold estate, but there was a copyhold estate, which the owner had subjected to a mortgage, and died. It is clear the mortgagee having two funds might, if he pleased, resort to the copyhold estate. But would this court compel him to resort to it? If so, the court marshals by the necessary consequence of its act. If the court would not compel him, is it not clear that it is purely matter of his will whether the simple contract creditors shall be paid or not? That, at least, contradicts all the authorities, that, if a party has two funds (not applying now to assets particularly), a person having an interest in one only has a

short we may here apply the common civil maxim, "Sic utere tuo ut non alienum lædas;" and still more emphatically the

right in equity to compel the former to resort to the other if that is necessary for the satisfaction of both. I never understood that, if A has two mortgages, and B has one, the right of B to throw A upon the security, which B cannot touch, depends upon the circumstance whether it is a freehold or a copyhold mortgage. It does not depend upon assets only; a species of marshalling being applied in other cases, though technically we do not apply that term except to assets. So where in bankruptcy the Crown by extent laying hold of all the property, even against creditors, the Crown has been confined to such property as would leave the securities of incumbrancers effectual. So in the case of the surety it is not by the force of the contract, but that equity upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the court placing the surety exactly in the situation of the creditor. So a surety may have the benefit of a mortgage of a copyhold estate exactly as of freehold. It is very difficult to reconcile this with the principle of all those cases between living persons." And again: "Suppose another case; two estates mortgaged to A, and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say a person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him. This has been carried to a great extent in bankruptcy; for a mortgagee whose interest in the estate was affected by an extent of the Crown has found his way, even in a question with the general creditors, to this relief; that he was held entitled to stand in the place of the Crown as to those securities which he could not affect per directum, because the Crown affected those in pledge to him. Another case may be put; that a man died, having no fund but a freehold and a copyhold estate; that they were both comprehended in a mortgage to A, and the freehold estate only was mortgaged to B; and that B was not only a mortgagee of the freehold estate, but also a specialty creditor by a covenant or a bond. In that case as well as in this it might be said the mortgagee of both estates might, if he thought proper, apply to the freehold estate and exhaust the whole value of it. The other would then stand as a naked specialty creditor, the fund being taken out of his reach; and there is no doubt that being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as mortgagee upon the copyhold estate, the same arrangement would take place, that he in equity shall throw the prior incumbrancer upon the estate to which the other has no resort." Mr. Powell, in his Treatise on Mortgages (1 Powell on Mortg. 343, and Coventry & Rand's notes, Id. 1014), and Mr. Fonblanque (2 Fonbl. Eq. B. 3, ch. 2, § 6, note (*i*), seem to have taken the same view. It may perhaps be true that the doctrine propounded by Lord Chancellor Sugden was intended to be applied only to cases where there could be a sale of the mortgaged property either by the original contract or by a decree of a Court of Equity in the exercise of its appropriate jurisdiction; and not to reach cases where, as in England, the mortgagee had a right to, and might insist upon, a foreclosure (post, 2 Story, Eq. Jurispr. § 1026). But such a qualification of the doctrine is not

intimated, as far as I have seen, except in the case before Lord Chancellor Sugden. In the late case of Barnes *v.* Racster (1 Younge & Coll. New Rep. 401, 403), Mr. Vice-Chancellor Bruce seems to have thought the doctrine of Mr. Sugden to be applicable to the case where, after the first mortgage of two estates, there are distinct mortgages to different persons of each estate mortgaged to the first mortgagee; and that, as between these last conflicting incumbrancers, Courts of Equity will not marshal the estates, but merely apportion the first charge between the two estates. It may be thought that a Court of Equity would be going too far by interfering with the creditor's right of foreclosure, and that it would be sufficient to give the second mortgagee a right to redeem the first mortgage. In America there has hitherto been no difficulty on the part of our Courts of Equity to give full effect to the doctrine of Lord Hardwicke in the case of two funds and two successive mortgages. Instead of a foreclosure, the usual course is, to decree a sale, as it is in Ireland; so that the main difficulty in narrowing the rights of the first mortgagee is avoided. See Cheeseborough *v.* Millard, 1 John. Ch. R. 413; Stevens *v.* Cooper, 1 John. Ch. R. 425; Evertson *v.* Booth, 19 John R. 486; Hayes *v.* Ward, 4 John. Ch. R. 123; Campbell *v.* Macomb, 4 John. Ch. R. 534; Conrade *v.* Harrison, 3 Leigh, R. 532; 1 Powell on Mortg. 343, and notes by Coventry & Rand. But at all events it is very certain that wherever a creditor, by his election to take one of two funds to which alone another creditor has the right to resort, deprives the latter of his claim to that fund, he will be permitted in equity to stand in the place of that creditor in regard to the other fund. In Aldrich *v.* Cooper, 8 Ves. 396, Lord Eldon referred to many cases of this sort, and, among other things, said: "The cases with respect to creditors and other classes of claimants go exactly the same length. In the cases of legatees against assets descended a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling; that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets, but with relation to the fact of a double fund. Both are in law liable to the creditors; and therefore by making the option to go against the one they shall not disappoint another person who the testator intended should be satisfied. That is not so strong as where it is not bounty, but the party has by his own act, in his life, made liable to the whole of the debt a copyhold estate not in law liable; and who, having also a freehold estate, must be understood to mean that the freehold estate shall be liable, according to law, to his specialty debts. The case is exactly the same with reference to the distinction taken, that, where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees; for that is upon the supposition that there is in the will as strong an inclination of the testator in favor of a specific devisee as a pecuniary legatee; and therefore there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case; for there is a double fund, and as by that denotation of intention the creditor has a double fund, the land devised and the personal estate, he shall not disappoint the legatee. The case is also the same where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator, as in Lutkins *v.* Leigh; there he shall not disappoint the legatee. So the case of paraphernalia is very strong for this proposition; that wherever there is a double fund, though this court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim whether

Christian maxim, "Do unto others as you would they should do unto you."[1]

§ 854. **Illustrations of the Doctrine.** — The same principle applies to one judgment creditor who has a right to go upon two funds, and another judgment creditor who has a right upon one only of them, both belonging to the same debtor. The former may be compelled to apply first to the fund which cannot be reached by the second judgment; so that both judgments may be satisfied.[2] But if the first creditor has a judgment against A and B, and the second against B only, and it does not appear whether A or B, ought to pay the debt due to the first creditor, nor whether any equitable right exists in B to have the debt charged on A alone, — in such a case equity will not compel the creditor first to take the land of A in satisfaction; for it is not (as we shall presently and more fully see) a case of different debts and securities against one common debtor.[3]

§ 855. **Same.** — Another case may easily be put to illustrate the general doctrine and the exceptions to it. Suppose the mortgagor to mortgage two estates to the mortgagee, and afterwards he should mortgage one of the estates to B and the other to C, by distinct mortgages, and B and C should each have knowledge of the first mortgage, and C should also have notice of B's mortgage at the time of taking his own, and the mortgaged estates

arising by the law or by the act of the testator." Ante, §§ 558, 559, 560 to 578. See also the Reporter's note to Averall *v.* Wade, Lloyd & Goold, Rep, 264, and especially p. 268, where they say: "The general principle of marshalling is, that where one claimant has two funds to resort to, and another only one, the court will either compel the person having the double security to resort to that fund not liable to the demand of the other (citing 2 Atk. 446, 8 Ves. 391, 395, and 1 Russ. & Mylne, 187); or if satisfaction has been already obtained by him who has the double security out of the fund to which alone the other can resort, the court will allow the later claimant to stand in the place of the former pro tanto." See the note to Clifton *v.* Burt (by Cox), 1 P. Will. 679, where the principal authorities are collected. Ante, § 561, note 6.

[1] See Cheeseborough *v.* Millard, 1 John. Ch. R. 413; Evertson *v.* Booth, 19 John. R. 486; Hayes *v.* Ward, 4 John. Ch. R. 123; Wiggin *v.* Dorr, 3 Sumner, R. 410.

[2] Dorr *v.* Shaw, 4 John. Ch. R. 17; Averall *v.* Wade, Lloyd & Goold, R. 252. In this last case Lord Chancellor Sugden decided that where a party, seised of several estates, and indebted by judgment, settled one of the estates for a valuable consideration, with a covenant against incumbrances, and subsequently acknowledged other judgments, the prior judgments should be thrown altogether upon the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute. Marshall *v.* Moon, 36 Ill. 321; McCormick's Appeal, 57 Pa. St. 54; Jones *v.* Jones, 13 Iowa, 276.

[3] Dorr *v.* Shaw, 4 John. Ch. R. 17; post, §§ 863, 864.

should finally turn out not to be sufficient to pay all the three mortgages, — in such a case it would seem that B would not have any right to have the estates marshalled so as to throw the whole charge upon the estate mortgaged to C, for he has no superior equity to C; and therefore the charge of the first mortgage ought to be ratably apportioned between B and C.[1] But this must be propounded as open to some doubt, as there is a conflict in the authorities.[2]

§ 856. **Origin of the Doctrine of Marshalling.** — It is not improbable that this doctrine of marshalling securities or funds, which under another form had its existence in the Roman law, and was therein called subrogation or substitution, was derived into the jurisprudence of equity from that source, as it might well be, since it is a doctrine belonging to an age of enlightened policy, and refined although natural justice. In the Roman law (as we have already seen) a surety upon a bond or security, paying it to the creditor, was entitled to a cession of the debt, and a subrogation or substitution to all the rights and actions of the creditor against the debtor; and the security was treated, as between the surety and the debtor, as still subsisting and unextinguished.[3] And where one creditor had any hypothecation or privilege upon property as security for a debt, and another creditor had a like subsequent security upon the same property for another debt, there the latter upon payment of the prior debt to the prior creditor was entitled to a cession of the property, and to a subrogation to all the rights and actions of the same creditor for that debt. So the doctrine is laid down in the Digest: "Plane, cum tertius creditor primum de sua pecunia dimisit, in locum ejus substituitur in ea quantitate quam superiori exsolvit."[4]

§ 857. **Same.** — We here see the original elements from which our present system of equitable relief is, or at least might have been, derived. The principal difference between the Roman sys-

[1] Barnes *v.* Racster, 1 Younge & Coll. New R. 401.

[2] Post, § 1640; Barnes *v.* Racster, 1 Younge & Coll. N. R. 401; Gouverneur *v.* Lynch, 2 Paige R. 300; Skell *v.* Spraker, 8 Paige, R. 182; Patty *v.* Pease, 8 Paige, R. 277; Schryver *v.* Teller, 9 Paige, R. 173. The rule seems now to be settled as propounded by the author. See Gibson *v.* Seagrim, 20 Beav. 614, 619; and the editor's note to § 853.

[3] Pothier on Oblig. by Evans, n. 275, 280, 281; Id. n. 428, 429, 430; Id. n. 556, 557, 558, 559 (n. 591, 592, 593, 594, of the French editions); 1 Domat, Civ. Law, B. 3, tit. 1, § 6, per tot, pp. 377, 378, 379; 2 Voet, ad Pand. Lib. 46, tit. 1, §§ 27, 28, 29, 30; ante, §§ 668, 709, 714.

[4] Dig. Lib. 20, tit. 4, l. 16, 17, l. 11, § 4, l. 12, § 9. See also 1 Domat, B. 3, tit. 1, § 6, art. 2, 3, 4, 6, 7, 8; ante, §§ 714, 715.

tem and ours is, that our Courts of Equity arrive directly at the same result by compelling the first creditor to resort to the fund over which he has a complete control, for satisfaction of his debt; and the Roman system substituted the second creditor to the rights of the first, by a cession thereof upon his payment of the debt. It is true that the case of a double fund is not put in the text of the Civil law; but it is an irresistible inference from the principles upon which it is founded.[1]

§ 858. **Same.** — Lord Kaimes has put the very case, as founded in a clear and indisputable principle of natural equity. After having adverted to the cases of sureties (fidejussores) and correi debendi (debtors bound jointly and severally to the same creditor),[2] he proceeds to state: "Another connection of the same nature with the former is that between one creditor who is infeft in two different tenements for his security, and another creditor who hath an infeftment on one of the tenements of a later date. Here the two creditors are connected by having the same debtor and a security upon the same subject. Hence it follows as in the former

[1] See Pothier on Oblig. by Evans, n. 520, 521, 522 (n. 555, 556, 557, of the French editions), B.; Hayes *v.* Ward, 4 John. Ch. R. 130 to 132; Cheeseborough *v.* Millard, 1 John. Ch. R. 414. There are three texts of the civil law pointing to cases of hypothecations or mortgages, which bear upon the subject. In the Code it is said: "Non omnino succedunt in locum hypothecarii creditoris hi quorum pecunia ad creditorem transit. Hoc enim tunc observatur; cum is qui pecuniam postea dat, sub hoc pacto credat ut idem pignus ei obligetur, et in locum ejus succedat. Quod cum in persona tua factum non sit (judicatum est enim te pignora non accepisse), frustra putas tibi auxilio opus esse Constitutionis nostræ ad eam rem pertinentis." And again: "Si potiores creditores pecunia tua dismissi sunt, quibus obligata fuit possessio, quam emisse te dicis, ita ut pretium perveniret ad eosdem priores creditores, in jus eorum successisti; et contra eos, qui inferiores illis fuerunt, justa defensione te tueri potes." And again: "Si prior Respublica contraxit, fundusque ei est obligatus, tibi secundo creditori offerenti pecuniam potestas est, ut succedas etiam in jus Reipublicæ." Cod. Lib. 8, tit. 19, l. 1, 3, 4. Pothier has expounded the sense of these passages with admirable clearness. Pothier on Oblig. by Evans, n. 521, B. (3) (n. 556 of the French editions). Domat, B. 3, tit. 1, § 3, art. 6, says: "Although the creditor who has a mortgage, whether general or special, may exercise his right on all lands and tenements that are subject to the mortgage, and even on those which are in possession of third persons, yet it seems agreeable to equity that if he can hope to recover payment of his debt out of the other effects which remain of the debtor, he should not begin with troubling the third possessor, even although his mortgage were special; but that before he molests the third possessor, and gives occasion to the consequences of having recourse against the debtor, he ought to discuss the other effects remaining in the debtor's possession." See also Domat's note, ibid., and Cod. Lib. 8, tit. 14, l. 2; ante, § 494, notes 1 and 2.

[2] Ersk. Instit. B. tit. 3, sec. 74.

case that if it be the will of the preferable creditor to draw his whole payment out of that subject in which the other creditor is infeft, the latter for his relief is entitled to have the preferable security assigned to him; which can be done upon the construction above mentioned. For the sum recovered by the preferable creditor out of the subject on which the other creditor is also infeft is justly understood to be advanced by the latter, being a sum which he was entitled to and must have drawn had not the preferable creditor intervened; and this sum is held to be purchase-money of the conveyance. This construction preserving the preferable debt entire in the person of the second creditor entitles him to draw payment of that debt out of the other tenement. By this equitable construction matters are restored to the same state as if the first creditor had drawn his payment out of the separate subject, leaving the other entire, for payment of the second creditor. Utility also concurs to support this equitable claim." [1]

§ 859. **Marshalling as Applied to Sureties.** — But the interposition of Courts of Equity is not confined to cases strictly of two funds and of different mortgagees; for it will be applied (as we have seen) in favor of sureties where the creditor has collateral securities or pledges for his debt.[2] In such cases the court will place the surety exactly in the situation of the creditor as to such securities or pledges whenever he is called upon to pay the debt; for it would be against conscience that the creditor should use the securities or pledges to the prejudice of the sureties, or refuse to them the benefit thereof in aid of their own responsibility.[3] And on the other hand if a principal has given any securities or other pledges to his surety, the creditor is entitled to all the benefit of such securities or pledges in the hands of the surety, to be applied in payment of his debt.[4]

[1] Kaimes, Equity, B. 1, Pt. 1, ch. 3, § 1, pp. 122, 123.

[2] Com. Dig. Chancery, 4 D. 6; Stirling *v.* Forrester, 3 Bligh, R. 590, 591; ante, §§ 451, 709, 716.

[3] Aldrich *v.* Cooper, 8 Ves. 388, 389. See Gammon *v.* Stone, 1 Ves. 339; Cheeseborough *v.* Millard, 1 John. Ch. R. 413; Hayes *v.* Ward, 4 John. Ch. R. 130, 131, 132; Clason *v.* Morris, 10 John. R. 524, 539; Stevens *v.* Cooper, 1 John. Ch. R. 430, 431; Robinson *v.* Wilson, 2 Madd. Ch. Rep. 569; Ex parte Rushforth, 10 Ves. 410, 414; Wright *v.* Morley, 11 Ves. 23; Parsons *v.* Ruddock, 2 Vern. 608; Ex parte Kendall, 17 Ves. 520; Wright *v.* Simpson, 6 Ves. 734; 2 Fonbl. Eq. B. 3, ch. 2, § 6, note (*i*); Stirling *v.* Forrester, 3 Bligh, R. 590, 591; ante, §§ 448, 450; Shinn *v.* Budd, 1 McCart. 234.

[4] Wright *v.* Morley, 11 Ves. 22; ante, §§ 451, 709, 758. See ante, § 502, and note.

§ 860. **Surety May Sue for His Exoneration Where Principal Debtor Fails to Pay.** — Courts of Equity do not stop here. If the debt is due, and the creditor does not choose to call upon the debtor for payment, the surety may come into equity by a bill against the creditor and the debtor, and compel the latter to make payment of the debt so as to exonerate the surety from his responsibility; for it is unreasonable that a man should always have such a cloud hang over him.[1] In cases of this sort there is not however (as has been already stated) any duty of active diligence incumbent upon the creditor. It is for the surety to move in the matter. But if the surety requires the exercise of such diligence and there is no risk, delay, or expense to the creditor, or a suitable indemnity is offered against the consequences of risk, delay, and expense, it seems that the surety has a right to call upon the creditor to do the most he can for his benefit; and if he will not, a Court of Equity will compel him.[2]

§ 861. **Same.** — But as between the debtor himself and the creditor where the latter has a formal obligation of the debtor, and also a security or a fund to which he may resort for payment, there seems no ground to say (at least unless some other equity intervenes) that a Court of Equity ought to compel the creditor to resort to such fund before he asserts his claim by a personal suit against his debtor. Why in such case should a Court of Equity interfere to stop the election of the creditor as to any of the remedies which he possesses in virtue of or under his contract? There is nothing in natural or conventional justice which requires it.

Where the surety had effected an insurance upon the life of the principal debtor, with his consent, and the principal had deceased, having made the surety his executor, it was held that the insurance money, beyond what was needed to indemnify the surety, should be applied to the payment of the debt. Lea *v.* Hinton, 5 DeG. M. & G. 823. See also Drysdale *v.* Piggott, 22 Beav. 238.

[1] Ante, §§ 451, 668; Ranelaugh *v.* Hayes, 1 Vern. 189, 190; 1 Eq. Abridg. 17, Pl. 6; Id. 79, Pl. 5; Wright *v.* Simpson, 6 Ves. 734; Antrobus *v.* Davidson, 3 Meriv. R. 579; King *v.* Baldwin, 2 John. Ch. R. 561, 562, 563; s. c. 17 John. Rep. 384; Hayes *v.* Ward, 4 John. Ch. R. 432; Nisbet *v.* Smith, 2 Bro. Ch. R. 579; Lee *v.* Rook, Moseley, R. 318.

Ferrer *v.* Barrett, 57 N. C. 455; Irick *v.* Black, 2 C. E. Green, 189. A person, however, under engagement to indemnify another from loss, cannot be compelled to make good the engagement before the damage or liability has arisen which gives rise to the indemnity. Hughes-Hallett *v.* Indian Mines Co., 22 Ch. D. 561, overruling Ranelaugh *v.* Hayes, 1 Vern. 189, cited by the author, supra. See Phené *v.* Gillan, 5 Hare, 1, 12.

[2] Wright *v.* Simpson, 6 Ves. 734; Nisbet *v.* Smith, 2 Bro. Ch. R. 579; Cottin *v.* Blane, 2 Anstr. R. 544; Eden on Injunct. ch. 2, pp. 38, 39, 40; King *v.* Baldwin, 2 John. Ch. R. 561, 563; s. c. 17 John. R. 384; Hayes *v.* Ward, 4 John. Ch. R. 123; ante, § 451.

It is true that a different doctrine has been strenuously maintained by very learned judges in a most elaborate manner.[1] But their opinions however able have been met by a reasoning exceedingly cogent, if not absolutely conclusive on the other side. And at all events the settled doctrine now seems to be in conformity to the early as well as the latest decisions, that the debtor himself has no right to insist that the creditor in such a case should pretermit any of his remedies or elect between them, unless some peculiar equity springs up from other circumstances.[2]

§ 862. **Same.** — The civil law, as we have seen, in the case of sureties required the creditor in the first instance to pursue his remedy against the debtor. But if the surety thought himself in peril of loss by the delay of the creditor, he might compel the latter to sue the debtor and thus obtain his indemnity. "Fidejussor," says the Digest,[3] "an, et prius quam solvat, agere possit, ut liberetur? Nec tamen semper expectandum est ut solvat, aut judicio accepto condemnetur; si diu in solutione reus cessabit, aut certe bona sua dissipabit; præsertim si domi pecuniam fidejussor non habebit, qua numerata creditori, mandati actione conveniat." This is a very wholesome and just principle.[4]

[1] See Lord Thurlow's opinion in Wright *v.* Nutt, 1 H. Bl. 136, 150, and Lord Loughborough in Folliott *v.* Ogden, 1 H. Bl. 124. See also Averall *v.* Wade, Lloyd & Goold, R. 255.

[2] Holditch *v.* Mist, 1 P. Will. 695; Wright *v.* Simpson, 6 Ves. 713, 726, 728 to 738, Lord Eldon's opinion. See Hayes *v.* Ward, 4 John. Ch. R. 132, 133; Eden on Injunct. ch. 2, pp. 38, 39, 40. See editor's note to § 853, ante.

[3] Dig. Lib. 17, tit. 1, l. 38; King *v.* Baldwin, 2 John. Ch. R. 562; Hayes *v.* Ward, 4 John. Ch. R. 132, 133; ante, §§ 451, 668.

[4] Mr. Chancellor Kent in his learned opinion in Campbell *v.* Macomb, 4 John. Ch. R. 538, speaking upon this subject, says: "The question on this subject, so often raised in the civil law, assumed the fact that the principal debtor was in default, 'Si diu in solutione reus cessabit;' and when it is added, 'aut certe bona sua dissipabit,' the reference was still on the case in which the debtor had failed to pay, and was also wasting his goods. I apprehend this must be the true construction; for the only question raised by Marcellus in the text referred to (Dig. Lib. 17, 1, 38, 1) was whether the surety could seek indemnity before he had himself paid, 'Fidejussor an, et prius quam solvat, agere possit, ut liberetur?' It was a very equitable provision in the civil law to afford a remedy to the surety when the debtor neglected to pay, though the creditor had not required payment, and though the surety had not actually advanced the debt. But it would not have been very just to have given the surety an action for indemnity against the debtor before the latter was in default, and when such a previous claim made no part of the original contract. The debtor, as the civil law truly observes in another place (Dig. Lib. 17, 1, 22, 1), has an interest not to be compelled to pay before the day; and yet I perceive that several writers on the civil law (Domat, Part 1, B. 3, tit.

§ 863. **Securities Will Be Marshalled, if Possible, so as to Cause No Injury to Common Debtor.** — But although Courts of Equity will thus administer relief to both parties in cases of double funds which are subject to the same debt, and will in favor of sureties marshal the securities for their benefit, yet this will be so done in

4, § 3, art. 3; Wood's Institutes of the Civil Law, p. 227; Brown's Lectures on the Civil Law, Vol. 1, 362) refer to this very text to prove that if the surety be in peril he may sue before the time of payment, to be indemnified or discharged. It may be so; but these writers refer to no other text but that already cited, and that certainly does not, by any necessary interpretation, warrant the doctrine. Indeed it seems to preclude it; because the remedy was intended or provided (and so it is expressed) especially for the case of a surety who could not conveniently discharge the debt himself, and have his regular recourse over at once by the action mandatum. It was a benevolent provision in that view, and just in no other. In other parts of the Pandects (Dig. Lib. 17, 1, 22, 1, and Lib. 46, 1, 31) Paul and Ulpian lay down a rule in respect to sureties in perfect accordance with the construction I have ventured to adopt; for they say that if the surety pays before the day he cannot have recourse over to the debtor until the day of payment has arrived. A number of civilians who have very fully discussed the rights and remedies of sureties under the civil law, and always with this text of Marcellus in view, give us no intimation of such a doctrine. The general rule of the civil law was, that the action by the surety against his principal depended upon his having paid the creditor. (Inst. Lib. 3, 21, 6, and Ferriere's Inst. h. t.) And the cases in which he might have recourse over before payment were all special cases; as where judgment had already passed against the surety, or the debtor was in failing circumstances, or such a recourse over was part of the original contract, or the debtor had neglected a long time, as from three to ten years, to pay, or the creditor to demand. In all these excepted cases the surety might sue the debtor for his indemnity or discharge. But when might he sue him? Not before the debt was due and payable to the creditor, but before the surety had paid the creditor. The authorities to which I now refer (Hub. Prælec. Lib. 3, tit. 21, De Fide Jussoribus, 11; Voet, ad Pand. Lib. 46, tit. 1, 34; Pothier, Traité des Oblig. n. 441; Ersk. Inst. B. 3, c. 65) all consider these exceptions as only providing for the relief of the surety ante solutionem. He may sue the principal debtor before he has actually paid the debt, and the exceptions were to relieve him from that burden; for without one of these special causes, says the Code, there would be no foundation before payment for the action of mandatum. ('Nulla juris ratione, antequam satis creditori pro ea feceris, eam ad solutionem urgeri, certum est.' Code 4, 35, 10.) This plain and equitable principle, that until the debtor is in default either in his contract with the editor or in his contract with the surety he is not bound to pay or indemnify, seems to pervade equally every part of the civil law. Pothier says (ubi sup. n. 442) that if the obligation to which the surety has acceded must, from its nature, exist a long time, as, if he was surety for the due execution of a trust, he cannot within the time sue the principal debtor or trustee for his discharge, for he knew, or ought to have known, the nature of the obligation he contracted. Though where he is surety indefinitely, as for payment of an annuity, he may after a long time, as, say ten years, demand that the principal debtor liberate him by redeeming the annuity."

cases where no injustice is done to the common debtor, for then other equities may intervene. And the interposition always supposes that the parties seeking aid are creditors of the same common debtor; for if they are not, they are not entitled to have the funds marshalled in order to leave a larger dividend out of one fund for those who can claim only against that. This principle may be easily illustrated by supposing the case of a joint debt due to one creditor by two persons, and a several debt due by one of them to another creditor. In such a case if the joint creditor obtains a judgment against the joint debtors, and the several creditor obtains a subsequent judgment against his own several debtor, a Court of Equity will not compel the joint creditor to resort to the funds of one of the joint debtors so as to leave the second judgment in full force against the funds of the other several debtor. At least it will not do so unless it should appear that the debt, though joint in form, ought to be paid by one of the debtors only, or there should be some other supervening equity.[1]

§ 864. **Same.** — Another case has been put, of a similar nature, by Lord Eldon. "We have gone this length," said he: "If A has a right to go upon two funds and B upon one, having both the same debtor, A shall take payment from that fund to which he can resort exclusively, that by those means of distribution both may be paid. That takes place where both are creditors of the same person and have demands against funds the property of the same person. But it was never said that if I have a demand against A and B, a creditor of B shall compel me to go against A without more, as if B himself could insist that A ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all obligations arising out of these complicated relations may be satisfied. But if I have a demand against both, the creditors of B have no right to compel me to seek payment from A if not founded in some equity giving B the right for his own sake to compel me to seek payment from A."[2]

§ 865. **Same.** — Upon this ground where there was a partnership of five persons, one of whom died, and the other four partners continued the partnership and afterwards became bankrupt, and the creditors of the four surviving partners sought to have the debts of the five paid out of the assets of the deceased partner so that the dividend of the estate of the four bankrupts might be

[1] Dorr *v.* Shaw, 4 John. Ch. R. 17. See Ayres *v.* Husted, 15 Conn. 504, 516; Newsom *v.* McLendon, 6 Ga. 392, 400; House *v.* Thompson, 3 Head, 512, 516; ante, § 853.

[2] Ex parte Kendall, 17 Ves. 520.

thereby increased in favor of their exclusive creditors, without showing that the assets of the deceased partner ought as between the partners to pay those debts, or that there was any other equity to justify the claim, the court refused the relief. On that occasion the Lord Chancellor said that even if it was clear that the creditors of the five partners could go against the separate assets of the deceased partner (which of course depended upon equitable circumstances, as the legal remedy was against the survivors only), yet if it was not clear that the survivors had a right to turn the creditors of the five against those assets, it did not advance the claim that without such arrangement the creditors of the four would get less. Unless the latter could establish that it is just and equitable that the estate of the deceased partner should pay in the first instance, they had no right to compel a creditor to go against that estate who had a right to resort to both funds.[1] Indeed there might exist an opposite equity, that of compelling the creditor to go first against the property of the survivors before resorting to the estate of the deceased partner.[2]

§ 866. **Same.** — The ground of all these decisions is the same general doctrine already suggested, though the application of that doctrine is necessarily varied by the circumstances. Where a creditor has a right to resort to two persons who are his joint and several debtors, he is not compellable to yield up his remedy against either, since he has a right to stand upon the letter and spirit of his contract unless some supervening equity changes or modifies his rights. If each debtor is equally bound in equity and justice for the debt, as is the case of joint debtors or partners where both have had the full benefit of the debt, the interference of a Court of Equity to change the responsibility from both debtors or partners to one would seem to be utterly without any principle to support it, unless there was a duty in one of the debtors or partners to pay the debt in discharge of the other. And if this be so, a fortiori the creditors of one of the debtors or partners cannot be entitled to such interference for their own benefit; for they can in no just sense in such a case work out any right except through the equity of the debtor or partner under whom their title is derived.[3]

[1] Lord Eldon in Ex parte Kendall, 17 Ves. 520. [2] Ibid.

[3] Ayres *v.* Husted, 15 Conn. 504, 517. It is held that in equity the creditors of an insolvent partnership are entitled to have the partnership assets applied in satisfaction of their claims in preference to the creditors of the individual partners, though the latter creditors may have been the first to attach those assets. And as the partnership creditors have this prior lien upon partnership effects, the other creditors may compel them

§ 867. [**Doctrine Does Not Apply Where Liens Are Held by Different Parties.** — In order to invoke the doctrine of marshalling, the lien debtor must be a common one — both sources of payment must belong to a common debtor.[1] In order for a creditor who had a lien upon one fund to be entitled to substitution to the right of a creditor who had a lien upon that and another fund, it was a necessary condition, among other things, that both funds upon which the prior creditor's claim was secured should be the property of the same debtor, and this condition does not exist where the assets of a partnership constitute one of the funds, and the individual property of a member of the partnership constitutes the other fund, unless the partner has in equity become entitled to the partnership assets and become primarily liable for the partnership debts.[2] A creditor who has a claim against two debtors, one a principal and the other a surety, cannot be compelled by another creditor of the principal debtor to exhaust his remedy against the surety before proceeding against the principal.[3]]

§ 868. [**Prior Creditor Has No Right to Release Singly Charged Property with Knowledge of Subsequent Debt.** — As a mortgagee is not obliged to ascertain whether his mortgagor has subsequently encumbered the premises, it is made the duty of a junior incum-

to exhaust the partnership effects first. For any balance remaining unpaid thereafter both classes of creditors stand upon an equal footing; and the party effecting the first lien, whether by contract or by legal process, will be allowed to maintain such priority. In the absence of any such lien equity will decree an equal distribution. Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Bardwell *v.* Perry, Ib. 292. See also Miner *v.* Pierce, 38 Vt. 610, 614; Tiffany *v.* Crawford, 1 McCart. 278; post, § 918.

[1] Birch River Boom & Lbr. Co. *v.* Glendon Boom & Lbr. Co., 71 W. Va. 139, 76 S. E. 167; Blakemore *v.* Wise, 95 Va. 269, 28 S. E. 332, 64 Am. St. Rep. 781; Perry *v.* Elliott, 101 Va. 709, 44 S. E. 919; Citizens State Bank *v.* Iddings, 60 Neb. 709, 84 N. W. 78; Swift & Co. *v.* Kortrecht, 112 Fed. 709, 50 C. C. A. 429.

[2] Guggenheimer *v.* Martin, 93 Va. 634, 25 S. E. 881.

[3] Gaines *v.* Hill, 147 Ky. 445, 144 S. W. 92; Mason *v.* Hull, 55 Ohio St. 256, 45 N. E. 632.

If the land of a wife is mortgaged for the husband's debt, a subsequent judgment creditor of the husband cannot claim that the mortgagee shall proceed first against the property of the wife, nor can he claim to be subrogated to the mortgagee's security against the wife. Stewart *v.* Stewart, 207 Pa. 59, 56 Atl. 323.

As against a mortgage in which the wife has joined, she may compel the holder of the mortgage to exhaust the husband's two-thirds before selling her one-third to pay such mortgage debt, and she is entitled to the surplus not exceeding one-third of the value of the whole of the land as against his judgment creditors. Darby *v.* Vinnedge, 53 Ind. App. 525, 100 N. E. 862.

brancer to demand that resort be first had to property upon which the paramount lien is exclusive. While equity will not permit a prior mortgagee, knowing that portions of the mortgaged premises have been subsequently conveyed or incumbered, to release the other portions, and attempt to collect his entire claim out of those not released, to the injury of purchasers or second mortgagees, this rule does not apply where the unreleased portions subsequently mortgaged are ample to secure both mortgages.[1] The doctrine of marshalling of assets is founded upon those considerations of natural justice whereby one is not permitted, from wantonness, rashness, or caprice, to do an injury to another, but is required to so use his own rights as not to injure, if possible, the rights of another. The equity exists also against the debtor, so that he shall not retain the singly-charged estate, but as between him and the primary creditor there is nothing in the principles of natural or conventional justice that ought to restrain the latter from resorting to any property of which the debtor may be possessed. As long as both funds are in existence, the principle of marshalling may, in proper cases, be enforced by means of substitution; but when the singly-charged fund has been put beyond the reach of the primary creditor by his own act, committed in wilful disregard of the rights of the other creditor, the former ought not to be permitted to take anything from the other fund, until the other creditor has had made good to him the loss he has incurred by the destruction of the singly-charged fund. But this ensued from the obligation of the primary creditor not to wilfully do any act that will injure any one else, and therefore, if he act without knowledge of the rights of the other creditor in good faith and with proper intention, there cannot result therefrom anything that will defeat his right to resort to the remaining fund.]

§ 869. [**The Rule Will Not Be Enforced to Injury of Senior Creditor.** — The doctrine of marshalling is intended primarily for the benefit of the junior creditor who may lose his debt if the senior creditor is permitted to first exhaust the singly-charged property; but this rule will not be enforced where it will work a serious injury to the rights of the senior creditor, the rule of equity in such case being to subrogate the junior creditor to the rights of

[1] Blanchette *v.* Farsch, 18 S. Dak. 20, 99 N. W. 79; Kelley *v.* Whitney, 45 Wis. 110, 30 Am. Rep. 697; Annan *v.* Hays, 85 Md. 505, 37 Atl. 20; First Natl. Bank *v.* Taylor, 69 Kans. 28, 76 Pac. 425; Bank of Commerce *v.* First Natl. Bank, 150 Ind. 588, 50 N. E. 566; Assn. etc. for Friendless *v.* Traders' Ind. Co., 77 N. J. Eq. 580, 78 Atl. 158; First Natl. Bank *v.* Roder, 114 Fed. 451, 52 C. C. A. 253.

the senior creditor and to his lien upon that fund or security which is not exhausted, if there be any.[1]]

§ 870. [**Rule Will Not Be Enforced to Injury of Third Persons.** — The rule requiring the marshalling of securities will not be enforced to the injury of innocent third persons, for they are as much entitled to the equitable protection of the court as a creditor who has been careless about the taking of his security, or where he took security upon property worth less than the incumbrances. If he has done this it is his own folly, and a court of equity will never lend him its aid where to do so will work an inequitable hardship upon an innocent third person;[2] but the rule does not apply to circumstances in which the third person injuriously affected has an inferior right or equity.[3]]

§ 871. [**The Rule Will Not Be Applied so as to Deprive the Debtor of His Homestead.** — The homestead estate is guaranteed by the constitutions of the States, and so jealously guarded by the law that in some jurisdictions an attempted waiver of the homestead and personal property exemptions by the debtor is absolutely void. While as a general rule equity will require a prior creditor who has several properties subject to the payment of his debt, to first resort to the property subject to the single incumbrance of the antecedent creditor, yet this rule will not be enforced where its tendency will be to deprive the debtor of his homestead.[4] In Iowa it is provided by statute that resort to the homestead shall be only for a "deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt," and this provision of the statute is mandatory, without regard to the rights of creditors.[5]]

[1] Anthes *v.* Schroeder, 68 Neb. 370, 94 N. W. 611; Dickson *v.* Back, 32 Oreg. 217, 51 Pac. 727; Webber *v.* Webber, 109 Mich. 147, 66 N. W. 960; Dahlman *v.* Greenwood, 99 Wis. 163, 74 N. W. 215; Moore *v.* Cofield, 10 Ga. App. 197, 73 S. E. 45.

[2] Whitaker *v.* Belvidere Roller Mill Co., 55 N. J. Eq. 674, 38 Atl. 289; Baker *v.* David, 211 Mass. 429, 97 N. E. 1094; Newby *v.* Fox, 90 Kans. 317, 133 Pac. 890, 47 L. R. A. (N. S.) 302; Webb *v.* Hunt, 2 Ind. Ter. 612, 53 S. W. 437; Cannon *v.* Kreipe, 14 Kans. 324; Rixey *v.* Pearre, 89 Va. 113, 15 S. E. 498; Jennings *v.* Ohio Natl. Bank, 17 Ohio Cir. Ct. Rep. 664, 8 O. C. D. 657; McClaskey *v.* O'Brien, 16 W. Va. 791; Monarch Cycle Co. *v.* Waggener, 59 Kans. 271, 52 Pac. 873; Anderson *v.* Engwall, 167 Iowa 457, 149 N. W. 611.

[3] Ingersoll *v.* Somers Land Co., 82 N. J. Eq. 476, 89 Atl. 288.

[4] Ralls *v.* Prather, 21 Ky. L. Rep. 555, 52 S. W. 800; Buckner *v.* Samuels, 6 Ky. L. Rep. 660; In re H. B. Hollins & Co., 225 Fed. 618; Mitchelson *v.* Smith, 28 Neb. 583, 44 N. W. 872; Koen *v.* Brill, 75 Miss. 870, 23 So. 481, 65 Am. St. Rep. 633.

[5] Century Sav. Bank *v.* Moody, 204 Fed. 963, 123 C. C. A. 285.

CHAPTER XV

PARTITION

§ 872. **Partition.** — Another head of concurrent jurisdiction is that of PARTITION in cases of real estate,[1] held by joint tenants, tenants in common,[2] and coparceners. It is not easy, as has been well observed by Mr. Fonblanque, to trace back or establish

[1] A bill may be maintained, at least in some States, for partition of personalty. Marshal *v.* Crow, 29 Ala. 278; Crapster *v.* Griffith, 2 Bland, 5; Hewitt's Case, 3 Bland, 184; Tinney *v.* Stebbins, 28 Barb. 290. See Biggs *v.* Peacock, 22 Ch. D. 284.

The court will assume jurisdiction and partition the estate, even though the pleadings allege that the petitioner is illegitimate. Barron *v.* Zimmerman, 117 Md. 296, 83 Atl. 258.

In North Carolina, prior to 1868, partition between tenants in common was a matter to be determined by a court of equity under the act of assembly; but they are entitled to partition now as a matter of right, and not as a matter of discretion. Haddock *v.* Stocks, 167 N. C. 70, 83 S. E. 9.

Where a special proceeding for partition has been removed to the superior court for hearing between the widow and children, that court has jurisdiction to fully determine the matters in controversy. Baggett *v.* Alston, 160 N. C. 26, 76 S. E. 86; Bozone *v.* Daniel, 39 So. 774.

The courts will exercise the same jurisdiction over the partition of personalty that it will over realty, Prentice *v.* Jannsen, 7 Hun, 86; Powell *v.* Hill, 64 N. C. 169; Grimm *v.* Wicker, 80 N. C. 344; Revisal of 1905 of North Carolina, §§ 2504 and 2519, where an actual partition cannot be made, then the court will order a sale of it.

[2] Corbitt *v.* Corbitt, 54 N. C. 114. One tenant in common is entitled to a partition of their interests as against his co-tenants. Holmes *v.* Holmes, 55 N. C. 334; but an actual partition must be accompanied by a deed signed by the other co-tenants, Rhea *v.* Craig, 141 N. C. 602, 54 S. E. 408.

But one tenant is not entitled to partition, where this would defeat the contingent right of survivorship provided by will. Owens *v.* Naughton, 23 Pa. Super. Ct. 639.

Nor can there be a partition where one of the parties is entitled to a right of entry only upon the event that a condition is broken. Bouvier *v.* Baltimore etc. Ry. Co., 67 N. J. L. 281, 51 Atl. 781, 60 L. R. A. 750.

The owner of a life estate cannot compel partition of the interestate, but where a sale of all of the lands is had, the life tenant is entitled to the present worth of his life interest, it depending upon his expectancy. Love *v.* Blauw, 61 Kans. 496, 59 Pac. 1059, 78 Am. St. Rep. 334, 48 L. R. A. 257; Revisal of 1905 of North Carolina, § 2509.

One who owns absolutely the "first and fourth stories of the brick

the origin of any branch of equitable jurisdiction.[1] But the jurisdiction of Courts of Equity in cases of partition is beyond question very ancient. It is curious enough to observe the terms of apparent indignation with which Mr. Hargrave has spoken of this jurisdiction as if it were not only new, but a clear usurpation. Yet he admits its existence and practical exercise as early as the reign of Queen Elizabeth;[2] a period so remote that at least one half of the law which is at present by way of distinction called the common law, and regulates the rights of property and the operation of contracts, and especially of commercial contracts, has had its origin since that time. "A new and compulsory mode of partition," says Mr. Hargrave, "has sprung up and is now fully established; namely, by decree of chancery exercising its equitable jurisdiction on a bill filed, praying for a partition, in which it is usual for the court to issue a commission for the purpose to various persons, who proceed without a jury. How far this branch of equitable jurisdiction, so trenching upon the writ of partition and wresting from a Court of Common Law its ancient exclusive jurisdiction of this subject might be traced by examining the records of chancery, I know not. But the earliest instance of a bill of partition I observe to be noticed in the printed books, is a case of the 48th Elizabeth in Tothill's Transactions of Chancery, title, Partition.[3] According to this short report of the case the court interfered from necessity in respect of the minority of one of the parties, the book expressing that on that account he could not be made a party to a writ of partition, which reason seems very inaccurate; for if Lord Coke is right,

building, etc.", is not entitled to partition. The right only lies where the petitioner is a joint owner or a tenant in common. Johnson *v.* Moser, 72 Iowa 523, 34 N. W. 314.

It must appear that petitioner is a joint tenant or a tenant in common before a petition for partition will be allowed. McConnell *v.* Pierce, 210 Ill. 627, 71 N. E. 622; Owen *v.* Brookport, 208 Ill. 35, 69 N. E. 952; Penn *v.* Case, 35 Tex. Civ. App. 4, 81 S. W. 349.

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Miller *v.* Warmington, 1 Jac. & Walk. 484. Before the Stat. 4 & 5 Vict. ch. 35, § 85, equity had no power to direct partition of copyholds or of customary freeholds. Horncastle *v.* Charlesworth, 11 Sim. 315; Jope *v.* Morshead, 6 Beav. 217; Burrell *v.* Dodd, 3 Bos. & P. 378. Though it might decree specific performance of an agreement to divide copyholds. Bolton *v.* Ward, 4 Hare, 350. Equity may decree partition of a manor. Hanbury *v.* Hussey, 14 Beav. 152. The writ of partition was abolished in England by Stat. 3 & 4 Will. 4, ch. 27, § 36, leaving equity with exclusive jurisdiction.

[2] See Mr. Fonblanque's Remarks on the passage, 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*).

[3] Speke *v.* Walrond, &c. (*a*), Tothill's Trans. 155 (ed. 1649).

that writ doth lie against an infant, and he shall not have his age in it, and after judgment he is bound by the partition.[1] But probably in Lord Coke's time this was a rare and rather unsettled mode of compelling partition; for I observe in a case in chancery of the 6th Car. I, which was referred to the judges on a point of law between two coparceners, that the judges certified for issuing a writ of partition between them, and that the court ordered one accordingly, which I presume would scarcely have been done if the decree for partition and a commission to make it had then been a current and familiar proceeding with chancery.[2] However it appears by the language of the court in a very important cause, in which the grand question was, whether the Lord Chancellor here could hold plea of a trust of lands in Ireland, that in the reign of James II bills of partition were become common."[3]

§ 873. **Nature of the Remedy.** — These remarks of the learned author are open to much criticism, if it were the object of these Commentaries to indulge in such a course of discussion. It cannot however escape notice that when the learned author speaks of this branch of equitable jurisdiction as trenching upon the writ of partition and wresting from the Courts of Common Law their ancient *exclusive* jurisdiction over the subject he assumes the very matter in controversy. That the writ of partition is a very ancient course of proceeding at the common law is not doubted. But it by no means follows that the Courts of Common Law had an exclusive jurisdiction over the subject of partition. The contrary may fairly be deemed to have been the case, from the notorious inadequacy of that writ to attain, in many cases, the purposes of justice. Thus for instance we know that until the reign of Henry VIII no writ of partition lay except in the case of parceners. Littleton (§ 264) expressly says: "For such a writ lyeth by parceners only." And to show how narrowly the whole remedial justice of this writ was construed, it was the known settled doctrine that if two coparceners be, and one should alien in fee, the remaining parcener might bring a writ of partition against the alienee, but the alienee could not have such a writ *against* the parcener. And the like diversity existed in cases of a writ of partition by or against a tenant by the curtesy.[4] Now such a case would, upon the very face of it, constitute a clear case for the interposition of a Court of Chancery, upon the ground

[1] Co. Litt. 171 *b*.
[2] 1 Chan. Rep. 49.
[3] Hargrave's note (2) to Co. Litt. 169 *b*.
[4] Co. Litt. 175 *a*.

of the total defect of any remedy at law, and yet of an unquestionable equitable right to partition. Cases of joint tenancy and tenancy in common afford equally striking illustrations. Until the statute of 31st Henry VIII ch. 1 and 32d Henry VIII ch. 32, no writ of partition lay at law for a joint tenant or tenant in common.[1] And yet the grossest injustice might have arisen if a Court of Chancery could not in such a case have interposed and granted relief upon the analogy to the legal remedy. The reason given at the common law against partition in such cases was more specious than solid. It was, that a joint tenancy being an estate originally created by the act or agreement of the parties, the law would not permit any one or more of the tenants to destroy the united possession without a similar universal consent. The good sense of the doctrine would rather seem to be that the joint tenancy being created by the act or agreement of the parties, in a case capable of a severance of interest the joint interest should continue (exactly as in cases of partnership) so long as, and no longer than, both parties should consent to its continuance.

§ 874. **Same.** — Mr. Justice Blackstone has cited the civil law as confirmatory of the reasoning of the common law: "Nemo enim invitus compellitur ad communionem."[2] But that law deemed it against good morals to compel joint owners to hold a thing in common, since it could not fail to occasion strife and disagreement among them. Hence the acknowledged rule was, "In communione vel societate nemo compellitur invitus detineri."[3] And therefore a decree of partition might always be insisted on, even when some of the part-owners did not desire it. "Communi dividendo judicium ideo necessarium fuit, quod *pro socio* actio magis ad personales invicem præstationes pertinet, quam ad communium rerum divisionem."[4] "Etsi non omnes, qui rem communem habent, sed certi ex his dividere desiderant, hoc judicium inter eos accipi potest."[5]

§ 875. **Same.** — But independently of considerations of this sort, which might have brought many cases of partition into the Court of Chancery in very early times from the manifest defect

[1] Co. Litt. 175 *a*; 2 Black. Comm. 185; Com. Dig. Parcener, C. 6; Miller *v.* Warmington, 1 Jac. & Walk. 473; Baring *v.* Nash, 1 Ves. & B. 555.

[2] Dig. Lib. 12, tit. 6, l. 26, § 4; 2 Black. Comm. 185, note (*c*).

[3] Cod. Lib. 3, tit. 37, l. 5, ult.

[4] Dig. Lib. 10, tit. 3, l. 1; 1 Domat, Civ. Law, B. 2, tit. 5, § 2, art. 11.

[5] Dig. Lib. 10, tit. 3, l. 8; 1 Domat, Civ. Law, B. 2, tit. 5, § 2, art. 11, pp. 303, 306; Id. B. 1, tit. 4, § 1, pp. 632, 633; Fulbeck's Parallel, B. 2, pp. 57, 58; Ersk. Instit. B. 3, tit. 3, § 56; 1 Stair's Inst. 48.

of any remedy at law, there must have been many cases where bills for partition were properly entertainable upon the ordinary ground of a discovery wanted or of other equities intervening between the parties.[1] Lord Loughborough upon one occasion said that there is no original jurisdiction in chancery in partition, which is a proceeding at the common law.[2] This may be true sub modo where the party is completely remediable at law, but not otherwise. On another occasion his Lordship said: "A party choosing to have a partition has the law open to him; there is no equity for it. But the jurisdiction of this court obtained upon a principle of *convenience*. It is not for the court to say one party shall not hold his estate as he pleases; but another person has also the same right to enjoy his part as he pleases, and therefore to have the estate divided. The law has provided that one shall not defeat the right of the other to the divided estate. Then the only question is, Whether the legal mode of proceeding is so convenient as the means this court affords to settle the interest between them with perfect fairness and equality. It is evident that the commission is much more convenient than the writ; the valuation of these proportions is much more considered; the interests of all parties are much better attended to; and it is a work carried on for the common benefit of both." [3]

§ 876. **Jurisdiction Arises from Inadequacy of Remedy at Law, and Not as a Mere Matter of Convenience.** — This language (it must certainly be admitted) is sufficiently loose and general. But it appears to be by no means a just description of the true nature and reason of the jurisdiction of Courts of Equity in cases of partition. It is not a jurisdiction founded at all in mere convenience, but in the judicial incompetency of the Courts of Common Law to furnish a plain, complete, and adequate remedy for such cases.[4] The true ground is far more correctly stated by Lord Redesdale in his admirable treatise on Pleadings in Equity. "In cases of partition of an estate," says he, "if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to Courts of Equity for partitions which are effected by

[1] See Watson *v.* Duke of Northumberland, 11 Ves. 155, Arguendo. As where the shares are unequal. Paddock *v.* Shields, 57 Miss. 340.

[2] Mundy *v.* Mundy, 2 Ves. jr., 124.

[3] Calmady *v.* Calmady, 2 Ves. Jr., 570. See also Baring *v.* Nash, 1 Ves. & Beam. 555.

[4] Mitford, Pl. Eq. by Jeremy, 120; Strickland *v.* Strickland, 6 Beav. R. 77, 31.

first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required; and upon the return of the commissioners, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties."[1]

§ 877. **Same.** — The ground here stated is of a complication of titles as the true foundation of the jurisdiction. But it is not even here expressed with entire legal precision. However complicated the titles of the parties might be, still if they could be thoroughly investigated at law in the usual course of proceedings in the common-law courts, there would seem to be no sufficient reason for transferring the jurisdiction of such cases to the Courts

[1] Mitford, Pl. Eq. by Jeremy, 120; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), pp. 120, 121. The commissioners do not ascertain the interests of the respective parties; but the court first ascertains the interest and the proportion of each party in the land; and then the commissioners make the allotments accordingly. Agar *v.* Fairfax, 17 Ves. 543. The mode of ascertainment is through the instrumentality of a master, to whom the subject is referred. Id. See also Phelps *v.* Green, 3 John. Ch. R. 304, 305. But the court will generally, where the title is denied, and has not been established at law, require it to be first established at law; and will retain the bill to await the decision. Wilkin *v.* Wilkin, 1 John. Ch. R. 117; Parker *v.* Gerrard, Ambler, R. 236; Phelps *v.* Green, 3 John. Ch. R. 305; Cox *v.* Smith, 4 John. Ch. R. 271, 276. Unless the title of *both* parties is clear, equity cannot decree partition. Burhans *v.* Burhans, 2 Barb. Ch. 398, 404; Garret *v.* White, 38 N. C. 131. So the plaintiff must prove his title and show that he is entitled to partition against the defendant. Ramsay *v.* Bell, 38 N. C. 209; Jope *v.* Morshead, 6 Beav. 213; Arnett *v.* Bailey, 60 Ala. 435; Oliver *v.* Jernigan, 46 Ala. 41. A bill for partition cannot be made the means of trying a disputed title, but the bill may be retained to give opportunity to try the title at law. Campbell *v.* Lowe, 9 Md. 500; Slade *v.* Barlow, L. R. 7 Eq. 296; Bolton *v.* Bolton, Ib. 298, note; Giffard *v.* Williams, L. R. 5 Ch. 546, reversing 8 Eq. 494; Daniel *v.* Green, 42 Ill. 471; Hoffman *v.* Beard, 22 Mich. 59; DeWitt *v.* Ackerman, 2 C. E. Green, 215; Hay *v.* Estell, 3 C. E. Green, 251; Hassam *v.* Day, 39 Miss. 392. See further Gourley *v.* Woodbury, 42 Vt. 395; Morenhout *v.* Higuera, 32 Cal. 289; Campau *v.* Campau, 19 Mich. 116; Riverview Cem. Co. *v.* Turner, 24 N. J. Eq. 18; Hardy *v.* Mills, 35 Wis. 141; Byers *v.* Domley, 27 Ark. 77; Chaplin *v.* Holmes, Ib. 414; Groves *v.* Groves, 3 Sneed, 187. There must be a good title shown before the court can be compelled to proceed to partition. Walker *v.* Lyon, 6 App. D. C. 484; In re Bishop's Estate, 200 Pa. 598, 50 Atl. 156; Hanneman *v.* Richter, 62 N. J. Eq. 365, 50 Atl. 904, Affirmed 63 N. J. Eq. 803, 52 Atl. 1131; Lee *v.* Lee, 161 Mo. 52, 61 S. W. 630.

Where there is a dispute as to the title to property in possession of defendant, and of which the plaintiff has never had possession, an action for partition will not lie. Damron *v.* Campion, 24 Misc. Rep. 234, 53 N. Y. Supp. 543; Ellis *v.* Feist, 65 N. J. Eq. 548, 56 Atl. 369.

Where defendant denied that he was a tenant in common with plaintiff, and alleged sole seizin in him, an action for partition will not lie till the question of title has been determined, and until this has been done the

of Equity.[1] The true expression of the doctrine should have been that Courts of Equity interfere in cases of such a complication of titles, because the remedy at law is inadequate and imperfect, without the aid of a Court of Equity to promote a discovery, or to remove obstructions to the right, or to grant some other equitable redress.[2] Besides, the remedy in Courts of Equity, even in such cases, is more perfect and extensive than at law; for in equity conveyances are directed to be made by the parties in pursuance of the allotments of the commissioners, which is a mode of redress of great importance as a permanent muniment of title, and of which a Court of Law is, by its own structure, incapable.

§ 878. **Same.** — This is very clearly but briefly stated in a judgment of Lord Redesdale. "Partition at law," said that learned judge, "and in equity are different things. The first operates by the judgment of a Court of Law and delivering up possession in pursuance of it, which concludes all the parties to it.

original case will be kept on the docket. Eagle *v.* Franklin, 71 Ark. 644, 75 S. W. 1093; Clark *v.* Roller, 199 U. S. 541, 50 L. Ed. 300, 26 S. Ct. Rep. 141.

An action for partition will lie where plaintiff owns a perfect record title, paid full value for property without notice of any pretended claim of defendant's for betterments. Hooper *v.* De Vries, 115 Mich. 231, 73 N. W. 132, 4 Detroit Leg. N. 831.

Only a joint tenant or a tenant in common of real estate can maintain an action for its partition, and an administrator of a tenant in common has no such interest in the property that he can maintain an action for its partition among the heirs at law. Phillips *v.* Dorris, 56 Neb. 293, 76 N. W. 555.

[1] See Whiting *v.* Whiting, 15 Gray, 503; Husband *v.* Aldrich, 135 Mass. 317. Secus if the titles are equitable, or if there are equities to settle. Carter *v.* Taylor, 3 Head, 30; infra, § 879.

[2] See Adams *v.* Briggs Iron Co., 7 Cush. 361; Husband *v.* Aldrich, 135 Mass. 317. See Manton *v.* Squire, 2 Freem. 26; Agar *v.* Fairfax, 17 Ves. 551; Watson *v.* Duke of Northumberland, 11 Ves. 153; Mitford, Pl. Eq. by Jeremy, 120; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), pp. 20, 21; Jeremy on Equity Jurisd. B. 3, ch. 1, § 1, pp. 303, 304. This is the ground of the jurisdiction as stated by Lord Eldon in Agar *v.* Fairfax (17 Ves. 551). "This court," said he, "issues the commission, not under the authority of any act of Parliament, but on account of the extreme difficulty attending the process of partition at law; where the plaintiff must prove his title, as he declares, and also the titles of the defendants, and judgment is given for partition according to the respective titles so proved. That is attended with so much difficulty, that by analogy to the jurisdiction of a Court of Equity in the case of dower a partition may be obtained by bill. The plaintiff must however state upon the record his own title and the titles of the defendants; and with a view to enable the plaintiff to obtain a judgment for partition, the court will direct inquiries to ascertain who are together with him entitled to the whole subject." The inquiries are (as we have seen) by a reference to a master. See the form of a Decree in Partition in 17 Ves. 545, 553, 554; Strickland *v.* Strickland, 6 Beav. R. 77, 80, 81; ante, § 847, note.

Partition in equity proceeds upon conveyances to be executed by the parties; and if the parties be not competent to execute the conveyances, the partition cannot be effectually had."[1] Hence if the infancy of the parties or other circumstances prevent such mutual conveyances, the decree can only extend to make the partition, give possession, and order enjoyment accordingly until effectual conveyances can be made. If the defect arise from infancy, the infant must have a day, after attaining twenty-one years, to show cause against the decree.[2] If a contingent remainder, not barable or extinguishable, is limited to a person not in existence, the conveyance cannot be made until he comes into being and is capable, or until the contingency is determined. An executory devise may occasion a similar embarrassment. And in either of these cases a supplemental bill will be necessary to carry the original decree into execution.[3]

§ 879. **If Title Is Clear at Law, the Remedy for Partition in Equity Is as Much a Matter of Right as at Law.**—It is upon this account that Lord Hardwicke has spoken of the remedy by partition in equity as being discretionary and not a matter of right in the parties. "Here," said he, "the reason" (that the plaintiff should show a title in himself and not allege generally that he is in possession of a moiety of the land) "is because conveyances are directed and not a partition only; which makes it discretionary in this court, where a plaintiff has a legal title, [whether] they [it] will grant a partition or not; and where there are suspicious circumstances in the plaintiff's title, the court will leave him to law."[4] His Lordship was here speaking of legal titles;

[1] Whaley *v.* Dawson, 2 Sch. & Lefr. 371, 372. Gay *v.* Parpart, 106 U. S. 679, 27 L. Ed. 256, 1 S. Ct. Rep. 456.

[2] In New York it is held that an infant cannot maintain a suit in equity for partition either alone or as a joint party with an adult. Postley *v.* Kain, 4 Sandf. Ch. 508. See Jackson *v.* Edwards, 7 Paige, 386, apart from statute. As to the present rule and practice in England see 13 & 14 Vict. ch. 60, §§ 7, 30; 31 & 32 Vict. ch. 40; 39 & 40 Vict. ch. 17; Bowra *v.* Wright, 20 L. J. Ch. 216; s. c. 3 Eng. L. & E. 190; Orger *v.* Spark, 9 Week. R. 180; Shepherd *v.* Churchill, 25 Beav. 21. In cases of lunacy, Bryant *v.* Stearns, 16 Ala. 302; In re Bloomar, 2 DeG. & J. 88; Moorehead *v.* Moorehead, 2 Ir. R. Eq. 492. Further as to partition among minors see Cocks *v.* Simmons, 57 Miss. 183; Shull *v.* Kennon, 12 Ind. 34; Thornton *v.* Thornton, 27 Mo. 302.

[3] Mitford, Pl. Eq. by Jeremy, 120, 121; Attorney-Gen. *v.* Hamilton, 1 Madd. Rep. 214; Wills *v.* Slade, 6 Ves. 498; Com. Dig. Chancery, 4 E.; Brook *v.* Hertford, 3 P. Will. 518, 519; Tuckfield *v.* Buller, 1 Dick. R. 240; Thomas *v.* Gyles, 2 Vern. 232; Gaskell *v.* Gaskell, 6 Sim. R. 643. See Martyn *v.* Perryman, 1 Rep. in Ch. 235; post, § 890.

[4] Cartwright *v.* Pulteney, 2 Atk. 380.

for in the same case he expressly stated that where the bill for a partition was founded on an equitable title, a Court of Equity might determine it,[1] or otherwise it would be without remedy.[2] And indeed if there are no suspicious circumstances, but the title is clear at law, the remedy for a partition in equity is as much a matter of right as at law.[3]

§ 880. [**Methods of Partition.** — Partition of lands between tenants in common is now generally had either by a sale held by a commissioner for the purpose, in which case all of the lands are sold and the proceeds divided amongst the tenants in common according to their respective interests; or an actual partition, where the land is of sufficient size to justify it, when each tenant in common conveys his undivided interest in the share allotted to his co-tenant. In partitioning lands amongst tenants in common, the premises are not transferred by virtue of a new title or ownership therein, but it is the same original title, subject to the same inheritable qualities, as attached to the original title of the ancestor of the tenants in common. For instance, if the title belongs to the wife, but by mistake or inadvertence or otherwise, the title to the share allotted to her is taken in the name of her husband, or in the name of her and her husband, the title is in the very same condition as if the conveyance had been made directly to her. The husband acquires no new title or estate in the property; his creditors acquire no interest in it, and upon his death the title will descend to his children as if coming from their mother.[4]]

[1] Supra, note to § 877; Campbell *v.* Lowe, 9 Md. 500; Lucas *v.* King, 2 Stockt. 277; Hosford *v.* Merwin, 5 Barb. 51; Leverton *v.* Waters, 7 Coldw. 20; Ross *v.* Cobb, 48 Ill. 111; Carter *v.* Taylor, 3 Head, 30; Williams *v.* Wiggand, 53 Ill. 233; Dameron *v.* Jameson, 71 Mo. 97, showing that the bill will be upheld though the defendant is in adverse possession if the plaintiff's title is equitable. See also as to possession Wommack *v.* Whitmore, 48 Mo. 448.

[2] It is essential to a partition in equity that the legal title should be before the court. It would be a decisive answer that the equitable title only is before the court; for then how could the conveyances be made if any should be necessary? See the opinion of Sir Thomas Plumer (Master of the Rolls) in Miller *v.* Warmington, 1 Jac. & Walk. 473.

[3] Baring *v.* Nash, 1 Ves. & B. 555, 556; Parker *v.* Gerrard, Ambler, R. 236, and Mr. Blunt's note; post, § 892; Wiseley *v.* Findlay, 3 Rand. 361, 398; Smith *v.* Smith, 10 Paige, 473; Lucas *v.* King, 2 Stockt. 277. Partition of real estate will not be decreed in favor of one partner and against another on the dissolution of the partnership. Either partner is entitled to have the whole partnership property disposed of. Wild *v.* Milne, 26 Beav. 504; Crawshay *v.* Maule, 1 Swanst. 495, 518; Darby *v.* Darby, 3 Drew, 495, 501.

[4] Sprinkle *v.* Spainhour, 149 N. C. 223, 62 S. E. 910; 25 L. R. A. (N. S.) 167; Schellinger *v.* Seloner, 46 Atl. 1058; Harrington *v.* Rawls, 136 N. C.

§ 881. [**Kinds of Property Subject to Be Partitioned.** — It may be stated generally that any kind of property, whether real, personal, or mixed, if it be such as may be owned in common or joint tenancy, is subject to partition among the several owners. There are some apparent exceptions to the rule which will be noticed presently, such as estates for life as dower and homestead interests, estates pur autre vie, remainders, both vested and contingent, and reversions. The surface ownership of the land may be in one person and the mineral rights in another, and their interests are such that both are landowners. The owner of the land may convey the surface to one and the minerals to another, and the effect of such a conveyance will be to create a separate and distinct estate in the two owners. Two or more persons may own mineral rights together, and they have such an estate in land as is capable of partition.[1] But where the lands contain oil wells which are now under lease, a partition of the oil in or under the lands, or produced or to be produced from the same, will not be partitioned during the continuance of the leases.[2] Where a testator devised his property absolutely to his wife, to be by her divided among their children whenever she saw fit, the children are not entitled to any portion of the property left

65, 48 S. E. 571; Carter *v.* Day, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757; Cottrell *v.* Griffits, 108 Tenn. 191, 65 S. W. 397, 57 L. R. A. 332, 91 Am. St. Rep. 748; Snyder *v.* Elliott, 171 Mo. 362, 71 S. W. 826; Whitsett *v.* Wamack, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339; Propes *v.* Propes, 171 Mo. 407, 71 S. W. 685.

Deed made by heirs directly to husband, instead of to his wife, it being her share of the land, is not color of title. Carson *v.* Carson, 122 N. C. 645, 30 S. E. 4.

Where a husband by quitclaim deed conveyed to his wife all of his interest in his father's estate, and subsequently he received other and additional lands from his brothers, this gave him no greater interest in the land than already conveyed by quitclaim, and the partition deed gave him no new title or estate, it simply designated the boundaries of his interest in the lands of severalty. Foster *v.* Hobson, 131 Iowa 58, 107 N. W. 1101; Pacific Bank *v.* Hannah, 90 Fed. 72, 32 C. C. A. 522.

Possession for 50 years, the making of valuable improvements, and conveyances of the land, are evidences of a partition by deed. Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 7 Detroit Leg. N. 447, 84 Am. St. Rep. 563.

[1] Ball *v.* Clark, 150 Ky. 383, 150 S. W. 359; McConnell *v.* Pierce, 216 Ill. 627, 71 N. E. 622.

[2] Hanna *v.* Clark, 204 Pa. 149, 53 Atl. 758, but see Hall *v.* Vernon, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791, 49 L. R. A. 464.

Where land was leased for a term of years, the owners are entitled to a partition of the entire estate, both lease and reversion. Oliver *v.* Lansing, 50 Neb. 828, 70 N. W. 369.

Rents are not real estate. Thomas *v.* Hamill, 106 Ill. App. 524.

by the father, unless the widow should die leaving the power of partition unexecuted, or during her lifetime she should voluntarily make a division.[1] Equity will not decree a division of lands, however, where the rights of the cestuis que trust are so interwoven in the trust established that there was no separate and severable interest in any of the parties during the lifetime of either of the original life tenants, so that, when a court of equity undertakes to separate and sever the interests of the parties during the lifetime of either of the life tenants, the trust established by the deed is at once destroyed.[2] Nor will a partition of the real estate be decreed, where from the terms of the will it was apparent that the testator intended that the land be sold and converted into cash and as such to be divided amongst his heirs at law.[3]]

§ 882. [**Estates Capable of Being Partitioned.** — The statutes authorizing the partitioning of the interests of tenants in common and joint tenants usually mean that the petitioning tenant should have at least some legal or present equitable interest in the property, but a devisee who is entitled to the rents and profits arising from property "at such time as the prudence and judgment of the trustee may deem proper," has no such estate in the lands as will be divided upon his own petition.[4] But one who owns an interest in a resulting or constructive trust has such an interest as is susceptible of partition. Where from the terms of the trust deed or will, a partition of the property is prevented, it is because that partition may destroy the trust or conflict with its terms, and when a partition will effect such a result, it will not be decreed.[5] If one of the petitioning tenants in common brings a suit asking for the partition of property, it is immaterial whether

[1] Goodrich *v.* Goodrich, 219 Ill. 426, 76 N. E. 575.

[2] Where a life estate is devised to one, with power of appointment in the event of her surviving another person, she has such an interest in land that it will not be partitioned. Schroeder *v.* Woodward, 116 Va. 506, 82 S. E. 192; Ward *v.* Ward, 163 Mich. 570, 128 N. W. 761, 17 Detroit Leg. N. 929.

[3] McGowan *v.* Tifft, 35 Misc. Rep. 603, 72 N. Y. Supp. 132.

[4] Mason *v.* Mason, 219 Ill. 609, 76 N. E. 692. Where will gives property to trustee to be held for use of two nieces, with right of survivorship in them, they have no such interest as is capable of being partitioned. Owens *v.* Naughton, 23 Pa. Super. Ct. Rep. 639; Horsfield *v.* Black; 40 App. Div. 264, 57 N. Y. Supp. 1006.

[5] Minson *v.* Bringe, 146 Wis. 393, 131 N. W. 904. Partition by one claiming to be remainder-man will not be decreed, where trust is an active one and created for lives still in existence. Peirson *v.* Van Bergen, 23 Misc. Rep. 547, 52 N. Y. Supp. 890.

he shows that he has a legal title in common with the defendants, or only an equitable title, in either case he is entitled to substantially the same relief.[1]]

§ 883. [**Same.** — The same is true of a widow and her infant children who are in possession and claiming a homestead right in the land. The widow has no such an estate in the land as entitles her alone to sue for a partition. The widow is entitled to the use of the homestead for life, and her children are entitled to live there during their minority, and ordinarily their rights are such that no partition will be had, but where it is of equal benefit to all parties concerned, and they all consent to a sale for partition, this may be done. In such case, the widow is entitled to the present value of her life interest, determined by her expectancy, and the balance will be distributed amongst the remainder-men.[2] The purpose of a homestead is to secure a home to each and all those clothed with a homestead right — to each and all of them; and the power of a stranger to enter into possession of the land, and as a tenant in common to interfere with its occupancy and control by the homestead claimants and have it partitioned, or sold, if division be impracticable, would be inconsistent with the very nature of a homestead and violative of the very purpose for which a homestead is created. So, where a widow owned an undivided interest in the lands in addition to her homestead, the lands outside of the homestead tract may be partitioned, but the homestead may not without her consent.[3] Lands occupied by

[1] Royston *v.* Miller, 76 Fed. 50; Martin *v.* Martin, 250 Mo. 539, 157 S. W. 575. If the right to an accounting arises in an action to partition a legal or equitable estate, equity will grant this additional relief, especially where to do so will do full and complete justice between the parties and settle all rights between them connected with the subject-matter. Stein *v.* McGrath, 128 Ala. 175, 30 So. 792.

[2] Clements *v.* Faulk, 181 Ala. 219, 61 So. 264; Saunders *v.* Strobel, 64 S. C. 489, 42 S. E. 429; Flynn *v.* Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245; Cox *v.* Oliver, 43 Tex. Civ. App. 110, 95 S. W. 596; Hufschmidt *v.* Gross, 112 Mo. 649, 20 S. W. 679; Stevens *v.* Wilbourn, 88 Miss. 514, 41 So. 66; Turnage *v.* Craig, 203 Ill. 167, 67 N. E. 762; Walker *v.* Walker, 195 Ill. 409, 63 N. E. 271.

Contra: Armor *v.* Lewis, 252 Mo. 568, 161 S. W. 251.

[3] Mills *v.* Stump, 20 Cal. App. 84, 128 Pac. 349.

A conditional fee may be partitioned among the tenants in common. Du Pont *v.* Du Bos, 52 S. C. 244, 29 S. E. 665.

There can be no partition of the homestead property during the life of the surviving husband or wife or minor children, unless the homestead has actually been abandoned by all of the parties entitled to possession of the same. Wells *v.* Sweeney, 16 S. Dak. 489, 94 N. W. 394, 102 Am. St. Rep. 713; but see contra, Patterson *v.* Patterson, 49 Mich. 176, 13 N. W. 504.

adjoining owners and used by them as a passageway is such a tenancy in common of lands as is capable of partition, even though its sale or division would take away the easement and right of ingress and egress of the other owners.[1]]

§ 884. [**Right to Partition of Estates Held in Reversion or Remainder.** — Reversioners and vested remainder-men are tenants in common and upon the termination of the life estate will be entitled to a partition of the common estate, but where the possible tenants in common with the petitioner are contingent remainder-men, no action for partition will lie.[2] But where all of the remainder-men are in esse, the existence of a dower right is no bar to a sale for partition of the remainder or reversion thereof, and for the purpose of partition the tenants in common are deemed seized and possessed as if no life estate existed.[3] One party who owns a present interest is entitled to a partition, though it may necessitate the setting apart of an interest in reversion or remainder. But if the petitioner has no present right of occupancy, as a reversioner, he is not entitled to a partition.[4] It is not necessary that the tenant own the estate for his own life. If he have a present vested interest and he is entitled to the immediate possession of the property, though the estate be pur autre vie, he is nevertheless entitled to have a partition of the interests.[5]

[1] Crocker *v.* Cotting, 170 Mass. 68, 48 N. E. 1023, 39 L. R. A. 215, 64 Am. St. Rep. 278.

[2] Vinson *v.* Wise, 159 N. C. 653, 75 S. E. 732; Rutherford *v.* Rutherford, 116 Tenn. 383, 92 S. W. 1112, 115 Am. St. Rep. 799; Seymour *v.* Bowles, 172 Ill. 521, 50 N. E. 122; Heininger *v.* Meissmer, 261 Ill. 105, 103 N. E. 565; Shafer *v.* Covey, 90 Kans. 588, 135 Pac. 676.

[3] Cummins *v.* Drake, 265 Ill. 111, 106 N. E. 456; Baggett *v.* Jackson, 160 N. C. 332, 76 S. E. 86; Palethorp *v.* Palethorp, 194 Pa. St. 408, 45 Atl. 322; Fitts *v.* Craddock, 144 Ala. 437, 39 So. 506, 113 Am. St. Rep. 53; Hatterich *v.* Bruce, 151 Ky. 12, 151 S. W. 31; Stovall *v.* Oates, 153 Ky. 81, 154 S. W. 914.

There can be no partition of the whole of the estate, subject to the dower and homestead rights, until these rights have been ascertained and allotted. McAllister *v.* McAllister, 189 Ala. 220, 66 So. 462; nor does partition lie so long as there is an outstanding curtesy interest. Croston *v.* Male, 56 W. Va. 207, 49 S. E. 136, 107 Am. St. Rep. 918.

[4] Wheat *v.* Wheat, 190 Ala. 468, 67 So. 417; Cummings *v.* Lohr, 246 Ill. 577, 92 N. E. 970.

Vested remainder-man has no such interest in property in possession, within meaning of Civ. Code Prac. § 490, as entitles him to a partition. Berry *v.* Lewis, 118 Ky. 652, 82 S. W. 252, 26 Ky. L. Rep. 530.

One who owns personal property in remainder and who has never had possession of the property, is not entitled to partition. Conter *v.* Herschel, 24 Nev. 152, 50 Pac. 851; Van Meter *v.* Van Meter, 160 Ky. 163, 169 S. W. 592.

[5] Holmes *v.* Fulton, 193 Pa. St. 270, 44 Atl. 426.

A tenant who owns a life estate in a one-fourth undivided interest in land has no such interest as entitles him, upon his own petition, to ask for a partition of the land.[1] Ordinarily there can be no partition of the interests of two joint owners of a life estate, and an estate for life to the survivor, but where a brother and sister inherited a home and the personal property therein, each having a life estate, and differences have arisen between them so that it is impossible for them to enjoy their interests together, a court of equity has such rights and remedies of its own that it will not permit one tenant to occupy the entire property to the exclusion of the co-tenant and will direct an actual partition of both real and personal property, subject to the rights of the contingent remainder-men.[2]]

§ 885. [**Estates Held by Entireties Are Not Subject to be Partitioned.** — The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice such estate to any greater extent than if it rested in the wife exclusively in her own right; he has no such estate as he can dispose of to the prejudice of the wife's estate. The unity of the husband and wife as one person, and the ownership of the estate by that person, prevents the disposition of it otherwise than jointly. Neither party to such tenancy can sell or convey this interest, for it is incapable of being separated. There can be no partition made of the estate, and if the husband attempts to sell timber upon the land, his grantee is not entitled to take possession as against the wife.[3]]

[1] In re Rudy's Estate, 185 Pa. St. 359, 39 Atl. 968, 64 Am. St. Rep. 654; Lave *v.* Blauw, 61 Kans. 496, 59 Pac. 1059, 48 L. R. A. 257, reversing, 9 Kans. App. 55, 57 Pac. 258; Purdy *v.* Purdy, 18 App. Div. 310, 46 N. Y. Supp. 215; Fullenwider *v.* Johnson, 145 Ky. 19, 139 S. W. 1096.

There is no right of partition between life tenant and remainder-man in Virginia. Turner *v.* Barraud, 102 Va. 324, 46 S. E. 318. See also Easly *v.* Easly, 78 Wash. 505, 139 Pac. 200; Bell *v.* Golding, 151 App. Div. 945, 136 N. Y. Supp. 278.

[2] Eisner *v.* Curiel, 20 Misc. Rep. 245, 45 N. Y. Supp. 1010.

[3] Jones *v.* Smith, 149 N. C. 318, 62 S. E. 1092, 19 L. R. A. (N. S.) 1037; Bruce *v.* Nicholson, 109 N. C. 202, 13 S. E. 790; Harrison *v.* Ray, 108 N. C. 215, 12 S. E. 993, 11 L. R. A. 722; Gray *v.* Bailey, 117 N. C. 439, 23 S. E. 318; Bynum *v.* Wicker, 141 N. C. 95, 53 S. E. 478; Shinn *v.* Shinn, 42 Kans. 1, 21 Pac. 813, 4 L. R. A. 224.

But it has been held in New Jersey that a grantee to whom the husband alone conveys is a tenant in common for the joint lives in the husband's place, and that partition may be had between such purchaser and the wife of this tenancy in common, but without affecting in any way the common-

§ 886. **Courts of Equity May Decree Owelty in Favor of One Co-tenant, as Well as a Division of the Estate.** — In regard to partitions there is also another distinct ground upon which the jurisdiction of Courts of Equity is maintainable, as it constitutes a part of its appropriate and peculiar remedial justice. It is that Courts of Equity are not restrained, as Courts of Law are, to a mere partition or allotment of the lands and other real estate between the parties according to their respective interests in the same and having a regard to the true value thereof.[1] But Courts of Equity may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality.[2]

law right of survivorship. Schulz *v.* Ziegler, 80 N. J. Eq. 199, 83 Atl. 968. See also 4 Rev. Stat. New York, § 2605 (1889, 8th ed.); Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692; Merritt *v.* Whitlock, 200 Pa. St. 50, 49 Atl. 786.

[1] Co. Litt. 176, *a* and *b*; Id. 168 *a*.

[2] See Calmady *v.* Calmady, 2 Ves. Jr. 570; Earl of Clarendon *v.* Hornby, 1 P. Will. 446, 447; Warner *v.* Baynes, Ambler, R. 589; Wilkin *v.* Wilkin, 1 John. Ch. R. 116, 117; Phelps *v.* Green, 3 John. Ch. R. 302, 305; Larkin *v.* Mann, 2 Paige, R. 27; Storey *v.* Johnson, 1 Younge & Coll. 538; s. c. 2 Younge & Coll. 586, 610, 611; post, § 893. This power rests only with the court. The commissioners of partition cannot award a sum to be paid for owelty of partition. Mole *v.* Mansfield, 15 Sim. 41. It seems that in England, before the Partition Act of 1868, 31 & 32 Vict. ch. 40, §§ 3, 4, Courts of Equity would, in small cases at least, order a sale in lieu of partition when satisfied it was for the benefit of all parties, though minors or persons out of the realm were interested. Davis *v.* Turvey, 32 Beav. 554; Hubbard *v.* Hubbard, 2 Hem. & M. 38. Though not against the will of a party in interest. Griffies *v.* Griffies, 11 Week. R. 943. But since that act sale may be ordered without the assent of all. See Roebuck *v.* Chadebet, L. R. 8 Eq. 127 (partition of part and sale of part); France *v.* France, L. R. 13 Eq. 173 (infant); Higgs *v.* Dorkis, Ib. 280 (married woman); Holland *v.* Holland, Ib. 406; Pemberton *v.* Barnes, L. R. 6 Ch. 685. See Act of 1876, 39 & 40 Vict. ch. 17; Pitt *v.* Jones, 8 Ch. D. 548; s. c. 11 Ch. D. 28; 5 App. Cas. 651; Porter *v.* Lopes, 7 Ch. D. 358. As to parties out of the jurisdiction see Peters *v.* Bacon, L. R. 8 Eq. 125; Silver *v.* Udell, L. R. 9 Eq. 227; Hurry *v.* Hurry, L. R. 10 Eq. 346; Teall *v.* Watts, L. R. 11 Eq. 213.

In many of the States there are statutes authorizing sale. Haywood *v.* Judson, 4 Barb. 228 (part allotted to one, the rest to be sold and proceeds distributed); Wilson *v.* Duncan, 44 Miss. 642; Hickenbotham *v.* Blackledge, 54 Ill. 316; Thruston *v.* Minke, 32 Md. 571; Graham *v.* Graham, 8 Bush, 334; Pockman *v.* Meatt, 49 Mo. 344; Loyd *v.* Loyd, 23 La. 231; Welsh *v.* Freeman, 21 Ohio St. 402; McCall's Appeal, 56 Pa. St. 363. Whether in the absence of statute equity will order a sale where infants are concerned see Rivers *v.* Durr, 46 Ala. 418.

It seems that a sale may be ordered with discharge of mortgages, the lien to attach to the proceeds. See Kilgour *v.* Crawford, 51 Ill. 249; Garvin *v.* Garvin, 1 S. C. 55; Girard Ins. Co. *v.* Farmers' Bank, 57 Penn.

This a Court of Common Law is not at liberty to do; for when a partition is awarded by such a court, the exigency of the writ is that the sheriff do cause, by a jury of twelve men, the partition to be made of the premises between the parties, regard being had to the true value thereof, without any authority to make any compensation for any inequality in any other manner.[1]

§ 887. **Same.** — Cases of a different nature involving equitable compensation to which a Court of Law is utterly inadequate may easily be put; such for instance as cases where one party has laid out large sums in improvements on the estate. For although under such circumstances the money so laid out does not in strictness constitute a lien on the estate, yet a Court of Equity will not grant a partition without first directing an account and compelling the party applying for partition to make due compensation.[2] So where one tenant in common has been in the exclusive

St. 388. Compare the case of marshalling in the editor's note to § 853, at the end. The partition may be confined to setting off the aliquot part of the plaintiff if the defendants do not desire further partition. Hobson *v.* Sherwood, 4 Beav. 184. As to setting off shares of two or more together, see Peers *v.* Needham, 19 Beav. 316.

Further as to owelty of partition see Thomas *v.* Farmers' Bank, 32 Md. 57; Cooke *v.* Moore, 2 S. C. 52.

A lot chargeable with owelty is liable to pay even in the hands of an infant heir. Powell *v.* Weatherington, 124 N. C. 40, 32 S. E. 380.

A son's indebtedness to his father may be charged against his interest in the estate, when directed by will, and has the same effect as if it were assessed as owelty of partition. Dunshee *v.* Dunshee, 243 Pa. 599, 90 Atl. 362.

In order for the enforcement of an owelty charge, the court must see that the requirement of owelty is equitably necessary; that the amount required is fair, and that its payment is not so imposed upon a party as to be unreasonably burdensome, considering both the condition of the property and the party. Updike *v.* Adams, 24 R. I. 220, 52 Atl. 991, 96 Am. St. Rep. 711.

The right to object to assessment of owelty is personal to the petitioner in interest. Robinson *v.* Robinson, 24 R. I. 222, 52 Atl. 992.

Generally, Eisner *v.* Curiel, 20 Misc. Rep. 245, 45 N. Y. Supp. 1010; Martin *v.* Martin, 95 Va. 26, 27 S. E. 810; Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726; In re Ausburn, 122 N. C. 42, 29 S. E. 56; Pardue *v.* Givens, 108 N. C. 413, 13 S. E. 112; Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Sawin *v.* Osborn, 87 Kans. 828, 126 Pac. 1074.

Where there is no appreciable difference in the value of two town lots, the peculiar value of one lot to the plaintiff did not render that lot intrinsically more valuable than the other lot. Field *v.* Hudson, 19 N. Mex. 89, 140 Pac. 1118.

[1] Co. Litt. 167 *d*; Com. Dig. Pleader, 3 F. 4. Littleton (§ 251) has spoken of a rent-charge in cases of partition for owelty or equality in partition. But this is not in a case of compulsive partition by writ, but of a voluntary partition by deed or by parol, as the context abundantly shows. Co. Litt. 168 *b*; Litt. §§ 250, 252.

[2] Swan *v.* Swan, 8 Price, R. 518; Martindale *v.* Alexander, 26 Ind.

perception of the rents and profits on a bill for a partition and account, the latter will also be decreed.[1] So where one tenant in common, supposing himself to be legally entitled to the whole premises, has erected valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements; or if that cannot be done, he will be entitled to a compensation for those improvements.[2]

104, 89 Am. Dec. 458; Walton *v.* Ward, 142 Ga. 385, 82 S. E. 1067; Boley *v.* Skinner, 38 Fla. 291, 20 So. 1017; Noble *v.* Tipton, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645; Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441; Pulse *v.* Osborn, 30 Ind. App. 631, 64 N. E. 59; Truth Lodge *v.* Barton, 119 Iowa 230, 93 N. W. 106, 97 Am. St. Rep. 303; Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Leavitt *v.* Locke, 68 N. H. 17, 40 Atl. 395; Legg *v.* Legg, 34 Wash. 132, 75 Pac. 130.

A partition involves the settlement of accounts between the heirs and the ancestor, but not individual accounts against each other nor a claim by one heir against the widow for her support. Faure *v.* Faure, 117 La. 204, 41 So. 494; Rentz *v.* Eckert, 74 Conn. 11, 49 Atl. 203.

The equitable rule is entirely settled that when a tenant in common has in good faith put improvements upon the common property — when the improvements were made honestly, for the purpose of improving the property, and not for the purpose of embarrassing his co-tenants or incumbering their estates, or hindering partition — he is entitled in some way to be compensated in an equitable partition. Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694.

One who makes improvements upon land during the continuance of a life estate which he owns, is not entitled to pay for such improvements after the termination of the life estate and a partition of his undivided interest in remainder. Porter *v.* Osmun, 135 Mich. 361, 98 N. W. 859, 10 Detroit Leg. N. 1013.

But where one co-tenant of his own volition makes improvements upon the property, without the consent of his co-tenants, and there is no apparent necessity for the making of the improvements, he is not entitled to recover their value in action in assumpsit. Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733.

[1] Hill *v.* Fulbrook, 1 Jac. R. 574; Lorimer *v.* Lorimer, 5 Madd. R. 363; Storey *v.* Johnson, 1 Younge & Coll. 538; s. c. 2 Younge & Coll. 586.

[2] Town *v.* Needham, 3 Paige, R. 546, 555. See also Teal *v.* Woodworth, 3 Paige, R. 470.

(*a*) Equity will incidentally settle an account between co-tenants, and charge one who occupies to the exclusion of the rest with occupation rent. Pascoe *v.* Swan, 27 Beav. 508. But it has been held that one co-tenant will not ordinarily be allowed for permanent improvements made with knowledge of the state of title, except as an offset to occupation rent. Teasdale *v.* Sanderson, 33 Beav. 534; Scott *v.* Guernsey, 48 N. Y. 106. But see Hall *v.* Piddock, 6 C. E. Green, 311, where it is held that the tenant is entitled in equity to claim for improvements made in good faith, though with knowledge. In Campbell *v.* Campbell, 21 Mich. 438, where in a suit for partition there had been improvements, but whether they had been paid for, and by whom, and what were the rights of the parties in regard to the same, was doubtful, it was held that partition should be made regardless of such questions. See further Green *v.* Putnam, 1 Barb. 500; Putnam *v.* Ritchie, 6 Paige, 390; In re Heller, 3 Paige,

§ 888. [**Apportionment of Taxes and Insurance against Several Shares.** — One co-tenant cannot fraudulently pay off a lien or purchase the property at a sale thereunder, so as to obtain any title adverse to his co-tenants, yet he is entitled to be reimbursed any moneys that he may have advanced to discharge a common burden, such, for instance, as taxes, insurance premiums, assess-

199; Conklin *v.* Conklin, 3 Sandf. Ch. 64. But if the erection of improvements has under the circumstances created a claim, the portion improved should be set off to the party who made them, if this can be done without injury to the rights of the rest; if it cannot so be done, then there must be compensation. Kurtz *v.* Hibner, 55 Ill. 514; Dean *v.* O'Meara, 47 Ill. 120. See Hall *v.* Piddock, 6 C. E. Green, 311, 314.

The defendant co-tenant should bring any claim of his for improvements by cross-bill. Stafford *v.* Nutt, 39 Ind. 93; Bond *v.* Hill, 37 Tex. 626.

In regard to the right of a tenant in common to partition where the land is subject to a charge in favor of such party and of others, see Otway-Cave *v.* Otway, L. R. 2 Eq. 725.

It is well settled that in partition proceedings, where one tenant in common has improved a part of the land, he is entitled to have it allotted to him at a valuation made without regard to the improvement. Pipkin *v.* Pipkin, 120 N. C. 161, 26 S. E. 697.

If the entire estate were a wilderness, and one co-tenant cleared part of the land and made it more valuable, upon a partition the land should be treated as if it were all a wilderness now, and that portion which has been cleared should be allotted to him who has made the improvement, and if his half is more valuable than the other half in a state of nature, contribution should be ordered. Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Collect *v.* Henderson, 80 N. C. 337; Kurtz *v.* Hibner, 55 Ill. 514, 8 Am. Rep. 665; Dugan *v.* City, 70 Md. 1, 16 Atl. 501; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911; McKelvey *v.* McKelvey, 83 Kans. 246, 111 Pac. 180; Martin *v.* Martin, 95 Va. 26, 27 S. E. 810; Polk *v.* Gunther, 107 Tenn. 16, 64 S. W. 25; Carson *v.* Broady, 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Keneaster *v.* Erb, 83 N. J. Eq. 625, 92 Atl. 377, reversing 83 N. J. Eq. 206, 89 Atl. 995; Ratterman *v.* Apperson, 141 Ky. 821, 133 S. W. 1005; Gayley *v.* Nichols, 263 Ill. 116, 104 N. E. 1054; Yung *v.* Blake, 156 App. Div. 211, 141 N. Y. Supp. 300; Skidmore *v.* Guenthal, 143 App. Div. 407, 128 N. Y. Supp. 402; Folk *v.* Brooks, 91 S. C. 7, 74 S. E. 46; Ventre *v.* Tiscornia, 23 Cal. App. 598, 138 Pac. 954; Milligan *v.* Masden, 25 Ky. L. Rep. 144, 74 S. W. 1049; Fenton *v.* Wendell, 116 Mich. 45, 74 N. W. 384, 4 Detroit Leg. N. 1057, 72 Am. St. Rep. 502.

A co-tenant is not entitled to pay for improvements put upon the property by a third person, for which he has paid nothing, without any showing of good faith and with the intent that the improvement should add to the permanent value of the common property. Pesqueira *v.* Kellogg, 8 Ariz. 266, 71 Pac. 915.

One who claimed sole seizin and who made improvements in good faith upon the strength of his title, should be allowed pay for his improvements. Moy *v.* Moy, 111 Iowa 161, 82 N. W. 481.

One co-tenant should not be allowed for improvements made, they being just ordinary repairs, where the other co-tenants have not charged him with rent. Booth *v.* Booth, 114 Iowa 78, 86 N. W. 51.

ments for improvement purposes, and ordinary repairs. State, county, and municipal taxes are recognized as legal burdens imposed on property, the discharge of which being for the preservation of the estate and for the benefit of all concerned, the ones paying the same have a lien therefor on the share of their co-tenants for repayment.[1]]

§ 889. **Partition Binds Only Those Persons before the Court and Those Whom They Represent.** — Indeed in a great variety of cases, especially where the property is of a very complicated nature as to rights, easements, modes of enjoyment, and interfering claims, the interposition of a Court of Equity seems indispensable for the purposes of justice. For since partition is ordinarily a matter of right, no difficulty in making a partition is allowed to prevail in equity, whatever may be the case at law, as the powers of the court are adequate to a full and just compensatory adjustment.[2] There have been cases disposed of in equity which seemed almost impracticable for allotment at law, as in the case of the Cold Bath Fields, in which Lord Hardwicke did not hesitate to act, notwithstanding the admitted diffi-

[1] Walker *v.* Williams, 84 Miss. 392, 36 So. 450; Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; McCants *v.* McCants, 51 S. C. 503, 29 S. E. 387; Taylor *v.* Dawson, 65 Ill. App. 232; Campbell *v.* Campbell, 21 Mich. 438; Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410; Coffman *v.* Gates, 110 Mo. App. 475, 85 S. W. 657; Sharp *v.* Zeller, 114 La. 549, 38 So. 449; Plant *v.* Fate, 114 Iowa 283, 86 N. W. 276; Booth *v.* Booth, 114 Iowa 78, 86 N. W. 51; Anderson *v.* Shaw, 131 La. 662, 60 So. 50; Rich *v.* Smith, 26 Cal. App. 775, 148 Pac. 545.

Premiums paid by one tenant on a policy which covered her interest alone, are not chargeable against her co-tenants in partition. Havey *v.* Kelleher, 36 App. Div. 201, 56 N. Y. Supp. 889; Fenton *v.* Wendell, 116 Mich. 45, 74 N. W. 384, 4 Detroit Leg. N. 1057, 72 Am. St. Rep. 502.

Nor are premiums upon an insurance policy, covering improvements made by one co-tenant and which were of especial benefit to him, and made without consent of co-tenants; nor are water rents paid by the co-tenant in possession, chargeable against the common property, these charges being of no especial benefit to the property or the other tenants. Clapp *v.* Hunter, 52 App. Div. 253, 65 N. Y. Supp. 411.

Where one co-tenant discharged a mortgage given for balance of purchase price for which his co-tenant was equally liable, he is entitled upon partition to be reimbursed his half out of the other's share. Weiskircher *v.* Connelly, 248 Pa. 327, 93 Atl. 1068; Funk *v.* Seehorn, 99 Mo. App. 587, 74 S. W. 445.

The tenant who has discharged all of an assessment for a drainage tax upon the common property, is entitled to be reimbursed. McNamara *v.* McNamara, 167 Iowa 479, 149 N. W. 642.

The assessment of taxes against property of which one supposed he was sole seized, as well as the tax assessor, is not entitled to recover pro rata part from the real co-tenant. O'Hara *v.* Quinn, 20 R. I. 176, 38 Atl. 7.

[2] Ante, § 885.

culties.[1] Nor does it constitute any objection in equity that the partition does not or may not finally conclude the interests of all persons, as where the partition is asked only by or against a tenant for life or where there are contingent interests to vest in persons not in esse.[2] For the court will still proceed to make partition between the parties before the court who possess competent present interests, such as a tenant for life or for years.[3] But under such circumstances the partition is binding upon those parties only who are before the court, and those whom they virtually represent;[4] and the interests of third persons are not affected.[5] And it is not an unimportant ingredient in the exercise of equity jurisdiction in cases of partition that the parties in interest may be brought before the court far more extensively than they can be by any processes known to the Courts of Law, for the purpose of doing complete justice.[6]

§ 890. **Same.** — Doubts were formerly entertained whether in a suit in equity for a partition brought only by or against a tenant for life of the estate where the remainder is to persons not in esse, a decree could be made which would be binding upon the persons in remainder. That doubt however is now removed, and the decree is held binding upon them upon the ground of a virtual representation of them by the tenant for life in such cases.[7] But if the partition is made in pursuance of an agreement between the tenant for life and the other party, under such circumstances the court will direct it to be referred to a master to inquire and state whether it will be for the future benefit of the remainder-

[1] Warner *v.* Baynes, Ambler, R. 589; Turner *v.* Morgan, 8 Ves. 143, 144.

[2] Gaskell *v.* Gaskell, 6 Sim. 643.

[3] Wills *v.* Slade, 6 Ves. 498; Baring *v.* Nash, 1 Ves. & B. 555; Wotten *v.* Copeland, 7 John. Ch. R. 140; Gaskell *v.* Gaskell, 6 Sim. R. 643; Striker *v.* Mott, 2 Paige, R. 387, 389; Woodworth *v.* Campbell, 5 Paige, R. 518. See Heaton *v.* Dearden, 16 Beav. 147; Hodge *v.* Lipscomb, 133 N. C. 199, 45 S. E. 556; Smith *v.* Gudger, 133 N. C. 627, 45 S. E. 955; Kornegay *v.* Miller, 137 N. C. 659, 50 S. E. 315; Anderson *v.* Wilkins, 142 N. C. 154, 55 S. E. 272; Springs *v.* Scott, 132 N. C. 548, 44 S. E. 116; McAfee *v.* Green, 143 N. C. 411, 55 S. E. 828. See also Revisal of 1905 of North Carolina, § 1590.

[4] Story on Equity Pleadings, §§ 144 to 148; Gaskell *v.* Gaskell, 6 Sim. R. 643.

[5] Agar *v.* Fairfax, 17 Ves. 544.

[6] Anon. 3 Swanst. R. 139, note (*b*). Where the defendant is a non-resident, the jurisdiction is statutory entirely, and the statute must be strictly complied with. Platt *v.* Stewart, 10 Mich. 260. Courts of one State cannot order partition of lands in another. Johnson *v.* Kimbro, 3 Head, 557.

[7] Gaskell *v.* Gaskell, 6 Sim. R. 643. See also Martyn *v.* Perryman, 1 Ch. Rep. 235; Brook *v.* Hertford, 2 P. Will. 518; ante, § 885.

men that the agreement should be carried into execution without any variations, or if with variations, what the variations ought to be.[1]

§ 891. **Improvements Made by One Tenant upon the Common Property Will Be Allotted to Him in His Share.** — In suits in equity also for partition various other equitable rights and claims and adjustments will be made which are beyond the reach of Courts of Law. Thus if improvements have been made by one tenant in common, a suitable compensation will (as we have seen) be made him upon the partition, or the property on which the improvements have been made assigned to him.[2] So Courts of Equity will not only take care that the parties have an equal share and just compensation, but they will assign to the parties respectively such parts of the estate as would best accommodate them and be of most value to them with reference to their respective situations in relation to the property before the partition.[3] For in all cases of partition a Court of Equity does not act merely in a ministerial character and in obedience to the call of the parties who have a right to the partition, but it founds itself upon its general jurisdiction as a Court of Equity, and administers its relief ex æquo et bono according to its own notions of general justice and equity between the parties. It will therefore by its decree adjust all the equitable rights of the parties interested in the estate,[4] and will if necessary for this purpose give special instructions to the commissioners, and nominate the commissioners, instead of allowing them to be nominated by the parties.[5]

§ 892. **Same.** — And Courts of Equity in making these adjustments will not confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate which have been derived from any of the original tenants in common; and will if necessary for this purpose direct a distinct partition of each of several portions of the estate in which the derivative alienees have a distinct interest, in order to protect that

[1] Gaskell *v.* Gaskell, 6 Sim. R. 643.

[2] See § 888.

[3] Storey *v.* Johnson, 1 Younge & Coll. 538; s. c. 2 Younge & Coll. 586; see note to § 887.

[4] The claims of the ancestor's creditors may be adjusted in a suit between heirs for partition. Gatewood *v.* Toomer, 14 Rich. Eq. 39.

[5] Haywood *v.* Judson, 4 Barb. 228. The report of the commissioners is regarded in the same light as the verdict of a jury in a trial at law, and will be set aside only on grounds which would justify a new trial at law. Livingston *v.* Clarkson, 4 Edw. 596.

interest. Thus where A, B, and C were tenants in common in undivided third parts of an estate comprising Whiteacre and Blackacre, and C had conveyed his interest in Blackacre to D and his interest in Whiteacre to E, upon a bill filed by A and B for partition of the whole estate the court directed that Blackacre should be divided into three parts, and one part should be conveyed to A and B and D respectively, and that Whiteacre should be divided into three parts, and one part should be conveyed to A and B and E respectively. In this way, consistently with the rights of A and B, the interests of D and E were, as in equity they ought to be, fully protected and secured.[1]

§ 893. **Same.** — In equity too (and it would seem that the same rule prevails at law, though this has sometimes been doubted),[2] where there are divers parcels of lands, messuages, and houses, partition need not be made of each estate separately so as to give to each party his moiety or other portion in every estate; but the whole of one estate may be allotted to one, and the whole of another estate to the other, provided that his equal share is allotted to each.[3] But it is obvious that at law such a partition can rarely be conveniently made, because the court cannot decree compensation so as to make up for any inequality which must ordinarily occur in the allotment of different estates to each party. In equity it is in the ordinary course.[4]

§ 894. **Not Necessary to State in the Bill Any Peculiar Ground of Equitable Interference.** — It is upon some or all of these grounds, the necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of Courts of Equity, and their ability to clear away all intermediate obstructions against complete justice, that these courts have assumed a general concurrrent jurisdiction with Courts of Law in all cases of partition.[5] So that it is not now deemed necessary to state in the bill any peculiar ground of equitable interference;[6] and unless I am greatly misled in my judgment, this review of

[1] Storey *v.* Johnson, 1 Younge & Coll. 538; s. c. 2 Younge & Coll. 586.

[2] See Arguendo in Earl of Clarendon *v.* Hornby, 1 P. Will. 446, 447; Storey *v.* Johnson, 1 Younge & Coll. 538; s. c. 2 Younge & Coll. 586.

[3] Earl of Clarendon *v.* Hornby, 1 P. Will. 446, 447; Peers *v.* Needham, 19 Beav. 316.

[4] Ante, § 886. [5] Haywood *v.* Judson, 4 Barb. 228.

[6] Mitford, Plead. Eq. by Jeremy, 120; Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, pp. 304, 305; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), pp. 10, 21. It is held in Husband *v.* Aldrich, 135 Mass. 317, and in Whiting *v.* Whiting, 15 Gray, 503, that equity has no jurisdiction in Massachusetts

the true sources and objects of this concurrent jurisdiction demonstrates in the most satisfactory manner how ill founded the animadversions of Mr. Hargrave (already cited) are upon the exercise of this jurisdiction.[1] But the most conclusive proof in its favor is, that wherever it exists it has almost entirely superseded any resort to Courts of Law to obtain a partition. In making partition however Courts of Equity generally follow the analogies of the law, and will decree it in such cases as the Courts of Law recognize as fit for their interference.[2] But Courts of Equity are not therefore to be understood as limiting their jurisdiction in partition to cases cognizable or relievable at law; for there is no doubt that they may interfere in cases where a writ of partition would not lie at law,[3] as for instance in the case where an equitable title is set up.[4]

to decree partition between tenants in common, on the ground that by statute full relief can be had at law. But see Hess *v.* Voss, 52 Ill. 472, contra. And see the editor's note to § 33, ante.

[1] See § 872.

[2] Wills *v.* Slade, 6 Ves. 498; Baring *v.* Nash, 1 Ves. & B. 555.

[3] Swan *v.* Swan, 8 Price, R. 519; Woodworth *v.* Campbell, 5 Paige, 518: Bailey *v.* Sisson, 1 R. I. 233; Haywood *v.* Judson, 4 Barb. 228.

[4] Cartwright *v.* Pulteney, 2 Atk. 380; Cox *v.* Smith, 4 John. Ch. R. 276. See Miller *v.* Warmington, 1 Jac. & Walk. 473; Com. Dig. Chancery, 4 E. Partition; ante, § 885. Hosford *v.* Merwin, 5 Barb. 51. But where an estate is devised to trustees for conversion inter alia, the beneficiaries must in England all agree to the partition though their interest is vested. Biggs *v.* Peacock, 22 Ch. D. 284. See Taylor *v.* Grange, 15 Ch. D. 165; s. c. 13 Ch. D. 223; Swaine *v.* Denby, 14 Ch. D. 326. Partition may be decreed though the trustees have a discretionary power of sale. Boyd *v.* Allen, 24 Ch. D. 622. As to costs in cases of partition, Landell *v.* Baker, L. R. 6 Eq. 268; Osborn *v.* Osborn, Ib. 338 (infants); France *v.* France, L. R. 13 Eq. 173; Miller *v.* Marriott, L. R. 7 Eq. 1; Cannon *v.* Johnson, L. R. 11 Eq. 90.

CHAPTER XVI

PARTNERSHIP

§ 895. **Partnership.** — Another head of concurrent jurisdiction arising from similar causes is in relation to PARTNERSHIP.[1] In cases of this nature where a remedy at law actually exists it is often found to be very imperfect, inconvenient, and circuitous. But in a very great variety of cases there is in fact no remedy at all at law to meet the exigency of the case. We shall in the first instance take notice of such remedies as exist at law, and then proceed to the considerations of others which are peculiar to Courts of Equity. [Before going into this subject, it may be well to consider what business transaction between parties will produce the partnership relation. The requisites of a copartnership have been stated in the text-books and cases in various forms of expression which substantially agree that the essential requisites to constitute the relation is a community of interest between the parties for the purpose of profit. Ordinarily the profits are expected to arise from the purchase and sale of some form of property, but they may be produced by the skill and industry of the parties as in the case of professional firms or those for the organization or promotion of various enterprises.[2]]

§ 896. **Nature of the Jurisdiction.** — And here it may be proper to begin by a reference to that which is in its own nature preliminary to all other inquiries; to wit, the actual existence of the partnership itself. Although in many cases written articles or instru-

[1] See Com. Dig. Chancery, 3 V. 6.

[2] Collom *v.* Bruning, 49 La. Ann. 1257, 22 So. 744; Hallenbeck *v.* Rogers, 58 N. J. Eq. 580, 43 Atl. 1098; see also 57 N. J. Eq. 199, 40 Atl. 576; Setzer *v.* Beale, 19 W. Va. 274; Williamson *v.* Nigh, 58 W. Va. 629, 53 S. E. 124; Morgart *v.* Smouse, 112 Md. 615, 77 Atl. 137; Foley *v.* McKinley, 114 Minn. 271, 131 N. W. 316; Fritz *v.* Johnson, 114 Minn. 316, 131 N. W. 337; Towers *v.* Errington, 78 Misc. Rep. 297, 138 N. Y. Supp. 119; Williams *v.* Knibbs, 213 Mass. 534, 100 N. E. 666; Kent *v.* Cobb, 24 Colo. App. 264, 133 Pac. 424; Eiler's Music House *v.* Reine, 65 Oreg. 598, 133 Pac. 788; Croft *v.* Bain, 49 Mont. 484, 143 Pac. 960.

ments of partnership exist as the foundation of the joint concerns, yet in many other cases the partnership itself exists merely in parol. And even in cases of written articles there are many defects and omissions which the parties have left unprovided for.[1] Now a controversy may arise in regard to the existence of the partnership between the partners themselves, or between them and third persons.[2] In each case its existence may mainly depend upon the discovery to be obtained through the instrumentality of a Court of Equity. If written articles exist, they may be suppressed or concealed; if none exist, it may be impracticable to obtain due knowledge of the partnership by any competent witnesses in the ordinary course of law. But in by far the most numerous and important class of cases, that of secret and dormant partners, there may not be and indeed ordinarily will not be any adequate means at law to get at the names or numbers of the partners. In all such cases the powers of a Court of Equity will be found most effective by means of a bill of discovery to bring out all the facts, as well in controversies between the partners themselves as between them and third persons.

§ 897. **Remedies at Law between Partners.** — But admitting a partnership to exist, let us now proceed to consider what are the remedies at law which exist between the partners themselves. These of course are dependent upon the nature of the partnership and the grievance for which a remedy is sought. If the articles of partnership are under seal, and any violation of any of the stipulations therein contained exists, it may be and is properly remediable by an action of covenant. If there are written articles not under seal, or the partnership is by a parol agreement, the proper remedy for any breach of the stipulations is by an action of assumpsit. But, as we shall presently see, both these remedies

[1] When after the expiration of the term limited by the partnership articles the business is carried on by the partners without new articles, the old provisions will govern so far as consistent with a partnership now at will. Cox *v.* Willoughby, 13 Ch. D. 863.

[2] Query whether persons associated together for the purpose of procuring an act of incorporation under which to trade are to be treated before the act is obtained as partners, so as to permit one of them to have recourse in equity against the others for a simple tort. In the cases of Holmes *v.* Higgins, 1 Barn. & C. 74, and Lucas *v.* Beach, 1 Man. & G. 417, it is held they are. See however 1 Lindl. Part. (4th ed.), 31, 32; Dole *v.* Wooldredge, 135 Mass. 140.

How far members of a mutual insurance company are partners, see In re Albion Assur. Co., 16 Ch. D. 83; Winstone's Case, 12 Ch. D. 239.

Further what constitutes partnership, see Powsey *v.* Armstrong, 18 Ch. D. 698; Steward *v.* Blakeway, L. R. 6 Eq. 479; s. c. 4 Ch. 603.

are utterly inadequate to provide for many exigencies and injuries which may arise out of the violation of partnership rights and duties.

§ 898. [**A Fiduciary Relationship Exists between the Partners.** — There can be no question but that the law holds each member of a partnership to the highest degree of good faith in his dealings with reference to any matter which concerns the business of the common engagement, and that each partner, being the agent of the firm, must be held, during the existence of the relation, to the same accountability as other trustees, in all matters which affect the common interest. He owes his partner the strictest good faith, and as an agent of the firm is under obligation to keep an accurate account of the moneys which passed through his hands. "Uberrima fides" is the rule which applies to agents, partners and trustees.[1] 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 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.[2]]

§ 899. **Partners Entitled to Action of Account.** — The most extensive and generally the most operative remedy at law between partners is an action of account. This is the appropriate and except under very peculiar circumstances is the only remedy at the common law for the final adjustment and settlement of partnership transactions. It is a very ancient remedy between partners, in which one naming himself a merchant may sue his partner for a reasonable account, naming him a merchant, and charging him as the receiver of the moneys of himself arising from whatever cause or contract for the common profit of both according to the law merchant.[3]

[1] Edwards *v.* Johnson, 90 S. C. 90, 72 S. E. 638; Wiggins *v.* Markham, 131 Iowa 102, 108 N. W. 113; McKinley *v.* Lynch, 58 N. W. 44, 51 S. E. 4; Chittenden *v.* Whitbeck, 50 Mich. 401, 15 N. W. 526.

In the absence of an express agreement, there is an implied agreement that each partner will devote himself reasonably to the advancement of the partnership business. Barclay *v.* Barrie, 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, reversing 154 App. Div. 925, 139 N. Y. Supp. 81.

[2] Krebs *v.* Blankenship, 73 W. Va. 539, 80 S. E. 948.

[3] Co. Litt. 172 *a*; Fitz. N. B. 117 D.

§ 900. **Same.** — But it is wholly unnecessary to dwell upon the inadequacy of this remedy in cases of partnership, as all the remarks already made in respect to the dilatory, cumbrous, and inconvenient proceedings in actions of account[1] apply with augmented force to cases of partnership, where it is absolutely impossible, in many cases, to settle the concerns of the partnership without the production of the books, vouchers, and other documents belonging to the partnership, and the personal examination of the partners themselves. So intimate is the confidence and so universal the community of interest and operations between partners, that no proceedings, not including a thorough and minute discovery, can enable any court to arrive at the means of doing even reasonable justice between them. And in addition to the common difficulties in ordinary cases, the death of either partner put an end, at the common law, to any means of enforcing this remedy by account; for it being founded in privity between the parties, no suit lay by or against the personal representative of the deceased partner to compel an account.[2]

§ 901. [**Right of Accounting.** — In every partnership, each member of the firm is entitled to have an accounting upon a dissolution of the firm, and he owes to his fellow members a correlative duty to keep accurate books of account of all moneys and articles of property coming under his control during the continuance of the partnership relation. The accounts should be kept as accurately and fully detailed as is possible, but if the co-partner knows that the account is correctly kept, though it does not go into detail in each item of charge or credit, he cannot complain.[3] But where the managing partner has kept the books of account, it is his duty, upon the winding up of the partnership, to accurately state his account and show item after item, and he cannot defeat the rights of his co-partner to a settlement and accounting by failing to keep such records.[4] Where there is a dispute in regard to partnership matters, and either party or both parties has been so negligent as to lose the evidence of the partnership, and to keep their accounts in such a confused way that the court cannot see what decree would do justice between the parties, the court will be unable to make a decree at all, and will dismiss the bill.[5]]

[1] Ante, §§ 581 to 589. [2] Ante, § 585.

[3] House *v.* Linn & Co., 179 Ill. App. 114.

[4] Gay *v.* Householder, 71 W. Va. 277, 76 S. E. 450; Richard *v.* Mouton, 109 La. 465, 33 So. 563.

[5] Ryman *v.* Ryman's Execrs., 100 Va. 20, 40 S. E. 96, 3 Va. Super. Ct. Rep. 599.

§ 902. **Same.** — In a few cases indeed where there has been a covenant or promise to account, Courts of Law have attempted to approximate towards an effectual remedy in the shape of damages for a breach of the obligation. But it is manifest that even in these cases the damages must be wholly uncertain unless an account can be fully and fairly taken between the parties, for otherwise there will be no rule by which to ascertain the damages. There has too been a struggle in cases where one partner has been compelled to advance or pay money on the partnership account out of his own private funds, to give him a remedy at law for a contribution from the other partners. But it is difficult to perceive how, except under very peculiar circumstances, such a remedy will lie.[1] For it is impossible, during the continuance of the partnership, without taking a general account, to say that any one partner, so called upon to advance or pay money, is on the whole a creditor of the firm to such an amount. And if he is, how, in point of technical propriety, can he institute a remedy against his other partners alone as contradistinguished from the partnership? It is very certain that if he should lend the partnership a sum of money, he could not sue for it at law, for he

[1] It is no part of the object of these Commentaries to show in minute detail the nature and extent of the legal remedies in cases of this sort. Where the partnership has been dissolved, and upon such a dissolution all the accounts of the partnership have been adjusted, as between the partners, or where one partner has purchased the property and agreed to pay all the debts, there, if the other partner is called upon to pay a partnership debt, he may be entitled at law to contribution. So where upon a dissolution of a partnership all the accounts have been adjusted and a balance struck, an action at law will lie for such balance. So where a sum of money has been received for one partner's separate account by the other partners, he may recover the same in an action of assumpsit as money had and received for his use. But all these and other cases of the like nature stand upon their own special circumstances, and steer wide of the general doctrine. There is no case in the English courts (although there may be cases in some of the American courts) where any action at law except on account has been held to lie generally to settle partnership accounts, or for a contribution by one partner against the others, for money paid by him for the use of the partnership. The learned reader will find many of the cases collected and commented on in Mr. Collyer's valuable work on Partnership, B. 2, ch. 3, §§ 1, 2, 4, and in the notes of the able American editor, Mr. Phillips, in his edition of that work. Mr. Gow, in his work on the same subject (ch. 2, § 3), has discussed the same subject at large; and in his last (the third) edition he has corrected some of the inadvertences into which he had fallen on this subject by relying too much upon some loose dicta in some of the authorities. See also Holmes *v.* Higgins, 1 B. & Cressw. 74; Harvey *v.* Crickett, 5 M. & Selw. 336; Bovill *v.* Hammond, 6 B. & Cressw. 149; Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; McGinty *v.* Orr, 110 Mo. App. 336, 85 S. W. 955; Sullivan *v.* Sullivan, 122 Wis. 326, 99 N. W. 1022.

could not sue himself; and it is not very easy to perceive a clear distinction between this and the former case. And if it should turn out, upon taking a general account, that such partner was a debtor to the partnership, it would be unreasonable and useless to allow him to recover the very money which he must refund to the partnership; for the maxim of common sense as well as of common justice is, "Frustra petis quod statim alteri reddere cogeris." [1]

§ 903. **One Partner Is Liable for Damages Arising through Failure to Furnish Part of Stock to the Partnership.** — Cases have also occurred in which suits at law have been maintained for the breach of an agreement to furnish a certain sum or stock for the partnership purposes. In such a case the transaction is not so much a partnership transaction as an agreement to launch the partnership; and an agreement to pay money or furnish stock for such a purpose is an individual engagement of each partner to the other.[2] For the breach of such an agreement there seems no reasonable objection to the maintenance of a suit at law.[3] But what should be the measure of the damages must depend upon the circumstances of each particular case. No general rule can be laid down to govern all cases. If the partnership has no specific term fixed for its continuance, in many cases the damages would be merely nominal. If it has such a specific fixed term, the damages must necessarily be of a very uncertain nature and extent. The whole sum agreed for the partnership stock could not be the true rule, for that would be in effect to give one partner the whole capital stock. And on the other hand the possible profits of the partnership if carried on would not furnish a rule, because of the uncertainty of such profits, and their being to arise in futuro, and the injury not being certain at the time of the breach.[4]

§ 904. **Specific Performance Lies to Compel One to Carry Out His Contract to Enter into Partnership.** — The remedial justice administered by Courts of Equity is far more complete, extensive,

[1] Branch's Maxims, 55.

[2] See Venning *v.* Leckie, 13 East, R. 7; Gale *v.* Leckie, 2 Stark. R. 107; Terrill *v.* Richards, 1 Nott & McCord, R. 20; Rule *v.* McGregor, 117 Iowa 419, 90 N. W. 811; Owen *v.* Meroney, 136 N. C. 475, 48 S. E. 821, 103 Am. St. Rep. 952; McCollum *v.* Carlucci, 206 Pa. 312, 55 Atl. 979, 98 Am. St. Rep. 780; Taylor *v.* Nelson, 26 Cal. App. 681, 147 Pac. 1189.

[3] See Hill *v.* Palmer, 56 Wis. 123; Vance *v.* Blain, 18 Ohio, 532; Ellison *v.* Chapman, 7 Blackf. 224; Ness *v.* Fisher, 5 Lans. 236.

[4] See some special cases in Watney *v.* Wells, L. R. 2 Ch. 250; Dinham *v.* Bradford, L. R. 5 Ch. 519.

and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner where no redress whatsoever, or very imperfect redress, could be obtained at law. In the first place they may decree a specific performance of a contract to enter into a partnership for a specific term of time (for it would ordinarily be useless to enforce one which might be dissolved instantly at the will of either party),[1] and to furnish a share of the capital stock, which a Court of Law is incapable of doing.[2] This remedy however is rarely sought, for the plain reason that few partnerships can be hoped to be successful where they begin in mutual distrust, dissatisfaction, or enmity.[3]

§ 905. **Same.** — In like manner after the commencement and during the continuation of a partnership Courts of Equity will in many cases interpose to decree a specific performance of other agreements in the articles of partnership. If for instance there be an agreement to insert the name of a partner in the firm name, so as to clothe him publicly with all the rights of acting for the partnership, and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name, Courts of Equity will grant a specific relief by an injunction against the use of any other firm name not including his. But the remedy in such cases is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental, or trivial omission.[4]

[1] This qualification (ordinarily) is necessary; for a specific performance may in some cases be important to establish rights under a partnership which has no fixed term for its continuance. Mr. Swanston, in his excellent note to Crawshay *v.* Maule, 1 Swanst. R. 511, 512, 513, has clearly shown the propriety of the qualification. See also Birchett *v.* Bolling, 5 Munf. R. 442.

Somerby *v.* Buntin, 118 Mass. 279, 287. But equity will secure to a partner the interest in property to which the partnership contract entitles him.

[2] Anon. 2 Ves. 629, 630; Hercy *v.* Birch, 9 Ves. 357; Buxton *v.* Lister, 3 Atk. 385; Hibbert *v.* Hibbert, cited in Collyer on Partn. B. 2, ch. 2, § 2, p. 197; Crawshay *v.* Maule, 1 Swanst. 511, 512, Mr. Swanston's note; Peacock *v.* Peacock, 16 Ves. 49; Birchett *v.* Bolling, 5 Munf. R. 442.

[3] Equity will not specifically enforce a verbal contract to form a partnership for trading in land, as it seems. Mason *v.* Kaine, 63 Pa. St. 335. Indeed Courts of Equity now decline in general to enforce executory contracts for forming partnerships. Ib.; Stocker *v.* Wedderborn, 3 Kay & J. 393; Scott *v.* Rayment, L. R. 7 Eq. 112; Somerby *v.* Buntin, 118 Mass. 279, 287; Sichel *v.* Mosenthal, 8 Jur. (N. S.) 275; 30 Beav. 371; Manning *v.* Wadsworth, 4 Md. 59. But see England *v.* Curling, 8 Beav. 129; Whitworth *v.* Harris, 40 Miss. 483, as to cases where such remedy is necessary for the protection of rights.

[4] Marshall *v.* Colman, 2 Jac. & Walk. 266, 269.

So where there is an agreement not to raise money in the name or on the credit of the firm for the private use of any one partner, Courts of Equity will, from the manifest danger of injury to the firm, interpose by injunction to stop such an abuse of the credit of the firm.[1] So where there is an agreement by the partners not to engage in any other business, Courts of Equity will act by injunction to enforce it, and if profits have been made by any partner in violation of such an agreement in any other business the profits will be decreed to belong to the partnership.[2] So if it is agreed that upon the dissolution of a partnership a certain partnership-book shall belong to one of the partners and the other shall have a copy of it, Courts of Equity will decree a specific performance.[3]

[1] Ibid. See Stockdale *v.* Allery, 37 Pa. St. 486.

[2] See Somerville *v.* Mackay, 16 Ves. 382, 387, 389. See Lock *v.* Lyman, 4 Ir. Ch. 188; Dean *v.* McDowell, 8 Ch. D. 345; Tyrrell *v.* Bank of London, 10 H. L. Cas. 26; s. c. 8 Jur. (N. S.) 849; Jones *v.* Dexter, 130 Mass. 380; Freeman *v.* Freeman, 136 Mass. 260; Herrick *v.* Ames, 8 Bosw. 115; Love *v.* Carpenter, 30 Ind. 284; ante, § 447. While no rule can be laid down by which the good will of a trading partnership as an asset can be stated; yet, if the concern has been in business long enough, and its business is of such a character, and the incidents of its locality, and a distinctive name, have a value, then the name and what is done under it go together and a good will exists which forms an asset of commercial value in a winding up between the partners. Moore *v.* Rawson, 185 Mass. 264, 70 N. E. 64.

Injunctive relief will lie to restrain the use of one's name when used in connection with a business it adds a peculiar value to the business. Wright Restaurant Co. *v.* Seattle Restaurant Co., 67 Wash. 690, 122 Pac. 348; Weinstock *v.* Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57; International Silver Co. *v.* William H. Rogers Corp., 66 N. J. Eq. 119, 57 Atl. 1037, 2 Ann. Cas. 407; Royal Baking Powder Co. *v.* Royal, 122 Fed. 337, 58 C. C. A. 499; Stuart *v.* Stewart, 91 Fed. 243, 33 C. C. A. 480; Kates *v.* Bok, 139 App. Div. 640, 124 N. Y. Supp. 297, 126 N. Y. Supp. 606.

Where plaintiff and defendant, co-partners, sold their business to a corporation which was composed of themselves and a third party, and plaintiff sold his interest to his business partners, and it was agreed that upon a dissolution of the corporation the party who paid the most for the property was entitled to use the old name, the plaintiff was not entitled to an injunction to restrain the use of the name by the original incorporators where they continued the business after the expiration of the charter. Withers *v.* Mills, 168 App. Div. 209, 153 N. Y. Supp. 1016.

But where a father and son were in business, the father died and the son later sold his interest to defendant, with right to use the old name, an injunction to restrain the use of the name does not lie. Marcus *v.* McFarland, 119 Md. 269, 86 Atl. 337.

[3] Lingen *v.* Simpson, 1 Sim. & Stu. 600. For a more full consideration of this subject, see Story on Partnership, §§ 188 to 190; Id. §§ 204 to 215; Id. §§ 224 to 232; Richardson *v.* Bank of England, 4 Mylne & Craig, R. 165, 172, 173; Featherstonhaugh *v.* Turner, 25 Beav. 382. Equity will

§ 906. **Same.** — Courts of Equity will even go further, and in case of a partnership existing during the pleasure of the parties, with no time fixed for its renunciation, will interfere (as it should seem) to qualify or restrain that renunciation unless it is done under fair and reasonable circumstances; for if a sudden dissolution is about to be made in ill faith and will work irreparable injury, Courts of Equity will, upon their ordinary jurisdiction to prevent irreparable mischief, grant an injunction against such a dissolution.[1] And this is in strict conformity to the doctrine of the civil law on the same subject. By that law a partnership, without any express agreement for its continuance, may be dissolved by either party provided the renunciation be bona fide and reasonable. The same principles are recognized in the countries which derive their jurisprudence from the civil law.[2]

§ 907. **Partner May Be Enjoined from Doing Any Act Injurious to Partnership.** — In like manner Courts of Equity will interfere by way of injunction to prevent a partner, during the continuation of the partnership, from doing any acts injurious thereto; as by signing or indorsing notes to the injury of the partnership, or by driving away customers, or by violating the rights of the other parties, or his duty to them, even when a dissolution is not necessarily contemplated.[3]

§ 908. [**The Property Belongs to the Firm and Not to the Several Partners.** — It may be said generally that the right of the partner in the firm property is in effect a right to share in the surplus left after discharging all the firm debts, including the reimbursement to the partner for advancements made by him in excess of his proportional share. Each partner has the right to require all the firm assets to be applied to the payment of the firm debts. The assets of a partnership are held by the firm for the benefit of its individual members and its creditors. The individual partners have only an interest in what remains of the partnership property after the firm debts have been paid, and the equities

also enjoin the taking away partnership-books. Taylor *v.* Davis, 3 Beav. 388, note; Greatrex *v.* Greatrex, 1 DeG. & S. 692.

[1] See Chavany *v.* Van Sommer, 3 Wooddes. Lect. 416, note; s. c. cited 1 Swanst. R. 511, 512, in a note. See Id. 123; 16 Ves. 49; 17 Ves. 198, 308.

[2] See 2 Bell, Comm. B. 7, ch. 3, n. 1227; Ersk. Inst. B. 3, tit. 3, § 26; 1 Stair's Inst. B. 1, tit. 16, § 4; Pothier, Traité de Société, n. 65, 149, 150, 151.

[3] See Charlton *v.* Poulter, 19 Ves. 148, *n.*; Goodman *v.* Whitcomb, 1 Jac. & Walk. 589; Collyer on Partn. B. 2, ch. 3, § 5; Marshall *v.* Watson, 25 Beav. 501; England *v.* Curling, 8 Beav. 129; Hall *v.* Hall, 12 Beav. 414; Marble Co. *v.* Ripley, 77 U. S. 329, 19 L. Ed. 955; McCollum *v.* Carlucci, 206 Pa. 312, 55 Atl. 979, 98 Am. St. Rep. 780.

of the partners among themselves have been adjusted. He has no several rights to any specific part of the property, or interest therein. The corpus is joint property. A sale or assignment of his interest therefor must be subject to the paramount rights of existing firm creditors and the equities of the partners.[1] The interest that partners have in a partnership property is not that of tenants in common, nor of joint tenancy, but is sui generis and peculiar to itself. Each partner has a joint interest in the whole, but not a separate interest in any particular part of the property. A partner cannot transfer an undivided interest in any specific article belonging to the firm. A partner may assign his interest in a partnership to a third person, but such person does not thereby, without the consent of the other partners, become a partner in the firm. Such a transfer of a partner's interest, either by voluntary act or legal process, simply entitles such person to receive such partner's share of what may remain after a settlement of the partnership affairs and the payment of all partnership debts. He takes nothing but a chose in action and the right to an accounting. He simply becomes subrogated to the rights of said partner in the winding up and settlement of the partnership estate.[2]]

§ 909. [**A Partner Is Liable for Wrongful Use of the Common Property.** — Each partner occupying the relation of a trustee for the benefit of his co-partner, with reference to the firm property that may come into his hands, it follows that he is liable to the partnership for the improper use or application of any property that may be under his control. He has no right to use the firm property in the payment of his individual debts, and where this has been done — property relieved from the lien of a mortgage, and then a conveyance of the estate directly to the wife, with knowledge of the fraudulent application by her husband of his firm's funds, equity will charge her a trustee for the benefit of the partnership and charge the husband's interest in the partnership with whatever amount he has wrongfully used.[3] Where the plaintiff

[1] Ewart *v.* Nave-McCord Merc. Co., 130 Mo. 112, 31 S. W. 1041; Costello *v.* Costello, 152 App. Div. 280, 137 N. Y. Supp. 132, 103 N. E. 148, 209 N. Y. 252; Kenneweg *v.* Schilansky, 45 W. Va. 521, 31 S. E. 949; Pratt *v.* McGuinness, 173 Mass. 170, 53 N. E. 380; Lambert *v.* Griffith, 50 Mich. 286, 15 N. W. 458; King *v.* Board of Canvassers, 37 R. I. 254, 92 Atl. 569.

[2] Home State Bank *v.* Vandolah, 188 Ill. App. 123; Eiler's Music House *v.* Reine, 65 Oreg. 598, 133 Pac. 788.

[3] Hanna *v.* McLaughlin, 158 Ind. 292, 63 N. E. 475; Bingham *v.* Keylor, 25 Wash. 156, 64 Pac. 942; Brown *v.* Orr, 110 Va. 1, 65 S. E. 499; Smith *v.* Hart, 179 Ill. App. 98.

owned a majority of the interest in the partnership, and it was agreed that he should have the active control of the business, credit extended to insolvent relatives of the defendant partner, against the wishes of the plaintiff, should be charged against the share of the defendant upon an accounting.[1] And so, where there was no guaranty of the faithful performance of the duties of a son of one of the partners who was employed as book-keeper, his failure to properly keep the books, entailing much loss to the firm, cannot be charged against the interest of his father, the son being merely an agent of the firm.[2] Any property that may be recovered from the partner who has wrongfully converted or used it, is subject to division among the other partners, according to their respective interests.[3]]

§ 910. [**The Managing Partner Is Not Held to the Highest Degree of Business Judgment.** — A partner who does not look after the active business matters himself, but leaves this to his co-partner, has no right to look to him to perform the business transaction with other than ordinary care. His dealings with the firm are not to be measured by the strict business acumen of his neighbor, nor is he liable for mere errors of judgment where otherwise he has used ordinary prudence and shown reasonable business ability in the management of affairs. For instance, where the

[1] McCoy *v.* Crosfield, 54 Oreg. 591, 104 Pac. 423; Hollister *v.* Simonson, 36 App. Div. 63, 55 N. Y. Supp. 372.

A partner has no right to pay his personal taxes and charge them up to the firm or pay them out of the common property. Snyder *v.* Seaman, 157 N. Y. 449, 52 N. E. 658.

[2] Archer *v.* Barry, 23 Ky. L. Rep. 12, 62 S. W. 485.

[3] Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621.

A partner has no right to receive property in payment of firm debt, after dissolution, in anything but cash, and then he has no right to apply what he received in payment of his own debts without the consent of his co-partners. Kutz *v.* Naugle, 7 Pa. Super. Ct. Rep. 179.

Where one partner used firm property in the erection of his house and charged the amount used against his individual account, he became the individual debtor of the partnership and the firm had no right to follow the amount thus used into the building. Lassiter *v.* Stainback, 119 N. C. 103, 25 S. E. 726; Columbia Finance & Trust Co. *v.* First Natl. Bank, 25 Ky. L. Rep. 561, 116 Ky. 364, 76 S. W. 156; Ulrich *v.* McConaughey, 69 Neb. 773, 96 N. W. 645.

One partner can give a valid mortgage on partnership property to secure his individual debt, but it would be subject to the rights of the firm creditors. Patterson *v.* Atkinson, 20 R. I. 102, 37 Atl. 532.

One partner may not make a profit to himself out of his individual delayings with the firm property, but he may engage in the real estate business with his own private funds, so long as that interest does not conflict with that of his firm. Shrader *v.* Downing, 79 Wash. 476, 140 Pac. 558, 52 L. R. A. (N. S.) 389.

active business partner had probably failed to collect as many of the accounts as might have been collected by more diligent demands, and they were finally charged to profit and loss, with the consent of the other partner, the managing partner should not be charged with the amount of these bad debts.[1] If he exercises the same business prudence and judgment as is ordinarily exercised in such business, he is not liable though he make an honest error in his judgment, nor for failure to take the utmost precaution possible in making investments.[2]]

§ 911. [**Good Faith Required of Partners in Dealings with the Firm.** — The relation of partners having been established between the contending parties, their rights and duties, as between themselves, are to be governed by the rules applicable to trustees and agents, and the trust relation, which exists between them, is not terminated with the dissolution, but continues until a final adjustment and settlement of the partnership affairs is had. A partner, after a dissolution of the co-partnership, but before a final accounting, purchased a note of the firm at a discount. Whatever discount he obtained in the purchase of the note inures to the benefit of the common fund and he ought to be allowed more upon an accounting than the amount he actually paid for the paper.[3] And so where one partner having possession and control of partnership property uses the same to acquire property in his own name, the property so acquired inures to the benefit of his co-partner, and his co-partner may demand an interest in the property obtained corresponding in extent to his interest in the original partnership property.[4] A partner is not bound by any act of a co-partner in bad faith toward him, though within the scope of the partner's powers, except in favor of persons who have in good faith parted with value in reliance upon such act. In the making of a partnership agreement, he has no right to purchase property, for his part of the firm assets, at a greatly reduced price,

[1] Knipe *v.* Livingstone, 209 Pa. 49, 57 Atl. 1130; Childers *v.* Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. Rep. 777; Inman *v.* Inkster, 90 Neb. 704, 134 N. W. 265.

[2] Exchange Bank *v.* Gardner, 104 Iowa 176, 73 N. W. 591; Hollister *v.* Simonson, 36 App. Div. 63, 55 N. Y. Supp. 372.

[3] Filbrun *v.* Ivers, 92 Mo. 388, 4 S. W. 674; Wiggins *v.* Markham, 131 Iowa 102, 108 N. W. 113; Law *v.* Emery, 8 N. Dak. 515, 79 N. W. 1053; Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55; White *v.* Jouett, 147 Ky. 197, 144 S. W. 55; Holmes *v.* Darling, 213 Mass. 303, 100 N. E. 611; Hurst *v.* Brennen, 239 Pa. 216, 86 Atl. 778; Axton *v.* Kentucky Bottlers Assn., 159 Ky. 51, 166 S. W. 776; Galbraith *v.* Devlin, 85 Wash. 482, 148 Pac. 589.

[4] Deaver *v.* O'Hara, 36 Colo. 476, 85 Pac. 1123.

where he has misled his co-partner as to the amount of assets he was furnishing.[1] Nor is one member of the firm entitled to share in the surplus, where from his own private acts he has disqualified himself to partake in the assets upon an accounting.[2]]

§ 912. **Where Remedy at Law Is Adequate, Equity Will Not Grant Relief.** — These are instances (and others might be mentioned) [3] of the remedial justice of Courts of Equity in carrying into specific effect the articles of partnership where the remedy at law would be wholly illusory or inadequate. But it is not hence to be inferred that Courts of Equity will in all cases interfere to enforce a specific performance of such articles. Where the remedy at law is entirely adequate, no relief will be granted in equity. And where the stipulation, though not against the policy of the law, yet is an effort to devest the ordinary jurisdiction of the common tribunals of justice, such as an agreement, in case of any disputes, to refer the same to arbitrators, Courts of Equity will not, any more than Courts of Law, interfere to enforce that agreement, but they will leave the parties to their own good pleasure in regard to such agreements.[4] The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced. And at all events courts of justice are presumed to be better capable of administering and enforcing the real rights of the parties than any mere private arbitrators, as well from their superior knowledge as their superior means of sifting the controversy to the very bottom.[5]

§ 913. **Court of Equity May Effect a Dissolution of the Partnership.** — The remedial justice of Courts of Equity is not confined to cases of the nature above stated. They may not only provide for a more effectual settlement of all the accounts of the partnership after a dissolution, but they may take steps for this purpose which Courts of Law are inadequate to afford. They may perhaps interpose and decree an account where a dissolution has not taken place and is not asked for; although ordinarily they are not inclined to decree an account unless under special circumstances,

[1] Mattern *v.* Canavan, 3 Cal. App. 493, 86 Pac. 618.
[2] Grafton *v.* Paine, 7 App. D. C. 255.
[3] See Collyer on Partn. B. 2, ch. 3, § 5.
[4] But see editor's note at end of § 1900.
[5] Street *v.* Rigby, 6 Ves. 815, 818; Thompson *v.* Charnock, 8 T. R. 139; Waters *v.* Taylor, 15 Ves. 10; Wellington *v.* Mackintosh, 2 Atk. 569.
See Agar *v.* Macklew, 2 Sim. & S. 418; Darby *v.* Whitaker, 4 Drew. 134; Jackson *v.* Jackson, 1 Sm. & G. 184; Dinham *v.* Bradford, L. R. 5 Ch. 519; post, § 1900, and notes.

if there is not an actual or contemplated dissolution so that all the affairs of the partnership may be wound up.[1]

§ 914. **A Receiver Will Be Appointed, upon a Dissolution, to Wind Up Partnership Affairs.** — But where such dissolution has

[1] Forman *v.* Homfray, 2 Ves. & B. 329; Harrison *v.* Armitage, 4 Madd. R. 143; Russell *v.* Loscombe, 4 Simons, R. 8; Knowles *v.* Haughton, 11 Ves. 168; s. c. Collyer on Part. B. 2, ch. 3, § 3, p. 163, note (*a*); Waters *v.* Taylor, 15 Ves. 15. Lord Eldon, in Forman *v.* Homfray (2 Ves. & Beam. 329), thought that no account ought to be decreed unless there is also a prayer for a dissolution. But the then vice-chancellor (Sir John Leach), in Harrison *v.* Armitage (4 Madd. R. 143), thought otherwise. In the later case of Russell *v.* Loscombe (4 Simons, R. 8), the present vice-chancellor (Sir Lancelot Shadwell) agreed with Lord Eldon, and held the bill demurrable for not praying a dissolution. In Walworth *v.* Holt, 4 Mylne & Craig, 619, 635 to 639, Lord Cottenham reviewed the cases at large and said: "When it is said that the court cannot give relief of this limited kind, it is, I presume, meant that the bill ought to have prayed a dissolution and a final winding up of the affairs of the company. How far this court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say anything beyond what is necessary for the decision of this case; but there are strong authorities for holding that to a bill praying a dissolution all the partners must be parties, and this bill alleges that they are so numerous as to make that impossible. The result therefore of these two rules would be, — the one binding the court to withhold its jurisdiction except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it, — that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind would be an absolute denial of justice to a large portion of the subjects of the realm in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law; for as I have said upon other occasions, I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy. This has always been the principle of this court, though not at all times sufficiently attended to. It is the ground upon which the court has in many cases dispensed with the presence of parties who would, according to the general practice, have been necessary parties. In Cockburn *v.* Thomson Lord Eldon says: 'A general rule established for the convenient administration of justice must not be adhered to in cases in which, consistently with practical convenience, it is incapable of application;' and again, 'The difficulty must be overcome upon this principle, that it is better to go as far as possible towards justice than to deny it altogether.' If therefore it were necessary to go much further than it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I should not shrink from the responsibility of doing so; but in this particular case, notwithstanding the opinions to which I have referred, it will be found that there is much more of authority in support of the equity claimed by this bill than there is against it. It is true that the bill does not pray for a dissolution, and that it states the company to be still subsisting; but it does not pray for an

taken place an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership

account of partnership dealing and transactions for the purpose of obtaining the share of profits due to the plaintiffs, which seems to be the case contemplated in the opinions to which I have referred; but its object is to have the common assets realized and applied to their legitimate purpose, in order that the plaintiffs may be relieved from the responsibility to which they are exposed, and which is contrary to the provisions of their common contract and to every principle of justice. But whether the interest of the plaintiffs, in right of which they sue, arises from such responsibility or from any other cause cannot be material; the question being, Whether some partners, having an interest in the application of the partnership property, are entitled on behalf of themselves and the other partners, except the defendants, to sue such remaining partners in this court for that purpose, pending the subsistence of the partnership; and if it shall appear that such a suit may be maintained by some partners on behalf of themselves and others similarly circumstanced, against other persons, whether trustees and agents for the company, or strangers being possessed of property of the company, it may be asked, Why the same right of suit should not exist when the party in possession of such property happens also to be a partner or shareholder. In Chancey *v.* May, the defendants were partners. In the Widows' Case before Lord Thurlow, cited by Lord Eldon, the bill was on behalf of the plaintiffs and all others in the same interest, and sought to provide funds for a subsisting establishment. In Knowles *v.* Haughton, 11th July, 1805, reported in Vesey, but more fully in Collyer on the Law of Partnership, the bill prayed an account of partnership transactions, and that the partnership might be established; and the decree directed an account of the brokerage business, and to ascertain what, if anything, was due to the plaintiff in respect thereof; and the master was to inquire whether the partnership between the plaintiff and the defendant had at any time, and when, been dissolved; showing that the court did not consider the dissolution of the partnership as a preliminary necessary before directing the account. In Cockburn *v.* Thomson the bill prayed a dissolution; but it was filed by certain proprietors on behalf of themselves and others, and Lord Eldon overruled the objection that the others were not parties. In Hichens *v.* Congreve the bill was on behalf of the plaintiff and the other shareholders, against certain shareholders who were also directors, not praying a dissolution, but seeking only the repayment to the company of certain funds alleged to have been improperly abstracted from the partnership property by the defendants; and Sir Anthony Hart overruled a demurrer, and his decision was affirmed by Lord Lyndhurst. In Walburn *v.* Ingilby the bill did not pray a dissolution of partnership, and Lord Brougham, in allowing the demurrer upon other grounds, stated that it could not be supported upon the ground of want of parties, because a dissolution was not prayed. In Taylor *v.* Salmon the suit was by some shareholders on behalf of themselves and others, against Salmon, also a shareholder, to recover property claimed by the company, which he had appropriated to himself; and the vice-chancellor decreed for the plaintiff, which was affirmed on appeal. The bill did not pray a dissolution, and the company was a subsisting and continuing partnership. That case and Hichens *v.* Congreve differ from the present in this only, that in those cases the partnerships were flourishing and likely to continue; whereas in the present, though not dissolved, it is unable to carry on the purpose for which it was

business and make sale of the partnership property, so that a final distribution may be made of the partnership effects.[1] This

formed, an inability to be attributed in part to the withholding that property which this bill seeks to recover. So far this case approximates to those in which the partnership has been dissolved; as to which it is admitted that this court exercises its jurisdiction. This case also differs from the two last-mentioned cases in this, that the difficulty in which the plaintiffs are placed, and the consequent necessity for the assistance of this court, is greater in this case, — no reason, certainly, for withholding that assistance. How far the principle upon which these cases have proceeded is consistent with the doctrine in Russell *v.* Loscombe, 'That in occasional breaches of contract between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the court stands neuter,' will be to be considered if the case should arise. It is not necessary to express any opinion as to that in the present case; but it may be suggested that the supposed rule that the court will not direct an account of partnership dealings and transactions, except as consequent upon a dissolution, though true in some cases and to a certain extent, has been supposed to be more generally applicable than it is upon authority, or ought to be upon principle. It is however certain that this supposed rule is directly opposed to the decision of Sir J. Leach in Harrison *v.* Armitage and Richards *v.* Davies. Having referred to so many cases in which suits similar to the present have been maintained by some partners on behalf of themselves and others, it is scarcely necessary to say anything as to the objection for want of parties; and as to the assignees of those shareholders who have become bankrupts, those assignees are now shareholders in their places, for the purpose of any interest they have in property of the company; and as such are included in the number of those on whose behalf the suit is instituted. A similar objection was raised and overruled in Taylor *v.* Salmon as to the shares of Salmon. Upon the authority of the cases to which I have referred, and of the principle to which I have alluded, if it be necessary to resort to it, I am of opinion that the demurrer cannot be supported; and that the usual order, overruling a demurrer, must be substituted for that pronounced by the vice-chancellor." The point must therefore be held to be still open for further consideration. See Hall *v.* Hall, 3 Macn. & G. 79; s. c. 12 Beav. 419, and 20 Beav. 139; Thomas *v.* Davies, 11 Beav. 29; Smith *v.* Jeges, 4 Beav. 503; Fairthorne *v.* Weston, 3 Hare, 387.

[1] See Crawshay *v.* Maule, 1 Swanst. R. 506, 523; Peacock *v.* Peacock, 16 Ves. 57, 58; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 308; Crawshay *v.* Collins, 15 Ves. 218; Wilson *v.* Greenwood, 1 Swanst. R. 471; Oliver *v.* Hamilton, 2 Anst. R. 453.

See Richards *v.* Baurman, 65 N. C. 162; Phillips *v.* Trezevant, 67 N. C. 370; Martin *v.* Hurley, 84 Mo. App. 670.

Where the firm property was distributed among the partners for purpose of payment of firm debts, and they disagreed as to value of property turned over, etc., a receivership was proper. Bennett *v.* Smith, 108 Ga. 466, 34 S. E. 156; and certainly so where the partner who had the property in his possession was insolvent and he was about to dispose of it to the prejudice of his co-partners. Taylor *v.* Russell, 119 N. C. 30, 25 S. E. 710.

A receiver will not be appointed, if the defendant, having possession of the alleged partnership property, denies the existence of any partnership, and is solvent. There must be clear evidence of a partnership. Wood *v.* Wood, 50 W. Va. 570, 40 S. E. 416.

a Court of Law is incompetent to do. The accounts are usually directed to be taken (as has been already suggested) before a master, who examines the parties if necessary, and requires the production of all the books, papers, and vouchers of the partnership; and he is armed, from time to time, by the court, with all the powers necessary to effectuate the objects of the reference to him. If it is deemed expedient and proper, the court will restrain the partners from collecting the debts or disposing of the property of the concern, and will direct the moneys of the firm received by any of them to be paid into court. In this way it adapts its remedial authority to the exigencies of each particular case.[1]

A receiver will be appointed where one of the partners has been excluded from participating in the firm property, and there is evidence of insolvency and a wasting of the property. Cole *v.* Price, 22 Wash. 18, 60 Pac. 153; Fleming *v.* Carson, 37 Oreg. 252, 62 Pac. 374; Witheree *v.* Witheree, 17 App. Div. 181, 45 N. Y. Supp. 297; Vieth *v.* Ress, 60 Neb. 52, 82 N. W. 116; Comstock *v.* McDonald, 113 Mich. 626, 71 N. W. 1087, 4 Detroit Leg. N. 439; Taylor *v.* Wells, 113 Iowa 326, 85 N. W. 30; Fink *v.* Montgomery, 162 Ind. 424, 68 N. E. 1010; Gillett *v.* Higgins, 142 Ala. 444, 38 So. 664; Redding *v.* Anderson, 37 Wash. 209, 79 Pac. 628.

There must be at least some amount of property to be taken in charge. Life insurance assessments to be paid at the option of the members as they accrue in the future, are not such funds as will authorize the appointment of a receiver. Blackwell *v.* Mutual Reserve Fund Life Assn., 141 N. C. 117, 53 S. E. 833; Lowther *v.* Lowther, 105 App. Div. 638, 94 N. Y. Supp. 159.

The exercise of the power of appointment of a receiver is in the sound discretion of the court. Silveira *v.* Reese, 138 Cal. 19, 71 Pac. 515.

[1] See Collyer on Partn. B. 2, ch. 3, § 3, and the cases there cited; Foster *v.* Donald, 1 Jac. & Walk. 252, 253.

Equity in general will not appoint a receiver or manager at the instance of one of the partners, in a suit which does not seek to dissolve the partnership. Roberts *v.* Eberhardt, Kay, 148. See Sheppard *v.* Oxenford, Kay & J. 491, infra; Sloan *v.* Moore, 37 Pa. St. 217; Garretson *v.* Weaver, 3 Edw. 385; cases indicating exceptions to the general rule. Nor in a suit which does seek dissolution will a receiver be appointed upon an interlocutory application, and merely upon evidence that the partners do not co-operate in the management of the business, unless one has wrongfully excluded the other from participation therein. Roberts *v.* Eberhardt, supra; Werner *v.* Leisen, 31 Wis. 169. See Birdsall *v.* Colie, 2 Stockt. 63; Hall *v.* Hall, 3 Macn. & G. 79; Henn *v.* Walsh, 2 Edw. 129; Walker *v.* House, 4 Md. Ch. 39; Madgwick *v.* Wimble, 6 Beav. 495.

Among the exceptions to the rule first stated may be noticed the case of Sheppard *v.* Oxenford, supra. There the partnership property consisted in mines, plant, and slaves in Brazil, put into shares and sold in England in the form of scrip transferable by delivery, and the defendant and another, at a meeting of the shareholders, had been appointed sole directors and trustees of the property, and the associate had died and disputes had arisen. It was held that an owner of shares purchased in the market

§ 915. **Partnership May Be Dissolved during Term for Insanity of a Partner or for Impracticability of Carrying on the Partnership Relation.** — But perhaps one of the strongest cases to illustrate the beneficial operation of the jurisdiction of Courts of Equity in regard to partnership is their power to dissolve the partnership during the term for which it is stipulated. This is a peculiar remedy which Courts of Common Law are incapable of administering by the nature of their organization. Such a dissolution may be granted in the first place on account of the impracticability of carrying on the undertaking either at all or according to the stipulations of the articles.[1] In the next place it may be granted on account of the insanity [2] or permanent incapacity of

might maintain a bill against the defendant as sole surviving trustee for an account of the receipts and payments of the debts of the association, and a division of the profits, and for a receiver, though the bill did not pray for a dissolution. The defendant had however left England after the filing of the bill and pending the motion for a receiver; and it was considered that the plaintiff had an equity to have the property secured by the appointment of a receiver. Sheppard *v.* Oxenford, 1 Kay & J. 491. Further as to partnerships with transferable shares see Phillips *v.* Blatchford, 137 Mass. 510, a case of contribution.

[1] Baring *v.* Dix, 1 Cox, R. 213; Waters *v.* Taylor, 2 Ves. & B. 299; Barr *v.* Speirs, 2 Bell, Comm. 642, § 1227, note (6); Harrison *v.* Tennant, 21 Beav. 482; Slemmer's Appeal, 58 Pa. St. 168. But dissolution will not ordinarily be decreed at a time when it would work special hardship, as at the beginning of a large operation. Richards *v.* Baurman, 65 N. C. 162; Sebastian *v.* Military Academy, 22 Ky. L. Rep. 186, 56 S. W. 810; Potter *v.* Tolbert, 113 Mich. 486, 71 N. W. 849, 4 Detroit Leg. N. 365; dissolution may be caused by war; Taylor *v.* Hutchinson, 25 Gratt. 536, 18 Am. Rep. 699.

[2] In Anonymous, 2 Kay & J. 441, a motion was made for a preliminary injunction to restrain a partner who six months before, being temporarily insane, had attempted to commit suicide, from interfering in the partnership affairs. It was refused on the ground that the evidence did not show that at the time of the motion he was incompetent to conduct the business of the partnership according to the articles. And it was declared that the fact that the conduct and state of mind of the partner in question were such as at once to destroy the confidence of the other partners, and to induce customers to withdraw their custom from the firm, and that the malady was such as might have led the partner to attempt the life of one of his associates, did not show sufficient ground for granting the motion. And a motion in a cross-suit, to restrain the defendants therein from preventing the partner in question from transacting the business of the firm as a partner, was granted.

It was considered in the same case that the following propositions had been established by the authorities: 1. That actual insanity of a partner is not of itself a dissolution of the partnership; there must be a decree of dissolution. 2. That such a decree, notwithstanding proof of actual insanity before the filing of the bill, will not be made in a disputed case without further inquiry upon the point whether, at the time when the relief is ought, the party is in such a state of mind as to be able to conduct

one of the partners.[1] In the next place it may be granted on account of the gross misconduct of one or more of the partners.[2] But trifling faults and misbehavior which do not go to the sub-

the business with the other members of the firm according to the articles. 3. That insanity existing when the relief is sought, with probability of its continuance, is ground for dissolution. See Kirby *v.* Carr, 3 Younge & C. 184; Jones *v.* Noy, 2 Mylne & K. 125; Saddler *v.* Lee, 6 Beav. 324; Besch *v.* Frolich, 1 Phill. 172; Leaf *v.* Coles, 1 DeG. M. & G. 171; Bagshaw *v.* Parker, 10 Beav. 532.

[1] Waters *v.* Taylor, 2 Ves. & B. 299; Sayer *v.* Bennet, 1 Cox, R. 107; s. c. 1 Montague on Partn. Appx. 18; Collyer on Partn. B. 2, ch. 3, § 3; Pearse *v.* Chamberlain, 2 Ves. 34, 35; Wrexham *v.* Hudleston, 1 Swanst. R. 514, note.

[2] See Marshall *v.* Coleman, 2 Jac. & Walk. [266] 300; Goodman *v.* Whitcomb, 1 Jac. & Walk. [569] 594; Chapman *v.* Beach, Id. [573] 594; Norway *v.* Rowe, 19 Ves. 148; Waters *v.* Taylor, 2 Ves. & B. 304; Master *v.* Kirton, 3 Ves. 74; De Berenger *v.* Hammel, 7 Jarman, Convey. 26, cited Collyer on Partn. B. 2, ch. 3, § 3, p. 161; Russell *v.* Loscombe, 4 Simons, R. 8; Bluck *v.* Capstick, 12 Ch. D. 863; Essell *v.* Hayward, 6 Jur. (N. S.) 690; Hartman *v.* Woehr, 3 C. E. Green, 383; Seighortner *v.* Weissenborn, 5 C. E. Green, 172; Werner *v.* Leisen, 31 Wis. 169. And this though the party asking for dissolution may have committed the first wrong. Blake *v.* Dorgan, 1 Green (Iowa), 537. If however the plaintiff knew of the bad character of the defendant before he entered into partnership with him, he may be barred. Ambler *v.* Whipple, 87 U. S. 546, 22 L. Ed. 403.

Error of judgment in a partner is no ground for dissolution. Cash *v.* Earnshaw, 66 Ill. 402.

Dissolution may be granted for the fraud of the defendant in inducing the plaintiff to join him in partnership, with an injunction of course against the further use of the plaintiff's name. Smith *v.* Everett, 126 Mass. 304; Richards *v.* Todd, 127 Mass. 167; Rawlins *v.* Wickham, 3 DeG. & J. 304; Mycock *v.* Beatson, 13 Ch. D. 384; Rose *v.* Watson, 10 H. L. Cas. 672; Aberamen Iron Works *v.* Wickens, L. R. 4 Ch. 101. And equity will order the defendant to repay all sums of money the plaintiff has paid into the firm as his part of the capital stock, pay him a reasonable compensation for the time spent as partner, and indemnify him from all liability arising out of such partnership. Richards *v.* Todd, supra. The plaintiff also will be entitled to a lien on the surplus of the partnership assets after satisfying the partnership debts, in respect of the sum paid on entering the firm; and in respect of any surplus paid in satisfying partnership debts, he will be entitled to stand in the place of the partnership creditors to whom he has made payment. Mycock *v.* Beatson, supra.

As to dissolution on the ground of disputes between the partners, see Lyon *v.* Tweddell, 17 Ch. D. 529.

Where one of the partners neglected live stock intrusted to his care, and permitted the buildings to be torn down to the damage to the premises, it is such misconduct as warrants a dissolution of the co-partnership. Lisco *v.* Husmann, 98 Neb. 276, 152 N. W. 383.

A repudiation by a partner of his own obligations may be considered as a repudiation of the partnership, and sufficient to warrant a dissolution of it. Westwood *v.* Cole, 66 Misc. Rep. 53, 120 N. Y. Supp. 884; Karrick *v.* Hannaman, 168 U. S. 335, 42 L. Ed. 484, 18 Sup. Ct. Rep. 135.

stance of the contract do not constitute a sufficient ground to justify a decree for a dissolution.[1]

§ 916. [**Dissolution on Account of Death of a Partner.** — As a general rule the death of a partner will dissolve the co-partnership, and he holds the property for the benefit of himself and the representative of his deceased co-partner for the purpose of payment of debts, and then a distribution to them according to their respective interests; but it often becomes a serious question whether a partnership has been dissolved by the death of one of its members, dependent upon the inherent nature of the business in which the firm was engaged, or upon the contract of partnership, or upon the testamentary disposition which the deceased partner makes of his interest in the firm, with the assent of the surviving members. If there is any special skill or capacity in the partner who has died, it is apparent that the partnership would cease to exist from the time of his death and that it could not be continued.[2] But if the business is of such a nature, for instance, simply keeping the partner's capital invested in the partnership, there is no reason why his death should terminate the relation, and especially where it is provided by the partner's will that his death should not terminate the partnership.[3] It is sometimes stipulated in the articles of agreement that the death of one of the members shall not terminate the partnership, and where the firm consists of a number of members and the objects of the business are that the partnership shall be continued practically indefinitely, the death of one member does not bring the partnership relation to a close.[4] Nor is such a stipulation absolutely binding upon

Where a contract between attorneys provided that each should devote his time to the profession, a subsequent election of one of them as a magistrate, which position took him away from his private office every work day, this was sufficient to justify a dissolution. Stiles *v.* Bradley, 113 App. Div. 508, 117 N. Y. Supp. 637.

