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COMMENTARIES

ON

EQUITY JURISPRUDENCE

VOLUME III

COMMENTARIES

ON

EQUITY JURISPRUDENCE

AS ADMINISTERED IN

ENGLAND AND AMERICA

By JOSEPH STORY, LL.D.

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

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

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

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BY

W. H. LYON, Jr., LL.B.

Of the Raleigh, N.C., Bar

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

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COMMENTARIES
ON
EQUITY JURISPRUDENCE

VOLUME THREE

CHAPTER XXX

EXPRESS TRUSTS. — MORTGAGES

§ 1348. **Mortgages.** — In the next place as to MORTGAGES. It is wholly unnecessary to enter into a minute examination of the origin and history of this well-known and universally received security in the countries governed by the common law. During the existence of the system of feudal tenures in its full rigor, mortgages could have had no existence in English Jurisprudence, as they were incompatible with the leading objects of that system.[1] The maxim of the feudal law was, "Feudalia, invito domino, aut agnatis, non recte subjiciuntur hypothecæ, quamvis fructus posse esse, receptum est."[2] But as soon as the general right of alienation of real property was admitted, the necessities of the people almost immediately led to the introduction of mortgages.[3] Littleton has enumerated two sorts, which were distinguished by the names of vadium vivum and vadium mortuum.[4] The latter was in the common law called a mortgage, from two French words, mort (mortuum or dead) and gage (vadium, pignus or pledge), because if not redeemed at the stipulated time it was dead to the debtor.[5] The former was called simply a living

[1] Glanville, Lib. 10, cap. 6.
[2] Bac. Abridg. Mortgage, A; 2 Fonbl. Eq. B. 3, ch. 1, § 1, note (*a*).
[3] 2 Fonbl. Eq. B. 3, ch. 1, § 1, and note (*a*); Bac. Abridg. Mortgage, A.
[4] Litt. §§ 327, 332; Co. Litt. 202 *b*, 205 *a*.
[5] Glanville seems to give a somewhat different explanation. "Mortuum vadium dicitur illud, cujus fructus vel redditus interim percepti in nullo se acquietant." Glanv. Lib. 10, cap. 6; 4 Kent, Comm. Lect. 58, pp. 136, 137 (3d ed.), and note (*b*).

pledge, in contradistinction to the latter, for the reason given by Lord Coke. "Vivum autem dicitur vadium, quia nunquam moritur ex aliqua parte, quod ex suis proventubus acquiratur."[1] Thus if a man borrowed £100 of another and made over an estate of lands to him until he received the same sum out of the issues and profits of the land, it was called a vivum vadium; for neither the money nor the land dieth or is lost. But if a feoffment was made of land, upon condition that if the feoffor paid to the feoffee the sum of £100 on a certain day he might re-enter on the land; there, if he did not pay the sum at the day, he could not at the common law afterwards re-enter; but (as Littleton said) the land was taken away from him forever, and so dead to him. And if he did pay at the day, then the pledge was dead as to the feoffee; and therefore the feoffee was called tenant in mortgage, the estate being mortuum vadium.[2]

§ 1349. **Same.** — It has been generally supposed that the notion of mortgages and of the redemption thereof in the English law was borrowed from the Roman law, although Mr. Butler contends that they were strictly founded on the common-law doctrine of conditions.[3] Whatever truth there may be in this latter observation as to the origin of mortgages of lands in the English law, there is no doubt that the notion of the equity of redemption was derived from the Roman law, and that it is purely the creature of Courts of Equity.[4] In the Roman law there were two sorts of transfers of property as security for debts; namely, the pignus and the hypotheca. The pignus, or pledge, was when anything was pledged as a security for money lent, and the possession thereof was passed to the creditor upon the condition of returning it to the owner when the debt was paid. The hypotheca was when the thing pledged was not delivered to the creditor, but remained in the possession of the debtor.[5] In respect to what was called an hypothecary action there was no difference

[1] Co. Litt. 205 *a*.

[2] Littleton, § 333; Co. Litt. 205 *a*; 2 Black. Comm. 157.

[3] In respect to mortgages of lands this opinion of Mr. Butler is certainly entitled to great consideration, for Littleton expressly puts mortgages as estates on condition. In respect to mortgages and pledges of personal property there may have been originally a distinction borrowed from the civil law. Glanville, Lib. 10, cap. 6. Courts of equity, in a great variety of cases of both sorts, act upon the principles of the civil law.

[4] 2 Fonbl. Eq. B. 3, ch. 1, § 1, note (*a*).

[5] Halifax, Roman Law, ch. 15, p. 63; Bac. Abr. Mortgage, A.; The Brig Nestor, 1 Sumner, R. 81, 82; Vinn. ad Inst. Lib. 3, tit. 15, Comm. 1. 2; Ryall *v.* Rolle, 1 Atk. 166, 167; Story on Bailments, § 286.

between them. "Inter pignus," says the Institutes, "autem et hypothecam (quantum ad actionem hypothecariam attinet) nihil interest; nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur. Sed in aliis differentia est. Nam pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori; maxime si mobilis sit. At eam quæ sine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus." [1] The Digest states the distinction with still more pregnant brevity. "Proprie pignus dicimus, quod ad creditorem transit; hypothecam, cum non transit, nec possessio ad creditorem." [2]

§ 1350. **Same.** — In the Roman law it seems that the word "pignus" was often used indiscriminately to describe both species of securities, whether applied to movables or immovables. Thus it is said in the Digest, "Pignus contrahitur non sola traditione, sed etiam nuda conventione, etsi non traditum est." [3] But in an exact sense pignus was properly applied to movables and hypotheca to immovables. "Pignus appellatum," says the Digest, "a pugno, quia res, quæ pignori dantur, manu traduntur. Unde etiam videri potest verum esse quod quidam putant, pignus proprie rei mobilis constituti." [4] So that it answered very nearly to the corresponding term *pledge* in the common law, which although sometimes used in a general sense to include mortgages of land, is in the stricter sense confined to the pawn and deposit of personal property.[5] In the Roman law however there was generally no substantial difference, in the nature and extent of the rights and remedies of the parties, between movables and immovables, whether pledged or hypothecated. But in the common law, as we shall presently see, the difference as to rights and remedies between a pledge of personal property and a mortgage of real estate, or even of personal property, is very marked and important.[6]

[1] Justin. Inst. Lib. 4, tit. 6, § 7; Dig. Lib. 20, tit. 1, l. 5, § 1; Vinn. ad Inst. Lib. 3, tit. 15.

[2] Dig. Lib. 13, tit. 7, l. 9, § 2. [3] Dig. Lib. 13, tit. 7, l. 1.

[4] Dig. Lib. 50, tit. 16, l. 238, § 2; Pothier, Pand. Lib. 20, tit. 1, n. 1; 1 Domat, B. 3, tit. 1, § 1, art. 1; Vinn. ad Inst. 4, tit. 6, § 8; Comm. 112; Id. Lib. 3, tit. 15, § 4, and Comm. 1; Story on Bailments, § 286; Ryall *v.* Rolle, 1 Ves. 358; s. c. 1 Atk. 166, 167.

[5] See 4 Kent, Comm. Lect. 58, pp. 138, 139 (2d ed.); Story on Bailments, §§ 286, 287; 1 Powell on Mortg. 3, by Coventry and Hughes and Rand.

[6] See Markby, Elements of Law, §§ 439–453 (3d ed.).

§ 1351. **Same.** — In the Roman law there were two sorts of actions applicable to pledges and hypothecations; the action called actio pigneratitia and that called actio hypothecaria. The former was properly an action in personam and divisible into two sorts: (1) Actio directa, which lay in favor of the debtor against the creditor, to compel him to restore the pledge when the debt had been paid;[1] (2) Actio contraria, which lay in favor of the creditor against the debtor, to recover the proper value or compensation when the latter had retained possession of the pledge, or when the title to it had failed by fraud or otherwise, or when the creditor sought compensation for expenses upon it.[2] The actio hypothecaria on the other hand was strictly in rem, and was given to the creditor to obtain possession of the pledge in whosever hands it might be.[3]

§ 1352. **Same.** — Without dwelling more upon topics of this sort, which are purely technical, it may be useful to state, as illustrative of some of the doctrines admitted into Equity Jurisprudence, that under the civil law, although the debt for which the mortgage or pledge was given was not paid at the stipulated time, it did not amount to a forfeiture of the right of property of the debtor therein. It simply clothed the creditor with the authority to sell the pledge and reimburse himself for his debt, interest, and expenses; and the residue of the proceeds of the sale then belonged to the debtor.[4] It has been supposed by some writers that to justify such a sale it was indispensable that it should be made under a decretal order of some court upon the application of the creditor. But although the creditor was at liberty to make such an application, it does not appear that he might not act in ordinary cases without any such judicial sanction, after giving the proper notice of the intended sale as prescribed by law to the debtor. When the debtor could not be found and notice could not be given to him, such a decretal order seems to have been necessary.[5] And where a sale could not be effected,

[1] Just. Inst. Lib. 3, tit. 15, § 4; Vinn. ad Inst. Lib. 3, tit. 15, Comm. 2, 3.

[2] Dig. Lib. 13, tit. 7, l. 3, 8, 9; Pothier, Pand. Lib. 13, tit. 7, n. 24 to 29; Vinn. ad Inst. Lib. 3, tit. 15, § 4, Comm. 2, 3; Id. Lib. 4, tit. 6, § 8, Comm. 6. The statement of Mr. Powell respecting the Actio Pigneratitia and Hypothecaria is not accurate. See 1 Brown, Civil Law, 204, note (8).

[3] Vinn. ad Inst. Lib. 3, tit. 15, § 4, Comm. 3; Id. Lib. 4, tit. 6, § 8, Comm. 1, 2; Pothier, Pand. Lib. 20, tit. 1, §§ 29 to 36.

[4] Pothier, Pand. Lib. 20, tit. 5; 1 Domat, B. 3, tit. 1, § 3, art. 1.

[5] 1 Bro. Civ. Law, 204, note (8); Cod. Lib. 8, tit. 34, l. 3, §§ 1 to 3; Heinecc. Elem. Pand. Ps. 4, tit. 5, §§ 37 to 44; Story on Bailments, § 309; Cortelyou *v.* Lansing, 2 Cain, Cas. Er. 213.

a decree in the nature of a foreclosure could be obtained under certain circumstances, by which the absolute property would be vested in the creditor.[1]

§ 1353. **Same.** — This authority to make a sale might be exercised not only when it was expressly so agreed between the parties, but when the agreement between them was silent on the subject. Even an agreement between them that there should be no sale was so far invalid that a decretal order of sale might be obtained upon the application of the creditor.[2] On the other hand if by the agreement it was expressly stipulated that if the debt was not paid at the day the property should belong to the creditor in lieu of the debt, such a stipulation was held void as being inhuman and unjust.[3]

§ 1354. **Tacking of Simple Debts to Mortgage Debt.** — In some cases also by the civil law a sort of tacking of debts could be insisted on by the mortgagee against the mortgagor, but not against intermediate incumbrancers;[4] and where movables and immov-

[1] Cod. Lib. 8, tit. 34, l. 3, §§ 2, 3; Pothier, Pand. Lib. 20, tit. 5, n. 34; Vinn. ad. Inst. Lib. 2, tit. 8, Comm. 2, 3; Story on Bailments, § 309. But see 4 Kent, Comm. Lect. 58, pp. 138, 139 (3d ed.).

[2] 1 Bro. Civ. Law, 203, 204; 1 Domat, B. 3, tit. 1, § 3, art. 9, 10; Dig. Lib. 13, tit. 7, l. 4; Cod. Lib. 8, tit. 28, l. 14; Pothier, Pand. Lib. 20, tit. 5, n. 1 to 5.

[3] Domat, B. 3, tit. 1, § 3, art. 11; Cod. Lib. 8, tit. 35, l. 3; 4 Kent, Comm. Lect. 58, p. 136, note (*a*) (3d ed.). See Markby, Elements, §§ 448, 456 (3d ed.).

[4] Markby, § 455. See editor's note to § 1023, infra. Cod. Lib. 8, tit. 27, l. 1; Dig. Lib. 20, tit. 4, l. 20; 1 Domat, B. 3, tit. 1, § 3, art. 3, 4. In a note to the former volume (§ 415, note 2, p. 419, § 420, and notes) it was stated that the doctrine of tacking mortgages was not known in the civil law. Of course the remarks there made were applicable to the case of tacking a first and third mortgage to the exclusion of an intermediate mortgagee; and not what may be called a tacking of debts by the mortgagee in the case of a mortgagor seeking redemption. It is clear that the civil law in the case of the mortgagor seeking to redeem did not permit it, unless the mortgagor paid not only the debt for which the mortgage was given, but all other debts due to the mortgagee. "Si in possessione fueris consitutus," says the Code, "nisi ea quoque pecunia tibi a debitore reddatur, vel offeratur, quæ sine pignore debetur, eam restituere propter exceptionem doli mali no cogeris. Jure enim contendis, debitores eam solam pecuniam, cujus nomine ea pignora obligaverunt, offerentes audiri non oportere, nisi pro illa satisfecerint quam mutuam simpliciter acceperunt." But then it is immediately added that this does not apply to the case of a second creditor. "Quod in secundo creditore locum non habet; nec enim necessitas ei imponitur chirographarium etiam debitum priori creditore offerre." Cod. Lib. 8, tit. 27, l. 1. For it was expressly held in the civil law that where there was a first mortgage and then a second mortgage, and then the first mortgagee lent another sum to the debtor, he could not tack it against the second mortgagee. Pothier, Pand. Lib.

ables were included in the same mortgage, and movables were first to be sold and applied in the course of payment.[1]

§ 1355. **Same.** — These instances are sufficient to show some strong analogies between the Roman law and the Equity Jurisprudence of England on the subject of mortgages, and to evince the probability if not the certainty that the latter has silently borrowed some of its doctrines from the former source.[2] But to develop them at large would occupy too much space; and we may now therefore return to the more immediate subject of mortgages at the common law.