Generally, see Carroll *v.* Cunningham, 73 Neb. 295, 102 N. W. 608; Lovejoy *v.* Bailey, 214 Mass. 134, 101 N. E. 63; Green *v.* Tuchner, 87 App. Div. 314, 84 N. Y. Supp. 345; Marnet Oil & Gas Co. *v.* Staley, 218 Fed. 45, 133 C. C. A. 108.

[1] Goodman *v.* Whitcomb, 1 Jac. & Walk. [569] 592; Collyer on Partn. B. 2, ch. 3, § 3; Cash *v.* Earnshaw, 66 Ill. 402; Anderson *v.* Anderson, 25 Beav. 190.

[2] Schmidt *v.* Archer, 113 Ind. 365, 14 N. E. 543; Hornaday *v.* Cowgill, 54 Ind. App. 631, 101 N. E. 1030; Costello *v.* Costello, 209 N. Y. 252, 103 N. E. 148, Affirming 152 App. Div. 280, 137 N. Y. Supp. 132; First Natl. Bank *v.* Payne, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

[3] Hax *v.* Burnes, 98 Mo. App. 707, 73 S. W. 928.

[4] Moore *v.* May, 117 Wis. 192, 94 N. W. 45; Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347.

the personal representative and heirs at law of the deceased partner;[1] nor upon his surviving co-partners.[2]]

§ 917. **Real Estate Belonging to Partnership Is Regarded as Personal Estate until Debts of Firm Are Paid.** — There are other considerations which make a resort to a Court of Equity instead of a Court of Law not only a more convenient but even an indispensable instrument for the purposes of justice. Thus real estate may be bought and held for purposes of the partnership and really be a part of the stock in trade. The conveyance in such a case may be in the name of one for the benefit of all the partners, or in the name of all as tenants in common or as joint tenants. In case of the death of a partner by which a dissolution takes place, the real estate may thus become severed at law from the partnership funds and vest in the surviving partner exclusively, or in the heirs of a deceased partner in common with the survivor, according to the particular circumstances of the case. In taking an account of the partnership effects at law it is impossible for the court for the benefit of creditors to bring such real estate into the account, or to direct a sale of it, or to hold it a part of the partnership funds. It must be treated in Courts of Law just as its character is according to the common law. But in a Court of Equity in such a case the real estate is treated to all intents and purposes as a part of the partnership funds, whatever may be the form of the conveyance.[3] For a Court of Equity considers the real estate to all intents and purposes as personal estate, and subjects it to all the equitable rights and liens of the partners which would apply to it if it were personal estate. And this doctrine not

[1] Andrews *v.* Stinson, 254 Ill. 111, 98 N. E. 222, reversing 164 Ill. App. 25; Hornaday *v.* Cowgill, 54 Ind. App. 631, 101 N. E. 1030.

[2] Lincoln *v.* Orthwein, 120 Fed. 880, 57 C. C. A. 540.

[3] The following cases contain illustrations of the text: Shanks *v.* Klein, 104 U. S. 18, 26 L. Ed. 635; Attorney-Gen. *v.* Hubbuck, 13 Q. B. D. 275; Murtagh *v.* Costello, 7 L. R. Ir. 428; Goodburn *v.* Stevens, 5 Gill, 1; Rice *v.* Barnard, 20 Vt. 479; Buchan *v.* Sumner, 2 Barb. Ch. 165; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278, 292; Day *v.* Perkins, 2 Sandf. Ch. 359; Cox *v.* McBurney, 2 Sandf. (Law) 561; Averill *v.* Loucks, 6 Barb. 19, 470; Uhler *v.* Semple, 5 C. E. Green, 288; Scruggs *v.* Blair, 44 Miss. 406; Stroud *v.* Stroud, 62 N. C. 525; Mauck *v.* Mauck, 54 Ill. 281; Cornwall *v.* Cornwall, 6 Bush, 369; Bank of Louisville *v.* Hall, 8 Bush, 672; Lime Rock Bank *v.* Phetteplace, 8 R. I. 56; National Bank *v.* Sprague, 5 C. E. Green, 13; Ware *v.* Owens, 42 Ala. 212; Pecot *v.* Armelin, 21 La. An. 667; Hiscock *v.* Phelps, 49 N. Y. 47; Deveney *v.* Mahoney, 23 N. J. Eq. 247; Story, Partnership, § 93, Gray's ed. Equity will compel the application of partnership land to the purposes for which it was bought. Faulds *v.* Yates, 57 Ill. 416.

only prevails as between the partners themselves and their creditors, but (as it should seem) as between the representatives of the partners also. So that real estate held in fee for the partnership and as a part of its funds will upon the death of the partner belong in equity not to the heirs at law but to the personal representatives and distributees of the deceased; unless perhaps there be a clear and determinate expression of the deceased partner that it shall go to his heir at law beneficially.[1]

§ 918. **Creditors of Partnership Are Entitled to Have Their Debts Paid Out of Partnership Funds before Private Creditors of Either Party.** — The lien also of partners upon the whole funds of the partnership for the balance finally due to them respectively seems incapable of being enforced in any other manner than by a Court of Equity through the instrumentality of a sale. Besides, the creditors of the partnership have a preference to have their debts paid out of the partnership funds before the private creditors of either of the partners.[2] But this preference is at law generally disregarded; in equity it is worked out through the equity of the partners over the whole funds.[3] On the other hand the separate creditors of each partner are entitled to be

[1] See Collyer on Partn. B. 2, ch. 1, § 1, pp. 68 to 76; Lake *v.* Craddock, 3 P. Will. 158; Elliot *v.* Brown, 9 Ves. 597; Thornton *v.* Dixon, 3 Bro. Ch. R. 199 (Belt's edition); Bell *v.* Phyn, 7 Ves. 453; Ripley *v.* Waterworth, 7 Ves. 425; Selkrig *v.* Davies, 2 Dow, R. 242; Townsend *v.* Devaynes, 1 Montague on Partn. Appx. 96 [101]; Gow on Partn. ch. 2, § 1; Randall *v.* Randall, 7 Sim. R. 271; Morris *v.* Kearsley, 2 Younge & Coll. 139; Bligh *v.* Brent, 2 Younge & Coll. 268, 288; Houghton *v.* Houghton, 11 Simons, R. 491; Hoxie *v.* Carr, 1 Sumner, R. 173; Murtagh *v.* Costello, 7 L. R. Ir. 428; Steward *v.* Blakeway, L. R. 4 Ch. 603; s. c. 6 Eq. 479; Waterer *v.* Waterer, L. R. 15 Eq. 402; Shanks *v.* Klein, 104 U. S. 18, 26 L. Ed. 635; Miller *v.* Proctor, 20 Ohio St. 442; Delmonico *v.* Guillaume, 2 Sandf. 366; Darby *v.* Darby, 3 Drew. 497; Cornwall *v.* Cornwall, 6 Bush, 369; Meily *v.* Wood, 71 Penn. St. 488. But it is held in Massachusetts that where, after all debts and balances between the parties are satisfied, there remains real estate of the partnership, in which the legal title of each partner corresponds to his interest or share in the partnership, equity will not interfere to convert such realty into personalty. Wilcox *v.* Wilcox, 13 Allen, 252; Shearer *v.* Shearer, 98 Mass. 107.

[2] See Miner *v.* Pierce, 38 Vt. 610, 614; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Bardwell *v.* Perry, Ib. 292; ante, § 866, note.

[3] See Muir *v.* Leitch, 7 Barb. 341; Freeman *v.* Stewart, 41 Miss. 138; O'Bannon *v.* Miller, 4 Bush, 25; Harman *v.* Clark, 13 Gray, 114; Allen *v.* Center Valley Co., 21 Conn. 130; Rainey *v.* Nance, 54 Ill. 29; Twiss *v.* Massey, 1 Atk. 67; Ex parte Cook, P. Will. 500; Ex parte Elter, 3 Ves. 240; Ex parte Clay, 6 Ves. 833; Collyer on Partnership, B. 4, ch. 2, §§ 1, 2, 3; Campbell *v.* Mullett, 2 Swanst. 574, 575; Ex parte Ruffin, 6 Ves. 125, 126; Gray *v.* Chiswell, 9 Ves. 118; Commercial Bank *v.* Wilkins, 9 Greenl. 28.

first paid out of the separate effects of their debtor before the partnership creditors can claim anything,[1] which also can be accomplished only by the aid of a Court of Equity; for at law a joint creditor may proceed directly against the separate estate.[2] This is another illustration of the doctrine of marshalling assets, and proceeds upon analogous principles, and it is commonly applied in cases of insolvency or bankruptcy. There are certain exceptions to the rule which confirm rather than abate its force, as they stand upon peculiar reasons.

§ 919. **Same.** — In like manner in cases of partnership debts if one of the partners dies and the survivor becomes insolvent or bankrupt, the joint creditors have a right to be paid out of the estate of the deceased partner through the medium of the equities subsisting between the partners.[3] Indeed a broader principle is

[1] Murrill *v.* Neill, 8 How. 414; Jarvis *v.* Brooks, 23 N. H. 136. But see Cleghorn *v.* Insurance Bank, 9 Ga. 319; Grosvenor *v.* Austin, 6 Ohio, 103. And see Black's Appeal, 44 Pa. St. 503; McCormick's Appeal, 55 Pa. St. 252; Millnight *v.* Smith, 2 C. E. Green, 259; Morgan *v.* Skidmore, 55 Barb. 263; Morris *v.* Morris, 4 Gratt. 293.

[2] Cleghorn *v.* Insurance Bank, supra. It has been held however, even at law, that if a joint creditor first levy execution upon the separate real estate of one partner, a private creditor may still levy upon the same estate, and bring a writ of entry against the partnership creditor. Jarvis *v.* Brooks, 23 N. H. 136; Dutton *v.* Morrison, 17 Ves. 205 to 210; Tucker *v.* Oxley, 9 U. S. 34, 3 L. Ed. 29.

[3] Collyer on Partn. B. 3, ch. 3, § 4; Cowell *v.* Sykes, 2 Russ. R. 191; Campbell *v.* Mullett, 2 Swanst. 574, 575; Ex parte Ruffin, 6 Ves. 125, 126; Ex parte Kendall, 17 Ves. 514, 526, 527; Lane *v.* Williams, 2 Vern. R. 277, 292; Vulliamy *v.* Noble, 3 Meriv. 614, 618; Gray *v.* Chiswell, 9 Ves. 118; Price's Case, 1 Meriv. R. 620; Hamersley *v.* Lambert, 2 John. Ch. R. 509, 510; Jenkins *v.* De Groot, 1 Cain. Cas. Err. 122. If the right of the joint creditors is worked out altogether through the equity of the partners, it seems somewhat difficult to perceive how the separate estate of a deceased partner who is a creditor of the firm far beyond all the partnership funds, should, the joint estate being insolvent, be compellable to pay any of the joint debts beyond these funds. Yet Lord Eldon acted upon the ground of the liability of such separate estate in Gray *v.* Chiswell, 9 Ves. 118. If on the other hand the true doctrine be that avowed by Sir William Grant in the case of Devaynes *v.* Noble (1 Meriv. R. 529), afterwards affirmed by Lord Brougham (2 Russ. & Mylne, 495), that a partnership contract is several as well as joint, then there seems no ground to make any difference whatsoever in any case between joint and several creditors as to payment out of joint or separate assets. See Collyer on Partn. B. 3, ch. 3, § 4, pp. 337 to 347; Hamersley *v.* Lambert, 2 John. Ch. R. 509, 510. This is now the established doctrine. Wilkinson *v.* Henderson, 1 Mylne & Keen, 582; Thorpe *v.* Jackson, 2 Younge & Coll. 553, 561, 562; Story on Partn. § 312; ante, §§ 234 to 236; Freeman *v.* Stewart, 41 Miss. 138. A bill in equity may be maintained by the personal representative of a deceased partner to compel an account and to discover partnership property. Denver *v.* Roane, 99 U. S. 355, 25 L. Ed. 476.

now established; and it is held that insolvency or bankruptcy is not necessary in order to justify the creditors of the partnership in resorting to the assets of the deceased partner, and that such creditors may in the first instance proceed against the executor or administrator of the deceased partner, leaving him to his remedy over against the surviving partners; though certainly the surviving partners in a suit in equity in such a case would be proper parties if not necessary parties to the bill.[1] The doubts formerly entertained upon this subject seem to have arisen from the general principle that the joint estate is the first fund for the payment of the joint debts; and as the joint estate vests in the surviving partner, the joint creditors upon equitable considerations ought to resort to the surviving partner before they seek satisfaction from the assets of the deceased partner.[2] The ground of the present doctrine is that every partnership debt is joint and several; and in all such cases resort may primarily be had for the debt to the surviving partners or to the assets of the deceased partner.[3] Nor is this doctrine confined to cases of partnership or to cases of a mercantile character. It equally applies to all cases where there is a joint loan to several persons not partners, whether it be in the course of mercantile transactions or not; for the debt will be treated in equity as joint and several, and in case any of the debtors die the creditor may have relief out of his assets without claiming any relief against the surviving joint debtors, or showing that they are unable to pay the debt by reason of their insolvency.[4]

[1] Wilkinson *v.* Henderson, 1 Mylne & Keen, 582; Devaynes *v.* Noble, 2 Russ. & Mylne, 495; Thorpe *v.* Jackson, 2 Younge & Coll. 553; Sleech's Case, 1 Meriv. R. 539; Braithwaite *v.* Britain, 1 Keen, R. 219; Freeman *v.* Stewart, 41 Miss. 138.

[2] Wilkinson *v.* Henderson, 1 Mylne & Keen, 582.

[3] Thorpe *v.* Jackson, 2 Younge & Coll. 553, 561, 562; Sleech's Case, 1 Meriv. 539.

[4] Ibid. It sometimes happens, either on account of the form of the partnership articles, or the manner in which the surviving partners treat the effects of the partnership after the decease of one of the partners, that they are liable to account for a share of the profits to the personal representatives of the deceased partner or the legal beneficiary. In Wedderburn *v.* Wedderburn, 22 Beav. 84; s. c. 2 Keen, 722; 4 Mylne & C. 41, Sir John Romilly, M. R., divides the cases into the following classes: 1. Where the surviving partners continue the trade with the capital, composed in whole or in part of the estate of the deceased partner. (See Heath *v.* Waters, 40 Mich. 457; Ex parte Butcher, 13 Ch. D. 465; Knox *v.* Gye, L. R. 5 H. L. 656; Noyes *v.* Crawley, 10 Ch. D. 31, 39.) The liability to account in such a case proceeds wholly on the ground that the profits are the product of the capital in part, and therefore belong to that extent to

§ 920. **Upon Sale under Execution of Interest of One Partner in Firm Property, the Other Partner Is Entitled to Have an Account Taken.** — In regard to partnership property another illustration of a kindred character involving the necessity of an account may be put to establish the utility and importance of equity jurisdiction. It is well known that at law an execution for the separate debt of one of the partners may be levied upon the joint property of the partnership.[1] In such a case however the judgment creditor can levy, not the moiety or undivided share of the judgment debtor in the property as if there were no debts of the partnership or lien on the same for the balance due to the other partner, but he can levy the interest only of the judgment debtor, if any, in the property after the payment of all debts and other charges thereon.[2] In short he can take only the same interest in the property which the judgment debtor himself would have upon the final settlement of all the accounts of the partnership. When therefore the sheriff seizes such property upon an execution, he seizes only such undivided and unascertained interest; and if he sells under the execution, the sale conveys nothing more to the vendee, who thereby becomes a tenant in common, substituted to the rights and interests of the judgment debtor in the property seized.[3] In truth the sale does not transfer any part of the joint property to the vendee so as to entitle

the owner of the capital. (As to the Stat. of Limitations in such a case, see Noyes *v.* Crawley, supra.) 2. Where the legal representatives of the deceased partner employ the assets in carrying on trade for themselves. The liability to account in such a case proceeds upon the misconduct of the personal representatives; and the cestuis que trust are entitled at their choice to legal interest on the amount, or to a share in the profits. 3. Where the surviving partners are also the personal representatives of the deceased partner. The liability to account in such a case may involve an inquiry into the misconduct of the executors, but is affected more or less by the articles of partnership. "Without some act on his part the executor would not become a partner." Holmes, J., in Phillips *v.* Blatchford, 137 Mass. 510, 514.

[1] See Cleghorn *v.* Insurance Bank, 9 Ga. 319; Jarvis *v.* Brooks, 23 N. H. 136, 141; Dow *v.* Sayward, 14 N. H. 9; Place *v.* Sweetzer, 16 Ohio, 142; Hardy *v.* Donellan, 33 Ind. 501; Story, Partnership, § 261, note, Gray's ed.

[2] West *v.* Skip, 1 Ves. 239; 2 Swanst. 526; Barker *v.* Goodair, 11 Ves. 85; Dutton *v.* Morrison, 17 Ves. 205, 206, 207; Gow on Partn. ch. 4, § 1, pp. 247, 248.

[3] West *v.* Skip, 1 Ves. 239; Chapman *v.* Koops, 3 Bos. & Pull. 289; Skip *v.* Harwood, 2 Swanst. R. 586; s. c. cited Cowp. R. 451; Dutton *v.* Morrison, 17 Ves. 205, 206; Heydon *v.* Heydon, 1 Salk. 392; Taylor *v.* Fields, 4 Ves. 396; Fox *v.* Hanbury, Cowp. R. 445; Nicoll *v.* Mumford, 4 John. Ch. R. 522; In re Wait, 1 Jac. & Walk. 587, 588, 589; Moody *v.* Payne, 2 John. Ch. R. 548; Habershon *v.* Blurton, 1 DeG. & S. 121.

him to take it from the other partners, for that would be to place him in a better situation than the partner himself. But it gives him, properly speaking, a right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which shall upon such settlement be ascertained to exist.[1] It is obvious, from what has been already stated, how utterly inadequate the means of a Court of Law are to take such an account. And indeed under a levy of this sort it is not easy to perceive what authority a Court of Law has to interfere at all to take an account of the partnership transactions, or by what process it can enforce it.[2] In such a case therefore the proper remedy for the other partners, if nothing is due to the judgment debtor out of the partnership funds, is to file a bill in equity against the vendee of the sheriff to have the proper accounts taken.[3]

§ 921. **If Debtor Partner Will Have No Interest in Firm Property upon an Accounting, Sale by the Sheriff Will Be Restrained.** — In cases of the seizure of the joint property for the separate debt of one of the partners a question has arisen how far a Court of Equity would interfere upon a bill for an account of the partnership to restrain the sheriff from a sale, or the vendee

[1] Gow on Partn. ch. 4, § 1, pp. 249 to 254; In re Smith, 16 John. R. 106; Nicoll *v.* Mumford, 4 John. Ch. R. 522, 525; s. c. 20 John. R. 611; Shaver *v.* White, 6 Munf. R. 110; Murray *v.* Murray, 5 John. Ch. R. 70; Marquand *v.* New York Manuf. Company, 17 John. R. 525.

[2] See Chapman *v.* Koops, 3 Bos. & Pull. 389; Eddie *v.* Davidson, 2 Doug. R. 650; Waters *v.* Taylor, 2 Ves. & B. 300, 301; Dutton *v.* Morrison, 17 Ves. 205, 206; In re Wait, 1 Jac. & Walk. 585. The remarks of Lord Eldon on this point, in Waters *v.* Taylor (2 Ves. & B. 301), are very striking and important. "If the Courts of Law," said he, "have followed Courts of Equity in giving execution against partnership effects, I desire to have it understood that they do not appear to me to adhere to the principle when they suppose that the interest can be sold before it has been ascertained what is the subject of sale and purchase. According to the old law, I mean before Lord Mansfield's time, the sheriff under an execution against partnership effects took the undivided share of the debtor without reference to the partnership account. But a Court of Equity would have set that right by taking the account and ascertaining what the sheriff ought to have sold. The Courts of Law however have now repeatedly laid down that they will sell the actual interest of the partner, professing to execute the equities between the parties, but forgetting that a Court of Equity ascertained previously what was to be sold. How could a Court of Law ascertain what was the interest to be sold and what the equities depending upon an account of all the concerns of the partners for years?" Habershon *v.* Blurton, 1 DeG. & S. 121.

[3] Chapman *v.* Koops, 3 Bos. & Pull. 290; Waters *v.* Taylor, 2 Ves. & B. 300, 301; Taylor *v.* Fields, 4 Ves. 396; Dutton *v.* Morrison, 17 Ves. 205, 206, 207; In re Wait, 1 Jac. & Walk. 588, 589; Gow on Partn. ch. 4, § 1, pp. 253, 254.

of the sheriff from an alienation of the property seized, until the account was taken and the share of the partner ascertained. Mr. Chancellor Kent has decided that an injunction for such a purpose ought not to issue to restrain a sale by the sheriff upon the ground that no harm is done to the other partners; and the sacrifice, if any, is the loss of the judgment debtor only.[1] But that does not seem a sufficient ground upon which such an injunction is to be denied. If the debtor partner has or will have upon a final adjustment of the accounts no interest in the partnership funds, and if the other partners have a lien upon the funds not only for the debts of the partnership but for the balance ultimately due to them, it may most materially affect their rights whether a sale takes place or not. For it may be extremely difficult to follow the property into the hands of the various vendees; and their lien may perhaps be displaced, if other equities arise by intermediate bona fide sales of the property by the vendees to other purchasers without notice, and the partners may have to sustain all the chances of any supervening insolvencies of the immediate vendees.[2] To prevent multiplicity of suits and irreparable mischiefs, and to insure an unquestionable lien, it would seem perfectly proper in cases of this sort to restrain any sale by the sheriff. And besides it is also doing some injustice to the judgment debtor by compelling a sale of his interest under circumstances in which there must generally from its uncertainty and litigious character be a very great sacrifice to his injury. If he has no right in such a case to maintain a bill to save his own interest, it furnishes no ground why the court should not interfere in his favor through the equities of the other partners. This seems (notwithstanding the doubts suggested by Mr. Chancellor Kent) to be the true result of the English decisions on this subject, which do not distinguish between the case of an assignee of a partner and that of an executor or administrator of a partner, or of the sheriff, or of an assignee in bankruptcy.[3]

[1] Moody *v.* Payne, 2 John. Ch. R. 548. See Hardy *v.* Donellan, 33 Ind. 501; Jarvis *v.* Brooks, 23 N. H. 136. But see Miner *v.* Pierce, 38 Vt. 610; Backus *v.* Murphy, 39 Pa. St. 397; Hubbard *v.* Curtis, 8 Iowa, 1; Thompson *v.* Frist, 15 Md. 24.

[2] See Skip *v.* Harwood, 2 Swanst. R. 586, 587.

[3] See Taylor *v.* Field, 4 Ves. 396, 397, 398; s. c. 15 Ves. 559, note; Barker *v.* Goodair, 11 Ves. 85, 86, 87; Skip *v.* Harwood, 2 Swanst. R. 586, 587; Franklyn *v.* Thomas, 3 Meriv. 234; Hawkshaw *v.* Parkins, Swanst. 548, 549; Parker *v.* Pistor, 3 Bos. & Pull. 288, 289; Eden on Injunct. 31; Collyer on Partn. B. 3, ch. 6, § 10, pp. 474 to 478; 1 Madd. Ch. Pr. 112. See also Brewster *v.* Hammet, 4 Connect. R. 540. See also In re Smith, 16

§ 922. **Actions by One Firm against Another Where Both Are Owned by Practically the Same Partners.** — Another illustration of the beneficial result of equity jurisdiction in cases of partnership may found in the not uncommon case of two firms dealing with each other where some or all of the partners in one firm are partners with other persons in the other firm. Upon the technical principles of the common law in such cases no suit can be maintained at law in regard to any transactions or debts between the two firms; for in such suit all the partners must join and be joined, and no person can maintain a suit against himself or against himself and others. The objection is at law a complete bar to the action.[1] Nay, even after the death of the partner or partners belonging to both firms no action upon any contract or mutual dealing ex contractu is maintainable by the survivors of one firm against those of the other firm; for in a legal view there never was any subsisting contract between the firms, as a partner cannot contract with himself.[2]

§ 923. **Same.** — But there is no difficulty in proceeding in Courts of Equity to a final adjustment of all the concerns of both firms in regard to each other; for in equity it is sufficient that all parties in interest are before the court as plaintiffs or as defendants, and they need not, as at law, in such a case be on the opposite sides of the record. In equity all contracts and dealings between such firms of a moral and legal nature are deemed obligatory, though void at law. Courts of Equity in all such cases look behind the form of the transactions to their substance, and treat the different firms for the purposes of substantial justice exactly as if they were composed of strangers, or were in fact corporate companies.[3]

§ 924. **One Partner Cannot Sue Copartners for Money Paid by Him for the Partnership.** — Upon similar grounds one partner cannot at law maintain a suit against his copartners to recover

John. R. 106, and the Reporter's learned note; Gow on Partn. ch. 4, § 1, p. 252.

[1] Bosanquet *v.* Wray, 6 Taunt. 597; s. c. 2 Marsh. 319; Mainwaring *v.* Newman, 2 Bos. & Pull. 120.

[2] Ibid.

[3] See Haven *v.* Wakefield, 39 Ill. 509; Printup *v.* Fort, 40 Ga. 276; Chapman *v.* Evans, 44 Miss. 113; Hayes *v.* Bement, 3 Sandf. 394.

Where one partnership sues another partnership, and in each firm there is a common member, an action at law will not lie by one copartnership against the other, as no man may sue himself; but a suit in equity may be maintained, in which the rights and liabilities of all the parties to the transaction can be determined. Noyes *v.* Olstrom, 113 Minn. 111, 129 N. W. 142; Mangels *v.* Shaen, 21 App. Div. 507, 48 N. Y. Supp. 526.

the amount of money which he has paid for the partnership, since he cannot sue them without suing himself also as one of the partnership. And if one partner in fraud of the partnership rights or credits should release an action, that release would at law be obligatory upon all the partners. But a Court of Equity would not under such circumstances hesitate to relieve the partnership.[1]

§ 925. **Partnership Property Is First Liable to Payment of Partnership Debts.** — Courts of Equity in this respect act upon principles familiarly recognized in the civil law and in the jurisprudence of those nations which derive their law from that most extensive source. This will abundantly appear by reference to the known jurisprudence of Scotland and that of the continental nations of Europe.[2] Indeed it would be a matter not merely of curiosity, but of solid instruction (if this were the proper place for such an examination), to trace out the strong lines of analogy between the law of partnership as understood in England, and especially as administered in equity, and that of the Roman Jurisprudence. Unexpected coincidences are everywhere to be found, while the differences are comparatively few; and for the most part these arise rather from the different processes and forms of administering justice in different countries than from any general diversity of principles.[3] Among other illustrations we may cite the general doctrine that the partnership property is first liable to the partnership debts; that the right of any one partner is only to his share of the surplus; that joint creditors have a priority or privilege of payment before separate creditors;[4] and that the estates of deceased partners are liable to contribute towards the payment of the joint debts.[5]

§ 926. **General Résumé of the Subject.** — This review of some of the more important cases in which Courts of Equity interfere

[1] Ante, § 679, note; Jones *v.* Yates, 9 B. & Cressw. 532, 538, 539, 540. See Craig *v.* Hulschizer, 34 N. J. 363; Piercy *v.* Fynney, L. R. 12 Eq. 69. But if one partner make advances to his associate, and an agreement is made to repay that particular sum, an action at law can be maintained. Sprout *v.* Crowley, 30 Wis. 187. See also Wells *v.* Carpenter, 65 Ill. 447: Hale *v.* Wilson, 112 Mass. 444.

[2] See 2 Bell, Comm. B. 7, ch. 2, § 2, art. 1214.

[3] To establish this statement the learned reader may be referred to the Digest, Lib. 17, tit. 2, Pro Socio; and Voet, Comm. ad id.; Vinnius, Comm. Inst. Lib. 3, tit. 26; 1 Domat, Civil Law, tit. Partnership, B. 1, tit. 8, per tot.; 2 Bell, Comm. B. 4, ch. 2, art. 1250 to 1263; Code Civil of France, art. 1832 to 1873; Pothier, Traité de Société, per tot.

[4] 1 Domat, B. 1, tit. 8, § 3, art. 10.

[5] 1 Domat, B. 1, tit. 8, § 6, art. 1, 2; Pothier, de Société, n. 96, 136, 161, 162.

in regard to partnerships does (unless my judgment greatly misleads me) establish in the most conclusive manner the utter inadequacy of Courts of Law to administer justice in most cases growing out of partnerships, and the indispensable necessity of resorting to Courts of Equity for plain, complete, and adequate redress. Where a discovery, an account, a contribution, an injunction, or a dissolution [1] is sought in cases of partnership, or even where a due enforcement of partnership rights and duties and credits is required, it is impossible not to perceive that generally a resort to Courts at Law would be little more than a solemn mockery of justice. Hence it can excite no surprise that Courts of Equity now exercise a full concurrent jurisdiction with Courts of Law in all matters of partnership; and indeed it may be said that practically speaking they exercise an exclusive jurisdiction over the subject in all cases of any complexity or difficulty.

[1] Or where the partnership transactions have taken place abroad. See Hendrick *v.* Wood, 9 Jur. (N. S.) 117; Cookney *v.* Anderson, 8 Jur. (N. S.) 1220; S. C. 31 Beav. 452; 9 Jur. (N. S.) 736; 1 DeG. J. & S. 365; Maunder *v.* Lloyd, 2 Johns. & H. 718; Steele *v.* Stuart, 12 Week. R. 247; Norris *v.* Chambers, 29 Beav. 246; Harvey *v.* Varney, 104 Mass. 436 (that a receiver will not be appointed of partnership assets out of the jurisdiction); Desper *v.* Continental Co., 137 Mass. 252.

CHAPTER XVII

MATTERS OF RENT

§ 926 *a*. **Matters of Rent as a Branch of the Concurrent Jurisdiction of Courts of Equity.** — Another head of concurrent jurisdiction of the same nature and resulting also from the imperfection of the remedy at law is in the case of RENTS. This subject has been already touched in other places;[1] and a few particulars only will be here taken notice of, which have not been already fully discussed. Thus for instance in case of a rent seck if the grantee has never had seisin and the rent cannot be recovered at law, Courts of Equity will decree a seisin of the rent and perhaps also that it be paid to the party.[2] So if the deeds are lost by which a rent is created, so that it is uncertain what kind of rent it was,[3] or if (as we have seen) by reason of a confusion of boundaries or otherwise the lands out of which it issues cannot be exactly ascertained, Courts of Equity will in like manner interfere.[4] So if the remedy for the rent has become difficult

[1] Ante, §§ 683 to 690.

[2] Francis's Maxims, 6, § 3, p. 25; Ferris *v.* Newby, cited 1 Cas. Ch. 147; Palmer *v.* Whettenhal, 1 Cas. Ch. 184; 1 Fonbl. on Equity, B. 1, ch. 3, § 3; Com. Dig. Chancery, 4 N. 1, Rent; Thorndike *v.* Collington, 1 Cas. Ch. 79; Web *v.* Web, Moore, R. 626; Davy *v.* Davy, 1 Cas. Ch. 147.

[3] Collet *v.* Jacques, 1 Cas. Ch. 120; Cocks *v.* Foley, 1 Vern. 359; Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, 518, 519; Holder *v.* Chambury, 3 P. Will. 256; Livingston *v.* Livingston, 4 John. Ch. R. 290, 291.

[4] 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*f*); Francis's Maxims, 6, § 3, p. 25; Bowman *v.* Yeat, cited 1 Ch. Cas. 145; Davy *v.* Davy, 1 Ch. Cas. 146, 147; Cocks *v.* Foley, 1 Vern. 359; North *v.* Earl of Strafford, 3 P. Will. 148; Holder *v.* Chambury, 3 P. Will. 256; Com. Dig. Chancery, 4 N. 1, Rent; Duke of Bridgewater *v.* Edwards, 4 Bro. Parl. Cas. 139; s. c. 6 Bro. Parl. Cas., by Tomlins, 368. As to the ancient remedy for rents, see 3 Reeves's History of the Law, ch. 21, pp. 317 to 320; 3 Black. Comm. 6; Id. 231; 2 Black. Comm. 42; Id. 288; Bacon, Abridg. Rent, A. K.

or doubtful at law, or if there is an apparent perplexity and uncertainty as to the title or as to the extent of the responsibility of the party from whom it is sought, — in all such cases Courts of Equity will maintain jurisdiction and upon a due ascertainment of the right will decree the rent.[1] So if a rent is devised out of a rectory to a devisee for which he cannot have any remedy by distress or otherwise at law, Courts of Equity will decree him the rent, not only in future, but all arrears.[2] So if a lease of an incorporeal thing is assigned, and the assignee enjoys it, he will be decreed in equity to pay the rent, although not bound at law.[3] So if an assignee of a term rendering rent assigns over, the lessor will be entitled to relief in equity for the rent against the first assignee so long as he held the land, although he may have no remedy at law for these arrears.[4] So the executor of a terre-tenant of lands liable for a rent charge which the terre-tenant has suffered to be in arrear, will be compellable in equity to pay the same, although the testator was not personally bound for the rent, which was recoverable only by distress; for his personal estate has been augmented by the non-payment.[5] So a cestui que trust of a lease rendering rent will in equity be compellable to pay the rent during the time wherein he has taken the profits if his trustee (the lessee) has become insolvent.[6] So

[1] Livingston *v.* Livingston, 4 John. Ch. R. 287, 290. In Benson *v.* Baldwyn (1 Atk. R. 598), Lord Hardwicke said: "Where a man is entitled to a rent out of lands, and through process of time the remedy at law is lost or become very difficult, this court has interfered and given relief upon the foundation only of payment of the rent for a long time, which bills are called bills founded upon the solet. Nay, the court has gone so far as to give relief where the nature of the rent (as there are many kinds at law) has not been known so as to be set forth. But then all the terre-tenants of the lands out of which the rent issues must be brought before the court, in order for the court to make a complete decree." See also Collet *v.* Jacques, 1 Ch. Cas. 120. See Swedesborough Church *v.* Shivers, 1 C. E. Green, 453; Holmes *v.* Shepard, 49 Mo. 600. So where rent could not be recovered at law for want of a legal title. Fleming *v.* Chunn, 57 N. C. 422.

[2] Com. Dig. Chancery, 4 N. 1, Rent; Thorndike *v.* Collington, 1 Ch. Cas. 79.

[3] Com. Dig. Chancery, 4 N. 1, Rent, which cites City of London *v.* Richmond, 2 Vern. 423; s. c. 1 Bro. Parl. Cas. 30.

[4] Com. Dig. Chancery, 4 N. 1, Rent, which cites Treackle *v.* Coke, 1 Vern. 165; Valliant *v.* Dodemede, 2 Atk. 546, 548; Richmond *v.* City of London, 1 Bro. Parl. Cas. 30.

[5] Com. Dig. Chancery, 4 N. 1, Rent, which cites Eton College *v.* Beauchamp, 1 Cas. Ch. 121.

[6] Clavering *v.* Westley, 3 P. Will. 402. As to this case however see Walters *v.* Northern Coal Co., 5 DeG. M. & G. 629, 646, 647. See also Cox *v.* Bishop, 8 DeG. M. & G. 815; Wright *v.* Pitt, L. R. 12 Eq. 408.

although a grantee of a rent shall not have a remedy in equity merely for the want of a distress, yet if the want of such distress be caused by the fraud or other default of the tenant, there he will be relieved in equity.[1] So if a rent is settled upon a woman by way of jointure, but she has no power of distress or other remedy at law, payment of the rent will be decreed in equity according to the intent of the conveyance.[2] So where a person is a grantee of an entire rent issuing out of a manor, and there are no demesne lands to distrain on, the rent will be decreed in equity.[3]

§ 926 *b*. **Foundation for Jurisdiction in Matters of Rent.** — This jurisdiction in matters of rent is asserted upon the general principle that where there is a right there ought to be a remedy; and if the law gives none, it ought to be administered in equity.[4] This principle is of frequent application in equity, but still it is not to be understood as of as universal application as its terms seem to import, for there are limitations upon it. An obvious exception is where a man becomes remediless at law from his own negligence.[5] So if he should destroy his own remedy to distrain for rent and debt would not lie for the arrears of rent, he would not be relievable in equity.[6]

§ 926 *c*. **Same.** — Courts of Equity have in some cases carried their remedial justice further in aid of parties entitled to rent. It is plain enough that they may well give relief where a bill for discovery and relief is filed and the discovery is essential to the plaintiff's case, and the defendant admits the right of the plaintiff to the rent; for in such a case the relief may well be held to be consequent upon the discovery.[7] But where no special ground of this sort has been stated in the bill, and where upon the circumstances there might well have been a remedy at law, Courts of Equity have in some cases gone on to decree the rent when the defendant has by his answer admitted the plaintiff's right, and no excep-

[1] Com. Dig. Chancery, 4 N. 3, Rent; Davy *v.* Davy, 1 Cas. Ch. 144, 147; Ferris *v.* Newby, cited 1 Ch. Cas. 147; Ferrers *v.* Tanner, cited 3 Ch. Cas. 91.

[2] Mitf. Eq. Pl. by Jeremy, 115, 116; Plunket *v.* Brereton, 1 Rep. in Chan. 5; Champernoon *v.* Gubbs, 2 Vern. R. 382.

[3] Duke of Leeds *v.* Powell, 1 Ves. 171.

[4] 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*f*), and cases before cited.

[5] Francis's Maxims, 6, § 3, p. 25; Vincent *v.* Beverlye, Noy, R. 82; 1 Fonbl. on Equity, B. 1, ch. 3, § 3.

[6] 1 Fonbl. Eq. B. 1, ch. 3, § 3; 1 Roll. Abridg. 375, Pl. 3.

[7] Ante, § 71; post, §§ 929, 930; Story on Eq. Plead. §§ 311, 312, 314, 315.

tion has been taken to the jurisdiction by demurrer or by answer, but simply at the hearing.[1]

§ 926 *d*. **There Can Be No Equitable Remedy of Distress Where There Is an Adequate Remedy at Law.** — These latter cases seem to stand upon grounds which, if not unquestionable, may at least be deemed anomalous. The general doctrine of Courts of Equity certainly is, that where the party entitled to rent has a complete remedy at law, either by an action or by distress, no suit will be entertained in equity for his relief;[2] and the cases in which a suit in equity is commonly entertained are of the kind above mentioned; namely, such as stand upon some peculiar equity between the parties, or where the remedy at law is gone without laches, or where it is inadequate or doubtful.[3] It is not enough to show that the remedy in equity may be more beneficial if the remedy at law is complete and adequate,[4] or even to show that the remedy at law by distress is gone if there be no fraud or default in the tenant.[5]

[1] Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, 518; North *v.* Earl of Strafford, 3 P. Will. 184; Holden *v.* Chambury, 3 P. Will. 256; Livingston *v.* Livingston, 4 John. Ch. R. 287, 291, 292.

[2] Com. Dig. Chancery, 4 N. 3, Rent; Palmer *v.* Whettenhal, 1 Cas. Ch. 184; Francis's Maxims, 6, § 3, p. 25; Champernoon *v.* Gubbs, 2 Vern. 382; Fairfax *v.* Derby, 2 Vern. 613; Holden *v.* Chambury, 3 P. Will. 256; Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, and Mr. Belt's note, Id. 519; Bouverie *v.* Prentice, 1 Bro. Ch. R. 200.

[3] Post, § 927. Mr. Fonblanque, in commenting on the case of the Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, 519, has said: "The case of the Duke of Leeds *v.* Corporation of New Radnor may in its first impression be thought to have been relievable at law; for though, for the purpose of making it the subject of equitable jurisdiction, the bill alleged that the lands in question had undergone various alterations in their boundaries, yet the defendants by their answer denied that any alteration whatever had taken place in such particulars, and insisted that the plaintiff's remedy was at law. And Lord Kenyon, then Master of the Rolls, appears to have been of such opinion, but he retained the bill for a year. Lord Thurlow, C., however conceived the legal remedy to be doubtful, and was of opinion that the defendants having admitted the plaintiff's right, and the bill having been retained, had done away the objection pressed against the jurisdiction of the court. It may be material to observe that his lordship's opinion went upon the grounds of an admission of the right and the previous retaking of the bill. As to the admission of the right, if it stood alone, that probably would not be thought a sufficient circumstance to give to a Court of Equity cognizance of a matter not properly within its jurisdiction; and with respect to the bill having been retained for a year, the same circumstance occurred in Ryan *v.* Macmath, 3 Bro. Rep. 15, notwithstanding which the suit was dismissed for want of equity. See also Curtis *v.* Curtis, 2 Bro. Rep. 620, where this point was very much considered."

[4] Com. Dig. Chancery, 4 N. 3, Rent; Attorney-Gen. *v.* Mayor of Coventry, 1 Vern. 713.

[5] Com. Dig. Chancery, 4 N. 3, Rent; Davy *v.* Davy, 1 Cas. Ch. 144,

§ 926 *e*. **Remedies in Equity in Cases of Rent Are Concurrent with the Remedies at Law.** — But in cases of rent where Courts of Equity do interfere, they do not grant a remedy beyond what, by analogy to the law, ought to be granted. As for instance if an annuity be granted out of a rectory and charged thereon, and the glebe be worth less per annum than the annuity, Courts of Equity will make the whole rectory, and not merely the glebe, liable for the annuity.[1] But they will not extend the remedy to the tithes, they not being by law liable to a distress.[2] So if a rent be charged on land only, the party who comes into possession of it will not be personally charged with the payment of it unless there be some fraud on his part to remove the stock, or he do some other thing to evade the right of distress.[3]

§ 926 *f*. **Same.** — Before the statute of Anne (8 Anne, ch. 14) it was often necessary to go into a Court of Equity, in cases of a rent seck, for a suitable remedy.[4] But that statute and other subsequent statutes enable the party in all cases, whether the rent be a rent service or a rent seck or a rent charge, to distrain or bring his action of debt.[5] The remedy in equity is therefore in a practical sense narrowed, or rather it is less advisable than formerly. Still however (as Mr. Fonblanque has properly remarked) there are cases in which a resort to a Court of Equity may be salutary and perhaps indispensable; as where the premises out of which the rent is payable are uncertain,[6] or where the time or amount of payment is uncertain, or where (as already hinted) the distress is obstructed or evaded by fraud,[7] or where the rent is issuing out of a thing of an incorporeal nature, as tithes, where no distress can be made,[8] or where a discovery may be necessary, or where an apportionment may be required in order to attain complete justice.[9]

147; Champernoon *v.* Gubbs, 2 Vern. R. 382; Francis's Maxims, 6, § 3, p. 35; 1 Fonbl. Eq. B. 1, ch. 3, § 3; Duke of Bolton *v.* Deane, Prec. Ch. 516.

[1] Thorndike *v.* Collington, 1 Cas. Ch. 79; Com. Dig. Chancery, 4 N. 2, Rent.

[2] Thorndike *v.* Collington, 1 Cas. Ch. 79; Francis's Maxims, 6, p. 25.

[3] Palmer *v.* Whettenhal, 1 Cas. Ch. 184; Com. Dig. Chancery, 4 N. 3, Rent; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*k*); Davy *v.* Davy, 1 Cas. Ch. 144, 145; S. P. 3 Cas. Ch. 91.

[4] See 3 Reeves, Hist. of the Law, ch. 21, pp. 316 to 320; Litt. § 218.

[5] Stat. 4 Geo. II. ch. 28; 5 Geo. III. ch. 17; 3 Black. Comm. 6; Id. 230 to 233; Bac. Abridg. Rent, K. 6.

[6] Benson *v.* Baldwyn, 1 Atk. 598; Com. Dig. Chancery, 4 N. 1, Rent.

[7] Champernoon *v.* Gubbs, 2 Vern. 382; S. C. Prec. Ch. 126; post, §§ 928, 929.

[8] 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*g*), and cases there cited.

[9] See North *v.* Earl of Strafford, 3 P. Will. 148, 151; Benson *v.* Baldwyn, 1 Atk. 598; Com. Dig. Chancery, 4 N. 3, Rent.

§ 926 *g*. **Same.** — The beneficial effect of this jurisdiction in equity may be further illustrated by reference to the doctrine at law in cases of derivative titles under leases. It is well known that, although a derivative lessee or under-tenant is liable to be distrained for rent during his possession, yet he is not liable to be sued for rent on the covenants of the lease, there being no privity of contract between him and the lessor.[1] But suppose the case to be that the original lessee is insolvent and unable to pay the rent; the question would then arise whether the under-lessee should be permitted to enjoy the profits and possession of the estate without accounting for the rent to the original lessor. Undoubtedly there would be no remedy at law. But it is understood that in such a case Courts of Equity would relieve the lessor, and would direct a payment of the rent to the lessor upon a bill making the original lessee and the under-tenant parties. For if the original lessee were compelled to pay the rent, he would have a remedy over against the under-tenant. And besides in the eyes of a Court of Equity the rent seems properly to be a trust or charge upon the estate; and the lessor is bound, at least in conscience, not to take the profits without a due discharge of the rent out of them.[2]

[1] Halford *v.* Hetch, 1 Doug. R. 183; 1 Fonbl. Eq. B. 1, ch. 3, note (*s*); Com. Dig. Chancery, 4 N. 5, Rent.

[2] See Goddard *v.* Keate, 1 Vern. 27; 1 Fonbl. Eq. B. 1, ch. 5, § 5, and note (*x*); post, § 927; Com. Dig. Chancery, 4 N. 1, 4 N. 2, Rent.

The covenant to pay rent runs with the land, and the assignee becomes liable to the original lessor, unless there is some provision in the lease or assignment, to the contrary. In such lease, the original lessee cannot sue his assignee to recover the rent due, until he has paid the lessor, but where the original lessors have not agreed to the assignment, and the assignment is in direct violation of the terms of the lease, the assignee is not in a position to deny liability to the lessor until he has made some other arrangements with the original lessors validating the assignment. Darmstaetter *v.* Hoffman, 120 Mich. 48, 78 N. W. 1014, 6 Detroit Leg. N. 66.

CHAPTER XVIII.

PECULIAR REMEDIES IN EQUITY. — DISCOVERY. — CANCELLATION AND DELIVERY OF INSTRUMENTS

§ 927. **Peculiar Remedies in Equity.** — We shall now proceed to the consideration of the other branch of concurrent jurisdiction, — that in which the peculiar remedies afforded by Courts of Equity constitute the principal although not the sole ground of jurisdiction.

§ 928. **Nature of the Jurisdiction of Courts of Equity in Matters of Discovery.** — And here we may begin by adverting to that large class of cases where the remedy of a DISCOVERY constitutes the main ground, and in many cases the sole ground, upon which a bill in equity is maintainable in point of jurisdiction. Every original bill in equity may in truth be properly deemed a bill of discovery, for it seeks a disclosure of circumstances relative to the plaintiff's case. But that which is usually and emphatically distinguished by this appellation is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in his custody, possession, or power, but seeking no relief in consequence of the discovery, although it may pray and often does pray for a stay of proceedings at law until the discovery shall be made.[1] Wherever therefore such a discovery alone is sought without asking any relief, Courts of Equity have a complete jurisdiction to compel the discovery, if the plaintiff is entitled to it according to the general principles which govern the subject. Courts of Law are incompetent by their very structure to compel such a discovery, and therefore it properly falls under the head of the exclusive jurisdiction of Courts of Equity, where the nature and limits of the right to a discovery will be fully examined.[2]

[1] Mitf. Eq. Pl. by Jeremy, 53, 183 to 185; post, § 1483; Cooper, Eq. Pl. ch. 1, § 4, p. 58; Id. ch. 3, § 3, p. 188; Jeremy on Eq. Jurisd. B. 2, ch. 1, pp. 257, &c.; 2 Fonbl. Eq. B. 6, ch. 3, § 1, &c.; 1 Madd. Ch. Pr. 160, &c.; Story on Equity Plead. §§ 311, 312, 315.

[2] Post, §§ 1480 to 1505.

§ 929. **Same.** — But the class of cases designed to be treated of in this place are cases where relief is sought as consequent upon the discovery of facts, and where but for the want of such discovery the case would be perfectly remediable at law. The necessity of obtaining a discovery in such cases therefore constitutes the sole ground of equity jurisdiction; and if upon such a bill no discovery is obtained, the cause fails and the bill must be dismissed. If on the other hand the discovery is obtained, then, as we have already seen, Courts of Equity in many cases will proceed to give entire and full relief. This subject has been already treated somewhat at length in the preliminary part of these Commentaries,[1] and therefore the ground of this jurisdiction may be briefly summed up in the language of Mr. Fonblanque, in a passage from which a short quotation has been already made: "This concurrence of jurisdiction [by Courts of Equity]," says he, "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 obtained 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 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 it for the purpose of relief in most cases of fraud, account, accident, and mistake." [2]

§ 930. **Same.** — We have already seen that there is a difference between the English and the American courts in regard to the extent of the jurisdiction attaching for relief as consequent upon discovery.[3] But whichever doctrine ought upon principle to prevail, there is no doubt of the two propositions above stated, — first, that the necessity of a discovery in a Court of Equity furnishes a just foundation of jurisdiction in a great variety of cases; [4]

[1] Ante, §§ 64 to 115; post, § 1483; Story on Eq. Plead. §§ 311 to 316.
[2] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 12. [3] Ante, § 112.
[4] See Lord Eldon's remarks in Kemp *v.* Pryor, 7 Ves. 248, 249. In Pearce *v.* Creswick, 2 Hare's R. 293, Mr. Vice-Chancellor Wigram said: "The first proposition relied upon by the plaintiff in support of the equity of his bill is 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

and secondly, that if the discovery is totally denied by the answer, the bill must be dismissed and the relief denied, although there might be other evidence sufficient to establish a title to relief; for the subject-matter is under such circumstances exclusively remediable at law. With these few remarks the further consideration of this subject may be dismissed in this place.

§ 931. **Nature of the Jurisdiction in Cases of Rescission and Cancellation.** — Another head of equity jurisdiction, founded upon the like circumstance of a peculiar remedy, embraces that large class of cases where the RESCISSION, CANCELLATION, or DELIVERY UP of agreements, securities, or deeds is sought, or a SPECIFIC PERFORMANCE is required of the terms of such agreements, securities, or deeds as indispensable to reciprocal justice. It is obvious that Courts of Law are utterly incompetent, by their general organization, to make a specific decree for any relief of this sort;[1] and without it the most serious mischiefs may often arise to the parties interested. The subject naturally divides

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. 324, 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 discovery carries along with it the right to relief in equity.' In Ryle *v.* Haggie, 1 J. & W. 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 M'Kenzie *v.* Johnson, 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 equity to which the dicta I have referred to may entitle him. But I confess that the argument founded upon these dicta appears to me to be exposed to the objection of proving 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."

[1] Bromley *v.* Holland, 7 Ves. 18.

itself into two great branches, — in the first place, what are the cases in which Courts of Equity will undertake to rescind, cancel, or direct a surrender of contracts, securities, and deeds; and in the second place, what are the cases in which Courts of Equity will enforce a specific performance of them.[1]

§ 932. [**Same.** — A court of equity possesses the inherent power to grant relief in the rescission of a contract, and as a usual and necessary coincident to this relief, the granting of the relief of cancellation or reformation of the instrument as written. The right of rescission will be allowed usually where there has been some fraud entering into the inception of the agreement; or there has been a mistake on the part of one of the parties and fraud on the part of the other; or where there has been an undue influence exerted; or where the mind of the stronger has overreached and controlled the power of assent in the weaker. In these and similar cases that might be enumerated, it will be seen that the law court has no jurisdiction, and but for the powers lodged in a court of equity an untold injury and hurt might come to the weaker party to the contract. It must be understood however in the beginning of this discussion, that this equitable relief will not be granted merely because it has been prayed. It is an extraordinary power residing in the breast of the chancellor, and a clear right to the remedy must first be shown.[2] The cancellation of a forged instrument;[3] the annulling of a patent right alleged to have been obtained from the government by fraud;[4] the cancellation of a release,[5] — all of these are common subjects of equity jurisdiction.]

§ 933. [**Same.** — 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. Equities

[1] Some remarks upon this subject will be found in the editor's note to § 33.

[2] Union Railroad *v.* Dull, 124 U. S, 173, 31 L. Ed. 417, 8 S. Ct. Rep. 433; Maxwell Land-Grant Case, 121 U. S. 325, 30 L. Ed. 949, 7 S. Ct. Rep. 1015.

[3] Terry *v.* Sharon, 131 U. S. 40, 33 L. Ed. 94, 9 S. Ct. Rep. 705.

[4] United States *v.* Bell Telephone Co., 128 U. S. 315, 32 L. Ed. 450, 9 S. Ct. Rep. 90; Maxwell Land-Grant case, 121 U. S. 325, 30 L. Ed. 949, 7 S. Ct. Rep. 1015.

[5] Atlantic Delaine Co. *v.* James, 94 U. S. 207, 24 L. Ed. 112.

of the kind, whether it be for the re-execution, reform, or rescission of the instrument, like the equity for the specific performance of a contract, are incapable of enforcement at common law, and therefore necessarily fall within the peculiar province of the courts invested with equitable jurisdiction. 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] The purchaser of real property, the title to which is bad, may rescind the contract, and in equity, set up the want of title as a defence in an action for the recovery of the purchase money, or he may file a bill in equity praying that the contract in terms be rescinded.[2] Another class of cases which is met with with some frequency, where a court of law has no power to administer a remedy, is where a contract or conveyance of property is made by one to another, upon condition that the grantor be maintained and supported during life and given a decent burial etc. upon his death, and the like conditions that may be inserted to gratify the wants and needs of the grantor. It is in accordance with the principles of the court of equity that it will freely set aside such conveyances for a breach of such conditions, and it will do full equity between the parties thereto as the circumstances of the case may require. In these and similar instances that might be mentioned, the relief, if there be any, is administered solely by the court of equity.[3]

§ 934. **Application of the Relief Is a Matter of Sound Discretion, according to What Is Reasonable and Proper under All the Circumstances.** — Before proceeding to the consideration of these distinct and important subjects it may be proper to suggest that the application to a Court of Equity for either of these purposes is not, strictly speaking, a matter of absolute right, upon which the court is bound to pass a final decree. But it is a matter of sound

[1] Ivinson *v.* Hutton, 98 U. S. 79, 25 L. Ed. 66; Mills *v.* Morris, 156 Wis. 38, 145 N. W. 369.

[2] Newberry *v.* Ruffin, 102 Va. 73, 45 S. E. 733.

[3] Knutson *v.* Bostrak, 99 Wis. 469, 75 N. W. 156; Beckman *v.* Beckman, 86 Wis. 655, 57 N. W. 1117; Hartstein *v.* Hartstein, 74 Wis. 1, 41 N. W. 721; Blake *v.* Blake, 56 Wis. 393, 14 N. W. 173; Howlin *v.* Castro, 136 Cal. 605, 69 Pac. 432; Pittinger *v.* Pittinger, 208 Ill. 582, 70 N. E. 699; Cash *v.* Cash, 19 Ky. L. Rep. 686, 41 S. W. 579; Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266.

discretion to be exercised by the court, either in granting or in refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case.[1] Thus for instance a Court of Equity will sometimes refuse to decree a specific performance of an agreement which it will yet decline to order to be delivered up, cancelled, or rescinded.[2] On the other hand a specific performance will be decreed upon the application of one party, when it would be denied upon the application of the other. And an agreement will be rescinded or cancelled upon the application of one party when the court would decline any interference at the instance of the other.[3] So that we are here to understand that the interference of a Court of Equity is a matter of mere discretion, not indeed of arbitrary and capricious discretion, but of sound and reasonable discretion, secundum arbitrium boni judicis.[4] And in all cases of this sort where the interposition of a Court of Equity is sought, the court will, in granting relief, impose such terms upon the party as it deems the real justice of the case to require; and if the plaintiff refuses to comply with such terms, his bill will be dismissed.[5] The maxim here is emphatically applied, — He who seeks equity must do equity.

§ 935. **The Relief Is Founded upon the Administration of a Protective or Preventive Justice.** — In the first place then let us consider in what cases a Court of Equity will direct the DELIVERY UP, CANCELLATION, or RESCISSION of agreements, securities, deeds, or other instruments. It is obvious that the jurisdiction exercised in cases of this sort is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, — as it is technically called, — quia timet; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him when

[1] Fonbl. Eq. B. 1, ch. 3, § 9, note (*i*); 3 Wooddes. Lect. 58, pp. 464, 465, 466; Mortlock *v.* Buller, 10 Ves. 293; s. c. 2 Dow, R. 518; Maltby *v.* Thews, 171 Ill. 264, 49 N. E. 486; Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019.

The principles of rescission and specific performance are similar. Boyce *v.* Grundy, 28 U. S. 210, 7 L. Ed. 655.

[2] See M'Leod *v.* Drummond, 17 Ves. 167; Savage *v.* Brocksopp, 18 Ves. 335; Mortlock *v.* Buller, 10 Ves. 305, 308; Turner *v.* Harvey, Jacob, R. 178; 3 Wooddes. Lect. 58, pp. 454, 455.

[3] Cooke *v.* Clayworth, 18 Ves. 12; 1 Story on Eq. Jur. 1294.

[4] Goring *v.* Nash, 3 Atk. 188; Buckle *v.* Mitchell, 18 Ves. 111; Revell *v.* Hussey, 2 B. & B. 288; post, §§ 742, 769.

[5] 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*a*); Id. B. 1, ch. 2, § 11, note (*p*).

the evidence to impeach them may be lost, or that they may now throw a cloud or suspicion over his title or interest.[1] A fortiori the party will have a right to come into equity to have such agreements, securities, deeds, or other instruments delivered up and cancelled where he has a defence against them which is good in equity, but not capable of being made available at law.[2] [The

[1] Newland on Contracts, ch. 34, pp. 493, &c.; post, §§ 947 to 949; Pettit *v.* Shepherd, 5 Paige, R. 493.

[2] Reed *v.* Bank of Newburgh, 1 Paige, R. 215, 218; Carroll *v.* Brown, 28 Gratt. 791; San Diego Flume Co. *v.* Souther, 90 Fed. 164, 32 C. C. A. 548.

An action to cancel deed will not be dismissed where defendant submitted himself to the jurisdiction of a court of equity and answered instead of demurring, although he had an adequate remedy at law. Smith *v.* Roney, 182 Ala. 540, 62 So. 753; Bush *v.* Prescott etc. R. Co., 76 Ark. 497, 89 S. W. 86; Old Dominion Copper Mining etc. Co. *v.* Bigelow, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479; Manning *v.* Berdan, 135 Fed. 159.

Where the right to the remedy has been shown, the exercise of equitable jurisdiction is not dependent upon the inadequacy of the legal remedy. Garretson *v.* Witherspoon, 15 Okla. 473, 83 Pac. 415; American Shipbuilding Co. *v.* Commonwealth Steamship Co., 215 Fed. 296.

Courts of chancery have jurisdiction to grant relief in the cancellation of instruments which, until their invalidity is determined, may annoy and harass one's business and impair his credit. Fred Macey Co. *v.* Macey, 143 Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036, 12 Detroit Leg. N. 948.

The right to the relief exists only where, from the form of the security, the defence cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the imposition of a court of equity is shown. County of Ada *v.* Bullen Bridge Co., 5 Idaho 79, 47 Pac. 818, 36 L. R. A. 367, 95 Am. St. Rep. 180. Lines *v.* Willey, 253 Ill. 440, 97 N. E. 843; Costello *v.* Portsmouth Brewing Co., 69 N. H. 405, 43 Atl. 640; Barnes *v.* Brown, 32 Mich. 146.

A partner who has induced the widow of his deceased partner to refrain from administering upon her husband's estate, so that he might secure the control of the business from her, has no right to rescind his agreement with her where in law she had no right to dispose of her husband's estate in her individual capacity. Barnum *v.* Barnum, 177 Mo. App. 68, 164 S. W. 129.

Plaintiff executed a deed, in fraud of the rights of his wife, to his daughter, and she, without his consent, had the deed recorded and now refuses to agree with him upon a subsequent reconveyance. The rule which denies equity to the worker of the iniquity does not apply, this being inequitable conduct in another and different transaction from the case at bar. Luebke *v.* Salzwedel, 157 Wis. 601, 147 N. W. 831. Nor does the rule apply where the alleged fraudulent deed has never been delivered to the grantee. Bunn *v.* Stewart, 183 Mo. 375, 81 S. W. 1091.

Where plaintiff executed her notes in payment of the defalcation of her intended husband, upon condition that there be no prosecution, equity will refuse to aid either party, but will leave them where they have placed themselves. Paige *v.* Hieronymus, 180 Ill. 637, 54 N. E. 583; Tucker *v.* Cox, 101 S. C. 473, 86 S. E. 28.

enactment of a statute touching the mode of pleading and practice where a release, alleged to have been procured by fraud, and similar contracts, interposed as a defence, does not abrogate the jurisdiction of equity to cancel such instruments, there being no intent exhibited by the enactment to accomplish such abrogation. The remedial jurisdiction of equity is not destroyed by the passage of a measure creating a statutory remedy at law in like circumstances, in the absence of an expression of legislative purpose to extinguish the ancient jurisdiction.[1]] We have already had occasion to take notice of a great variety of cases in which agreements, securities, deeds, and other instruments have been set aside and decreed to be delivered up on the ground of accident, mistake, and fraud.[2] Under the two former heads it will readily be perceived upon the slightest examination that a rescission or cancellation of the agreements, securities, deeds, or other instruments would not in a great many cases be an appropriate, adequate, or equitable relief. The accident or mistake may be of a nature which does not go to the very foundation and merits of the agreement, but may only require that some amendment, addition, qualification, or variation should take place to make it at once just and reasonable and fit to be enforced.[3] But it can rarely be said that in cases of fraud, actual or constructive, the same observations properly apply. If there is actual fraud, there seems the strongest ground for the interference of a Court of Equity to rescind a contract, security, or other instrument. And if the fraud be constructive, still for the most part it ought

A reconveyance of property will not be denied, where the deed was executed for the purpose of defrauding creditors, when in fact there were no creditors, and no one was hurt by the transfer. Collins *v.* Schump, 16 N. Mex. 537, 120 Pac. 331; Chamberlain *v.* Chamberlain, 7 Cal. App. 634, 95 Pac. 659.

[1] Roberts *v.* Central Lead Co., 95 Mo. App. 581, 69 S. W. 630.

[2] Ante, §§ 233, 578; Willan *v.* Willan, 16 Ves. 72; Underhill *v.* Horwood, 10 Ves. 225; Ware *v.* Horwood, 14 Ves. 28, 31, 32. Want of authority on the part of an agent to execute an instrument, e.g. to assign a mortgage belonging to his principal, may be ground, where the agency is special, for cancelling the instrument. Holden *v.* Phelps, 135 Mass. 61. And this though the consideration was adequate. Ib. Concerning the effect of the existence of a defence at law in such cases, see Fuller *v.* Percival, 126 Mass. 381; Commercial Ins. Co. *v.* McLoon, 14 Allen, 351; Hoare *v.* Bremridge, L. R. 8 Ch. 22; Insurance Co. *v.* Bailey, 80 U. S. 616, 20 L. Ed. 501. The last-named case is opposed to what appears to be the better view. See the editor's note to § 33, vol. i.

[3] See Mitford, Eq. Pl. by Jeremy, 127, 128, 129, and note (*u*); Skillern's Executors *v.* May's Executors, 4 Cranch, 137; Boyce's Executors *v.* Grundy, 28 U. S. 210, 7 L. Ed. 655.

to draw after it the same consequences, either as a breach of trust or an abandonment of duty, or a violation of public policy.[1] But although fraud may in all these cases furnish a sufficient ground to rescind a contract in jure strictissimo, yet there may be circumstances which may justly mitigate the rigid severity of the law, or may place the parties in pari delicto;[2] or may require a Court of Equity, from the demerit of the plaintiff in the particular transaction, to abstain from the slightest interference; or may even induce it, if it should rescind the contract, to do so only upon the terms of due compensation and the allowance of the countervailing equities of the plaintiff.[3] [The law will not permit a party to convey his property for an unlawful purpose, and then, through the intervention of a court of equity, regain the same after the unlawful purpose has been accomplished. The law will leave him where he has placed himself. This rule applies, not only to the grantor, but to those in privity with him.[4]]

§ 936. [**Some Injury Must Have Resulted.** — In an action for the cancellation of an instrument and a rescission of the contract from its inception, it is necessary generally that the plaintiff show that he has sustained some injury. The same rule applies here as the rule in the application for an injunction, or the restraint of a nuisance, there must be some actual injury, or the proof must be so clear as to show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate.[5] But if it be made to appear from the evidence that the plaintiff has such a present, apparent right to relief and it is reasonably certain from the facts that an injury will inevitably follow, unless relief is granted now, then a Court of Equity will interpose and grant such relief as the circumstances of the case may require. So,

[1] Thompson *v.* Graham, 1 Paige, R. 384.

[2] As where a note and mortgage are given to compound a felony. Atwood *v.* Fisk, 101 Mass. 363; Gotwalt *v.* Neal, 25 Md. 434. But see Porter *v.* Jones, 6 Coldw. 313.

[3] Ante, § 50; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); Holbrook *v.* Sharpey, 19 Ves. 131; Harding *v.* Handy, 11 Wheat. R. 125, 126; Tantum *v.* Miller, 3 Stockt. 551; Thigpen *v.* Pitt, 54 N. C. 49.

[4] Lines *v.* Willey, 253 Ill. 440, 97 N. E. 843.

[5] Cherry *v.* Williams, 147 N. C. 452, 61 S. E. 267; but if the injury apprehended is doubtful, contingent or eventual merely, the injunction will not lie. Hickory *v.* Southern Ry. Co., 143 N. C. 451, 55 S. E. 840; City of Durham *v.* Eno Cotton Mills, 144 N. C. 705, 57 S. E. 465; Bomar *v.* Rosser, 131 Ala. 215, 31 So. 430; Hairolson *v.* Carson, 118 Ga. 57. 36 S. E. 319; Bishop *v.* Thompson, 196 Ill. 206, 63 N. E. 684; Rostein *v.* Park, 38 Oreg. 1, 62 Pac. 529.

where the plaintiff seeks to set aside what purports to be an antenuptial contract, executed and delivered while she was pregnant, ill and distressed in mind, after a secret marriage had been entered into, but before the consummation of a public common-law ceremony, the plaintiff has such an interest in the property of the defendant that her rights will be defeated if the alleged contract is allowed to stand. Her rights in defendant's property are, it is true, inchoate and susceptible of change; but she has a present right to have determined the validity of an instrument which she sufficiently alleges and proves she was unduly influenced to execute.[1] An action to remove a cloud from title may be maintained though no actual injury has occurred, if the complaint discloses such facts as show that an actual injury will arise unless the relief be granted.[2]]

§ 937. **Contracts Will Be Cancelled Generally When There Is an Element of Fraud Entering into Their Execution.** — Without attempting to go over the different classes of cases of fraud (which have been already enumerated), it may be stated that Courts of Equity will generally set aside, cancel, and direct to be delivered up agreements and other instruments, however solemn in their form or operation, where they are voidable and not merely void, under the following circumstances: First, where there is actual fraud in the party defendant, in which the party plaintiff has not participated.[3] Secondly, where there is a constructive fraud against public policy, and the party plaintiff has not participated therein. Thirdly, where there is a fraud against public policy, and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand. And lastly, where there is a constructive fraud by both parties, but they are not in pari delicto.[4]

[1] Slingerland *v.* Slingerland, 109 Minn. 407, 124 N. W. 19; Hoeldtke *v.* Horstman, 128 S. W. 642; Lindowese *v.* Amidon, 124 Minn. 288, 144 N. W. 965.

[2] Hicks *v.* Rupp, 49 Mont. 40, 140 Pac. 97.

[3] The mere breach of a contract upon the faith of which a mortgage is executed is not a fraud, justifying the cancellation of the mortgage. Johnson *v.* Murphy, 60 Ala. 288; Blossom *v.* Van Amringe, 62 N. C. 133; Blackwell's Durham Tobacco Co. *v* McElwel, 94 N. C. 429.

[4] See ante, §§ 421 to 510; Mitford, Eq. Pl. by Jeremy, 128, 129, and notes; 3 Wooddes. Lect. 58, pp. 458, 459, and note; Hanington *v.* Du Chatel, 1 Bro. Ch. 124; s. c. 2 Dick. 581; s. c. more full, 2 Swanst. R. 159, note; St. John *v.* St. John, 11 Ves. 535, 536; Wynne *v.* Callander, 1 Russ. Rep. 293; Jacknan *v.* Mitchell, 13 Ves. 581, 583; Fanning *v.* Dunham, 5 John. Ch. R. 36, 142; Earl of Milltown *v.* Stewart, 3 Mylne & Craig, R. 18, 24; ante, § 425; Thompson *v.* Graham, 1 Paige, R. 384;

§ 938. **Same.** — The first two classes of cases seem scarcely to require any illustration, since it is manifestly a result of natural justice that a party ought not to be permitted to avail himself of any agreement, deed, or other instrument procured by his own actual or constructive fraud, or by his own violation of legal duty or public policy, to the prejudice of an innocent party. The third class may be illustrated by the common case of a gaming security, which will be decreed to be given up, notwithstanding both parties have participated in the violation of the law; because public policy will be best subserved by such a course.[1] The fourth class may also be illustrated by cases where, although both parties have participated in the guilty transaction, yet the party who seeks relief has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age or condition; so that in a moral as well as in a legal point of view his guilt may well be deemed far less dark in its character and degree than that of his associate.[2]

§ 939. **In Some Cases Where Contract Is Declared Void or Voidable, the Court Will Impose Such Terms as the Circumstances Require.** — But in many cases where the instrument is declared void by positive law, and also where it is held void or voidable upon other principles, Courts of Equity will impose terms upon the party if the circumstances of the case require it. Thus as we have seen in cases of usury, Courts of Equity will not interpose in favor of the borrower, except upon the payment or allowance of the debt fairly due.[3] So in cases of the setting aside and cancellation and delivery up of annuity securities, because they are not duly registered, Courts of Equity will direct an account of all receipts and payments on each side, and require the just balance to be paid by the proper party.[4] And similar principles are applied to other cases where the transaction is deemed indefensible and yet there is an equitable right to compensation.[5]

Seymour *v.* Delancy, 3 Cowen, R. 445; MacCabe *v.* Hussey, 2 Dow & Clark, 440; s. c. 5 Bligh, R. 715.

[1] Ante, § 425; Earl of Milltown *v.* Stewart, 3 Mylne & Craig, 18, 24; Wynne *v.* Callander, 1 Russ. R. 293. See, as to gaming securities given in a foreign country, Quarrier *v.* Colston, 1 Phillips, Ch. R. 147.

[2] Ante, §§ 421, 423, 424. See Porter *v.* Jones, 6 Cold. 313; Gotwalt *v.* Neal, 25 Md. 434; Blossom *v.* Van Amringe, 62 N. C. 133; Tantum *v.* Miller, 3 Stockt. 551.

[3] See ante, §§ 69, 425.

[4] Holbrook *v.* Sharpey, 19 Ves. 131; Bromley *v.* Holland, 5 Ves. 618; s. c. 7 Ves. 16 to 28; Byne *v.* Vivian, 5 Ves. 606, 607; Byne *v.* Potter, 5 Ves. 609.

[5] See Harding *v.* Handy, 11 Wheat. 103, 125, 126.

§ 940. **Relief Will Be Denied if Complainant Has Participated Equally and Deliberately in the Fraud.** — On the other hand, where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded in illegality, immorality, or base and unconscionable conduct on his own part, — in such cases Courts of Equity will leave him to the consequences of his own iniquity, and will decline to assist him to escape from the toils which he has studiously prepared to entangle others, or whereby he has sought to violate with impunity the best interests and morals of social life.[1] And if acts of this sort have been deliberately done under circumstances in which innocence has been betrayed, or confidence seduced, or falsehood or concealment systematically practised, a fortiori Courts of Equity could not, without staining the administration of justice, interfere to save the party from the just results of his own gross misconduct when the failure of success in the scheme would manifestly be the sole cause of his praying relief.

§ 941. [**Right to Enforce Executory Illegal Contract.** — A Court of Equity will not lend its aid to the parties to an unlawful or immoral contract, both parties being in pari delicto, but will leave them where they have placed themselves. The courts will not aid the parties to enforce a contract which is yet executory, and which is directed to the accomplishment of a fraudulent purpose, nor will it entertain a suit to recover damages for a breach thereof. This is true not out of regard for the defendant in such an action, but because of their unwillingness to use the powers which were granted to them for the furtherance of lawful ends, in aiding schemes which are in their nature against good morals and public policy.[2] An agreement to share the proceeds derived from the vote of a director in a corporation is not enforceable;[3] nor a contract which has for its purpose the control of the entire output of salt in a large scope of territory. In determining whether such a contract is enforceable, it is proper to view the circumstances attending the making of the agreement, the object and purpose in view, and the construction placed upon it by the parties. Courts

[1] See ante, §§ 421 to 428. See also Franco *v.* Bolton, 3 Ves. jr. 368 to 372; St. John *v.* St. John, 11 Ves. 535, 536; Brackenbury *v.* Brackenbury, 2 Jac. & Walk. 391; Gray *v.* Mathias, 5 Ves. jr. 286.

[2] Wyckoff *v.* Weaver, 66 N. J. L. 648, 52 Atl. 356; Capehart *v.* Rankin, 3 W. Va. 571, 100 Am. Dec. 779; Stansfield *v.* Kunz, 62 Kans. 797, 64 Pac. 614.

[3] Attaway *v.* Third Natl. Bank, 93 Mo. 485, 5 S. W. 16.

of Equity refuse to enforce such contracts, or to assist a party to recover the spoil that may have been secured by the execution of the contract.[1]]

§ 942. [**Same.** — A party to an action for a breach of contract should offer evidence to show that the agreement was such a one as was sanctioned by public policy; but if a contract has been entered into by a county for the purchase of supplies and the preliminary requirements as to publication of notice for bidders for furnishing the supplies, the county will be liable for a conversion of goods received and used by it under a contract for their purchase, though the contract upon its face were incapable of enforcement.[2] The fact that the illegality of the contract was neither pleaded nor urged on the trial makes no difference. If it appears that the contract before the court is opposed to good morals or sound public policy, the court will of its own motion deny relief thereunder.[3] And so, where the court below committed an error, a new trial will not be awarded, where to do so the court will lend its aid to secure for one of the parties an advantage to which he might be entitled under a gambling contract;[4] but where an independent contract has arisen, not forbidden by law, even though it be with respect to the proceeds of an illegal contract, the independent contract is enforceable.[5] The seller of goods has

[1] Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1, 10 Detroit Leg. N. 366; Jackson *v.* McLean's Execrs., 100 Mo. 130, 13 S. W. 393; Richardson *v.* Buhl., 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457.

[2] Hill County *v.* Shaw, 225 Fed. 475, 140 C. C. A. 523; Edwards *v.* Boyle, 37 Okla. 639, 133 Pac. 233.

An agent employed to bring about the recall of municipal officers cannot recover for moneys expended by him. Stirtan *v.* Blethen, 79 Wash. 10, 139 Pac. 618; Smith *v.* Crockett, 85 Conn. 282, 82 Atl. 569; City of Pittsburg *v.* Goshorn, 230 Pa. 212, 79 Atl. 505.

An action on account of milk sold and delivered will be sustained, where milk was received for long period of time without objection as to quality, though answer alleges a criminal act in selling milk under the standard. Whitcomb *v.* Boston Dairy Co., 218 Mass. 24, 105 N. E. 554.

Holder of stock who has sold it in violation of a statute, cannot enforce the return of the stock to him, or recover its value. Krell-French Piano Co. *v.* Dengler, 145 Ky. 202, 140 S. W. 168; but vendor of patent right who has violated statute in making sale of patent is not in pari delicto with innocent purchaser. Michener *v.* Watts, 176 Ind. 376, 96 N. E. 127.

[3] Barry *v.* Mulhall, 162 App. Div. 749, 147 N. Y. Supp. 996; Sprague *v.* Webb, 168 App. Div. 292, 153 N. Y. Supp. 1020; Kaufman *v.* Sorrels, 164 Ill. App. 324; Patterson *v.* Imperial Window Glass Co., 91 Kans. 201, 137 Pac. 955.

[4] Glass *v.* Childs, 9 Ga. App. 520, 71 S. E. 920.

[5] Rountree *v.* Ingle, 94 S. C. 231, 77 S. E. 931.

no moral or equitable right to come into a court and seek the return of the property, the title to which was retained by him, where the property was purchased upon his solicitation for use in a house of prostitution, and he knew that payment was to be derived in this way. If either derives advantage from the transaction, it results from the act of the parties and not of the law, and they will be left in the plight in which they have placed themselves.[1]]

§ 943. [**Right to Rescind an Executed Illegal Contract.** — Since a Court of Equity will not lend its aid to the enforcement of an executory illegal or immoral contract, it will not lend its aid to rescind such a contract that is executed. It is not necessary that the illegal character of the contract appear from the defendant's evidence. If from the plaintiff's own statement, or otherwise, the cause of action appears to arise ex turpi causa, or from the transgression of a positive law of this country, then the court says he has no right to be assisted.[2] The owner of bonds is not entitled to have a return of the papers to him, his interest in the property having been assigned, and the consideration for the money to be paid him thereunder, being his promise not to begin a criminal prosecution.[3] And a party having entered into an illegal contract for purpose of relieving a bank in its embarrassment, is not entitled to recover the consideration parted with by him in the contract, he having a knowledge of all the facts, but ignorant as to the legal effect of his acts.[4] There is an exception to the rule, however, where the paramount public interest demands it,

[1] Philip Levy & Co. *v.* Davis, 115 Va. 814, 80 S. E. 791; Lewer *v.* Cornelius, 72 Wash. 124, 129 Pac. 911.

[2] Garrison *v.* Burns, 98 Ga. 762, 26 S. E. 471; Heintz *v.* Sawyer, 27 Ohio Cir. Ct. R. 10; Delbridge *v.* Beach, 66 Wash. 416, 119 Pac. 856; Ellis *v.* Batson, 127 Ala. 313, 58 So. 193; Roller *v.* Murray, 112 Va. 780, 72 S. E. 665; Wolkovisky *v.* Rapapart, 216 Mass. 48, 102 N. E. 910; Pelosi *v.* Bugbee, 217 Mass. 579, 105 N. E. 222; Maybank *v.* Rogers, 98 S. C. 279, 82 S. E. 422; Sickelsteel *v.* Edmonds, 158 Wis. 122, 147 N. W. 1024; McAndrew *v.* Taylor, 15 Ga. App. 555, 83 S. E. 967; Pierce *v.* Kibbee, 51 Vt. 559; Howard *v.* Farrar, 28 Okla. 490, 114 Pac. 695; Jenness *v.* Simpson, 84 Vt. 127, 78 Atl. 886; Godding *v.* Hall, 56 Colo. 579, 140 Pac. 165.

The execution of a mortgage and bond to secure defalcation of plaintiff's daughter, will be cancelled, where it appears there was duress, menace or undue influence, the parties in such a case not being in pari delicto. Colby *v.* Title Ins. & Trust Co., 160 Cal. 632, 117 Pac. 913.

A note given for payment of rent for a term of years of property to be used for illegal sale of liquors, is enforceable in the hands of a bona fide purchaser for value. Koepke *v.* Peper, 155 Iowa 687, 136 N. W. 902.

[3] Eno *v.* Sage, 83 Misc. Rep. 389, 144 N. Y. Supp. 1062.

[4] Klein *v.* Mechanics & Traders Bank, 144 App. Div. 615, 130 N. Y. Supp. 436, reversing 69 Misc. Rep. 504, 125 N. Y. Supp. 1100.

and relief will be granted, though the result may be that the property will be resorted to, or a benefit derived by a plaintiff who is in equal guilt with the defendant. A life insurance agent gave to defendant all of his share of the first premium on account of his being given a large policy, which was against the law forbidding discrimination in rates. The administrator of the agent is entitled to recover his share of the premium because it is in the interest of the general public that there be no discrimination in rates.[1]]

§ 944. [**Plaintiff May Recover if Remedy Does Not Depend upon Enforcement of Illegal Contract.** — As has already been stated, it is a general rule that a Court of Equity will not grant relief for the recovery of property given by means of an illegal contract, or for a rescission of it, nor will it enforce the contract if it is still executory; it will, however, enforce a contract, which is base and illegal in its very nature, if a recovery can be had without resort to the illegal features of the agreement. For instance, where the parties to a contract have perpetrated a fraud upon another, neither the plaintiff nor a defendant may found his case, either in whole or in part, upon a fraudulent transaction, although his antagonist may have participated therein, but a plaintiff may nevertheless recover if he is able to make out his case without calling upon the fraud for help; but he must fail if such help is indispensable.[2] A new contract founded on a new and independent consideration, if fair and lawful, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties, will be determined by the courts on its own merits; and if the new consideration be valid and adequate it will be enforced.[3] A contract against good morals, as

[1] Rideout *v.* Mars, 99 Miss. 199, 54 So. 801.

[2] Matthews *v.* Wayne Junction Trust Co., 197 Fed. 237; In re T. H. Bunch Co., 180 Fed. 519; Primeau *v.* Granfield, 180 Fed. 847; National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352, 56 N. W. 864, 38 Am. St. Rep. 902; Washington Irrigation Co. *v.* Krutz, 119 Fed. 279, 56 C. C. A. 1; Southern Mut. Aid Assn. *v.* Blount, 112 Va. 214, 70 S. E. 487; Koepke *v.* Peper, 155 Iowa, 687, 136 N. W. 902; Wald *v.* Whelden, 27 N. Dak. 624, 147 N. W. 402.

Employment of servant to bet on horse races for master is a void contract, and salary earned is not collectible. Cahill *v.* Gilman, 84 Misc. Rep. 372, 146 N. Y. Supp. 224; Sprague *v.* Webb, 168 App. Div. 292, 153 N. Y. Supp. 1020.

But if it is necessary to have aid from the illegal transaction, the action will not lie. Logan *v.* Fidelity Ins. Co., 161 App. Div. 404, 146 N. Y. Supp. 678; Dennehy *v.* McNulta, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609; Noble *v.* Davison, 177 Ind. 19, 96 N. E. 325.

[3] Dent *v.* Ferguson, 132 U. S. 50, 33 L. Ed. 342, 10 S. Ct. Rep. 13; Columbus *v.* Sheehy, 43 App. D. C. 462; Jourdan *v.* Burstow, 78 N. J.

an agreement entered into on Sunday, will not be enforced, but if it has been executed, the law leaves the parties where it finds them and will not assist the parties to avoid it or set it aside.[1] And where an executor, in order to procure land in his own name and which he was selling as executor, took title in the name of his son, but by a misdescription of the land the deed conveyed nothing, no action will lie by either party to correct the mistake.[2]]

§ 945. **Extent to Which Courts of Equity Will Go in Directing the Cancellation of Void and Voidable Instruments.** — A question has often occurred, how far Courts of Equity would or ought to interfere to direct deeds and other solemn instruments to be delivered up and cancelled, which are utterly void and not merely voidable.[3] The doubt has been in the first place whether, as an instrument utterly void is incapable of being enforced at law, it is not a case where the remedial justice to protect the party may not be deemed adequate and complete at law, and therefore where the necessity of the interposition of Courts of Equity is obviated.[4] And in the next place, whether if the instrument be void and ought not to be enforced, the more appropriate remedy in a Court of Equity would not be to order a perpetual injunction to restrain

Eq. 587, 81 Atl. 1133, affirming 76 N. J. Eq. 55, 74 Atl. 124, 139 Am. St. Rep. 741.

Mortgage and accompanying notes, given to secure defalcation of son, and to stifle criminal prosecution, are not enforceable against parents, grantors. American Natl. Bank *v.* Madison, 137 S. W. 1076, 144 Ky. 152.

[1] McKee *v.* Verner, 239 Pa. 69, 86 Atl. 646; Scott *v.* O'Hara, 150 Ky. 200, 150 S. W. 63.

[2] Gilmore *v.* Thomas, 252 Mo. 147, 158 S. W. 577.

[3] See Mitford, Eq. Pl. by Jeremy, 129, and note (*x*); 2 Swanst. 159, note (*b*); Bromley *v.* Holland, 5 Ves. 618, 619; s. c. 7 Ves. 18, 19; Simpson *v.* Lord Howden, 3 Mylne & Craig, R. 102, 103; Colman *v.* Sarrel, 1 Ves. Jr. R. 50.

[4] Hilton *v.* Barrow, 1 Ves. Jr. 284; Ryan *v.* Mackmath, 3 Bro. Ch. R. 15, 16, Mr. Belt's note (1), and Pierce *v.* Webb, there cited, p. 16, note 2; Jervis *v.* White, 7 Ves. 413, 414; Gay *v.* Mathias, 5 Ves. Jr. 293, 294; Bromley *v.* Holland, 5 Ves. 618, 619; Piersoll *v.* Elliot, 31 U. S. 95, 8 L. Ed. 332; Humphrey *v.* Gerard, 83 Conn. 346, 77 Atl. 65; Letohatchie Baptist Church *v.* Bullock, 133 Ala. 548, 32 So. 58; Miller *v.* Moffit, 153 Ill. App. 1; Baltimore & Ohio R. Co. *v.* Evans, 188 Fed. 8, 110 C. C. A. 158; General Bonding & Casualty Co. *v.* Mosely, 174 S. W. 1031; Ehrlich *v.* Shuptrine, 117 Ga. 882, 45 S. E. 279; Hager *v.* Arland, 81 Misc. Rep. 421, 143 N. Y. Supp. 388; Coan *v.* Consolidated Light & Power Co., 126 Md. 506, 95 Atl. 151.

The general jurisdiction of courts of equity to cancel void deeds or other void instruments apparently affecting the title to real estate, not shown upon their faces to be void, is undoubted, but it is essential that the complainant be in possession of the land. Smith *v.* Roney, 182 Ala. 540, 62 So. 753. See Mawhorter *v.* Armstrong, 16 Ohio, 188; Wilkes *v.* Wilkes, 4 Edw. 630; post, p. 13, note.

the use of the instrument rather than to compel a delivery up and cancellation of the instrument.[1]

§ 946. **Acquisition of General Jurisdiction Where Discovery Is Sought as a Means of Arriving at Relief by Cancellation of Instrument.** — Where the party is seeking a discovery as the means of arriving at relief by the delivery up or cancellation of the void instrument, it seems somewhat difficult to understand why a Court of Equity, having acquired a full jurisdiction in the case for discovery, should not when that is obtained proceed for the purpose of preventing multiplicity of suits to make a decree for the relief sought.[2] But where no discovery is sought, and the naked case made by the bill is for a mere delivery up or cancellation of the instrument, not averring any defect of proof but simply stating that the instrument is void, there might be more color for some scruple in entertaining the bill.[3] Still even in the latter case the specific relief required being such as a Court of Law cannot give, and yet the instrument being from its very nature and its apparent validity calculated to throw some doubt upon the title, or being capable of future misuse, the justice of a Court of Equity would seem to require even under such circumstances an interposition to prevent serious mischiefs.[4]

§ 947. **Same.** — But whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest, and the jurisdiction is now maintained in the fullest extent.[5] And these de-

[1] Mitford, Eq. Pl. by Jeremy, 129, and note (*x*); Jervis *v.* White, 7 Ves. 414; Hanington *v.* Du Chatel, 1 Bro. Ch. R. 124; s. c. 2 Dick. 581, and more fully 2 Swanst. R. 159, note.

Where defendant procured from plaintiff a contract which enabled him to collect insurance money, fraudulently represented by defendant as being void, equity will cancel the contract and enjoin further performance of the agreement. Barrington *v.* Ryan, 88 Mo. App. 85; Moyle *v.* Silbaugh, 105 Iowa, 531, 75 N. W. 362; Fred Macey Co. *v.* Macey, 143 Mich. 138, 106 N. W. 722, 12 Detroit Leg. N. 948, 5 L. R. A. (N. S.) 1036.

[2] See Newman *v.* Milner, 3 Ves. Jr. 483; ante, §§ 64 to 115, 929 to 935; 690, 694; post, § 1483.

[3] See Gray *v.* Mathias, 5 Ves. 286; Franco *v.* Bolton, 3 Ves. 368.

[4] Hamilton *v.* Cummings, 1 John. Ch. R. 520 to 524; Hawkshaw *v.* Parkins, 2 Swanst. R. 546.

[5] Hamilton *v.* Cummings, 1 John. Ch. R. 520 to 524, and the cases there cited; Mitford, Eq. Pl. by Jeremy, 128, 129, and notes; Mr. Swanston's note to Davis *v.* Duke of Marlborough, 2 Swanst. R. 157, note (*b*); St. John *v.* St. John, 11 Ves. 535; Mitford, Eq. Pl. by Jeremy, 127 to 130; 1 Madd. Ch. Pr. 186 to 190; Simpson *v.* Lord Howden, 3 Mylne & Craig, R. 104, 105; Mayor of Colchester *v.* Lowton, 1 Ves. & Beam. 244; Bromley *v.* Holland, 7 Ves. R. 16, 19, 20, 21; Hayward *v.* Dimsdale, 17 Ves. 112;

cisions are founded on the true principles of Equity Jurisprudence, which is not merely remedial but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose to the injury of a third person.[1] If it is a deed purporting to convey lands or other hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title.[2]

Pierce *v.* Webb, cited in Mr. Belt's ed. of 3 Bro. Ch. R. 116, note; Williams *v.* Flight, 5 Beav. R. 41. See Mr. Belt's notes to Ryan *v.* Mackmath, 3 Bro. Ch. R. 15; Chennel *v.* Churchman, cited ibid. p. 16; Minshaw *v.* Jordan, ibid. p. 17; Lisle *v.* Liddle, 3 Anst. R. 649; Piersoll *v.* Elliot, 31 U. S. 95, 8 L. Ed. 332, in which last case the doctrine was much considered. See editor's note to § 33.

[1] Minshaw *v.* Jordan, 1 Bro. Ch. R. 17, Mr. Belt's note; Bromley *v.* Holland, 7 Ves. 20, 21; s. c. Cooper, R. 9, 21; Jervis *v.* White, 7 Ves. 414; Bishop of Winchester *v.* Fournier, 2 Ves. 445, 446; Wynne *v.* Callander, 1 Russell, R. 293; Reed *v.* Bank of Newburgh, 1 Paige, R. 215. But equity will not order the cancellation of a negotiable note obtained by fraud after the defrauding party has passed it for value and without notice. Fuller *v.* Percival, 126 Mass. 381; Stephens *v.* Summerfield, 22 Tex. Civ. App. 182, 54 S. W. 1088; Price *v.* Schwartz, 18 Ohio Cir. Ct. R. 607, 9 O. C. D. 438; Fidelity Trust Co. *v.* Palmer, 22 Wash. 473, 61 Pac. 158, 79 Am. St. Rep. 953.

[2] Pierce *v.* Webb, 3 Bro. Ch. R. 16, note, and Mr. Belt's notes; Hayward *v.* Dimsdale, 17 Ves. 111; Byne *v.* Vivian, 5 Ves. 606, 607; Mayor of Colchester *v.* Lowton, 1 Ves. & B. 244; Attorney-Gen. *v.* Morgan, 2 Russell, R. 306; Duncan *v.* Warrall, 10 Price, R. 31; Jackman *v.* Mitchell, 13 Ves. 581; Pettit *v.* Shepherd, 5 Paige, R. 493; Van Doren *v.* Mayor, &c. of New York, 9 Paige, R. 388. *Cloud upon Title.* — To remove a cloud upon the plaintiff's title to land the plaintiff must under the common statutes, when suing upon a legal title, show that he is in possession, or that the land is vacant; for it is said, if the defendant or another is in possession, the plaintiff has a remedy at law by ejectment or by writ of entry. Allen *v.* Storer, 132 Mass. 372, 376; Russell *v.* Deshon, 124 Mass. 342; Machine Co. *v.* Perry, 119 Mass. 123; Boardman *v.* Jackson, Ib. 161; Sullivan *v.* Finnegan, 101 Mass. 447; Bassett *v.* Brown, 100 Mass. 355 (where the defendant had obtained a deed by fraud from the plaintiff, and equity would not interfere); Clouston *v.* Shearer, 99 Mass. 209, 212; Bunce *v.* Gallagher, 5 Blatchf. 48; Page *v.* Montgomery, 46 Mich. 51; Barron *v.* Robbins, 22 Mich. 35; Woods *v.* Monroe, 17 Mich. 238; Baines *v.* Barnes, 64 Ala. 375; Jones *v.* DeGraffenreid, 60 Ala. 145; Herrington *v.* Williams, 31 Tex. 448; Sale *v.* McLean, 29 Ark. 612; Polk *v.* Pendleton, 31 Md. 118; Burton *v.* Gleason, 56 Ill. 25; Oakley *v.* Hurlbut, 100 Ill. 204; Eldridge *v.* Smith, 34 Vt. 484; Lake Bigler Road Co. *v.* Bedford, 3 Nev. 399; Clark *v.* Covenant Ins. Co., 52 Mo. 272; Keane *v.* Kyne, 66 Mo. 216. See editor's note to § 33, ante.

But the contrary was held in Jones *v.* Perry, 10 Yerg. 59, and in Almony *v.* Hicks, 3 Head, 39, on the very intelligible ground that the relief at law would not be adequate. It might still be necessary, or at least proper and desirable, for the plaintiff after recovering possession to ask

If it is a mere written agreement, solemn or otherwise, still while it exists it is always liable to be applied to improper purposes,

to have the defendant's title-deed delivered up for cancellation as a cloud, especially if the plaintiff had obtained judgment by default against a non-resident defendant. Evidence aliunde would still be required to show the invalidity of the deed. To drive the plaintiff to two actions in such a case would, it might be argued, where statute has not cut short the question, be hard and needless. See also Marston *v.* Moore, 39 Ala. 722, where relief was granted though the defendant was in possession of part of the land.

It is clear too that if the possession is vacant, the plaintiff may have his relief. Oakley *v.* Hurlbut, 100 Ill. 204; Hardin *v.* Jones, 86 Ill. 313; Gage *v.* Abbot, 99 Ill. 366. So too if the plaintiff's title or claim is equitable, or if it is a junior legal title with superior equities, he need not have possession. King *v.* Carpenter, 37 Mich. 363; Branch *v.* Mitchell, 24 Ark. 431; Hodges *v.* Griggs, 21 Vt. 280. Thus it is perhaps that a judgment creditor may have such relief, as he clearly may though not in possession, the better to enforce his judgment. Hager *v.* Shindler, 29 Cal. 47; Stowell *v.* Haslett, 5 Lans. 380; s. c. 57 N. Y. 637. So may one who seeks to restrain a sale and prevent a cloud; at least in California, such a case not falling within the statute. Thompson *v.* Lynch, 29 Cal. 189. So also of a purchaser under execution sale, upon judgment against one who has conveyed the land in question in fraud of creditors. Gould *v.* Steinburg, 84 Ill. 170; Hager *v.* Shindler, supra. It is also held that a mortgagee or his assignee may have a cloud upon the mortgage title removed, regardless of possession in himself. Polk *v.* Reynolds, 31 Md. 106; Wofford *v.* Board of Police, 44 Miss. 579.

The plaintiff must however show some title in himself deserving protection. Hutchinson *v.* Howe, 100 Ill. 11; Emery *v.* Cochran, 82 Ill. 65; Robinson *v.* Joplin, 54 Ala. 70; Huntington *v.* Allen, 44 Miss. 654. One who has acquired title by prescription will be entitled to the relief. Arrington *v.* Liscomb, 34 Cal. 365; Marston *v.* Rowe, 39 Ala. 722; Moody *v.* Holcomb, 26 Tex. 714. And it has been held that one who has warranted title to land sold by him may in support of his warranty have a cloud removed. Ely *v.* Wilcox, 26 Wis. 91, citing Malins *v.* Brown, 4 Comst. 403; Bennett *v.* Abrams, 41 Barb. 620; Owen *v.* Paul, 16 Ala. 130. See Chamblin *v.* Slichter, 12 Minn. 276. But query if the cases cited support the doctrine. The case of Bissell *v.* Kellogg, 60 Barb. 617, 629, is contra. On the other hand an administrator cannot have a cloud removed from the title to his intestate's land even where power has been given him to sell the same for the payment of debts. Ryan *v.* Duncan, 88 Ill. 144; Smith *v.* McConnell, 17 Ill. 135; Shormate *v.* Lockridge, 53 Ill. 503; Gridley *v.* Watson, Ib. 186; Paine *v.* First Div. St. Paul R. Co., 14 Minn. 65.

Assuming however that the plaintiff is in a position to ask for relief, he will be entitled to it upon establishing the existence of any such facts as the following: (1) An invalid deed or instrument relating to the title to land, the invalidity of which does not appear therein; as e. g. an invalid tax-deed or certificate. Russell *v.* Deshon, 124 Mass. 342; Sherman *v.* Fitch, 98 Mass. 59, 61; Martin *v.* Graves, 5 Allen, 601; Carroll *v.* Brown, 28 Gratt. 791; Lockett *v.* Hurt, 57 Ala. 198; Crooke *v.* Andrews, 40 N. Y. 547; Newell *v.* Wheeler, 48 N. Y. 486; Davis *v.* Boston, 129 Mass. 378; Frederick *v.* Ewrig, 82 Ill. 363; Reed *v.* Tyler, 56 Ill. 288; Gage *v.* Billings, Ib. 268; Gage *v.* Rohrback, Ib. 262; Gage *v.* Chapman, Ib. 311; Hamilton *v.* Fond du Lac, 25 Wis. 490; Brooks *v.* Howland, 58 N. H. 98;

and it may be vexatiously litigated at a distance of time when the proper evidence to repel the claim may have been lost or

McPike *v.* Pen, 51 Mo. 63; Clark *v.* Covenant Ins. Co., 52 Mo. 272; Lee *v.* Ruggles, 62 Ill. 427. And this though the plaintiff's title was acquired since the sale. Siegel *v.* Outagamie, 26 Wis. 70. But the plaintiff must repay the amount paid by the defendant, including the amount of subsequent taxes. Farwell *v.* Harding, 96 Ill. 32; State Railroad Tax Cases, 92 U. S. 616; Pritchard *v.* Madren, 24 Kans. 486; Knox *v.* Dunn, 22 Kans. 683; Montgomery *v.* Sayre, 65 Ala. 564. Whether the deed or instrument was recorded or not makes no difference. Fonda *v.* Sage, 48 N. Y. 173; Allen *v.* Buffalo, 39 N. Y. 386. But it seems that it is material that the defendant has, fraudulently or not, had the deed recorded where there had been no valid delivery. Eckman *v.* Eckman, 55 Pa. St. 269. But see Pratt *v.* Pond, 5 Allen, 59. As to tax *assessments*, see infra. (2) A patent, apparently valid, granted by the Government on part of a lot of land, the whole of which had already been legally granted to another. Van Wyck *v.* Knevels, 106 U. S. 360, 27 L. Ed. 201, 1 S. Ct. Rep. 336. (3) A pretended title which if proved would call for an answer. Lick *v.* Ray, 43 Cal. 83. (4) An instrument which is really a mortgage but purports to be an absolute deed, payment having been made or tendered. Shays *v.* Norton, 48 Ill. 100; Rich *v.* Doane, 35 Vt. 124. (5) A mortgage which has been paid but has not been discharged of record. Tucker *v.* Conwell, 67 Ill. 553; Redmond *v.* Packersham, 66 Ill. 434. But see, in regard to mortgages of personalty, Bushnell *v.* Avery, 121 Mass. 148, infra. (6) A judgment obtained against a defendant after his death, which if valid would be a lien upon his lands. Blodget *v.* Blodget, 42 How. Pr. 19. Or a judgment of the kind, voidable for any other reason. Smith *v.* Hickman, 68 Ill. 314. (7) Voidable execution sale of land. Anderson *v.* Talbot, 1 Heisk. 407. As e. g. to one who has notice of a prior legal sale by the owner. Phillips *v.* Pitts, 78 Ill. 72. (8) A fortiori a voidable deed executed upon an invalid execution sale. Fitts *v.* Davis, 42 Ill. 391; Stout *v.* Cook, 37 Ill. 283; Mustain *v.* Jones, 30 Ga. 951; Maxon *v.* Ayres, 28 Wis. 612. (9) Judgment and sale against the legal and apparent owner of land, but not the real owner thereof. Lownsbery *v.* Purdy, 18 N. Y. 515; Sieman *v.* Scharck, 29 N. Y. 598; Mulligan *v.* Baring, 3 Daly, 75. 80. (10) Sale by an administrator of land that had been lawfully sold by the intestate himself. Thompson *v.* Lynch, 29 Cal. 189. (11) Execution levied upon land in which a bankrupt owned a reversion, suit being brought by the assignee. Hall *v.* Whiston, 5 Allen, 126; Sherman *v.* Fitch, 98 Mass. 59, 61. (12) Inquisition of lunacy of a grantor who had previously conveyed to the plaintiff without notice of the disability. Yauger *v.* Skinner, 1 McCart. 389. (13) An estate upon condition, defeated by breach thereof. Smith *v.* Smith, 23 Wis. 176. (14) An illegal tax or assessment, in some States. Scofield *v.* Lansing, 17 Mich. 437; Roe *v.* Lincoln, 56 Wis. 66. See Albany Mining Co. *v.* Auditor Gen., 37 Mich. 391; Sinclair *v.* Winona, 23 Minn. 404 (injunction to restrain unauthorized publication of delinquent tax list). But see infra (5). For other cases of cloud see Dart *v.* Orme, 41 Ga. 376; Larmon *v.* Jordan, 56 Ill. 204; Bartlett *v.* Bartlett, 137 Mass. 156.

Facts of the following nature have been held not to constitute clouds: (1) The existence of deeds or other instruments relating to the title to land, which disclose their own invalidity, or whose invalidity will appear upon any attempt to prove title under them. Crevier *v.* New York, 12 Abb. Pr. (N. S.) 340, 346; Overing *v.* Foote, 43 N. Y. 290; Howell *v.* Buffalo,

obscured, or when the other party may be disabled from contesting its validity with as much ability and force as he can contest

2 Abb. App. Dec. 412; Cohen *v.* Sharp, 44 Cal. 29; Meloy *v.* Dougherty, 16 Wis. 269; Clark *v.* Covenant Ins. Co., 52 Mo. 272; Tyson *v.* Brown, 64 Ala. 244; Rea *v.* Longstreet, 54 Ala. 291; Alden *v.* Truber, 44 Conn. 455. Contra, Jones *v.* Perry, 10 Yerg. 59, 83; Almony *v.* Hicks, 3 Head, 39; Dart *v.* Orme, 41 Ga. 376. And see Hamilton *v.* Cummings, 1 Johns. Ch. 517; Fuller *v.* Percival, 126 Mass. 381, 382; Anthony *v.* Valentine, 130 Mass. 119, 120. As a new question much could be said in support of the rule in Jones *v.* Perry and the other cases here cited with it. The invalidity of the deed or instrument in question may be matter of construction doubtful even to a lawyer, and much more so to the average layman; and yet it will be void on its face if the court on construing it so declare. Its validity again may turn upon doubtful statutory law, with the same result. In such cases the instrument clouds the plaintiff's title as really as may an instrument whose invalidity can be shown only by parol. But see Commonwealth *v.* Smith, 10 Allen, 448, infra (10). Besides the plaintiff has in fact gained much of his point by obtaining the court's declaration to the instrument's invalidity, and this too by an indirection, — a thing he could not accomplish by a bill brought directly to have the instrument (if not a will) construed by the court. Surely it would be quite as well to grant the prayer directly and order the writing delivered up as a cloud. (2) A deed not acknowledged, and hence not entitled to record, is not a cloud. Nickerson *v.* Loud, 115 Mass. 94, 97, Wells, J. (3) So of assignments and subleases by a lessee after sale, on execution of his leasehold estate. McNeil *v.* Ames, 120 Mass. 481. (4) Sale of land on execution against one who never had any title to or interest in it. Shelley *v.* Spillman, 19 Fla. 500; Barnes *v.* Mayo, Ib. 542; Kuhn *v.* McNeil, 47 Mo. 389; Drake *v.* Jones, 27 Mo. 428. But see Goodell *v.* Blumer, 41 Wis. 436. As where a wife's land is sold on execution against her husband. Mulligan *v.* Baring, 3 Daly, 75; Farnham *v.* Campbell, 34 N. Y. 480. But see Woodworth *v.* Gorton, 46 Mich. 324. "Is there any case where a deed between utter strangers is held to be a cloud upon the title?" Wells, J., in Nickerson *v.* Loud, 115 Mass. 94, 97; Kuhn *v.* McNeil, supra. But see Goodell *v.* Blumer, supra. (5) An illegal tax or municipal assessment, in some States. Loud *v.* Charlestown, 99 Mass. 208; Hunnewell *v.* Charlestown, 106 Mass. 350; Norton *v.* Boston, 119 Mass. 194; Macy *v.* Nantucket, 121 Mass. 351; Crevier *v.* New York, 12 Abb. Pr. (N. S.) 340; Waterbury Bank *v.* Lawler, 46 Conn. 243 (whether on real or personal property); Arnold *v.* Middletown, 39 Conn. 406; Rowland *v.* First School Dist., 42 Conn. 30; Montgomery *v.* Sayre, 65 Ala. 564; Alabama Ins. Co. *v.* Lott, 54 Ala. 499; Elyton Land Co. *v.* Ayres, 62 Ala. 413; Burke *v.* Speer, 59 Ga. 353; Decker *v.* McGowan, Ib. 805; Georgia Loan Assoc. *v.* McGowan, Ib. 811; Snyder *v.* Marks, 109 U. S. 189, 27 L. Ed. 901, 3 S. Ct. Rep. 189; State Railroad Tax Cases, 92 U. S. 575, 613. Contra, in other States. Scofield *v.* Lansing, 17 Mich. 437; Roe *v.* Lincoln, 56 Wis. 66; Pier *v.* Fond du Lac, 53 Wis. 421 (if the invalidity of the tax is not apparent from the record); Mitchell *v.* Milwaukee, 18 Wis. 92; Powers *v.* Bowman, 53 Iowa, 359 (but not in Iowa for a mere over assessment. Ib.; Nugent *v.* Bates, 51 Iowa, 359); Macklot *v.* Davenport, 17 Iowa, 379; Cattell *v.* Lowry, 45 Iowa, 478; Kimball *v.* Merchants' Trust Co., 89 Ill. 611. These cases proceed upon the ground that the assessment itself was unauthorized; but that makes no difference in the States first mentioned; there the taxes

it at the present moment.[1] [The instrument in question must be in writing and must be of such a character that, if left outstand-

must first be paid, then redress if proper may be had at law on compliance with the statute. If a special equity intervene aside from the invalidity of the assessment, it is clear that that may be reached by a Court of Chancery, as where in the case of a tract of land to be sold in lots, the proceeding is to avoid a multiplicity of suits affecting the seller. Union Pacific Ry. Co. *v.* Cheyenne, 113 U. S. 516, 5 S. Ct. Rep. 601; Crews *v.* Burcham, 1 Black, 352; State Railroad Tax Cases, 92 U. S. 575; Dow *v.* Chicago, 78 U. S. 108, 20 L. Ed. 65; Hannewinkle *v.* Georgetown, 82 U. S. 548, 21 L. Ed. 231; Crevier *v.* New York, 12 Abb. Pr. (N. S.) 340; Corrothers *v.* Board of Education, 15 W. Va. 527; Chesapeake R. Co. *v.* Miller, 19 W. Va. 408. See further, as to equitable relief from improper tax and municipal assessments, Pelton *v.* National Bank, 101 U. S. 143, 25 L. Ed. 901; Cummings *v.* National Bank, 101 U. S. 153, 25 L. Ed. 903; Litchfield *v.* Webster, 101 U. S. 773, 25 L. Ed. 925; Strasburgh *v.* New York, 87 N. Y. 452; Lemont *v.* Singer Stone Co., 98 Ill. 94; Worthen *v.* Badgett, 32 Ark. 496; Greedup *v.* Franklin, 31 Ark. 101; Oliver *v.* Memphis R. Co., Ib. 128; Baldwin *v.* Tucker, 16 Fla. 258; Dean *v.* Davis, 51 Cal. 406; Scobey *v.* Decatur, 72 Ind. 551; Wright *v.* Southwestern R. Co., 64 Ga. 783. (6) Mere notice on the registry of deeds that one claims a trust in certain lands is not a cloud, at least if such notice is not entitled to record. Nickerson *v.* Loud, 115 Mass. 94. (7) Mere unfounded apprehension concerning the validity of one's own title, and a false and clamorous assertion of title by the defendant. March *v.* England, 55 Ala. 275; Rea *v.* Longstreet, 54 Ala. 291. (8) Assertion by a mortgagee of personalty of rights over the property after the mortgage has been paid and all conditions therein performed, the mortgagor being in possession. Bushnell *v.* Avery, 121 Mass. 148. (9) So of an attempt by an assignee of an insolvent to set aside a mortgage of personalty alleged by the plaintiff to be invalid, the defendant not having taken possession or in any way intermeddled with the property. Sherman *v.* Fitch, 98 Mass. 59. Secus in a case of realty. Ib. p. 61. (10) A mortgage by a corporation of its franchise, not authorized by law, against a second valid mortgage by the corporation. Commonwealth *v.* Smith, 10 Allen, 448.

Of course if the alleged cloud is supported by an equity, the court will not remove it. Torrent *v.* Booming Co., 22 Mich. 21; Gayne *v.* Boisregard, 39 Miss. 796.

As indicated near the beginning of this note, equity will entertain a bill to prevent the creation of a cloud as well as to remove one. Mann *v.* Utica, 44 How. Pr. 334; McPike *v.* Pen, 51 Mo. 63; Longley *v.* Hudson, 4 Thomp. & C. 533; Marsh *v.* Brooklyn, 59 N. Y. 280; Roe *v.* Lincoln, 56 Wis. 66; Goodell *v.* Bloomer, 41 Wis. 436; Tucker *v.* Kenniston, 47 N. H. 270; Porter *v.* Rice, 55 Cal. 165.

But see Foley *v.* Kirk, 33 N. J. Eq. 170, for important qualification of this doctrine. And see Springport *v.* Teutonia Bank, 75 N. Y. 397; Buxton *v.* Broadway, 45 Conn. 540. It is held that equity will not compel a lessee whose term for years has been sold on execution to deliver to the purchaser the counterparts of his recorded lease and subleases. McNeil *v.* Ames, 120 Mass. 481.

[1] Bromley *v.* Holland, 7 Ves. 20, 21; Kemp *v.* Pryor, 7 Ves. 248, 249; St. John *v.* St. John, 11 Ves. 535; Peake *v.* Highfield, 1 Russ. R. 559; Duncan *v.* Warrall, 10 Price, R. 31; Hamilton *v.* Cumimngs, 1 John. Ch. R. 520 to 524.

ing, it will menace with injury the person against whom it is void or voidable; hence, if its invalidity appears directly or constructively upon its face, the court may not interfere.[1]]

§ 948. **Instrument Will Not Be Cancelled Where It Can Do No Harm in Its Present State.** — But where the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of Courts of Equity to direct it to be cancelled or delivered up would not seem to apply; for in such a case there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it in a just sense be said that such a paper can throw a cloud over his right or title or diminish its security, nor is it capable of being used as a means of vexatious litigation or serious injury. And accordingly it is now fully established that in such cases Courts of Equity will not interpose their authority to order a cancellation or delivery up of such instruments.[2] Upon an analogous principle Courts of Equity have refused to entertain a bill for the delivery up of a bill of exchange on which the holder had obtained a judgment at law against the plaintiff, which was satisfied, but where he retained the bill, treating it as a case in which there was scarcely a pretence of danger from future litigation;[3] for the bill was merged in the judgment.

§ 949. **This Doctrine Comes under General Jurisdiction of the Court of a Bill of Quia Timet.** — The whole doctrine of Courts of Equity on this subject is referable to the general jurisdiction, which it exercises in favor of a party quia timet.[4] It is not confined to cases where the instrument having been executed is void upon grounds of law or equity. But it is applied even in cases of

[1] Hjcks *v.* Rupp, 49 Mont. 40, 140 Pac. 97; Rostein *v.* Park, 38 Oreg. 1, 62 Pac. 529. See generally, Bishop *v.* Thompson, 196 Ill. 206, 63 N. E. 684; Morton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94; Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251.

[2] Gray *v.* Mathias, 5 Ves. 286; Simpson *v.* Lord Howden, 3 Mylne & Craig, 97, 102, 103, 108; Bromley *v.* Holland, 7 Ves. 16, 20, 22. See also Piersoll *v.* Elliot, 31 U. S. 95, 8 L. Ed. 332; Van Doren *v.* Mayor, &c. of New York, 9 Paige, R. 388; Smyth *v.* Griffin, 13 Simon, R. 245.

[3] Threlfall *v.* Lunt, 7 Sim. R. 627. See Lisle *v.* Liddle, 3 Anst. R. 649, where after a verdict and before judgment in favor of the original defendant, the plaintiff in equity was held entitled to a delivery up of the note. See also Ryan *v.* Mackmath, 3 Bro. Ch. R. 15, 16, 17, and Mr. Belt's notes, ibid.; ante, § 947, and note 4; Johnston *v.* Renton, L. R. 9 Eq. 181; Lee *v.* Angas, L. R. 7 Ch. 79, n.; editor's note to § 33.

[4] See Newland on Contracts, ch. 34, p. 493; Viner, Abridg. Quia Timet, A. B.; 1 Fonbl. Eq. B. 1, ch. 1, § 8, and note (*y*); ante, § 935; post, §§ 1141 to 1171.

forged instruments which may be decreed to be given up without any prior trial at law on the point of forgery.[1]

§ 950. **Trial of the Issue of Validity of the Instrument Sought to Be Cancelled.** — In cases where the delivery up or cancellation of any deed or other instrument is sought on account of its being void the old course used to be, if the validity of the instrument was contested, to direct an issue or a trial at law to ascertain the fact.[2] But this, although the common practice, was a matter in the sound discretion of the court, as the determination of a jury upon the point was not indispensable. It was merely ancillary to the conscience of the Court of Equity when administering relief, and not strictly the right of the party.[3] At present a different and more convenient course seems to prevail (which is clearly within the jurisdiction of the court), and that is for the court itself to decide the point, without sending the matter to be ascertained at law by a jury, unless it is satisfied from the contradictory character of the evidence or the want of clearness in the proofs that such a determination by a jury would be advisable.[4]

§ 951. **Right of Owner to Have Evidences of His Title to Property Preserved though in Possession of Another.** — Hitherto we have been considering the jurisdiction of Courts of Equity to decree a delivery up or cancellation of deeds or other instruments on account of some inherent defect in their original character which renders them either voidable or void. But the powers of Courts of Equity are by no means limited to cases of this sort. On the contrary its remedial justice is often and most beneficially applied by affording specific relief in cases of unexceptionable deeds and other instruments, in favor of persons who are legally entitled to them.[5] This indeed is a very old head of equity jurisdiction, and has been traced back to so early a period as the reign

[1] Peake *v.* Highfield, 1 Russell, R. 559.

[2] See Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 2, p. 469.

[3] Jervis *v.* White, 7 Ves. 414.

[4] Newman *v.* Milner, 2 Ves. Jr. 483; Smith *v.* Carll, 5 John. Ch. R. 118, 119.

[5] Mitford, Eq. Pl. by Jeremy, 117, 118; Brown *v.* Brown, 1 Dick. R. 62; post, § 1231.

See post, § 906. In Pierce *v.* Lamson, 5 Allen, 60, the court compelled a mortgagor to surrender his mortgage to the plaintiff, who had vainly intrusted it to the former for putting it on record. See also Knye *v.* Moore, 1 Sim. & S. 61; Freeman *v.* Fairlie, 3 Mer. 29, 30. There is nothing in the nature of the certificate of registry of a ship which excludes it from the jurisdiction of the court to decree its delivery as against a party unlawfully detaining it. Gibson *v.* Ingo, 6 Hare, 112.

of Edward IV.[1] It is a most important branch of Equity Jurisprudence, and is exerted in all suitable cases of a public or private nature in favor of persons entitled to the custody and possession of deeds and other writings. But where the title to the possession of deeds and other writings depends upon the validity of the title of the party to the property to which they relate, and he is not in possession of that property, and the evidence of his title to it is in his own power, or it does not depend upon the production of the deed or writings, of which he prays the delivery, — in such cases he must first establish his title to the property at law before he can come into a Court of Equity for a delivery of the deeds.[2] But if his title is not disputed, relief follows of course. Thus heirs at law, devisees, and other persons properly entitled to the custody and possession of the title-deeds of their respective estates may, if they are wrongfully detained or withheld from them, obtain a decree for a specific delivery of them.[3] The same doctrine applies to other instruments and securities, such as bonds, negotiable instruments, and other evidences of property which are improperly withheld from the persons who have an equitable or legal interest in them,[4] or who have a right to have them preserved. This redress a Court of Common Law is for the most part incapable of affording, since the prescribed forms of its remedies rarely enable it to pronounce a judgment in rem in such cases, which is or can be made effectual.[5] It is true that an action of detinue or even of replevin might in some few cases lie and give the proper remedy if the thing could be found; but generally in actions at law damages only are recoverable, and such a remedy must in many cases be wholly inadequate. This constitutes the true ground for the prompt interposition of Courts of Equity for the recovery of the specific deeds or other instruments.[6]

[1] Mitford, Eq. Pl. by Jeremy, 117, note (*l*); Armitage *v.* Wadsworth, 1 Madd. R. 192.

[2] Mitford, Eq. Pl. by Jeremy, 54, 117, 118, 128; Armitage *v.* Wadsworth, 1 Madd. R. 192; post, § 1231.

[3] Reeves *v.* Reeves, 9 Mod. R. 128; Tanner *v.* Wise, 3 P. Will. 296; Harrison *v.* Southcote, 1 Atk. 539; Ford *v.* Peering, 1 Ves. Jr. 92; Papillon *v.* Voice, 2 P. Will. 478; Duncombe *v.* Mayer, 8 Ves. 320; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 2, pp. 468, 469.

[4] See Knye *v.* Moore, 1 Sim. & Stu. 61; Freeman *v.* Fairlie, 3 Meriv. R. 30; post, § 1231.

[5] Mitford, Eq. Pl. by Jeremy, 127, 128; Cooper, Eq. Pl. 137; Jackson *v.* Butler, 2 Atk. R. 306; s. c. 9 Mod. R. 297; Gray *v.* Cockeril, 2 Atk. 114; Duchess of Newcastle *v.* Pelham, 3 Bro. Parl. Cas. 460, by Tomlins; s. c. 1 Bro. Parl. Cas. 392, folio edition.

[6] Ibid.

§ 952. **Owner of Property is Entitled to Have an Inspection of the Deeds under Which He Claims.** — Upon similar principles persons having rights and interests in real estate are entitled to come into equity for the purpose of having an inspection and copies of the deeds under which they claim title.[1] And in like manner remainder-men and reversioners and other persons having limited or ulterior interests in real estate have a right in many cases to come into equity to have the title-deeds secured for their benefit.[2] But in all such cases the court will exercise a sound discretion as to making the decree; for it is by no means an absolute right of the party to have the title-deeds in all cases secured or brought into chancery for preservation. If such a practice were suffered universally to prevail, the title-deeds of half the estates in the country might be brought into court. To entitle the party therefore to seek relief it must clearly appear that there is danger of a loss or destruction of the title-deeds in the custody of the persons possessing them, and also that the interest of the plaintiff is not too contingent or too remote to warrant the proceeding.[3]

§ 953. **An Instrument Which Has Been Satisfied, but now Casts a Cloud upon the Title, Will be Ordered to be Cancelled.** — Cases also may occur where a deed or other instrument originally valid has by subsequent events, such as by a satisfaction or payment or other extinguishment of it, legal or equitable, become functus officio; and yet its existence may be either a cloud upon the title of the other party or subject him to the danger of some future litigation when the facts are no longer capable of complete proof, or have become involved in the obscurities of time.[4] Under such circumstances, although the deed or other instrument has become a nullity, yet Courts of Equity will interpose upon the like principles to prevent injustice, and will decree a delivery

[1] Banbury *v.* Briscoe, 2 Ch. Cas. 42; 2 Eq. Abridg. 285, D.; Reeves *v.* Reeves, 9 Mod. R. 128; Brown *v.* Wales, L. R. 15 Eq. 142. See more at length §§ 1490 et seq.

[2] Smith *v.* Cooke, 3 Atk. 382; Banbury *v.* Briscoe, 2 Ch. Cas. 42; Ivie *v.* Ivie, 1 Atk. R. 431; Lempster *v.* Pomfret, Ambler, R. 154; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 2, p. 469; Freeman *v.* Fairlie, 3 Meriv. R. 30. As to title-deeds in the hands of trustees or of the court see Jenner *v.* Morris, L. R. 1 Ch. 603; Stanford *v.* Roberts, L. R. 6 Ch. 307.

[3] Ivie *v.* Ivie, 1 Atk. R. 431; Ford *v.* Peering, 1 Ves. Jr. 76, 78; Noel *v.* Ward, 1 Madd. R. 322; Lempster *v.* Pomfret, Ambler, R. 154; Pyncent *v.* Pyncent, 3 Atk. 571; Joy *v.* Joy, 2 Eq. Abridg. 284; Webb *v.* Lymington, 1 Eden, R. 8, and the editor's note (*a*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 3.

[4] See Anon. Gilb. Eq. R. 1; Flower *v.* Marten, 2 Mylne & Craig, 459.

and cancellation of the instrument.[1] This indeed is a very old head of equity, and traces of it are to be found in some of our earliest reports.[2]

§ 954. **Same.** — The doctrine has been applied not only to cases where the deed or other instrument is clearly established by the proofs to have become functus officio according to the original intent and understanding of both parties, but also to cases where it has been fairly inferable from the acts or conduct of the party entitled to the benefit of the deed or other instrument that he has treated it as released, or otherwise dead in point of effect. Thus for example, where a nephew gave a note to his uncle for a sum of money, and afterwards the uncle wrote the following entry: "H. J. P. (the nephew) pays no interest, nor shall I ever take the principal, unless greatly distressed"; and upon his death the executors found the entry; it was held a good discharge of the note at law.[3] So where a son-in-law was indebted to his father-in-law on several bonds, and by his will the latter left him a legacy, and from some memoranda of the testator it was satisfactorily shown that the testator did not intend that these bonds should be enforced by the executors, it was decreed that they should not be the subject of any demand by the executors

[1] Foley *v.* Kirk, 33 N. J. Eq. 170. It has sometimes been held that a total failure to perform covenants of support and maintenance imposed upon the grantee of a deed may authorize a rescission on behalf of the grantor. Bogie *v.* Bogie, 41 Wis. 209; Bishop *v.* Aldrich, 48 Wis. 619; Blake *v.* Blake, 56 Wis. 392. But this, it seems, can only be true on the ground that there is in the particular case no other adequate way of protecting the grantor, as was perhaps the case in Bogie *v.* Bogie, supra. Clearly neither breach of contract nor failure of consideration per se affords ground for rescinding a contract. In Massachusetts, and elsewhere to some extent, breach of warranty in sales affords ground for rescission, though there has been no fraud. Bryant *v.* Isburgh, 13 Gray, 607; Dorr *v.* Fisher, 1 Cush. 271. Contra, Street *v.* Blay, 2 Barn. & Ad. 456; Dawson *v.* Collis, 10 C. B. 523. But breach of (affirmative) warranty is not like an ordinary breach of contract. It is not failure to perform; it is in reality false statement, and is therefore akin to fraud. In any view however this is the only case in which a breach of the contract by the one party will of itself entitle the other to a rescission.

So of failure of consideration. Such fact will prevent liability in an action on the contract; but it does not give a right to rescind. It gives merely a right to recover the money equivalent of what was agreed. Possibly the case may be different if that equivalent is not ascertainable, which might be true of a covenant for support and maintenance. The natural justice of such cases as Bogie *v.* Bogie and Bishop *v.* Aldrich, supra, is at all events clear.

[2] Cary, R. 17; ante, §§ 947, 948.

[3] Aston *v.* Pye, 5 Ves. 350, note (*b*). Cited also in Flower *v.* Marten, 2 Mylne & Craig, 474, 475.

against the son-in-law.[1] So where a father upon payment of the debts of his son took a bond from the latter, and it was apparent from all the circumstances that the father did not intend it as an absolute security against the son, but in some sort as a check upon his future conduct, and that he did not intend after his death that it should be treated as a debt due from his son to his estate, or to be put in force against him, it was decreed that the bond should be delivered up by the executors to be cancelled.[2] So where a testatrix by her will forgave a debt due to her on bond by her son-in-law, and he died in her lifetime, it was held that it was a release in equity, and that the bond ought to be delivered up by her executor.[3]

§ 955. **Same.** — There is also a curious case of an analogous nature, which was finally decided by the House of Lords, in which the powers of a Court of Equity were applied to give relief to an extent which no Court of Law would for a moment entertain. The testator on his death-bed said to his executrix that he had the bond of B, but when he died B should have it, and that he should not be asked or troubled for it. The executrix after the death of the testator put the bond in suit, and thereupon B brought a bill for a discovery and delivery up and cancellation of the bond. And it was decreed accordingly at the hearing by the lord chancellor, and his decree was affirmed by the House of

[1] Eden *v.* Smyth, 5 Ves. 341, 351. Cited also in Flower *v.* Marten, 2 Mylne & Craig, 474, 475.

[2] Flower *v.* Marten, 2 Mylne & Craig, R. 459, 474, 475.

[3] Sipthorp *v.* Moxon, 3 Atk. 579; Elliot *v.* Davenport, 2 Vern. 521; s. c. 1 P. Will. 83. See also Toplis *v.* Baker, cited in Mr. Cox's note, 1 P. Will. 86; Duffield *v.* Elwes, 1 Bligh, R. (N. S.) 529, 530, 531, 538, 539; ante, § 572, note (4), § 820; post, § 1080; Richards *v.* Symes, 2 Eq. Abridg. 617; s. c. 2 Atk. 319; 2 Barnard. R. 90; s. c. 1 Bligh, R. (N. S.) 537, 538, 539.

But it is held that voluntary declarations by a creditor of intention to release a debtor, not accompanied by any act amounting to a release at law, will not operate as an equitable release. Irwin *v.* Johnson, 36 N. J. Eq. 347; Arnold *v.* Fraser, 43 Mont. 540, 117 Pac. 1064.

A deed executed by parent to child, in consideration of being supported during his lifetime, will be cancelled, where he was driven from home without cause, the deed being treated as a cloud upon the parent's right of title. Tomlinson *v.* Tomlinson, 162 Ind. 530, 70 N. E. 881.

A deed of trust will be cancelled at the suit of the administrator, where there was evidence of the debt having been paid, but the instrument never having actually been cancelled upon the records. Johnson *v.* Lockhart, 20 Tex. Civ. App. 596, 50 S. W. 955.

Vendee of defective machinery is entitled to have his notes, given for purchase price, cancelled, when he returns the machinery. Kenney *v.* Ruff, 34 Ind. App. 259, 72 N. E. 622.

Lords.[1] This case carries the doctrine of an implied trust or equitable extinguishment of a debt to the very verge of the law. The case would be clearly unsupportable, as a donatio mortis causa; and it must stand upon the parol evidence to establish an intention to have the bond delivered up, not touched or provided for by the testator's will.[2]

§ 956. **Same.** — Whether all the cases which have been cited in the last two sections, being cases of imperfect gifts or incomplete acts sought to be enforced in equity in favor of mere volunteers, are strictly maintainable or not upon the true principles which now regulate the subject, may perhaps in the present state of the authorities be thought to admit of some doubt.[3] Be this as it may, they proceed upon the distinct ground that the transaction was one exclusively between the creditor and the debtor; and that taking all the circumstances together, it was clearly the intention of the creditor to treat the debt as in equity forgiven and released to the debtor himself. But cases of this sort are clearly distinguishable from purely voluntary imperfect gifts or assignments of debts or other property to third persons, and also from purely voluntary contracts inter vivos, to which however at first view they might seem to bear a very close analogy.[4] In respect to voluntary contracts inter vivos it is a general principle

[1] Wekett *v.* Raby, 3 Bro. Parl. Cas. 16 [2 Bro. Parl. Cas. by Tomlins, 386]. This case was recognized in its principle by Lord Cottenham, in Flower *v.* Marten, 2 Mylne & Craig, 459, 474, 475. See also Sipthorp *v.* Moxon, 3 Atk. 580, 581. But see Tufnell *v.* Constable, 8 Sim. R. 69, 70. And in Leddell *v.* Starr, 5 C. E. Green, 274, 283; Otis *v.* Beckwith, 49 Ill. 121, 135. See Yeomans *v.* Williams, L. R. 1 Eq. 184.

[2] It may not perhaps be thought very easy to reconcile the case of Tufnell *v.* Constable (8 Simons, R. 69) with that of Flower *v.* Marten (2 Mylne & Craig, R. 459, 474, 475). The true difference however seems to be that in the latter case, taking all the circumstances together, the court presumed that the money advanced to the son was originally intended as a gift, or that the father subsequently treated it as a gift, and abandoned it as a debt. In the former case the assignment of the bond was purely voluntary, and it would not take effect as an assignment, not being under seal, and the act therefore imperfect. It is not perhaps so easy to reconcile Tufnell *v.* Constable with Eden *v.* Smyth, 5 Ves. R. 341. It has been already stated (ante, note (2) to this section) that Wekett *v.* Raby (2 Bro. Parl. Cas. by Tomlins, p. 386), was fully recognized in its principles, in Flower *v.* Marten. See ante, § 572, note (4), p. 433, where several of the cases on this subject are cited; and § 607 *b*, where the case of Richard *v.* Symes, 2 Eq. Abridg. 617, before Lord Hardwicke, is cited, and on which Lord Eldon commented in Duffield *v.* Elwes, 1 Bligh, R. (N. S.) 537, 538; Callaghan *v.* Callaghan, 8 Clarke & Fin. R. 374, 401.

[3] See ante, §§ 572, 955, 956; Flower *v.* Marten, 2 Mylne & Craig, 459; Edwards *v.* Jones, 1 Mylne & Craig, 226.

[4] See ante, § 572, post, §§ 1077, 1081, 1313, 1331.

that Courts of Equity will not interfere, but will leave the parties where the law finds them.[1] In respect also to gifts and assignments inter vivos Courts of Equity will enforce them only when the gift or assignment is perfected and complete, so that nothing further remains to consummate the title of the donee.[2] For if the gift or assignment is imperfect, or any further act remains to be done to complete the title of the donee, Courts of Equity, treating the donee as a mere volunteer, will not aid him to carry it into effect either against the donor or against his legal representatives.[3] But of this we shall have occasion to speak more in another place.[4]

§ 957. **In Directing a Cancellation Courts of Equity Will Impose Such Terms as Will Meet the Just Equities of the Opposing Party.** — In all these cases where a delivery up or cancellation of deeds or other instruments is sought, either upon the ground of their original invalidity, or of their subsequent satisfaction, or because the party has a just title thereto, or derives an interest under them, Courts of Equity act upon an enlarged and comprehensive policy;[5] and therefore in granting the relief they will impose such terms and qualifications as shall meet the just equities of the opposing party. Thus for instance if the heir at law seeks a discovery and delivery of the title-deeds of the estate of his ancestor against a jointress, he will not be allowed the relief

[1] Post, §§ 1076, 1081.

[2] Young *v.* Young, 80 N. Y. 422; §§ 1077, 1080, 1081, 1331.

[3] See ante, § 572, note (4), where several of the cases are collected. See also Pulvertoft *v.* Pulvertoft, 18 Ves. 91, 93, 99; Colman *v.* Sarrel, 1 Ves. Jr. 52, 54; Ellison *v.* Ellison, 6 Ves. 656; Antrobus *v.* Smith, 12 Ves. 39; Minturn *v.* Seymour, 4 John. Ch. R. 498, 500; Duffield *v.* Elwes, 1 Bligh. R. (N. S.) 529, 530, 531; S. C. 1 Sim. & Stu. 244, 245; Edwards *v.* Jones, 7 Simons, R. 325; S. C. 1 Mylne & Craig, R. 226, 227; Fortescue *v.* Barnett, 1 Mylne & Keen, 36; Sloane *v.* Cadogan, Sugden on Vendors, Appx. No. 26 (9th ed.); Jeffreys *v.* Jefferys, 1 Craig & Phillips, 132, 140; Holloway *v.* Headington, 8 Simons, R. 324; ante, § 572, note (4); Duffield *v.* Elwes, 1 Bligh, R. (N. S.) 529, 530, 531; Cunningham *v.* Plunkett 2 Younge & Coll. 245; 1 Drury & Warren, R. 308; Ward *v.* Audland, 8 Beav. R. 201. It matters not that the agreement is under seal. Lamprey *v.* Lamprey, 29 Minn. 151.

[4] Post, §§ 1077, 1080, 1396. As to the right of a donor or of his representative to set aside his voluntary deed see Anderson *v.* Elsworth, 3 Giff. 154; Forshaw *v.* Welsby, 30 Beav. 243; Toker *v.* Toker, 31 Beav. 629; Phillipson *v.* Kerry, 32 Beav. 628; Bonfield *v.* Hassell, Ib. 217; Bentley *v.* Mackay, 31 Beav. 143; May *v.* May, 33 Beav. 81; Lister *v.* Hodgson, L. R. 4 Eq. 30; Coutts *v.* Ocworth, L. R. 8 Eq. 558; Wollaston *v.* Tribe, L. R. 9 Eq. 44; Everitt *v.* Everitt, L. R. 10 Eq. 405; Hall *v.* Hall, L. R. 8 Ch. 430; Jarratt *v.* Aldam, L. R. 9 Eq. 463; Townsend *v.* Toker, L. R. 1 Ch. 446; Morgan *v.* Mallison, L. R. 10 Eq. 475.

[5] 1 Fonbl. Eq. B. 1, ch. 1, § 8, and note (*y*).

unless upon the terms of confirming her jointure.[1] So where there is a subsequent mortgagee without notice who has possession of the title-deeds, he will not be compelled to deliver up the deeds to the first mortgagee unless upon the terms that the latter will pay him his mortgage money.[2] Cases of this sort afford a very frequent illustration of the maxim that he who seeks the aid of equity must do equity.[3]

§ 958. **Ordinarily Courts of Equity Will Not Interfere to Decree a Specific Delivery of Chattels.** — There yet remains another class of cases in which the remedial powers of Courts of Equity are applied to compel a specific delivery of the thing to which another person has a clear right. We here allude to the jurisdiction to entertain bills for the delivery of specific chattels. Ordinarily in cases of chattels Courts of Equity will not interfere to decree a specific delivery, because by a suit at law a full compensation may be obtained in damages, although the thing itself cannot be specifically obtained; and where such a remedy at law is perfectly adequate and effectual to redress the injury, there is no reason why Courts of Equity should afford any aid to the party.[4] Indeed it may be truly said that the value of goods and merchandise varies so much at different times that it might not unfrequently be inequitable to decree a specific performance of contracts respecting them, since it might be wholly disproportionate to the injury sustained.[5]

§ 959. **If Remedy at Law by Damages Is Inadequate, the Relief Will Be Granted.** — But there are cases of personal goods and chattels in which the remedy at law by damages would be utterly inadequate and leave the injured party in a state of irremediable

[1] Towers *v.* Davys, 1 Vern. R. 479; Petre *v.* Petre, 3 Atk. 511; Ford *v.* Peering, 1 Ves. Jr. 76.

[2] Head *v.* Egerton, 3 P. Will. 280.

[3] Ante, Vol. I. § 69.

[4] Buxton *v.* Lister, 3 Atk. 383; Mitford, Eq. Pl. by Jeremy, 118, 119; 1 Madd. Ch. Pr. 184, 295, 320.

[5] See Barr *v.* Lapsley, 1 Wheat R. 151 and 154, note (*a*); Buxton *v.* Lister, 3 Atk. R. 383; Mitf. Eq. Pl. by Jeremy, 118, 119; Dorman *v.* MacDonald, 47 Fla. 252, 36 So. 52; Hendry *v.* Whidden, 48 Fla. 268, 37 So. 571; Hissam *v.* Parrish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892; Mirandona *v.* Burg, 49 La. Ann. 656, 21 So. 723.

In the absence of allegation and proof that the sale of shares of railroad stock are of peculiar value and character, the loss of which could not be fully compensated in damages, no action lies. Graham *v.* Herlong, 50 Fla. 521, 39 So. 111; Carolee *v.* Handelis, 103 Ga. 299, 29 S. E. 935.

Courts of equity do not enforce the sale of articles of commerce, such as cotton, which can at all times be bought in the open market. Block *v.* Shaw, 78 Ark. 511, 95 S. W. 806; Neal *v.* Parker, 98 Md. 254, 57 Atl. 213.

loss. In all such cases Courts of Equity will interfere and grant full relief by requiring a specific delivery of the thing which is wrongfully withheld. This may occur where the thing is of a peculiar value and importance, and the loss of it cannot be fully compensated in damages when withheld from the owner, and then relief will be granted in equity.[1] Thus where the lord of a manor was entitled to an old altar-piece made of silver, and remarkable for a Greek inscription and dedication to Hercules, as treasure-trove within his manor, and it had been sold by a wrongdoer, it was decreed to be delivered up to the lord of the manor, as a matter of curious antiquity which could not be replaced in value, and which might, by being defaced, become greatly depreciated.[2] So where an estate was held by the tenure of a horn, and a bill was brought by the owner to have it delivered up to him, it was held maintainable, for it constituted an essential muniment of his title.[3] The same principle applies to any other chattel whose principal value consists in its antiquity, or in its being the production of some distinguished artist, or in its being a family relic or ornament, or heirloom, such for instance as ancient gems, medals, and coins, ancient statues and busts, paintings of old and distinguished masters, and even those of a modern date having a peculiar distinction and value, such as family pic-

[1] Jeremy, Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 2, p. 467; Mitf. Eq. Pl. by Jeremy, 117; Cooper, Eq. Pl. 132; Fells *v.* Read, 3 Ves. Jr. 70; Walwyn *v.* Lee, 9 Ves. 33; 1 Madd. Ch. Pr. 190, 320; Cooper, Eq. Pl. 132; Saville *v.* Tankred, 1 Ves. 101; s. c. 3 Ves. 72 (box of jewels); Jackson *v.* Butler, 2 Atk. 306; Knye, *v.* Moore, 1 Sim. & S. 61 (mortgage deeds); Pattison *v.* Skillman, 34 N. J. Eq. 344 (letters and documents); Brigham *v.* Home Ins. Co., 131 Mass. 319 (surrender of a policy of insurance to an assignee in bankruptcy); Wood *v.* Rowcliffe, 3 Hare, 304; s. c. 2 Phill. 382; Lingan *v.* Simpson, 1 Sim. & S. 600; Cowles *v.* Whitman, 10 Conn. 121. But in some of these cases, as in Wood *v.* Rowcliffe, and in the last, there was a trust. See Hill *v.* Rockingham Bank, 44 N. H. 567. The following cases relating to slaves may be noticed: Murphy *v.* Clark, 1 Smedes & M. 221; Butler *v.* Hicks, 11 Smedes & M. 78; Dudley *v.* Mullery, 4 Ga. 52; Loftin *v.* Espy, 4 Yerg 84; Henderson *v.* Vaulx, 10 Yerg. 30; Brady *v.* Yost, 6 Idaho, 273, 55 Pac. 542.

A contract for the sale of shares of stock will be enforced where the value of the stock is not easily ascertainable, or the stock is not obtainable on the market at all. Newton *v.* Wooley, 105 Fed. 544.

A contract of the administrator of a deceased partner will be enforced, where the other partners owned the majority of the business, and the acquisition of the interest sought to be purchased was of peculiar and specific value to the purchasers, in that the purchase of it would keep the business going. Ralston *v.* Ihmsen, 204 Pa. 588, 54 Atl. 365.

[2] Somerset *v.* Cookson, 3 P. Will. 390.

[3] Pusey *v.* Pusey, 1 Vern. 273.

tures and portraits and ornaments, and other things of a kindred nature.[1]

§ 960. **Cases Where Specific Agreements as to Chattels Will Be Enforced.** — There are other cases where Courts of Equity have interfered to decree a specific delivery of chattels under an agreement of sale or for an exclusive possession and enjoyment for a term of years. But all these cases stand upon very peculiar circumstances, where the nature of the remedy at law is inadequate to complete redress, or where some other ingredients of equity jurisdiction are mixed up in the transaction, such as the necessity of interference to prevent multiplicity of suits or irreparable mischief.[2] Thus for instance where on the dissolution of a partnership an agreement was made that a particular book used in the trade should be considered the exclusive property of one of the partners, and that a copy of it should be given to the other, a specific performance of the agreement was decreed as to the copy; for it is clear that at law no adequate redress could be obtained.[3] So a decree was made against a lessee of alum works, to prevent a breach of a covenant, to leave a certain amount of stock on the premises at the expiration of the term, there being ground of suspicion that he did not mean to perform the covenant. So a decree was made against a landlord to restore to a tenant certain farm stock taken by the former in violation of the terms of his contract.[4] These cases all proceed upon the same principle of quia timet and the danger of irreparable mischief.[5]

§ 961. **Same.** — And formerly where the court would not decree a specific performance and delivery of chattels, it would yet entertain the suit to decree compensation against the party for his omission to perform his contract. Thus for instance where there was a contract for the delivery of specific stock, the court refused to decree a specific performance, but at the same time entertained the bill for the purpose of giving compensation for the

[1] Fells *v.* Read, 3 Ves. Jr. 70; Lloyd *v.* Loaring, 6 Ves. 773, 779; Lowthar *v.* Lowther, 13 Ves. 95; Pearne *v.* Lisle, Ambl. 77; Macclesfield *v.* Davis, 3 Ves. & B. 16, 17, 18; Nutbrown *v.* Thornton, 10 Ves. 163; Arundell *v.* Phipps, 10 Ves. 140, 148.

[2] See Nutbrown *v.* Thornton, 10 Ves. 159, 161, 163; Buxton *v.* Lister, 3 Atk. 383, 384, 385; Thompson *v.* Harcourt, 2 Bro. Parl. R. 415; Arundell *v.* Phipps, 10 Ves. 139, 148; Mitf. Eq. Pl. by Jeremy, 119, and notes; Lloyd *v.* Loaring, 6 Ves. 773; 1 Madd. Ch. Pr. 186 to 190.

[3] Lingan *v.* Simpson, 1 Sim. & Stu. 600.

[4] Nutbrown *v.* Thornton, 10 Ves. 159; Newland on Contracts, ch. 6. pp. 92, 93; ante, § 949; post, §§ 1141 to 1171.

[5] Ward *v.* Buckingham, cited 10 Ves. 161.

non-delivery.[1] But this subject will naturally come more properly under review in the succeeding chapter.[2]

§ 962. [**Necessity of Placing Parties in Statu Quo.** — Before a plaintiff, who has come into a Court of Equity asking that a contract be rescinded, is entitled to the relief prayed, he must first do equity unto the party with whom he has dealt. It is a general rule of law that a plaintiff will not be granted relief until he has placed the defendant in statu quo, and the plaintiff must have done everything, in his power, to save the defendant harmless.[3] Of course it is not possible in every case that may arise that the parties can be placed in statu quo, and thus suffer no injury. The policy of the law is that this be done. For instance, where the mortgagor seeks to have the deed cancelled because the notary who took her examination was a stockholder in the mortgagee corporation, it is contrary to good morals that the deed be cancelled until everything received under it be returned.[4] Nor is a minor child required to deed back to her father the land received by her from her father in settlement of her interest in her mother's estate, when in fact the land deeded to her was not her real share in the estate.[5] In passing upon the offer of plaintiff to restore the consideration, it is sufficient where he alleges in his complaint that he is ready to return the consideration, and while upon the witness stand he offers to return it in open court.[6] In asking a cancellation of an instrument conveying interests in property which has been improved, and from the nature of the property it is impossible to restore it to the former owner in precisely the same condition as when received, it is sufficient a repara-

[1] Cud *v.* Rutter, 1 P. Will. 570, and Cox's notes (2 and 3); Colt *v.* Netterville, 2 P. Will. 394, 395; post, §§ 994, 997, 1004, 1085.

[2] Post, §§ 994, 997, 1002 to 1009.

[3] Hirzel *v.* Schwartz, 17 Colo. App. 470, 68 Pac. 1056; Cheuvront *v.* Cheuvront, 54 W. Va. 171, 46 S. E. 233; Sullivan *v.* California Realty Co., 142 Cal. 201, 75 Pac. 767; Hoover *v.* Binkley, 66 Ark. 645, 51 S. W. 73; Douglas *v.* Standard Real Estate & Loan Co., 189 Ala. 223, 66 So. 614; Flitcraft *v.* Commonwealth Title Ins. & Trust Co., 211 Pa. 114, 60 Atl. 557; Bell *v.* Felt, 102 Ill. App. 218, modified, 205 Ill. 213, 68 N. E. 794; Womelsdorf *v.* O'Connor, 53 W. Va. 314, 44 S. E. 191; Bonsal *v.* Camp, 111 Va. 595, 69 S. E. 978; Madson *v.* Clark, 165 Ill. App. 228; May *v.* Loomis, 140 N. C. 351, 52 S. E. 728.

[4] Hirzel *v.* Schwartz, 17 Colo. App. 470, 68 Pac. 1056; and a mortgagor who seeks a cancellation of the deed because the mortgagee corporation has not complied with the laws authorizing its doing business in the State, must come in with clean hands. Douglas *v.* Standard Real Estate & Loan Co., 189 Ala. 223, 66 So. 614.

[5] Taylor *v.* Colley, 138 Ga. 41, 74 S. E. 694.

[6] Wenegar *v.* Bollenbach, 180 Ill. 222, 54 N. E. 192.

tion can be made by a money judgment in favor of the former owner.[1] But if the plaintiff has received nothing from the defendant, of course no offer of restitution is necessary.[2] And so the defendant is not entitled to a restitution, if he has so entangled himself in the meshes of his own knavish plot that the party defrauded cannot unloose him, the fault is his own, and the law only requires the injured party to restore what he has received, and as far as he can, undo what had been done in the execution of the contract.[3] If the relief in equity is maintainable at all, it will grant full relief and will not ordinarily take cognizance where there is only a partial failure of consideration. Especially is this true where the party against whom the rescission is sought cannot be placed in statu quo, as where a deed was made to an intended wife, upon consideration of her living with grantor and looking after him in his illness, and the wife soon after broke her contract. She was not required to surrender her deed and reconvey the property because she could not be restored to her former condition.[4]]

§ 963. [**Necessity for a Return of the Consideration Received in Order to Enforce a Cancellation of the Contract.** — As just stated, it is a general rule that in order for the plaintiff to invoke the equitable jurisdiction of the court to obtain a cancellation of the contract, he must first place the opposite party in statu quo; and it is a little difficult to determine to what extent this doctrine shall be carried and what must be done in order to fulfil the requirements of the rule. Some courts lay down the rule that whatever has been received must be returned before the remedy will be granted;[5] and others, of equal diligence and learning, have held that it is not necessary to make any return at all;[6] and other courts have held that it is sufficient that the plaintiff offers in his pleadings, or on the trial, that whatever amount or value he has received be deducted from what he is rightfully entitled to.[7]]

[1] Barker *v.* Fitzgerald, 105 Ill. App. 536, affirmed 204 Ill. 325, 68 N. E. 430.

[2] Larkin *v.* Mullen, 128 Cal. 449, 60 Pac. 1091.

[3] Ring *v.* Ring, 127 App. Div. 411, 111 N. Y. Supp. 713, affirmed 199 N. Y. 574, 93 N. E. 1130; Paquin *v.* Milliken, 163 Mo. 79, 63 S. W. 417.

[4] Jackson *v.* Jackson, 226 Ill. 46, 78 N. E. 19, 6 L. R. A. (N. S.) 785.

[5] Breyfogle *v.* Walsh, 80 Fed. 172; Strodder *v.* Southern Granite Co., 99 Ga. 595, 27 S. E. 174.

[6] Modlin *v.* Roanoke R. & Lbr. Co., 145 N. C. 223, 58 S. E. 1075; Sheehan *v.* Allen, 67 Kans. 712, 74 Pac. 245.

[7] Halpin *v.* Mutual Brewing Co., 20 App. Div. 583, 47 N. Y. Supp. 412.

§ 964. [**The Doctrine That It Is Necessary to Return the Consideration.** — In the settlement of prospective actions for negligent injuries, it frequently happens that the injured party, after regaining his health and strength, and after the consideration paid him for his release has been used, seeks to have the release set aside for undue influence, fraud and the like. Unless the plaintiff plainly shows that his inability to make restitution arose from causes beyond his control, a court of equity cannot, merely because of a present inability on his part from poverty to restore the original status between himself and his adversary, grant the relief he seeks. Certainly, if it appeared that the plaintiff, through his own voluntary act, deliberately placed himself in a situation rendering restoration impossible, the essential element of equity would be entirely wanting, and the fact of poverty would be utterly immaterial.[1] And where an employee of a railroad company was injured, and at the time of his employment he contracted and agreed to receive hospital and medical treatment as a part of the master's liability to him in event of his injury, it was incumbent upon him to unreservedly make his election, and offer to yield up the benefits he accepted thereunder, if within his power, or, if not, to treat it as binding upon him to the extent of releasing the company from liability to respond in damages for his alleged injury.[2] A married woman having received a large sum of money by way of a defective mortgage, cannot rescind the contract and ask for a cancellation of the paper until she restores the money received, with legal interest.[3] But if the plaintiff took nothing of benefit under his contract, then the rule which requires a restoration of benefits would have no application, as there would be nothing which could operate to the disadvantage of the defendants or change their status by such failure.[4]]

§ 965. [**The Necessity of Returning the Consideration at All.** — A vendor of timber will not be required to return, or offer to

The plaintiff must plead his ability and willingness to restore, and make such offer good by compliance with it on the trial, otherwise it would be unavailing. Nelson *v.* Hatch, 56 App. Div. 149, 67 N. Y. Supp. 570.

[1] Strodder *v.* Southern Granite Co., 99 Ga. 595, 27 S. E. 174; Breyfogle *v.* Walsh, 80 Fed. 172; Guilfoyle *v.* Pierce, 125 App. Div. 504, 109 N. Y. Supp. 924, 196 N. Y. 499, 89 N. E. 1101.

[2] Petty *v.* Brunswick etc. R. Co., 109 Ga. 666, 35 S. E. 82; Hayden *v.* St. Louis S. F. R. Co., 117 Mo. App. 76, 93 S. W. 833.

[3] Cox *v.* Railway Bldg. & Loan Assn., 101 Tenn. 490, 48 S. W. 226; Walter *v.* Mutual Home Sav. Assn., 29 Tex. Civ. App. 379, 68 S. W. 536; Anderson *v.* Anderson Food Co., 66 N. J. Eq. 209, 57 Atl. 489.

[4] Nelson *v.* Hatch, 56 App. Div. 149, 67 N. Y. Supp. 570.

return, the consideration received by him for his deed, where the execution of the deed was procured through the fraud of defendant's agent. It is well established that one who has been induced to convey his property by fraud and deceit has an election of remedies, and may either bring an action to set aside the conveyance, unless the property has passed into the hands of a bona fide purchaser for value and without notice, or he may allow the conveyance to stand and sue to recover damages for the injury inflicted upon him by the fraud.[1] A woman who has been induced by fraud to accept a deed to a small piece of land, as a part of her interest in a verdict for damages for personal injuries to her son, and a compromise was subsequently entered into between her attorneys and the employer, all of which was without her knowledge or consent, and grossly in fraud of her rights, is not required to tender a deed to the land as a prerequisite to her right to recover.[2] If the plaintiff indicates a willingness on his part to do equity, without actually offering to return the consideration received by him, this is sufficient. The defrauded party need not rescind and sue in an action at law for the consideration parted with upon the fraudulent contract. He may bring an action in equity to rescind the contract, and in that action he may have full relief. In such a case it is sufficient for the plaintiff to offer in his complaint to restore to the defendant what he received, and the rights of the parties can be fully regulated and protected in the judgment to be entered.[3] Nor is it necessary for a partner, who has been paid by the instaying partner what purports to be in full settlement of his share of the estate, to tender the amount thus received by him for his share, where he alleges fraudulent concealment of the true condition of the partnership affairs. Here there is a marked distinction from a case in which a fraud-doer conveys to the defrauded one an article of merchandise of little value, and by fraud and chicanery induces him to pay for it a sum greater than its value. In such a case the defrauded party cannot recover back his money from the fraud-doer without at the same time handing him back the article of merchandise which he has received. In this case, however, the outgoing partner has simply received a part of what was due him, and the residue of his interest has been retained by his copartner by fraud.

[1] Modlin *v.* Roanoke R. & Lbr. Co., 145 N. C. 223, 58 S. E. 1075.

[2] Bush *v.* Prescott & N. W. R. Co., 76 Ark. 497, 89 S. W. 86; Sheehan *v.* Allen, 67 Kans. 712, 74 Pac. 245.

[3] Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571.

In taking the account, the plaintiff would be charged with so much money received by him from the defendant, and the defendant will be credited with that amount, unless he paid it out of partnership funds.[1]]

§ 966. [**Sufficiency of Tender of Consideration in Pleadings or at Trial.** — In those courts where it is held that it is essential to the relief demanded that the consideration be returned, it is sufficient if the consideration be not returned in specie, but that the value of it be returned or offered at the time of the trial, or if offered in the pleadings.[2] It is sufficient, in an action to set aside a contract entered into by the fraud and deceit of the defendant, if the plaintiff offers to restore the lands actually received by him and tenders a deed for the property upon the trial. This was all he was called upon to do, any question as to rents and interest being in the hands of the court for adjustment in such a manner as it saw fit.[3]]

§ 967. [**Parties in Privity with the Defrauded Party May Seek Cancellation.** — The right to cancellation and surrender of an instrument, procured through fraud, is not confined to the injured party himself, but those who are in privity with him, by blood or contract, may avail themselves of any rights that he had. Nor is it necessary in all cases that the plaintiff be the original party to the contract. It is sufficient if the plaintiff be the beneficiary of some interest in the subject-matter pertaining to the contract, that is, where her interest is such that she can sue into the original contract. For instance, where the plaintiff, the mother of defendant, was given a life interest by her father in certain lands, the remainder after the death of the grantor and the plaintiff to go to the defendant, upon condition that she support and live with her mother and the grantor, and both of whom she abandoned, the plaintiff has such an interest in the contract that she may sue to annul the deed to the daughter.[4] The children of the grantor

[1] Menzenhauer *v.* Schmidt, 63 N. J. Eq. 463, 52 Atl. 156, affirmed 65 N. J. Eq. 402, 54 Atl. 1124; same as to rights of infant, whose judgment has been compromised for less than face-value by his guardian, Winter *v.* Kansas City Cable Ry. Co., 160 Mo. 159, 61 S. W. 606.

[2] Halpin *v.* Mutual Brewing Co., 20 App. Div. 583, 47 N. Y. Supp. 412; Thayer *v.* Knote, 59 Kans. 181, 52 Pac. 433; Wells *v.* Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; Smith *v.* Howlett, 21 Miss. Rep. 383, 47 N. Y. Supp. 1002, affirmed 29 App. Div. 182, 51 N. Y. Supp. 910; Littlejohn *v.* Leffingwell, 40 App. Div. 13, 57 N. Y. Supp. 839; Haydon *v.* St. Louis & S. F. R. Co., 117 Mo. App. 76, 93 S. W. 833; Halpin *v.* Mutual Brewing Co., 20 App. Div. 583, 47 N. Y. Supp. 412.

[3] Daiker *v.* Strelinger, 28 App. Div. 220, 50 N. Y. Supp. 1074.

[4] Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 7 Detroit Leg. N.

may maintain an action, after the death of their father, to set aside a deed executed and delivered by him to older brothers, upon consideration of their support, where they failed to comply with their contract. The children who took no part of the land are considered as having the same right to a cancellation of the deed that their ancestor had.[1] A grantee of land, encumbered by mortgage, is entitled to sue for a cancellation of the deed, where the indebtedness has been paid by the original debtor.[2] But where the widow of the purchaser of a stable paid part of the original purchase price, the title to the property was taken in the husband, now dead, she has no such interest in the property as widow that she can maintain an action to rescind the deed of sale for fraud.[3] A bona fide purchaser of land from the owner is entitled to maintain an action for a cancellation of a prior deed to the same land, executed by the owner to his agent. In this case the deed to the agent could not be delivered by him to his prospective purchaser and upon demand for a surrender of the instrument by the owner, which was refused, he conveyed to the plaintiff. Certainly if the owner had any right to sue to cancel the deed, his grantee, the plaintiff, whose title was clouded with this prior outstanding deed, for which nothing in fact had been paid, had the right to maintain the action.[4] The rule that a party can only file a bill to quiet the title or remove a cloud from the title to real property where he is in possession, or where he claims to be the owner, has no application where the deed or other

447, 84 Am. St. Rep. 563; Price *v.* Jennings, 62 Ind. 111; Houston *v.* Greiner, 73 Oreg. 304, 144 Pac. 133; Rickman *v.* Meier, 213 Ill. 507, 72 N. E. 1121.

A deed given by husband and wife to son in consideration of his supporting them both may be set aside at suit of wife, she surviving the husband. Whittaker *v.* Trammell, 86 Ark. 251, 110 S. W. 1041; Ingersoll *v.* Gourley, 72 Wash. 462, 130 Pac. 743.

The right to have a deed set aside for fraud in procuring it upon promise of future support, is a mere personal right or privilege in the grantor, and not assignable. Berry *v.* Heiser, 271 Ill. 264, 111 N. E. 99.

[1] Groesbeck *v.* Groesbeck, 49 Oreg. 113, 88 Pac. 870; McKnatt *v.* McKnatt, (Del. Ch.) 93 Atl. 367.