§ 1356. **Same.** — We have already had occasion to take notice of the inconveniences attendant upon the creation of mortgages in fee, and of the substitution in their stead of terms for years.[3] But in truth whether the one course or the other was adopted, so far as the common law was concerned the mortgagor was subjected to great hardships and inconveniences if he did not strictly fulfil the conditions of the mortgage at the very time specified; as he

20, tit. 4, n. 10; Dig. Lib. 20, tit. 4, l. 20. Mr. Chancellor Kent (4 Kent, Comm. Lect. 58, p. 136, note (*a*); Idem, pp. 175, 176, 3d ed.) has said that in the civil law the mortgagee was even allowed to tack another incumbrance to his own, and thereby to gain a preference over an intermediate incumbrance; for which he cites Dig. Lib. 20, tit. 4, l. 3. If, as I presume, his meaning is that the tacking gave a preference over the intermediate incumbrancer, with great deference I do not find that the passage cited supports the doctrine; and it seems contrary to the passages already cited from Cod. Lib. 8, tit. 27, l. 1, and Dig. Lib. 20, tit. 4, l. 20. There are other passages in the Code on the subject of a subsequent mortgagee acquiring the rights of a first mortgagee by paying his mortgage, and thereby confirming his own title by substitution. But it appears to me that they do no more than subrogate the subsequent mortgagee to all the rights of the first mortgagee, and that they do not enlarge those rights. See Code, Lib. 8, tit. 18, l. 1, 5; 1 Domat, B. 3, tit. 1, § 3, art. 7, 8; Id. B. 3, tit. 1, § 6, art. 6, 7; Heinecc. Elem. Pand. Ps. 4, tit. 4, § 35. Doctor Brown too (1 Brown, Civ. Law, 208; Id. 202) insists that a mortgagee might tack another incumbrance to his mortgage; and if he lent more money by way of further charge on the estate he was, in the civil law, preferred as to this charge also before a mortgage created in the intermediate time. He cites the Dig. Lib. 20, tit. 4, l. 3, which does not (as has been already stated) seem to support the conclusion. In the Equity Jurisprudence of England (as we have seen) the heir of a mortgagor cannot (although the mortgagor himself may) redeem without paying the bond debt of the mortgagor as well as the mortgage debt. Ante, § 418. And tacking is also permitted against mesne incumbrancers in certain cases. See ante, §§ 412 to 419; 2 Wooddes. Lect. 24, pp. 158, 159; 4 Kent, Comm. Lect. 58, pp. 175, 176 (3d ed.); 2 Fonbl. Eq. B. 3, ch. 1, § 9, note (*u*); Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, pp. 188 to 191.

[1] 1 Bro. Civ. Law, 206, 207; Dig. Lib. 42, tit. 1, l. 15, § 2.

[2] 4 Kent, Comm. Lect. 58, p. 136, note (*a*), (3d ed.).

[3] Ante, § 1342.

thereby forfeited the inheritance or the term, as the case might be, however great might be its intrinsic value compared with the debt for which it was mortgaged.[1]

§ 1357. **The Mortgagee Holds the Estate in Trust.** — Courts of Equity therefore acting upon their general principles could not fail to perceive the necessity of interposing to prevent such manifest mischief and injustice, which were wholly irremediable at law. They soon arrived at the just conclusion that mortgages ought to be treated as the Roman law had treated them, as a mere security for the debt due to the mortgagee; that the mortgagee held the estate, although forfeited at law, as a trust;[2] and that

[1] See 4 Kent, Comm. Lect. 58, p. 140 (3d ed.).

[2] Seton *v.* Slade, 7 Ves. 273; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 182 to 185. When a mortgage is denominated a trust and the mortgagee a trustee of the mortgagor, the expression is not to be understood in an unlimited sense. It is a trust sui generis and of a peculiar nature. This subject is expounded with great ability by Sir Thomas Plumer in his masterly judgment in Cholmondeley *v.* Clinton, 2 Jac. & Walk. 1 to 189, &c. The following extract from it is so valuable and important that I have not been able to persuade myself to omit it although it is long (p. 182.) "As to the position," said he, "of the mortgagee being a trustee for the mortgagor, upon which so much of the argument is built that the consequences contended for would not follow even if the character of trustee did properly belong to the mortgagee, not being in actual possession, I have already endeavored to show. It may be proper however to consider how far and in what respect he is to be considered as possessing that character. The position is to be received with considerable qualifications, as will appear by examining, what is the true character of a mortgagee, and how he is considered in a Court of Equity. Lord Mansfield, adverting to the comparisons made in respect to mortgages, has, I think, said there is nothing so unlike as a simile, and nothing more apt to mislead. A mortgagor has had ascribed to him a variety of different characters, in which there existed some points of resemblance when it was not very material to ascertain what his powers or interests were, or to settle with any great precision in what respects the resemblance did and in what it did not exist. But it would be productive of much error if it were to be concluded that the resemblance was complete in every point to any one of the ascribed characters. The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, of trustee and cestui que trust, have been applied to the relation of mortgagor and mortgagee according to their different rights and interests before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee. 'Quo teneam vultus mutantem Protea nodo?' The truth is, it is a relation perfectly anomalous and sui generis. The names of mortgagor and mortgagee most properly characterize the relation. They are (as Mr. Justice Buller observes in Birch *v.* Wright) characters as well known, and their rights, powers, and interests as well settled, as any in the law. It is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract. It is

the mortgagor had what was significantly called an equity of redemption, which he might enforce against the mortgagee, as he could any other trust, if he applied within a reasonable time

only raised by implication, in subordination to the main purposes of it and after that is fully satisfied. Its primary character is not fiduciary. It is a contract of a peculiar nature by which under certain conditions the mortgagee becomes the purchaser of a security and pledge to hold for his own use and benefit. He acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one, to take possession; and he is entitled to enforce his right by an adverse suit in invitum against the mortgagor, — all which can never take place between trustee and cestui que trust. They have always an identity and unity of interest, and are never opposed in contest to each other. The late Master of the Rolls observes that in general a trustee is not allowed to deprive his cestui que trust of the possession. But a Court of Equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast between the two characters is strongly marked. By not interfering in this latter case a Court of Equity does not, as it is supposed, in opposition to its usual principle, refuse to afford a protection to a cestui que trust against his trustee. But the interference is refused because the mortgagor and mortgagee do not in this instance stand in the relation of trustee and cestui que trust. The mortgagee, when he takes the possession, is not acting as a trustee for the mortgagor, but independently and adversely for his own use and benefit. A trustee is stopped in equity from dispossessing his cestui que trust, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. Upon the same principle the mortgagee is not prevented but assisted in equity, when he has recourse to a proceeding which is not only to obtain the possession but the absolute title to the estate by foreclosure. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. The payment of that interest by the person claiming to be the mortgagor is a recognition of that relation subsisting between them; but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor. The ground on which a mortgagee is in any case and for any purpose considered to have a character resembling that of a trustee, is the partial and limited right which in equity he is allowed to have in the whole estate legal and equitable. He does not at any time possess like a trustee a title to the legal estate distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either he is fully entitled to both and to the legal and equitable remedies incident to both. But in equity his title is confined to a particular purpose. He has no right to either, nor can he make use of any remedy belonging to either further than, and as may be necessary, to secure the repayment of the money due to him. When that is paid his duty is to reconvey the estate to the person entitled to it. It never remains in his hands clothed with any fiduciary duty. He is never entrusted with the care of it, nor under any obligation to hold it for any one but himself; nor is he allowed to use it for any other purpose. The estate is not committed

to redeem, and offered a full payment of the debt and of all equitable charges.[1]

§ 1358. **Same.** — These doctrines of Courts of Equity were at first strenuously resisted, and found little public favor owing to the rigid character of the common law and the sturdy prejudices of its advocates. We are told by Lord Hale that in the 14th year of Richard II. Parliament would not admit of an equity of redemption;[2] although it seems not long after to have struggled into existence.[3] Even as late as the latter part of the reign of Charles II. the same great judge was so little satisfied with encouraging an equity of redemption, that in a case before him for a redemption he declared that by the growth of equity on equity the heart of the common law is eaten out and legal settlements are destroyed.[4] And perhaps the triumph of common sense over professional prejudices has never been more strikingly illustrated than in the gradual manner in which Courts of Equity have been enabled to withdraw mortgages from the stern and unrelenting character of conditions at the common law.[5] Even

to his care, nor has he the means of preventing or being acquainted with the changes which the title to the equity of redemption may undergo, either by the act of the mortgagor without his privity, or by operation of law by descent, forfeiture, or otherwise; and consequently, as I have already endeavored to show, by the operation of the analogy to the Statute of Limitations." See also Casburne *v.* Inglis, 2 Jac. & Walk. 194, 196, in note.

[1] 2 Fonbl. Eq. B. 3, ch. 1, § 13, and note (*e*); Seton *v.* Slade, 7 Ves. 273.

[2] Roscarrick *v.* Barton, 1 Ch. Cas. 219; 2 Fonbl. Eq. B. 3, ch. 1, § 2, note (*c*).

[3] Butler's note (1) to Co. Litt. 204 *b*.

[4] Roscarrick *v.* Barton, 1 Ch. Cas. 219. But see Pawlett *v.* Attorney-Gen., Hardres, R. 469. Lord Redesdale, in his treatise on Equity Pleadings, seems to attribute the jurisdiction of Courts of Equity in cases of non-redemption of mortgages at the prescribed time to the head of accident. "In many cases," says he, "as lapse of time, the Courts of Equity will relieve against the consequence of the accident in a Court of Law. Upon this ground they proceed in the common case of a mortgagee, where the title of the mortgage has become absolute at law upon default of payment of the mortgage money at the time stipulated for payment." Mitford, Eq. Pl. 130, by Jeremy. But this is quite too narrow a ground upon which to rest the general jurisdiction. A trust arising from the nature of the contract as a security is a broader and in many cases a better foundation. See ante, § 130, and note, where this passage is also cited. See Lennon *v.* Napper, 2 Sch. & Lefr. 684, 688; Seton *v.* Slade, 7 Ves. 273, 274.

[5] Mr. Chancellor Kent has said, with great force and felicity of expression: "The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the Courts of Law. Without any prophetic

after the equity of redemption was admitted it was long maintained that if the money was not paid at the time appointed, the estate became liable in the hands of the mortgagee to his legal charges, to the dower of his wife, and to escheat.[1] And it was a common opinion that there was no redemption against those who came in by the post. This introduced mortgages for long terms of years,[2] the nature of which we have already somewhat considered.[3]

§ 1359. **Same.** — Courts of Equity having thus succeeded in establishing the doctrine, in conformity to common sense and common justice, that the mortgage is but a pledge or security for the payment of the debt or the discharge to the other engagements for which it was originally given,[4] it yet remained to be determined what was the true nature and character of the equity of redemption and of the relations between the mortgagor and mortgagee. It has been well observed that these were not actually settled until a comparatively recent period.[5] It was formerly contended that the mortgagor after forfeiture of the condition had but a mere right to reduce the estate back into his own possession by payment of the debt or other discharge of the condition. But it is now firmly established that the mortgagor has an estate in the land in equity, in the nature of a trust estate, which may be granted, devised, and entailed;[6] that this equity of redemption if entailed may be barred by a fine or recovery; that

anticipation, we may well say that 'returning Justice lifts aloft her scale.'" 4 Kent, Comm. Lect. 58, p. 158 (4th ed.).

[1] Butler's note (1) to Co. Litt. 204 *b*; Bac. Abr. Mortgage, A.

[2] Ibid.; 2 Fonbl. Eq. B. 3, ch. 1, § 2, note (*b*); Bac. Abr. Mortgage, A.; 2 Black. Comm. 158.

[3] Ante, § 1342, and note. Mr. Butler has stated the advantages and disadvantages of mortgages by way of long terms of years in a very accurate manner in his note (1) to Co. Litt. 204 *b*.

[4] A trust for sale, given as security, is a mortgage. Locking *v.* Parker, L. R. 8 Ch. 30; Com. Dig. Chancery, 4 A. 1.

[5] Ibid.; 2 Fonbl. Eq. B. 3, ch. 1, § 3, note (*d*).

[6] Lord Hale, in Pawlett *v.* Attorney-Gen. Hardres, R. 469, distinguished between a trust and an equity of redemption, as follows. "There is a diversity," says he, "betwixt a trust and a power of redemption; for a trust is created by the contract of the party and he may direct it as he pleaseth, and he may provide for the execution of it; and therefore one that comes in the post shall not be liable to it without express mention made by the party. And the rules for executing a trust have often varied, and therefore they only are bound by it who come in in privity of estate. A tenant in dower is bound by it because she is in in the per; but not a tenant by the curtesy, who is in in the post. So all who come in in privity of estate, or with notice, or without a consideration. But a power of redemption is an equitable right inherent in the land, and binds all per-

it is capable of a possessio fratris;[1] and that it is liable to tenancy by the curtesy,[2] but not liable to dower.[3] [If the mortgage was given for the purchase money the widow's rights to dower are subordinate to the rights of the mortgagee.[4]]

§ 1360. **Right of Mortgagee to Possession.** — In regard to the estate of the mortgagee, it being treated in equity as a mere security for the debt, it follows the nature of the debt. And although where the mortgage is in fee the legal estate descends to the heir, yet in equity it is deemed a chattel interest and personal estate, and belongs to the personal representatives as assets.[5] It is upon the same ground that an assignment of the debt by the mortgagee

sons in the post or otherwise; because it is an ancient right which the party is entitled to in equity. And although by the escheat the tenure is extinguished, that will be nothing to the purpose; because the party may be recompensed for that by the court by a decree for rent, or part of the land itself, or some other satisfaction. And it is of such consideration in the eye of the law that the law takes notice of it and makes it assignable and devisable." S. P. cited 2 Fonbl. Eq. B. 3, ch. 1, § 3.

[1] Coke, Litt. 14 *b*.

[2] Casborne *v.* Scarfe, 1 Atk. 605, 606.

[3] Dixon *v.* Saville, 1 Bro. Ch. R. 327, 328; Virgin *v.* Virgin, 91 Ill. App. 188, Affirmed 189 Ill. 144, 59 N. E. 586; Frederick *v.* Emig, 186 Ill. 319, 57 N. E. 883, 78 Am. St. Rep. 283.

[4] Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578; and it makes no difference that the widow did not join in the execution of the mortgage. Harrow *v.* Grogan, 219 Ill. 288, 76 N. E. 350; Grimes *v.* Grimes, 141 Ind. 480, 40 N. E. 912; Groce *v.* Ponder, 63 S. C. 162, 41 S. E. 83.

[5] 2 Fonbl. Eq. B. 3, ch. 1, § 3, note (*d*); Id. § 13, note (*e*); Co. Litt. 208 *b*, Butler's note (1); 1 Madd. Ch. Pr. 412; Com. Dig. Chancery, 4 A. 9; Casborne *v.* Scarfe, 1 Atk. 605; Demarest *v.* Wynkoop, 3 John. Ch. R. 145, 4 Kent, Comm. Lect. 58, pp. 159, 160, 164 to 166 (4th ed.). The remarks of Mr. Chancellor Kent in the passage cited contain a very exact and luminous view of the equitable doctrine on this subject. It is also very fully discussed in Mr. Butler's note (1) to Co. Litt. 208 *b*. In adopting the rule of considering mortgages to be personal assets, Courts of Equity (as Mr. Butler has well remarked) appear to have been guided by the same reasoning which in former times made Courts of Law consider the estates of tenants by statute merchant, and tenant by statute staple and by elegit, merely as chattels interest. These from their uncertain nature ought to have been considered as freehold; but, as Mr. Justice Blackstone observes, being a security and remedy provided for personal debts to which the executor is entitled, the law has therefore directed their succession, as judging it reasonable from a principle of natural equity that the security and remedy should be vested in them to whom the debt if recovered would belong. Butler's note, Ibid.; 2 Black. Comm. pp. 161, 162; Co. Litt. 42, 43. The mortgage is not only considered as personal estate of the mortgagee, but the debt is also treated as the personal debt of the mortgagor; and therefore it is primarily a charge on his personal assets in favor of his heir, his devisee, and other parties standing in a similar predicament. There are exceptions to the doctrine where the land is treated as the primary fund, but they stand on special reasons.

carries with it in equity as an incident the interest of the mortgagee in the mortgaged property;[1] unless indeed the instrument of assignment contains a plain exception of the latter.[2] The mort-

See ante, §§ 562 to 578; Co. Litt. 208 *b*, Butler's note (106); Howell *v.* Price, 1 P. Wil. 294, Mr. Cox's note. If a mortgage should happen to be in the disjunctive, payable to the heirs or the executors of the mortgagee, there a payment to either the heir or the executor will discharge it, and the mortgagor has his election. But if there has been a default of payment at the day, there the mortgage is absolute at law, and the election is gone and the money is payable exclusively to the executor. This doctrine was very ably expounded and the reasons stated in Thornborough *v.* Baker, 1 Ch. Cas. 283. See 2 Fonbl. Eq. B. 2, ch. 1, § 13, and note (*e*); Co. Litt. 209 *b*, 210; Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, pp. 184, 185; 2 Powell on Mort. ch. 15, pp. 662, 667, and the notes of Coventry & Rand, Ibid.