A hospital association to whom property was left by will have such an interest that they may sue to set aside a deed to same property, executed by devisor shortly before his death, for fraud. Bethany Hospital Co. *v.* Philippi, 82 Kans. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194.

[2] Whelpley *v.* Ross, 25 App. D. C. 207.

[3] Guilfoyle *v.* Pierce, 125 App. Div. 504, 109 N. Y. Supp. 924, 196 N. Y. 499, 89 N. E. 1101.

[4] Prince *v.* Du Purzy, 163 Ill. 417, 45 N. E. 298; Berry *v.* Williams, 141 Ga. 642, 82 S. E. 881.

instrument alleged to be a cloud upon the title was procured through fraud. An instrument may be set aside by an insane person after his restoration to sanity, or it may be set aside by a vendee, to whom such insane person conveys the premises, after his restoration to sanity.[1]]

§ 968. [**Rescission and Cancellation of Contracts of Parties under Disabilities.** — What has been said with reference to the rights of rescission of a contract and its cancellation applies generally to parties who are sui juris at the time of the inception of the agreement; but it will be observed that infants, lunatics, and persons who are not of full age and understanding and normal at the time of entering into the contract are not bound by the same strict rules that govern the conduct of others. Formerly, the general rule was that where an infant disaffirmed his contract, he was not entitled to ask for a cancellation of it and to otherwise relieve himself of his obligation until he had restored what he had received pursuant to the agreement, in other words, to place the other party in statu quo in every respect. This rule still prevails in some of the States,[2] but the trend of opinion seems to be that where an infant has received something pursuant to a contract of his, he is not bound to return the consideration received if he hasn't it, for instance, if he has lost it or squandered it, or for some other reason he is not able to produce it.[3] It is no ground for a rescission of a contract, that one of the members of the partnership was an infant at the time of making the contract, especially where it appears that no personal judgment is asked against the infant partner, and he has not repudiated it. An infant is not entitled, as against the seller of personal property, the title of which he retained, to keep the money he has received under the contract and also take the property back. He must return the one or the other.[4] An infant has no more

[1] Clay *v.* Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146.

[2] Koerner *v.* Wilkinson, 96 Mo. App. 510, 70 S. W. 509; Gordon *v.* Miller, 111 Mo. App. 342, 85 S. W. 943; Lown *v.* Spoon, 158 App. Div. 900, 143 N. Y. Supp. 275; Jones *v.* Valentine, 122 Wis. 318, 99 N. W. 1043.

Where minor heirs of mortgagor are paid the surplus by the mortgagee, after an alleged defective sale has been made, they would have to refund what they had received, after arriving at their majority, before they could rescind their action. Price *v.* Blankenship, 144 Mo. 203, 45 S. W. 1123; Berry *v.* Stigall, 253 Mo. 690, 162 S. W. 126.

[3] Craig *v.* Van Bebbler, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

[4] Born *v.* Chicago City Ry. Co., 159 Ill. App. 585; Barr *v.* Packard Motor Car Co., 172 Mich. 299, 137 N. W. 697; Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803; Gillis *v.* Goodwin, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265; Corbett *v.* Spencer, 63 Mich. 731, 30 N. W. 385; Featherstone

right to perpetrate a fraud upon another than a person of full age, and if he resorts to artifice and misleads the other party and misrepresents his age, and this fact is relied upon, the infant is not then entitled to have the contract cancelled.[1]]

§ 969. [**Same.** — The general rule is the same in contracts of conditional sale and applies to infants as well as to adults. A voidable contract of an infant for the purchase of goods is to be construed and enforced like other similar contracts. The relation of the sellers to the goods, and their title in them, are the same as if the other contracting party had been of full age. They parted with their possession only conditionally. They never parted with the title. The defendant received possession and held it subject to the conditions which were lawfully imposed. Among the conditions was one that the title should not pass until full payment, and another was that, upon failure to pay rent or instalments as agreed, the plaintiffs might take possession. These conditions affect the defendant minor the same as if he were an adult.[2]]

§ 970. [**Infant Need Not Restore Consideration if He Has Lost or Squandered It.** — If the infant has the consideration received in hand so that the other party can be actually placed in statu quo, of course it would be inequitable for him to be granted the relief prayed, without at the same time requiring him to return the fruits of the alleged prejudicial contract. But, if the infant has lost, wasted, or squandered the consideration or property during infancy, then he can repudiate the contract upon arriving at maturity without tendering what he received. The privilege of repudiating a contract is accorded an infant because of the indiscretion incident to his immaturity; and, if he were required to restore an equivalent where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed.[3] If the infant has kept any part of the

v. Betlejiwski, 75 Ill. App. 59; Latrobe *v.* Dietrich, 114 Md. 8, 78 Atl. 983.

[1] Reynolds *v.* Garber, 183 Mich. 157, 149 N. W. 985, L. R. A. 1915 C. 362.

[2] Robinson *v.* Berry, 93 Me. 320, 45 Atl. 34; Sanger *v.* Hibbard, 2 Ind. Ter. 547, 53 S. W. 330.

[3] Craig *v.* Van Bebbler, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Tower *v.* Smith, 86 Mo. App. 490; MacGreal *v.* Taylor, 167 U. S. 688, 42 L. Ed. 326, 17 S. Ct. Rep. 961; Falconer *v.* May, 165 Ill. App. 598; Knipers *v.* Thorne, 182 Ill. App. 28; Tucker *v.* Eastridge, 51 Ind. App. 632, 100 N. E. 113; Reynolds *v.* Garber, 183 Mich. 157, 149 N. W. 985, L. R. A. 1915 C. 362; Arizona Eastern R. Co. *v.* Carillo, 17 Ariz. 115,

consideration received from the bargain, and has it in his possession upon arrival at maturity, when he asks that the contract be cancelled, in order for the rule, requiring the return of such property as he may have in hand, to apply, the other party has the burden of proving that the property in hand is the same consideration that was paid by him to the infant and as the inducement of the agreement.[1] Although a rescission of the contract by an infant upon his reaching his majority may work a hardship upon the other party, he is entitled to this right and it will be allowed, especially where he has and offers to return the consideration.[2] A minor is not required to return the consideration received for the giving of a general release for personal injuries, before disaffirming the contract, but may retain it and the jury may deduct it from the amount of their verdict.[3] Nor does it make any difference that the value of the article received in the trade and now sought to be returned has depreciated in value; or that the value of the use of the property while he had it exceeded the payment made upon it.[4]]

§ 971. [**Rights of a Non Compos Person to the Remedy of Rescission and Cancellation.** — An insane person, or one non compos mentis, stands very nearly upon the same footing as an infant with respect to his right to rescind his contract and ask for its cancellation. In speaking of an insane person, it is not meant that he be actually a raving maniac in order to be entitled

149 Pac. 313; Britton *v.* South Penn. Oil Co., 73 W. Va. 792, 81 S. E. 525; Wallace *v.* Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777; Abernathy *v.* Phillips, 82 Va. 769, 1 S. E. 113; Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788; Smith *v.* Equitable Co-operative Bank, 219 Mass. 382, 106 N. E. 1020; Simpson *v.* Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560; Gray *v.* Grimm, 157 Ky. 603, 163 S. W. 162; Zuck *v.* Turner, 106 Mo. App. 566, 80 S. W. 967; Lane *v.* Dayton Coal & Iron Co., 101 Tenn. 581, 48 S. W. 1094; White *v.* New Bedford Cotton Waste Co., 178 Mass. 20, 59 N. E. 642; Shirk *v.* Shultz, 113 Ind. 571, 15 N. E. 12; Brancut *v.* Graves, 92 Minn. 116, 99 N. W. 417.

[1] Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

[2] Gannon *v.* Manning, 42 App. D. C. 206; Beickler *v.* Guenther, 121 Iowa, 419, 96 N. W. 895.

[3] Richards *v.* Hellen, 153 Iowa, 66, 133 N. W. 393; Winter *v.* Kansas City Cable Ry. Co., 160 Mo. 159, 61 S. W. 606.

[4] First Natl. Bank *v.* Casey, 158 Iowa, 349, 138 N. W. 897; International Land Co. *v.* Marshal, 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056; Coody *v.* Coody, 39 Okla. 719, 136 Pac. 754.

An Indian, under age at time of execution of deed, made in violation of restrictions imposed by Congress, is entitled to have deed cancelled without returning the consideration, even where he induced the contract by his misrepresentation of his age. Collins *v.* Beard, 148 Pac. 846.

to the relief, but it is sufficient if he be in fact a non compos, whether his mental capacity be much or little. A Court of Equity will protect a non compos in the securing and enforcement of his rights and especially where the other party to the contract entered into the agreement with him knowing his mental weakness at the time. Here there is an evidence of a deliberate fraud, — an unfair advantage that may be taken by the stronger over the weaker mind and when the parties thus deal with each other there is no obligation on the part of the non compos to return the consideration received, or its equivalent, as a condition precedent to his right of recovery.[1] There is no presumption that a non compos used the consideration received by him in the trade for the purpose of supplying himself with necessaries. It is incumbent upon the seller to show by his pleadings, and to establish by evidence, that the money received was expended for necessaries, or that it was on hand at the time of the death of the non compos, or that it had been invested by or for him and for the benefit of his estate. In the absence of such proofs there is no necessity for the return of the consideration.[2] If the mental weakness or unsoundness is known to the other contracting party, neither the person laboring under the disability nor his representative is required to do more than tender back what he has left of what his ward received. And if the consideration passed to another no tender is necessary.[3] The burden of proving both the insanity and the knowledge of it by the other contracting party lies upon the party seeking to avoid the contract;[4] and when this has been established, the lunatic can be charged only with such benefits as he actually received.[5]]

§ 972. [**Consideration Must Be Returned if Contract Was Fairly Entered Into and without Knowledge of Insanity.**— Courts of Equity protect the rights of persons of weakened and diseased minds so as to prevent frauds being practised upon them; and it guards the rights of innocent, unsuspecting parties who fairly and in good faith contract with the alleged non compos, who pay value for what they get, and have no notice of the mental

[1] Brown *v.* Brenner, 161 S. W. 14; Tetcht *v.* Freeman, 251 Ill. 84, 95 N. E. 1043; Paulen *v.* Springfield Ry. Co., 166 Ill. App. 382; Wager *v.* Wagoner, 53 Neb. 511, 73 N. W. 937; Sheehan *v.* Allen, 67 Kans. 712, 74 Pac. 245.

[2] Brown *v.* Brenner, 161 S. W. 14; Williams *v.* Sapieha, 94 Tex. 430, 61 S. W. 115.

[3] Jefferson *v.* Rust, 149 Iowa, 594, 128 N. W. 954.

[4] Merritt *v.* Merritt, 43 App. Div. 68, 59 N. Y. Supp. 357.

[5] Creekmore *v.* Baxter, 121 N. C. 31, 27 S. E. 994.

infirmity at the time of making the contract. When the contract has been entered into under these circumstances, equity requires that the parties be placed in statu quo and the consideration returned as a condition precedent to relief.[1] It must appear upon the face of the petition either that the defendant knew that the man with whom he was dealing was insane, and took advantage of him, or else, if he dealt with the insane man without knowledge of his misfortune, and dealt fairly, the petition must show both an ability and a willingness on the part of the plaintiff to put the defendant in statu quo.[2]]

[1] Coburn *v.* Raymond, 76 Conn. 484, 57 Atl. 116, 100 Am. St. Rep. 1000; Eldredge *v.* Palmer, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; Voris *v.* Harshbarger, 11 Ind. App. 555, 39 N. E. 521; Tlach *v.* Gottschalk, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; Clay *v.* Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146; Williams *v.* Sapieha, 94 Tex. 430, 61 S. W. 115; West *v.* Seaboard Air Line Ry., 151 N. C. 231, 65 S. E. 979; Creekmore *v.* Baxter, 121 N. C. 31, 27 S. E. 994; Paulen *v.* Springfield Ry. Co., 166 Ill. App. 382; Morris *v.* Great Northern Ry. Co., 67 Minn. 74, 69 N. W. 628; Merry *v.* Bergfeld, 264 Ill. 84, 105 N. E. 758; Walton *v.* Malcolm, 264 Ill. 389, 106 N. E. 211; Williams *v.* Williams, 265 Ill. 64, 106 N. E. 476; Miller *v.* Barker, 73 N. J. L. 38, 62 Atl. 276; Jordan *v.* Kirkpatrick, 251 Ill. 116, 95 N. E. 1079; Barkley *v.* Barkley, 182 Ind. 322, 106 N. E. 609.

[2] Jamison *v.* Culligan, 151 Mo. 410, 52 S. W. 224.

CHAPTER XIX

REFORMATION AND CORRECTION OF WRITTEN INSTRUMENTS

§ 973. [**Nature of the Equitable Doctrine.** — The doctrine of the reformation and correction of written instruments is a rule in equity practice that is extraordinary in its application. The enforcement of this doctrine is very much analogous to the doctrine of specific performance. Neither will be granted as a matter of course, nor upon the simple prayer for the relief in the bill. A Court of Equity will never interfere and correct an instrument where the correction will not then entitle the complainant to relief.[1] Unlike an action to remove a cloud from the title, it is not even necessary that the complainant be in possession of the premises.[2] The relief will not be granted if it appears that a needless hardship will be forced upon the other party; nor will a contract be reformed so as to produce a breach of the agreement and thereby give rise to an action for damages;[3] nor will it reform an instrument merely for the sake of reforming it, but only to enable a party to assert some right under it. Where an assignment of a lease was sought to be reformed for mistake, and the lease itself had expired a year before, there is no ground for enforcing the doctrine.[4]]

[1] Wm. Cramp Sons *v.* United States, 46 Ct. Cl. 54; Miller *v.* Stuart, 107 Md. 23, 68 Atl. 273; Phenix Ins. Co. *v.* Hilliard, 59 Fla. 590, 52 So. 799; Ackerlind *v.* United States, 49 Ct. Cl. 635; First Natl. Bank *v.* Hartford Fire Ins. Co., 17 N. Mex. 334, 127 Pac. 1115; McAlister *v.* Richardson, 103 Miss. 418, 60 So. 570; Daniel *v.* Williams, 177 Ala. 140, 58 So. 419; Buford *v.* Chichester, 69 W. Va. 213, 71 S. E. 120; Henderson *v.* Dickey, 35 Mo. 120; Wells *v.* Yates, 44 N. Y. 525; Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45.

[2] American Assn. *v.* Williams, 166 Fed. 17; Nolen *v.* Henry, 190 Ala. 540, 67 So. 500.

[3] Whitley *v.* Willingham & Bell, 176 Ala. 264, 57 So. 816; Tazewell Coal & Iron Co. *v.* Gillespie, 113 Va. 134, 75 S. E. 757.

[4] Thompson *v.* Phenix Ins. Co., 25 Fed. 296; St. Louis House etc. Cleaning Co. *v.* York Realty Co., 193 Mo. App. 28, 180 S. W. 576;

§ 974. [**Jurisdiction Attaches Where the Remedy at Law Is Inadequate.** — The doctrine of correction and reformation of written instruments is a distinct branch of jurisprudence; it has its rise, and jurisdiction attaches, where the remedy sought is inadequate in the law courts. If there is an adequate remedy at law there is no grounds for equitable interference, for that remedy must be pursued first and to its limit; but if the remedies are concurrent, it makes no difference that the complainant first sought the aid of a Court of Equity. If it appears from the facts in evidence that the relief prayed should be awarded, and that no such relief could be given in an action at law, the jurisdiction will be maintained in equity. For instance, where the grantee of land seeks a reformation of his deed, and the grantor has died and his heir at law is an infant, it would be useless to bring his action at law for the correction of the alleged error, and equity alone can afford the desired relief.[1] But if from a reading of the entire contract the mistake is so palpable, and it is one which does not in any manner affect the validity of the contract or leave in doubt whatever who were the respective parties and their respective relations to the contract, the relief could properly be given at law.[2]]

§ 975. [**The Mistake Must Be a Mutual One.** — If the ground upon which the jurisdiction is to be invoked, be a mistake, a mistake on one side will not be sufficient. It must be a mutual one. Not only must a mutual mistake be shown, but the precise agreement which the parties intended, but failed to express, must be proven beyond a reasonable doubt. The evidence required for

McCrary *v.* Williams, 127 Ala. 251, 28 So. 695; Gardner *v.* Knight, 124 Ala. 273, 27 So. 298; King *v.* Edward Thompson Co., 56 Ind. App. 274, 104 N. E. 106; Liggett *v.* Shira, 159 Pa. 350, 28 Atl. 218.

Where the inserting of names, omitted by mistake, would not change the meaning or legal effect of the writing, reformation of the instrument is immaterial and unnecessary. Buford *v.* Chichester, 69 W. Va. 213, 71 S. E. 120.

The insured has no standing in equity to have his contract reformed, where the result to him would be the same in any event. Grieb *v.* Equitable Life Assur. Soc., 189 Fed. 498, 194 Fed. 1021, 114 C. A. 658.

[1] Harold *v.* Weaver, 72 Ala. 373; Garage Equipment Mfg. Co. *v.* Danielson, 156 Wis. 90, 144 N. W. 284; Merritt *v.* Coffin, 152 Ala. 474, 44 So. 622; Sellwood *v.* Henneman, 36 Oreg. 575, 60 Pac. 12; Hancock *v.* Cossett, 45 Fed. 754; Walker *v.* Garner, 258 Mo. 494, 167 S. W. 955.

Where plaintiff by mistake overpaid for land, his remedy was at law to recover the overpayment, and not in equity to reform the deed. Ragsdale *v.* Turner, 141 Iowa 604, 120 N. W. 109.

[2] Gaulding *v.* Baker, 9 Ga. App. 578, 71 S. E. 1018; Braithwaite *v.* Henneberry, 124 Ill. App. 407, affirmed 222 Ill. 50, 78 N. E. 34.

this purpose must be of the stronger character, and the proof must be convincing. It must appear that both have done what neither intended.[1] Where an instrument is executed according to the intention and understanding of the parties, at the time of execution, and with full knowledge of the facts, such knowledge and execution will operate to defeat an action to reform, in that it negatives mutual mistake. It is not what the parties would have intended, if they had known better, but what did they intend at the time, informed as they were.[2] One who sold land and took deed of trust to secure balance due on purchase price, is not entitled to a reformation of a deed to the same land subsequently purchased by him, where the land was improperly described in the deed of trust and also in the deed to the purchaser at the trustee's sale, and also in the deed back to the original grantor. He has had knowledge all the time that his first conveyance didn't describe the land his grantee intended to buy, and he having got the original land back and lost nothing, is not entitled to have a reformation of the deed to him and thus get more land than he originally conveyed.[3] It is where the parties in reducing the agreement to writing, fail by mutual mistake to embody their intention in the instrument, either because they do not understand the meaning of the words used or their legal effect, that equity will grant relief by reforming the instrument, and it matters not whether such mistake be called one of fact or law.[4]]

§ 976. [**Courts Will Not Reform an Instrument so as to Make a Contract for the Parties.** — The province of Courts of Equity is to reform a contract so as to make it speak what the parties originally intended; but they will not reform a writing into a contract to which the parties did not mutually assent.[5] Before

[1] Dameron *v.* Rowland Lbr. Co., 161 N. C. 495, 77 S. E. 694; Miller *v.* Stuart, 107 Md. 23, 68 Atl. 273; First Natl. Bank *v.* Hartford Fire Ins. Co., 17 N. Mex. 334, 127 Pac. 1115; Boyce *v.* Hamburg Ins. Co., 24 Pa. Super. Ct. Rep. 589; Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797; Barnes *v.* Peterson, 136 Ga. 264, 71 S. E. 163; Forester *v.* Van Auken, 12 N. Dak. 175, 96 N. W. 301; McGraw *v.* Muma, 164 Mich. 117, 129 N. W. 20, 17 Detroit Leg. N. 1037; Godwin *v.* Da Conturbia, 115 Md. 488, 80 Atl. 1016; Holland Blow Stave Co. *v.* Barclay, 193 Ala. 200, 69 So. 118; Good Milking Machine Co. *v.* Galloway, 168 Iowa, 550, 150 N. W. 710.

[2] Hughes *v.* Payne, 27 S. Dak. 214, 130 N. W. 81.

[3] Graham *v.* Bryant, 95 Miss. 180, 48 So. 518.

[4] Lockwood *v.* Geier, 98 Minn. 317, 108 N. W. 877; Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816.

[5] Jordy *v.* Dunlevil, 139 Ga. 325, 77 S. E. 162; Louisville & N. R. Co. *v.* Cox, 133 Ga. 763, 66 S. E. 1088; Gaulding *v.* Baker, 9 Ga. App. 578, 71 S. E. 1018; Allgood *v.* Fahrney, 164 Iowa 540, 146 N. W. 42.

it will attempt to reform the contract, or to incorporate into the agreement such new phraseology as may be necessary to make the old form of words correctly state what was understood by the parties and attempted to be reduced to writing by them, a Court of Equity will seek to ascertain and act upon conditions as they actually were at the time of the trial, and not conditions as they were at the beginning of litigation.[1] Strictly speaking, the court does not reform the instrument; it corrects the written evidence of the agreement to make it correspond with the agreement of the parties. So that, where an agent of a fire insurance company was given a line of insurance upon a building upon one side of the street, but the reference that he took of the insurance was of another building belonging to the same owner upon the opposite side of the street, and it was that building that he inspected preparatory to issuing the policy, and upon which the policy was actually issued, the doctrine of reformation does not apply.[2] The most the court can do, in exercising the power of reformation, is to clearly ascertain what the contract was, and to correct such mutual errors as have intervened in carrying it into execution.[3]]

§ 977. [**Written Contracts Alone Will Be Reformed.** — The doctrine of reformation of instruments applies only to such agreements as have been reduced to writing. Equity only takes cognizance where the contract has been reduced to writing, and the writing does not express truly the actual contract entered into between the parties. Where the writing, through fraud or mistake, does not express the true contract, equity will reform the writing, which is the evidence of the contract, to conform it to the real contract, as actually made between the parties. But where the contract rests in parol, parol evidence is necessary to establish the contract, and the contract is that which the evidence shows it, in fact, was, and is enforced according to the proof, whether in law or in equity.[4]]

§ 978. [**In What Cases Reformation Will Be Decreed.** — The equitable doctrine of reformation of written instruments is usually applied where there has been a mutual mistake on the part of

[1] Baird *v.* Erie R. Co., 72 Misc. Rep. 162, 129 N. Y. Supp. 329, affirmed 148 App. Div. 452, 132 N. Y. Supp. 971.

[2] Boyce *v.* Hamburg Ins. Co., 24 Pa. Super. Ct. Rep. 589.

[3] Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797.

A mere clerical error, which is perfectly apparent from all of the surrounding circumstances, and about which there can be no doubt as to the real agreement of the parties, is not sufficient to authorize an action for reformation of the instrument and the correction of the error. Gaulding *v.* Baker, 9 Ga. App. 578, 71 S. E. 1018.

[4] Allgood *v.* Fahrney, 164 Iowa, 540, 146 N. W. 42.

both parties to the contract, or else where there has been a mistake on the part of one of the parties and fraud in the other. Mistakes are of two kinds: of law, and of fact. They will be considered in their order. As a general rule, it makes no difference whether the mistake be of law or of fact. The reason of the rule is the same. Where two parties have dealt with each other upon a mistaken view as to the legal effects of their associations and dealings, it is just as much inequitable to refuse relief to them both, as it would be to refuse relief to one who had suffered on account of the fraudulent practices of the other.[1] Relief will not be granted upon every mistake of law, if there is nothing in the case but the bare mistake. A mistake of law, pure and simple, without the addition of any circumstances of fraud or misrepresentation, constitutes no basis for relief in equity, and forms no excuse in favor of the party asserting that he made such a mistake. While ignorance of the law is no excuse, it has its limitations and is confined to mistakes of persons as to their own private rights and interests.[2] For instance, where two parties agree upon the purchase of one's interest in land, and they are mistaken as to the legal rights of one of them and what interest he really has as a matter of law, equity will interfere and reform the agreement to express the true intention of the parties.[3] Or where the parties undertake to contract as to the sale of machines, and a forfeiture of the contract is made to depend upon a condition other than as actually agreed upon, equity will reform the agreement. Where it is clearly shown that the words used do not express the real contract on which the minds of the parties met and the mistake in the use of the words was mutual, equity will intervene and reform the contract so as to make it express

[1] Staples *v.* East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721; McGraw *v.* Muma, 164 Mich, 117, 129 N. W. 20, 17 Detroit Leg. N. 1037; Hall and Blow Stave Co. *v.* Barclay, 193 Ala. 200, 69 So. 118.

Where deed to State was presented to attorney general for his approval, failure of the deed to include the proper boundaries will be corrected, even though the officer did not know what property it was intended to convey. State *v.* Lorenz, 22 Wash. 289, 60 Pac. 644.

Relief will be granted especially where party seeking to reform brought about the mistake, and the rights of innocent third parties have not accrued. Biggs *v.* Bailey, 49 W. Va. 188, 38 S. E. 499.

[2] Campbell *v.* Newman, 46 Okla. 15, 151 Pac. 602; McIntyre *v.* Casey, 268 Mo. 89, 182 S. W. 966; Morton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94; Wemple *v.* Hauenstein, 19 App. Div. 552, 46 N. Y. Supp. 288.

[3] McIntyre *v.* Casey, 268 Mo. 89, 182 S. W. 966; Godwin *v.* Da Conturbia, 115 Md. 488, 80 Atl. 1016.

the true agreement upon which the minds of the parties met.[1] And so where the parties willed to reduce their agreement to writing, but by a mutual mistake of all of them, and especially of the draftsman, as to what was necessary to be included in the written memorandum made, equity will reform it to effectuate the original intent.[2]]

§ 979. [**Same.** — One of the well-recognized and firmly established jurisdictions of a Court of Equity is to reform written contracts when there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake. If, therefore, a promissory note or other written agreement omits or contains terms or stipulations contrary to the agreement and intention of the parties, a Court of Equity will, upon a proper showing, reform it so as to make it conform to the actual contract. It is sometimes said that a mistake of law is no ground for equitable relief, but this rule only applies to cases where the contract, as entered into, speaks the true agreement of the parties. In such case, equity will not ordinarily reform the contract merely because one or both of the parties were mistaken as to its legal consequence, but where, through a mistake of the parties or the draftsman, there is a failure to express the actual contract of the parties as contemplated, owing to the use of inapt words, or where the legal effect of the terms employed by the parties in putting their contract in writing results in an agreement different from the one really entered into, a Court of Equity will reform the writing so as to effectuate the intention of the parties, even though the mistake was one of law.[3] This is true where the maker and payee of a note agreed that the debt should not bear interest, and thought it would be sufficient if

[1] Good Milking Machine Co. *v.* Galloway, 168 Iowa, 550, 150 N. W. 710.

[2] Korte *v.* O'Neill, 34 S. Dak. 241, 148 N. W. 12.

[3] Richmond *v.* Odgen St. Ry. Co., 44 Oreg. 48, 74 Pac. 333; Deseret Natl. Bank *v.* Burton, 17 Utah, 43, 53 Pac. 215; Burns *v.* Caskey, 100 Mich. 94, 58 N. W. 642; Bonbright *v.* Bonbright, 123 Iowa, 305, 98 N. W. 784; Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688; Hopwood *v.* McCausland, 120 Iowa, 218, 94 N. W. 269; Parish *v.* Camplin, 139 Ind. 1, 37 N. E. 607. Where a daughter intended to give her father a receipt for money advanced by him to her, and which he desired to keep as an evidence of his advance to her in the final distribution of his estate, a plain note executed instead will be reformed to show the real agreement. Hausbrandt *v.* Hofler, 117 Iowa, 103, 90 N. W. 494, 94 Am. St. Rep. 289.

A note executed by one in his individual capacity by stating after his name the title of his office, and thus making him individually liable, will be reformed where it was the intention to make the note the obligation

no reference was made to the payment of interest in the paper, whereas, under the laws of the State of Georgia it was provided that such an instrument bore interest.[1]]

§ 980. [**Reformation on Account of Mistake of Fact.** — The most general application of the doctrine of reformation occurs where there has been a mutual mistake of fact. If reformation is sought solely upon the ground of mistake, it must appear that the mistake was material and common to both parties. If the parties to a deed understand what land is to be sold and there is a well-defined dividing line between the locus in quo and the adjoining property, but by mistake a part of the adjoining property is included in the description, it is within the province of a Court of Equity to reform the deed so as to effectuate the true intention of the parties[2]; or where an instrument is drawn which is intended to carry into effect an agreement previously entered into, but which by mistake does not fulfil that intention.[3] It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party and fraud or inequitable conduct of the other. A mere misunderstanding of facts is not sufficient ground for asking reformation.[4] When the parties have been made cognizant of the fact

of the corporation. Prescott *v.* Hixon, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. Rep. 291. Contra, see Morehead Banking Co. *v.* Morehead, 122 N. C. 318, 30 S. E. 331; 124 N. C. 622, 32 S. E. 962.

But where the words used were fully understood by both parties, the relief will not be granted. Atherton *v.* Roche, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591.

Deed by husband to wife in consideration of natural love and affection will be reformed where the consideration was expressed in ignorance, a real consideration being paid, and even though the deed is being attacked by creditors as fraudulent. Orr *v.* Echols, 119 Ala. 340, 24 So. 357; Berry *v.* Sowell, 72 Ala. 14.

[1] Loudermilk *v.* Loudermilk, 98 Ga. 780, 25 S. E. 927.

[2] Whitt *v.* Whitt, 145 Ky. 367, 140 S. W. 570; Moynihan *v.* Brennan, 77 N. H. 273, 90 Atl. 964; Clements *v.* Life Ins. Co. of Va., 155 N. C. 57, 70 S. E. 1076; Huber Mfg. Co. *v.* Claudel, 71 Kans. 441, 80 Pac. 960; Barry *v.* Rownd, 119 Iowa, 105, 93 N. W. 67; Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921; nor is it necessary that a previous demand for correction had been made. Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 901.

Mistake in insuring right property. Holden *v.* Law Union etc. Ins. Co., 63 Oreg. 253, 127 Pac. 547; as to unpaid taxes and assessments, Reider *v.* White, 182 Ill. App. 430; or where a life estate was conveyed instead of a fee. Drum *v.* Drum, 251 Ill. 232, 95 N. E. 1071.

[3] Trenton Terra Cotta Co. *v.* Clay Shingle Co., 80 Fed. 46; but see Citizens Natl. Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259.

[4] Britton *v.* Metropolitan Life Ins. Co., 165 N. C. 149, 80 S. E. 1072;

that a mistake has occurred, they ought not to go on and perform the contract as written, and then sue for a reformation;[1] but if, when one of the parties realizes that a mistake has occurred, and he immediately informs the other party of it and requests a reformation of the contract as written, which is promised, this is a proper subject for jurisdiction in equity.[2]]

§ 981. [**Mistake Made by Third Party as Ground for Reformation.** — It can make no difference that the parties themselves did not actually prepare the writing in which the alleged mistake occurred. The principle is the same even though they entrusted the writing of the agreement to a third person and it was he who misunderstood the terms of the original agreement, or who failed to express in proper language the agreement as it was actually made. As a rule, in order to reform the instrument, the mistake must be mutual. Where it is the mistake of both parties, equity will reform; where of one party only, it cannot reform because of mistake of that one only. The demand of mutuality does not, however, apply to a mistake that is one purely of the scrivener.[3] In order to take advantage of the error of a third person in writing the contract, the plaintiff ought not to be guilty of negligence himself, as, where a contract was made for the sale of a stock of goods, including active accounts, and the assuming by defendant of a number of accounts, by name. Where plaintiff subsequently executed a bill of sale, but the account of a large creditor of his was omitted, equity will not grant relief, because plaintiff had an equal right with defendant to compare the contract with bill of sale, and failing to do this, he must bear the loss.[4] Mistakes which occur in this way must be shown by clear evidence, and in order to do this, it is competent to prove by parol in what particulars the writing differs from the original oral agreement.[5] The writing will be reformed even though the writer was not a

Auer *v.* Matthews, 129 Wis. 143, 108 N. W. 45; Gray *v.* Merchants Ins. Co., 113 Ill. App. 537; City of New York *v.* Matthews, 156 App. Div. 490, 141 N. Y. Supp. 432; Birch *v.* Baker, 81 N. J. Eq. 264, 86 Atl. 932; Kitchens *v.* Usry, 121 Ga. 294, 48 S. E. 945.

[1] MacFarland *v.* Mead, 34 App. D. C. 268.

[2] Woolf *v.* Barnes, 46 Misc. Rep. 169, 93 N. Y. Supp. 219.

[3] Ferrell *v.* Ferrell, 53 W. Va. 515, 44 S. E. 187; Allen *v.* Purcell, 141 Ga. 226, 80 S. E. 713; Forrester *v.* Moon, 100 S. C. 157, 84 S. E. 532; Silbon *v.* Pacific Brewing Co., 72 Wash. 13, 129 Pac. 581; Trump *v.* Paul, 78 Ill. App. 165; Stinson *v.* Ray, 79 Ark. 592, 96 S. W. 141.

[4] Hyde *v.* Kirkpatrick, 78 Oreg. 466, 153 Pac. 41.

[5] Story *v.* Gammell, 68 Neb. 709, 94 N. W. 982; Nutall *v.* Nutall, 26 Ky. L. Rep. 671, 82 S. W. 377; Kentucky Building & Loan Assn. *v.* Lawrence, 20 Ky. L. Rep. 1700, 106 Ky. 88, 49 S. W. 1059.

lawyer, but a man who claimed to know how to write a deed such as the parties intended to execute. Where it was the purpose and intent of the parties to execute and deliver a deed conveying an estate by entireties, and the draftsman understood that that was the estate to be conveyed, but was ignorant as to the proper language to be used to convey this estate, the deeds will be corrected.[1]]

§ 982. [**As a General Rule Voluntary Conveyances Will Not Be Corrected.** — The right to correct and reform a written instrument executed by mistake, or fraud, is one that attaches primarily to conveyances to which the injured party stands as a bona fide purchaser for value, and does not apply, as a general rule, where the conveyance is the evidence of the bounty of the grantor and a mere gratuity as to the grantee. The purpose of this is to prevent an unscrupulous creditor from taking an undue advantage, or a designing heir from obtaining a conveyance from the ancestor, the purpose of which is to foreclose his kin from their legal and equitable rights to the estate. The grantor, if living, could not be compelled to correct the deed[2]; and in the absence of consent of all of the parties, equity will not grant the relief.[3] But if there is any consideration, no difference how small it may be, if it be supplemented by natural love and affection, a mistake in the deed will be reformed.[4] Evidence that the husband of a large family, who was about to engage in an unfamiliar business, by deed duly executed and delivered, conveys his real estate to his wife, thereby making provision for her in the event of his misfortune, is sufficient to entitle the wife to a correction of an admitted mistake in the description of the property. While this is not a valuable consideration, it is not a voluntary conveyance. The meritorious con-

[1] Whittaker *v.* Lewis, 264 Mo. 208, 174 S. W. 369.

Reformation will be decreed where the terms of an agreement were dictated to another, and erasures made in his presence, though he did not again read the contract as actually written. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015.

[2] Shears *v.* Westover, 110 Mich. 505, 68 N. W. 266, 3 Detroit Leg. N. 485; Henry *v.* Henry, 215 Ill. 205, 74 N. E. 126; Strayer *v.* Dickinson, 205 Ill. 257, 68 N. E. 767; Mudd *v.* Dillon, 166 Mo. 110, 65 S. W. 973; Enos *v.* Stewart, 138 Cal. 112, 70 Pac. 1005; Smith *v.* Barksdale, 110 Ga. 278, 34 S. E. 582; Legate *v.* Legate, 249 Ill. 359, 94 N. E. 498; Willey *v.* Hodge, 104 Wis. 81, 80 N. W. 75, 76 Am. St. Rep. 852; Langley *v.* Kesler, 57 Oreg. 281, 110 Pac. 401; Harvey *v.* Hand, 48 Ind. App. 417, 95 N. E. 1020; Triesback *v.* Tyler, 62 Fla. 564, 56 So. 947.

[3] Shears *v.* Westover, 110 Mich. 505, 68 N. W. 266, 3 Detroit Leg. N. 485.

[4] Baker *v.* Pyeatt, 108 Ind. 61, 9 N. E. 112.

Promise to pay off existing indebtedness of grantor is sufficient. Bronston's Admr. *v.* Bronston's heirs, 141 Ky. 639, 133 S. W. 584.

sideration as between them and their heirs brings the cause within the jurisdiction of a Court of Equity.[1]]

§ 983. [**The Doctrine Will Not Be Applied so as to Injure Bona Fide Purchasers.** — It may be stated as the general prevailing rule that the doctrine of reformation will not be enforced, where to do so the rights of bona fide purchasers for value will be affected,[2] but there are a few authorities to the contrary.[3] A deed to defendant's grantor, taken and received by him without knowledge of a mistake, will not be corrected in the hands of defendants, where they purchased the timber for value and without any notice of a mistake.[4] In all cases of mistakes in written instruments, 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. As against bona fide purchasers for a valuable consideration, no relief will be granted.[5] For instance, defendant bank bona fide loaned money and took a mortgage securing the debt, and correctly described the land. Plaintiff bank took a prior mortgage, which in fact described land six miles away from the locus in quo. A Court of Equity will not restrain the defendant bank from selling under its mortgage, where the relief prayed by plaintiff would be to correct its prior mortgage and thus defeat the rights of defendant under its mortgage, which was taken without knowledge of the defective description.[6]]

§ 984. [**Necessity for Correction to Be Demanded and Other Conditions Precedent to Institution of Action.** — It is not necessary that a demand be made by the other party that the instru-

[1] Crawley *v.* Crafton, 193 Mo. 421, 91 S. W. 1027.

[2] Robinson *v.* Braiden, 44 W. Va. 183, 28 S. E. 798; Brown *v.* Gwin, 197 Mo. App. 499, 95 S. W. 208; Adams *v.* Drews, 110 La. 456, 34 So. 602; Martin *v.* Mixon, 92 Md. 26, 4 S. W. 503; Bender *v.* Chew, 129 La. 849, 56 So. 1023; Mears *v.* Lockart, 115 Fed. 865, 53 C. C. A. 191; Peters *v.* Fell, 15 S. Dak. 391, 89 N. W. 1014.

[3] Jamaica Sav. Bank *v.* Taylor, 72 App. Dist. 567, 76 N. Y. Supp. 790; Klatt *v.* Dummert, 70 Minn. 467, 73 N. W. 404.

A deed from husband to wife, reciting the consideration as love and affection, through mistake, may be reformed even though a creditor of the husband bought under his own execution sale, with the intention of bringing suit to set aside the deed. Jones *v.* Anderson, 116 S. W. 253.

[4] Dameron *v.* Rowland Lbr. Co., 161 N. C. 495, 77 S. E. 694.

[5] Byrne *v.* Ft. Smith Natl. Bank, 1 Ind. Ter. 680, 43 S. W. 957; Sentell *v.* Randolph, 52 La. Ann. 52, 26 So. 797; Stevens *v.* Wadleigh, 6 Ariz. 351, 57 Pac. 622; Rinehardt *v.* Reifers, 158 Ind. 675, 64 N. E. 459.

[6] Farmers & Merchants Bank *v.* Citizen's Natl. Bank, 25 S. Dak. 91, 125 N. W. 642.

ment be corrected before he is entitled to maintain his action. The demand is not a material part of the evidence, it is the duty resting upon the defendant to aid in correcting the defective instrument and where he has knowledge of the mistake it is his duty to correct it.[1] The plaintiff need not be in possession of the lands, about which the alleged defective description applies, especially where the property is timber, since the only evidence of a taking of possession of the timber would be the felling of trees, and the right to cut would depend upon the use of the timber actually intended to be conveyed, and not that mentioned in the defective instrument.[2] Where the plaintiffs sold land to defendant, and took a mortgage upon land with the same description to secure the purchase money, they are not entitled to have a reformation of the mortgage until they have shown that they were the owners of the lands embraced in the deed, and they had the right to make the conveyance;[3] and where a deed was executed and delivered upon a nominal consideration and expressly upon the support of grantor, it is a condition precedent that the plaintiff should show that he has performed his agreement before the relief will be granted and the instrument reformed.[4] The rule that one who seeks to have a contract set aside must offer to return what he has received and otherwise place the other party in statu quo, does not apply.[5]]

§ 985. [**He Who Seeks Relief Should Have Been Diligent about the Enforcement of His Own Rights, and Not Neglectful with Reference Thereto.** — The doctrine of reformation is applied in favor of those who have been diligent about the protection of their rights, and who have not carelessly or negligently walked into the injury of which they now complain. It is the duty of every one in conveying his lands, to carefully read the deed which he gives or receives, and yet the failure to read the deed, alone, is not sufficient reason why the instrument should not be corrected. If the parties have entrusted the writing of the deed to another

[1] Danielson *v.* Neal, 164 Cal. 748, 130 Pac. 716; Nichols *v.* Berning, 37 Ind. App. 109, 76 N. E. 776; Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 901; Sparta School Township *v.* Mendell, 138 Ind. 188, 37 N. E. 604; Parche *v.* Chessman, 49 Mont. 326, 142 Pac. 631.

[2] Gillen *v.* Powe, 219 Fed. 553, 135 C. C. A. 321; Jones *v.* McNealy, 139 Ala. 378, 35 So. 1022, 101 Am. St. Rep. 38.

[3] Adams *v.* Henderson, 168 U. S. 573, 42 L. Ed. 584, 18 S. Ct. Rep. 179; plaintiffs need not pay any part of mortgage debt before bringing action. Rose *v.* Hoye, 89 Ath. 242.

[4] Williams *v.* Husky, 192 Mo. 533, 90 S. W. 425.

[5] Keeley *v.* Sayles, 217 Ill. 589, 75 N. E. 567.

and given him the data from which to prepare it, and through his mistake, the deed is incorrectly prepared, and one of the parties failed to read it as written, yet he may have a reformation of the instrument;[1] but if the instrument sought to be reformed has been in his possession for some length of time and he has kept it with knowledge of its being incorrect, this is some evidence to be considered upon the questions of his ratification of the error.[2] Even negligence itself in closely examining the description of the lot about to be conveyed, so that the grantee is receiving a larger lot than it was intended to convey and for which he has paid nothing, will not preclude the grantor from having the deed reformed, especially where he has agreed to repay the grantee the value of improvements placed by him upon the lot conveyed by mistake.[3] But if plaintiff knew of the error in description before he signed the instrument, and said he thought it would be all right, this is not a case of a mistake at all, but one in which the plaintiff relied upon a mere conjecture of his own that the defendant would

[1] Jamaica Sav. Bank *v.* Taylor, 72 App. Div. 567, 76 N. Y. Supp. 790; Smelser *v.* Pugh, 29 Ind. App. 614, 64 N. E. 943; Busey *v.* Moraya, 130 Cal. 586, 62 Pac. 1081; Ætna Ins. Co. *v.* Brannon, 99 Tex. 391, 89 S. W. 1057.

Where a party to contract, who was hardly able to read English, relied upon his relative to put his agreement in writing, but did not ask for the paper, as written, to be read over to him, he was not negligent to such extent as to bar reformation of the contract. Nichols *v.* Berning, 37 Ind. App. 109, 76 N. E. 776.

[2] Young *v.* Marion College, 91 Mo. App. 214; but see, Kinman *v.* Hill, 156 N. W. 168, where papers were held two years before mistake was discovered; Carlson *v.* Druse, 79 Wash. 542, 140 Pac. 570.

[3] Southern Finishing etc. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681; Harris *v.* Parr, 165 S. W. 42; Rosenbaum *v.* Evans, 63 Wash. 506, 115 Pac. 1054.

Reid *v.* Bradley, 105 Iowa, 220, 74 N. W. 896; Nielander *v.* Chicago N. & St. P. Ry. Co., 114 Iowa, 420, 87 N. W. 285; Lloyd *v.* Hulick, 69 N. J. Eq. 784, 63 Atl. 616, 115 Am. St. Rep. 624.

Negligent failure to exercise option, or prayer for reformation of contract, procured without fraud or mistake, will bar right to relief. Pope *v.* Hoopes, 84 Fed. 927, affirmed 90 Fed. 451, 33 C. C. A. 595.

Wilful failure to read deed when it is presented to him for signature will bar right to reformation. Waslee *v.* Rossman, 231 Pa. 219, 80 Atl. 643; Youngstown Elec. Co. *v.* Butler County, 21 Pa. Super. Ct. Rep. 95.

A most important part of the proof is that the party who seeks the equitable relief must show that he was without negligence in the matter. Spelman *v.* Delano, 187 Mo. App. 119, 172 S. W. 1163.

The mere fact that a married woman was laboring under the mistake, does not excuse her inaction, and even though the statute of limitations did not operate. Harry *v.* Hamilton, 154 S. W. 637.

One who takes mortgage with wrong description does not forfeit right to relief. Keister *v.* Myers, 115 Ind. 312, 17 N. E. 161.

agree to the performance of a contract entirely different from the one that was written, and from which there is no relief.[1] A Court of Equity will not lend its aid to the reformation of a note, received by one from his assignor with notice that the instrument was procured through fraud. If the court lends its aid to reform the note and enforce it as reformed, it will actively assist in the consummation of the original fraudulent scheme. Courts of Equity do not allow their process to be so used.[2] Negligence in failing to properly examine an instrument about to be executed, is the same kind and degree of negligence that is required in order for one to recover for a negligent injury. The negligence, in order to bar equitable relief, in case of mutual mistake, clearly established, must be so gross and inexcusable as to amount to a positive violation of a legal duty on the part of the complaining party.[3]]

[1] Bonds *v.* Bonds, 102 Ga. 163, 29 S. E. 218.
[2] Moore *v.* Michaelson, 152 Wis. 352, 140 N. W. 28.
[3] Howard *v.* Tettelbaum, 61 Oreg. 144, 120 Pac. 373; Conn *v.* Hagan, 93 Tex. 334, 55 S. W. 323; Benesh *v.* Traveler's Ins. Co., 14 N. Dak. 39, 103 N. W. 405.

CHAPTER XX

SPECIFIC PERFORMANCE OF AGREEMENTS AND OTHER DUTIES

§ 986. **Specific Performance.** — Having thus gone over some of the principal grounds upon which Courts of Equity will interpose to decree the rescission, cancellation, or delivery up of agreements, securities, and other instruments, and the delivery of chattels to the rightful owners, we shall in the next place pass to the consideration of the other branch of our inquiries, namely, what are the cases in which Courts of Equity will interpose and decree a specific performance of agreements.

§ 987. [**Specific Performance Defined.** — The doctrine of specific performance of a contract may be defined as the right that one of the parties to a contract has to come into a Court of Equity and obtain the strict enforcement of the agreement in specie. It is not every contract that is enforceable in equity. A contract may be valid at law and unenforceable. There must have been a valid subsisting contract, binding at law, and the remedy in damages at law must be inadequate. The instrument must be clear, unambiguous, and certain, and of such a character that a court of equity can make an efficient decree and enforce it when made.[1] Where the contract is for the sale of land, in order to

[1] Harms *v.* Stern, 222 Fed. 581; Jerling *v.* Lain, 269 Ill. 337, 109 N. E. 972; Hodalski *v.* Hodalski, 181 Ill. App. 158; African Home Assn. *v.* Carroll, 267 Ill. 380, 108 N. E. 322; King *v.* Prospect Fishing Club, 126 Md. 213, 94 Atl. 780; Bauman *v.* Kusian, 164 Cal. 582, 129 Pac. 986; Hissam *v.* Parrish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892; Matthes *v.* Wier, 84 Atl. 878; Waymire *v.* Waymire, 141 Ind. 164, 40 N. E. 523; Louisville & N. R. Co. *v.* Bodenschatz Stove Co., 141 Ind. 251, 39 N. E. 703; Riverside Land Co. *v.* Sawyer, 24 Colo. App. 442, 134 Pac. 1011; Dingman *v.* Hillberry, 159 Wis. 170, 149 N. W. 761; Thomas *v.* United States Brewing Co., 102 Md. 417, 62 Atl. 633; Miller *v.* Tjexhus, 20 S. Dak. 12, 104 N. W. 519; Bear Track Min. Co. *v.* Clark, 6 Idaho, 196, 54 Pac. 1007; Kent *v.* Dean, 128 Ala. 600, 30 So. 543.

Specific performance, which is one of the commonest forms of relief, will seldom be granted where there is not a mutual liability to the jurisdiction, or where the court has not means of seeing that its decree shall be

come within the Statute of Frauds, it is competent to offer together the oral statements, letters, telegrams, and any other written memoranda that may tend to show that a valid contract was in fact made, and when all of these pieces of written evidence are so related to the subject-matter, and are so connected with each other, that it may be fairly said to constitute one paper relating to the contract, it will be enforced in equity.[1] If the contract sought to be enforced relates to land and was executed by one through his agent, attorney, or some one else supposedly for him, the same rules apply and the land must be described with sufficient definiteness, the contract must be a valid engagement of the party to be charged therewith, and there must be a concise and plain promise to convey the property upon the terms indicated.[2] After having been properly executed, the contract must have been delivered, unless deposited as a perfect escrow. Specific performance cannot be predicated upon the execution of a deed which has never been delivered.[3]]

carried out. It will not entertain a bill where it could not obtain the means of enforcing a cross-bill, if one should become proper, so as to compel both parties to do equity. Voorhies *v.* Frisbie, 25 Mich. 476, 12 Am. Rep. 295.

While it is universally conceded that specific performance is a matter of discretion, the best authorities agree that, where a contract relating to land is not objectionable legally, it is as much a matter of course for a Court of Equity to decree specific performance as it is for a Court of Law to give damages for a breach thereof. Stamper *v.* Stamper, 121 N. C. 253, 28 S. E. 20.

[1] Atwood *v.* Rose, 32 Okla. 355, 122 Pac. 929; Plante *v.* Fullerton, 148 Pac. 87; Maris *v.* Masters, 31 Ind. App. 235, 67 N. E. 699.

[2] Repetto *v.* Baylor, 61 N. J. Eq. 501, 48 Atl. 774; Council *v.* Bailey, 154 N. C. 54, 69 S. E. 760; Atwood *v.* Rose, 32 Okla. 355, 122 Pac. 929; Carlson *v.* O'Connor, 79 Oreg. 333, 154 Pac. 755; Amick *v.* Ellis, 53 W. Va. 421, 44 S. E. 257; Dunsmore *v.* Lyle, 87 Va. 391, 12 S. E. 610; Wiggins *v.* Lynn, 139 Ga. 297, 77 S. E. 157; Tran. *v.* Sloan, 213 Pa. 540, 62 Atl. 984; Wood *v.* Sheffer, 248 Ill. 617, 94 N. E. 24.

Auctioneer at land sale is agent of both parties and memorandum made by him is an enforceable contract. Love *v.* Harris, 156 N. C. 88, 72 S. E. 150.

A contract signed by an alleged agent, in which no consideration is stated, nor a grantee named, will not be enforced. Woodcock *v.* Merrimon, 122 N. C. 731, 30 S. E. 321.

A contract made by husband for the disposition of the homestead where the wife does not join, cannot be specifically enforced. Laubscher *v.* Mixell, 171 Iowa, 88, 153 N. W. 335.

Where assignee of contract knew at time that he took it that the corporation did not own the property, he cannot enforce it. Vacarezza *v.* Realty Inv. Co., 165 S. W. 516.

[3] Minnesota Land etc. Co. *v.* Hewitt Inv. Co., 201 Fed. 752; Bradt *v.* Hartson, 4 Neb. 889, 96 N. W. 1008.

§ 988. [**Nature of the Doctrine of Specific Performance.** — The contract sought to be enforced must be reasonable, clean, and not such as would shock the conscience of the court. It must have been freely and fairly entered into, and evidences of fraud and undue influence must be lacking. The complainant in such an action is asking the court to require another to do equity, and it is incumbent upon him to convince the court that the strict performance of the contract will not work a needless hardship upon the defendant. If the circumstances and conditions of the parties have so materially changed since the execution of the agreement and the time when its enforcement is demanded, that strict compliance with it will work an unusual injury or hardship upon the defendant, performance will not be decreed. And if the plaintiff, prior to the time he acquired his interest in the contract, knew that the title was in the name of a third person, and purposely so as a voluntary and fraudulent conveyance, there is no such equity in the entire transaction as will induce the exercise of jurisdiction.[1] Where parol evidence is relied upon to show the execution of the contract, it is subject to the same rules as are requisite for the enforcement of a written contract. If the contract as written refers to land used with a certain mill, but does not in fact actually describe the boundaries, parol evidence is admissible to show what lands were used at the time in connection with the mill.[2] The enforcement of contracts of municipal corporations is in the same category with the contracts of individuals. If a certain method is prescribed as a prerequisite of contracting, that method must be followed. For instance, if the ordinances of the town provide that the proposal for contracts for grading the streets be advertised in a newspaper for a given period, the plaintiff will be required to prove that the proper advertisement was given before the contract will be enforced.[3]]

§ 989. **Classification of Contracts.** — With reference to the present subject agreements may be divided into three classes: (1) those which respect personal property; (2) those which respect personal acts; and (3) those which respect real property. And we shall presently see that the jurisdiction now actually exercised by Courts of Equity is not co-extensive in all these classes of

[1] Bradt *v.* Hartson, 4 Neb. 889, 96 N. W. 1008; McLaughlin *v.* Leonhardt, 113 Md. 261, 77 Atl. 647; Edwards *v.* Watson, 258 Mo. 631, 167 S. W. 1119; Schenck *v.* Ballou, 253 Ill. 415, 97 N. E. 704.

[2] Smith *v.* Broadhurst, 18 Misc. Rep. 546, 41 N. Y. Supp. 1002; Brown *v.* Ward, 110 Iowa, 123, 81 N. W. 247.

[3] Hallett *v.* Borough of Bellevue, 247 Pa. 296, 93 Atl. 477.

cases; but at the same time it may be fairly resolved into the same general principles.

§ 990. **Same.** — It is well known that by the common law every contract or covenant to sell or transfer a thing, if there is no actual transfer, is treated as a mere personal contract or covenant, and as such, if it is unperformed by the party, no redress can be had except in damages. This is in effect in all cases allowing the party the election either to pay damages or to perform the contract or covenant at his sole pleasure. But Courts of Equity have deemed such a course wholly inadequate for the purposes of justice; and considering it a violation of moral and equitable duties, they have not hesitated to interpose and require from the conscience of the offending party a strict performance of what he cannot without manifest wrong or fraud refuse.[1] However where it has become impossible from subsequent events for the party to perform his contract, as by a subsequent sale of the subject-matter of the contract without notice, Courts of Equity will not decree a specific performance, but will (as we shall see) retain the bill for compensation.[2]

§ 991. **Jurisdiction Not Dependent upon Form of Instrument.** — The jurisdiction of Courts of Equity to decree a specific performance of contracts is not dependent upon or affected by the form or character of the instrument. What these courts seek to be satisfied of is that the transaction in substance amounts to and is intended to be a binding agreement for a specific object, whatever may be the form or character of the instrument. Thus if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events, and not to be discharged by the payment of the penalty, although it has assumed the form of a condition only.[3] Courts of Equity in all cases of this sort look to the substance of the transaction and

[1] See 1 Madd. Ch. Pr. 286; Alley *v.* Deschamps, 13 Ves. 228, 229; Gilb. For. Rom. 220; Harnett *v.* Yeilding, 2 Sch. & Lefr. 553.

[2] Greenaway *v.* Adams, 12 Ves. 395.

[3] Sugden on Vendors, ch. 4, § 2, p. 202 (7th ed.); Newland on Contr. ch. 17, pp. 307 to 310; Logan *v.* Wienholt, 7 Bligh, R. 1, 49, 50; Chilliner *v.* Chilliner, 2 Ves. 528; Ensign *v.* Kellogg, 4 Pick. R. 1.

It matters not that the sum to be paid is called "liquidated damages." Hull *v.* Sturdivant, 46 Me. 34; Hooker *v.* Pynchon, 8 Gray, 550. Especially if the case is really one of penalty. Daily *v.* Litchfield, 10 Mich. 29. See also Whitney *v.* Stone, 23 Cal. 275; Long *v.* Bowring, 33 Beav. 585; Fox *v.* Scard, Ib. 327; Coles *v.* Sims, 5 DeG. M. & G. 1; Carnes *v.* Nesbit, 7 Hurl. & N. 778; Ropes *v.* Upton, 125 Mass. 258 (injunction).

the primary object of the parties; and where that requires a specific performance, they will treat the penalty as a mere security for its due performance and attainment.

§ 992. **History of the Jurisdiction.** — The jurisdiction of Courts of Equity to decree a specific performance of agreements is certainly of very ancient date, if it be not coeval with the existence of these courts in England. It may be distinctly traced back to the reign of Edward IV.; for in the Year Book of 8th Edw. IV., 4, it was expressly recognized by the chancellor as a clear jurisdiction.[1] But whatever may be its origin and antiquity it is now clearly established, and is in daily and most beneficial exercise for the purposes of justice.[2] The ground of the jurisdiction is that a Court of Law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which in many cases would fall far short of the redress which his situation might require. Wherever therefore the party wants the thing in specie and he cannot otherwise be fully compensated, Courts of Equity will grant him a specific performance.[3]

[1] 1 Madd. Ch. Pr. 287; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*o*); Newl. on Contr. ch. 6, p. 88; Halsey *v.* Grant, 13 Ves. 76. The case in 8 Edw. IV. 4 was a suit in chancery; and Genney, of counsel for the defendant, in his argument said by way of illustration (as the text stands): "If I promise to build a house for you, if I do not build it, you shall have a remedy by subpœna"; to which the chancellor is reported to have replied, "He shall." I cannot but think that Genney put the case not as an affirmative proposition but by way of interrogatory (would he have a subpœna?), for so the scope of his argument required. But either way, the chancellor's remark points in favor of the jurisdiction. In cases of contract to build a house, or a bridge, a specific performance would not now be decreed. (*a*) See Errington *v.* Aynesly, 2 Bro. Ch. R. 341, 342; Mosely *v.* Virgin, 3 Ves. Jr. 185, 186; Lucas *v.* Commerford, 3 Bro. Ch. R. 166, 167.

[2] Gilbert, Lex Prætor, 235.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*o*); Bettesworth *v.* Dean of St. Paul's, Sel. Cas. in Ch. 68, 69; Halsey *v.* Grant, 13 Ves. 76; Flint *v.* Brandon, 8 Ves. 159, 163; Harnett *v.* Yeilding, 2 Sch. & Lefr. 553; Errington *v.* Aynesly, 2 Bro. Ch. R. 341; Mitford, Eq. Pl. by Jeremy, 112, 118, 119; Gilb. Forum Roman. 220; Sugden on Vendors, ch. 4, § 4, p. 190, 191 (7th ed.); Gilb. Lex Prætoria, 235; Cathcart *v.* Robinson, 30 U. S. 264, 8 L. Ed. 120; Storer *v.* Great Western Railway Co., 2 Y. & Coll. N. R. 48, 50. In Harnett *v.* Yeilding, 2 Sch. & Lefr. 552, 553, Lord Redesdale said: "I have bestowed a good deal of consideration upon this case, and particularly with reference to the jurisdiction exercised by Courts of Equity in decreeing specific performance of agreements. Whether Courts of Equity in their determinations on this subject have always considered what was the original foundation of decrees of this nature, I very much doubt. I believe that, from something of habit, decrees of this kind have been carried to an extent which has tended to injustice. Unquestionably

§ 993. **Jurisdiction Not Founded upon Distinction between Real and Personal Property.** — And this constitutes the true and leading distinction in the present exercise of equity jurisdiction in England in regard to decreeing specific performance.[1] It does

the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the court in a variety of cases has refused to interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained; as for instance in agreements for the purchase of stock, it being the same thing to the party where or from whom the stock is purchased, provided he receives the money that will purchase it. These cases show what were the grounds on which Courts of Equity first interfered; but they have constantly held that the party who comes into equity for a specific performance must come with perfect propriety of conduct, otherwise they will leave him to his remedy at law. He must also show that in seeking the performance he does not call upon the other party to do an act which he is not lawfully competent to do; for if he does, a consequence is produced that quite passes by the object of the court in exercising the jurisdiction, which is to do more complete justice. If a party is compelled to do an act which he is not lawfully authorized to do, he is exposed to a new action for damages at the suit of the person injured by such act; and therefore if a bill is filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it unless the party seeking performance is willing to accept such a title as he can give; and that only in cases where an injury would be sustained by the party plaintiff in case he were not to get such an execution of the agreement as the defendant can give. I take the reason to be this among others, — not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person, by creating a title which he may have to contend. There is also another ground on which Courts of Equity refuse to enforce specific execution of agreements; that is, when from the circumstances it is doubtful whether the party meant to contract to the extent that he is sought to be charged. All these are held sufficient grounds to induce the court to forbear decreeing specific performance, that being a remedy intended by Courts of Equity to supply what are supposed to be the defects in the remedy given by the Courts of Law. Under these circumstances therefore I think considerable caution is to be used in decreeing specific performance of agreements; and the court is bound to see that it really does that complete justice which it aims at, and which is the ground of its jurisdiction."

[1] *Specific Performance as a Primary and as a Secondary Remedy.* — So far as the intention of the parties is concerned, there can be no doubt that the duty to perform a contract made by them is primary, and that of making compensation in lieu of performance secondary, otherwise the contract would not have been made. But a clear distinction must be observed by the student or he will be misled. The duty to perform is, in the purpose of the parties, primary; but the law may not always deem it best to enforce such duty even when it might easily do so. On the contrary the law may deem it best to reverse the case and prefer the secondary duty, treating it as really primary and not as substitutional. In other words, changing the terms "primary" and "secondary" from the duty to

not proceed (as is sometimes erroneously supposed) upon any distinction between real estate and personal estate, but upon the ground that damages at law may not in the particular case

the rule of law, as will now be useful, it may be and in fact it is a primary rule of law in many cases to refuse specific enforcement of the duty undertaken, and to permit and prefer compensation in the first instance. In such cases compensation may be spoken of with truth as a primary *remedy*, and specific fulfilment as secondary or substitutional. This may appear anomalous; it may not be defensible; but it is a fact in the English law. The two subjects, Specific Performance and Injunction (see editor's note to § 1181), show this.

Indeed to a superficial view of the authorities on the English law, the very idea of specific performance appears to be opposed to the general theory of the law. That theory is often supposed to be that men may violate their duties if they will, and that it is only in peculiar and exceptional cases, where the remedy of compensation cannot be applied, that the law will require direct performance of the contract. It would not be surprising if it should be found that the reason of this view is largely historical, being based upon the fact that, in the past, actions for damages were far more frequent than others; but another reason has come into prominence in modern times and is probably to be taken as the present ground of the view referred to. Money, the common measure of value, is an equivalent for most cases of liability; and the party wronged must, it is thought, accept the equivalent if he finds it necessary to resort to the courts. That appears to be the ordinary view. See e. g. Port Clinton R. Co. *v.* Cleveland R. Co., 13 Ohio St. 544, 559. And that implies that before a plaintiff can have specific performance it must appear that compensation cannot well or properly be made.

But specific performance, i. e. the requirement of performance of an immediate duty in distinction from paying for a violation of it, has a higher place in the English law than the first appearance of the authorities would suggest. Far from being exceptional, it has in reality a clear place in general theory as a primary remedy, as clear a place as compensation, though the fact is doubtless obscured by the peculiarity of English procedure. In the earliest times revenge for wrong done, pursued by the party wronged, appears to have been the object and the mode of redress; but when in the development of the State this gave way to the interference of courts of justice, two substitutes came into use for civil cases, to be applied according to the nature of the question, to wit, compensation and restoration, if to be had, of property taken. See as to revenge and compensation Holmes, Common Law, Lect. 1.

Where a chattel, individual and capable of clear identification, or a piece of land, is wrongfully taken or withheld from one entitled to the possession, the wrong-doer having it in his hand may be compelled to give it up. Here is recovery of the specific thing of which the plaintiff has been deprived, and here is specific performance of the immediate duty to return the property. The wrong-doer has not the privilege of making compensation. And in giving the party wronged his property in specie the courts have simply done the natural thing. Under the practice of private revenge the property would be seized; and the courts in ordering restoration but carry out a deep instinct of human nature. There is surely nothing anomalous or exceptional in this. If not specific performance in the technical sense, this is at least the root of the doctrine. When therefore technical specific performance came first to be urged upon the chancellor,

he had only to lay hold of a perfectly familiar principle of the Common-law Courts and mould it to the new use; if indeed he did not find it in his own court, as in Year Book 12 & 13 Edw. 3, Introd. p. cix by Pike, a case in full, temp. Hen. V. (The reader's attention is also called to the very interesting suggestion of Mr. Pike in that connection, concerning the Chancery, p. cx.)

In the text the author says that the rule in regard to decreeing specific performance in cases of personalty and of realty "does not proceed upon any distinction between real estate and personal estate, but upon the ground that damages at law may not in the particular case afford a complete remedy." As applied to personal chattels this is true; but in regard to real property the courts have always in fact, though not always in language, proceeded upon just such a distinction. Specific performance of contracts for the sale of land is constantly enforced, and as was said in Port Clinton R. Co. *v.* Cleveland R. Co., 13 Ohio St. 544, 559, "as a matter of course" in clear cases; and this without regard to the question whether the loss could be properly measured in an action for damages. The land is a thing the court can lay its hand upon, and, consciously or unconsciously, following out familiar usage to a natural result, it orders the selling contractor to deliver it to the buyer. As for the converse case, of the right of the seller to enforce specific performance on the part of the buyer, that is only a concession to justice, being based on the idea that the right should be mutual. See Hawralty *v.* Warren, 3 C. E. Green, 124; Marble Co. *v.* Ripley, 77 U. S. 339, 19 L. Ed. 955, Jones *v.* Newhall, 115 Mass. 244, 251. It appears therefore that contracts for the sale of land are specifically enforceable, not because of any difficulty in measuring damages at law, but because of the nature of the property. See Kitchin *v.* Herring, 42 N. C. 190; Barnes *v.* Barnes, 65 N. C. 261, 263. And compare the remarks of Bacon, V. C., in Greene *v.* West Cheshire Ry. Co., L. R. 13 Eq. 44, 51, on the supposed test of the remedy in damages.

Now it has never been necessary to extend this rule of equity generally to the case of chattels capable of identification, the title to which has passed to the party wronged, not because compensation is to be preferred to specific performance, but because specific performance is to be had elsewhere and in another manner, i. e. because the Law Courts have always had power in ordinary cases to require delivery or return of the same; although whenever it is necessary, equity will act, as it did in Wood *v.* Rowcliffe, 2 Phill. 382, and as it does in requiring the delivery up of instruments. Ante, ch. 17. See also Western R. Co. *v.* Bayne, 75 N. Y. 1. And in regard to cases in which there is only a contract to sell Courts of Equity have already advanced in the same direction as far perhaps as may be necessary. They cannot, it is considered, go the whole length and order specific performance as freely as in contracts for the sale of land; for at this point the principle of compensation, in connection with modern ideas, acquires special prominence. Wheat, corn, horses, and chattels generally are merchandise, to be bought and sold for money. Money is both the common measure of value and the thing sought; and payment of money is accordingly ordered in such cases wherever in law it answers the purpose of the chattel. Compensation is substituted as a legal equivalent for a thing which has never actually come under the ownership of the plaintiff. It is not his; it is a special object of barter for money; and money must be accepted if the will of the court is invoked. That appears to be the theory. For the proposition itself, that specific performance will not ordinarily be enforced in such cases, see McGarvey *v.* Hall, 23 Cal. 140, 142; Hall *v.* Joiner, 1 S. C. 186; Clark *v.* Flint, 22 Pick. 231, 239. As to shares and stocks see editor's note, infra, end of the next

section. Compensation is here the primary remedy; and reason against its application must appear. Waters *v.* Howard, 1 Md. Ch. 112.

If however the plaintiff can show that there is no clearly accurate and certain measure of value in money in regard to the chattel contracted for, occasion arises for the application of the now secondary or substitutional principle, purely modern in this respect, of specific performance. Falcke *v.* Gray, 5 Jur. 645; Dowling *v.* Betjemann, 2 Johns. & H. 544; Fells *v.* Read, 3 Ves. 70; Pooley *v.* Budd, 14 Beav. 229; Hall *v.* Joiner, 1 S. C. 186; Sullivan *v.* Tuck, 1 Md. Ch. 59; McGowin *v.* Remington, 12 Pa. St. 56; Johnson *v.* Brooks, 93 N. Y. 337; Clark *v.* Flint, 22 Pick. 231. Thus a contract to sell bric-à-brac, such as a pair of old china jars of indeterminate pecuniary value, will be specifically enforced. Falcke *v.* Gray, supra. So of an agreement to sell a painting in a similar case. See Dowling *v.* Betjemann, supra. So too of an agreement to supply articles of merchandise, if the agreement is an open one in regard to performance, i. e. if it is not final, not to be executed immediately, but requires the doing of continuous acts, so as to make the determination of a question of damages uncertain and doubtful. Furman *v.* Clark, 3 Stockt. 307, 311; Buxton *v.* Leiter, 3 Atk. 383.

The last illustration is deserving of some remark. In the first of the two cases cited there was an agreement to furnish the plaintiff with quantities of clay, on the plaintiff's boats, from time to time while navigation was open, for a period of seven years, on special terms with which the plaintiff had not complied. But the court declared that the contract itself was a proper one for specific performance, because there could be no adequate compensation in damages for the breach of such an undertaking; the profits whereof, depending upon future events, must have been a mere matter of conjecture.

The case of Hall *v.* Joiner, 1 S. C. 186, is perhaps inconsistent with this, it is conceived, perfectly sound decision. In that case A had agreed to make advances to B to enable B to carry on a turpentine farm. The products were to be sent to A to be sold by him on *commission*, and the proceeds above commissions to be applied by him in payment of the advances made to B. The advances were made, but B, in violation of his contract, sent products of the farm to market and sold them himself. The court declined to enforce specific performance in favor of A, on the narrow view apparently that specific performance in respect of chattels could be demanded only when the chattel was of a peculiar nature, the value of which could not be determined by reference to market rates.

It is apprehended that in view of the fact that profits of uncertain extent were to enter into the case, it was not a case for damages at law; what the plaintiff would have been entitled to recover would have been matter of conjecture. It may however be that the case should be distinguished on the ground that there was no contract for the sale of anything to the plaintiff; the goods were to be sold on commission.

It may be too that there is a further ground of distinction between the two cases. Where the obligations to be performed are continuous and complex, especially if they relate to a subject-matter such that the court cannot determine what constitutes exact performance, performance will not be ordered. Marble Co. *v.* Ripley, 77 U. S. 339, 19 L. Ed. 955. "The agreement," said the court, "being for a perpetual supply of marble, no decree the court can make will end the controversy. . . . The court to the end of time may be called upon to determine not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size or shape or proportion." (There were other grounds how-

ever for refusing the plaintiff's demand.) See further, with regard to continuous obligations, Port Clinton R. Co. *v.* Cleveland R. Co., 13 Ohio St. 544; Wheatly *v.* Westminster Coal Co., L. R. 9 Eq. 538; Atlanta R. Co. *v.* Speer, 32 Ga. 550; Blanchard *v.* Detroit R. Co., 31 Mich. 44, 57; Cairo R. Co. *v.* People, 92 Ill. 170.

Other cases not unlike the foregoing may be mentioned. A agreed with B to furnish a quantity of fruit-trees, and B agreed to plant and cultivate them on his own farm and to sell the fruit on joint account during the life of the trees. During that time B died, and his right passed to C, and C was now held entitled to specific performance against A. McKnight *v.* Robbins, 1 Halst. Ch. 229, 642. So where a person pledged his growing crops to his agent, who was to advance money thereon, and the person died insolvent, largely indebted to his agent, the latter obtained a decree for specific performance, the court ordering that the crops be forwarded to him. Sullivan *v.* Tuck, 1 Md. Ch. 59. See also Starnes *v.* Newsom, 1 Tenn. Ch. 239, where however the contract was considered hard and unconscionable.

In these and in all other cases of a modern origin, i. e. influenced by modern notions as distinguished from the instinctive right to take one's own, specific performance is indeed (excepting mandamus, which is really a case of specific performance), a secondary or substitutional remedy, not to be called into exercise where compensation may certainly and accurately be computed. On this ground contracts for the performance of services are not ordinarily specifically enforceable, except in so far as an injunction, if obtainable, may work an enforcement. Port Clinton R. Co. *v.* Cleveland R. Co., 13 Ohio St. 544, 550 (where it is said that this may be true even where damages would not afford adequate relief), citing Hamblin *v.* Dinneford, 2 Edw. 529; De Rivafinoli *v.* Corsetti, 4 Paige, 264; Stocker *v.* Brockelgank, 3 Macn. & G. 250. And see Woodward *v.* Aspinwall, 3 Sandf. 272. Even where an injunction against a positive violation of the terms of a contract is granted, this is not necessarily equivalent to a decree for specific performance. See the distinction luminously set forth in Lumley *v.* Wagner, 1 DeG. M. & G. 604; s. c. 5 DeG. & S. 485, the case of an opera singer who had agreed to sing at a certain theatre and not elsewhere. And see § 722 *a*, infra. But it is obvious that in some cases injunction must work specific performance; indeed it is founded upon the same theory of the right of compulsion.

It is probably upon a similar ground concerning compensation that contracts for the formation thereafter of partnerships have sometimes been specifically enforced. Birchett *v.* Bolling, 5 Munf. 442; England *v.* Curling, 8 Beav. 129. But as the author says (ante, § 666), the remedy of specific performance in such cases is rarely sought, — he might have added, "and still more rarely obtained," — because partnerships begun in mutual distrust, dissatisfaction, or enmity would not be apt to be successful. See upon this subject Sichel *v.* Mosenthal, 30 Beav. 371; Stocker *v.* Wedderburn, 3 Kay & J. 393; Scott *v.* Rayment, L. R. 7 Eq. 112; Manning *v.* Wadsworth, 4 Md. 59; Meason *v.* Kaine, 63 Pa. St. 335; Whitworth *v.* Harris, 40 Miss. 483; Somerby *v.* Buntin, 118 Mass. 279, 287. After the partnership has been formed, however, specific performance of the articles may doubtless be enforced or denied upon the principle of the adequacy of a remedy in damages; or in case the agreement is to bring into the firm a particular piece of property belonging to the partner, it will be enforced, it is conceived, because the court can lay hold of the property. So, if on the dissolution of the partnership, whether in accordance with the original articles or with special articles of dissolution, it is agreed that one of the partners shall have a specific piece of property, even personalty, belong-

afford a complete remedy.[1] Thus Courts of Equity will decree performance of a contract for land, not because of the particular nature of land, but because the damages at law, which must be calculated upon the general value of land, may not be a complete remedy to the purchaser, to whom the land purchased may have a peculiar and special value. So Courts of Equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because the damages at law, calculated on the market price of the stock or goods, are as complete a remedy for the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may ordinarily purchase the same quantity of the like stock or goods.[2]

ing to the firm, such an agreement will be specifically enforced, subject of course to the rights of creditors. Lingan *v.* Simpson, 1 Sim. & S. 600. Compare Somerby *v.* Buntin, 118 Mass. 279, 287.

This note may be closed with a quotation from the judgment of Lord St. Leonards in Lumley *v.* Wagner, 1 DeG. M. & G. 604, 619, to show how anxious great judges have been to apply the rule of requiring direct performance of duties as opposed to requiring acceptance of compensation: "Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give." An injunction was accordingly granted against Miss Wagner's singing elsewhere than at the plaintiff's theatre, though specific performance of her engagement to sing there could not be enforced, and indeed was not asked. See Donnell *v.* Bennett, 22 Ch. D. 835, 837. See also, for a sound statement concerning specific performance, Barnes *v.* Barnes, 65 N. C. 261, 263. Further see the editor's note on Injunction as a Primary Remedy, post, § 1181.

[1] Adderley *v.* Dixon, 1 Sim. & Stu. 607; Cud *v.* Rutter, 1 P. Will. 570, 571; 1 Madd. Ch. Pr. 295, 296; Harnett *v.* Yeilding, 2 Sch. & Lefr. 553, 554; Dean *v.* Izrad, and Hollis *v.* Edwards, 1 Vern. R. 159; Duff *v.* Fisher, 15 Cal. 375.

[2] Adderley *v.* Dixon, 1 Sim. & Stu. 607, and the cases cited in the preceding note. Lord Hardwicke, in Buxton *v.* Lister (3 Atk. 384), lays down the same distinction between contracts respecting chattels and contracts respecting lands. But he does not seem to give precisely the same reasons for the distinction. "In general," says he, "this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c.; for as these are contracts which relate to merchandise that vary according to different times and circumstances, if a Court of Equity should admit such bills, it might drive on parties to the execution of a contract to the ruin of one side, when upon an action that party might not have paid perhaps above a shilling damage." "As to the cases of contracts for purchase of lands or things that relate to realties, those are of a permanent nature; and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade." It has been very properly remarked by Lord Chief Baron Richards that

§ 994. **In Sales of Stock.** — The truth is, that upon the principles of natural justice Courts of Equity might proceed much farther and might insist upon decreeing a specific performance of all bona fide contracts, since that is a remedy to which Courts of Law are inadequate.[1] There is no pretence for the complaints sometimes made by the common lawyers, that such relief in equity would wholly subvert the remedies by actions of the case and actions of covenant; for it is against conscience that a party should have a right of election whether he would perform his covenant or only pay damages for the breach of it. But on the other hand there is no reasonable objection to allowing the other party who is injured by the breach to have an election either to take damages at law or to have a specific performance in equity, the remedies being concurrent but not coextensive with each other.[2] The restriction stands therefore not so much upon any general principle ex æquo et bono as upon the general convenience of leaving the party to his remedy in damages at law, where that will give him a clear and full compensation. And the true reason why a contract for stock is not now specifically decreed is that it is ordinarily capable of such an exact compensation. But cases of a peculiar stock may easily be supposed where Courts of Equity might still feel themselves bound to decree a specific performance upon the ground that from its nature it has a peculiar value, and is incapable of compensation by damages.[3] Indeed it has been thought that on contracts for stock a bill ought now to be maintainable generally in equity for a specific delivery thereof, upon the ground that a Court of Law cannot give the property but can only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party.[4]

the reason given by Lord Hardwicke for not entertaining jurisdiction in cases of chattels would equally apply to contracts for the purchase of land, which (in the present times) sinks and rises in value in an extraordinary manner. Wright *v.* Bell, 5 Price, R. 329. See also Doloret *v.* Rothschild, 1 Sim. & Stu. 590.

[1] Halsey *v.* Grant, 13 Ves. 76, 77; Alley *v.* Deschamps, 13 Ves. 228.

[2] 1 Fonbl. Eq. Pl. B. 1, ch. 1, §§ 5, 6, and note (*r*); Id. B. 1, ch. 3, § 2, and note (*d*); Alley *v.* Deschamps, 13 Ves. 228; Gilb. For. Rom. 220.

[3] See Lady Arundel *v.* Phipps, 10 Ves. 148; Forrest *v.* Elwes, 4 Ves. 497.

[4] Doloret *v.* Rothschild, 1 Sim. & Stu. 500. It appears to have become settled doctrine in England that specific performance of a contract to convey shares in a railway or other private corporation will be decreed, upon the ground that such shares are of uncertain value, and not always to be had in the market. Duncuft *v.* Albrecht, 12 Sim. 189; Shaw *v.* Fisher, 5 DeG. M. & G. 596; Cheale *v.* Kenward, 3 DeG. & J. 27. In

§ 995. [**Same.** — As a general rule specific performance of a contract for the purchase or sale of stocks will not be decreed, but where the articles sold are of such a nature that they cannot be purchased in the open market, this is not true. Nor does it apply where the contract is for the purchase of almost the whole of the bonds and stock of the particular company. If the breach can be fully compensated, equity will not interfere; but when, notwithstanding the payment of the money value of the stock, the plaintiff will still lose a substantial benefit, and thereby remain uncompensated, specific performance may be decreed.[1] For

Shaw *v.* Fisher the plaintiff only failed to obtain a decree because he had already conveyed the stock to the defendant's vendee, in ignorance that the defendant was the real purchaser; and the matter having lain by for a year, it now seemed impossible to say that the plaintiff had made or could make a good title to the stock.

The rule in Duncuft *v.* Albrecht has been approved in some of the American cases, and, so far as it applies to railway shares, rejected in others. It was approved in Leach *v.* Fobes, 11 Gray, 506, in Todd *v.* Taft, 7 Allen, 371, in Hurley *v.* Brown, 98 Mass. 545, 547, in Cushman *v.* Thayer Jewelry Co., 76 N. Y. 365, and in Johnson *v.* Brooks, 93 N. Y. 337. See also Hill *v.* Rockingham Bank, 44 N. H. 567, which however was a case of trust. And see Machinists' Bank *v.* Field, 126 Mass. 345; Pratt *v.* Taunton Copper Co., 123 Mass. 110, where specific performance of a duty to issue to the plaintiff a certificate of stock was enforced, though the duty did not arise by contract. See In re Cannock Colliery Co., 28 Ch. D. 363. The rule in Duncuft *v.* Albrecht was rejected as to railway shares in Ross *v.* Union Pacific R. Co., Woolw. 26, and in Treasurer *v.* Commercial Mining Co., 23 Cal. 390. So of contracts to buy shares in a national bank for the purpose of gaining control. Foll's Appeal, 91 Pa. St. 434. The cases of railway shares were put on the ground that such shares were ordinarily like shares in public corporations, of definite value and readily obtainable in the market, — a ground on which it has always been declared that specific performance of an agreement to sell public stocks would not be decreed. Duncuft *v.* Albrecht, supra; Cheale *v.* Kenward, supra. See Leach *v.* Fobes, supra. In the first two of these cases it was stated that there was no analogy between a quantity of government three per cents, or other stock of the kind, and a quantity of railway shares of a particular description, limited in number and not always to be had in the market. Foll's Appeal was put on the ground that the contract was against public policy.

The question of the construction and effect of contracts for transferring shares is subject to a greater or less extent, in the large cities, to the rules of the stock exchange, if the shares are bought in the market. Thus on a mortgage of shares it seems that by the custom of the English stock exchange the mortgagee is not justified in trading with the same, but must return the identical shares and all gains belonging to them or made in the use of them. Langton *v.* Waite, L. R. 6 Eq. 165. See further in regard to customs of the exchange Shepherd's Case, L. R. 2 Ch. 16; Evans *v.* Wood, L. R. 5 Eq. 9; Musgrave's Case, Ib. 193; Cruse *v.* Paine, L. R. 6 Eq. 641; Paine *v.* Hutchinson, L. R. 3 Ch. 388; Hawkins *v.* Maltby, Ib. 188.

[1] Northern Cent. R. Co. *v.* Walworth, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. Rep. 683; Goodwin Gas Stove Co.'s Appeal, 117 Pa. 514, 12 Atl.

instance, where a contract for the purchase of stock was made for the purpose of giving to plaintiff the controlling interest in the corporation, and without enforcing the contract this peculiar interest would be lost to him, equity will decree a compliance in the terms of the agreement.[1] A specific enforcement of a contract sought by a minority stockholder in order that he may become a majority stockholder is not sufficient to invoke the rule. The stockholders have the right to pool their stock and thus get a control of the affairs if they can, but for an ordinary breach of contract for pooling stock, a Court of Equity will leave the parties where it finds them and leave them to their action at law.[2] The plaintiff in an action to enforce his purchase of stock has his election of three remedies, (1) he may maintain a suit in equity for specific performance and compel a delivery of the stock; (2) or he may treat the executory contract as subsisting and recover the damages occasioned by the breach; or, (3) he may rescind the contract and maintain an action in assumpsit for the recovery of the sum paid as money had and received.[3] The

736, 2 Am. St. Rep. 696; Rumsey *v.* New York R. Co., 203 Pa. 579, 53 Atl. 495; Doherty *v.* Rice, 186 Fed. 204; Lathrop *v.* Columbia Collieries Co., 70 W. Va. 58, 73 S. E. 299; Bacon *v.* Grosse, 165 Cal. 481, 132 Pac. 1027; First Natl. Bank *v.* Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084; Gilfallan *v.* Gilfallan, 168 Cal. 23, 141 Pac. 623; Morgan *v.* Bartlett, 75 W. Va. 293, 83 S. E. 1001; Whiting *v.* Enterprise Land Co., 265 Mo. 374, 177 S. W. 589; Eichbaum *v.* Sample, 213 Pa. 216, 62 Atl. 837; Newton *v.* Wooley, 105 Fed. 541; Altoona Elec. Co. *v.* Kittaning St. Ry. Co., 126 Fed. 559; Leach *v.* Fobes, 77 Mass. 506, 71 Am. Dec. 732; Moulton *v.* Warren Mfg. Co., 81 Minn. 259, 83 N. W. 1082; Selover *v.* Isle Harbor Co., 91 Minn. 451, 98 N. W. 344; Kennedy *v.* Thompson, 97 App. Div. 296, 89 N. Y. Supp. 963; Clements *v.* Dunn, 108 App. Div. 327, 95 N. Y. Supp. 766, affirming 187 N. Y. 521, 79 N. E. 1102; Ehrich *v.* Grant, 111 App. Div. 196, 97 N. Y. Supp. 600.

Specific performance of contract for cutting of box shooks will not be decreed, where the same material could have been procured in the open market. Neal *v.* Parker, 98 Md. 254, 57 Atl. 213.

Where the terms of the contract give the stock a special character and thus present a case where an award of damages would be inadequate, equitable relief will be granted. Missenheimer *v.* Alexander, 162 N. C. 226, 78 S. E. 161.

[1] O'Neill *v.* Webb, 78 Mo. App. 1; Scruggs *v.* Cotterill, 67 App. Div. 583, 73 N. Y. Supp. 882.

Contra: Ryan *v.* McLane, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501, 80 Am. St. Rep. 438.

[2] Gleason *v.* Earles, 78 Wash. 491, 139 Pac. 213.

[3] Watkins *v.* Record Phonographing Abstract Co., 76 Oreg. 421, 149 Pac. 478; but see generally, Clark *v.* Borough Asphalt Co., 93 Misc. Rep. 662, 157 N. Y. Supp. 581; Johnson *v.* Stratton, 109 Ill. App. 481; Gilbert *v.* Bunnell, 92 App. Div. 284, 86 N. Y. Supp. 1123; Rigg *v.* Reading St. Ry., 191 Pa., 298, 43 Atl. 212.

granting of relief in such cases is in the sound discretion of the court and is never granted as a matter of right. Equity will only interfere where the law affords no remedy, or where compensation and damages would be difficult, if not impossible, owing to the fact that the matter was in the nature of an experiment, contracted for but not made, so that the result, of necessity, could never be known. The pleadings should show such facts as would give the court jurisdiction, the burden of proof being upon the plaintiff.[1]]

§ 996. [**Same.** — What has just been said as to the enforcement of contracts for the purchase and sale of stocks applies with equal force to the sale of patents and patent rights. The right is based upon the theory that the interest in the patent is of some peculiar and special value to the claimant, and interest and right that cannot be purchased upon the open market, and which cannot be adequately compensated for in a mere suit for damages. If two men procure a patent and it is agreed that one of them shall have the letters made in his name, that he shall have the active charge of selling the patented article and account to his copartner for a half interest in the business, this is such a contract as is specifically enforceable in equity.[2] If an employee finds the time to pursue work looking to perfecting a patent, and has an agreement with his employer that he is to be paid for this outside investigation and at the time assigned any rights that he may have in any patents that he might become entitled to, the contract, while a hard one, will be enforced.[3] It is apparent that an adequate compensation in such cases cannot be had in an action for damages, because from the nature of the subject-matter it would be impossible, in many cases, to ascertain the damages which licensees might sustain by reason of being deprived of their rights to use their invention and protect themselves through their patent. When one is placed in possession and use of property upon condition, it is incumbent upon him, when the question arises, to show that he has used the property according to the terms of the condition, and otherwise done everything that he is called upon, under the contract, to do. It is an established

[1] Bateman *v.* Strauss, 86 App. Div. 540, 83 N. Y. Supp. 785.

[2] Young *v.* Gilmour, 59 App. Div. 612, 69 N. Y. Supp. 191; Telegraphone Corp. *v.* Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767; Fairchild *v.* Dement, 164 Fed. 200; McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729.

[3] Thompson *v.* Automatic Fire Protection Co., 197 Fed. 750, affirmed 211 Fed. 120.

rule of patent law that when a licensee, who is entitled to use a patented machine under certain conditions only, undertakes to use the machine otherwise than in conformity with the conditions, he loses the protection of his license and he thereby becomes an infringer. The principle seems to be that the license is limited in its operation, and that, since in the case of a territorial limit the license has no existence in the exempted territory, so in case of other limitations the license has no existence in the exempted field. The price restriction, as a license condition, has been often sustained, as well as a condition that no machines shall be attached except those of a certain quality of material or those painted a certain color or those bearing certain distinguishing marks. So long as the licensee uses the patent under the conditions imposed, he is the rightful owner and can thus control the patent; but when he violates the conditions, he has no right to continue using the patent and equity will assume jurisdiction and require the specific enforcement of the agreement.[1]]

§ 997. **Same.** — But although the general rule now is not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature,[2] yet the rule is (as we have seen) a qualified one and subject to exceptions, or rather the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy.[3] Cases may readily be enumerated which are and have been deemed fit for the exercise of equity jurisdiction. Thus where there was a contract for the sale of eight hundred tons of iron, to be paid for in a certain number of years by instalments, a specific performance was decreed; for such sort of contracts (it was said) differ from those which are to be immediately executed.[4] But the true reason probably

[1] Indiana Mfg. Co. *v.* Nichols & Shepard Co., 190 Fed. 579; Button Fastener Cases, 77 Fed. 294, 25 C. C. A. 267, 35 L. R. A. 728; Rupp *v.* Elliott, 131 Fed. 730, 65 C. C. A. 544.

[2] See 1 Madd. Ch. Pr. 320.

[3] See Eden on Injunct. ch. 2, p. 27; Wood *v.* Rowcliffe, 3 Hare, R. 304; Clark *v.* Flint, 22 Pick. 231; Falcke *v.* Gray, 5 Jur. 645; Pooley *v.* Budd, 14 Beav. 229.

[4] Taylor *v.* Neville, cited in 3 Ati. 384; Furman *v.* Clark, 3 Stockt. 306; Union Pac. Ry. Co. *v.* Chicago etc. R. Co., 163 U. S. 611, 41 L. Ed. 282, 16 S. Ct. Rep. 1207; Western Union Tel. Co. *v.* Pennsylvania Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968; Berliner *v.* Seaman, 110 Fed. 30, 49 C. C. A. 99; Staunton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Schmidt *v.* Louisville & N. R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809; Louisville & N. R. Co. *v.* Mississippi R. Co., 92 Tenn. 681, 22 S. W. 920.

was, that under the particular circumstances of the case there could be no adequate compensation in damages at law; for the profits upon the contract being to depend upon future events could not be correctly estimated by the jury in damages, inasmuch as the calculation must proceed upon mere conjecture.[1]

§ 998. **Same.** — Lord Hardwicke has himself put several cases to illustrate the same exception. A man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber, and this may be well known and understood on the part of the buyer; and then a specific performance would seem indispensable to justice.[2] On the other hand there may be a peculiar convenience on the part of the seller, as if a man wants to clear his land in order to turn it to a particular sort of husbandry; there nothing could answer the justice of the case but the performance of the contract in specie.[3] Upon the same general ground an agreement for the purchase of timber trees, to be paid for in six annual instalments, and eight years to be allowed for disposing of the same, and articles of agreement to be drawn up accordingly, has been thought to be a fit case for a decree for a specific performance, especially as in that case the agreement, contemplating future articles, might perhaps be deemed incomplete at law.[4] And indeed this last ground alone would be sufficient to sustain the jurisdiction;[5] and it has been adopted on other occasions.[6]

§ 999. **Same.** — Other illustrations may be found in cases not merely of sales but of matters peculiarly resting in contracts of a very different nature. Thus where a covenant was made in a lease of some alum works, to leave a certain stock upon the premises, a specific performance was decreed, because the trade would

[1] Adderley *v.* Dixon, 1 Sim. & Stu. 607.

[2] Buxton *v.* Lister, 3 Atk. 384, 385; Adderley *v.* Dixon, 1 Sim. & Stu. 607.

[3] Ibid. So a bill has been maintained for the specific delivery of chattels. The case made by the bill was that certain specific chattels described in an inventory had been placed in the possession of A as agent of the plaintiff, and that A had, in breach of the duty of an agent, contracted to sell them to a third party. The court restrained the agent from parting with the possession. Wood *v.* Rowcliffe, 3 Hare R. 304.

So in general where there is a relation of trust in respect of the property. Pooley *v.* Budd, 14 Beav. 34; Cowles *v.* Whitman, 10 Conn. 121; Hill *v.* Rockingham Bank, 44 N. H. 567; Clark *v.* Flint, 22 Pick. 231; Peer *v.* Kean, 14 Mich. 354.

[4] Buxton *v.* Lister, 3 Atk. 382, 385.

[5] See Doloret *v.* Rothschild, 1 Sim. & Stu. 590.

[6] Wright *v.* Bell, 5 Price, R. 325, 332.

be greatly damaged if the covenant was not specifically performed, contrary to the real justice of the case between the parties; and the landlord had stipulated for a sort of enjoyment of the premises after the expiration of the lease.[1]

§ 1000. **Enforcement of Personal Covenant.** — Of the like nature are the common cases of covenants between landlords and tenants where injunctions in the nature of a specific performance are often decreed, as for instance covenants not to remove manure or crops at the end of a lease, covenants not to plough meadow, covenants not to dig gravel, sand, or coal.[2] In all cases of this sort, although the court acts merely by injunction to prevent the breach of the particular covenant, it in effect secures thereby a specific performance; and it may at once be seen that such interposition is indispensable to prevent irreparable mischief.[3]

§ 1001. **Same.** — Indeed it may be laid down as a general rule that it is competent for the court to interfere to enforce the specific performance of a contract by the defendant to do definite work upon his property, in the performance of which the plaintiff has a material interest, and one which is not capable of an adequate compensation in damages. A recent case furnishes a very satisfactory illustration of this doctrine, where a railway company undertook to build and maintain an archway on the pleasure-grounds of the plaintiff, through which the railway was to pass, upon his withdrawing all opposition, and to make it sufficient to permit a loaded carriage of hay to pass under. A specific performance was decreed.[4]

§ 1002. **Enforcing Partnership Agreement.** — Cases of agreements to form a partnership and to execute articles accordingly may also be specifically decreed, although they relate exclusively to chattel interests; for no adequate compensation can in such cases be made at law.[5] Upon the like ground Courts of Equity

[1] Ward *v.* Duke of Buckingham, cited 3 Atk. 385; s. c. 10 Ves. 161.

[2] So of a covenant to use demised premises only for a certain business. Steward *v.* Winters, 4 Sandf. Ch. 587. But see Columbia College *v.* Thacher, 87 N. Y. 311. So too of an agreement not to erect a dam on the defendant's land. Barnes *v.* Barnes, 65 N. C. 261.

[3] See Eden on Injunct. ch. 2, p. 27; Id. ch. 10, pp. 198, 199, and cases there cited; Bathurst *v.* Burden, 2 Bro. Ch. R. 64; City of London *v.* Pugh, 3 Bro. Parl. Cas. 374; s. c. 4 Bro. Parl. Cas. 395, by Tomlins.

[4] Storer *v.* The Great Western Ry. Co., 2 Y. & Coll. New R. 48, 53.

[5] Buxton *v.* Lister, 3 Atk. 385; Anon. 2 Ves. 629; Birchett *v.* Bolling, 5 Munf. R. 442; Story on Partnership, §§ 188, 189; England *v.* Curling, 8 Beav. R. 129; Whistler *v.* MacDonald, 167 Fed. 477; Whitney *v.* Dewey, 158 Fed. 385, 86 C. C. A. 21.

As a general rule specific performance of a contract to form a partner-

will decree the specific performance of a covenant for a lease, or to renew a lease;[1] so of a contract for the sale of the good-will of a trade, and of a valuable secret connected with it;[2] so of a contract to keep the banks of a river in repair;[3] so of a contract to pay the plaintiff an annual sum for life, and a certain other sum for every hundred-weight of brass wire manufactured by the defendant during the life of the plaintiff;[4] so of a contract for the sale of an annuity payable out of the dividends of stock;[5] so of a covenant upon the grant of an annuity to charge the same upon all the property of which the grantor should be possessed at the death of the annuitant, if the grantor should survive him;[6] so of a contract for the sale of debts proved under a commission of bankruptcy, where an assignment of the debt had not been already executed.[7]

ship does not lie, but if there has been part performance of the contract, the parties will be required to execute a proper deed, and restrain the parties from entering into any other partnership. Goldberg *v.* Kirschstein, 36 Misc. Rep. 249, 73 N. Y. Supp. 358; Clark *v.* Truitt, 183 Ill. 239, 55 N. E. 683.

[1] Furnival *v.* Carew, 3 Atk. 83, 87; Tritton *v.* Foote, 2 Bro. Ch. R. 636; s. c. 2 Cox, R. 174; Russell *v.* Darwin, cited in note, 2 Bro. Ch. R. 639; Newland on Contracts, ch. 6, pp. 95 to 103; 5 Vin. Abridg. 548, pl. 4.

See Wilson *v.* Furness Ry. Co., L. R. 9 Eq. 28; Greene *v.* West Cheshire Ry. Co., L. R. 13 Eq. 44; Hood *v.* Northeastern Ry. Co., L. R. 5 Ch. 525; Raphael *v.* Thames Valley Ry. Co., L. R. 2 Ch. 147, reversing 2 Eq. 37; Gregory *v.* Ingwersen, 32 N. J. Eq. 199. These cases show that specific performance may be had against a corporation as well as against an individual, if there were any room for doubt. Desper *v.* Continental Meter Co., 137 Mass. 252, 254; Clark *v.* Clark, 49 Cal. 586. See Moss *v.* Barton, L. R. 1 Eq. 474; Buckland *v.* Papillon, L. R. 2 Ch. 67. But this supposes that the terms of the contract are clear and certain. Whitlock *v.* Duffield, Hoff. Ch. 110; s. c. 26 Wend. 55; Robinson *v.* Kettletas, 4 Edw. 67; Kelso *v.* Kelly, 1 Daly, 419; Morrison *v.* Rossignol, 5 Cal. 614; Myers *v.* Forbes, 24 Md. 598; Hopkins *v.* Gilman, 22 Wis. 476; McKibben *v.* Brown, 21 McCart. 13; Marshall *v.* Berridge, 19 Ch. D. 233 (Court of App. overruling Jaques *v.* Miller, 6 Ch. D. 153); Wyse *v.* Russell, 11 L. R. Ir. 173; Nesham *v.* Selby, L. R. 7 Ch. 406; Cartwright *v.* Miller, 36 L. T. (N. S.) 398; Pray *v.* Clark, 113 Mass. 283.

[2] Bryson *v.* Whitehead, 1 Sim. & Stu. 74. But see Baxter *v.* Conolly, 1 Jac. & Walk. 576; Coslake *v.* Till, 1 Russell, R. 378.

[3] Kilmorey *v.* Thackeray, cited 2 Bro. Ch. R. 65; Id. 343.

[4] Ball *v.* Coggs, 1 Bro. Parl. Cas. 140 [296], cited 1 Sim. & Stu. R. 607.

[5] Withy *v.* Cottle, 1 Sim. & Stu. 174. See also Pritchard *v.* Ovey, 1 Jac. & Walk. 396.

[6] Lyde *v.* Mynn, 1 Mylne & Keen, 683.

[7] Adderley *v.* Dixon, 1 Sim. & Stu. 607; Wright *v.* Bell, 5 Price, R. 325.

To the foregoing category of cases for specific performance the following cases may be added: Contracts for the sale of patent rights.

§ 1003. **Same.** — In like manner although where one partner contracts that he will exert himself for the benefit of the partnership, a Court of Equity cannot compel a specific performance of that part of the agreement;[1] yet if he has also covenanted that he will not carry on the same trade with other persons, there being a partnership subsisting, the court will restrain him from breaking that part of the agreement.[2] So if a party covenants that

Corbin *v.* Tracy, 34 Conn. 325; Ely *v.* McKay, 12 Allen, 323; Binney *v.* Annan, 107 Mass. 94; Somerby *v.* Buntin, 118 Mass. 279. An agreement by a partner to offer his interest for sale to his associate before selling to a stranger. Homfray *v.* Fothergill, L. R. 1 Eq. 567. See Vickers *v.* Vickers, L. R. 4 Eq. 529. An agreement to pay gold, on depreciation of the paper currency. Hord *v.* Miller, 2 Duv. 103. But see Howe *v.* Nickerson, 14 Allen, 400. A contract for the sale of realty and personalty, where the realty is the principal object. Leach *v.* Fobes, 11 Gray, 506. And see Richardson *v.* Smith, L. R. 5 Ch. 648. A will directing that slaves be sent to Liberia at their election. Graham *v.* Sam, 7 B. Mon. 403. A contract to discharge a judgment debt upon receipt of another's promissory note for part of the amount. Phillips *v.* Berger, 2 Barb. 609; s. c. 8 Barb. 527. Or to pay off a mortgage. Barkley *v.* Barkley, 14 Rich. Eq. 12; Bennett *v.* Abrams, 41 Barb. 619; Weir *v.* Mundell, 3 Brewst. 594. An agreement for insurance of a building which burns down before the policy is executed, the premium having been paid. Woody *v.* Old Dominion Ins. Co., 31 Gratt. 362. A covenant by the defendant to pay over to the plaintiff's creditor money put into the defendant's hands by the plaintiff. Woodruff *v.* Erie Ry. Co., 93 N. Y. 609. See Johnson *v.* Brooks, Ib. 337.

[1] Richmond *v.* Dubuque R. Co., 33 Iowa, 432; Hooks Tea Co. *v.* Dorsey, 99 Ill. App. 181; Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Peterson *v.* Schmidt, 13 Ohio Cir. Ct. R. 205, 7 O. C. D. 202; Hauser *v.* Harding, 126 N. C. 295, 35 S. E. 586; McAuliffe *v.* Vaughan, 135 Ga. 852, 70 S. E. 322; Moorman *v.* Givens, 127 La. 835, 54 So. 47; Nelson *v.* Brassington, 64 Wash. 180, 116 Pac. 629; Eureka Laundry Co. *v.* Long, 146 Wis. 205, 131 N. W. 412; Fisherty *v.* Libby, 108 Me. 337, 81 Atl. 166; Knowles *v.* Jones, 182 Ala. 187, 62 So. 514; Holliston *v.* Ernston, 124 Minn. 49, 144 N. W. 415; Dick *v.* Fuller, 213 Fed. 98; Holtman *v.* Knowles, 141 Ga. 613, 81 S. E. 852; Telford *v.* Smith, 186 Ill. App. 631; Metropolitan Opera Co. *v.* Hammerstein, 162 App. Div. 691, 147 N. Y. Supp. 532; Fox *v.* Barbee, 94 Kans. 212, 146 Pac. 364; Kuhns *v.* Loetzbier, 58 Pa. Super. Ct. Rep. 148; Morehead City Sea Food Co. *v.* Way, 169 N. C. 679, 86 S. E. 603.

[2] Kemble *v.* Kean, 6 Simons, R. 333.

Compare Lumley *v.* Wagner, 1 DeG. M. & G. 604; s. c. 5 DeG. & S. 485; Stocker *v.* Brockelbank, 3 Macn. & G. 250. "It appears to me that the tendency of recent decisions, and especially the cases of Fothergill *v.* Rowland, L. R. 17 Eq. 132, and of the Wolverhampton Ry. Co. *v.* London & N. Ry. Co., is towards this view, — that the court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract, whether it contain or does not contain a negative stipulation. But that if on the other hand the breach of the contract is properly satisfied by damages, then that the

he will not carry on his trade within a certain distance or in a certain place within which the other party carries on the same trade, a Court of Equity will restrain the party from breaking the agreement so made. In each of these cases the decree operates pro tanto as a specific performance. The ground of all these decisions is the utter uncertainty of any calculation of damages, as they must in such cases be in a great measure conjectural; or that some further act is necessary to be done, to clothe the defendant with a full and effective title to support his claim.[1]

§ 1004. **Either Party May Invoke the Doctrine.** — Where the specific performance of a contract respecting chattels will be decreed upon the application of one party, Courts of Equity will maintain the like suit at the instance of the other party, although the relief sought by him is merely in the nature of a compensation in damages or value; for in all such cases the court acts upon the ground that the remedy, if it exists at all, ought to be mutual and reciprocal, as well for the vendor as for the purchaser.[2]

court ought not to interfere whether there be or be not the negative stipulation." Donnell *v.* Bennett, 22 Ch. D. 835, 837, Fry, J. But the learned judge said that the cases appeared to show that where a negative clause was found, the court had enforced it without regard to the question whether specific performance could be granted of the entire contract. He referred to Dietrichsen *v.* Cabburn, 2 Ph. 52, and to Lumley *v.* Wagner, 1 DeG. M. & G. 604. The case of Hills *v.* Croll, 2 Ph. 60, was criticised. See also Cott *v.* Tourle, L. R. 4 Ch. 654; Fothergill *v.* Rowland, L. R. 17 Eq. 132.

[1] Adderley *v.* Dixon, 1 Sim. & Stu. 607.

[2] Withy *v.* Cottle, 1 Sim. & Stu. 174; Adderley *v.* Dixon, 1 Sim. & Stu. R. 607; Forrest *v.* Elwes, 4 Ves. 497; Lewis *v.* Lechmere, 10 Mod. R. 506; Newland on Contracts, ch. 6, p. 91; Brown *v.* Haff, 5 Paige, R. 235; Cathcart *v.* Robinson, 30 U. S. 264, 8 L. Ed. 120; Flight *v.* Bolland, 4 Russ. R. 298; Marble Co. *v.* Ripley, 77 U. S. 339, 19 L. Ed. 955; Jones *v.* Newhall, 115 Mass. 244, 251; Old Colony R. Co. *v.* Evans, 6 Gray, 25; Hawralty *v.* Warren, 3 C. E. Green, 124; Hopper *v.* Hopper, 1 C. E. Green, 147; Springs *v.* Sanders, 62 N. C. 67. Contra, Kauffman's Appeal, 55 Pa. St. 383.

The fact that the contract provides for sale to third person does not prevent its enforcement by vendor in case the conveyance bargained for is executed and tendered. Stephenson *v.* Arnold, 89 Ind. 426.

If the contract is reasonable, and not oppressive in its terms, the court may decree a specific performance in favor of the vendor just as it would in favor of the vendee. Migatz *v.* Stieglitz, 166 Ind. 361, 77 N. E. 400; Maryland Clay Co. *v.* Simpers, 96 Mo. 1, 53 Atl. 424; Moore *v.* Baker, 62 N. J. Eq. 208, 49 Atl. 836; Covert *v.* Brinkerhoff, 41 Misc. Rep. 230, 84 N. Y. Supp. 4; Sloan *v.* Rose, 101 Va. 151, 43 S. E. 329; Anderson *v.* Wallace Lbr. Co., 30 Wash. 147, 70 Pac. 247; Kerr *v.* Nygren, 114 Minn. 268, 130 N. W. 1112; Jones *v.* Union Ice Cream Co., 145 Ky. 178, 140 S. W. 145; Donahoe *v.* Franks, 199 Fed. 262; McClurg *v.* Crawford, 209 Fed. 340, 126 C. C. A. 266; Shelton *v.* Wallace, 41 Okla. 325, 137

§ 1005. **Same.**—Indeed a disposition has been evinced on various occasions to apply the jurisdiction to a much larger extent.[1] Thus although the doctrine seems well settled that a contract for the sale of stock will not now be decided to be specifically performed, because it is ordinarily capable of an exact compensation in damages,[2] yet it is well known that as late as Lord Hardwicke's time such contracts were so decreed in chancery.[3] And even in our own times it has been held that a bill will lie for a specific performance of a contract for the purchase of government stock in favor of a holder of scrip receipts, purporting to give the title to the bearer thereof, where the bill prayed for the delivery of the certificates which gave the legal title to the stock, upon the ground that a Court of Law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party.[4] If this

Pac. 694; Waters *v.* Pearson, 163 Iowa, 391, 144 N. W. 1026; Caplan *v.* Buckner, 123 Mo. 590, 91 Atl. 481; Waite *v.* Stanley, 88 Vt. 407, 92 Atl. 633.

[1] Mr. Cox, in his note to Cud *v.* Rutter, 1 P. Will. 571, note 2, says: "But cases of this kind depend so much on their own particular circumstances that it seems no general rule can be laid down. And Lord Redesdale, in a note to his Treatise on Equity Pleadings, admits that it is difficult to reconcile all the cases in which the Courts of Equity have compelled the performance of agreements or refused so to do; and in some cases where performance has been denied it is difficult to reconcile the decisions with the principles of equal justice." Mitf. Eq. Pl. by Jeremy, p. 119, note (*q*). Still perhaps the Equity Jurisprudence of England on this subject does not deserve the severe reproach of being "the caprices of the English law in regard to specific performance." See Mr. Austin's Province of Jurisprudence and the Outline appended, cited in the English Law Magazine, Vol. XII, p. 335. The able article in that volume on this subject did not fall under my immediate notice until the main body of these remarks was written. I am glad to find that the author takes the same view of this matter of equity jurisdiction, in cases of a specific performance of contracts respecting chattels, which is to be found in the text. It does not strike me that the doctrines maintained in equity are either incongruous or indefensible upon principle. There may be some discrepancies in the authorities, but the main doctrines stand upon the fundamental rule of Equity Jurisprudence, that there is not a plain, adequate, and complete remedy at law.

[2] Cud *v.* Rutter, 1 P. Will. 570, 571; Nutbrown *v.* Thornton, 10 Ves. 161; Mason *v.* Armitage, 13 Ves. 37, Dorison *v.* Westbrook, 5 Vin. Abridg. 540, pl. 22; Capper *v.* Harris, Bunb. R. 135.

[3] Nutbrown *v.* Thornton, 10 Ves. 161. See also Garden *v.* Pullen, 2 Vern. 394; Forrest *v.* Elwes, 4 Ves. 497.

[4] Doloret *v.* Rothschild, 1 Sim. & Stu. 590. Besides the ground stated in the text, Sir John Leach added: "I consider also that the plaintiff not being the original holder of the scrip, but merely the bearer, may not be able to maintain any action at law upon the contract; and that if he has any title, it must be in equity." Even in regard to stock, a specific

however be a sufficient ground to entertain the jurisdiction, it seems universally applicable to all bills for a specific performance. In the Supreme Court of the United States an inclination has been evinced to maintain a far more extensive jurisdiction in equity to grant relief by a specific performance in contracts respecting personal chattels than is at present exercised in the English courts.[1]

§ 1006. **Enforcement of Building Contract.** — Some of the cases already stated are not purely cases respecting the sale, transfer, or enjoyment of personal chattels, but may properly be deemed to involve personal acts and proceedings. But it is difficult to separate the one class entirely from the other, and they naturally flow into each other. In regard however to contracts for personal acts and proceedings, there is some diversity of judgment in the authorities as to the cases and circumstances in which a specific performance ought to be decreed in equity. Thus for example it has been a matter of some conflict of opinion how far Courts of Equity ought to entertain a suit for the specific performance of a covenant to build or rebuild a house of a specified form and size on particular land. In the earlier cases the jurisdiction was maintained;[2] and Lord Hardwicke recognized it in its full extent at the same time that he denied that a covenant to repair a house ought to be specifically performed.[3] The ground of his opinion in the particular case (which was between landlord and tenant) was not that the building takes away the security of the landlord, but that upon the covenant to repair he might have a remedy at law.[4]

§ 1007. **Same.** — On the other hand in later cases this doctrine has been expressly denied; and it has been said that no such covenant ought to be enforced specifically in equity; for if one will not

performance is sometimes decreed in equity. As for instance if a trustee of stock sells it, cestui que trust has an option, either to have it replaced in stock or the money produced by it with interest. Forrest *v.* Elwes, 4 Ves. 497.

See also Jackson *v.* Cocke, 4 Beav. 59; Duncuft *v.* Albrecht, 12 Simons, R. 189. But it is doubtful whether specific performance will be decreed of the sale of scrip. Columbine *v.* Chichester, 2 Phillips, 27.

[1] Barr *v.* Lapsley, 14 U. S. 151, 4 L. Ed. 58; Mechanics Bank of Alexandria *v.* Seton, 26 U. S. 305, 7 L. Ed. 152.

[2] Holt *v.* Holt, 2 Vern. 322; Allen *v.* Harding, 2 Eq. Abridg. 17, Pl. 6; 1 Fonbl. Eq. B. 1, ch. 3, § 7, note (*x*).

[3] City of London *v.* Nash, 3 Atk. R. 512, 515; Pembroke *v.* Thorpe, 3 Swanst. R. 437, note; Rook *v.* Worth, 1 Ves. 461; Mosly *v.* Virgin, 3 Ves. Jr. 184, 185, 186; 3 Wooddes. Lect. 58, p. 465.

[4] Ibid. Hill *v.* Barclay, 16 Ves. 403, 406; Rayner *v.* Stone, 2 Eden, R. 128. But see Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 442.

build, another may. There can be a full compensation at law in damages, and Courts of Equity ought not to undertake the conduct of a building or rebuilding any more than of repairs.[1] Upon similar grounds a covenant to make good a gravel-pit at the expiration of a lease has been refused to be specifically decreed.[2]

§ 1008. **Same.** — Still however the doctrine as to a covenant to build or rebuild can hardly be considered even now as completely settled against the jurisdiction (although the doctrine as to repairs certainly is),[3] since Lord Rosslyn in one of his leading judgments maintained that where the covenant to build or rebuild had a definite certainty as to size, materials, etc., it ought to be decreed in equity to be specifically performed. But if it was loose, general, or uncertain, there it ought to be left to a suit for damages at law.[4] This decision, although questioned at the bar, has never been overruled; and indeed it has incidentally received some confirmation from the reluctance of Courts of Equity to shake it.[5]

[1] Errington *v.* Aynesly, 2 Bro. Ch. R. 343; Lucas *v.* Comerford, 3 Bro. Ch. R. 167; s. c. 1 Ves. Jr. 235. But see Mosly *v.* Virgin, 3 Ves. 184, 185, 186; Flint *v.* Brandon, 8 Ves. 159, 163, 164.

[2] Flint *v.* Brandon, 8 Ves. 163, 164; Armour *v.* Connolly, 49 Atl. 1117; Ward *v.* Newbold, 115 Md. 689, 81 Atl. 793.

Specific performance of parol contract to construct a tile drain instead of an open drainage, will not lie. Schuette *v.* Shutter, 128 Minn. 150, 150 N. W. 622.

Executory contract to construct a levee will not be enforced. Leonard *v.* Board of Directors of Drainage Dist., 79 Ark. 42, 94 S. W. 922.

Road overseer employed for a year to look after the building of roads in the county, cannot enforce the contract. Rhoden *v.* Johnston, 181 S. W. 128.

A contract to build a railroad will not be enforced in equity. Strang *v.* Richmond, P. & C. R. Co., 101 Fed. 511, 41 C. C. A. 474; Texas etc. R. Co. *v.* Marshall, 136 U. S. 407, 34 L. Ed. 385, 10 S. Ct. Rep. 846.

Enforcement of contract to construct a ditch, requiring special skill, will not be decreed. La Hogue Drainage Dist. *v.* Watts, 179 Fed. 690, 103 C. C. A. 236.

A contract made with builders for the erection of a capitol building is not enforceable against the State, the work having been abandoned for lack of funds. Caldwell *v.* Donaghey, 156 S. W. 839.

[3] See Rayner *v.* Stone, 2 Eden, 128, and the Reporter's notes, ib. 130; Hill *v.* Barclay, 16 Ves. 405, 406.

[4] Mosly *v.* Virgin, 3 Ves. Jr. 185.

[5] Flint *v.* Brandon, 8 Ves. 159, 164. Compare Brace *v.* Wehnert, 25 Beav. 348; Wilkinson *v.* Clements, L. R. 8 Ch. 96; Phillips *v.* Soule, 9 Gray, 233; Oxford *v.* Provand, L. R. 2 P. C. 135. But query how far that rule can be applied to such cases.

Equity will not, it seems, enforce a contract to build a railroad. Ross *v.* Union Pac. Ry. Co., Woolw. 26; Fallon *v.* Railroad Co., 1 Dill. 121. See South Wales Ry. Co. *v.* Wythes, 1 Kay & J. 186; s. c. 5 DeG. M. & G. 880; Kansas Const. Co. *v.* Topeka R. Co., 135 Mass. 34, and cases cited. The chief ground appears to be that the duties are continuous,

§ 1009. **Same.** — Independently of authority there are certainly strong reasons which may be adduced in favor of entertaining the jurisdiction in equity upon a covenant to build or rebuild in cases where the contract has sufficient definiteness and certainty. In the first place it is by no means clear that complete and adequate compensation can in such cases be obtained at law; for if the suit is brought before any building or rebuilding by the party claiming the benefit of the covenant, the damages must be quite conjectural, and incapable of being reduced to any absolute certainty; and if the suit is brought afterwards, still the question must be left open, whether more or less than the exact sum required has been expended upon the building, which inquiry must always be at the peril of the plaintiff.[1] In the next place such a covenant does not admit of an exact compensation in damages from another circumstance, — the changing value of the stock and materials at different times, according to the various demands

and not enforceable at once. The court cannot turn itself into a supervisor of a construction company. See Port Clinton R. Co. *v.* Cleveland R. Co., 13 Ohio St. 544; Peto *v.* Brighton Ry. Co., 1 Hem. & M. 468; South Wales Ry. Co. *v.* Wythes, supra; Wilson *v.* West Hartlepool Ry. Co., 11 Jur. (N. S.) 124; S. C. 2 DeG. J. & S. 475. It could not now be said however, as was said by Mr. Justice Miller in Ross *v.* Union Pacific R. Co., supra, that in all the cases in which building contracts have been specifically enforced the building was to be done upon the land of the person who had agreed to do it; nor that the consideration for the agreement was always the conveyance of the land to the builder. Greene *v.* West Cheshire Ry. Co., L. R. 13 Eq. 44.

It is also held that equity will not specifically enforce an agreement by a railroad company to build fences. Cincinnati R. Co. *v.* Washburn, 25 Ind. 259. Or to keep cattle-guards in repair. Columbus R. Co. *v.* Watson, 26 Ind. 50. But no satisfactory reasons are given in either case, and the first question at least deserves further consideration. See Darnley *v.* London Ry. Co., 9 Jur. (N. S.) 452.

[1] See Bettesworth *v.* Dean of St. Paul's, Sel. Cas. in Ch. 68, 69.

Agreements by a railroad company to build fences or crossings, or to locate and build a depot, or to do other things for the benefit of the grantor, may be specifically enforced. Nurray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617.

A contract by a railroad company to locate its station at a certain point or place or within certain limits, which does not prohibit or restrict the location of any other station, is not contrary to public policy and is valid and enforceable. Parrott *v.* Atlantic & N. C. R. Co., 165 N. C. 295, 81 S. E. 348; Taylor *v.* Railroad, 54 Fla. 635, 45 So. 74, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155, 14 Ann. Cas. 472; Railroad *v.* Camp, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. (N. S.) 594, 18 Am. St. Rep. 151, 14 Ann. Cas. 439; Blair *v.* St. Louis etc. Ry. Co., 92 Mo. App. 538; Ames *v.* Witbeck, 179 Ill. 458, 53 N. E. 969; a contract to erect an underground, instead of an overhead crossing, will be enforced. Owens *v.* Carthage & W. Ry. Co., 110 Mo. App. 320, 85 S. W. 987; Indianapolis Northern Traction Co. *v.* Essington, 54 Ind. App. 286, 99 N. E. 757; Gloe *v.* Chicago etc.

of the market. In the last place it seems against conscience to compel a party at his own peril to advance his own money to perform what properly belongs to another, when it may often happen, either from his own want of skill or means, that at every step he may be obliged to encounter personal obstacles or to make personal sacrifices, for which no real compensation can ever be made. It would not therefore be surprising if after all the doctrine of Lord Rosslyn should obtain a firm hold in Equity Jurisprudence, as it stands well supported by analogy, as well as by high authority. The just conclusion in all such cases would seem to be that Courts of Equity ought not to decline the jurisdiction for a specific performance of contracts whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy.

§ 1010. **Same.** — In regard to many other contracts for personal acts and proceedings which are of a very different character, similar observations may apply.[1] Thus for instance a covenant to renew a lease will (as we have seen) be specifically decreed.[2] So a covenant to levy a fine of an estate, for it may be indispensable as a muniment of title; so a covenant to invest money in lands, and settle it in a particular manner;[3] so an agreement to settle the boundaries between two estates;[4] so an agreement for the grant of an annuity or to charge it on land;[5] so an agreement to indorse a bill of exchange or promissory note upon a transfer thereof, when it has been omitted by design or accident or mistake;[6] so an assignment of an expectancy, if made upon a valuable consideration.[7] Many other cases might easily be put to illustrate

R. Co., 65 Neb. 680, 91 N. W. 547; City of Columbus *v.* Cleveland C. C. & St. L. Ry. Co., 25 Ohio Cir. Ct. Rep. 663.

If the construction of a house is incidental to the main relief, but now the subject of the contract, the agreement is enforceable. Williams *v.* Lowe, 79 N. J. Eq. 173, 81 Atl. 760.

[1] See Eden on Injunct. ch. 2, p. 27.

[2] Furnival *v.* Carew, 3 Atk. 87; Newland on Contracts, ch. 6, pp. 96 to 103; 1 Madd. Ch. Pr. 309.

[3] Newland on Contracts, ch. 6, p. 109; 1 Madd. Ch. Pr. 312; post, § 785.

[4] Newland on Contracts, ch. 6, p. 109; Penn *v.* Baltimore, 1 Ves. 444.

[5] Wellesley *v.* Wellesley, 4 Mylne & Craig, 554, 579; Lyde *v.* Munn, 4 Sim. R. 505; s. c. 1 Mylne & Keen, 683.

[6] Watkins *v.* Maule, 2 Jac. & Walk. 243.

[7] An assignment of an expectancy is an agreement to assign the interest. If made for a valuable consideration, it may be enforced in equity; otherwise it may not. Meek *v.* Kettlewell, 1 Phillips, Ch. R. 342; Trull *v.* Eastman, 3 Met. 121; Power's Appeal, 63 Pa. St. 443; Bayler *v.* Commonwealth, 40 Pa. St. 37; Mastin *v.* Marlow, 65 N. C. 695.

the same doctrine, as the case of a covenant not to build upon a contiguous estate, to the injury of an ancient messuage; of a covenant not to cut down timber trees, which are peculiarly ornamental to the mansion of the covenantee; of a covenant not to erect any noisome or injurious manufacturing establishment on an estate adjacent to that of the covenantee; of a covenant not to carry on the same trade with the covenantee in the same street or town, and of a covenant that a house to be built adjacent to other houses should correspond with them in its elevation.[1]

§ 1011. **Enforcement of Contract Where There Is a Contemplated Injury.** — Courts of Equity will upon analogous principles interpose in many cases to decree a specific performance of express and even of implied contracts where no actual injury has as yet been sustained, but it is only apprehended from the peculiar relation between the parties. This proceeding is commonly called a bill quia timet in analogy to some proceedings at law, where in some cases a writ may be maintained before any actual molestation, distress, or impleading of the party.[2] Thus (as we have seen) a surety may file a bill to compel the debtor on a bond in which he has joined, to pay the debt when due, whether the surety has been actually sued or not.[3] And upon a covenant to save harmless a bill may be filed to relieve the covenantee under similar circumstances.[4] So where property is covenanted to be secured for certain purposes and in certain events, and there is danger of its being alienated or squandered, Courts of Equity will interpose to secure the property for the original purposes.[5] And generally it may be stated that in cases of contracts, express or implied, Courts of Equity will interpose to preserve the funds devoted to particular objects under such contracts, and decree what in effect is a specific performance, security to be given, or the fund to be placed under the control of the court.[6] This subject will present

[1] Franklin *v.* Tuton, 5 Madd. 469.

[2] Co. Litt. 100 *a*; Mitf. Eq. Pl. by Jeremy, 148; 1 Madd. Ch. Pr. 178, 179.

[3] Mitford, Eq. Pl. by Jeremy, 148; Hayes *v.* Ward, 4 John. Ch. R. 132; Ranlagh *v.* Hayes, 1 Vern. 189, 190; s. c. 2 Ch. Cas. 146; Barnesley *v.* Powell, 1 Ves. 283, 284; Flight *v.* Cook, 2 Ves. 619; 1 Fonbl. Eq. B. 1, ch. 1, § 8, and note (*y*); Baker *v.* Shelbury, 1 Cas. Ch. 70; Champion *v.* Brown, 6 John. Ch. R. 398, 406, 407; Lee *v.* Rook, Moseley R. 318.

[4] Ibid.; Champion *v.* Brown, 6 John. Ch. R. 398, 406.

[5] Flight *v.* Cook, 2 Ves. 619; Green *v.* Pigot, 1 Bro. Ch. R. 108; Brown *v.* Dudbridge, 2 Bro. Ch. R. 321; Mitf. Eq. Pl. by Jeremy, 148.

[6] 1 Fonbl. Eq. B. 1, ch 1, § 8, and note (*y*). Where a party has agreed to execute a mortgage on an advance of money, and has refused to perform the agreement, a Court of Equity will often, upon a bill for a specific

itself in some other aspects hereafter, and does not therefore require a fuller development in this place.

§ 1012. **Contracts between Husband and Wife.** — There is another sort of contract respecting which there has been no small diversity of opinion, whether a specific performance ought to be decreed or not. It is where a husband covenants that his wife shall levy a fine, or execute any other lawful conveyance to bar her right in his estate or in her own estate. There are many cases in which covenants of this sort have been decreed to be specifically performed. And on one occasion Sir Joseph Jekyll, Master of the Rolls, said: "There have been a hundred precedents where, if the husband for a valuable consideration covenants that the wife shall join with him in a fine, the court has decreed the husband to do it; for that he has undertaken it, and must lie by it if he does not perform it." [1]

§ 1013. **Same.** — The reason is said to be, because in all such cases it is to be presumed that the husband when he enters into such a covenant has first gained the wife's consent for that purpose.[2] But this reason is a very insufficient one for so strong a doctrine; for it may be a presumption entirely against the fact; and if correct at the time, the wife may have subsequently withdrawn her consent, and refused upon very proper grounds to comply with the covenant. Let us suppose a case in which either there has been no consent or it has been thus withdrawn; it may then be asked, and indeed it has been asked, with the earnestness of great doubt, whether, if it is impossible for the husband to procure the concurrence of his wife in such a proceeding, a Court of Equity, acting according to conscience, will decree the husband to perform what it is morally impossible for him to perform.[3] It seems difficult to maintain the affirmative, especially as a full compensation may generally be obtained by returning the money with interest and damages.[4]

performance, and praying for a receiver, order a receiver to be appointed. In such a case the bill is in the nature of a bill quia timet so far as a receiver is prayed for. Shakel *v.* Duke of Marlborough, 4 Madd. R. 463.

[1] Hall *v.* Hardy, 3 P. Will. 189. See also Berry *v.* Wade, Rep. Temp. Finch, 180; Barrington *v.* Horne, 2 Eq. Abridg. 17, pl. 8; Withers *v.* Pinchard, cited 7 Ves. 475; Morris *v.* Stephenson, 7 Ves. 474.

[2] Winter *v.* D'Evreux, cited 3 P. Will, 189, note B.; Newland on Contracts, ch. 6, pp. 104, 108. As to specific performance of agreements for mortgages see Ashton *v.* Corrigan, L. R. 13 Eq. 76; Hermann *v.* Hodges, L. R. 16 Eq. 18; De Pierres *v.* Thorn, 4 Bosw. 266; City Ins. Co. *v.* Olmsted, 33 Conn. 476; St. Paul Division *v.* Brown, 11 Minn. 356; McClintock *v.* Laing, 22 Mich. 212; Dean *v.* Anderson, 34 N. J. Eq. 496.

[3] See Greenaway *v.* Adams, 12 Ves. 395, 400. [4] Ibid.

§ 1014. **Same.** — But there is a much stronger ground upon which the propriety of the doctrine may well be contested. It is the impolicy of endeavoring to compel the husband to use undue influence and unjustifiable means inconsistent with the harmony, peace, and confidence of conjugal life to obtain such a surrender of the rights of the wife. It is offering to him a premium to be ungenerous as well as unjust, and separating his interests as well as his good faith from hers.[1] On this account Lord Cowper refused to adopt the doctrine, saying: "It is a tender point to compel the husband by a decree to compel his wife to levy a fine, though there have been some precedents in the court for it. And it is a great breach upon the wisdom of the law which secures the wife's lands from being aliened by the husband without her free and voluntary consent, to lay a necessity upon the wife to part with her lands, or otherwise to be the cause of her husband's lying in prison all his days."[2]

§ 1015. **Same.** — It is true that this reasoning has not met the approbation of some learned minds in our own times, because it is suggested creditors may, by throwing the husband into prison, compel the wife to part with her estate in the same way.[3] But with great submission there is a great difference between a court's undertaking to enforce a contract against the policy of the law and thus sanctioning a violation of conjugal duties, and leaving all parties free to act upon such exigencies as may arise, according to their own sense of the necessities of the case. A Court of Equity may well decline to enforce a contract which it might not under the circumstances incline to cancel. It is most manifest that the doctrine has not the support of one of the most able equity judges of England (Lord Eldon); for he has not hesitated to express a very pointed disapprobation of it. "If this was perfectly res integra," said he, "I should hesitate long before I should say the husband is to be understood to have gained her consent, and the presumption is to be that he obtained it before the bargain, to avoid all fraud that may be afterwards practised to procure it."[4]

[1] Howel *v.* George, 1 Madd. R. 9.

[2] Outram *v.* Round, 4 Vin. Abridg. Baron and Feme, H. b, pl. 4, and marg. p. 203; Frederick *v.* Coxwell, 3 Younge & Jerv. 514.

[3] Morris *v.* Stephenson, 7 Ves. 474, and Withers *v.* Pinchard, there cited.

[4] Emery *v.* Wase, 8 Ves. 514, 515. See also Howel *v.* George, 1 Madd. R. 9; Davis *v.* Jones, 4 Bos. & Pull. 267; Martin *v.* Mitchell, 2 Jac. & Walk. 425; Mortlock *v.* Buller, 10 Ves. 305; Innes *v.* Jackson, 16 Ves. 367. The reasoning of Lord Eldon is so forcible that it deserves to be here given at large. "Certainly the general point is of great importance,

§ 1016. **Same.** — Where indeed there is no pretence to say that the wife is not ready and willing to consent to the act, and that defence is not set up in the answer, but the objections to the decree are put wholly upon other distinct grounds, there may be

whether the contract of the husband — which however this was not intended to be, but that of the daughters — is to be executed against the husband by a Court of Equity; in effect compelling the husband to compel his wife to levy a fine, which is a voluntary act. This is brought forward in the report as the principal ground of the decree. The argument shows that point is not quite so well settled as it has been understood to be. The policy of the law is that a wife is not to part with her property but by her own spontaneous and free will. If this was perfectly res integra, I should hesitate long before I should say the husband is to be understood to have gained her consent, and the presumption is to be made that he obtained it before the bargain, to avoid all the fraud that may be afterwards practised to procure it. I should have hesitated long in following up that presumption rather than the principle of the policy of the law; for if a man chooses to contract for the estate of a married woman or an estate subject to dower, he knows the property is hers altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain if she who, according to law, cannot part with her property but by her own free will expressed at the time of that act of record, takes advantage of the locus pœnitentiæ? And why is he not to take his chance of damages against the husband? If cases have determined this question so that no consideration of the absurdity that must arise, and the almost ridiculous state in which this court must in many instances be placed, can prevail against their authority, it must be so. For the sake of illustration, suppose £10,000 3 per cents carried to the account of a married woman, and the husband contracts to transfer (taking it that the court had jurisdiction to decree performance of such a contract). At the hearing, what is to be done for the wife? In the two last cases the wife appears to have been left a party to the suit without affecting her under the decree. If the court cannot by the decree order an act to be done by her, the bill ought to be dismissed against her, unless some future act by her, to be ordered upon further directions, is looked to. But the principle of the decree shows that cannot be the purpose. It does not rest there. Suppose the husband procures her consent, even by the mildest means, persuades and influences her by the difficulties he has got into, or entering into an improvident contract; and she is examined here by the judge who has made the decree upon the husband; and if, upon the submission of all the considerations which ought to be submitted to her in this court and the Court of Common Pleas, she says, she thinks it, in her situation, not fit for her to part with the property, — the court must send the husband to jail, telling her she never ought to relieve him from that state. And all this for the benefit of a person who cannot have a specific performance certainly, but who may have damages, and who sets up his title to a specific performance in opposition to the policy of the law. Upon the first ground therefore there is difficulty enough to make me pause before I should follow the two last authorities. And I am not sure whether it is not proper to have the judgment of the House of Lords to determine which of these decisions ought to bind us. As to the expression used by Lord Cowper, that this jurisdiction is to be very sparingly exercised, certainly it is very dissatisfactory to be informed that it is and is not to

less difficulty in making a decree for a specific performance.[1] Even in such a case a Court of Equity ought not to decree in so important a matter affecting the wife's interest, without bringing her directly before the court and obtaining her consent upon full deliberation. But where the answer expressly shows an inability of the husband to comply with the covenant, and a firm refusal of the wife, it will require more reasoning than has yet appeared to sustain the justice or equity or policy of the doctrine.[2]

§ 1016 *a*. [**Enforcement of Oral Contract to Devise Land in Consideration of Services Performed.** — The enforcement of contracts of the character here involved is an exception which Courts of Equity have ingrafted upon the Statute of Frauds. The

be done." See also the opinion of Sir Thomas Plumer in Howel *v.* George, 1 Madd. R. 9, who says: "It could not be argued that a man should be compelled to use his marital and parental authority to compel his wife and son to do acts which ought only to be spontaneously done." Sir James Mansfield also, in Davis *v.* Jones (4 Bos. & Pull. 267), said: "Nothing can be more absurd than to allow a married woman to be compelled to levy a fine through fear of her husband being sued and thrown into jail, when the general principle of law is that a married woman shall not be compelled to levy a fine." See also Frederick *v.* Coxwell, 3 Y. & Jerv. 514.

[1] Morris *v.* Stephenson, 7 Ves. 474.

[2] See Howel *v.* George, 1 Madd. R. 9; Davis *v.* Jones, 4 Bos. & Pull. 267; Martin *v.* Mitchell, 2 Jac. & Walk. R. 425. In accordance with the view of the author it is held that equity will not enforce an agreement on the part of the husband to convey land in which there are homestead and dower rights which the wife will not convey. Phillips *v.* Stauch, 20 Mich. 369; Yost *v.* Devault, 9 Iowa, 60. Comp. Allison *v.* Shilling, 27 Tex. 450; Brewer *v.* Wall, 23 Tex. 585. So too in a case of dower only. Clark *v.* Seirer, 7 Watts, 107; Burk's Appeal, 75 Pa. St. 141; Riesz's Appeal, 73 Pa. St. 485; Weller *v.* Weyand, 2 Grant, 103; Hawralty *v.* Warren, 3 C. E. Green, 124. See Richmond *v.* Robinson, 12 Mich. 193. But it is held in Massachusetts that a deduction in price may be made in favor of the buyer, if the wife will not release dower, and specific performance granted to him of what the husband can convey. Davis *v.* Parker, 14 Allen, 94. See Woodbury *v.* Luddy, Ib. 1. But see Phillips *v.* Stauch, supra; Burk's Appeal, supra. This appears to be opposed to English ruling that where a party agrees with husband and wife for the purchase of an estate in fee owned by the wife, in such a way that the wife is not bound, he cannot compel the husband to convey his interest with an abatement. Castle *v.* Wilkinson, L. R. 5 Ch. 534. Unless perhaps the husband held himself out to the purchaser as owner of the fee. Barnes *v.* Wood, L. R. 8 Eq. 424.

A wife on the other hand cannot, after the death of her husband, have specific performance of a contract made by her husband for the sale of her land, it seems. Hoover *v.* Calhoun, 16 Gratt. 109.

It appears to be settled in England that contracts for separation of husband and wife may be enforced specifically, certainly in regard to property. Gibbs *v.* Harding, L. R. 5 Ch. 336; Wilson *v.* Wilson, 5 H. L. Cas. 40. See Hamilton *v.* Hector, L. R. 6 Ch. 701.

exception is one that is sparingly exercised, and rightfully so. The very conscience of the court must be touched by the facts of the particular case before the exception to the statute will be called into play. The exceptions to the Statute of Frauds are not without well defined rules. The rules cover many phases, i. e. (1) the alleged oral contract must be clear, explicit, and definite; (2) it must be proven as pleaded; (3) such contract cannot be established by conversations either too ancient on the one hand, or too loose or casual on the other; (4) the alleged oral contract must be fair in itself, and not unconscionable; (5) the proof of the contract as pleaded must be such as to leave no reasonable doubt in the mind of the chancellor that the contract as alleged was in fact made, and that the full performance, so far as lies in the hands of the parties to perform, has been had; (6) and the work constituting performance must be such as is referable solely to the contract sought to be enforced and not such as might be reasonably referable to some other or different contract; (7) the contract must be one based upon an adequate and legal consideration, so that its performance upon the one hand, but not upon the other, would bespeak an unconscionable advantage and wrong, demanding in good conscience relief in equity; (8) proof of mere disposition to devise by will or convey by deed by way of gift, as a reward for services, is not sufficient, but there must be shown a real contract to devise by will or convey by deed made before the acts of performance relied upon were had.[1]]

§ 1016 *b*. [**Contract Not Enforceable against Wife Where She Is Not a Party to It and Did Not Sign.** — Simply executing and delivering a contract for the sale of lands by the husband, whether the property be that of his own or that of his wife's, specific performance will not be decreed as to her interest in the absence of execution by her. It is her personal right to own her inchoate dower interest in her husband's property and she cannot be compelled, against her consent, to release her dower interest.[2] Especially is this true, where the property belonged to husband

[1] Walker *v.* Bohannon, 243 Mo. 119, 147 S. W. 1024; Parsons *v.* Cashman, 23 Cal. App. 298, 137 Pac. 1109.

A contract upon sufficient consideration, to devise land, is valid, and may be enforced in equity. Price *v.* Price, 133 N. C. 503, 45 S. E. 855.

[2] Solomon *v.* Shewitz, 185 Mich. 620, 152 N. W. 196; Stenson *v.* Elfmann, 29 S. Dak. 59, 135 N. W. 694; Kasal *v.* Hlinka, 118 Minn. 37, 136 N. W. 569; Camden & T. Ry. Co. *v.* Adams, 62 N. J. Eq. 656, 51 Atl. 24; Plum *v.* Mitchell, 16 Ky. L. Rep. 162, 26 S. W. 391; Haden *v.* Falls, 115 Va. 779, 80 S. E. 576.

and wife, and in the contract for exchange of lands, the wife was neither a party to the action nor to the contract sued on.[1] The rule seems to be settled that a husband will not be decreed to procure the release of dower of an unwilling wife, and that indemnity will not be awarded against the dower right where the refusal of the wife to release is not procured by the fraudulent contrivance of the husband. Whatever force the rule had as applied to a husband acting in good faith during the life of his wife, affecting only her inchoate right, is certainly much increased when, after his death, her right has become complete, and decree is sought, not only against his heirs, but also directly against the widow.[2] It is too late for the wife to object to conveying the title, after she has executed a deed for the property, even though she was not a party to the contract now sought to be enforced, and though the property in fact belonged to her and not to her husband.[3] The contract will not be enforced against either the husband or wife, where at the time the husband signed it was with the understanding that the wife was also to sign, but which she now refuses to do.[4] The failure of the wife to sign will not be regarded as material, where the husband has died and there is ample property outside of that in controversy out of which to allot her dower, and this course should be pursued and protect the rights under the contract.[5]]

§ 1017. **Enforcement of Contract against Public Policy.** — In cases of covenants and other contracts where a specific performance is sought, it is often material to consider how far the reciprocal obligations of the party seeking the relief have been fairly and fully performed. For if the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so seeking relief, or from their nature they have ceased to have any just application by subsequent events, or it is against public policy to enforce them, Courts of Equity will not interfere. Thus where two persons had agreed to work a coach from Bristol to London, one providing the horses for a part of the road and the other for the remainder, and in

[1] Chapman *v.* Hill, 77 Wash. 475, 137 Pac. 1041. Nor does it make any difference that the notes given in part payment were made to the wife and endorsed by her and money received thereon. Shipman *v.* Campbell, 79 Mich. 82, 44 N. W. 171.

[2] McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840; but see Plum *v.* Mitchell, 16 Ky. L. Rep. 162, 26 S. W. 391.

[3] Lockhart *v.* Ferrey, 59 Oreg. 179, 115 Pac. 431.

[4] Venator *v.* Swenson, 100 Iowa, 295, 69 N. W. 522.

[5] Bartley *v.* Big Branch Coal Co., 160 Ky. 123, 169 S. W. 601.

consequence of the horses of the latter being taken in execution the former was obliged to furnish horses for the whole road and claimed the whole profits, the court, on a bill by the party who was so in default, for an account of the profits, and to restrain the other party from working the coaches with his own horses on the whole road, refused to interfere, because the default might again occur, and subject the defendant to an action.[1] So where upon a grant of certain land with a well in it, there was a covenant by the grantees not to sell or dispose of the water from the well to the injury of the proprietors of certain water-works intended for the public supply, but not deriving their supply from the well, upon a bill for an injunction the court refused to interfere on account of the inconveniences, saying that although the court will in many cases interfere to restrain a breach of covenant, yet there was no instance to be met with of such a covenant as this. For here the court must in each instance try whether the act of selling any specified quantity of water was a prejudice to the proprietors of the water-works or not; and that upon such a covenant so framed a Court of Equity ought not to entertain jurisdiction, even if there were no objection on the score of public policy.[2]

§ 1018. **Same.** — So where a conveyance in fee had been made of certain lands in the city of London, and the feoffee covenanted not to use the land in a particular manner, with a view to the more ample enjoyment of the adjoining lands by the feoffor; and afterwards, by the voluntary acts of the feoffor and those claiming under him, the character and condition of the adjoining land had been so greatly altered that the contemplated benefits were entirely gone, the court refused to interfere to compel a

[1] Smith *v.* Fromont, 2 Swanst. R. 330.

[2] Collins *v.* Plumb, 16 Ves. 454. This case turned upon its own special circumstances, and cannot be admitted to be an authority for any general doctrine on the subject. If the Water Works Company had derived their supply of water from the well, there is no doubt that a Court of Equity would have interfered to prevent the party from violating his covenant to the injury of the company. In the actual posture of the case then before the court the object of the covenant seemed to have been to secure to the company the monopoly of water for the supply of the inhabitants of the town, and other persons resorting thereto, against any competition by a sale of the water of the well. The case seems to have been decided upon very mixed considerations, as there are several other points before the court; and it must be admitted not to have been decided upon very satisfactory grounds. Specific performance of a contract for supplying water to a mill will be decreed, it seems, when necessary for running the mill. Randall *v.* Latham, 36 Conn. 48.

specific performance by injunction, and left the party to his remedy at law on the covenant.[1]

§ 1019. [**Same.** — It will be observed that there is a vast difference between a contract that is inherently harsh and unjust in its own nature, one that is so obnoxious to reason and equality of rights that it will shock the senses of a Court of Equity, and a contract that was originally of mutual advantage to both parties, but since its execution the conditions and circumstances surrounding have so changed as to make it inequitable for it to be enforced in specie. In the former class of contracts, their enforcement is not favored in equity; but in the latter class, while the remedy sought is the proper one, the court will, in its discretion, and in order to equalize the burdens of both parties, refuse

[1] Duke of Bedford *v.* Trustees of the British Museum, 2 Mylne & K. 552. See also Kepple *v.* Bailey, 2 Mylne & K. 517.

This case, so far as it relates to covenants running with the land, has been overruled. Luke *v.* Dennis, 7 Ch. D. 227.

Generally speaking, mere change of value and consequent inadequacy, unless gross, are not sufficient to prevent specific performance. Lee *v.* Kirby, 104 Mass. 420; Booten *v.* Schefler, 21 Gratt. 474; Chubb *v.* Peckham, 2 Beasl. 207; Park *v.* Johnson, 4 Allen, 259; Powers *v.* Mayo, 97 Mass. 180; Turley *v.* Nowell, 62 N. C. 301; Losee *v.* Murray, 57 Barb. 561; Collier *v.* Mason, 25 Beav. 200. See Regent's Canal Co. *v.* Ware, 23 Beav. 575. But change of value in a case where the vendor was at first unable to make title and afterwards became able has been treated as ground for refusing specific performance in a suit against a purchaser. Griffin *v.* Cunningham, 19 Gratt. 571; Young *v.* Rathbone, 1 C. E. Green, 224. And if by reason of war the consideration money has become worthless at the time of payment, this will be ground for refusing to decree specific performance. Love *v.* Chubb, 63 N. C. 324; Hudson *v.* King, 2 Heisk. 560. See Wintz *v.* Weakes, 10 Heisk. 593. But the burning down of a house on the land to be sold is not sufficient. Brewer *v.* Herbert, 30 Md. 301.

With regard to restrictions upon building it has lately been declared in accordance with the text that if the condition of the surrounding property has been so altered since the contract was made, without the defendant's act, that the restrictions are no longer applicable to the state of things, the agreement in regard to restrictions will not be enforced. Columbia College *v.* Thacher, 87 N. Y. 311.

Ordinarily however covenants of restriction as to the use of premises will be enforced by injunction, and that too against purchasers, if with notice, whether the covenants run with the land or not. Tulk *v.* Moxhay, 13 Jur. 89; s. c. 2 Phill. 774. See Heriot's Hospital, 2 Dow, 301. And one grantee may enforce the covenant against another grantee from the common grantor. Parker *v.* Nightingale, 6 Allen, 341; Linzee *v.* Mixer, 101 Mass. 512; Perkins *v.* Coddington, 4 Rob. (N. Y.) 647. But it must appear that the covenant was intended for the benefit of the party seeking to enforce it. Badger *v.* Boardman, 16 Gray, 559; Jewell *v.* Lee, 14 Allen, 145. See Clark *v.* Martin, 49 Pa. St. 289. It makes no difference whether the provision is in form a condition or a restriction. Whitney *v.* Union R. Co., 11 Gray, 359.

to decree the specific performance of the engagement. The changed condition must be an extraordinary and unusual one, not brought about by the fault of the complainant. Courts withhold the peculiar relief asked for, where it appears that a widow at the time of making the contract for the sale of her land, owned a homestead interest and of this fact she was ignorant, where the hardship suggested appears from external facts, events, or circumstances.[1] The mere fact that the property contracted for has depreciated in price,[2] or that the price is very much higher, the enhancement having arisen from natural surroundings, is not alone sufficient to prevent the strict enforcement of the contract.[3] A Court of Equity will not undertake to make a contract for the parties, or to dictate terms into it that have never been agreed upon. Hardships, fairly and voluntarily assumed as a part of the contract which is sought to be enforced, cannot prevail to stay a specific performance.[4] But where a real estate company contracted

[1] Van Norsdall *v.* Smith, 141 Mich. 355, 104 N. W. 660, 12 Detroit Leg. N. 478; Rathbone *v.* Groh, 137 Mich. 373, 100 N. W. 588, 11 Detroit Leg. N. 331; McCutcheon's heirs *v.* Rawleigh, 25 Ky. L. Rep. 549, 76 S. W. 50; Williamson *v.* Dils, 24 Ky. L. Rep. 1792, 114 Ky. 962, 72 S. W. 292; Holloway *v.* Conlon, 143 Mo. 369, 45 S. W. 275; Shinkle *v.* Vickery, 156 Mo. 1, 55 S. W. 456; Veth *v.* Gierth, 92 Mo. 97, 4 S. W. 432; Eleventh Street Church *v.* Pennington, 18 O. Cir. Ct. Rep. 408, 10 O. C. R. 74; Ford *v.* Euker, 86 Va. 75, 9 S. E. 500; Linthicum *v.* Washington Elec. R. Co., 124 Md. 263, 92 Atl. 917; Pasco Fruit Land Co. *v.* Timmermann, 88 Wash. 112, 152 Pac. 675; Bradford *v.* Smith, 123 Iowa, 41, 98 N. W. 377; Moody *v.* Eastern Oregon Land Co., 180 Fed. 532; Rice *v.* Lincoln & N. R. Co., 88 Neb. 307, 129 N. W. 425; Rawlings *v.* Collins, 36 App. D. C. 72; Heydrick *v.* Dickey, 155 Ky. 222, 159 S. W. 666; McDowell *v.* Biddison, 120 Md. 118, 87 Atl. 752; Penn. Gas Co. *v.* Greensboro Gas Co., 238 Pa. 97, 85 Atl. 1093; Pratt *v.* McCoy, 128 La. 570, 54 So. 1012; Eiseman *v.* Josephthal, 71 Misc. Rep. 288, 128 N. Y. Supp. 699; Ross *v.* Ross, 148 Iowa, 729, 127 N. W. 1034; Heyward *v.* Bradley, 179 Fed. 325, 102 C. C. A. 509; Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87; Stitt *v.* Ward, 142 App. Div. 626, 127 N. Y. Supp. 351; Southern Ry. Co. *v.* Franklin & P. R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297; Claypoal *v.* Board of School Comrs., 132 Ind. 261, 31 N. E. 665; Cella *v.* Brown, 144 Fed. 742, 75 C. C. A. 608; Waite *v.* O'Neil, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550; Nevada Nickel Syndicate *v.* National Nickel Co., 96 Fed. 133; South & N. A. R. Co. *v.* Highland Ave. R. Co., 119 Ala. 105, 24 So. 114; Sanders *v.* Newton, 140 Ala. 335, 37 So. 340; Stubbings *v.* Durham, 210 Ill. 542, 71 N. E. 586; Hopwood *v.* McCausland, 120 Iowa, 218, 94 N. W. 469.

[2] Wrenn *v.* Cooksey, 147 Ky. 825, 145 S. W. 1116; Texas Co. *v.* Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21; but see Newberry *v.* French, 98 Va. 479, 36 S. E. 519.

[3] Hairston *v.* Bescherer, 141 N. C. 205, 53 S. E. 845; Dingman *v.* Hillberry, 159 Wis. 170, 149 N. W. 761.

[4] Bosch Magneto Co. *v.* Rushmore, 85 N. J. Eq. 93, 95 Atl. 614; Marvel *v.* Jonah, 83 N. J. Eq. 295, 90 Atl. 1004, L. R. A. 1915 B, 206.

to purchase a tract of land, which was to be subdivided into residence property, and in the tract there was a graveyard of an acre and a half which the grantors reserved, the situation of a graveyard in property to be used for such purposes would work such a hardship to the purchasers that equity will not decree a performance.[1]]

§ 1020. **Same.** — Before proceeding to the remaining head of specific performance, that of contracts respecting real estate, which will occupy our attention to a far greater extent, it may be proper to mention that before Lord Somers's time the practice used to be on bills for a specific performance to send the party to law, and if he recovered anything by way of damages, the Court of Chancery then entertained the suit; otherwise the bill was dismissed.[2] And hence the opinion was not uncommon that unless damages were recoverable at law no suit could be maintained in equity for a specific performance. Accordingly it was laid down in a celebrated case by Lord Chief Justice Raymond, that "where damages are to be recovered at law for the breach of covenant, equity will compel a specific execution of such act, for the not doing of which the law gives damages; and that for this reason, as an adequate compensation is to be made on the covenant, the quantum of the damages may be very uncertain, and therefore to prevent that uncertainty equity will enforce a specific execution of the thing."[3] At present no such practice prevails, and therefore the rule is not applied, as it certainly ought not to be applied, as a test of jurisdiction.

[1] Bluegrass Realty Co. *v.* Shelton, 148 Ky. 666, 147 S. W. 33.

[2] Dodsley *v.* Kinnersley, Ambler, R. 406; 1 Madd. Ch. Pr. 288; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*e*); Id. B. 1, ch. 3, § 1, note (*e*); Normanby *v.* Duke of Devonshire, 2 Freem. R. 217, and Mr. Hovenden's note; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 425. According to Mr. Butler the old practice in Courts of Equity was, in all cases, first to send the party to law, to ascertain whether there was any remedy there or not. If there was no remedy at law, then equity would interfere. His language is: "The grand reason for the interference of a Court of Equity is, that the imperfection of a legal remedy in consequence of the universality of legislative provisions may be redressed. Hence for a length of time after the introduction of equitable judicature into this country it was thought necessary that before equity should interfere this imperfection should be manifested by the party's previously proceeding at law, so far as to show from its result the want or inadequacy of legal redress and his claim for equitable relief. This inflicted upon him two judicial suits, and consequently a double expense. To remedy this grievance it became the practice, particularly from the time in which the seals were intrusted to Lord Cowper, to dispense with the previous legal suit, when the want or inadequacy of the legal remedy to be obtained by it was evident." 1 Butler, Reminis. 39, 40.

[3] Bettesworth *v.* Dean of St. Paul's, Sel. Cas. in Ch. 68, 69.

§ 1021. **Same.** — But there is very great reason to doubt if the rule ever was generally applied at any former period, for many cases must always have existed in which damages were not recoverable at law, but in which a specific performance would nevertheless be decreed.[1] The rule was probably confined to cases in which the party was not entitled to any remedy at law, and there was no equity to be administered beyond the law.[2] Lord Macclesfield denied the existence of the rule altogether, and said: "Neither is it a true rule which had been laid down by the other side, that where an action cannot be brought at law on an agreement for damages, there a suit will not lie in equity for a specific performance."[3] And accordingly in the very case then before him he gave relief, although there could be no remedy at law. It was a case where a feme sole gave a bond to her intended husband, that in case of their marriage she would convey her lands to him in fee. They afterwards married, and the wife died without issue, and then the husband died. And it was held that although the bond was void at law, yet it was good evidence of an agreement, and the heir of the husband could compel a specific performance against the heir of the wife.[4]

§ 1022. **Heir Is Bound to Convey Where Ancestor Died within Period When Estate Was to Be Conveyed.** — Lord Macclesfield on that occasion put another case. If a feme infant seised in fee, on a marriage with the consent of her guardians, should covenant in consideration of a settlement, to convey her inheritance to her husband, and the settlement were competent, a Court of Equity would decree a specific execution of the agreement, although no action at law would lie to recover damages.[5] Another case may also be put. If an agreement be made for the sale of an estate, and the vendor dies before the period when the estate is to be conveyed, the heir of the vendor will in equity be bound to convey, although no action lies at law against him.[6]

§ 1023. [**Inadequacy of Legal Remedy in Action for Specific**

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*e*); Id. B. 1, ch. 3, § 1, note (*c*); 1 Madd. Ch. Pr. 288.

[2] See Sugden on Vendors, ch. 4, § 2, pp. 201, 202 (7th ed.).

[3] Cannel *v.* Buckle, 2 P. Will. 244.

[4] Acton *v.* Pierce, 2 Vern. 480.

[5] Cannel *v.* Buckle, 2 P. Will. 244, and Mr. Cox's note (2).

[6] 1 Madd. Ch. Pr. 288. See also Wiseman *v.* Roper, 1 Rep. in Chan. 158; Attorney-Gen. *v.* Day, 1 Ves. 222; Whitmel *v.* Farrel, 1 Ves. 258; Gell *v.* Vermedun, 2 Freem. R. 199; Sugden on Vendors (7th ed.), ch. 4, § 2, p. 180; 1 Sugden on Vendors, ch. 4, § 3, n. 3, p. 321 (10th ed.).

Performance Is Assumed. — Where a contract is clearly established in which one of the parties bound himself to sell, or did sell, specific real property, a prima facie right to have such contract specifically enforced arises. If nothing is made to appear which could influence or invoke the discretion of a Court of Equity to justify its refusal to decree specific performance, a decree requiring the party to perform, must follow. If a full, fair, and adequate remedy may be had by resort to law, then there is no remedy in equity. It is to be presumed where an action is brought seeking the specific performance of a contract that there is no adequate and efficient remedy at law.[1] In general it may be said that the specific relief will be granted when it is apparent from a view of all the circumstances of the particular case that it will subserve the ends of justice. But to have this effect it is not sufficient that there be a remedy at law. It must be plain and adequate, and as certain, prompt, complete and efficient to attain the ends of justice and its prompt administration as the remedy in equity.[2] The difference between relief at law by way of damages and relief at equity by way of specific performance is one of remedy. In cases of guaranty or indemnity against loss, pure and simple, there can be no breach of contract until a loss has been suffered. But where the principal has defaulted in paying the note, the surety is entitled to maintain a bill in equity to compel the principal to pay the debt, and that he, the surety, be exonerated. The distinction between the two classes of cases is the determining question which runs through and explains all the cases. In the former class there is no breach until the loss has been suffered, and then an action at law will give the proper relief, that is, damage for breach of contract. In the latter the breach has occurred before substantial loss, and a bill in equity will lie to compel performance by the principal and exoneration of the surety.[3] A contract by the owners of a large share of the stock in a company will be enforced against the administrator of a deceased partner, where the purpose of purchasing the stock is not

[1] Cummings *v.* Nielson, 42 Utah, 157, 129 Pac. 619; Indiana Union Traction Co. *v.* Leisler, 58 Ind. App. 507, 106 N. E. 911.