[1] Whittemore *v.* Gibbs, 24 N. H. 484; Graham *v.* Newman, 21 Ala. 497; Potter *v.* Stevens, 40 Mo. 229; Holmes *v.* McGinty, 44 Miss. 94; Hyman *v.* Devereux, 63 N. C. 624; Kurtz *v.* Sponable, 8 Kans. 395; Mapps *v.* Sharpe, 32 Ill. 13; Lindsay *v.* Bates, 42 Miss. 397; post, § 1410. On the other hand it is held that a transfer of the mortgage, or the mortgaged premises, without transferring the note or debt to secure which it was given, conveys no estate. Johnson *v.* Cornett, 29 Ind. 59; Merritt *v.* Bartholick, 36 N. Y. 44; Dearborn *v.* Taylor, 18 N. H. 153. The explanation given is that the note or debt being the principal obligation, and the mortgage only an incident thereof, the incident cannot be alone transferred. Ib. But this is technical reasoning, and if taken as a broad rule of law concerning securities generally would lead to erroneous results. As regards the interest of the *debtor* the true ground of the rule stated appears to be that the debtor who has mortgaged his property to secure payment of his undertaking still owes but one debt, and that this cannot be doubled or increased by separating the security from that which it secures, towards any assignee or any transferee fixed with notice. This appears clearly from Ruggles *v.* Barton, 13 Gray, 506, where a mortgagee conveyed the mortgaged premises by warranty deed, without transferring at the time the mortgage notes; but the grantee on bringing suit to foreclose the mortgage produced the notes in court as his own, and this was held sufficient. The notes had "never been given up or in any way discharged or transferred to any third person." Dewey, J. It is obvious that the rule itself applies only to securities given by the debtor on his own property.

But to determine which of two claimants to rights under the mortgage should prevail, — as e. g. whether the original mortgagee, who has transferred to another the mortgage but has retained the mortgage note should prevail, or such transferee, — it becomes more important to consider what is the principal obligation and what the incident; and here it may well be said that he who holds the principal obligation shall prevail, unless there is some very special equity in favor of the other party. See Merritt *v.* Bartholick, 36 N. Y. 44; Strong *v.* Jackson, 123 Mass. 60; Morris *v.* Bacon, Ib. 58; Blunt *v.* Norris, Ib. 55; Commonwealth *v.* Reading Bank, 137 Mass. 431, 443.

An assignment of a mortgage to one who, for the benefit of others, is bound to extinguish it is a discharge of it. Morse *v.* Bassett, 132 Mass. 502; Wadsworth *v.* Williams, 100 Mass. 126.

[2] Wheeler *v.* Wheeler, 9 Cowen, 34.

gagee is however entitled (unless there be some agreement to the contrary) to enter into possession of the lands and to take the rents and profits if he chooses so to do.[1] But in such cases he must account therefor towards the discharge of the debt after deducting all reasonable charges and allowances.[2] So he may grant

[1] Scott *v.* Ware, 65 Ala. 174, 184. In the case of mortgages conditioned to support the mortgagee or others during life it seems to be impliedly taken that the mortgagor shall remain in possession until breach of condition. Wales *v.* Mellen, 1 Gray, 512; Norton *v.* Webb, 35 Me. 218; Brown *v.* Leach, Ib. 39.

Though there be a provision for the mortgagee's taking possession, it seems that equity will not give possession by interlocutory decree on a bill to foreclose. Cheever *v.* Rutland R. Co., 39 Vt. 653. See Whitehead *v.* Wooten, 43 Miss. 523; City of Hagerstown *v.* Groh, 101 Md. 560, 61 Atl. 467; Lackey *v.* Martin, 120 N. C. 391, 27 S. E. 35; Yingling *v.* Redwine, 12 Okla. 64, 69 Pac. 810; State *v.* Superior Court of Kittitas Co., 21 Wash. 564, 58 Pac. 1065.

Contra: Byers *v.* Byers, 65 Mich. 598, 32 N. W. 831.

[2] 4 Kent, Comm. Lect. 58, pp. 166, 167 (4th ed.). See in what cases in respect to rents received by the mortgagee annual rests will be made in equity on favor of the mortgagee, Wilson *v.* Cluer, 3 Beav. R. 136, 140; Scruggs *v.* Memphis R. Co., 108 U. S. 368, 27 L. Ed. 756, 2 S. Ct. Rep. 780; Saunders *v.* Frost, 5 Pick. 260, Mahone *v.* Williams, 39 Ala. 202; Shaiffer *v.* Chambers, 2 Halst. Ch. 548; Brocklehurst *v.* Jessop, 7 Sim. 438; Shepard *v.* Jones, 21 Ch. D. 469, 475. See Mayer *v.* Murray, 8 Ch. D. 424. This, it is held, assumes that the mortgagee occupies, either personally or by his own tenant or servants. Shepard *v.* Jones, supra. But it is laid down by Jessel, M. R. in Cockburn *v.* Edwards, 18 Ch. D. 449, 456, that a mortgagee in possession receiving rents receives only what is his own, subject to the right of redemption, and that there is no appropriation in law on the principal or interest by the payment of rent to the mortgagee or his tenants until the accounting is reached, unless indeed the rents were paid and received on behalf of the mortgagor. But of course at the accounting the rents and profits must be allowed the mortgagor; and the mortgagee must then account for what he received or could have received "by reasonable diligence." Scruggs *v.* Memphis R. Co., supra. But see Mayer *v.* Murray, supra, where it is said that the mortgagee must account for what he has received or might have received "without wilful default" from the time of taking possession. Shepard *v.* Jones, supra, where the distinction was important. Further see Dozier *v.* Mitchell, 65 Ala. 511, 519; Barron *v.* Paulling, 38 Ala. 292; Parkinson *v.* Hanbury, L. R. 2 H. L. 1; Strong *v.* Blanchard, 4 Allen, 538; Richardson *v.* Wallis, 5 Allen, 78; Hubbard *v.* Shaw, 12 Allen, 120; Moshier *v.* Norton, 100 Ill. 63; White *v.* Atlas Lbr. Co., 49 Neb. 82, 68 N. W. 359; Thomas *v.* Livingstone, 147 Ala. 200, 40 So. 504; Dyer *v.* Brown, 82 Ill. App. 17.

Where a deed absolute upon its face is sought to be converted into a mortgage, the alleged vendee is subject to the same liabilities as a mortgagee in possession, Richter *v.* Noll, 128 Ala. 198, 30 So. 740; Froud *v.* Merritt, 99 Iowa, 410, 68 N. W. 728.

The mortgagee is not liable for rents of a house built by him without the authority of the mortgagor, when not necessary for preservation of the mortgaged property. Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132.

leases of the premises and avoid any leases which have been made by the mortgagor subsequent to his mortgage.[1] Still he is treated so entirely as a trustee that he cannot exercise any right over the mortgaged property (such for example as the renewal of a lease) for his own benefit; but all acts of this sort done and all profits made are deemed to be for the benefit of the party who is entitled to the estate.[2] A mortgagor has no right to cut timber upon the mortgaged estate; and if he assumes to do so he will be restrained by an injunction if it would be injurious to the security of the mortgagee.[3]

§ 1361. **Same.** — Where the mortgagee enters into possession of the mortgaged property he is of course accountable for the rents and profits. But Courts of Equity will not under such circumstances ordinarily require annual rests to be made in settling the accounts; as for example they will not require annual rests to be made where the interest of the mortgage is in arrears at the time when the mortgagee takes possession, even although the rents and profits may exceed the annual interest, nor until the principal mortgage debt is entirely paid off.[4] But where special cir-

In arriving at proper amount of rent, mortgagee is chargeable only with due care, and where mortgagor has intimidated prospects and prevented the property from being rented the mortgagee is not responsible for an occasioned loss of rents. La Forest *v.* Blake, 100 Me. 218, 60 Atl. 899.

In Mississippi the mortgagee is only liable to account for the proceeds actually received, and not for what he ought to have received, in the absence of wilful wrong, neglect, or fraud. Watson *v.* Perkins, 88 Miss. 64, 40 So. 643.

A reduction of $1 a month in rent, in order to keep the tenant in the house, where it was in poor repair and it would be difficult to secure another tenant, will not be charged up to the mortgagee. Chapman *v.* Cooney, 25 R. I. 657, 57 Atl. 928.

[1] 2 Fonbl. Eq. B. 3, ch. 1, § 3, note (*d*); 4 Kent, Comm. Lect. 58, pp. 157, 164 to 167 (4th ed.).

[2] 4 Kent, Comm. Lect. 58, 167 (4th ed.); Holdridge *v.* Gillespie, 2 John. Ch. R. 33, and cases there cited; Rakestraw *v.* Brewer, 2 P. Will. 511.

[3] King *v.* Smith, 2 Hare, R. 239, 242. Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Minneapolis Trust Co. *v.* Verhulst, 74 Ill. App. 350; Bigelow *v.* Thompson, 133 Mich. 334, 94 N. W. 1077, 10 Detroit Leg. N. 219; Holbrook *v.* Greene, 98 Me. 171, 56 Atl. 659.

[4] Finch *v.* Brown, 3 Beav. R. 70; Wilson *v.* Cluer, 3 Beav. R. 136. In this latter case Lord Langdale said: "Under these circumstances the question is, whether the surplus of the rents after satisfying the interest ought or ought not to be annually applied in reduction of the principal money due on the mortgage; or in other words whether the account ought to be taken against the mortgagee with annual rests. With some qualification perhaps it may be said to be a general rule not to direct annual rests to be made in the accounts of a mortgagee in possession when the interest is in arrear at the time when he takes possession; and in the

cumstances exist, as for example where no arrears of interest are due at the time when the mortgagee enters into possession, or any agreement exists between the parties by which the interest in arrears is converted into principal, there and in such cases annual rests will be made.[1]

§ 1362. **Liabilities of Mortgagee upon Entry.** — In respect to the rights of a mortgagee in possession it may be stated that he will in equity be allowed for all repairs necessary for the support of the property,[2] but not for general improvements made without

absence of any special reason, I conceive that if a mortgagee is not liable to account with annual rests when he enters into possession, he does not become so liable when the arrear of interest is paid off, or till after the whole of the mortgage debt has been paid off by receipt of the rents, although from the time when the debt is ascertained to be paid off annual rests will be decreed, though none were ordered previously. I am not aware of any case in which, although the mortgagee may have taken possession under circumstances which did not render him liable to account with annual rests, there was afterwards a settled account by which it appeared either that no interest was due or that any interest which was due was satisfied as interest by being converted into principal, and the mortgagee continued in the receipt of rents of amount more than sufficient to satisfy the interest of such principal. But it appears to me that such settlement of account ought to be considered as a rest made by the parties themselves; and that the mortgagee continuing in possession after the statement of such an account, and with no interest due to him, must from that time be dealt with as a mortgagee who takes possession without any interest being in arrear."

[1] Satisfaction of the debt due upon a mortgage will extinguish all the interest of the mortgagee in the mortgage, and an assignee of the mortgagee will not be in any better condition after such extinguishment of the debt than the mortgagee. See Wilkinson *v.* Simson, 2 Moore, Priv. Coun. R. 275, which was a case arising under the Dutch law. As to when payment by tenant for life is an extinguishment of mortgages or other incumbrances, see 3 Hare, R. 217. See as to rests Thompson *v.* Hudson, L. R. 10 Eq. 497; Van Vronker *v.* Eastman, 7 Met. 157; Mahone *v.* Williams, 39 Ala. 202.

[2] He is bound to make reasonable repairs. Dozier *v.* Mitchell, 65 Ala. 511; Morrison *v.* McLeod, 37 N. C. 108.

Duty of mortgagee in possession to pay taxes. Pollard *v.* American Freehold Land Mtge. Co., 139 Ala. 183, 35 So. 767; McLoughlin *v.* Darlington, 6 Kans. App. 212, 50 Pac. 507; but there is no personal liability on the part of the mortgagee to pay where he is not in possession. Hood *v.* Clark, 141 Ala. 397, 37 So. 550; McLoughlin *v.* Acom., 58 Kans. 514, 50 Pac. 441.

Mortgagee in possession is liable to see that taxes are paid. White *v.* Atlas Lbr. Co., 49 Neb. 82, 68 N. W. 359; Northwestern Mut. L. Ins. Co. *v.* Butler, 57 Neb. 198, 77 N. W. 667; Sanford *v.* Lichtenberger, 62 Neb. 501, 87 N. W. 305; Wells *v.* Van Dyke, 109 Pa. 330; but he is not entitled to charge up against the mortgaged premises the premiums taken for insurance upon his own interest in the mortgaged property. Pendleton *v.* Elliott, 67 Mich. 496, 35 N. W. 97; Hamel *v.* Corbin, 69 Minn. 223, 72 N. W. 106.

the acquiescence or consent of the mortgagor which enhance the value of the estate, especially if they are of such a nature as may cripple the right or power of redemption.[1] And in no case will a Court of Equity permit a mortgagee to commit waste or do damage to the estate, as for example by pulling down cottages.[2]

§ 1363. **In Absence of Agreement Mortgagor Is Treated as Substantial Owner of the Estate.** — In regard to the mortgagor he is not, unless there be some special agreement to that effect, entitled of right to the possession of the land mortgaged. But he holds it solely at the will and by the permission of the mortgagee, who may at any time by an ejectment, without giving any prior

[1] Sandon *v.* Hooper, 6 Beavan, R. 246. On this occasion Lord Langdale said: "The next question is, whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times showing what he ought, and to some extent what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property; but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor with his means ever to redeem; this is what has been termed improving a mortgagor out of his estate, — an expression which has been used both in this argument and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair and for protecting the title to the property." Woodward *v.* Phillips, 80 Mass. 132; Barnard *v.* Paterson, 137 Mich. 633, 100 N. W. 893, 11 Detroit Leg. N. 426; Eggensperger *v.* Lanpher, 92 Minn. 503, 100 N. W. 372; White *v.* Atlas Lbr. Co., 49 Neb. 82, 68 N. W. 359. It has recently been laid down that a mortgagee in possession or selling under power of sale who has reasonably expended money in permanent works on the property is entitled to an inquiry whether the outlay has increased the value of the property. If it has, he must be repaid the outlay to the extent of the increase of value. In such a case it matters not whether the mortgagor had notice of the intended outlay; notice is material only when the outlay is unreasonable, — then for the purpose of showing consent. Shepard *v.* Jones, 21 Ch. D. 469 (C. A.), explaining Sandon *v.* Hooper, 6 Beav. 246. See also Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co., 7 Ch. D. 192.