[2] American Fisheries Co. *v.* Lennen, 118 Fed. 869; Texas Co. *v.* Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21; Davis *v.* Wakelee, 156 U. S. 680, 39 L. Ed. 578, 15 S. Ct. Rep. 555; Castle Creek Water Co. *v.* Aspen, 146 Fed. 8, 76 C. C. A. 516; Farwell *v.* Colonial Trust Co., 147 Fed. 480, 78 C. C. A. 22; Rowell *v.* Covenant Mut. Ins. Co., 84 Ill. App. 304; Harper *v.* Virginian Ry. Co., 86 S. E. 919; Burnett *v.* Mitchell, 158 S. W. 800.

[3] Roberts *v.* Keene, 74 Misc. Rep. 238, 133 N. Y. Supp. 1091.

simply to own and control it, but the interest is of peculiar and specific value to the purchasers.[1]]

§ 1024. [**The Right to the Application of the Doctrine in General.** — We will now consider what parties are entitled to the enforcement of the doctrine of specific performance. From the definition already given, and the general principles governing the application of the remedy, it will be seen that intermeddlers as such have no right, but if the plaintiff is the bona fide owner of the contract, or an interest therein, and the other essentials are present, he is entitled to enforce the contract. Not only is the original party to the contract entitled to the remedy, but his assignee may enforce a specific performance thereof upon his complying with the terms of the contract; and a stipulation that the contract should not be assigned will not avoid the instrument, especially where it is not made a subject of forfeiture, and the vendor accepted the first instalment due from the assignee.[2] The same is true of one who buys land with knowledge that his grantor had already executed and delivered a valid contract for the conveyance of the property and the owner would be bound to convey it in an action brought for a specific performance of the contract.[3] And so, where the owner executed a contract to

[1] Ralston *v.* Ihmsen, 204 Pa. 588, 54 Atl. 365.

Insolvency of defendant is not alone sufficient ground for decreeing specific performance. Gillett *v.* Warren, 10 N. Mex. 523, 62 Pac. 975; Livesley *v.* Johnston, 45 Oreg. 30, 76 Pac. 946, 65 L. R. A. 783, 106 Am. St. Rep. 647.

Specific performance of a lease requiring the rotation of crops will not be decreed. Thruston *v.* Bailey, 157 Ky. 29, 162 S. W. 525.

Relief will not be granted where through a change in circumstances not contemplated by the parties, enforcement of the contract would work a hardship and injustice to the other party. Tazewell Coal & Iron Co. *v.* Gillespie, 113 Va. 134, 75 S. E. 757.

[2] Contract induced by fraud cannot be enforced by party or his assignee. Perkins *v.* Lyons, 68 Wash. 498, 123 Pac. 793; Kasal *v.* Hlinka, 118 Minn. 37, 136 N. W. 569; Craver *v.* Spencer, 40 Fla. 135, 23 So. 880; Johnson *v.* Eklund, 72 Minn. 195, 75 N. W. 14; Ackerman *v.* Maddux, 26 N. Dak. 50, 143 N. W. 147; Perry *v.* Paschal, 103 Ga. 134, 29 S. E. 703; Lighton *v.* City of Syracuse, 48 Misc. Rep. 134, 96 N. Y. Supp. 692; J. I. Case Threshing Mach. Co. *v.* Farnsworth, 28 S. Dak. 432, 134 N. W. 819; but see Lockerby *v.* Amon, 64 Wash. 24, 116 Pac. 463.

Neither the purchaser nor his assignee can escape taking the land, where they have in bad faith procured mechanics' liens to be asserted against the title. Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019.

The assignee of an option to purchase, who pays his money within the time limit, is entitled to specific performance of the contract. McSwain *v.* Davis, 96 S. C. 155, 80 S. E. 87; Smith *v.* Anderson, 84 N. J. Eq. 681, 95 Atl. 358.

[3] Randolph *v.* Wheeler, 182 Mo. 145, 81 S. W. 419; City of Birming-

convey, and the other party deposited a check in payment, but before delivery of the deed the owner died, it is proper for the administratrix to file a bill setting forth her inability to comply with the contract and a specific performance by the heirs at law will be decreed.[1] If one of the owners of the land is not a party to the contract for land sought to be conveyed by exchange, but in the pleadings there is evidence and admissions that she owns the land in controversy, she is entitled to relief.[2] The parties to the contract, or their heirs or assigns are the only ones who have the right to enforce the specific performance of the agreement. A third person who has no interest in the contract itself or in the subject matter has no rights as such that he can enforce, for instance, a broker who claims to have effectuated a contract of sale and purchase, has no right to come into a Court of Equity to compel the owners to sell to a party who has declined to buy, and to whom the owners have refused to sell, each upon the statement that no binding contract exists between them for the transfer of the title.[3] But specific performance may be enforced either by or against an undisclosed principal, when his duly authorized agent, in his own name, within the scope of his agency, contracts concerning the sale or purchase

ham *v.* Forney, 173 Ala. 1, 55 So. 618; Peay *v.* Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731.

[1] McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840; Butman *v.* Butman, 213 Ill. 104, 72 N. E. 821; Zeuske *v.* Zeuske, 62 Oreg. 46, 124 Pac. 203; Hadden *v.* Thompson, 118 Ga. 207, 44 S. E. 1001; but see Wait *v.* Wilson, 86 App. Div. 485, 83 N. Y. Supp. 834; Maddock *v.* Progressive Inv. Co., 79 N. J. Eq. 139, 84 Atl. 575; Walker *v.* Bradley, 89 Misc. Rep. 516, 153 N. Y. Supp. 686; Davenport *v.* Lattimer, 53 S. C. 563, 31 S. E. 630.

The heirs of the purchase may maintain specific performance of the contract, where their ancestor died before the title was transferred. Weidenbaum *v.* Raphael, 83 N. J. Eq. 17, 90 Atl. 683.

[2] Cusack *v.* Budasz, 187 Ill. 392, 58 N. E. 326; Record *v.* Littlefield, 218 Mass. 483, 106 N. E. 142.

Contract not to engage in similar business within given period will be enforced against assignee, though the word "assignee" was not used in the contract. Johnston *v.* Blanchard, 16 Cal. App. 321, 116 Pac. 973.

School commissioners may maintain action in their own name to compel furnishing of free gas to light the building, they being the only parties interested, though they are not parties to the contract. School Hist. *v.* Enterprise Gas. Co., 18 Pa. Super. Ct. Rep. 73.

[3] Frye *v.* Warren, 264 Mo. 281, 174 S. W. 391.

The owner of an unpaid judgment against insured for injuries received through his negligence, and covered by his insurance, has no right to enforce the contract in violation of express conditions in the face of the policy. Van Reen *v.* Ætna Life Ins. Co., 209 Fed. 691.

of the land.[1] Taking a contract for the purchase of land in one's name as "cashier" of a certain bank will not prevent the holder from showing that the contract was his own personal property and that the word "cashier" was simply descriptive of the person.[2]]

§ 1025. **Agreement to Be Enforced Must Be Such an Agreement as Was Subject to Action at Law.** — It has been said in a late case that it may be safely laid down as a general proposition, notwithstanding many exceptions, that an agreement in order to call for a specific performance by the decree of a Court of Equity must be such an agreement as might have been made the subject of an action at law.[3] This language, when understood in a qualified sense, is doubtless correct; for generally if a party does not contract personally at law, equity will not create a personal obligation on his part, unless under peculiar circumstances.[4] But the whole class of cases of specific performance of contracts respecting real estate where the contract is by parol, and there has been a part performance, or where the terms of the contract have not been strictly complied with, and yet equity relieves the party, are proofs that the right to maintain a suit in equity to compel a specific performance does not and cannot properly be said to depend upon the party's having a right to maintain a suit at law for damages.[5] In cases of specific performance, Courts of Equity sometimes follow the law and sometimes go far beyond the law; and their doctrines, if not wholly independent of the point whether damages would be given at law, are not in general dependent upon it. Whoever should assume the existence of a right to damages in an action at law as the true test of the jurisdiction in equity would find himself involved in endless perplexity;[6] for sometimes damages may be recoverable at law

[1] Forgey *v.* Gilbirds, 262 Mo. 44, 170 S. W. 1135; Davidson *v.* Hurty, 116 Minn. 280, 133 N. W. 862.

[2] Beddow *v.* Flage, 22 N. Dak. 53, 132 N. W. 637.

A contract to convey to "G and his associates" will not be enforced in favor of one who claims to be an assignee and not one of the "associates" contemplated in the original agreement. Goodwin *v.* Rosser, 64 Fla. 299, 60 So. 341.

[3] Sir William Grant in Williams *v.* Steward, 3 Meriv. R. 491.

[4] See Com. Dig. Chancery, 4 N. 3, Rent, which cites Davy *v.* Davy, 1 Cas. Ch. 145, Palmer *v.* Whettenhall, 1 Cas. Ch. 184, 185.

[5] Davis *v.* Hone, 2 Sch. & Lefr. 347, 348; Lennon *v.* Napper, 2 Sch. & Lefr. 684; Sugden on Vendors, ch. 4, § 2, p. 192 (7th ed.); 1 Sugden on Vendors, ch. 4, § 3, n. 14, p. 330 (10th ed.); Id. n. 35, p. 340; Id. n. 59, p. 351; Alley *v.* Deschamps, 13 Ves. 228, 229.

[6] See Sugden on Vendors, ch. 4, § 2, pp. 200 to 202 (7th ed.); 3 Wooddes. Lect. 58, p. 463; Williams *v.* Steward, 3 Meriv. R. 486.

where Courts of Equity would yet not decree a specific performance; and on the other hand damages may not be recoverable at law, and yet relief would be granted in equity.[1]

§ 1026. **The Remedy Is Not a Matter of Mere Right.** — In truth the exercise of this whole branch of Equity Jurisprudence respecting the rescission and specific performance of contracts is not a matter of right in either party, but it is a matter of discretion in the court;[2] not indeed of arbitrary or capricious discretion[3] dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties.[4] On

[1] Weale *v.* West Middlesex Water Works Company, 1 Jac. & Walk. R. 370.

"It is true there is a maxim that equity will not enforce the specific performance of an agreement upon which an action will not lie at law for damages; and anciently it was the practice to send the party to law, there to establish the validity of the contract, before he was allowed to proceed in equity. That practice has fallen into disuse, and the maxim never meant more than that the contract must be such as the law would have recognized if sued upon in proper time and under proper circumstances. If the rule were that equity would not entertain a suit for the specific performance of an agreement except where, at the same instant, a suit might be sustained at law for damages, there would be no ground for the existence of another well-known maxim, that time is not of the essence of a contract in equity. Upon the efficacy of this maxim it often happens that a party, by a neglect of a strict compliance with his stipulations in a covenant or other contract, with regard to time, loses his right to sue at law, while he may yet have a remedy by a suit for a specific execution in equity. Walker *v.* Allen, 50 N. C. 58; Falls *v.* Carpenter, 21 N. C. 237." Mr. Justice Battle in delivering judgment in White *v.* Butcher, 59 N. C. 231.

[2] City of London *v.* Nash, 1 Ves. 13; s. c. 3 Atk. 512; Joynes *v.* Statham, 3 Atk. 389; Underwood *v.* Hitchcox, 1 Ves. 279; Clowes *v.* Higginson, 1 Ves. & B. 527; 1 Madd. Ch. Pr. 287; 1 Fonbl. Eq. B. 1, ch. 3, § 9, note (*i*); Sugden on Vendors (7th ed.), ch. 4, § 2, p. 191; 1 Sugden on Vendors, ch. 4, § 3, n. 14, p. 330 (10th ed.); St. John *v.* Benedict, 6 John. Ch. Rep. 111; Seymour *v.* Delancey, 6 John. Ch. R. 222.

[3] Allen *v.* Woodruff, 96 Ill. 11.

[4] See 3 Wooddes. Lect. 58, p. 466; White *v.* Damon, 7 Ves. 35; Buckle *v.* Mitchell, 18 Ves. 111; Mason *v.* Armitage, 13 Ves. 37; Clowes *v.* Higginson, 1 Ves. & Beam. 527; Moore *v.* Blake, 1 B. & Beatt. 69; Howel *v.* George, 1 Madd. R. 9; Sugden on Vendors, ch. 4, § 2, p. 191 (7th ed.); 1 Sugden on Vendors, ch. 4, § 3, n. 14, p. 330 (10th ed.); Wedgewood *v.* Adams, 6 Beav. R. 600.

Moore *v.* Crowder, 72 Ala. 79; Stearns *v.* Beckham, 31 Gratt. 379; Taylor *v.* Williams, 45 Mo. 80; Fish *v.* Lightner, 44 Mo. 268; Quinn *v.* Roath, 37 Conn. 16; McComas *v.* Easley, 21 Gratt. 23, 29; Hale *v.* Wil-

this account it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases; and therefore it would be a waste of time to attempt to limit the principles or the exceptions which the complicated transactions of the parties and the ever-changing habits of society may at different times and under different circumstances require the court to recognize or consider. The most that can be done is to bring under review some of the leading principles and exceptions which the past times have furnished as guides to direct and aid our future inquiries.

§ 1027. [**Specific Performance Is Not Applied as a Matter of Course.** — The remedy of specific performance of a contract is not applied in any event as a matter of course. It is not always a right, but rests in the sound, unbiased discretion of the court. It will not be withheld when no hardship or injustice will result, and where an action at law for damages will be inadequate. The discretion with which the chancellor is vested is a legal, and not arbitrary, discretion. He may only exercise his discretion and deny relief when the facts are doubtful, or the contract or some of its terms are so uncertain that injustice might arise.[1] A Court of Equity enforces a contract according to its terms, when to do so would violate the real object of the contract in the minds of the parties when the contract was made, and produce a result not contemplated at the time of the execution of the agreement. Numerous cases hold that the relief will be denied where the contract is harsh, uncertain, unjust, oppressive, and regardless of actual fraud.[2] Courts usually scrutinize with

kinson, Ib. 75, 79; Humbard *v.* Humbard, 3 Head, 100; Auter *v.* Miller, 18 Iowa, 405; Lowry *v.* Buffington, 6 W. Va. 249; Aston *v.* Robinson, 49 Miss. 348; Sherman *v.* Wright, 49 N. Y. 227.

It is not a happy use of language (unless explained, as by the author) to speak of the "discretion" of a chancellor in a matter of specific performance, for that might imply, as in other cases, that no appeal could be taken. The authorities show that the chancellor has no "discretion" in the face of the law; he is bound by the law always. If the equity is clear, he must grant or refuse the plaintiff's prayer, according as it is within or without the law; if the equity is not clear, under all the facts and circumstances taken together, he must refuse the relief sought. There is no more "discretion" in the latter part of the proposition than in the former.

[1] Harper *v.* Virginian Ry. Co., 86 S. E. 919; Wolf *v.* Great Falls Water Co., 15 Mont. 49, 38 Pac. 115; Horner *v.* Woodland, 88 Md. 511, 41 Atl. 1079; Nollsperger *v.* Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221; Newton *v.* Wooley, 105 Fed. 541; Bluegrass Realty Co. *v.* Shelton, 148 Ky. 666, 147 S. W. 33; Woollums *v.* Horsley, 93 Ky. 582, 20 S. W. 781, 14 Ky. L. Rep. 642.

[2] Rudisill *v.* Whitener, 146 N. C. 410, 59 S. E. 995; Baskcomb *v.*

care cases wherein specific performance of contracts for the sale of real estate is sought, and especially those involving verbal contracts even when accompanied by part performance — possession and improvements.[1]]

§ 1028. **Performance of Contract to Convey Lands in Foreign Country.** — Let us now in the next place proceed to the consideration of the remaining and far most numerous class of cases in which Courts of Equity are called upon to decree a specific performance of contracts; that is to say, contracts respecting land.[2] In examining this subject our attention will almost exclusively be drawn to cases of contracts respecting land situate in the same country where the suit is brought. It may therefore be proper to premise that a bill for a specific performance of a contract respecting land may be entertained by Courts of Equity, although the land is situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court. The ground of this jurisdiction is that Courts of Equity have authority to act upon the person: "Æquitas agit in personam."[3] And although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land,

Beckwith, 8 L. R. Eq. Cas. 100; Woolam *v.* Hearn, 7 Ves. 211 (2 White & Tudor's L. C. 491); Calverly *v.* Williams, 1 Ves. Jr. 201; Love *v.* Welch, 97 N. C. 200, 2 S. E. 242; Semour *v.* Delancy, 3 Cowan, 445, 15 Am. Dec. 270. Sale of an expectancy, as the interest which child has in estate of ancestor will be decreed. Boles *v.* Caudle, 133 N. C. 534, 45 S. E. 835; McDonald *v.* McDonald, 58 N. C. 211, 75 Am. Dec. 434; Foster *v.* Hackett, 112 N. C. 556, 17 S. E. 426; Wright *v.* Brown, 116 N. C. 28, 22 S. E. 313; Kornegay *v.* Miller, 137 N. C. 667, 50 S. E. 315; Holroyd *v.* Marshall, 10 H. L. Cas. 209. Contract upon sufficient consideration, to devise land, is valid, and may be enforced in equity. Price *v.* Price, 133 N. C. 503, 45 S. E. 855; Stapilton *v.* Stapilton, 1 Atk. 2 (2 White & Tudor's L. C. 1675, star p. 824). Fair compromises, especially between members of a family, are favorably looked upon by courts of equity, their object being to prevent litigation, and to preserve the peace and property of families. Price *v.* Price, 133 N. C. 505, 45 S. E. 855. George Melius Co. *v.* Motion Picture Patents Co., 190 Fed. 859, affirmed 200 Fed. 342, 118 C. C. A. 448, where contract was procured through false and fraudulent representations; Solomon *v.* Shewitz, 185 Mich. 620, 152 N. W. 196.

[1] Gallaher *v.* Gallaher, 31 W. Va. 9, 5 S. E. 297; Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391; McCulley *v.* McLean, 48 W. Va. 625, 37 S. E. 559; Knight *v.* Knight, 51 W. Va. 518, 41 S. E. 905; Bell *v.* Whitesell, 64 W. Va. 1, 60 S. E. 879; Pickens *v.* Stout, 67 W. Va. 422, 68 S. E. 354; Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742; Martin *v.* Martin, 112 Va. 731, 72 S. E. 680.

[2] For the sake of brevity land only is mentioned; but the same principles will apply generally to all other real property and incorporeal hereditaments savoring of the realty.

[3] Toller *v.* Carteret, 2 Vern. 495; Sutton *v.* Fowler, 9 Paige, R. 280.

and compel him to perform his agreement according to conscience and good faith.[1] Accordingly it was held by Lord Hardwicke that the specific performance of a contract respecting the boundaries of the colonies of Pennsylvania and Maryland, entered into by the proprietaries, might be decreed by the Court of Chancery

[1] Com. Dig. Chancery, 3 X. 4 W. 27; Lord Cranstown *v.* Johnston, 3 Ves. Jr. 182; Massie *v.* Watts, 10 U. S. 148, 3 L. Ed. 181.

See Carver *v.* Peck, 131 Mass. 291; Dehon *v.* Foster, 4 Allen, 545; s. c. 7 Allen, 57; Pingree *v.* Coffin, 12 Gray, 288; Penn *v.* Hayward, 14 Ohio St. 302; Muller *v.* Dows, 94 U. S. 444, 24 L. Ed. 76, 207, 449; Blount *v.* Blount, 1 Hawks, 365, 376; Loney *v.* Penniman, 43 Md. 130, 133; Olney *v.* Eaton, 66 Mo. 563; Keyser *v.* Rice, 47 Md. 203. Thus a non-resident even, if served with process within the jurisdiction, especially after appearing and answering without objection to the authority of the court, may be compelled to perform a contract to assign a bond for the conveyance of lands in another State. Pingree *v.* Coffin, 12 Gray, 288; Penn *v.* Hayward, 14 Ohio St. 302.

But a Court of Equity cannot bind the title to lands lying in another State except according to the laws of that State, since it is for the State in which land is situated to declare how it may be conveyed. Blount *v.* Blount, 1 Hawks, 365, 376; Waterhouse *v.* Stansfield, 9 Hare, 234. See Loney *v.* Penniman, 43 Md. 130. Hence an executor in North Carolina cannot be required by the courts of that State to sell land of the testator in Tennessee, though the will give him full authority to do so. Blount *v.* Blount, supra. For the subject of the proposed action must be such that the court can administer the relief. Morris *v.* Remington, 1 Pars. Eq. 387. It is said that a domestic corporation cannot be compelled to do acts in another State. Port Royal Co. *v.* Hammond, 58 Ga. 523.

It is no objection however to specific enforcement in general that the contract was made and is to be performed in another State. Myres *v.* De Mier, 4 Daly, 343. Provided it be one that would be enforceable where it is to be performed. Waterhouse *v.* Stansfield, 9 Hare, 234. If not so enforceable, the domestic courts will not take jurisdiction even of the proceeds of a sale of such lands, though brought within the territorial jurisdiction. Ib.

It is upon this ground, it seems, that a contract made by a railroad company with a construction company, both foreign corporations, and the contract performable in another State, will not be specifically enforced. Nor will a citizen of the State of the forum in which the suit is attempted be restrained in such a case from disposing of stock and bonds of the railroad company in violation of the terms of the contract with the construction company. The court could not "assume to direct how, when, or where the railway shall be constructed, nor give any direction in relation thereto, nor enforce the obligations which the construction company has undertaken to perform in regard to it." Kansas Const. Co. *v.* Topeka R. Co., 135 Mass. 34, 39. See Smith *v.* New York Ins. Co., 14 Allen, 336. Nor does the fact that the defendant has appeared give the court jurisdiction for any such purpose. Case first cited.

The rule authorizing specific execution of contracts made abroad will apply a fortiori to contracts made in another county of the State in which the suit is brought, over which county the court's jurisdiction does not extend. Davis *v.* Parker, 14 Allen, 94. Provided, as in the case of proposed action in regard to property without the State, the relief sought is

in England.[1] The like doctrine was held in the case of an agreement respecting the Isle of Man, where a specific performance was decreed by the Court of Chancery in England, although the Isle was without the realm.[2] In like manner in a contract respecting lands in Ireland a specific performance has been decreed.[3]

§ 1029. **It Is Not Necessary That Land be Situate within the Jurisdiction of the State.** — The proposition may therefore be laid down in the most general form that to entitle a Court of Equity to maintain a bill for the specific performance of a contract respecting land it is not necessary that the land should be situate within the jurisdiction of the state or country where the suit is brought. It is sufficient that the parties to be affected and bound by the decree are resident within the state or country where the suit is brought; for in all suits in equity the primary decree is in personam and not in rem.[4] The incapacity to enforce the decree in rem constitutes no objection to the right to entertain such a suit.[5] Where indeed the lands lie within the reach of the

of such a nature that the court is able to administer the same in the given case; for the mere fact that the parties are lawfully before the court will not of necessity give jurisdiction. Morris *v.* Remington, 1 Pars. Eq. 387; Carteret *v.* Petty, 2 Swanst. 324, note. "All this," said Lord Nottingham, in Carteret *v.* Petty, speaking of jurisdiction in cases of extraterritorial torts, "is to be understood of cases where imprisonment of the person is the most proper means to effect that which is decreed to be done, viz. the payment of money, making a conveyance, and the like. But where no obedience of the person, or any act of his, can sufficiently execute such a decree, there it is in vain to hold such a plea, and thus in this case." And this, which was said of a bill for partition of lands in Ireland, was quoted with effect in Morris *v.* Remington, 1 Pars. Eq. 387, 391, against a bill brought in Philadelphia, praying a Court of Equity there to restrain the defendant from erecting a nuisance in another county, contrary to the agreement of the parties. The court said that to give a complete remedy in such a case it must not only restrain and prevent the continuance of the nuisance, but must order its removal; and this could only be done where the locus was within the court's jurisdiction, which was not the case here.

[1] Penn *v.* Lord Baltimore, 1 Ves. 444; Portarlington *v.* Soulby, 3 Mylne & Keen, 104.

[2] Earl of Athol *v.* Earl of Derby, 1 Ch. Cas. 221; Com. Dig. Chancery, 3 X. 4 W. 27; Portarlington *v.* Soulby, 3 Mylne & Keen, 104.

[3] Archer *v.* Preston, cited 1 Vern. 77; s. c. 1 Eq. Abr. 133.

[4] Newland on Contr. ch. 16, p. 305; Com. Dig. Chancery, 3 X. 4 W. 27; Penn. *v.* Lord Baltimore, 1 Ves. 447, 454; Archer *v.* Preston, 1 Eq. Abr. 133; s. c. 1 Vern. 77, and Mr. Raithby's note; Lord Cranstown *v.* Johnston, 3 Ves. Jr. 182; Jackson *v.* Petrie, 10 Ves. 164; Foster *v.* Vassall, 3 Atk. 589; Pike *v.* Hoare, 2 Eden, R. 185, and note; White *v.* Hall, 12 Ves. 323; Massie *v.* Watts, 10 U. S. 148, 3 L. Ed. 181; Story on Conflict of Laws, §§ 544, 545; Ward *v.* Arredondo, 1 Hopk. R. 213; Mead *v.* Merritt, 2 Paige, R. 402; Sutton *v.* Fowler, 9 Paige, R. 280.

[5] Earl of Arglasse *v.* Muschamp, 1 Vern. 135.

process of the court, Courts of Equity will not exclusively rely on proceedings in personam, but will put the successful party in possession of the lands if the other party remains obstinate and refuses to comply with the decree.[1]

§ 1030. **Subdivision of This Class of Cases.** — But to return to the class of cases where a specific performance is sought on contracts respecting land situate in the country where the suit is brought. This class may be subdivided into two heads: (1) where relief is sought upon parol contracts within the Statute of Frauds and Perjuries (as it is called); and (2) where it is sought under written contracts, not falling within the scope of that statute.

§ 1031. **Jurisdiction as to Chattels Is Limited to Special Circumstances.** — It has been already suggested that Courts of Equity are in the habit of interposing to grant relief in cases of contracts respecting real property to a far greater extent than in cases respecting personal property, not indeed upon the ground of any distinction founded upon the mere nature of the property as real or as personal, but at the same time not wholly excluding the consideration of such a distinction. In regard to contracts respecting personal estate it is (as has been already intimated) generally true that no particular or peculiar value is attached to any one thing over another of the same kind, and that a compensation in damages meets the full merits as well as the full objects of the contracts. If a man contracts for the purchase of a hundred bales of cotton, or boxes of sugar, or bags of coffee, of a particular description or quality, if the contract is not specifically performed, he may generally, with a sum equal to the market price, purchase other goods of the same kind of a like description and quality, and thus completely obtain his object, and indemnify himself against loss.[2] But in contracts respecting a specific messuage or parcel of land the same considerations do not ordinarily apply. The locality, character, vicinage, soil, easements or accommodations of the land generally may give it a peculiar and special value in the eyes of the purchaser, so that it cannot be replaced by other land of the same precise value, but not having the same precise local conveniences or accommodations;[3] and

[1] Earl of Arglasse *v.* Muschamp, 1 Vern. 135; Earl of Kildare *v.* Eustace, 1 Vern. 421; Penn *v.* Lord Baltimore, 1 Ves. 454; Hide *v.* Pettit, 1 Ch. Cas. 91; Newland on Contracts, ch. 16, pp. 305, 306; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*q*); Roberdeau *v.* Rous, 1 Atk. 543; Stribley *v.* Hawkie, 3 Atk. 275.

[2] Ante, §§ 992, 993, 994 to 1005.

[3] Adderley *v.* Dixon, 1 Sim. & Stu. 607; ante, § 994.

therefore a compensation in damages would not be adequate relief. It would not attain the object desired, and it would generally frustrate the plans of the purchaser. And hence it is that the jurisdiction of Courts of Equity to decree specific performance is in cases of contracts respecting land universally maintained; whereas in cases respecting chattels it is limited to special circumstances.

§ 1032. **Courts of Equity Will Not Permit the Forms of Law to Be Made the Instruments of Injustice.** — Courts of Equity too in cases of contracts respecting real property have been in the habit of granting this relief, not only to a greater extent but also under circumstances far more various and more indulgent than in cases of contracts respecting chattels; for they do not confine themselves to cases of a strict legal title to relief. Another principle equally beneficial is well known and established, that Courts of Equity will not permit the forms of law to be made the instruments of injustice, and they will therefore interpose against parties attempting to avail themselves of the rigid rules of law for unconscientious purposes. When therefore advantage is taken of a circumstance that does not admit of a strict performance in the contract, if the failure is not in a matter of substance, Courts of Equity will interfere.[1]

§ 1033. **Specific Performance Not Allowed at Instance of Vendor Where His Title Is Imperfect.** — On the other hand as the interference of Courts of Equity is discretionary, they will not enforce a specific performance of such contracts at the instance of the vendor, where his title is involved in difficulties which cannot be removed, although perhaps at law an action might be maintainable against the defendant for damages, for his not completing his purchase.[2]

§ 1034. **Specific Performance Allowed Only Where It Would Be Strictly Equitable to Make the Decree.** — Indeed the proposition may be more generally stated, that Courts of Equity will not interfere to decree a specific performance, except in cases where it would be strictly equitable to make such a decree. There is no pretence to say that it is the doctrine of Courts of Equity to carry into specific execution every contract in all cases where

[1] Halsey *v.* Grant, 13 Ves. 76, 77; post, §§ 1063 to 1065.

[2] 1 Fonbl. Eq. B. 1, ch. 3, § 9, note (*i*); Cooper *v.* Denne, 4 Bro. Ch. R. 80; s. c. 1 Ves. Jr. 565. Specific performance has been denied when the plaintiff's title, though probably good, was not so clear that the defendant ought to be compelled to take it and assume the risk of possible litigation with persons then before the court. Butts *v.* Andrews, 136 Mass. 221, following Cunningham *v.* Blake, 121 Mass. 333, and citing Jeffries *v.* Jeffries, 117 Mass. 184; Hayes *v.* Harmony Grove Cem., 108 Mass. 400; Pyrke *v.* Waddingham, 10 Hare, 1.

that is found to be the legal intention and effect of the contract between the parties. If in any case the parties have so dealt with each other in relation to the subject-matter of a contract that the object of one party is defeated while the other party is at liberty to do as he pleases in relation to that very object, or if in fact the character and condition of the property to which the contract is attached have been so altered that the terms and restrictions of it are no longer applicable to the existing state of things, — in such cases Courts of Equity will not grant any relief, but will leave the parties to their remedy at law.[1]

§ 1035. **No Relief Granted Where Contract Founded in Fraud.** — Upon grounds still stronger Courts of Equity will not proceed to decree a specific performance where the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension, or where from a change of circumstances or otherwise it would be unconscientious to enforce it.[2] But upon this topic we shall have occasion again to touch hereafter.[3]

§ 1036. **The Form of the Instrument Is Not Important.** — Where indeed a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for Courts of Equity to decree a specific performance of it as it is for a Court of Law to give damages for the breach of it.[4] And generally it may be stated that Courts of Equity will decree a specific performance where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration,[5] and is capable of being performed,[6] but not, other-

[1] Duke of Bedford *v.* British Museum, 2 Mylne & Keen, 552, 567, 569, 571, 579; Taylor *v.* Longworth, 39 U. S. 173, 10 L. Ed. 405.

[2] Bank of Alexandria *v.* Lynn, 26 U. S. 376, 7 L. Ed. 185; Cathcart *v.* Robinson, 30 U. S. 264, 8 L. Ed. 120; Sugden on Vendors, ch. 3, § 4, pp. 125 to 135, 7th ed.; Harnett *v.* Yeilding, 2 Sch. & Lefr. 554, 555; post, §§ 1055, 1056.

[3] Post, §§ 1055 to 1063.

[4] Hall *v.* Warren, 9 Ves. 608; Greenaway *v.* Adams, 12 Ves. 395, 400; King *v.* Hamilton, 29 U. S. 311, 7 L. Ed. 869. A specific performance will not be decreed upon a contract in favor of an infant, because the remedy is not mutual. Flight *v.* Bolland, 4 Russ. R. 298.

See Columbia College *v.* Thacher, 87 N. Y. 311. St. Paul Div. *v.* Brown, 9 Minn. 157; Port Clinton R. Co. *v.* Cleveland R. Co., 13 Ohio St. 544, 559. A vendor cannot object to convey to a purchaser in parcels by separate conveyance at one and the same time if the purchaser will bear the extra expense. Egmont *v.* Smith, 6 Ch. D. 469. But qu. whether the purchaser could require conveyances at different times. Ib.

[5] Sugden on Vendors, ch. 4, § 2, p. 191 (7th ed.); German *v.* Machin, 6 Paige, 288.

[6] Denton *v.* Stewart, 1 Cox, R. 258; Greenaway *v.* Adams, 12 Ves. 395, 400; Cathcart *v.* Robinson, 30 U. S. 264, 8 L. Ed. 120.

wise.[1] The form of the instrument by which the contract appears is wholly unimportant. Thus if the contract appears only in the condition of a bond secured by a penalty, the court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty.[2] On the other hand if Courts of Equity refuse to interfere, they inflict no injury upon the plaintiff; for no decision is made which affects his right to proceed at law for any redress by way of damages to which he may be entitled. The whole effect of the dismissal of his suit is that he is barred of any equitable relief.

§ 1037. **Reference Will Be Had to the Nature of the Transaction and the Character of the Parties.** — Courts of Equity will also in allowing or denying a specific performance look not only to the nature of the transaction but also to the character of the parties who have entered into the contract. Thus if the purchase be made by trustees for the benefit of a cestui que trust, and there be a substantial misdescription of the premises, Courts of Equity will not enforce against them a specific performance with compensation, as being prejudicial to the cestui que trust and incapable of being ascertained.[3]

§ 1038. **Application of the Statute of Frauds.** — With these explanations in view let us now proceed to examine in the first place in what cases a specific performance will be decreed of contracts respecting lands where they are within the provisions of the Statute of Frauds and Perjuries.[4] That statute[5] which has been generally re-enacted or adopted in America declares, "That all interests in lands, tenements, and hereditaments, except leases for three years, not put in writing and signed by the parties or their agents authorized by writing, shall not have nor be deemed in law or equity to have any greater force or effect than leases on estates at will." It further enacts, "That no action shall be brought whereby to charge any person upon any agreement

[1] Moore *v.* Crowder, 72 Ala. 79; Irwin *v.* Baily, Ib. 467.

[2] See Logan *v.* Wienholt, 7 Bligh, R. 1, 49, 50; Ensign *v.* Kellogg, 4 Pick. 1.

[3] White *v.* Cudden, 8 Clarke & Fin. 766.

[4] Throughout this discussion I have freely availed myself of Mr. Wooddeson's excellent lecture upon the same subject. See 3 Wooddes. Lect. (Lect. 57), p. 420, &c. to p. 443; of Sir Edward Sugden's learned treatise on Vendors and Purchasers, ch. 4, § 2, pp. 99 to 120 (7th ed.); 1 Sugden on Vendors, ch. 4, § 3, pp. 326 to 354 (10th ed.); of Mr. Newland on Contracts, ch. 10, and of the notes of Mr. Fonblanque (1 Fonbl. Eq. B. 1, ch. 3, § 8, notes (*a*), (*b*), (*c*), (*d*), (*e*)).

[5] 29 Car. II. ch. 3.

made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party or his lawful agent." By the same statute declarations of trust created by the parties are to be in writing; but trusts resulting by implication of law are to remain as they stood before the passing of the act.[1]

§ 1039. **Same.** — The objects of this statute are such as the very title indicates, to prevent the fraudulent setting up of pretended agreements and then supporting them by perjury. But besides these direct objects there is a manifest policy in requiring all contracts of an important nature to be reduced to writing, since otherwise, from the imperfection of memory and the honest mistakes of witnesses, it must often happen either that the specific contract is incapable of exact proof, or that it is unintentionally varied from its precise original terms. So sensible were Courts of Equity of these mischiefs that they constantly refused, before the statute, to decree a specific performance of parol contracts unless confessed by the party in his answer, or they are in part performed.[2]

[1] 3 Wooddes Lect. 57, p. 420.

[2] Greenleaf on Evidence, § 262. See Rondeau *v.* Wyatt, 2 H. Bl. 68; Child *v.* Comber, 3 Swanst. R. 423, note; Pembroke *v.* Thorpe, 3 Swanst. R. 437, note. Sir Edward Sugden, in his learned treatise on Vendors and Purchasers, ch. 4, § 2, pp. 107, 108 (7th ed.), has reviewed the cases and stated the result. I shall give it in his own words: "There are four cases in Tothill, which arose previously to the Statute of Frauds, and appear to be applicable to the point under consideration; for equity, even before the Statute of Frauds, would not execute a mere parol agreement, not in part performed. In the first case (Williams *v.* Neville, Tothill, 135), which was heard in the 38th of Eliz., relief was denied, 'because it was but a preparation for an action upon the case.' In the two next cases (Ferne *v.* Bullosk, Toth. 206, 228; Clark *v.* Hackwell, ibid.), which came on in the 9th of Jac. I., parol agreements were enforced apparently on account of the payment of very trifling parts of the purchase-money; but the particular circumstances of these cases do not appear. The last case reported in Tothill (Miller *v.* Blandist, Toth. 85) was decided in the 30th of Jac. I., and the facts are distinctly stated. The bill was to be relieved concerning a promise to assure land of inheritance, of which there had not been any execution, but only 55*s.* paid in hand, and the bill was dismissed. This point received a similar determination in the next case on the subject before the statute, which is reported in 1 Chan. Rep., and was determined in the 15th of Charles II. (Simmons *v.* Cornelius, 1 Chan. Rep. 128). So the same doctrine was adhered to in a case which occurred three years afterwards, and is reported in Freeman (Anon. 2

§ 1040. **Same.** — It is obvious that Courts of Equity are bound as much as Courts of Law by the provisions of this statute; and therefore they are not at liberty to disregard them.[1] That they do

Freem. R. 128); for although a parol agreement for a house, with 20*s.* paid, was decreed without further execution proved, yet it appears by the judgment that the relief would not have been granted if the defendant, the vendor, had demurred to the bill, which he had neglected to do, but had proceeded to proof. The last case I have met with, previously to the statute, was decided in the 21st of Car. II. (Voll *v.* Smith, 3 Chan. R. 16), and there a parol agreement upon which only 20*s.* were paid was carried into specific execution. This case probably turned, like the one immediately preceding it, on the neglect of the defendants to demur to the bill. It must be admitted that the foregoing decisions are not easily reconcilable; yet the result of them clearly is, that payment of a trifling part of the purchase-money was not a part performance of a parol agreement. Whether payment of a considerable sum would have availed a purchaser does not appear. In Toth. 67, a case is thus stated: 'Moyl *v.* Horne, by reason 200*l.* was deposited towards payment, decreed.' This case may perhaps be deemed an authority, that prior to the statute the payment of a substantial part of the purchase-money would have enabled equity to specifically perform a parol agreement; but it certainly is too vague to be relied on." Id. p. 120.

Specific performance will be decreed only when the contract is in writing, is certain and definite in all of its provisions, is fair and mutual in its terms, is for an adequate consideration, and is capable of being performed. Cline *v.* Strong, 52 Ind. App. 286, 100 N. E. 569; Moode *v.* Howe, 17 S. Dak. 545, 97 N. W. 841; Dunsmore *v.* Lyle, 87 Va. 391, 12 S. E. 610; Henderson *v.* Henrie, 68 W. Va. 562, 71 S. E. 172, 34 L. R. A. (N. S.) 628; Safe Deposit Co. *v.* Diamond Coal Co., 234 Pa. 100, 83 Atl. 54; Mackey *v.* Magnon, 12 Colo. App. 137, 54 Pac. 907, affirmed 28 Colo. App. 100, 62 Pac. 945; Etheridge *v.* Woodard, 106 Ga. 251, 32 S. E. 122; Ruff Brewing Co. *v.* Schanz, 114 Ill. App. 508; Francis *v.* Francis, 122 Mich. 10, 80 N. W. 795, 6 Detroit Leg. N. 626; Bradt *v.* Hartson, 4 Neb. 889, 96 N. W. 1008; Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694; Bullenkamp *v.* Bullenkamp, 34 App. Div. 193, 54 N. Y. Supp. 482; Davis *v.* Yelton, 127 N. C. 348, 37 S. E. 464.

The contract will be enforced, where it is admitted to have been made by parol, and the Statute of Frauds is not pleaded. Ranck *v.* Wickwire, 255 Mo. 42, 164 S. W. 460; Maybee *v.* Moore, 90 Mo. 340, 2 S. W. 471; Moore *v.* Ward, 71 W. Va. 393, 76 S. E. 807.

Written authority of agent to make sale and bind the principal must be shown before the contract is enforceable. Bruns *v.* Huseman, 266 Ill. 212, 107 N. E. 462; Hughes *v.* Carne, 135 Ill. 519, 26 N. E. 517; Kelly *v.* Fischer, 263 Ill. 184, 105 N. E. 21.

An oral contract to convey land is unenforceable for the conveyance of land, in the absence of part performance. Reel *v.* Reel, 59 W. Va. 106, 52 S. E. 1023.

Where part performance of oral contract to convey, is relied upon, and the evidence of the making the contract is not strong, the bar of the statute will prevail. Stone *v.* Hill, 52 W. Va. 63, 43 S. E. 92.

[1] Wheeler *v.* Reynolds, 66 N. Y. 227. It seems that a bill cannot be maintained to enforce the specific performance of a duty to make a contract in writing, which would otherwise be within the Statute of Frauds. Marcus *v.* Boston, 136 Mass. 350.

however interfere in some cases within the reach of the statute is equally certain. But they do so not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects or collateral to it and independent of it.

§ 1041. **Enforcement of Contract Set Out in Bill and Confessed in the Answer.** — In the first place then Courts of Equity will enforce a specific performance of a contract within the statute, not in writing, where it is fully set forth in the bill and is confessed by the answer of the defendant.[1] The reason given for this decision is that the statute is designed to guard against fraud and perjury; and in such a case there can be no danger of that sort. The case then is taken entirely out of the mischief intended to be guarded against by the statute.[2] Perhaps another reason might fairly be added; and that is that the agreement, although originally by parol, is now, in part evidenced by writing under the signature of the party, which is a complete compliance with the terms of the statute. If such an agreement were originally by parol, but it was afterwards reduced to writing by the parties, no one would doubt its obligatory force.[3] Indeed if the defendant does

[1] Attorney-Gen. *v.* Sitwell, 1 Younge & Coll. R. 583. In such a case if the defendant should die before a decree, upon a bill of revivor against the heir a specific performance by him would be decreed (Attorney-Gen. *v.* Day, 1 Ves. 221); for the principle goes throughout, and equally binds the representative as well as the ancestor. Ibid.; Lacon *v.* Mertins, 3 Atk. 3; Ranch *v.* Wickwire, 255 Mo. 42, 164 S. W. 460; Maybee *v.* Moore, 90 Mo. 340, 2 S. W. 471; Moore *v.* Ward, 71 W. Va. 393, 76 S. E. 807; Houser *v.* Lamont, 55 Pa. St. 311; Artz *v.* Grove, 21 Md. 456; Kirksey *v.* Kirksey, 30 Ga. 156.

[2] Attorney-Gen. *v.* Day, 1 Ves. 221; Croyston *v.* Baynes, 1 Eq. Abridg. 19; s. c. Prec. Ch. 208; Symondson *v.* Tweed, Prec. Ch. 374; Lacon *v.* Mertins, 3 Atk. 3; Child *v.* Godolphin, 1 Dick. R. 39; s. c. cited 2 Bro. Ch. R. 564; Gunter *v.* Halsey, Ambler, R. 586; Whitchurch *v.* Bevis, 2 Bro. Ch. R. 566, 567; Cottington *v.* Fletcher, 2 Atk. 155; Spurrier *v.* Fitzgerald, 6 Ves. 548, 555; Gilb. Lex Prætor. 237, 238; Attorney-Gen. *v.* Sitwell, 1 Younge & Coll. R. 583.

[3] Lord Bathurst however, in Eyre *v.* Popham (Lofft's Rep. 808, 809), held that a parol agreement not in part performed could not be carried into execution, although confessed by the answer, saying that the court could not repeal the Statute of Frauds. See Sugden on Vendors, ch. 4, § 2, p. 99 (7th ed.). The London and Birmingham Railway Company *v.* Winter, 1 Craig & Phillips, 57, 62. Lord Rosslyn, in Rondeau *v.* Wyatt (2 H. Bl. 68), speaking on the subject of the cases of parol agreements, confessed by the answer of the defendant, said: "It is said in these cases, and has been adopted in the argument, that when the defendant confesses the agreement there is no danger of perjury, which was the only thing the statute intended to prevent. But this seems to be very bad reasoning; for the calling upon a party to answer a parol agreement certainly lays

not insist on the defence he may fairly be deemed to waive it; and the rule is, "Quisque renuntiare potest juri pro se introducto." [1]

§ 1042. **Same.** — The case which we have now been considering is that of a parol agreement confessed by the answer, where the answer does not insist upon the Statute of Frauds as a defence. But suppose the answer confesses the parol agreement and insists upon the Statute of Frauds as a defence and bar to the suit; the question then arises whether Courts of Equity will allow the statute, under such circumstances, as a bar; or whether they will, notwithstanding the statute, decree a specific performance upon the ground of the confession. Upon this question there has been no small conflict of judicial opinion. Lord Macclesfield expressly decreed a specific performance where the parol agreement was confessed by the answer and the Statute of Frauds was insisted on as a defence.[2] Lord Hardwicke appears to have entertained the same opinion, although perhaps he was not called upon finally to adjudicate it.[3]

§ 1043. **Same.** — But later judges in equity have expressed a strong dissatisfaction with this opinion; and it may now be deemed

him under a great temptation to commit perjury. But though the preventing perjury was one, it was not the sole object of the statute. Another object was to lay down a clear and positive rule to determine when the contract of sale should be complete." This last reason has great force; but it is questionable if the statute had in view so much the prevention of perjury in the party defendant as the prevention of it in witnesses. There is always some temptation in the defendant to commit perjury in his answer in all cases where his interest is concerned; nevertheless he is required generally to answer on oath all facts charged in the bill. Mr. Fonblanque's note on this subject is very able and satisfactory. 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*d*).

[1] Newland on Contracts, ch. 10, p. 201; Rondeau *v.* Wyatt, 2 H. Bl. 68; Spurrier *v.* Fitzgerald, 6 Ves. 548; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*d*); Flagg *v.* Mann, 2 Sumner's R. 489, 528, 529.

[2] Child *v.* Godolphin, 1 Dick. 39; s. c. cited 2 Bro. Ch. R. 566; Child *v.* Comber, 3 Swanst. R. 423, note.

[3] Cottington *v.* Fletcher, 2 Atk. 155, 156; Lacon *v.* Mertins, 3 Atk. 3. It is not quite certain that this was Lord Hardwicke's opinion. The case of Cottington *v.* Fletcher (2 Atk. R. 156) might perhaps have turned upon a point of pleading. But the dictum in Lacon *v.* Mertins (3 Atk. 3) seems direct. Lord Loughborough, in Moore *v.* Edwards (4 Ves. 24), said: "There is a case in Atkyns that misleads people, where Lord Hardwicke is stated to have overruled the defence upon the statute, merely on the ground that the agreement was admitted. I had occasion to look into that; and it is a complete misstatement. It appears by Lord Hardwicke's own notes that it was upon the agreement having been in part executed that he determined the case." See also Sugden on Vendors, ch. 4, § 2, p. 100 (7th ed.); Evans *v.* Harris, 2 V. & Beam. R. 361; Morrison *v.* Turnour, 18 Ves. 175; Mitf. Eq. Pl. by Jeremy, 265 to 268.

to be entirely overruled, and the doctrine firmly established, that even where the answer confesses the parol agreement, if it insists by way of defence upon the protection of the statute, the defence must prevail as a competent bar.[1] This doctrine seems conformable to the true intent and objects of the statute; for it is difficult to perceive how a party can be legally bound by a contract which the statute declares to be invalid, when the party insists upon the objection and does not submit to waive it. It has been forcibly said by a great judge in equity that it is immaterial what admissions are made by a defendant who insists upon the benefit of the statute; for he throws it upon the plaintiff to show a complete written agreement; and it can be no more thrown upon the defendant to supply defects in the agreement than to supply the want of an agreement.[2] The same doctrine seems now fully recognized in America.[3]

§ 1044. **Same.** — It follows from what has been already said that if the answer denies the existence of any parol contract, and insists upon the benefit of the statute, the case cannot be made out by parol evidence, and that the bar is complete. This would seem to be sufficiently clear upon principle. But the question having been at one time made, it is no longer a matter of mere principle, but it stands confirmed by the highest authority.[4] A question however of a different sort, but connected with this subject, has also been much discussed; and that is whether to a bill

[1] See Mitf. Eq. Pl. by Jeremy, 265 to 268; Sugden on Vendors, ch. 4, § 2, pp. 98, 100, 101, 102 (7th ed.); 1 Sugden on Vendors, ch. 3, § 6, n. 10, p. 197 (10th ed.); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 439; Newland on Contr. ch. 10, pp. 197 to 201; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*d*); Thompson *v.* Todd, 1 Peters, Circuit R. 380. Mr. Baron Eyre in Eyre *v.* Ivison and Stewart *v.* Careless, in 1785 (cited 2 Bro. Ch. R. 563, 564), and Walters *v.* Morgan, 2 Cox, R. 369, decided the point directly in favor of the bar of the statute under such circumstances. That also appears to have been the opinion of Lord Thurlow. Whitbread *v.* Brockhurst, 1 Bro. Ch. R. 416, and Mr. Belt's note; and Whitchurch *v.* Bevis, 2 Bro. Ch. R. 559, 568, 569. Lord Rosslyn held the same opinion. Rondeau *v.* Wyatt, 2 H. Bl. 68; Moore *v.* Edwards, 4 Ves. 23; Cooth *v.* Jackson, 6 Ves. 17. So Lord Eldon in Cooth *v.* Jackson, 6 Ves. 37, and Rowe *v.* Teed, 15 Ves. 375; and Sir William Grant in Blagden *v.* Bradbear, 12 Ves. 466, 471.

[2] Sir William Grant in Blagden *v.* Bradbear, 12 Ves. 471.

[3] See Thompson *v.* Todd, 1 Peters, Circ. R. 388, and the cases cited by Mr. Ingraham in his note to the American edition of Vesey, Jr.'s Reports, Vol. III. pp. 38 to 40; Luckett *v.* Williamson, 37 Mo. 388. See Auter *v.* Miller, 18 Iowa, 405.

[4] Whaley *v.* Bagenal, 6 Bro. Parl. R. 45; s. c. cited 2 Bro. Ch. R. 567, 568; Whitchurch *v.* Bevis, 2 Bro. Ch. R. 567; s. c. 1 Bro. Parl. Cas. by Tomlins, 345; Buckmaster *v.* Harrop, 7 Ves. 347; Botsford *v.* Burr, 2

for discovery and relief upon the ground of a parol agreement the statute can be pleaded as a bar to the discovery of the fact of such agreement; or in other words whether the plea must not state, not only that there was no agreement in writing, but also that there was no such agreement by parol as is charged in the bill. Upon this point some diversity of judicial opinion has also existed, and perhaps it is not now quite put at rest. But as this is rather a matter of pleading than of jurisdiction, it properly belongs to another place.[1]

John. Ch. R. 408; Bartlett *v.* Pickersgill, 4 East, R. 577, note; s. c. 1 Eden, R. 515; Leman *v.* Whitley, 4 Russ. R. 423; 2 Sugden on Vendors, p. 138 (9th ed.); Seitman *v.* Seitman, 106 Ill. App. 671, 204 Ill. 504, 68 N. E. 461; Harrington *v.* Halcomb, 75 Mich. 535, 42 N. W. 1003.

[1] See Mitf. Eq. Pl. by Jeremy, 265 to 268; Beames, Eq. Pl. 176 to 187; Cooper, Eq. Pl. 255, 256; Newl. on Contr. ch. 10, pp. 201 to 204; Story on Equity Pleadings, §§ 763, 766. See also note to 3 Vesey, Jr. R. 38 (Amer. ed.). Mr. Fonblanque's note upon this point (1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*d*)), as well as upon the preceding, is so valuable that, though long, it deserves to be cited at large in this place. "If a defendant," says he, "confess the agreement charged in the bill, there is certainly no danger of fraud or perjury in decreeing the performance of such agreement. But it is of considerable importance to determine whether the defendant be bound to confess or deny a merely parol agreement not alleged to be in any part executed; or if he do confess it, whether he may not insist on the statute in bar of the performance of it. The cases upon the first point are many in number, various in their circumstances, and the decisions upon them not immediately reconcilable. I shall therefore consider them in their principle rather than in detail. They who insist that the defendant is bound to confess or deny the agreement alleged, principally rely on the rule of equity that the defendant is bound to confess or deny all facts which if confessed would give the plaintiff a claim or title to the relief prayed; and that as equity would decree a parol agreement if confessed, the defendant must confess or deny it. It is certainly a general rule in equity that the defendant shall discover whatever is material to the justice of the plaintiff's case; but in applying this rule to the case of a parol agreement it is previously material to ascertain whether the Statute of Frauds has not in such case relieved the defendant from this general obligation. The prevention of frauds and perjuries is the declared object of the statute; and the decreeing of a parol agreement, when confessed by the defendant, and the statute not insisted on, is evidently consistent with such object: 'Nam quisque renuntiare potest juri pro se introducto.' But if the defendant be bound to confess or deny the parol agreement, his answer must be either liable to contradiction or not liable to contradiction. If the defendant's answer be liable to contradiction by evidence aliunde, the evil arising from contradictory evidence which the statute proposed to guard against would necessarily result. If the defendant's answer be not liable to contradiction by evidence aliunde, the rule would furnish a temptation to perjury, by giving the defendant a certain interest in denying the agreement, since if he confessed it he would be bound to perform it. If the defendant be bound to confess or deny the parol agreement insisted on by the plaintiff, one of the above consequences must necessarily ensue; which of the two is likely to prove the most

§ 1045. **Enforcement Where Parol Agreement Has Been Partly Carried into Execution.** — In the next place Courts of Equity will enforce a specific performance of a contract within the statute where the parol agreement has been partly carried into

mischievous, were perhaps difficult to decide; for though the perjury which might take place if contradictory evidence were allowed is an evil of considerable size, yet the defendant's being liable to be contradicted might operate as a check on his falsely denying that which was truly alleged. It seems however to have been the opinion of Lord Chancellor Thurlow that the only effect of the statute is to preclude the plaintiff from resorting to evidence aliunde for the purpose of substantiating a parol agreement denied by the defendant. Whitchurch *v.* Bevis, 2 Bro. R. 566. See also Child *v.* Godolphin (1 Dick. R. 39), therein cited by Lord Chancellor Thurlow. Cooth *v.* Jackson, 6 Ves. 39. This rule, which, when the agreement is in no part performed, renders the defendant's answer conclusive, may certainly in some instances prevent fraud; but it is possible that in other instances it may encourage perjury. To strike out the mean by which the spirit of the statute might be preserved, without trenching on its provisions, is certainly difficult, perhaps impossible; for it is clear that the statute intended to prevent fraud as well as perjury, and it cannot be denied that the refusing to execute an agreement deliberately and fairly entered into merely because it was not reduced into writing is a fraud which a court of conscience ought to discourage, but which it cannot discourage if of such an agreement it cannot enforce a discovery. It would ill become me to pursue this point further; the difficulties which I have stated are probably sufficient to explain and justify the contrariety of opinion which has prevailed upon it. It remains however to consider whether a defendant, having confessed the agreement alleged, can protect himself from the performance of it by insisting on the statute. This, which is also vexata quæstio, is almost immediately dependent on the former point; for when Lord Macclesfield, in Child *v.* Godolphin, held that the defendant was bound to confess or deny the agreement, it seems to have been a necessary consequence that if the defendant confessed the agreement he should not be allowed to avail himself of the statute; for if he might avail himself of the statute, cui bono compel him to confess or deny the agreement? See Cottington *v.* Fletcher, 2 Atk. 155; Lacon *v.* Mertins, 3 Atk. 1. But see Kingsman *v.* Kingsman, cited in 10 Mod. 404. But if the defendant be not bound to confess or deny the agreement it must be in respect of the statute affording him a good defence against the performance of it; and if such be the effect of the statute, it should seem to be immaterial whether he set up such defence in the shape of a plea or by his answer, the statute not having prescribed any mode in particular by which a defendant must avail himself of such defence. See Stewart *v.* Careless, cited in Whitchurch *v.* Bevis. It may be material here to observe that even the cases which most favor the opinion that Courts of Equity may compel the performance and consequently the discovery of merely parol agreements, require that the terms of such agreement should be clear, definite, and conclusive; and therefore if the courts can collect the jus deliberandi or locus pœnitentiæ to have been reserved, the contract shall not be considered as complete till reduced into writing or in part performed. Whaley *v.* Bagenal, 6 Bro. P. C. 45; s. c. 1 Bro. Parl. Cas. 345, by Tomlins; Whitchurch *v.* Bevis, 2 Bro. R. 566; Clarke *v.* Grant, 14 Ves. 519; Mortlock *v.* Buller, 10 Ves. 311."

execution.[1] The distinct ground upon which Courts of Equity interfere in cases of this sort is, that otherwise one party would be enabled to practise a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed fraud in all cases constitutes an answer to the most solemn acts and conveyances; and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief.[2] And where one party has executed his part of the agreement in

[1] Gilb. Lex Prætoria, pp. 239, 240; 1 Fonbl. Eq. B. 1, ch. 3, § 8, and note (*e*). See for illustrations Potter *v.* Jacobs, 111 Mass. 32; Glass *v.* Hulbert, 102 Mass. 24; Northrop *v.* Boom, 66 Ill. 368; Fall *v.* Hazebrigg, 45 Ind. 576; Lowry *v.* Buffington, 6 W. Va. 249; Semmes *v.* Worthington, 38 Md. 298; Pierce *v.* Catron, 23 Gratt. 588; Morgan *v.* Berger, 3 Neb. 209; Cole *v.* Cole, 41 Md. 301; Hall *v.* Whittier, 10 R. I. 530; Stratton *v.* Stratton, 58 N. H. 473; Gregg *v.* Hamilton, 12 Kans. 133; Johnson *v.* Skillman, 29 Minn. 95; Johnson *v.* Bowden, 37 Tex. 621; Wiggin *v.* Wiggin, 58 N. H. 235.

It seems that in Mississippi part performance of an oral contract will not take a case out of the statute. McGuire *v.* Stephens, 42 Miss. 724. So in Maine. Wilton *v.* Harwood, 23 Me. 131. So formerly in Massachusetts. Buck *v.* Dowley, 16 Gray, 555; Glass *v.* Hulbert, 102 Mass. 24, 33.

A contract for the sale of land by parol will be specifically performed where there has been a partial performance, and the terms of the contract have been established by proof that is clear, definite, and unequivocal, and the acts relied on as part performance are exclusively referable to the contract. Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660; Henley *v.* Real Estate Co., 101 Va. 70, 43 S. E. 191; Wallace *v.* Scoggins, 18 Oreg. 502, 21 Pac. 558, 17 Am. St. Rep. 749; Venable *v.* Stamper, 102 Va. 30, 45 S. E. 738; Menger *v.* Schulz, 28 Wash. 329, 68 Pac. 875; Blankenship *v.* Whaley, 124 Cal. 300, 57 Pac. 79; Barton *v.* Dunlap, 8 Idaho, 82, 62 Pac. 832; Kinchloe *v.* Bounds, 117 Va. 735, 86 S. E. 110; Lucas *v.* Lucas, 64 Neb. 190, 89 N. W. 769; Coban *v.* Hecklen, 27 Mont. 245, 70 Pac. 805; Nelson *v.* Schoonover, 89 Kans. 388, 131 Pac. 147; Black *v.* Hoopeston Gas Co., 250 Ill. 68, 95 N. E. 51; King *v.* Seeback, 20 Idaho, 223, 118 Pac. 292; Houser *v.* Hobart, 22 Idaho, 735, 127 Pac. 997; Willis *v.* Zorger, 258 Ill. 574, 101 N. E. 963; Halsell *v.* Renfrow, 14 Okla. 674, 78 Pac. 118, affirmed 202 U. S. 287, 50 L. Ed. 1032, 26 S. Ct. Rep. 610; Telford *v.* Chicago P. & M. R. Co., 172 Ill. 559, 50 N. E. 105; Goldman *v.* Brinton, 90 Md. 259, 44 Atl. 1029; Putman *v.* Tinkler, 83 Mich. 628, 47 N. W. 687; Briggs *v.* Briggs, 113 Mich. 371, 71 N. W. 632, 4 Detroit Leg. N. 328; Alexander *v.* Alexander, 150 Mo. 579, 52 S. W. 256; McElvain *v.* McElvain, 171 Mo. 244, 71 S. W. 142.

[2] See Attorney-Gen. *v.* Day, 1 Ves. 221; Walker *v.* Walker, 2 Atk. 100; Taylor *v.* Beech, 1 Ves. 297; Buckmaster *v.* Harrop, 7 Ves. 346; Whitbread *v.* Brockhurst, 1 Bro. Ch. R. 417; s. c. 2 Ves. & B. 153, note; Hawkins *v.* Holmes, 1 P. Will. 770; Wills *v.* Stradling, 3 Ves. 378; Morphett *v.* Jones, 1 Swanst. R. 181; Hare *v.* Shearwood, 1 Ves. Jr. 242; Clinan *v.* Cooke, 1 Sch. & Lefr. 41; Mr. Raithby's note to Hollis *v.* Edwards, 1 Vern. R. 159; Newland on Contr. ch. 10, pp. 179, 180, 181, 182; Mitford, Eq. Pl. by Jeremy, 266; 1 Fonbl. Eq. B. 1, ch. 3, § 8, notes (*a*), (*b*).

the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice.[1]

§ 1046. **What Is Such a Part Performance as Will Take the Case Out of the Statute.** — But the more difficult question is to ascertain what, in the sense of Courts of Equity, is to be deemed a part performance, so as to extract the case from the reach of the statute. It seems formerly to have been thought that a deposit, or security, or payment of the purchase-money, or of a part of it, or at least of a considerable part of it, was such a part performance as took the case out of the statute.[2] But that doctrine was open to much controversy, and is now finally overthrown.[3] Indeed the distinction taken in some of the cases between the payment of a small part and the payment of a considerable part of the purchase-money seems quite too refined and subtle; for independently of the difficulty of saying what shall be deemed a small and what a considerable part of the purchase-money, each must, upon principle, stand upon the same reason, namely, that it is a part performance in both cases, or not in either.[4] One ground why part payment is not now deemed a part performance, sufficient to take a case out of the statute, is that the money can be recovered back again at law, and therefore the case admits of full and direct compensation.[5] This ground is not however quite

[1] Ibid.; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*e*); 3 Wooddes. Sect. 57, pp. 433, 434; Newland on Contr. ch. 10, pp. 179, 181 to 187. "Where an agreement for valuable consideration between two parties has been partially performed, the court ought to do its utmost to carry out that agreement by a decree of specific performance." Fry, J. in Hart *v.* Hart, 18 Ch. D. 670, 685.

[2] Hales *v.* Van Berchem, 2 Vern. R. 618; Owen *v.* Davies, 1 Ves. 82; Skett *v.* Whitmore, 2 Freem. Ch. R. 281; Lacon *v.* Mertins, 3 Atk. 4; Main *v.* Melbourn, 4 Ves. 720, 724; Clinan *v.* Cooke, 1 Sch. & Lefr. 40, note (*a*); 3 Wooddes. Lect. 57, p. 427.

[3] Ibid.

[4] Clinan *v.* Cooke, 1 Sch. & Lefr. 40, 41; Pengal *v.* Ross, 2 Eq. Abr. 46, pl. 12.

[5] Chastain *v.* Smith, 30 Ga. 96; Biern *v.* Ray, 49 W. Va. 129, 38 S. E. 530; Gladville *v.* McDole, 247 Ill. 34, 93 N. E. 86; Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694; Bernheimer *v.* Verdon, 63 N. J. Eq. 312, 49 Atl. 732; Halsed *v.* Renfrow, 14 Okla. 674, 78 Pac. 118, affirmed 202 U. S. 287, 50 L. Ed. 1032, 26 S. Ct. Rep. 610; Robinson *v.* Driver, 132 Ala. 169, 31 So. 495; Thompson *v.* New South Coal Co., 135 Ala. 630, 34 So. 31, 62 L. R. A. 551, 93 Am. St. Rep. 49; Ormsby *v.* Graham, 123 Iowa, 202, 98 N. W. 724; Lippincott *v.* Bridgewater, 55 N. J. Eq. 208, 36 Atl. 672; Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660; Hall *v.* Edwards, 140 Ga. 765, 79 S. E. 852; Milholland *v.* Payne, 169 App. Div. 712, 155 N. Y. Supp. 773.

The doctrine of enforcing parol contract to convey land upon ground

satisfactory; for the party may become insolvent before the judgment at law can be executed. Another ground has been stated which certainly has more strength in it. It is that the statute has said in another clause (that which respects contracts for goods) that part payment, by way of earnest, shall operate as a part performance. And hence the courts have considered this clause as excluding agreements for lands; because it is to be inferred that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands.[1]

§ 1047. **Part Performance Is Such a Situation That One Is in, Which Is a Fraud upon Him.** — But a more general ground, and that which ought to be the governing rule in cases of this sort, is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him,

of part performance does not prevail in North Carolina. Ballard *v.* Boyette, N. C., 86 S. E. 175.

Specific performance will not be enforced, where the consideration is labor and services, which may be estimated and their value liquidated in money. Haubrich *v.* Haubrich, 118 Minn. 394, 136 N. W. 1025.

The court will require a strict performance where there has been a part performance and a judiciary relationship exists. Becker *v.* Buffalo Package Co., 85 Misc. Rep. 503, 148 N. Y. Supp. 782.

An oral contract for sale of land will not be enforced against a married woman who alone signed the instrument, though there has been part performance. Rosenour *v.* Rosenour, 47 W. Va. 554, 35 S. E. 918.

The plaintiff must have changed his situation in reliance upon the contract to such extent that he can neither be placed in statu quo, nor be justly and fully compensated in money for such change in situation. Chapel *v.* Chapel, 132 Minn. 86, 155 N. W. 1054.

Where the parties agreed upon an exchange of lands, and plaintiff executed his deed, offered to pay difference in purchase price and deliver insurance policy, this was a sufficient performance on his part. Te Poel *v.* Shutt, 57 Neb. 592, 78 N. W. 288.

The mere payment of the consideration, unaccompanied by any other act, is not such part performance as will authorize the specific enforcement of the contract, but the making of valuable permanent improvements on land by vendee, pursuant to agreement, with knowledge of vendor is the strongest and most unequivocal act of part performance. Henrikson *v.* Henrikson, 143 Wis. 314, 127 N. W. 962; Woolley *v.* Stewart, 169 App. Div. 678, 155 N. Y. Supp. 169.

Where the purchase price has been fully paid, and vendee has entered into possession and erected valuable improvements, this is sufficient to take the case out of the statute. Timmonds *v.* Taylor, 48 Ind. App. 531, 96 N. E. 331.

[1] Savage *v.* Foster, 9 Mod. 37. Services of a child rendered on the faith of a parol promise to give him a farm on the promisor's death are part performance. Davison *v.* Davison, 2 Beasl. 246; Lamb *v.* Hinman, 46 Mich. 112; Cole *v.* Pilkington, L. R. 19 Eq. 174, 178; Loffus *v.* Maw, 3 Giff. 592; Lorentz *v.* Lorentz, 14 W. Va. 761.

unless the agreement is fully performed.[1] Thus for instance if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser, if there be no agreement valid in law or equity. Now for the purpose of defending himself against a charge as a trespasser, and a suit to account for the profits in such a case, the evidence of a parol agreement would seem to be admissible for his protection; and if admis-

[1] Purcell *v.* Miner, 71 U. S. 513, 18 L. Ed. 435; Barnes *v.* Boston R. Co., 130 Mass. 388; Gilbert *v.* East Newark Co., 1 Beasl. 180; Cuppy *v.* Hixon, 29 Ind. 522; Pierce *v.* Catron, 23 Gratt. 588; Glass *v.* Hulbert, 102 Mass. 24; Williams *v.* Evans, L. R. 19 Eq. 547; Peckham *v.* Barker, 8 R. I. 17; Mims *v.* Lockett, 33 Ga. 9; Wheeler *v.* Reynolds, 66 N. Y. 227; Seaman *v.* Aschermann, 51 Wis. 678. The mere non-performance of a contract does not constitute fraud. Ahrend *v.* Odiorne, 118 Mass. 261; Campbell *v.* Dearborn, 109 Mass. 130, 140; Brightman *v.* Hicks, 108 Mass. 246.

Where the purchase price has been fully paid, and vendee has entered into possession and erected valuable improvements, this is sufficient to take the case out of the statute. Timmonds *v.* Taylor, 48 Ind. App. 531, 96 N. E. 331; Milwaukee Land Co. *v.* Ruesink, 50 Mont. 489, 148 Pac. 396; Jorgenson *v.* Jorgenson, 81 Minn. 428, 84 N. W. 221; Gross *v.* Milligan, 176 Mass. 566, 58 N. E. 471; Low *v.* Low, 173 Mass. 580, 54 N. E. 257; Stillings *v.* Stillings, 67 N. H. 584, 42 Atl. 271; Francis *v.* Green, 7 Idaho, 668, 65 Pac. 362; Rovelsky *v.* Scheuer, 114 Ala. 419, 21 So. 785; Cross *v.* Johnson, 76 Ark. 363, 88 S. W. 945; Cherry *v.* Whalen, 25 App. D. C. 537; McFarland *v.* Stansifer, 36 Ind. App. 486, 76 N. E. 124; Goodwin *v.* Smith, 89 Me. 506, 36 Atl. 997; Gibbs *v.* Horton Ice Cream Co., 61 App. Div. 621, 71 N. Y. Supp. 193; Sprague *v.* Jessup, 48 Oreg. 211, 83 Pac. 145, 4 L. R. A. (N. S.) 410; Ratliff *v.* Sommers, 55 W. Va. 30, 46 S. E. 712; Bartz *v.* Paff, 95 Wis. 95, 69 N. W. 297.

Where the owner contracted with her daughter's intended husband, that if he would build a house on a vacant lot, she would give it to her daughter, and the house was built, this was sufficient. Bell *v.* Sappington, 111 Ga. 391, 36 S. E. 780.

The acts of part performance should be of such positive and substantial character as to be beyond doubt of their being done. Hudson *v.* Meadows Land & Imp. Co., 99 Va. 537, 39 S. E. 215.

The mere fact that one party refuses to perform his contract, however fraudulent his motive may be, and great a hardship to the other party, this would not repel the bar of the statute. Reynolds *v.* Scriber, 41 Oreg. 407, 69 Pac. 48.

Attentions given by a young physician to an older one, and looking after his office matters, standing alone, is not sufficient to enforce a parol contract. The acts done must unmistakably point to the existence of a contract between the parties, and must have been done in pursuance of such contract. Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200.

Marriage is not a sufficient part performance so as to enforce parol contract to convey land. Russell *v.* Russell, 60 N. J. Eq. 282, 47 Atl. 37; McCartney *v.* Titsworth, 142 App. Div. 292, 126 N. Y. Supp. 905; Hunt *v.* Hunt, 55 App. Div. 430, 66 N. Y. Supp. 957, affirmed 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306; contra, see Allen *v.* Moore, 30 Colo. 307, 70 Pac. 682.

The doctrine of enforcing parol contract to convey land upon its par-

sible for such a purpose, there seems no reason why it should not be admissible throughout.[1] A case still more cogent might be put, where a vendee, upon a parol agreement for a sale of land, should proceed to build a house on the land, in the confidence of a due completion of the contract. In such a case there would be a manifest fraud upon the party in permitting the vendor to escape from a due and strict fulfilment of such agreement.[2] Such

tial performance, does not obtain in North Carolina. Pass *v.* Brooks, 125 N. C. 129, 34 S. E. 228; 127 N. C. 119, 37 S. E. 151.

Clinan *v.* Cooke, 1 Sch. & Lefr. 40, 41; O'Herlihy *v.* Hedges, 1 Sch. & Lefr. 129; Jackson's Assignees *v.* Cutright, 5 Munf. R. 318. I am aware that this may seem strong language. But the direct decisions and dicta in some cases in former times (see 1 Freem. R. 486, Case, 664 (*b*); Leak *v.* Morrice, 2 Ch. Cas. 135; Alsopp *v.* Patten, 1 Vern. R. 472; Seagood *v.* Meale, Prec. Ch. 560; Pengall *v.* Ross, 2 Eq. Abr. 46, Pl. 12), and the positive decision of Lord Redesdale on the point in Clinan *v.* Cooke, 1 Sch. & Lefr. 41, 42, seem to justify it. Mr. Sugden has collected all the authorities in an able manner, with a very clear commentary, in his Treatise on Vendors, ch. 3, § 3, pp. 107 to 112 (7th ed.); 1 Sugden on Vendors, ch. 3, § 7, note 10, p. 202 (10th ed.), and holds the same opinion. Mr. Newland manifestly inclines to the same opinion. Newland on Contr. ch. 10, pp. 187 to 191. There are also other modern cases in which the contrary doctrine has been treated as doubtful. See Buckmaster *v.* Harrop, 7 Ves. 341, 346; Coles *v.* Trecothick, 9 Ves. 234, 340; Frame *v.* Dawson, 14 Ves. 388; Ex parte Hooper, 1 Meriv. R. 7, 8; s. c. 19 Ves. 479, 480; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*e*).

Mr. Sugden has made some striking remarks on this subject in his Treatise on Vendors, ch. 3, § 3, p. 112 (7th ed.); 1 Sugden on Vendors, ch. 3, § 7, note 10, p. 209 (10th ed.), which deserves to be cited. "On this subject," says he, "Sir William Grant's admirable judgment in Butcher *v.* Butcher must occur to every discerning mind. It turns on a subject so applicable to the present that his arguments, with a slight alteration, directly bear upon it. To say that a considerable share of the purchase-money must be given is rather to raise a question than to establish a rule. What is a considerable share, and what is a trifling sum? Is it to be judged of upon a mere statement of the sum paid, without reference to the amount of the purchase-money? If so, what is the sum that must be given to call for the interference of the court? What is the limit of amount at which it ceases to be trifling and begins to be substantial? If it is to be considered with reference to the amount of the purchase-money, what is the proportion which ought to be paid? Mr. Booth also was impressed with this difficulty, although his sentiments are not so forcibly expressed. Where, he asks, will you strike the line? And who shall settle the quantum that shall suffice in payment of part of any purchase-money to draw the case out of the statute, or ascertain what shall be deemed so trifling as to leave the case within it?" Cuppy *v.* Hixon, 29 Ind. 522; Ann Berta Lodge *v.* Leverton, 42 Tex. 18; Cronk *v.* Trumble, 66 Ill. 428; Horn *v.* Ludington, 32 Wis. 73; Barnes *v.* Boston R. Co., 130 Mass. 388. So where the undertaking is to pay for services in land instead of money. Webster *v.* Gray, 37 Mich. 37.

[1] Pengall *v.* Ross, 2 Eq. Abr. 46, Pl. 12; Middleton *v.* Selby, 19 W. Va. 167 (possession and part payment of purchase price).

[2] Foxcroft *v.* Lister, cited 2 Vern. R. 456; Prec. Ch. 519; Wetmore *v.*

a case is certainly distinguishable from that of part payment of the purchase-money; for the latter may be repaid, and the parties are then just where they were before, especially if the money is repaid with interest. A man who has parted with his money is not in the situation of a man against whom an action may be brought, and who may otherwise suffer an irreparable injury.[1]

§ 1048. **Acts Must Have Been Done Solely with a View to the Agreement Being Performed.** — In order to make the acts such as a Court of Equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed. For if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement.[2] On this account acts merely introductory or ancillary to an agreement are not considered as a part performance thereof, although they should be attended with expense. Therefore delivering an abstract of title, giving directions for conveyances, going

White, 1 Cain. Cas. Er. 87; Parkhurst *v.* Van Cortlandt, 14 John. Rep. 15; Peckham *v.* Barker, 8 R. I. 17; Mims *v.* Lockett, 33 Ga. 9, as to the extent of the improvements necessary.

[1] Clinan *v.* Cooke, 1 Sch. & Lefr. 41, 42. See Sutherland *v.* Briggs, 1 Hare, R. 26.

[2] Gunter *v.* Halsey, Ambl. R. 586; s. c. 1 West. R. 681; Lacon *v.* Mertins, 3 Atk. 4; Ex parte Hooper, 19 Ves. 479; Morphett *v.* Jones, 1 Swanst. R. 181; Phillips *v.* Thompson, 1 John. Ch. R. 149; Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 283, 284, 285; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*e*); Knoll *v.* Harvey, 19 Wis. 99; Lester *v.* Kinne, 37 Conn. 9; Jacobs *v.* Peterborough R. Co., 8 Cush. 223; Purcell *v.* Miner, 4 Wall. 513; Wheeler *v.* Reynolds, 66 N. Y. 227; Pike *v.* Pettus, 71 Ala. 98. The acts relied upon should be such as to give a mutual right to performance. Smith *v.* McVeigh, 3 Stockt. 239; Irwin *v.* Baily, 72 Ala. 467; Moore *v.* Crowder, Ib. 79; Railroad Co. *v.* Tel. Co., 38 Ohio St. 24. And it is held that the part performance must be by the plaintiff. Caton *v.* Caton, L. R. 1 Ch. 137. Hence the fact that the defendant has made a will in pursuance of an oral antenuptial contract will not, it is considered, take the case out of the statute. Ib. But see Lowe *v.* Bryant, 30 Ga. 528. And see Whitridge *v.* Parkhurst, 20 Md. 62; Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200; Meigs *v.* Morris, 63 Ark. 100, 37 S. W. 302; Lay *v.* Lay, 75 Ark. 526, 87 S. W. 1026; Seitman *v.* Seitman, 106 Ill. App. 671, 204 Ill. 504, 68 N. E. 461; Gibbs *v.* Whitwell, 164 Mo. 387, 64 S. W. 110; Price *v.* Lloyd, 31 Utah, 86, 86 Pac. 767, 8 L. R. A. (N. S.) 870; Walker *v.* Bohannon, 243 Mo. 119, 147 S. W. 1024; Carpenter *v.* Tingloff, 76 N. H. 454, 84 Atl. 51; Moore *v.* Moore, 72 W. Va. 260, 78 S. E. 99; Hersman *v.* Hersman, 253 Mo. 175, 161 S. W. 800; Tonseth *v.* Larsen, 69 Oreg. 387, 138 Pac. 1080; Woolley *v.* Stewart, 169 App. Div. 678, 155 N. Y. Supp. 169; Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660.

to view the estate, fixing upon an appraiser to value stock, making valuations, admeasuring the lands, registering conveyances, and acts of the like nature, are not sufficient to take a case out of the statute.[1] They are all preliminary proceedings; and are besides of an equivocal character, and capable of a double interpretation; whereas acts to be deemed a part performance should be so clear, certain, and definite in their object and design as to refer exclusively to a complete and perfect agreement, of which they are a part execution.[2]

[1] Hawkins *v.* Holmes, 1 P. Will. 770; Pembroke *v.* Thorpe, 3 Swanst. R. 437; Clark *v.* Wright, 1 Atk. 12; Whitbread *v.* Brockhurst, 1 Bro. Ch. 412; Whitchurch *v.* Bevis, 2 Bro. Ch. R. 559, 566; Redding *v.* Wilkes, 3 Bro. Ch. R. 400; Cooth *v.* Jackson, 6 Ves. 17; Sugden on Vendors, ch. 3, § 3, p. 104 (7th ed.); Stokes *v.* Moore, 1 Cox, R. 219; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*c*); Newland on Contr. ch. 10, pp. 196, 197; Frame *v.* Dawson, 14 Ves. 386.

[2] Ibid. A verbal agreement for the sale of lands or of an interest therein may be enforced in either of two cases: first, when that agreement has been partly performed; and secondly, when to declare the agreement invalid would work a fraud upon the plaintiff. To the first of these cases there is one exception, to wit, where the act of part performance consists merely in the payment of money; and the explanation of this appears to be founded on the statute itself. Supra, § 760, at the end. To the second case there are probably no exceptions.

The distinction between the two cases is often lost; the second case being commonly treated as the test of the right to specific performance. The question asked is, whether under the circumstances it would work a fraud upon the plaintiff to treat the contract as invalid; and this in cases which are in the proper sense cases of part performance of the agreement. It is often said e. g. that for the purchaser to take possession is to make the oral contract good on the ground that, after such act, to treat the contract as invalid would be to expose the party who had entered to liability as a trespasser, and that would be a fraud. Supra, § 1047. But that appears to be incorrect; for though the contract should be treated as invalid both at law and in equity, it would not be absolutely void. If void, part performance could not make it good. In reality it would simply be voidable as a contract; it would be perfectly good as a license to enter. An oral license to enter lands is as good as a written license; and hence the party should not be treated as a trespasser. The true reason why entering into possession takes the contract out of the operation of the statute appears to be that it is part performance of the contract.

This is borne out by the authorities concerning continued possession. Where there is no new taking of possession, but a continuance after the contract, the presumption is that the continuance is not based on the new contract but upon the previously granted right. But this presumption may be controlled by evidence; it may be shown by evidence other than the fact of continued possession — not by that alone — that the further holding was in reality due to the new agreement entirely. Spear *v.* Orendorf, 26 Md. 37. Evidence e. g. that the lessor received the new rent upon the footing of the oral agreement, or that the tenant paid the same "as part and parcel of the agreement" will be sufficient to avoid the statute. Ib.

§ 1049. **Mere Possession of Land Is Not Sufficient as Part Performance.** — In like manner the mere possession of the land contracted for will not be deemed a part performance if it be obtained wrongfully by the vendee, or if it be wholly independent of the contract.[1] Thus if the vendee enter into possession, not under the contract but in violation of it, as a trespasser, the case is not taken out of the statute. So if the vendee be a tenant in possession under the vendor; for his possession is properly referable to his tenancy, and not to the contract.[2] But if the possession be delivered and obtained solely under the contract, or if in case of a tenancy the nature of the holding be different from the original tenancy, as by the payment of a higher rent,[3] or by other unequivocal circumstances referable solely and exclusively to the contract,[4] there the possession may take the case out of the statute. Especially will it be held to do so where the party let into possession has expended money in building, or repairs, or other

Outlays for repairs or improvements, on the other hand, are not necessarily part performance, for the oral contract may not call for them. The possession taken before the outlays was part performance, and the outlays make a case within the second class. It would work a fraud on the purchaser who has expended money upon the estate, to be turned out; at least if he has made the expenditure in good faith and not against the consent of the vendor to "improve him out of his estate." See Nunn *v.* Fabian, L. R. 1 Ch. 35, 40, that outlays are not, properly speaking, part performance.

[1] So, it is said, if it consist merely in going on the land and ploughing a few hours. Goetchius *v.* Sanborn, 46 Mich. 330. Contra, Ungley *v.* Ungley, 4 Ch. D. 73, 76, Malins, V. C.

[2] Rosenthal *v.* Freeburger, 26 Md. 75; Mahana *v.* Blunt, 20 Iowa, 142; Peckham *v.* Barker, 8 R. I. 17; Crawford *v.* Wick, 18 Ohio St. 190; Barnes *v.* Boston R. Co., 130 Mass. 388; Conner *v.* Fitzgerald, 11 L. R. Ir. 106; Brennan *v.* Bolton, 2 Dru. & War. 354. But this inference may be controlled, as has been stated supra, note at end of § 1047. Spear *v.* Orendorf, 26 Md. 37. If the verbal agreement include other premises besides those of which the plaintiff is already in possession, and he takes possession of them, that will be part performance as to all, it seems. Nunn *v.* Fabian, L. R. 1 Ch. 35. See also in regard to continued possession Pain *v.* Coombs, 1 DeG. & J. 34, 46; and compare cases of the estoppel of a tenant, on continued possession, to deny his landlord's title. Bigelow, Estoppel, 409–417 (3d ed.); Cole *v.* White, cited 1 Bro. Ch. R. 409; Wills *v.* Stradling, 3 Ves. 378; Smith *v.* Turner, Prec. Ch. 561; Savage *v.* Carroll, 1 B. & Beatt. 265, 282; Frame *v.* Dawson, 14 Ves. 386; Lindsay *v.* Lynch, 2 Sch. & Lefr. 1; O'Reilly *v.* Thompson, 2 Cox, R. 271; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*e*); Morphett *v.* Jones, 1 Swanst. R. 181; Sugden on Vendors, ch. 3, § 3, pp. 104, 105 (7th ed.); 1 Sugden on Vendors, ch. 3, § 7, n. 5 and 6, pp. 200, 201 (10th ed.); 3 Wooddes. Lect. 57, pp. 424 to 426.

[3] Conner *v.* Fitzgerald, 11 L. R. Ir. 106; Spear *v.* Orendorf, 26 Md. 37; Nunn *v.* Fabian, L. R. 1 Ch. 35.

[4] In re Cokoke, 7 L. R. Ir. 99.

improvements; for under such circumstances, if the parol contract were to be deemed a nullity, he would be liable to be treated as a trespasser; and the expenditures would not only operate to his prejudice, but be the direct result of a fraud practised upon him.[1]

§ 1050. **Contract Should Be Established by Competent Proofs Clear, Definite, and Unequivocal in Its Terms.** — But in order to take a case out of the statute upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract; but the contract should also be established by competent proofs to be clear, definite, and unequivocal in all its terms.[2]

[1] McDowell *v.* Lucas, 97 Ill. 489; Bohannon *v.* Bohannon, Ib. 591; Blunt *v.* Tomlin, 27 Ill. 93; How *v.* Rogers, 32 Texas, 218; Morrison *v.* Peay, 21 Ark. 110; Watson *v.* Mahan, 20 Ind. 223. It is not necessary, in order to take a case out of the statute, that a consideration should exist for the oral agreement; a volunteer who has been induced to take possession and make important outlays by the defendant's promise to convey or lease may require specific performance. Neale *v.* Neales, 76 U. S. 1, 19 L. Ed. 590; Galbraith *v.* Galbraith, 5 Kans. 402; Kurtz *v.* Hibner, 55 Ill. 514; Bright *v.* Bright, 41 Ill. 97; Lobdell *v.* Lobdell, 36 N. Y. 327; Freeman *v.* Freeman, 43 N. Y. 34; Johnston *v.* Johnston, 19 Iowa, 74; Burkholder *v.* Ludlan, 30 Gratt. 255. See Thorne *v.* Thorne, 18 Ind. 462. As where a son enters upon land of his father and makes improvements upon a promise by the father to convey the land to him. Lorentz *v.* Lorentz, 14 W. Va. 761; Dowling *v.* Bergin, 47 Mich. 188; Willis *v.* Matthews, 46 Texas, 478.

Concerning mixed possession between the parties see Holmes *v.* Holmes, 44 Ill. 168; Watson *v.* Mahan, 20 Ind. 223; Littlefield *v.* Littlefield, 51 Wis. 23; Butcher *v.* Staples, 1 Vern. 363; Pike *v.* Williams, 2 Vern. 455; Lockey *v.* Lockey, Prec. Ch. 518; Earl of Aylesford's case, 2 Str. R. 783; Binstead *v.* Coleman, Bunb. R. 65; Lacon *v.* Mertins, 3 Atk. 1; Wills *v.* Strandling, 3 Ves. 378; Kine *v.* Balfe, 2 B. & Beatt. R. 348; Denton *v.* Stewart, 1 Cox, R. 258; Gregory *v.* Mighell, 18 Ves. 328; Morphett *v.* Jones, 1 Swanst. R. 172; Sugden on Vendors, ch. 3, § 3, pp. 104, 105 (7th ed.); 1 Sug. on Vend. ch. 3, § 7, n. 5 and 6, pp. 200, 201 (10th ed.); 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*e*); Id. § 9.

[2] See among a multitude of cases Lynes *v.* Hayden, 119 Mass. 482; Cunningham *v.* Blake, 121 Mass. 333; Blanchard *v.* Detroit R. Co., 31 Mich. 43; Wright *v.* Wright, Ib. 380; Shropshire *v.* Brown, 45 Ga. 175; Huff *v.* Shepard, 58 Mo. 242; Allen *v.* Webb, 64 Ill. 342; Reese *v.* Reese, 41 Md. 554; McClintock *v.* Laing, 22 Mich. 212; Nichols *v.* Williams, 7 C. E. Green, 63; Potts *v.* Whitehead, 5 C. E. Green, 55; Tiernan *v.* Gibney, 24 Wis. 190; Camden R. R. Co. *v.* Stewart, 3 C. E. Green, 489; Hyde *v.* Cooper, 13 Rich. Eq. 250; Ferris *v.* Irving, 28 Cal. 645; McGuire *v.* Stevens, 42 Miss. 724; Munsell *v.* Loree, 21 Mich. 491; Whelan *v.* Sullivan, 102 Mass. 204; Carr *v.* Passaic Land Co., 7 C. E. Green, 85; Welsh *v.* Bayand, 6 C. E. Green, 186; Gelston *v.* Sigmund, 27 Md. 334; Myers *v.* Forbes, 24 Md. 598; Goodman *v.* Randall, 44 Conn. 321 (reforming defective deed); McCarnack *v.* Sage, 87 Ill. 484 (the same); Mathews *v.* Jarrett, 20 W. Va. 415; Race *v.* Weston, 86 Ill. 91.

Contracts for the making or renewal of leases afford a good illustra-

If the terms are uncertain or ambiguous, or not made out by satisfactory proofs, a specific performance will not (as indeed upon principle it should not) be decreed. The reason would seem obvious enough; for a Court of Equity ought not to act upon conjectures, and one of the most important objects of the statute was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts. Yet it is certain that in former times very able judges felt themselves at liberty to depart from such a reasonable course of adjudication, and granted relief notwithstanding the uncertainty of the terms of the contract. In other words the court framed a contract for the parties ex æquo et bono, where it found none.[1] Such a latitude of jurisdiction seems unwarrantable upon any sound principle, and accordingly it has been expressly renounced in more recent times.[2] It may perhaps be true that in such cases

tion. All the terms of such contracts must be clear and certain. Thus an executory agreement in writing for a lease does not satisfy the Statute of Frauds unless it can be collected on what day the term is to begin; and there is no inference that the term is to begin from the date of the agreement in the absence of language to that effect. Marshall *v.* Berridge, 19 Ch. D. 233 (overruling Jaques *v.* Millar, 6 Ch. D. 153); Nesham *v.* Selby, L. R. 7 Ch. 406; Cartwright *v.* Miller, 36 L. T. N. S. 398; Wyse *v.* Russell, 11 L. R. Ir. 173 ("If you, at the end of six months, require a lease for thirty-one years or under, you shall have it" held within the rule of Marshall *v.* Berridge); Blore *v.* Sutton, 3 Mer. 237. So where the duration of the lease is uncertain. Myers *v.* Forbes, 24 Md. 598; Morrison *v.* Rossignol, 5 Cal. 64. So too where the amount to be paid as rent is uncertain. Howard *v.* Carpenter, 11 Md. 278; Pray *v.* Clark, 113 Mass. 283; Morrison *v.* Rossignol, supra; Hopkins *v.* Gilman, 22 Wis. 476; Tracy *v.* Albany Exch. Co., 3 Seld. 472, 474. And so where the terms of the lease (or other contract) are to be left to the agreement of the parties, or to arbitration. Tracy *v.* Albany Exch. Co., supra; Western Transp. Co. *v.* Lansing, 49 N. Y. 499, 505; Abeel *v.* Radcliff, 13 Johns. 297; Noyes *v.* Marsh, 123 Mass. 286; Pearl *v.* Harris, 121 Mass. 390; Vickers *v.* Vickers, L. R. 4 Eq. 529; Hopkins *v.* Gilman, 22 Wis. 476; Tobey *v.* Bristol, 3 Story, 800; McKibbin *v.* Brown, 1 McCart. 13, 19; Huff *v.* Shepard, 58 Mo. 242. So if it cannot be ascertained from the writings, where the contract is in writing, who is to be the lessor. Williams *v.* Jordan, 6 Ch. D. 517; Warner *v.* Willington, 3 Drew. 523, 530. See further Whitlock *v.* Duffield, Hoff. Ch. 110; s. c. 26 Wend. 55; Kelso *v.* Kelly, 1 Daly, 419; Arnot *v.* Alexander, 44 Mo. 25 (sed qu. as to this case; see Tobey *v.* Bristol, supra); Hudson *v.* Buck, 7 Ch. D. 682; Rishton *v.* Whatmore, 8 Ch. D. 467; Williams *v.* Briscoe, 22 Ch. D. 441; Ashbury *v.* Hicklin, 181 Mo. 658, 81 S. W. 390.

[1] Anon. 5 Vin. Abr. 523, Pl. 40; Id. 522, Pl. 38; Anon., cited 6 Ves. 470; Allan *v.* Bower, 3 Bro. Ch. R. 149.

[2] See Boardman *v.* Mostyn, 6 Ves. 467, 470; Clinan *v.* Cooke, 1 Sch. & Lefr. 22, 40; Symondson *v.* Tweed, Prec. Ch. 374; Forster *v.* Hale, 3 Ves. 712, 713; Savage *v.* Carroll, 1 B. & Beatt. 265, 551; s. c. 2 B. & Beatt. 451; Toole *v.* Medlicott, 1 B. & Beatt. 404; Phillips *v.* Thompson, 1

of part performance the court will not be deterred from making an inquiry before a master into the terms of the contract by the mere fact that all the terms are not sufficiently before the court to enable it to make a final decree.[1] But if such an inquiry should end in leaving the contract uncertain, so that the court cannot say what its precise import and limitations are, then the court will withhold a final decree for a specific performance.[2]

§ 1051. **Same.** — It must be admitted that the exceptions thus allowed do greatly trench upon the policy and objects of the Statute of Frauds; and perhaps there might have been as much wisdom originally in leaving the statute to its full operation without any attempt to create exceptions, even in cases where the statute would enable the party to protect himself from a performance of his contract through a meditated fraud. For even admitting that such cases might occur, they would become more and more rare as the statute became better understood; and a partial evil ought not to be permitted to control a general convenience. And indeed it is far from being certain that these very exceptions do not assist parties in fraudulent contrivances, and increase the temptations to perjury, quite as often as they do assist them

John. Ch. R. 149, 150; Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 283 to 286; Lindsay *v.* Lynch, 2 Sch. & Lefr. 6.

[1] Sugden on Vendors, ch. 3, § 3, pp. 114 to 118 (7th ed.); 1 Sugden on Vendors, ch. 3, § 7, n. 19 to 32, pp. 210 to 216 (10th ed.); Allan *v.* Bower, 3 Bro. Ch. R. 149, and Mr. Belt's notes, p. 151, notes (2) (3); 1 Sch. & Lefr. 33, 36, 37; Harnett *v.* Yeilding, 2 Sch. & Lefr. 555; 1 Fonbl. Eq. B. 1, ch. 3, § 7, note (*x*). I have used this language rather in deference to Sir Edward Sugden's opinion (Sugden on Vendors, ubi supra) than because I am entirely satisfied that the authorities bear out the position. Lord Manners's remarks on the subject present the contrary doctrine in a forcible manner, and his comments on the authorities are important. Savage *v.* Carroll, 2 B. & Beatt. R. 451 to 453. Mr. Chancellor Kent agrees with Lord Manners. Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 283 to 286. But see Hammer *v.* McEldowney, 46 Penn. St. 334; Dobson *v.* Litton, 5 Coldw. 616; Myers *v.* Forbes, 24 Md. 598. In cases where the writing is not void for uncertainty, but merely of indeterminate application, parol evidence has been admitted. Hurley *v.* Brown, 98 Mass. 545; Chattock *v.* Muller, 8 Ch. D. 177; Waring *v.* Ayres, 40 N. Y. 357; Fowler *v.* Redican, 52 Ill. 405; Purinton *v.* Northern Ill. R. Co., 46 Ill. 297; Torr *v.* Torr, 20 Ind. 118; McMurray *v.* Spicer, L. R. 5 Eq. 527. See Mathews *v.* Jarrett, 20 W. Va. 415; Schmeling *v.* Kriesel, 45 Wis. 325; Gilbert *v.* Cooksey, 69 Mo. 42. And compare the instructive opinion of Sir Thomas Plumer, M. R., in Colpoys *v.* Colpoys, Jacob. 451.

[2] Colson *v.* Thompson, 15 U. S. 336, 4 L. Ed. 253. And see cases cited in note (*b*); Lindsay *v.* Lynch, 2 Sch. & Lefr. 7, 8; Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 283 to 286; Harnett *v.* Yeilding, 2 Sch. & Lefr. 555; Newland on Contr. ch. 8, p. 151; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, 441.

in the promotion of good faith and the furtherance of justice. These exceptions have also led to great embarrassments in the actual administration of equity; and although in some cases one may clearly see that no great mischiefs can occur from enforcing them, yet in others difficulties may be stated in their practical application which compel us to pause, and to question their original propriety.[1]

[1] See 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*e*). Mr. Fonblanque's able note on this subject is full of important instruction on this head. I know not where the objections are so thoroughly sifted. "To allow a statute," says he, "having the prevention of frauds for its object, to be interposed in bar of the performance of a parol agreement in part performed, were evidently to encourage one of the mischiefs which the legislature intended to prevent. It is therefore an established rule that a parol agreement in part performed is not within the provisions of the statute. See Whitchurch *v.* Bevis, 2 Bro. Ch. R. 566. This exception however leads to considerable difficulties. Part performance is clearly a relative term, and in stating acts of part performance the plaintiff must necessarily state the agreement to which he refers. The defendant by the above rule seems bound to consider the case stated as out of the statute. Supposing him however to deny the acts alleged to have been done in part performance, would he be bound to admit or deny the parol agreement referred to? Or, admitting such acts to have been done, supposing him to deny the agreement or the terms of the agreement to which such acts are referred in part performance, would the plaintiff, in the latter case, be at liberty to resort to evidence aliunde in order to substantiate such parol agreement? In the first case I conceive that the plaintiff would be entitled to go into evidence to show that the acts alleged were actually done; and if he succeeded in this particular, it seems to follow, as a necessary consequence, that he might prove the agreement to which such acts referred. But suppose the plaintiff not to be able to prove the agreement, the terms of it being confined to his and the defendant's knowledge, would he be entitled to a discovery from the defendant? If the defendant be bound to discover such agreement merely because the plaintiff had alleged it to have been in part performed, the plaintiff might, by alleging what was false, be placed in a better situation than he would have been in if he had stated the truth. But it would be difficult, in a court of conscience, to maintain that falsehood can entitle to such an advantage. For the purpose of investigating the point, I will however assume, agreeably to the decision in the Earl of Aylesford's Case, 2 Stra. 783, and the opinion of Lord Thurlow in Whitchurch *v.* Bevis, that the defendant is bound to discover whether he entered into such parol agreement or not. Suppose the defendant to have confessed the agreement, denying however the acts alleged in part performance of it; where the plaintiff alleges part performance it is assumed that the defendant cannot plead to statute; and when the statute cannot be pleaded, it should seem that it cannot be insisted upon by the answer. But where the statute is not insisted on, it seems admitted that a parol agreement confessed shall be decreed to be performed. It would follow in the above supposed case that the plaintiff would be relieved from the necessity of proving the acts alleged in part performance; for cui bono put him upon proving the part performance of an agreement confessed, the admission of the agreement being alone a sufficient circumstance to entitle him to a decree. This advantage might

§ 1052. **Same.** — Considerations of this sort have led eminent judges to declare that they would not carry the exceptions of cases from the Statute of Frauds farther than they were compelled to

encourage the plaintiff untruly to allege a part performance. But I know no means by which the objection can be obviated; for if the agreement be in part performed, it is but reasonable that it should be completed, and to that the defendant's discovery may be material; and whether it was or was not in part performed is a point which clearly the defendant may establish by evidence aliunde. I have adverted to another difficulty, which may arise from the rule that an agreement in part performed is not within the Statute of Frauds. The case I state supposes the defendant to admit certain acts to have been done, but denies that they were done in part performance of any agreement, or insists that the terms of the agreement, of which they were done in part performance, were not such as stated in the bill. But see Moore *v.* Edwards, 4 Ves. 22; Cooth *v.* Jackson, 6 Ves. 27, in which the above reasoning is very fully considered. There are various acts which are considered to amount to a part performance of a parol agreement, and some of them are of a nature which necessarily imply some agreement; as where a man is let into possession, the possession must be referred to some title. But to what can it, unless to the agreement of one having right to confer a title? In such a case it might be consistent with the provisions of the statute to allow evidence to explain the agreement which led to the possession, though the defendant denied that there was any agreement upon the subject. But if the act alleged in part performance be of a more doubtful nature, as retaining possession after the expiration of a lease, in such case if the defendant denied having agreed to grant a new lease, or to grant it on the terms alleged, it seems very difficult to determine whether the plaintiff ought or ought not, in respect of the admission of the acts alleged, to be allowed to prove a parol agreement by evidence aliunde. See Mortimer *v.* Orchard, 2 Ves. Jr. 243. This note is already drawn out to a greater length than I intended; and as the difficulties which I feel may have been judicially removed by the late decisions of the court, I shall close it with a few distinctions upon the question, what acts amount to a part performance. The general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory or ancillary to it. Gunter *v.* Halsey, Ambl. 586; Whitbread *v.* Brockhurst, 1 Bro. R. 412. See Wills *v.* Stradling, 3 Ves. Jr. 379; Pym *v.* Blackburn, 3 Ves. Jr. 34. The giving of possession is therefore to be considered as an act of part performance. Stewart *v.* Denton, MSS. 4th July, 1786. But giving directions for conveyances and going to view the estate are not. Clerk *v.* Wright, 1 Atk. 12; Whaley *v.* Bagnel, 6 Bro. P. C. 45; s. c. 1 Bro. Parl. Cas. by Tomlins, 345. Payment of money is also said to be an act of part performance. Lacon *v.* Mertins, 3 Atk. 4; sed qu. But it is said that payment of money is not a part performance. See Clinan *v.* Cooke, 1 Sch. & Lefr. R. 40; Frame *v.* Dawson, 14 Ves. 388. Query, Whether it means payment of the whole or only a part of the purchase-money? See also O'Reilly *v.* Thompson, 2 Cox, R. 272. That payment of a sum by way of earnest is not. Seagood *v.* Meale, Prec. Ch. 560; Lord Pengall *v.* Ross, 2 Eq. Cas. Abr. 46, pl. 12; Simmons *v.* Cornelius, 1 Ch. R. 128. But see Voll *v.* Smith, 3 Ch. R. 16; and Anon. 2 Freem. 128." See Givens *v.* Calder, 2 Desaus. Ch. R. 171; Davenport *v.* Mason, 15 Mass. R. 93; Niven *v.* Belknap, 2 Johns. R. 587.

do by former decisions.[1] Lord Redesdale has strongly said: "The statute was made for the purpose of preventing perjuries and frauds; and nothing can be more manifest to any person who has been in the habit of practising in Courts of Equity than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing. Whereas it is manifest that the decisions on the subject have opened a new door to fraud; and that under pretence of part execution, if possession is had in any way whatsoever, means are frequently found to put a Court of Equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. And I remember it was mentioned in one case, in argument, as a common expression at the bar, that it had become a practice to improve gentlemen out of their estates. It is therefore absolutely necessary for Courts of Equity to make a stand, and not carry the decisions further." [2]

§ 1053. **Terms of Contract Must Be Clear and Definite.** — We have already had occasion to see that parol agreements, even with part performance, will not be decreed to be specifically executed unless the whole terms of the contract are clear and definitely ascertained.[3] The same rule applies to cases

[1] Cooth *v.* Jackson, 6 Ves. 22, 27; Lindsay *v.* Lynch, 2 Sch. & Lefr. R. 5.

[2] Lindsay *v.* Lynch, 2 Sch. & Lefr. 4, 5, 7. See also Harnett *v.* Yeilding, 2 Sch. & Lefr. 549; O'Reilly *v.* Thompson, 2 Cox, R. 271, 273; Forster *v.* Hale, 3 Ves. 712, 713; Phillips *v.* Thompson, 1 John. Ch. R. 149; Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 284, 285. Lord Alvanley's remarks in Forster *v.* Hale, 3 Ves. 712, 713, are striking. "I admit," said he, "my opinion is that the court has gone rather too far in permitting part performance and other circumstances to take cases out of the statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part performance, it might be evidence of some agreement; but of what, must be left to parol evidence. I always thought the court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. Those cases are very dissatisfactory. It was very right to say the statute should not be an engine of fraud, therefore compensation would have been very proper. They have however gone further, saying it was clear there was some agreement, and letting them prove it. But how does the circumstance of a man having laid out a great deal of money prove that he is to have a lease for 99 years? The common sense of the thing would have been, to have let them bring an action for the money. I should pause upon such a case."

[3] Ante, § 1050.

of written contracts.[1] If they are not certain in themselves, so as to enable the court to arrive at the clear result of what all the terms are, they will not be specifically enforced. In the first place it would be inequitable to carry a contract into effect where the court is left to ascertain the intentions of the parties by mere conjecture or guess; for it might be guilty of the error of decreeing precisely what the parties never did intend or contemplate.[2] In the next place if any terms are to be supplied it must be by parol evidence; and the admission of such evidence would let in all the mischiefs intended to be guarded against by the statute. Indeed it would be inconsistent with the general principles of evidence (although there are exceptions) [3] which are administered in Courts of Equity as well as in Courts of Law; for the general rule in both courts is that parol evidence is not

[1] Ante, § 751; Kendall *v.* Almy, 2 Sumner's R. 278; Smith *v.* Burnham, 3 Sumner's R. 425. See supra, § 1050. But see Bedford Ry. Co. *v.* Stanley, 2 Johns. & H. 746, that contracts with the promoters of railways for the sale of lands to a contemplated company will be specifically enforced notwithstanding the objections of vagueness, want of consideration, and want of mutuality. A contract requiring arbitration to fix one of its terms, such as value, will not be specifically enforced. Supra, note to § 1050; Noyes *v.* Marsh, 123 Mass. 286; Hopkins *v.* Gilman, 22 Wis. 476; Vickers *v.* Vickers, L. R. 4 Eq. 529; Tobey *v.* Bristol, 3 Story, 800. See Richardson *v.* Smith, L. R. 5 Ch. 648. Secus if the court can ascertain the terms, the provision for arbitration being merely incidental. Dinham *v.* Bradford, L. R. 5 Ch. 519. See Hart *v.* Hart, 18 Ch. D. 670, 687. So where a "fair price" is to be paid, specific performance may be decreed. Van Doren *v.* Robinson, 1 C. E. Green, 256. But not where the terms may be such as the parties shall agree upon. Ib.; Huff *v.* Shepard, 58 Mo. 242; McKibbin *v.* Brown, 1 McCart. 13; Tobey *v.* Bristol, supra.

[2] Lindsay *v.* Lynch, 2 Sch. & Lefr. 7, 8; Colson *v.* Thompson, 2 Wheat. R. 336, 341; Harnett *v.* Yeilding, 2 Sch. & Lefr. 555; Kendall *v.* Almy, 2 Sumner, R. 278; Holloway *v.* Headington, 8 Simons, R. 324. Bear Track Min. Co. *v.* Clark, 6 Idaho, 196, 54 Pac. 1007; Denlar *v.* Hite, 123 Ind. 68, 24 N. E. 170; Louisville & N. Ry. Co. *v.* Bodenschatz, 141 Ind. 251, 39 N. E. 703; Waymire *v.* Waymire, 141 Ind. 164, 40 N. E. 523; Thomas *v.* Gottlieb Brewing Co., 102 Md. 417, 62 Atl. 633; Woodcock *v.* Merrimon, 122 N. C. 731, 30 S. E. 321; Dunsmore *v.* Lyle, 87 Va. 391, 12 S. E. 610; Hissam *v.* Parrish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892; Baumann *v.* Kusian, 164 Cal. 582, 129 Pac. 986; Parsons *v.* Cashman, 23 Cal. App. 298, 137 Pac. 1109; Africano Home etc. Assn. *v.* Carroll, 267 Ill. 380, 108 N. E. 322; King *v.* Prospect Point Fishing Club, 126 Md. 213, 94 Atl. 780; Gerling *v.* Lain, 269 Ill. 337, 109 N. E. 972.

[3] Some of these exceptions have been already considered under the heads of Accident, Mistake, and Fraud; but the full examination of the subject belongs to a treatise on Evidence. See 3 Starkie on Evidence, title Parol Evidence; and Sugden on Vendors, ch. 3, §§ 3, 4, pp. 97 to 146 (7th ed.); 1 Sugden on Vendors, ch. 3, § 3, n. 8 to 31, pp. 163 to 171 (10th ed.); Id. ch. 3, § 8, n. 1 to 28, pp. 217 to 231; 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*o*). For a similar reason I have omitted all notice of what are the proper proofs of a written agreement, the signature of the

permissible to vary, annul, or explain a written contract.[1] A contract cannot rest partly in writing and partly in parol. The writing is the highest evidence, and does away the necessity and effect of the parol evidence if it is contradictory to it.[2]

§ 1054. **Agreement Intended to Be in Writing, but Prevented by Fraud of One of the Parties.** — Another exception to the statute, turning upon similar considerations, is where the agreement is intended by the parties to be reduced to writing according to the statute, but it is prevented from being done by the fraud of one of the parties.[3] In such a case Courts of Equity have said that the agreement shall be specifically executed; for otherwise the statute, designed to suppress fraud, would be the greatest protection to it.[4] Thus if one agreement in writing should be proposed and drawn, and another should be fraudulently and secretly brought in and executed in lieu of the former, in this and the like cases equity would relieve.[5] So if instructions are given by an intended husband to prepare a marriage settlement, and he promises to have the settlement reduced to writing, and then fraudulently and secretly prevents it from being done, and the marriage takes effect in consequence of false assurances and contrivances, a specific performance will be decreed.[6] But if there has been no fraud and no agreement to reduce the settlement to writing, but the other party has placed reliance solely upon the honor, word, or promise of the husband, no relief will be granted;[7]

party, &c., within the Statute of Frauds; and indeed everything respecting the construction of the statute, which does not directly touch the jurisdiction in equity. See Squire *v.* Campbell, 1 Mylne & Craig, 480.

[1] 3 Starkie on Evid. Pt. 4, pp. 995 to 1015; Parteriche *v.* Powlet, 2 Atk. 383; Tinney *v.* Tinney, 3 Atk. 8; Lawson *v.* Laude, 1 Dick. R. 346; Townshend *v.* Stangroom, 6 Ves. 328; Rich *v.* Jackson, 6 Ves. 334, note (*c*); Woollam *v.* Hearn, 7 Ves. 211; Clinan *v.* Cooke, 1 Sch. & Lefr. 33 to 39; Sugden on Vendors, ch. 3, § 4, pp. 123 to 134 (7th ed.); Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 283, 284; s. c. 14 John. R. 15; Squire *v.* Campbell, 1 Mylne & Craig, 480; Carr *v.* Duvall, 39 U. S. 77, 10 L. Ed. 361.

[2] Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 283; s. c. 14 John. R. 15; 3 Wooddes. Lect. 57, pp. 436, 437.

[3] See Newl. on Contr. ch. 10, pp. 179 to 197.

[4] Montacute *v.* Maxwell, 1 P. Will. 618; s. c. 1 Eq. Abr. 19; Prec. Ch. 526.

[5] Ibid.; 3 Wooddes. Lect. 57, p. 432; 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*o*).

[6] Ibid. See Ante, §§ 331, 374, note; Taylor *v.* Beech, 1 Ves. 297, 298; Newl. on Contr. ch. 10, pp. 191, 192, 194; Redding *v.* Wilkes, 3 Bro. Ch. R. 400; Dundas *v.* Dutens, 1 Ves. Jr. 196, 199; s. c. 2 Cox, R. 234; Gilb. Lex. Prætor. 243, 244; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 432, &c.

[7] Ibid.

for in such a case the party chooses to rest upon a parol agreement and must take the consequences.[1] And the subsequent marriage is not deemed a part performance taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case standing on its own grounds.[2] So if a man should treat for a loan of money on mortgage, and the conveyance is to be by an absolute deed of the mortgagor and a defeasance by the mortgagee, and after the absolute deed is executed the mortgagee fraudulently refuses to execute the defeasance, equity will decree a specific performance.[3] So where a father had purchased lands in fee, and on his death-bed told his eldest son that the lands were purchased with his second son's money, and that he intended to give them to him, and the eldest son promised that he should enjoy them accordingly, and the father died, and the eldest son refused to comply with his promise, it was held that the promise should be specifically performed, upon the ground of fraud, notwithstanding the objection that there ought to have been a declaration of the use or trust under the statute.[4] Other cases of a like character have occurred under the head of fraud; and similar considerations may apply in cases of accident and mistake clearly and incontrovertibly made out.[5]

[1] It has sometimes been attempted to except from the statute cases where the parties have expressly agreed that their contract should be reduced to writing. But this doctrine, except in cases of fraud, has been expressly denied. Hollis *v.* Whiting, 1 Vern. 151, 159; Whitchurch *v.* Bevis, 2 Bro. Ch. R. 565.

[2] See Taylor *v.* Beech, 1 Ves. Senr. 297, 298; Dundas *v.* Dutens, 1 Ves. Jr. 195, 199; s. c. 2 Cox. R, 233; Redding *v.* Wilkes, 3 Bro. Ch. R. 400, 401.

[3] Maxwell *v.* Montacute, Prec. Ch. 526; Walker *v.* Walker, 2 Atk. 99; Young *v.* Peachy, 2 Atk. 258; Joynes *v.* Statham, 3 Atk. 389. Oldham *v.* Litchford, 2 Freem. R. 284, 285; Skett *v.* Whitmore, 2 Freem. R. 281; 3 Wooddes. Lect. 57, p. 429.

[4] Sellack *v.* Harris, 5 Vin. Abridg. 521, Pl. 31; 3 Wooddes. Lect. 57, p. 438; ante, § 365; Podmore *v.* Gunning, 7 Sim. R. 644.

[5] See ante, under the heads of Accident, Mistake, and Fraud, §§ 140, 257, 294, 365, 515, Newl. on Contr. ch. 10, pp. 179 to 181; 3 Wooddes. Lect. 57, pp. 436 to 438; Sugden on Vendors, ch. 3, § 3, p. 103, § 4, pp. 154, 155 (7th ed.); 1 Sugden on Vendors, ch. 3, § 8, n. 20 to 28, pp. 225 to 231 (10th ed.); Id. § 11, n. 1 to 27, pp. 258 to 271; Irnham *v.* Child, 1 Bro. Ch. Cas. 92; Pym *v.* Blackburn, 3 Ves. 38, note (*a*) (Amer. ed.); Pember *v.* Matthews, 2 Bro. Ch. R. 54; Whitchurch *v.* Bevis, 2 Bro. Ch. 565. See Attorney-Gen. *v.* Sitwell, 1 Younge & Coll. R. 583; Attorney-Gen. *v.* Jackson, 5 Hare, R. 355. Where A agrees verbally to purchase and pay for land on joint account of himself and B, the latter to reimburse him in half the money, and A after purchasing refuses to carry out the contract, the statute is not removed. Levy *v.* Brush, 45 N. Y. 589;

§ 1055. **Immoral Contract Will Not Be Specifically Enforced.** — And here it is important to take notice of a distinction between the case of a plaintiff seeking a specific performance in equity and the case of a defendant resisting such a performance. We have already seen that the specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court.[1] Hence it requires a much less strength of case on the part of the defendant to resist a bill to perform a contract than it does on the part of the plaintiff to maintain a bill to enforce a specific performance.[2] When the court simply refuses to enforce the specific performance of a contract, it leaves the party to his remedy at law.[3] An agreement to be entitled to be carried into specific performance ought (as we have seen) to be certain, fair, and just in all its parts.[4] Courts of Equity will not decree a specific performance in cases of fraud or mistake;[5] or of hard and unconscionable bar-

Farnham *v.* Clements, 51 Maine, 526. See Buck *v.* Dowley, 16 Gray, 555; Glass *v.* Hulbert, 102 Mass. 24. Secus where by payment of consideration a resulting trust arises. Nelson *v.* Skinner, 20 Iowa, 469. So where a purchaser at decretal sale agreed by parol to buy for the defendant owner, and that the deed should stand as a mortgage, and the plaintiff paid part of the purchase price. Green *v.* Ball, 4 Bush. 586. See Fluharty *v.* Beatty, 4 W. Va. 514. So of a parol agreement to hold property of the grantor, pay his debts thereout and reconvey any surplus. Sandfoss *v.* Jones, 35 Cal. 481. So also of a promise by a purchaser at a tax sale to assign the certificate, relying whereon the owner allows the time for redemption to pass. Laing *v.* McKee, 13 Mich. 124.

[1] Ante, § 1026.

[2] Vigers *v.* Pike, 8 Clarke & Fin. 562, 645, and Lord Cottenham's Remarks, p. 645.

[3] Vigers *v.* Pike, 8 Clarke & Fin. 562, 645. In this respect it differs greatly from the case of an executed contract; for if a court of equity should refuse to administer equities founded upon a deed executed, it would leave the party applying without a remedy. Ibid.

[4] Buxton *v.* Lister, 3 Atk. 385; Brashier *v.* Gratz, 19 U. S. 528, 5 L. Ed. 322; Harnett *v.* Yeilding, 2 Sch. & Lefr. 554; Ellard *v.* Llandaff, 1 B. & Beatt. 250; Seymour *v.* Delancey, 6 John. Ch. R. 222; Ante, §§ 934, 1026 to 1053; Kendall *v.* Almy, 2 Sumner, R. 278. Stearns *v.* Beckham, 31 Gratt. 379; Irwin *v.* Baily, 72 Ala. 467; Moore *v.* Crowder, Ib. 79; Railroad Co. *v.* Telegraph Co., 38 Ohio St. 24. See Love *v.* Sortwell, 124 Mass. 446.

[5] See Post *v.* Marsh, 16 Ch. D. 395; Tomplin *v.* James, 15 Ch. D. 215; Parker *v.* Taswell, 2 DeG. & J. 559; Taylor *v.* Williams, 45 Mo. 80; Davis *v.* Shepherd, L. R. 1 Ch. 410; Harris *v.* Pepperill, L. R. 5 Eq. 1; Wood *v.* Scarth, 2 Kay & J. 33; Higgins *v.* Samels, 2 Johns. & H. 460; Bloomer *v.* Spittle, L. R. 13 Eq. 427; Webster *v.* Cecil, 30 Beav. 62; Harnett *v.* Baker, L. R. 20 Eq. 50; Phillips *v.* Homfray, L. R. 6 Ch. 770; Denny *v.* Hancock, Ib. 1; Butterworth *v.* Walker, 13 Week. R. 168; Moxey *v.* Bigwood, 12 Week. R. 811; Swaisland *v.* Dearsley, 29 Beav. 430; Park *v.* Johnson, 4 Allen, 259; Boynton *v.* Hazelboom, 14 Allen,

gains;[1] or where the decree would produce injustice; or where it would compel the party to an illegal[2] or immoral act; or where it would be against public policy;[3] or where it would involve a breach of trust;[4] or where a performance has become impossible;[5] and

107; Wells *v.* Millett, 23 Wis. 64; Gilroy *v.* Alis, 22 Iowa, 174; Platt *v.* Stonington Bank, 46 Conn. 476; Patterson *v.* Bloomer, 35 Conn. 63; Pendleton *v.* Dalton, 62 N. C. 119; Magraff *v.* Muir, 57 N. Y. 155; Weise's Appeal, 72 Pa. St. 351; Chambers *v.* Livermore, 15 Mich. 381; White *v.* Williams, 48 Barb. 222; Patterson *v.* Bloomer, 35 Conn. 57; Hitchins *v.* Pettingill, 58 N. H. 3; Glass *v.* Hulbert, 102 Mass. 24; Davis *v.* Parker, 14 Allen, 94 (full means of knowledge may justify specific performance notwithstanding mistake); ante, Vol. I. p. 155, editor's note on Mistake of Fact. It is not necessary, to defeat a bill for specific performance, to show fraud as clearly as it would be to defeat recovery on the contract at law. Race *v.* Weston, 86 Ill. 91. If the contract provide for compensation in case of mistake, specific performance may be decreed. Hoy *v.* Smythies, 22 Beav. 510.

[1] Keeler *v.* Taylor, 53 Pa. St. 467; Harkness *v.* Remington, 7 R. I. 154. See Carson *v.* Percy, 57 Miss. 97; Stearns *v.* Beckham, 31 Gratt. 379.

[2] But the parties may not be in pari delicto. Pingree *v.* Coffin, 12 Gray, 288; Freelove *v.* Cole, 41 Barb. 318; Sandfoss *v.* Jones, 35 Cal. 481; Kreamer *v.* Earl, 91 Cal. 112, 27 Pac. 735; Chicago Gaslight & Coke Co. *v.* Peoples Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; reversed Peoples Gaslight etc. Co. *v.* Chicago Gaslight etc. Co., 20 Ill. App. 473; Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505; Lewis *v.* Walker, 61 Mo. App. 550; Simonds *v.* East Windsor Electric Ry. Co., 71 Conn. 513, 48 Atl. 210; Buttgenback *v.* Gerbig, 2 Neb. 889, 90 N. W. 654.

[3] See Post *v.* Marsh, 16 Ch. D. 395; Oldham *v.* James, 14 Ir. Ch. 81; Flanagan *v.* Great Western Ry. Co., L. R. 7 Eq. 116; Whitaker *v.* Bond, 63 N. C. 290; Mortimer *v.* Bell, L. R. 1 Ch. 10; Dobson *v.* Swan, 2 W. Va. 511; Smith *v.* Johnson, 37 Ala. 633; Keeler *v.* Taylor, 53 Pa. St. 467; Foll's Appeal, 91 Pa. St. 434; Sawyer *v.* Churchill, 77 Vt. 273, 59 Atl. 1014, 107 Am. St. Rep. 762; Reed *v.* Johnson, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404; Ralphsnyder *v.* Shaw, 45 W. Va. 680, 31 S. E. 953; Baum *v.* Baum, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. Rep. 854; Barnsdall *v.* Owen, 200 Fed. 519, 118 C. C. A. 623; Bart-Kowiak *v.* Malinowski, 257 Ill. 199, 99 N. E. 905; McQuitty *v.* Wilhite, 247 Mo. 163, 152 S. W. 598.

[4] Tamm *v.* Lavalle, 92 Ill. 263. Or a breach of contract with another. Willmott *v.* Barber, 15 Ch. D. 96; Whitney *v.* Cady, 71 Conn. 166, 41 Atl. 550; Boone *v.* Graham, 215 Ill. 511, 74 N. E. 559; Neuforth *v.* Hall, 6 Kans. App. 902, 51 Pac. 573; Caperton *v.* Forrey, 49 La. Ann. 872, 21 So. 600; Coleman *v.* Dunton, 99 Me. 121, 58 Atl. 430; Rommel *v.* Summit Branch Coal Co., 18 Pa. Super. Ct. Rep. 482; Flackenhamer *v.* Himes, 24 R. I. 306, 53 Atl. 46; Davenport *v.* Lattimer, 53 S. C. 563, 31 S. E. 630; Sweeney Cattle Co. *v.* Erb, 20 S. Dak. 618, 108 N. W. 32; Jones *v.* Tunis, 99 Va. 220, 37 S. E. 841; Hudson *v.* Max Meadows Land & Improvement Co., 99 Va. 537, 39 S. E. 215; Peters *v.* Van Horn, 37 Wash. 550, 79 Pac. 1110.

[5] Smith *v.* Kelly, 56 Maine, 64; Love *v.* Cobb, 63 N. C. 324; Youell *v.* Allen, 18 Mich. 108; Jerome *v.* Scudder, 2 Rob. (N. Y.) 169; Tainter *v.* Cole, 120 Mass. 162; Milkman *v.* Ordway, 106 Mass. 232; Ferguson *v.* Wilson, L. R. 2 Ch. 77. In regard to this class of cases it is laid down

generally not in any cases where such a decree would be inequitable under all the circumstances.[1]

§ 1056. [**If Contract Is Tainted with Fraud It Will Not Be Enforced.** — Since the jurisdiction to specifically enforce the performance of a contract is a peculiar subject-matter cognizable in the Court of Equity, it follows that he who seeks equity must do equity, and if the contract has been induced by a fraudulent misrepresentation, of however slight importance the false statement was, the contract will not, as a general rule, be enforced. This is a proposition that is obviously right. No man ought to be permitted to perpetrate a deliberate fraud upon his neighbor

in Tainter *v.* Cole that if a bill is brought in good faith, and the relief defeated by inability of the defendant to perform the contract arising after the agreement was made, equity will retain the bill and give relief by ordering compensation. Mobile *v.* Kimball, 102 U. S. 691, 706, 26 L. Ed. 238. See Wonson *v.* Fenno, 129 Mass. 405. But the plaintiff must have been ignorant of the defendant's inability. Tainter *v.* Cole, supra. And this rule extends to all cases where a defect of title, right, or capacity appears. Ib.

[1] Sugden on Vendors, ch. 3, § 4, pp. 125 to 135 (7th ed.); 1 Sugden on Vendors, ch. 3, § 8, n. 18 to 28, pp. 224 to 231 (10th ed.); Id. ch. 4, § 3, n. 29 to 42, pp. 337 to 343; Id. § 5, n. 3 to 15, pp. 381 to 386; King *v.* Hamilton, 29 U. S. 31, 7 L. Ed. 869; Kimberley *v.* Jennings, 6 Sim. R. 340; Harnett *v.* Yeilding, 2 Sch. & Lefr. 554, 555; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 432, &c.; Greenaway *v.* Adams, 12 Ves. 399, 400; Denton *v.* Stuart, 1 Cox, R. 258; Cathcart *v.* Robinson, 30 U. S. 264, 8 L. Ed. 120; Mechanics Bank of Alexandria *v.* Lynn, 26 U. S. 376, 7 L. Ed. 185. We have already seen that Mr. Baron Anderson, in Attorney-Gen. *v.* Sitwell, 1 Younge & Coll. R. 582, 583, expressed a strong opinion against a Court of Equity's undertaking, first upon the ground of mistake to reform a contract, and then decreeing a specific performance of it. Ante, § 161, note (1), p. 175; ante, §§ 295, 1055, 1077; Cella *v.* Brown, 144 Fed. 742, 75 C. C. A. 608; Stubbings *v.* Durham, 210 Ill. 542, 71 N. E. 586; Claypool *v.* Board of School Commrs., 132 Ind. 261, 31 N. E. 665; Hopwood *v.* McCausland, 120 Iowa, 218, 94 N. W. 469; Bradford *v.* Smith, 123 Iowa, 41, 98 N. W. 377; Ormsby *v.* Graham, 123 Iowa, 202, 98 N. W. 724; Williamson *v.* Dils, 114 Ky. 962, 72 S. W. 292, 24 Ky. L. Rep. 1792; McCutcheon's Heirs *v.* Rawleigh, 25 Ky. L. Rep. 549, 76 S. W. 50; Goding *v.* Bangor & A. R. Co., 94 Me. 542, 48 Atl. 114; Maryland Telephone Ctc. Co. *v.* Simons, 103 Md. 136, 63 Atl. 314, 115 Am. St. Rep. 346; Rathbone *v.* Groh, 137 Mich, 373, 100 N. W. 588, 11 Detroit Leg. N. 331; Van Nordsall *v.* Smith, 141 Mich. 355, 104 N. W. 660, 12 Detroit Leg. N. 478; Pomeroy *v.* Fullerton, 131 Mo. 581, 33 S. W. 173; Veth *v.* Gierth, 92 Mo. 97, 4 S. W. 432; Ford *v.* Euker, 86 Va. 75, 9 S. E. 500; Southern Ry. Co. *v.* Franklin R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297; Newberry *v.* French, 98 Va. 479, 36 S. E. 519; Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87; Heyward *v.* Bradley, 179 Fed. 325, 102 C. C. A. 509; Moody *v.* Eastern Oregon Land Co., 180 Fed. 532; Stitt *v.* Ward, 142 App. Div. 626, 127 N. Y. Supp. 351; Eiseman *v.* Josepthal, 71 Misc. Rep. 288, 128 N. Y. Supp. 699; Rawlings *v.* Collins, 36 App. D. C. 72; Texas Co. *v.* Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21.

and at the same time come in and ask a Court of Equity to enforce for him, or to relieve him from, a contract permeated with his own deliberate wrong-doing. It is true that the same rules of law with reference to the essentials to be shown in order to set aside a contract on the ground of fraud, equally apply to contracts sought to be specifically enforced in equity. The degree of fraud and the greatness of the falsity of the statement need not be proven to the extent that would be necessary at law. It is sufficient if a false statement, material to the consummation of the agreement, has been made and relied upon by the other party, to his injury;[1] but a mere matter of opinion, such as the value of an acre of land, when honestly made, is not, standing alone, sufficient to avoid the enforcement of the contract.[2] Where the defendant purchased land according to an advertisement in a newspaper, relying upon the description mentioned, when as a fact it contained much less frontage, there was either a mutual mistake on the part of both parties, or mistake on the part of one and fraud on the part of the other and the contract will not be specifically enforced.[3]]

§ 1057. **Same.** — But Courts of Equity do not stop here, for they will let in the defendant to defend himself by evidence to resist a decree where the plaintiff would not always be permitted to establish his case by the like evidence. Thus for instance Courts of Equity will allow the defendant to show that by fraud, accident, or mistake the thing bought is different from what he intended;[4] or that material terms have been omitted in the written agreement; or that there has been a variation of it by parol; or that there has been a parol discharge of a written con-

[1] McBrerty *v.* Hyde, 211 Pa. 123, 60 Atl. 507; Chapman *v.* Hill, 77 Wash. 475, 137 Pac. 1041; Storrs *v.* Scougale, 48 Mich. 387, 12 N. W. 502; Schmitz *v.* Peterson, 113 La. 134, 36 So. 915; Crotty *v.* Effler, 60 W. Va. 258, 54 S. E. 345; Cleavenger *v.* Sturm, 59 W. Va. 658, 53 S. E. 593; Spencer *v.* Sandusky, 46 W. Va. 582, 33 S. E. 221; Hallinger *v.* Zimmerman, 58 N. J. Eq. 217, 42 Atl. 726, affirmed 59 N. J. Eq. 644, 44 Atl. 1100; Ginther *v.* Townsend, 114 Md. 122, 78 Atl. 908; Cowan *v.* Curran, 216 Ill. 598, 75 N. E. 322; McDowell *v.* Caldwell, 116 Iowa, 475, 89 N. W. 1111; Coryell *v.* Hotchkiss, 131 Mich. 308, 91 N. W. 162, 9 Detroit Leg. N. 324; Van Nordsall *v.* Smith, 141 Mich. 355, 104 N. W. 660, 12 Detroit Leg. N. 478; Grand Rapids etc. R. Co. *v.* Stevens, 143 Mich. 646, 107 N. W. 436, 13 Detroit Leg. N. 86; Isaacs *v.* Strainka, 95 Mo. 517, 8 S. W. 427.

[2] Bear *v.* Fletcher, 252 Ill. 206, 96 N. E. 997; Lucas *v.* Long, 125 Md. 420, 94 Atl. 12; Bartley *v.* Big Branch Coal Co., 160 Ky. 123, 169 S. W. 601.

[3] McIntyre *v.* Harrison, 43 Misc. Rep. 94; 87 N. Y. Supp. 1028; Crane *v.* Judik, 86 Md. 63, 38 Atl. 129.

[4] Malins *v.* Freeman, 2 Keen, 25, 34.

tract.[1] The ground of this doctrine is that which has been already alluded to, that Courts of Equity ought not to be active in enforcing claims which are not, under the actual circumstances, just as between the parties. The statute has said that no person shall be charged with the execution of an agreement who has not personally, or by his agent, signed a written agreement. But the statute does not say that if a written agreement is signed, the same exceptions shall not hold to it, as did before the statute. Now before the statute, if a bill had been brought for a specific performance, and it had appeared that the agreement had been prepared contrary to the intentions of the defendant, he might have resisted the performance of it. The statute has made no alteration in this respect in the situation of the defendant. It does not say a written agreement shall bind, but only that an unwritten agreement shall not bind.[2]

[1] Joynes *v.* Statham, 3 Atk. 388; Woollam *v.* Hearn, 7 Ves. 211; Townshend *v.* Stangroom, 6 Ves. 328; Clarke *v.* Grant, 14 Ves. 519; 15 Ves. 523; Winch *v.* Winchester, 1 Ves. & Beam. 375; Price *v.* Dyer, 17 Ves. 356; Rich *v.* Jackson, 4 Bro. Ch. R. 514; 6 Ves. Jr. 334, note; Robson *v.* Collins, 7 Ves. 130; Ogilvie *v.* Foljambie, 3 Meriv. 53; King *v.* Hamilton, 29 U. S. 311, 7 L. Ed. 869; Squire *v.* Campbell, 1 Mylne & Craig, 180; The London and Birmingham Railway Co. *v.* Winter, 1 Craig & Phillips, 60, 61, 68; Pope *v.* Garland, 4 Younge & Coll. 394; Hepburn *v.* Dunlop, 14 N. S. 69, 3 L. Ed. 271; Malins *v.* Freeman, 2 Keen, 25, 34; 1 Fonbl. Eq. B. 1, ch. 6, § 2, note (*e*); 3 Wooddes. Lect. 57, p. 428; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 432, &c. The cases on this subject are very numerous, and are commented on with great care by Sir Edward Sugden, in his Treatise on Vendors, ch. 3, § 4, pp. 125 to 140 (7th ed.); 1 Sugden on Vendors, ch. 3, § 8, n. 18 to 28, pp. 224 to 231 (10th ed.), to which the reader is referred. I have cited only a few of the more prominent cases to support the text. Sir Edward Sugden states that whether an absolute parol discharge, not followed by any other agreement, upon which the parties have acted, can be set up, even as a defence in equity, is questionable. He gives the result of the authorities as to a parol variation as follows: "1. That evidence of it is totally inadmissible at law; 2. That in equity the most unequivocal proof of it will be expected; 3. That if it be proved to the satisfaction of the court, and be such a variation as the court will act upon, yet it can only be used as a *defence* to a bill demanding a specific performance, and is inadmissible as a ground to *compel* a specific performance; unless, 4. There has been such a part performance of the new parol agreement as would enable the court to grant its aid in the case of an original independent agreement; and then, in the view of equity, it is tantamount to a written agreement." The case of Omerod *v.* Hardman, 5 Ves. 722, turned upon a different point. There the object of the parol evidence was, not to establish any fraud or mistake of the intention of the parties, but to add a new term to the contract by parol, which was held inadmissible, even as a defence against a specific performance. See also Newland on Contracts, ch. 10, pp. 206 to 211.

[2] Clinan *v.* Cooke, 1 Sch. & Lefr. 39; Ram *v.* Hughes, 7 Term. R. 350, note; Clarke *v.* Grant, 14 Ves. 524.

§ 1058. **Enforcement of Written Contract Where Part Has Been Fraudulently Omitted.** — But in the case of a plaintiff seeking the specific performance of a contract, if it is reduced to writing, Courts of Equity will not (as has just been hinted) ordinarily entertain a bill to decree a specific performance thereof with variations or additions or new terms to be made and introduced into it by parol evidence; for in such a case the attempt is to enforce a contract partly in writing and partly by parol; and Courts of Equity deem the writing to be higher proof of the real intentions of the parties than any parol proof can generally be, independently of the objection which arises in many cases under the Statute of Frauds.[1] There are however certain exceptions to this doctrine which have been allowed to prevail; as for example where the omission has been by fraud;[2] and in cases not within the reach of the Statute of Frauds where there has been a clear omission by mistake.[3] So also where the defendant sets up in his defence to a bill for the specific performance of a written contract, that there has been a parol variation or addition thereto by the parties, if the plaintiff assents thereto he may award his bill, and at his election have a specific performance of the written contract with such variations or additions so set up; for under such circumstances there is a written admission of each party to the parol variation or addition, and there can be no danger of injury to the parties or evasion of the rules of evidence or of the Statute of Frauds.[4] So the court may decree a specific performance in

[1] Joynes *v.* Statham, 3 Atk. 388; Townshend *v.* Stangroom, 6 Ves. 328; Ramsbottom *v.* Gosden, 1 Ves. & Beam. R. 165; The London and Birmingham Railway Co. *v.* Winter, 1 Craig & Phillips, R. 57, 62; ante, § 1057.

[2] Ante, §§ 224 to 226.

[3] Henkle *v.* Royal Exch. Assur. Co., 1 Ves. 317; Motteux *v.* London Assur. Co., 1 Atk. R. 545; ante, §§ 224 to 227; post, § 1364.

[4] The London and Birmingham Railway Co. *v.* Winter, 1 Craig & Phillips, 57. On this occasion Lord Cottenham said: "This is not a case within the meaning of those decisions in which the court has said that it will not specifically perform the contract with a variation. If the court finds a written contract has been entered into, and the plaintiff says, 'That was agreed upon, but then there were certain other terms added or certain variations made', the court holds that in such a case the contract is not in the writing, but in the terms which are verbally stated to have been the agreement between the parties; and therefore refuses specifically to perform such an agreement. On the other hand it is quite competent for the defendant to set up a variation from the written contract; and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted

favor of the plaintiff, notwithstanding he does not make out the case stated by his bill, if he offers to comply with the contract as set forth in the defendant's answer, and as the defendant states it.[1]

§ 1059. **Plaintiff Must Not Have Been in Laches.** — In general it may be stated that to entitle a party to a specific performance he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps

for. That this is the rule of the court is sufficiently established in many cases, of which I will only mention three. Joynes *v.* Statham, 3 Atk. 388, by Lord Hardwicke; Townshend *v.* Stangroom, 6 Ves. Jr. 328, by Lord Eldon; and Ramsbottom *v.* Gosden, 1 Ves. & Beames, 165, by Sir William Grant. In the last-mentioned case Sir William Grant put it to the plaintiff whether he would take a specific performance with the performance of the condition established by parol testimony, or whether he would have the bill dismissed. The only doubt therefore I should have had if Mr. Wigram had declined, on the part of the plaintiffs, to comply with the terms mentioned by the witness, would have been whether in this case the variation was so stated as to entitle the defendant to the benefit of it; because he does not state it in his answer, nor does he prove it, nor attempt to prove it, but it comes out on the cross-examination of the plaintiffs' witness. On such a statement, not put in issue between the parties, and which the plaintiffs had therefore no opportunity of meeting, I should certainly not have thought it right to act; but as it appears on the evidence before the court that such an understanding existed, I should probably have thought it a fit subject of inquiry, before I finally disposed of the case, if the course taken by the plaintiffs had not made it unnecessary for me to consider the point." See ante, § 1041.

It sometimes happens that variations from the written agreement are entered into, and leave the rights of the parties so uncertain that specific performance of the contract cannot be decreed. But if, after changes are assented to, it is still clear what the rights of the parties are under the contract as modified, there is nothing to prevent the enforcement of those rights by a decree for specific performance. Gloucester Isinglass & Glue Co. *v.* Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214. See also Welch *v.* McIntosh, 89 Kans. 47, 130 Pac. 641.

[1] Daniell, Ch. Pr. 513, 514, which cites Lindsay *v.* Lynch, 2 Sch. & Lefr. 9; Woolan *v.* Hearn, 7 Ves. 22; Denniston *v.* Little, 2 Sch. & Lefr. 11, note (2); Ib. 149, note (2); Story on Eq. Plead. § 394.

See McComas *v.* Easley, 21 Gratt. 23. But where the defendant sets up in his answer a different agreement from that which the plaintiff seeks to have enforced, and the plaintiff has always repudiated the same, he cannot have this agreement specifically enforced. Jeffrey *v.* Stephens, 6 Jur. (N. S.) 947. See Richardson *v.* Goodwin, 6 Jones, Eq. 229. If however the fulfilment has merely been waived, and the part so waived does not affect the essential rights of the parties with regard to specific performance, performance may be decreed. Portland R. Co. *v.* Grand Trunk R. Co., 63 Maine, 90. And of course if the contract set up by the defendant is an independent collateral agreement, not connected with the contract sued upon, neither its existence nor its non-performance will defeat the plaintiff's claim. Stewart *v.* Metcalf, 68 Ill. 109.

towards the performance on his own part.[1] If he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed; for Courts of Equity do not, any more than Courts of Law, administer relief to the gross negligence of suitors.[2] Of course if the contract has been abandoned, then all rights under it cease and the remedy of specifically enforcing it no longer applies.[3] But this doctrine is to be taken (as we shall presently see) with some qualifications. For although Courts of Equity will not encourage laches, yet if there has not been a strict legal compliance with the terms of the contract, and the non-compliance does not go to the essence of the contract, relief will be granted.[4]

[1] 1 Fonbl. Eq. B. 1, ch. 6, § 2, and notes (*c*), (*d*); Gilbert, Lex Prætor. 240; Colson *v.* Thompson, 15 U. S. 336, 4 L. Ed. 253; Kendall *v.* Almy, 2 Sumner, R. 278.

[2] Ibid. and note (*e*); Pratt *v.* Carroll, 12 U. S. 471, 3 L. Ed. 627; Milward *v.* Earl of Thanet, 5 Ves. 720, note; Moore *v.* Blake, 1 B. & Beatt. 68, 69; King *v.* Hamilton, 29 U. S. 311, 7 L. Ed. 869; Watson *v.* Reid, 1 Russ. & Mylne, 236; Page *v.* Broom, 4 Russ. R. 6; Watts *v.* Waddle, 31 U. S. 389, 8 L. Ed. 437; McNeil *v.* Magee, 5 Mason, R. 244; Coulson *v.* Walton, 34 U. S. 62, 9 L. Ed. 51; Holt *v.* Rogers, 33 U. S. 420, 8 L. Ed. 995; Baldwin *v.* Salter, 8 Paige, R. 473; Vigers *v.* Pike, 8 Clark & Fin. 650.

[3] Riley *v.* Allen, 71 Kans. 625, 81 Pac. 186; Laird *v.* Laird, 115 Mich. 352, 73 N. W. 382, 4 Detroit Leg. N. 921; Oliver Mining Co. *v.* Clark, 69 Minn. 75, 71 N. W. 908; Milmoe *v.* Murphy, 65 N. J. Eq. 767, 56 Atl. 292; Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49; Magnusson *v.* Linwell, 9 N. Dak. 157, 82 N. W. 743; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998.

[4] Post, §§ 1064; 1065; Taylor *v.* Longworth, 39 U. S. 173, 10 L. Ed. 405.

It appears to be unnecessary that all the terms of the contract have become performable before suit for specific performance. See Nives *v.* Nives, 15 Ch. D. 649, where a vendor had specific performance though the purchase price was payable in instalments, some of which were not yet due.

"It is not every breach of a covenant upon his part which prevents a man coming to a Court of Equity to have covenants enforced. Take a simple instance. A man is a lessee, with a proviso that he may purchase on a six months' notice. He does not pay his rent punctually; but that does not prevent his coming here for a specific performance of the purchase. It must not only have some connection with the matter for which specific performance is sought, but it must be some such material and substantial breach as will enable the court to say that his conduct has been such that it ought not to interfere in his behalf at all." Besant *v.* Wood, 12 Ch. D. 605, 628, Jessel, M. R. For special illustrations of the text see Todd *v.* Taft, 7 Allen, 371; Fuller *v.* Hovey, 2 Allen, 324; Du Bois *v.* Baum, 46 Penn. St. 537; Boston R. Co. *v.* Bartlett, 10 Gray, 384; Johns *v.* Norris, 7 C. E. Green, 102; Haughwout *v.* Murphy, 6 C. E. Green, 118; Lawrence *v.* Lawrence, Ib. 317; Merritt *v.* Brown, Ib. 401; Hubbell *v.* Van Schoening, 49 N. Y. 326; Campbell *v.* Hicks, 19 Ohio St. 433; Eppinger

§ 1060. **Performance by Other Party Where Plaintiff Has Done His Part.** — It has been laid down that if a man has performed a valuable part of an agreement, and is in no default for not performing the residue there it is but reasonable that he should have a specific execution of the other part of his contract, or at least should recover back what he has paid, so that he may not be a loser. For since he entered upon the performance in contemplation of the equivalent from the other party, there is no reason why an accidental loss should fall upon him any more than upon the other.[1] A distinction has been put upon this subject by Lord Chief Baron Gilbert, which is entitled to consideration, because it apparently reconciles authorities which might otherwise seem discordant. It is the distinction between cases in which the plaintiff is in statu quo as to all that part of his agreement which he has performed, and those cases in which he

v. McGreal, 31 Tex. 147; Eyre *v.* Eyre, 4 C. E. Green, 102; Andrews *v.* Bell, 56 Pa. St. 343; Cadwallader's Appeal, 57 Pa. 158; Nelson *v.* Hagerstown Bank, 27 Md. 51; Addington *v.* McDonnell, 63 N. C. 389; Thompson *v.* Bruen, 46 Ill. 125; Gentry *v.* Rogers, 40 Ala. 442; Smith *v.* Lawrence, 15 Mich. 499; Johnson *v.* Hopkins, 19 Iowa, 49; Williams *v.* Hart, 116 Mass. 513; Abbott *v.* L'Hommedieu, 10 W. Va. 677; Boone *v.* Missouri Iron Co., 17 How. 340; Willard *v.* Taylor, 8 Wall. 557; McClellan *v.* Darrah, 50 Ill. 249; Wass *v.* Mugridge, 128 Mass. 394; Howe *v.* Conley, 16 Gray, 552; Thorp *v.* Pettit, 1 C. E. Green, 488; Beach *v.* Dyer, 93 Ill. 295; Cooper *v.* Pena, 21 Cal. 403; Martin *v.* Veeder, 20 Wis. 466.

For cases in which the failure or refusal of the defendant to perform is properly due to the plaintiff's own action, see Eastman *v.* Plumer, 46 N. H. 464; Dech's Appeal, 57 Penn. St. 467; Tomplin *v.* James, 15 Ch. D. 215. See also Viney *v.* Chaplin, 2 DeG. & J. 468.

Relief will not be decreed where one of the parties has waited for 36 years, and until after the other party has died. Cook *v.* Stafford, 86 Mich. 163, 48 N. W. 785.

If one party abandons the contract, he loses his right to enforce performance of it, especially where it would entail a hardship upon the other party. Findley *v.* Koch, 126 Iowa, 131, 101 N. W. 766.

Anything short of the utmost good faith in performing the contract will not suffice, but if one party through unavoidable accident, or where by the exercise of due diligence performance has been rendered impossible, and at the earliest opportunity he performed his contract, the court will enforce it, if this can be done and the parties left in the same relative position they would have been in had no delay occurred. Monihon *v.* Wakelin, 6 Ariz. 225, 56 Pac. 735; see also Rexford *v.* Southern Woodland Co., 208 Fed. 295.

If property depreciates by reason of slight delay, which is excusable, this will not prevent performance of the contract. Clark *v.* Hutzler, 96 Va. 73, 30 S. E. 469; generally, see Cronen *v.* Moore, 210 Fed. 239; Caplan *v.* Buckner, 123 Md. 590, 91 Atl. 481.

[1] 1 Fonbl. Eq. B. 1, ch. 6, § 3; Gilb. Lex Prætor. 240, 241; ante, §§ 775, 976.

is not in statu quo. In the former cases equity will not enforce the agreement if the plaintiff cannot completely perform the whole of his part of it; in the latter cases equity will enforce it notwithstanding he is incapable of performing the remainder by a subsequent accident.[1]

§ 1061. **Same.** — Thus upon a marriage settlement A contracted to settle a manor on his wife and the heirs of their bodies, and to clear it of incumbrances, and to settle a separate maintenance on her, and likewise to sell some pensions, in order to make a further provision for her and the issue of the marriage; and his father-in-law agreed to settle £3,000 per annum on A for life, remainder to the wife for life, and so to the issue of the marriage. A cleared the manor of incumbrances, and settled it accordingly, and settled also the separate maintenance; but he did not sell the pensions, nor settle the further provisions. The wife died without issue, and A brought his bill to have the £3,000 settled on him during his life. The court refused to decree it, because A was in statu quo as to all that part of the agreement which he had performed, and not having performed the whole, and the other part being now impossible, and no compensation being possible to be adjusted for it, he had no title in equity to a specific performance, since such performance would not be mutual. But the issue of A, if any, might have been relieved, because they would have been in no default. This case illustrates the first proposition.[2]

[1] Gilb. Lex Prætor. 240; 1 Fonbl. Eq. B. 1, ch. 6, § 3, note (*f*); Newland on Contr. ch. 12, pp. 249, 250.

A contract to convey three lots will not be enforced as to two of them, where the title to one of the lots was defective. Gosman *v.* Pfister, 80 N. J. Eq. 432, 83 Atl. 781; Rose *v.* Henderson, 63 Fla. 603, 59 So. 138; Vickers *v.* Baltimore, 102 Md. 487, 63 Atl. 120; North Avenue Land Co. *v.* Baltimore, 102 Md. 475, 63 Atl. 115; but if all of the parties understood that only a portion of the property contracted for was subject to sale, then only that particular portion would be affected. Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824.

If it appears upon the face of the contract that it was to be performed in its entirety, an enforcement of part and an allowance for defects will not be decreed. Joyner *v.* Crisp, 158 N. C. 199, 73 S. E. 1004; but if a small portion of the land cannot be conveyed by warranty deed on account of defect in title, and this portion does not in any material degree affect the balance of the land, the contract will be enforced, with allowance for deficiency. James Land & Inv. Co. *v.* Vernon, 129 Tenn. 637, 168 S. W. 156, 52 L. R. A. (N. S.) 959; Riverside Land & Irrigation Co. *v.* Sawyer, 24 Colo. App. 442, 134 Pac. 1011.

See generally, Brisbane *v.* Sullivan, 83 N. J. Eq. 182, 93 Atl. 705; Gates *v.* Gamble, 53 Mich. 181, 18 N. W. 631; Whiteside *v.* Winans, 29 Pa. Super Ct. Rep. 244.

[2] Gilb. Lex Prætor. 240, 241; Feversham *v.* Watson, Rep. temp. Finch,

§ 1062. **Same.** — But (which is the second case) if a man has performed so much of the agreement as that he is not in statu quo, and is in no default for not performing the residue, there he shall have a specific execution of the agreement from the other party. As if a man has contracted for a portion to be received with the wife, and has agreed to settle lands of a certain value upon the wife and her issue, free of incumbrances, and he sells part of his lands to disencumber the other lands, and is proceeding to disencumber and settle the rest, — in such a case if the wife should die without issue before the settlement is actually made, yet he shall have the portion, because he cannot be placed in statu quo, having sold part of his lands; and there was no default in him, since he was going on to perform his contract, and therefore the accident of the wife's death shall not prejudice him.[1]

§ 1063. **Compensation Made Where Contract Has Been Partly Performed.** — Where the terms of an agreement have not been strictly complied with, or are incapable of being strictly complied with, still, if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed, and if compensation may be made for any injury occasioned by the non-compliance with the strict terms, — in all such cases Courts of Equity will interfere and decree a specific performance. For the doctrine of Courts of Equity is, not forfeiture, but compensation;[2] and nothing but such a decree will, in such cases, do entire justice between the parties.[3] Indeed, in some cases Courts of Equity will decree a specific execution, not according to the letter of the contract, if that would be unconscientious, but they will modify it according to the change of circumstances.[4]

445; s. c. 2 Freem. R. 35. But see Hovenden's note to 2 Freem. R. 35 (4). The case seems to have been put in the reports upon the ground that the covenants of the plaintiff were by way of condition precedent, which could not be dispensed with in equity. Rep. temp. Finch, 447; 2 Freem. R. 35. See Newland on Contracts, ch. 12, pp. 249, 250.

[1] Gilb. Lex Prætor. 241, 242; Meredith *v.* Wynn, 1 Eq. Abr. 71; s. c. Prec. Ch. 312; 1 Fonbl. Eq. B. 1, ch. 6, § 4, note (*f*).

[2] Page *v.* Broom, 4 Russ. R. 6, 19; ante, § 1059; post, § 1064.

[3] Davis *v.* Hone, 2 Sch. & Lefr. 347; Lennon *v.* Napper, 2 Sch. & Lefr. 684; 1 Fonbl. Eq. B. 1, ch. 6, § 2, note (*e*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, pp. 460, 461; Winne *v.* Reynolds, 6 Paige, R. 407; Taylor *v.* Longworth, 39 U. S. 173, 10 L. Ed. 405.

[4] Ibid.; Mechanics' Bank of Alexandria *v.* Lynn, 26 U. S. 376, 7 L. Ed. 185. On this occasion Mr. Justice Thompson, in delivering the opinion of the court, said: "But the court ought not to decree performance according to the letter, when from change of circumstances, mistake, or misapprehension, it would be unconscientious so to do. The court may so modify the agreement as to do justice as far as circumstances will permit,

§ 1064. **Time as of Essence of Contract in Equity.** — One of the most frequent occasions on which Courts of Equity are asked to decree a specific performance of contracts is, where the terms for the performance and completion of the contract have not, in point of time, been strictly complied with. Time is not generally deemed in equity to be of the essence of the contract unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract.[1] It is true that Courts of Equity have regard to time

and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires." The remarks of Lord Redesdale on this same point deserve to be cited at large. "A Court of Equity," said he, "frequently decrees specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that the agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance, and to sustain an action at law performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case." Davis *v.* Hone, 2 Sch. & Lefr. 347. Again in Lennon *v.* Napper, 2 Sch. & Lefr. 684, he said: "The courts, in all cases of contracts for estates in land, have been in the habit of relieving, where the party from his own neglect had suffered a lapse of time, and from that or other circumstances could not maintain an action to recover damages at law. And even where nothing exists to prevent his suing at law, so many things are necessary to enable him to recover at law that the formalities alone render it very inconvenient and hazardous so to proceed; nor could in many cases the legal remedy be adequate to the demands of justice. Courts of Equity have therefore enforced contracts specifically where no action for damages could be maintained; for at law the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of Courts of Equity. They dispense with that which would make compliance with what the law requires oppressive; and in various cases of such contracts they are in the constant habit of relieving the man who has acted fairly though negligently. Thus in the case of an estate sold by auction there is a condition to forfeit the deposit if the purchase be not completed within a certain time, yet the court is in the constant habit of relieving against the lapse of time. And so in the case of mortgages, and in many instances relief is given against mere lapse of time where lapse of time is not essential to the substance of the contract."

[1] Newland on Contr. ch. 12, pp. 230 to 255; 1 Fonbl. Eq. B. 1, ch. 6, § 2, note (*e*); Sugden on Vendors, ch. 8, § 1, p. 359, § 4, pp. 375 to 379 (7th ed.); Wynn *v.* Morgan, 7 Ves. 202; Gibson *v.* Patterson, 1 Atk. 12; Pincke *v.* Curtit, 4 Bro. Ch. R. 329; Lloyd *v.* Collet, 4 Bro. Ch. R. 469, Tomlins's ed.; 4 Ves. R. 689, note; Omerod *v.* Hardman, 5 Ves. 736; Seton *v.* Slade, 7 Ves. 265; Hall *v.* Smith, 14 Ves. 426; Savage *v.* Brocksopp, 18 Ves. 335; Hertford *v.* Boore, 5 Ves. 719; Reynolds *v.* Nelson, 6 Madd. R. 19, 25, 26; Newman *v.* Rogers, 4 Bro. Ch. R. 391; Doloret *v.* Rothschild, 1 Sim. & Stu. 590; Heapy *v.* Hill, 2 Sim. & Stu. 29; Hepburn *v.* Dunlop, 9 U. S. 263, 3 L. Ed. 96; Brashier *v.* Gratz, 19 U. S. 528, 5 L.

so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the

Ed. 322; Taylor *v.* Longworth, 39 U. S. 173, 10 L. Ed. 405; Baldwin *v.* Salter, 8 Paige, 473; ante, § 771. The doctrine was formerly carried to an extravagant extent in favor of relief. But in recent times Courts of Equity have endeavored to restrict it to very moderate limits. See Sugden on Vendors, ch. 8, § 1, pp. 359, 360, 361 (7th ed.); 1 Sugden on Vendors, ch. 5, § 2, n. 1 to 15, Id. § 3, n. 27 (10th ed.). Mr. Baron Alderson, in the recent case of Hipwell *v.* Knight, 1 Younge & Collyer, 415, has put this whole subject in its true light, and I gladly avail myself of the opportunity to quote his remarks. "Now the first question," said he, "is whether time is of the essence of this agreement. After examining with as much attention as I can the various cases brought before me during the argument, it seems to me to be the result of them all that a Court of Equity is to be governed by this principle, — it is to examine the contract, not merely as a Court of Law does, to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to carry that into effect. But in so doing I should think it prudent in the first place to look carefully at what the parties have expressed; because in general they must be taken to express what they intend, and the burden ought in good reason to be thrown on those who assert the contrary. In the case of a mortgage however, which I use rather for the purpose of illustrating the principle than as at all parallel to the present case, the court, looking at the real contract, which is a pledge of the estate for a debt, treats the time mentioned in the mortgage deed as only a formal part of it, and decrees accordingly; taking it to be clear that the general intention should override the words of the particular stipulation. So in the ordinary case of the purchase of an estate and the fixing a particular day for the completion of the title, the court seems to have considered that the general object being only the sale of the estate for a given sum, the particular day named is merely formal; and the stipulation means in truth that the purchase shall be completed within a reasonable time, regard being had to all the circumstances of the case and the nature of the title to be made. But this is but a corollary from the general position, which is, that the real contract and all the stipulations really intended to be complied with literally shall be carried into effect. We must take care however that we do not mistake the corollary for the original proposition. If therefore the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract; and a stipulation as to time must then be literally complied with in equity as well as in law. The cases of the sale of stock and of a reversion are instances of this. So also if it appear that the object of one party known to the other was that the property should be conveyed on or before a given period, as the case of a house for residence, or the like. I do not see therefore why, if the parties choose even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a Court of Equity. That is the real contract. The parties had a right to make it. Why then should a Court of Equity interfere to make a new contract which the parties have not made? It seems to me therefore that the conclusion at which Sir Edward Sugden in his valuable treatise on this subject has arrived is founded in law and good sense." See also Coslake *v.* Till, 1 Russ. R. 376; Doloret *v.* Rothschild, 1 Sim. & Stu. 590; King *v.* Wilson, 6 Beav. R. 124.

party from a strict compliance, or if he comes, recenti facto, to ask for a specific performance, the suit is treated with indul-

Besant *v.* Wood, 12 Ch. D. 605, 628, Jessel, M. R.; Parkin *v.* Thorold, 16 Beav. 59; Huffman *v.* Hummer, 2 C. E. Green, 263; Scarborough *v.* Arrant, 25 Tex. 129; Steele *v.* Branch, 40 Cal. 4; Pritchard *v.* Todd, 38 Conn. 413; Spalding *v.* Alexander, 6 Bush, 160; Ashmore *v.* Evans, 3 Stockt. 151; Snowman *v.* Harford, 55 Me. 197; De Camp *v.* Crane, 4 C. E. Green, 166; Mix *v.* Beach, 46 Ill. 311; Richmond *v.* Robinson, 12 Mich. 193; Morris *v.* Hoyt, 11 Mich. 9; Delavan *v.* Delavan, 49 N. Y. 485; Dresel *v.* Jordan, 104 Mass. 407. But time, as the author has stated supra, may be made of the essence of a contract even in the view of a Court of Equity, either by express stipulation, by necessary implication, or by subsequent notice. Parkin *v.* Thorold, 16 Beav. 59; Macbryde *v.* Weekes, 22 Beav. 533; King *v.* Ruckman, 5 C. E. Green, 316; Stow *v.* Russell, 36 Ill. 18; Heckard *v.* Sayre, 34 Ill. 142; Quinn *v.* Roath, 37 Conn. 16; Sharp *v.* Trimmer, 24 N. J. Eq. 422; Miller *v.* Miller, 25 N. J. Eq. 354; Hubbell *v.* Van Schoening, 49 N. Y. 326; O'Fallen *v.* Kennerly, 45 Mo. 124; Becker *v.* Smith, 59 Pa. St. 469. See Steele *v.* Branch, 40 Cal. 4; Bullock *v.* Adams, 5 C. E. Green, 367; Richmond *v.* Robinson, 12 Mich. 193; Van Campen *v.* Knight, 63 Barb. 205; Atkins *v.* Rison, 25 Ark. 138. Time may also be made of the essence of a contract by circumstances, e.g. by the fluctuation of values. Merritt *v.* Brown, 4 C. E. Green, 286; Macbryde *v.* Weekes, 22 Beav. 533; Goldsmith *v.* Guild, 10 Allen, 239 (where it is said that time is generally of the essence in sales of land in this country); Booten *v.* Scheffer, 21 Gratt. 474. So in the following cases: Sale of a residence and growing crop. Gale *v.* Archer, 42 Barb. 320. See Tilley *v.* Thomas, L. R. 3 Ch. 61. Sale of a public house as a "going concern." Day *v.* Lubke, L. R. 5 Eq. 336; Cowles *v.* Gale, L. R. 7 Ch. 12. An election in favor of A to purchase land after the expiration of a lease, on condition of three months' notice and paying a certain sum at the expiration of that time. Ranelagh *v.* Melton, 2 Drew. & S. 278; Weston *v.* Collins, 11 Jur. (N. S.) 190. See Magoffin *v.* Holt, 1 Duv. 95; Mason *v.* Payne, 47 Mo. 517 (infant reversioners); Potts *v.* Whitehead, 5 C. E. Green, 55.

But though time might be of the essence of the contract, the plaintiff may be unable to avail himself of the fact, as by failing punctually to perform his part of the engagement. Upperton *v.* Nickolson, L. R. 6 Ch. 436. So by continuing negotiations for adjustment after the expiration of the time, at least where equities have intervened. Webb *v.* Hughes, L. R. 10 Eq. 281; Grigg *v.* Landis, 6 C. E. Green, 494. See further as to time Leaird *v.* Smith, 44 N. Y. 618; Reed *v.* Breeden, 61 Pa. St. 460; Jones *v.* Noble, 3 Bush, 694; Barnard *v.* Lee, 97 Mass. 92; Troy *v.* Clarke, 30 Cal. 419; Kentucky *v.* Warwick, 109 Fed. 280, 48 C. C. A. 363; Foot *v.* Bush, 100 Iowa, 522, 69 N. W. 874; Frey *v.* Camp, 131 Iowa, 109, 107 N. W. 1106; Williams *v.* McManus, 90 S. C. 490, 78 S. E. 1038; Turn Verein Eiche *v.* Kionka, 255 Ill. 392, 99 N. E. 684; Mercantile Bank *v.* Heinz, 75 Misc. Rep. 551, 135 N. Y. Supp. 962; Benham *v.* Columbia Canal Co. 74 Wash. 110, 132 Pac. 884; Wood *v.* Sheffer, 248 Ill. 617, 94 N. E. 24; Blanchard *v.* Archer, 93 App. Div. 459, 87 N. Y. Supp. 665; Hollomann *v.* Conlon, 143 Mo. 369, 45 S. W. 275; and for cases in which time has been held not to be of the essence, see Sandiford *v.* Thompson, 135 Fed. 991, 68 C. C. A. 425; Vance *v.* Newman, 72 Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42.

While time may be of the essence of the contract, it may be waived by

gence, and generally with favor, by the court.[1] But then in such cases it should be clear that the remedies are mutual;[2] that there has been no change of circumstances affecting the character or justice of the contract;[3] that compensation for the delay can be fully and beneficially given;[4] that he who asks a specific performance is in a condition to perform his own part of the contract;[5] and that he has shown himself ready, desirous, prompt, and eager to perform the contract.[6] Even where time is of the essence of the contract it may be waived by proceeding in the purchase after the time has elapsed; and if time was not originally made by the parties of the essence of the contract, yet it may become so by notice, if the other party is afterwards guilty of improper delays in completing the purchase.[7]

§ 1065. **Vendor Relieved Where He Has Been Unable to Perform on Account of Condition of His Title.** — Courts of Equity will also relieve the party vendor by decreeing a specific performance where he has been unable to comply with his contract according to the terms of it, from the state of his title at the time, if he comes within a reasonable time, and the defect is cured.[8] So if there has been no unnecessary delay Courts of Equity will some-

both parties, and where the vendee has been in possession for ten years after time limit, and property has greatly increased in value, he will not forfeit his estate, but may demand a conveyance. Hairston *v.* Bescherer, 141 N. C. 205, 53 S. E. 845.

The time limited in an option contract for the purchase of land is of the essence. Herman *v.* Winter, 20 S. Dak. 196, 105 N. W. 457.

The claim of him who has been guilty of gross laches is not looked upon with favor. Bradley *v.* Union Pac. Ry. Co., 76 Neb. 172, 107 N. W. 238.

[1] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, pp. 461, 462; ante, § 1059; post, § 1065; Asia *v.* Hiser, 38 Fla. 71, 20 So. 796.

[2] 1 Fonbl. Eq. B. 1, ch. 6, § 12, note (*c*), and the cases there cited.

[3] Brashier *v.* Gratz, 19 U. S. 528, 5 L. Ed. 322; Mechanics Bank of Alexandria *v.* Lynn, 26 U. S. 376, 7 L. Ed. 185; Payne *v.* Meller, 6 Ves. 349; Taylor *v.* Longworth, 39 U. S. 173, 10 L. Ed. 405.

[4] Pratt *v.* Law, 9 Cranch, 456, 493, 494.

[5] Morgan *v.* Morgan, 15 U. S. 290, 4 L. Ed. 242; Sugden on Vendors, ch. 8, § 2, pp. 365 to 375 (7th ed.).

[6] Millard *v.* Earl of Thanet, 5 Ves. 420, note; Alley *v.* Deschamps, 13 Ves. 228; Moore *v.* Blake, 1 B. & Beatt. 68, 69; Newland on Contracts, ch. 12, pp. 242 to 248, King *v.* Hamilton, 29 U. S. 311, 7 L. Ed. 869.

[7] King *v.* Wilson, 6 Beav. R. 124; Studdard *v.* Hawkins, 139 Ga. 743, 78 S. E. 116; Mansfield *v.* Wiles, 221 Mass. 75, 108 N. E. 901; Darrow *v.* Cornell, 30 App. Div. 15, 51 N. Y. Supp. 828.

[8] See the cases cited in Sugden on Vendors, ch. 8, § 2, pp. 365 to 375 (7th ed.); Id. ch. 6, p. 260, § 2, p. 279, § 3, p. 290 (7th ed.); 1 Sugden on Vendors, ch. 5, § 2, n. 6, 8; Id. § 3, n. 1 to 9, pp. 415 to 420; Guest *v.* Homfray, 5 Ves. 818; Newland on Contr. ch. 12, pp. 227 to 230; Esdaile

times decree a specific performance in favor of the vendor, although he is unable to make a good title at the time when the bill is brought, if he is in a condition to make such a title at or before the time of the decree.[1] So if the circumstances of the quality or quantity of land are not correctly described, and the misdescription is not very material, and admits of complete compensation, Courts of Equity will decree a specific performance. In all such cases Courts of Equity look to the substance of the contract, and do not allow small matters of variance to interfere with the manifest intention of the parties; and especially where full compensation can be made to the party on account of any false or erroneous description.[2]

§ 1066. **Same.** — But where there is a substantial [3] defect in the estate sold, either in the title itself, or in the representation or description, or the nature, character, situation, extent, or quality of it, which is unknown to the vendee, and in regard to which he is

v. Stephenson, 1 Sim. & Stu. 122; Wynn *v.* Morgan, 7 Ves. 202; Hepburn *v.* Auld, 9 U. S. 263, 3 L. Ed. 96; 3 Wooddes. Lect. 68, pp. 465, 466; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 457; Hepburn *v.* Dunlop, 1 Wheat. R. 179; ante, § 1059.

[1] Hepburn *v.* Dunlop, 14 U. S. 69, 3 L. Ed. 271; ante, §§ 1059, 1052; Hoggart *v.* Scott, 1 Russ. & Mylne, 293; s. c. Tamlyn, R. 500; May *v.* Getty, 140 N. C. 311, 53 S. E. 75; Dresel *v.* Jordan, 104 Mass. 407; Mussleman's Appeal, 65 Pa. St. 480; Christian *v.* Cabell, 22 Gratt. 82; Cook *v.* Bean, 17 Ind. 504; Seaver *v.* Hall, 50 Neb. 878, 70 N. W. 373; McDonald *v.* Vach, 29 Misc. Rep. 96, 60 N. Y. Supp. 557, affirmed 51 App. Div. 549, 64 N. Y. Supp. 831, 169 N. Y. 615, 62 N. E. 1097; Arnett *v.* Smith, 11 N. Dak. 55, 88 N. W. 1037; Scudder *v.* Lehman, 142 App. Div. 631, 127 N. Y. Supp. 470; Kinsey *v.* Posey, 148 Ky. *v.* 54, 145 S. W. 1121; Mansfield Wiles, 221 Mass. 75, 108 N. E. 901.

The vendor need not have a marketable title at the time the contract was made, but it is sufficient if he is in a position to convey such a title when the decree is made. Hammer *v.* Westphal, 120 Md. 15, 87 Atl. 488; Heller *v.* McGuin, 261 Ill. 588, 104 N. E. 158; Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657. Contra, Smith *v.* Browning, 171 App. Div. 278, 157 N. Y. Supp. 71.

While it is sufficient if vendor is able to convey a perfect title at time of trial, he will not be allowed to enforce the contract where he has had vendee's money for seven years and made no effort to complete his title until just before the hearing. Begen *v.* Pettus, 144 App. Div. 476, 129 N. Y. Supp. 218.

[2] 1 Fonbl. Eq. B. 1, ch. 6, § 2, note (*e*); Calcraft *v.* Roebuck, 1 Ves. Jr. 221; Calverley *v.* Williams, 1 Ves. Jr. 212; Dyer *v.* Hargrave, 10 Ves. 507; Guest *v.* Homfray, 5 Ves. 818; Newland on Contr. ch. 12, pp. 251 to 255; Drewe *v.* Hanson, 6 Ves. 675; Halsey *v.* Grant, 13 Ves. 76, 77; Sugden on Vendors, ch. 6, §§ 2, 3, pp. 279 to 300 (7th ed.); Hovenden on Frauds, Vol. 2, ch. 16, pp. 31 to 34; King *v.* Bardeau, 6 John. Ch. R. 38; Hanbury *v.* Litchfield, 2 Mylne & Keen, 629; Horniblow *v.* Shirley, 13 Ves. 81.

[3] Wuesthoff *v.* Seymour, 7 C. E. Green, 66.

not put upon inquiry, there a specific performance will not be decreed against him.[1] Upon the like ground a party con-

[1] For recent illustrations see Sturdevant *v.* Jaques, 14 Allen, 523; Boynton *v.* Hazelboom, Ib. 107; Richmond *v.* Gray, 3 Allen, 25; Young *v.* Rathbone, 1 C. E. Green, 224; Swain *v.* Fidelity Ins. Co., 54 Pa. St. 455; Linkous *v.* Cooper, 2 W. Va. 67; Littlefield *v.* Tinseley, 26 Tex. 353; Higgins *v.* Samels, 2 Johns. & H. 460; Hamett *v.* Baker, L. R. 20 Eq. 50; Wells *v.* Millett, 23 Wis. 64; Magraff *v.* Muir, 57 N. Y. 155; Weise's Appeal, 72 Pa. St. 351; Phillips *v.* Homfray, L. R. 6 Ch. 770; Denny *v.* Hancock, Ib. 1; Baskcomb *v.* Beckwith, L. R. 8 Eq. 100; Hume *v.* Pocock, L. R. 1 Eq. 662; s. c. 1 Ch. 379; Collier *v.* McBean, L. R. 1 Ch. 81; Mullings *v.* Trinder, L. R. 10 Eq. 449; In re Huish, Ib. 5; Sugden on Vendors, ch. 6, § 2, p. 279, &c. § 3, p. 290 (7th ed.); 1 Sugden on Vendors, ch. 7, § 3, n. 1 to 24, pp. 525 to 534 (10th ed.); Id. § 4, n. 1 to 38, pp. 536 to 550; Lowndes *v.* Lane, 2 Cox, R. 363; Ellard *v.* Landaff, 1 B. & Beatt. 249, 250; Grant *v.* Meunt, Cooper, R. 173; Dyer *v.* Hargrave, 10 Ves. 505; Shirley *v.* Stratton, 1 Bro. Ch. R. 440; Hovenden on Frauds, ch. 16, pp. 1 to 65. Drewe *v.* Hanson, 6 Ves. 678; 1 Fonbl. Eq. B. 1, ch. 3, § 9, note (*i*); Waters *v.* Travis, 9 John. R. 450; Bowyer *v.* Bright, 13 Price, 702, 703, 704; Binkes *v.* Rokeby, 2 Swanst. R. 222; Collier *v.* Jenkins, 1 Younge, R. 295; Dalby *v.* Pullen, 3 Sim. R. 29; Portman *v.* Mill, 2 Russ. R. 570; Bowyer *v.* Bright, 13 Price, R. 698; s. c. 1 McClelland, R. 479; Wood *v.* Griffith, 1 Swanst. R. 54; Watts *v.* Waddle, 31 U. S. 389, 8 L. Ed. 437. Lord Erskine, in Halsey *v.* Grant (13 Ves. 76, 77), said: "If a Court of Equity can compel a party to perform a contract that is substantially different from that which he entered into, and proceed upon the principle of compensation, as it has compelled him to execute a contract substantially different and substantially less than that for which he stipulated, without some very distinct limitation of such a jurisdiction, having all the precision of law, the rights of mankind under contracts must be extremely uncertain. There is no doubt that this jurisdiction had its origin upon the foundation of a legal right, the law giving the title; but a Court of Law, from the modes in which justice is there administered, not being capable of giving a complete remedy, — all the relief to which the party was entitled. This jurisdiction began so long ago as the time of King Henry the Seventh; and though Courts of Equity, then proceeeded upon that principle, yet the Courts of Law thought proper to resist the jurisdiction. Bromage *v.* Genning (1 Roll's Rep. 368), in the 14th year of King James I., was the plainest case that can be stated; and the ground taken against the jurisdiction the most untenable, preposterous, and unjust. This most beneficial jurisdiction was in that instance maintained in equity. When the Courts of Equity had quieted these doubts and maintained their jurisdiction, they could not confine it to cases of strict legal title; for another principle equally beneficial is equally well known and established, — that equity does not permit the forms of law to be made instruments of injustice, and will interpose against parties attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where therefore advantage is taken of a circumstance that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. If for instance the contract is for a term of 99 years in a farm, and it appears that the vendor has only 98 or 97 years, he must be nonsuited in an action. But equity will not so deal with him; and if the other party can have the substantial benefit of his contract, that slight difference

tracting for the entirety of an estate will not be compelled to take an undivided aliquot part of it.[1]

§ 1067. **Vendee May Proceed with the Purchase, Where Contract Contains Material Misdescription, or Abandon It Altogether.** — We have thus far principally spoken of cases of suits by the vendor against the purchaser for a specific performance where the contract has not been or cannot be strictly complied with. But suits may also be brought by the purchaser for a specific performance under similar circumstances where the vendor is incapable of making a complete title to all the property sold, or where there has been a substantial misdescription of it in important particulars, or where the terms as to the time and manner of execution have not been punctually or reasonably complied with on the part of the vendor. In these and the like cases, as it would be unjust to allow the vendor to take advantage of his own wrong, or default, of misdescription, Courts of Equity allow the purchaser an election to proceed with the purchase pro tanto, or to abandon it altogether. The general rule (for it is not universal) in all such cases is, that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase-money or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate.[2] But if the purchaser should insist upon such a per-

being of no importance to him, equity will interfere. Thus was introduced the principle of compensation, now so well established, — a principle which I have no disposition to shake." See also Morgan's heirs *v.* Morgan, 15 U. S. 298, 4 L. Ed. 242; Hepburn *v.* Auld, 9 U. S. 263, 3 L. Ed. 96; Winne *v.* Reynolds, 6 Paige, R. 407.

[1] Dalby *v.* Pullen, 3 Sim. R. 29.

[2] Paton *v.* Rogers, 1 Ves. & B. 351; Hill *v.* Buckley, 17 Ves. 394; Millegan *v.* Cooke, 16 Ves. 1; Waters *v.* Travis, 9 John. R. 465; Todd *v.* Gee, 17 Ves. 278, 279; Wood *v.* Griffith, 1 Swanst. R. 54; Mestaer *v.* Gillespie, 11 Ves. 640; Graham *v.* Oliver, 3 Beav. 124, 128. In this last case Lord Langdale said: "The general rule subject to some qualification undoubtedly is, that where a party has entered into a contract for the sale of more than he has, the purchaser, if he thinks fit to accept that which it is in the power of the vendor to give, is entitled to a performance to that extent. There is however a very great difficulty in all these cases, and I scarcely know how it can be overcome; though a partial performance only, it has been somewhat incorrectly called a specific performance. The sentiments of Lord Redesdale on this point, as expressed by him in two cases before him, are strongly impressed on my mind. The court has thought it right in many cases to get over those difficulties for the purpose of compelling parties to perform the agreements into which they have entered; and it is right they should be compelled to do so where it can be done without any great preponderance of inconvenience." King

formance, the court will grant the relief only upon his compliance with equitable terms.[1]

§ 1068. [**Compensation for Deficiency Where Fraud Has Entered into Contract.** — If the parties were at arm's length and each had an equal opportunity with the other to investigate and ascertain if there was in fact the acreage contracted for, or that there were no incumbrances upon the property, or if the former deeds are upon the records and a calculation would readily reveal the fact there was a deficiency in the quantity of acres contracted to be sold, as a rule there is no abatement of the purchase price.[2] If the purchaser intends to protect himself and be certain of the acreage conveyed, in addition to having a calculation made, he should have an express warranty as to acreage.[3] A husband who contracts to sell his land, without first obtaining the consent of his wife, will not be entitled to the full purchase price if she refuses to join with him in the conveyance. A dower right is an incumbrance and compensation for this deficiency in the title will be allowed.[4]

v. Wilson, 6 Beav. R. 124. See Phillips *v.* Stauch, 20 Mich. 369; Bogan *v.* Daughdrill, 51 Ala. 312; Jerome *v.* Scudder, 2 Rob. (N. Y.) 169; Covell *v.* Cole, 16 Mich. 223; Austin *v.* Ewell, 25 Tex. 403; White *v.* Dobson, 17 Gratt. 262; Wilcoxon *v.* Galloway, 67 N. C. 463; Stockton *v.* Union Oil Co., 4 W. Va. 273; Woodbury *v.* Luddy, 14 Allen, 1; James *v.* Lichfield, L. R. 9 Eq. 51; Barnes *v.* Wood, L. R. 8 Eq. 424; Whittemore *v.* Whittemore, Ib. 603; Aberaman Iron Works *v.* Wickens, L. R. 4 Ch. 101; Horrocks *v.* Rigby, 9 Ch. D. 180; Norwood *v.* Washington, 136 Ala. 657, 33 So. 869; Logan's Admr. *v.* Bryant, 19 Ky. L. Rep. 1774, 44 S. W. 435; Wuest *v.* Moehrig, 24 Tex. Civ. App. 124, 57 S. W. 864; Berry's Execr. *v.* Fishburne, 104 Va. 459, 51 S. E. 827; Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. 506; Adams *v.* White, 138 Ga. 306, 75 S. E. 321; Dulin *v.* Sharp, 43 App. D. C. 550; Ferrill *v.* Coombs, 13 Ky. L. Rep. 737, 18 S. W. 226; Ludwick *v.* Petree, 32 Ind. App. 550, 70 N. E. 280.

Contra: Gilliman *v.* Gillespie, 48 W. Va. 374, 37 S. E. 669.

[1] Paton *v.* Rogers, 1 Ves. & Beam. 351; Thomas *v.* Dering, 1 Keen, R. 729, 743, 747.

[2] Currie *v.* Collins, 136 Ga. 473, 71 S. E. 798; Richards *v.* Millard, 146 Wis. 552, 131 N. W. 365; Patterson *v.* Walker, 98 S. C. 286, 82 S. E. 432; Finney *v.* Morris, 116 Ga. 758, 42 S. E. 1020; Rich *v.* Scales, 116 Tenn. 57, 91 S. W. 50; Baker *v.* Manley, 203 Pa. 191, 52 Atl. 176; Conta *v.* Corgiat, 74 Wash. 28, 132 Pac. 748; Cartun *v.* Myers, 78 N. J. Eq. 303, 82 Atl. 14; Garibaldi *v.* Santangelo, 164 App. Div. 513, 149 N. Y. Supp. 669; Smith *v.* Donahue, 60 Pa. Super. Ct. Rep. 424.

[3] Bethell *v.* McKinney, 164 N. C. 71, 80 S. E. 162.

[4] Bethell *v.* McKinney, 164 N. C. 71, 80 S. E. 162:

Where part of the land conveyed was included in the street, which was known to purchaser, no compensation will be awarded. Weller *v.* Fidelity Trust Co., 23 Ky. L. Rep. 1136, 64 S. W. 843; Manlove *v.* Lemmon, 272 Ill. 120, 111 N. E. 739; but if there was a mutual mistake and neither party was guilty of fraud, compensation will be allowed. Willard *v.* Sanford, 33 Tex. Civ. App. 594, 77 S. W. 290.

While the vendee will not be required to pay the contract price and take a doubtful or imperfect title, he may, if he so elect and it be not inequitable, have a decree for such part of the land or such interest as the vendor can convey, with a deduction from the contract price.[1] It depends somewhat upon the materiality of the mistake in passing upon whether the vendee is entitled to a rebate, as if the land is sold as so many acres, more or less, if there is a small quantity of land over or under the estimated number of acres, this would not authorize a rebate.[2] But if the tract is sold to contain a given number of acres, the purchaser is entitled to a rebate if the tract fails to contain that much, as, where the land is sold by the acre rather than by the entire tract.[3] Fraud or undue advantage taken by one over the other will allow a compensation for the deficiency, especially where the deficiency is so large as to be material to the transaction.[4]]

§ 1069. **Same.** — Perhaps it may be truly said that in some of the cases in which in former times the strict terms of the contract as to time, description, quantity, quality, and other circumstances of the estate sold were dispensed with, Courts of Equity went beyond the true limits to which every jurisdiction of this sort should be confined, as it amounted to a substitution, pro tanto, of what the parties had not contracted for.[5] But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity, and by a reasonable regard to the convenience of mankind, as well as to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions.[6]

§ 1070. **Same.** — We have hitherto been considering cases of contracts respecting lands within the reach of the Statute of Frauds. But other cases within the reach of other clauses of the Statute of Frauds have occurred, and may again occur, in which also the remedial justice of Courts of Equity ought to be exerted by decreeing a specific performance of the contemplated act of trust. Thus if a man in confidence of the parol promise of another to perform the intended act should omit to make certain provisions,

[1] Campbell *v.* Cronly, 150 N. C. 462, 64 S. E. 213.

[2] Trinkle *v.* Jackson, 86 Va. 238, 9 S. E. 986, 4 L. R. A. 525; Turner *v.* Vann, 171 N. C. 127, 87 S. E. 985.

[3] Strickland *v.* Hutchinson, 123 Ga. 396, 51 S. E. 348.

[4] Phifer *v.* Stunburg, 66 Fla. 555, 64 So. 265; May *v.* Getty, 140 N. C. 310, 53 S. E. 75.

[5] See Halsey *v.* Grant, 13 Ves. 76; Drewe *v.* Hanson, 6 Ves. 678; Bowyer *v.* Bright, 13 Price, R. 702.

[6] Newland on Contr. ch. 13, p. 254; Drewe *v.* Hanson, 6 Ves. 678.

gifts, or arrangements for other persons by will or otherwise, such a promise would be specifically enforced in equity against such promisee, although founded on a parol declaration creating a trust contrary to the Statute of Frauds; for it would be a fraud upon all the other parties to permit him to derive a benefit from his own breach of duty and obligation.[1] Therefore where a testator by his will gave an annuity to his nephew, and his brother (who was his executor and devisee of his real estate) promised to pay the annuity, otherwise the testator would have charged it on his lands devised, it was decreed that the executor should specifically perform it by paying the annuity, although he had fully administered all the personal assets.[2] So where a testator intended by will to fell timber to raise portions for his younger children, but his eldest son being by desired him not to fell the timber because it would deface the estate, and promised that he would answer for the value of it to his brothers and sisters, and the testator forbore to cut the timber, and after his death the eldest son refused to perform his promise, he was held bound by it.[3] So where a tenant in tail was about to suffer a recovery in order to provide for his younger children, and was kept by the issue in tail from so doing by a promise to make such a provision, the issue in tail was decreed to perform the promise.[4] So where an executor promised the testator to pay a legacy, and told the testator he need not put it into his will, he was decreed specifically to perform it.[5] So where a testator was about altering his will for fear that there would not be assets enough to pay all the legacies, and his heir at law persuaded him not to alter it, promising to pay all the legacies, he was decreed specifically to perform his promise.[6]

§ 1071. **Relief under Contracts not within the Statute of Frauds.** — These may suffice as illustrations of the class of cases calling for a specific performance which are within the purview of the Statute of Frauds. And we shall now proceed in the next

[1] 3 Wooddes. Lect. 57, p. 436; ante, §§ 64, 256, 439; Williams *v.* Vreeland, 32 N. J. Eq. 135, 736.

[2] Oldham *v.* Litchfield, 2 Vern. R. 506; s. c. 2 Freem. R. 284; ante, §§ 64, 256.

[3] Dutton *v.* Pool, 2 Lev. 211; s. c. 1 Ventr. 318; s. c. cited 2 Freem. R. 285.

[4] 3 Wooddes. Lect. 57, p. 436.

[5] Reech *v.* Kennigate, Ambl. R. 67; s. c. 1 Ves. 123; Barrow *v.* Greenough, 3 Ves. 152, 154; Mestaer *v.* Gillespie, 11 Ves. 638; Chamberlain *v.* Agar, 2 Ves. & Beam. 262; Devenish *v.* Baines, Prec. Ch. 3.

[6] Chamberlaine *v.* Chamberlaine, 2 Freem. R. 34.

place to a brief statement of the other class of cases already referred to, namely, those where relief is sought under written or parol contracts not within the Statute of Frauds. Many of these cases have already been incidentally taken notice of under the other heads, and especially under the heads of Accident, Mistake, and Fraud.[1]

§ 1072. **Rights of Assignee of Contract to Be Enforced.** — Illustrations may easily be put of cases where no action whatsoever would lie at law between the parties. Thus if A should enter into a contract with B, which contract B should afterwards assign to a third person, there no action would be maintainable at law by such assignee against A, or by A against such assignee on such contract. But a bill in equity would well lie by either of them against the other, either to enforce a specific execution of the contract, or to set it aside in the same manner and under the same circumstances, as such a bill would lie between the immediate parties to it.[2] We all know that privity of contract between the parties is in general indispensable to a suit at law; but Courts of Equity act in favor of all persons claiming by assignment under the parties independent of any such privity.[3]

§ 1073. **Purchaser of Land, with Notice of Prior Valid Contract to Convey, May Be Compelled to Perform.** — Upon similar principles if a person has in writing contracted to sell land and afterwards refuses to perform his contract, and then sells the land to a purchaser with notice of the contract, the latter will be compelled to perform the contract of his vendor, for he stands upon the same equity; and although he is not personally liable on the contract, yet he will be decreed to convey the land in the same manner as his vendor.[4] In other words he is treated as a trustee of the first vendee. So if a power is reserved in a marriage settlement for a feme covert to dispose of her separate property, real and personal, Courts of Equity will enforce the specific performance of it in favor of any party claiming title from her against her husband, although at law it might in many cases be difficult to prevent the latter from exercising power over it.[5]

[1] See ante, §§ 55, 140, 224 to 229, 233, 454, 455. See also 3 Wooddes. Lect. 58, pp. 471, 472; 1 Fonbl. Eq. B. 1, ch. 3, § 11, and Id. B. 1, ch. 1, § 8, note (*o*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, pp. 456, 457.

[2] See Williams *v.* Steward, 3 Meriv. R. 485, 486; and Duke of Chandos *v.* Talbot, 2 P. Will. 608; Champion *v.* Brown, 6 John. Ch. R. 402.

[3] Post, §§ 1393, 1421, 1422.

[4] Champion *v.* Brown, 6 John. Ch. R. 402; Potter *v.* Sanders, 6 Hare, R. 1.

[5] Jeremy on Eq. Jurisd. B. 1, ch. 3, § 2, pp. 207, 208; Id. B. 1, Pt. 2,

§ 1074. **Same.** — The cases of contracts to grant an annuity for a life or lives, to settle the boundaries between contiguous estates, and to levy a fine, have been already mentioned as proper matters for a bill for a specific performance.[1] So where an agreement was made by persons who were presumptive heirs to another person, to divide the estate equally between them without any reference to any will which might be made by such person, it was held valid, and that it should be specifically decreed.[2] So contracts to invest money in land, and on the other hand to turn land into money, have been held proper for a specific performance.[3] So a contract to make mutual wills, if one of the parties has died having made a will according to the agreement, will be decreed in equity to be specifically executed by the surviving party if he has enjoyed the benefit of the will of the other party.[4] So a general covenant to indemnify a party for the purchase-money due for land upon an assignment thereof to an assignee, although it sounds only in damages, will be decreed to be specifically performed by the assignee upon the principle of quia timet.[5]

§ 1075. **Same.** — Another curious case, illustrative of the extent to which Courts of Equity will go to enforce a specific

ch. 4, § 1, pp. 430, 431; Rippon *v.* Dawding, Ambler, R. 565; Power *v.* Bailey, 1 B. & Beatt. 49; Fettiplace *v.* Gorges, 3 Bro. Ch. R. 8; 3 Wooddes. Lect. 58, p. 444; post, §§ 788, 789, 790; Wilson *v.* Emig, 44 Kans. 125, 24 Pac. 80; Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414; Bailey *v.* Agawam Natl. Bank, 190 Mass. 20, 76 N. E. 449, 3 L. R. A. (N. S.) 98, 112 Am. St. Rep. 296; Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; Cummins *v.* Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881; Veeder *v.* Horstmann, 85 App. Div. 154, 83 N. Y. Supp. 99; Northern Cent. R. Co. *v.* Walworth, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. Rep. 683; Barrett *v.* McAlister, 33 W. Va. 738, 11 S. E. 220; Drake Lbr. Co. *v.* Branning, 66 Fla. 543, 64 So. 263; Grooms *v.* Grooms, 141 Ga. 478, 81 S. E. 210; Dillinger *v.* Ogden, 244 Pa. 20, 90 Atl. 446; Copple *v.* Aigeltinger, 167 Cal. 706, 140 Pac. 1073; Reynolds *v.* Condon, 110 App. Div. 542, 97 N. Y. Supp. 1.

Specific performance of the prior contract will be enforced, if the purchaser took with notice of it, but he was informed at the time that the prior trade had fallen through. Engler *v.* Garrett, 100 Md. 387, 59 Atl. 648.

[1] Ante, §§ 1002, 1010, 1011; Nield *v.* Smith, 14 Ves. 490; Penn *v.* Lord Baltimore, 1 Ves. 444.

[2] Beckley *v.* Newland, 2 P. Will. 182; Id. 608; 3 Wooddes. Lect. 58, p. 451; Newland on Contr. ch. 6, p. 110; ante, § 377.

[3] Newland on Contr. ch. 3, pp. 43, 47; ch. 6, p. 109.

[4] Dufour *v.* Ferrara, cited 3 Ves. 412, 416; Goilmere *v.* Battison, 1 Vern. 48; Newland on Contr. ch. 6, p. 111.

[5] Champion *v.* Brown, 6 John. Ch. R. 405, 406, and the cases there cited; 1 Fonbl. Eq. B. 1, ch. 1, § 8, and note (*y*); ante, § 1011; post, §§ 1168, 1169.

performance of contracts against parties and privies in estate, in cases where a fraudulent evasion is attempted, has been recently propounded and acted upon in the House of Lords. If a person covenants or agrees or in any other manner validly binds himself to give to A by his will as much property as he gives to any other child, he may put it out of his power to do so by giving away all his property in his lifetime. Or if he binds himself to give to A as much as he gives to B by his will, he may in his lifetime give to B what he pleases, so as, by his will, he shall give to A as much as he gives to B. But then the gifts which he makes in his lifetime to B must be out and out. For if, to defraud or defeat the obligation which he has thus entered into, he gives to B any property real or personal over which he retains a control, or in which he reserves an interest to himself, then in order to protect the agreement or obligation which he has entered into, and to defeat the fraud attempted upon that agreement or obligation, and to prevent his escaping as it were from his own contract, Courts of Equity will treat this gift to B in the same manner as if it were purely testamentary, and were included in a will; and the subject-matter of the gift will be brought back and made the fund out of which to perform the obligation. At all events it will be made the measure for calculating and ordering the performance of and dealing with the claim arising under that agreement or obligation.[1]

§ 1076. [**Enforcement of Contracts to Execute a Will in Favor of Another Person.** — Contracts to execute a will in favor of another, whether that other person be of the blood of the devisor, or related by adoption, are not looked upon with disfavor, but if fairly entered into, and the subject-matter is sufficiently described, and the matters and things to be performed by the devisee are reasonably performed, and the parties are definite, the contract as a rule will be enforced, especially where it appears that the decree is not oppressive, harsh or inequitable, nor will it work hardship or injustice to any one.[2] The contract is founded upon a

[1] Logan *v.* Wienholt, 7 Bligh, R. 53.

As to contracts to will property see Moorehouse *v.* Colvin, 21 L. J. Ch. 177; s. c. 9 Eng. L. & E. 136; Van Duyne *v.* Vreeland, 3 Stockt. 370; s. c. 1 Beasl. 142; Wright *v.* Tinsley, 30 Mo. 389; Frisby *v.* Parkhurst, 29 Md. 58; Semmes *v.* Worthington, 38 Md. 298; Fordy *v.* Williams, Ib. 493.

[2] Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126; Best *v.* Grolapp, 69 Neb. 811, 96 N. W. 641; Schoonover *v.* Schoonover, 86 Kans. 487, 121 Pac. 485; Hood *v.* McGehee, 189 Fed. 205, affirmed 199 Fed. 989, 117 C. C. A. 664; Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49; Plunkett

sufficient consideration, where its execution is based upon the settlement of a family matter;[1] and the execution of a will by the husband to the wife, is a sufficient consideration for the execution of a will by the wife to the husband, where it appears that it was the intent and purpose of each of them that their property should go to the ones who would naturally be entitled to their bounty.[2] The contract to adopt a child, however ineffective or void the contract may be, will be enforced in equity, if it is reasonably certain what the terms of the contract were, and that the infant was to stand in relation to the foster parent as a natural heir.[3]]

§ 1077. **Same.** — These cases are sufficient to point out the general course of remedial justice in equity in all cases of specific performance, whether they are within or without the Statute of Frauds. To go over all the doctrines applicable to the subject, in all the varieties, would require a discussion wholly incompatible with the objects of this work. The principles already expounded may serve to explain the true nature and extent of the jurisdiction at present exercised, — a jurisdiction which has been an appropriate theme of praise on all occasions in which the claims of Courts of Equity to public favor have been vindicated by their friends or assailed by their enemies.[4] In conclusion it may however be proper to remark that all the cases for a specific performance which we

v. Bryant, 101 Va. 814, 45 S. E. 742; Ripsom *v.* Hart, 64 App. Div. 593, 72 N. Y. Supp. 791; Spencer *v.* Spencer, 25 R. I. 239, 55 Atl. 637; Schaadt *v.* Mutual L. Ins. Co., 2 Cal. App. 715, 84 Pac. 249; Stellmacher *v.* Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609; Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197; Newton *v.* Lyon, 62 Kans. 306, 62 Pac. 1000, affirmed 62 Kans. 651, 64 Pac. 592; Ayers *v.* Short, 105 N. W. 1115, 142 Mich. 501, 12 Detroit Leg. N. 783.

Where contract provided that devisee should actually become a member of devisor's household and he should have her presence and comfort in his old age, and he gave her part of his property preparatory to beginning housekeeping, but the house was never actually occupied by her, the contract will not be enforced. Ackerson *v.* Fly, 99 Mo. App. 116, 72 S. W. 706.

The fact that the devisee received very valuable property and devisor lived but a few months makes no difference as affecting the right to enforce the contract. Bless *v.* Blizzard, 86 Kans. 230, 120 Pac. 351; Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420.

[1] Price *v.* Price, 133 N. C. 494, 45 S. E. 855.

[2] Wallace *v.* Wallace, 71 Misc. Rep. 305, 130 N. Y. Supp. 58.

[3] Gates *v.* Gates, 34 App. Div. 608, 54 N. Y. Supp. 454; Pemberton *v.* Pemberton's Heirs, 76 Neb. 669, 107 N. W. 996; Winne *v.* Winne, 166 N. Y. 263, 59 N. E. 832, 48 App. Div. 638, 63 N. Y. Supp. 1118, 82 Am. St. Rep. 647; Burns *v.* Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

[4] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 445; 1 Fonbl. Eq. B. 1, ch. 5, § 1, and notes (*a*), (*c*); Id. § 2 (*h*); 1 Madd. Ch. Pr. 326, 327.

have been examining presuppose the contract to be between competent parties, and founded upon a valuable or meritorious consideration; for Courts of Equity will not, as we have seen and shall presently more fully see,[1] carry into specific execution any merely nude pacts or voluntary agreements not founded upon some valuable or meritorious consideration;[2] nor between parties not sui juris or competent to contract, such as infants and femes covert;[3] nor (as we have already seen) any agreements which are against public policy, or are immoral, or which involve a breach of trust.[4]

§ 1078. **Same.** — It may also be stated that in general where the specific execution of a contract respecting lands will be decreed between the parties, it will be decreed between all persons claiming under them in privity of estate, or of representation, or of title, unless other controlling equities are interposed.[5] If a person

[1] Ante, §§ 572, 955, 956, 1034 to 1055; post, §§ 1080, 1313, 1319, 1331, 1393; Woodcock *v.* Bennet, 1 Cowen, C. 711; Crosbie *v.* McDonal, 13 Ves. 148; Wycherley *v.* Wycherley, 2 Eden, R. 177.

[2] Young *v.* Young, 80 N. Y. 422, 482; Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647; Engler *v.* Garrett, 100 Md. 387, 59 Atl. 648; Van Norsdall *v.* Smith, 141 Mich. 355, 104 N. W. 660, 12 Detroit Leg. N. 478; Bosley *v.* Bosley, 85 Mo. App. 424; Brevator *v.* Creech, 186 Mo. 558, 85 S. W. 527.

A cited consideration of one dollar is insufficient, in the absence of any other consideration. Berry *v.* Frisbie, 27 Ky. L. Rep. 724, 120 Ky. 337, 86 S. W. 558 or a contract under seal bearing a nominal consideration only. Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755.

Mere inadequacy of consideration is not sufficient of itself for withholding the remedy. Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535.

[3] Flight *v.* Bolland, 4 Russ. R. 298, 301; ante, §§ 1004, 1036, note; Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824; Sprague *v.* Jessup, 48 Oreg. 211, 83 Pac. 145, 4 L. R. A. (N. S.), 410; O'Brien *v.* Voland, 166 Mass. 481, 44 N. E. 602; Ratterman *v.* Campbell, 26 Ky. L. Rep. 173, 80 S. W. 1155; Warren *v.* Dail, 170 N. C. 406, 87 S. E. 126; Richardson *v.* De Giverville, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426; Corby *v.* Drew, 55 N. J. Eq. 387, 36 Atl. 827; Brown *v.* Pechman, 53 S. C. 1, 30 S. E. 586.

Contra: Clay *v.* Mayer, 183 Mo. 150, 81 S. W. 1066; Moore *v.* Baker, 65 N. J. Eq. 104, 55 Atl. 106.

[4] 1 Madd. Ch. Pr. 328; Brownsmith *v.* Gilborne, 2 Str. 738; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, pp. 445, 451; 1 Fonbl. Eq. B. 1, ch. 1, § 7 (*x*); Ellison *v.* Ellison, 6 Ves. 656, 662; Ex parte Pye, 18 Ves. 149; ante, §§ 327, 414, 416, 417, 1055.

[5] See 3 Wooddes. Lect. 58, pp. 468, 469, 472; Newland on Contr. ch. 2, p. 34, &c.; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, pp. 448, 449; Champion *v.* Brown, 6 John. Ch. R. 398, 402, 403; Smith *v.* Hibbard, 2 Dick. 730; Ewins *v.* Gordon, 49 N. H. 444; Currier *v.* Howard, 14 Gray, 511; Van Duyne *v.* Vreeland, 3 Stockt. 370; s. c. 1 Beasl. 142; Carrell *v.* Potter, 23 Mich. 377; Janes *v.* Holmden, 60 Kans. 855, 55 Pac. 1101; Brandon *v.* West, 28 Nev. 500, 83 Pac. 327; see also 29 Nev. 135,

purchases lands with knowledge of a prior contract to convey them, he is (as we have seen) affected by all the equities which affected the lands in the hands of the vendor.[1] The lien of the vendor for the purchase-money attaches to them; and such purchaser may be compelled either to pay the purchase-money, or to surrender up the land, or to have it sold for the benefit of the vendor. In this view the remedy of the vendor against such purchaser may be said to be in rem rather than in personam.[2] On the other hand if the vendee under such a contract conveys the same to a third person, the latter upon paying the purchase-money may compel the vendor and any person claiming under him in privity or as a purchaser with notice to complete the contract and convey the title to him.[3]

§ 1079. **Same.** — The general principle upon which this doctrine proceeds is, that from the time of the contract for the sale of the land the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either with notice becomes subject to the same equities as the party would be from whom he purchased.[4] In cases of this sort if the original vendee dies after having sold the lands to a third person who is to pay the purchase-money, his personal representatives are entitled to proceed against such purchaser in equity to indemnify them and to pay the purchase-money.[5] On the other hand if the vendor dies, his personal representatives may enforce the lien for the purchase-money

85 Pac. 449; Fleming *v.* Ellison, 124 Wis. 36, 102 N. W. 398; Gladville *v.* McDole, 247 Ill. 34, 93 N. E. 86; Day *v.* Washburn, 76 N. H. 203, 81 Atl. 474.

[1] Ante, § 1073. [2] Champion *v.* Brown, 6 John. Ch. R. 398, 402.

[3] Ibid.; Winged *v.* Lefebury, 2 Eq. Abridg. 32, pl. 43; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Daniels *v.* Davison, 16 Ves. 249; s. c. 17 Ves. 433; ante, § 1073; Craver *v.* Spencer, 40 Fla. 135, 23 So. 880; Mack *v.* McIntosh, 181, Ill. 633, 54 N. E. 1019; Cussack *v.* Budasz, 187 Ill. 392, 58 N. E. 326; Butman *v.* Butman, 213 Ill. 104, 72 N. E. 821; Johnson *v.* Eklund, 72 Minn. 195, 75 N. W. 14; Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300; Randolph *v.* Wheeler, 182 Mo. 145, 81 S. W. 419; Lighton *v.* City of Syracuse, 48 Misc. Rep. 134, 96 N. Y. Supp. 692; Gillis *v.* Arringdale, 135 N. C. 295, 47 S. E. 429; Peay *v.* Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731.

[4] Champion *v.* Brown, 6 John. Ch. R. 403; Davie *v.* Beardsham, 1 Ch. Cas. 39; Green *v.* Smith, 1 Atk. 572, 573; Pollexfen *v.* Moore, 3 Atk. 273; Mackreth *v.* Symmons, 15 Ves. 329, 336; Walker *v.* Preswick, 2 Ves. 622; Trimmer *v.* Bayne, 9 Ves. 209; ante, § 681; Smith *v.* Lytle, 27 Minn. 184.

[5] Champion *v.* Brown, 6 John. Ch. R. 405, 406.

against the land in the possession of the purchaser. But who as between the heirs and personal representatives of the vendee or a subsequent purchaser is to bear the charge, that is, whether it is to be borne by the personal estate or by the land purchased, is a matter properly belonging to other branches of equity jurisdiction in which the marshalling of assets is considered.[1]

§ 1080. **Voluntary Contract Is Unenforceable against the Party Who Made It and also His Personal Representative.** — We have already had occasion to remark, throughout the whole of the preceding discussion respecting bills for specific performance of contracts, that it has been constantly supposed that the contract was one founded upon a valuable consideration in the contemplation of law.[2] In respect to voluntary contracts, or such as are not founded in a valuable consideration, we have already had occasion to state that Courts of Equity do not interfere to enforce them, either as against the party himself or as against other volunteers claiming under him.[3] Thus for example if a party should enter into a voluntary agreement to transfer stock to another, or to give him a sum of money, or to convey to him certain real estate, Courts of Equity would not assist in enforcing the agreement, either against the party entering into the agreement, or against his personal representatives; for the party contracted with is a mere volunteer.[4] The same rule is applied to imperfect gifts, not testamentary, inter vivos, to imperfect voluntary assignments of debts and other property, to voluntary executory trusts, and to voluntary defective conveyances.[5] A few cases may serve to illustrate this doctrine. Thus where a parent has assigned certain scrip to his daughter by a written assignment which operated as an equitable assignment

[1] Ante, § 758 to 783; Champion *v.* Brown, 6 John. Ch. R. 402.

[2] Ante, § 787.

[3] Ante, § 433, note 4, §§ 706, 706 *a*, 787; 1 Fonbl. on Equity, B. 1 ch. 5, § 2, note (*h*), § 3; Tate *v.* Hilbert, 2 Ves. Jr. 112; Jefferys *v.* Jefferys, 1 Craig & Phillips, R. 136, 141; Meek *v.* Kettlewell, The (English) Jurist for Dec. 1843, p. 1121; s. c. 1 Phillips, Ch. R. 342.

Unless in a case of agreement to convey land the volunteer has entered and made outlays in reliance upon the promise. Note at end of § 763.

[4] Ex parte Pye, 18 Ves. 149; Bunn *v.* Winthrop, 1 John. Ch. R. 336, 337, 338; Pulvertoft *v.* Pulvertoft, 18 Ves. 98, 99; Antrobus *v.* Smith, 12 Ves. 39, 45, 46; Ellison *v.* Ellison, 6 Ves. 662; Edwards *v.* Jones, 1 Mylne & Craig, 226, 237; Duffield *v.* Elwes, 1 Bligh, R. (N. S.) 529, 530, 531; Colman *v.* Sarrel, 3 Bro. Ch. R. 12; s. c. 1 Ves. Jr. R. 50, 56; Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 141; post, § 793 *b*.

[5] Ellison *v.* Ellison, 6 Ves. 662; Ex parte Pye, 18 Ves. 149; Bunn *v.* Winthrop, 1 John. Ch. R. 336, 337, 338; Edwards *v.* Jones, 1 Mylne &

only, and not as a legal transfer, a Court of Equity refused to compel the donor or his executors to perfect the gift.[1] So where a lady by a writing assigned a bond of a third person to her niece, and delivered the bond to the latter, and then died, a Court of Equity refused to enforce the assignment against the executor, or to decree payment of the money by the obligor to the niece.[2] So where a testatrix drew a check on her bankers for £150 in favor of A, and verbally directed A to apply that sum, or so much of it as might be necessary, to make up to a legatee the difference in value between a legacy of £100 which she had by her will given to the legatee, and the price of a £100 share in a certain railway; the testatrix informing A that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will, and the bankers gave credit to A for the £150: in a suit for the administration of the testatrix's estate it was held that there was no trust created for the benefit of the legatee in respect to the £150, as it could not be inferred from the facts that the testatrix meant to place this disposition of the £150 out of her own control in her lifetime. It was therefore not an absolute perfected gift.[3] So where a testator to whom a party

Craig, 226, 227; s. c. 7 Simons, R. 325; Tufnell *v.* Constable, 8 Simons, R. 69, 70; ante, § 433, note 1, § 706 *a*; 1 Fonbl. on Equity, B. 1, ch. 5, § 2, and note (*h*); Callaghan *v.* Callaghan, 8 Clarke & Fin. R. 394, 401; Dillon *v.* Copper, 4 Mylne & Craig, 647, 670, 671; Antrobus *v.* Smith, 12 Ves. 39.

[1] Antrobus *v.* Smith, 12 Ves. 39, 43; ante, § 433 and note.

[2] Edwards *v.* Jones, 1 Mylne & Craig, 226; s. c. 7 Simons, R. 325. Ante, § 433 and note.

[3] Hughes *v.* Stubbs, 1 Hare's R. 476. In this case Mr. Vice-Chancellor Wigram said: "The question is whether the testatrix has so dealt with the sum of £150 in question as to make it no longer her property, but the property of Mrs. Gelding (the legatee). If a person intending to give property to another vests that property in trustees, and declares a trust upon it in favor of the object of his bounty, there are cases which establish that by such acts the gift is perfected and the author of the trust loses all dominion over it. Colman *v.* Sarrel, 3 Bro. C. C. 12; s. c. 1 Ves. Jr. 50; Ellison *v.* Ellison, 6 Ves. 656; Pulvertoft *v.* Pulvertoft, 18 Ves. 84; Ex parte Pye, Ex parte Dubost, 18 Ves. 140. The principle has been extended to cases in which the author of the gift has had the legal dominion over the property remaining in him, but has completely declared himself to be a trustee of that property for the object indicated. Ex parte Pye, Ex parte Dubost. But it is clear also that a person not intending to give or to part with the dominion over his property may retain such dominion notwithstanding he may have vested the property in trustees, and have declared a trust upon it in favor of third persons. Walwyn *v.* Coutts, 3 Sim. 14; Ganard *v.* Lord Lauderdale, 3 Sim. 1; s. c. 2 R. & M. 451; Acton *v.* Woodgate, 2 Myl. & K. 492; Gaskell *v.* Gaskell, 2 Younge & J. 502. The different effects thus given by Courts of Equity to transactions similar

was indebted in one sum on a note, and in another on a bond, in his will bequeathed to a son a part of the entire debt, and afterwards by codicil revoked the bequest, and by an indorsement on the bond declared that he thereby acquitted the obligor of the sum, and stated that in consequence thereof he had revoked the bequest to the same amount made by the codicil; it was held that the obligor was not entitled, after the death of the testator, to come into equity for an injunction and relief against the enforcement of the bond, because he was a mere volunteer, and the acquittance was without any consideration to support it.[1] On the other hand if the transfer, assignment, trust, or conveyance is completed at law so that no further act remains to be done to give full effect to the title, there Courts of Equity will enforce it throughout, although it is derived from a mere gift or other voluntary act of the party. Thus for example if there is a gift of stock, and a transfer is actually made thereof, it will be held valid against the donor and his representatives.[2] So if an assignment of a debt or other property is consummate, so as to pass the title, and no further act is to be done by the donor, it will be enforced in equity.[3] So if a creditor shortly before his

in form necessarily give rise, in some cases, to questions of considerable difficulty. But the distinction which has been taken between the two classes of cases is founded in reason and good sense, and however refined that distinction may in some instances appear, I do not entertain a doubt but that Courts of Equity will continue to maintain it. 'The distinction,' as Lord Cottenham observed in Bell *v.* Cureton, 2 Myl. & K. 511, speaking of trusts for the payment of debts, 'is adopted to promote the views and intentions of the parties. A man who without communication with his creditors puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts; his object is not to benefit his creditors. It would therefore be a result most remote from the contemplation of the debtor, if it should be held that any creditor, discovering the transaction, should be able to fasten upon the property and invest himself with the character of a cestui que trust.' The result of the cases is that the court looks into the nature of the transaction, and determines from the nature of the transaction what the effect of it shall be in divesting the owner of the property to which it relates."

See Price *v.* Price, 21 L. J. Ch. 59; s. c. 8 Eng. L. & E. 271.

[1] Tufnell *v.* Constable, 8 Simons, R. 69.

[2] Ex parte Pye, 18 Ves. 149; Edwards *v.* Jones, 1 Mylne & Craig, 226, 237; Fortescue *v.* Barnett, 3 Mylne & Keen, 36; Ellison *v.* Ellison, 6 Ves. 662; ante, § 433, note; post, §§ 973 *a*, 987, 1040, 1040 *b*, 1196; Collinson *v.* Pattrick, 2 Keen, R. 123, 134.

[3] Fortescue *v.* Barnett, 3 Mylne & Keen, 36; Sloane *v.* Cadogan, Sugden on Vendors, Appx. 26 (9th ed.). The application of the principle in these cases must, since the remarks of Lord Cottenham on them, in Edwards *v.* Jones, 1 Mylne & Craig, 238, 239, 240, be deemed open to

death should send a verbal message to his debtor to hold the debt in trust for a particular person, and the debtor should assent thereto, and the fact is communicated to the cestui que trust or beneficiary, there the trust, although verbal, will be held consummate, and enforced against the representatives of the creditor after his death.[1]

§ 1081. **Remedy in Equity to Enforce Voluntary Contract Founded upon Meritorious Consideration.** — It has been said that there are exceptions however to the rule, where the contract or conveyance, although voluntary, is deemed to be founded upon a meritorious as contradistinguished from a valuable consideration; and that Courts of Equity will interfere and aid a defective conveyance, as they will the defective execution of a power against mere volunteers under the same party, where it is designed to be a provision for a wife or children; for in such cases it is treated as founded in a meritorious consideration, since the party is under a natural and moral obligation to provide for them.[2] And it has been added

some doubt. But they certainly derive support from the case of Richards *v.* Symes, 2 Eq. Abridg. 617, cited ante, § 607 *b*, and commented on by Lord Eldon in Duffield *v.* Elwes, 1 Bligh, R. 538, 539. See also ante, § 433, note, and the Vice-Chancellor's remarks in Edwards *v.* Jones, 7 Simons, R. 325. See Collinson *v.* Pattrick, 2 Keen, R. 123, 134; Ward *v.* Audland, 8 Beav. R. 201.

[1] M'Fadden *v.* Jenkins, 1 Phillips, Ch. R. 153. In this case Lord Lyndhurst said some points were disposed by the vice-chancellor in this case which are indeed free from doubt, and appear not to have been contested in this court, viz. that a declaration by parol is sufficient to create a trust of personal property; and that if the testator, Thomas Warry, had in his lifetime declared himself a trustee of the debt for the plaintiff, that in equity would perfect the gift to the plaintiff as against Thomas Warry and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the present. The testator in directing Jenkins to hold the money in trust for the plaintiff, which was assented to and acted upon by Jenkins, impressed, I think, a trust upon the money, which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the plaintiff. The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the court was not necessary to complete it.

See Donaldson *v.* Donaldson, Kay, 711; Kekewich *v.* Manning, 1 DeG. M. & G. 176, where the conflicting cases are considered; Otis *v.* Beckwith, 49 Ill. 121; Stone *v.* Hackett, 12 Gray, 227.

[2] Ante, §§ 95, 169, 433, 706, 706 *a*; 1 Fonbl. on Equity, B. 1, ch. 5, § 2; Fothergill *v.* Fothergill, 2 Freem. R. 256; Ellis *v.* Nimmo, Lloyd & Goold's Rep. 333; Bunn *v.* Winthrop, 1 John. Ch. R. 336, 337, 338; Minturn *v.* Seymour, 4 John. Ch. R. 498, 500. See also Colyear *v.* Countess of Mulgrave, 2 Keen, R. 81, 97, 98.

that it might be a very different question whether such a defective conveyance, or a defective execution of a power, would be enforced against the grantor or appointor himself, unless he had voluntarily entered into some contract to make a perfect conveyance or to execute the power. And accordingly in a recent case it was held, on great consideration, that a voluntary contract in writing by a father to make a post-nuptial provision or settlement upon his daughter, might be enforced against him in equity, as being founded on a meritorious although not on a valuable consideration.[1] But this doctrine has been since denied, and the general rule seems now established that the court will not execute a voluntary contract, but will withhold assistance from a volunteer, whether he seeks to have the benefit of a contract, or a covenant, or a settlement.[2] There may be a clear if not a satisfactory line of distinction drawn between cases of voluntary contracts, covenants, and settlements, where there has been a defective conveyance or execution thereof, and cases of a defective execution of a power. In the latter cases the donee of the power designs to carry into effect not merely his own objects and interests, but those of other persons, by executing the power in favor of persons who stand as volunteers upon a meritorious consideration, and for whom he is under a natural and moral obligation to provide; and his own defective execution of the power, by mistake or otherwise, not only defeats his own positive intention and moral obligation and duty to execute the trust reposed in him, but it would, if not aided, also defeat the very objects for which the power was created by third persons, whether it was created as a bounty, or upon a valuable

[1] Ellis *v.* Nimmo, Lloyd & Goold's Rep. 333. See also Sloane *v.* Cadogan, Sugden on Vendors, Appx. No. 26 (9th ed.); Fortescue *v.* Barnett, 3 Mylne & Keen, 56; Edwards *v.* Jones, 1 Mylne & Craig, 226, 238, 239, 240; Antrobus *v.* Smith, 12 Ves. 39; Minturn *v.* Seymour, 4 John. Ch. R. 498, 500. See also King's Heirs *v.* Thompson, 9 Peters, R. 204. The case of Ellis *v.* Nimmo was doubted by the Vice-Chancellor (Sir L. Shadwell) in Holloway *v.* Headington, 8 Simons, R. 325, and overthrown in effect in Jefferys *v.* Jefferys, 1 Craig & Phillips, 138–141. But still the reasoning of Lord Chancellor Sugden deserves to be very carefully examined. It is certainly very able. See also post, §§ 973 *a*, 987, 1040 *b*, 1196.

[2] Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 141; Holloway *v.* Headington, 8 Simons, R. 325. See post, §§ 1377 *a*, 1415; ante, § 793 *a*; Callaghan *v.* Callaghan, 8 Clarke & Fin. 374, 401; Dillon *v.* Coppin, 4 Mylne & Craig, 647, 670, 671.

See ante, §§ 169, 170, and note.

See Studer *v.* Seyer, 69 Ga. 125; Hoig *v.* Adrian College, 83 Ill. 267; Guynn *v.* McCauley, 32 Ark. 97.

consideration passing between the donor and donee of the power. Another exception, having a firmer foundation, is of cases of donations mortis causa as contradistinguished from donations inter vivos, in which, although the donation is imperfect as a complete transfer of the right of property, yet in equity it will be upheld, in order to effectuate the intention of the donor, and enforced against his executors, as it is treated as in the nature of a testamentary act. But of this sufficient has been already said in another place.[1]

[1] Ante, § 433, note; § 607 *a*, note; § 607 *b*, note.

CHAPTER XXI

COMPENSATION AND DAMAGES

§ 1082. **Compensation and Damages.** — It is in cases of bills brought for a specific performance that questions principally (although not exclusively) arise as to compensation and damages being awarded by Courts of Equity; and therefore it is convenient in this place to consider the nature and extent of the jurisdiction exercised by Courts of Equity as to compensation and damages.[1] It may be stated as a general proposition, that for breaches of contract, and other wrongs and injuries cognizable at law, Courts of Equity do not entertain jurisdiction to give redress by way of compensation or damages where these constitute the sole objects of the bill. For wherever the matter of the bill is merely for damages, and there is a perfect remedy therefor at law, it is far better that they should be ascertained by a jury than by the conscience of an equity judge.[2] And indeed the just foundation of equitable jurisdiction fails in all such cases, as there is a plain, complete, and adequate remedy at law. Compensation or damages (it should seem) ought therefore ordinarily to be decreed in equity only as incidental to other relief sought by the bill and granted by the court;[3] or where there is no adequate remedy at

[1] The same principle of compensation and damages is applied in granting relief against penalties and forfeitures, as will be seen in a future page.

[2] Gilbert, For. Roman. ch. 12, p. 219; Clifford *v.* Brooke, 13 Ves. 130, 131, 134; Blore *v.* Sutton, 3 Meriv. R. 247, 248; Newham *v.* May, 13 Price, 749, 752.

[3] Lord Chief Baron Alexander, in Newham *v.* May (13 Price, R. 752), said: "The cases of compensation in equity I consider to have grown out of the jurisdiction of Courts of Equity as exercised in respect to contracts for the purchase of real property where it is often ancillary, as incidentally necessary to effectuate decrees of specific performance." And he added: "It is not in every case of fraud that relief is to be administered in equity. In the cases for instance of a fraudulent warranty on the sale of a horse, or any fraud in the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity." Ante, § 779.

law;[1] or where some peculiar equity intervenes. Thus for example if, pending a suit for a specific performance of an agreement for a demise of quarries, a part of the subject-matter of the demise is abstracted, compensation may be obtained therefor by a supplemental bill.[2]

§ 1083. **Same.** — So strictly has the rule been construed, that it has been thought that, even in cases where no remedy would exist at law, — as for example in cases where a trustee by a breach of his trust has injured the property, — a Court of Equity would not award damages therefor, although if by reason of such breach of trust the trustee had made profits, it would make him account therefor. But it certainly may admit of some question whether, in a case of such a character, where there would otherwise be an

[1] Newham *v.* May, 13 Price 752, Ranelaugh *v.* Hayes, 1 Vern. 189; David *v.* McRae, 183 Fed. 812; Thruston *v.* Bailey, 157 Ky. 29, 162 S. W. 525; Rogers *v.* Brock, 156 N. C. 401, 72 S. E. 820; Rowell *v.* Covenant Mut. Life Assn., 84 Ill. App. 304; Smith *v.* Cansler, 83 Ky. 367, 7 Ky. L. Rep. 317; American Fisheries Co. *v.* Lennen, 118 Fed. 869.

A contract by administrator to sell interest of his decedent in a partnership will be enforced where the other partners owned a majority of the business and the acquisition of this interest was of a peculiar value to them. Ralston *v.* Ihmsen, 204 Pa. 588, 54 Atl. 365.

Though plaintiff has a remedy at law, this will not oust jurisdiction. It must be plain and adequate, and as certain, prompt, complete, and efficient to attain the ends of justice and its prompt administration as the remedy in equity. Texas Co. *v.* Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21; Indiana Mfg. Co. *v.* Nichols, 190 Fed. 579; Noyes *v.* Bragg, 220 Mass. 106, 107 N. E. 669; New Orleans Pole Club *v.* New Orleans Jockey Club, 128 La. 1044, 55 So. 668.

Before a decree in equity will be awarded, the defendant must be convicted of an offence against equity, or the plaintiff be without other adequate remedy. Triumph Elec. Co. *v.* Thullen, 225 Fed. 293; Dalzell *v.* Dueber, 149 U. S. 315, 37 L. Ed. 749, 13 S. Ct. Rep. 886.

[2] Nelson *v.* Bridges, 2 Beav. R. 239. In this case Lord Langdale said: "It has already been declared that the plaintiff is entitled to a specific performance of the agreement; but, pending the proceedings, the very subject of the agreement, to which the plaintiff has by the decree been declared entitled, has been abstracted. The stone or a quantity of the stone which the plaintiff had obtained a license to quarry, has actually been taken away by the defendant Wordsworth; so that while the performance of the agreement has been resisted and delayed by the defendants, they or one of them at least has taken away a portion of the very subject-matter of the suit, and the plaintiff has been thereby forever deprived of the full benefit of his contract. If that circumstance had been known at the first hearing, I cannot have the least doubt but that the court would, in the exercise of its jurisdiction, have put in a due course of investigation the question of the amount of compensation which ought to be made to the plaintiff. This matter, it appears, was not brought to the attention of the court at that time, and a supplemental bill is now filed by the plaintiff for the purpose of obtaining compensation. It is said that such compensation might originally have been had at law;

irreparable injury and wrong, a Court of Equity ought not to grant redress to the injured party, since at law there would be no remedy.[1]

§ 1084. **Procedure for Ascertaining Damages.** — The mode by which such compensation or damages are ascertained is either by a reference to a master, or by directing an issue, quantum damnificatus, which is tried by a jury. The latter used to be almost the invariable course, in former times, in all cases where the compensation was not extremely clear as to its elements and amount; and this course is still commonly resorted to in all cases of a complicated nature. But the same inquiries may be had before a master; and in cases where such inquiries do not involve

or if not, that at least it might have been obtained at law by perfecting the decree for the specific performance of the agreement in some particular form. I am of opinion that it is not necessary for this court, when it has once entertained jurisdiction in a case, to resort to that circuitous mode of giving relief; I think moreover that if this matter had been before the court at the first hearing it would have been put in a proper train of investigation. Under these circumstances therefore it appears to me that the plaintiff is now entitled to relief; but the form in which that relief is to be given is certainly a matter of very serious consideration. I think that the amount of what is due to the plaintiff ought to be ascertained by means of an action at law, and I do not clearly see how it can be satisfactorily done in any other way. In this and perhaps in all cases the profit made by the defendants is not the measure of the damages done to the plaintiff; for we find that the quarry was not worked in a way to make the most of it. Mr. Bridges, thinking the validity of the license which he had given to Wordsworth to be doubtful, discouraged his working it, pending the proceedings; so that Wordsworth took only that stone which it was convenient for him to take, and he did not therefore work it in the profitable way in which the plaintiff would have worked it. It appears to me that the defendants are correct when they say that this is a case of damages and not of account, because it is to recover something which cannot be ascertained by taking an account of the profits made, — it is to ascertain the amount of the loss which the plaintiff has sustained by being prevented doing that which it has been declared he was entitled to do. I think the proper mode of assessing the amount of the damage will be to require the defendants to admit such facts as are necessary, and to allow the plaintiff to bring an action to ascertain quantum damnificatus."

[1] The corporation of Ludlow *v.* Greenhouse, 1 Bligh's (N. S.) R. 18, 57, 58. In this case Lord Redesdale said: "Is there any case in which the Court of Chancery has awarded damages for a breach of trust? Lord Keeper Coventry was of opinion that he could not. In the case of a chapel of which I am trustee Lord Coventry declared that where there was a gross breach of trust, all he could do was to make the persons who had committed it account for all the profits they had made, though the thing had received considerable damage." See Pratt *v.* Law & Campbell, 13 U. S. 494, 3 L. Ed. 791; post, § 1088; Osgood *v.* Franklin, 2 Johns. Ch. 1; s. c. 14 Johns. 527; Willard's Eq. 614; Chapman *v.* Chapman, L. R. 9 Eq. 276.

much complexity of facts or amounts, this course is now often adopted.[1]

§ 1085. **Jurisdiction of Court of Equity to Allow Compensation for Deficiency is Co-existent with Right to Compel Specific Performance.** — Wherever compensation or damages are incidental to other relief, as for instance, where a specific performance is decreed upon the application of either party, with an allowance to be made for any deficiency as to the quantity, quality, or description of the property, or for any delay in performing the contract, there it seems clear that the jurisdiction properly attaches in equity, for it flows and is inseparable from the proper relief.[2] So where a bill is brought by the vendor against the vendee for a specific performance of the contract of sale, and for a payment of the purchase-money, if the decree is for a specific performance, equity will decree the payment of the purchase-money also, as incidental to the general relief, and to prevent a multiplicity of suits, although the vendor might in many cases have a good remedy at law for the purchase-money.[3] So where a contract for the sale of lands has been in part executed by a conveyance of a part of the lands by the vendor, but he is unable to convey the residue, equity will decree the repayment to the vendee of a proportionate part of the purchase-money with interest, if he has paid more than the part of the lands conveyed

[1] Gilb. For. Roman. 219; Denton *v.* Stewart, 1 Cox, R. 258; Greenaway *v.* Adams, 12 Ves. 401, 402; Todd *v.* Gee, 17 Ves. 278, 279; Phillips *v.* Thompson, 1 John. Ch. R. 150; Pratt *v.* Law, 13 U. S. 494, 3 L. Ed. 791; Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 273, 285, 286; Watt *v.* Grove, 2 Sch. & Lefr. 513; 1 Fonbl. Eq. B. 1, ch. 3, § 8, note (*b*); 2 Fonbl. Eq. B. 5, ch. 1, § 5, note (*s*); Woodcock *v.* Bennett, 1 Cowen, R. 711.

[2] Ante, §§ 983 to 985. See Todd *v.* Gee, 17 Ves. 278, 279; Grant *v.* Munt, Cooper, Eq. Rep. 173; Newham *v.* May, 13 Price, 752 (*x*); Mortlock *v.* Buller, 10 Ves. 306, 315; Dyer *v.* Hargrave, 10 Ves. 507; Howland *v.* Norris, 1 Cox, R. 61; Halsey *v.* Grant, 13 Ves. 77; Forrest *v.* Elwes, 4 Ves. 497; Hedges *v.* Everard, 1 Eq. Abr. 18, pl. 7; Hepburn *v.* Auld, 9 U. S. 263, 3 L. Ed. 96.

If a man having a part interest in an estate enters into a contract of sale agreeing to sell the whole as his own, he may be compelled to transfer what he has and accept an abatement of price; and equity will not hear from him the objection that the purchaser cannot have the whole. Mortlock *v.* Buller, 10 Ves. 292, 315; Horrocks *v.* Rigby, 9 Ch. D. 180; Burrow *v.* Scammell, 19 Ch. D. 175, 183, distinguishing Wheatley *v.* Slade, 4 Sim. 126, and Price *v.* Griffith, 1 D. M. & G. 80. See also Curran *v.* Holyoke Water Co., 116 Mass. 90; Bogan *v.* Daughdrill, 51 Ala. 312.

[3] See Brown *v.* Haff, 5 Paige, R. 235, 240; Withy *v.* Cottle, 1 Sim. & Stu. 174; Adderley *v.* Dixon, 1 Sim. & Stu. 607; ante, §§ 985, 1004, 1060, 1063.

entitle the vendor to hold.[1] But where a specific performance is denied, there is somewhat more difficulty in establishing the propriety of exercising a general jurisdiction for compensation or damages. It was strongly said by the Master of the Rolls,[2] on one occasion where a specific performance was sought and refused because the vendor had rendered himself incapable of performing the contract, "The party injured by the non-performance of a contract has the choice to resort either to a Court of Law for damages, or to a Court of Equity for a specific performance. If the court does not think fit to decree a specific performance, or finds that the contract cannot be specifically performed, either way I should have thought there was equally an end of its jurisdiction; for in the one case the court does not see reason to exercise the jurisdiction, in the other the court finds no room for the exercise of it. It seems that the consequence ought to be that the party must seek his remedy at law." But upon the footing of authority he nevertheless proceeded to decree compensation in that case by a reference to a master.[3]

[1] Pratt *v.* Law, 13 U. S. 494, 3 L. Ed. 791.

[2] Sir William Grant, in Greenaway *v.* Adams, 12 Ves. 401; ante, §§ 985, 990, 1004.

[3] S. P. Denton *v.* Stewart, 1 Cox, R. 258; 1 Fonbl. Eq. B. 1, ch. 1, § 8, note (*z*); Id. ch. 3, § 8, note (*b*); 2 Fonbl. Eq. B. 5, ch. 1, § 5, note (*s*); ante, §§ 711, 714, 723. In Sainsbury *v.* Jones, 5 Mylne & Craig, R. 1, 3, Lord Cottenham said: "I certainly recollect the time at which there was a floating idea in the profession that this court might award compensation for the injury sustained by the non-performance of a contract in the event of the primary relief for a specific performance failing, and I have formerly seen bills praying such relief; but that arises from my having known the profession sufficiently long to recollect the time when the decision of Lord Kenyon in Denton *v.* Stewart (1 Cox, 258) had not been formally overruled; but at that time very little weight was attached to it, and very few instances occurred in which plaintiffs were advised to ask any such relief; and for a short time Sir W. Grant's decree in Greenaway *v.* Adams (12 Ves. 395) added something to the authority of Denton *v.* Stewart, although he threw out strong doubts as to the principle of that case. This however lasted but a short time, for Greenaway *v.* Adams occurring in 1806, Lord Eldon in 1810, in Todd *v.* Gee (17 Ves. 273), expressly overruled Denton *v.* Stewart; and from that time there has not, I believe, been any doubt upon the subject. Certainly during the thirty years which have elapsed since that time I have never supposed the granting any such relief as being within the jurisdiction of this court. Indeed before that case Sir W. Grant in 1807, in Gwillim *v.* Stone (14 Ves. 128), refused to follow his own decision in Greenaway *v.* Adams, because the plaintiff did not ask a specific performance; that is, in a case precisely the same as the present; for upon this appeal the plaintiff does not ask a specific performance. Had it been supposed that this court had the jurisdiction contended for, every bill for a specific performance would have prayed compensation in the event

§ 1086. **Same.** — There is much weight in the reasoning of the Master of the Rolls; and the only assignable ground upon which the jurisdiction can be maintained in such a case is to prevent a multiplicity of suits. But that seems chiefly proper in cases where the court has already acquired a clear jurisdiction by a discovery for relief. In a later case, where a bill was framed for the delivery up of a contract upon the ground of the defective title of the defendant, with a prayer that the compensation might be made, it was refused.[1] Indeed Lord Eldon seems to have doubted the authority to decree compensation, and to have held the opinion that a Court of Equity ought not to give relief in the shape of damages, but only compensation out of the purchase-money; or at least that a Court of Equity ought not, except under very particular circumstances, upon a bill for specific performance, to direct an issue or a reference to a master to ascertain damages, as it is a matter purely at law, and has no resemblance to compensation strictly so called.[2] And his opinion seems to have been adopted on other recent occasions.[3]

of the vendor proving not to have a good title. It is true that in this case the compensation sought is not against the vendor, but against a person who falsely assumed authority to sell; but this places the case still wider from the principle upon which this court exercises its jurisdiction in cases of contract; because as against such agent there is no case of contract, but a mere claim for compensation, for damages arisen from there being none which the purchaser can enforce." In Woodcock *v.* Bennet (1 Cowen, R. 711) the court held that where a party has put it out of his power to perform his contract specifically, the bill for a specific performance ought to be retained, and an equivalent in damages awarded, to be assessed on reference to a master, or by a jury upon an issue of quantum damnificatus, as the circumstances may require.

It is laid down in recent authorities that where a bill in equity for specific performance is brought in good faith, and the relief sought is defeated by inability on the part of the defendant to comply with a decree, caused after the suit or after the date of the agreement sued upon, equity will retain the bill, and afford relief by compelling compensation, provided the plaintiff brought his bill without knowledge of the disability. Tainter *v.* Cole, 120 Mass. 162; Milkman *v.* Ordway, 106 Mass. 232; Mobile *v.* Kimball, 102 U. S. 691, 26 L. Ed. 238. See also Wonson *v.* Fenno, 129 Mass. 405. The rule extends to all cases where a defect of title, right, or capacity in the defendant is developed in his answer or in the course of the hearing. Tainter *v.* Cole, supra.

But where specific performance has become impossible for want of title, the purchaser is entitled to no other damages than the amount of such expense as he has incurred by reason of the vendor's default; he cannot sue for damages sustained by the loss of his bargain. Bain *v.* Fothergill, L. R. 7 H. L. 158; Burrow *v.* Scammell, 19 Ch. D. 175, 181.

[1] Gwillim *v.* Stone, 14 Ves. 129.

[2] Todd *v.* Gee, 17 Ves. 278, 279, 280.

[3] Clinan *v.* Cooke, 1 Sch. & Lefr. 25; Newham *v.* May, 13 Price, R.

§ 1087. **This Jurisdiction Is Entertained as Incident to the Main Relief Sought.** — There is however a distinction upon this subject which is entitled to consideration, and may perhaps reconcile the apparent diversity of judgment in some of the authorities. It is that Courts of Equity ought not to entertain bills for compensation or damages except as incidental to other relief, where the contract is of such a nature that an adequate remedy lies at law for such compensation or damages. But where no such remedy lies at law, there a peculiar ground for the interference of Courts of Equity seems to exist in order to prevent irreparable mischief or to avoid a fraudulent advantage being taken of the injured party. Thus where there has been a part performance of a parol contract for the purchase of lands, and the vendor has since sold the same to a bona fide purchaser for a valuable consideration without notice, — in such a case, inasmuch as a decree for a specific performance would be ineffectual, and the breach of the contract being by parol would give no remedy at law for compensation or damages, there seems to be a just foundation for the exercise of equity jurisdiction.[1]

749; Kempshall *v.* Stone, 5 John. Ch. R. 194, 195; Blore *v.* Sutton, 3 Meriv. R. 248. But see Woodcock *v.* Bennet (1 Cowen, R. 711).

[1] Denton *v.* Stewart, 1 Cox, R. 258; 1 Fonbl. Eq. B. 1, ch. 1, § 8, note (*z*); Phillips *v.* Thompson, 1 John. Ch. R. 149, 150, 151; Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 273, 286; Deane *v.* Izard, 1 Vern. R. 159; Hatch *v.* Cobb, 4 John. Ch. R. 559, 560; Kempshall *v.* Stone, 5 John. Ch. R. 193, 195; Todd *v.* Gee, 17 Ves. 273. In a case cited from Lord Colchester's MSS. (—— *v.* White, 3 Swanst. R. 109, note), and decided in the beginning of the last century, a specific performance was refused, but an issue of quantum damnificatus was awarded. In Phillips *v.* Thompson (1 John. Ch. R. 150), Mr. Chancellor Kent retained the bill, and awarded an issue of quantum damnificatus, founding himself upon the peculiar circumstances of the case before him, which he thought brought it within the reach of Denton *v.* Stewart (1 Cox, R. 258), and expressly affirming the jurisdiction. S. P. Parkhurst *v.* Van Cortlandt, 1 John. Ch. R. 286. In another case however (Hatch *v.* Cobb, 4 John. Ch. R. 560) the learned chancellor seems to have doubted on the point, and said: "It is doubtful how far the court has jurisdiction to assess damages merely in such a case in which the plaintiff was aware when he filed the bill that the contract could not be specifically performed or decreed. It was properly a matter of legal cognizance." And after citing the case in 1 Cox, R. 258, 12 Ves. 395, and 17 Ves. 273, he concluded by saying: "And though equity in very special cases may possibly sustain a bill for a specific performance, it is clearly not the ordinary jurisdiction of the court." In a later case he expressed a still more decided opinion against the jurisdiction. Kempshall *v.* Stone, 5 John. Ch. R. 194, 195. But in Woodcock *v.* Bennet (1 Cowen, R. 711) the jurisdiction was expressly affirmed. Ante, § 796, note. The Supreme Court of the United States seem to have entertained no doubt that though a specific performance might not be decreed, an issue of quantum damnificatus would be within

§ 1088. **Same.** — In the present state of the authorities, involving as they certainly do some conflict of opinion, it is not possible to affirm more than that the jurisdiction for compensation or damages does not ordinarily attach in equity except as ancillary to a specific performance or to some other relief. If it does attach in any other cases, it must be under very special circumstances, and upon peculiar equities, as for instance in cases of fraud, or in cases where the party has disabled himself by matters ex post facto from a specific performance,[1] or in cases where there is no adequate remedy at law.[2]

§ 1089. **Vendee Who Has Made Improvements under Innocent Mistake as to Real Ownership Is Entitled to Compensation for What He Has Done.** — The cases however which we have been thus far considering are cases where the party sought relief in equity as a plaintiff, and not where compensation was ordinarily sought by the defendant, in resistance or modification of the plaintiff's claim. In these latter cases the maxim often prevails that he who seeks equity shall do equity. Thus for example if a plaintiff in equity seeks the aid of the court to enforce his title against an innocent person who has made improvements on land

the competence of the court. Pratt *v.* Law, 13 U. S. 494, 3 L. Ed. 791. In Cud *v.* Rutter (1 P. Will. 570, Mr. Cox's note (3)), a specific performance was denied, and yet damages were decreed by way of compensation. See also Forrest *v.* Elwes, 4 Ves. 497. Lord Hardwicke, in City of London *v.* Nash, 3 Atk. 512, 517, refused a specific performance, but he awarded an issue of quantum damnificatus.

[1] Andrews *v.* Brown, 3 Cush. 130.

[2] See Cud *v.* Rutter, 1 P. Will. 570, and Mr. Cox's note (3); Greenaway *v.* Adams, 12 Ves. 395; Hedges *v.* Everard, 1 Eq. Abr. 18, pl. 7; Errington *v.* Aynesly, 2 Bro. Ch. R. 341; Deane *v.* Izard, 1 Vern. 159; Gwillim *v.* Stone, 14 Ves. 129; Todd *v.* Gee, 17 Ves. 273. Under the Act of 21 & 22 Vict. ch. 27, § 2, equity may award damages in addition to or substitution for an injunction. Holland *v.* Worley, 26 Ch. D. 578; Krehl *v.* Burrell, 7 Ch. D. 551. Thus in a patent suit damages and an account may be ordered. Betts *v.* Neilson, L. R. 3 Ch. 429. See Davenport *v.* Rylands, L. R. 1 Eq. 302; Betts *v.* Gallais, L. R. 10 Eq. 392. So probably in this country irrespective of statute, under a suitable prayer for relief, special or general. As to damages under the act above cited in cases of easement see Hindley *v.* Emery, L. R. 1 Eq. 52; Martin *v.* Headon, L. R. 2 Eq. 425; Senior *v.* Pawson, L. R. 3 Eq. 330. Where goods are parted with after notice of stoppage in transit, Schotsman *v.* Lancashire Ry. Co., L. R. 1 Eq. 349; s. c. 2 Ch. 332. Wrongful working of mines, Jegon *v.* Vivian, L. R. 6 Ch. 742; Hilton *v.* Woods, L. R. 4 Eq. 432. Equity will not, it seems, add an order for assessing damages for breach of covenant after a decree for specific performance of the contract. Hythe *v.* East, L. R. 1 Eq. 630. See further Phillips *v.* Thompson, 1 Johns. Ch. 131; May *v.* Leclaire, 11 Wall. 236; Peabody *v.* Tarbell, 2 Cush. 226; Fry, Specific Perf. 449 (2d Am. ed.).

supposing himself to be the absolute owner, that aid will be given to him only upon the terms that he shall make due compensation to such innocent person to the extent of the benefits which will be received from those improvements.[1] In such a case if the plaintiff has fraudulently concealed his title and has thereby misled the defendant, the title to this compensation is founded in the highest justice.[2] But independently of any such fraud, if the plaintiff seeks from an innocent person an account of the rents and profits of an estate on which the latter has made improvements without any notice of any defect of his title, a Court of Equity in decreeing an account will allow him to deduct or recoup therefrom a due compensation for his improvements.[3] So in cases of partition between tenants in common, compensation is often allowed in equity to one of the tenants in common who has made valuable improvements thereon.[4]

§ 1090. **Same.** — It has been sometimes thought, as a matter of justice, that courts ought to go further, and in favor of a bona fide possessor of the land whose title is defective, to decree compensation for the improvements made by him upon the land in good faith against the true owner who asserts his title to it.[5] The civil law seems to have adopted this broad doctrine where the improvements were made by a bona fide possessor without notice of any adverse title. "Certe illud constat; si in possessione constituto ædificatore, soli dominus petat domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor fuerit qui ædificavit."[6] And this also appears to be the rule of countries deriving their jurisprudence from the civil law.[7] But Courts of

[1] McLaughlin *v.* Barnum, 31 Md. 425; Sale *v.* Crutchfield, 8 Bush, 636; Troost *v.* Davis, 31 Ind. 34; Miller *v.* Tobie, 41 N. H. 84; Winton *v.* Fort, 58 N. C. 251; Patterson *v.* Yeaton, 47 Me. 308; Davidson *v.* Barclay, 63 Pa. St. 406; Bacon *v.* Cottrell, 13 Minn. 194; Bomberger *v.* Turner, 13 Ohio St. 263; post, § 1644. But see Cook *v.* Craft, 3 Lans. 512; Cannon *v.* Copeland, 43 Ala. 252.

[2] Ante, §§ 514, 517, 518. See also § 887; post, §§ 1644, 1645.

[3] Putnam *v.* Ritchie, 6 Paige, R. 390, 405, 406.

[4] Ante, § 887; Coulter's case, 5 Co. R. 30; Southall *v.* McKean, 1 Wash. Virg. Rep. 434. Marlow *v.* Adams, 24 Ark. 109, that the compensation cannot exceed the rents.

[5] Winton *v.* Fort, 58 N. C. 251; Miller *v.* Tobie, 41 N. H. 84; post, § 1644.

[6] Just. Inst. Lib. 2, tit. 1, §§ 30, 35; Dig. Lib. 6, tit. 1, ll. 38, 48; Pothier, Pand. Lib. 6, tit. n. 44; post, § 1239; Bright *v.* Boyd, 1 Story, R. 478, 494, 495.

[7] Merlin, Repertoire, Amelioration; Id. Possession, § 5; Cod. Civ. de France, art. 555, 1381, 1634, 1635; 1 Domat, B. 3, tit. 1, § 5, art. 7;

Equity seem not to have gone to this extent, but to have confined themselves simply to the administration of the equity in cases where their aid has been invoked by the true owner in support of his equitable claims. They have never enforced in a direct suit by the bona fide possessor his claim to meliorations of the property from which he has been evicted by the true owner.[1]

Id. tit. 7, § 3, art. 5, 6; post, § 1646, and the authorities cited in Putnam *v.* Ritchie, 6 Paige, R. 403, 404.

[1] Putnam *v.* Ritchie, 6 Paige, R. 390, 403, 404, 405. In this case Mr. Chancellor Walworth said: "This principle of natural equity is constantly acted upon in this court where the legal title is in one person, who has made the improvements in good faith, and where the equitable title is in another, who is obliged to resort to this court for relief. The court in such cases acts upon the principle that the party who comes here as a complainant to ask equity must himself be willing to do what is equitable. I have not however been able to find any case either in this country or in England wherein the Court of Chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter, after he had knowledge of his legal rights. I do not therefore feel myself authorized to introduce a new principle into the law of this court without the sanction of the legislature, which principle, in its application to future cases, might be productive of more injury than benefit. If it is desirable that such a principle should be introduced into the law of this State for the purpose of giving the bona fide possessor a lien upon the legal title for the beneficial improvements he has made, it would probably be much better to give him a remedy by action at law, where both parties could have the benefit of a trial by jury, than to embarrass the title to real estate with the expense and delay of a protracted chancery suit in all such cases." Post, §§ 1237, 1238. On the other hand Mr. Justice Story in delivering the opinion of the court, in Bright *v.* Boyd (1 Story, R. 478, 494), said: "The other question as to the right of the purchaser bona fide, and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of Courts of Equity, acting ex æquo et bono, I own that there does not seem to me any just ground to doubt that compensation under such circumstances ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, 'Nemo debet locupletari ex alterius incommodo;' or, as it is still more exactly expressed in the Digest, 'Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiorem.' Dig. Lib. 50, tit. 17, l. 206. I am aware that the doctrine has not as yet been carried to such an extent in our Courts of Equity. In cases where the true owner of an estate, after a recovery thereof at law from a bona fide possessor for a valuable consideration without notice, seeks an account in equity as plaintiff, against such possessor, for the rents and profits, it is the constant habit of Courts of Equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate, and thus to recoup them from the rents and profits. Ante, § 1089; post, §§ 1644, 1645, 1646. So if the

true owner of an estate holds only an equitable title thereto, and seeks the aid of a Court of Equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such bona fide possessor for the amount of his meliorations and improvements of the estate beneficial to the true owner. Ante, § 799 *b*, and note; post, §§ 1237, 1238. In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. Post, §§ 1237, 1238. But it has been supposed that Courts of Equity do not and ought not to go further, and to grant active relief in favor of such a bona fide possessor making permanent meliorations and improvements, by sustaining a bill, brought by him therefor, against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in Putnam *v.* Ritchie (6 Paige, R. 390, 403, 404, 405), entertained this opinion, admitting at the same time that he could find no case in England or America where the point has been expressed or decided either way. Now if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such bona fide purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city where a bona fide purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just that in such a case the true owner should recover and possess the whole, without any compensation whatever to the bona fide purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another who is in no default. The argument, I am aware, is, that the moment the house is built it belongs to the owner of the land by mere operation of law, and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law by which the true owner seeks to hold what in a just sense he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest that the claim of the bona fide purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and in this view of the matter I am supported by the positive dictates of the Roman law. The passage already cited shows it to be founded in the clearest natural equity. 'Jure naturæ æquum est.' And the Roman law treats the claim of the true owner without making any compensation under such circumstances as a case of fraud or ill faith. 'Certe,' say the Institutes, 'illud constat; si in possessione constituto ædificatore, soli dominus petat domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem doli mali repelli; utique si bonæ fidei possessor qui ædificavit. Nam scienti alienum solum esse, potest objici culpa, quod ædificaverit temere in eo solo, quod intelligebat alienum esse.' Just. Inst. lib. 2, tit. 1, §§ 30, 32; Vin. Com. ad Inst. lib. 2, tit. 1, § 30, n. 3, 4, pp. 194, 195. It is a grave mistake sometimes made, that the Roman law merely confined its equity or remedial justice on this subject to a mere reduction from the amount of the rents and profits of the land. See Green *v.* Biddle, 8 Wheat. R. 79, 80. The general doctrine is fully expounded and supported in the Digest, where it is applied, not to all expenditures upon the

estate, but to such expenditures only as have enhanced the value of the estate, 'quatenus pretiosior res facta est' (Dig. lib. 20, tit. 1, l. 29, § 2; Dig. lib. 6, tit. 1, l. 65; Id. l. 38; Pothier, Pand. lib. 6, tit. 1, n. 43, 44, 45, 46, 48), and beyond what he has been reimbursed by the rents and profits. Dig. lib. 6, tit. 1, l. 48. The like principle has been adopted into the law of the modern nations which have derived their jurisprudence from the Roman law; and it is especially recognized in France, and enforced by Pothier with his accustomed strong sense of equity and general justice and urgent reasoning. Pothier de la Propriété, n. 343 to 353; Code Civil of France, art. 552 to 555. Indeed some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a mala fide possessor ought to have an allowance of all expenses which have enhanced the value of the estate so far as the increased value exists. Pothier de la Propriété, n. 350; Vinn. ad Inst. lib. 2, tit. 1, l. 30, n. 4, p. 195. The law of Scotland has allowed the like recompense to bona fide possessors making valuable and permanent improvements; and some of the jurists of that country have the benefit to mala fide possessors to a limited extent. Bell, Comm. on Law of Scotland, p. 139, § 538; Ersk. Inst. b. 3, tit. 1, § 11; 1 Stair, Inst. b. 1, tit. 8, § 6. The law of Spain affords the like protection and recompense to bona fide possessors, as founded in natural justice and equity. 1 Mor. & Carl. Partid. b. 3, tit. 28, l. 41, pp. 357, 358; Asa & Manuel, Inst. of Laws of Spain, 102. Grotius, Puffendorf, and Rutherforth, all affirm the same doctrine as founded in the truest principles ex æquo et bono. Grotius, b. 2, ch. 10, §§ 1, 2, 3; Puffend. Law of Nat. b. 4, ch. 7, § 61; Rutherf. Inst. b. 1, ch. 9, § 4, p. 7. There is still another broad principle of the Roman law which is applicable to the present case. It is that where a bona fide possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him. Dig. lib. 6, tit. 1, l. 65; Pothier Pand. lib. 6, tit. 1, l. 43; Pothier de la Propriété, n. 343." See also s. c. 2 Story, R. 605, where the doctrine was again affirmed and acted upon by the court.

CHAPTER XXII

CONVERSION AND RECONVERSION

§ 1091. [**Conversion and Reconversion.** — Let us now proceed to consider the doctrine of the conversion of property from realty into personalty, and vice versa. Equitable conversion is defined as a constructive alteration in the nature of property by which in equity real estate is regarded as personalty or personal estate as realty. It grows out of the old equitable maxim that "Equity regards that done which ought to be done." It has been adopted for the purpose of executing trusts, and it is essential to the application of the doctrine that the property should be subject to a trust or imperative direction for conversion.[1] It is not to be presumed beyond the purposes of the will, or further than is necessary to gratify the several legacies and bequests.[2] Conversion takes place from the death of the testator only when there is a positive direction to sell. In order to work a conversion of a testator's land into money from the time of his death, there must be either (1) a positive direction to sell; or (2) an absolute necessity to sell in order to execute the will; or (3) such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath said fund as money. The will must direct it absolutely, or out and out, irrespective of all contingencies, and unless there be an imperative direction to sell, irrespective of contingencies and independent of discretion, conversion will not take place until the sale is actually made.[3] Conversion is a fiction

[1] Beaver *v.* Ross, 140 Iowa, 154, 118 N. W. 287, 20 L. R. A. (N. S.) 65, 17 Ann. Cas. 640; Geiger *v.* Bitzer, 80 Ohio St. 65, 88 N. E. 134, 22 L. R. A. (N. S.) 285, 17 Ann. Cas. 151; Griggs Land Co. *v.* Smith, 46 Wash. 185, 89 Pac. 477.

[2] Boyce *v.* Kelso Home, 107 Md. 190, 68 Atl. 550.

[3] In re Cooper's Estate, 206 Pa. 628, 56 Atl. 67, 98 Am. St. Rep. 799; Duckworth *v.* Jordan, 138 N. C. 520, 51 S. E. 109; Bennett *v.* Gallaher, 115 Tenn. 568, 92 S. W. 66; In re Vanuxem's Estate, 212 Pa. 315, 61 Atl. 876 1 L. R. A. (N. S.) 400; Clifton *v.* Owens, 170 N. C. 607, 87 S. E. 502.

of equity applied in proper cases in order to carry out the intention of the testator, but, where the intention, or purpose, fails, the fiction will not be applied. If there be a total failure of purpose, the heir at law takes, and may not only prevent a sale, but may compel the trustee, if the estate be so held, to make a conveyance of the real estate to him. In case of a partial failure of purpose, while the heir cannot prevent the sale, he takes his share according to the course of inheritance under the intestate law as if no will had been made.[1]]

§ 1092. **Same.** — There is another consideration which is incident to this subject, and to which Courts of Equity have given an attention and effect proportioned to its importance. In the view of Courts of Law contracts respecting lands, or other things, of which a specific execution will be decreed in equity, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident, or as a present or future charge. But Courts of Equity regard them in a very different light. They treat them, for most purposes, precisely as if they had been specifically executed.[2] Thus if a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made, and it passes by descent to his heir as land.[3] The vendor is deemed in equity to stand seised of it for the benefit of the purchaser, and the trust (as has been already stated) attaches to the land so as to bind the heir of the vendor, and every one claiming under him as a purchaser with notice of the trust.[4] The heir of the purchaser may come into equity and insist upon a specific performance of the contract; and unless some other circumstances affect the case, he may require the purchase-money to be paid out of the personal estate of the purchaser in the hands of his personal representative. On the other hand the vendor may come into equity for a specific performance of the contract on the other side, and to have the money paid; for the remedy, in cases of specific performance, is mutual,[5] and the purchase-

[1] In re Reed's Estate, 237 Pa. 125, 85 Atl. 138; Christopher *v.* Mungen, 61 Fla. 513, 55 So. 273.

[2] 1 Fonbl. Eq. B. 1, ch. 6, § 9, and note (*s*); ante, § 64. See Huffman *v.* Hummer, 2 C. E. Green, 263; Brewer *v.* Herbert, 30 Md. 301; Worrall *v.* Munn, 38 N. Y. 137.

[3] Seton *v.* Slade, 7 Ves. 264, 274; post, § 1612.

[4] Ante, §§ 1078, 1079. [5] Ante, § 1004; post, §§ 1085, 1612, 1614.

money is treated as the personal estate of the vendor, and goes as such to his personal representatives. In like manner land articled or devised to be sold and turned into money is reputed as money,[1] and money articled or bequeathed to be invested in land has, in equity, many of the qualities of real estate, and is descendible and devisable as such, according to the rules of inheritance in other cases.[2] So if a trustee should take property

[1] Burr *v.* Sim, 1 Whart. 252; Lindsay *v.* Pleasants, 39 N. C. 321; Wood *v.* Cone, 7 Paige, 472; Wood *v.* Keyes, 8 Paige, 365.

[2] Post, §§ 1612 to 1615; 3 Wooddes. Lect. 58, pp. 466 to 468; 1 Fonbl. Eq. B. 1, ch. 6, § 9, and notes (*s*), (*t*); Newland on Contr. ch. 3, pp. 48 to 64; Craig *v.* Leslie, 16 U. S. 563, 4 L. Ed. 460; Fletcher *v.* Ashburner, 1 Bro. Ch. R. 496; Doughty *v.* Bull, 2 P. Will. 320; Yates *v.* Compton, 2 P. Will. 308; Trelawney *v.* Booth, 2 Atk. 307; Rose *v.* Cunynghame, 11 Ves. 554; Kirkman *v.* Miles, 13 Ves. 338. As a fit illustration of the text, Mr. Fonblanque's note (1 Fonbl. Eq. B. 1, ch. 6, § 9, note *t*), containing the principal authorities, is here inserted. "The rule," says he, "equally applies to money devised to be laid out in land. The authorities to show that money, agreed or directed to be laid out in land, is to be considered as land, are very numerous. The force of the rule is particularly evinced by those cases in which it has been held that the money, agreed or directed to be laid out, so fully becomes land: as, 1st, not to be personal assets; Earl of Pembroke *v.* Beighden, 3 Ch. Rep. 115; 2 Vern. 52; Lawrence *v.* Beverly, 2 Keble, 841; cited also in Kettleby *v.* Attwood, 1 Vern. 298, 741; 2dly, to be subject to the curiosity of the husband though not to the dower of the wife; Sweetapple *v.* Bindon, 2 Vern. 536; Otway *v.* Hudson, 2 Vern. 583; 3dly, to pass as land by will, if subject to the real use at the time the will was made. See ch. 4, § 2, note (*n*). See also Milner *v.* Mills, Mosely, 123; Greenhill *v.* Greenhill, 2 Vern. 679, Prec. Ch. 320; Shorer *v.* Shorer, 10 Mod. 39; Lingen *v.* Sowray, 1 P. Wms. 172; Guidott *v.* Guidott, 3 Atk. 254; 4thly, not to pass as money by a general bequest to a legatee; but it will by a particular description, as so much money to be laid out in land. Cross *v.* Addenbroke; Fulham *v.* Jones, cited in a note to Lechmere *v.* Earl of Carlisle, 3 P. Wms. 222; or by a bequest of all the testator's estate in law and equity; Rashleigh *v.* Masters, 1 Ves. Jr. 204. But equity will not consider money as land unless the covenant or direction to lay it out in land be express; Symons *v.* Rutter, 2 Vern. 227; Curling *v.* May, M. 8, G. II. cited in Guidott *v.* Guidott, 3 Atk. 255. And as money agreed or directed to be laid out in land shall in general be considered as land, so land agreed or directed to be sold shall be considered and treated as money; Gilb. Lex Prætoria, 243; but see Ashby *v.* Palmer, 1 Merivale, R. 296. As to from what time the conversion shall be supposed, see Sitwell *v.* Bernard, 6 Ves. 520; Elwin *v.* Elwin, 8 Ves. 547; and the creditors of the bargainer may compel the heir to convey the land. Best *v.* Stanford, 1 Salk. 154. But it must not be understood that where a testator directs his real estate to be sold for purposes which are answered out of the personal estate, the next of kin may insist upon the real estate's being sold; for 'there is no equity between the next of kin and the heir, but the general principle is that the heir takes all which is not for a defined and specific purpose given by the will.' Chitty *v.* Parky, 2 Ves. Jr. 271; Ex parte Bromfield, 1 Ves. Jr. 453; Oxenden *v.* Lord Compton, 2 Ves. Jr. 69; Walker *v.* Denne, 2 Ves. Jr. 170; Lord Compton *v.* Oxenden, 2 Ves. Jr. 361; but see Wheldale *v.*

with absolute directions to sell and convert it into money, there, although the directions were not carried into effect during the life of the party creating the trust, the property would be deemed personalty. But if the charge is not absolute,[1] as if a testator should charge his real estate for the payment of his debts, it will retain its character as real estate, so far as the charge does not extend, until it is actually converted.[2] The like rule will apply to the case of real estate conveyed to a trustee in trust to permit a mortgagor to receive the rents and profits, and upon payment of the mortgage money to reconvey to the mortgagor, and upon default of payment to sell the premises and pay over the residue to the mortgagor after payment of the mortgage; there, if no sale should be made until after the death of the mortgagor, it will pass by his devise to his devisee, or to his heir, as real estate, and not as personalty.[3]

§ 1093. **Same.** — The ground of this latter doctrine is, that Courts of Equity will regard the substance, and not the mere form of agreements and other instruments, and will give them the precise effect which the parties intended, in furtherance of that intention. It is presumed that the parties, in directing money to be invested in land, or land to be turned into money, intend that the property shall assume the very character of the property into which it is to be converted, whatever may be the manner in which that direction is given. And no one will deny that it is competent, at least in a Court of Equity, for the owner of

Partridge, 8 Ves. 235. And where the testator was entitled to a fund, as money or land, his real and personal representatives shall take it as money or as land, according as the testator would have taken it. See Ackroyd *v.* Smithson, and the cases there cited, 1 Bro. Ch. R. 503; see also Hewitt *v.* Wright, 1 Bro. Ch. R. 86, as to Lord Thurlow's opinion that money, resulting to the heir as being produced by sale of real estate undisposed of, is to be considered as personal estate of the heir, and as such would go to his executor. Russell *v.* Smythies, 1 Cox, R. 215. But if the use and possession were not united, it would still be considered as land. Rashleigh *v.* Masters, 1 Ves. Jr. 201; Wheldale *v.* Partridge, 8 Ves. 235." The same subject is most amply discussed by Mr. Newland with uncommon care in his treatise on Contracts, ch. 3, pp. 48 to 64. See also Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, pp. 446, 447; Craig *v.* Leslie, 16 U. S. 563, 4 L. Ed. 460; 2 Fonbl. on Equity, B. 1, ch. 4, § 2, note (*n*).

[1] White *v.* Howard, 46 N. Y. 144, 162.

[2] Bourne *v.* Bourne, 2 Hare, R. 38; Dalzell on the Law of Conversion, 89; Penalosa State Bank *v.* Murray, 86 Kans. 766, 122 Pac. 1117; In re Murray's Estate, 234 Pa. 520, 83 Atl. 473; Martin *v.* Provident Life & Trust Co., 235 Pa. 281, 83 Atl. 713.

[3] Dalzell on the Law of Conversion, 89.

the fund to make land money, or money land, at his sole will and pleasure.[1]

§ 1094. **Same.** — But although these are the general principles adopted by Courts of Equity, yet they are not without limitations and qualifications, standing upon peculiar reasons, but still consistent with those principles. Thus (as we have seen) nothing is looked upon in equity as done but what ought to be done, not what might have been done.[2] Nor will equity consider things as thus done in favor of everybody, but only in favor of those who have a right to pray that they might be done.[3]

§ 1095. **Same.** — Upon the ground of intention also, if it can be collected from any present or subsequent acts of the parties that it is their intention, notwithstanding any will, or deed, or other instrument, that the property shall retain its present character, either in whole or in part, Courts of Equity will act upon that intention.[4] Thus for instance if money is directed by a will or other instrument to be laid out in land, or land is directed to be turned into money, the party entitled to the beneficial interest may in either case, if he elects so to do, prevent any conversion of the property from its present state, and hold it as it is. And this election he may make as well by acts or declarations clearly indicating a determination to that effect, as by an application to a Court of Equity. It is this election however, and not the mere right to make it, which changes the character of the estate so as to make it real or personal at the will of the party entitled to the whole beneficial interest. If he does not make such an election in time to stamp the property with a character different from that which the will or other instrument gives it, the latter character accompanies it with all its legal consequences into the hands of those who are entitled to it in that character.

[1] Post, §§ 1612 to 1614. If the nature of real estate has been imposed upon a fund, as where it is the produce of real estate not necessary to be converted, the same will pass to the heir as such, unless something has been done to alter the equitable devolution. Scott *v.* Scott, 9 L. R. Ir. 367, 379. This principle is held to apply to the surplus of proceeds of sale over what was necessary for the purpose. Ib. But see Steed *v.* Preece, L. R. 18 Eq. 192. See also Flanagan *v.* Flanagan, cited 1 Bro. C. C. 498; Oxenden *v.* Compton, 2 Ves. Jr. 69; Walker *v.* Denne, Ib. 176, and other cases considered in Scott *v.* Scott; also note 1, p. 115, infra.

[2] Ante, §§ 64, 1092.

[3] 1 Fonbl. Eq. B. 1, ch. 6, § 9, and note (*s*); ante, § 64 *g*; F Leslie, 16 U. S. 563, 4 L. Ed. 460.

[4] See Mr. Cox's note to Cruse *v.* Barley, 3 P. Will. 22, note (1 *v.* Leslie, 16 U. S. 563, 4 L. Ed. 460; post, §§ 1612 to 1615, 165 ford *v.* Temple, 10 Simons, R. 184.

So that in the case of the death of the party thus beneficially entitled without having made an election, the property will pass to his heirs, or personal representatives, in the same manner it would have done if the trust had been executed and the conversion had been actually made in his lifetime.[1]

§ 1096. [**Status of Fund Remaining after Sale of Property.** — We will now consider the status of a fund remaining after the sale of property, and the income arising from it upon its conveyance. Where real property has been sold for the payment of debt, the fund arising after the payment has been held by some courts to still retain its character as land, and some others hold that this is a conversion of real into personal property. We will consider these different theories in their order. In the cases that hold that the residue is to be regarded as real property, it is usually where the instrument, by virtue of which the sale was had, does not require a sale, but leaves the question of a disposition of the property to a trustee or executor. It is essential to an equitable conversion of a fund that there be an absolute duty to convey.[2] In the case of a contract for the purchase and sale of real property, the vendor continuing to hold the legal title merely as security for the payment of the purchase money, in the event of the death

[1] Craig *v.* Leslie, 16 U. S. 563, 4 L. Ed. 460; Kirkman *v.* Miles, 13 Ves. 338; Edwards *v.* Countess of Warwick, 2 P. Will. 171; Roper *v.* Radcliffe, 9 Mod. 167; Cruse *v.* Barley, 3 P. Will. 20, and Mr. Cox's note; Id. 22; Ackroyd *v.* Smithson, 1 Bro. Ch. R. 503, and Mr. Belt's note; s. c. cited 3 P. Will. 22, Cox's note; Hewitt *v.* Wright, 1 Bro. Ch. R. 86; Seton *v.* Slade, 7 Ves. 274. This whole subject is most elaborately considered upon all the distinctions stated in the text, in the opinion of the court, delivered by Mr. Justice Washington in Craig *v.* Leslie, supra, which will well reward the diligent perusal of the reader. Mr. Cox's note also to Cruse *v.* Barley, 3 P. Will. 22, note (1), contains a valuable exposition of the doctrine. The question often arises under wills, between personal representatives and real representatives, as to who are entitled; and the struggle is maintained with great pertinacity on each side. Thus if a testator should direct that his lands should be sold for the payment of his debts, or for other purposes, the question would arise whether he meant to give the produce of his real estate the quality of personalty to all intents and purposes, or only so far as respected the purposes of his will. For unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the purposes of the will, but further that the produce of the real estate shall be taken as personalty whether such purposes take effect or not, so much of the real estate, or the produce of it, as may not, in the event, be required for any purposes of the will from any cause whatsoever will result to the heir at law, who will be entitled to hold it in any character which he may elect. See Mr. Cox's note, supra; ante, § 1092; post, §§ 1612 to 1615. In re Pedder, 5 DeG. M. & G. 890.

[2] Swisher *v.* Swisher, 157 Iowa, 55, 137 N. W. 1076.

of such a vendee before actual delivery of the deed the interest of the vendee is treated as real estate and descends to his heirs or is devisable as real estate.[1]]

§ 1097. [**Same.** — The principle on which the doctrine of conversion is based is that equity regards things directed or agreed to be done as having been actually performed. Hence money directed to be employed in the purchase of land, and land directed to be sold and converted into money, are to be considered as that species of property into which they are directed to be converted, without regard to the manner in which the direction is given. While the doctrine is usually applied in the case of a devise by will, it is equally applicable in the case of the disposition of property made by deed; the only difference being that a will usually speaks from the death of the testator, while a deed usually speaks from the date of its delivery and registration. However, in order to effect an immediate conversion by deed of trust with power to sell, the direction to sell must be mandatory and not discretionary. In other words, there must be an absolute direction to sell, and not a mere power which may or may not be exercised. In the case of a mere power to sell, the conversion does not take place until the sale is made.[2] Surplus money realized by the sale of land under a deed of trust is treated as realty and not personalty in respect to rules of law governing its disposition. It remains real estate in the hands of the trustee to be disposed of according to the law of real property.[3] The owners of a lot held by entireties may agree among themselves as to a partition of their interests in the property, where they have been divorced and the purpose is to have an equal division of the money. Such an agreement is an equitable conversion of the land into money.[4] In order for the conversion to occur, it is not essential that the land be actually sold, but it is sufficient if the land is yet unsold and the direction to sell is clearly defined and specific.[5] It may be that in the development of the realty, it is advantageous to have the coal mined, and in the consummation of the contract for mining, the written instrument is denominated a "deed", this of itself

[1] In re Edgewater Road, 138 App. 203, 122 N. Y. Supp. 931.

[2] Collins *v.* Combs, 160 Ky. 325, 169 S. W. 721.

[3] Enbank *v.* Finnell, 118 Mo. App. 535, 94 S. W. 591; Sperry *v.* Farmers Loan & Trust Co., 154 App. Div. 447, 139 N. Y. Supp. 192; Brown Banking Co. *v.* Stockton, 107 Ky. 492, 54 S. W. 854, 21 Ky. L. Rep. 1212; Clapp *v.* Tower, 11 N. Dak. 556, 93 N. W. 862; Rhodes *v.* Meredith, 260 Ill. 138, 102 N. E. 1063.

[4] Southern Ice & Coal Co. *v.* Alley, 127 Tenn. 173, 154 S. W. 536.

[5] Koehne *v.* Beattie, 36 R. I. 316, 90 Atl. 211.

does not change the proceeds resulting from the operation of the mine from personalty to realty.[1]]

§ 1098. [**Effect of Conversion under a Will.** — There is no general rule as to a presumption of an intent to create a conversion of realty into personalty, and where a conversion is claimed it must be clearly shown to have been positively declared in the will. Where it appears that the personal estate is wholly inadequate to fully discharge the debts, and a life estate is given the wife "and after her death and within two years thereafter" a sum of money is given to each of his children, this is a sufficient evidence of a conversion.[2] A mere power of sale in the will is not sufficient to create a conversion, unless there is something in the will that authorizes a constructive change in the property. The duty to sell must be imperative, and when there is no out and out conversion, the lands are charged only with the payment of debts, and they retain their character of realty until actually converted.[3] The authority to sell may be either express or implied because of its necessity to carry out the terms of the will[4]; but when it is manifest that each and every provision of the will cannot be carried out without a sale of the real estate, and the effort is to derive an intention to convert from the fact of a blending of the real and personal estate such inference cannot be supported except as it rests on something more than a mere failure on part of the testator to distinguish between the two kinds of property in directing that his estate be divided into shares and distributed.[5] If the intention or purpose of the testator fails, the doctrine of conversion will not be applied. If there be a total failure of purpose, the heir at law takes, and may not only prevent a sale, but may compel the trustee, if the estate be so held, to make a conveyance of the real estate to him.[6]]

§ 1099. [**Effect upon Rights of Heirs where Conversion Is Created by Will.** — Conversion is altogether a doctrine of equity — in law it has no being — and it is admitted only for the accom-

[1] Dorr *v.* Reynolds, 26 Pa. Super. Ct. Rep. 139; In re Gardner's Estate, 199 Pa. 524, 49 Atl. 346.

[2] Greenman *v.* McVey, 126 Minn. 21, 147 N. W. 812.

[3] St. John's Church *v.* Dippoldsmann, 118 Md. 242, 84 Atl. 373; Keen *v.* Plume, 82 N. J. Eq. 526, 90 Atl. 1027.

[4] Utica Trust Co. *v.* Thompson, 87 Misc. Rep. 31, 149 N. Y. Supp. 392; Brown *v.* Miner, 261 Ill. 543, 104 N. E. 150; Todd *v.* McFall, 96 Va. 754, 32 S. E. 472; McConnell *v.* Bryan, 62 Pa. Super. Ct. Rep. 178.

[5] Martin *v.* Provident Life & Trust Co., 235 Pa. 281, 83 Atl. 713; Hanson *v.* Hanson, 149 Iowa, 82, 127 N. W. 1032.

[6] In re Reed's Estate, 237 Pa. 125, 85 Atl. 138.

plishment of equitable results, and, of necessity, it must be limited to this end. The creditor of one of the legatees is as much bound by the terms of the will as the legatee would be had there been no debt, and can only subject to the payment of his claims the interest of his debtor. They both must take, if at all, per formam doni, and the mere fact that one of the beneficiaries has become indebted does not alter the rights of the parties under the will. There being no interest in the land, considered as land, it logically follows that a creditor of one entitled to the proceeds mistakes his remedy by levying upon the land itself.[1] Land directed by the will to be converted into personalty is not subject to the lien of a mortgage, as land, but it operates as an equitable assignment of the interest of the donor in the property.[2] A claim for expenses of administration, which is not a direct claim against the lands of the decedent, will not be allowed as a liability against the land, except where the lands have to be sold for the payment of debts. The conversion authorized by the will was for the purpose of division only. For all other purposes the property remains real estate.[3] But where a statute provides that a widow may dissent from the will, the attempted conversion of real into personal property will not be allowed to defeat her right of dower. This is a right that she is entitled to without regard to whether the husband die testate or intestate, and this estate passed to her under the shape in which, at the time of his death, it was held by the testator.[4]]

§ 1100. [**Effect of a Conversion where Sale Is Had by Order of Court.** — When a conversion has once occurred, it extends only so far as the language of the instrument creating it, or the intention of the donor warrants. If the property has been ordered to be sold by a decree of court, and a conversion thereby ensues, it follows that the property is treated as converted from real to personal property only so far as it is necessary to discharge the obligation or duty required in the decree. Equitable conversion is

[1] Clifton *v.* Owens, 170 N. C. 607, 87 S. E. 502; Todd *v.* McFall, 96 Va. 754, 32 S. E. 472; Greenman *v.* McVey, 126 Minn. 21, 147 N. W. 812; Penalosa State Bank *v.* Murray, 86 Kans. 766, 121 Pac. 1117.

[2] Walker *v.* Killian, 62 S. C. 482, 40 S. E. 887; Stake *v.* Mobley, 102 Md. 408, 62 Atl. 963; Chick *v.* Ives, 2 Neb. 879, 90 N. W. 751.

[3] Taylor *v.* Crook, 136 Ala. 354, 34 So. 905, 96 Am. St. Rep. 26.

[4] In re Petterson, 195 Pa. St. 78, 45 Atl. 654; In re Hutchins' Estate, 21 Ohio Cir. Ct. R. 720.

Where there is a question as to whom the property belongs, whether it is converted from real into personal property, and whether if not converted it is real property and subject to execution, it is proper for the execution creditor to bring an action in advance to determine who is the true owner. Smith *v.* Hensen, 89 Kans. 792, 132 Pac. 997.

dependent on the particular object to be attained by it, insomuch that, if the property be more than sufficient for it, the surplus passes, at the transmission, as if it had not been converted at all. Where the lands of a decedent are sold under order of court for the purpose of paying his debts or making real estate assets, the fund derived from the sale of the property is to be treated as converted into personalty so far as it is necessary to discharge the obligations, but that remaining is to be distributed amongst the heirs at law, rather than to go to the personal representative.[1]]

§ 1101. [**Application of the Rule to the Estates of Infants and Persons under Disability.** — The rule that that portion of the proceeds arising from the sale of real property, in excess of what was actually needed to comply with the judgment of the court, continues to be realty, applies also to sales of properties of infants or incompetents. Where the fund was deposited in court it remained real estate during the minority of the petitioner, but upon his arriving at full age it passed to the infant as personal property.[2] When land of an infant is sold under judicial proceedings, the fund arising from the sale is not devested of its character as realty, unless it appears from the order directing the sale that it was the intention of the court to convert the proceeds into personalty. The mere sale of the land is not in itself sufficient to show this intention. It is not only of the utmost importance to resort to the pleadings to determine the purpose which the parties themselves had in view, but likewise to the order of the court, especially where the rights of an infant are involved, to ascertain to what extent the court has allowed such purpose to be carried into effect.[3] It is of the utmost importance to determine what the character of the fund is, for it will be noted that the personalty is primarily liable for the discharge of the indebtedness, and the fund, as money, but retaining its character as realty, is only liable after the primary fund has been exhausted.[4]]

§ 1102. [**Intent of Testator Aids in Construction of Will.** — The fundamental rule in the interpretation of wills is that the inten-

[1] Smith *v.* Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403; In re Knapp, 25 Misc. Rep. 133, 54 N. Y. Supp. 927, 28 Civ. Proc. R. 220; Sulphur Mines Co. *v.* Thompson's Heirs, 93 Va. 293, 25 S. E. 232; Phelan *v.* Elbin, 84 Conn. 208, 79 Atl. 187; In re Dolan's Estate, 231 Pa. 180, 80 Atl. 73; Picken's Execr. *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997.

[2] Williams *v.* Post, 158 App. Div. 818, 143 N. Y. Supp. 1027; Findley *v.* Findley, 42 W. Va. 372, 26 S. E. 433.

[3] Major *v.* Hunt, 64 S. C. 97, 41 S. E. 816; Farris *v.* Bingham, 164 Ky. 444, 175 S. W. 649.

[4] In re Reeve, 38 Misc. Rep. 409, 77 N. Y. Supp. 936.

tion of the testator governs and it is the duty of the court to ascertain such intention and give force and effect thereto, and this rule is applicable to questions of equitable conversion. There is no conversion of realty into personalty, nor personalty into realty, taking effect at the time of testator's death, unless it can be seen by the court that the testator intended such a conversion.[1] If this intention to convert clearly and explicitly appears by the provisions of the will, it is equally effective as a positive direction contained in the instrument.[2] When the execution of the scheme of the testator would be impossible, or attended with such difficulties that it would be unreasonable to suppose that its execution was contemplated by him without the conversion of his real estate into personal property, a direction for such conversion will be deemed imperatively expressed in the will by necessary implication, to the same effect as if expressed in words; and the realty so directed to be converted will be deemed impressed with the character of personal property from the time of the death of the testator.[3]]

§ 1103. [**When a Conversion Has Been Created, It Usually Takes Effect upon the Death of the Testator.** — When the language used by the testator imposes the duty upon the executor to convert the land into money for the purpose of discharging the trusts imposed upon him, the rule is settled that a conversion takes place in wills from the death of the testator;[4] and where the will is silent as to the time at which the realty is to be converted into personalty, and nothing is required to be done except a sale of the property, the law construes the proceeds as personalty because equity will hold that to be done which ought to be done. But where it is evident that the land was not to be sold until the young-

[1] In re Bamfield, 88 Misc. Rep. 463, 152 N. Y. Supp. 212; Merritt v. Merritt, 32 App. Div. 442, 53 N. Y. Supp. 127; Elliott v. Loflin, 160 N. C. 361, 76 S. E. 236.

[2] McConnell v. Bryan, 62 Pa. Super. Ct. Rep. 178; Griffith v. Witten, 252 Mo. 627, 161 S. W. 708; Keen v. Plume, 82 N. J. Eq. 526, 90 Atl. 1027; Brown v. Miner, 261 Ill. 543, 104 N. E. 150; Williams v. Williams, 152 App. Div. 323, 136 N. Y. Supp. 990.

[3] Becker v. Chester, 150 Wis. 90, 91 N. W. 87; Brown v. Fidelity Trust Co., 82 N. J. Eq. 323, 87 Atl. 222.

[4] Meekins v. Branning Mfg. Co., 224 Fed. 202; Lash v. Lash, 209 Ill. 595, 70 N. E. 1049; Clifton v. Owens, 170 N. C. 607, 87 S. E. 502; Greenman v. McVey, 126 Minn. 21, 147 N. W. 812; Wayne v. Fouts, 108 Tenn. 145, 65 S. W. 471; Spencer v. Lyman, 27 S. Dak. 471, 131 N. W. 802; Chick v. Ives, 2 Neb. 879, 90 N. W. 751; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924; Becker v. Chester, 115 Iowa, 90, 91 N. W. 87; Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100.

est child became of age, and in the meantime it was held as realty, whether or not there was a conversion at the death of the testator, or whether the conversion was postponed till the arrival of age of the youngest child, depends upon the intention of the testator.[1] The equitable conversion of the real estate into money continues until such time as there is an actual conversion, or until by election there has been a reconversion. This reconversion may take place at any prior time to the actual conversion. The constructive conversion or equitable conversion is as of date of the will or death of testator; the actual conversion is as of the date of the sale of the real estate.[2]]

§ 1104. [**Necessity for an Absolute Transfer of the Property.** — The intent to create a conversion is never presumed, and hence it is absolutely essential that the sale or other disposition of the property be absolutely directed, so that there is no discretion in the personal representative as to what he will do with the property. The doctrine of equitable conversion of real into personal property is evidenced by a provision for the sale of real estate and a distribution of the proceeds, contained in a will, and is sufficient to show the intention of the testator to make such a conversion, but the intention to make the conversion must be clear and certain, and the direction to sell the lands for that purpose imperative and unconditional. The intention must appear by explicit direction, and the conversion be obligatory upon the executor or trustee. If the direction to sell is made to depend upon contingencies, or discretion is given to the executors to sell for distribution or divide the property in kind, the intent of the testator to make a conversion is not sufficiently definite and positive, and none is effected.[3] If the intention, as gathered from the whole instrument, be left in doubt, or the direction allows the trustee to sell or not as he deems best, the court is not at liberty to say that conversion has taken place, but must deal with the property according to its actual form and character.[4] No conversion occurs if the will, from a reading of all of its parts, conveys

[1] Elliott *v.* Loflin, 160 N. C. 361, 76 S. E. 236.

[2] Griffith *v.* Witten, 252 Mo. 627, 161 S. W. 708.

[3] In re Sauerbier's Estate, 202 Pa. 187, 51 Atl. 751; Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017; Phifer *v.* Giles, 159 N. C. 142, 74 S. E. 919; Dunshee *v.* Dunshee, 234 Pa. 550, 83 Atl. 422; In re Murray's Estate, 234 Pa. 520, 83 Atl. 473; Clifton *v.* Owens, 170 N. C. 607, 87 S. E. 502; Windsor *v.* Waterbury, 160 App. Div. 571, 145 N. Y. Supp. 794; Whitman *v.* Huefner, 221 Mass. 265, 108 N. E. 1054.

[4] Bennett *v.* Gallaher, 115 Tenn. 568, 92 S. W. 66; In re Hardenbrook, 23 Misc. Rep. 538, 52 N. Y. Supp. 845.

the idea that the executrix may use the property as she sees fit, as where she may "live in and to rent out and keep it in good repair, during her life", and "if she does not desire to care for the house, she may sell the same", etc.[1]]

§ 1105. [**Conversion as Applied to a Lapsed Legacy.** — There is a presumption that where a man executes a will of his property, it is his purpose and intention to die testate as to all of it, and this presumption is well exemplified in the equitable doctrine of conversion. Here, if the testator by his will provides that the realty shall be sold and converted into personalty, if the legatee dies before the testator, the presumption is that he died testate as to all of his property, and that part of the estate embraced in this particular legacy would descend under the intestate laws to the heirs of the testator, rather than be distributed as personal property under the will.[2] Where the direction in the will to sell the real estate was not general, but for the specific purpose of producing a fund to pay the bequests named by the testatrix, the charities having failed, the part of the fund intended for that purpose went to the heirs at law as real estate.[3] The conversion of property from one species to another by the will of the testator takes place only for the purposes of the will, and so far as those purposes do not extend, or in so far as any of them do not take effect in fact or in law, the property is considered as remaining in its former condition, as it was in the hands of the testator, and passes accordingly. The same principle is established where real estate is directed, either by the owner or by the order of the law, to be converted into money for a particular object, and a surplus remains after the accomplishment of such object, such surplus as between the heir and personal representative of such owner, will be regarded by a court of equity as land, and will descend as such.[4]]

§ 1106. [**Conversion of Real into Personal Property.** — The doctrine of conversion applies with equal force where realty is changed into personalty, and where personalty is changed into realty, as where the will in question directed the personal property to be used and disposed of as land. Some of the cases hold that a change so made, not as an investment, but for the convenience

[1] Koezly *v.* Koezly, 31 Misc. Rep. 397, 65 N. Y. Supp. 613; Carberry *v.* Tumis, 72 App. Div. 489, 76 N. Y. Supp. 537.

[2] In re Reed's Estate, 237 Pa. 125, 85 Atl. 138; Meeker *v.* Forbes, 84 N. J. Eq. 271, 93 Atl. 887; Lash *v.* Lash, 209 Ill. 595, 70 N. E. 1049.

[3] In re Muderspaugh's Estate, 231 Pa. 376, 80 Atl. 870.

[4] Canfield *v.* Canfield, 62 N. J. Eq. 578, 50 Atl. 471.

of the infant, in the absence of a limitation in the order, converts the personal property into real estate, in law as well as fact. The general rule both in England and in this country is that courts having jurisdiction to deal with the property of infants are careful to impress it during minority with its original character, regardless of any change that may, in fact, have been made.[1] The power to convert a ward's estate from personalty into realty ought not to be assumed in any case; and to sanction it under any circumstances would encourage guardians to act independently of the court. Besides, in a hard case, a judge would be disposed to sanction what he would not have authorized. Where a pecuniary legacy is given, and the same is directed to be laid out in land, while, for some purposes, such a testamentary provision may be regarded as a devise of real estate, yet it cannot be so regarded for all purposes, and the assent of the testator is necessary to perfect the title of the grantee, and until such assent the legacy constitutes a part of the personal assets of the testator, and as such must be applied, as the other personal estate, to the payment of debts.[2] To convert the personalty into realty, the will should contain the same specific command that is essential where real property is directed to be converted into personalty. Where one portion of the will directs the executors "to purchase a property at some convenient place for his use etc.", and in another portion of the will they are directed "to put Elias' share to interest or purchase property for his use", this does not effect a conversion.[3]]

§ 1107. [**Conversion is Governed by Laws of the State in Which the Land Lies.** — It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. Where a will was executed in the State of South Carolina, purporting to convey lands in that State and also in the State of Connecticut, the fact that the courts of the State of the testatrix' domicil have declared that the land was in fact converted into personalty under the will, this decision would not be conclusive upon the Connecticut court as to lands lying in that State. It is the exclusive province of-

[1] In re Bolton, 37 App. Div. 625, 56 N. Y. 1105, Affirmed 158 N. Y. 129, 53 N. E. 756; Peter *v.* Beverly, 35 U. S. 532, 9 L. Ed. 522; Craig *v.* Leslie, 16 U. S. 563, 4 L. Ed. 460; Horton *v.* McCoy, 47 N. Y. 21; Empire Surety Co. *v.* Cohen, 93 Misc. Rep. 299, 156 N. Y. Supp. 935; Magnolia Park Co. *v.* Tinsley, 96 Tex. 364, 73 S. W. 5; Mowry *v.* Taft, 36 R. I. 427, 90 Atl. 815.

[2] McFadden *v.* Hefley, 28 S. C. 317, 5 S. E. 812, 13 Am. St. Rep. 675.

[3] In re Becker's Estate, 150 Pa. St. 524, 24 Atl. 687.

the courts of the State of the situs of the property to determine its ownership, and its devolution and transfer and whether or not there has been a conversion of the property from one sort to another. This is essentially so from the very nature of things, or else the State would have certain classes of property within its boundaries completely subject to the caprice and desires of non-residents and thus render nugatory its laws enacted for the purpose of protecting its own citizens and their property rights.[1] But in the case of Handley *v.* Palmer [2] it was held that where the testator owned lands in three different States, and after disposing of the bulk of his estate, gave the residue to the city of Winchester, Virginia, the validity of the residuary clause should be determined by the law of the State of the domicil. A similar ruling was held in a case in which the testator had property in a State other than that of his domicil, that the meaning and intent of the testator having been settled by the domiciliary court, the courts in foreign States and countries will be guided by such construction, unless it can be clearly gathered, from the terms used in the will, that the testator had in mind the law of the place of the situs, or used language necessarily referring to the usages, and appropriate only to the situs.[3]]

§ 1108. [**Reconversion Considered.** — The doctrine of reconversion is as thoroughly grounded in the law as is the doctrine of conversion. In other words, that, whilst the terms of a will may, in legal effect, convert land into money, yet subsequent acts of the beneficiaries may reconvert the subject-matter into land. Reconversion is that process that occurs as a fiction of law when the testator directs that his property be converted from one state into another, and thereafter, by common consent of the devisees, they agree that it shall remain in its present status and just as if there had been no specific direction in the will. This imaginary process is one which takes place upon the election of the beneficiary under the instrument creating the constructive or equitable conversion. It will be seen that under this rule, the beneficiaries may elect to reconvert at any time before the actual conversion takes place. The word "actual" is used to distinguish it from a mere constructive conversion. The constructive conversion is the one made by the agreement of the parties; the actual con-

[1] Clarke *v.* Clarke, 70 Conn. 483, 40 Atl. 111, Affirmed 178 U. S. 186, 44 L. Ed. 1028, 20 S. Ct. Rep. 873; Holcomb *v.* Wright, 5 App. D. C. 76.

[2] 103 Fed. 39, 43 C. C. A. 100.

[3] Ford *v.* Ford, 80 Mich. 42, 44 N. W. 1057.

version, in the case of lands, is the one made by the sale. Under the rule, therefore, the beneficiaries may elect to hold the land, rather than the proceeds from the sale of the land, at any time before sale or actual conversion.[1] It is equally well settled that before any actual change in the property has taken place, there may be a reconversion, as where the direction to convert is countermanded by the parties entitled to the property. This reconversion can be effected where all the parties beneficially interested in the property by some explicit and binding action direct that no actual conversion shall take place, and to elect to take the property in its original form.[2] Where all of the devisees join in a written request that the personal representative be dismissed from further duties, he then having the legal title to the land, and the instrument showed that they desired to hold the property as real estate, together with their subsequent acts in relation thereto, this was sufficient to justify the conclusion that a reconversion had been accomplished.[3] The intention to reconvert must clearly and unmistakably appear, yet a direct election is not necessary. Any acts or act which disclose plainly an intention to hold the real estate as such is sufficient.[4] Where there are several beneficiaries, they must all, as a general rule, unite in the election in order to make it effectual. A remainderman cannot elect so as to affect injuriously the interests of those who own prior estates; nor can a lunatic himself elect as being devoid of capacity to make a discreet choice, or to act for himself; nor can an infant make such a binding election ordinarily for the same reason, but it may be done for him when found to be for his benefit.[5]]

§ 1109. [**Acts Showing an Election to Reconvert.** — Election by the devisees to take the property in its present condition,

[1] Wall *v.* Wall, 243 Mo. 247, 147 S. W. 1006; Van Zandt *v.* Garretson, 21 R. I. 418, 44 Atl. 221; Hibbler *v.* Oliver, 193 Ala. 369, 69 So. 477; Mattison *v.* Stone, 90 S. C. 146, 72 S. E. 991; 82 S. E. 1046, 99 S. C. 151; Griffith *v.* Witten, 252 Mo. 627, 161 S. W. 708; Gilbreath *v.* Cosgrove, 193 Mo. App. 419, 185 S. W. 1181.

[2] Duckworth *v.* Jordan, 138 N. C. 520, 51 S. E. 109; Scott *v.* Douglass, 39 Misc. Rep. 555, 80 N. Y. Supp. 354; Phifer *v.* Giles, 159 N. C. 142, 74 S. E. 919; Starr *v.* Willoughby, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623.

[3] Lincoln *v.* Wakefield, 237 Pa. 97, 85 Atl. 133; Meekins *v.* Branning Mfg. Co., 224 Fed. 202.

[4] Brandon *v.* McKinney, 233 Pa. 481, 82 Atl. 764; In re McClarren's Estate, 238 Pa. 220, 85 Atl. 1119; McGarry *v.* McGarry, 9 Pa. Super. Ct. Rep. 71.

[5] Clifton *v.* Owens, 170 N. C. 607, 87 S. E. 502.

rather than in the plight, intended by their ancestor, should clearly appear by the acts of all of the devisees. The heirs may elect at any time before a sale to retain the land as real estate, but the concurrence of all of the heirs is necessary. The direction to sell the land and convert it into money gives to each heir the right to have it sold, and it takes away from each one the separate right to reconvert his single share, and thus have the sale of a fraction. One heir at law cannot take from the other beneficiaries their right to have the proceeds of a sale of the property simply because it is more convenient for him.[1] Where the widow and each of the heirs at law disregarded the terms of the will, and instead of treating the land as converted into money, and dealing with it as such, and asked for a partition of their interests and that the widow's share be set apart to her, this was such an election upon the part of all of them that would result in a reconversion, and that part allotted to the widow would be subject, as land, to a docketed judgment against her.[2] It is not essential that the election be indicated in any particular manner. It may be shown by either acts or declarations clearly indicating a determination to that effect. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest. The burden of establishing a countermand of the trust — a reconversion of the estate — is upon those who assert it. They must show the election claimed, by proof of some unequivocal act or declaration of the beneficiaries evincing an intention on their part to extinguish the trust, and terminate the equitable character impressed upon the property in the first instance by the instrument conferring the benefit.[3] The plaintiff must show by his complaint not only that a reconversion has occurred, but he must also establish it by proof. The intention to make the election may be slight, but it must be unequivocal.[4]]

[1] In re Pforr's Estate, 144 Cal. 121, 77 Pac. 825; Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623; Lash v. Lash, 209 Ill. 595, 70 N. E. 1049.

[2] Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889.

[3] Wayne v. Fonts, 108 Tenn. 145, 65 S. W. 471; Phifer v. Giles, 159 N. C. 142, 74 S. E. 919; Gilbreath v. Cosgrove, 193 Mo. App. 419, 185 S. W. 1181.

[4] Bank of Ukiah v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118.

CHAPTER XXIII

INTERPLEADER

§ 1110. **Interpleader.** — With these remarks on the jurisdiction of Courts of Equity as to specific performance and compensation and damages we may dismiss the subject and proceed to another head of concurrent equitable jurisdiction, arising principally from the peculiar remedies administered therein, and that is INTERPLEADER. A learned author has treated this and one other branch of Equity Jurisprudence (that of interference in cases of irreparable mischief and injury) as not strictly belonging either to the concurrent, or the exclusive, or the auxiliary jurisdiction of Courts of Equity. Perhaps in strictness this may be correct, but it more nearly falls within the former than within either of the others.[1]

§ 1111. **Same.** — The remedy by interpleader was not unknown to the common law, but it had a very narrow range of purpose and application. The interpleader at law was where there was a joint bailment by both claimants.[2] It was a common practice in the early times of the English law for parties by joint agreement to deposit title-deeds and other deeds and things in the lands of third persons to await the performance of covenants, or the doing of some other act upon which they were to be redelivered to one or the other of the parties. It often happened under such circumstances that questions subsequently arose whether the act had been properly performed or the terms strictly complied with; and if, when either party supposed the crisis, on which the deed or thing was demandable, to have arrived, any dispute existed as to the right or as to the fact, an action of detinue (the appropriate action for such a case) became inevitable.[3] Now by the common law in such a case the depositary might, if such an action

[1] Cooper, Eq. Pl. Introd. p. 35.
[2] Crawshay *v.* Thornton, 2 Mylne & Craig, R. 1, 21.
[3] 3 Reeves, Hist. of the English Law, ch. 23, pp. 448 to 455.

was brought against him, plead for his protection the fact of such delivery or bailment upon certain conditions, and his willingness to deliver the property to the party entitled to it, and his ignorance whether the conditions were performed or not; and thereupon he might pray that a process of garnishment (that is, a process of monition or notice) might issue to compel the other depositor to appear and become a defendant in his stead. This was properly called the process of garnishment.[1]

§ 1112. **Same.** — The process of interpleader was very nearly allied to that of garnishment, and it arose when both of the parties who concurred in a joint bailment brought several actions of detinue against the depositary under like circumstances for a redelivery of the thing deposited. The depositary might then plead the facts of the case, and pray that the plaintiffs in the several actions might interplead with each other. This was properly the process of interpleader.[2] The proceeding seems highly reasonable in itself, to prevent the depositary from being harassed by suits in which he had no interest.

§ 1113. **Same.** — The same process was also applied to cases where the thing in controversy came to the possession of the depositary by finding, and he was sued in detinue by different persons, each claiming to be the owner in severalty.[3] And it seems also to have been applied to cases of a bailment by A to the depositary to rebail to B, where both A and B sued the depositary in detinue.[4] But if there was no privity between the parties, but each plaintiff counted upon a several independent bailment against the depositary, there it was said the plaintiffs were not compellable to interplead, for it was the depositary's own folly, and he must abide by it.[5]

§ 1114. **Same.** — The remedy however, such as it was, was principally confined to actions of detinue, although it was applied to a few other cases, such as writs of quare impedit, and writs of right of ward. But it was not allowed in any personal action except detinue; and then only, as we have seen, when it was founded either in privity of contract or upon a finding.

[1] Id. pp. 448 to 450.

[2] Mitford, Eq. Pl. by Jeremy, pp. 141, 142; Crawshay *v.* Thornton, 2 Mylne & Craig, 1; Hoyt *v.* Gouge, 125 Iowa, 603, 101 N. W. 464; Pennsylvania R. Co. *v.* Stevenson, 63 N. J. Eq. 634, 54 Atl. 696.

[3] 3 Reeves, Hist. of the English Law, ch. 23, pp. 448 to 455; Mitf. Eq. Pl. by Jeremy, pp. 141, 142.

[4] 3 Reeves, Hist. of the English Law, ch. 23, pp. 448, 452.

[5] 3 Reeves, Hist. of the English Law, ch. 23, pp. 453, 454. See Rich *v.* Aldred, 6 Mod. 216; Story on Bailments, §§ 111, 112.

§ 1115. **Same.** — From this description of the process of interpleader at the common law it is obvious that it could afford a very imperfect remedy in a great variety of cases. Indeed as the action of detinue has in modern times fallen much into disuse, and the action of trover has been substituted in its stead (in which interpleader did not lie at the common law), little or no practical advantage could be derived from it in modern times.[1] The only remedy therefore now resorted to (as we are informed from very high authority) for the relief of a person sued or in danger of being sued by several claimants of the same property, is that of filing a bill to compel them by the authority of a Court of Equity to interplead either at law or in equity.[2]

§ 1116. **Same.** — It is observable that the jurisdiction of Courts of Equity to compel an interpleader follows to some extent the analogies of the law.[3] It is properly applied to cases where two

[1] Cooper, Eq. Pl. 47, 48, 49; Mitf. Eq. Pl. by Jeremy, p. 48, and note H.; Id. 141, 142.

[2] The reader is referred to the able report of the Common Law Commissioners, made to Parliament, and printed by the order of the House of Commons, in March, 1830 (p. 24), for further information on this subject. Mr. Reeves has, in his History of the English Law (Vol. III. pp. 448 to 455), brought together some of the cases of difficulty in the proceedings of interpleader at the common law. They abundantly show the inadequacy of the remedy. Mr. Eden's valuable treatise on Injunctions contains a head of Interpleader, which I have consulted with great advantage and have freely used. Eden on Injunct. pp. 335 to 347.

[3] See Metcalf *v.* Hervey, 1 Ves. 249; Mitford, Eq. Pl. by Jeremy, 141, 142; Cooper, Eq. Pl. Introd. 35, 36. Lord Redesdale, in his treatise on Equity Pleadings (edition by Jeremy, pp. 141, 142), gives the following description of equity jurisdiction on this subject. "It has been mentioned," says he, "that where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, Courts of Equity will assume a jurisdiction to protect him; and that the bill exhibited for this purpose is termed a bill of interpleader, the object of it being to compel the claimants to interplead so that the court may adjudge to whom the property belongs, and the plaintiff may be indemnified. The principles upon which the Courts of Equity proceed in these cases are similar to those by which the Courts of Law are guided in the case of bailment; the Courts of Law compelling interpleader between persons claiming property for the indemnity of a third person, in whose hands the property is, in certain cases only; as where the property has been bailed to the third person by both claimants, or by those under whom both make title; or where the property came to the hands of the third person by accident; and the Courts of Equity extending the remedy to all cases to which in conscience it ought to extend, whether any suit has been commenced by any claimant or only a claim made." In Pearson *v.* Cardon, 2 Russ. & Mylne, 613, Lord Brougham said: "In looking at the rules of interpleader at law you discover the principles that govern this court; because I hold it to be strictly a concurrent jurisdiction, and that you can have no interpleader here, if upon

or more persons severally claim the same thing under different titles or in separate interests from another person, who not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties. He therefore applies to a Court of Equity to protect him, not only from being compelled to pay or deliver the thing claimed to both the claimants, but also from the vexation attending upon the suits which are or possibly may be instituted against him.[1]

§ 1117. **Origin of the Jurisdiction Is Where There Is No Remedy at Law.** — The true origin of the jurisdiction is that there either is

principle you could not have it at law." It is not very clear what is the precise extent to which this general remark was intended to reach. With reference to the case before his lordship it was perfectly accurate. But there certainly are cases in which an interpleader will not lie at law, but in which nevertheless it will lie in equity. Indeed if there be in the case a clear right of interpleader at law that would seem to put an end to the jurisdiction in equity, which comes in aid of the party only when there is no remedy at law, or the remedy is inadequate.

[1] Mitf. Eq. Pl. by Jeremy, 48, 49; 1 Eq. Abr. 80, 1 pl. 1 in marg.; Atkinson *v.* Manks, 1 Cowen, R. 691, 703; Eden on Injunctions, ch. 16, pp. 335 to 343; Moore *v.* Usher, 7 Sim. 383; Badeau *v.* Rogers, 2 Paige, R. 209; Mohawk and Hudson Railroad Co. *v.* Clute, 4 Paige, R. 384, 392; Richards *v.* Salter, 6 John. Ch. R. 445. In Glyn *v.* Duesbury (11 Simons, R. 147), the Vice-Chancellor, Sir L. Shadwell, said: "In the case of Crawshay *v.* Thornton, the Lord Chancellor, speaking of the law of interpleader, uses this language: 'In equity it is defined to be where two or more persons claim the same debt or duty.' It is obvious that there may be a case of interpleader where no debt or duty is claimed. Lord Redesdale, in his treatise on Pleading, twice asserts the proposition that where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. p. 48 (4th edition). And again, at p. 141, he says that where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, Courts of Equity will assume a jurisdiction to protect him. A case of interpleader then arises where the same subject, whether debt, duty, or thing, is claimed. Now when the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; for no dispute can arise as to identity of matter. But where the subject in dispute is a chose in action, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made by the defendants are of different amounts, they ever can be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount however may not be sufficient of itself to determine the identity; for the amount may be the same and the debt may be different." See also Sieveking *v.* Vehrens, 2 Mylne & Craig, 581.

no remedy at all at law, or the legal remedy is inadequate in the given case. If an interpleader at law will lie in the case, and it would be effectual for the protection of the party, then the jurisdiction in equity fails.[1] So if the party himself seeking the aid of the court by bill of interpleader claims an interest in the subject-matter as well as the other parties, there is no foundation for the exercise of the jurisdiction; for in such a case he has other appropriate remedies.[2] And besides a bill of inter-

Lord Chief Baron Gilbert, in his Forum Romanum (p. 47), has supposed that a bill of interpleader bears a close resemblance to the process of intervention in the civil law. Mr. Eden, in his treatise on Injunctions (p. 336, note *a*), has abundantly shown that the processes are very different. The intervener, or tertius interveniens in the civil law, files his process upon his own independent title, asserting a right to the thing in controversy against both of the parties who are already contesting it, and insists upon his right to intervene or join in the discussion. On the contrary a party who seeks an interpleader in law or equity disclaims all title in himself, and requires other persons to engage in the controversy and to exonerate him. The bill of interpleader in equity was doubtless borrowed from the process of interpleader at the common law. It might have been a far more useful jurisdiction if it had gone to the full length of the intervention of the civil law. See Merlin, Repertoire; Intervention. See also Gaill. Pract. Observ. Lib. 1, Obs. 69, cited also by Mr. Eden.

Generally speaking the bill should be filed before any judgment at law settling the rights of the respective parties; the object of the bill being to protect the complainant from the annoyance of defending all the suits that may be brought against him for the same property. Cornish *v.* Tanner, 1 Younge & J. 333; Yarborough *v.* Thompson, 3 Smedes & M. 291; Union Bank *v.* Kerr, 2 Md. Ch. 460. But a bill of interpleader may be filed after a verdict at law, if the effect of the action at law was merely to ascertain the damages due the plaintiff at law who was a defendant in the equity case. Hamilton *v.* Marks, 1 DeG. & S. 638; s. c. 19 Eng. L. & E. 321; Byers *v.* Sansom Commission Co., 111 Ill. App. 575; Fleming *v.* Blosser Printing Co., 118 Ga. 86, 44 S. E. 805.

The interest of the plaintiff must be a subsisting, vested equitable interest, not one that he expects to acquire as the result of the litigation between them. Stephenson *v.* Burdett, 56 W. Va. 109, 48 S. E. 846, 10 L. R. A. (N. S.) 748.

[1] Note to Mitf. Eq. Pl. by Jeremy, p. 49; Oil Run Co. *v.* Gale, 6 W. Va. 525.

[2] Langstone *v.* Boylston, 2 Ves. Jr. 103, 109; Angell *v.* Hadden, 15 Ves. 244; Mitchell *v.* Hayne, 2 Sim. & Stu. 63; Bedell *v.* Hoffman, 2 Paige, Ch. R. 200; Aldrich *v.* Thompson, 2 Bro. Ch. R. 149; Slingsby *v.* Boulton, 1 Ves. & Beam. 334; Atkinson *v.* Manks, 1 Cowen, R. 691, 703. Killian *v.* Ebbinghaus, 110 U. S. 568, 28 L. Ed. 246, 4 S. Ct. Rep. 232; Sprague *v.* West, 127 Mass. 471; Cobb *v.* Rice, 130 Mass. 231. But see First Baptist Church *v.* Robberson, 71 Mo. 326; Sprague *v.* West, 127 Mass. 471, of the right of a legatee to an interpleader against the executor. So if the plaintiff has lent himself in any way to further the claims of either party, or to aid one in obtaining possession to the exclusion of the others, he cannot have the relief of interpleader. Marvin *v.* Ellwood, 11 Paige, 365. See Michigan Plaster Co. *v.* White, 44 Mich. 25; infra, § 1119. But

pleader always supposes that the plaintiff is the mere holder of a stake which is equally contested by the other parties, and as to which the plaintiff stands wholly indifferent between them, so that when their respective rights are settled nothing further remains in controversy.[1] But that can never be truly said to be the case when the plaintiff asserts a personal right or claim which remains to be settled between him and the other parties, or the plaintiff seeks relief in the premises against either of them.[2] The true ground upon which the plaintiff comes into equity is that, claiming no right in the subject-matter himself, he is, or may be, vexed by having two legal or other processes in the names of different persons going on against him at the same time. He comes therefore into court upon the most obvious equity to insist that those persons claiming that to which he makes no claim should settle that contest among themselves and not with him, or at his expense and hazard.[3] If their respective titles are doubtful, there is so much the more reason why he should not be harassed by suits to ascertain and fix them; and unless under such circumstances Courts of Equity afford him protection, he will in almost every event be a sufferer, however innocent and honorable his own conduct may have been.

§ 1118. **It Is Not Necessary that Titles of Both Claimants Should Be Purely Legal.** — In regard to bills of interpleader it is not necessary to entitle the party to come into equity, that the titles of the claimants should be both purely legal. It is sufficient to found the jurisdiction, that one title is legal and the other is equitable.[4] Indeed where one of the claims is purely equitable it

the mere fact that the plaintiff might receive an indirect benefit by the proceeding would make no difference. Oppenheim *v.* Wolf, 3 Sandf. Ch. 571.

[1] Lincoln *v.* Rutland R. Co., 24 Vt. 639.

[2] Mitchell *v.* Hayne, 2 Sim. & Stu. 63; Moore *v.* Usher, 7 Sim. R. 383; Bedell *v.* Hoffman, 2 Paige, R. 199, 200; Badeau *v.* Rogers, 2 Paige, R. 209; Story on Equity Plead. §§ 291, 292. Hence it is said that if upon a sale by an auctioneer a deposit is made by the purchaser and the auctioneer is afterwards sued for the deposit by the purchaser, and he claims a right to deduct from the deposit his commission and the auction duty, a bill of interpleader will not lie by the auctioneer against the vendor and the purchaser to ascertain their title to the deposit; because the auctioneer makes a personal claim to a part of the fund and is therefore not indifferent between the parties. Mitchell *v.* Hayne, 2 Sim. & Stu. 63. But see Fairbrother *v.* Prattent, Daniel, R. 64, 70; Fairbrother *v.* Nerot, Id. p. 68, note.

[3] Langston *v.* Boylston, 2 Ves. Jr. 109; Atkinson *v.* Manks, 1 Cowen. 703.

[4] Paris *v.* Gilham, Cooper, Eq. R. 56; Martinius *v.* Helmuth, Cooper, R. 245; s. c. Daniel, R. 68, note; 2 Ves. & Beam. 412 (2d ed.), note;

seems indispensable to come into equity, for in such a case there can be no interpleader awarded at law.[1] Thus for instance if a debt or other claim has been assigned and a controversy arises between the assignor and the assignee respecting the title, a bill of interpleader may be brought by the debtor to have the point settled to whom he shall pay.[2] Where the title of all the claimants is purely equitable, there is a still broader ground to entertain bills in the nature of a bill of interpleader; for Courts of Equity in virtue of their general jurisdiction may grant relief in such cases. Nor is it necessary (as may be gathered from what has been already said) that a suit shall have been actually commenced by either or both of the conflicting claimants against the party either at law or in equity. It is sufficient that a claim is made against him, and that he is in danger of being molested by conflicting rights.[3]

§ 1119. [**Payment into Court Operates as a Release Only as to the Amount Paid.** — But in every case of a bill of interpleader, the court, in order to prevent its being made the instrument of delay or of collusion with one of the parties, requires that an affidavit of the plaintiff should be made that there is no collusion between him and any of the other parties;[4] and also if it is a case of money due by him, that he should bring the money into court, or

Morgan *v.* Marsack, 2 Meriv. R. 107; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 348; Richards *v.* Salter, 6 John. Ch. R. 445; Smith *v.* Hammond, 6 Sim. R. 10; Crawford *v.* Fisher, 10 Sim. R. 479.

The relief asked for must be equitable. Killian *v.* Ebbinghaus, 110 U. S. 568, 28 L. Ed. 246, 4 S. Ct. Rep. 232. And the plaintiff must have acted in good faith, without collusion or fault. Michigan Plaster Co. *v.* White, 44 Mich. 25; supra, p. 139.

[1] Duke of Bolton *v.* Williams, 4 Bro. Ch. 309; s. c. 2 Ves. Jr. 151, 152.

[2] See Wright *v.* Ward, 4 Russ. 215; Lowndes *v.* Cornford, 18 Ves. 299. See Atkinson *v.* Manks, 1 Cowen, R. 691.

[3] Langston *v.* Boylston, 2 Ves. Jr. 107; 1 Eq. Abr. 80, I. in marg.; Morgan *v.* Marsack, 2 Meriv. R. 107; Alnete *v.* Bettam, Cary, R. 65, 66; Angell *v.* Haddin, 15 Ves. 244; s. c. 16 Ves. 202; Fairbrother *v.* Prattent, 5 Price, R. 303; s. c. Daniel, R. 64, 70; Fairbrother *v.* Nerot, cited Daniel, R. 70, note; Richards *v.* Salter, 6 John. Ch. R. 445, 447; Atkinson *v.* Manks, 1 Cowen, R. 691. But the stakeholder can maintain the suit after an action has been brought against him in equity by one of the claimants without joining the other claimant. Prudential Assur. Co. *v.* Thomas, L. R. 3 Ch. 74. See also as to the pendency of a suit in equity, School District *v.* Weston, 31 Mich. 86.

[4] Byers *v.* Sansom Commission Co., 111 Ill. App. 575; Charter Oil Co. *v.* Moore's Devisees, 56 W. Va. 540, 49 S. E. 449; Williams *v.* Halbert, 7 B. Mon. 184; Mt. Holly Co. *v.* Ferree, 2 C. E. Green, 117; Michigan Plaster Co. *v.* White, 44 Mich. 25. A counter affidavit will not prevent the injunction, but the plaintiff may be put under an undertaking as to damages. Manby *v.* Robinson, L. R. 4 Ch. 347.

at least should offer to do so by the bill.[1] [The payment of the fund into court operates as a release only as to the amount paid.[2] What has been said as to the actual deposit of the fund into court of course is to be taken in the light of all of the circumstances. It is assumed that the thing to be paid into court is money, but if it consists of various articles of property, and from their nature it would be impossible to make the deposit in specie, as the deposit in the clerk's office of one thousand chests of tea, a constructive deposit by offering to turn over the property to the party entitled, is sufficient.[3]]

§ 1120. **Same.** — A few cases to illustrate these doctrines may not be without use to the more full understanding of their purport and effect. Thus where A received money of B upon the terms that if so much should appear upon an adjustment of accounts to be due to C, the same should be paid to the latter, and what was not due should be repaid to B, and A gave a bond accordingly, there, B having died before any adjustment of accounts, and the creditors of B and C having severally sued A for the money, the court, on his bringing the money into court, decreed an account between the parties, and that the bond should be cancelled and a perpetual injunction awarded to the proceedings at law.[4] In this case the court, as we perceive, went beyond the mere decree of an interpleader, and sustained the bill for an account, as well as for other relief, without sending the parties to law.

§ 1121. **Same.** — So where there were several sets of annuitants who had distrained for rents upon a tenant's farm and he brought the rents into court and prayed that the annuitants might inter-

[1] 1 Madd. Ch. Pr. 142, 143; Mitford, Equity Pl. by Jeremy, 49; Id. 143; Metcalf *v.* Hervey, 1 Ves. 248; Dungey *v.* Angove, 3 Bro. Ch. R. 36; Langston *v.* Boylston, 2 Ves. Jr. 109, 110; Errington *v.* Attorney-General, Bunbury, R. 303: Stevenson *v.* Anderson, 2 Ves. & B. 410; Warrington *v.* Wheatstone, Jac. R. 202; Atkinson *v.* Manks, 1 Cowen, R. 703, 704; Shaw *v.* Coster, 8 Paige, R. 339. See Williams *v.* Walker, 2 Rich. Eq. 291; Parker *v.* Barker, 47 N. H. 278; Williams *v.* Wright, 20 Texas, 490; Freyhan *v.* Berry, 49 La. Ann. 305, 21 So. 911; Barroll *v.* Foreman, 86 Md. 675, 39 Atl. 273; Gardiner Sav. Inst. *v.* Emerson, 91 Me. 535, 40 Atl. 551.

The bill of interpleader is demurrable in the absence of an affidavit that the bill was not filed by plaintiff out of collusion, and where he neither brought the fund into court, or offered to do so, merely stating that he was willing to pay it to the parties entitled. Home Ins. Co. *v.* Caulk, 86 Md. 385, 38 Atl. 901.