Under a proviso in a mortgage for reduction of interest on punctual payment, a mortgagee who has taken possession in default of the mortgagor is entitled on the accounts being taken to charge the mortgagor with the higher rate, and also in a proper case with the commission paid to a receiver for collecting the rents. Union Bank *v.* Ingram, 16 Ch. D. 53, pointing out that Stains *v.* Banks, 9 Jur. (N. S.) 1049, contra, had been reversed on appeal.

[2] Dozier *v.* Mitchell, 65 Ala. 511.

notice, recover the same against him or his tenants. In this respect the estate of the mortgagor at law is inferior to that of a tenant at will.[1] But so long as he continues in possession, by the permission of the mortgagee, he is entitled to take the rents and profits in his own right without any account whatsoever therefor to the mortgagee.[2] Indeed for most purposes, except where the interest of the mortgagee is concerned, the mortgagor is treated as the substantial owner of the estate.[3] He will not however be permitted to do any acts injurious to or diminishing the security of the mortgagee; and if he should commit or attempt to commit acts of waste, he will be restrained therefrom by the process of injunction.[4] [The parties may by contract entitle the mortgagee to the possession of the mortgaged premises, and also to the rents and profits arising therefrom, and when this has been done the rents become a primary liability, like the land, for the payment of the mortgage debt.[5]]

§ 1364. **Conveyance Absolute upon Its Face, as a Mortgage.** — As to what constitutes a mortgage there is no difficulty what-

[1] City of Hagerstown *v.* Groh, 101 Md. 560, 61 Atl. 467; Butler's note (1) to Co. Litt. 204 *b*; 2 Fonbl. Eq. B. 3, ch. 1, § 3, note (*d*); Keech *v.* Hall, Doug. R. 21; Moss *v.* Gallimore, Doug. R. 279; 4 Kent, Comm. Lect. 58, p. 155 (4th ed.).

[2] Moss *v.* Gallimore, Doug. R. 279, 282; 2 Fonbl. Eq. B. 2, ch. 1, § 13, note (*d*); Colman *v.* Duke of St. Albans, 3 Ves. 25, 32; Mead *v.* Lord Orrery, 3 Atk. 244; 4 Kent, Comm. Lect. 58, pp. 156, 157, 164 to 166 (4th ed.); Ex parte Wilson, 2 Ves. & B. 252. After maturity of the mortgage the mortgagor, allowed to remain in possession, will be entitled to the rents and profits to his own use, though he is in default in payment of the debt, unless they have been pledged. Scott *v.* Ware, 65 Ala. 174. And merely filing a bill for foreclosure will not cut off this right. Ib. A receiver must be granted. Ib. But this right of the mortgagor to take the rents and profits to his own use may be displaced by notice to the tenants to pay to the mortgagee. But payments made before such notice will be good. Ib. Eastern Trust & Banking Co. *v.* American Ice Co., 14 App. D. C. 304; Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Keeley Brewing Co. *v.* Nason, 116 Ill. App. 603; Georgetown Water Co. *v.* Fidelity Trust & Safety Vault Co., 117 Ky. 325, 78 S. W. 113, 25 Ky. L. Rep. 1739; Stevens *v.* Hulin, 53 Mich. 93, 18 N. W. 569; Huston *v.* Canfield, 57 Neb. 345, 77 N. W. 763; Clark *v.* Missouri, K. & T. Trust Co., 59 Neb. 53, 80 N. W. 257; Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362; Cox *v.* Horner, 43 W. Va. 786, 28 S. E. 780.

[3] 4 Kent, Comm. Lect. 58, pp. 154 to 157, 160 to 162 (4th ed.).

[4] Robinson *v.* Litton, 3 Atk. 210; Ushborne *v.* Ushborne, 1 Dick. R. 75; Brady *v.* Waldron, 2 John. Ch. R. 148; Malone *v.* Marriott, 64 Ala. 486; Barlow *v.* Gaines, 8 Beav. 329; Goodman *v.* Kine, Ib. 379. See In re Tallahassee Mfg. Co., 64 Ala. 568.

[5] McLester *v.* Rose, 104 Ill. App. 433; Loughridge *v.* Haugan, 79 Ill. App. 644; Kelly *v.* Bowerman, 113 Mich. 446, 71 N. W. 836, 4 Detroit Leg. N. 360.

ever in Courts of Equity, although there may be technical embarrassments in Courts of Law. The particular form or words of the conveyance are unimportant;[1] and it may be laid down as a general rule subject to few exceptions that wherever a conveyance, assignment, or other instrument, transferring an estate, is originally intended between the parties as a security for money or for any other incumbrance, whether this intention appear from the same instrument or from any other, it is always considered in equity as a mortgage and consequently is redeemable upon the performance of the conditions or stipulations thereof.[2] Even parol evidence is admissible in some cases, as

[1] Whether a conveyance of land and the contemporaneous execution of a bond to reconvey the land upon the payment of the consideration for the conveyance amount to a mortgage or a contract for repurchase is a question of fact; and this, if really doubtful, is, it seems, to be decided upon the view that it is a mortgage. Rich *v.* Doane, 35 Vt. 125; Lodge *v.* Furman, 24 Cal. 385; Crassen *v.* Swoveland, 22 Ind. 427; Leech's Appeal, 44 Pa. St. 519; Harper's Appeal, 64 Pa. St. 315; Turner *v.* Kerr, 44 Mo. 429; Robinson *v.* Willoughby, 65 N. C. 520; Holton *v.* Meighan, 15 Minn. 69. The agreement for repurchase will of course be sustained if it is not a mere cover for securing a debt. See Pitts *v.* Cable, 44 Ill. 103; Carr *v.* Rising, 62 Ill. 14; Cornell *v.* Hall, 22 Mich. 377; Carter *v.* Williams, 23 La. Ann. 281.

The transaction may amount to a mortgage though the bond for reconveyance bears a different date from that of the deed. McIntier *v.* Shaw, 6 Allen, 83. The existence and securing of a debt make the test. Morrill *v.* Skinner, 57 Neb. 164, 77 N. W. 375; Beebee *v.* Wisconsin Mortgage Loan Co., 117 Wis. 328, 93 N. W. 1103.

[2] Butler's note (1) to Co. Litt. 204 *b*; 4 Kent, Comm. Lect. 58, p. 142 (4th ed.); 2 Fonbl. Eq. B. 3, ch. 1, § 4, and note (*e*); Id. § 5, note (*h*). Every conveyance of land which is in fact, whatever it may be in form, a security for a debt contemporaneous or antecedent is in equity a mortgage. Mobile Bldg. Assn. *v.* Robertson, 65 Ala. 382, 388; Bryant *v.* Cowart, 21 Ala. 92; Brookings *v.* White, 49 Me. 479; Shillaber *v.* Robinson, 97 U. S. 68, 24 L. Ed. 967; Hughes *v.* Edwards, 22 U. S. 489, 6 L. Ed. 142; Brick *v.* Brick, 98 U. S. 514, 25 L. Ed. 256; Peugh *v.* Davis, 96 U. S. 336, 24 L. Ed. 775; Curtiss *v.* Sheldon, 47 Mich. 262. It matters not that no bond, bill, or note may be given with it; though the absence of anything of the kind would be a circumstance in aid of the position that the deed was really an absolute conveyance if purporting to be such. Mobile Building Assoc. *v.* Robertson, supra; Conway *v.* Alexander, 11 U. S. 218, 3 L. Ed. 321; Russell *v.* Southard, 53 U. S. 139, 13 L. Ed. 927; Brown *v.* Dewey, 1 Sandf. Ch. 56. And parol evidence is admissible to show the facts. Brick *v.* Brick, supra; Peugh *v.* Davis, supra.

Absence of remedy against the person is not conclusive that the instrument is not a mortgage. Mobile Building Assoc. *v.* Robertson; Brown *v.* Dewey, supra; Hodgkins *v.* Wright, 127 Cal. 688, 60 Pac. 431; Banta *v.* Wise, 135 Cal. 277, 67 Pac. 129; Prefumo *v.* Russell, 148 Cal. 451, 83 Pac. 810; Fleming *v.* Georgia Bank, 120 Ga. 1023, 48 S. E. 420; Scott *v.* Hughes, 124 Ga. 1000, 53 S. E. 453; Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782; nothing can change the instrument as now written,

in cases of fraud,[1] accident, and mistake to show that a conveyance absolute on its face was intended between the parties to be a mere mortgage or security for money.[2]

§ 1365. **Equity of Redemption as Mortgagor's Estate in the Property.** — So inseparable indeed is the equity of redemption from a mortgage that it cannot be disannexed even by an express agreement of the parties. If therefore it should be expressly stipulated that unless the money should be paid at a particular day or by or to a particular person the estate should be irredeemable, the stipulation would be utterly void.[3] In this respect

to a deed in fact, but a new agreement. Le Comte *v.* Pennock, 61 Kans. 330, 59 Pac. 641; Garvin's Admx. *v.* Vincent, 27 Ky. L. Rep. 1076, 87 S. W. 804; Moore *v.* Universal Elevator Co., 122 Mich. 48, 80 N. W. 1015, 6 Detroit Leg. N. 695; Huston *v.* Canfield, 57 Neb. 345, 77 N. W. 763; Babcock *v.* Wells, 25 R. I. 23, 54 Atl. 596, 105 Am. St. Rep. 848; Plummer *v.* Ilse, 41 Wash. 5, 82 Pac. 1009, 2 L. R. A. (N. S.) 627, 111 Am. St. Rep. 997; Beebee *v.* Wisconsin Mortgage Loan Co., 117 Wis. 328, 93 N. W. 1103; Schneider *v.* Reed, 123 Wis. 488, 101 N. W. 682.

[1] Anding *v.* Davis, 38 Miss. 574. See Green *v.* Butler, 26 Cal. 595.

[2] Haines *v.* Thompson, 70 Pa. St. 434; How *v.* Russell, 36 Me. 115; Hodges *v.* Tennessee Ins. Co., 4 Seld. 416; Bigelow *v.* Topliff, 25 Vt. 273; Bank of Westminster *v.* Whyte, 3 Md. Ch. 508; Bryan *v.* Cowart, 21 Ala. 92; Johnson *v.* Huston, 17 Miss. 58; Wyman *v.* Babcock, 2 Curt. C. C. 36; s. c. 19 How. 289; Hills *v.* Loomis, 42 Vt. 562; Campbell *v.* Dearborn, 109 Mass. 130; Horn *v.* Ketaltas, 46 N. Y. 605; French *v.* Burns, 35 Conn. 359; Villa *v.* Rodriguez, 79 U. S. 323, 20 L. Ed. 406.

A bona fide purchaser for value without notice, under a warranty deed from the grantee of the supposed absolute deed, would of course take free from the equity against such grantee; but it seems that one who has taken title by quit-claim only will not be protected beyond improvements honestly made. Villa *v.* Rodriguez, supra. Ante, §§ 225, 228, 454, 1054, 1057; 2 Fonbl. Eq. B. 2, ch. 3, § 5, note (*h*); 4 Kent, Comm. Lect. 58, p. 142 (4th ed.); Monis *v.* Nixon, 42 U. S. 118, 11 L. Ed. 69; Maxwell *v.* Montacute, Prec. Ch. 556; s. c. 1 P. Will. 618; Walker *v.* Walker, 2 Atk. 98; Vernon *v.* Bethell, 2 Eden, R. 110; Marks *v.* Pell, 1 John. Ch. R. 594; Babcock *v.* Wyman, 60 U. S. 289, 15 L. Ed. 644; Peugh *v.* Davis, 96 U. S. 332, 24 L. Ed. 775; Jones *v.* Guaranty & Indem. Co., 101 U. S. 622, 25 L. Ed. 1030; First Natl. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657; German Ins. Co. *v.* Gibe, 162 Ill. 251, 44 N. E. 490; Berond *v.* Lyons, 85 Iowa, 482, 52 N. W. 486; Cullen *v.* Carey, 146 Mass. 50, 15 N. E. 131; Kimbrough *v.* Smith, 17 N. C. 558; Allen *v.* McRae, 39 N. C. 325; Mathews *v.* Leaman, 24 Ohio St. 615; Swegle *v.* Belle, 20 Oreg. 323, 25 Pac. 633; Hexter *v.* Urwitz, 6 Tex. Civ. App. 580, 25 S. W. 1101; McNeel's Exec. *v.* Auldridge, 34 W. Va. 748, 12 S. E. 851; McLaurin *v.* Wright, 37 N. C. 94. Contra: see Boozer *v.* Teague, 27 S. C. 348, 3 S. E. 551; Peagler *v.* Stabler, 91 Ala. 308, 9 So. 157; Bryant *v.* Crosby, 36 Me. 562, 58 Am. Dec. 767.

[3] Fonbl. Eq. B. 2, ch. 3, § 4, and note (*e*), § 5; Butler's note (1) to Co. Litt. 204 *b*; Newcomb *v.* Bonham, 1 Vern. R. 232; Seton *v.* Slade, 7 Ves. 273; 4 Kent, Comm. Lect. 58, pp. 142, 143 (4th ed.); Id. 159; Holridge *v.* Gillespie, 2 John. Ch. R. 33, 34; Com. Dig. Chancery, 4 A. 1, 2. The cases on this point are fully collected in Butler's note to Co. Litt.

Courts of Equity act upon the same principle which (we have seen) is avowed in the civil law,[1] and most probably it has been borrowed from that source. A distinction also is taken like that in the civil law between a conditional purchase or an agreement for a repurchase and a mortgage properly so called.[2] The former, if clearly and satisfactorily proved to be a real sale and not a mere transaction to disguise a loan, will be held valid, although every transaction of this sort is watched with jealousy.[3]

§ 1366. **Legal and Equitable Mortgages Defined.** — Mortgages may not only be created by the express deeds and contracts of the parties, but they may also be implied in equity from the nature of the transactions between the parties, and then they are termed equitable mortgages.[4] Thus for instance it is now settled in England that if the debtor deposits his title-deeds to an estate with a creditor as security for an antecedent debt, or upon a fresh loan of money, it is a valid agreement for a mortgage between the parties, and is not within the operation of the Statute of Frauds.[5] This doctrine has some-

204 *b*, and in 4 Kent, Comm. 142 to 144 (4th ed.). See also Cortelyou *v.* Lansing, 2 Caines, Cas. Err. 209, 210; Hazeltine *v.* Granger, 44 Mich. 503. A mortgagor's right to redeem was deemed lost in Tufts *v.* Tapley, 129 Mass. 380, by reason of concealment of title while outlays and improvements were being made. Barlow *v.* Cooper, 109 Ill. App. 375; Faulkner *v.* Cody, 45 Misc. Rep. 64, 91 N. Y. Supp. 633; First Natl. Bank *v.* Moor, 34 Tex. Civ. App. 476, 9. S. W. 53; Shank *v.* Groff, 43 W. Va. 337, 27 S. E. 340.