[2] Bellingham Boom Co. *v.* Brisbois, 14 Wash. 144, 46 Pac. 238.

[3] Beebe *v.* Mead, 102 App. Div. 500, 92 N. Y. Supp. 51.

[4] Hackett *v.* Webb, Rep. temp. Finch, 257, 258; Com. Dig. Chancery, 3 T.

plead, it was decreed accordingly, and referred to a master to settle their priorities.[1] So where there was an entire rent charge which had been split into several parts by the owner, and there were different persons claiming the different parts, it was held that the tenant might bring a bill of interpleader to compel the parties to ascertain their shares respectively.[2] So where the owner of an estate upon which a rent charge had been secured filed a bill to compel the grantee and the executors of a person to whom it had been assigned to interplead, a question having arisen which of them was entitled to receive, the court sustained the jurisdiction.[3] So where a tenant was liable to pay rent, but there were several persons claiming title to it in privity of contract or tenure, he was held entitled to file a bill of interpleader to compel them to ascertain to whom it was properly payable.[4]

§ 1122. **Privity of Claim of Right.** — And here it may be proper to state that in the cases of tenants seeking such relief it must appear that the persons claiming the same rent claim in privity of contract or tenure, as in the case of mortgagor and mortgagee, or of trustee and cestui que trust; or where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in receipt of the rent.[5] In cases of this sort the tenant does not dispute the title of his landlord, but he affirms that title and the tenure and contract by which the rent is payable, and puts himself upon the mere uncertainty of the person to whom he is to pay the rent. But if a claim to the rent should be set up by a mere stranger under a title paramount, and not in privity of contract or tenure (as if the stranger should bring ejectment against the tenant),[6] there the tenant cannot

[1] Aldrich *v.* Thompson, 2 Bro. Ch. R. 149, 150.

[2] Angell *v.* Hadden, 15 Ves. 244; s. c. 16 Ves. 203; 2 Meriv. R. 164. See also Paris *v.* Gilham, Coop. Eq. R. 55.

[3] Duke of Bolton *v.* Williams, 4 Bro. Ch. R. 297, 430; s. c. 2 Ves. Jr. 138.

[4] Dungey *v.* Angove, 2 Ves. Jr. 310, 312; Metcalf *v.* Harvey, 1 Ves. 248; Hodges *v.* Smith, 1 Cox, R. 357; Cowtan *v.* Williams, 9 Ves. 107; Clarke *v.* Byne, 13 Ves. 383. See Stephens *v.* Callanan, 12 Price, R. 158; Jew *v.* Wood, 1 Craig & Phillips, R. 184. So if two persons are claiming of a corporation dividends upon the same stock. Mills *v.* Townshend, 109 Mass. 115.

[5] Johnson *v.* Atkinson, 3 Anstr. 798; Coop. Eq. Pl. Introd. 35, 36. Crawshay *v.* Thompson, 17 Sim. R. 391; s. c. 2 Mylne & Craig, R. 1.

[6] Lord Hardwicke, in Metcalf *v.* Harvey (1 Ves. 249), said that a bill of interpleader cannot lie as to the possession of an estate, but it must lie as to the payments of some demand of money. This might be true in the case then under consideration. But a bill of interpleader will also lie as well as to chattels as to money.

compel his landlord to interplead with such a stranger, for it is not a demand of the same nature or in the same right. The stranger cannot demand the rent as such; but he has, if successful in the ejectment, only a right to damages for use and occupation, whereas the landlord claims the rent as such in privity of contract, tenure, and title. The debt or duty is not the same, and interpleader lies only when it is so and in privity.[1] [Where there is an independent liability of the party seeking the relief to one of the several defendants, arising out of the relations subsisting between them or upon a special contract, creating, for example, the relation of bailor and bailee, landlord and tenant, or creditor and debtor, there can be no interpleader, unless it be made to appear that others have acquired a claim of title or interest, derived under the said liability.[2]]

§ 1123. **Same.** — These last cases may serve as proofs of the truth of the remark already made, that equity in bills of interpleader follows to some extent the analogies of the law; for we have seen that privity of contract is generally necessary to found a jurisdiction at law in cases of bailment upon a writ of interpleader. But in many other respects the bill of interpleader in equity differs from that at law. In all the cases above mentioned no interpleader would lie at law, for they involve no mutual or joint bailment, and no claim founded upon a finding by the plaintiff.[3]

§ 1124. **Same.** — So where a person is taxed in two different

[1] Woolaston *v.* Wright, 3 Anst. R. 801; Smith *v.* Target, 2 Anst. R. 530; Coop. Eq. Pl. ch. 1, pp. 48, 49. Lord Rosslyn, in Dungey *v.* Angove, 2 Ves. Jr. 310, has expounded this doctrine very satisfactorily. "The reason," says he, "is manifest; for upon the definition of it a bill of interpleader is where two persons claim of a third the same debt or the same duty. With regard to the relation of landlord and tenant the right must be the object of an ejectment. The law has taken such anxious care to settle their rights, arising out of that relation, that the tenant attacked throws himself upon his landlord. He has nothing to do with any claim adverse to his landlord. He puts the landlord in his place. If the landlord does not defend for him, he recovers upon his lease a recompense against the landlord. In the case of another person claiming against the title of his landlord, it is clear unless he derives under the title of the landlord he cannot claim the same debt. The rent due upon the demise is a different demand from that which some other person may have upon the occupation of the premises." See also Crawshay *v.* Thornton, 2 Mylne & Craig, 1, 20, 21, 22; Stuart *v.* Welch, 4 Mylne & Craig, 316, 317.

Hence if an administrator claim rent from a tenant by virtue of a parol lease from himself, and the heirs of the late owner claim compensation for use and occupation during the same time, a bill of interpleader will not lie as there is no privity. Crane *v.* Burntrager, 1 Ind. 165.

[2] Richardson *v.* Belt, 13 App. D. C. 197.

[3] Coop. Eq. Pl. ch. 1, p. 47.

towns for the same property when he is only liable to be taxed in one, and it is doubtful to which town the right to tax belongs, he may file a bill of interpleader to compel the tax-collectors or towns to settle the right between themselves if there is no dispute about the amount of the tax which he is to pay.[1] But if the amount is in dispute and he seeks relief in respect thereto, there the appropriate remedy is (as we shall presently see) a bill in the nature of a bill of interpleader.[2]

§ 1125. **Same.** — So where a loss had occurred under a policy of insurance underwritten for a person who afterwards became insolvent and assigned the policy, and there were various creditors, some of whom claimed on the ground of special liens and others under the assignment against the underwriters on the policy, it was held that the latter might well be entitled to maintain a bill of interpleader to compel the various creditors to ascertain and adjust their rights to the fund.[3] So where there was a fund in the hands of an agent of a party who had become insolvent, and there were various attaching creditors, as well as the assignees of the insolvent, claiming title to the same fund, it was held that a bill of interpleader would lie to ascertain and adjust their conflicting claims.[4]

§ 1126. **Same.** — So where an insurance was procured to be made by a broker upon a ship at the request of a part-owner who was also the ship's husband, and a loss occurred under the insurance, the amount of which was received by the broker, and the ship's husband afterwards required payment of all the loss to be paid to

[1] Thomson *v.* Ebbets, Hopkins, R. 272; Mohawk and Hudson Railroad Company *v.* Clute, 4 Paige, R. 384, 391.

[2] Post, § 1128; Macy *v.* Nantucket, 121 Mass. 351, criticising Hardy *v.* Yarmouth, 6 Allen, 277. See Loud *v.* Charlestown, 99 Mass. 208; Norton *v.* Boston, 119 Mass. 194.

[3] Spring *v.* South Car. Ins. Co., 21 U. S. 268, 5 L. Ed. 614. See also Paris *v.* Gilham, Cooper, Eq. R. 56.

[4] Sieveking *v.* Behrens, 2 Mylne & Craig, R. 581, 591, 592. So where A, a judgment creditor, assigned all his interest in the debt to B, subject to a lien of C, notice of which lien and also of the assignment was given to the judgment debtor, and A became insolvent afterwards, and his assignee gave notice to the judgment debtor that the estate of A was vested in him, it was held that the debtor might have a bill of interpleader to settle the rights of the claimants. Jones *v.* Thomas, 23 Eng. L. & E. 475. So also where two persons claim under the same instrument in hostility to each other, they may be compelled to interplead. McHenry *v.* Hazard, 45 N. Y. 580; Sullivan *v.* Knights of Father Matthew, 73 Mo. App. 43; Sovereign Camp Woodmen of the World *v.* Wood, 100 Mo. App. 655, 75 S. W. 377; Supreme Council Legion of Honor *v.* Palmer, 107 Mo. App. 157, 80 S. W. 699.

him by the broker, and the other part-owners resisted his right to receive such payment, it was held to be a clear case for a bill of interpleader to be brought by the broker against all the part-owners.[1]

§ 1127. **Bills Are Generally Brought by Persons Acting as Mere Stake-holders.** — What the true limit of the jurisdiction upon bills of interpleader is in cases where different persons claim the same specific chattel or thing from a third person upon the ground of title as owners, is not a matter perhaps settled by the authorities in a very precise manner.[2] In general bills of this sort are brought by persons standing in the situation of mere stakeholders, such as auctioneers, agents, factors, and consignees, between whom and the different claimants there is a privity of contract or duty.[3] In one case where a banker with whom public stock was deposited for safe custody by the owner afterwards refused to deliver it up to the owner, who was sued and imprisoned under actions brought against him as a dormant partner in an insolvent mercantile house, and the banker was served with attachments by the plaintiffs in those actions, and also was held to bail in an action of trover by the owner, it was held to be a clear case for a bill of interpleader. In this case however all the parties claimed in privity under the same owner.[4] There does not seem any difficulty upon principle in maintaining that a bill of inter-

[1] Stuart *v.* Welch, 4 Mylne & Craig, 316, 317, 319, 320, and note.

[2] Where, upon a bill of interpleader, there is a priority in the different titles not incompatible with each other, so that it is apparent on the bill or answers in what order they are to be paid, there is no ground to require an interpleader. Bowyer *v.* Pritchard, 11 Price, R. 115. Mr. Baron Wood, in the same case, said: "I certainly cannot say that I am very conversant with the doctrine of interpleader as entertained in Courts of Equity." The meagre state of the materials to be found in the Reports leads to the conclusion that the doctrine on this whole subject is not well defined. And I cannot but regret that it is not in my power to give a more full and clear exposition of it.

[3] See Martinius *v.* Helmuth, Cooper, R. 245; s. c. Daniel, Rep. 68, note; 2 Ves. & B. 412; Stevenson *v.* Anderson, 2 Ves. & B. 407, note (2d ed.); Birch *v.* Corbin, 1 Cox, R. 144, 145; Edensor *v.* Roberts, 2 Cox, R. 280; Dawson *v.* Hardcastle, 2 Cox, R. 258; Pearson *v.* Cardon, 4 Sim. R. 218; Fairbrother *v.* Prattent, Daniel, R. 64, 70; Fairbrother *v.* Nerot, Id. 70, note. These latter cases do not seem in all respects entirely reconcilable with that of Pearson *v.* Cardon (4 Sim. R. 218). See ante, § 1117, note; Fenn *v.* Edmands, 5 Hare, R. 314. See Cobb *v.* Rice, 130 Mass. 231.

[4] By Lord Rosslyn in Langston *v.* Boylston, 2 Ves. Jr. 106, 107, 109. But see Fuller *v.* Gibson, 2 Cox, R. 24.

See Desborough *v.* Harris, 5 DeG. M. & G. 439, overruling Fenn *v.* Edmands, 5 Hare, 314, cited by the author, supra. Where the adverse titles are all derived from the one title under or by which the plaintiff originally held the property, he will be entitled to his interpleader.

pleader may be brought by a stake-holder against three persons, each claiming in a distinct and different right the same property, as well as against two persons claiming in the same manner.[1]

§ 1128. **Same.** — In another and later case where a bill of interpleader was brought by the master of a ship against the consignee under a bill of lading, and also against a person who insisted that the master ought not to deliver the goods under the bill of lading because the consignor had acted with fraud towards him in making the consignment, it was doubted whether the bill would lie. On that occasion it was said that although a master might file a bill of interpleader where parties claimed adversely at law or in equity under the bill of lading, yet it might be doubted whether the bill would lie where the adverse claims were not under the bill of lading, but paramount to it. Delivery according to the bill of lading would fully justify the master; and those who alleged an equity paramount to the bill of lading, and against the consignor, should assert it by a bill of their own.[2] But in a still later case, on further consideration it was decided by the same court that the master might file such a bill, although the adverse claims were paramount to the bill of lading; as the right of possession in chattels may be in one person and the right of property in another. In this case also it is to be remarked that the bill does not seem to have been founded upon any legal adverse titles wholly independent of each other and not derived from a common source.[3]

§ 1129. **Right to Interplead Where Parties Claim under Independent Titles.** — But let us suppose that two persons should claim the same property under independent titles not derived from the same common source; the question would then arise whether a third person bona fide and lawfully in possession of the property, as the agent, consignee, or bailee of one of the parties, could maintain a bill of interpleader against the different claimants, standing in privity with one only of them. It would seem that he could not, and that the analogies of the law and the doctrines of Courts of Equity equally prohibit it.[4]

Fairbanks *v.* Belknap, 135 Mass. 179, 185; Providence Bank *v.* Wilkinson, 4 R. I. 507; Bell *v.* Hunt, 3 Barb. Ch. 391; Horton *v.* Chester Church, 34 Vt. 309.

[1] Hoggart *v.* Cutts, 1 Craig *v.* Phillips R. 197.

[2] Sir John Leach, in Lowe *v.* Richardson, 3 Madd. R. 277.

[3] Morley *v.* Thompson, 3 Madd. Ch. R. Index, Interpleader, p. 564; Eden on Injunctions, pp. 339, 340. See also Dawson *v.* Hardcastle, 2 Cox. R. 278.

[4] Abbott on Shipp. Pt. 3, ch. 9, §§ 24, 25; Cooper *v.* De Tastet, 1 Tamlyn, R. 177; Atkinson *v.* Manks, 1 Cowen, R. 691, 703 to 706.

§ 1130. **Same.** — In the case here stated the property is supposed to be lawfully in the hands of an agent of one of the claimants. Now the settled rule of law in such a case is that an agent shall not be allowed to dispute the title of his principal to property which he has received from or for his principal, or to say that he will hold it for the benefit of a stranger.[1] And this doctrine seems equally true in equity also; for it has been held that property put into the hands of an agent by his principal, under a bailment, is not the subject of an interpleader upon the assertion of a claim to it by a third person against the agent; but the latter must deliver it to the principal, as his possession is the possession of the principal.[2] The like doctrine would prevail in favor of a third person to whom the principal after the bailment had transferred the right to the property in the possession of the agent, where the transfer had been recognized and assented to by the agent. For in such a case the third person by such transfer and assent would in respect to the agent be treated as the principal.[3] Upon the same ground it has been held that where one person receives money for another as his agent, and the money is claimed by a third person, who gives notice of his claim, a bill of interpleader will not lie; for a mere agent to receive money for the use of another cannot by notice be converted into an implied trustee. His possession is the possession of his principal.[4]

[1] Dixon *v.* Hamond, 2 B. & Ald. 313, 314; Story on Agency, § 217; Cooper *v.* De Tastet, 1 Tamlyn, R. 177; Nickolson *v.* Knowles, 5 Madd. R. 47; Smith *v.* Hammond, 6 Sim. R. 10; Pearson *v.* Cardon, 2 Russ. & Mylne, 606, 609, 610, 612; Crawshay *v.* Thornton, 7 Sim. R. 391; s. c. 2 Mylne & Craig, 1.

[2] Cooper *v.* De Tastet, 1 Tamlyn, R. 177, 181, 182. But see Pearson *v.* Cardon, 4 Sim. R. 218; s. c. 2 Russ. & Mylne, R. 606, 609; Crawshay *v.* Thornton, 7 Sim. R. 391; s. c. 2 Mylne & Craig, 1. Roberts *v.* Bell, 7 El. & B. 323; Fairbanks *v.* Belknap, 135 Mass. 179; Tyus *v.* Rust, 37 Ga. 574. Bartlett *v.* Sultan of Turkey, 23 Fed. 257.

An attorney has no right to file a bill of interpleader with reference to funds in his hands belonging to his client, though claimed by a third party. Marvin *v.* Ellwood, 11 Paige, 365.

A bailee is not entitled to file a bill of interpleader where at the time of the bailment the third party claiming the property was unknown to him, and she had no connection with the property. First Natl. Bank *v.* Bininger, 26 N. J. Eq. 345; Vosburgh *v.* Huntington, 15 Abb. Pr. 254.

[3] Crawshay *v.* Thornton, 7 Sim. R. 391; s. c. 2 Mylne & Craig, 1, 22, 23, 24; Atkinson *v.* Manks, 1 Cowen, R. 691, 692; Pearson *v.* Cardon, 4 Sim. R. 218; s. c. 2 Russ. & Mylne, 606.

[4] Nickolson *v.* Knowles, 5 Madd. Rep. 47; Dixon *v.* Hamond, 2 B. & Ald. 313. See Atkinson *v.* Manks, 1 Cowen, R. 691; Smith *v.* Hammond, 6 Sim. R. 16.

§ 1131. **Agent May Interplead Where Claim Is Against Principal.** — But this doctrine is to be taken with its proper qualifications. For if the principal has created an interest or a lien on the funds in the hands of the agent in favor of a third person, and the nature and extent of that interest or lien is in controversy between the principal and such third person, there the agent may for his own protection file a bill of interpleader to compel them to litigate, and adjust their respective titles to the fund.[1] [Where this is allowed, it is under peculiar circumstances, where the agent might be liable, if he paid the debt, to the principal; as where the principal had created a lien in favor of another person on funds in the hands of his agent, the agent may file a bill of interpleader against his principal and the other claimant.[2]] So if an agent has possession of a fund, and an equitable assignment or arrangement has been made between the party entitled to the fund and a third person, and a controversy

[1] Smith *v.* Hammond, 6 Sim. R. 10; Wright *v.* Ward, 4 Russell, R. 215, 220; Crawshay *v.* Thornton, 7 Sim. R. 391; s. c. 2 Mylne & Craig, 1, 21; Crawford *v.* Fisher, 1 Hare's R. 436, 440. In this case Mr. Vice-Chancellor Wigram said: "The first question is whether the subjects of these suits are upon the pleadings proper subjects of interpleader; and I am of opinion that they are so. I admit that where a warehouseman or other depositary of property receives such property as bailee for another and nothing is afterwards done by the party making the deposit before he claims to have the property restored to him, the possession of the depositary must in many cases and for many purposes be considered as the possession of the party making the deposit. The relation of the parties in such circumstances may often be analogous to that of landlord and tenant, in which the latter might be precluded from disputing the title of the former, in whomsoever the legal or equitable ownership of the lands in question may really be. This is explained by Lord Cottenham in Crawshay *v.* Thornton (2 Mylne & Craig, 1), to which it is sufficient to refer. But the case assumes a widely different aspect where after the deposit is made the party making it has, by an act of his own, transferred his interest in the subject of the deposit to another. It is clear that in such a case the bailee may compel the depositor to interplead with the party to whom by the act of the depositor the property in the goods has been transferred."

[2] Hechmer *v.* Gilligan, 28 W. Va. 750; Roselle *v.* Farmers' Bank, 119 Mo. 84, 24 S. W. 744; Bechtel *v.* Sheafer, 117 Pa. St. 555, 11 Atl. 889; Brock *v.* Southern Ry. Co., 44 S. C. 444, 22 S. E. 601.

Where money has been paid to another to use for a specific purpose, he cannot refuse to pay because of a pretended claim on behalf of some third person. If upon sufficient grounds he considered such claim valid, he should interplead the person making it and bring the money into court. Berry *v.* Mayhew, 1 Daly, 54.

An attorney may file the bill where his client refuses to receive the money on account of his insolvency, where it would leave the attorney subject to be harassed by the suits of claimants of his client. Sammis *v.* L'Engle, 19 Fla. 800.

subsequently arises between them respecting it, the same rule will apply.[1]

§ 1132. **Same.** — The true ground upon which this doctrine stands, that no bill of interpleader lies in cases of landlord and tenant and principal and agent, lies somewhat deeper than might be inferred from the mere state of the doctrine; and it is not so much to be considered as an independent rule, as a necessary consequence of all interpleading. It is essentially founded in privity of rights, or contracts between the parties. In the cases of landlord and tenant, and principal and agent, rights and liabilities exist between the parties independent of the title to the property, or the debt or duty in question, and which may not depend upon the question of title.[2] Hence it is that if an agent or bailee receive

[1] Wright *v.* Ward, 4 Russ. R. 215, 220. Where an attorney received notes of a corporation for collection, and held in his hands the money collected, and different persons claimed the same, some as assignees of the corporation and others in part by virtue of an order from one of the very assignees, the attorney was allowed to have an interpleader. Gibson *v.* Goldthwaite, 7 Ala. 282. But it seems that where a bailee has recognized the right of one claiming by alleged assignment from the bailor, and has agreed to act as his agent, he cannot require such assignee to interplead with the bailor who disavows the assignment. Tyus *v.* Rust, 37 Ga. 574; Hatfield *v.* McWhorter, 40 Ga. 269.

[2] Crawshay *v.* Thornton, 7 Sim. R. 391; s. c. 2 Mylne & Craig, 1. In this last case Lord Cottenham said: "The case tendered by every such bill of interpleader ought to be that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest; because if the plaintiff shave come under any personal obligation independently of the question of property, so that either of the defendants may recover against them at law without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs; and the injunction, which is of course if the case be a proper subject for interpleader, would deprive a defendant, having such a case beyond the question of property, of part of his legal remedy, with the possibility at least of failing in the contest with his co-defendant; in which case the injunction would deprive him of a legal right without affording him any equivalent or compensation. Such a case undoubtedly would not be a case for interpleader. A party may be induced by the misrepresentation of the apparent owner of property to enter into personal obligations with respect to it from which he may be entitled to be released by a Court of Equity; but such a case could not be a subject for interpleader between the real and pretended owners. In such a case the plaintiff would be asserting an equity for relief from a personal contract against one of the defendants with which the other would have nothing to do." Fairbanks *v.* Belknap, 135 Mass. 179, 184; Cook *v.* Rosslyn, 5 Jur. (N. S.) 973; Reid *v.* Stearn, 6 Jur. (N. S.) 267; Tyus *v.* Rust, 37 Ga. 574.

It is proper for the tenant to file a bill of interpleader where he executed to his landlord each year in advance a note for the rent for the

goods from A, who directs a delivery thereof to B, and upon the application of B the bailee agrees to hold them at the disposal of B, the bailee cannot afterwards, if a third person claims the goods under another title, file a bill of interpleader against B and such third person, because of the want of privity, and his own obligations contracted with B.[1]

§ 1133. **Same.** — A distinction has also been taken upon this subject between the case of a mere private agent or bailee and that of a public agent or bailee. Thus for instance if a private warehouseman should receive goods as agent of the principal, it is said that he must account solely to the latter for them. But if the goods are deposited in a public bonded warehouse, the warehouseman is treated as a public agent holding the same for the person who is entitled to the goods. The ground for the distinction (if it is at all maintainable) would seem to be the policy of protecting public agents, in the discharge of their duty, from the burdens of suits in which they have no interest and have undertaken no private trust; and also the propriety of treating them, as they in reality are, merely as public depositaries or stake-holders, and not in any just sense as mere agents of the parties interested.[2]

§ 1134. **Same.** — Another case may be put, where a person is in possession of property as bailee, to which the bailor himself

ensuing year, and prior to the next term the land was sold and the original landlord and the new owner both claimed the note for the next year's rent. Schluter *v.* Harvey, 65 Cal. 158, 3 Pac. 659; Warnock *v.* Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209.

A tenant of whom rent is claimed by the husband insisting on a title by will, and by the heirs insisting on title by descent, may file a bill of interpleader to determine who is entitled to rents. Badeau *v.* Tylee, 1 Sandf. Ch. 270; Hall *v.* Craig, 125 Ind. 532, 25 N. E. 538.

[1] Fairbanks *v.* Belknap, 135 Mass. 179, 184; Tyus *v.* Rust, 37 Ga. 574. But the law has been changed in England. Attenborough *v.* London Dock Co., 3 C. P. D. 450, reversing 3 C. P. D. 373.

[2] Cooper *v.* De Tastet, 1 Tamlyn, R. 171, 181. Lord Brougham, in commenting on the case of Cooper *v.* De Tastet, in Pearson *v.* Cardon (2 Russ. & Mylne, 606, 609), said: "And now, entirely adopting the doctrine of that case before the Master of the Rolls, though the report must be incorrect, or that learned judge has not in his judgment expressed himself with his usual very remarkable accuracy; for doubtless he there meant to point to the distinction between a party who was and a party who was not agent, — to the distinction between an agent and a mere stake-holder, — and not to the distinction between a public and a private agent; I have no hesitation in stating it to be clear law that an agent cannot as an agent, if there be nothing to distinguish his situation from the common case, have a bill of interpleader against his principal." Lord Cottenham, in Crawshay *v.* Thornton, 2 M. & Craig, 1, 22, seems to have doubted the soundness of the distinction.

has no possessory title; but he is a mere tortious possessor, and the rightful owner demands it of the bailee. In such a case the question may arise whether he can compel the bailor and the rightful owner to interplead with each other. Upon principle it would seem that he cannot; for not only is there no privity between him and the rightful owner, but he is himself liable to be deemed a wrongful possessor if he should, after notice, withhold the property from the rightful owner.[1]

§ 1135. **Stake-holder Must Defend as Best He Can Where There Are Independent Adverse Titles.** — The true doctrine supported by the authorities would seem to be that in cases of adverse independent titles the party holding the property must defend himself as well as he can at law;[2] and he is not entitled to the assistance of a Court of Equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person, who calls for an interpleader.[3] Whether it might

[1] Taylor *v.* Plumer, 3 M. & Selw. 562; Shaw *v.* Coster, 8 Paige, R. 339.

[2] Fairbanks *v.* Belknap, 135 Mass. 179, 184.

[3] It is difficult to understand what was the particular ground upon which the Vice-Chancellor held the case of Mason *v.* Hamilton, 5 Sim. R. 19, to be a plain case of interpleader. The wharfinger there was clearly a bailee of Livermore and afterwards of Hamilton, to whom Livermore transferred the goods. But it does not appear what was the title of Emmerson, Price & Co. to the goods; whether it was in privity with Livermore, or by a paramount and adverse title. And yet this might have been most material to the question, whether it was a case for an interpleader or not. This case has since the former edition of this work been commented on by Lord Cottenham in Crawshay *v.* Thornton (2 M. & Craig, 1, 23), who treated it as no longer an authority upon the point of interpleader, not only upon its own circumstances but also upon the subsequent deliberate opinion of the Vice-Chancellor himself in another case, that of Crawshay *v.* Thornton (7 Sim. R. 391). The case of Pearson *v.* Cardon (4 Sim. R. 218), before the Vice-Chancellor, also contains some language not unattended with difficulty. That was a case where the plaintiffs, who were warehousemen, and with whom A & Co. (of which firm B was a partner) had deposited some bags of wool, which were the goods in question. A & Co. afterwards gave an order to the plaintiffs to transfer the goods to the name of B, and to be at his disposal, reserving the privilege of drawing samples from the wool in these bags. The plaintiffs accordingly transferred them in their books to B; and then C, claiming them as owner and as having put them into the hands of A & Co. as his agents, gave notice of his title thereto and denied the title of B, and offered an indemnity against B's title. The plaintiffs brought a bill of interpleader; and it was held by the Vice-Chancellor that the bill was maintainable, admitting the plaintiffs to be the agents of A & Co., for here there was a claim made by C under a paramount title. This language would seem to intimate that an agent might maintain a bill of interpleader against his principal and a third person claiming by a paramount title. When the

not have been more wise and more consistent with the principles of equity, originally to have held that in all cases whatsoever, where the bailee was innocent and without any fault, he should have a right to a bill of interpleader, is a point into which it is now too late to inquire.

§ 1136. **Bill Cannot Be Maintained by One Who Does Not Admit Title in Two Claimants.** — A bill of interpleader cannot be maintained by any person who does not admit a title in two claimants, and does not also show two claimants in existence capable of interpleading.[1] Thus a sheriff who seizes goods on execution cannot sue a bill of interpleader upon account of adverse claims existing to the property; for as to one of the defendants he necessarily admits himself to be a wrongdoer.[2] It is essential also in every bill of interpleader that the plaintiff should show that each of the defendants claims a right, and such a right as they may interplead for; for otherwise both the defendants may demur: the one, because the bill shows no claim of right against him; the other, because the bill, showing no claim of right in the co-defendant, shows no cause of interpleader.[3]

same case came before the Lord Chancellor (Lord Brougham) he affirmed the decree upon the special ground of the reservation as to the samples (2 Russ. & Mylne, 606). But he expressly held, as we have seen (ante, § 818, note), that an agent as such could not maintain a bill of interpleader upon the ground of a claim by a stranger under a paramount title. In the case of Crawshay *v.* Thornton (2 Mylne & Craig, 1, 23), in which the decision of the Vice-Chancellor in Pearson *v.* Cardon was cited, Lord Cottenham said that there must be some mistake in the report, for interpleader as between agent and principal was admissible only where the claim was under a derivative and not under an adverse title. Ibid. p. 23. The cases of Pearson *v.* Cardon, 2 Russ. & Mylne, 606, 609, 610, and Crawshay *v.* Thornton, 2 Mylne and Craig, 1, 22, 23, 24, have now settled the doctrine precisely as it is laid down in the text.

[1] See Metcalf *v.* Harvey, 1 Ves. 248, 249; Atkinson *v.* Manks, 1 Cowen, R. 691, 708; Darthex *v.* Winter, 2 Sim. & Sty. 536; Browning *v.* Watkins, 10 Smedes & M. 482; Briant *v.* Reed, 1 McCart. 271; National Bank of Augusta *v.* Augusta Cotton Compress Co., 99 Ga. 286, 25 S. E. 686; Partlow *v.* Moore, 184 Ill. 119, 56 N. E. 317.

[2] Slingsby *v.* Boulton, 1 Ves. & B. 334; Shaw *v.* Costef, 8 Paige, R. 339. As to the right of a sheriff to have an interpleader see Fairbanks *v.* Belknap, 135 Mass. 179; Shaw *v.* Coster, 8 Paige, 339; Smith *v.* Critchfield, 14 Q. B. D. 873; Dutton *v.* Furness, 12 Jur. (N. S.) 386; Child *v.* Mann, L. R. 3 Eq. 806; Ex parte Sheriff of Middlesex, L. R. 12 Eq. 207; Parker *v.* Barker, 42 N. H. 78; Dewey *v.* White, 65 N. C. 225; Hatfield *v.* McWhorter, 40 Ga. 269; Quinn *v.* Green, 36 N. C. 229, 36 Am. Dec. 46; Stephenson *v.* Burdett, 56 W. Va. 109, 48 S. E. 846.

[3] Mitford, Eq. Pl. by Jeremy, pp. 142, 143. The language of the Common Law Commissioners in the Report to Parliament, March, 1830, p. 24, is: "The only course now resorted to for the relief of a person sued or in danger of being sued by several claimants, is that of filing a bill to compel

§ 1137. **Same.** — From the language used in some of the authorities it might perhaps be thought that in cases of bills of interpleader Courts of Equity had authority only to order the defendants to interplead at law. This would certainly be a very erroneous view of the jurisdiction. Indeed it has been so rare that interpleading bills have gone to a decree, that some doubts have been entertained as to what is the proper course. The result, upon a full examination of the subject, will be found to be that Courts of Equity dispose of questions arising upon bills of interpleader, in various modes, according to the nature of the question and the manner in which it is brought before the court. An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill does which is brought by an executor or trustee to obtain the direction of the court upon the adverse claims of different defendants.[1] If therefore at the hearing the question between the defendants is ripe for a decision, the court will decide it; and if it is not ripe for a decision, the court will direct an issue, or a reference to a master, to ascertain contested facts, as may be best suited to the nature of the case.[2] Indeed an issue or a direction to interplead at law would be obviously improper in all cases except those where the titles on each side are purely legal. Equitable titles can only be disposed of by Courts of Equity; and even as to legal titles it is obvious that in many cases a resort to an issue or to an interpleader to be had at law would be unnecessary or inexpedient.

§ 1138. [**Application for Bill of Interpleader Should Not Be Delayed until an Action Has Been Brought to Recover the Fund by the Third Person.** — The right to apply for a bill of interpleader, like other equitable remedies, should be promptly sought and before the rights of others have intervened against the complainant. The complainant cannot be considered free from laches where he

the parties by the authority of a Court of Equity to interplead at law." I have quoted these words in another place in the text (ante, § 1115), and have added a qualification. Probably the Commissioners intended here to speak solely of legal rights.

[1] In regard to bills for instruction by the courts see Morse *v.* Stearns, 131 Mass. 389; Stevens *v.* Warrent, 101 Mass. 564; Houghton *v.* Kendall, 7 Allen, 72; Bowditch *v.* Soltyk, 99 Mass. 136; First Baptist Church *v.* Robberson, 71 Mo. 326; Sohier *v.* Burr, 127 Mass. 221; Sprague *v.* West, Ib. 471. But while a legatee may have an interpleader against the executor, in the nature of a bill for instructions, a party in interest under a trust cannot maintain a bill in the nature of a bill of interpleader against the trustee and an adverse claimant under the trust. Sprague *v.* West, supra.

[2] Angell *v.* Hadden, 16 Ves. 203; City Bank *v.* Bangs, 2 Paige, R. 570.

has deferred the application for his bill until an action has been brought against him in another county for the recovery of the identical fund, when the further hearing of the action in his own county could no longer be deferred.[1] For instance, an insurance company will not be allowed to interplead and ask for an adjudication of the rights of the parties to the proceeds arising from a life policy, where the funds had already been garnished in one State and the beneficiary had then brought suit in another State to recover the amount of the policy.[2]]

§ 1139. **Cases Unprovided For as a Hardship.** — The remedy by bill of interpleader, although it has cured many defects in the proceedings at law, has yet left many cases of hardship unprovided for. No attempt has been made in America (as far as I know) to remedy these grievances. But in England, an Act of Parliament, recently passed, has given a far more expanded reach to the remedy of interpleader in the Courts of Law, and extended its benefits to many cases of honest but unavoidably doubtful litigation.[3] The jurisdiction in equity seems however to have been left substantially upon its old foundations.

§ 1140. **Bill to Establish Conflicting Rights between Third Persons.** — But although a bill of interpleader, strictly so called, lies only where the party applying claims no interest in the sub-

[1] Brackett *v.* Graves, 30 App. Div. 162, 51 N. Y. Supp. 895.

[2] Hartford L. Ins. Co. *v.* Weed, 75 Vt. 429, 56 Atl. 97.

[3] The act is the Stat. of 1 and 2 Will. IV., ch. 58. It recites that it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader. It then enacts that upon application of a defendant sued in the Courts of Law in any action of assumpsit, debt, detinue, or trover, showing that the defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring the money into court, &c., the court may make an order on such third party to appear and state his claim, &c.; and powers are given to the courts to direct an issue to try the same. See 2 Chitty's General Practice, ch. 5, § 3, pp. 342, 343, 344. See 23 & 24 Vict. ch. 126, § 12. Under this statute Courts of Law may direct an interpleader to settle the rights of claimants in cases in which equity would do the like; but the statute does not extend to equitable claims. Hurst *v.* Sheldon, 13 C. B. (N. S.) 750. See also Tanner *v.* European Bank, L. R. 1 Ex. 261; Rusden *v.* Pope, L. R. 3 Ex. 269. The New York statute also permits an interpleader at law. Hornby *v.* Gordon, 9 Bosw. 656. For statutes in other States see Nelson *v.* Goree, 34 Ala. 565; Rohrer *v.* Turrill, 4 Minn. 407; Bates *v.* Lilly, 65 N. C. 232.

ject-matter, yet there are many cases where a bill, in the nature of a bill of interpleader, will lie by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons.[1] As for instance if a plaintiff is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to which it actually belongs, he may file a bill against the several claimants in the nature of a bill of interpleader for relief.[2] So it seems that a purchaser may file a bill, in the nature of a bill of interpleader, against the vendor, or his assignee, and any creditor who seeks to avoid the title of the assignee, and pray the direction of the court as to whom the purchase-money shall be paid.[3] So if a mortgagor wishes to redeem the mortgaged estate and there are conflicting claims between third persons as to their title to the mortgage money, he may bring them before the court to ascertain their rights, and to have a decree for a redemption, and to make a secure payment to the party entitled to the money.[4] In these cases the plaintiff seeks relief for himself; whereas in an interpleading bill, strictly so called, the plaintiff only asks that he may be at liberty to pay the money or deliver the property to the party to whom it of right belongs, and may thereafter be protected against the claims of both.[5] In the latter case the only decree to which the plaintiff is entitled is a decree that the bill is properly filed; or in other words that he shall be at liberty to pay the money, or bring the property into court, and have his costs, and that the defendants interplead and settle the conflicting claims between themselves.[6] So a bill in the nature of an interpleading bill will lie by a bank which has offered a reward

[1] See ante, § 1138.

[2] Mohawk & Hudson Railroad Co. *v.* Clute, 4 Paige, R. 384; Thomson *v.* Ebbets, Hopkins, R. 272. This same doctrine would apply to a case where a person was taxed in two towns for the same property, and did not know to which town tax should properly belong, and asked by his bill to have the amount of tax with which he was chargeable, as well as the persons to whom it was payable, ascertained. Ibid.; ante, § 1124.

[3] Parks *v.* Jackson, 11 Wend. 443.

[4] See Goodrick *v.* Shotbolt, Prec. Ch. 333, 334, 335, 336; Bedell *v.* Hoffman, 2 Paige, 199; Mitchell *v.* Hayne, 2 Sim. & Stu. 63; 1 Madd. Ch. Pr. 146, 147; S. P. Gilb. Eq. Rep. 18.

[5] See ante, §§ 1117, 1119; Mitchell *v.* Hayne, 2 Sim. & Stu. 63; Meux *v.* Bell, 6 Sim. R. 175. See East India Company *v.* Campion, 11 Bligh, R. 158, 182, 185.

[6] Anon. 1 Vern. R. 351; Bedell *v.* Hoffman, 2 Paige, R. 200; Atkinson *v.* Manks, 1 Cowan, R. 691; Mohawk & Hudson Railroad Co. *v.* Clute, 4 Paige, R. 384, 392; 1 Eq. Abridg. 80.

for the recovery of money stolen, and a proportionate reward for a part recovered, where there are several claimants of the reward or a proportion thereof, one or more of whom have sued the bank. And in such a bill all the claimants may be made parties, in order to have their respective claims adjusted.[1]

[1] City Bank *v.* Bangs, 2 Paige, R. 570; Merchants Bank of Providence *v.* Packard and others, Circuit Court of Rhode Island District, November Term, 1838. See Gray *v.* Pitman, 5 Scott, R. 795.

CHAPTER XXIV

BILLS QUIA TIMET

§ 1141. **Bills Quia Timet.** — In the next place let us proceed to the consideration of another class of cases, where the peculiar remedies administered by Courts of Equity constitute the principal although not the sole ground of jurisdiction, and that is BILLS QUIA TIMET. We have already had occasion in another place to explain in some measure the nature of these bills and the origin of the appellation, and to show their application to cases of covenants and contracts with sureties and others, where a specific performance is necessary to prevent future mischief.[1] They are called (as we have seen) bills quia timet, in analogy to certain writs of the common law whose objects are of a similar nature. Lord Coke has explained this matter very clearly in his Commentary on Littleton. "And note," says he, "that there be six writs in law that may be maintained, quia timet, before any molestation, distress, or impleading. As, (1) a man may have a Writ of Mesne (whereof Littleton here speaks) before he be distrained; (2) a Warrantia Chartæ, before he be impleaded; (3) a Monstraverunt, before any distress or vexation; (4) an Audita Querela, before any execution sued; (5) a Curia Claudenda, before any default of enclosure; (6) a Ne injuste Vexes, before any distress or molestation. And these be called brevia anticipantia, writs of prevention."[2]

§ 1142. **In Their Nature Are Preventive Writs.** — Now bills in equity quia timet answer precisely to this latter description. They are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to re-

[1] Ante, §§ 948 to 958, 1011. See also 1 Madd. Ch. Pr. 178, 179; Viner, Abridg. title, Quia Timet, A. and B.; Mitf. Eq. Pl. by Jeremy, 148.

[2] Co. Litt. 100 *a*. See also Mitf. Eq. Pl. by Jeremy, 148.

dress them when done. The party seeks the aid of a Court of Equity because he fears (quia timet) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief. The manner in which this aid is given by Courts of Equity is of course dependent upon circumstances. They interfere sometimes by the appointment of a receiver to receive rents or other income; sometimes by an order to pay a pecuniary fund into court; sometimes by directing security to be given or money to be paid over; and sometimes by the mere issuing of an injunction or other remedial process; thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it.[1]

§ 1143. **Jurisdiction in Equity.** — In regard to equitable property the jurisdiction is equally applicable to cases where there is a present right of enjoyment, and to cases where the right of enjoyment is future or contingent. The object of the bill in all such cases is to secure the preservation of the property to its appropriate uses and ends; and wherever there is danger of its being converted to other purposes, or diminished or lost by gross

[1] Jeremy on Eq. Jurisd. B. 1, ch. 7, and §§ 1, 2, pp. 248 to 254; Id. B. 3, ch. 2, § 2, p. 350; post, §§ 1143, 1144, 1145, 1146.

If the bill is founded upon a written instrument, that must be apparently valid. Harkness *v.* Public Works, 1 McArth. 121; Minnesota Oil Co. *v.* Palmer, 20 Minn. 468; Ulman *v.* Clark, 75 Fed. 868; Naylor *v.* Sidener, 106 Ind. 179, 6 N. E. 345; Ellett *v.* Newman, 92 N. C. 519; Bryan *v.* Moring, 94 N. C. 694; Twitty *v.* Logan, 80 N. C. 69; Taylor *v.* Russell, 119 N. C. 33, 25 S. E. 710; City Natl. Bank *v.* Bridgers, 114 N. C. 383, 19 S. E. 642.

To justify the appointment of a receiver in limine before the decree upon the merits of the bill, two grounds must appear, first a reasonable probability that the complainant will succeed ultimately in obtaining the general relief sought; second, imminent danger to the property, the subject of the suit. Hayes *v.* Jasper Land Co., 147 Ala. 340, 41 So. 909.

A receiver will not be appointed where the title to the land is claimed by two parties, and is without the least show of any peculiar equities of one as against the other. Freer *v.* Davis, 52 W. Va. 35, 43 S. E. 172, 94 Am. St. Rep. 910.

In an action for divorce, where one of the parties is a joint owner of the property with the other, and the property is in danger of being wasted, a receiver will be appointed. Stone *v.* Stone, 18 Tex. Civ. App. 80, 43 S. W. 567.

Application for appointment of receiver will not lie where made long after judgment, and upon application for new trial. Brashears *v.* Dickinson, 23 Ky. L. Rep. 2181, 66 S. W. 1011.

A receiver will not be appointed to take possession of property from administrator of deceased wife, where husband is in possession and threatening to dispose of property. Mahoney *v.* Stewart, 123 N. C. 110, 31 S. E. 384.

negligence, the interference of a Court of Equity becomes indispensable. It will accordingly take the fund into its own hands, or secure its due management and appropriation either by the agency of its own officers or otherwise. Thus for instance if property in the hands of a trustee for certain specific uses or trusts (either express or implied) is in danger of being diverted or squandered, to the injury of any claimant having a present or future fixed title thereto, the administration will be duly secured by the court according to the original purposes, in such a manner as the court may in its discretion, under all the circumstances, deem best fitted to the end; as by the appointment of a receiver, or by payment of the fund, if pecuniary, into court, or by requiring security for its due preservation and appropriation.[1]

§ 1144. **Same.** — The same principle is applied to the cases of executors and administrators, who are treated as trustees of the personal estate of the deceased party. If there is danger of waste of the estate, or collusion between the debtors of the estate and the executors or administrators, whereby the assets may be subtracted, Courts of Equity will interfere and secure the fund; and in the case of collusion with debtors, they will order the latter to pay the amount of their debts into court.[2]

§ 1145. **Same.** — The appointment of a receiver, when directed, is made for the benefit and on behalf of all the parties in interest, and not for the benefit of the plaintiff or of one defendant only.[3] It may be granted in any case of equitable property upon suitable circumstances. And where there are creditors, annuitants, and others, some of whom are creditors at law claiming under judgments, and others are creditors claiming upon equitable debts, if the property be of such a nature that, if legal, it may be taken in execution, it may, if equitable, be put into the possession of a receiver to hold the same, and apply the profits under the direction of the court for the benefit of all the parties

[1] Jeremy on Eq. Jurisd. B. 1, ch. 7, and §§ 1 and 2, pp. 248 to 254.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 8, and note (*y*); Elmsley *v.* Macauley, 3 Bro. Ch. R. 624; Taylor *v.* Allen, 2 Atk. 213; Utterson *v.* Mair, 4 Bro. Ch. R. 277; Mandeville *v.* Mandeville, 8 Paige, R. 475; Story on Equity Pleadings, §§ 178, 514; Haines *v.* Carpenter, 1 Woods, 262.

[3] Davis *v.* Duke of Marlborough, 1 Swanst. R. 83; s. c. 2 Swanst. R. 125; Scott *v.* Ware, 65 Ala. 174, 184; Patterson *v.* Ward, 6 N. Dak. 609, 72 N. W. 1013; Lees *v.* Dobson, 26 App. Div. 624, 49 N. Y. Supp. 902; Hendrie *v.* Parry, 37 Colo. 359, 86 Pac. 113.

The receiver is the sole agent by and through whom the rights of the creditors can be protected, and in protecting and enforcing these rights he is the representative of the creditors, and not of the debtor. In re Wilcox, 70 Conn. 220, 39 Atl. 163.

according to their respective rights and priorities.[1] The same rule applies to cases where the property is legal, and judgment creditors have taken possession of it under writs of elegit; for it is competent for the court to appoint a receiver in favor of annuitants and equitable creditors, not disturbing the just prior rights, if any, of the judgment creditors.[2] Hence the appointment of a receiver, in cases of this sort, is often called an equitable execution.[3]

§ 1146. **Same.** — It has been said that the general rule of equity to appoint a receiver for an equitable creditor against a person having an equitable estate, without prejudice to persons who have prior estates, is to be understood in this limited sense, that it is to be without prejudice to persons having prior legal estates, and so that it will not prevent their proceeding to obtain possession if they think proper. And with regard to persons having prior equitable estates the court will take care, in appointing a receiver, not to disturb their prior equities; and for that purpose it will direct inquiries to determine the priorities among equitable incumbrancers, permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors.[4]

§ 1147. **Appointment of Receiver Is Matter Resting in Sound Discretion of Court.** — The appointment of a receiver is a matter resting in the sound discretion of the court;[5] and the receiver when appointed is treated as virtually an officer and representative of the court, and subject to its orders.[6] Lord Hardwicke considered this power of appointment to be of great importance and most beneficial tendency, and he significantly said: "It is a discretionary power, exercised by the court with as great utility to the subject as any authority which belongs to it; and it is provisional only for the mere speedy getting in of a party's estate and securing it

[1] Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, p. 248; Davis *v.* Duke of Marlborough, 2 Swanst. R. 125, 135, 139, 145, 146, 173.

[2] Davis *v.* Duke of Marlborough, 1 Swanst. R. 83; s. c. 2 Swanst. R. 125, 135, 139, 140, 141, 173; White *v.* Bishop of Peterborough, 3 Swanst. R. 117, 118.

[3] Ibid., and Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, pp. 248, 249.

[4] Lord Eldon, in Davis *v.* Duke of Marlborough, 2 Swanst. R. 145, 146.

[5] Battle *v.* Davis, 66 N. C. 252. Notice of the application must be given. Vance *v.* Wood, 46 Mo. 120; Bostwick *v.* Isbell, 41 Conn. 305; Skip *v.* Harwood, 3 Atk. 564.

[6] Jeremy on Eq. Jurisd. B. 1, ch. 7, pp. 248, 249; Angel *v.* Smith, 9 Ves. 338; Hutchinson *v.* Massareene, 2 B. & Beatt. 55; Chicago City R. Co. *v.* People, 116 Ill. App. 633; Herrick *v.* Miller, 123 Ind. 304, 24 N. E. 111; Crane *v.* McCoy, 1 Bond, 422; Battle *v.* Davis, 66 N. C. 252; Bird *v.* Harris, 63 Ga. 433.

for the benefit of such person who shall appear to be entitled; and it does not at all affect the right." [1]

§ 1148. **Same.** — The exercise of the power being thus discretionary, it would be difficult with any precision to mark out the limits within which it is ordinarily circumscribed, even if such a task were within the scope of these Commentaries. As however the equitable rights and incidents to such an appointment are often highly important to the parties in interest, and may affect the rights and remedies of third persons having adverse claims, it will be proper in this place to state some of the principles by which this discretion is regulated.[2]

§ 1149. **Rights and Incidents to Cases of Sequestration.** — Before doing so it may not be without use to suggest what some of those rights and incidents are; and the more so, as similar rights and incidents belong to cases of sequestration. In the first place upon the appointment of a receiver of the rents and profits of real estate, if there are tenants in possession of the premises they are compellable to attorn, and the court thus becomes virtually pro hac vice the landlord.[3] In the next place the appointment of such a receiver is generally deemed to entitle him to possession of the premises. It does not indeed in all cases amount to a turning of the other party out of possession; for in many cases, as in the case of an infant's estate, the receiver's possession is that of the infant. But where the rights are adverse in the different parties in the suit, the possession of the receiver is treated as the possession of the party who ultimately establishes his right to it.[4] The receiver however cannot proceed in any ejectment against the tenants of any estate except by the authority of the court.[5] Nor will the possession of the tenants be ordinarily disturbed by the court where a receiver is appointed. But although not parties to the suit, the tenants may, and will in certain cases, be compelled to attorn to the receiver.[6]

[1] Skip *v.* Harwood, 3 Atk. 564.

[2] Angel *v.* Smith, 9 Ves. 338. See Blandheir *v.* Moore, 11 Md. 364, where the principal rules governing the appointment of receivers are stated.

[3] Farmers' Loan & Trust Co. *v.* Eaton, 114 Fed. 14, 51 C. C. A. 640; Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, pp. 248, 249; Angel *v.* Smith, 9 Ves. 338; Silver *v.* Bishop of Norwich, 3 Swanst. R. 112, note; Id. 117; Sharp *v.* Carter, 3 P. Will. 379, Cox's note (C).

[4] Sharp *v.* Carter, 3 P. Will. 379. See Albany City Bank *v.* Schermerhorn, 9 Paige, R. 372.

[5] Wynn *v.* Lord Newborough, 3 Bro. Ch. R. 88; s. c. 1 Ves. Jr. 164.

[6] Sea Ins. Co. *v.* Stebbins, 8 Paige, R. 565.

§ 1150. **Discretion of Receiver in Possession.** — In the next place a receiver when in possession has very little discretion allowed him, but he must apply from time to time to the court for authority to do such acts as may be beneficial to the estate. Thus he is not at liberty to bring or to defend actions, or to let the estate, or to lay out money, unless by the special leave of the court.[1] In the next place when such a receiver is in possession under the process or authority of the court in execution of a decree or decretal order, his possession is not to be disturbed, even by an ejectment under an adverse title, without the leave of the court. For his possession is deemed the possession of the court,[2] and the court will not permit itself to be made a suitor in a Court of Law.[3] The proper and usual mode adopted under such circumstances is for the party claiming an adverse interest to apply to the court to be permitted to come in and be examined pro interesse suo.[4] He is then allowed to go before the master and to state his title, upon which he may in the first instance have the judgment of the master, and ultimately, if necessary, that of the court. And where the question to be tried is a pure matter of title which can be tried in an ejectment, the court, from a sense of convenience and justice, will generally authorize such a suit to be brought, taking care however to protect the possession by giving proper directions.[5]

[1] Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, pp. 252, 253. He may prove against a debtor's estate in bankruptcy, though the effect is to discharge the debtor and entitle him to a legacy which otherwise might have applied to the debt. Armstrong *v.* Armstrong, L. R. 12 Eq. 614; Ft. Wayne Coal Co. *v.* Webster, 163 Mass. 134, 39 N. E. 786; Dalliba *v.* Riggs, 11 Idaho, 364, 82 Pac. 107, 114 Am. St. Rep. 267; Braman *v.* Trust Co., 114 Fed. 18, 51 C. C. A. 644.

Where receiver sold property and applied the proceeds contrary to directions of the court, he is liable for its fair value. State Central Bank *v.* Fanning Chain Co., 118 Iowa, 698, 92 N. W. 712.

[2] Bird *v.* Harris, 63 Ga. 433; Tindall *v.* Wescott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225.

[3] Parker *v.* Browning, 8 Paige R. 388.

[4] See Searle *v.* Choat, 25 Ch. D. 723, under Jud. Act. of 1873.

[5] Angel *v.* Smith, 9 Ves. 338, 339; Brooks *v.* Greathed, 1 Jac. & Walk. 178; Bryan *v.* Cormick, 1 Cox, R. 422; Hayes *v.* Hayes, 1 Ch. Cas. 223; Empringham *v.* Short, 3 Hare, R. 461; Evelyn *v.* Lewis, 3 Hare, 472, 475; Brein *v.* Light, 36 Misc. Rep. 112, 72 N. Y. Supp. 1087; Peirce *v.* Chism, 23 Ind. App. 505, 55 N. E. 795, 77 Am. St. Rep. 441; Citizens Sav. Bank *v.* Bay Circuit Judge, 110 Mich. 633, 68 N. W. 649, 3 Detroit Leg. N. 520; Minot *v.* Mastin, 95 Fed. 734, 37 C. C. A. 234; Hollifield *v.* Wrightsville R. Co., 99 Ga. 365, 27 S. E. 715; Glover *v.* Thayer, 101 Ga. 824, 29 S. E. 36.

To enforce a cause of action accruing prior to appointment of receiver, permission to sue must first be had. Smith *v.* St. Louis etc. R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368.

§ 1151. **Suits by Receiver to Recover Property Withheld from Him.** — Where a receiver is appointed and the property is in possession of a third person who claims a right to retain it, the receiver must either proceed by a suit in the ordinary way to try his right to it, or the plaintiff in equity should make such third person a party to the suit, and apply to the court to have the receivership extended to the property in his hands, so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt if it is not obeyed.[1] And whenever the property is in possession of a third person under a claim of title, the court will not protect the officer who attempts by violence to obtain possession thereof any further than a Court of Law will protect him; his right to take possession of the property of which he has been appointed the receiver not being questioned.[2]

The rule requiring permission to sue is established to prevent collision of different jurisdictions and not as an unbending prerequisite to all pleadings against receivers. Fox River Paper Co. *v.* Western Envelope Co., 109 Ill. App. 393.

A receiver is liable personally for trespass or torts committed by him and he obtains no immunity from liability by reason of his office, and for such causes of action no permission to sue is necessary. Kirk *v.* Kane, 87 Mo. App. 274.

The rule does not apply where the same judge who appointed the receiver is also called upon to try the case at issue, though no permission was obtained. Ratcliff *v.* Baer, 71 Ark. 269, 72 S. W. 896.

Where the receiver has appeared and defended an action, he cannot after an adverse judgment raise the question that no permission was given to sue. Manker *v.* Phœnix Loan Assn., 124 Iowa, 341, 100 N. W. 38.

[1] Parker *v.* Browning, 8 Paige, R. 388; Albany City Bank *v.* Schermerhorn, 9 Paige, R. 372.

[2] Ibid. In Parker *v.* Browning, Mr. Chancellor Walworth said: "It is not necessary in any case for the receiver to put himself in a situation where he is not entitled to the full protection of this court, as he is under no obligation to attempt to take property out of the possession of a third person, or even out of the possession of the defendant himself by force, and without an express order of the court directing him to do so. The proper course, as this court has repeatedly decided, where the defendant is directed to deliver over his property to the receiver under the direction of a master, is for the receiver or the party who wishes for an actual delivery of the property, in addition to the legal assignment thereof, to call upon the master to decide, upon the examination of the defendant, and on the evidence before him, what property, legally or equitably belonging to the defendant, and to which the receiver is entitled under the order of the court, is in the possession of the defendant or under his power and control. And it is the duty of the master to direct the defendant to deliver over to the receiver the actual possession of all such property, in such manner and within such time as the master may think reasonable. Where such a direction is given, the defendant, if he is dissatisfied with the decision of the master, must apply to the court to review

§ 1152. **Receiver Will Be Appointed When.** — Let us now proceed to consider some of the cases in which a receiver will be appointed.[1] We have already seen that in cases of elegit and conflicting legal equitable debts and charges upon the estate it is a common course to appoint a receiver for the benefit of all concerned.[2] In cases also where an estate is held by a party under a title obtained by fraud, actual or constructive, a receiver will be appointed.[3]

§ 1153. **Appointment of Receiver against Party Rightfully in Possession.** — But it is not infrequent for a bill quia timet to ask for the appointment of a receiver against a party who is rightfully in possession, or who is entitled to the possession of the fund, or who has an interest in its due administration. In such cases Courts of Equity will pay a just respect to such legal and equitable rights and interests of the possessor of the fund, and will not withdraw it from him by the appointment of a receiver, unless the facts averred and established in proof show that there has been an abuse, or is danger of abuse, on his own part. For the rule of such courts is not to displace a bona fide possessor from any of the just rights attached to his title, unless there be some equitable ground for interference.[4]

the same, or he will be compelled by process of contempt to comply with that decision. And if the property is in the possession of a third person, who claims the right to retain it, the receiver must either proceed by suit, in the ordinary way, to try his right to it, or the complainant should make such third person a party to the suit, and apply to have the receivership extended to the property in his hands; so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt if it is not obeyed. Where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect that possession, not only against acts of violence, but also against suits at law; so that a third person claiming the same may be compelled to come in and ask to be examined pro interesse suo, if he wishes to test the justice of such claim. But where the property is in the possession of a third person under a claim of title, the court will not protect the officer who attempts by violence to obtain possession, any further than the law will protect him; his right to take possession of property of which he has been appointed receiver being unquestioned."

[1] See English Jud. Act, 1873, 36 & 37 Vict. ch. 66, § 25, subs. 8; Fuggle *v.* Bland, 11 Q. B. D. 711.

[2] Ante, § 1145.

[3] Huguenin *v.* Baseley, 13 Ves. 105; Stilwell *v.* Williams, 6 Madd. R. 49; s. c. Stillwell *v.* Wilkins, Jacob, R. 280; Ashley *v.* Ashley, 59 App. Div. 611, 69 N. Y. Supp. 173; Reeves *v.* Pierce, 64 Kans. 502, 67 Pac. 1108.

[4] Jeremy on Eq. Jurisd. B. 1, ch. 1, § 3, p. 174; Id. B. 1, ch. 7, § 1, pp. 249, 250. See Tyson *v.* Fairclough, 2 Sim. & Stu. 142. A receiver of a corporation cannot, it is held, be appointed by equity in aid of a suit by a private person, unless the act is authorized by statute. French Bank Case, 53 Cal. 495; Neall *v.* Hill, 16 Cal. 145; Kelley *v.* Boettcher, 89 Fed. 125.

§ 1154. **Same.** — This principle may be easily illustrated in the common case of executors and administrators. They are by law intrusted with authority to collect and administer the assets of the deceased party, and Courts of Equity will not interfere with their management and administration of such assets upon slight grounds. Whenever therefore the appointment of a receiver is sought against an executor or administrator, it is necessary to establish by suitable proofs that there is some positive loss, or danger of loss, of the funds; as for instance some waste or misapplication of the funds, or some apprehended danger from the bankruptcy, insolvency, or personal fraud, misconduct, or negligence of the executor or administrator.[1] Mere poverty of the party will not of itself constitute a sufficient ground, but there must be other ingredients to justify the appointment.[2]

§ 1155. **Same.** — So where there are several incumbrances on an estate, as the first incumbrancer is entitled to the possession of the estate and the receipt of the rents and profits, a Court of Equity will not deprive him of such possession and profits unless upon sufficient cause shown.[3] But if the first incumbrancer is not in possession and does not desire it, or if he has been paid off, or if he refuses to receive what is due to him, there a receiver may be appointed upon the application of a subsequent incumbrancer.[4] But in all cases of this sort where the court acts in favor of subsequent incumbrancers it is cautious, in thus inter-

[1] Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, pp. 248, 249; Mandeville *v.* Mandeville, 8 Paige, R. 475; ante, §§ 559, 1144; Chappell *v.* Akin, 39 Ga. 177; In re Johnson, L. R. 1 Ch. 325. So of superseding an assignee by a receiver. Gresham *v.* Crossland, 59 Ga. 270.

[2] Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, pp. 249, 250; White *v.* Bishop of Peterborough, 3 Swanst. R. 107; Davis *v.* Duke of Marlborough, 2 Swanst. R. 113. On the other hand as it is the business and duty of such parties to hold and administer the property, *they* cannot ask for a receiver. The principle is general. Thus trustees in a mortgage of railroad property, authorizing them to take possession and operate the road on default, can enforce their rights by ejectment, and cannot have a receiver in a suit brought by them to foreclose the mortgage. Rice *v.* St. Paul R. Co., 24 Minn. 464. Comp. Sollory *v.* Leaver, L. R. 9 Eq. 22, 25, infra, p. 164, note (*a*).

[3] Rowe *v.* Wood, 2 Jac. & Walk. 554, 557; Berney *v.* Sewell, 1 Jac. & Walk. 649; Quarrell *v.* Beckford, 13 Ves. 377; Codrington *v.* Parker, 16 Ves. 469. Nor will equity grant a receiver in ordinary cases in favor of a first incumbrancer, since he can help himself. Sollory *v.* Leaver, L. R. 9 Eq. 22, 25. But see Hughes *v.* Hatchett, 55 Ala. 631; Warner *v.* Gouverneur, 1 Barb. 36; Bank of Ogdensburg *v.* Arnold, 5 Paige, 38.

[4] Bryan *v.* Cormick, 1 Cox, R. 422; Norway *v.* Rowe, 19 Ves. 153; White *v.* Bishop of Peterborough, 3 Swanst. R. 109. See Sollory *v.* Leaver, L. R. 9 Eq. 22, 25.

fering, not to disturb any prior rights or equities, and therefore before it acts finally it will endeavor to ascertain the priorities and equities of all the incumbrancers, and then it will apply the funds which are received according to such priorities and equities, in case the incumbrancers entitled thereto shall make a seasonable application for the purpose.[1]

§ 1156. **Same.** — So where the tenants of particular estates for life or in tail neglect to keep down the interest due upon incumbrances upon the estates, Courts of Equity will appoint a receiver to receive the rents and profits in order to keep down the interest; for this is but a mere act of justice to the incumbrancers, and also to those who may be otherwise interested in the estates.[2] But here again it is to be remembered that the court will not force incumbrancers to receive their interest; and therefore if they would avail themselves of the privileges of receiving their interest, they must make a seasonable application for the purpose.[3]

§ 1157. **Same.** — But although Courts of Equity will not appoint a receiver except upon special grounds justifying such an interference in the nature of a bill quia timet, yet there are cases in which it will interpose and require money to be paid into court by a party who stands in the relation of a trustee to the property, without any ground being laid to show that there has been any abuse or any danger to the fund.[4] Thus in cases of bills brought by creditors, or legatees, or distributees against executors or administrators for a settlement of the estate, if the executors or administrators by their answers admit assets in their hands, and the court takes upon itself a settlement of the estate, it will direct the assets to be paid into court.[5]

§ 1158. **Same.** — The like doctrine has been applied to cases where an executor or administrator has lodged funds of the estate in the hands of a banker avowedly as assets. In such cases, upon the application of a party in interest, as for instance of a creditor or a legatee, the banker will be directed to pay the money into

[1] Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, pp. 250, 251; Davis *v.* Duke of Marlborough, 2 Swanst. R. 145, 146; 19 Ves. 153; 1 Swanst. R. 74.

[2] Jeremy on Eq. Jurisd. B. 1, ch. 7, § 1, pp. 251, 252; Giffard *v.* Hart, 1 Sch. & Lefr. 407, note; Bertie *v.* Lord Abingdon, 3 Meriv. R. 560.

[3] Ibid.; Gresley *v.* Adderley, 1 Swanst. R. 579, and note; Bertie *v.* Lord Abingdon, 3 Meriv. R. 560, 566, 567, 568.

[4] Vose *v.* Reed, 1 Woods, 647; Jeremy on Eq. Jurisd. 1, ch. 7, § 2, pp. 253, 254; Id. B. 3, ch. 2, § 2, pp. 351, 352.

[5] Strange *v.* Harris, 3 Bro. Ch. R. 365; Blake *v.* Blake, 2 Sch. & Lefr. 26, 27; Yare *v.* Harrison, 2 Cox, R. 377. See Mandeville *v.* Mandeville, 8 Paige, R. 475.

court; for it is a rule in equity to follow trust money whenever it may be found in the hands of any person who has not prima facie a right to hold it, and to order him to bring it into court. And this may be done even without making the executor or administrator a party to the suit, especially if there be a doubt of the safety of the fund.[1]

§ 1159. **Receiver Appointed for Property Required to Be Paid into Court.** — The general rule upon which Courts of Equity proceed in requiring money to be paid into court is this, that the party who is entitled to the fund is also entitled to have it secured. And this rule is equally applicable to cases where the plaintiffs seeking the payment are solely entitled to the whole fund, and to cases where they have acquired such an interest in the whole fund, together with others, as entitles them on their own behalf and the behalf of others to have the sum secured in court.[2] Now this is precisely the case in what is commonly called a creditor's bill for the administration of an estate.[3]

§ 1160. **Same.** — And Courts of Equity will in cases of this sort not only order money to be paid into court, but they will also direct that papers and writings in the hands of executors and administrators shall be deposited with a master for the benefit of those interested, unless there are other purposes which require that they should be retained in the hands of the executors or administrators.[4]

§ 1161. **Receiver Will Be Appointed to Protect Legal Rights to Property Where Rights of Enjoyment Are in the Future.** — The preceding remarks are principally (but not exclusively) applicable to cases of equitable property, whether the right of enjoyment thereof be present, future, or contingent. In regard to legal property it is obvious that where the right of enjoyment is present, the legal remedies will be generally found sufficient for the protection and vindication of that right. But where the right of enjoyment is future or contingent, the party entitled is often without any adequate remedy at law for any injury which he may in the meantime sustain by the loss, de-

[1] See Leigh *v.* Macaulay, 1 Younge & Coll. 260; Bogle *v.* Stewart, cited Ibid. pp. 265, 266; Bowsher *v.* Watkins, 1 Russ. & Mylne, 277; Gedge *v.* Traill, Ibid. 281, note; Revisal of 1905 of North Carolina, §§ 850, 851, 852.

[2] Freeman *v.* Fairlie, 3 Meriv. R. 29, 30; Cruikshanks *v.* Robarts, 6 Madd. R. 104; Johnston *v.* Aston, 1 Sim. & Stu. R. 73; Rothwell *v.* Rothwell, 2 Sim. & Stu. R. 217; Orrok *v.* Binney, Jac. R. 523.

[3] Ante, §§ 740, 741, 743.

[4] Freeman *v.* Fairlie, 3 Meriv. R. 29, 30; Clark *v.* Clark, 8 Paige, R. 152.

struction, or deterioration of the property in the hands of the party who is entitled to the present possession of it. Thus for instance if personal property should be given by a will to A for life, and after his death to B, there is (as we have seen) at law no remedy to secure the legacy to B, whether it be of specific chattels or of a pecuniary nature.[1]

§ 1162. **Same.** — Indeed by the ancient common law there could in general be no future right of property created in personal goods and chattels to take place in expectancy, for they were considered to be of so transitory a nature, and so liable to be lost, destroyed, or otherwise impaired, that future interests in them were not in the law treated as of any account.[2] An exception was permitted at an early period as to goods and chattels given by will in remainder, after a bequest for life. But that was at first allowed only where the use of the goods or chattels, and not the goods or chattels themselves, was given to the first legatee, the property being supposed to continue all the time in the executor of the testator.[3] That distinction has since been disregarded, and the limitation in remainder is now equally respected, whether the first legatee takes the use, or the goods and chattels themselves for life.[4]

§ 1163. **Same.** — In all cases of this sort where there is a future right of enjoyment of personal property, Courts of Equity

[1] Ante, § 810; 1 Eq. Abridg. 360, pl. 4; Clark *v.* Clark, 8 Paige, R. 152.

[2] 2 Black. Comm. 398; 1 Eq. Abridg. pl. 4; Fearne on Conting. Rem. by Butler (7th ed.), pp. 401 to 407; Id. 413, 414.

[3] Ibid.; Hyde *v.* Parrat, 1 P. Will. 1, and cases there cited; Tissen *v.* Tissen, 1 P. Will. 502.

[4] Anon. 2 Freem. R. 145; Id. 206; Hyde *v.* Parrat, 1 P. Will. 1, 6; Upwell *v.* Halsey, 1 P. Will. 651; Vachel *v.* Vachel, 1 Cas. Chan. 129, 130; Foley *v.* Burnell, 1 Bro. Ch. Rep. 274, 278; Co. Litt. 20 (*a*); Harg. note (5); Fearne on Conting. Rem. and Exec. Dev. (7th ed.), by Butler, pp. 401 to 407; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4. This subject is discussed very much at large in Mr. Fearne's Essay on Contingent Remainders and Executory Devises, from pp. 401 to 407 (7th ed.), by Butler. There is in the same work a very valuable discussion upon the rights of the tenant for life in the goods and chattels, and how far the same may be taken in execution by his creditors. The result of the whole discussion seems to be that the creditors cannot subject the property to their claims beyond the rights of the tenant for life therein. Mr. Fearne seems to consider that the validity of executory dispositions of personal chattels (i. e. in remainder after a life estate) was originally founded and still rests on the doctrine and interposition of Courts of Equity. But he admits that in chattels real the right is recognized at law. Fearne on Conting. Rem. pp. 412, 413 (7th ed.); Matthew Manning's case, 8 Co. R. 95; Lampet's case, 10 Co. R. 47; post, § 1166, note. See also 2 Kent, Comm. Lect. 35, pp. 352, 353; 1 Chitty, Gen. Pract. 101; Bacon, Abridg. Uses and Trusts, G. 2, p. 109 (Gwillim's ed.); Wright *v.* Cartwright, 1 Burr. 282; Clark *v.* Clark, 8 Paige, R. 152.

will now interpose and grant relief upon a bill quia timet, where there is any danger of loss, or deterioration, or injury to it, in the hands of the party who is entitled to the present possession. We have already had occasion to take notice of the manner in which this remedial jurisdiction is applied in cases of legacies, whether pecuniary or specific, and whether vested or contingent.[1] The same doctrine is applied to cases of annuities charged on the personal estate.[2]

§ 1164. **Same.** — Indeed the doctrine may now be deemed well established, that the bequest of the use of the residue of the personal estate of the testator to a legatee for life, or for a shorter period, with a bequest over to other legatees, does not give the legatee for life, or for a shorter period, the right to the possession of the fund in the meantime. But the executor is entitled to retain the fund in his own hands and to pay over the income thereof to the legatee for life, or for a shorter period, as it occurs from time to time. And at all events if he suffers the fund to go into the possession of such legatee, to enable him to enjoy the due use or income thereof, he is bound to take ample security for the safe return of the fund at the termination of the particular estate therein. If the executor omits to take such security, he may become personally responsible for any loss accruing thereby.[3]

§ 1165. **Same.** — The same remedial justice will be applied to other cases as well as to legacies and personal annuities. Thus for instance where a future interest in personal property is assigned by the owner to his creditors, the latter may come into a Court of Equity to have the property secured to their future use.[4] On one occasion of this sort Lord Hardwicke said that nothing was better settled than that whenever a demand was made out of assets certainly due but payable at a future time, the person entitled thereto might come against the executor to have it secured for his benefit and set apart in the meantime, that he might not be obliged to pursue those assets through several hands. Nor is

[1] Ante, §§ 809, 935; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, and note (*d*); 1 Madd. Ch. Pr. 178 to 181; Fearne on Conting. Rem. p. 413 (7th ed.), by Butler; Id. 414; Covenhoven *v.* Shuler, 2 Paige, R. 123; Clark *v.* Clark, 8 Paige, R. 152. Compare Van Duyne *v.* Vreeland, 1 Beasl. 142.

[2] Batten *v.* Earnley, 2 P. Will. 163; Slanning *v.* Style, 3 P. Will. 336, 337.

[3] Clark *v.* Clark, 8 Paige, R. 152, 160; Covenhoven *v.* Shuler, 2 Paige, R. 122.

[4] Johnson *v.* Mills, 1 Ves. 282, 283.

there any ground for the distinction taken between a legacy and a demand by contract.[1]

§ 1166. **Same.** — Upon the same ground, where under marriage articles the plaintiff, in case she survived her husband, had a contingent interest in certain South Sea annuities and a certain promissory note, which were specifically appointed for the payment of the same to be allowed her, and the defendant had threatened to aliene the property and securities, on a bill quia timet a decree was made that the defendant should give security to have the same forthcoming.[2]

[1] Johnson *v.* Mills, 1 Ves. 282, 283. See Van Duyne *v.* Vreeland, 1 Beasl. 142. So where a life interest in personalty is sold on execution against the owner of such interest, and the purchaser claims the absolute property, the remainderman may in equity compel the purchaser to give security for the production of the property on the expiration of his interest. McDougal *v.* Armstrong, 6 Humph. 428; Bowling *v.* Bowling, 6 B. Mon. 31.

[2] Flight *v.* Cook, 2 Ves. 619. This doctrine is discussed at large in Eq. Abridg. 360, pl. 4, and the following extract shows the gradual establishment of it: "But what seems most proper to be inquired into under this head is, the reason and practice of limiting remainders in personal goods or chattels; for they in their own nature seem incapable of such a limitation, because being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and also the exigencies of trade and commerce requiring a frequent circulation thereof, it would put a stop to all trading, and occasion perpetual suits and quarrels, if such limitations were generally tolerated and allowed. But yet in last wills and testaments such limitations over of personal goods or chattels have sometimes prevailed, especially where the first devisee had only the use or occupation thereof devised to him. For then they held the property to continue in the executors of the testator, and that the first devisee had no power to alter or to take it from them. Yet in either case, if the first devisee did actually give, grant, or sell such personal goods or chattels, the judges would very rarely allow of actions to be brought by those in reminder for recovery thereof. Hence it came to pass that it was a long while ere the judges of the common law could be prevailed on to have any regard for a devise over, even of a chattel real, or a term for years after an estate for life limited thereon; because the estate for life being in the eye of the law of greater regard and consideration than an estate for years, they thought he who had it devised to him for life had therein included all that the devisor had a power to dispose of. And though they have now gained that point upon the ancient common law by establishing such remainders, and have thereby brought that branch out of the chancery (where they frequently helped the remainder-man by allowing of bills to compel the first devisee to give security), yet it was at first introduced into the common law under the new name of Executory Devise, and took all the sanction it has since received from thence, and not as a remainder (for which vide title Devise). But as to personal goods and chattels the common law has provided no sufficient remedy for the devisee in the remainder of them, either during the life of the first devisee or after his death; therefore the Chancery seems to have taken that branch to themselves in lieu of the other, which they lost, and to allow of the same

§ 1167. **Same.** — So where a party seised of lands in fee grants a rent-charge in fee issuing thereout, and afterwards devises the lands to A for life with remainder to B in fee, B may maintain a bill quia timet to compel A to pay the arrears during his life for fear that otherwise the whole would fall on his reversionary estate.[1] And the like principle would apply under like circumstances to a legacy payable in futuro and chargeable on land, to compel the tenant for life to pay or secure a proportion of the legacy.[2]

§ 1168. **Application of Bills Quia Timet to Cases of Sureties.** — Another case of the application of the remedial justice of Courts of Equity by a bill quia timet is in cases of sureties of debtors and others. We have already seen that if a surety after the debt has become due has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he may file a bill of this sort to compel the debtor to discharge the debt or other obligation for which the surety is responsible.[3] Nay it has been insisted (as we have also seen) that the surety may come into equity and compel the creditor to sue the principal and collect the debt from him in discharge of the surety, at least if the latter will undertake to indemnify the creditor for the risk, delay, and expense of the suit.[4]

§ 1169. **Specific Performance of General Covenant to Indemnify Will Be Decreed, though It Sounds in Damages Only.** — So Courts of Equity will decree the specific performance of a general covenant to indemnify, although it sounds in damages

remedy for such devisee in remainder of personal goods and chattels as they before did to the devisee in remainder of chattels real, or terms for years." See also Fearne on Conting. Rem. and Ex. Dev. pp. 401 to 415, by Butler (7th ed.); ante, §§ 1161, 1162; Bacon, Abridg. Uses and Trusts, G. 2, by Gwillim.

[1] Hayes *v.* Hayes, 1 Ch. Cas. 223. [2] Ibid.

[3] Ante, §§ 451, 1011; Mitf. Eq. Pl. by Jeremy, p. 148; King *v.* Baldwin, 2 John. Ch. R. 561, 562; Hayes *v.* Ward, 4 John. Ch. R. 132; Nisbet *v.* Smith, 2 Bro. Ch. R. 581 (Belt's ed.) and note (5); Ranelaugh *v.* Hayes, 1 Vern. 190; Norton *v.* Reid, 11 S. C. 593.

[4] Ante, §§ 451, 860, 1002, 1010, 1011; King *v.* Baldwin, 2 John. Ch. R. 561, 562; Hayes *v.* Ward, 4 John. Ch. R. 132. The cases of Rees *v.* Berrington, 2 Ves. Jr. 540, and Nisbet *v.* Smith, 2 Bro. Ch. R. 578, do not seem to establish this principle of relief against the creditor. But in the case of Wright *v.* Simpson (6 Ves. 734), Lord Eldon seems to admit that the surety might have a right to compel the creditor to proceed against the debtor under some circumstances. But then in such a case the surety is compellable to deposit the money in court for the payment of the creditor. So that in fact it is but the case of an indirect subrogation to the rights of the creditor upon a virtual payment of the debt by such a deposit. See Hayes *v.* Ward, 4 John. Ch. R. 129 to 134, where this subject is much discussed, and the principles of the Roman law are fully stated.

only, upon the same principle that they will entertain a bill quia timet; and this not only at the instance of the original covenantee, but of his executors and administrators.[1] Thus where a party had assigned several shares of the excise to A, and the latter covenanted to save the assignor harmless in respect to that assignment, and to stand in his place touching the payments to the king and other matters, and afterwards the king sued the assignor for money which the assignee ought to have paid, the court decreed that the agreement should be specifically performed, and referred it to a master, and directed that toties quoties any breach should happen, he should report the same specially to the court, so that the court might, if there should be occasion, direct a trial at law in a quantum damnificatus. The court further decreed that the assignee should clear the assignor from all these suits and incumbrances within a reasonable time.[2] The case was compared to that of a counter bond, where, although the surety is not molested or troubled for the debt, yet after the money becomes payable the court will decree the principal to pay it.[3]

§ 1170. [**Appointment of a Receiver as the Sole Relief Sought.** — The appointment of a receiver is a provisional remedy and is not to be allowed in the absence of some independent equity growing out of or in some way connected with the action. This remedy is usually concurrent with the application for an injunction, and where applied for, the utmost caution and diligence should be observed by the court to prevent an undue or unwarranted injury to the defendant. As a right, there is no such a cause of action as the appointment of a receiver. The appointment is most generally incidental to some other right, the protection of the property pendente lite, or to enforce the judgment of

[1] Champion *v.* Brown, 6 John. Ch. R. 406; ante, § 1011. Griffin *v.* Orman, 9 Fla. 22. So one who has subscribed for stock in his own name, but in trust for another, may sue the cestui que trust in equity for indemnity against calls. Hemming *v.* Maddick, L. R. 7 Ch. 395.

[2] Ranelaugh *v.* Hayes, 1 Vern. R. 189; s. c. 2 Ch. Cas. 146; Mitf. Eq. Pl. by Jeremy, 148. In Refeld *v.* Woodfolk, 63 U. S. 318, 16 L. Ed. 370, the plaintiff had bought land which he knew was mortgaged, under a contract that on payment of the purchase-price the vendor should convey "with general warranty of title." He had taken possession, made valuable improvements, and paid the price; but it was held that he could not in equity compel the executor and heir of the vendor to remove the incumbrance, or make a deposit by way of indemnity.

[3] Lee *v.* Rook, Moseley, R. 318; Pember *v.* Mathers, 1 Bro. Ch. R. 53; Champion *v.* Brown, 6 John. Ch. R. 405, 406; ante, §§ 451, 1002, 1010, 1168.

the court. The appointment will be refused as a rule where there is an absence of some other equitable right involved. The appointment of a receiver and authorizing him to take possession of property is the exercise of a higher and more far-reaching power than the granting of an injunction, and should not be resorted to where an injunction will as well serve the purpose of the judicial proceeding, and to the same extent protect the rights of the complainant.[1]]

§ 1171. **Application of Bills Quia Timet.** — There are other cases where a remedial justice is applied in the nature of bills quia timet; as where Courts of Equity interpose to prevent the waste, or destruction, or deterioration of property, pendente lite, or to prevent irreparable mischief. But these cases will more properly come under review in our subsequent inquiries in matters of injunction.[2]

[1] Schack *v.* McKey, 97 Ill. App. 460; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660; State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; Smiley *v.* Sioux Beet Syrup Co., 71 Neb. 581, 101 N. W. 253; Winona Traction Co. *v.* Collins, 162 Ind. 693, 69 N. E. 998; Bufkin *v.* Boyce, 104 Ind. 53, 3 N. E. 615; Hayes *v.* Jasper Land Co., 147 Ala. 340, 41 So. 909.

[2] See also Jeremy on Eq. Jurisd. B. 3, ch. 2, § 2, pp. 353, 354; 1 Madd. Ch. Pr. 183, 184.

CHAPTER XXV

BILLS OF PEACE

§ 1172. **Bills of Peace.** — We come in the next place to the consideration of what are technically called BILLS OF PEACE.[1] These bills sometimes bear a resemblance to bills quia timet, which latter (as has been already stated) seem to have been founded upon analogy to certain proceedings at the common law quia timet.[2] Bills quia timet however are quite distinguishable from the former in several respects, and are always used as a preventive process before a suit is actually instituted; whereas bills of peace, although sometimes brought before any suit is instituted to try a right, are most generally brought after the right has been tried at law. It is not my design in this place to enter upon the subject of the cases generally in which Courts of Equity will decree a perpetual injunction, for that will more properly be examined under another head,[3] but simply to treat of bills seeking such an injunction and strictly falling under the denomination of bills of peace.

§ 1173. **Bills of Peace Defined.** — By a bill of peace we are to understand a bill brought by a person to establish and perpetuate a right which he claims, and which from its nature may be controverted by different persons, at different times, and by different actions; or where separate attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the party should be quieted in the right if it is already sufficiently established, or if it should be sufficiently established under the direction of the court.[4] The obvious design of such a bill is to procure repose from perpetual litigation, and therefore it is justly called a bill of peace. The general doctrine of public policy

[1] See Mitf. Eq. Pl. by Jeremy, 145, 148; Co. Litt. 100 (*a*).
[2] Ante, § 1141.
[3] Post, §§ 1193 to 1290.
[4] See Eldridge *v.* Hill, 2 John. Ch. R. 281, 282; Alexander *v.* Pendleton, 12 U. S. 462, 3 L. Ed. 624; 3 Wooddes. Lect. 56, pp. 416, 417.

which in some form or other may be found in the jurisprudence of every civilized country is, that an end ought to be put to litigation, and above all to fruitless litigation; "Interest reipublicæ ut sit finis litium." If suits might be perpetually brought to litigate the same questions between the same parties or their privies as often as either should choose, it is obvious that remedial justice would soon become a mere mockery; for the termination of one suit would only become the signal for the institution of a new one, and the expenses might become ruinous to all the parties. The obvious ground of the jurisdiction of Courts of Equity in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits.[1]

§ 1174. **Use of Bill of Peace to Prevent Multiplicity of Suits.** — One class of cases to which this remedial process is properly applied, is where there is one general right to be established against a great number of persons. And it may be resorted to either where one person claims or defends a right against many, or where many claim or defend a right against one.[2] In such

[1] Caro *v.* Pensacola, 19 Fla. 766; Steigerwalt *v.* Rife, 9 Pa. Super. Ct. Rep. 363; Eureka R. Co. *v.* California R. Co., 109 Fed. 509, 48 C. C. A. 517; Smith *v.* Bank of New England, 69 N. H. 254, 45 Atl. 1082.

The mere possibility that a multiplicity of suits may occur, if there be colorable ground for them, is not sufficient to warrant the maintenance of the bill. Pechstein *v.* Smith, 14 App. D. C. 27.

The multiplicity of suits which confers jurisdiction in equity is a multiplicity of suits to which the complainant will be a party. Suits in which the defendant has no interest furnish no ground for his resort to equity. Thomas *v.* Council Bluffs Canning Co., 92 Fed. 422, 34 C. C. A. 428.

Where all of the defendants are trespassers and can be joined in one suit, the bill does not lie. McGuire *v.* Pensacola City Co., 105 Fed. 677, 44 C. C. A. 670.

The party or privies who invoke this jurisdiction must have some prior legal or equitable right in the premises. It cannot be invoked for the mere prevention of a multiplicity of suits by bringing into one litigation numerous pending actions by a party who is without cause of action or ground of defence. Turner *v.* City of Mobile, 135 Ala. 73, 33 So. 132.

The jurisdiction may not be invoked where it appears that there is a simple allegation that a multiplicity of actions will lie, and it is the purpose, to save expenses, and where the bill, if granted, would promote convenience, would deprive the defendant of a substantial right. Booneville Natl. Bank *v.* Blakey, 166 Ind. 427, 76 N. E. 529; Pennsylvania Coal Co. *v.* Jones, 30 Pa. Super. Ct. Rep. 358.

Questions between landlord and tenant can be finally disposed of in one action, and where the tenant has been dispossessed there is no reason for a bill of peace. Williams *v.* Matthewson, 73 N. H. 242, 60 Atl. 687.

[2] Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 343; Eldridge *v.* Hill, 2 John. Ch. R. 281; Alexander *v.* Pendleton, 12 U. S. 462, 3 L. Ed. 624; Sheffield Water Works *v.* Yeomans, L. R. 2 Ch. 8; Saratoga *v.* Dryor, 77 N. Y. 219.

cases Courts of Equity interpose in order to prevent multiplicity of suits;[1] for as each separate party may sue or may be sued in a separate action at law, and each suit would only decide the particular right in question between the plaintiff and defendant in that action, litigation might become interminable. Courts of Equity therefore, having a power to bring all the parties before them, will at once proceed to the ascertainment of the general right; and if it be necessary, they will ascertain it by an action or issue at law, and then make a decree finally binding upon all the parties.[2]

[1] Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730; Caro *v.* Pensacola, 19 Fla. 766; Ewelme Hospital *v.* Andover, 1 Vern. 266; Hanson *v.* Gardiner, 7 Ves. 309, 310; Ware *v.* Horwood, 14 Ves. 32, 33; Dilley *v.* Doig, 2 Ves. Jr. 486; Cooper, Eq. Pl. Introd. xxxiv; Eldridge *v.* Hill, 2 John. Ch. R. 281.

[2] Eden on Injunctions, ch. 16, pp. 358, 359, 360; Cooper, Eq. Pl. ch. 3, pp. 153, 154; Gilb. Forum Roman. 195; 1 Madd. Ch. Pr. 140, 141; 2 Eq. Abridg. 172, pl. 3, 5; Mitf. Eq. Pl. by Jeremy, 147; Tenham *v.* Herbert, 2 Atk. R. 483, 484; Eldridge *v.* Hill, 2 John. Ch. R. 281, 282; Trustees of Huntington *v.* Nicoll, 3 John. R. 566, 589, 590, 591, 595, 602, 603. The nature of this jurisdiction is thus stated by Lord Redesdale: "Courts of Equity will also prevent multiplicity of suits; and the cases in which it is attempted, and the means used for that purpose, are various. With this view, where one general legal right is claimed against several distinct persons, a bill may be brought to establish the right. Thus where a right of fishery was claimed by a corporation throughout the course of a considerable river, and was opposed by the lords of manors and owners of land adjoining, a bill was entertained to establish the right against the several opponents, and a demurrer was overruled. As the object of such bills is to prevent multiplicity of suits by determining the rights of the parties upon issues directed by the court, if necessary for its information, instead of suffering the parties to be harassed by a number of separate suits, in which each suit would only determine the particular right in question between the plaintiff and the defendant in it, such a bill can scarcely be sustained where a right is disputed between two persons only, until the right has been tried and decided upon at law. Indeed in most cases it is held that the plaintiff ought to establish his right by a determination of a Court of Law in his favor before he files his bill in equity. And if he has not so done, and the right he claims has not the sanction of long possession, and he has any means of trying the matter at law, a demurrer will hold. If he has not been actually interrupted or dispossessed, so that he has had no opportunity of trying his right, he may bring a bill to establish it, though he has not previously recovered in affirmance of it at law, and in such a case a demurrer has been overruled." Mitf. Eq. Pl. by Jeremy, 145, 146; Smith *v.* Bank of New England, 69 N. H. 254, 45 Atl. 1082; Wyman *v.* Bowman, 127 Fed. 257, 62 C. C. A. 189; Rosenbaum *v.* Kershaw, 40 Ill. App. 659.

There is no jurisdiction where it appears that the right disputed is between two persons only, and this right is not for themselves and all others in interest, but for themselves alone, and that right has not been established at law. Cleland *v.* Campbell, 78 Ill. App. 624.

Where a county has collected the total tax assessed against property,

§ 1175. **Same.** — Bills of this nature may be brought by a parson for tithes against his parishioners; by parishioners against a parson to establish a modus; by a lord against tenants for an encroachment under color of a common right, or by tenants against the lord for disturbance of a common right; by a party in interest to establish a toll due by custom; by a like party to establish the right to profits of a fair, there being several claimants; by a lord to establish an enclosure which he has approved under the statute of Merton and which his tenants throw down, although sufficient common of pasture is left.[1]

§ 1176. **Same.** — So where a party has possession and claims a right of fishery for a considerable distance on a river, and the riparian proprietors set up several adverse rights, he may have a bill of peace against all of them to establish his right and quiet his possession.[2] So a bill of peace will lie to settle the amount of a general fine to be paid by all the copyhold tenants of a manor. So it will lie to establish a right of common of the freehold tenants of a manor.[3] So it will lie to establish a duty claimed by a munici-

one-half of which belongs to it and the other half to the city included within its boundaries, equity has jurisdiction, where otherwise it would be necessary for the city to bring a separate suit against each tax-payer. County Commrs. of Frederick County *v.* Mayor, etc. of Frederick, 88 Md. 654, 42 Atl. 218.

A number of complainants who have identical claims against a number of public service corporations, who are engaged in an unjust discrimination, may sue in a single action. Tift *v.* Southern R. Co., 123 Fed. 795.

[1] How *v.* Tenants of Broomsgrove, 1 Vern. 22; Ewelme Hospital *v.* Andover, 1 Vern. 266; Pawlet *v.* Ingres, 1 Vern. 308; Brown *v.* Vermuden, 1 Ch. Cas. 272; Rudge *v.* Hopkins, 2 Eq. Abridg. p. 170, pl. 27; Conyers *v.* Abergavenny, 1 Atk. 284, 285; Poore *v.* Clark, 2 Atk. 515; Weeks *v.* Staker, 2 Vern. 301; Arthington *v.* Fawkes, 2 Vern. 356; Corporation of Carlisle *v.* Wilson, 13 Ves. 279, 280; Hanson *v.* Gardiner, 7 Ves. 305, 309, 310; Duke of Norfolk *v.* Myers, 4 Madd. Rep. 50, 117.

[2] The inhabitants of a town whose rights have been infringed upon by encroachments built out upon the street have the right to maintain a single suit to remedy the evil, Stockwell *v.* Fitzgerald, 70 Vt. 468, 41 Atl. 504; or where a number of persons are interested as riparian owners in the protection of their rights in a stream, Crawford *v.* Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

That several parties to a negotiable instrument, alleged to have been procured by fraud, may each be sued upon his endorsement, is no ground for a suit in equity. Johnson *v.* Swanke, 128 Wis. 68, 107 N. W. 481, 5 L. R. A. (N. S.) 1048; Mayor of York *v.* Pilkington, 1 Atk. 282; Tenham *v.* Herbert, 2 Atk. R. 483. See New River Co. *v.* Graves, 2 Vern. 431, 432.

[3] Middleton *v.* Jackson, 1 Ch. Rep. 18 [33]; Popham *v.* Lancaster, 1 Ch. Rep. [96]; Cowper *v.* Clerk, 3 P. Will. 157; Powell *v.* Powis, 1 Younge & Jerv. 159.

pal corporation against many persons, although there is no privity between them.[1]

§ 1177. **There Must Be a Clear Right Affecting Many Persons.** — But to entitle a party to maintain a bill of peace, it must be clear that there is a right claimed which affects many persons, and that a suitable number of parties in interest are brought before the court; for if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed, for it cannot then conclude any persons but the very defendants.[2]

§ 1178. **Perpetual Injunction Will Not Issue to Protect Private Rights as against the Public.** — It seems too that Courts of Equity will not upon a bill of this nature decree a perpetual injunction for the establishment or the enjoyment of the right of a party who claims in contradiction to a public right; as if he claims an exclusive right to a highway or to a common navigable river, or an exclusive right to a rope ferry across a river, for it is said that this would be to enjoin all the people of the State or country.[3] But the true principle is that Courts of Equity will not in such cases upon prineiples of public policy intercept the assertion of public rights.

§ 1179. **Use of Bill of Peace to Prevent Repeated Trials of Same Cause.** — Another class of cases to which bills of peace are now ordinarily applied, is where the plaintiff has after repeated and satisfactory trials established his right at law, and yet is in danger of further litigation and obstruction to his right from new attempts to controvert it. Under such circumstances Courts of Equity will interfere and grant a perpetual injunction to quiet the possession of the plaintiff and to suppress future litigation of the right.[4] This exercise of jurisdiction was formerly much ques-

[1] City of London *v.* Perkins, 4 Bro. Parl. R. 157; 1 Madd. Ch. Pr. 138, 139; Mayor of York *v.* Pilkington, 1 Atk. R. 284; Tenham *v.* Herbert, 2 Atk. 483, 484.

[2] Disney *v.* Robertson, Bunb. R. 41; Cowper *v.* Clerk, 3 P. Will. 157; Welby *v.* Duke of Rutland, 6 Bro. Parl. R. 575; s. c. 3 Bro. Parl. Cas. by Tomlins, 39; Mitford, Eq. Pl. by Jeremy, 169, 170; Cooper, Eq. Pl. ch. 1, p. 41; 1 Madd. Ch. Pr. 140; Weller *v.* Smeaton, 1 Bro. Ch. R. 572; Baker *v.* Rogers, 2 Eq. Abridg. 171, pl. 2; Select Cas. in Ch. 74, 75; Alexander *v.* Pendleton, 12 U. S. 462, 3 L. Ed. 624; Moses *v.* Mobile, 52 Ala. 198.

[3] 1 Madd. Ch. Pr. 139; Hilton *v.* Lord Scarborough, 2 Eq. Abridg. 171, pl. 2; Mitf. Eq. Pl. by Jeremy, 148. But a ferryman, having an exclusive right of ferriage, may have a bill of peace against any who infringe upon his right. Letton *v.* Goodden, L. R. 2 Eq. 123; McRoberts *v.* Washburne, 10 Minn. 23. See post, § 1257.

[4] See Trustees of Huntington *v.* Nicoll, 3 John. R. 589, 590, 591, 595,

tioned. Lord Cowper, in a celebrated case where the title to land had been five several times tried in an ejectment and five verdicts given in favor of the plaintiff, refused to sustain the jurisdiction for a perpetual injunction, and said that the application was new and did not fall under the general notion of a bill of peace, as this was only a suit between A and B, and one man is able to contend against another. But his decision was overruled by the House of Lords, and a perpetual injunction was decreed, upon the ground that it was the only adequate means of suppressing oppressive litigation and irreparable mischief.[1] And this doctrine has ever since been steadily adhered to. However, Courts of Equity will not interfere in such cases before a trial at law, nor until the right has been satisfactorily established at law. But if the right is satisfactorily established, it is not material what number of trials have taken place, whether two only or more.[2]

§ 1180. **Same.** — These seem to be the only classes of cases in which bills of peace, technically so called, will lie.[3] But there are other cases bearing a close analogy to them in which a like relief is granted, as for instance cases of confusion of boundaries, which however require some superinduced equity, and cases of

602; Alexander *v.* Pendleton, 12 U. S. 462, 3 L. Ed. 624; Com. Dig. Chancery, D. 13; Earl of Bath *v.* Sherwin, Prec. Ch. 261; s. c. 10 Mod. R. 1; Mitf. Eq. Pl. by Jeremy, 143, 144; Eden on Injunct. ch. 16, p. 356; Eldridge *v.* Hill, 2 John. Ch. R. 281. Lord Redesdale thus describes this jurisdiction: "In many cases the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege the Courts of Equity have assumed a jurisdiction. Thus actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the Courts of Equity have interfered, and after repeated trials and satisfactory determination of questions, have granted perpetual injunctions to restrain further litigation, and thus have in some degree put that restraint upon litigation which is the policy of the common law in the case of real actions." Mitford, Eq. Pl. by Jeremy, 143, 144.

[1] Earl of Bath *v.* Sherwin, Prec. Ch. 261; s. c. 10 Mod. 1; s. c. 1 Bro. Parl. Cas. 266, 270 [2 Bro. Parl. Cas. by Tomlins, 217]; Leighton *v.* Leighton, 1 P. Will. 671, 672; Trustees of Huntington *v.* Nicoll, 3 John. Rep. 566, 589, 590, 591, 595, 601, 602; Mitf. Eq. Pl. by Jeremy, 143, 144; Gilb. Forum Roman. 195.

[2] Devonsher *v.* Newenham, 2 Sch. & Lefr. 208, 209; Leighton *v.* Leighton, 1 P. Will. 671, 672; Tenham *v.* Herbert, 2 Atk. 483; Earl of Darlington *v.* Bowes, 1 Eden, R. 270, 271, 272; Eden on Injunctions, ch. 16, pp. 354, 355; Eldridge *v.* Hill, 2 John. Ch. R. 281, 282; Weller *v.* Smeaton, 1 Cox, R. 102; s. c. 1 Bro. Ch. R. 573; Alexander *v.* Pendleton, 12 U. S. 462, 3 L. Ed. 624; Patterson *v.* McCamant, 28 Mo. 210; Knowles *v.* Inches, 12 Cal. 212.

[3] Eldridge *v.* Hill, 2 John. Ch. R. 281, 282.

quit-rents where the remedy at law is either lost or deficient.[1] Cases of mines and collieries may also be mentioned where Courts of Equity will entertain bills in the nature of bills quia timet and bills of peace, where there is danger that the mine may be ruined in the meantime before the right can be established; and upon such a bill the court will grant an adequate remedy by quieting the party in the enjoyment of his right by restoring things to their old condition, and by establishing the right by a decree.[2] Other cases also where the object of the bill is to prevent vexatious suits will occur under the head of Injunctions.[3]

[1] Eden on Injunctions, ch. 16, pp. 361, 362; ante, § 842; Com. Dig. Chancery, D. 13.

[2] Falmouth (Lord) *v.* Innys, Moseley, R. 87, 89; post, § 1259; see also Alexander *v.* Pendleton, 12 U. S. 462, 3 L. Ed. 624. In Bush *v.* Western, Prec. Ch. 530, the plaintiff had been in possession of a water-course upwards of sixty years, and the defendant claimed the land through which the water-course ran, under a foreclosed mortgage. The defendant obstructed the water-course, and the plaintiff brought a bill for an injunction to quiet his, the plaintiff's, possession, and it was held maintainable, notwithstanding there was a remedy at law and the title had not been established at law.

[3] Post, §§ 1253 to 1260.

CHAPTER XXVI

INJUNCTION

§ 1181. **Injunctions.** — The last subject which is proposed to be treated under the second head of concurrent equity jurisdiction, namely, where the peculiar remedies afforded by Courts of Equity constitute the principal although not the sole ground of jurisdiction, is that of INJUNCTIONS. A writ of injunction may be described to be a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ.[1] The most common sort

[1] Gilb. Forum Rom. ch. 11, p. 192, &c.; Eden on Injunct. ch. 14, p. 290, &c.; 1 Wooddes. Lect. 7, p. 206. It has been remarked by Mr. Eden that wherever a plaintiff appears entitled to equitable relief, if it consists in restraining the commission or the continuance of some act of the defendant, a Court of Equity administers that relief by injunction. In many cases it enforces it by means of the process of the writ of injunction, properly so called. But he proceeds to remark: "But as the known forms of that remedy are by no means adapted to every case in which the court has jurisdiction to interpose, the prohibition has in numerous cases been issued and conveyed in the shape merely of an order in the nature of an injunction. And as the court treats the neglect or disobedience of all orders as a contempt, and enforces the performance of them by imprisonment, the object sought is equally attained by an order of this nature as by a writ. The distinction is consequently disregarded in practice, and these orders, though not enforced by means of the writ of injunction, have indiscriminately obtained the name of injunctions." Eden on Injunct. ch. 14, p. 290.

Injunction as a Primary Remedy. — The remedy of injunction, like that of specific performance, proceeds upon the theory that there are duties the performance of which, as they stand, ought to be insisted upon, — duties in regard to which an election, as an equivalent, to violate the same upon the terms of making compensation cannot be permitted; not indeed that all the duties the violation of which may be enjoined, may be enjoined without regard to the question whether damages for a violation could be accurately computed, but that there *are* duties of a peremptory nature within the operation of the remedy of injunction as well as within that of specific performance. These duties may here, as well as in the law of specific performance, be termed primary, since they are not substitutional.

The only difference in this respect between the two remedies is that specific performance is directed to compelling performance of an active

duty, while injunction (though sometimes in a subsidiary way requiring an act to be done), is generally directed to preventing the violation of a negative one. This difference however is very great. The remedy of specific performance, relating as it does to active duties, deals in the main only with contracts; while the remedy of injunction, having to do with negative duties, deals not only with contracts, but also with torts, and with many other subjects, among them subjects of a purely equitable nature.

Indeed the difference between the two remedies is still greater. We have seen how far specific performance is a primary remedy, how far, that is, it may be applied without regard to the question whether damages could be accurately computed for a breach of the duty in question, — that this is perhaps the case only of contracts for the sale, lease, or disposal otherwise of land. Injunction on the other hand, besides being a primary remedy when sought in aid of the enforcement of a contract relating to the disposal of land, may be granted in a great many other cases without reference to the question of the computation of damages. Some of the most striking examples may be noticed here: —

1. Perhaps it is on the same ground that specific performance of contracts relating to real property, i. e. (as really seems to be the case; ante, p. 32, note), because it *is* real property, that an injunction may be had to restrain the removal of true fixtures from premises without regard to the question of compensation. Pugh *v.* Arton, L. R. 8 Eq. 626; Mather *v.* Fraser, 2 Kay & J. 536.

2. Injunction is a remedy for preventing the breach of the duty not to take an unwarrantable advantage of the process of the law, — a duty partly legal and partly equitable only; and here too the remedy is in most cases primary. Thus, as the author has shown, a plaintiff in a judgment which has been compromised, or satisfied in any way, without mention of record, may be enjoined from levying execution thereon. Infra, § 1196. So equity will restrain a threatened levy of execution upon property not subject thereto. O'Hare *v.* Downing, 130 Mass. 16; Hinchley *v.* Greany, 118 Mass. 595; Tucker *v.* Kenniston, 47 N. H. 267. Or a sale thereof after levy. Kenyon *v.* Clarke, 2 R. I. 67; Kendall *v.* Dow, 46 Ga. 607; Marlin *v.* Jewell, 37 Md. 560. So again if the injured party can show that he was prevented from making a good defence by fraud, accident, or mistake, without fault of his own. Infra, § 1197; Clark *v.* Ewing, 93 Ill. 572.

3. The next case that may be noticed relates to the alienation of personalty. It is laid down, apparently without reference to the question whether damages might not be computed, that where the title to stock is in controversy under different wills the transfer of it may be restrained pendente lite; so where the title to stock is controverted between principal and agent. Western R. Co. *v.* Bayne, 75 N. Y. 1. So of a wrongful attempt to transfer diamonds or other valuables. Infra, § 1232. A striking example in this connection is found in the rule that the holder of a negotiable note, who has obtained it from the maker by fraud, may be enjoined from negotiating the same. Infra, § 1286. Here computation of the damages of a breach of the duty enjoined is immediately at hand. Compare also Western R. Co. *v.* Bayne, supra.

4. Another class of examples may be found in the duties of the officers of municipal or of private corporations in respect of collecting and paying out moneys and incurring debts. A tax-payer may in some states have an injunction to restrain a municipality, through its proper officers, from levying upon him an illegal tax. Ante, p. 13, note. Or (and this probably everywhere) from incurring indebtedness beyond that permitted by law. Springfield *v.* Edwards, 84 Ill. 626. Or from appropri-

of injunctions is that which operates as a restraint upon the party in the exercise of his real or supposed rights; and this is sometimes

ating the public money to a purpose not authorized by law. Crampton *v.* Zabriskie, 101 U. S. 601, 25 U. S. 1070; Fitzgerald *v.* Holmes, 92 Ill. 372; Terretts *v.* Sharon, 34 Conn. 105; Harrison *v.* McCarty, 27 Ind. 475. But see Johnson *v.* Thorndike, 56 Maine, 32. Or generally from creating an illegal debt. Crampton *v.* Zabriskie, supra; Hudson *v.* Marietta, 64 Ga. 286. But see Moore *v.* Fessenbeck, 84 Ill. 422, a case governed by statute.

5. Among cases of duties of a purely equitable nature may be mentioned those referred to by the author in § 1285; the right to enjoin sales which would be inequitable, "as in cases of trusts and special authorities, where the party is abusing his trust or authority," and, where there is danger of the misapplication of the proceeds of trust sales, the right to restrain the purchaser from paying over the purchase money.

These examples will be sufficient to show how wide is the range of subjects over which the law extends the remedy of injunction as a primary mode of relief; and the tendency is clearly, and, it seems, rightly on the whole, towards enlarging the jurisdiction in this respect. But the most noticeable fact is the distinction which the law has silently drawn between the two compulsory remedies under consideration. Injunction, as has been shown, has in some way far outrun the companion remedy of specific performance, and made a deep incursion into the bounds of the common-law doctrine of compensation. So far as the two remedies have run side by side, so that what would operate to make specific performance, e. g. a primary remedy, would operate in the same way upon injunction, as where the question concerns the conveyance of land, the course of the last-named remedy may be easily understood. But (to drop the figure) on what principle is it that an injunction may be granted as a primary remedy in other cases?

It cannot be that any such test as whether damages can be accurately computed is to be applied in all cases, consistently with what has gone before; the examples above given clearly show that. Nor can the test be the mere existence of a negative duty on the part of the person to be proceeded against; the settled course of authority concerning trespass, not to mention other cases both of tort and of contract, as clearly shows that. Indeed to make the test the existence of a negative duty would be to make it possible for a plaintiff in every case of the kind to turn a civil into a quasi criminal cause of action; for a breach of the injunction would be punishable by imprisonment.

A solution of the question in general, though it will not answer for every case that has been decided, is probably to be found by considering the jurisdiction of equity over fraud, accident, and mistake. These subjects afford of themselves, at least where the suit is not for damages alone, original and primary jurisdiction in equity; and it follows that an injunction to restrain the taking of an advantage in such cases might regularly be granted without inquiring whether damages could not be accurately computed and made a just equivalent in favor of the plaintiff. Most of the examples falling under the five classes of cases above enumerated are explainable upon this view; nearly all of them will be found to be cases in which to have allowed the defendant to proceed to a violation of his duty would have been to allow him to perpetrate a fraud upon the plaintiff. And this too in the legal sense of the term "fraud", i. e. without treating every breach of contract or other duty as a fraud.

called the remedial writ of injunction.[1] The other sort, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same; as for instance it may contain a direction to the party defendant to yield up, or to quiet, or to continue the possession of the land or other property which constitutes the subject-matter of the decree in favor of the other party.[2]

§ 1182. **Same.** — The object of this process, which is most extensively used in equity proceedings, is generally preventive and protective rather than restorative, although it is by no means confined to the former.[3] It seeks to prevent a meditated wrong

Assuming this analysis to be correct, it is apprehended that we can take one step further, and say that, in general, fraud, accident, and mistake (or practically fraud alone, for it becomes a fraud to attempt to take an undue advantage of accident or of mistake) bound the law of injunctions as a primary remedy; and if that is true, all other cases suitable for injunction, such as may be classed under the head of "irreparable injury", fall within the range of injunction as a secondary or substitutional remedy, — a remedy to be applied, that is to say, only upon the footing that compensation is not available or is not justly applicable.

It should be added that this note has reference only to final injunctions.

[1] See Cole Min. Co. *v.* Virginia Water Co., 1 Sawy. 685; Camblos *v.* Philadelphia R. Co., 4 Brewst. 563.

[2] Eden on Injunct. ch. 1, p. 1, 2; 3 Wooddes. Lect. 56, p. 397; Jeremy on Equity Jurisd. B. 3, ch. 2, § 1, p. 308, &c.; Gilb. Forum Rom. ch. 11, pp. 194, 195; Stribley *v.* Hawkie, 3 Atk. R. 275; Huguenin *v.* Baseley, 15 Ves. 179. This is the distinction stated by Mr. Eden in his excellent treatise on Injunctions (ch. 1, pp. 1, 2), a work of which I have made constant use in this chapter. But it may be doubted if the appellation "judicial writ" is not strictly applicable to all writs of injunction, since they are not writs of course, but are specially ordered by the court after the suit is instituted upon a hearing of the matter. The description of the writ by Mr. Jeremy seems sufficiently accurate. "An injunction," says he, "is a writ framed according to the circumstances of the case, commanding an act which this court regards essential to justice, or restraining an act which it esteems contrary to equity and good conscience." Jeremy on Eq. Jurisd. ch. 2, § 1, p. 307. If one were disposed to be scrupulously critical on such a subject, he might object to the apparent contrast between justice in the first part of the sentence, and equity and good conscience in the latter. The truth is that in this connection the words have the same identical meaning. See 1 Madd. Ch. Pr. 104, 105; 106.

Chancery has no peculiar jurisdiction over corporations to restrain them in the exercise of their powers, to control their action or to prevent them from violating their charter in the absence of fraud or breach of trust. Pond *v.* Framingham R. Co., 130 Mass. 194. See French Bank Case, 53 Cal. 495, 551. As e. g. to restrain a corporation on behalf of a creditor from making an improvident contract. Ib. Though the corporation be insolvent. Pond *v.* Framingham R. Co.

[3] Injunction may sometimes be employed to undo what has been done Smith *v.* Smith, 20 Eq. 500; Beadel *v.* Perry, 3 Eq. 465; Tucker *v.* Howard, 128 Mass. 361. Thus where substantial injury has been done to an

more often than to redress an injury already done. It is not confined to cases falling within the exercise of the concurrent jurisdiction of the court, but it equally applies to cases belonging to its exclusive and to its auxiliary jurisdiction.[1] It is treated of however in this place principally because it forms a broad foundation for the exercise of concurrent jurisdiction in equity. In cases calling for such redress there is always a prayer in the bill for this process and relief, and hence bills of this sort are commonly called injunction bills.[2]

§ 1183. **Injunction Must Be Prayed For in the Bill.** — Indeed unless an injunction is specifically prayed for by the bill, it is the settled practice not to grant this remedial process, because (it has been said) the defendant might make a different case by his answer against the general words of the bill from what he would have done against the specific prayer for an injunction.[3] This at least constitutes an exception from the general doctrine as to the efficacy of the prayer for general relief.[4] The granting or refusal of injunctions is however a matter resting in the sound discretion of the court; but injunctions are now more liberally granted than in former times.[5]

§ 1184. **The Writ of Injunction Is Peculiar to Courts of Equity.** — The writ of injunction is peculiar to Courts of Equity, although there are some cases where Courts of Law may exercise

innocent plaintiff's estate by the defendant's wrongful act, as by encroaching upon a passage-way of the plaintiff by the building of a wall therein, equity will compel the defendant to restore the premises as near as may be to their former condition and pay damages and not require the plaintiff to sell his right at a valuation. Tucker *v.* Howard, supra. See Dent *v.* Auction Mart Co., L. R. 2 Eq. 238, 246, 255; Aynsley *v.* Glover, L. R. 18 Eq. 544; s. c. L. R. 10 Ch. 283; Krehl *v.* Burrell, 7 Ch. D. 551; s. c. 11 Ch. D. 146; Schwoerer *v.* Boylston Market Assn., 99 Mass. 285; Creely *v.* Bay State Brick Co., 103 Mass. 514; Nash *v.* New England Ins. Co., 127 Mass. 91; Salisbury *v.* Andrews, 128 Mass. 336; Petrolia Mfg. Co. *v.* Jenkins, 29 App. Div. 403, 51 N. Y. Supp. 1028; Com. Dig. Chancery, D. 11, D. 13; Gilb. For. Roman. ch. 11, pp. 192, 194.

[1] Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 308.

[2] Mitford, Eq. Pl. by Jeremy, 47; Story on Equity Plead. § 41.

[3] Savory *v.* Dyer, Ambl. R. 60; Eden on Injunct. ch. 3, pp. 48, 49; Id. ch. 15, p. 321; Cook *v.* Martyn, 2 Atk. 3; Grimes *v.* French, 2 Atk. 141; Dormer *v.* Fortescue, 3 Atk. 131; Manaton *v.* Molesworth, 1 Eden, R. 26; 2 Madd. Ch. Pr. 173; Story on Equity Plead. § 41; American Fine Art Co. *v.* Voigt, 103 Ill. App. 659; Lesher *v.* Annunziata, 119 Ill. App. 653.

[4] Nashville etc. R. Co. *v.* McConnell, 82 Fed. 65; Atcheson etc. R. Co. *v.* Meyer, 64 Pac. 597, 62 Kans. 696; State *v.* Judge, 51 La. Ann. 1768, 26 So. 374; Mackintyre *v.* Jones, 9 Pa. Super. Ct. Rep. 540.

[5] 1 Madd. Ch. Pr. 104.

analogous powers, such as by the writ of prohibition and estrepement in cases of waste.[1] The cases however to which these legal processes are applicable are so few and so utterly inadequate

[1] In the case of Jefferson *v.* The Bishop of Durham (1 Bos. & Pull. 105, 120 to 132), the subject of these remedies in Courts of Law, in cases of waste, is very learnedly discussed. A single passage from the opinion of Lord Chief Justice Eyre may serve to explain them, and show their inadequacy as a remedy. "The state of the common law," said he, "with respect to waste has been so fully laid open by the bar that I need do little more than allude to it. At common law the proceeding in waste was by writ of prohibition from the Court of Chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. If that writ was obeyed, the ends of justice were answered. But if that was not obeyed, and an alias and pluries produced no effect, then came the original writ of attachment out of chancery, returnable in a Court of Common Law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the same original writ of attachment which was and is the foundation of all the proceedings in prohibition, and of many other proceedings in this court at this day. 'Si A. B. fecerit te securum, &c. tunc pone, &c. quod sit coram justiciariis nostris, &c. ostensurus quare fecit vastam, &c. contra prohibitionem nostram, &c.' That writ being returnable in a Court of Common Law, and most usually in the Court of Common Pleas, on the defendant appearing the plaintiff counted against him, he pleaded, the question was tried, and if the defendant was found guilty, the plaintiff recovered single damages for the waste committed. Thus the matter stood at common law. It has been said (and truly so, I think, so far as can be collected from the text-writers), that at the common law this proceeding lay only against tenant in dower, tenant by the curtesy, and guardian in chivalry. It was extended by different statutes to farmers, tenants for life, and tenants for years, and, I believe, to guardians in socage. That which these statutes gave by way of remedy was not so properly the introduction of a new law as the extension of an old one to a new description of persons. The course of proceeding remained the same as before these statutes were made. The first act which introduced anything substantially new was that which gave a writ of waste or estrepement pending the suit. It follows of course that this was a judicial writ, and was to issue out of the Courts of Common Law. But except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text-writers that any prohibition could issue from those courts. By the Stat. of West. 2, the writ of prohibition from the Chancery which existed at common law is taken away, and the writ of summons substituted in its place. And although it is said by Lord Coke, when treating of prohibitions at the common law, that it 'may be used at this day', those words, if true at all, can only apply to that very ineffectual writ directed to the sheriff, empowering him to take the posse comitatus to prevent the commission of waste intended to be done. The writ directed to the party was certainly taken away by the statute. At least as far as my researches go no such writ has issued even from Chancery in the common cases of waste by tenant in dower, tenants by the curtesy, and guardians in chivalry, tenants for life, &c. &c., since it was taken away by the Statute of West. 2. Thus the common-law remedy stood with the alteration above mentioned, and with the judicial writ of estrepement introduced pendente lite." See 1 Law Quarterly Rev. 461, 462.

for the purposes of justice, that the processes themselves have fallen into disuse, and almost all the remedial justice of this sort is now administered through the instrumentality of Courts of Equity.[1] The jurisdiction in these courts then has its true origin in the fact that there is either no remedy at all at law, or the remedy is imperfect and inadequate. The jurisdiction was for a long time most pertinaciously resisted by the Courts of Common Law, especially when it was applied by an injunction to stay suits and judgments in these courts.[2] But it was firmly established in the reign of King James the First upon an express appeal to that monarch, and it is now in constant and unquestioned exercise.[3]

§ 1185. **Same.** — It has been justly remarked by an eminent civilian that injunctions issued by the Courts of Equity in England partake of the nature of interdicts according to the Roman law.[4] The term " interdict " was used in the Roman law in three distinct but cognate senses. It was in the first place often used to signify the edicts made by the prætor, declaratory of his intention to give the remedy in certain cases, chiefly to preserve or to restore possession. And hence such an interdict was called edictal, " Edictale, quod prætoriis edictis propunitur, ut sciant omnes ea forma posse imploriari." Again it was used to signify his order or decree, applying the remedy in the given case before him, and then it was called decretal, " Decretale, quod prætor pro re nata implorantibus decrevit." And in the last place it was used to signify the very remedy sought in the suit commenced under the prætor's edict, and thus it became the denomination of the action itself.[5]

§ 1186. **Same.** — It is in the second sense above stated that the interdict of the Roman law bears a resemblance to the injunction of Courts of Equity. It is said to have been called interdict because it was originally interposed in the nature of an interlocutory decree between two parties contending for possession until the property could be tried. But afterwards the appellation was extended to final decretal orders of the same nature. In the Institutes interdicts are thus defined. Interdicts were certain forms of words by which the prætor either commanded or pro-

[1] Eden on Injunct. ch. 9, pp. 158, 159, 160; 3 Wooddes. Lect. 56, p. 399; Com. Dig. Chancery, D. 11.

[2] 3 Wooddes. Lect. 56, p. 398; 1 Wooddes. Lect. 6, p. 186; 1 Ch. Rep. App.; Eden on Injunct. ch. 3, p. 135.

[3] Ibid.; 3 Wooddes. Lect. 56, p. 398.

[4] Halifax, Roman Civil Law, ch. 6, p. 102.

[5] Livingston on the Batture case, 5 American Law Journal, 271, 272; Brisson de Verb. Sig. Interdictum; Vicat, Vocab. Interdictum; Heineccii Elem. Pand. Ps. 6, §§ 285, 286.

hibited something to be done, and they were chiefly used in controversies respecting possession or quasi possession. "Erant autem interdicta formæ atque conceptiones verborum, quibus prætor aut jubebat aliquid fieri, aut fieri prohibebat. Quod tunc maxime fiebat, cum de possessione, aut quasi possessione, inter aliquos contendebatur." [1] They were divided into three sorts, prohibitory, restitutory, and exhibitory interdicts. Prohibitory were those by which the prætor forbade something to be done, as when he forbade force to be used against a lawful possessor; restitutory, by which he directed something to be restored, as when he commanded possession to be restored to any one who had been ejected from the possession by force; exhibitory, by which he ordered a person or thing to be produced.[2] After this definition or description of the various sorts of interdicts the Institutes proceed to state that some persons nevertheless have supposed that those only can be properly called interdicts which were prohibitory, because to interdict is properly to denounce and prohibit; and that the restitutory and exhibitory interdicts should properly be called decrees; but that by usage they are all called interdicts because they are pronounced between two persons. "Sunt tamen qui patent proprie interdicta ea vocari quæ prohibitoria sunt, quia interdicere sit denuntiare et prohibere; restitutoria autem et exhibitoria proprie decreta vocari. Sed tamen obtinuit omnia interdicta appellari, quia inter duos dicuntur." [3]

§ 1187. **Same.** — Another division of interdicts in the Roman law was into those which were (1) to gain or acquire possession, or (2) to retain possession, or (3) to recover possession.[4] And again another division was into those which were (1) single, in which each of the litigant parties sustained one character, that of plaintiff or actor, or defendant or reus; or (2) double, in which each of the litigant parties sustained two characters, that of plaintiff or actor and that of defendant or reus.[5]

§ 1188. **Same.** — From this summary account of the Roman interdicts, which were after a time superseded by what were called extraordinary actions, in which judgment was pronounced with-

[1] Inst. Lib. 4, tit. 15; Introd.

[2] Instit. Lib. 4, tit. 15, § 1; Heinecc. Elem. Pand. Ps. 6, Lib. 43, §§ 285, 286, 287; Halifax on Civil Law, ch. 6, p. 101; Dig. Lib. 43, tit. 1, l. 1, 2; Pothier Pand. Lib. 43, tit. 1, §§ 1 to 16; Vicat, Vocab. voce, Interdictum.

[3] Inst. Lib. 4, tit. 15, § 1.

[4] Inst. Lib. 4, tit. 15, §§ 2, 3, 4; Halifax on Roman Law, ch. 6, p. 101.

[5] Inst. Lib. 4, tit. 15, § 7; Halifax on Roman Law, ch. 6, p. 101.

out any antecedent interdict, and in the same manner as if a beneficial action had been given in consequence of an interdict,[1] it is easy to perceive that they partake very much of the nature of injunctions in Courts of Equity, and were applied to the same general purposes; that is to say, to restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions, and to secure the permanent enjoyment of the rights of property.

§ 1189. **Same.** — In the early course of chancery proceedings injunctions to quiet the possession of the parties before the hearing were indiscriminately granted to either party, plaintiff or defendant, in cases where corporeal hereditaments were the subject of the suit; the object of them being to prevent a forcible change of possession by either party pending the litigation.[2] These injunctions bore a very close resemblance to the interdict "Uti possidetis" of the Roman law, which was granted to either party in a suit who was then in possession, in order that he might be secured therein as the legal possessor during the litigation.[3] "Hoc interdictum (Uti possidetis) de soli possessore scriptum est, quem potiorem prætor in soli possessione habebat; et est prohibitorium ad retinendam possessionem."[4] "Est igitur hoc interdictum, quod vulgo Uti possidetis appellatur, retinendæ possessionis; nam hujus rei causa redditur, ne vis fiat ei qui possidet."[5] "Hoc interdictum duplex est; et hi quibus competit et actores et rei sunt."[6]

§ 1190. **Same.** — The practice of granting injunctions of this sort has (it is said) become obsolete in England, if not altogether, at least in so great a degree that there are few instances of it in modern times.[7] But injunctions of the nature of an interdict,

[1] Inst. Lib. 4, tit. 15, § 8.

[2] Eden on Injunctions, ch. 16, pp. 332 to 334; 2 Collect. Jurid. 196; Beames, Ord. ch. 15, and note (49). One of Lord Bacon's Ordinances (26) is that "Injunctions for possession are not to be granted before a decree; but where the possession hath continued by the space of three years before the bill exhibited; and upon the same title, and not upon any title by leave or otherwise, determined." Beames, Ord. ch. 15. This was probably the origin of the Chancery Proceedings in Ireland stated in the text; post, § 1190.

[3] Halifax on Roman Law, ch. 6, pp. 101, 102.

[4] Dig. Lib. 43, tit. 17, l. 1, § 1. [5] Dig. Lib. 43, tit. 17, l. 1, § 4.

[6] Dig. Lib. 43, tit. 17, l. 3, § 1. Proceedings analogous to those in the Roman law are recognized in the Scottish Jurisprudence. Ersk. Instit. p. 764, § 47.

[7] Eden on Injunct. ch. 16, 333, 334; Hughes *v.* Trustees of Morden College, 1 Ves. 188, 189; Anon. 2 Ves. 415. In America injunctions of

Unde vi, of the Roman law to restore a possession from which the party has been forcibly ejected are, under the name of possessory bills, said to be still common in Ireland.[1] The interdict "Unde vi" in the Roman law was granted to restore a possession forcibly taken away; whereas the interdict "Uti possidetis" was granted to preserve a present possession. "Illud (Interdictum Unde vi)," says the Digest, "enim restituit vi amissam possessionem; hoc (Interdictum Uti possidetis) tuetur, ne amittatur possessio. Denique prætor possidenti vim fieri vetat; et illud quidem interdictum oppugnat possessorem; hoc tuetur."[2]

§ 1191. **Same.** — It is obviously incompatible with the object of these Commentaries to enumerate in detail (even if such a task were practicable) the various cases in which a writ of injunction will be granted in Courts of Equity. Many cases of this sort have already been incidentally taken notice of in the preceding pages, and others again will occur hereafter. What is proposed to be done in this place is to enumerate some only of the more common cases in which it is applied rather as illustrations of the nature and extent of the jurisdiction than as a complete analysis of it.

§ 1192. **Purposes of Injunctions.** — A learned writer whose work on this subject is in high estimation has enumerated among the most ordinary objects of the remedial writ of injunctions the following: "To stay proceedings in Courts of Law, in the Spiritual Courts, the Courts of Admiralty, or in some other Court of Equity; to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate or from setting up a term of

this sort are not without precedent. Thus in Varick *v.* Corporation of New York (4 John. Ch. R. 53), Mr. Chancellor Kent granted an injunction against the corporation (until they should have established their right at law) to prevent them from digging into the soil and throwing down the fences of a close which the plaintiff had possessed for twenty-five years, the acts being done by the corporation under the claim of its being a public highway. The case is a good deal like that of Hughes *v.* Trustees of Morden College, 1 Ves. 188. Why may not cases of this sort be properly referable to the doctrine of irreparable mischief or to prevent multiplicity of suits? See Belknap *v.* Belknap, 2 John. Ch. R. 463; Agar *v.* Regent's Canal Company, Coop. Eq. R. 77; Shand *v.* Aberdeen Canal Co., 2 Cow. R. 519.

[1] Eden on Injunct. ch. 16, p. 334; 2 Brown, Parl. Cas. by Tomlins, 28; Anon. 2 Ves. 415.

[2] Dig. Lib. 43, tit. 17, l. 1, § 4; Halifax on Roman Law, ch. 6, p. 102.

years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse which the court disapproves of with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents and the violation of copyright, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation." But he immediately adds: "These however are far from being all the instances in which this species of equitable interposition is obtained. It would indeed be difficult to enumerate them all; for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a Court of Equity administers it by means of the writ of injunction." [1]

§ 1193. **Same.** — The illustrations of the jurisdiction which will be attempted in our pages will be principally limited to cases of injunctions to stay proceedings at law; to restrain vexatious suits; to restrain the alienation of property; to restrain waste; to restrain nuisances; to restrain trespasses; and to prevent other irreparable mischiefs. We shall then add some few instances of special injunctions in order more fully to develop the nature and extent of this most beneficial process of preventive and remedial justice. It should be premised however that injunctions when granted on bills are either temporary, as until the coming in of the defendant's answer, or until the further order of the court, or until the hearing of the cause, or until the coming in of the report of a master; or they are perpetual, as when they form a part of the decree after the hearing upon the merits, and the defendant is perpetually inhibited from any assertion of a particular right, or perpetually restrained from the doing of a particular act.[2]

§ 1194. **Stay of Proceedings at Law.** — And in the first place as to injunctions to stay proceedings at law.[3] Injunctions of this

[1] Eden on Injunct. ch. 1, pp. 1, 2. See also 1 Madd. Ch. Pr. 106.

[2] See 3 Wooddes. Lect. 56, p. 416; Gilb. Forum Roman. ch. 11, pp. 194, 195.

[3] Under systems of law in which, as in England, the doctrines of equity have become applicable to all causes, or in which, as in Massachusetts, equitable pleas and rights are available at law, this subject of injunction to stay legal proceedings must have become narrowed. Indeed in Eng-

sort are sometimes granted to stay trial; or after verdict to stay judgment; or after judgment to stay execution; or if the execution has been effected, to stay the money in the hands of the sheriff; or if part only of the judgment debt has been levied by a fieri facias to restrain the suing out of another fi. fac. or a ca. sa., according to the exigency of the particular case.[1] This jurisdiction of granting injunctions in an especial manner met the decided opposition and hostility of the Courts of Common Law from a very early period of the exercise of Equity Jurisprudence. The common mode in which this relief was granted was after a judgment at law by enjoining the plaintiff not to sue out execution upon the judgment.[2] This was supposed to trench upon the jurisdiction of the Courts of Common Law, from its tendency to destroy their conclusiveness, and to make nullities of their judgments; since an execution is properly said to be fructus, finis, et effectus legis, and therefore is the life of the law.[3] The exercise of this jurisdiction however can be distinctly traced back to the beginning of the reign of Henry the Seventh,[4] and although it was constantly struggled against, and even constituted one of the articles of impeachment against Cardinal Wolsey in the reign of Henry the Eighth, yet it was constantly upheld by the chancellors, and was finally and conclusively established in the reign of King James in the manner already mentioned.[5]

§ 1195. **Writ to Stay Proceedings Is Directed to Parties and Not to the Court.** — There does not seem to be any just foundation for the opposition of the Courts of Common Law to this jurisdiction. A writ of injunction is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them.[6] The process, when its object is to restrain proceedings at law, is directed only to the parties. It neither assumes any superiority over the court in which those proceedings are had, nor denies its

land it appears to have been entirely remodelled. Judicature Act, 1873, s. 24, subs. 1, 5, 8; Wright *v.* Redgrave, 11 Ch. D. 24.

[1] 3 Wooddes. Lect. 56, p. 406; post, § 1207.

[2] 1 Wooddes. Lect. 6, p. 186; 3 Wooddes. Lect. 56, pp. 398, 406.

[3] Bac. Abr. Execution, A; Co. Litt. 289 *b*.

[4] Rep. Ch. App. 1, 21 (ed. 1715); 1 Wooddes. Lect. 6, p. 186; 3 Wooddes. Lect. 56, p. 398; 4 Co. Inst. 92. [5] Ante, §§ 51, 1182.

[6] Equity will not grant an injunction against the issuance of process by another court. Tyler *v.* Hamersley, 44 Conn. 419. Where the Legislature has pointed out a mode of proceeding before a magistrate, it is not, as a general rule, for another court to stop that proceeding by injunction. Stannard *v.* St. Giles, 20 Ch. D. 190, 196.

jurisdiction. It is granted on the sole ground that from certain equitable circumstances, of which the Court of Equity granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause.[1] The object therefore really is to prevent an unfair use being made of the process of a Court of Law, in order to deprive another party of his just rights, or to subject him to some unjust vexation or injury which is wholly irremediable by a Court of Law.[2]

§ 1196. **Stay of Proceedings Where Judgment at Law Has Been Satisfied.** — One of the plainest cases which can be put of the propriety of granting an injunction to a judgment at law, is where it has been in fact satisfied, and yet the judgment creditor attempts to set it up and enforce it either against the judgment debtor or against some person claiming under him,[3] who is thereby injured in his property or rights.[4] In such cases a Court of Law would often be exceedingly embarrassed in giving the proper redress, if it could give it at all. But Courts of Equity deal with it at once, and apply the most complete remedial relief.

§ 1197. **Same.** — Indeed without a jurisdiction of this sort to control the proceedings, or to enjoin the judgments of parties at law, it is most obvious that Equity Jurisprudence, as a system of remedial justice, would be grossly inadequate to the ends of its institution. In a great variety of cases, as we shall presently see, Courts of Law cannot afford any redress to the party sued, although it is most manifest that he has in conscience and justice, but not at law, a perfect defence. He may be deprived of his rights by fraud, or accident, or mistake. Nay, the very facts on

[1] Eden on Injunct. ch. 2, p. 4.

[2] Mitford, Eq. Pl. by Jeremy, pp. 127, 128, 131. The chancellor may restrain proceedings in his own court as well as at law. Mann *v.* Flower, 26 Minn. 479; Gage *v.* Riverside Trust Co., 86 Fed. 984; Sandage *v.* Studebaker, 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; Kelly *v.* Siefert, 71 Mo. App. 143; Kempson *v.* Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 58 L. R. A. 484, 92 Am. St. Rep. 682.

[3] Shaw *v.* Dwight, 16 Barb. 536.

[4] Brinckerhoff *v.* Lansing, 4 John. Ch. 65; Bowen *v.* Clark, 46 Ind. 405. So where satisfaction has been agreed upon. See Jordan *v.* Money, 5 H. L. Cas. 185. So where property attached was bailed for safe keeping by the sheriff, and the debt was afterwards paid, though not until final judgment had been recovered against the bailee. Paddock *v.* Palmer, 19 Vt. 581. See Keighler *v.* Savage Mfg. Co., 12 Md. 383. So where by fraud, accident, or mistake judgment has been *entered* for an amount or in terms not intended, equity will on clear proof relieve. Katz *v.* Moore, 13 Md. 566. But mistake in *obtaining* judgment is of course a different thing; that could not be shown. Sheets *v.* Selden, 74 U. S. 416, 19 L. Ed. 166.

which he relies may be exclusively within the knowledge of the party who sues him, and without a discovery (which a Court of Law cannot grant) he may be unable to establish his defence; and if proceedings cannot in the meantime be stayed at law until a discovery can be had in equity, he will be subjected to intolerable oppression or injury.[1] Many cases of this sort have already been suggested under the preceding heads, and especially in cases of accident, mistake, and fraud; and others again will occur in our subsequent inquiries.[2]

§ 1198. **Same.** — A single case under each of the heads of accident, mistake, and fraud will sufficiently show the beneficial operation, nay the necessity of the interposition of Courts of Equity to restrain proceedings at law under circumstances of the most simple character. Suppose an executor or administrator should be in possession of abundant assets to pay all the debts of the deceased, and by an accidental fire a great portion of them should be destroyed, so that the estate should be deeply insolvent. In such a case he might be sued by a creditor at law, and the loss of the assets by accident would be no defence; for when he once becomes chargeable with the assets at law, he is forever chargeable, notwithstanding any intervening casualties. But Courts of Equity will enjoin proceedings at law, in cases of this sort, upon the purest principles of justice.[3]

§ 1199. **Same.** — Suppose a party is sued at law for a debt of long standing, and a judgment is obtained against him for the amount, although he has actually paid it, but he is unable after due search to find a receipt or release which would establish the fact; and then after judgment the paper is unexpectedly found either in his own possession or in that of a third person. At law there would be no redress under such circumstances. The judgment would be conclusive. But a Court of Equity would in such

[1] Mitford, Eq. Pl. by Jeremy, pp. 127, 128, 130.

[2] Mr. Eden has collected under this head many cases of accident, mistake, fraud, account, illegal and immoral contracts, penalties and forfeitures, breaches of covenants, decrees for the administration of assets, election of remedies at law or in equity, marshalling of securities, discharge of sureties, &c., where an injunction is the appropriate remedy; and to this work, and the authorities there cited, the learned reader is referred for more full information. Eden on Injunctions, ch. 2, pp. 3 to 44. See also 1 Madd. Ch. Pr. 109, 110. Prevention of multiplicity of suits is a common case. Bishop *v.* Rosenbaum, 58 Miss. 84; Union Pacific R. Co. *v.* Cheyenne, 113 U. S. 516, 28 L. Ed. 1098; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663.

[3] See ante, § 131; Crosse *v.* Smith, 7 East, 246; Croft's Executors *v.* Lyndsey, 2 Freem. R. 1.

a case afford relief by a perpetual injunction of the judgment.[1] Such a suit may be brought without fraud, as by a representative of a deceased party; and therefore it may be a case of innocent mistake.

§ 1200. **Same.** — Suppose a judgment should be obtained at law by fraud for a sum larger than is justly due to the party, upon a mutual understanding of the parties that certain set-offs should be allowed and deducted. There would be no remedy at law; and yet a Court of Equity would not hesitate to enjoin the judgment upon due proof to the extent of the set-offs. Or suppose a party were surprised at the trial by proof of a claim of which from the nature of the declaration he could have no notice and was in no default, and thus a recovery should be had for an amount not legally due, the like relief would be granted in equity. But at law the party might be utterly without redress; for he might not be able to bring the case within the ordinary rules for granting a new trial.

§ 1201. **Proceedings Will Be Enjoined Pending Discovery of Facts.** — Another case may easily be supposed where the defendant at law has a perfect defence, but where the facts upon which it depends are exclusively within the knowledge of the plaintiff in the suit. In such a case a bill of discovery is indispensable, to enable the party to make good his defence at law. But if in the meantime the plaintiff were permitted to go on at law, and to insist upon a trial before the discovery was obtained, it is obvious that the law would be an instrument of the grossest injustice. In such a case a Court of Equity would decree an injunction to stay proceedings until the discovery was duly obtained.[2]

§ 1202. **Same.** — In some of the cases which have been above supposed the defendant would have had a complete remedy at law if at the time he had been in possession of the appropriate proofs. But the great mass of cases in which an injunction is ordinarily applied for, to stay proceedings at law, is where the rights of the party are wholly equitable in their own nature, or

[1] Gainsborough *v.* Gifford, 2 P. Will. 424; Rickle *v.* Dow, 39 Mich. 91. This appears to be on the ground that a material fact has been "discovered after a trial, which could not by ordinary diligence have been ascertained before." King *v.* Hart, 116 Ill. App. 33; Oconta Co. *v.* Lundquist, 119 Mich. 264, 79 N. W. 950, 5 Detroit Leg. N. 807.

[2] See Eden on Injunct. ch. 2, p. 3, &c.; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 340, 341; Waterlow *v.* Bacon, L. R. 2 Eq. 514; Hibbard *v.* Eastman, 47 N. H. 507; Sperry *v.* Gibson, 3 W. Va. 522.

are incapable under the circumstances of being asserted in a Court of Law. A ready illustration of the former class may be found in the attempt of a trustee, in violation of his trust, to oust the possession of the cestui que trust of an estate to the beneficial enjoyment of which he is entitled; or of a landlord to oust the possession of a tenant with whom he has contracted for a lease, by an ejectment in violation of that contract; or of a party setting up a satisfied term, or an outstanding legal incumbrance, to defeat the possession of another person having a better conscientious and equitable title to it. Illustrations of the latter class may be found in the common cases of bonds and mortgages [1] and other penal securities and covenants, where by the strict rules of law the party after forfeiture can obtain no relief; in cases of set-offs in equity, which are not recognized at all at law as such; [2] and in cases of partnership property, seized in execution by a creditor of one of the partners, where an injunction will be awarded to stay proceedings until an account of the partnership funds and rights is taken.

§ 1203. **Same.** — It seems proper too in this place to take notice of the application of this same remedial process, upon larger principles, to the case of sureties who are often discharged from their liability, according to the doctrines of Courts of Equity, when they would be held responsible upon their bond or other security at law. It is for instance well settled (as we have seen) that wherever a creditor, in pursuance of a valid agreement for such a purpose, gives time for payment to the principal debtor on a bond or other security, without the consent of the surety, the latter will be held discharged in equity, although he might still be held bound at law.[3] In such a case it is of no consequence whether the surety has sustained any actual damage or not. Nay, the arrangement may be for his benefit, and yet he will in equity be discharged; for the rights of the creditor as to his debtor have been voluntarily suspended, and of course the relation of the surety to both changed without his consent. Under such circumstances the surety has a right to restrain the creditor from proceeding at law against him to recover the

[1] Equity will enjoin a suit on a note held as collateral to the mortgage debt, pending a bill to redeem. Walker *v.* Jones, L. R. 1 P. C. 50.

[2] See Hopkins *v.* Fechter, 47 Mo. 331; Tommy *v.* Ellis, 41 Ga. 260.

[3] United States *v.* McIntyre, 111 Fed. 590; Schuster *v.* Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182; Cudahy Packing Co. *v.* Shepard, 37 Tex. Civ. App. 1, 82 S. W. 786; Kirschbaum *v.* Blair, 98 Va. 35, 34 S. E. 895; ante, §§ 448 to 450; Clarke *v.* Henty, 3 Younge & Coll. 187, 189.

debt, and a perpetual injunction constitutes the true and effectual remedy.[1]

§ 1204. **Same.** — But the question who is to be deemed a surety in the sense of a Court of Equity is very material to be considered; for although a person between himself and his co-obligor may be a surety only, yet as to the obligee both may be properly deemed principals and liable as such. And this, at law, must depend upon the very terms of the instrument itself; for no extrinsic evidence is admissible for the purpose. Thus for example where two persons purported on the face of a grant of an annuity to be both grantors, it was held that although as between themselves one might be a surety, yet as to the grantee both were to be deemed principals, and extrinsic evidence was inadmissible to establish the fact to be different.[2] Still however if the grantee knew that one was a surety and he dealt with the other injuriously to the interests of the former, this might raise an equity in favor of the surety entitling him to protection against the legal consequences of the instrument which he joined in executing.[3] However a surety is not necessarily discharged by a dealing between the obligee and his principal which is unknown to him.[4] [The rule that the release of the principal debtor releases the surety does not apply where a release is filed upon a claim made

[1] Eden on Injunctions, ch. 2, p. 40; Nisbet *v.* Smith, 2 Bro. Ch. R. 579; Rees *v.* Berrington, 2 Ves. Jr. 540, 543, 544; Boultbee *v.* Stubbs, 18 Ves. 20; Samuell *v.* Howarth, 3 Meriv. R. 272; Eyre *v.* Bartrop, 3 Madd. R. 220; King *v.* Baldwin, 2 John. Ch. R. 554, 560; s. c. 17 John. R. 384; Tyson *v.* Cox, 1 Turner & Russ. 395, 399; Blake *v.* White, 1 Younge & Coll. 420, 422, 423, 424; Bank of Ireland *v.* Beresford, 6 Dow. R. 233. If a creditor fraudulently aid his principal debtor to abscond, with intent to delay a surety in recovering from his principal the sum for which he is bound, equity will enjoin the creditor from enforcing his claim against the surety. Smith *v.* Hays, 1 Jones, Eq. 321. But equity will not in England, it seems, enjoin a suit against a surety on a bond, who was induced to sign by false representations, because he can defend the suit. Stiff *v.* Eastbourne, 17 Week. R. 428 (C. A.), reversing Ib. 68. See vol. i. p. 31, note.

[2] Hollier *v.* Eyre, 9 Clark & Fin. 1, 45, 57.

[3] Ibid.

[4] Hollier *v.* Eyre, 9 Clark & Fin. 1, 45, 57. On this occasion Lord Cottenham said: "Lord Eldon's observations in ex parte Gifford (6 Ves. 806) and in Samuel *v.* Howarth (3 Meriv. 278) must be understood with reference to the cases before him; they afford no inference that that very learned judge would have held that a surety was discharged because the principal had agreed with his creditor that only half the debt should be claimed or only a portion of the annuity paid for the future. The surety will be left to judge for himself between his original undertaking and another substituted for it; but that is not the case where the contract remains the same, though part of the subject-matter is withdrawn from its operation. In Witcher *v.* Hall (5 Barn. & C. 281), Mr. Justice Little-

under an assignment for creditors, pursuant to a statute which provides that such release shall be filed, and that it shall not operate to discharge any surety. Nor is the surety discharged from liability where a greater credit was extended to the principal than had been anticipated, but the contract of guaranty between the principal and the surety had not been changed.[1]]

§ 1205. **Proceedings Will Be Controlled in Order that Securities Be Marshalled.** — We might here also advert to the important branches of Equity Jurisprudence in the administration and marshalling of assets, and the marshalling of securities, as furnishing other appropriate illustrations of the beneficial interposition of Courts of Equity to control the rights and proceedings of creditors and others at law by the remedial process of injunction, upon principles almost purely of an equitable and conscientious nature. In most of the cases of this nature there is no pretence to assert the jurisdiction upon any of the ordinary grounds of accident, mistake, fraud, or confidence. It stands upon the more enlarged principles of general justice, and was probably derived from that great reservoir of general principles, the Roman Civil Law, where (as we have seen) equities of this sort were not unfrequently entertained.[2]

§ 1206. **Injunctions to Stay Proceedings Are Usually Granted Where There Has Been Accident, Mistake, or Fraud.** — Indeed

dale puts the case of a surety for the rent of a tenant who was to hold one hundred acres, but by a subsequent agreement with his landlord held only fifty, and thinks it clear that the surety would be liable. Modern cases, such as Hulme *v.* Coles (2 Sim. 12) and Price *v.* Edmunds (10 Barn. & C. 578), have put a very rational limit to the rule that giving time to the principal discharges the surety, by holding that for that purpose such giving time must be under circumstances which at best might be injurious to the surety. The latter case also establishes that a conditional agreement for time does not discharge the surety, when from the condition not being performed the agreement does not become binding; and in the present case it was a condition of the alteration of the arrangement that the reduced annuity should be a primary charge upon the estate, and that the title-deeds should be deposited; which condition was never performed. It is true that payment of the annuity at a reduced rate was nevertheless accepted, which, it has been said, was a waiver of the condition; but the contract to discharge a surety must be positive and distinct, and if the acceptance of the reduced annuity by the grantee was a waiver of the condition, the payment of it was conclusive evidence of the plaintiff's acquiescence in the arrangement under which the reduction had taken place."

See Pooley *v.* Harradine, 7 El. & B. 431; and notes to Amer. ed. of 9 Clark & F. p. 1.

[1] Fertig *v.* Bartles, 78 Fed. 866.

[2] Ante, §§ 758, 853, 854, 856, &c., 633, 635, 636, &c.; Eden on Injunct. ch. 2, pp. 31, 32, 38, 39; Id. ch. 3, p. 46.

the occasions on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances.[1] In general it may be stated that in all cases where by accident, or mistake, or fraud,[2] or otherwise a party has an unfair advantage in proceedings in a Court of Law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a Court of Equity will interfere and restrain him from using the advantage which he has thus improperly gained; and it will also generally proceed to administer all the relief which the particular case requires, whether it be by a partial or by a total restraint of such proceedings. If any such unfair advantage has been already obtained by proceedings at law to a judgment, it will in like manner control the judgment, and restore the injured party to his original rights.[3]

§ 1207. **Injunction May Be Granted at Any Stage of the Suit.** — The injunction is not confined to any one point of the proceedings at law; but it may, upon a proper case being presented to the court, be granted at any stage of the suit.[4] Thus an injunction is sometimes granted to stay trial;[5] some-

[1] Wooddes. Lect. 56, p. 407.

[2] Stanton *v.* Embry, 46 Conn. 65 and 595; Pearce *v.* Olney, 20 Conn. 544. Or corruption of an arbitrator. Malmesbury Ry. Co. *v.* Budd, 2 Ch. D. 113; post, § 1452.

[3] Mitf. Eq. Pl. by Jeremy, pp. 127 to 133; 1 Madd. Ch. Pr. 166 to 173; 3 Wooddes. Lect. 56, pp. 406 to 410; Eden on Injunct. ch. 2, p. 3. The fraud for which relief against a judgment will be granted must be something practised on the unsuccessful party, preventing him from exhibiting his case fully. False testimony or forged documents are not enough if the disputed matter has actually been presented. Vance *v.* Burbank, 101 U. S. 514, 25 L. Ed. 929; United States *v.* Throckmorton, 98 U. S. 91, 25 L. Ed. 93; Metcalf *v.* Gilmore, 59 N. H. 417 (foreign judgment). And in any case damage must be shown. Dobbs *v.* St. Joseph Ins. Co., 72 Mo. 189; Williams *v.* Nolan, 58 Texas, 708 (unauthorized settlement by counsel).

[4] Eden on Injunc. ch. 2, p. 44; Gardner *v.* Hershey, 27 Ark. 552; Clark *v.* Ewing, 93 Ill. 572; Cairo R. Co. *v.* Holbrook, 92 Ill. 297; Miller *v.* Palmer, 55 Miss. 323. The fraud necessary to setting aside a judgment should be actual. Patch *v.* Ward, L. R. 3 Ch. 203. And it should be shown, where the judgment was for the plaintiff in the action, that the injured party had a good defence. White *v.* Crow, 110 U. S. 183, 28 L. Ed. 113, 4 S. Ct. Rep. 71; Luckenbach *v.* Anderson, 47 Pa. St. 123.

[5] Equity e. g. will, generally speaking, enjoin a suit against a receiver brought without leave of the court which appointed him. Barton *v.* Barbour, 104 U. S. 126; 26 L. Ed. 672; Davis *v.* Gray, 83 U. S. 203, 21 L. Ed. 447. See Searle *v.* Choat, 25 Ch. D. 723. But leave is not necessary to a suit against a receiver for goods wrongfully taken possession of by him. Barton *v.* Barbour, supra.

times after verdict to stay judgment; sometimes after judgment to stay execution;[1] sometimes after execution[2] to stay the money in the hands of the sheriff if it be a case of a fieri facias, or to stay the delivery of possession if it be a writ of possession.[3] And, as has been already intimated, the injunction may be temporary or perpetual, total or partial, qualified or unconditional.[4]

§ 1208. **Injunctions to Prevent Execution of Unconscionable Judgments.** — In regard to injunctions after a judgment at law it may be stated as a general principle that any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a Court of Law, or of which he might have availed himself at law, but was prevented by fraud or accident,[5] unmixed with any fault or negligence in himself or his agents, will authorize a Court of Equity to interfere by injunction, to restrain the adverse party from availing himself of such judgment.[6] Bills of this sort are usually called bills for a new trial.[7]

§ 1209. **Stay of Proceedings of Suits Which Have Been Brought at Law and in Equity at Same Time and about Same Matter.** — Courts of Equity will not only award an injunction to stay proceedings at law, but they will also, where the party is proceeding at law and in equity for the same matter at the same time, compel him to make an election of the suit in which he will proceed, and will stay the proceedings in the other court.[8] And if

[1] See Grant *v.* Lathrop, 23 N. H. 67; Lewis *v.* Denkgrave, 24 La. An. 489; Whitehurst *v.* Green, 69 N. C. 131; Lesley *v.* Shock, 3 Houst. 130.

[2] To restrain the sale of property illegally taken thereon. Kenyon *v.* Clarke, 2 R. I. 67; Kendall *v.* Dow, 46 Ga. 607; Marlin *v.* Jewell, 37 Md. 560.

[3] See 3 Wooddes. Lect. 56, pp. 406, 407, 412, 416; 1 Madd. Ch. Pr. 109, 110; Eden on Injunct. ch. 2, p. 44, &c.; ante, § 1194.

[4] Ibid.; ante, § 1193.

[5] Fletcher *v.* Warren, 18 Vt. 45; Tysor *v.* Lutterloh, 4 Jones, Eq. 247; Devoll *v.* Scales, 49 Me. 320; Wingate *v.* Haywood, 40 N. H. 437; Cage *v.* Cassidy, 23 How. 109; Seymour *v.* Miller, 32 Conn. 402; Starr *v.* Heckart, 32 Md. 267; Cooper *v.* Tyler, 46 Ill. 462.

[6] Crim *v.* Handley, 94 U. S. 653, 24 L. Ed. 216; Miller *v.* Palmer, 55 Miss. 323; Emerson *v.* Udall, 13 Vt. 477; Ocean Ins. Co. *v.* Field, 2 Story, 59; post, § 1572. Thus a surety may enjoin a judgment confessed by an insolvent principal who had a defence to the action. Costley *v.* Allen, 56 Ala. 198; Jarvis *v.* Chandler, 1 Turn. & Russ. 319; Truly *v.* Wanger, 4 Howard, Sup. Ct. R. 142.

[7] Mitf. Eq. Pl. by Jeremy, 131; Floyd *v.* Jayne, 6 John. Ch. R. 479; Woodworth *v.* Van Buskerk, 1 John. Ch. R. 432.

[8] Eden on Injunct. ch. 2, pp. 34, 35, 36, 37, 38; Vaughan *v.* Welsh, Moseley, R. 210; Anon. Id. 304; Mocher *v.* Reed, 1 B. & Beatt. 318, 319, 320; Schoole *v.* Sall, 1 Sch. & Lefr. 176; Rogers *v.* Vosburgh, 4 John.

after a decree in equity a party shall proceed at law for the same matter, they will interfere by way of injunction. So if a decree is made against a party upon the merits, and he afterwards brings a bill in a foreign court for the same subject-matter, a Court of Equity will grant an injunction against proceeding in such foreign suit.[1] Indeed wherever after a bill is filed in equity the party institutes a suit at law for the same matter, it is treated as a contempt of the court, for the jurisdiction has already attached in equity; and it is a gross oppression to vex another with a double suit for the same cause of action.[2]

§ 1210. **Same.** — It has been remarked by Lord Redesdale that bills of this description have not of late years been much countenanced. In general it has been considered that the ground for a bill to obtain a new trial after judgment in an action at law must be such as would be the ground for a bill of review of a decree in a Court of Equity, upon the discovery of a new matter.[3]

§ 1213. **Stay of Proceedings at Law Where There Has Been a Decree upon a Creditors' Bill.** — Another class of cases in which injunctions are granted to proceedings at law is where there has already been a decree upon a creditors' bill for the administration of assets.[4] Such a decree is considered in equity to be in the nature of a judgment for all the creditors; and therefore if subsequently to it a bond creditor should sue at law, the Court of Equity in which the decree is made will (as we have seen) in the assertion of its jurisdiction restrain him from proceeding in his suit.[5] The reason is, that Courts of Law do not take notice of a decree in equity, and therefore the Court of Equity is compelled to establish its jurisdiction over all the assets and the administration

Ch. R. 84. There are some exceptions to this doctrine. One is, that a mortgagee may proceed on his mortgage in equity and on his bond at law at the same time. But this right is not unqualified; for the mortgagor will not be compelled to pay upon his bond unless secure of his title-deeds being delivered up. Schoole *v.* Sall, 1 Sch. & Lefr. 176; Eden on Injunct. ch. 3, p. 36; Royle *v.* Wynne, 1 Craig & Phillips, 232.

[1] Booth *v.* Leycester, 1 Keen, R. 579.

[2] Eden on Injunct. ch. 2, pp. 34 to 38.

[3] See Crim *v.* Handley, 94 U. S. 653, 24 L. Ed. 216.

[4] Foreign administration proceedings may be enjoined in some cases. Hope *v.* Carnegie, L. R. 1 Ch. 320; Baillie *v.* Baillie, L. R. 5 Eq. 175.

[5] Ante, § 748; Eden on Injunct. ch. 2, p. 31; Morrice *v.* Bank of England, Cas. temp. Talb. 217; s. c. 4 Brown, Parl. Cas. by Tomlins, 287; Paxton *v.* Douglass, 8 Ves. 520; Martin *v.* Martin, 1 Ves. 210, 212; Perry *v.* Phelips, 10 Ves. 34; Clarke *v.* Ormonde, Jacob, R. 122; Thompson *v.* Brown, 4 John. Ch. R. 619.

thereof, by preventing creditors from going elsewhere at law to assert their rights.[1] An injunction in cases of this sort was formerly granted only upon a bill filed; but it may now be obtained upon motion after notice given to the creditor.[2] And it makes no difference (it should seem), as to granting an injunction, whether the bill be brought by one or more creditors against the executor or administrator for the administration of the assets solely on his or their own behalf, or whether it be brought on behalf of themselves and all other creditors; provided that upon such a bill a general decree is made for the benefit of all the creditors. For then it is in the nature of a judgment for all the creditors, and all are entitled to have notice, and to come in and to prove their debts before the master.[3]

§ 1214. **Protection of Officer in Execution of Process.** — Courts of Equity will not only grant an injunction restraining suits at law between parties upon equitable circumstances, but they will exercise the same jurisdiction to protect their own officers who execute their processes against any suits brought against them for acts done under or in virtue of such processes.[4] The ground of this assertion of jurisdiction is, that Courts of Equity will not suffer their processes to be examined by any other courts; and Courts of Law cannot know anything of their nature and effect. If they are irregularly issued or executed, it is the duty of Courts of Equity themselves to apply the proper remedy and to make satisfaction.[5] And for this purpose in a proper case it will be referred to a master to ascertain and settle the proper compensation.[6] Therefore where an arrest was

[1] Ibid. But although Courts of Equity will grant an injunction in cases of this sort, they will interfere only so far as is necessary to give effect to their own decree for an administration of the assets of the deceased. But if the executor or administrator has rendered himself personally liable to the creditor, there the injunction will not restrain the creditor from proceeding personally against him, but only against the assets. Kent. *v.* Pickering, 5 Sim. 569; Price *v.* Evans, 4 Sim. R. 514.

[2] Cleverley *v.* Cleverley, cited in 8 Ves. 526; Paxton *v.* Douglass, 8 Ves. 520.