[1] Ante, § 1353; Story on Bailm. § 345; Cortelyou *v.* Lansing, 2 Caines, Cas. Err. 209, 210.

[2] 1 Domat, B. 3, tit. 1, § 3, art. 11; Dig. Lib. 20, tit. 1, l. 16, § 9. "Potest ita fieri pignoris datio, hypothecæve," says the Digest, "ut si intra certum tempus non sit soluta pecunia, jure emptoris possideat rem, justo pretio tunc æstimandam; hoc enim casu videtur quodammodo conditionalis esse venditio." Dig. Lib. 20, tit. 1, l. 16, § 9. This approaches nearer to a right of prēmption than to a conditional sale. See Orby *v.* Trigg, 2 Eq. Cas. Abridg. 599, pl. 25; s. c. 9 Mod. R. 2.

[3] Butler's note (1) to Co. Litt. 204 *b*; Barrell *v.* Sabine, 1 Vern. 268; Longuet *v.* Scawen, 1 Ves. 402, 406; 1 Powell, Mort. 138, note (Coventry and Rand's ed.); 4 Kent, Comm. Lect. 58, pp. 143, 144, 159 (4th ed.); Com. Dig. Chancery, 4 A. 2; 2 Fonbl. Eq. B. 3, ch. 1, § 5, note (*h*); Vernon *v.* Bethell, 2 Eden, R. 113; Goodman *v.* Grierson, 2 Ball & Beatt. 278.

[4] An equitable mortgage may be created by an unsuccessful attempt to make a valid mortgage. Gale *v.* Morris, 29 N. J. Eq. 222; Love *v.* Sierra Nev. Min. Co., 32 Cal. 639, 652. So an assignment of a mortgage, the assignment being defective at law, may be good in equity, giving the assignee a right to foreclose. Carlisle *v.* Wilkins, 51 Ala. 371; Smith *v.* Rainey, 209 U. S. 53, 52 L. Ed. 679, 28 S. Ct. Rep. 474; Woodruff *v.* Adair, 131 Ala. 530, 32 So. 515.

[5] Russell *v.* Russell, 1 Bro. Ch. R. 269, and Mr. Belt's note (1); Ex

times been thought difficult to be maintained either upon the ground of principle or of public policy. And although it is firmly established, it has of late years been received with no small hesitation and disapprobation, and a disposition has been strongly evinced not to enlarge its operation.[1] It is not there-

parte Coming, 9 Ves. 116, 117; Birch *v.* Ellames, 2 Anst. R. 427, 438; Ex parte Mountfort, 14 Ves. 606; Ex parte Langston, 17 Ves. 228, 229; Pain *v.* Smith, 2 Mylne & Keen, 417; Keys *v.* Williams, 3 Younge & Coll. 55; Mandeville *v.* Welch, 18 U. S. 277, 5 L. Ed. 87; post, § 1636. So in some of our States. Rockwell *v.* Hobby, 2 Sandf. Ch. 9; Welsh *v.* Usher, 2 Hill, Ch. 166; Williams *v.* Stratton, 10 Smedes & M. 418. See Griffin *v.* Griffin, 3 C. E. Green, 104. Contra in other States. Shitz *v.* Dieffenbach, 3 Barr, 233; Van Meter *v.* McFaddin, 8 B. Mon. 435; Probosco *v.* Johnson, 2 Disn. 96.

[1] Ex parte Haigh, 11 Ves. 403; Norris *v.* Wilkinson, 12 Ves. 197, 198; Ex parte Kensington, 2 V. & B. 83; Ex parte Coomb, 17 Ves. 369; Ex parte Hooper, 1 Meriv. R. 9; Ex parte Whitbread, 19 Ves. 209. In Keys *v.* Williams, 3 Younge & Coll. 55, 61, Lord Abinger said: "The doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds, and no doubt there was great difficulty in knowing how to deal with deposits of deeds by way of security after the passing of that statute. But in my opinion that statute was never meant to affect the transaction of a man borrowing money and depositing his title-deeds as a pledge of payment. A Court of Law could not assist such a party to recover back his title-deeds by an action of trover, the answer to such an action being that the title-deeds were pledged for a sum of money, and that till the money is repaid the party has no right to them. So if the party came into equity for relief, he would be told that before he sought equity he must do equity by repaying the money in consideration for which the deeds had been lodged in the other party's hands. The doctrine of equitable mortgages therefore appears to have arisen from the necessity of the case. It may however in many cases operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title-deeds and preparing the mortgage. Expediency therefore as well as necessity has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute. The question here is, whether the circumstances under which these deeds were deposited lead to any distinction between this case and others which have been decided on the general doctrine. It has been very ably argued for the defendant, that the circumstance of the deeds having been deposited, not as a present security but with a view to a future security, gives rise to such a distinction. Certainly if before the money was advanced the deeds had been deposited with a view to prepare a future mortgage, such transaction could not be considered as an equitable mortgage by deposit. But it is otherwise where there is a present advance and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such case the deeds are given in [as] part of the security and become pledged from the very nature of the transaction." The doctrine that an equitable mortgagee by deposit of title-deeds is entitled to foreclosure does not extend to a pledgee of personal chattels. Carter *v.* Wake, 4 Ch. D. 605.

fore ordinarily applied to enforce parol agreements to make a mortgage or to make a deposit of title-deeds for such a purpose; but it is strictly confined to an actual, immediate, and bona fide deposit of the title-deeds with the creditor as a security in order to create the lien.[1] Such an equitable mortgage will not however avail against a subsequent mortgagee whose mortgage has been duly registered without notice of the deposit of the title-deeds. But in cases not affected by the registry acts the mere fact that a first mortgagee has left the title-deeds in the possession of the mortgagor, without any attendant circumstances of fraud, will not be sufficient to postpone such first mortgagee to a second, who has taken the title-deeds with his mortgage without any notice of the prior mortgage.[2]

[1] Norris *v.* Wilkinson, 12 Ves. 197–199.

[2] Birch *v.* Ellames, 2 Anst. 427, 431; Plumb *v.* Fluitt, 2 Anst. 432, 439, 440; Tourle *v.* Rand, 2 Bro. Ch. R. 649, and Mr. Belt's note; Evans *v.* Bicknell, 6 Ves. 182 to 184; Berry *v.* Mutual Insur. Co., 2 John. Ch. R. 609, 610; Evans *v.* Bicknell, 6 Ves. 173, 183, 184. Mr. Vice-Chancellor Wigram, in West *v.* Reid, 2 Hare, R. 249, 259, said: "I do not deny that difficulty may sometimes arise in drawing the line between the degree of negligence which shall be sufficient to charge a purchaser, and that mere want of extreme caution which in the absence of fraud will excuse him. But the distinction is founded in principle, and the difficulty is one with which (upon the very question of gross negligence) courts of justice are in the daily habit of grappling; and the difficulty in principle is not distinguishable from that which occurs in every other case in which antagonistic principles come into immediate conflict with each other. The distinction which is taken in terms by Sir Edward Sugden (1 Vend. & Pur. vol. 3, p. 472, ed. 10) is fully borne out by the cases which decide that a person purchasing without obtaining the title-deeds is not affected by notice of an equitable mortgage. Plumb *v.* Flint, Bicknell *v.* Evans; by Lord Thurlow's judgment in Cothoy *v.* Sydenham; by a judgment of Lord Hardwicke; and other cases referred to in the judgment in Jones *v.* Smith. If that distinction be not admitted in a case like Jones *v.* Smith, the unavoidable consequence must be that a man who mortgages a fraction of his estate will thereby throw a cloud upon the title to the rest of his estate, and a devise of a single acre of land by a will which does nothing more will throw a cloud upon the title of an heir-at-law to his descended estates; for it is clear that neither the mortgagor in the one case nor the heir in the other can command the production of the mortgage-deed or will; and it is equally clear that nothing but the production of the original itself would be sufficient if a representation such as Smith relied upon be not sufficient. Similar observations would apply to a codicile partially revoking a will, and to every deed executed after the date of a will. In short let the doctrine of constructive notice be extended to all cases in which the purchaser has notice that the property is affected, or has notice of facts raising a presumption that it is so, and the doctrine is reasonable, though it may sometimes operate with severity. But once transgress the limits which that statement of the rule imposes, — once admit that a purchaser is to be affected with constructive notice of the contents of instruments not necessary to nor presumptively connected with the title,

§ 1367. **Any Property Which Is the Subject of Sale May Be Mortgaged.** — As to the kinds of property which may be mortgaged it may be stated that in equity whatever property personal or real is capable of an absolute sale may be the subject of a mortgage. This is in conformity to the doctrine of the civil law: "Quod emptionem venditionemque recipit, etiam pignorationem recipere potest."[1] Therefore rights in remainder and reversion, possibilities coupled with an interest, rents, franchises, and choses in action are capable of being mortgaged. But a mere naked possibility or expectancy, such as that of an heir, is not.[2] In this

only because by possibility they may affect it (for that may be predicated of almost any instrument), and it is impossible in sound reasoning to stop short of the conclusion that every purchaser is affected with constructive notice of the contents of every instrument of the mere existence of which he has notice. A purchaser must be presumed to investigate the title of the property he purchases, and may therefore be presumed to have examined every instrument forming a link directly or by inference in that title; and that presumption I take to be the foundation of the whole doctrine. But it is impossible to presume that a purchaser examines instruments not directly nor presumptively connected with the title, only because they may by possibility affect it." This whole subject is very ably summed up in 4 Kent, Comm. Lect. 58, pp. 150, 151 (4th ed.). But see Layard *v.* Maud, L. R. 4 Eq. 397, 406; Spencer *v.* Clark, 9 Ch. D. 137, 142; Clarke *v.* Palmer, 21 Ch. D. 124, and cases cited. Further as to deposit of title-deeds see West *v.* Reid, 2 Hare, 249; Ratcliffe *v.* Barnard, L. R. 6 Ch. 652; Dixon *v.* Muckleston, L. R. 8 Ch. 155; Ex parte National Bank, L. R. 14 Eq. 507; Ex parte Valpy, L. R. 7 Ch. 289; Wilson's Case, L. R. 12 Eq. 516; Newton *v.* Newton, L. R. 6 Eq. 135; s. c. 4 Ch. 143; Layard *v.* Maud, L. R. 4 Eq. 397; Thorpe *v.* Holdsworth, L. R. 7 Eq. 139; Darke *v.* Williamson, 25 Beav. 622; Briggs *v.* Jones, L. R. 10 Eq. 92; Roberts *v.* Croft, 24 Beav. 223; Espin *v.* Pemberton, 3 DeG. & J. 547.

One who lends money on an insurance policy which the borrower says is deposited with his banker for safe keeping does so at his peril; and if it be found that the policy had already been pledged to the banker in whose possession it was, the banker will have priority over the later creditor. Spencer *v.* Clark, 9 Ch. D. 137.

[1] Massey *v.* Papin, 65 U. S. 362, 16 L. Ed. 734; Wilson *v.* Wright, 91 Ga. 774, 18 S. E. 546; Ryan *v.* Illinois Trust & Sav. Bank, 100 Ill. App. 251; Ortengren *v.* Rice, 104 Ill. App. 428; Snyder *v.* Ackermann, 37 N. J. Eq. 442; Brooke *v.* Bordner, 125 Pa. 470, 17 Atl. 467.

The owner of a bond for title who is in possession and has made improvements, has such an interest as may be mortgaged. White *v.* Butt, 32 Iowa, 335; Jones *v.* Lapham, 15 Kans. 540; Laughlin *v.* Braley, 25 Kans. 147; 1 Domat, B. 3, tit. 1, § 1, art. 19; Dig. Lib. 20, tit. 1, l. 9, § 1.

[2] 4 Kent, Comm. Lect. 58, p. 144 (4th ed.); Carlton *v.* Leighton, 3 Meriv. 667; 1 Powell on Mort. 17, 18, 23, and note (Coventry & Rand's ed.). Lord Eldon, in Carlton *v.* Leighton, 3 Meriv. R. 967, 670, expressly held that an expectancy of an heir presumptive or apparent, the fee-simple being in the ancestor, was not an interest or a possibility, nor was capable of being made the subject of an assignment or contract. But

respect the civil law seems to differ from ours; for a party might by that law mortgage property to which he had no present title by contract or otherwise.[1]

§ 1368. **Rights of Trustees to Mortgage.** — As to the persons who are capable of mortgaging an estate nothing need be said in this place except so far as regards persons who have qualified interests therein, or are trustees in autre droit, or are clothed with particular powers for limited purposes. And here very difficult questions may arise as to the construction of such powers and the competency of such persons to make mortgages. Thus for example if a power is given to trustees to sell for the purpose of raising money, a question may arise whether they may raise the money by way of mortgage. But the solution of such questions properly belongs to a treatise on powers.[2]

§ 1369. **Owners of Future Estates May Discharge the Incumbrance and Protect Their Estates.** — As to the right of redemption. From what has been already stated it is clear that the equity of redemption is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees, and representatives (strictly so called) of the mortgagor, but it is also in the hands of any other persons who have acquired any interest in the lands mortgaged by operation of law, or otherwise in privity of title.[3] Such persons have a clear right to disengage the property from all incumbrances in order to make their own claims beneficial or available. Hence a tenant for life, a tenant by the curtesy, a

may it not operate, although not as a mortgage, yet as a contract for a mortgage? Post, § 1393. Clark *v.* Deutsch, 101 Ind. 491; Bryan *v.* Howland, 98 Ill. 625; Flanders *v.* Greely, 64 N. H. 357, 10 Atl. 686; Horst *v.* Dague, 34 Ohio St. 371.

An interest in land for a term of years may be the subject of mortgage. Bank of Louisville *v.* Baumeister, 87 Ky. 61, 7 S. W. 170; French *v.* Prescott, 61 N. H. 27; Hagar *v.* Brainerd, 44 Vt. 294.

[1] 1 Domat, B. 3, tit. 1, § 3, art. 5, 20. An attempted mortgage of property not belonging to the mortgagor, made with full warranty, will be good upon a subsequent acquisition of title by the mortgagor, through the application of the law of estoppel. See Bigelow, Estoppel, 332 et seq. (3d ed.). So too a mortgage in terms of property thereafter to be acquired will be good in equity as an agreement for a mortgage whenever the property is acquired. Sample *v.* Scarborough, 44 La. Ann. 257, 10 So. 860; Hirshkind *v.* Israel, 18 S. C. 157.

[2] See on this subject 4 Kent, Comm. Lect. 58, pp. 147, 148 (4th ed.); Sugden on Powers, ch. 9, § 2, p. 437; Id. art. 3, pp. 472, 478 (2d ed.); 1 Powell on Mort. 62, by Coventry & Rand; 3 Powell on Mort. 1633, note (*o*), same ed.; Mills *v.* Banks, 3 P. Will. 1, 6; Wilson *v.* Troup, 7 John. Ch. R. 25.

[3] 2 Fonbl. Eq. B. 3, ch. 1, § 8, note (*p*); Co. Litt. 208, Butler's note (1); 4 Kent, Comm. Lect. 58, pp. 162, 163 (4th ed.).

jointress, a tenant in dower in some cases,[1] a reversioner, a remainder-man, a judgment creditor,[2] a tenant by elegit, the lord of a manor holding by escheat,[3] and indeed every other person being an incumbrancer or having legal or equitable title or lien therein, may insist upon a redemption of the mortgage in order to the due enforcement of their claims and interests respectively in the land.[4] When any such person does so redeem,

[1] Ibid. and Co. Litt. 208 *a*, Butler's note (1); Swannoch *v.* Lifford, cited ibid.; s. c. Ambler, R. 6; Kinnoul *v.* Money, 3 Swanst. R. 208; Jeremy on Eq. Juris. B. 1, ch. 2, § 1, pp. 182, 183.

The party who offers to redeem must have at least some interest in the mortgaged property. Daws *v.* Overmyer, 141 Ind. 438, 40 N. E. 1065; Cooper *v.* Maurer, 122 Iowa, 321, 98 N. W. 124; Harwood *v.* Underwood, 28 Mich. 427; Powers *v.* Golden Lbr. Co., 43 Mich. 468, 5 N. W. 656; Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672; Kebabian *v.* Shinkle, 26 R. I. 505, 59 Atl. 743; Gatewood *v.* Gatewood, 75 Va. 407.

[2] See Dawson *v.* Whitehaven, 4 Ch. D. 639; s. c. 6 Ch. D. 218.

[3] Mildred *v.* Austin, L. R. 8 Eq. 220; Beadle *v.* Cole, 173 Ill. 136, 50 N. E. 809; Shumate *v.* McLendon, 120 Ga. 396, 48 S. E. 10; Perkins *v.* Stewart, 75 Minn. 21, 77 N. W. 434; Johnson *v.* Stewart, 75 Minn. 20, 77 N. W. 435; the mortgagee is liable for the surplus over and above the mortgage debt, if he fails to collect it. Price *v.* Blankenship, 144 Mo. 203, 45 S. W. 1123; Bobbitt *v.* Stanton, 120 N. C. 253, 26 S. E. 817; Norman *v.* Halsey, 132 N. C. 6, 43 S. E. 473; Downe *v.* Morris, 3 Hare, R. 394.

[4] Com. Dig. Chancery, 4 A. 4. Even a person claiming under a prior or subsequent voluntary conveyance may, as against the mortgagee, redeem. 2 Fonbl. Eq. B. 3, ch. 1, § 8, and note (*p*). An assignment of the debt generally draws after it the land mortgaged as a consequence and an appurtenance of the debt, upon the rule, "Omne principale trahit ad se accessorium." But an assignment of the mortgage without an assignment of the debt is treated at most as a transfer of a naked trust. See 4 Kent, Comm. Lect. 58, p. 194 (4th ed.).

A junior mortgagee may file a bill against the mortgagor and senior mortgagee asking an account of the mortgage debts and a sale of the property for the payment of the sums due; and he may offer in his bill to redeem the senior mortgage, and have the property sold for the satisfaction of that mortgage, or sold to satisfy both mortgages, the proceeds to be applied first to the elder mortgagee. Davis *v.* Cook, 65 Ala. 617.

When however subsequent purchasers or incumbrancers file a bill in equity against the first mortgagee asking an account and redemption, and not denying that there is a balance due on the mortgage debt, it follows that they ought to make tender in the bill or offer to pay whatever may be found due. Smith *v.* Conner, 65 Ala. 371; Rogers *v.* Torbert, 58 Ala. 523; Eslava *v.* Crampton, 61 Ala. 507; Cain *v.* Gimon, 36 Ala. 168.

The mortgagee himself may pay off an existing incumbrance of any kind, and doing so will be entitled to reimbursement when redemption is sought by the mortgagor or by any one claiming under him. McCormick *v.* Knox, 105 U. S. 122, 26 L. Ed. 940; Sharp *v.* Thompson, 100 Ill. 447; Humphreys *v.* Allen, Ib. 511. See Dale *v.* McEvers, 2 Cowen, 118.

In redeeming from a purchaser from the mortgagee with notice, the

he or she becomes substituted to the rights and interests of the original mortgagee in the land exactly as in the civil law. And in some cases (as we have already seen) a further right of priority by tacking may sometimes be acquired beyond what the civil law allowed.[1] But no person except a mortgagor, his heirs or privies in estate, has a right to redeem or to call for an account unless indeed it can be shown that there is collusion between

mortgagor is not concerned with any enhanced price paid. Dozier *v.* Mitchell, 65 Ala. 511.

[1] Ante, §§ 410 to 421, and notes; ante, § 1010, and note 5; Com. Dig. Chancery, 4 A. 10, 2 Fonbl. Eq. B. 3 ch. 1, § 9, and note (*u*); § 11, note, (*a*). Where a mortgagee has two mortgages upon different estates separately mortgaged to him by the mortgagor, and one of them is a deficient security for the debt, and the other is more than sufficient, the mortgagor and his heirs will not be permitted to redeem one without redeeming the other. 1 Madd. Ch. Pr. 425; Shuttleworth *v.* Laycock, 1 Vern. R. 245; Margrave *v.* Le Hooke, 2 Vern. R. 207; Pope *v.* Onslow, 2 Vern. R. 286; Jones *v.* Smith, 2 Ves. Jr. 376. But see Ex parte King, 1 Atk. 300. And if the equity of redemption of one of the estates be sold, the purchaser will not be permitted to redeem that estate (if the mortgage has become absolute at law) without redeeming both mortgages. Purefoy *v.* Purefoy, 1 Vern. 29, and Mr. Raithby's note; Ex parte Carter, Ambler, R. 733; Jones *v.* Smith, 2 Ves. Jr. 376; Ireson *v.* Denn, 2 Cox, R. 425; Willie *v.* Lugg, 2 Eden, R. 80. The ground of this doctrine is that he who seeks equity must do equity; and a Court of Equity will not assist any person in depriving a mortgagee of any security which he would have against the mortgagor. See also 2 Fonbl. Eq. B. 2, ch. 3, § 9, and note (*x*). The author here and elsewhere (see note 2, supra) alludes to the case of consolidation of mortgages on different estates. "What is consolidation? It is when a mortgagor comes into a Court of Equity to redeem his property, and the court says: 'You shall not do this if the mortgagee has another debt due from you which is secured upon an insufficient security. You must pay both debts; if not, you cannot redeem either property.' " Cotton, L. J. in In re Raggett, 16 Ch. D. 117.

But this consolidation of two mortgages of different estates cannot be insisted upon by the common mortgagee as a condition to the right of redemption when one of the mortgage debts has ceased to exist, as by bankruptcy. Ib. Nor where one of the mortgage debts is created after the mortgagor has assigned the equity of redemption of the first mortgage to the person seeking to redeem. Mills *v.* Jennings, 13 Ch. D. 638 (C. A.), overruling Tassell *v.* Smith, 1 DeG. & J. 718. And see Baker *v.* Gray, 1 Ch. D. 491. The court in Mills *v.* Jennings said that Beevor *v.* Luck, L. R. 4 Eq. 517, was not opposed to this rule. Indeed in Harter *v.* Colman, 19 Ch. D. 630, the case of Beevor *v.* Luck was denied, and it was held by Mr. Justice Fry that the owner of the two mortgages, who had acquired both after an assignment by the mortgagor of the equity of redemption of one, could not consolidate them against the assignee of the equity of the one, though both mortgages were created before the assignment. See White *v.* Hillacre, 3 Younge & C. Ex. 597. It was declared that in such a case the assignee of the equity was subject to the equities which would exist against the assignor only at the time of the assignment, not to those which might prevail against him at the time of the claim to redemption. Harter *v.* Colman, supra; Cummings *v.* Fletcher,

them and the mortgagee.[1] Hence it is that a mere annuitant of the mortgagor (who has no interest in the land) has no title to redeem.[2]

§ 1370. **The Right of Foreclosure.** — As to the correspondent right of foreclosure and other remedies for the mortgagee, to secure the due discharge of the mortgage, they naturally flow from the principles already stated. We have already seen[3] that in the civil law there were two remedies allowed to the mortgagee, a remedy in rem and also a remedy in personam against the mortgagor for the debt. The general remedy in rem was by a sale by the mortgagee of the mortgaged estate, either under a judicial decree or without such a decree by his own voluntary act of sale after a certain fixed notice to the debtor. In either case the sale if bona fide and regularly made was valid to pass the absolute title to the estate against the mortgagor and his heirs, and the proceeds were first to be applied to the discharge of the debt,

14 Ch. D. 712; Jennings *v.* Jordan, 6 App. Cas. 701. But the case was admitted to be otherwise where both equities of redemption existed in the same person. See Vint *v.* Padget, 2 DeG. & J. 611.

[1] See Briggs *v.* Davis, 108 Mass. 322, that a divorced wife entitled to dower may redeem in case of collusion between the husband and the mortgagee.

[2] So of one who has only a bond from the mortgagor to convey the equity of redemption. McDougald *v.* Capron, 7 Gray, 278; Grant *v.* Duane, 9 Johns. 612. See Porter *v.* Read, 19 Me. 363. So also of one who has an assignment of the debt, with right to retain a portion of it, the remainder to belong to the assignor, but without an assignment of the mortgage. Morley *v.* Morley, 25 Beav. 253; White *v.* Parnther, 1 Knapp, R. 229; Troughton *v.* Binkes, 6 Ves. 572. Lord Wynford, in delivering the opinion of the court, in White *v.* Parnther, 1 Knapp, R. 229, said: "But it has been said that as the mortgagee has within twenty years acknowledged the existence of the mortgage, the mortgagor has, on account of such acknowledgment, a right to sue for the redemption of the estate; and that this annuitant whose claim is against the equity of redemption has a right, as the mortgagor does not object to it, to claim through his side against the mortgagee. If so, every legatee of the mortgagor must have the same right of insisting that the mortgage debt is satisfied, and of calling on the mortgagee to give him an account of the proceeds of the estate from the time of the death of the mortgagor, a period of above fifty years. If creditors or legatees of the mortgagor had the right of calling mortgagees to separate accounts, every mortgagee would be liable to be ruined by the different suits that might be instituted against him. But from the principle laid down in the case of Troughton *v.* Binkes (6 Vesey, 572), and the cases referred to by the Master of the Rolls in his judgment in that case, I think that the mortgagor or his heirs only can sue the mortgagee for an account and redemption, unless it can be shown that they and the mortgagee are in collusion to prevent creditors or legatees from recovering what is due to them from the mortgagor's property."

[3] Ante, § 1351.

and the surplus if any was to be paid over to the mortgagor or his representatives. This seems to have been the ordinary course in the civil law in order to obtain satisfaction of the debt out of the mortgaged estate. But in some cases, and especially where a sale could not be made effectual, a decree might be obtained in the nature of a foreclosure, by which after certain judicial proceedings the absolute dominion of the property would be passed to the mortgagee.[1] This was probably the origin of the present mode of extinguishing the rights of the mortgagor by a decree of foreclosure in a Court of Equity.

§ 1371. **Same.** — The natural course and certainly the most convenient and beneficial course for the mortgagor would seem to be for the court to follow out the civil-law rules on this subject;[2] that is to say, primarily and ordinarily to direct a sale of the mortgaged property giving the debtor any surplus after discharging the mortgaged debt; and secondarily to apply the remedy of foreclosure only to special cases where the former remedy would not apply or might be inadequate or injurious to the interests of the parties. This course has accordingly been adopted in many of the American Courts of Equity, and it is also the prevailing practice in Ireland. It is done without any distinction whether there is a power to sell contained in the mortgage or not.[3]

§ 1372. **Same.** — In England a practice widely different has prevailed. A bill for a foreclosure is deemed in common cases the exclusive and appropriate remedy; and the Courts of Equity in

[1] Ante, §§ 1352, 1353. Equity will sometimes relieve against one who has so enforced his legal right to foreclosure as to work injustice upon a third person having rights in the property. See Gilbert *v.* Haire, 43 Mich. 283.

[2] In most if not all cases it would be equally beneficial to the mortgagee, as it would prevent the delays incident to the common decree of foreclosure, which is liable to be reopened, and would also prevent any difficulty in obtaining the residue of the debt when the mortgaged property is not sufficient to discharge it. See 4 Kent, Comm. Lect. 58, pp. 146, 147, 181, 182 (4th ed.). See also Perry *v.* Barker, 13 Ves. 198, 202; Tooke *v.* Hartley, 2 Bro. Ch. R. 125, and Mr. Belt's note (1); s. c. 2 Dick. R. 785; 3 Powell on Mort. 1046, note T, by Coventry (Coventry & Rand's ed.).

[3] 4 Kent, Comm. Lect. 58, pp. 181, 182 (4th ed.); Brinckerhoff *v.* Thalhimer, 2 John. Ch. R. 486; Mills *v.* Dennis, 3 John. Ch. R. 369, 370; Perry *v.* Baker, 13 Ves. 205; 3 Powell on Mort. 963, Coventry's note B. (Cov. & Rand's ed.); 1 Dow, Parl. R. 20; McDonough *v.* Shewbridge, 2 Ball & Beatt. 555. But although the mortgagee may pray a sale, yet it seems that in Ireland a mortgagor cannot insist on a sale, but is only entitled to redeem. McDonough *v.* Shewbridge, 2 Ball & Beatt. 555. Can a pledgor compel a sale by the pledgee? See Story on Bailments, § 320.

that country refuse except in special cases to decree a compulsory sale against the will of the mortgagor. These courts however have departed from this general rule in certain cases: (1) where the estate is deficient to pay the incumbrance;[1] (2) where the mortgagor is dead and there is a deficiency of personal assets;[2] (3) where the mortgage is of a dry reversion;[3] (4) where the mortgagor dies and the estate descends to an infant;[4] (5) where the mortgage is of an advowson;[5] (6) where the mortgagor becomes bankrupt and the mortgagee prays a sale; (7) or where the mortgagor is dead and the mortgagee by his bill, brought against the executor or administrator and the heir, prays for a sale of the mortgaged estate, alleging it to be scanty security, and for the payment of any deficiency out of the general estate of the deceased mortgagor;[6] (8) where the mortgage or charge is purely equitable, as for example by a deposit of title-deeds;[7] (9) where the mortgage is of land and by the local law is subject to a sale;[8] such as for example in Ireland and America.

§ 1373. **Same.** — It is difficult to perceive any solid or distinct ground upon which these exceptions stand, which would not justify the Courts of Equity in England in decreeing a sale at all times when it is prayed for by the mortgagee, or when it would be beneficial to the mortgagor. The inconveniences of the existing practice of foreclosure in that country are so great that it has become a common practice to insert in mortgages a power of

[1] Dashwood *v.* Bithazey, Mosel. R. 196.

[2] Daniel *v.* Skipwith, 2 Bro. Ch. R. 155.

[3] How *v.* Vigures, 1 Ch. Rep. 32.