[3] Thompson *v.* Brown, 4 John. Ch. R. 619, 643; Martin *v.* Martin, 1 Ves. 211; ante, § 746; Benson *v.* Le Roy, 4 John. Ch. R. 651.

[4] Parker *v.* Browning, 8 Paige, R. 388; Mackay *v.* Brackett, 9 Paige, R. 437; Albany City Bank *v.* Schermerhorn, 9 Paige, R. 372.

[5] Eden on Injunct. ch. 3, p. 34; 3 Wooddes. Lect. 56, p. 407; Bailey *v.* Devereaux, 1 Vern. 269; Frowd *v.* Lawrence, 1 Jac. & Walk. 641; May *v.* Hook, 2 Dick. R. 619; s. c. cited 1 Jac. & Walk. 642, note; Aston *v.* Heron, 2 Mylne & Keen, 390; Ex parte Merritt, 5 Paige, R. 125.

[6] Chalie *v.* Pickering, 1 Keen, R. 749; Ex parte Merritt, 5 Paige, R. 125.

made by virtue of a process which issued irregularly out of a Court of Equity, and an action for false imprisonment was brought against the officer who made the arrest, an injunction was issued restraining the suit.[1] The same principle is applied to protect sequestrators in possession under a decree in a Court of Equity against suits brought against them; for the court will not permit itself to be made a suitor at law, but it will examine for itself the nature of any adverse title upon application of the party.[2] The same principle is also applied, as we have already seen, to the case of receivers.[3]

§ 1215. **Common or Special Injunctions to Restrain Proceedings at Law.** — Injunctions to restrain suits at law are usually spoken of as common or special. The common injunction (as it is called) so frequently alluded to in the books of Reports and Practice, is the writ of injunction issued upon and for the default of the defendant, in not appearing to or answering the bill. It is also granted where the defendant obtains an order for further time to answer, or for a commission (commonly called a dedimus) to take his answer.[4] In all these cases the injunction is of course.[5] In its terms the writ recites that the defendant has not appeared or answered the bill, and yet is proceeding at law; and it commands the defendant to desist from all further proceedings at law, touching the matters in the bill, until he shall have fully answered the bill, cleared his contempt, and the court shall make other orders to the contrary. But the defendant is nevertheless at liberty to call for a plea, and to proceed to trial thereon, and for want of a plea to enter up judgment; but execution is thereby stayed.[6] Such is the exigency of the writ. All other injunc-

[1] Bailey *v.* Devereaux, 1 Vern. R. 269; s. c. 1 Jac. & Walk. 640, note; Phillips *v.* Worth, 2 Russ. & Mylne, 638.

[2] Angel *v.* Smith, 9 Ves. 338; ante, § 833; Chalie *v.* Pickering, 1 Keen, R. 749.

[3] Parker *v.* Browning, 8 Paige, 385. But equity will not protect a sheriff from an action by an owner of goods wrongfully seized by him on a writ issued out of chancery. Onyon *v.* Washbourne, 14 Jur. 497. Later however refusal to interfere has been put upon the ground that the sheriff did not apply for protection at the earliest moment, and that he had notice at the time of the seizure that the goods were not the property of the person against whom the process issued. Tufton *v.* Harding, 6 Jur. (N. S.) 116. See also Peck *v.* Crane, 24 Vt. 146.

[4] Eden on Injunc. ch. 3, pp. 59 to 61; Id. ch. 4, pp. 68 to 72; Gilb. For. Roman. ch. 11, p. 194; James *v.* Downes, 18 Ves. 523.

[5] Ibid.; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 339; Newl. Ch. Pr. ch. 4, § 7.

[6] Eden on Injunc. Append. p. 370; Barton's Suit in Eq. 48, note.

tions granted upon other occasions, or involving other directions, are called special injunctions.[1]

§ 1216. **Proceedings in Criminal Matters and Cases of a Strictly Civil Nature Will Not Be Enjoined.** — There are however cases in which Courts of Equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place they will not interfere to stay proceedings in any criminal matters or in any cases not strictly of a civil nature. As for instance they will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition.[2] But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally from proceeding, at the same time upon the same matter of right, for redress in the form of a civil suit and of a criminal prosecution.[3] In such cases the injunction is merely incidental to the ordinary power of the court to impose terms upon parties who seek its aid in furtherance of their rights.

§ 1217. [**Same.** — The right to injunctive relief, as a rule, is not applicable to criminal acts. The Law Courts have ample jurisdiction to protect the people from criminal acts, and it is therefore unnecessary for the extraordinary jurisdiction of a Court of Equity to be invoked to prevent a threatened wrong. Courts of Equity will issue the writ of injunction to restrain the threatened injury to property rights, but if it appears that the criminal act does not affect property rights, the injunction will not issue. For instance, where an ordinance prohibited the erection of a wooden building within a prescribed area, the erection of such a structure will not be enjoined in the absence of evidence of an injury to private rights;[4] nor does this remedy lie to restrain the keeping open of a barber shop on Sunday, where it affects no property

[1] Eden on Injunc. ch. 4, p. 78; Id. ch. 14, p. 290; Vipan *v.* Mortlock, 2 Meriv. R. 475; James *v.* Downes, 18 Ves. 522, 523; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 339; Drummond *v.* Pigou, 2 Mylne & Keen, 168; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 341, 342.

[2] Eden on Injunc. ch. 2, pp. 41, 42; Lord Montague *v.* Dudman, 2 Ves. 396; 3 Wooddes. Lect. 56, p. 413; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 309.

[3] Eden on Injunc. ch. 2, p. 42; Mayor of York *v.* Pilkington, 2 Atk. 302; Lord Montague *v.* Dudman, 2 Ves. 396; Attorney-Gen. *v.* Cleaver, 18 Ves. 220; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 308, 309; 3 Wooddes. Lect. 56, pp. 413, 414.

[4] Town of Rochester *v.* Walters, 27 Ind. App. 194, 60 N. E. 1101; O'Brien *v.* Harris, 105 Ga. 732, 31 S. E. 745; City of Mt. Vernon *v.* Seeley, 74 App. Div. 50, 77 N. Y. Supp. 250.

rights.[1] The burden of showing that the maintenance of a gambling house, in an action to restrain its operation on account of an injury to property rights, is upon the party who claims to have been injured.[2] The fact that the law is not enforced is no ground for jurisdiction to restrain the commission of crime, nor to enforce moral obligations or the performance of moral duties as such; nor can it rightfully interfere with the performance of an illegal act merely because it is illegal, in the absence of an injury to property or civil rights.[3] But if the wrongful act in addition to being an indictable offence is at the same time a detriment to the private civil rights or property interests of others, the injunction will lie.[4]]

§ 1218. **Courts of Equity Will Not Relieve against a Judgment at Law Where Case in Equity Proceeds upon a Defence Equally Available at Law.** — In the next place Courts of Equity will not relieve against a judgment at law where the case in equity proceeds upon a defence equally available at law;[5] but the plaintiff ought to establish some special ground for relief.[6] The doctrine goes yet further; and it may be asserted to be a general rule that a defence cannot be set up as the ground of a bill in equity for an injunction which has been fully and fairly tried at law, although it may be the opinion of a Court of Equity that the defence ought to have been sustained at law.[7] If there are any exceptions to this rule, they must be of a very special nature.[8] But relief will be granted where the defence could not at the time or under the circumstances be made available at law with-

[1] York *v.* Yzaguairre, 31 Tex. Civ. App. 26, 71 S. W. 563.

[2] Ex Parte Allison, 48 Tex. Cr. R. 634, 90 S. W. 492; State *v.* Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478.

[3] People *v.* District Court, 26 Colo. 386, 58 Pac. 504, 46 L. R. A. 850; State *v.* Schweickardt, 109 Mo. 496, 19 S. W. 47; State *v.* Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711; Klein *v.* Livingtone, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717.

[4] Jones *v.* Oewler, 110 Ga. 202, 35 S. E. 375; Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264; Christie *v.* Board of Trade, 92 Ill. App. 604; Christensen *v.* Kellogg Switchboard Co., 110 Ill. App. 61; People *v.* Condon, 102 Ill App. 449.

[5] Crim *v.* Handley, 94 U. S. 653, 24 L. Ed. 216; Harris *v.* Galbraith, 43 Ill. 309; Agard *v.* Valencia, 39 Cal. 292; Merriman *v.* Cannovan, 7 Cold. 571; George *v.* Tutt, 36 Mo. 141; Hudson *v.* Kline, 9 Gratt. 379 (set-off); Wolcott *v.* Jones, 4 Allen, 367 (set-off).

[6] Harrison *v.* Nettleship, 2 Mylne & Keen, 423; Murray *v.* Graham, 6 Paige, R. 622.

[7] Marine Ins. Co. *v.* Hodgson, 11 U. S. 322, 3 L. Ed. 362; see Simpson *v.* Lord Howden, 3 Mylne & Craig, 97, 102, 103.

[8] Ibid.; Mitf. Eq. Pl. by Jeremy, 132.

out any laches of the party.[1] Thus for instance if a party should recover a judgment at law for a debt, and the defendant should afterwards find a receipt under the plaintiff's own hand for the very money in question, the defendant (where there was no laches on his part) would be relieved by a perpetual injunction in equity.[2] So if a fact material to the merits should be discovered after a trial, which could not by ordinary diligence have been ascertained before, the like relief would be granted.[3]

§ 1219. **Laches in Making Defence Will Bar Relief after Verdict.** — And this leads us to remark in the next place that relief will not be granted by staying proceedings at law after a verdict, if the party applying has been guilty of laches as to the matter of defence, or might by reasonable diligence have procured the requisite proofs before the trial.[4] Thus if a defendant has omitted to file a bill for a discovery of facts known to him and material to his defence, and has suffered the case to go to trial

[1] Farquharson *v.* Pitcher, 2 Russell, R. 81; Murray *v.* Graham, 6 Paige, R. 622; Clark *v.* Ewing, 93 Ill. 572; Cairo R. Co. *v.* Holbrook, 92 Ill. 297; Brown *v.* Buena Vista, 95 U. S. 157.

[2] Ante, § 1199; Gainsborough *v.* Gifford, 2 P. Will. 424; Protheroe *v.* Forman, 2 Swanst. 227, 232, 233; Williams *v.* Lee, 3 Atk. 224. See Hankey *v.* Vernon, 2 Cox, R. 12, 14; Taylor *v.* Sheppard, 1 Younge & Coll. R. 277, 279, 280; Hennell *v.* Kelland, 1 Eq. Abridg. 377, pl. 2; Barbone *v.* Brent, 1 Vern. 176; Smith *v.* Lowry, 1 John. Ch. R. 320, 324; Marine Ins. Co. *v.* Hodgson, 11 U. S. 322, 3 L. Ed. 362. The cases on this subject are not perhaps quite reconcilable with each other. But I have given in the text what seems the fair result of the leading authorities. The case of the receipt stated in Gainsborough *v.* Gifford, 2 P. Will. 424, seems to have been doubted by Lord Eldon in Protheroe *v.* Forman, 2 Swanst. R. 232, 233. But it has been recognized either absolutely or in a qualified manner in other cases. See Williams *v.* Lee, 3 Atk. 224; Hennell *v.* Kelland, 1 Eq. Abridg. 377, pl. 2; Smith *v.* Lowry, 1 John. Ch. R. 320; Hankey *v.* Vernon, 2 Cox, R. 12.

[3] See Sewell *v.* Freeston, 1 Ch. Cas. 65; Jarvis *v.* Chandler, 1 Turn. & Russ. 319. Inglehart *v.* Lee, 4 Md. Ch. 514; Cox *v.* Mobile R. Co., 44 Ala. 611; Harvey *v.* Seashol, 4 W. Va. 115. Of course mere ignorance of facts is not enough. Taliaffero *v.* Branch Bank, 23 Ala. 755. The loss of a record, of which secondary evidence might have been given, will not justify equitable interference. Crim *v.* Handley, 94 U. S. 653, 24 L. Ed. 216.

[4] Protheroe *v.* Forman, 2 Swanst. R. 227, 232, 233; Curtess *v.* Smallridge, 1 Ch. Cas. 43; 2 Freem. R. 178; Tovey *v.* Young, Prec. in Chan. 193; Smith *v.* Lowry, 1 John. Ch. R. 320; Dodge *v.* Strong, 2 John. Ch. R. 230; Brown *v.* Buena Vista, 95 U. S. 157, 24 L. Ed. 122; Smith *v.* Walker, 8 Smedes & M. 131; Trevor *v.* McKay, 15 Ga. 550; Sample *v.* Barnes, 53 U. S. 70, 14 L. Ed. 330; Powell *v.* Stewart, 17 Ala. 719; Ricker *v.* Pratt, 48 Ind. 73; Jordon *v.* Corley, 42 Tex. 284; Yaylor *v.* Fore, Ib. 256; Long *v.* Smith, 39 Tex. 160; McBride *v.* Little, 115 Mass. 308; Holt *v.* Parsons, 118 Ga. 895, 45 S. E. 690; Barnard *v.* Sherley, 135 Ind. 547, 34 N. E. 600, 24 L. R. A. 568, 41 Am. St. Rep. 454; Byros *v.* Louisville & N. R. Co., 24 Ky. L. Rep. 1007, 59 S. W. 519.

without adequate proof of such facts, he cannot afterwards claim an injunction, or a new trial from a Court of Equity; for it was his own folly not to have prepared himself with such proof, or to have filed a bill for a discovery, and to have procured a stay of the trial until the discovery.[1] So if the facts on which the bill is founded, although discovered since the trial, might have been established at the trial upon the cross-examination of a witness, and the party was put upon the inquiry, relief will be refused.[2] So where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the time appointed by the rules of the proper Court of Law, Courts of Equity will not entertain a bill for an injunction upon an alleged ground that the original demand was unconscientious, or the subject-matter of an account, provided it was competent for the party to have laid those grounds before the jury on the trial, or before the Court of Law upon the motion for a new trial.[3]

§ 1220. **Same.** — Indeed this doctrine is not limited to mere cases decided in the Courts of Common Law, but it is applicable to all cases where the matter of the controversy has been already decided on by another court of competent jurisdiction, even though it be a foreign court, or where it might have been made available in that court as a matter of claim or defence in a suit pending in such court. For it has been truly said not to be the practice of Courts of Equity to assume jurisdiction in favor of parties who, having had an opportunity of asserting their title in another court where the matter has been properly the subject of adjudication, have either missed that opportunity or have not thought proper to bring their title forward.[4]

[1] Sewell *v.* Freeston, 1 Ch. Cas. 65; Mitf. Eq. Pl. by Jeremy, 132; Protheroe *v.* Forman, 2 Swanst. 227, 232, 233, and note (*b*). See also Hankey *v.* Vernon, 2 Cox, R. 12; Williams *v.* Lee, 3 Atk. 224; Barbone *v.* Brent, 1 Vern. 176; Richards *v.* Symmes, 2 Atk. R. 319; Taylor *v.* Sheppard, 1 Younge & Coll. 271, 280; Whitmore *v.* Thornton, 3 Price, 231; Field *v.* Beaumont, 1 Swanst. R. 209; Smith *v.* Lowry, 1 John. Ch. R. 320; Barker *v.* Elkins, 1 John. Ch. R. 465; McVickar *v.* Wolcott, 4 John. R. 510; Lansing *v.* Eddy, 1 John. Ch. R. 49, 51; Le Guen *v.* Gouverneur, 1 John. Cas. 436.

[2] Taylor *v.* Sheppard, 1 Younge & Coll. 271, 280.

[3] Bateman *v.* Willoe, 1 Sch. & Lefr. 201; Lansing *v.* Eddy, 1 John. Ch. R. 49; Smith *v.* Lowry, 1 John. Ch. R. 320; Barker *v.* Elkins, 1 John. Ch. R. 465; Simpson *v.* Hart, 1 John. Ch. R. 97, 98; Dodge *v.* Strong, 2 John. Ch. R. 228; Duncan *v.* Lyon, 3 John. Ch. R. 351; Foster *v.* Wood, 6 John. Ch. R. 90; Norton *v.* Woods, 5 Paige, R. 249. But equity may grant a new trial if there was no opportunity to move for one. Knifong *v.* Hendricks, 2 Gratt. 212.

[4] Marquess of Breadalbane *v.* Marquess of Chandos, 2 Mylne & Craig,

§ 1221. **Same.** — The general reasoning upon which this doctrine is maintained is the common maxim that Courts of Equity, like Courts of Law, require due and reasonable diligence from all parties in suits, and that it is sound policy to suppress multiplicity of suits. Lord Redesdale has stated it with great clearness and force. "It is not sufficient," said he, "to show that injustice has been done; but that it has been done under circumstances which authorize the court to interfere. Because if a matter has been already investigated in a court of justice according to the common and ordinary rules of investigation, a Court of Equity cannot take on itself to enter into it again. Rules are established, some by the Legislature, some by the courts themselves, for the purpose of putting an end to litigation. And it is more important that an end should be put to litigation, than that justice should be done in every case. The truth is that owing to the inattention of parties and several other causes exact justice can very seldom be done."[1] "The inattention of parties in a Court of Law can scarcely be made a subject for the interference of a Court of Equity. There may be cases cognizable at law and also in equity, and of which cognizance cannot be effectually taken at law; and therefore equity does sometimes interfere, as in cases of complicated accounts where the party has not made defence because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using. But without circumstances of that kind I do not know that equity ever does interfere to grant a trial of a matter which has been already discussed in a Court of Law, a matter capable of being discussed there, and over which the Court of Law had full jurisdiction."[2] "A bill for a new trial is watched by equity with extreme jealousy. It must see that injustice has been done not merely through the inattention of the parties, but some such reasons as those I have mentioned must exist."

721, 732, 733; Norton *v.* Woods, 5 Paige, R. 249. A foreign judgment is now generally held to be as conclusive as a domestic judgment when it has been rendered upon the merits. But still it may be affected by fraud, and if it is sought to be made available here, an injunction will lie to it in the same way as it will lie to any other security or any judgment here. Bowles *v.* Orr, 1 Younge & Coll. 464, 473.

[1] Bateman *v.* Willoe, 1 Sch. & Lefr. 204; Marine Ins. Co. *v.* Hodgson, 11 U. S. 322, 3 L. Ed. 362. See also Barker *v.* Elkins, 1 John. Ch. R. 465.

[2] Bateman *v.* Willoe, 1 Sch. & Lefr. 205, 206.

§ 1222. **Equity Will Not Relieve from Judgment against Mistake in Pleading or Conduct of Cause.** — In the next place Courts of Equity will not relieve a party by an injunction to a judgment or other proceedings at law, against a mistake in pleading or in the conduct of the cause; or when he has failed in obtaining fresh evidence; or merely to let in new corroborative evidence;[1] or because a question of law has been erroneously decided by the Court of Law.[2]

§ 1223. **Stay of Proceedings Will Not Be Ordered Merely on Account of Defect of Jurisdiction.** — In the next place Courts of Equity will not grant an injunction to stay proceedings at law merely on account of any defect of jurisdiction of the court where such proceedings are pending.[3] It has been said that although Courts of Equity do not profess to proceed upon the ground of any such defect of jurisdiction, yet that it is remarkable that one of the most ordinary instances of this species of interposition by the Equity Courts in England seems exclusively founded upon it; namely, where a suit is instituted in the Spiritual Court for tithes, and a modus is set up as a defence.[4] Perhaps this criticism is a little too refined. The Spiritual Courts have a general jurisdiction in matters of tithes; and if the defendant should plead a modus in a suit there for tithes and the modus should be admitted,

[1] Eden on Injunct. ch. 3, pp. 10, 11; Stephenson *v.* Wilson, 2 Vern. 325; Blackhall *v.* Combs, 2 P. Will. 70; Holworthy *v.* Mortlock, 1 Cox, R. 141; Kemp *v.* Mackrell, 2 Ves. 579; Stevens *v.* Praed, 2 Ves. Jr. 519; Ware *v.* Horwood, 14 Ves. 31; Lansing *v.* Eddy, 1 John. Ch. R. 49; Hankey *v.* Vernon, 2 Cox, R. 12.

[2] Mar. Ins. Co. *v.* Hodgson, 11 U. S. 322, 3 L. Ed. 362; Simpson *v.* Hart, 1 John. Ch. R. 95 to 99; Waring *v.* Lewis, 53 Ala. 615; Hunt *v.* Coachman, 6 Rich. Eq. 286. Secus if there was fraud in the opposite party. Railroad Co. *v.* Neal, 1 Woods, 353.

[3] Secor *v.* Woodward, 8 Ala. 500, 767; Walker *v.* Robbins, 55 U. S. 584, 14 L. Ed. 584; Stokes *v.* Knarr, 11 Wis. 389; Winterfield *v.* Strauss, 24 Wis. 394; Comstock *v.* Clemens, 19 Cal. 77. But see contra Ryan *v.* Boyd, 33 Ark. 778; Cunningham *v.* Taylor, 20 Tex. 126; Rucker *v.* Moore, 1 Heisk. 726; Ingle *v.* McCurry, Ib. 26. Further see Washington *v.* Barnes, 41 Ga. 307; Ricketts *v.* Hitchins, 34 Ind. 348; Owens *v.* Ranstead, 22 Ill. 162; Weaver *v.* Poyer, 70 Ill. 567; Chambers *v.* King Bridge Manuf., 16 Kans. 270. The text, as the words "*merely* on account of any defect of jurisdiction" imply, probably means no more than that the party seeking the injunction should show that the judgment was unfounded on the merits as well as void for want of jurisdiction. Colson *v.* Leitch, 110 Ill. 504; Taggart *v.* Wood, 20 Iowa, 236; Fowler *v.* Lee, 10 Gill & J. 358, 363; Stokes *v.* Knarr, 11 Wis. 389; Blackburn *v.* Bell, 91 Ill. 434, 443; Weaver *v.* Poyer, supra; White *v.* Crow, 110 U. S. 183, 28 L. Ed. 113, 4 S. Ct. Rep. 71; Luckenbach *v.* Anderson, 47 Pa. St. 123 (foreign judgment).

[4] Eden on Injunct. ch. 7, p. 137.

the Spiritual Courts are not ousted of their jurisdiction. But if the modus should be denied, then the Spiritual Courts cannot proceed propter triationis defectum, and a prohibition lies. The jurisdiction then attaches in equity in such cases not upon the ground of a want of original jurisdiction of the Spiritual Courts over the suit, but upon the ground of the remedy there under such circumstances not being adequate and complete; and the injunction follows as a natural result of the necessity of exercising an exclusive jurisdiction.[1] Lord Hardwicke in a case of this sort said: "Injunctions in this court are granted upon a suggestion of something which affects the rights or convenience of the party in the proceedings in the other court, or where there is a concurrent jurisdiction."[2] The same remarks apply to the exercise of exclusive jurisdiction by Courts of Equity in cases of legacies where an injunction is issued against proceedings in the Spiritual Courts.[3]

§ 1224. **Stay of Proceedings in Foreign Countries.** — It has sometimes been made a question whether Courts of Equity have authority to stay proceedings in the courts of foreign countries. Nothing can be clearer than the proposition that the courts of one country cannot exercise any control or superintending authority over those of another country. The independence, equality, and sovereignty of every country would repudiate any such interference as inconsistent with its own supremacy within its own territorial domains. But although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When therefore both parties to a suit in a foreign country are resident within the territorial limits of another country, the Courts of Equity in the latter may act in personam upon those parties and direct them by injunction to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court; but without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties and decree in personam according to those equities, and enforce obedience to their decrees by process in personam.[4] Hence it is the known habit

[1] See Rotheram *v.* Franshaw, 3 Atk. 627, 629, 630.
[2] Ibid. [3] Ibid.
[4] Eden on Injunct. ch. 7, pp. 141, 142; Com. Dig. Ch. 3 X.; 4 W. 27;

Lord Cranstown *v.* Johnston, 3 Ves. Jr. 170, 182; Beckford *v.* Kemble, 1 Sim. & Stu. 7; Harrison *v.* Gurney, 2 Jac. & Walk. 562; Mead *v.* Merritt, 2 Paige, R. 404; Mitchel *v.* Bunch, 2 Paige, 606; Portarlington *v.* Soulby, 3 M. & Keen, 104; Bowles *v.* Orr, 1 Younge & Coll. R. 464. In Portarlington *v.* Soulby, the Lord Chancellor said: "Soon after the Restoration, and when this like every other branch of the court's jurisdiction was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors the Nottinghams and Macclesfields, the parents of equity, the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of Love *v.* Baker, 2 Freem. 125; 1 Ch. Cas. 67. In Love *v.* Baker it appears that one only of several parties who had begun proceedings in the court of Leghorn was resident within the jurisdiction here, and the court allowed the subpœna to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain those proceedings at Leghorn, after advising with the other judges. But the report adds, 'for all the bar was of another opinion'; and it is said that when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country which no order of this court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding. Accordingly this case of Love *v.* Baker has not been recognized or followed in later times. Two instances are mentioned, in Mr. Hargrave's collection, of the jurisdiction being recognized; and in the case of Warnton *v.* May, 5 Ves. 71 (see also Kennedy *v.* Earl of Cassillis, 2 Swans. 313; Bushby *v.* Munday, 5 Madd. R. 297; Harrison *v.* Gurney, 2 J. & W. 563; Beauchamp *v.* Marquis of Huntley, Jac. 546), which underwent so much discussion, part of the decree was to restrain the defendants from entering up any judgment or carrying on any action in what is called 'the Court of Great Session in Scotland', meaning of course the Court of Session. I have directed a search to be made for precedents in case the jurisdiction had been exercised in any instances which have not been reported, and one has been found directly in point. It is the case of Campbell *v.* Houlditch, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the Court of Session in Scotland. From the note which his lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent therefore is of very high authority. In truth nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad, — if for instance as in Penn *v.* Lord Baltimore, 1 Ves. Sen. 444, it can decree the performance of an agreement touching the boundary of a province in North America; or as in the case of Toller *v.* Carteret, 2 Vern. 449, can foreclose a mortgage in the Isle of Sark, one of the Channel islands, — in precisely the like manner it can restrain the

of Courts of Equity to relieve in cases of contracts and other matters respecting lands situated in foreign countries.[1]

§ 1225. **Same.** — Notwithstanding the clearness of the general principle, the jurisdiction to stay proceedings in suits in foreign countries by injunction in personam upon parties resident within the realm was greatly doubted in the time of Lord Clarendon; and his lordship, after taking the opinion of the judges, decided against the jurisdiction. His decision however was not satisfactory to the bar,[2] and the doctrine has in modern times been completely established the other way. It is now held that whenever the parties are resident within a country the courts of that country have full authority to act upon them personally, with respect to the subject of suits in a foreign country, as the ends of justice

party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act in pais, or the instituting or prosecution of an action in a foreign court. It is upon these grounds, I must add, and these precedents, that I choose to rest the jurisdiction, and not upon certain others of a very doubtful nature, such as the power assumed in the year 1682, in Arglasse *v.* Muschamp, 1 Vern. 75, and again by Lord Macclesfield in the year 1724, in Fryer *v.* Bernard, 2 P. Wms. 261, of granting a sequestration against the estates of a defendant situated in Ireland. The reasons given by that great judge in the latter case plainly show that he went upon a ground which would now be untenable, viz., what he terms the superintendent power of the courts in this country over those in Ireland. And indeed he supports his order by expressly referring to the right then claimed by the King's Bench in England, to reverse the judgments of the King's Bench in Ireland. This pretension however has long ago been abandoned, and has indeed been discontinued by parliamentary interposition; and the power of enforcing in Ireland judgments pronounced here, and vice versa, is at the present time the subject of legislative consideration."

[1] Ibid.; Archer *v.* Preston, 1 Eq. Abridg. 133; Earl of Arglasse *v.* Muschamp, 1 Vern. 75; s. c. 2 Ch. Rep. 266; Earl of Kildare *v.* Eustace, 1 Vern. 419; s. c. 2 Ch. Cas. 188; 1 Eq. Abridg. 133; Toller *v.* Carteret, 2 Vern. 494; s. c. 1 Eq. Abridg. 134, pl. 5; Foster *v.* Vassall, 3 Atk. 589; Penn *v.* Lord Baltimore, 1 Ves. 444; Cranstown *v.* Johnston, 3 Ves. 170; White *v.* Hall, 12 Ves. 321; Portarlington *v.* Soulby, 3 Mylne & Keen, 104; Wharton *v.* May, 5 Ves. 71; Massie *v.* Watts, 10 U. S. 148, 3 L. Ed. 181; Briggs *v.* French, 1 Sumner, R. 504. So to restrain the use abroad of a misleading trademark. Orr *v.* Johnston, 13 Ch. D. 434 (C. A.); U. S. Rev. St. 720; Evans *v.* Gorman, 115 Fed. 401; Security Trust Co. *v.* Union Trust Co., 134 Fed. 301; Julian *v.* Central Trust Co., 193 U. S. 93, 48 L. Ed. 629, 24 S. Ct. Rep. 399; Phelps *v.* Mutual Reserve Fund L. Assn., 112 Fed. 465, 50 C. C. A. 339, 61 L. R. A. 717; Farmers Loan Co. *v.* Lake St. Elev. R. Co., 177 U. S. 61, 44 L. Ed. 671, 20 S. Ct. Rep. 564; McDowell *v.* McCormick, 121 Fed. 65, 57 C. C. A. 401; In re Chetwood, 165 U. S. 443, 41 L. Ed. 782, 17 S. Ct. Rep. 385.

[2] Love *v.* Baker, 1 Ch. Cas. 67; s. c. 2 Freem. R. 125; Portarlington *v.* Soulby, 3 Mylne & Keen, 104, 107, and the comments of the Lord Chancellor cited ante, § 1224; Bunbury *v.* Bunbury, 2 Eq. Jurist (English) for 1839, pp. 104, 111.

may require; and with that view to order them to take or to omit to take any steps and proceedings in any other court of justice, whether in the same country or in any foreign country.[1] There is one exception to this doctrine which has been long recognized in America; and that is that the State courts cannot enjoin proceedings in the courts of the United States,[2] nor the latter in the former courts.[3] This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein.[4] But the like doctrine has been recently applied by the State courts to suits and judgments in

[1] Bushby *v.* Munday, 5 Madd. R. 307, 308; Cruikshanks *v.* Robarts, 6 Madd. 104; Eden on Injunct. ch. 7, pp. 141, 142; Beckford *v.* Kemble, 1 Sim. & Stu. 7; Phelps *v.* Mutual Reserve Fund L. Assn., 112 Fed. 465, 50 C. C. A. 339, 61 L. R. A. 717; Bank *v.* Stevens, 169 U. S. 436, 42 L. Ed. 807, 18 S. Ct. Rep. 403; Iron Mountain R. Co. *v.* City of Memphis, 96 Fed. 113, 37 C. C. A. 410; Dietsch *v.* Huidekoper, 103 U. S. 494, 26 L. Ed. 497.

Where the requisite federal jurisdiction exists, a bill in equity will lie to deprive parties of the benefits of a decree or judgment obtained by fraud in a State court. Barrow *v.* Hunton, 99 U. S. 80, 25 L. Ed. 407; Arrowsmith *v.* Gleason, 129 U. S. 86, 32 L. Ed. 630, 9 S. Ct. Rep. 237; Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547, 4 S. Ct. Rep. 619. See Hope *v.* Carnegie, L. R. 1 Ch. 320 (foreign administration); Baillie *v.* Baillie, L. R. 5 Eq. 175 (the same); Ex parte Tait, L. R. 13 Eq. 311; In re Chapman, L. R. 15 Eq. 95; Dehon *v.* Foster, 4 Allen, 505; Harris *v.* Pullman, 84 Ill. 20; Cole *v.* Young, 24 Kans. 435; Engel *v.* Scheuerman, 40 Ga. 206; Pearce *v.* Olney, 20 Conn. 544; Dobson *v.* Pearce, 12 N. Y. 156; Rogers *v.* Gwinn, 21 Iowa, 58. For the converse case, staying domestic proceedings, to await the result of proceedings abroad, see Wilson *v.* Farrand, L. R. 13 Eq. 362; Liverpool Co. *v.* Hunter, L. R. 3 Ch. 479.

[2] See English *v.* Miller, 2 Rich. Eq. 320; United States *v.* Keokuk, 73 U. S. 514, 18 L. Ed. 918; Strozier *v.* Howes, 30 Ga. 578; Bryan *v.* Hixon, 40 Ga. 405; Hines *v.* Rawson, Ib. 356; Kendall *v.* Winsor, 6 R. I. 453; Akerly *v.* Vilas, 15 Wis. 401; Daly *v.* Sheriff, 1 Woods, 175.

[3] But see Craft *v.* Lathrop, 2 Wall. C. C. 103.

[4] Diggs *v.* Wolcott, 8 U. S. 179, 2 L. Ed. 587; McKim *v.* Voorhes, 11 U. S. 279, 3 L. Ed. 342; see also Cruikshanks *v.* Robarts, 6 Madd. R. 104. In Mead *v.* Merritt (2 Paige, R. 404, 405), Mr. Chancellor Walworth, after admitting the general principles, said that it had frequently been decided in that court (the Court of Chancery of New York) that it would not sustain an injunction bill to restrain a suit or proceeding previously commenced in a sister State or in any of the Federal Courts; that not only comity but public policy forbade the exercise of such a power. In Mitchell *v.* Bunch (2 Paige, 606) the same court not only asserted jurisdiction to decree the application of real property situate out of the jurisdiction of the court, but to compel the defendant either to bring the property in dispute within the jurisdiction of the court, or to execute a conveyance or transfer thereof, so as to vest the legal title as well as the possession according to the lex rei sitæ.

other American State courts where the latter are competent to administer the proper relief.[1]

§ 1226. **Injunction to Suppress Vexatious Litigation.** — Another class of cases of an analogous nature to which the process of injunction is also most beneficially applied is to suppress undue and vexatious litigation.[2] We have already seen the manner in which it is applied in cases of bills of peace.[3] But Courts of Equity are not limited in their jurisdiction to cases of this sort. On the contrary they possess the power to restrain and enjoin parties in all other cases of vexatious litigation. Thus for instance where a party is guilty of continual and repeated breaches of his covenants; although it may be said that such breaches may be recompensed by repeated actions of covenant, yet a Court of Equity will interpose and enjoin the party from further violations of such covenants. For it has been well remarked that the power has in many instances been recognized at law as resting on the very circumstance, that without such interposition the party can do nothing but repeatedly resort to law; and when suits have proceeded to such an extent as to become vexatious, for that very reason the jurisdiction of a Court of Equity attaches.[4]

§ 1227. **Injunction against Suit in Another State Where There Has Been a Sentence of a Foreign Court.** — Upon the same ground Courts of Equity have interposed by way of injunction to prevent a party who has been discharged from a contract by the sentence of a foreign court from being again sued on the same contract in the Courts of Law of another State. Such a sentence if obtained upon the merits is, or certainly ought to be, conclusive between the parties, and as such there would seem to be a com-

[1] Grant *v.* Quick, 5 Sandf. 612; Williams *v.* Ayrault, 31 Barb. 364. But see Pearce *v.* Olney, 20 Conn. 544; Engel *v.* Scheuerman, 40 Ga. 206; which are opposed to the statement of the text. See also Rogers *v.* Gwinn, 21 Iowa, 58; Dobson *v.* Pearce, 12 N. Y. 156; Bigelow, Estoppel, 242–244 (3d ed.); Mead *v.* Merritt, 2 Paige, R. 402; Bicknell *v.* Field, 8 Paige, R. 440, 444.

[2] What constitutes, see McHenry *v.* Lewis, 21 Ch. D. 202; Ellsworth *v.* Hale, 33 Ark. 633. And see Castro *v.* Murray, L. R. 10 Ex. 213; Dawkins *v.* Saxe-Weimar, 1 Q. B. D. 499.

The prevention of multiplicity of suits is a distinct ground upon which Courts of Equity maintain jurisdiction in a variety of cases. Hence it is that where a Court of Equity has acquired a jurisdiction for a discovery it will in many cases proceed to make a final decree upon the merits in order to prevent multiplicity of suits.

[3] Eldridge *v.* Hill, 2 John. Ch. R. 282; Cooper, Eq. Pl. 153, 154.

[4] Waters *v.* Taylor, 2 V. & Beam. 302; see also Trustees of Huntingdon *v.* Nicoll, 3 John. R. 566; Ware *v.* Horwood, 14 Ves. 33.

plete defence at law against such a new suit by the plea of res judicata. But Courts of Equity have deemed it right nevertheless to sustain the jurisdiction, because the nature and effect of a foreign judgment may not be without hazard and embarrassment in a suit at law, and there is great difference between domestic and foreign judgments in their forms as well as in their effects as records.[1]

§ 1228. **Injunction against Setting Up Unconscientious Defence.** — With a view to the same beneficial purpose and to suppress undue and mischievous litigation, Courts of Equity will in like manner prevent a party from setting up an unconscientious defence at law, or from interposing impediments to the just rights of the other party.[2] In such cases Courts of Equity act by injunction, and by that process prohibit the party from asserting such an unconscientious defence, or from setting up such an impediment to the obstruction of justice. In cases of this sort they act as ancillary to the administration of justice in other courts. Thus for instance if an ejectment is brought to try a right to land in a Court of Common Law, a Court of Equity will under proper circumstances restrain the party in possession from setting up any title which may prevent the fair trial of the right, as for example a term of years or other outstanding interest in a trustee, or lessee, or mortgagee. But this will not be done in every case; for as the court proceeds upon the principle that the party in possession ought not, in conscience to use an accidental advantage to protect his possession against a real right in his adversary, if there is any counter equity in the circumstances of the case which meets the reasoning upon this principle, the court will not interfere. Thus it will not interfere against the possessor who is a bona fide purchaser for a valuable consideration, without notice of the adverse claim at the time of his purchase.[3]

§ 1229. **Same.** — Cases often arise in which a party may be entitled to proceed in a suit at law for damages when a complete equitable defence exists which is yet incapable of being asserted at law. In such cases the suit at law is treated as vexatious, and

[1] Burrows *v.* Jemino, Sel. Cas. Ch. 69; s. c. 2 Strange, 733; Moseley, R. 1; ante, § 1209.

[2] Eden on Injunct. ch. 16, pp. 349, 350. See Martin *v.* Nicolls, 3 Sim. R. 458; Bowles *v.* Orr, 1 Younge & Coll. 464.

[3] Mitford, Eq. Pl. by Jeremy, 134, 135; Eden on Injunct. ch. 16, pp. 349, 350; Bond *v.* Hopkins, 1 Sch. & Lefr. 429; Cooper, Eq. Pl. 143; Baker *v.* Mellish, 10 Ves. 549.

will be stayed by an injunction.[1] Thus for instance if a decree has been made against a vendor for the specific performance of a contract for the sale of land, notwithstanding the vendee has not strictly complied with the terms of the contract, and subsequently a suit is brought by the vendor against the vendee for the breach of the contract, a Court of Equity will restrain the suit as being unjustifiable and vexatious.[2] So (as has been already stated) if a creditor should give time to his debtor and should thereby release the surety in equity, and he should afterwards proceed at law against the surety, the suit would be stopped by injunction upon a similar ground.[3] Indeed there can scarcely be found an end to the enumeration of cases in which vexatious suits of this sort have been suppressed by injunctions when there was no redress at law, and yet when upon the principles of justice the party was entitled to complete protection against such litigation.

§ 1230. **Injunction to Restrain Alienation of Property.** — In the next place let us proceed to the consideration of the granting of injunctions to restrain the alienation of property in the largest sense of the words. The propriety of this sort of relief will at once be seen by considering a very few cases in which it is indispensable to secure the enjoyment of specific property, or to preserve the title to such property, or to prevent frauds or gross and irremediable injustice in respect to such property. [But if the plaintiff shows no probable cause for his ultimate recovery, and where it is apparent that the filing of a notice of lis pendens, in accordance with the practice of the State, will operate effectually to prevent a transfer of the lands in controversy pendente lite, and will protect plaintiff's equitable interest therein, if any, it is not the proper case for the appointment of a receiver and an injunction.[4] The equitable owners of a judgment have such an interest in the property of the defendant as is capable of being protected by an injunction forbidding the assignment upon the records.[5] A creditor must have something more than an ordinary unascertained debt in order to procure an injunction

[1] Secus, it seems, where equitable pleas are allowed at law. See Rogers *v.* Gwinn, 21 Iowa, 58.

[2] Reynolds *v.* Nelson, 6 Madd. R. 290.

[3] Bank of Ireland *v.* Beresford, 6 Dow, R. 233; Bowmaker *v.* Moore, 3 Price, R. 219. See Clarke *v.* Henty, 3 Younge & Coll. 187.

[4] City of Spokane *v.* Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088; Adirondack R. Co. *v.* Indian River Co., 27 App. Div. 326, 50 N. Y. Supp. 245.

[5] Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. 413.

against the sale or disposition of his property by an insolvent debtor. Various rights would intervene and be for consideration before a debtor would be prevented from disposing of his property in an honest effort to rid himself of debt. Otherwise, the owner of a homestead would be powerless to dispose of his life interest in the exempt property.[1]]

§ 1231. **Injunction against Transfer of Written Instruments.** — We have already had occasion to speak of the interposition of Courts of Equity in directing the delivery of title-deeds and other instruments to the parties properly entitled to them,[2] and also in directing the delivery of chattels of a peculiar value, and not capable of compensation to the lawful owners.[3] This remedial justice is administered by means of the process of injunction. In regard to negotiable securities, as by their being transferred to a bona fide holder without notice the latter may be entitled to recover upon them, notwithstanding any fraud in their original concoction or the loss of them by the real owner, it is often indispensable to the security of the party against whose rights they may be thus made available, to obtain an injunction prohibiting any such transfer.[4]

§ 1232. **Transfer of Stocks Will Be Restrained Where There Is a Controversy as to Ownership.** — The same principle is applied to restrain the transfer of stocks.[5] Thus for instance where there is a controversy respecting the title to stock under different wills, an injunction will be granted to restrain any transfer pendente lite.[6] So an injunction will be granted where the title to stock is contro-

[1] Frederick County Natl. Bank *v.* Shafer, 87 Md. 54, 39 Atl. 320; Mullen *v.* Martin, 5 App. Div. 450, 40 N. Y. Supp. 725; Puryear *v.* Sanford, 124 N. C. 276, 32 S. E. 685.

[2] Ante, §§ 951 to 954.

[3] Fells *v.* Read, 3 Ves. Jr. 70; Nutbrown *v.* Thornton, 10 Ves. 160, 163; Osborn *v.* Bank of United States, 22 U. S. 845, 6 L. Ed. 204; Eden on Injunct. ch. 14, p. 313.

[4] 1 Madd. Ch. Pr. 127; 1 Fonbl. Eq. B. 1, ch. 1, § 8, note (*y*); Smith *v.* Haytwell, Amb. R. 66; Lloyd *v.* Gurdon, 2 Swanst. R. 180; King *v.* Hamlet, 4 Sim. R. 223; Patrick *v.* Harrison, 3 Bro. Ch. R. 476; Eden on Injunct. ch. 14, p. 292; Osborn *v.* Bank of United States, 22 U. S. 845, 6 L. Ed. 204; Hood *v.* Alston, 1 Russell, R. 412. See Hodgson *v.* Murray, 2 Simons, R. 515.

[5] Snow *v.* Weber, 39 Mich. 143. Or to restrain suit for interest or dividends on stock fraudulently issued, though bought in good faith on the market. Athenæum Assur. Co. *v.* Pooley, 3 DeG. & J. 294; Barth *v.* Union Natl. Bank, 67 Ill. App. 131; Dickerson *v.* Bankers Loan Co., 93 Va. 498, 25 S. E. 548; Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236, N. W. 24; Currie *v.* Jones, 138 N. C. 189, 50 S. E. 560.

[6] King *v.* King, 6 Ves. 172.

verted between principal and agent,[1] or where a trustee or agent attempts to transfer it for his own benefit and to the injury of the party beneficially entitled to it.[2] So an injunction will be granted to restrain the payment of money where it is injurious to the party to whom it belongs, or where it is in violation of the trust to which it should be devoted.[3] So it will be granted to restrain the transfer of diamonds or other valuables where the rightful owner may be in danger of losing them.[4]

§ 1233. [**The Complainant Must Have Had at Least an Apparent Right to the Property in Controversy.** — In actions respecting real property, where the plaintiff's right has not been established at law, or is not clear, he is generally not entitled to remedy by injunction; but where in a proceeding in equity the plaintiff's title is clear, and all of the evidence relating to it is of such a character that a judge in a trial at law upon the same evidence would not be at liberty to submit the question of the plaintiff's title to the jury, equity will grant relief although there has been no adjudication of the title at common law. Where the complainant had purchased property abutting upon a common alley-way, he was entitled to have the stoppage of the alley-way enjoined by defendant, though the trial of the action, in which it would be incumbent upon him to show his own title, had not then occurred.[5] But if the mischief sought to be remedied was not such as to work an irreparable injury, it is essential that the title be sustained in an action at law before an injunction would issue to protect the alleged right of property.[6] It must be borne in mind that there is a substantial difference between the cases in which an easement will or will not be protected by injunction prior to the establishment of the title at law. If the easement is an apparent right annexed to and incidental to the enjoyment of real property about which there can be no serious question, it is not necessary to first

[1] Chedworth *v.* Edwards, 8 Ves. 46. But see 1 Madd. Ch. Pr. 128, note (*e*).

[2] Osborn *v.* Bank of United States, 22 U. S. 845, 6 L. Ed. 204; Stead *v.* Clay, 1 Sim. R. 294; Rogers *v.* Rogers, 1 Anst. 174.

[3] See Reeve *v.* Parkins, 2 Jac. & Walk. 390; Whittingham *v.* Burgoyne, 3 Anst. 900; Green *v.* Lowes, 3 Bro. Ch. R. 217.

[4] Ximènes *v.* Franco, 1 Dick. 149; Tonnins *v.* Prout, 1 Dick. 387; Eden on Injunct. ch. 14, p. 313.

[5] Richmond *v.* Bennett, 205 Pa. 470, 55 Atl. 17; Robertson *v.* Meyer, 59 N. J. Eq. 366, 45 Atl. 983; Hart *v.* Leonard, 42 N. J. Eq. 416, 7 Atl. 865; Hinckel *v.* Stevens, 17 App. Div. 279, 45 N. Y. Supp. 678.

[6] Delaware L. & W. R. Co. *v.* Breckenridge, 55 N. J. Eq. 141, 35 Atl. 756; Kanawha etc. R. Co. *v.* Glen Jean etc. R. Co., 45 W. Va. 119, 30 S. E. 86.

establish the title; but if there is a question as to the right of the complainant to use the easement in any event, then the title must first be shown to be in the complainant.[1] For instance, where the complainant is neither in the actual nor constructive possession of the property sought to be protected, nor is there evidence that he is reasonably entitled to recover the same in an action at law, an injunction will not issue.[2] It is essential to the maintenance of a suit by an individual to abate a public nuisance for the complainant to show that he is peculiarly affected and especially injured by it. Where they do not claim to have suffered any peculiar injury to themselves other than as abutting owners of the land, the title to which is disputed, they have no right to enjoin the alleged nuisance until they prove their title to the land and that they have sustained a special injury.[3]]

§ 1234. [**Court Will Protect Property by Injunction Pending Trial of the Question of Title.** — When the action is of such a nature that the complainant may have a right that will be jeopardized by the delay in awaiting a trial of the question of his title or right to maintain a bill in equity for an injunction against the interference with his property, the court will not permit the property to be wasted or lost pending the trial. If one of the parties has built a house upon his own land and that of the complainant, while the complainant, strictly speaking, is not entitled to a bill in equity to restrain the removal of the house from off of his land, yet the court will enjoin the wasting of the property pending the determination of the true ownership of it.[4] It need not necessarily appear that irreparable damage is about to be done to the property claimed by complainant. It is sufficient if it appear that great damage would result pending the final hearing.[5] Where a tenant has erected upon the demised premises various articles of personalty and upon the expiration of his term he is about to remove the fixtures so erected by him, an injunction restraining the removal is proper pending the final determination of the question whether or not the property so affixed is real or personal and

[1] Todd *v.* Staats, 60 N. J. Eq. 507, 46 Atl. 645.

[2] Hamilton *v.* Brent Lbr. Co., 127 Ala. 78, 28 So. 698.

[3] Lownsdale *v.* Gray's Harbor Boom Co., 117 Fed. 983.

[4] Cromwell *v.* Hughes, 144 Mich. 3, 107 N. W. 323, 13 Detroit Leg. N. 107; Cole *v.* Jerman, 77 Conn. 374, 59 Atl. 425; Fine *v.* Rabinbauer, 49 Misc. Rep. 437, 99 N. Y. Supp. 896; Ajax Gold Min. Co. *v.* Triumph Gold Min. Co., 30 Colo. 115, 69 Pac. 523; Pittsburg S. & W. R. Co. *v.* Fiske, 123 Fed. 760.

[5] Staples *v.* Rossi, 7 Idaho, 618, 65 Pac. 67; Freer *v.* Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895.

to whom it belongs.[1] The further transfer and assignment of shares of stock, alleged to have been obtained from complainant by fraud and duress, will be enjoined pending the determination of the question as to the legality of the original transfer. Otherwise, the failure to grant the injunctive relief might result in the complete disposition of the stock pendente lite and in forcing the complainant to resort to a multiplicity of suits against those to whom the shares were transferred.[2]]

§ 1235. **Vexatious Alienation of Property May Be Restrained.** — In like manner an injunction will be granted to restrain a party from making vexatious alienations of real property pendente lite.[3] So also to restrain a vendor from conveying the legal title to real estate pending a suit for the specific performance of a contract for the sale of that estate.[4] For in every such case the plaintiff may be put to the expense of making the vendor a party to the proceedings, and at all events his title, if he prevails in the suit, may be embarrassed by such new outstanding title under the transfer.[5] Although the maxim is "pendente lite nil innovetur", that maxim is not to be understood as warranting the conclusion that the conveyance so made is absolutely null and void at all times and for all purposes. The true interpretation of the maxim is that the conveyance does not vary the rights of the parties in that suit, and they are not bound to take notice of the title acquired under it, but with regard to them the title is to be taken as if it had never existed. Otherwise suits would be indeterminable if one party pending the suit could by conveying to others create a necessity for introducing new parties.[6]

[1] Baker *v.* Natl. Biscuit Co., 96 Ill. App. 228.

[2] Hoy *v.* Altoona Midway Oil Co., 136 Fed. 483.

[3] Daly *v.* Kelly, 4 Dow, R. 440.

[4] Echliff *v.* Baldwin, 16 Ves. 267; Daly *v.* Kelly, 4 Dow, R. 435; Mitf. Eq. Pl. by Jeremy, 46, 135, 136, 137.

[5] Ibid.; see Mitf. Eq. Pl. by Jeremy, 135; Story on Eq. Plead. §§ 156, 351.

[6] Metcalfe *v.* Pulvertoft, 2 Ves. & B. 205; Bishop of Winchester *v.* Paine, 11 Ves. 197; Gaskeld *v.* Durdin, 2 Ball & B. 169; Bishop of Winchester *v.* Beaver, 3 Ves. 314; Moore *v.* Macnamara, 2 Ball & B. 186. In some of the authorities the doctrine seems to be countenanced that a purchaser pendente lite should be made a party. See Echliff *v.* Baldwin, 16 Ves. 267; Daly *v.* Kelly, 4 Dow, R. 435. But the true doctrine seems to be that asserted in the text. If however the purchaser pendente lite be a purchaser of the legal estate and not of a mere equitable estate, it may, after the determination of the pending suit, be necessary, in order to compel a surrender of his title or to declare it void, to institute a new suit against him. Bishop of Winchester *v.* Paine, 11 Ves. 197; Murray *v.* Ballou, 1 John. Ch. R. 576 to 581; Murray *v.* Lylburn, 2 John. Ch.

§ 1236. **Injunction against Waste.** — In the next place let us proceed to the consideration of injunctions in cases of waste.[1] The state of the common law with regard to waste was very learnedly expounded by Lord Chief Justice Eyre in a celebrated case,[2] and it can be best stated in his own words. "At common law," said he, "the proceeding in waste was by writ of prohibition from the Court of Chancery, which was considered as the foundation of a suit between the party suffering by the waste and the party committing it. If that writ was obeyed, the ends of justice were answered. But if that was not obeyed, and an alias and pluries produced no effect, then came the original writ of attachment out of chancery, returnable in a Court of Common Law, which was considered as the original writ of the court. The form of that writ shows the nature of it. It was the same original writ of attachment which was and is the foundation of all proceedings in prohibition, and of many other proceedings in this court at this day, &c. That writ being returnable in a Court of Common Law, and most usually in the Court of Common Pleas, on the defendant appearing the plaintiff counted against him, he pleaded, the question was tried, and if the defendant was found guilty, the plaintiff recovered single damages for the waste committed. Thus the matter stood at common law. It has been said (and truly so, I think, so far as can be collected from the text-writers) that at the common law this proceeding lay only against tenant in dower, tenant by the curtesy, and guardian in chivalry. It was extended by different statutes (Stat. of Marlbridge, ch. 24; Stat. of Gloucester, ch. 5) to farmers, tenants for life, and tenants for years, and, I believe, to guardians in socage.[3] That which these statutes gave by way of remedy was not so properly the introduction of a new law, as the extension of an old one to a new description of persons. The course of proceeding remained the same as before these statutes were made. The first act which introduced anything substantially new was that (Stat. of Gloucester, ch. 13) which gave a writ of waste or estrepement pending

R. 444, 445; Metcalfe *v.* Pulvertoft, 2 Ves. & B. 204, 205; Eades *v.* Harris, 1 Younge & Coll. New R. 231; Story on Equity Plead. §§ 156, 351.

[1] See Com. Dig. Chancery, D. 11, 4 X.

[2] Jefferson *v.* Bishop of Durham, 1 Bos. & Pull. 120.

[3] Mr. Reeves (Hist. of the Law, Vol. 1, p. 186, Vol. 2, pp. 73, 74, 148, note) seems to suppose that these statutes were but an affirmance of the common law. In this opinion he is opposed by Lord Coke and other great authorities; and Mr. Eden (on Injunct. ch. 8, p. 145, note) very properly considers the weight of authority decidedly against Mr. Reeves.

the suit. It follows of course that this was a judicial writ, and was to issue out of the Courts of Common Law. But except for the purpose of staying proceedings pending a suit, there is no intimation in any of our text-writers that any prohibition could issue from those courts. By the Statute of Westminster 2d the writ of prohibition is taken away, and the writ of summons is substituted in its place; and although it is said by Lord Coke, when treating of prohibition at the common law, that it 'may be used at this day', those words, if true at all, can only apply to that very ineffectual writ directed to the sheriff, empowering him to take the posse comitatus to prevent the commission of waste intended to be done. The writ directed to the party was certainly taken away by the statute. At least as far as my researches go, no such writ has issued, even from chancery, in the common cases of waste by tenants in dower, tenants by the curtesy, and guardians in chivalry, tenants for life, &c., since it was taken away by the Statute of Westminster 2d. Thus the common law remedy stood, with the alteration above mentioned, and with the judicial writ of estrepement introduced pendente lite." [1]

§ 1237. **Same.** — To this luminous exposition of the state of the common law it may be added that there was by the common law another remedy of a preventive nature in the writ of estrepement. This lay after a judgment obtained in a real action, before possession was delivered by the sheriff, to prevent the tenant

[1] Mr. Justice Blackstone has given a very full view of the action of waste at the common law and as awarded by statute. He says: "A writ of waste is also an action partly founded upon the common law and partly upon the Statute of Gloucester (6 Edw. I. ch. 5), and may be brought by him who hath the immediate estate of inheritance in reversion or remainder against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. This action is also maintainable in pursuance of Statute (13 Edw. I. ch. 22) Westm. 2, by one tenant in common of the inheritance against another, who makes waste in the estate holden in common. The equity of which statute extends to joint tenants but not to coparceners; because by the old law coparceners might make partition whenever either of them thought proper, and thereby prevent future waste. But tenants in common and joint tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition and take the place wasted to his own share, or to give security not to commit any further waste (2 Inst. 403, 404). But these tenants in common and joint tenants are not liable to the penalties of the Statute of Gloucester, which extends only to such as have life-estates and do waste to the prejudice of the inheritance. The waste however must be something considerable; for if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste: 'Nam de minimis non curat lex'". See 3 Black. Comm. 227, 228; Finch, L. 29.

from committing waste in the lands recovered.[1] And the Statute of Gloucester, which gave the writ of estrepement pendente lite, also directed (ch. 5) that the tenant should forfeit the place wasted, and also treble damages.[2]

§ 1238. **Use of the Writ of Estrepement.** — The remedy by writ of estrepement was applicable only to cases of real actions; and when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of estrepement did not apply, Courts of Equity, acting upon the principle of preserving the property pendente lite, supplied the defect and interposed by way of injunction.[3]

§ 1239. **The Wasting of Property in Which a Limited Interest Is Held, Will Be Restrained.** — But Courts of Equity have by no means limited themselves to an interference in cases of this sort. They have indeed often interfered in restraining waste by persons having limited interests in property, on the mere ground of the common-law rights of the parties, and the difficulty of obtaining the immediate preservation of the property from destruction or irreparable injury by the process of the common law. But they have also extended this salutary relief to cases where the remedies provided in the Courts of Common Law cannot be made to apply;

[1] Eden on Injunct. ch. 9, p. 159; Com. Dig. Waste, A. B.; Fitz. Nat. Brev. 60; Cooper, Eq. Pl. 147, 148; 3 Black. Comm. 225 to 227. Mr. Justice Blackstone, in his Commentaries (3 Black. Comm. 225, 226), has given a much fuller account of the writ of estrepement than that given in the text. It is too long for insertion in this place, but the following extract corroborates the statement in the text. "Estrepement is an old French word signifying the same as waste or extirpation; and the writ of estrepement lay at the common law, after judgment obtained in any action real (2 Inst. 328), and before possession was delivered by the sheriff to stop any waste which the vanquished party might be tempted to commit in lands which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive that the tenant may make waste or estrepement pending the suit, well knowing the weakness of his title, therefore the Statute of Gloucester (6 Edw. I. ch. 13) gave another writ of estrepement pendente placito, commanding the sheriff firmly to inhibit the tenant, 'Ne faciat vastum vel estrepamentum pendente placito dicto indiscusso' (Regist. 77). And by virtue of either of these writs the sheriff may resist them that do, or offer to do, waste; and if otherwise he cannot prevent them, he may lawfully imprison the wasters or make a warrant to others to imprison them; or if necessity require, he may take the posse comitatus to his assistance. So odious in the sight of the law is waste and destruction." 2 Inst. 399.

[2] Com. Dig. Waste, C. 1; Id. Chancery, D. 11; 2 Inst. 299; 3 Black. Comm. 227 to 229.

[3] Mitf. Eq. Pl. by Jeremy, 136; Pultney *v.* Shelton, 5 Ves. 261, note; Cooper, Eq. Pl. 146, 147; 3 Black. Comm. 227; Peak *v.* Hayden, 3 Bush, 125; Markham *v.* Howell, 33 Ga. 508.

and where the titles of the parties are purely of an equitable nature;[1] and where the waste is what is commonly, although with no great propriety of language, called equitable waste,[2] meaning acts which are deemed waste only in Courts of Equity; and where (as we have already seen) no waste has been actually committed, but is only meditated or feared to be done, by a bill quia timet.

§ 1240. **Commission of Waste by Tenant for Life.** — In order to show the beneficial nature of the remedial interference of Courts of Equity in cases of waste, it may not be without use to suggest a few cases where it is indispensable for the purposes of justice, and there is either no remedy at all at law, or none which is adequate. In the first place there are many cases where a person is dispunishable at law for committing waste, and yet a Court of Equity will enjoin him. As where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be restrained by injunction from committing waste,[3] although if he did commit waste no action of waste would lie against him by the remainder-man for life, for he has not the inheritance; or by the remainder-man in fee, by reason of the interposed remainder for life.[4] So a ground landlord may have an injunction to stay waste against an under-lessee.[5] So an injunction may be obtained against a tenant from year to year, after a notice to quit, to restrain him from removing the crops, manure, &c., according to the usual course of husbandry.[6] So it may be obtained against a lessee, to prevent him from making material alterations in a dwelling-house, as by changing it into a shop or warehouse.[7]

§ 1241. **Injunction Lies Where Aggrieved Party Has Equitable Rights Only.** — In the next place Courts of Equity will grant an in-

[1] Mitf. Eq. Pl. by Jeremy, 114, 115, and cases cited in note (*u*); 3 Wooddes. Lect. 56, pp. 399 to 406; 1 Madd. Ch. Pr. 114 to 121; Jeremy, Eq. Jurisp. B. 3, ch. 2, §§ 1, 327 to 344.

[2] Marquis of Downshire *v.* Lady Sandys, 6 Ves. 109, 110, 115; Chamberlain *v.* Dummer, 1 Bro. Ch. R. 166; post, § 1242.

[3] Not for permissive waste of course. Powys *v.* Blagrave, 4 DeG. M. & G. 448.

[4] Com. Dig. Waste, C. 3; Abraham *v.* Bubb, 2 Freem. Ch. R. 53; Garth *v.* Cotton, 1 Dick. 183, 205, 208; s. c. 1 Ves. 555; Perrot *v.* Perrot, 3 Atk. 94; Robinson *v.* Litton, 3 Atk. 210; Eden on Injunct. ch. 9, pp. 162, 163; Davis *v.* Leo, 6 Ves. 787.

[5] Farrant *v.* Lovell, 3 Atk. 723; s. c. Ambler, R. 105; 3 Wooddes. Lect. 56, pp. 400, 404.

[6] Onslow *v.* ——, 16 Ves. 173; Pratt *v.* Brent, 2 Madd. R. 62.

[7] Douglass *v.* Wiggins, 1 John. Ch. R. 335.

junction in cases where the aggrieved party has equitable rights only; and indeed it has been said that these courts will grant it more strongly where there is a trust estate.[1] Thus for instance in cases of mortgages, if the mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction will be granted although there is no remedy at law.[2] So where there is a contingent estate, or an executory devise, over dependent upon a legal estate, Courts of Equity will not permit waste to be done to the injury of such estate; more especially not if it is an executory devise of a trust estate.[3]

§ 1242. **Equitable Waste Considered.** — In the next place in regard to equitable waste, which may be defined to be such acts as at law would not be esteemed to be waste under the circumstances of the case, but which in the view of a Court of Equity are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. As if the mortgagor in possession should fell timber on the estate and thereby the security would become insufficient (but not otherwise), a Court of Equity will restrain the mortgagor by injunction.[4] So if there be a tenant for life without impeachment for waste, and he should pull down houses or do other waste wantonly or maliciously, a Court of Equity would restrain him; for it is said a Court of Equity ought to moderate the exercise of such a power, and pro bono publico restrain extravagant humorous waste.[5] Upon this ground tenants for life[6] without impeachment for waste, and tenants in tail, after possibility of issue extinct, have been restrained not only from acts of waste to the destruction of the estate, but also from cutting down trees planted for the ornament or shelter of the premises.[7]

[1] Robinson *v.* Litton, 3 Atk. 200; Garth *v.* Cotton, 1 Dick. 183; s. c. 1 Ves. 555; Stansfield *v.* Habergham, 10 Ves. 277, 278.

[2] Farrant *v.* Lovell, 3 Atk. 723; Eden on Injunct. ch. 9, pp. 165, 166; 3 Wooddes. Lect. 56, p. 405; Brady *v.* Waldron, 2 John. Ch. R. 148; Humphreys *v.* Harrison, 1 Jac. & Walk. 581; Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Minneapolis Trust Co. *v.* Verhulst, 74 Ill. App. 350.

[3] Stansfield *v.* Habergham, 10 Ves. 278; Eden on Injunct. ch. 9, pp. 170, 171; 3 Wooddes. Lect. 56, pp. 399, 400; Jeremy, Eq. Jurisd. B. 3, ch. 2, § 1, p. 339.

[4] King *v.* Smith, 2 Hare, R. 239.

[5] Abraham *v.* Bubb, 2 Freem. Ch. R. 53; Lord Barnard's case, Prec. Ch. 454; s. c. 2 Vern. 738; Aston *v.* Aston, 1 Ves. 265.

[6] And their assignees. Clement *v.* Wheeler, 25 N. H. 361.

[7] Eden on Injunct. ch. 9, pp. 177 to 186; Burgess *v.* Lamb, 16 Ves. 185, 186; Marquis of Downshire *v.* Sandys, 6 Ves. 107; Lord Tamworth

In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties.

§ 1243. **Restraint of Waste Committed by Tenants in Common.** — Upon similar grounds, although Courts of Equity will not interfere by injunction to prevent waste in cases of tenants in common, or coparceners, or joint tenants, because they have a right to enjoy the estate as they please, yet they will interfere in special cases, as where the party committing the waste is insolvent, or where the waste is destructive of the estate and not within the usual legitimate exercise of the right of enjoyment of the estate.[1]

§ 1244. **Relief Will Be Granted from Voluntary as Well as Permissive Waste.** — From this very brief view of some of the more important cases of equitable interference in cases of waste, the inadequacy of the remedy at common law, as well to prevent waste as to give redress for waste already committed, is so unquestionable that there is no wonder that the resort to the Courts of Law has in a great measure fallen into disuse. The action of waste is of rare occurrence in modern times,[2] an action on the case for

v. Lord Ferrers, 6 Ves. 419; Day *v.* Merry, 16 Ves. 375; Attorney-Gen. *v.* Duke of Marlborough, 3 Madd. R. 539, 540; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*p*); 3 Wooddes. Lect. 56, pp. 402, 403; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 333 to 336; Wellesley *v.* Wellesley, 6 Sim. R. 497. See Sowerby *v.* Fryer, L. R. 8 Eq. 417; Birch-Wolf *v.* Birch, L. R. 9 Eq. 683; Bubb *v.* Yelverton, L. R. 10 Eq. 465; Briggs *v.* Oxford, 8 Eng. L. & E. 194; s. c. 16 Jur. 53; Kekewich *v.* Marker, 3 Macn. & G. 311; Bailey *v.* Hobson, L. R. 5 Ch. 180.

[1] Eden on Injunct. ch. 9, pp. 171, 172; Twort *v.* Twort, 16 Ves. 128, 131; Hale *v.* Thomas, 7 Ves. 589, 590; Hawley *v.* Clowes, 2 John. Ch. R. 122. The Statute of Westminster 2d, ch. 22, provided a remedy for tenants in common and joint tenants in many cases of waste, by providing that, upon an action of waste, the offending party should make an election to take the part wasted in his purparty, or to find surety to take no more than belonged to his share. But this statute only applied to cases of freehold. Bodking *v.* Arnold, 48 W. Va. 108, 35 S. E. 980; Cecil *v.* Clark, 47 W. Va. 402, 35 S. E. 11, 81 Am. St. Rep. 802; Byam *v.* Bickford, 140 Mass. 31, 2 N. E. 687; Benedict *v.* Torrent, 83 Mich. 181, 47 N. W. 129, 11 L. R. A. 278, 21 Am. St. Rep. 589; Hinson *v.* Hinson, 120 N. C. 400, 27 S. E. 80.

The right to sue for waste includes the right to restrain its commission. Morrison *v.* Morrison, 122 N. C. 598, 29 S. E. 901.

A tenant in common may bore wells for oil upon the common property and it is not waste so long as he takes no more oil than his share. Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891.

The boxing of the trees upon 120 acres of land held in common is an unusual and unreasonable act upon the part of one co-tenant and is waste. Leatherbury *v.* McInnis, 85 Miss. 160, 37 So. 1018, 107 Am. St. Rep. 274.

[2] Harrow School *v.* Alderton, 2 Bos. & Pull. 86; Redfern *v.* Smith, 1 Bing. R. 382; 2 Bing. R. 262.

waste being generally substituted in its place whenever any remedy is sought at law. The remedy by a bill in equity is so much more easy, expeditious, and complete, that it is almost invariably resorted to.[1] By such a bill not only may future waste be prevented, but, as we have already seen, an account may be decreed and compensation given for past waste.[2] Besides, an action on the case will not lie at law for permissive waste;[3] but in equity an injunction will be granted to restrain permissive waste as well as voluntary waste.[4]

§ 1245. **Waste Will Be Restrained though There Be No Privity of Estate.** — The interference of Courts of Equity in restraint of waste was originally confined to cases founded in privity of title; and for the plaintiff to state a case in which the defendant pretended that the plaintiff was not entitled to the estate, or in which the defendant was asserted to claim under an adverse right, was said to be for the plaintiff to state himself out of court. But at present the courts have, by insensible degrees, enlarged the jurisdiction to reach cases of adverse claims and rights not founded in privity;[5] as for instance to cases of trespass attended with irreparable mischief, which we shall have occasion hereafter to consider.[6]

§ 1246. **Same.** — The jurisdiction then of Courts of Equity to interpose by way of injunction in cases of waste may be referred to the broadest principles of social justice. It is exerted where the remedy at law is imperfect or is wholly denied; where the nature of the injury is such that a preventive remedy is indispensable, and it should be permanent; where matters of discovery and account are incidental to the proper relief;[7] and where equitable rights

[1] Eden on Injunct. ch. 9, p. 159.

[2] Eden on Injunct. ch. 9, pp. 159, 160; Id. ch. 40, pp. 206 to 219.

[3] Gibson *v.* Wells, 4 Bos. & Pull. 290; Herne *v.* Bembow, 4 Taunt. R. 764.

[4] Eden on Injunct. ch. 9, pp. 159, 160; Caldwall *v.* Baylis, 2 Meriv. R. 408; 1 Fonbl. Eq. B. 1, ch. 1, § 5, note (*p*).

[5] The rule appears now to be well settled in England, that the want of privity is no objection; it is enough that the waste is malicious, destructive, and irreparable at law. See Haigh *v.* Jagger, 2 Coll. 231; Talbot *v.* Scott, 4 Kay & J. 96; Neale *v.* Cripps, Ib. 472. But see Bogey *v.* Shute, 57 N. C. 174.

[6] See the cases fully collected by Mr. Eden, Eden on Injunct. ch. 9, pp. 191 to 196, ch. 10, pp. 206 to 214; Livingston *v.* Livingston, 6 John. Ch. R. 497; Smith *v.* Collyer, 8 Ves. 90.

[7] Palmer *v.* Young, 108 Ill. App. 252; Chapel *v.* Hull, 60 Mich. 167, 26 N. W. 874; Greathouse *v.* Greathouse, 46 W. Va. 21, 32 S. E. 994; Watson *v.* Hunter, 5 John. Ch. R. 170; Jeremy on Equity Jurisd. B. 3, ch. 2, § 1, pp. 327, 328; Winship *v.* Pitts, 3 Paige, R. 259.

and equitable injuries call for redress to prevent a malicious, wanton, and capricious abuse of their legal rights and authorities by persons having but temporary and limited interests in the subject-matter. On the other hand Courts of Equity will often interfere in cases where the tenant in possession is impeachable for waste, and direct timber to be felled which is fit to be cut, and in danger of running into decay, and thus will secure the proceeds for the benefit of those who are entitled to it.[1]

§ 1247. **Nuisance Restrained by Injunction.** — In the next place let us proceed to the consideration of the granting of injunctions in cases of nuisances. Nuisances may be of two sorts: (1) such as are injurious to the public at large or to public rights; (2) such as are injurious to the rights and interests of private persons.

§ 1248. **Injunction against Public Nuisances.** — In regard to public nuisances the jurisdiction of Courts of Equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth.[2] The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. Purpresture, according to Lord Coke, signifies a close or enclosure, that is, when one encroaches or makes that several to himself which ought to be common to many.[3] The term was, in the old law writers, applied to cases of encroachment not only upon the king but upon subjects. But in its common acceptation it is now understood to mean an encroachment upon the king, either upon part of his demesne lands, or upon rights and easements held by the Crown of the public, such as upon highways,[4] public river, forts, streets, squares, bridges, quays, and other public accommodations.[5]

§ 1249. **Same.** — In cases of purpresture the remedy for the Crown is either by an information of intrusion at the common law, or by an information at the suit of the attorney-general in equity.

[1] See Eden on Injunct. ch. 10, pp. 218 to 221; Burges *v.* Lamb, 16 Ves. 182; Mildmay *v.* Mildmay, 4 Bro. Ch. R. 76; Delapole *v.* Delapole, 17 Ves. 150; Osborne *v.* Osborne, 19 Ves. 423; Wickham *v.* Wickham, 19 Ves. 419, 423; Cooper, R. 288.

[2] Eden on Injunct. ch. 11, pp. 224, 225.

[3] 2 Inst. 38, 272.

[4] Metropolitan R. Co. *v.* Chicago, 96 Ill. 620.

[5] Hale in Harg. Law Tracts, ch. 8, pp. 74, 78; Trustees of Watertown *v.* Cowen, 4 Paige, R. 510, 514, 515; Commonwealth *v.* Wright, 3 Amer. Jur. 185; City of New Orleans *v.* United States, 35 U. S. 662, 9 L. Ed. 573; Attorney-Gen. *v.* Forbes, 2 Mylne & Craig, 123; Earl of Ripon *v.* Hobart, 3 Mylne & Keen, 169, 179, 180, 181; Mohawk Bridge Co. *v.* Utica & Schenectady R. Co., 6 Paige, R. 554; Attorney-Gen. *v.* Cohoes Co., 6 Paige, R. 133.

In the case of a judgment upon an information of intrusion the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appear to be a mere purpresture, without being at the same time a nuisance, the court may direct an inquiry to be made whether it is most beneficial to the Crown to abate the purpresture, or to suffer the erections to remain and be arrented.[1] But if the purpresture be also a public nuisance, this cannot be done; for the Crown cannot sanction a public nuisance.

§ 1250. **Same.** — In cases of public nuisances properly so called an indictment lies to abate them and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.[2] The instances of the interposition of the court however are (it is said) rare, and principally confined to informations seeking preventive relief. Thus informations in equity have been maintained against a public nuisance by stopping a highway.[3] Analogous to that, there have been many cases in the Court of Exchequer of nuisance to harbors, which are a species of highway. If the soil belongs to the Crown, there is the species of remedy for the purpresture above mentioned for that. If the soil does not belong to the Crown, but it is merely a common nuisance to all the public, an information in equity lies. But the question of nuisance or not must, in cases of doubt, be tried by a jury; and the injunction will be granted or not, as that fact is decided.[4] And the court in the exercise of its juris-

[1] Mitf. Eq. Pl. by Jeremy, 145; Eden on Injunct. ch. 11, pp. 223, 224; Hale in Harg. 81; Attorney-Gen. *v.* Richards, 2 Anstr. R. 603, 606; Attorney-Gen. *v.* Johnson, 2 Wilson, Ch. R. 101 to 103.

[2] Attorney-Gen. *v.* Shrewsbury Bridge Co., 21 Ch. D. 752; Attorney-Gen. *v.* Tudor Ice Co., 104 Mass. 239; Attorney-Gen. *v.* Metropolitan R. Co., 125 Mass. 515. The court will not interfere in this way when the nuisance is of a nature to be removed with equal facility by other constituted authorities. Attorney-Gen. *v.* Metropolitan R. Co., supra; Attorney-Gen. *v.* Bay State Brick Co., 115 Mass. 431, 438. Further see Attorney-Gen. *v.* Great Eastern R. Co., 11 Ch. D. 449; Attorney-Gen. *v.* Cockermouth Board, L. R. 18 Eq. 172; Attorney-Gen. *v.* Ely R. Co., L. R. 4 Ch. 194. Acquittal on an indictment is no bar to proceedings to enjoin and abate a nuisance in equity. Minke *v.* Hopeman, 87 Ill. 450.

[3] Craig *v.* People, 47 Ill. 487; Attorney-Gen. *v.* Shrewsbury Bridge Co., 21 Ch. D. 752. See Dunning *v.* Aurora, 40 Ill. 481.

[4] If the legal right is doubtful, the practice appears to be to leave that question to trial at law. Afterwards an injunction may be granted. Broadbent *v.* Imperial Gas Co., 7 DeG. M. & G. 436; Attorney-Gen. *v.* United Kingdom Tel. Co., 5 Law T. (N. S.) 338; Cardiff *v.* Cardiff Waterworks Co., 4 DeG. & J. 596; Carlisle *v.* Cooper, 6 C. E. Green, 576; Burnham *v.* Kempton, 44 N. H. 78; Bradfield *v.* Dewell, 48 Mich. 9. But equity will retain the bill meantime. Attorney-Gen. *v.* United

diction will direct the matter to be tried upon an indictment, and reserve its decree accordingly.[1]

§ 1251. **Same.** — The ground of this jurisdiction of Courts of Equity in cases of purpresturê as well as of public nuisances undoubtedly is their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations.[2] In the first place they can interpose where the Courts of Law cannot, to restrain and prevent such nuisances as are threatened or are in progress, as well as to abate those already existing.[3] In the next place by a perpetual injunction the remedy is made complete through all future time; whereas an information or indictment at the common law can only dispose of the present nuisance, and for future acts new prosecutions must be brought. In the next place the remedial justice in equity may be prompt and immediate before irreparable mischief is done; whereas at law nothing can be done except after a trial, and upon the award of judgment. In the next place a Court of Equity will not only interfere upon the information of the attorney-general, but also upon the application of private parties directly affected by the nuisance;[4] whereas at law in many cases the remedy

Kingdom Tel. Co., supra. And where the plaintiff has long been in the exercise of the right, or where delay would be disastrous, he will not be required to establish his right at law. Burnham *v.* Kempton, supra; Falls Village Waterpower Co. *v.* Tibbetts, 31 Conn. 165. See Coe *v.* Lake Co. 37 N. H. 254; Attorney-Gen. *v.* Cleaver, 18 Ves. 217, 218; Crowder *v.* Tinkler, 19 Ves. 620, 622; Barnes *v.* Baker, Ambl. R. 158; Eden on Injunct. ch. 11, pp. 223, 224, 230, 235 to 237; Mitf. Eq. Pl. by Jeremy, 145; Attorney-Gen. *v.* Forbes, 2 Mylne & Craig, R. 143; Mohawk Bridge Co. *v.* Utica & Schenectady R. Co., 6 Paige, R. 554; Attorney-Gen. *v.* Cohoes Co., 6 Paige, R. 133.

[1] But see Earl of Ripon *v.* Hobart, 1 Cooper, Sel. Cas. 333; s. c. 3 Mylne & Keen, 164, 179, 180.

[2] Mitf. Eq. Pl. by Jeremy, 144, 145; Attorney-Gen. *v.* Johnson, 2 Wilson, Ch. R. 101, 102.

[3] Attorney-Gen. *v.* Johnson, 2 Wilson, Ch. R. 101, 102.

[4] Soltau *v.* De Held, 9 Eng. L. & E. 104; s. c. 2 Sim. (N. S.) 133; Knox *v.* New York, 55 Barb. 404; Savannah R. Co. *v.* Shiels, 33 Ga. 601; Ewell *v.* Greenwood, 26 Iowa, 377; New York *v.* Baumberger, 7 Robt. 219; Hudson River R. Co. *v.* Loeb, Ib. 418. If the defendant claims a right under an act of the Legislature, he cannot be restrained on the ground of anticipated damage. Woodman *v.* Kilbourn Manuf. Co., 1 Abb. U. S. 158. See as to statutory rights Truman *v.* London Ry. Co., 29 Ch. D. 89; Sellors *v.* Matlock Board, 14 Q. B. D. 928; United States *v.* Ruggles, 5 Blatchf. 35; Milhau *v.* Sharp, 28 Barb. 228; s. c. 27 N. Y. 611; Fisher *v.* Thirkell, 21 Mich. 1, and cases there considered. And compare Radcliff *v.* Brooklyn, 4 Comst. 195; Bigelow's L. C. Torts, 549, 633.

As to the nature of the damage see Sparhawk *v.* Union Ry. Co., 54 Penn.

is, or may be, solely through the instrumentality of the attorney-general.[1]

§ 1252. **Injury to the Rights of the Public Must Be Undoubted.** — But in all cases of this sort Courts of Equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory

St. 401 (injunction against running cars on Sunday refused); First Baptist Church *v.* Utica R. Co., 5 Barb. 79; Black *v.* Philadelphia R. Co., 58 Penn. St. 249; Higbee *v.* Camden R. Co., 4 C. E. Green, 276; Hartshorn *v.* South Reading, 3 Allen, 501; Manhattan Co. *v.* Barker, 7 Robt. 523; Osborne *v.* Brooklyn R. Co., 5 Blatchf. 366; Sheboygan *v.* Sheboygan R. Co., 21 Wis. 667; Bigelow's L. C. Torts, 470, 471. If the injury is merely anticipated, and it is possible so to carry on the business as not to create a nuisance, it seems that an injunction will be refused even on the application of the attorney-general. Attorney-Gen. *v.* Stewart, 5 C. E. Green, 415.

[1] Eden on Injunct. ch. 11, p. 230; Crowder *v.* Tinkler, 19 Ves. 617, 623; Attorney-Gen. *v.* Johnson, 2 Wils. Ch. R. 87, 102, 103; Corning *v.* Lowerre, 6 John. Ch. R. 439; Attorney-Gen. *v.* Forbes, 2 Mylne & Craig, 129, 130. On this occasion Lord Cottenham said: "With respect to the question of jurisdiction, it was broadly asserted that an application to this court to prevent a nuisance to a public road was never heard of. A little research however would have found many such instances. Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbors. And the Court of Exchequer, as well as this court, acting as a Court of Equity, has a well-established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbors and public roads, and in short generally to prevent public nuisances. In Box *v.* Allen this court interfered to stay the proceedings of parties whose jurisdiction is quite as high as that of the Court of Quarter Sessions over bridges, namely, the Commissioners of Sewers. Those commissioners possess a jurisdiction founded on acts of Parliament, and they have a right, within the due limits of their authority, to do all necessary acts in the execution of their functions. Nevertheless if they so execute what they conceive to be their duty as to create or occasion a public nuisance, this court has an undoubted right to interpose. The same question occurred in Kerrison *v.* Sparrow, before Lord Eldon, in which his lordship, under the circumstances of the case, considered that he ought not to interfere; but the jurisdiction of the court was not there denied or disputed. In Attorney-Gen. *v.* Johnson the objection to the jurisdiction was attempted to be raised. The defendants in that case, the corporation of the city of London, were authorized by act of Parliament to do what was necessary to be done in the exercise of their duty as conservators of the river Thames. But in that particular instance they had assumed to themselves a right to carry on or sanction operations which created a nuisance to the king's subjects; and the court accordingly interfered to prevent them from so exercising their undoubted legal powers. To say that this court, when it interferes in such a case, is acting as a court of appeal from the Court of Quarter Sessions, is anything but a correct representation of the fact. The jurisdiction is exercised not for the purpose of overruling the power of others, by way of appeal from their authority, but for the purpose of exerting a salutary control over all for the protection of the public." See also Spencer *v.*

evidence. For if the evidence be conflicting, and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition.[1] And indeed the same

London & Birmingham Railway Company, 8 Sim. R. 193; Sampson *v.* Smith, 8 Sim. R. 272.

[1] Earl of Ripon *v.* Hobart, 1 Cooper, Sel. Cas. 333; s. c. 3 Mylne & Keen, 169. In this last case Lord Brougham said: "In considering more generally the question which is raised by the present motion, I certainly think we shall not go beyond what both principle and authority justify, if we lay down the rule respecting the relief by injunction as applied to such cases as this. If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial, and will, according to the circumstances, direct an issue or allow an action, and if need be expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere, where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property which are prima facie harmless or even praiseworthy is equally manifest. And it is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the thing or the act complained of was admitted to be directly and immediately hurtful to the complainant. All that has been said in the cases where this unwillingness has appeared may be referred to in support of the proposition which I have stated; as in the Attorney-Gen. *v.* Nichol, 16 Ves. 338; Attorney-Gen. *v.* Cleaver, 18 Ves. 211; and an Anonymous case before Lord Thurlow, in 1 Ves. Jr. 140, and others. It is also very material to observe, what is indeed strong authority of a negative kind, that no instance can be produced of the interposition by injunction in the cases of what we have been regarding as eventual or contingent nuisance. But some authorities approach very near the ground upon which I have relied. Lord Hardwicke, in Attorney-Gen. *v.* Doughty, 2 Ves. 453, speaks of plain nuisances and a plain case of nuisance as contradistinguished from others, and entitling the court to grant an injunction before answer. Lord Eldon appeared at one time (Attorney-Gen. *v.* Cleaver) to think that there was no instance of an injunction to restrain nuisance without trial. But though this cannot now be maintained, it is clear that in other cases where there appeared a doubt, as in Chalk *v.* Wyatt, 3 Mer. 688, the injunction was said only to be granted because damages had been recovered at law. The course which has been pursued at law with respect to different kinds of obstruction and other violations of right furnishes a strong analogy of the same kind. Lord Hale, in a note to Fitzherbert's Nat. Brev. 184 *a*, speaking of a market holden in derogation of a franchise, says that if it be kept on the same day, it shall be intended a nuisance; but if it

doctrine is equally applicable to cases of private nuisance.[1] But when private individuals suffer an injury quite distinct from that of the public in general in consequence of a public nuisance, they will be entitled to an injunction and relief in equity, which may thus compel the wrong-doer to take active measures against allowing the injury to continue.[2]

§ 1253. **Private Nuisance Enjoined Where the Mischief Is Irreparable.** — In regard to private nuisances the interference of Courts of Equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits.[3] It is not every case which will furnish a right of action against a party for a nuisance which will justify the interposition of Courts of Equity to redress the injury or to remove

be on another day, it shall be put to issue whether it be a nuisance or not. And the case of Yard *v.* Ford, 2 Saund. 172, seems to recognize the same distinction." See Mohawk Bridge Company *v.* Utica and Schenectady Railroad Company, 6 Paige, R. 559, 563; Spencer *v.* London and Birmingham Railway Company, 8 Sim. 193. See Upjohn *v.* Richland, 46 Mich. 542, which was an attempt to enjoin the establishment of a burial-ground near the plaintiff's premises. The court declared that equity had jurisdiction to restrain a municipality from action of the kind, but only upon a clear showing that it would work a nuisance; State *v.* Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478; City of New Orleans *v.* Lagasse, 114 La. 1055, 38 So. 828; People *v.* Condon, 102 Ill. App. 449; People *v.* Truckee Lbr. Co., 116 Cal. 397; Weiss *v.* Taylor, 144 Ala. 440, 39 So. 519.

The unreasonable blowing of a steam whistle at unusual hours when there is no real necessity for it, should be enjoined. Hill *v.* McBurney Oil & Fertilizer Co., 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398.

The operation of a carnival by a military company for the space of a week, covering much of the street for the distance of a block, with side-shows, merry-go-rounds, etc., is a public nuisance. City Council of Augusta *v.* Reynolds, 122 Ga. 754, 50 S. E. 998, 69 L. R. A. 564, 106 Am. St. Rep. 147.

[1] Hart *v.* Mayor of Albany, 3 Paige, R. 210, 213.

[2] Spencer *v.* London and Birmingham Railway Company, 8 Sim. R. 193; Catlin *v.* Valentine, 9 Paige, R. 575. See Sampson *v.* Smith, 8 Sim. R. 272. See Soltau *v.* De Held, 2 Sim. (N. S.) 133, 145, 147; Milhau *v.* Sharp, 27 N. Y. 611; Wesson *v.* Washburn Iron Co., 13 Allen, 95, 101; Grigsby *v.* Clear Lake Water Co., 40 Cal. 396; Enos *v.* Hamilton, 27 Wis. 256; Houck *v.* Wachter, 34 Md. 265. The meaning of the rule is that if any one of the public, or every one of the public, will suffer special, i. e. actual, damage, private relief will be given; but if the injury will only affect the public right, without producing specific damage to the individual, relief must be sought by the public. See Wesson *v.* Washburn Iron Co., supra; Bigelow's L. C. Torts, 471–475.

[3] Mitf. Eq. Pl. by Jeremy, 144, 145; Eden on Injunct. ch. 11, pp. 231 to 238; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 309; Kingsbury *v.* Flowers, 65 Ala. 479; Minke *v.* Hopeman, 87 Ill. 450; Burnham *v.*

the annoyance. But there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction.[1] Thus it has been said that every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary. But if it is continued so long as to become a nuisance, in such a case an injunction ought to be granted to restrain the person from committing it.[2] So a mere diminution of the value of property by the nuisance without irreparable mischief will not furnish any foundation for equitable relief.[3]

Kempton, 44 N. H. 78; Eastman *v.* Amoskeag Co., 47 N. H. 71; Bassett *v.* Salisbury Co., Ib. 426; Wilcox *v.* Wheeler, Ib. 488; Niagara Falls Bridge Co. *v.* Great Western Ry. Co., 39 Barb. 212; Broadbent *v.* Imperial Gas Co., 7 DeG. M. & G. 436.

Where the evidence does not show that the act complained of amounts to a nuisance, an injunction will not issue until the nuisance has been established at law. Redd *v.* Etna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983; Sterling *v.* Littlefield, 97 Me. 479, 54 Atl. 1108; Reyburn *v.* Sawyer, 135 N. C. 328, 47 S. E. 761, 65 L. R. A. 930, 102 Am. St. Rep. 555; Tracy *v.* Le Blanc, 89 Me. 304, 36 Atl. 399; Deaconess Home & Hospital *v.* Boutjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215; Ingersoll *v.* Rousseau, 35 Wash. 92, 76 Pac. 513; Friedman *v.* Columbia Machine Works, 99 App. Div. 504, 91 N. Y. Supp. 129; Flood *v.* Consumers Co., 105 Ill. App. 559.

[1] Fishmongers' Co. *v.* East India Co., 1 Dick. 163, 164; Attorney-Gen. *v.* Nichol, 16 Ves. 342; Corporation of New York *v.* Mapes, 6 John. Ch. R. 46; Mohawk & Hudson R. Co. *v.* Artcher, 6 Paige, R. 83; Fisk *v.* Wilbur, 7 Barb. 400; Dana *v.* Valentine, 5 Met. 8; Ingraham *v.* Dunnell, Ib. 118; Bruce *v.* Delaware Canal Co., 19 Barb. 378; Ray *v.* Sweeney, 77 Ky. 1, 29 Am. Rep. 388; and it makes no difference what the motive was that prompted the act. Bordeaux *v.* Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600.

[2] Coulson *v.* White, 3 Atk. 21; Gaunt *v.* Fynnery, L. R. 8 Ch. 8.

The fact that smoke from the furnace in defendant's green-house occasionally settles on plaintiff's ice pond, rendering the ice unfit for use, shows such a temporary injury as will not warrant an injunction, Downing *v.* Elliott, 182 Mass. 28, 64 N. E. 201; nor where smoke and cinders are blown upon plaintiff's property occasionally by the wind, Farrell *v.* New York Steam Co., 23 Misc. Rep. 726, 53 N. Y. Supp. 55.

The erection of a building will not be enjoined, where in the absence of negligence, the drilling through solid rock causes noises that disturb plaintiff, who is in an enfeebled condition from sickness. Lord *v.* De Witt, 116 Fed. 713; Phillips *v.* Lawrence Brick Co., 72 Kans. 643, 82 Pac. 787, 2 L. R. A. (N. S.) 92; Ladd *v.* Granite State Brick Co., 68 N. H. 185, 37 Atl. 1041.

[3] Attorney-Gen. *v.* Nichol, 16 Ves. 342; Wynstanley *v.* Lee, 2 Swanst. R. 336; Earl of Ripon *v.* Hobart, 3 Mylne & Keen, 169; s. c. 1 Cooper, Sel. Cas. 333; Morris R. Co. *v.* Prudden, 5 C. E. Green, 530; Harrison *v.* Good, L. R. 11 Eq. 338; Hamilton *v.* Whitridge, 11 Md. 128.

§ 1254. [**The Erection of Fences as a Nuisance.** — The same rule applies in the erection of fences or obstructions by one tenant upon his own property to the injury of the rights to light, air, vision, etc., of his adjoining tenant. In the absence of some contract between the adjoining owners as to the height of dividing fences, there seems to be no right in one to have the light and air come to his property free and unobstructed from the lands of his adjacent owner, and either party may build a fence, the height of which is subject to external standards only, without regard to the motive that prompts the act.[1] The owner of a very desirable and valuable dwelling house may be greatly injured by having a high fence, built of rough boards of uneven length, extending several feet past the dwelling, but it seems that where each is the owner of the premises occupied by him, and each has the right to use his property so long as it is not done in an unlawful manner, an appeal to the moral rights of the parties and the conscience is the only forum for the hearing of such questions.[2] But if the complainant has been the cause of the erection of the fence, by building the roof of her house over upon defendant's land, so that the water falls upon his flowers, he would have the right to protect his flowers, but he would have no right to erect a nine-foot fence, so as to shut out the air from three windows purely for spite because the complainant refused to join with him in the erection of an ordinary line fence. In any event, he would not be required to remove his fence, although it was erected in violation of a statute against such erections, until the complainant had ceased to trespass upon his property by means of her roof.[3] A similar rule applies where an adjoining owner builds upon his own land and in his own wall a house with several openings for light and air, so long as his house is built higher than the house of the plaintiff. In the one case the defendant could not be restrained from leaving the openings in his wall because to do so would leave open and exposed to view

Neither increased danger from fire, increase of insurance rates, nor depreciation of property by erection of a neighboring lawful building will authorize the issue of an injunction. Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672; Benton *v.* City of Elizabeth, 61 N. J. L. 693, 40 Atl. 1132; Chambers *v.* Cramer, 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545; Flood *v.* Consumers Co., 105 Ill. App. 559.

[1] Koblegard *v.* Hale, 60 W. Va. 37, 53 S. E. 793, 116 Am. St. Rep. 868; Schafer *v.* Baker, 16 App. D. C. 213; Sadler *v.* Alexander, 21 Ky. L. Rep. 1835, 56 S. W. 518; Ingwersen *v.* Barry, 118 Cal. 342, 50 Pac. 536. Contra, Bloom *v.* Koch, 63 N. J. Eq. 10, 50 Atl. 621.

[2] Metzges *v.* Hochrein, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305.

[3] Karasek *v.* Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

the back premises of plaintiff.[1] Ordinances and statutes have been enacted prohibiting the erection of high or unusual fences and where the structure in question is lawful in itself, in the absence of such legislation, it will not be construed to be a nuisance. The policy of the law does not contemplate that one owner may place a building upon one side of his lot and then enjoin his adjacent owner from doing the same thing, because for some reason he does not get the light, air, and view as freely and without obstruction as he would have received it had he built his house in the centre of his lot.[2]]

§ 1255. **Extent of Injury as Material in Cases of Private Nuisance.** — On the other hand where the injury is irreparable, as where loss of health,[3] loss of trade, destruction of the means

[1] Bryant *v.* Sholars, 104 La. 786, 29 So. 350; Hansell *v.* Downing, 17 Pa. Super. Ct. Rep. 235.

[2] Triplett *v.* Jackson, 5 Kans. App. 777, 48 Pac. 931.

[3] Crump *v.* Lambert, L. R. 3 Eq. 409; Salvin *v.* Brancepeth Co., L. R. 9 Ch. 705; Broadbent *v.* Imperial Gas Co., 7 DeG. M. & G. 436; Walter *v.* Selfe, 4 DeG. & S. 315; Beardmore *v.* Treadwell, 3 Giff. 383; Columbus Gas Co. *v.* Freeland, 12 Ohio St. 392; Huckenstine's Appeal, 70 Pa. St. 102; Berkeley *v.* Smith, 27 Gratt. 892; Carlisle *v.* Cooper, 6 C. E. Green, 576; Beckham *v.* Brown, 19 Ky. L. Rep. 519, 40 S. W. 684; Zugg *v.* Arnold, 75 Mo. App. 68; Rhoades *v.* Cook, 122 Iowa, 336, 98 N. W. 122; Anable *v.* Commrs., 34 Ind. App. 72, 71 N. E. 272, 107 Am. St. Rep. 173.

Where a barn yard is kept not for the ordinary purposes, but for the use of breeding purposes, an injunction will lie to prevent such use. Hockaday *v.* Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094.

To render the keeping of a hen-house and the cackling of chickens a nuisance, it must appear that the injury is a real and not a fanciful one. Wade *v.* Miller, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820.

As to injuries of properties caused by location of hospitals for treatment of infectious diseases, see Barry *v.* Smith, 191 Mass. 78, 77 N. E. 1099, 5 L. R. A. (N. S.) 1028; Cherry *v.* Williams, 147 N. C. 452, 61 S. E. 267; Manning *v.* Bruce, 186 Mass. 282, 71 N. E. 537.

The erection of a stable will not be enjoined on account of its close proximity to plaintiff's dwelling, where it is contended that the property, when completed, will emit disagreeable odors. Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672; Albany Christian Church *v.* Wilborn, 112 Ky. 507, 66 S. W. 285, 23 Ky. L. Rep. 1820.

The fact that a burial ground was unsightly, disfigured, and needed to be filled and graded and put in a proper and suitable condition is not sufficient to authorize an injunction. Woodstock Burial Ground Assn. *v.* Hager, 68 Vt. 488, 35 Atl. 431. Location near a dwelling house is not alone sufficient; there must be clear evidence of probable injury. Braasch *v.* Cemetery Assn. of Christ Soc., 69 Neb. 300, 95 N. W. 646; Elliott *v.* Ferguson, 37 Tex. Civ. App. 40, 83 S. W. 56.

An ordinary privy is not a nuisance per se. Its objectionable character is a fact to be found from all of the circumstances. Teinen *v.* Lally, 10 N. Dak. 153, 86 N. W. 356.

The owner of a lot has the right to deposit rubbish upon it so long as there are no disagreeable odors emitted, and the bare fact that the rub-

of subsistence, or permanent ruin to property,[1] may or will ensue from the wrongful act or erection, — in every such case Courts of Equity will interfere by injunction in furtherance of justice and the violated rights of the party.[2] Thus for example where a party builds so near the house of another party as to darken his windows against the clear rights of the latter, either by contract or by ancient possession, Courts of Equity will interfere by injunction to prevent the nuisance as well as to remedy it if already done, although an action for damages would lie at law; for the latter can in no just sense be deemed an adequate relief in such a case.[3] The injury is material, and operates daily to destroy or diminish the comfort and use of the neighboring house; and the remedy by a multiplicity of actions for the continuance of it would furnish no substantial compensation.

§ 1256. **Same.** — The same rule will apply to cases where blocks of buildings have been erected with particular covenants respecting the enjoyment thereof, and the erection of livery stables, slaughter-houses, glue-factories, and other special privileges or inconveniences; for in such cases each purchaser or owner of one of the block will be entitled to an injunction to prevent the breach, and to enforce the observance of such covenants, since they are

bish makes the lot unsightly will not authorize the issue of an injunction. Lane *v.* City of Concord, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643.

A guano factory remotely situated from residences and highways as not to affect the health or comfort of the community by means of odors, is not a nuisance. Duffy *v.* Meadows, 131 N. C. 31, 42 S. E. 460.

[1] Fletcher *v.* Bealey, 28 Ch. D. 688; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642; s. c. Bigelow's L. C. Torts, 454, as to the effect on property necessary to constitute a nuisance; Edwards *v.* Allouez Min. Co., 38 Mich. 46; Gaunt *v.* Fynney, L. R. 8 Ch. 8; Sellors *v.* Matlock Board, 14 Q. B. D. 928 (public urinal); Kansas Zinc Min. Co. *v.* Brown, 8 Kans. App. 802, 57 Pac. 304; Bates *v.* Holbrook, 89 App. Div. 548, 85 N. Y. Supp. 673; Farver *v.* America Car & Foundry Co., 24 Pa. Super. Ct. Rep. 579; Wilmot *v.* Bell, 76 App. Div. 252, 78 N. Y. Supp. 591; Van Fossen *v.* Clark, 113 Iowa, 86, 84 N. W. 989, 52 L. R. A. 279; Shellabarger *v.* Morris, 115 Mo. App. 566, 91 S. W. 1005.

[2] Wynstanley *v.* Lee, 2 Swanst. R. 335; Attorney-Gen. *v.* Nichol, 16 Ves. 342; Cherrington *v.* Abney, 2 Vern. 646; Earl Bathurst *v.* Burden, 2 Bro. Ch. R. 64; Nutbrown *v.* Thornton, 10 Ves. 163; Mohawk & Hudson R. Co. *v.* Artcher, 6 Paige, R. 83. As to threatened nuisance see Kingsbury *v.* Flowers, 65 Ala. 479; St. James Church *v.* Arrington, 36 Ala. 546; Adams *v.* Michael, 38 Md. 128; Begein *v.* Anderson, 28 Ind. 79.

[3] Eden on Injunct. ch. 11, pp. 231, 232; Back *v.* Stacy, 2 Russ. R. 121; post, § 1257. It need hardly be said that the law of ancient lights does not prevail in the United States. For late English cases see Bullers *v.* Dickinson, 29 Ch. D. 155; Durell *v.* Pritchard, L. R. 1 Ch. 244; Heath *v.* Bucknell, L. R. 8 Eq. 1; Tapling *v.* Jones, 11 H. L. Cas. 290.

for the mutual benefit and protection of all the owners and purchasers in the block.[1]

§ 1257. **Same.** — Cases of a nature calling for the like remedial interposition of Courts of Equity are, the obstruction[2] of watercourses, the diversion of streams from mills,[3] the back flowage on mills, and the pulling down of the banks of rivers and thereby exposing adjacent lands to inundation or adjacent mills to destruction.[4] So where easements or servitudes are annexed by grant

[1] Barrow *v.* Richards, 8 Paige, R. 351; Duke of Bedford *v.* The Trustees of the British Museum, 2 Sugden on Vendors, Appx. p. 361 (9th ed.); s. c. cited 8 Paige, R. 354. See Williams *v.* Earl of Jersey, 1 Craig & Phillips, R. 91. Tallmadge *v.* East River Bank, 2 Duer, 614; s. c. 26 N. Y. 105; Commonwealth *v.* Rush, 14 Pa. St. 186; Williams *v.* Smith, 22 Wis. 594; infra, p. 232, note (*c*).

A covenant that in the erection of a building no window shall be opened so as to view the property of the adjoining tenant, is valid. Hansell *v.* Downing, 17 Pa. Super. Ct. Rep. 235.

A covenant that liquor shall never be sold upon the premises runs with the land. Spencer *v.* Stevens, 18 Misc. Rep. 112, 41 N. Y. Supp. 39; City of Atlantic City *v.* Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Dieterlen *v.* Miller, 114 App. Div. 40, 99 N. Y. Supp. 699; Scudder *v.* Watt, 98 App. Div. 228, 90 N. Y. Supp. 605.

The covenant attaches to property built up on piles below high water mark, though the contract prohibits the sale of liquors on the water front. Silberman *v.* Mayer, 48 Misc. Rep. 468, 96 N. Y. Supp. 928, Affirmed 16 App. Div. 869, 102 N. Y. Supp. 299.

[2] Adams *v.* Popham, 76 N. Y. 410. Or pollution thereof. Ib.; Fletcher *v.* Bealey, 28 Ch. D. 688; Lewis *v.* Stein, 16 Ala. 214; Wheatley *v.* Chrisman, 24 Pa. St. 298; Merrifield *v.* Worcester, 110 Mass. 216. See Lingwood *v.* Stowmarket Co., L. R. 1 Eq. 77, 336; Attorney-Gen. *v.* Richmond, L. R. 2 Eq. 306; Goldsmid *v.* Turnbridge Com'rs, L. R. 1 Ch. 349; Attorney-Gen. *v.* Colney Asylum, L. R. 4 Ch. 146; Attorney-Gen. *v.* Leeds, L. R. 5 Ch. 583; Clowes *v.* Staffordshire Co., L. R. 8 Ch. 125; Attorney-Gen. *v.* Gee, L. R. 10 Eq. 131; Jacobs *v.* Allard, 42 Vt. 303; Ballard *v.* Tomlinson, 29 Ch. D. 115, reversing 26 Ch. D. 194. The last was a case of the pollution of underground water running in no defined channel. See Snow *v.* Whitehead, 27 Ch. D. 588; Broder *v.* Saillard, 2 Ch. D. 692; Hurdman *v.* Northeastern Ry. Co., 3 C. P. D. 168. And see Bigelow's L. C. Torts, 522–526; Upjohn *v.* Richland, 46 Mich 542.

[3] Springfield *v.* Harris, 4 Allen, 494; Elliot *v.* Fitchburg R. Co., 10 Cush. 191; Fisk *v.* Wilbur, 7 Barb. 395; Burden *v.* Stein, 27 Ala. 104; Frink *v.* Lawrence, 20 Conn. 117; Pollitt *v.* Long, 58 Barb. 20.

[4] As to the effect of Mill Acts see Bull. *v.* Valley Falls Co., 8 R. I. 42; Spangler's Appeal, 64 Pa. St. 387; Gould *v.* Boston Dock Co., 13 Gray, 442. Injunctions ought not to be granted, it is said, to regulate the rights of mill-owners on the same stream, except in clear cases of intentional violation of such rights. Hoxsie *v.* Hoxsie, 38 Mich. 77. And to enjoin the running of a flouring mill as a nuisance the injury complained of must be substantial and material. Owen *v.* Phillips, 73 Ind. 284; Gilbert *v.* Showerman, 23 Mich. 448. Indeed courts interfere by injunction against both mills and factories with great caution, and only where the injury

or covenant, or otherwise to private estates,[1] or where privileges of a public nature and yet beneficial to private estates are secured to the proprietors contiguous to public squares or other places dedicated to public uses, the due enjoyment of them will be protected against encroachments by injunction.[2] So an injunction will be granted against a corporation to prevent an abuse of the powers granted to them to the injury of other persons.[3] So an injunction will be granted against the erec-

is or will be serious and permanent. Owen *v.* Phillips, supra; Cooke *v.* Forbes, L. R. 5 Eq. 166; Harrison *v.* Good, L. R. 11 Eq. 338; Goodall *v.* Crofton, 33 Ohio St. 271; Barnes *v.* Calhoun, 37 N. C. 199; Green *v.* Lake, 54 Miss. 540; Duncan *v.* Hayes, 7 C. E. Green, 25; Adams *v.* Michael, 38 Md. 123; Huckenstine's Appeal, 70 Pa. St. 102.

[1] The interruption being of a permanent nature. Nash *v.* New England Ins. Co., 127 Mass. 91. But this, it is held, is upon the assumption that adequate relief cannot be had at law. Oakland Woolen Co. *v.* Union Gas Co., 101 Me. 98, 63 Atl. 915; Fahnestock *v.* Feldner, 98 Md. 335, 56 Atl. 785; Carley *v.* Jennings, 131 Mich. 385, 91 N. W. 634, 9 Detroit Leg. N. 369; McIntosh *v.* Rankin, 134 Mo. 340, 35 S. W. 995.

[2] Robinson *v.* Byron, 1 Bro. Ch. R. 588; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 706; Lane *v.* Newdigate, 10 Ves. 194; Chalk *v.* Wyatt, 3 Meriv. R. 688; Martin *v.* Stiles, Mosel. R. 145; Gardner *v.* Village of Newburgh, 2 John. Ch. R. 165; Van Bergen *v.* Van Bergen, 2 John. Ch. R. 272; s. c. 3 John. Ch. R. 282; Hammond *v.* Fuller, 1 Paige, R. 197; Arthur *v.* Case, 1 Paige, R. 448; Belknap *v.* Trimble, 3 Paige, R. 577, 600, 601; Reid *v.* Gifford, 1 Hopkins, R. 416. Hills *v.* Miller, 3 Paige, R. 254; Corning *v.* Lowerre, 6 John. Ch. R. 439; Trustees of Watertown *v.* Cowen, 4 Paige, R. 510, 514.

[3] Coates *v.* The Clarence Railway Company, 1 Russ. & Mylne, 181. This principle was strongly exemplified in the case of Bonaparte *v.* Camden & Amboy Railroad Company, 1 Baldwin's Cir. R. 231, where a bill was brought to prevent a railroad company from illegally appropriating the lands of the plaintiff. On this occasion Mr. Justice Baldwin said: "The injury complained of as impending over his property is its permanent occupation and appropriation to a continuing public use which requires the divesture of his whole right, its transfer to the company in full property, and its inheritance to be destroyed as effectively as if he had never been its proprietor. No damages can restore him to his former condition; its value to him is not money, which money can replace, nor can there be any specific compensation or equivalent; his damages are not pecuniary (vide 7 Johns. Ch. 731); his objects in making his establishment were not profit, but repose, seclusion, and a resting-place for himself and family. If these objects are about to be defeated, if his rights of property are about to be destroyed without the authority of law, or if lawless danger impends over them by persons acting under color of law when the law gives them no power, or when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a Court of Law for a trespass, a Court of Equity will enjoin its commission." In the same case it was held that although an act of the Legislature appropriating private lands to public uses without compensation first being awarded was not unconstitutional, yet a Court of Equity would issue an injunction against the actual pos-

tion of a new ferry injurious to an old established ferry.[1] So an injunction will be granted in favor of a turnpike corporation to secure the due enjoyment of their privileges by preventing the establishment of short by-roads (commonly called shunpikes) to destroy their tolls.[2] So (as we have seen) an injunction will lie to prevent the darkening or obstruction of ancient lights of a dwelling-house.[3] So to prevent a party from making erections on an adjacent lot in violation of his covenant or other contract.[4] So to prevent the erection of a statue upon a public street or square, if it be clearly in violation of a covenant or other contract.[5] So to prevent a voluntary religious association from being disturbed in their burial-ground.[6] So to prevent rights of possession and property being injured, obstructed, or taken away illegally by a railroad company.[7] So to prevent a tenant from removing mineral and other deposits from the bed of a stream running through a farm which he occupies.[8] So an injunction will be granted in favor of parties pos-

session of the lands until compensation was made. 1 Baldwin, Cir. Rep. 226 to 230. See also Mohawk & Hudson Railroad Company *v.* Artcher, 6 Paige, R. 83.

But equity has no jurisdiction over corporations as such to restrain them in the exercise of their powers, unless there is anticipated fraud or breach of trust. Treadwell *v.* Salisbury Manuf. Co., 7 Gray, 393; Pond *v.* Framingham R. Co., 130 Mass. 194. And the insolvency of the corporation will make no difference. Pond *v.* Framingham R. Co.

[1] Com. Dig. Chancery, D. 12; Newburgh Turnpike Company *v.* Miller, 5 Johns. Ch. R. 101, 111; Ogden *v.* Gibbons, 4 Johns. Ch. R. 159, 160. See Letton *v.* Goodden, L. R. 2 Eq. 123; McRoberts *v.* Washburne, 10 Minn. 23.

[2] Croton Turnpike Company *v.* Ryder, 1 Johns. Ch. R. 615; Williams *v.* New York Cent. R. Co., 18 Barb. 222; Auburn Plank Road Co. *v.* Douglass, 12 Barb. 553; Harrell *v.* Ellsworth, 17 Ala. 576.

[3] Sutton *v.* Montford, 4 Sim. R. 559; Back *v.* Stacy, 2 Russ. &c. 121; Wynstanley *v.* Lee, 2 Swanst. R. 333; Attorney-Gen. *v.* Nichol, 16 Ves. 338; Morris *v.* Berkeley's Lessees, 2 Ves. 453; Corning *v.* Lowerre, 6 John. Ch. R. 439; ante, § 1255.

[4] Ranken *v.* Huskisson, 4 Sim. R. 13; Squire *v.* Campbell, 1 Mylne & Craig, 480, 481; Roper *v.* Williams, 1 Turn. & Russ. R. 18; Peck *v.* Matthews, L. R. 3 Eq. 515; Western *v.* McDermott, L. R. 2 Ch. 72. Constructive notice of the covenant is sufficient. Wilson *v.* Hart, L. R. 1 Ch. 463. As in the case of tenancy. Feilden *v.* Slater, L. R. 7 Eq. 523; Clements *v.* Welles, L. R. 1 Eq. 200.

[5] Squire *v.* Campbell, 1 Mylne & Craig, R. 459, 477 to 486; Heriot's Hospital (Feoffees of) *v.* Gibson, 2 Dow, R. 301, 304. See Cosens *v.* Bognor Ry. Co., L. R. 1 Ch. 594; Pell *v.* Northampton Ry. Co., L. R. 2 Ch. 100; Munns *v.* Isle of Wight Ry. Co., L. R. 5 Ch. 414.

[6] Beatty *v.* Kurtz, 2 Peters, R. 566, 584.

[7] Bonaparte *v.* Camden & Amboy Railroad Company, 1 Bald. Cir. R. 231.

[8] Thomas *v.* Jones, 1 Y. & Coll. New R. 510.

sessing a statute privilege or franchise, to secure the enjoyment of it from invasion by other parties.[1] In all cases of this sort, if the right be doubtful, the court will direct it to be tried at law, and will in the mean time restrain all injurious proceedings;[2] and when the right is fully established, a perpetual injunction will be decreed.[3]

§ 1258. **A Trespass of Irreparable Nature Will Be Enjoined.** — It is upon similar grounds that Courts of Equity interfere in cases of trespasses, that is to say, to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation.[4] For if the trespass be fugitive and temporary, and

[1] Ogden *v.* Gibbons, 4 John. Ch. R. 150; Livingston *v.* Ogden, 4 John. Ch. R. 48.

[2] Ante, § 1252.

[3] Jeremy on Eq. B. 3, ch. 2, § 1, p. 310; Ryder *v.* Bentham, 1 Ves. 543; Eden on Injunct. ch. 11, pp. 235, 236; Anon. 2 Ves. 414; Reid *v.* Gifford, 6 John. Ch. R. 46; Osborn *v.* Bank of United States, 22 U. S. 45, 6 L. Ed. 204; Hart *v.* Mayor of Albany, 3 Paige, R. 213; Livingston *v.* Livingston, 6 John. Ch. R. 497, and the cases there cited. In the case of an injunction for a nuisance equity always postpones the operation of its decree for a reasonable time to enable the defendant to take adequate measures to remove the nuisance, without doing unnecessary injury. Breed *v.* Lynn, 126 Mass. 367; Haskell *v.* New Bedford, 108 Mass. 208; Boston Rolling Mills *v.* Cambridge, 117 Mass. 396, 401. Locating near a nuisance is not a consent to its existence, so as to bar one of relief. St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642; Hale *v.* Barlow, 4 C. B. (N. S.) 334, 336; Bliss *v.* Hall, 4 Bing. N. C. 183; Bamford *v.* Turnley, 3 Best & S. 62, 70, 73; King *v.* Morris, 3 C. E. Green, 397. But in a doubtful question of the existence of a nuisance the plaintiff's locating near it with notice may perhaps be considered. Upjohn *v.* Richland, 46 Mich. 542.

[4] Cooper, Eq. Pl. 152, 153, 154; Mitf. Eq. Pl. by Jeremy, 137; Hanson *v.* Gardiner, 7 Ves. 308, 309, 310; Norway *v.* Rowe, 19 Ves. 147, 148, 149; New York Printing and Dyeing Estab. *v.* Fitch, 1 Paige, R. 97; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 311, 312; Milan Steam Mills *v.* Hickey, 59 N. H. 241; Musselman *v.* Marquis, 1 Bush, 463; Allen *v.* Merton, L. R. 20 Eq. 462; McIntyre *v.* Storey, 80 Ill. 127; Clark *v.* Jeffersonville R. Co., 44 Md. 248; London Ry. Co. *v.* Lancashire Ry. Co., L. R. 4 Eq. 174 (obstructing access to railway); Ryan *v.* Brown, 18 Mich. 196; Frederick *v.* Groshon, 30 Md. 436; Eckelkamp *v.* Schrader, 45 Mo. 505; De Veney *v.* Gallagher, 5 C. E. Green, 33; Phillips *v.* Boardman, 4 Allen, 147; Nash *v.* New England Ins. Co., 127 Mass. 91; Washburn *v.* Miller, 117 Mass. 376; Wilcox *v.* Wheeler, 47 N. H. 488; Council Bluffs *v.* Stewart, 51 Iowa, 385; Sword *v.* Allen, 25 Kans. 67; Poirier *v.* Fetter, 20 Kans. 47; Ellsworth *v.* Hale, 33 Ark. 623; Boulo *v.* New Orleans R. Co., 55 Ala. 480. But the plaintiff's right to the locus must be clear; the interference being to protect the right and not to redress the trespass. Boulo *v.* New Orleans R. Co., supra; Ellsworth *v.* Hale, supra; Storm *v.* Mann, 4 Johns. Ch. 21; Irwin *v.* Dixon, 50 U. S. 28, 13 L. Ed. 25. And equity will not enjoin the act when the defendant is in adverse possession. Felton *v.* Justice, 51 Cal. 529. See Stanford *v.* Harlstone, L. R. 9 Ch. 116; Lowndes *v.* Bettle, 10 Jur. U. S. 226; 33 L. J. Ch. 451. (The law

adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of Courts of Equity.[1] Formerly indeed Courts of Equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If indeed Courts of Equity did not interfere in cases of this sort, there would (as has been truly said) be a great failure of justice in the country.[2]

on this point has been changed by statute in England. Judicature Act, 1873, § 25, subs. 8. See Stannard *v.* St. Giles, 20 Ch. D. 190.) Equity will not restrain trespasses to chattel interests, however frequent. Ellsworth *v.* Hale, supra.

[1] Neigel *v.* Walsh, 45 Mo. 560; Indianapolis Co. *v.* Indianapolis, 29 Ind. 245; Colwell *v.* May's Landing, 4 C. E. Green, 245; Laney *v.* Jasper, 39 Ill. 46; Blanchard *v.* Doering, 23 Wis. 200; Ganse *v.* Perkins, 3 Jones Eq. 177 (cutting timber for staves); Thomas *v.* James, 32 Ala. 723; Blake *v.* Brooklyn, 26 Barb. 301; Bolster *v.* Catterlin, 10 Ind. 117; Hatch *v.* Vermont Cent. Ry. Co., 25 Vt. 49; Cox *v.* Douglass, 20 W. Va. 175; Nash *v.* New England Ins. Co., 127 Mass. 376; Council Bluffs *v.* Stewart, 51 Iowa, 385.

[2] Hanson *v.* Gardiner, 7 Ves. 306 to 308; Courthope *v.* Mapplesden, 10 Ves. 291; Field *v.* Beaumont, 1 Swanst. 207, 208; Crockford *v.* Alexander, 15 Ves. 138; Thomas *v.* Oakley, 18 Ves. 184. Lord Eldon has on many occasions alluded to this change or enlargement of equity jurisdiction, and especially in Hanson *v.* Gardiner, 7 Ves. 310, 311, and Thomas *v.* Oakley, 18 Ves. 184. In the latter case he said: "The distinction long ago established was, that if a person still living committed a trespass by cutting timber or taking lead ore or coal, this court would not interfere, but gave the discovery, and then any action might be brought for the value discovered. But the trespass dying with the person, if he died, the court said, this being property, there must be an account of the value, though the law gave no remedy. In that instance therefore the account was given where an injunction was not wanted. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged, and I have frequently alluded to the case upon which Lord Thurlow first hesitated. A person having a close demised to him began to get coal there, but continued to work under the contiguous close belonging to another person. And it was held that the former, as waste, would be restrained; but as to the close which was not demised to him, it was a mere trespass, and the court did not interfere. But I take it that Lord Thurlow changed his opinion upon that, holding that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which in equity he was entitled. The interference of the court is to prevent your removing that which is his estate. Upon that principle Lord Thurlow granted the injunction as to both. That has since been repeatedly followed, and whether it was trespass under the color of another's right actually existing or not. If this protection would be granted in the case of timber, coals, or lead ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course

§ 1259. **Same.** — Thus for instance where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted because it operates a permanent injury to the property as a mine.[1] So where timber is attempted to be cut down by a trespasser in collusion with the tenant of the land.[2] So where there is a dispute respecting the boundaries of estates, and one of the claimants is about to cut down ornamental or timber trees in the disputed territory.[3] So where a party who is in possession under articles is proceeding to cut down timber trees.[4] So where lessees are taking away from a manor bordering on the sea stones of a peculiar value.[5] In short it is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited rights with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property.[6]

§ 1260. **Injunction against Vexatious Patent Litigation.** — It is upon similar principles, to prevent irreparable mischief or to suppress multiplicity of suits and vexatious litigation, that Courts of Equity interfere in cases of patents for inventions, and in cases of copyrights to secure the rights of the inventor or author and his assignees and representatives.[7] It is wholly beside

is to sustain a bill for the purpose of injunction, connecting it with the account in both cases, and not to put the plaintiff to come here for an injunction and to go to law for damages." See also Livingston *v.* Livingston, 6 John. Ch. R. 497, 498, 499, where Mr. Chancellor Kent has with his usual ability commented on the cases at large.

[1] Case cited in 7 Ves. 308; Mitchell *v.* Dorrs, 6 Ves. 147; Smith *v.* Collyer, 8 Ves. 90; Grey *v.* Duke of Northumberland, 17 Ves. 281; Falmouth (Lord) *v.* Inneys, Moseley, R. 87, 89; ante, § 1180.

The right of a landowner as such to the lateral support of his soil in its natural state may be noticed. Humphries *v.* Brogden, 12 Q. B. 739; Hunt *v.* Peake, Johns. (Eng. Ch.) 705; Angus *v.* Dalton, 6 App. Cas. 740; Thurston *v.* Hancock, 12 Mass. 220; Bigelow's L. C. Torts, 529, 536, 548 et seq. Whether a right by prescription can be acquired to the support of buildings is not clear. See Hunt *v.* Peake, supra, favoring such right. But see contra Gilmore *v.* Driscoll, 122 Mass. 199; Tunstall *v.* Christian, 19 Rep. 575 (Sup. Ct. Va. 1885).

[2] Courthope *v.* Mapplesden, 10 Ves. 290.

[3] Kinder *v.* Jones, 17 Ves. 110. The mere fact that the plaintiff has brought ejectment against the defendant will not justify an injunction against the cutting of timber by the latter. Cox *v.* Douglass, 20 W. Va. 175.

[4] Crockford *v.* Alexander, 15 Ves. 138.

[5] Earl Cowper *v.* Baker, 17 Ves. 128.

[6] Thomas *v.* Oakley, 18 Ves. 184; Livingston *v.* Livingston, 6 John. Ch. R. 497; Field *v.* Beaumont, 1 Swanst. 208; Norway *v.* Rowe, 19 Ves. 147, 148, 149, 154.

[7] Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 327; 1 Fonbl. Eq. B. 1, ch. 1, § 6, note (*p*); Sheriff *v.* Coates, 1 Russ. & M. 159.

the purpose of the present Commentaries to enter upon the subject of the general rights of inventors and authors, or to state the circumstances under which an exclusive property, in virtue of those rights, may be acquired or lost. Our observations will rather be limited to the consideration of the cases in which Courts of Equity will interfere to protect those rights when acquired, by granting injunctions.

§ 1261. **Same.** — It is quite plain that if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.[1]

§ 1262. **Same.** — Indeed, in cases of this nature it is almost impossible to know the extent of the injury done to the party without a discovery from the party guilty of the infringement of the patent or copyright; and if it were otherwise, mere damages would give no adequate relief. For example, in the case of a copyright the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book which he might otherwise have sold, but it may also be injuring him to an incalculable extent in regard to the value and disposition of his copyright, which no inquiry for the purpose of damages could fully ascertain.[2]

§ 1263. **Same.** — In addition to this consideration the plaintiff could at law have no preventive remedy which should restrain the future use of his invention or the future publication of his work, injuriously to his title and interests. And it is this preventive remedy which constitutes the peculiar feature of Equity Jurisprudence and enables it to accomplish the great purposes of justice. Besides, in most cases of this sort the bill usually seeks an account, in the one case of the books printed, and in the other of the profits which have arisen from the use of the invention from the persons who have pirated the same.[3] And this account will in all cases where the right has been already established, or is estab-

[1] Harmer *v.* Plane, 14 Ves. 132; Hogg *v.* Kirby, 8 Ves. 223, 224; Lawrence *v.* Smith, Jacob, R. 472; Sturz *v.* De la Rue, 5 Russ. R. 322; Welsbach Light Co. *v.* Freeman, 100 Fed. 298; Marvel Co. *v.* Pearl, 114 Fed. 946.

[2] Hogg *v.* Kirby, 8 Ves. 223, 224, 225; Wilkins *v.* Aikin, 17 Ves. 424; Lawrence *v.* Smith, Jacob, R. 472.

[3] In equity profits are a proper measure of damages for infringement of patent, though not at law. The principle is that equity converts the infringer into a trustee as to the profits, a principle appropriate in equity by reference to a master, who can examine books and papers and examine

lished under the direction of the court, be decreed as incidental, in addition to the other relief by a perpetual injunction.[1]

§ 1264. **Validity of Patent Should Be Ascertained at Law before Issue of Injunction against Its Infringement.** — In cases however where a patent has been granted for an invention, it is not a matter of course for Courts of Equity to interpose by way of injunction. If the patent has been but recently granted and its validity has not been ascertained by a trial at law, the court will not generally act upon its own notions of the validity or invalidity of the patent and grant an immediate injunction, but it will require it to be ascertained by a trial in a Court of Law if the defendant denies its validity or puts the matter in doubt.[2] But if the patent has been granted for some

the infringer and his employees on oath. Burdell *v.* Denig, 92 U. S. 716, 23 L. Ed. 764; Packet Co. *v.* Sickles, 86 U. S. 611, 22 L. Ed. 203. Where no profits are shown, equity cannot decree them by way of damages or as punishment. Root *v.* Railway Co., supra; Livingston *v.* Woodworth, 56 U. S. 559, 14 L. Ed. 809; Root *v.* Lake Shore & M. S. R. Co., 105 U. S. 189, 26 L. Ed. 975.

[1] Mitf. Eq. Pl. by Jeremy, 138; Jeremy on Eq. Jurisd. B. 3. ch. 2, § 1, pp. 313 to 327; Eden on Injunct. ch. 12, p. 261, ch. 13, p. 364; Hogg *v.* Kirby, 8 Ves. 223, 224, 225; Baily *v.* Taylor, 1 Tamlyn, R. 295; Cooper, Eq. Pl. 155; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 705, 706; Baily *v.* Taylor, 1 Russ. & Mylne, 73; Sheriff *v.* Coates, 1 Russ. & Mylne, 159; Geary *v.* Norton, 1 De Gex & Smale, R. 9. The copyright laws in England authorize the delivery up of the pirated edition to the proprietor of the copyright. A question has recently arisen whether this right existed at the common law independent of the statutes. See Mr. Vice-Chancellor Wigram's observations upon this point in Colburn *v.* Simms, 2 Hare, R. 543, 553.

[2] Martin *v.* Wright, 6 Sim. R. 297; Bramwell *v.* Halcomb, 3 Mylne & Craig, 737; Spottiswoode *v.* Clarke, 2 Phillips, Ch. R. 156; Steven *v.* Keating, Ib. 333. It has lately been held, overruling Rollins *v.* Hinks, L. R. 13 Eq. 355, and Axmann *v.* Lund, L. R. 18 Eq. 330, that equity will presume, prima facie, that a patent is valid. Halsey *v.* Brotherhood, 15 Ch. D. 514; s. c. 19 Ch. D. 386; Sprague Elec. R. Co. *v.* Nassau Elec. R. Co., 95 Fed. 821, 37 C. C. A. 286.

That a patent is only two and one-half years old and has not been adjudicated, is not alone sufficient to overcome the presumption of validity arising from its issue. It must also appear from common reason or some display of the prior art, there is reasonable ground for doubting its existence as a patentable novelty. Palmer *v.* Wilcox, 141 Fed. 378; Lambert Vibrator Co. *v.* Marvel Vibrator Co., 138 Fed. 82; Doig *v.* Morgan Mach. Co., 91 Fed. 1001, 33 C. C. A. 683.

Where there is a question as to the validity of the patent and it has never been adjudicated, the injunction will be dissolved. Bradley *v.* Eccles, 120 Fed. 947; Bristol Oil Co. *v.* Beacom, 143 Fed. 550; Seidenberg *v.* Davidson, 112 Fed. 431; Planters' Compress Co. *v.* Moore, 106 Fed. 500; Duff Mfg. Co. *v.* Kalamazoo R. Co., 100 Fed. 357; Pennsylvania Gaslight Co. *v.* American Lighting Co., 117 Fed. 324; Union Switch Co. *v.* Philadelphia & R. R. Co., 75 Fed. 1004.

length of time, and the patentee has put the invention into public use, and has had an exclusive possession of it under his patent for a period of time, which may fairly create the just presumption of an exclusive right, the court will in such a case ordinarily interfere by way of preliminary injunction pending the proceedings, reserving of course unto the ultimate decision of the cause its own final judgment on the merits.[1] And an injunction will be granted not only before, but after the time limited for the expiration of a patent to restrain the sale of machines piratically manufactured in violation of the patent while it was in force.[2]

[1] Hill *v.* Thompson, 3 Meriv. R. 622, 628; Eden on Injunct. ch. 12, p. 260; 1 Madd. Ch. Pr. 113; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 316; Cooper, Eq. Pl. 154, 155, 156; Universities of Oxford, &c. *v.* Richardson, 6 Ves. 706, 707; Harmer *v.* Plane, 14 Ves. 130. Lord Cottenham, in Bacon *v.* Jones (4 Mylne & Craig, R. 433, 436), made the following remarks on the mode of granting injunctions in cases of patents: "When a party applies for the aid of the court, the application for an injunction is made either during the progress of the suit or at the hearing; and in both cases, I apprehend, great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open: the court may at once grant the injunction simpliciter, without more, — a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome practice in such a case, of either granting an injunction and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the mean time keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the court according to the case made. When the cause comes to a hearing, the court has also a large latitude left to it; and I am far from saying that a case may not arise in which even at that stage the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent-right and of the evidence by which it is established, — these and other circumstances may combine to produce such a result; although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge, that such a course if adopted will do justice between the parties. Again the court may at the hearing do that which is the more ordinary course: it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course the propriety of which must also depend upon the circumstances of the case, — that of at once dismissing the bill."

[2] Crossley *v.* Derby Gas Light Company, 1 Russ. & Mylne, 166, note. One may in good faith notify the world that another is infringing his patent. Whitehead *v.* Kitson, 119 Mass. 485; Hammersmith Skating

§ 1265. **Same.** — Similar principles apply to cases of copyright.[1] But it does not seem indispensable to relief in either case that the party should have a strictly legal title. It is sufficient that under the patent or copyright the party has a clear equitable title.[2] Formerly indeed Courts of Equity would not interfere by way of injunction to protect copyrights any more than patent-rights, until the title had been established at law.[3] But the present course is to exercise jurisdiction in all cases where there is a

Rink Co. *v.* Dublin Skating Rink Co., Ir. R. 10 Eq. 235; Prudential Assur. Co. *v.* Knott, L. R. 10 Ch. 142, overruling in effect Rollins *v.* Hinks, L. R. 13 Eq. 355, and Axmann *v.* Lund, L. R. 18 Eq. 330. And one need not follow such notice with an action; but if as the result of a trial it is found that there has been no infringement, then it seems such party may be enjoined from publishing further notices of the kind. Halsey *v.* Brotherhood, 15 Ch. D. 514; s. c. 19 Ch. D. 386. See Barney *v.* United Telephone Co., 28 Ch. D. 394. So if after being requested to desist or bring suit, he will not, the other party may try the right by bill for injunction, and if he succeeds on the question of infringement, he will then be entitled to an injunction. Ib., explaining Dicks *v.* Brooks, 15 Ch. D. 22. See Wren *v.* Weild, L. R. 4 Q. B. 730. And if the notifying party knows that he has no patent, or that there has been no infringement, he will be liable in damages. 15 Ch. D. 514.

Closely connected with such cases is the right of injunction against the publication of a libel upon one's business; indeed it may be the same thing. It is declared to be well settled that an injunction may be granted to restrain the publication of any libel calculated to injure the plaintiff in his business. Hill *v.* Davies, 21 Ch. D. 798; Quartz Hill Mining Co. *v.* Beall, 20 Ch. D. 501 (C. A.). See Beddow *v.* Beddow, 9 Ch. D. 89; Shaw *v.* Jersey, 4 C. P. D. 120, 359; Day *v.* Brownrigg, 10 Ch. D. 294. And this now without evidence of special damage. Thomas *v.* Williams, 14 Ch. D. 864; Saxby *v.* Easterbrook, 3 C. P. D. 339; Thorley's Co. *v.* Massam, 6 Ch. D. 582; s. c. 14 Ch. D. 748, 763. The contrary has been held in some cases. Singer Manuf. Co. *v.* Domestic Sewing Machine Co., 49 Ga. 70; Boston Diatite Co. *v.* Florence Manuf. Co., 114 Mass. 69, denying Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551, Dixon *v.* Holden, L. R. 7 Eq. 488, and Rollins *v.* Hinks, L. R. 13 Eq. 355. See also Prudential Assur. Co. *v.* Knott, L. R. 10 Ch. 142 (overruling the first two of these English cases); Whitehead *v.* Kitson, 119 Mass. 484; Partridge *v.* Hood, 120 Mass. 403, 406. In Boston Diatite Co. *v.* Florence Manuf. Co. the right to an injunction against violating a trade mark was distinguished as resting on property in the same and an unlawful use or attempted use of it. But the English courts, it seems, would not accept this distinction. Hill *v.* Davies and Thomas *v.* Williams, supra.

[1] Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 705, 706; Wilkins *v.* Aikin, 17 Ves. 424.

[2] Mawman *v.* Tegg, 2 Russ. R. 385; Werner Co. *v.* Encyclopædia Britannica Co., 134 Fed. 831, 67 C. C. A. 281; Harper *v.* Holman, 84 Fed. 224.

[3] Baron Eyre, in Leardet *v.* Johnson, 1 Y. & Coll. New R. 527, 532, note, said: "The ordinary relief in the case of a patent is an injunction and account. Where the right is disputed, the court expects that to be ascertained by a trial at law." See Spottiswoode *v.* Clarke, 2 Phillips, Ch. R. 154.

clear color of title founded upon a long possession and assertion of right.[1]

§ 1266. **Works Subject to Copyright.** — There are some peculiar principles applicable to cases of copyright which deserve notice in this place, and are not generally applicable to patents for inventions. In the first place no copyright can exist consistently with principles of public policy in any work of a clearly irreligious, immoral, libellous, or obscene description. In the case of an asserted piracy of any such work, if it be not a matter of any real doubt whether it falls within such a predicament or not, Courts of Equity will not interfere by injunction to prevent or to restrain the piracy, but will leave the party to his remedy at law.[2]

§ 1267. **Same.** — It is true that an objection has been taken to this course of proceeding, that by refusing to interfere in such cases to suppress the publication, a Court of Equity virtually promotes the circulation of offensive and mischievous books. But the objection vanishes when it is considered that the court does not affect to act as a censor morum, or to punish or restrain injuries to society generally. It simply withholds its aid from those who, upon their own showing, have no title to protection, or to assert a property in things which the law will not upon motives of the highest concern permit to be deemed capable of founding a just title or property.[3]

§ 1268. **Same.** — The soundness of this general principle can hardly admit of question. The chief embarrassment and difficulty lie in the application of it to particular cases.[4] If a Court of Equity under color of its general authority is to enter upon all the moral, theological, metaphysical, and political inquiries which in the past times have given rise to so many controversies and in

[1] Eden on Injunct. ch. 13, p. 284; Tonson *v.* Walker, 3 Swanst. 679; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 326.

[2] I am not unaware that Lord Eldon has held the opposite of this doctrine; and that is, that if it does admit of real doubt whether the work be irreligious, immoral, libellous, or seditious, or not, an injunction ought to be denied upon the mere ground of the doubt. It has been thought that there is great difficulty in adopting this doctrine, denying the protection of an injunction in matters of property upon mere doubts. Prima facie the copyright confers title; and the onus is on the other side to show clearly that notwithstanding the copy there is an intrinsic defect in the title. See Lawrence *v.* Smith, Jacob, R. 472 (*a*); Dun *v.* International Merc. Agency, 127 Fed. 173; Martinetti *v.* Maguire, 1 Abb. U. S. 356.

[3] Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 321, 322; Cooper, Eq. Pl. 157; Walcot *v.* Walker, 7 Ves. 1; Southey *v.* Sherwood, 2 Meriv. R. 435; Lawrence *v.* Smith, Jacob, R. 471; Id. 474, note; 6 Petersd. Abridg. Copyright, pp. 557, 560.

[4] Eden on Injunct. ch. 14, pp. 315 to 318.

the future may well be supposed to provoke many heated discussions, and if it is to decide dogmatically upon the character and bearing of such discussions and the rights of authors growing out of them, it is obvious that an absolute power is conferred over the subject of literary property which may sap the very foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical as well as at metaphysical truths. Thus for example a judge who should happen to believe that the immateriality of the soul as well as its immortality was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been greatly divided) would deem any work anti-Christian which should profess to deny that point, and would refuse an injunction to protect it. So a judge who should be a Trinitarian might most conscientiously decide against granting an injunction in favor of an author enforcing Unitarian views, when another judge of opposite opinions might not hesitate to grant it.[1]

§ 1269. **What Constitutes an Infringement.** — In the next place in cases of copyright [2] difficulties often arise in ascertaining whether there has been an actual infringement thereof which are not strictly applicable to cases of patents. It is for instance clearly settled not to be any infringement of the copyright of a book to make bona fide quotations or extracts from it, or a bona fide abridgment of it, or to make a bona fide use of the same common materials in the composition of another work.[3] And a work consisting partly of compilations and selections from former works, and partly of original compositions, may be the subject of copyright.[4] But what constitutes a bona fide case of extracts, or a bona fide abridgment, or a bona fide use of common materials, is often a matter of most embarrassing inquiry.[5] The true question in all cases of this sort is (it has been said) whether there has been a legitimate use of the copyright publication in the fair exercise of a mental operation deserving the character of a new work. If there has

[1] Lawrence *v.* Smith, Jacob, R. 471.

[2] What may be copyrighted see Drury *v.* Ewing, 1 Bond, 540; Cox *v.* Land Co., L. R. 9 Eq. 324; Low *v.* Ward, L. R. 6 Eq. 415; Greene *v.* Bishop, 1 Cliff. 186; Dicks *v.* Yates, 18 Ch. D. 76; Maple *v.* Junior Army Stores, 21 Ch. D. 369 (an illustrated catalogue; overruling Cobbett *v.* Woodward, L. R. 14 Eq. 407); Hotten *v.* Arthur, 1 Hem. & M. 603; Grace *v.* Newman, L. R. 19 Eq. 623; Ager *v.* Peninsular Nav. Co., 26 Ch. D. 637.

[3] Eden on Injunct. ch. 13, pp. 280, 281; Campbell *v.* Scott, 11 Simons, R. 31.

[4] Lewis *v.* Fullerton, 2 Beav. R. 6.

[5] See Story *v.* Holcombe, 4 McLean, 307, relating to the present work; Scott *v.* Stanford, L. R. 3 Eq. 718.

been, although it may be prejudicial to the original author, it is not an invasion of his legal rights. If there has not been, then it is treated as a mere colorable curtailment of the original work, and a fraudulent evasion of the copyright.[1] But this is another mode of stating the difficulty, rather than a test affording a clear criterion to discriminate between the cases.[2]

§ 1270. **Originality of the Work in Question.** — A difficulty of a similar character often arises in the ascertainment of the fact whether a work is original or not. Of some intellectual productions the originality admits of as little doubt as the originality of some inventions or discoveries. But in a great variety of cases the differences between the known and the unknown, between the new and the old, between the original and the copy, depend upon shades of distinction extremely minute and almost inappreciable.[3] It is obvious that there can be no monopoly of thoughts, or of the expression of them. Language is common to all; and in the present advanced state of literature and learning and science, most species of literary works must contain much which is old and well known mixed up with something which perhaps is new, peculiar, and original. The character of some works of this sort may beyond question be in the highest sense original; such for example as the works of Shakespeare and Milton and Pope and Sir Walter Scott, although all of them have freely used the thoughts of others. Of others again the original ingredients may be so small and scattered that the substance of the volumes may be said to embrace little more than the labor of sedulous transcription and colorable curtailment of other works. There are others of an intermediate class, where the intermixture of original and borrowed materials may be seen in proportions more nearly approaching to an equality with each other. And there are others again, as in cases of maps, charts, translations, and road books, where, the materials being equally open to all, there must be a close identity or similitude in the very form and use of the common materials. The difficulty here is to distinguish what belongs to the exclusive labors of a single

[1] Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 323, 324; Eden on Injunct. ch. 13, p. 380; Wilkins *v.* Aikin, 17 Ves. 425, 426.

[2] See Campbell *v.* Scott, 11 Simons, R. 31; Bramwell *v.* Halcomb, 3 Mylne & Craig, 737; Lewis *v.* Fullerton, 2 Beav. R. 6. In the late case of Folsom *v.* Marsh, 2 Story, R. 100, it was held that an abridgment consisting of extracts of the essential or most valuable portions of the original work was a piracy.

[3] See Jollie *v.* Jaques, 1 Blatchf. 618, musical composition.

mind from what are the common sources of the materials of the knowledge used by all.[1] Suppose for instance the case of maps; one man may publish the map of a country, another man with the same design, if he has equal skill and opportunity, may by his own labor produce almost a fac-simile. He has certainly a right so to do. But then from his right through that medium it does not follow that he would be at liberty to copy the other map and claim it as his own. He may work on the same original materials, but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another.[2]

[1] Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, pp. 322, 323.

[2] As to similarity see Drury *v.* Ewing, 1 Bond, 540; Daly *v.* Palmer, 6 Blatchf. 256; Mack *v.* Petter, L. R. 14 Eq. 431; McCrea *v.* Holdsworth, L. R. 6 Ch. 418; s. c. 2 H. L. 380; Pike *v.* Nicholas, L. R. 5 Ch. 251; Jerrold *v.* Houlston, 3 Kay & J. 708; Crookes *v.* Petter, 6 Jur. (N. S.) 1131. In Jerrold *v.* Houlston it is declared that it is a proper use of a copyrighted book, after getting one's own work into shape as well as may be, to look through the other work to see if it contain any heads now overlooked. But it was considered that if one, instead of searching into the common sources and obtaining materials there, should avail himself of the labor of his predecessor, and adopt his arrangement with only colorable variations (Greene *v.* Bishop, 1 Cliff. 186), or his materials, it would be an infringement. Dramatizing the incidents of a novel is held no infringement of a copyright of the latter. Reade *v.* Conquest, 7 Jur. (N. S.) 265; Coleman *v.* Wathen, 5 T. R. 245; Wilkins *v.* Aikin, 17 Ves. 424, 425; Longman *v.* Winchester, 16 Ves. 269, 271; Matthewson *v.* Stockdale, 12 Ves. 270; Carey *v.* Faden, 5 Ves. 24; Eden on Injunct. ch. 13, pp. 282, 283. The case of Campbell *v.* Scott, 11 Simons, R. 31, was for an alleged piracy in taking large selections from the work of the poet Campbell. On that occasion the Vice-Chancellor said: "In this case the legal right is prima facie quite clear with the plaintiff; because it is not denied that the extracts complained of are taken literally as they stand from the plaintiff's work. Then is the work complained of anything like an abridgment of the plaintiff's work or a critique upon it? Some of the poems are given entire, and large extracts are given from other poems; and I cannot think that it can be considered as a book of criticism when you observe the way in which it is composed. It contains 790 pages, 34 of which are taken up by a general disquisition upon the nature of the poetry of the nineteenth century; then, without any particular observation being appended to the particular poems and extracts from poems which follow, there are 758 pages of selections from the works of other authors; and therefore I cannot think that the work complained of can in any sense be said to be a book of criticism. If there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay, then there follows a mass of pirated matter which in fact constitutes the value of the volume. Then it is said that there is no animus furandi; but if A takes the property of B, the animus furandi is inferred from the act. Here

there is a very distinct taking, and in my opinion it has been done in a manner which the law will not permit. Roworth *v.* Wilkes was a case in which 75 pages of a treatise consisting of 118 pages were taken and inserted in a very voluminous work, 'The Encyclopædia Londinensis'; and although the matter taken formed but a very small proportion of the work into which it was introduced, the jury found for the plaintiff, who was the author of the treatise. I do not think that it is necessary for me to consider whether the selections in this case are the very cream and essence of all that Mr. Campbell ever wrote; but it is pretty plain that they would not have been inserted in the defendants' work unless the party who selected them thought that they were very attractive in themselves. However it so happens that in turning over the pages of the defendants' publication I find an extract from 'The Pleasures of Hope', which is the only part of that poem of which I have a distinct recollection; and I have reason to suppose that is a very striking passage, because it has remained impressed upon my memory for so many years. Then it is said that with respect to three of the selected poems the court ought not to interfere in the present case. I admit that they are not contained in Moxon's edition of the plaintiff's works, published in 1840; but nevertheless there is a general statement in the bill that the plaintiff composed them all. And I observe that Mr. Campbell is the sole plaintiff; the bill is not filed by him and Mr. Moxon, or by Mr. Moxon alone, but by Mr. Campbell solely; and I consider that his copyright in those three poems is entitled to protection equally with his copyright in the rest of the matters, which unquestionably have been pirated from Moxon's edition and copied into the work complained of. Then the only question is whether there has been such a damnum as will justify the party in applying to the court; because injuria there clearly has been. What has been done is against the right of the plaintiff. Now in my opinion he is the person best able to judge of that himself; and if the court does clearly see that there has been anything done which tends to an injury, I cannot but think that the safest rule is to follow the legal right and grant the injunction." In Bramwell *v.* Halcomb, Lord Cottenham said: "When it comes to a question of quantity it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity. In my view of the law, Lord Eldon, in Wilkins *v.* Aikin, 17 Ves. 422, put the question on a most proper footing. He says: 'The question upon the whole is whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work.'" See also Gray *v.* Russell, 1 Story, Rep. 11.

This subject was largely discussed in Gray *v.* Russell, 1 Story, R. 11. It was the case of a supposed piracy of Gould's edition of Adam's Latin Grammar, with notes. On this occasion the court said: "Now certainly the preparation and collection of these notes from these various sources must have been a work of no small labor and intellectual exertion. The plan, the arrangement, and the combination of these notes in the form in which they are collectively exhibited in Gould's Grammar belong exclusively to this gentleman. He is then justly to be deemed the author of them in their actual form and combination, and entitled to a copyright accordingly. If no work could be considered by our law as entitled to the privilege of copyright which is composed of materials drawn from many different sources, but for the first time brought together in the same plan and arrangement and combination, simply because those materials might be found scattered up and down in a great variety of volumes,

perhaps in hundreds or even thousands of volumes, and might therefore have been brought together in the same way and by the same researches of another mind equally skilful and equally diligent, — then indeed it would be difficult to say that there could be any copyright in most of the scientific and professional treatises of the present day. What would become of the elaborate commentaries of modern scholars upon the classics, which for the most part consist of selections from the works and criticisms of various former authors, arranged in a new form, and combined together by new illustrations intermixed with them? What would become of the modern treatises upon astronomy, mathematics, natural philosophy, and chemistry? What would become of the treatises in our own profession, the materials of which, if the works be of any real value, must essentially depend upon faithful abstracts from the reports, and from juridical treatises, with illustrations of their bearing? Blackstone's Commentaries is but a compilation of the laws of England, drawn from authentic sources, open to the whole profession; and yet it was never dreamed that it was not a work which in the highest sense might be deemed an original work, since never before were the same materials so admirably combined and exquisitely wrought out, with a judgment, skill, and taste absolutely unrivalled. Take the case of the work on Insurance, written by one of the learned counsel in this cause, and to which the whole profession are so much indebted; it is but a compilation with occasional comments upon all the leading doctrines of that branch of the law, drawn from reported cases or from former authors, but combined together in a new form and in a new plan and arrangement; yet I presume none of us ever doubted that he was fully entitled to a copyright in the work as being truly in a just sense his own. There is no foundation in law for the argument, that because the same sources of information are open to all persons, and by the exercise of their own industry and talents and skill they could from all these sources have produced a similar work, one party may at second hand, without any exercise of industry, talents, or skill, borrow from another all the materials which have been accumulated and combined together by him. Take the case of a map of a county, or of a state or an empire; (*a*) it is plain that in proportion to the accuracy of every such map must be its similarity to or even its identity with every other. Now suppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys in order to perfect such a map, and has thereby produced one far excelling every existing map of the same sort. It is clear that notwithstanding this production he cannot supersede the right of any other person to use the same means, by similar surveys and labors, to accomplish the same end. But it is just as clear that he has no right, without any such surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party, and thus to rob him of all the fruit of his industry, skill, and expenditures. See Wilkins *v.* Aikin, 17 Ves. 424, 425; Eden on Injunct. ch. 13, pp. 282, 283; 2 Story on Equity Jurisp. §§ 1269 to 1272. It would be a downright piracy. Neither is it of any consequence in what form the works of another author are used; whether it be by a simple reprint, or by incorporating the whole or a large portion thereof in some larger work. Thus for example if in one of the large encyclopædias of the present day the whole or a large portion of a scientific treatise of another author, — as for example one of Dr. Lardner's, or Sir John Herschell's, or Mrs. Somerville's treatises, should be incorporated, — it would be just as much a piracy upon the copyright as if it were published in a single volume. In some cases indeed it may be a very nice question what amounts to a piracy of a work or not. Thus if large extracts are

§ 1271. **Inspection of Books Allowed in Cases of Piracy.** — In some cases of this nature a Court of Equity will take upon itself the task of inspection and comparison of books alleged

made therefrom in a review it might be a question whether those extracts were designed bona fide for the mere purpose of criticism, or were designed to supersede the original work under the pretence of a review by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question in such a case must be compounded of various considerations: whether it be a bona fide abridgment, or only an evasion by the omission of some unimportant parts; whether it will in its present form prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort which may enter as elements in ascertaining whether there has been a piracy or not. Although the doctrine is often laid down in the books that an abridgment is not a piracy of the original copyright, yet this proposition must be received with many qualifications. See 2 Story on Equity Jurisprudence, §§ 939 to 942; Sweet *v.* Shaw before the Vice-Chancellor in 1839; The [English] Jurist for 1839, p. 212. In many cases the question may naturally turn upon the point not so much of the quantity as of the value of the selected materials. As was significantly said on another occasion, — 'Non numerantur, ponderantur.' The quintessence of a work may be piratically extracted so as to leave a mere caput mortuum, by the selection of all the important passages in a comparatively moderate space. In the recent case of Bramwell *v.* Halcomb (3 Mylne & Craig, 737), it was held that the question whether one author has made a piratical use of another's work does not necessarily depend upon the quantity of that work which he has quoted or introduced into his own book. On that occasion Lord Cottenham said: 'When it comes to a question of quantity it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value which is looked to. It is useless to look to any particular cases about quantity.' See the Lord Chancellor's opinion in Bell *v.* Whitehead, The [English] Jurist, 1839, p. 14; Sweet *v.* Shaw, before the Vice-Chancellor, 1839; The [English] Jurist for 1839, p. 212. The same subject was a good deal considered by the same learned judge in Saunders *v.* Smith (3 Mylne & Craig, R. 711, 728, 729), with reference to copyright in reports; and how far another person was at liberty to extract the substance of such reports or to publish select cases therefrom even with notes appended. In the case of Wheaton *v.* Peters (8 Peters, R. 591) the same subject was considered very much at large. It was not doubted by the court that Mr. Peters's Condensed Reports would have been an infringement of Mr. Wheaton's copyright (supposing that copyright properly secured under the act), if the opinions of the court had been or could be the proper subject of the private copyright by Mr. Wheaton. But it was held that the opinions of the court, being published under the authority of Congress, were not the proper subject of private copyright. But it was as little doubted by the court that Mr. Wheaton had a copyright in his own marginal notes and in the arguments of counsel as prepared and arranged in his work. The cause went back to the Circuit Court for the purpose of further inquiries as to the fact whether the requisites of the act of Congress had been complied with or not by Mr. Wheaton. This would have been wholly useless and nugatory, unless Mr. Wheaton's marginal notes and abstracts of argu-

to be a piracy.[1] But the usual practice is to refer the subject to a master, who then reports whether the books differ, and in what respects; and upon such a report the court usually acts in making its interlocutory as well as its final decree.[2]

§ 1272. **The Publication of an Infringement Will Be Enjoined.** — In cases of the invasion of a copyright by using the same materials in another work of which a large proportion is original, it constitutes no objection that an injunction will in effect stop the sale and circulation of the work which so infringes upon the copyright. If the parts which are original[3] cannot be separated from those which are not original, without destroying the use and value of the original matter, he who has made the improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to another, and the mixture is forbidden by the law, he must again separate them and bear all the mischief and loss which the separation may occasion. The same rule applies to the use of literary matter.[4] It proceeds upon the same general principle of justice which applies to the ordinary case of a confusion of property by premeditation or wanton impropriety.[5]

§ 1273. **The Publication of Unpublished Manuscripts May Be Enjoined.** — We may now proceed to the consideration of other cases, where upon similar grounds of irreparable mischief, or the inadequacy of the remedy at law, or the prevention of multiplicity of suits, Courts of Equity interfere by way of injunction.[6] And here we may take notice in the first place of a class of cases bearing a close analogy to that of copyrights; that is to say,

ments could have been the subject of a copyright (for that was all the work which could be the subject of copyright); so that if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress." See also Emerson *v.* Davies, 3 Story; R. 768.

[1] Lewis *v.* Fullerton, 2 Beav. R. 6; Farmer *v.* Calvert Lith. Co., 5 Chic. Leg. N. 1; s. c. 7 Am. Law Rev. 365.

[2] Eden on Injunct. ch. 13, p. 289; Carnan *v.* Bowles, 2 Bro. Ch. R. 80; —— *v.* Leadbetter, 4 Ves. 681; Carey *v.* Faden, 5 Ves. 24, 25; Jeffrey *v.* Bowles, 1 Dick. 429.

[3] As to the copyright of part of a book see Low *v.* Ward, L. R. 6 Eq. 415. Query as to copyrighting the title of a book. See Dicks *v.* Yates, 18 Ch. D. 76; Waldon *v.* Dicks, 10 Ch. D. 247. But one may be protected against a fraudulent use of his titlepage. See editor's note at end of § 1282.

[4] Mawman *v.* Tegg, 2 Russ. R. 390, 391. But see Baily *v.* Taylor, 1 Tamlyn, R. 295; Emerson *v.* Davies, 2 Story, 768. See Jarrold *v.* Houlston, 3 Kay & J. 708.

[5] Story Com. on Bailments, § 40.

[6] Ante, §§ 1171 to 1175.

cases where Courts of Equity interfere to restrain the publication of unpublished manuscripts. In cases of literary, scientific, and professional treatises in manuscript it is obvious that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited in point of right, use, and effect to the very occasions expressed or implied, and ought not to be construed as a general gift, or authority for any purposes of profit or publication to which the receiver may choose to devote them. The property then in such manuscripts, not having been parted with in cases of this sort, if any attempt is made to publish them without the consent of the author or proprietor, it is obvious that he ought to be entitled to protection in equity. And accordingly this course of granting injunctions against such unauthorized publications has been constantly acted upon in Courts of Equity,[1] and has been applied to all sorts of literary compositions.[2]

§ 1274. **Same.** — Upon the same principle the publication of private letters forming literary compositions has been restrained, where the publication has been attempted without the consent of the author.[3] Upon one occasion of this sort the question arose whether letters having the character of literary compositions remained in any respect the property of the writer after they were transmitted to the person to whom they were addressed. It was held that they did;[4] that by sending letters the writer does not part wholly with his property in the literary composi-

[1] Eden on Injunct. ch. 13, pp. 275, 276; Duke of Queensbury *v.* Shebbeare, 2 Eden, R. 329; Southey *v.* Sherwood, 2 Meriv. R. 434, 436; Macklin *v.* Richardson, Ambl. R. 694; Pope *v.* Curl, 2 Atk. 342.

[2] An author of letters or papers of whatever kind, whether they be letters of business or private letters or literary compositions, has a property and an exclusive copyright therein, unless he unequivocally dedicate them to the public or to some private person; and no person has any right to publish them without his consent unless such publication be required to establish a personal right or claim or to vindicate character. Folsom *v.* Marsh, 2 Story, R. 100. See the qualification as to the right of the government to publish official letters, post, § 1277, note.

[3] Pope *v.* Curl, 2 Atk. 342; 3 Wooddes. Lect. 56, p. 415. Unless the publishing is necessary for the vindication of the receiver's character. Lytton *v.* Devey, 54 L. J. Ch. 293. But the letters belong to the receiver. Ib. See Grigsby *v.* Breckenridge, 2 Bush, 480; Lytton *v.* Devey, 54 L. J. Ch. 293.

[4] Lytton *v.* Devey, 54 L. J. Ch. 293.

tions, nor give the receiver the power of publishing them; and that at most the receiver has only a special property in them, and possibly may have the property of the paper. But this does not give a license to any person whatsoever to publish them to the world, and at most the receiver has only a joint property with the writer. Whether he is to be considered as having such joint property or not, letters having the character of literary composition must be treated as within the laws protecting the rights of literary property; and a violation of those rights in that instance is attended with the same legal consequences as in the case of an unpublished manuscript of an original composition of any other description.[1]

§ 1275. **Same.** — In a comparatively recent case Lord Eldon has explained the doctrine of Courts of Equity on this subject to be founded, not on any notion that the publication of letters would be painful to the feelings of the writer, but upon a civil right of property, which the court is bound to respect. That the property is qualified in some respects, that by sending a letter the writer has given for the purpose of reading it, and in some cases of keeping it, a property to the person to whom the letter is addressed, yet that the gift is so restrained, that beyond the purposes for which the letter is sent, the property is in the sender. Under such circumstances it is immaterial whether the intended publication is for the purpose of profit or not. If for profit, the party is then selling; if not for profit, he is then giving that a portion of which belongs to the writer.[2]

§ 1276. **Same.** — A question has been made, and a doubt has been suggested, how far the like protection ought to be given to restrain the publication of mere private letters on business, or on family concerns, or on matters of personal friendship, and not strictly falling within the line of literary compositions.[3] In a moral view the publication of such letters, unless in cases where it is necessary to the proper vindication of the rights or conduct of the party against unjust claims or injurious imputations,[4] is perhaps one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined. It strikes at the root of all that free and mutual inter-

[1] Pope *v.* Curl, 2 Atk. 342; Lord Perceval *v.* Phipps, 2 Ves. & Beam. 19, 24; Thompson *v.* Stanhope, Ambler, R. 739, 740; Gee *v.* Pritchard, 2 Swanst. R. 403, 414, 415, 422, 425.

[2] Gee *v.* Pritchard, 2 Swanst. R. 413 to 416.

[3] Percival *v.* Phipps, 2 Ves. & Beam. 24.

[4] Lytton *v.* Devey, 54 L. J. Ch. 293.

change of advice, opinions, and sentiments between relatives and friends and correspondents which is so essential to the well-being of society and to the spirit of a liberal courtesy and refinement. It may involve whole families in great distress, from the public display of facts and circumstances which were reposed in the bosoms of others under the deepest and most affecting confidence that they should forever remain inviolable secrets. It may do more, and compel every one in self-defence to write even to his dearest friends with the cold and formal severity with which he would write to his wariest opponents or his most implacable enemies. Cicero has with great beauty and force spoken of the grossness of such offences against common decency: "Quis enim unquam qui paulum modo bonorum consuetudinem nosset, literas ad se ab amico missas, offensione aliqua interposita, in medium protulit, palamque recitavit? Quid est aliud, tollere e vita vitæ societatem, quam tollere amicorum colloquia absentium? Quam multa joca solent esse in epistolis, quæ, prolati si sint, inepta videantur! Quam multa seria, neque tamen ullo modo divulganda!"[1]

§ 1277. **Same.** — It would be a sad reproach to English and American jurisprudence if Courts of Equity could not interpose in such cases, and if the rights of property of the writers should be deemed to exist only when the letters were literary compositions. If the mere sending of letters to third persons is not to be deemed in cases of literary composition a total abandonment of the right of property therein by the sender, a fortiori the act of sending them cannot be presumed to be an abandonment thereof in cases where the very nature of the letters imports as matter of business, or friendship, or advice, or family or personal confidence, the implied or necessary intention and duty of privacy and secrecy.[2]

[1] Cic. Orat. Philip. 2, ch. 4, Oliv. & Ernest. ed.; Id. cited by Sir Samuel Romilly, 2 Swanst. 419.

[2] In Folsom *v.* Marsh, 2 Story, 100, 113, Mr. Justice Story said: "In respect to official letters addressed to the government or any of its departments by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication or to give them publicity, there may be a just ground of distinction. It may be doubtful whether any public officer is at liberty to publish them, at least in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand from the nature of the public service or the character of the documents, embracing historical, military, or diplomatic information, it may be the right and even the duty of the government to give them publicity even against the will of the writers. But this is an exception in favor of the government,

§ 1278. **Same.** — Fortunately for public as well as for private peace and morals, the learned doubts on this subject have been overruled; and it is now held that there is no distinction between private letters of one nature and private letters of another.[1] For the purposes of public justice publicly administered, according to the established institutions of the country in the ordinary modes of proceeding, private letters may be required to be produced and published.[2] But it by no means follows that private persons have a right to make such publications on other occasions, upon their own notion of taking the administration of justice into their own hands, or for the purpose of vindicating their own conduct or of gratifying their own enmity, or of indulging a gross and diseased public curiosity by the circulation of private anecdotes or family secrets or personal concerns.[3]

§ 1279. **Injunction Issues Not because a Libel Has Been Committed, but an Invasion of Property Rights of Plaintiff.** — But the utmost extent to which Courts of Equity have gone in restraining any publication by injunction has been upon the principle of protecting the rights of property in the book or letters sought to be published. They have never assumed, at least since the destruction of the Court of Star Chamber, to restrain any publication which purports to be a literary work, upon the mere ground that it is of a libellous character, and tends to the degradation or injury of the reputation or business of the plaintiff, who seeks relief against such publication. For matters of this sort do not properly fall within the jurisdiction of Courts of Equity to redress, but are cognizable in a civil or criminal suit at law. To justify therefore the interposition of a Court of Equity

and stands upon principles allied to, or nearly similar to, the rights of private individuals to whom letters are addressed by their agents, to use them and publish them upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers under its own sanction and for public purposes, I am not prepared to admit that any private persons have a right to publish the same letters and papers without the sanction of the government for their own private profit and advantage. Recently the Duke of Wellington's despatches have (I believe) been published by an able editor with the consent of the noble Duke under the sanction of the government. It would be a strange thing to say that a compilation, involving so much expense and so much labor to the editor in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher and editor." See Nicols *v.* Pitman, 26 Ch. D. 374.

[1] See 1 Am. Law Reg., 449, June, 1853, a valuable article.

[2] Gee *v.* Pritchard, 2 Swanst. R. 418, 426, 427; Brandreth *v.* Lance, 8 Paige, R. 24.

[3] Ibid.

by way of injunction, in cases of literary publication, there must be an invasion by the defendant of the rights of property of the plaintiff, or some direct breach of confidence connected therewith.

§ 1280. **Protection of Scientific or Literary Lectures by Injunction.** — Principles of a similar nature have been applied for the assistance of persons to whom letters are written, and by whom they are received, in order to protect such letters from publication in any manner injurious to the rights of property of the lawful owners thereof.[1] So they have been applied in all cases where the publication would be a violation of a trust or confidence founded in contract,[2] or implied from circumstances. Thus for example where a person delivers scientific or literary oral lectures, it is not competent for any person who is privileged to hear them, to publish the substance of them from his own notes; for the admission to hear such lectures is upon the implied confidence and contract that the hearer will not use any means to injure or to take away the exclusive right of the lecturer in his own lectures.[3]

§ 1281. **Same.** — So where a dramatic performance has been allowed by the author to be acted at a theatre, no person has a right to pirate such performance and to publish copies of it surreptitiously, or to act it at another theatre without the consent of the author or proprietor; for his permission to act it at a public theatre does not amount to an abandonment of his title to it, or to a dedication of it to the public at large.[4]

§ 1282. **The Fraudulent Use of One's Name or Trade Mark Will Be Enjoined.** — So an injunction will be granted against publishing

[1] Earl of Granard *v.* Dunkin, 1 B. & Beatt. 207; Thompson *v.* Stanhope, Ambler, R. 737.

[2] See Lord Perceval *v.* Phipps, 2 Ves. & Beam. 19, 27; Eden on Injunct. ch. 13, p. 279.

[3] See Williams *v.* Prince of Wales, 23 Beav. 338; Abernethy *v.* Hutchinson, 3 L. J. Ch. 209, Lord Eldon; Nicols *v.* Pitman, 26 Ch. D. 374; Bartlette *v.* Crittenden, 4 McLean, 300. The publication of the contents of documents, produced as exhibits, may be restrained. Williams *v.* Prince of Wales, 23 Beav. 338.

[4] Morris *v.* Kelley, 1 Jac. & Walk. 461; Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10; Boucicault *v.* Fox, 5 Blatchf. 87; Palmer *v.* De Witt, 47 N. Y. 532; Chappell *v.* Boosey, 21 Ch. D. 232. But a spectator may, it seems, publish what he can remember, though he cannot publish notes or a phonographic copy. Palmer *v.* De Witt; Keene *v.* Clark, 5 Rob. (N. Y.) 38. See Keene *v.* Kimball, 16 Gray, 545; Keene *v.* Wheatley, 9 Am. Law Reg. 33. The publication in England of a dramatic piece or musical composition as a book, before it has been publicly represented or performed, does not deprive the author or his assignee of the exclusive right of representing or performing it. Chappell *v.* Boosey, 21 Ch. D. 232.

a magazine in a party's name who has ceased to authorize it;[1] or from assuming the name of a newspaper published by the plaintiff, for the fraudulent purpose of deceiving the public, and supplanting the plaintiff in the good-will of his own newspaper.[2] So an injunction will be granted against vending an article of trade under the name of a party with false labels, to the injury of the same party who has already acquired a reputation in trade by it.[3] So an injunction will be granted to restrain the owner from running omnibuses having on them such names and words and devices as to form a colorable imitation of the words, names, and devices on the omnibuses of the plaintiff; for this has a natural tendency to deprive the plaintiff of the fair profits of his business by attacting custom under the false representation that the omnibuses of the defendant belong to and are under the management of the plaintiff.[4] So an injunction will be granted to prevent the use of names, marks, letters, or other indicia of a tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman, when they are not so.[5]

[1] Hogg *v.* Kirby, 8 Ves. 215; Eden on Injunct. ch. 14, pp. 313, 314; Bell *v.* Locke, 8 Paige, R. 75. Or a prospectus stating without authority that A is trustee of a company. Routh *v.* Webster, 10 Beav. 561; Job Printers' Union *v.* Kinsley, 107 Ill. App. 654; Keller *v.* Goodrich, 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; Noel *v.* Ellis, 89 Fed. 978; Griggs *v.* Erie Co., 131 Fed. 359; Standard Table Oil Cloth Co. *v.* Trenton Oil Cloth Co., 71 N. J. Eq. 555, 63 Atl. 846.

[2] Bell *v.* Locke, 8 Paige, R. 75.

[3] Eden on Injunct. ch. 14, pp. 314, 315; Motley *v.* Dowman, 3 Mylne & Craig, 1, 14, 15; Millington *v.* Fox, 3 Mylne & Craig, 338; Perry *v.* Truefit, 6 Beav. R. 66. But not, it is said, against one for selling a quack medicine under a false and colorable representation that it was the medicine of the plaintiff, an eminent physician, who had no such medicine of his own with which the quack medicine could come into competition. Clark *v.* Freeman, 10 Beav. 112.

[4] Knott *v.* Morgan, 2 Keen, R. 213, 219; Perry *v.* Truefit, 6 Beav. R. 66; Marsh *v.* Billings, 7 Cush. 322.

[5] Perry *v.* Truefit, 6 Beav. R. 66; Gout *v.* Aleploglu, 6 Beav. R. 69, note. In Perry *v.* Truefit, Lord Langdale said, "I think that the principle on which both the Courts of Law and Equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade or that custom which, without that

§ 1283. The Disclosure of Trade Secrets Obtained through Confidential Employment Will Be Restrained. — Upon similar

improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark. The case of Millington *v.* Fox (3 M. & Cr. 338) seems to have gone this length, that the deception need not be intentional, and that a man, though not intending any injury to another, shall not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. I am not aware that any previous case carried the principle to that extent." See Howard *v.* Henriques, 3 Sandf. 725; Sykes *v.* Sykes, 3 Barn. & C. 541; Cartier *v.* Carlile, 31 Beav. 292; Edelsten *v.* Edelsten, 1 DeG. J. & S. 185; Coats *v.* Holbrook, 2 Sandf. Ch. 586; Lee *v.* Haley, L. R. 5 Ch. 155; Marsh *v.* Billings, 7 Cush. 322; Wotherspoon *v.* Currie, L. R. 5 H. L. 508; Seixo *v.* Provizende, L. R. 1 Ch. 192; Hirst *v.* Denham, L. R. 14 Eq. 542; Bradley *v.* Norton, 33 Conn. 157.

Trade Marks and the Like. — For the purpose of redress it is only necessary that the mark or device used by the defendant should so far resemble that of the plaintiff as to be apt to mislead the general public, where used; it is not necessary that there should be such a resemblance that it would be difficult to distinguish the two when placed together. The defendant's mark, word, or device need not be a counterfeit in any sense, or anything near a counterfeit; enough that, as it is used, it is likely to deceive, not an expert, but an average person. Seixo *v.* Provizende, supra; Lawrence Mfg. Co. *v.* Lowell Mills, 129 Mass. 325; McLean *v.* Fleming, 96 U. S. 245, 24 L. Ed. 828; Gorham Co. *v.* White, 81 U. S. 511, 20 L. Ed. 731; Metzler *v.* Wood, 8 Ch. D. 606. And further as to resemblance see Wotherspoon *v.* Currie, supra; Crawshay *v.* Thompson, 4 Man. & G. 357; Orr *v.* Johnston, 13 Ch. D. 434; Gillott *v.* Esterbrook, 48 N. Y. 374; Partridge *v.* Menck, 2 Sandf. Ch. 622; McCartney *v.* Garnhart, 45 Mo. 593. But if the truth is clearly told with the mark, the resemblance will not be ground for relief. Magee Furnace Co. *v.* Le Barron, 127 Mass. 115; Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434.

If there is however such resemblance as that here indicated, and there appears an intention on the part of the defendant to palm off his goods, in the case of a trade mark, as the goods of the plaintiff, or to represent the plaintiff or his business, in any case, — then an injunction will be readily granted. Lee *v.* Haley, L. R. 5 Ch. 155; Day *v.* Brownrigg, 10 Ch. D. 294; Seixo *v.* Provizende, supra; Wotherspoon *v.* Currie, supra; Congress Spring Co. *v.* High Rock Spring Co., 45 N. Y. 291; and many other cases.

Indeed if the mark or word be capable of exclusive appropriation, it is not necessary for the purpose of a mere injunction that there should be any intention, in the use of the imitative mark or word, on the part of the defendant to personate the plaintiff in his business or property. Priority of use, with the resemblance, will then be enough. Singer Mfg. Co. *v.* Loog, 18 Ch. D. 395, 417, Cotton, L. J.; Cartier *v.* Carlile, 31 Beav. 292; Edelsten *v.* Edelsten, 1 DeG. J. & S. 185; Dale *v.* Smithson, 12 Abb. Pr. 237; Coffeen *v.* Brunton, 4 McLean, 516; Kendall *v.* Davis, 2 R. I. 566. But to recover *damages* the plaintiff must show more than prior use of a word or device capable of exclusive appropriation, — he must show intention on the part of the defendant to appear as the plaintiff. Marsh *v.* Billings, 7 Cush. 322; Sykes *v.* Sykes, 3 Barn. & C. 541; Rodgers *v.* Nowill, 5 C. B. 109; Morison *v.* Salmon, 2 Man. & G. 385; Coats *v.*

grounds of irreparable mischief Courts of Equity will restrain a party from making a disclosure of secrets communicated to him

Holbrook, 2 Sandf. Ch. 586, 597; Crawshay *v.* Thompson, 4 Man. & G. 357.

The injunction can be had in any case, as has already been observed, where there appears to be an intention to personate the plaintiff; and this whether the mark used is capable or not of exclusive appropriation. But where the mark, device, or words used are not in law capable of such appropriation, the right to an injunction, unlike the converse case, depends upon fraud on the part of the defendant; that being shown however, the injunction will be granted. Lee *v.* Haley, L. R. 5 Ch. 155; Radde *v.* Norman, L. R. 14 Eq. 348; Rodgers *v.* Nowill, 6 Hare, 325. See Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599 (as to this case see infra, near end of this note); Congress Spring Co. *v.* High Rock Spring Co., 45 N. Y. 291; Newman *v.* Alvord, 51 N. Y. 189; Seixo *v.* Provizende, L. R. 1 Ch. 192; Wotherspoon *v.* Currie, L. R. 5 H. L. 508; Singer Mfg. Co. *v.* Loog, 18 Ch. D. 395, 412, James, L. J. Continuing to use a mark after complaint to the party by the plaintiff is strong evidence of fraud. Orr *v.* Johnston, 13 Ch. D. 434 (C. A.). See Crawshay *v.* Thompson, 4 Man. & G. 357, 379, 383.

The courts have found it difficult however to lay down any clear rule by which to determine what may be exclusively appropriated as a mark. The chief difficulty has arisen with respect to names used as business trade marks, that do not define kind or quality, composition or texture, or something of the sort. Much of the difficulty has been removed in England by recent decisions. It has lately been declared in that country that no one can appropriate to his exclusive use any name which he may choose to fix to landed property of his, whether consisting of a house or only of land. Day *v.* Brownrigg, 10 Ch. D. 294 (C. A.), name of a lodge. Contra Howard *v.* Henriques. 3 Sandf. 725, name of a hotel. However it would probably be agreed that if the proprietor e. g. of a hotel should license another to place the name of the hotel, for a certain time, upon coaches run by him, a different case would arise. Deiz *v.* Lamb, 6 Rob. (N. Y.) 537. A special right for the time would then be conferred upon the coach-owner at least towards the hotel-owner; which right would terminate, if not extended, at the end of the time agreed. And if the coach-owner should afterwards persist in using the name of the hotel as of *such right*, he could, it seems, be enjoined. Ib. Compare Marsh *v.* Billings, 7 Cush. 322.

With regard to the clearer case of the use of a family name it was said by Bruce, L. J., in Burgess *v.* Burgess, 3 DeG. M. & G. 896, 903, that all "the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less so that their fathers have done so before them. All the Queen's subjects have a right to sell them in their own name, and not the less so that they bear the same name as their fathers." See also Holloway *v.* Holloway, 13 Beav. 209; Rodgers *v.* Nowill, 6 Hare, 325; Eddleston *v.* Vick, 23 Eng. L. & E. 51, 57; s. c. 18 Jur. 7. But even in such a case fraud will give a right to relief. Sykes *v.* Sykes, 3 Barn. & C. 541.

Perhaps the general test in doubtful cases of names, of the right of exclusive appropriation at the *outset*, may lie in the question whether the use of the words by another would have the obvious or perhaps the natural effect to injure the plaintiff materially. See Day *v.* Brownrigg, 10 Ch. D. 294, 303, Jessel, M. R. That would clearly be a proper

in the course of a confidential employment. And it matters not in such cases whether the secrets be secrets of trade, or secrets of

test on a question of resemblance. Singer Mfg. Co. *v.* Loog, 18 Ch. D. 395, 417.

But it seems that names not in the first instance capable in law of exclusive appropriation may become individual property under certain circumstances, as where they have been used by the plaintiff alone for a long time and have come to be understood generally as designating a certain particular kind or quality of goods or property. Newman *v.* Alvord, 51 N. Y. 189; Congress Spring Co. *v.* High Rock Spring Co., 45 N. Y. 291; Magee Furnace Co. *v.* Le Barron, 127 Mass. 115; Wotherspoon *v.* Currie, L. R. 5 H. L. 508; Radde *v.* Norman, L. R. 14 Eq. 348. In the last-named case, at p. 355, Wickens, V. C., says "I must treat the case therefore as one in which the plaintiffs have established prima facie what I admit to be a very difficult title to establish, — a title to the exclusive use of a particular word as a trade mark." But he was not willing to admit that such a title would have been considered established, for the purpose of an injunction, against one who had used the name in ignorance of the plaintiffs' claim. The case is therefore clear authority, as already cited, for the rule that if the words are not naturally capable of exclusive use, fraud must be shown even for an injunction. Rodgers *v.* Nowill, 6 Hare, 325.

A few special cases may now be enumerated in which the use of particular words, marks, or the like has been enjoined or considered: "The original." Cocks *v.* Chandler, L. R. 11 Eq. 446. "Only genuine." James *v.* James, L. R. 13 Eq. 421. "Charter Oak" stoves. Filley *v.* Fassett, 44 Mo. 168. "Magee Advance." Magee Furnace Co. *v.* Le Barron, 127 Mass. 115. "Ainsworth's thread." Ainsworth *v.* Walmsley, L. R. 1 Eq. 518. "Coats' best six cord." Coats *v.* Holbrook, 2 Sandf. Ch. 586. Name of a newspaper. Kelly *v.* Hutton, L. R. 3 Ch. 703. A system of numerals or letters. Gillott *v.* Esterbrook, 48 N. Y. 374; Crawshay *v.* Thompson, 4 Man. & G. 357; Gillott *v.* Kettle, 3 Duer, 624; Glen Mfg. Co. *v.* Hall, 61 N. Y. 226; Coats *v.* Holbrook, supra; Lawrence Mfg. Co. *v.* Lowell Mills, 129 Mass. 325; Boardman *v.* Meriden Co., 35 Conn. 402; Magee Furnace Co. *v.* Le Barron, supra. But see Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599 (letters of the alphabet). Imitation of sheet music of a song sung by a particular singer at a popular theatre. Chappell *v.* Sheard, 2 Kay & J. 117; Chappell *v.* Davidson, Ib. 123 (the fact of shopmen being cautioned to explain was disregarded). Imitation of the titlepage of a book. Metzler *v.* Wood, 8 Ch. D. 606. An advertisement calculated to make the public believe that the party is the same as or successor to another person or firm. Colton *v.* Thomas, 2 Brewst. 308. See Reeves *v.* Denicke, 12 Abb. Pr. (N. S.) 92.

An injunction may be granted against the use of a mark though it is used only in a foreign market. Orr *v.* Johnston, 13 Ch. D. 434 (C. A.).

It is laid down that where particular labels are made and sold for legitimate purposes, the court will not restrain the printing and sale of them until the party who claims to be aggrieved has established his right at law. Farina *v.* Silverlock, 6 DeG. M. & G. 214; s. c. in a later stage somewhat qualifying the first decision, 4 Kay & J. 650.

If the plaintiff's own mark or device is a deceptive misrepresentation, no injunction will be granted. Manhattan Medicine Co. *v.* Wood, 108 U. S. 218, 27 L. Ed. 706, 2 S. Ct. Rep. 436; Leather Cloth Co. *v.* American Leather Cloth Co., 4 DeG. J. & S. 137; s. c. 11 H. L. Cas. 523; Connell

title, or any other secrets of the party important to his interests.[1] [If a trusted employee, whether he be engaged in the office, or factory or laboratory is permitted at random to divulge the secret business affairs of the employer or the valuable formulæ, gathered at much expense and worked out through years of careful research, he might equally be permitted to trespass upon and possess himself of his master's land. Where a man was engaged in the building of soap making plants which would produce a given kind of soap, and he was under contract with plaintiff not to sell any plants within this country for a period of twenty years, this did not prevent his building plants for other parties, and especially, where in the case at bar the soap being manufactured was produced under conditions that were superior to those used by plaintiff.[2] Blue prints for cars made for a customer and turned over to the customer for use in ordering duplicate cars or parts of cars, are the property of the contractor, and use of the same by a competing company will be restrained.[3] The right to prohibit the giving away of trade secrets carries with it the implied right to enforce a contract where plaintiff purchased property with the understanding that an employee was to use his skill in the making of preparations.[4] If it is necessary for the plaintiff to divulge his trade secret before the court in order for it to see that he has a right that should be protected, this is no ground for preventing its being divulged by the defendant.[5]]

v. Reed, 128 Mass. 477; Palmer *v.* Harris, 60 Pa. St. 156; Marshall *v.* Ross, L. R. 8 Eq. 651; Pidding *v.* How, 8 Sim. 477; Perry *v.* Truefit, 6 Beav. 66; Smith *v.* Woodruff, 48 Barb. 438. The mere unauthorized use of the word "patent" however will not necessarily be fatal. Sykes *v.* Sykes, 3 Barn. & C. 541; Ford *v.* Foster, L. R. 7 Ch. 611; Marshall *v.* Ross, supra.

[1] Cholmondeley *v.* Clinton, 19 Ves. 261, 267; Evitt *v.* Price, 1 Sim. R. 483; Yovatt *v.* Winyard, 1 Jac. & Walk. 394; Morrison *v.* Moat, 15 Jur. 787; Williams *v.* Williams, 3 Mer. 159; Green *v.* Folghamb, 1 Sim. S. 398; Westwelt *v.* Natl. Paper Co., 154 Ind. 673, 57 N. E. 552; Sanitas Nut Food Co. *v.* Cewer, 134 Mich. 370, 96 N. W. 454, 10 Detroit Leg. N. 503; Simmons Medicine Co. *v.* Simmons, 81 Fed. 163; Harvey *v.* Natl. Drug Co., 75 App. Div. 103, 77 N. Y. Supp. 674; Shaver *v.* Heller, 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878; Stewart *v.* Hook, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255; Vulcan Detinning Co. *v.* American Can Co., 67 N. J. Eq. 243, 58 Atl. 290; O. & W. Thum Co. *v.* Tloczynski, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 4 Detroit Leg. N. 527, 68 Am. St. Rep. 469.

[2] Bell *v.* Petrolia Mfg. Co., 25 Misc. Rep. 66, 54 N. Y. Supp. 663.

[3] Ibid.

[4] Natl. Gum Co. *v.* Braendly, 27 App. Div. 219, 51 N. Y. Supp. 93.

[5] Stone *v.* Goss, 65 N. J. Eq. 756, 55 Atl. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794.

§ 1284. **The Sale of Real Estate to the Prejudice of the Proposed Vendee's Rights Will Be Restrained.** — Before closing this subject we shall now proceed to state a few other cases of special injunctions, in order more fully to illustrate the nature and limits of the jurisdiction, and the importance of it to prevent a total failure of remedial justice. There are for instance many cases in which Courts of Equity will interfere by injunction to prevent the sales of real estates; as to restrain the vendor from selling to the prejudice of the vendee, pending a bill for the specific performance of a contract respecting an estate; for it might put the latter to the expense of making the purchaser a party, in order to give perfect security to his title.[1]

§ 1285. **Same.** — In like manner sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons; as in cases of trusts and special authorities, where the party is abusing his trust or authority.[2] And where sales have been made to satisfy certain trusts and purposes, and there is danger of a misapplication of the proceeds, Courts of Equity will also restrain the purchaser from paying over the purchase-money.[3]

§ 1286. **Same.** — Cases of injunctions against a transfer of stocks, of annuities, of ships, and of negotiable instruments furnish an appropriate illustration of the same principle;[4] as also do injunctions to restrain husbands from transferring property in fraud of the legal or equitable rights of their wives.[5]

[1] Echliff *v.* Baldwin, 16 Ves. 267; Curtis *v.* Marquis of Buckingham, 3 Ves. & B. 168; Daly *v.* Kelly, 4 Dow, R. 440; ante, § 1235.

[2] Anon. 6 Madd. R. 10.

[3] Green *v.* Lowes, 3 Bro. Ch. R. 217; Matthews *v.* Jones, 2 Anst. R. 506; Hawkshaw *v.* Parkins, 2 Swanst. 549; Hine *v.* Handy, 1 John. Ch. R. 6. So equity will interfere, when necessary, to prevent a defendant from affecting property in litigation by contracts, conveyances, or other acts. Shrewsbury Ry. Co. *v.* Shrewsbury & B. Ry. Co., 4 Eng. L. & E. 171; s. c. 15 Jur. 548; Great Western Ry. Co. *v.* Birmingham Ry. Co., 2 Phill. 597.

[4] Terry *v.* Harrison, Bunb. R. 289; Chedworth *v.* Edwards, 8 Ves. 46; Stead *v.* Clay, 1 Sim. 294; Hood *v.* Aston, 1 Russ. R. 412; Thompson *v.* Smith, 1 Madd. R. 395; Rogers *v.* Rogers, 1 Anst. R. 174; ante, § 1234; Dickerson *v.* Bankers' Loan & Inv. Co., 93 Va. 498, 25 S. E. 548; Currie *v.* Jones, 138 N. C. 189, 50 S. E. 560; Brown *v.* Bracking, 11 Idaho, 678, 83 Pac. 950; Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236, 87 N. W. 24.

The fact that the certificate is in custodia legis, when the custodian is the party interested in evading the claim upon the certificate, is no impediment to a restraint upon him. Barth *v.* Union Natl. Bank, 67 Ill. App. 131.

[5] Anon. 9 Mod. 43; Eden on Injunctions, ch. 14, pp. 295, 296; Roberts

§ 1287. **Misfeasance in Office by Public Officials.** — The question has been made, how far a Court of Equity has jurisdiction to interfere in cases of public functionaries who are exercising special public trusts or functions. As to this the established doctrine now is that so long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.[1]

§ 1288. **The Wasting of Heirlooms by Those Having the Present Possession Will Be Restrained by the Remainder-man.** — We have already had occasion to take notice of the granting of injunctions in the case of persons having future interests in chattels, as in remainder after an immediate estate for life.[2] The same principle is applied to cases of personal property bequeathed as heirlooms, or settled in trust to go with particular estates. Thus for example household furniture, plate, pictures, statues, books, and libraries are often bequeathed or settled in trust to go with the title of certain family mansions and estates. In such cases Courts of Equity will enforce a due observance of the trust, and restrain the parties having a present possession from wasting the property or doing any acts inconsistent with the trust.[3]

v. Roberts, 2 Cox, 422; Flight *v.* Cook, 2 Ves. 619; 1 Eq. Abridg. 360, pl. 5; Cadogan *v.* Kennet, Cowp. R. 436.

[1] Frewin *v.* Lewis, 4 Mylne & Craig, 254. As to injunctions against the Executive, and against public officers generally see Mississippi *v.* Johnson, 71 U. S. 475, 18 L. Ed. 437; Gaines *v.* Thompson, 74 U. S. 347, 19 L. Ed. 62; Graham *v.* Horton, 6 Kans. 343; Galloway *v.* Jenkins, 63 N. C. 147; Missouri R. Co. *v.* Commissioners, 12 Kans. 230; Murray *v.* Clarendon, L. R. 9 Eq. 11; Attorney-Gen. *v.* Kirk, L. R. 14 Eq. 558; People *v.* Canal Board, 55 N. Y. 390; Lane *v.* Morrill, 51 N. H. 422; Beebe *v.* Robinson, 52 Ala. 66, 75; Vavasseur *v.* Krupp, 9 Ch. D. 351 (foreign sovereign); Nelson *v.* State Board of Health, 108 Ky. 769, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383; Gile *v.* Stegner, 92 Minn. 429, 100 N. W. 101; Way *v.* Fox, 109 Iowa, 340, 80 N. W. 405; Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300; Poppleton *v.* Moores, 67 Neb. 388, 93 N. W. 747.

[2] Ante, §§ 1161, 1162.

[3] Ante, §§ 1161, 1162, and note, § 845; Cadogan *v.* Kennet, Cowp. 435, 436; Co. Litt. 20 *a*; Hargrave's note (5).

§ 1289. **Same.** — Injunctions will also be granted to restrain the sailing of a ship upon the application of a part-owner whose share is unascertained, in order to ascertain that share, and to obtain the usual security given in the Admiralty for the due return of the ship.[1] So they will be granted against the removal of timber which has been wrongfully cut down.[2]

§ 1290. **Enforcement of Personal Covenants Where There Is No Effectual Remedy at Law.** — Injunctions will also be granted to compel the due observance of personal covenants where there is no effectual remedy at law.[3] Thus in the old case of the parish bell where certain persons owning a house in the neighborhood of a church entered into an agreement to erect a cupola and clock in consideration that the bell should not be rung at five o'clock in the morning to their disturbance. The agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour.[4] Upon the same ground a celebrated playwriter, who had covenanted not to write any dramatic performances for another theatre, was by injunction restrained from violating the covenant.[5] So an author who had sold his copyright in a work and covenanted not to publish any other to its prejudice was restrained by injunction from so doing.[6]

[1] Haly *v.* Goodson, 2 Meriv. R. 77; Christie *v.* Craig, 2 Meriv. R. 137; Abbott on Shipp. Pt. 1, ch. 3, §§ 4, 5.

[2] Anon. 1 Ves. Jr. 93. [3] Ante, §§ 850, 960, 997, 1000, 1002, 1172.

[4] Martin *v.* Nutkin, 2 P. Will. 266.

[5] Morris *v.* Colman, 18 Ves. 437; Clark *v.* Price, 2 Wils. Ch. R. 157. But a Court of Equity will not decree a specific performance of a contract by an actor, that he would act twenty-four nights at a particular theatre during a certain period of time, and that he would not in the mean time act at any other theatre in the same town. Kemble *v.* Kean, 6 Simons, R. 333. And as it would not decree a specific performance in such a case, the Vice-Chancellor thought it ought not to restrain the defendant from acting at another theatre, that is, from breaking the negative part of his covenant. In his judgment the Vice-Chancellor commented at large upon the cases of Morris *v.* Coman and Clark *v.* Price, from which he labored to distinguish the case before him. His reasoning, it must be confessed, has not relieved the subject from all doubt. Ibid. See also Kimberley *v.* Jennings, 6 Sim. R. 340; Lumley *v.* Wagner, 1 DeG. M. & G. 604; Soltan *v.* De Held, 2 Sim. U. S. 133.

[6] Barfield *v.* Nicholson, 2 Sim. & Stu. 1; Kimberley *v.* Jennings, 6 Sim. 340. In Stevens *v.* Benning, 6 DeG. M. & G. 223, publishers had agreed with an author to print, reprint, and publish a work at their own risk, the author to make all necessary alterations and additions in future editions, which were to be published on the same terms. After several changes in the partners of the publishing house, and the bankruptcy of the last survivor, the assignees, with the solvent members of the new firm, to whom the work had been assigned by their predecessors, assigned to other publishers all the interest of the firm in the work and all the unsold copies.

§ 1291. **Injunction as Aid to Enforcement of Judgment for Recovery of Land.** — Courts of Equity also interfere and effectuate their own decrees in many cases by injunctions in the nature of a judicial writ or execution for possession of the property in controversy; as for example by injunctions to yield up, deliver, quiet, or continue the possession, followed up by a writ of assistance.[1] Injunctions of this sort are older than the time of Lord Bacon, since in his Ordinances they are treated as a well-known process. Indeed they have been distinctly traced back to the reign of Elizabeth and Edward the Sixth, and even of Henry the Eighth.[2] In some respects they bear an analogy to sequestrations; but the latter process, at least since the reign of James the First, has been applied not merely to the lands in controversy in the cause but also to other lands of the party.[3]

§ 1292. **The Granting of an Injunction Is a Matter of Discretion with the Court.** — It has been already suggested that the granting or refusing of injunctions is a matter resting in the sound discretion of a Court of Equity;[4] and consequently no injunction

Upon these facts it was held that the purchasers were not entitled to an injunction to restrain the publication of a new edition by another publisher with the author's concurrence. See also Jarrold *v.* Heywood, 18 Week. R. 279; Pike *v.* Nicholas, Ib. 321; s. c. L. R. 5 Ch. 251; Morris *v.* Morris, 18 Week. R. 327; Reade *v.* Bentley, 3 Kay & J. 278; s. c. 4 Kay & J. 656; Taylor *v.* Pillow, L. R. 7 Eq. 418; Paige *v.* Banks, 7 Blatchf. 152.

[1] Stribley *v.* Hawkie, 3 Atk. 275; Penn *v.* Lord Baltimore, 1 Ves. 454; Dove *v.* Dove, 1 Cox, R. 101; s. c. 1 Bro. Ch. R. 373; 2 Dick. 617; Huguenin *v.* Baseley, 15 Ves. 180; Roberdeau *v.* Rous, 1 Atk. 549; Kershaw *v.* Thompson, 4 John. Ch. R. 612 to 618.

[2] Eden on Injunct. ch. 17, pp. 363, 364; Id. App. 380; Beam. Ord. Ch. 15, 16; Kershaw *v.* Thompson, 4 John. Ch. R. 612 to 618. It has been remarked by Mr. Chancellor Kent in his Commentaries (4 Kent, Comm. Lect. 58, pp. 191, 192, 3d ed.) that, "Upon a decree for a sale [of mortgaged property] it is usual to insert a direction that the mortgagor deliver up possession to the purchaser. But whether it be or be not a part of the decree, a Court of Equity has competent power to require by injunction and enforce by process of execution, delivery of possession; and the power is founded upon the simple elementary principle that the power of the court to apply the remedy is coextensive with its jurisdiction over the subject-matter." He cites among other cases Dove *v.* Dove, 2 Dick. 517; s. c. 1 Bro. Ch. R. 373, and Belt's note; s. c. 1 Cox, R. 101; Kershaw *v.* Thompson, 4 John. Ch. R. 609. In this last case the whole of the leading authorities were historically and critically examined.

[3] Ibid. and note (*c*), p. 363; Beames, Ord. Chan. 16, and note 55; Barton, Suit in Eq. 87; 2 Madd. Ch. Pr. 163; Hide *v.* Petit, 1 Ch. Cas. 91.

[4] Bacon *v.* Jones, 4 Mylne & Craig, 433; Bramwell *v.* Halcomb, 3 Mylne & Craig, 737; First Natl. Bank *v.* Crabtree, 18 S. Dak. 355, 100 N. W. 744; Fuller *v.* Schutz, 88 Minn. 372, 93 N. W. 118; Ward *v.* Sweeney, 106 Wis. 44, 82 N. W. 169; City of Laporte *v.* Scott, 166 Ind.

will be granted whenever it will operate oppressively, or inequitably, or contrary to the real justice of the case; or where it is not the fit and appropriate mode of redress under all the circumstances of the case; or where it will or may work an immediate mischief or fatal injury. Thus for example no injunction will be granted to restrain a nuisance by the erection of a building, where the erection has been acquiesced in or encouraged by the party seeking the relief.[1] So it will not be granted in cases of gross laches or delay by the party seeking the relief in enforcing his rights; as for example where in case of a patent or a copyright the patentee has lain by and allowed the violation to go on for a long time without objection or seeking redress.[2] On the other hand a covenant may be of such a nature as ought not in equity to be specifically enforced by an injunction in consideration of the unreasonable and inconvenient consequences which may ensue therefrom. Thus where it was covenanted by the lessee of an inn that he would keep it open and not discontinue it, the court refused to grant an injunction to enforce the specific performance of the covenant.[3] It is obvious that the granting of the injunction in such a case might be utterly useless, and moreover be attended with ruinous consequences to the lessee. Upon similar principles a Court of Equity will not by injunction compel a person to fulfil a contract to write dramatic performances for a particular theatre;[4] or to act a certain number of nights at

78, 76 N. E. 878; Detroit *v.* Frazer, 98 Mich. 141, 56 N. W. 1109; Price *v.* Grice, 10 Idaho 443, 79 Pac. 387; Suwanee *v.* West etc. R. Co., 50 Fla. 609, 39 So. 538; Allen *v.* Pedro, 136 Cal. 1, 68 Pac. 99.

The discretion ought not to be exercised except in a clear case. Mitchell *v.* Colorado Fuel & Iron Co., 117 Fed. 723.

[1] Williams *v.* Earl of Jersey, 1 Craig & Phillips, 91. Secus of merely locating near a nuisance. St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642; Bigelow's L. C. Torts, 467.

[2] Saunders *v.* Smith, 3 Mylne & Craig, 711; Lewis *v.* Chapman, 3 Beav. 133; Levi *v.* Schoenthal, 57 N. J. Eq. 244, 41 Atl. 105; United States *v.* La Compagnie etc. Télégraphiques, 77 Fed. 495.

[3] Hooper *v.* Brodrick, 11 Simons, R. 47. On this occasion the Vice-Chancellor said: "The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing or permitting to be done, any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises. It is not however shown that the defendant has threatened, or intends to do, or to cause or permit to be done, any act whereby the licenses may become forfeited or be refused; and therefore the injunction must be dissolved."

[4] Morris *v.* Colman, 18 Ves. 437; Clark *v.* Price, 2 Wils. Ch. R. 157.

a particular theatre;[1] or to furnish maps which the plaintiff is to have the sole privilege of engraving and publishing.[2]

§ 1293. **Same.** — It may be remarked in conclusion, upon the subject of special injunctions, that Courts of Equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts thus operating by way of special injunction is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence. At the same time it must be admitted that the exercise of it is attended with no small danger both from its summary nature and its liability to abuse. It ought therefore to be guarded with extreme caution and applied only in very clear cases; otherwise instead of becoming an instrument to promote the public as well as private welfare, it may become a means of extensive and perhaps of irreparable injustice.[3]

§ 1294. [**Enforcement by Injunction of Contracts for Personal Services.** — Courts of Equity will interfere by injunction to pre-

[1] Kemble *v.* Kean, 6 Simons, R. 333. See however Lumley *v.* Wagner, 1 DeG. M. & G. 604.

[2] Baldwin *v.* Society for Diffusing Useful Knowledge, 9 Simons, R. 393. Equity will, it seems, enjoin the expulsion of a member of a company owning property, though the proposed expulsion is for misconduct, unless the accused is given a proper opportunity to defend himself. Russell *v.* Russell, 14 Ch. D. 471, 478; Wood *v.* Woad, L. R. 9 Ex. 190. See Blisset *v.* Daniel, 10 Hare, 493; O'Hara *v.* Stack, 90 Pa. St. 477 (removal of a priest by his bishop). Secus of an association having no property, and formed for purposes of pleasure, or for prosecuting scientific or philanthropic pursuits. Rigby *v.* Connol, 14 Ch. D. 482, 487.

A pastor lawfully dismissed from his church may be enjoined from attempting to continue his ministrations. Cooper *v.* Gordon, L. R. 8 Eq. 249. See First Church *v.* Stewart, 43 Ill. 81; Reformed Soc. *v.* Draper, 97 Mass. 349; Gilbert *v.* Arnold, 30 Md. 29; Sarver's Appeal, 81 Pa. St. 183; Lutheran Church *v.* Maschop, 2 Stockt. 57.

[3] See the pointed remarks of Lord Cottenham on this subject, in Brown *v.* Newall, 2 Mylne & Craig, 570, 571. See also Lord Brougham's remarks in the case of the Earl of Ripon *v.* Hobart, 1 Cooper, Sel. Cases, 333; s. c. 3 Mylne & Keen, 169. Mr. Justice Baldwin, in Bonaparte *v.* Camden & Amboy Railroad Company, 1 Baldwin's Cir. R. 218, made the following remarks on the same subject: "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where Courts of Law cannot afford

vent a servant from entering the service of another, in violation of his contract with the complainant, as effectually as it will restrain him from divulging the secrets of his former employer. Of course the servant could not actually be required to perform labor, pursuant to his contract, for this might be involuntary servitude, but a Court of Equity will restrain him from entering the service of another.[1] The master may discharge the servant when his services are no longer desirable, as where he has joined a labor union. The master may be liable in an action at law for discharging the servant, and certainly he cannot be enjoined from terminating the employment.[2] If the service that the master desires to be continued requires unusual skill and ability and is such that the same service cannot be readily obtained from others, the re-

an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction. But that will not be awarded in doubtful cases, or new ones not coming within well-established principles; for if it issues erroneously, an irreparable injury is inflicted for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act. In such a case the court owes it to its suitors and its own principles to administer the only remedy which the law allows to prevent the commission of such act. We know of no rule which excludes from this process any person over whom the court has jurisdiction on account of the character or capacity in which he acts, although it is conferred upon him by a law of a State or of Congress." Railways have recently given rise to many questions as to the duty of Courts of Equity to interfere and prevent mischiefs to private property by an excess or abuse or misapplication of the corporate powers of the companies. See Nicoll & Hare's Reports of Cases relating to Railways, where the recent decisions are collected. See also Barnard *v.* Wallis, 1 Craig & Phillips, 85; Durham and Sunderland Railway Co. *v.* Wawn, 3 Beav. R. 119. "An interlocutory application to restrain a railway company from running their trains is monstrous." Latimer *v.* Aylesbury Ry. Co., 9 Ch. D. 385, James, L. J. See Pell *v.* Northampton Ry. Co., L. R. 2 Ch. 100. The application of injunctions to railroad companies may be seen in the following cases: Delaware R. Co. *v.* Raritan R. Co., 1 C. E. Green, 321 (against illegal connections); Delaware R. Co. *v.* Erie R. Co., 6 C. E. Green, 298; Attorney-Gen. *v.* Ely, L. R. 6 Eq. 106 (injunction against changing road for convenience of public refused); In re Palmer, L. R. 1 C. P. 588; 6 C. P. 194; In re Parkinson, L. R. 6 C. P. 554; Great Western Ry. Co. *v.* Sutton, L. R. 4 H. L. 226 (these English cases being injunctions against granting privileges, contrary to statute); Cumberland R. Co.'s Appeal, 62 Pa. St. 218; Rogers Locom. Works *v.* Erie Ry. Co., 5 C. E. Green, 379; Stewart *v.* E. Transp. Co., 17 Minn. 372.

[1] Brouk *v.* Riley, 18 N. Y. St. 179, 2 N. Y. Supp. 266.

[2] Boyer *v.* Western Union Tel. Co., 124 Fed. 246; Miller *v.* Warner, 42 App. Div. 208, 59 N. Y. Supp. 956; Stewart *v.* Pierce, 116 Iowa, 733, 89 N. W. 234.

sulting damage is irreparable, in that it cannot be estimated, and an injunction will lie, but otherwise, if the same service can be easily obtained from any one else, there is no jurisdiction.[1] But if a clerk, whose services may be easily duplicated by any one else, has violated his contract and is seeking to take with him the trade of the customers of his former employer, an injunction will lie, although there be no peculiar value in his services.[2] If the services rendered by a baseball player, who has been for years in the employ of the complainant, are of such an unusual and unique character that a breach of his contract cannot be adequately measured, his entering the service of another ball club will be restrained.[3]]

§ 1295. [**An Agreement in Partial Restraint of Trade May Be Enforced by Injunction.** — Contracts providing that no business of the specified class can be carried on within a certain limited area, within a reasonable time, have been held to be valid, generally, depending upon the nature of the contract, the usefulness of the business and the location in which it is ceased to be conducted. Contracts of this sort are not generally favored, unless it appears that a hardship will be endured if the contract is not enforced, and then the plaintiff must show that from some cause the anticipated injury is irreparable.[4] Where the owner of a newspaper contracted not to engage in the newspaper business, within a city, either as editor, publisher, or manager, for a period of five years, evidence that shortly after the sale he became the manager of another newspaper, in the same town, but having different politics, and therefore circulating among a different class of people,

[1] Jaccard Jewelry Co. *v.* O'Brien, 70 Mo. App. 432; Kessler *v.* Chappelle, 73 App. Div. 447, 77 N. Y. Supp. 285; Stone Cleaning Union *v.* Russell, 38 Misc. Rep. 513, 77 N. Y. Supp. 1049; Universal Talking Mach. Co. *v.* English, 34 Misc. Rep. 342, 69 N. Y. Supp. 813; Taylor Iron & Steel Co. *v.* Nichols, 70 N. J. Eq. 541, 61 Atl. 946; Jones *v.* Williams, 139 Mo. 1, 39 S. W. 486, 37 L. R. A. 682, 61 Am. St. Rep. 436.

[2] Cahill *v.* Madison, 94 Ill. App. 216.

[3] Philadelphia Ball Club *v.* Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627; Myers *v.* Steel Mach. Co., 67 N. J. Eq. 300, 57 Atl. 1080, Affirmed 68 N. J. Eq. 795, 64 Atl. 746.

[4] Downing *v.* Lewis, 56 Neb. 386, 76 N. W. 900; Alker, Merrall & Condit *v.* McGraw, 144 Fed. 864; Davis *v.* Booth, 131 Fed. 31; Booth *v.* Seibold, 37 Misc. Rep. 101, 74 N. Y. Supp. 776; Ice Co. *v.* Meckel, 109 App. Div. 93, 95 N. Y. Supp. 1060; Augusta Steam Laundry Co. *v.* Debow, 98 Me. 496, 57 Atl. 845; Hulen *v.* Earel, 13 Okla. 246, 73 Pac. 927; Pittsburg Stove Co. *v.* Pennsylvania Stove Co., 208 Pa. 37, 57 Atl. 77; Walverton *v.* Bruce, 6 Ind. Ter. 135, 89 S. W. 1018; Ryan *v.* Hamilton, 205 Ill. 191, 68 N. E. 781.

Proof of making contract must be clear. Pfeifer *v.* Rahiser, 2 Pa. Super. Ct. Rep. 355; Roberts *v.* Lemont, 73 Neb. 365, 102 N. W. 770.

is sufficient showing a breach of contract, which should be restrained.[1] The solvency of the defendant will not prevent the application of the rule.[2] Irreparable damage is presumed where a grantor provided in his deed as a part of the consideration that liquors should not be sold on the other property belonging to the grantee in that same block, for a period of five years, a subsequent grantee takes with notice of this reservation.[3] A mortgage held by defendant upon a stock of goods, is not a violation of his contract not to engage in the drug business within a limited time, it appearing that the mortgage was given by his vendee for the balance of the unpaid purchase money and in good faith.[4]]

§ 1296. [**A Party May Be Made Secure in His Personal Rights by Injunction.** — A man has the same right to protect his person by the unwarranted invasion of his private rights as he has to prevent a trespass upon his property. It happens sometimes that when a mercantile business is purchased it is desirable to continue the business in the same old name, it is regarded as one of the assets purchased — the good will of that particular name in business.

A woman's right of privacy, in so far as it includes the right to prevent the public from making pictures, busts, or statues of her to commemorate her worth or services, does not survive her, so that it can be enforced by her relatives. And so, a parent cannot maintain an action to enjoin the unauthorized publication of the portrait of an infant child, and for damages for injuries to his sensibilities caused by the invasion of his child's privacy; for the law takes no cognizance of a sentimental injury, independent of a wrong to person or property. Nor can such suit be maintained upon the ground that the plaintiff had caused the portrait to be painted, and that the publication is an invasion of his proprietary rights, where it appears he had given the portrait to his wife. It frequently happens that the name of a noted man is carried on after his death by the designation of a good brand of cigar or the like. Some people name themselves; some assume the names of others as their own name; the name of an illustrious actor or ball player is sometimes given to one's pet dog, or horse. What harm can come to one from such a legitimate use and when everything connected with the use of the name, or the publication of

[1] Andrews *v.* Kingsbury, 212 Ill. 97, 72 N. E. 11.
Preparation of chemicals. Mallinckrodt *v.* Nemnich, 169 Mo. 388, 69 S. W. 355.
[2] Gordon *v.* Mansfield, 84 Mo. App. 367.
[3] Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.
[4] Reeves *v.* Sprague, 114 N. C. 647, 19 S. E. 707.

the picture is anything but a libel?[1] The same is true of the right of officers of the law to photograph and measure with the Bertillon measurements a man suspected of having committed crime, though in fact he be really innocent. If the photograph has already been taken and the criminal either tried and convicted of crime, or discharged, an injunction will not lie to prevent the further showing of the picture in the rogues' gallery.[2]]

§ 1297. [**Injuries to Rights to Public Service.** — A man will be protected in his right to enjoy some of the luxuries of life, whether he be tenant or land-owner or private citizen. A contract made with a gas company by which it undertakes to furnish gas to a consumer at a given price, but not for any stipulated period of time, is binding upon the company and it may not cut off the supply where there is no contention or claim that the consumer has failed to pay his bills.[3] The same is true where a vendee purchased a mill with the understanding that the power was to be supplied from defendant's pond, and subsequent to the sale the vendor erected a mill of his own, between his pond and the mill sold plaintiff, thus taking the water and the apparatus used for driving plaintiff's mill. The prayer of the bill is to enjoin the erection of a gin house which will cut off plaintiff from the use of the water power and destroy the benefits of his purchase.[4] But where the contract for the furnishing of gas provided that the company would furnish gas so long as a sufficient quantity flowed from its wells for the use of its patrons, as they existed at the time of the execution of the contract, an injunction would not lie to restrain the supply from being cut off where the flow was not sufficient to meet the demand.[5] Patrons of public service corporations ought to be free to purchase from whomsoever they please, but the right to purchase may be limited by contract, when reasonable in its nature. A contract providing that the company is to furnish electric current for five years at a stated price, and in consideration of the length of time, at this price, that the current is furnished, a stipulation that the patron will use no

[1] Atkinson *v.* Doherty, 121 Mich. 372, 80 N. W. 285, 6 Detroit Leg. N. 482, 46 L. R. A. 219, 80 Am. St. Rep. 507; Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828.

[2] Itzkovitch *v.* Whitaker, 115 La. 479, 39 So. 499, L. R. A. (N. S.) 1147, 112 Am. St. Rep. 272; Schulman *v.* Whitaker, 115 La. 628, 39 So. 737; Owen *v.* Partridge, 40 Misc. Rep. 415, 82 N. Y. Supp. 248.

[3] Gallagher *v.* Equitable Gaslight Co., 141 Cal. 699, 75 Pac. 329; Simpson *v.* Pittsburg Plate Glass Co., 28 Ind. App. 343, 62 N. E. 753.

[4] Hendricks *v.* Hughes, 117 Ala. 591, 23 So. 637.

[5] Loy *v.* Madison etc. Gas Co., 156 Ind. 332, 58 N. E. 844.

other electric current during that time, is valid.[1] A condition in a lease providing that the lessor shall furnish sufficient steam power to lessee, and his heirs and assigns, is a condition that binds the lessor to the lessee during the term, or to the assignee of the lease prior to its termination, and a breach of the condition may be restrained;[2] even though the lessor claims that the lessee uses power in excess of that to which he is entitled under the lease.[3]]

§ 1298. [**The Erection of Buildings Contrary to Covenants May Be Restrained.** — Of recent years conditions and covenants have been written into deeds conveying property in residence districts, or business districts, and at places of resort, restricting the building to houses of a given kind and character, and to cost at least a specified sum. These conditions, when reasonable, are enforceable and are binding upon the parties and their privies. Equity will not, as a rule, enforce a restriction, where, by the acts of the grantor who imposed it, or of those who derived title under him, the property, and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship on the owner, and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction; or, in short, it may be said that where, from all of the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking the enforcement will be left to whatever remedy he may have at law.[4] A covenant that the described premises should not be run up in height more than two stories, where the property adjoined that of the mortgagee, and was inserted as one of the considerations, will be enforced against the parties and their privies, and even after the payment of the mortgage debt.[5]]

[1] Indianapolis Light & Power Co. *v.* Beck, 36 Ind. App. 600, 76 N. E. 312.

[2] Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967. Traitel Marble Co. *v.* Chase, 35 Misc. Rep. 233, 71 N. Y. Supp. 628.

[4] Ewertsen *v.* Gerstenberg, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310; Scollard *v.* Normile, 181 Mass. 412, 63 N. E. 941; Frink *v.* Hughes, 133 Mich. 63, 94 N. W. 601, 10 Detroit Leg. N. 106; Meriwether *v.* Joy, 85 Mo. App. 634; Atlantic City *v.* New Auditorium Pier Co., 67 N. J. Eq. 610, 59 Atl. 158; Righter *v.* Winters, 69 N. J. Eq. 252, 59 Atl. 770; McClure *v.* Leageraft, 183 N. Y. 36, 75 N. E. 961; Alvord *v.* Fletcher, 28 App. Div. 493, 51 N. Y. Supp. 117; McGuire *v.* McCaskey, 62 Ohio St. 419, 57 N. E. 53.

[5] Brown *v.* O'Brien, 168 Mass. 484, 47 N. E. 195.

§ 1299. [**An Injunction Lies to Restrain an Unlawful Interference with One's Business.** — A man has the right to keep his business together as a going concern, even though his enemies or competitors seek to deprive him of his patronage by unfair means. The use of the word "unfair" has a singular meaning in union trade circles, and where union men are urged not to drink scab beer, naming over several kinds that come within this classification, and calling it "unfair", is such an act as will be enjoined.[1] The fact that the order issued and sent out to co-workers and friends of the society tends to the bettering of conditions and for the benefit of their labor, does none the less prevent the action from being wrong where the purpose is to boycott the use of hats not bearing the union label.[2] An employee has an unquestionable right to place a price and impose conditions upon his labor at the outset of his employment, or, unless restrained by contract obligations, upon the continuance of his labor at any time thereafter; and if the terms and conditions are not complied with by the employer, he has a clear right either not to engage, or having engaged in his service to cease from work, even though it result in serious injury and inconvenience to the master.[3] Builders have the right to refuse to bid upon the erection of a building if the bid of another builder is submitted in competition with theirs, where there was no threat expressed or implied, and the architect is left free to select whichever builder he chose.[4] The mere fact that defendants, in combination, by molestation and intimidation, or by criminal violence, interfere with the free flow of labor to an employer, does not necessarily give such employer the right to come into a Court of Equity and procure an injunction for his protection. The employer must not only show that the conduct of the defendants in combination unlawfully obstructs him, the complainant, in enjoying his natural expectancy in respect of the labor market, but that the natural and probable result of the un-

[1] Seattle Brewing Co. *v.* Hansen, 144 Fed. 1011; Matthews *v.* Shankland, 25 Misc. Rep. 604, 56 N. Y. Supp. 123, F.

[2] Loewe *v.* California State Federation of Labor, 139 Fed. 71; Martin *v.* McTall, 65 N. J. Eq. 91, 55 Atl. 465.

[3] Wabash R. Co. *v.* Hannahan, 121 Fed. 563; Gray *v.* Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477.

Employees have the right to send out circulars notifying customers of differences between them and their employer. Cohen *v.* United Garment Workers, 35 Misc. Rep. 748, 72 N. Y. Supp. 341; Foster *v.* Retail Clerks Assn., 39 Misc. Rep. 48, 78 N. Y. Supp. 860; Butterick Pub. Co. *v.* Typographical Union, 50 Misc. Rep. 1, 100 N. Y. Supp. 292.

[4] Master Builders' Assn. *v.* Damascio, 16 Colo. App. 25, 63 Pac. 782.

lawful conduct complained of will be to inflict upon him, the employer, substantial money damages, for which the remedy at law is inadequate. Courts of Equity should be cautious in undertaking to regulate by injunction the annoying conduct of a combination of individuals at the instance of complainants, whose only complaint is that their political, social, or religious activities are interfered with, or their amusements curtailed.[1] Where a member of a trade association has been guilty of such conduct that he has been expelled from the body, he has no right to enjoin the association from refusing to deal with him. The members can boycott a member, or, rather, they can refuse to deal with him, not because he is not a member of the exchange, but because he has been found guilty and expelled from the association for his wrong doing.[2]]

[1] Atkins *v.* Fletcher, 65 N. J. Eq. 658, 55 Atl. 658.

A conspiracy to boycott will be enjoined. Maryland Lodge *v.* Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; Beattie *v.* Callahan, 67 App. Div. 14, 73 N. Y. Supp. 518; Davis *v.* Robinson, 41 Misc. Rep. 329, 84 N. Y. Supp. 837.

[2] Gladish *v.* Bridgeford, 113 Mo. App. 726, 89 S. W. 77.

CHAPTER XXVII

EXCLUSIVE JURISDICTION. — EXPRESS TRUSTS

§ 1300. **Exclusive Jurisdiction.** — Having taken this general survey of Equity Jurisprudence in cases of concurrent jurisdiction, we shall in the next place proceed to the consideration of another head proposed in these Commentaries, that of EXCLUSIVE JURISDICTION. And this again, like the former head, is divisible into two branches, the one dependent upon the subject-matter, the other upon the nature of the remedy to be administered. The former comprehends TRUSTS in the largest and most general sense of the word, whether they are express or implied, direct or constructive, created by the parties or resulting by operation of law. The latter comprehends all those processes or remedies which are peculiar and exclusive in Courts of Equity, and through the instrumentality of which they endeavor to reach the purposes of justice in a manner unknown or unattainable at law.

§ 1301. **Nature of Jurisdiction.** — And in the first place let us examine the nature and extent of the jurisdiction of Courts of Equity in matters of trust in the general sense above alluded to, which will be found directly or remotely to embrace most of the subjects of their exclusive jurisdiction. It has been well observed that the principles of law which guide the decisions of the Courts of Common Law were principally formed in times when the necessities of men were few and their ingenuity was little exercised to supply their wants. Hence it has happened that there are many rights according to the principles of natural and universal justice for injuries to which the law as administered by those courts has provided no remedy. This is particularly the case in matters of trust and confidence of which the ordinary Courts of Law in a vast variety of instances take no cognizance. The positive law being silent on the subject, Courts of Equity, considering the conscience of the party intrusted as bound to perform the trust, have, to prevent a total failure of justice, interfered to compel the perform-

ance of it.[1] And as they will compel the performance of the trust, so on the other hand they will assist the trustees and protect them in the due performance of the trust whenever they seek the aid and direction of the court as to the establishment, the management, or the execution of it.[2]

§ 1302. **Same.** — For the most part indeed matters of trust and confidence are exclusively cognizable in Courts of Equity; there being few cases except bailments, and rights founded in contract and remedial by an action of assumpsit and especially by an action for money had and received, in which a remedy can be administered in the Courts of Law.[3] Thus for example a debt or chose in action is not generally assignable at law except in case of negotiable instruments.[4] And hence the assignee is ordinarily compellable to seek redress against the assignor and the debtor solely in Courts of Equity.[5]

§ 1303. **Same.** — It is not within the design of these Commentaries to enter upon a minute examination of the nature and peculiarities of trusts as known to English Jurisprudence, or to attempt by any development of the history of their rise and progress to ascertain the exact boundaries of the jurisdiction at present exercised over them. In general it may be said that trusts constitute a very important and comprehensive branch of Equity Jurisprudence; and that where the remedy in regard to them ends at law, there the exclusive jurisdiction in equity for the most part begins.

§ 1304. **Trusts Defined.** — A trust in the most enlarged sense in which that term is used in English Jurisprudence may be defined to be an equitable right, title, or interest in property real or personal, distinct from the legal ownership thereof.[6] In other words the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly or in part to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits,

[1] Mitf. Eq. Pl. by Jeremy, 4. [2] Id. 134.

[3] Cooper on Eq. Pl. Introd. p. 27; 3 Black. Comm. 432; 2 Fonbl. Eq. B. 2, ch. 1, § 1, note (*a*); Sturt *v.* Mellish, 2 Atk. 610; Co. Litt. 290 *b*; Butler's note, 246, § xv.

[4] Post, § 1039.

[5] Com. Dig. Assignment, C. 1; Com. Dig. Chancery, 2, H.; Post, § 1057. This statement would now be too broad.

[6] Lord Hardwicke, in Sturt *v.* Mellish (2 Atk. 612), said: "A trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of this court."

or charges constitute the trusts which Courts of Equity will compel the legal owner as trustee to perform in favor of the cestui que trust or beneficiary. Three things are said to be indispensable to constitute a valid trust: first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object.[1]

§ 1305. **Origin of Trusts.** — It is in the highest degree probable that those trusts which are exclusively cognizable in Courts of Equity were in their origin derived from the Roman law, being very similar in their nature to the Fidei Commissa of that law.[2] As the jurisdiction of a peculiar prætor[3] was created for the express purpose of protecting property fidei commissum, so the jurisdiction of our Courts of Equity, if not created, was soon extended for the purpose of protecting and enforcing the execution of trusts.[4] Indeed it is impossible to suppose that in any country professing to have an enlightened jurisprudence, obligations and trusts in regard to property binding in conscience and duty, and which ex æquo et bono the party ought to perform, should be left without any positive means of securing their due fulfilment; or that they might be violated without rebuke or evaded with impunity.

§ 1306. **Same.** — In the Institutes of Justinian a summary account is given of the origin and nature of the Roman Fidei Commissa. It is there observed that anciently all trusts were infirm (precarious); for no man could without his own consent be compelled to perform what he was requested to do. But when testators were unable directly to bequeath an inheritance or legacy to certain persons, if they did bequeath it to them they gave it in trust to other persons who were capable of taking it by will. And therefore such bequests were called trusts (Fidei commissa) because they could not be enforced by law, but depended solely on the honor of those to whom they were entrusted. Afterwards the Emperor Augustus having been frequently solicited in favor of particular persons either on account of the solemn adjurations of the party, or on account of the gross perfidy of other persons, commanded the consuls to interpose their authority. This, being

[1] Cruwys *v.* Colman, 9 Ves. 323; Peck *v.* Scofield, 186 Mass. 108, 71 N. E. 109; Taylor *v.* Coriel, 66 N. J. Eq. 262, 57 Atl. 810; Brown *v.* Spohr, 84 N. Y. Supp. 995, 87 App. Div. 522, 180 N. Y. 201, 73 N. E. 14.

[2] The origin of trusts in the English law is considered by Mr. Justice Holmes to be traceable to early Germanic sources. 1 Law Quarterly Rev. 162.

[3] "Prætor proprius." Inst. lib. 2, tit. 23, § 1.

[4] 2 Fonbl. Eq. B. 1, ch. 1, § 1, note (*a*); 2 Black. Comm. 327, 328.

a just and popular order, was by degrees converted into a permanent jurisdiction. So great indeed was the favor in which trusts were held, that at length a special prætor was created to pronounce judgment in cases of trusts; and hence he was called the commissary of trusts (Fidei Commissarius [1]).

§ 1307. **Same.** — This brief sketch of the origin and nature of trusts in the civil law does in a very striking manner illustrate the origin and nature of trusts in the common law of England in regard to real property. It has been well remarked by Mr. Justice Blackstone that uses and trusts in English Jurisprudence are in their original of a nature very similar or rather exactly the same, answering more to the Fidei commissum than to the Usus fructus of the civil law; [2] the latter being the temporary right of using a thing, without having the ultimate property or full dominion of the substance.[3]

§ 1308. **Same.** — Lord Coke, in describing the nature of a use or trust in land according to the common law, uses the following language: "A use is a trust or confidence reposed in some other which is not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land and to the person touching the land; scilicet, that cestui que use (the beneficiary) shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as cestui qui use had neither jus in re nor jus ad rem, but only a confidence and trust for which he had no remedy by the common law, but for breach of trust his remedy was by subpœna in chancery." [4] Thus we see that the original fiduciary estate from its nature imported a right to the enjoyment of the profits of the land as distinct from the seisin of the land and the rights issuing thereout.

§ 1309. **Same.** — The introduction of uses and trusts into England has been generally attributed to the ingenuity of the clergy in order to escape from the prohibitions of the Mortmain Acts. But whether this be the true origin of them or not, it is very certain that the general convenience of them in subserving the common interests of society, as well as in enabling parties to escape from forfeitures in times of civil commotion, soon gave them an exten-

[1] Inst. B. 2, tit. 23, § 1, Vinn. ad Inst. h. t. Comm.; 2 Black. Comm. 327, 328; Bac. on Uses, 19.

[2] Markby, Elements of Law, §§ 336, 814 (3d ed.).

[3] Black. Comm. 327; Bac. on Uses, 19.

[4] Co. Litt. 272 *b*; Chudleigh's Case, 1 Co. Rep. 121 *a*, *b*; Bac. Abridg. Uses and Trusts, A, B; 2 Fonbl. Eq. B. 2, ch. 1, § 2; Com. Dig. Chancery, 4 W; Fisher *v.* Fields, 10 John. Rep. 505, 506.

sive public approbation and secured their permanent adoption into the system of English Jurisprudence.[1] And they have since been applied to a great variety of cases which never could have been in the contemplation of those who originally introduced them; but which nevertheless are the natural attendants upon a refined and cultivated state of society where wealth is widely diffused and the necessities and conveniences of families, of commerce, and even of the ordinary business of human life require that trusts should be established, temporary or permanent, limited or general, to meet the changes of past times as well as to provide for the exigencies of times to come.

§ 1310. **Same.** — According to the spirit of over-nice and curious learning belonging to the age, uses in lands upon their introduction into English Jurisprudence were refined upon with many elaborate distinctions,[2] to cure the mischiefs arising from which the Statute of Uses of 27 Hen. VIII. ch. 10 was enacted, the general intent of which was to transfer the use into possession and to make the cestui que use complete owner of the lands as well at law as in equity.[3] But as the statute did not in its terms apply to all sorts of uses, and was construed not to apply to uses engrafted on uses (which constitute one great class of modern trusts in lands), it failed in a great measure to accomplish the ends for which it was designed.[4] Thus for example it was held not to apply to trusts or uses created upon terms of years, or to trusts of a nature requiring the trustee still to hold out the estate in order to perform the trusts, and generally not to trusts created in relation to mere personal property.[5]

§ 1311. **Creation of Uses by Parol.** — In regard to uses it seems formerly to have been a matter of considerable doubt whether at

[1] 2 Black. Comm. 328, 329; Bac. Abridg. Uses and Trusts, A, B; Gilb. Lex Prætor. 259, 260. See also Lloyd *v.* Spillet, 2 Atk. 149, 150; Hopkins *v.* Hopkins, 1 Atk. 591; ante, § 48.

[2] 2 Black. Comm. 330.

[3] 2 Black. Comm. 332, 333; 2 Fonbl. Eq. B. 1, ch. 1, §§ 2, 3; Butler's note 231 to Co. Litt. 271 *b*.

[4] Ibid.

[5] 2 Black. Comm. 335 to 337; Sympson *v.* Turner, 1 Eq. Abridg. 383; Butler's note (1) to Co. Litt. 290 *b*, and to Co. Litt. 271 *b*, note (1) iii. § 5; Bac. Abridg. Uses and Trusts, B, C, D, G, 2 H; Id. Trusts, A; 2 Fonbl. Eq. B. 2, ch. 1, § 4; 2 Wooddes. Lect. 29, pp. 295 to 297. It is said that a tenant by the curtesy cannot stand seised to a use, for he is in by the act of law in consideration of marriage, and not in privity of estate; and for a like reason also tenant in dower by the better opinion cannot stand seised to a use. Sanders on Uses, ch. 1, § 11, pp. 62, 63; 2 Fonbl. Eq. B. 2, ch. 6, § 1, note (*a*). But in equity such a tenant would nevertheless be affected by the use or trust.

the common law they could be raised by parol, or even by writing without a seal. Lord Chief Baron Gilbert has extracted a distinction from the different cases which will in some measure reconcile their apparent contrariety. It is in effect that a use might be raised at the common law by parol upon any conveyance which operated by way of transmutation of possession, or passed the possession by some solemn act, such as a feoffment, since the estate itself might by the common law pass by a parol feoffment, and therefore by the same reason a use of the estate might be declared by parol. But where a deed was requisite to the passing of the estate itself, there a deed was also necessary for the declaration of the uses. Thus for example a man could not covenant to stand seised to a use without a deed.[1]

§ 1312. **Same.** — However this may have been, the Statute of Frauds of 29 Charles II. ch. 3, § 7 (which has been generally adopted in America) requires all declarations or creations of trusts or confidences of any lands, tenements, and hereditaments to be manifested and proved by some writing signed by the party entitled to declare such trusts, or by his last will in writing.[2] The statute excepts trusts arising, transferred, or extinguished by operation of law; and from its terms it is apparent that it does not extend to declarations of trusts of personalty.[3] Neither

[1] Gilb. Uses, 270, 271; 2 Fonbl. Eq. B. 1, ch. 2, § 1, note (*b*); Id. § 3.

[2] A verbal agreement by a grantee to hold premises, voluntarily conveyed to him, to the benefit of the grantor raises no trust. Titcomb *v.* Morrill, 10 Allen, 15; Eaton *v.* Eaton, 35 N. J. 290. See also Bedilian *v.* Seaton, 3 Wall. Jr. 279; Harper *v.* Harper, 5 Bush, 176; Minot *v.* Mitchell, 30 Ind. 228; Smith *v.* Hollenback, 51 Ill. 223; Lantry *v.* Lantry, Ib. 458. If however it would work a fraud to deny the trust, the statute cannot be relied upon. Haigh *v.* Kaye, L. R. 7 Ch. 469; Foote *v.* Foote, 58 Barb. 258. See Bedilian *v.* Seaton, supra; Curd *v.* Brown, 148 Mo. 82, 49 S. W. 990; Smith *v.* Peacock, 40 S. E. 757, 114 Ga. 691, 88 Am. St. Rep. 53; Eaton *v.* Barnes, 121 Ga. 548, 49 S. E. 593; McCartney *v.* Fletcher, 11 App. D. C. 1; Davis *v.* Stambaugh, 163 Ill. 557, 45 N. E. 170; McCormick Harvesting Mach. Co. *v.* Griffin, 116 Iowa 397, 90 N. W. 84; Reagan *v.* McKibben, 11 S. Dak. 270, 76 N. W. 943.

Under Burns' Rev. St. 1894 (Indiana) the trust may be established by any writing or writings under the hand of the party to be charged, or by the party who is under the law enabled to declare the same, provided the fiduciary relations and the terms of the trust are set forth with sufficient certainty. Ransdel *v.* Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753.

The Statute of Frauds does not apply to declaration of trusts and they may be in parol, and where one buys land under an agreement to do so and hold it for another until he pays the purchase money, he becomes a trustee for that other. Owens *v.* Williams, 130 N. C. 165, 41 S. E. 93.

[3] Ante, § 1080; post, §§ 1331, 1393; 2 Fonbl. Eq. B. 2, ch. 2, § 4, and note (*x*); Nab *v.* Nab, 10 Mod. 404; Fordyce *v.* Willis, 2 Bro. Ch. R.

does it prescribe any particular form or solemnity in writing, nor that the writing should be under seal. Hence any writing sufficiently evincive of a trust, as a letter or other writing of a trustee stating the trust, or any language in writing clearly expressive of a trust intended by the party, although in the form of a desire, or a request, or a recommendation, will create a trust by implication.[1] And where a trust is created for the benefit of a third person, although without his knowledge, he may afterwards affirm it and enforce the execution of it in his own favor,[2] at least if it has not in the intermediate time been revoked by the person who has created the trust.[3]

586; 2 Black. Comm. 337; Benbow *v.* Townsend, 1 Mylne & Keen, 506; Danser *v.* Warwick, 33 N. J. Eq. 133; Barkley *v.* Lane, 6 Bush, 587. Such a trust must be clearly shown. Monroe *v.* Graves, 23 Iowa, 597; Crossman *v.* Crossman, 23 Mich. 217. See Turner *v.* Nye, 7 Allen, 176; Moore *v.* Pickett, 62 Ill. 158. A valid trust in a mortgage debt may be created by parol, for though a trust thus created will not pass any interest in land held in pledge, it is good in respect of the debt, and will entitle the cestui que trust to the payment of the debt out of the proceeds of the sale of the land. Danser *v.* Warwick, 33 N. J. Eq. 133. See Childs *v.* Jordan, 106 Mass. 321; Dawes *v.* Dawes, 116 Ill. App. 36; Peck *v.* Scofield, 186 Mass. 108, 71 N. E. 109; Withering *v.* Herring, 140 N. C. 495, 53 S. E. 303.

[1] Fonbl. Eq. B. 2, ch. 2, § 4, and note (*x*), and cases there cited; Crook *v.* Brooking, 3 Vern. 106, 107; Inchiquin *v.* French, 1 Cox, 1; Smith *v.* Attersoll, 1 Russ. R. 266: Barrell *v.* Joy, 16 Mass. 221; Baylies *v.* Payson, 5 Allen, 473; Urann *v.* Coates, 109 Mass. 581; Maffit *v.* Rand, 69 Pa. St. 380; De Laurencel *v.* De Boom, 48 Cal. 581; Bryan *v.* Howland, 98 Ill. 625 (expression of a motive of a gift not enough); Cook *v.* Barr, 44 N. Y. 156; Ivory *v.* Burns, 56 Pa. St. 300; Bancroft *v.* Consen, 13 Allen, 50. A mere memorandum upon a ledger is not enough. Homer *v.* Homer, 107 Mass. 82. As to declarations of trust in Pennsylvania by married women see Graham *v.* Long, 65 Pa. St. 383; Wiggs *v.* Winn, 127 Ala. 621, 29 So. 96; Stratton *v.* Edwards, 174 Mass. 374, 54 N. E. 886; Williams *v.* Williams, 118 Mich. 477, 76 N. W. 1039, 5 Detroit Leg. N. 587; Commercial & Farmers' Bank *v.* Vass, 130 N. C. 590, 41 S. E. 791; Withering *v.* Herring, 140 N. C. 495, 53 S. E. 303; Preston *v.* Preston, 202 Pa. 515, 52 Atl. 192; Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55.

[2] Cumberland (Duke of) *v.* Codrington, 3 John. Ch. R. 261; Shepherd *v.* McEvers, 4 John. Ch. R. 136; Neilson *v.* Blight, 1 John. Cas. 205; Weston *v.* Barker, 12 John. R. 276; Moses *v.* Murgatroyd, 1 John. Ch. R. 119, 473; Nicoll *v.* Mumford, 4 John. Ch. R. 529; ante, § 1080; post, § 1449; Walker *v.* Johnson, 37 Tex. 127.

[3] Acton *v.* Woodgate, 2 Mylne & Keen, 492. It is now clearly settled that if a debtor conveys property in trust for the benefit of his creditors, to whom the conveyance is not communicated, and the creditors are not in any manner parties or privy to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment or communication with the creditors had recalled it. Ibid.; Wallwyn *v.* Coutts, 3 Meriv. R. 707; s. c.

§ 1313. **What Consideration Is Necessary.** — Uses or trusts, to be raised by any covenant or agreement of a party in equity, must be founded upon some meritorious or some valuable consideration; for Courts of Equity will not enforce a mere gratuitous gift (donum gratuitum), or a mere moral obligation.[1] Hence it is that if there be a mere voluntary executory trust created, Courts of Equity will not enforce it.[2] And upon the same ground if two persons for a valuable consideration, as between themselves, covenant to do some act for the benefit of a third person who is a mere stranger to the consideration, he cannot enforce the covenant against the two, although each one might enforce it against the other.[3] But it is otherwise in cases where the use or trust is already created and vested, or otherwise fixed in the cestui que trust, or where it is raised by a last will and testament.[4] Thus for example if A should direct his debtor to hold the debt in trust for B, and the debtor should accept the trust, and communicate the fact to both A and B, the trust, although voluntary, would be enforced in favor of B and binding on A, for nothing remains to be done to fix the trust.[5] So

3 Sim. R. 14; Gerrard *v.* Lord Lauderdale, 3 Sim. R. 1; post, §§ 1388, 1404 to 1407; Maber *v.* Hobbs, 2 Younge & Coll. 317, 327; Lane *v.* Husband, 14 Simons, R. 656. As to the revocation of a trust see Paul *v.* Paul, 19 Ch. D. 47, doubting s. c. 15 Ch. D. 580.

[1] Chilvers *v.* Race, 196 Ill. 71, 63 N. E. 701; Bennett *v.* Littlefield, 177 Mass. 294, 58 N. E. 1011; Fisher *v.* Hampton Transp. Co., 136 Mich. 218, 98 N. W. 1012, 10 Detroit Leg. N. 1028, 112 Am. St. Rep. 358; Mann *v.* Shrive, 111 App. Div. 452, 97 N. Y. Supp. 688; Whiting *v.* Dyer, 21 R. I. 278, 43 Atl. 181; Gwynn *v.* Gwynn, 11 App. D. C. 564; Lewis *v.* Cornutt, 130 Iowa, 423, 106 N. W. 914; 2 Fonbl. Eq. B. 1, ch. 2, § 2, and notes (*f*), (*g*), (*i*); 2 Black Comm. 330; 1 Fonbl. Eq. B. 1, ch. 6, § 8; Colman *v.* Sarrel, 1 Ves. Jr. 53, 54; Colyear *v.* Countess of Mulgrave, 2 Keen, 81, 97, 98; Ellis *v.* Nimmo, Lloyd & Goold Rep. 333; Holloway *v.* Headington, 8 Sim. R. 324; Gaskell *v.* Gaskell, 2 Younge & Jerv. 502; Carson *v.* Phelps, 40 Md. 73. Though under seal. Lamprey *v.* Lamprey, 29 Minn. 151.

[2] Colyear *v.* Countess of Mulgrave, 2 Keen, 81, 97, 98; Collinson *v.* Patrick, 2 Keen, R. 123, 134; Holloway *v.* Headington, 8 Sim. R. 329; Callagan *v.* Callagan, 8 Clark & Fin. 374, 401; Lloyd *v.* Brooks, 34 Md. 27; Swan *v.* Frick, Ib. 139; Jones *v.* Lock, L. R. 1 Ch. 25; Scales *v.* Maude, 6 DeG. M. & G. 43.

[3] Sutton *v.* Chetwynd, 3 Meriv. R. 249; 1 Turn. & Russ. 296.

[4] 1 Fonbl. Eq. B. 1, ch. 6, § 6; Id. § 8, and note (*r*); 2 Fonbl. Eq. B. 2, ch. 2, notes (*f*), (*g*); 1 Fonbl. Eq. B. 1, ch, 6, § 9, note (*r*); Lechmere *v.* Earl of Carlisle, 3 P. Will. 222; Austen *v.* Taylor, Ambl. R. 376; s. c. 1 Eden, R. 361; Bunn *v.* Winthrop, 1 John. Ch. R. 329; Petre *v.* Espinasse, 2 Mylne & Keen, 496; Collinson *v.* Pattrick, 2 Keen, 123, 134; Lewin on Trusts, ch. 9, pp. 110 to 137.

[5] Adams *v.* Adams, 88 U. S. 185, 22 L. Ed. 504 (that the trust will arise though the trustee did not know of the transaction at the time,

if A had declared himself trustee for B of the same debt, the same doctrine would apply.[1]

§ 1314. **Rules Governing Construction of Trusts.** — Trusts in real property which are exclusively cognizable in equity are now in many respects governed by the same rules as the like estates at law, and afford a striking illustration of the maxim "æquitas sequitur legem." Thus for example they are descendible, devisable, and alienable; and heirs, devisees, and alienees may, and generally do, take therein the same interests in point of construction and duration, and they are affected by the same incidents, properties, and consequences, as would under like circumstances apply to similar estates at law.[2] We say gener-

and on hearing of it declined to act); Craven *v.* Winter, 38 Iowa, 472; Pierce *v.* Brooks, 52 Ga. 425; Odell *v.* Moss, 137 Cal. 542, 70 Pac. 547; Smith *v.* Caldwell, 6 Idaho, 436, 55 Pac. 1065; Copeland *v.* Summers, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971; O'Neil *v.* Greenwood, 106 Mich. 572, 64 N. W. 511; Eipper *v.* Beuner, 113 Mich. 75, 71 N. W. 511, 4 Detroit Leg. N. 218; Oberlender *v.* Butcher, 67 Neb. 410, 93 N. W. 764; Walston *v.* Smith, 70 Vt. 19, 39 Atl. 353; Johnson *v.* Ludwick, 58 W. Va. 464, 52 S. E. 489.

[1] McFadden *v.* Jenkins, 1 Phillips, Ch. R. 152. See also Stapleton *v.* Stapleton, 14 Simons, R. 186.

[2] 2 Bl. Comm. 337; 1 Madd. Ch. Pr. 360; 3 Wooddes. Lect. 59, pp. 479, 480; 1 Wooddes. Lect. 7, p. 209; 1 Fonbl. Eq. B. 1, ch. 6, §§ 6, 7, and note (*n*); 1 Madd. Ch. Pr. 360, 361; 2 Fonbl. Eq. B. 2, ch. 3, §§ 5, 6, ch. 4, §§ 1, 2; Fisher *v.* Fields, 10 John. R. 494. The most remarkable deviation in executed trusts from the rules in relation to legal estates is, that a man may be tenant by the curtesy of a trust estate of his wife, but a woman is not entitled to dower in a trust estate of her husband. 2 Fonbl. Eq. B. 2, ch. 4, § 1, and notes (*c*) and (*d*). Lord Redesdale, in D'Arcy *v.* Blake (2 Sch. & Lefr. 387), has given the best account of the origin of this anomaly. He there observed: "The difficulty in which the Courts of Equity have been involved with respect to dower, I apprehend originally arose thus. They had assumed as a principle, in acting upon trusts, to follow the law. And according to this principle they ought in all cases where rights attached on legal estates to have attached the same rights upon trusts, and consequently to have given dower of an equitable estate. It was found however that in cases of dower this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting on the footing of dower upon a contrary principle, and had supposed that by the creation of a trust the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion if Courts of Equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the security of purchasers of mortgages, and of other persons taking the legal estates, to depart from the

ally, because there are exceptions to the doctrine above stated. Thus for example the construction put upon executory trusts arising under agreements and wills sometimes differs in equity from that in regard to executed trusts.[1] And trusts in terms for years and personalty will be often recognized and enforced in equity, which would be wholly disregarded at law.[2]

general principle in case of dower, but it was not necessary in the case of tenancy by the curtesy. Pending the coverture, a woman could not aliene without her husband, and therefore nothing she could do could be understood by a purchaser to affect his interest. But where the husband was seised or entitled in his own right, he had full power of disposing except so far as dower might attach. And the general opinion having long been that dower was a mere legal right, and that as the existence of a trust estate previously created prevented the right of dower [from] attaching at law, it would also prevent the property from all claim of dower in equity; and many titles depending on this opinion, it was found that it would be mischievous in this instance to the general principle that equity should follow the law. And it has been so long and so clearly settled that a woman should not have dower in equity who is not entitled at law, that it would be shaking everything to attempt to disturb the rule."

[1] 3 Wooddes. Lect. 59, pp. 480, 481; Co. Litt. 290 *b*, Butler's note, 246, xiv.; ante, § 56; 1 Fonbl. Eq. B. 1, ch. 6, § 8, note (*s*); Fisher *v.* Fields, 10 John. R. 506. It has been well remarked that Courts of Equity take cognizance of trusts only when they are executory, or are not so executed as to be enforced at law. If therefore the trust is executed so that it is cognizable at law, and nothing more remains to be done by the trustee, Courts of Equity will leave the parties to their remedies at law. Baker *v.* Biddle, 1 Baldwin, Cir. R. 422.

[2] 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (*d*); 1 Fonbl. Eq. B. 1, ch. 4, § 20; Id. ch. 3, § 1, note (*b*); Id. ch. 4, § 1, note (*f*); Id. ch. 6, § 8, note (*s*), § 9, note (*r*); Austen *v.* Taylor, Ambl. 376; s. c. 1 Eden, R. 361; Messenburgh *v.* Ash, 1 Vern. 234, 304; Bac. Abridg. Uses and Trusts, G. § 2, p. 109, Guillim's ed.; Wood *v.* Burnham, 6 Paige, 513. Hence in executory trusts created by a will, the rule in Shelley's Case (as it is called) will not be strictly followed in equity, but the same construction will be had as governs in regard to marriage articles, if the same intent is apparent on the face of the will. There is however a distinction between marriage articles and executory trusts arising under wills, as to the inference of the intention of the parties. It is stated post, § 1328. See Stonor *v.* Curwen, 5 Sim. R. 264; Roberts *v.* Dixwell, 1 West. R. 542; Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 227; Wood *v.* Burnham, 6 Paige, R. 513, 519; 4 Kent. Comm. Lect. 59, p. 218; post, §§ 1327, 1329. See also 2 Fonbl. Eq. B. 1, ch. 4, § 6; Co. Litt. 290 *b*, Butler's note, 246, X.; 1 Madd. Ch. Pr. 360; Com. Dig. Chancery, 4 W. 5, 4 W. 19; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 31, 32; Id. pp. 53, 56, 62, 63; ante, § 56. Mr. Butler's note to Co. Litt. 290 *b* contains so valuable a summary of the general doctrine on this subject that it deserves to be here stated at large. "It is to be observed that in most cases, particularly those which relate to real property, Courts of Equity have generally endeavored that their decisions should bear the strictest possible analogy to the decisions of Courts of Law in cases of a similar or corresponding impression. All the canons of law respecting the descent or inheritance of legal estates in lands have been applied to trust or equitable estates. Some of these,

§ 1315. **Alienation of Trust Estates.** — Where a trust is created for the benefit of a party, it is not only alienable by him by his own proper act and conveyance,[1] but it is also liable to be disposed of by operation of law in invitum, like any other property; as for example by a general assignment under bankruptcy or insolvency,

as the exclusion of the half-blood of the ascending line of the paternal line from the maternal inheritance, and the maternal line from the paternal inheritance, are evidently of feudal extraction, and are generally supposed to be contrary to reason and equity. Yet they have been admitted without any limitation into the equitable code of England. There is the same division in equity as there is at law, of estates of freehold and inheritance, of estates of freehold only, and of estates less than freehold; of estates in possession, remainder, or reversion; and of estates several and estates undivided. It has been observed before that every species of property is in substance equally capable of being settled in the way of entail, and that the utmost term allowed for the suspense either of real or personal property from vesting absolutely is that of a life or lives in being, and twenty-one years after, and perhaps in the case of a posthumous child, a few months more. The analogy between law and equity is in this instance complete. It may be laid down without any qualification that no nearer approach to a perpetuity can be made through the medium of a trust, or will be supported by a Court of Equity, than can be made by legal conveyances of legal estates or interests, or will be admitted in a Court of Law. In these leading rules we find the analogy holds. In some instances it fails. Curtesy has been admitted; dower, though a more favored claim, has been refused in equitable estates. An equitable estate is by its nature incapable of livery of seisin, and of every form of conveyance which operates by the Statute of Uses. In the transfer therefore of equitable estates these forms of conveyance have been dispensed with, and a mere declaration of trust in favor of another has been held sufficient to transfer to him the equitable fee. On the other hand trust estates are by their nature equally incapable of the process of fines or recoveries. Yet fines are levied and recoveries are suffered of them; and fines and recoveries are as necessary to bar entails of equitable estates as they are to bar entails of legal estates. In the case of a feme inheritrix, law and equity agree in vesting the fee in the husband in her right during their joint lives, and, subject to that, in preserving it to the wife. Where the feme is possessed of personal property, the law, speaking generally, vests it absolutely in the husband, or at least gives him the power of acquiring the absolute property of it. Courts of Equity have in many cases abridged the right of the husband to the personal property of the wife, and qualified his power over it. In fixing the term for the redemption of mortgages, and in many other cases, an analogy to the term for bringing ejectments has frequently influenced the decisions of the courts. In other cases an analogy to the term for ejectments, or the terms for bringing other writs, has not been attended to. And in some instances the courts have not considered themselves bound even by the Statutes of Limitations. Smith *v.* Clay, 3 Bro. Ch. Rep. 639. But the cases where the analogy fails are not numerous; and there scarcely is a rule of law or equity of a more ancient origin, or which admits of fewer exceptions, than the rule that equity followeth the law."

[1] Parker *v.* Converse, 5 Gray, 336; Sayre *v.* Sayre, 2 C. E. Green, 349; Palmer *v.* Stevens, 15 Gray, 343; Ames *v.* Clark, 106 Mass. 573.

although indirectly the very purposes of the trust may thereby be defeated. Thus where by will certain estates were bequeathed to trustees in order, among other things, to pay an annuity to the testator's son of £500 for his natural life, the annuity being declared to be for his personal maintenance and support during his life, and not on any account to be subject or liable to the debts, engagements, charges, and incumbrances of the son, but as the same became due it was to be paid into the son's hands, and not to any other person whatsoever, and the son became a bankrupt, it was held that the annuity passed by the assignment under the bankruptcy to the assignees.[1] For it was said that the policy of the law does not permit property to be so limited that it shall continue in the enjoyment of the bankrupt notwithstanding the bankruptcy. The testator might, if he had thought fit, have made the annuity determinable on the bankruptcy,[2] or have made it to go over to another person in the event of the bankruptcy. But while it was the property of the bankrupt it must be subject to the ordinary incidents of property, and therefore subject to his debts.[3] So if a trust is created for a married woman for her separate use, and the trustees are to pay the money into her proper hands and for her use, her own receipt only being required, she may still assign it, and her assignee will take the full title to it.[4] The same rule will apply to the case of a trust fund in rents and profits created by a will for the benefit of a particular person during his life, although there be a proviso that he shall not have any power to sell, or to mortgage, or to anticipate in any way the rents and profits.[5]

[1] Sears *v.* Russell, 8 Gray, 86; Thorndike *v.* Loring, 15 Gray, 341; Fosdick *v.* Fosdick, 6 Allen, 41; Otis *v.* McClellan, 13 Allen, 339; Lovering *v.* Worthington, 106 Mass. 86; Floyer *v.* Bankes, L. R. 8 Eq. 115; Morgan *v.* Gronow, L. R. 16 Eq. 1; Sykes *v.* Sykes, L. R. 13 Eq. 59; Sparhawk *v.* Cloon, 125 Mass. 263. But see Nichols *v.* Eaton, 91 U. S. 716, 23 L. Ed. 254. In these two cases the principal authorities upon this subject of the power of the founder of a trust to secure to the beneficiary a bounty against the demands of creditors, are considered or cited.

[2] Graves *v.* Dolphin, 1 Sim. R. 66; Piercy *v.* Roberts, 1 Mylne & Keen, 4; In re Muggeridge, Johns. (Eng. Ch.) 625.

[3] Rochford *v.* Hackman, 10 Eng. L. & Eq. 64, 67; s. c. 16 Jur. 212, where Brandon *v.* Robinson, supra, is commented upon. And see Hutchins *v.* Heywood, 50 N. H. 491; Rife *v.* Geyer, 59 Pa. St. 393; Easterly *v.* Keney, 36 Conn. 18; McIlvaine *v.* Smith, 42 Mo. 45; Brandon *v.* Robinson, 18 Ves. 429, 433, 434; Hallett *v.* Thompson, 5 Paige, R. 583.

[4] Brandon *v.* Robinson, 18 Ves. 434; post, § 1394. But an express prohibition of alienation or anticipation will, in the case of a married woman, be binding. Perkins *v.* Hayes, 3 Gray, 405; Arnold *v.* Woodhams, L. R. 16 Eq. 29.

[5] Green *v.* Spicer, 1 Russ. & Mylne, 395.

§ 1316. **Analogy of Trusts to Estates at Common Law.** — In regard to trusts the analogy to estates at the common law is not only followed as to the rights and interests of the cestui que trust, but also as to the remedies to enforce, preserve, and extinguish those rights and interests. Thus for instance there cannot, strictly speaking, be a disseisin, abatement, or intrusion as to a trust estate. But nevertheless there may be such an adverse claim of a trust estate by an adverse claimant, taking the rents and profits, as may amount to an equitable ouster of the rightful claimant; and such as, if continued twenty years, would by analogy to legal remedies bar any assertion of his right in equity.[1] We have already had occasion to consider this subject in reference to Statutes of Limitations generally.[2] And it may be here added that bars to relief in equity from lapse of time are also entertained in Courts of Equity independently of the express provisions of any Statute of Limitations.[3]

§ 1317. **Trustee Is Only Liable to Matters Pertaining to the Trust Estate.** — In general a trustee is only suable in equity in regard to any matters touching the trust.[4] But if he chooses to bind himself by a personal covenant in any such matters, he will be liable at law for a breach thereof, although he may in the instrument containing the covenant describe himself as covenanting as trustee; for the covenant is still operative as a personal covenant,

[1] Cholmondeley *v.* Clinton, 2 Jac. & Walk. 1; Id. 191, note; Bond *v.* Hopkins, 1 Sch. & Lefr. 428, 429; Hovenden *v.* Annesley, 2 Sch. & Lefr. 630, 636; Elmendorf *v.* Taylor, 23 U. S. 168, 6 L. Ed. 289; Kane *v.* Bloodgood, 7 John. Ch. R. 90, 113 to 128; Prevost *v.* Gratz, 19 U. S. 481, 5 L. Ed. 311; Boone *v.* Chiles, 35 U. S. 177, 9 L. Ed. 388; Shaver *v.* Radley, 4 John. Ch. R. 310, 316.

[2] Ante, §§ 55, 705, 1059.

[3] Piatt *v.* Vattier, 34 U. S. 405, 9 L. Ed. 173 and cases there cited; 1 Fonbl. Eq. B. 1, ch. 4, § 27, note (*q*); 1 Madd. Ch. Pr. 365; Swift *v.* Smith, 79 Fed. 709, 25 C. C. A. 154; Robb *v.* Day, 90 Fed. 337, 33 C. C. A. 84; Smick's Admr. *v.* Beswick's Admr., 113 Ky. 439, 24 Ky. L. Rep. 276, 68 S. W. 439; Bruner *v.* Finley, 187 Pa. St. 389, 41 Atl. 334; McClure *v.* Bryant, 18 Tex. Civ. App. 141, 44 S. W. 3; Redford *v.* Clark, 100 Va. 115, 40 S. E. 630.

As between trustee and cestui que trust, in the absence of knowledge of a wrongful withholding, times does not run against the demand until repudiated by the trustee, and knowledge of the cestui que trust. In re Yale, 84 Minn. 109, 86 N. W. 894.

Where a child of tender years was sent away into another State to live with kinspeople, and while there was led to believe that there was nothing due her from her father's estate, the registration of her father's will in the other State was not such notice to her as would bar her claim. Mullen *v.* Walton, 142 Ala. 166, 39 So. 97.

[4] Merriam *v.* Hassam, 14 Allen, 516; Watkins *v.* Specht, 7 Cold. 585; Curtis *v.* Smith, 6 Blatchf. C. C. 537.

and the superadded words are but a descriptio personæ.[1] Still however, where the matter is otherwise cognizable in equity, the mere existence of such a covenant will not deprive the Courts of Equity of their jurisdiction over the trust.

§ 1318. **Equity Will Decree Execution of Trust though No Trustee Be Appointed.** — It is a general rule in Courts of Equity that wherever a trust exists, either by the declaration of the party or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate and decree the person in whom it is vested (not being a bona fide purchaser for a valuable consideration without notice, or otherwise entitled to protection) to execute the trust. For it is a rule in equity which admits of no exception, that a Court of Equity never wants a trustee.[2] This is often applied to the cases of powers of sale of lands given by will for the payment of debts and other purposes, which are in the nature of a trust. In such cases if the power becomes extinct at law, either from no person being appointed in the will to execute it, or from the party designated dying before the execution of it, Courts of Equity will decree the execution of such trust, and compel the party in possession as heir or devisee of the legal estate in the lands to perform it.[3] And generally it may be stated that where property has been bequeathed in trust without the appointment of a trustee, if it is personal estate the personal representative is deemed the trustee, and if real estate the heir or devisee is deemed the trustee, and is bound to its due execution.[4]

§ 1319. **Power of Trustee over Legal Estate Exists for Benefit of Cestui Que Trust.** — The power of a trustee over the legal estate or property vested in him properly speaking exists only for the benefit of the cestui que trust. It is true that he may as legal owner do acts to the prejudice of the rights of the cestui que trust, and he may even dispose of the estate or property so as to

[1] Duvall *v.* Craig, 15 U. S. 45, 4 L. Ed. 180.

[2] Dodkin *v.* Brunt, L. R. 6 Eq. 580; Bowditch *v.* Bannelos, 1 Gray, 220; Co. Litt. 290 *b*, Butler's note (1); Co. Litt. 113 *a*, Butler's note (1); McCartee *v.* Orph. Asylum Soc., 9 Cowen, R. 437.

[3] Co. Litt. 113 *a*, Butler's note (1); Id. 290, Butler's note (1).

[4] Piatt *v.* Vattier, 34 U. S. 405, 9 L. Ed. 173, and cases there cited; 1 Fonbl. Eq. B. 1, ch. 4, § 27, note (*q*); 1 Madd. Ch. Pr. 365; French *v.* Northern Trust Co., 197 Ill. 30, 64 N. E. 105; Penny *v.* Croul, 76 Mich. 471, 43 W. Va. 649, 5 L. R. A. 858; Hiles *v.* Garrison, 70 N. J. Eq. 605, 62 Atl. 865; Keith *v.* Scales, 124 N. C. 497, 32 S. E. 809; In re Johns' Will, 30 Oreg. 494, 47 Pac. 341, 36 L. R. A. 242; Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748; McWilliams *v.* Gough, 116 Wis. 576, 93 N. W. 550.

bar the interests of the latter therein, as by a sale to a bona fide purchaser for a valuable consideration without notice of the trust.[1] But when the alienation is purely voluntary, or where the estate devolves upon heirs, devisees, or other representatives of the trustee, or where the alienee has notice of the trust, the trust attaches to the estate in the same manner as it did in the hands of the trustee himself, and it will be enforced accordingly in equity.[2] And although the trustee may by a mortgage or other specific lien without notice of the trust bind the estate or the property, yet it is not bound by any judgments or any other claims of creditors against him.[3] How far acts of forfeiture by the trustee ought to be allowed to bind the estate of the cestui que trust has been a matter of considerable diversity of judgment.[4]

§ 1320. **Powers of Trustee Depend upon Nature of the Trust and Situation of the Cestui Que Trust.** — What powers may be properly exercised over trust property by a trustee depends upon the nature of the trust, and sometimes upon the character and situation of the cestui que trust. Where the cestui que trust is of age, or sui juris, the trustee has no right (unless express power is given) to change the nature of the estate, as by converting land into money, or money into land, so as to bind the cestui que trust.[5] But where the cestui que trust is not of age, or sui juris, it is frequently necessary to his interests that the trustee should

[1] Williams *v.* Jackson, 107 U. S. 478, 27 L. Ed. 529, 2 S. Ct. Rep. 814.

[2] 1 Madd. Ch. Pr. 363, 364; 2 Fonbl. Eq. B. 2, ch. 7, § 1, and note (*a*); Pye *v.* Gorge, 1 P. Will. 129; Saunders *v.* Dehew, 2 Vern. 271; Smith *v.* Walser, 49 Mo. 250; Ryan *v.* Doyle, 31 Iowa, 53. Where the trustee holds the legal title with power to convert the trust property into money and apply the money to the purposes of the trust, a bona fide purchaser will hold the property free from the trust. To enable the cestui que trust to follow the money into the hands of a purchaser from the trustee in such a case, it must appear either that no consideration was paid or that the purchaser knew that the trustee was misapplying the trust estate, and took the estate in aid of such wrong. It is not enough that one who advances money on a pledge of the trust estate knew the character of the estate, if he had no reason to doubt the right of the trustee. Ashton *v.* Atlantic Bank, 3 Allen, 217. See also Shaw *v.* Spencer, 100 Mass. 382; Jandon *v.* Natl. Bank, 8 Blatchf. C. C. 430; Newton *v.* Newton, L. R. 6 Eq. 135; Boursot *v.* Savage, L. R. 2 Eq. 134.

[3] Hart *v.* Farmers' Bank, 33 Vt. 252. See also Abell *v.* Howe, 43 Vt. 403; Siemon *v.* Shurck, 29 N. Y. 598.

[4] 1 Madd. Ch. Pr. 363, 364; 2 Fonbl. Eq. B. 2, ch. 7, § 1, note (*a*).

[5] If trustees have possession and control of premises they may make necessary repairs, but without either general or special authority they cannot enter upon making large improvements. Dickinson *v.* Corniff, 65 Ala. 581; Green *v.* Winter, 1 Johns. Ch. 27; Wykoff *v.* Wykoff, 3

possess the power; and in case his interests require the conversion, the acts of the trustee bona fide done for such a purpose seem to be justifiable.[1]

§ 1321. **Right of Cestui Que Trust to Demand Conveyance.** — It has also been laid down as a general rule that the cestui que trust may call upon the trustee for a conveyance to execute the trust;[2] and that what the trustee may be compelled to do by a suit he may voluntarily do without a suit. But this rule admits, if it does not require, many qualifications in its practical application; for otherwise a trustee may incur many perils, the true nature and extent of which may not be ascertainable until there has been a positive decision upon his acts by a Court of Equity, or a positive declaration by such a court of the acts which he is at liberty to do.[3]

§ 1322. **Trusts Should Be Certain and Definite.** — In regard to trusts it may be proper to state that Courts of Equity carry them into effect only when they are of a certain and definite character. If therefore a trust be clearly created in a party, but the terms by which it is created are so vague and indefinite that Courts of Equity cannot clearly ascertain either its objects or the persons who are to take, then the trust will be held entirely to fail,

Watts & S. 481; Hassard *v.* Rowe, 2 Barb. Ch. 22. But see Cogswell *v.* Cogswell, 2 Edw. Ch. 231.

Persons dealing with a trustee must look to him for payment and ordinarily the creditor cannot resort to the trust estate for advances or services to that estate. But where expenses have been made for the trust estate, and they have not been paid for, and the estate is either indebted to the trustee or would be if he should pay the demand, and the trustee is insolvent or non-resident so that the creditor cannot recover of him, and must follow him into a foreign jurisdiction, the trust estate may be resorted to directly in equity. Hewitt *v.* Phelps, 105 U. S. 393, 26 L. Ed. 1072, Matthews, J., quoting from Norton *v.* Phelps, 54 Miss. 467, 471. See Clopton *v.* Gholson, 53 Miss. 466.

The ground of the rule is that the trustee has an equity of his own for reimbursement enforceable through the legal title in him, and that the creditor in the cases supposed may resort to this equity upon a principle of equitable substitution or attachment. Hewitt *v.* Phelps, supra.

[1] Fonbl. Eq. B. 2, Ch. 7, § 1, note (*a*). If the trustee has a discretionary right, equity will not interfere with his exercise thereof unless to prevent or to redress fraud. Camden *v.* Murray, 16 Ch. D. 161; Tabor *v.* Brooks, 10 Ch. D. 273; Tempest *v.* Camoys, 21 Ch. D. 571; Proctor *v.* Heyer, 122 Mass. 525; Marshall *v.* Caldwell, 125 Mass. 435; Nichols *v.* Eaton, 91 U. S. 716, 23 L. Ed. 254. See In re Norrington, 13 Ch. D. 654.

[2] Inches *v.* Hill, 106 Mass. 575; Paine *v.* Sackett, 27 R. I. 300, 61 Atl. 753. See Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 559, 571.

[3] See Mr. Fonblanque's note (*c*), 2 Fonbl. Eq. B. 2, ch. 7, § 2; Moody *v.* Walters, 16 Ves. 302, 303, 307 to 314.

and the property will fall into the general funds of the author of the trust. Thus for example where a lady in her lifetime indorsed a promissory note of £2,000, and sent it to another lady in a letter, whereby she gave it to the latter for her sole use and benefit, for the express purpose of enabling her to present to either branch of the testatrix's family any portion of the principal or interest thereon as she might deem the most prudent, and, in the event of her death, empowering her to dispose of the same by will or deed to those, or either branch of her family she might consider most deserving thereof, and stating that the indorsement was made to enable her to have the sole use and power thereof, it was held that the letter created a trust the objects of which were too indefinite to enable the court to execute it; and that therefore the £2,000 formed a part of the donor's personal estate.[1] It was clear in this case that the donee could not take to her own sole use, for there was a superadded trust, showing that not to be the intention of the donor; and therefore the property reverted to the donor, as it would upon the failure of any ordinary trust.[2]

§ 1323. **Same.** — So where a testatrix bequeathed the residue of her estate to her executor "upon trust to dispose of the same at such times and in such manner, and for such use and purposes, as they shall think fit, it being my will that the distribution thereof shall be left to their discretion", it was held to be a trust in the executors of such a vague and uncertain nature that it could not be executed by a Court of Equity, and it was therefore void; and the residuary estate so bequeathed was decreed to belong to the next of kin of the testatrix.[3]

§ 1324. **Express and Implied Trusts Defined.** — Passing from these more general considerations in regard to trusts, and the jurisdiction exercised in equity over them, we may next proceed

[1] Stubbs *v.* Sargon, 2 Keen, R. 225; Omanney *v.* Butcher, 1 Turn. & Russ. 260, 270, 271. See also Wheeler *v.* Smith, 50 U. S. 55, 13 L. Ed. 44; Monroe *v.* Graves, 23 Iowa, 597; Crossman *v.* Crossman, 23 Mich. 217; Angus *v.* Noble, 73 Conn. 56, 46 Atl. 278; Orr *v.* Yates, 209 Ill. 222, 70 N. E. 731; Haines *v.* Allen, 78 Ind. 100, 41 Am. Rep. 555; Gaylord *v.* City of La Fayette, 115 Ind. 423, 17 N. E. 899; Murdock *v.* Bridges, 91 Me. 124, 39 Atl. 475; Renz *v.* Stall, 94 Mich. 377, 54 N. W. 276, 34 Am. St. Rep. 358; Smullin *v.* Wharton, 73 Neb. 667, 103 N. W. 288; Cathcart *v.* Nelson, 70 Vt. 317, 40 Atl. 826; Weaver *v.* Spurr, 56 W. Va. 95, 48 S. E. 852; McHugh *v.* McCole, 97 Wis. 166, 72 N. W. 631; Gates *v.* Paul, 117 Wis. 170, 94 N. W. 55.

[2] Post, §§ 1447 to 1449. See Wood *v.* Cox, 2 M. & Craig, 684; s. c. 1 Keen, R. 317; Aston *v.* Wood, L. R. 6 Eq. 419.

[3] Fowler *v.* Garlike, 1 Russ. & Mylne, 232; Wheeler *v.* Smith, 50 U. S. 55, 13 L. Ed. 44.

to examine them under the heads into which they are usually divided, of express trusts and implied trusts; the latter comprehending all those trusts which are called constructive and resulting trusts. Express trusts are those which are created by the direct and positive acts of the parties by some writing, or deed, or will.[1] Not that in those cases the language of the instrument need point out the very nature, character, and limitations of the trust in direct terms, ipsissimis verbis; for it is sufficient that the intention to create it can be fairly collected upon the face of the instrument from the terms used, and the trust can be drawn, as it were, ex visceribus verborum.[2] Implied trusts are those which are deducible from the nature of the transaction as matter of clear intention, although not found in the words of the parties; or which are superinduced upon the transaction by operation of law as matter of equity, independent of the particular intention of the parties.[3]

§ 1325. **Same.** — The most usual cases of express trusts are found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of lands; or in formal conveyances, such as marriage settlements, terms for years, mortgages, and other conveyances and assignments for the payment of debts, or for raising portions, or for other special purposes; or in last wills and testaments in a variety of bequests and devises, involving fiduciary interests for private benefit or for public charity. Indeed many of these instruments (as we shall abundantly see) will also be found to contain implied, constructive, and resulting trusts; and the separate consideration of them throughout would therefore be scarcely attainable without frequent repetitions of the same matters as well as of the same illustrations.

§ 1326. **Same.** — In regard to each of these subjects there are a great many nice and refined doctrines and distinctions which have been engrafted into Equity Jurisprudence, the full examination of which belongs rather to single treatises upon each particular topic than to a general survey of the system such as is em-

[1] See as to what constitutes an express trust Banner *v.* Berridge, 18 Ch. D. 254; Burdick *v.* Garrick, L. R. 5 Ch. 233, 239; Foley *v.* Hill, 2 H. L. Cas. 28, 35; Paul *v.* Paul, 19 Ch. D. 47.

[2] Fisher *v.* Fields, 10 John. R. 494; Foster *v.* Friede, 37 Mo. 36; Peck *v.* Scofield, 186 Mass. 108, 71 N. E. 109; Brown *v.* Crafts, 98 Me. 40, 56 Atl. 213; Taylor *v.* Coriell, 66 N. J. Eq. 262, 57 Atl. 810; City of Austin *v.* Cahill, 99 Tex. 172, 88 S. W. 542.

[3] In re Davis, 112 Fed. 129; Columbian Univ. *v.* Taylor, 25 App. D. C. 124; Minot *v.* Parker, 189 Mass. 176, 75 N. E. 149; Gentry *v.* Poteet, 59 W. Va. 408, 53 S. E. 787.

braced in the design of the present Commentaries. It may be added that many of these doctrines and distinctions are the creations of Courts of Equity, acting upon the enlarged principles of social justice, ex æquo et bono, rather than express trusts created by the acts of the parties, or an exposition and execution of their declared intentions. So that they may properly be said to fall within the scope of implied or constructive trusts. In our subsequent remarks upon all of these topics (which will necessarily be brief) no attempt will be made nicely to distinguish between those trusts which are express and those which are implied. Both will occasionally be blended, unless where the particular nature of the trusts calls for some discrimination between them.

CHAPTER XXVIII

EXPRESS TRUSTS.—MARRIAGE SETTLEMENTS

§ 1327. **Marriage Settlements.** — And in the first place in regard to MARRIAGE SETTLEMENTS. Where an instrument designed as a marriage settlement is final in its character, and the nature and extent of the trust estates created thereby are clearly ascertained and accurately defined, so that nothing further remains to be done according to the intention of the parties, there the trusts will be treated as executed trusts, and Courts of Equity will construe them in the same way as legal estates of the like nature would be construed at law upon the same language.[1] Thus if the language of the instrument would give a fee tail to the parents in a legal estate, they will be held entitled to a fee tail in the trust estate. But where no marriage settlement has actually been executed, but mere marriage articles only for a settlement, there Courts of Equity when called upon to execute them will indulge in a wider latitude of interpretation, and will construe the words, according to the presumed intention of the parties, most beneficially for the issue of the marriage.[2] In executing such articles they will put it out of the power of the parents to defeat the issue, by requiring that the limitations in the marriage settlement should be what are called limitations in strict settlement; that is to say, instead of giving the parents a fee tail, the limitations will be made to them for life, with remainders to the first and other sons, &c. in the fee tail; and if the articles are applicable to daughters, the like limitations will be made to them

[1] 1 Fonbl. Eq. B. 1, ch. 6, § 7, and note (*n*); Id. § 8, note (*s*); 2 Fonbl. Eq. B. 2, ch. 1, § 5, note (*k*); Fearne on Conting. Rem. by Butler, pp. 145 to 148 (7th ed.); Id. pp. 133 to 136; 1 Madd. Ch. Pr. 360; Synge *v.* Hales, 2 B. & Beatt. 507; Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 559, 571; 4 Kent, Comm. Lect. 61, p. 302 (2d ed.).

[2] See Dawes *v.* Tredwell, 18 Ch. D. 354, Smith *v.* Lucas, Ib. 531; In re Allnutt, 22 Ch. D. 275; In re Stonor, 24 Ch. D. 195; In re Bellasis, L. R. 12 Eq. 218; In re Brookman, L. R. 5 Ch. 182.

also.[1] And in cases of executory trusts arising under wills a similar favorable construction will be made in favor of the issue in carrying them into effect, if the court can clearly see from the terms of the will that the intention of the testator is to protect the interests of the issue in the same way.[2]

§ 1328. **Executory Trusts Created under Marriage Articles.** — There is however a distinction recognized in equity between executory trusts created under marriage articles and those created under wills, in relation to the interpretation of them and the mode of carrying them into execution. In cases of marriage articles Courts of Equity will, from the nature of the instrument, presume it to be intended for the protection and support of the interests of the issue of the marriage, and will therefore direct the articles to be executed in strict settlement, unless the contrary purpose clearly appear.[3] For otherwise it

[1] 1 Fonbl. Eq. B. 1, ch. 6, § 7, and note (*n*); Id. § 8, note (*s*); Fearne on Conting. Rem. pp. 90 to 114, by Butler (7th ed.); Earl of Stamford *v.* Hobart, 1 Bro. Parl. Cas. 288; Glenorchy *v.* Bosville, Cas. temp. Talb. 3; Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 218, 227; Taggart *v.* Taggart, 1 Sch. & Lefr. 87. There is a most elaborate note of Mr. Fonblanque (1 Fonbl. Eq. B. 1, ch. 6, § 8, note *s*), on this subject, in which the distinction between trusts executed and trusts executory is fully discussed, and the distinction stated in the text is firmly maintained. I regret that it is too long for an insertion in this place. See also Atherley on Marriage Settlement, ch. 7, pp. 93 to 105. Lord Eldon, in Jervoise *v.* Duke of Northumberland (1 Jac. & Walk. 559, 571), has taken notice of the confused and inaccurate senses in which the words executory trusts and executed trusts are often used. In one sense all trusts are executory, since the cestui que trust may call for a conveyance and execution of the trust. But executory trusts are properly those where something remains to be done to complete the intention of the parties, and their act is not final. See Mott *v.* Buxton, 7 Ves. 201; Hopkins *v.* Hopkins, 1 Atk. 591. As to this case see Hagerbham *v.* Vincent, 2 Ves. Jr. 238; Lloyd *v.* Brooks, 34 Md. 27. As to the proper limitations where a will directs a strict settlement see Loch *v.* Bagley, L. R. 4 Eq. 122; Stanley *v.* Coulthurst, L. R. 10 Eq. 259; Grier *v.* Grier, L. R. 5 H. L. 688; Mayn *v.* Mayn, L. R. 5 Eq. 150 (that the estates to be vested in children should be in common rather than in joint tenancy).

[2] Leonard *v.* Earl of Sussex, 2 Vern. 526; Papillon *v.* Voice, 2 P. Will. 478; Glenorchy *v.* Bosville, Cas. temp. Talb. 3; 1 Fonbl. Eq. B. 1, ch. 6, § 8, and note (*s*); Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 227, 230, 231, 234; Fearne on Cont. Rem. by Butler, pp. 113 to 148 (7th ed.); Id. p. 184; Green *v.* Stephens, 17 Ves. 75, 76; Carter *v.* White, Ambler, R. 670; Sydney *v.* Shelley, 19 Ves. 366; Stonor *v.* Curwen, 5 Sim. R. 264.

See Thompson *v.* Fisher, L. R. 10 Eq. 207; Magrath *v.* Morehead, L. R. 12 Eq. 491. As to after-acquired property see In re Edwards, L. R. 9 Ch. 97; In re Mainwaring, L. R. 2 Eq. 487; Carter *v.* Carter, L. R. 8 Eq. 551; Young *v.* Smith, L. R. 1 Eq. 180.

[3] Atherley on Marr. Settlem. ch. 7, pp. 93 to 101; ante, § 974.

would be in the power of the father to defeat the purpose of protecting and supporting such interests, and to appropriate the estate to himself. But in executory trusts under wills all the parties take from the mere bounty of the testator, and there is no presumption that the testator means one quantity of interest rather than another, an estate for life in the parent rather than an estate tail; for he has a right arbitrarily to give what estate he thinks fit to the parent or to the issue.[1] If therefore the words of marriage articles limit an estate for life to the father, with remainder to the heirs of his body, Courts of Equity will decree a strict settlement in conformity to the presumed intention of the parties. But if the like words occur in executory trusts created by a will, there is no ground for Courts of Equity to decree the execution of them in strict settlement, unless other words occur explanatory of the intent. The subject being a mere bounty, the intended extent of the bounty can be known only from the words in which it is conferred. If it is clearly ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in a technical sense, Courts of Equity in decreeing such a settlement as he has directed will depart from his words in order to execute his intention. But they will follow his words unless he has himself shown that he did not mean to use them in their proper sense; and they have never said that merely because the direction was for an entail they could execute that by decreeing a strict settlement.[2]

[1] 1 Fonbl. Eq. B. 1, ch. 6, § 8; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 32; Id. B. 3, Pt. 2, ch. 2, p. 379; Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 550, 551, 554.

[2] Blackburn *v.* Stables, 2 Ves. & B. 370; Jervoise *v.* Duke of Northumberland, 1 Jac. & Walk. 559, 571, 574; Lord Deerhurst *v.* Duke of St. Albans, 5 Madd. R. 260; Synge *v.* Hales, 2 B. & Beatt. 508. There is some language of Lord Eldon in The Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 227 to 230, which might lead to the conclusion that he held that there was no distinction between executory trusts under marriage articles and those created by a will. In that case he said: "There is no difference in the execution of an executory trust created by a will and of a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity." But in Jervoise *v.* Duke of Northumberland (1 Jac. & Walk. 573) he corrected the misapprehension of his opinion, and said: "If it is supposed that I said there was no difference between marriage articles and executory trusts, and that they stood precisely on the same ground, I never meant to say so. In marriage articles, the object of such settlement, the issue to be provided for, the intention to provide for such issue, and in short all the considerations that belong peculiarly to them, afford prima facie evidence of intent which does not belong to executory trusts under wills." See Sackville-West *v.* Homesdale, L. R. 4 H. L. 543.

§ 1329. **Construction of Marriage Contracts.** — In furtherance of the same beneficial purpose in favor of issue Courts of Equity will construe an instrument which might under one aspect be treated as susceptible of a complete operation at law, to contain merely executory marriage articles, if such an intent is apparent on the face of it; for this construction may be most important to the rights and interests of the issue.[1] So an instrument, as to one part of the property comprised in it, may be construed to be a final legal marriage settlement, and as to other property merely to be executory marriage articles.[2]

§ 1330. **Parties Entitled to Claim Interests in Marriage Contracts.** — There is also a distinction in Courts of Equity as to the parties in whose favor the provisions of marriage articles will be specifically executed or not.[3] The parties seeking a specific execution of such articles may be those who are strictly within the reach and influence of the consideration of the marriage, or claiming through them, such as the wife and issue, and those claiming under them; or they may be mere volunteers for whom the settler is under no natural or moral obligation to provide, and yet who are included within the scope of the provisions in the marriage articles, such as his distant heirs or relatives, or mere strangers. Now the distinction is that marriage articles will be specifically executed upon the application of any persons within the scope of the consideration of the marriage, or claiming under such person;[4] but not generally upon the application of mere volunteers.[5] But where the bill is brought by persons who are within the scope of the marriage consideration, or claiming under them, there Courts of Equity will decree a specific execution throughout, as well in favor of the mere volunteers as of the plaintiffs in the suit. So that indirectly mere volunteers may obtain the full benefit of the articles in the cases where they could not directly insist upon such rights. The ground of this

[1] Atherley on Marr. Sett. ch. 7, pp. 121 to 133; Trevor *v.* Trevor, 1 P. Will. 622; White *v.* Thornborough, 2 Vern. 702.

[2] Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 218; Vaughan *v.* Burslem, 3 Bro. Ch. 101, 106.

[3] See Neves *v.* Scott, 50 U. S. 197, 13 L. Ed. 102; Dennison *v.* Gothring, 7 Barr, 175; King *v.* Whitely, 10 Paige, 465.

[4] In Jeston *v.* Key, L. R. 6 Ch. 610, articles were enforced in favor of a husband, though he had broken the contract, there being part performance by the marriage, and the covenants being independent. Compare Butman *v.* Porter, 100 Mass. 337.

[5] See Atherley on Marr. Sett. ch. 5, pp. 131 to 145; ante, §§ 572, 956, 1080, 1313; post, § 1400.

peculiarity is, that when Courts of Equity execute such articles at all, they execute them in toto, and not partially.[1]

§ 1331. **Marriage Articles Will Not Be Decreed in Favor of Mere Volunteers.** — It has been already stated that generally marriage articles will not be decreed in favor of mere volunteers.[2] But an exception seems formerly to have been entertained in favor of a wife and children claiming as volunteers (such as a wife and children under a subsequent marriage,[3] or under a voluntary contract made before or after marriage, and not in consideration thereof) upon the ground that the settler is under a natural and moral obligation to provide for them,[4] upon the same principle

[1] Atherley on Marriage Sett. ch. 5, pp. 125 to 130; Id. 131 to 135; Osgood *v.* Strode, 2 P. Will. 255, 256; Trevor *v.* Trevor, 1 P. Will. 622; Goring *v.* Nash, 3 Atk. 186, 190.

[2] Ante, §§ 136, 241, 572, 956, 1080, 1081; West *v.* Erissey, 2 P. Will. 349; Kettleby *v.* Atwood, 1 Vern. 298, 471; Stephens *v.* Trueman, 1 Ves. 73; Williamson *v.* Codrington, 1 Ves. 512, 516; Colman *v.* Sarrel, 1 Ves. Jr. 50; s. c. 3 Bro. Ch. R. 13; Pulvertoft *v.* Pulvertoft, 18 Ves. 99; Ellison *v.* Ellison, 6 Ves. 662; Graham *v.* Graham, 1 Ves. Jr. 275; Wycherley *v.* Wycherley, 2 Eden, R. 177, and note; Bunn *v.* Winthrop, 1 John. Ch. R. 336, 337. This seems to be the general rule. But there are cases not easily reconcilable with it. See Vernon *v.* Vernon, 2 P. Will. 594; Williamson *v.* Codrington, 1 Ves. 512, 514; Stephens *v.* Trueman, 1 Ves. 73; 1 Madd. Ch. Pr. 326, 328; 1 Fonbl. Eq. B. 1, ch. 1, § 7, notes (*v*), (*x*); Id. ch. 5, § 2, note (*h*); 2 Fonbl. Eq. B. 2, ch. 5, § 2, and note (*i*). Lord Eldon, in Ellison *v.* Ellison, 6 Ves. 662, has stated the general doctrine in equity to be that voluntary trusts executed by a conveyance will be held valid and enforced in equity; but if the trust is executory, and rests merely in covenant, it will not be executed. The exception in favor of meritorious claimants, such as a wife or children, is admitted by the same learned judge in Pulvertoft *v.* Pulvertoft, 18 Ves. 99. Mr. Chancellor Kent, in Bunn *v.* Winthrop, 1 John. Ch. R. 336, 337, has examined many of the cases and adopted Lord Eldon's conclusion. With respect to chattel interests he maintains that an agreement under seal imports a consideration at law, and that therefore a bond though voluntary and without consideration will support a decree for executing the trust; relying on Lechmere *v.* Earl of Carlisle, 3 P. Will. 222, and Beard *v.* Nuthall, 1 Vern. 427; ante, §§ 1313, 1322; Wallwyn *v.* Coutts, 3 Meriv. R. 708. See also Minturn *v.* Seymour, 4 John. Ch. R. 500; Antrobus *v.* Smith, 12 Ves. 44 to 46, and Colman *v.* Sarrel, 1 Ves. Jr. 54, seem contra.

[3] See Gale *v.* Gale, 6 Ch. D. 144. And see with regard to provisions in favor of children of a *former* marriage, Ib.; Newstead *v.* Searle, 1 Atk. 265; Price *v.* Jenkins, 4 Ch. D. 483; s. c. 5 Ch. D. 219; Clarke *v.* Wright, 6 Hurl. & N. 849; Ithill *v.* Beane, 1 Ves. Sr. 215.

[4] Atherley on Marriage Sett. ch. 5, pp. 131 to 139; Osgood *v.* Strode, 2 P. Will. 245; Ithill *v.* Beane, 1 Ves. 216; Roe *v.* Mitton, 2 Wils. R. 36; Goring *v.* Nash, 3 Atk. 186; Pulvertoft *v.* Pulvertoft, 18 Ves. 99; Ellison *v.* Ellison, 6 Ves. 662; Ellis *v.* Nimmo, 1 Lloyd & Goold, R. 333. But see Holloway *v.* Headington, 8 Sim. R. 324, 325; Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 141.

which has been applied in favor of a wife and children in cases of a defective execution of powers.[1] But against what persons Courts of Equity ought in favor of a wife or children to interfere was a point which was thought to admit of more question. It was said that they ought to interfere to enforce the specific execution of such voluntary contracts or voluntary articles, against the heir at law of the voluntary settler, unless perhaps where he was a son wholly unprovided for. But whether they ought to interfere against the settler himself in such a case was a matter upon which there was more diversity of opinion and judgment. However the whole doctrine seems now overthrown; and the general principle is established that in no case whatsoever will Courts of Equity interfere in favor of mere volunteers, whether it be upon a voluntary contract, or a covenant, or a settlement, however meritorious may be the consideration, and although they stand in the relation of a wife or child.[2]

§ 1332. **Estates that May Be the Subject of Marriage Contract.** — In regard to terms for years and personal chattels it may be observed that they are capable of being limited in equity in strict settlement, in the same way and to the same extent as real estates of inheritance may be, so as to be transmissible like heirlooms.[3] The statute de Donis does not extend to entails of any-

[1] Ante, §§ 136, 241, 242.

[2] Holloway *v.* Headington, 8 Simons, R. 325; Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 141; post, § 1401. But see Gale *v.* Gale, 6 Ch. D. 144, 148; Price *v.* Jenkins, 4 Ch. D. 483; s. c. 5 Ch. D. 219. It is clear that if any inducement were held out by another on behalf of the woman, on the faith of which the marriage and the settlement were entered into, the inducement must be made good. Hammersley *v.* De Biel, 12 Clark & F. 45; Coverdale *v.* Eastwood, L. R. 15 Eq. 121. See Young *v.* Young, 80 N. Y. 422. Whether a settlement of the wife's property, after marriage, in express pursuance of an antenuptial parol agreement is valid against creditors, query. The affirmative was held in Dundas *v.* Dutens, 2 Cox, 235. But see contra Warden *v.* Jones, 2 DeG. & J. 76, a case that has been criticised. Jurist, Feb. 12, 1859 (5 Jur. (N. S.) part 2), p. 46. See also Barkworth *v.* Young, 3 Jur. (N. S.) 34; Hall *v.* Light, 2 Duv. 358; and compare Turner *v.* Nye, 7 Allen, 176; Merrill *v.* Merrill, 32 Vt. 27: Caldwell *v.* Renfrew, 33 Vt. 213.

[3] Atherley on Marr. Sett. ch. 5, 121 to 139; Goring *v.* Nash, 3 Atk. 185; s. c. cited 1 Ves. 513; I content myself with referring to Mr. Atherley's examination of this subject in his work on Marriage Settlements (ch. 5, pp. 131 to 145), and Lewin on Trusts (ch. 9, pp. 110 to 137), where indeed the authorities cited may be thought to afford some grounds for doubt and further consideration. Co. Litt. 18 *b*, note (7), by Hargrave; Co. Litt. 20 *a*, note (5), by Hargrave; 1 Madd. Ch. Pr. 367; 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (*d*); 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (*f*).[1] In the case of Ellis *v.* Nimmo (1 Lloyd & Goold, R. 333) the subject was discussed at large by Lord Chancellor Sugden, who affirmed the doctrine that a

thing except real estates of inheritance. But nevertheless estates pur autre vie, and terms of years, and personal chattels are now held to be susceptible of being settled in tail, and rendered unalienable almost for as long a time as if they were strictly entailable.

§ 1333. **Same.** — In regard to estates pur autre vie, they may at law be devised or limited in strict settlement by way of remainder, like estates of inheritance, and the remainder-man will take as special occupant.[1] But those who have an interest therein in the nature of estates tail may bar their issue and all remainders over by the alienation of the estate pur autre vie; as those who are, strictly speaking, tenants in tail of legal estates may do by fine and recovery.[2]

§ 1334. **Same.** — In regard to estates in terms of years and personal chattels the manner of settling them is different; for in them no remainder can at law be limited. But they may be entailed at law by an executory devise, or by a deed of trust in equity, as effectually as estates of inheritance, and with the same limitations as to perpetuity.[3] However the vesting of an interest in a term for years or in chattels in any person equivalent to a tenancy in tail confers upon such person the absolute property in such term or chattels, and bars the issue and all subsequent limitations as effectually as a fine and recovery would do in cases of pure entails, or as an alienation would do in the case of conditional fees and estates pur autre vie.[4] If in the case of a term of

postnuptial agreement making provision for a child ought to be enforced in equity against the settler as being grounded on a meritorious consideration. But in Holloway *v.* Headington, 8 Sim. R. 325, the Vice-Chancellor (Sir L. Shadwell) expressed some doubt upon the case of Ellis *v.* Nimmo, and the case has since been shaken, and seems overthrown by the case of Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 141. See Shelley *v.* Shelley, L. R. 6 Eq. 540; West *v.* Holmesdale, L. R. 4 H. L. 543; Cardigan *v.* Curzon-Howe, L. R. 9 Eq. 358; Harrington *v.* Harrington, L. R. 5 H. L. 87.

[1] Low *v.* Burron, 3 P. Will. 262, and Mr. Cox's notes; Fearne on Conting. Rem. by Butler, pp. 493 to 499 (7th ed.); Doe d. Blake *v.* Luxton, 6 Term Rep. 291, 292; Finch *v.* Tucker, 2 Vern. 184; Baker *v.* Bayley, 2 Vern. 225.

[2] Co. Litt. 20 *a*, note (5); Fearne on Conting. Rem. by Butler, pp. 493 to 499 (7th ed.); 2 Black. Comm. 113, 259, 260; Wastneys *v.* Chappell, 1 Bro. Parl. R. 475; Norton *v.* Frecker, 1 Atk. 525; Low *v.* Burron, 3 P. Will. 262, and Mr. Cox's notes; Gray *v.* Mannock, 2 Eden, R. 339; Blake *v.* Luxton, Cooper, R. 178, 184 to 186; Forster *v.* Forster, 2 Atk. 269.

[3] Ante, §§ 1162, 1163; 1 Fonbl. Eq. B. 1 ch. 4, § 2, and note (*f*); 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (*d*); Wright *v.* Cartwright, 1 Burr. 282, 284.

[4] Co. Litt. 18 *b*, Hargrave's note (7); Co. Litt. 20 *a*, Hargrave's note (5); Mathew Manning's case, 8 Co. R. 94, 95; Lampet's case, 10 Co. R.

years or of chattels the limitations over are too remote, the whole property vests in the first taker.[1]

§ 1335. **Same.** — In marriage settlements it is that we principally find limitations made to trustees to preserve contingent remainders. Trusts of this sort arose out of the doctrine in Chudleigh's Case[2] and Archer's Case,[3] although it is said that they were not put in practice until the time of the Usurpation.[4] The object of these limitations is to prevent the destruction of contingent remainders by the tenant for life or other party before the remainder comes in esse, and is vested in the remainder-man. The great dispute in Chudleigh's Case was concerning the power of feoffees to uses, created since the Statute of Uses of 27 Henry VIII. ch. 10, to destroy contingent uses by fine or feoffment before the contingent uses came into being. It was determined that the feoffees possessed such a power, and also that they had in them a possibility of seisin to serve such contingent uses when they came into being, and a scintilla juris, or power of entry, in case their estate was devested, to restore that possibility. At this time it had not been decided that the destruction of the particular estate for life, by the feoffment or other conveyance of the cestui que use for life, before the contingent remainder became vested, was a destruction of the contingent remainder. But that point was settled in the affirmative a few years afterwards in Archer's Case.[5]

§ 1336. **Same.** — There being then at law under these determinations a power in the general feoffees to uses either to preserve or to destroy these contingent uses ad libitum, and also a power in the cestui que use for life to destroy them, there arose a necessity to remedy these defects. And it was done by vesting a limitation in certain trustees, eo nomine, upon an express trust to preserve such contingent remainders. So that thereby the whole inheritance might come entire to the cestui que use in contingency, in like manner as trustees to uses ought to have preserved them before the Statute of Uses, when they were but trusts to be executed by Courts of Equity.[6]

47; Fearne on Conting. Rem. by Butler, 402, 403 (7th ed.); 1 Madd. Ch. Pr. 367; Goodright *v.* Parker, 1 M. & Selw. 692; 2 Kent, Comm. Lect. 35, p. 352 (3d ed.); 2 Fonbl. B. 2, ch. 4, § 2, note (*d*).

[1] Co. Litt. 20 *a*, Harg. note (5); 1 Madd. Ch. Pr. 367.

[2] 1 Co. R. 120.

[3] 1 Co. R. 66.

[4] Per Lord Hardwicke, in Garth *v.* Cotton, 1 Dick. R. 191; s. c. 1 Ves. 555; 3 Atk. 751; Fearne on Conting. Rem. by Butler, 325, 326 (7th ed.).

[5] Fearne on Conting. Rem. by Butler, 290, and note (*h*); Id. 291 to 300; Chudleigh's Case, 1 Co. R. 120; Archer's Case, 1 Co. R. 66.

[6] Garth *v.* Cotton, 1 Dick. R. 194.

§ 1337. **Same.** — It was at first a question whether upon such a limitation to trustees after a prior limitation for life they took any estate in the land, or only a right of entry on the forfeiture or surrender of the first tenant for life, by reason that the limitation being only during his life could not commence or take effect after his death. But it was settled that the trustees had the immediate freehold in them as an estate pur autre vie; and that at law they could maintain and defend any action respecting the freehold.[1] Upon this ground it is that such trustees are entitled to an injunction in equity to prevent waste in the lands, and in mines, and timber thereon, as these constitute a valuable and sometimes the most valuable portion of the inheritance, which the trustees are bound to preserve. In short as has been observed by Lord Hardwicke, the duty of such trustees being to preserve the inheritance, every assistance will be granted by Courts of Equity in support of their trust, and to aid them in its due accomplishment.[2]

§ 1338. **Breaches of Trust by Trustees.** — On the other hand Courts of Equity will treat as a distinct breach of trust every act of such trustees inconsistent with their proper duty, and will give relief to the parties injured by such misconduct.[3] If therefore they should in violation of their trust join in any conveyance to destroy the contingent uses or remainders, they will be held responsible therefor. If the persons taking under such conveyance are volunteers, or have notice of the trust, they will be held liable to the same trusts, and decreed to restore the estate. If they are purchasers without notice, then the lands are indeed discharged of the trust; but the trustees themselves will be held liable for the breach in equity, and will be decreed to purchase lands with their own money equal in value to the lands sold, and to hold them upon the same trusts and limitations as they held those sold by them.[4]

§ 1339. **Same.** — But it is not in every case in which trustees have joined in a conveyance to destroy contingent remainders

[1] Duncomb *v.* Duncomb, 3 Lev. 437; Fearne on Conting. Rem. by Butler, 326 (7th ed.).

[2] Garth *v.* Cotton, 1 Dick. 195 to 197, 205, 208, 219; Eden on Injunc., ch. 9, pp. 167, 168; 1 Madd. Ch. Pr. 395 to 397; Stansfield *v.* Habergham, 10 Ves. 278.

[3] Garth *v.* Cotton, 1 Dick. 199.

[4] Garth *v.* Cotton, 1 Dick. R. 199, 200 to 202, 205, 208, 219; Pye *v.* Gorges, Prec. Ch. 308; s. c. 1 P. Will. 128; Mansel *v.* Mansel, 2 P. Will. 680 to 685; Fearne on Conting. Rem. by Butler, 326, 327 (7th ed.); 1 Madd. Ch. Pr. 393, 394.

that they will be deemed guilty of a breach of trust.[1] In some cases Courts of Equity will even compel them to join in conveyances which may affect or destroy such remainders. And in such cases it has been supposed that what they may be compelled to do by suit, if voluntarily done, will not be deemed a breach of trust.[2] But the cases in which Courts of Equity will compel trustees to join in such conveyances are (as has been correctly said) rare. They have happened under peculiar circumstances; either of pressure to discharge incumbrances prior to the settlement, or in favor of creditors where the settlement was voluntary, or for the advantage of persons who were the first objects of the settlement, as for example to enable the first son to make a settlement upon an advantageous marriage.[3]

§ 1340. **Same.** — There is no question however that the trustees may join with the cestui que trust in tail in any conveyance to bar the entail; for that is no breach of trust, but precisely what they may be compelled to do; although the cestui que trust himself might have barred such entail without their joining in it.[4] But there is a great distinction between cases where Courts of Equity will compel trustees to join in a conveyance to destroy contingent remainders and cases where they will decree them to be guilty of a breach of trust for such an act when it is voluntarily done by them. Thus for example Courts of Equity will not punish trustees as guilty of a breach of trust for joining in a conveyance of the cestui que trust in tail to bar the entail. And yet it is equally clear that they will not compel them to join in such conveyance.[5] The ground of this distinction is that trustees to support contingent remainders are considered as honorary trustees for the benefit of the family, and the interests of mankind require them to be treated as such by all courts of justice; and unless a violation of their trust appears, Courts of Equity ought not to take away all their discretion, or to direct them not to join in any conveyance without the order of such a court, al-

[1] Moody *v.* Walters, 16 Ves. 302, 303, 307, to 314. [2] Id. 310.

[3] Fearne on Conting. Rem. by Butler, 331 to 337, and the cases there cited; 1 Madd. Ch. Pr. 394, 395; Moody *v.* Walters, 16 Ves. 301 to 314, and cases there cited.

[4] Fearne on Conting. Rem. by Butler, 133; 1 Eq. Abridg. 384, E. 1, note; Robinson *v.* Comyns, Cas. temp. Talb. 166; Boteler *v.* Allington, 1 Bro. Ch. R. 72; and Belg's note (5); Marwood *v.* Turner, 3 P. Will. 165, 171; Biscoe *v.* Perkins, 1 Ves. & B. 485.

[5] Moody *v.* Walters, 16 Ves. 301 to 314; Biscoe *v.* Perkins, 1 V. & Beam. 491; Woodhouse *v.* Hoskins, 3 Atk. 22; s. c. cited 16 Ves. 308; Barnard *v.* Large, 1 Bro. Ch. R. 354; Osbrey *v.* Bury, 1 B. & Beatt. 58.

though the trustees may be of opinion that the interests of the family require it. The effect of such a doctrine would be to make the Courts of Equity the trustees of all the estates in the country.[1]

§ 1341. **Same.** — It is not a little difficult to ascertain from the authorities the true nature and extent of the duties and liabilities of trustees to preserve contingent remainders, and in what cases they may or ought to join in conveyances to destroy them or not. Lord Eldon has expressed himself unable to deduce the true principle from them. His language is: "The cases are uniform to this extent; that if trustees before the first tenant in tail is of age join in destroying the remainders, they are liable for a breach of trust, and so is every purchaser under them with notice. But when we come to the situation of trustees to preserve remainders who have joined in a recovery after the first tenant in tail is of age, it is difficult to say more than that no judge in equity has gone the length of holding that he would punish them as for a breach of trust, even in a case where they would not have been directed to join. The result is that they seem to have laid down as the safest rule for trustees, but certainly most inconvenient for the general interests of mankind, that it is better for the trustees never to destroy the remainders, even if the tenant in tail concurs, without the direction of the court. The next consideration is in what cases the court will direct them to join. And if I am governed by what my predecessors have done and refused to do, I cannot collect in what cases trustees would or would not be directed to join, as it requires more abilities than I possess to reconcile the different cases with reference to that question. They all however agree that these trustees are honorary trustees; that they cannot be compelled to join; and all the judges protect themselves from saying that if they had joined they should be punished; always assuming that the tenant in tail must be twenty-one." [2]

[1] Moody *v.* Walters, 16 Ves. 310, 311; Biscoe *v.* Perkins, 1 Ves. & Beam. 491. Lord Hardwicke, in Potter *v.* Chapman (Ambler, R. 99), said that if a trust is personal and has not been corruptly exercised, Courts of Equity will not interpose. This remark is applicable, not to cases like those of trustees to preserve contingent remainders, but to trusts purely personal, and in the discretion of the trustee as to their exercise.

[2] Biscoe *v.* Perkins, 1 V. & Beam. 491, 492.

CHAPTER XXIX

EXPRESS TRUSTS. — TERMS FOR YEARS

§ 1342. **Terms for years.** — In the next place in regard to TERMS FOR YEARS, whereby trusts are created to subserve the special objects of the parties. The creation of long terms for years for the purpose of securing money lent on mortgage of the land took its rise from the inconveniences of the ancient way of making mortgages in fee by way of feoffment and other solemn conveyances with a condition of defeasance. For by such mode if the condition was not punctually performed the estate of the mortgagee at law became absolute and was subject to incumbrances made by him, and even (as some thought) to the dower of his wife. Hence it became usual to create long terms of years upon the like condition, because among other reasons such terms on the death of the mortgagee became vested in his personal representatives who were also entitled to the debt and could properly discharge it.[1] But as this subject will be more fully considered hereafter,[2] it is only necessary to say in this place that by analogy to the case of mortgages, terms for years were often created for securing the payment of jointures and portions for children, and for other special trusts. Such terms do not determine upon the mere performance of the trusts for which they are created unless there be a special proviso to that effect in the deed. The legal interest thus continues in the trustee after the trusts are performed, although the owner of the fee is entitled to the equitable and beneficial interest therein. At law the possession of the lessee for years is deemed to be the possession of the owner of the freehold. And by analogy Courts of Equity hold that where

[1] Black. Comm. 158; 2 Fonbl. Eq. B. 2, ch. 4, § 3, (*i*); Id. B. 3, ch. 1, § 2, and note (*b*); Co. Litt. 290 *b*, Butler's note (1), § 13; Id. 208 *a*, note (1); Bac. Abridg. Mortgage, A.

[2] See post, chapter on Mortgages, §§ 1348 to 1383.

the tenant for the term of years is but a trustee for the owner of the inheritance he shall not oust his cestui que trust, or obstruct him in any act of ownership or in making any assurances of his estate. In these respects therefore the term is consolidated with the inheritance. It follows the descent to the heir, and all the alienations made of the inheritance or of any particular estate or interest carved out of it by deed or by will or by act of law.[1] In short a term attendant upon the inheritance by express

[1] 2 Fonbl. Eq. B. 2, ch. 4, § 3, note (*i*), § 4, note (*o*); Co. Litt. 290 *b*, Butler's note (1), § 13; Whitchurch *v.* Whitchurch, 2 P. Will. 236; Charlton *v.* Low, 3 P. Will. 330; Villers *v.* Villers, 2 Atk. 72; Willoughby *v.* Willoughby, Term Rep. 765. This whole subject was fully considered by Lord Hardwicke in his masterly judgment in Willoughby *v.* Willoughby (1 Term Rep. 763). The following extract from that opinion contains a clear exposition of the points in the text. "What is the nature of a term attendant upon the inheritance? The attendance of terms for years upon the inheritance is the creature of a Court of Equity, invented partly to protect real property, and partly to keep it in the right channel. In order to do it this court framed the distinction between such attendant terms and terms in gross, notwithstanding that in the consideration of the common law they are both the same, and equally keep out the owner of the fee so long as they subsist. But as equity always considers who has the right in conscience to the land, and on that ground makes one man a trustee for another, and as the common law allows the possession of the tenant for years to be the possession of the owner of the freehold, this court said where the tenant for years is but a trustee for the owner of the inheritance, he shall not keep out his cestui que trust nor, pari ratione, obstruct him in doing any acts of ownership or in making any assurances of his estate. And therefore in equity such a term for years shall yield, ply, and be moulded according to the uses, estates, or charges which the owner of the inheritance declares, or carves out of the fee. Thus the dominion of real property was kept entire. Of this we meet with nothing in our books before Queen Elizabeth's reign, when mortgages by long terms of years began to come into use. Before that time the law looked upon very long terms with a jealous eye and laid them under violent presumptions of fraud, because they tended to prevent the Crown of its forfeitures, and the lord of the fruits of his tenures. Neither could there much before that time be any use of a term attendant upon the inheritance to preserve the limitations of a settlement in many cases, because the tenant for years was in the power of the owner of the freehold till the statute 21 Hen. VIII. c. 15, which enabled him to falsify a recovery against the tenant of the freehold. Till then, by such a recovery the term was gone, and consequently could attend upon nothing. But since the law was altered by that statute and the term was preserved, this court could lay hold of it. Proceeding upon these principles, wherever a term for years has been vested in a stranger in trust for the owner of the inheritance, whether by trust expressly declared or by construction or judgment of this court, which is called a trust by operation of law, this court has said that the trust or beneficial interest of such a term shall follow or be affected by all such conveyances, assurances, or charges as the owner creates of the inheritance. Although the law says that the term and the fee being in different persons, they are separate, distinct estates, and the

declaration or by implication of law may be said to be governed in equity by the same rules generally to which the inheritance is subject.[1]

§ 1343. **Same.** — Still although the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law, and the whole benefit and advantage to be made of the term arises from this separation. For if two or more persons have claims upon the inheritance under different titles, a term of years attendant upon it is still so distinct from it that if any one of them obtains an assignment of it then (unless he is affected by some of the circumstances which equity considers as fraudulent or as otherwise controlling his rights) he will be entitled both at law and in equity to the estate for the whole continuance of the term to the utter exclusion of all the other claimants. This, if the term is of long duration, absolutely deprives all the other claimants of every kind of benefit in the land.[2]

one not merged in the other, yet the beneficial and profitable interest of both being in the same person, equity will unite them for the sake of keeping the property entire. Therefore if the owner of the inheritance levy a fine sur conusance de droit, or suffer a common recovery to uses, the trust of the term shall follow and be governed by those uses, although a term for years is not the subject of a fine sur conusance de droit, much less of a common recovery; nor would equity allow the trust of a term in gross to be settled with such limitations. This doctrine is always allowed to have its full effect as between the representatives, that is, the heir either in fee-simple or fee-tail of the owner of the inheritance, and the executor, and all persons claiming as volunteers under him, though certain distinctions have been admitted as to creditors which are not material to the present case. And in general the rule has been the same, whether the trust of the term be created by express declaration, or arise by construction and judgment of this court. On this ground are the cases of Tiffin *v.* Tiffin, 2 Ch. Cas. 49 and 55, and Vern. 1; Best *v.* Stamford, 2 Vern. 420, and Preced. in Chan. 252; Haytor *v.* Rod, 1 P. Will. 360; Whitchurch *v.* Whitchurch, before the Lord's Commissioners, 1725, 2 P. Will. 236, and Lady Dudley *v.* Lord Dudley, Precedents in Chancery, 241, 2 Chan. Cas. 160, which was a case on the custom of London. All these cases were cited at the bar, and I choose to put them together without stating them particularly, because they all tend only to prove this general proposition. But although in all these cases this court considers the trust of the term as annexed to the inheritance, yet the legal estate of the term is always separate from it, and must be so, otherwise it would be merged. And this gives the court an opportunity to make use of such terms as a guard and protection to an equitable owner of the inheritance against mesne conveyances, which would carry the fee at common law, or to a person who is both legal and equitable owner of the inheritance against such mesne incumbrances as he ought not to be affected with in conscience. And here the court often disannexes the trust of the term from the strict legal fee, but still in support of right."

[1] Sugden on Vendors, ch. 9, § 2, n. 7, p. 450.

[2] Co. Litt. 290 *b*, Butler's note (1), § 13.

§ 1344. **Same.** — Supposing therefore that A purchases an estate which previous to his purchase had been sold, mortgaged, leased, and charged with every kind of incumbrance to which real property is subject; in this case A and the other purchasers and all the incumbrancers have equal claim upon the estate. This is the meaning of the expression that their equity is equal. But if there is a term of years subsisting in the estate which was created prior to the purchases, mortgages, or other incumbrances, and A procures an assignment of it in trust for himself, this gives him the legal interest in the lands during the continuance of the term absolutely discharged from and unaffected by any of the purchases, mortgages, and other incumbrances subsequent to the creation of the term but prior to his own purchase. This is the meaning of the expression in assignments of terms that they are to protect the purchaser from all mesne incumbrances. But it is to be observed that A to be entitled in equity to the benefit of the term must have all the following requisites: he must be a purchaser for a valuable consideration; his purchase must in all respects be a fair purchase and free from every kind of fraud; and at the time of his purchase he must have no notice of the prior conveyance, mortgage charge, or other incumbrance. It is to be observed that mortgagees, lessees, and other incumbrancers are purchasers in this sense to the amount of their several charges, interests, or rights. If any person of this description unaffected by notice or fraud takes a defective conveyance or assignment of the fee or of any estate carved out of it defective either by reason of some prior conveyance or some prior charge or incumbrance, and if he also takes an assignment of a term to a trustee for himself or to himself where he takes the conveyance of the inheritance to his trustee, — in each of these cases he is entitled to the full benefit of the term; that is, he may use the legal estate of the term to defend his possession during the continuance of the term, or if he has lost the possession, to recover it at common law in preference to all claimants prior to his purchase but subsequent to his term.[1]

[1] The whole of these last two sections have been copied almost verbatim from Mr. Butler's learned note to Co. Litt. 290 *b*, § 13, which gives a thorough and at the same time a condensed view of the doctrines of equity on this subject. The notes of Mr. Fonblanque on the same subject are highly valuable. 2 Fonbl. Eq. B. 2, ch. 4, § 3, notes (*i*), (*l*), § 4, note (*o*). The basis of the general statements by each of these distinguished authors will be found in the opinion of Lord Hardwicke in the case of Willoughby *v.* Willoughby, 1 Term Rep. 765. See also Sugden

§ 1345. **Same.** — At the common law all terms for years are (as has been intimated) deemed to be terms in gross.[1] And Courts of Equity when they hold terms for years to be attendant upon the inheritance always do so by affecting the person holding the term with a trust for that purpose either upon the express declaration of the parties or by implication of law. If the term is made attendant upon the inheritance by express declaration, it is immaterial whether the term if it were in the same hands with the inheritance would or would not have merged, or whether it be subject to some ulterior limitation to which the inheritance is not subject; for the express declaration will be sufficient to make it attendant upon the inheritance. But if the term is to be made attendant upon the inheritance by implication of law, then it is necessary that it should not be subject to any other limitation, and that the owner of the inheritance should be entitled to the whole trust in the term.[2] The general rule is that where the same person has the inheritance and the term in himself although he has in one the equitable interest and in the other the legal interest, there the inheritance by implication draws to itself the term and makes that attendant upon it. For as at law if the legal estate in the term and in the inheritance come into the same hand the term is merged and the estate goes to the heir, so in equity where the one estate is equitable and the other legal it is in the nature of a merger; and the trust of the term will follow the inheritance.[3]

§ 1346. **Same.** — But although a term may be so attendant upon the inheritance, yet as the legal estate in it remains distinct and separate from the inheritance at law it may at any time be

on Vendors, ch. 9, § 2, pp. 387 to 462 (7th ed.); Id. pp. 510 to 529 (9th ed.); 1 Madd. Ch. Pr. 406 to 413; Powell on Mortg. ch. 8, pp. 189, 390; Id. 464 to 513, and the notes of Coventry and Hughes. See In re Russell Road Moneys, L. R. 12 Eq. 78.

[1] Willoughby *v.* Willoughby, 1 T. Rep. 765; Scott *v.* Fenhoullet, 1 Bro. Ch. R. 69, 70.

[2] 2 Fonbl. Eq. B. 2, ch. 4, § 3, note (*l*); Scott *v.* Fenhoullet, 1 Bro. Ch. R. 70, and Mr. Belt's notes. If there be a substantial intervening interest in a third person, there the term will not by implication or without an express declaration be attendant upon the inheritance. Scott *v.* Fenhoullet, 1 Bro. Ch. R. 69, 70, and Mr. Belt's notes; Sugden on Vendors, ch. 9, § 2, art. 6, pp. 455 to 459 (7th ed.); Id. pp. 521 to 525 (9th ed.).

[3] Capel *v.* Girdler, 9 Ves. 510; Best *v.* Stamford, 2 Freem. R. 288; s. c. Prec. Ch. 252; Sugden on Vendors, ch. 9, § 2, art. 6, pp. 455 to 459 (7th ed.); Id. pp. 521 to 525 (9th ed.). Whitchurch *v.* Whitchurch, 2 P. Will. 236; Sidney *v.* Shelly, 19 Ves. 352; Kelly *v.* Power, 2 Ball & Beatt. 253.

disannexed therefrom by the proper acts of the parties in interest and be turned into a term in gross at law. And a term so attendant becomes a term in gross when it fails of a freehold to support it or it is divided from the inheritance by different limitations from those of the latter.[1] In many cases the distinction between terms in gross and terms attendant upon the inheritance is highly important; the former being generally treated as mere personalty, the latter as partaking of the realty and following the fate of the inheritance. Thus for example a term attendant upon the inheritance will not pass by a will not executed so as to pass real estate under the Statute of Frauds. So such a term is real assets in the hands of the heir; for the Statute of Frauds having made a trust in fee assets in the hands of the heir, the term which follows the inheritance and is subject to all the charges which would affect the inheritance must also be real assets.[2] On the contrary a term in gross is personal assets only.[3]

§ 1347. **Same.** — It would lead us too far from the immediate object of these Commentaries to go at large into all the doctrines of Courts of Equity in regard to terms for years created upon special trusts. It may be remarked however that where such terms are created to raise portions for children upon marriage settlements, and the settler also personally covenants to pay such portions, the real estate is considered as the primary fund, and the personal estate of the covenantor as auxiliary only.[4] If there be no such personal covenant for the payment of the portions, but only a covenant to settle lands and to raise a term of years out of the lands for securing the portions, in such a case, even although there be a bond to perform the covenant, the portions are not in any event payable out of his personal estate.[5]

[1] Fonbl. Eq. B. 2, ch. 4, § 3, and notes (*i*), (*l*); Willoughby *v.* Willoughby, 1 Term R. 765, 770.

[2] 2 Fonbl. Eq. B. 2, ch. 4, § 6, and notes (*r*), (*s*); Sugden on Vendors, ch. 9, § 2, art. 7, pp. 459 to 461; Id. pp. 525 to 528 (9th ed.).

[3] Ibid.

[4] 1 Madd. Ch. Pr. 327, 398; Lechmere *v.* Charlton, 15 Ves. 197, 198; ante, §§ 777, 778, 1656, 1657.

[5] Edwards *v.* Freeman, 2 P. Will. 437, 438. Very intricate questions have arisen as to the time when portions are to be raised by trustees for the benefit of children, especially upon reversionary interests. Upon this subject I cannot do better than to quote a passage from the learned commentaries of Mr. Chancellor Kent (4 Kent Comm. Lect. 58, pp. 148 to 150, 3d ed.). "A very vexatious question has been agitated, and has distressed the English courts, from the early case of Graves *v.* Mattison down to the recent decision in Wynter *v.* Bold, as to the time at which money provided for children's portions may be raised by sale or mort-

gage of a reversionary term. The history of the question is worthy of a moment's attention as a legal curiosity and a sample of the perplexity and uncertainty with which complicated settlements 'rolled in tangles', and subtle disputation, and eternal doubts, will insensibly encumber and oppress a free and civilized system of jurisprudence. If nothing appears to gainsay it, the period at which they are to be raised is presumed to have been intended to be that which would be most beneficial to those for whom the portions were provided. If the term for providing portions ceases to be contingent and becomes a vested remainder in trustees, to raise portions out of the rents and profits after the death of the parents and payable to the daughters coming of age or marriage, a Court of Equity has allowed a portion to be raised by sale or mortgage in the lifetime of the parents, subject nevertheless to the life estate. The parents' death is anticipated in order to make provision for the children. The result of the very protracted series of these discussions for one hundred and fifty years is, that if an estate be settled to the use of the father for life, remainder to the mother for life, remainder to the sons of the marriage in strict settlement, and in default of such issue with remainder to trustees to raise portions, and the mother dies without male issue, and leaves issue female, the term is vested in remainder in the trustees; and they may sell or mortgage such a reversionary term in the lifetime of the surviving parent for the purpose of raising the portions; unless the contingencies on which the portions were to become vested had not happened, or there was a manifest intent that the term should not be sold or mortgaged in the lifetime of the parents, nor until it had become vested in the trustees in possession. The inclination of the Court of Chancery has been against raising portions out of reversionary terms by sale or mortgage in the lifetime of the parent, as leading to a sacrifice of the interests of the person in reversion or remainder. And modern settlements usually contain a prohibitory clause against it." Post, §§ 1656, 1657.

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