[4] Booth *v.* Rich, 1 Vern. 295; Mondey *v.* Mondey, 1 Ves. & B. 223. But see Goodier *v.* Ashton, 18 Ves. 83; Mills *v.* Dennis, 3 John. Ch. R. 369, 370; 3 Powell on Mort. 982, 983 *a*, 984 *b*, by Coventry & Rand, and notes, ibid., and especially note (*z*); Gore *v.* Stackpole, 1 Dow, R. 18; 2 Fonbl. Eq. B. 2, ch. 3, §§ 8, 12, note (*b*); Davis *v.* Dowding, 2 Keen, R. 245.

[5] Mackensie *v.* Robinson, 3 Atk. 559; 2 Fonbl. Eq. B. 2, ch. 3, § 3, note (*d*).

[6] King *v.* Smith, 2 Hare, R. 239.

[7] Pain *v.* Smith, 2 Mylne & Keen, 417; Parker *v.* Housefield, 2 Mylne & Keen, 419; Meller *v.* Woods, 1 Keen, R. 16, 23; Russell *v.* Russell, 1 Bro. Ch. R. 269; Brocklehurst *v.* Jessop, 7 Sim. R. 438; Thorpe *v.* Gartside, 2 Younge & Coll. 730; Greenwood *v.* Firth, 2 Hare, R. 241, note. But six months are allowed to redeem before the sale is made. Ibid.; post, § 1636. The remedy in England of an equitable mortgagee is foreclosure, not sale. James *v.* James, L. R. 16 Eq. 153.

[8] 4 Powell on Mort. 1016, Coventry & Rand's note; Stileman *v.* Ashdown, 2 Atk. 477, 608; s. c. Ambler, R. 13 and Mr. Blunt's note, p. 16, note (*b*); post, § 1619; Bronson *v.* Kinsie, 42 U. S. 321, 11 L. Ed. 143.

sale upon default of payment. And although Lord Eldon at first intimated an opinion unfavorable to such a power as dangerous, it is now firmly established.[1]

§ 1374. **Same.** — In bills for redeeming mortgages where there are various persons claiming adverse rights and limited interests

[1] 4 Kent, Comm. Lect. 58, pp. 146, 147 (4th ed.), and note; Croft *v.* Powell, Comyn. R. 603; Anon. 6 Madd. R. 15; Clay *v.* Sharpe, Sugden on Vendors, p. 326, and App. No. 14 (7th ed.); Corder *v.* Morgan, 18 Ves. 344; 1 Powell on Mort. 9, 13, Coventry's note K, and Rand's note (1); Doolittle *v.* Lewis, 7 John. Ch. R. 35. See In re Richardson, L. R. 12 Eq. 398; In re Chawner, L. R. 8 Eq. 569; Cruikshank *v.* Duffin, L. R. 13 Eq. 555; Boyd *v.* Petrie, L. R. 7 Ch. 385; Thurlow *v.* Mackeson, L. R. 4 Q. B. 97; McLean *v.* Presley, 56 Ala. 211; Shillaber *v.* Robinson, 97 U. S. 68. Thus the mortgagee cannot be enjoined from selling under the power in the absence of fraud or of some other particular equity, such as an attempt to pervert the power to purposes of unlawful oppression. Struve *v.* Childs, 63 Ala. 473; Robertson *v.* Norris, 4 Jur. (N. S.) 155; s. c. 1 Giff. 421.

But the power must be strictly complied with or the sale will be invalid. Shillaber *v.* Robinson, supra. This rule must not however be taken too widely. Much may be done which the power does not expressly authorize. Thus upon the non-payment of an instalment due upon a mortgage with power of sale, the mortgage becomes payable; and in the absence of controlling language to the contrary, the property may be sold and enough held by the mortgagee to cover future instalments as well as those in default. McLean *v.* Presley, 56 Ala. 211; Cox *v.* Wheeler, 7 Paige, 248; Holden *v.* Gilbert, Ib. 208; Jencks *v.* Alexander, 11 Paige, 619; Barber *v.* Cary, 11 Barb. 549; Bunce *v.* Reed, 16 Barb. 347.

A mortgagee acting under a power of sale is not trustee of the power. The power is given him for his own benefit, to enable him the better to realize his debt. If he exercise it bona fide for that purpose, without corruption or collusion with the purchaser, equity will not interfere, even though the sale be very disadvantageous, unless the price is so low as to show fraud. Warner *v.* Jacob, 20 Ch. D. 220, Kay, J. See Jones *v.* Matthie, 11 Jur. 504 (reversing Matthie *v.* Edwards, 2 Coll. 465); Davey *v.* Durrant, 1 DeG. & J. 535, 557; Adams *v.* Scott, 7 W. R. 213; Kirkwood *v.* Thompson, 2 H. & M. 392; Locking *v.* Parker, L. R. 8 Ch. 30; In re Alison, 11 Ch. D. 284. Doubt is cast on Robertson *v.* Norris, 1 Giff. 421, 424, in which the language of Lord Eldon in Downes *v.* Glazebrook, 3 Mer. 600, is referred to. But see Hood *v.* Adams, 124 Mass. 481, 484. The mortgagee of course is trustee for the mortgagor as to any surplus remaining after the debt is paid from the proceeds of sale. Warner *v.* Jacob, supra. And see Hood *v.* Adams, supra.

Even where the words of a mortgage express a trust most clearly, equity will not hold the mortgagee a trustee for all purposes. Thus where under an ordinary power of sale in a mortgage there is an express trust of the moneys to be received by the mortgagee, that is not a trust which the mortgagor can enforce except as to the surplus. Banner *v.* Berridge, 18 Ch. D. 254, 269, Kay, J.

A sale under the power will be restrained if the mortgagor bring into court the amount due. Hickson *v.* Darlow, 23 Ch. D. 690. On the other hand a mortgagee may file a bill to foreclose though the mortgage contain a power of sale. Vaughan *v.* Marable, 64 Ala. 60.

in the mortgaged estate, it often becomes necessary to direct how assets and securities are to be marshalled in order to do justice between the different claimants and to prevent irreparable mischiefs, as well as to ascertain the amounts and proportions in which they should contribute towards the discharge of the incumbrances common to them all. This subject in many of its most important bearings has already been examined in other places.[1] Similar principles prevailed (as we have seen) to a great extent in the civil law, in which the right of substitution was admitted as well as what was technically called the benefit of discussion, answering in some measure to our doctrine of marshalling assets and securities.[2]

§ 1375. **Time of Redemption May Be Extended by Parol.** — In respect to the time within which a mortgage is redeemable it may be remarked that the ordinary limitation is twenty years from the time when the mortgagee has entered into possession after breach of the condition under his title, by analogy to the ordinary limitation of rights of entry and actions of ejectment.[3] If therefore the mortgagee enters into possession in his character of mortgagee and by virtue of his mortgage alone, he is for twenty years liable to account; and if payment be tendered to him, he is liable to become a trustee of the mortgagor and to be treated as such. But if the mortgagor permits the mortgagee to hold the possession for twenty years without accounting or without admitting that he possesses a mortgage title only, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it previously was in law. In such a case the time begins to run against the mortgagor from the moment the mortgagee takes possession in his character as such; and if it has once begun to run and no subsequent admission is made by the mortgagee, it continues to run against all persons claiming under the mortgagor, whatever may be the disabilities to which they may be subjected.[4] [The time for redemption may be extended by parol,

[1] Ante, §§ 709, 758 to 760, 764, 765, 767, 856 to 859; post, § 1640.

[2] Ante, §§ 663, 856, 857.

[3] Raffety *v.* King, 1 Keen, R. 602, 609, 610, 616, 617; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 1, 191; s. c. 4 Bligh (N. S.), 1; Corbett *v.* Barker, 1 Anst. R. 138; s. c. 3 Anst. R. 755; White *v.* Parnther, 1 Knapp, R. 228, 229. Stevens *v.* Dedham Inst. for Sav., 129 Mass. 547; Ayres *v.* Waite, 10 Cush. 72.

[4] See post, § 1520; Robinson *v.* Fife, 3 Ohio St. 551; Ayres *v.* Waite, 10 Cush. 72; Crook *v.* Glen, 30 Md. 55. An acknowledgment by one of several joint mortgagees is inoperative. Richardson *v.* Younge, L. R.

and where additional time to redeem has thus been given, time is then counted as of the essence.[1] If the contract does not state within what time the redemption shall be made, the mortgagor is entitled to at least a reasonable time.[2]] But if the mortgagee enters not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor and the validity of the conveyance which he takes. So that if the conveyance be such as gives him the estate of a tenant for life only in the equity of redemption, there, as he unites in himself the characters of mortgagor and mortgagee, he is bound to keep down the interest of the mortgage, like any other tenant for life, for the benefit of the persons entitled to the remainder; and time will not run against the remainder-man during the continuance of the life estate.[3]

§ 1376. **Waiver of Right of Foreclosure.** — Similar considerations will in many respects apply to the right of foreclosure of a mortgagee. If he has suffered the mortgagor to remain in possession for twenty years after the breach of the condition without any payment of interest or any admission of the debt or other duty, the right to file a bill for a foreclosure will generally be deemed to be barred and extinguished.[4] However, in cases of this sort, as the bar is not positive but is founded upon a presumption of payment, it is open to be rebutted by circumstances.[5]

6 Ch. 478; McGuire *v.* Lynch, 126 Cal. 576, 59 Pac. 27; Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Tibbs *v.* Reed, 105 Ky. 331, 49 S. W. 6, 20 Ky. L. Rep. 1208; Munro *v.* Barton, 98 Me. 250, 56 Atl. 844; Schafer *v.* Hauser, 111 Mich. 622, 70 N. W. 136, 3 Detroit Leg. N. 801, 35 L. R. A. 835, 66 Am. St. Rep. 403; Decker *v.* Decker, 64 Neb. 239, 89 N. W. 795; Nash *v.* Northwest Land Co., 15 N. Dak. 566, 108 N. W. 792.

[1] Taggart *v.* Blair, 215 Ill. 339, 74 N. E. 372; Tinkler *v.* Swaynie, 71 Ind. 562; Williams *v.* Hoffman, 39 Ind. App. 315, 76 N. E. 440; Matney *v.* Williams, 28 Ky. L. Rep. 494, 89 S. W. 678; Svenson *v.* Rohrer, 206 Pa. 407, 55 Atl. 1070.

[2] Turpie *v.* Lowe, 158 Ind. 314, 62 N. E. 484, 92 Am. St. Rep. 310; Mann *v.* Provident L. & Trust Co., 42 Wash. 581, 85 Pac. 56.

[3] Raffety *v.* King, 1 Keen, R. 601, 609, 610, 616 to 618; Corbett *v.* Barker, 1 Anst. R. 138; s. c. 3 Anst. 755; Reeve *v.* Hicks, 2 Sim. & Stu. 403; Ravald *v.* Russell, 1 Younge, R. 19.

[4] Garren *v.* Fields, 131 Ala. 304, 30 So. 775; Bentley *v.* Callaghan, 79 Miss. 302, 30 So. 709; City of St. Louis *v.* Priest, 103 Mo. 652, 15 S. W. 988; Combs *v.* Goldworthy, 109 Mo. 151, 18 S. W. 1130; Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Stewart *v.* Nicholls, 1 Tamlyn, R. 307; Christophers *v.* Sparke, 2 Jac. & Walk. 223; Trash *v.* White, 3 Bro. Ch. R. 289; Toplis *v.* Baker, 2 Cox, R. 119. See also White *v.* Parnther, 1 Knapp, R. 228, 229.

[5] Ibid. Richmond *v.* Aiken, 25 Vt. 324; Cheever *v.* Perley, 11 Allen, 584. See post, § 1520.

§ 1377. **Same.** — These may suffice as illustrations of some of the more important doctrines of Courts of Equity in regard to mortgages of lands, many of which are founded upon principles of justice so universal as equally to commend themselves to the approbation of a Roman prætor and of a modern judge administering the law of continental Europe ex equo et bono.[1]

§ 1378. **Distinction between Pledge and Mortgage of Personal Property.** — Let us now pass to a brief consideration of the doctrines of equity applicable to mortgages and pledges of personal property. A mortgage of personal property differs from a pledge. The former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. The latter only passes the possession, or at most a special property only to the pledgee with a right of retainer until the debt is paid or the other engagement is fulfilled.[2] The difference between them was well stated by a learned judge in a comparatively recent case. "A mortgage is a pledge, and more; for it is an absolute pledge, to become an absolute interest if not redeemed at a certain time. A pledge is a deposit of personal effects not to be taken back but on payment of a certain sum, by express stipulation or the course of trade to be a lien upon them."[3]

§ 1379. **Equity of Redemption of Personal Property.** — In mortgages of personal property, although the prescribed condition has not been fulfilled, there exists as in mortgages of land an equity of redemption which may be asserted by the mortgagor if he brings his bill to redeem within a reasonable

[1] See 1 Domat, B. 3, tit. 1, § 3, art. 6, and note, ibid.; Cod. Lib. 8, tit. 14, l. 2; Code Civ. of Louisiana, arts. 3366, 3367.

[2] See Doane *v.* Russell, 3 Gray, 382, 384; Winchester *v.* Ball, 54 Me. 558; Donald *v.* Suckling, L. R. 1 Q. B. 585; Halliday *v.* Holgate, L. R. 3 Ex. 299; Johnson *v.* Stear, 15 C. B. (N. S.) 330; Baltimore Ins. Co. *v.* Dalrymple, 25 Md. 269; Bulkeley *v.* Welch, 31 Conn. 339. Delivery is necessary to create the lien of a pledge. Walcott *v.* Keith, 22 N. H. 196; Whittle *v.* Skinner, 23 Vt. 531. See Donald *v.* Suckling, supra. Further as to the distinction between these securities see Heyland *v.* Badger, 35 Cal. 404; Wright *v.* Ross, 36 Cal. 414; Parshall *v.* Eggart, 52 Barb. 367; Haskins *v.* Kelly, 1 Robt. (N. Y.) 160; Bunacleugh *v.* Poolman, 3 Daly, 236; 4 Kent, Comm. Lect. 58, p. 138 (4th ed.); Story on Bailments, § 287; Ryall *v.* Rolle, 1 Atk. 166, 167; Ratcliff *v.* Davies, Cro. Jac. 244; Barrow *v.* Paxton, 5 John. R. 258; Story *v.* Tompkins, 8 John. R. 97, 98; McLean *v.* Walker, 10 John. R. 472; Cortelyou *v.* Lansing, 1 Cain. Cas. Err. 200, 202; Com. Dig. Mortgage, A.

[3] Jones *v.* Smith, 2 Ves. Jr. 378.

time.[1] There is however a difference between mortgages of land and mortgages of personal property in regard to the rights of the mortgagee after a breach of the condition. In the latter case there is no necessity to bring a bill of foreclosure; but the mortgagee upon due notice may sell the personal property mortgaged, as he could under the civil law; and the title, if the sale be bona fide made, will vest absolutely in the vendee.[2] And it makes no difference whether the personal property mortgaged consists of goods, or of stock, or of personal annuities.

§ 1380. **Same.** — In cases of pledges, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards if he applies within a reasonable time. But if no time is fixed for the payment, the pledgor has his whole life to redeem unless he is called upon to redeem by the pledgee; and in case of the death of the pledgor without such a demand his personal representatives may redeem.[3] Generally speaking a bill in equity to redeem will not lie on the behalf of the pledgor or his representatives, as his remedy upon a tender is at law.[4] But if any special ground is shown, as if an account or a discovery is wanted, or there has been an assignment of the pledge, a bill will lie.[5]

§ 1381. **Same.** — On the other hand the pledgee might, according to Glanville, at any time bring a suit at the common law to compel the pledgor to redeem by a given day; and if he did not then redeem he was forever foreclosed of his right.[6] But the course now adopted is to bring a bill in equity to foreclose and sell the pledge, in which case an absolute title passes to the

[1] See Flanders *v.* Chamberlain, 24 Mich. 305; Stoddard *v.* Dennison, 7 Abb. Pr. (N. S.) 309. See Kemp *v.* Westbrook, 1 Ves. 278; Hart *v.* Ten Eyck, 2 John. Ch. R. 100, 101; Harrison *v.* Hart, Comyns, R. 392, 411.

[2] Tucker *v.* Wilson, 1 P. Will. 261; Lockwood *v.* Ewer, 9 Mod. R. 275; s. c. 2 Atk. 303; Hart *v.* Ten Eyck, 2 John. Ch. R. 100, 101; 2 Fonbl. Eq. B. 2, ch. 3, § 4, and note (*f*); 1 Domat, B. 3, tit. 1, § 3, art. 9; Story on Bailments, § 309; Cortelyou *v.* Lansing, 1 Cain. Cas. Err. 210, 213. See Dane *v.* Mallory, 16 Barb. 46; Freeman *v.* Freeman, 2 C. E. Green, 44; Doane *v.* Russell, 3 Gray, 382, 384; Bryant *v.* Carson, 3 Nev. 313.

[3] 4 Kent, Comm. Lect. 58, p. 138 (4th ed.); Story on Bailments, §§ 308, 345, 346, 348; Glanville, Lib. 10, cap. 6, 8; Cortelyou *v.* Lansing, 1 Cain. Cas. Err. 200, 203; Demandry *v.* Metcalf, Prec. Ch. 420; s. c. 2 Vern. 691, 698; Gilb. Eq. R. 104; Vanderzee *v.* Willis, 3 Bro. Ch. R. 21; Kemp *v.* Westbrook, 1 Ves. 278.

[4] Surber *v.* McClintic, 10 W. Va. 236.

[5] See Hasbrouck *v.* Vandervoort, 4 Sandf. 74; Bartlett *v.* Johnson, 9 Allen, 530; Kemp *v.* Westbrook, 1 Ves. 278; Demandry *v.* Metcalf, Prec. Ch. 419, 420; Jones *v.* Smith, 2 Ves. Jr. 372.

[6] Glanville, Lib. 10, cap. 8; 1 Cain. Cas. Err. 204, 205; 4 Kent, Comm. Lect. 58, p. 138 (4th ed.).

vendee.[1] It has been also said that the pledgee may, after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree of sale.[2]

§ 1382. **The Doctrine of Tacking as Applied to Mortgages of Personal Property.** — There is another consideration applicable to cases of mortgages and pledges of personal property which does not apply, or at least is not as cogent, in cases of mortgages of land. The latter pass by formal conveyances; the former may be transferred by the mere change of possession. A subsequent advance made by a mortgagee or a pledgee of chattels would attach by tacking to the property in favor of such mortgagee, when a like tacking might not be allowed in cases of real estate. Thus for instance in the case of a mortgage of real estate the mortgagee cannot, as we have seen, compel the mortgagor upon an application to redeem to pay any debts subsequently contracted by him with, or advances made up to him by, the mortgagee, unless such new debts or advances are distinctly agreed to be made upon the security of the mortgaged property.[3] But in the case of a mort-

[1] 4 Kent, Comm. Lect. 58, p. 139 (4th ed.); Story on Bailments, §§ 308, 310, 317; Ex parte Mountfort, 14 Ves. 606.

[2] Kemp *v.* Westbrook, 1 Ves. 278; Lockwood *v.* Ewer, 9 Mod. 278; Cortelyou *v.* Lansing, 1 Cain. Cas. Err. 202, 203, 210; Garlick *v.* James, 12 John. R. 146; 2 Kent, Comm. Lect. 40, pp. 581, 582 (4th ed.); 4 Kent, Comm. Lect. 58, p. 139 (4th ed.); Story on Bailments, § 310; Jeremy on Eq. Jurisd. B. 1, ch. 2, § 2, p. 196. The doctrine that the pledgee has a right to sell the pledge absolutely, after the due notice to the pledgor, is so frequently stated that it is laid down in the text as clear law. The cases however in which it has been asserted are generally cases of mortgages of personal property, and not of mere pledges strictly so called. Whether there is any substantial distinction between the cases is left for the consideration of the learned reader; none has as yet been taken in Courts of Equity as to this point. In Pothonier *v.* Dawson, Holt's N. P. Rep. 385 (which was the case of a pledge sold), Lord Chief Justice Gibbs said: "Undoubtedly as a general proposition a right of lien gives no right to sell the goods. But when goods are deposited by way of security to indemnify a party against a loan of money it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred therefore that the contract was this: If I the borrower repay the money, you must redeliver the goods; but if I fail to repay it, you must use the security I have left to repay yourself. I think therefore the defendant had a right to sell." There is certainly much sound sense to commend itself in this interpretation of the contract of pledge in such a case. See post, note by the editor at end of § 1047 *a*. Doane *v.* Russell, 3 Gray, 382, 384; Washburn *v.* Pond, 2 Allen, 474; Freeman *v.* Freeman, 2 C. E. Green, 44; Donald *v.* Suckling, L. R. 1 Q. B. 585; Halliday *v.* Holgate, L. R. 3 Ex. 299.

[3] Ante, §§ 550, 551; Mathews *v.* Cartwright, 2 Atk. 347; Brace *v.* Duchess of Marlborough, 2 P. Will. 491, 492, 494; Shepherd *v.* Titley, 2

gage or pledge of chattels the general rule, or at least the general presumption, seems the other way. For it has been held that in such a case, without any distinct proof of any contract for that purpose, the pledge may be held until the subsequent debt or advance is paid as well as the original debt. The ground of this distinction is, that he who seeks equity must do equity; and the plaintiff seeking the assistance of the court ought to pay all the moneys due to the creditor, as it is natural to presume that the pledgee would not have lent the new sum but upon the credit of the pledge which he had in his hands before.[1] The presumption may indeed be rebutted by circumstances; but unless it is rebutted it will generally in favor of the lien stand for verity against the pledgor himself, although not against his creditors or against subsequent purchasers.[2]

§ 1383. **Same.** — It is not improbable that this doctrine respecting mortgages and pledges of chattels being held as security for subsequent debts and advances was borrowed from the civil law, although it is applied with some modifications in the Equity Jurisprudence of England. In the civil law (as we have already seen) the mortgagor or pledgor could not redeem without discharging all the other debts which he then owed to the pledgee; with a saving however in favor of the rights of other creditors and purchasers.[3]

§ 1384. **Same.** — We have already had occasion to consider the doctrine of tacking mortgages when one of several incumbrancers has acquired the legal estate.[4] But in cases of mortgages other

Atk. 352, 354; Anon. 2 Ves. 662; Lowthian *v.* Hasel, 3 Bro. Ch. R. 162; Jones *v.* Smith, 2 Ves. Jr. 376, 378; Ex parte Knott, 11 Ves. 617; 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (*u*); Id. § 12; St. John *v.* Holford, 1 Ch. Cas. 97; 4 Kent, Comm. Lect. 58, p. 185 (4th ed.).

[1] Demandray *v.* Metcalf, Prec. Ch. 419, 420; s. c. 2 Vern. 691, 698; 1 Eq. Abr. 324, pl. 4; Gilb. Eq. R. 104; Jones *v.* Smith, 2 Ves. Jr. 378, 379; Vanderzee *v.* Willis, 3 Bro. Ch. R. 21; Adams *v.* Claxton, 6 Ves. 229; Anon. 2 Vern. R. 177; 2 Fonbl. Eq. B. 3, ch. 1, § 10; 2 Kent, Comm. Lect. 40, p. 584 (3d ed.); Jarvis *v.* Rogers, 15 Mass. R. 389.

[2] Ibid.; 2 Fonbl. Eq. B. 3, ch. 1, § 11; 4 Kent, Comm. Lect. 58, pp. 175, 176 (4th ed.). As to the general doctrine of tacking in cases of mortgages of real estate, see ante, §§ 545 to 555.

[3] Ante, § 548, note (1); § 1354, 4 Kent, Comm. Lect. 58, pp. 175, 176 (4th ed.); Cod. Lib. 8, tit. 27, l. 1; Heinecc. Elem. P. and P. 4, § 46. In regard to the liens and charges and the modes of enforcing them in equity see post, §§ 1617 to 1661. In regard to the time within which a bill to foreclose a mortgage or to redeem a mortgage must be brought see ante, §§ 55, 1375, 1376; Story on Equity Plead. §§ 503, 751 to 760; White *v.* Parnther, 1 Knapp, R. 228, 229.

[4] Ante, §§ 545 to 553.

questions as to relative priorities and titles to payment often arise between different merely equitable incumbrancers. In such cases if a second equitable incumbrancer without notice of a prior incumbrance has by his diligence acquired a better equity, he will be entitled to be first paid. A better equity is thus acquired when the legal estate being outstanding in a trustee, a second incumbrancer without notice of a prior incumbrance takes a protection against a subsequent incumbrancer which the prior incumbrancer has neglected to take.[1] Thus for example (as we have seen) a declaration of trust of an outstanding term accompanied by a delivery of the deeds which create and continue the term will give a better equity than a mere declaration of trust to a prior incumbrancer. So where a second equitable incumbrancer has given notice to the trustees in whom the legal estate is vested, he will thereby acquire a priority over a prior incumbrancer who has omitted to give such notice.[2] So where the same equitable interest has been assigned by the assignor to different independent assignees, he who first gives notice of his title to the legal holder of the interest will thereby acquire a priority of right over the others, although his assignment be subsequent in date, provided that at the time of taking it he had no notice of the prior assignments.[3] And it has been

[1] Nandoin *v.* Fullenwider, 72 Neb. 221, 100 N. W. 296; Laton *v.* Crowell, 136 N. C. 377, 48 S. E. 767. But see Muir *v.* Schenectady, 3 Hill, N. Y. R. 228; Davies *v.* Austin, 1 Ves. Jr. 228; Story on Confl. of Laws, § 395; James *v.* Marcy, 2 Cowen, R. 246.

[2] Foster *v.* Blackstone, 1 Mylne & Keen, 297; Stanhope *v.* Earl Verney, 2 Eden, R. 81.

[3] Timson *v.* Ramsbottom, 2 Keen, R. 35; Dearle *v.* Hall, 3 Russ. R. 1; Loveridge *v.* Cooper, 3 Russ. R. 30; Meux *v.* Bell, 1 Hare, Ch. R. 73; Foster *v.* Cockerell, 9 Bligh, R. 332, 375, 376. Lord Lyndhurst, in delivering his opinion in the House of Lords on this occasion, said: "This was a question of priority between two equitable incumbrancers, — a question whether the subsequent incumbrancer of the equity having given notice to the trustees of the fund was entitled to priority over the former incumbrancer. Now that question has been settled, after much deliberate discussion, in the cases of Dearle *v.* Hall and Loveridge *v.* Cooper. Those two cases were argued before Sir Thomas Plumer, as Master of the Rolls, with great learning and attention to the subject. The Master of the Rolls, after considering the question, pronounced a very elaborate judgment, deciding that in cases of this description the party who gave notice to the trustees was entitled to the priority. And without adverting to the particular facts of those cases the principle upon which the decisions were founded was this, that if a contrary doctrine were to prevail it would enable a cestui que trust to commit a fraud; he might assign his interest first to one and then to a second incumbrancer, and that second incumbrancer would have no opportunity by any communication with the trustees of ascertaining whether or not there had

held that it makes no difference, in cases of different assignments, as to this priority of title acquired by notice under such assignments, whether the interest of the assignor be vested or contingent, present or reversionary.[1]

§ 1385. **What Amounts to an Extinguishment of the Debt.** — Questions often arise as to the point when and under what circumstances a mortgage is deemed to be extinguished. Undoubtedly by our law the satisfaction of the principal debt by payment or otherwise will be deemed in equity an extinguishment of the mortgage, unless there is an express or implied contract for keeping alive the original security.[2] By the Dutch

been a prior assignment of the interest. There was also another principle upon which he decided that case, which was this, that a party till he gives notice to the trustee has not done everything necessary to complete his title. In such cases it is necessary for the parties to do everything in their power. Further than that he assigns as an additional reason, that until notice was given to the trustees they did not in fact become trustees for the assignee. It was upon these distinct grounds that he laid down as a general rule, that in cases of an equitable assignment the party giving notice to the trustees, although he was the second incumbrancer, was entitled to priority if the former incumbrancer had given no such notice. These cases afterwards came before me when I had the honor of presiding in the Court of Chancery, and they were again argued before me with great ability and learning. I took time to consider the judgment on those occasions, and I was satisfied, after deliberate consideration, that the judgment pronounced in each of those cases was correct, and that it was my duty to affirm those judgments. Now the principle of those authorities applies directly to the present case. There are two incumbrancers of an equitable interest; the latter gave notice to the trustees, the former neglected to do so. The Master of the Rolls, Sir John Leach, when this case came before him, was of opinion, in conformity with the decisions already pronounced, that the notice gave to the second incumbrancer a prior right; and under these circumstances I think the decision so pronounced upon these principles by the Master of the Rolls was a correct decision, and that your lordships will be disposed to affirm the judgment; and as the case has already been decided after deliberate argument, this judgment ought to be affirmed with costs." See Langton *v.* Horton, 2 Hare, R. 549, 560, 562.

[1] Dearle *v.* Hall, 3 Russ. R. 1; Foster *v.* Cockrell, 9 Bligh, R. (N. S.) 378; Foster *v.* Blackstone, 1 Mylne & K. 297, 306, 307; Etty *v.* Bridges, 3 Younge & Coll. New R. 486, 492. See Société Générale *v.* Tramways Co., 14 Q. B. D. 424; Lee *v.* Howlett, 2 Kay & J. 531. This last case and Wiltshire *v.* Rabbits, 14 Sim. 76, declare that this does not apply to real estate or to equitable interests in chattels real. But in Consolidated Ins. Co. *v.* Riley, 5 Jur. (N. S.) full effect was given to the prior notice of a subsequent assignment of an equitable interest in real and personal estate of the nature of a chose in action. See also Foster *v.* Cockrell, 9 Bligh, 332; Foster *v.* Blackstone, 1 Mylne & K. 297; Kekewich *v.* Manning, 1 DeG. M. & G. 176.

[2] Chester *v.* Willis, Ambler, R. 246; Compton *v.* Oxendon, 2 Ves. Jr. 264; 2 Fonbl. Eq. B. 2, ch. 6, § 8. Whether payment of the amount due on a mortgage will operate to discharge the debt or as a purchase and

law it seems that the mortgage is extinguished unless there is an express contract for keeping it alive.[1] An extinguishment of the debt will also ordinarily take place where the mortgagee becomes also absolute owner of the equity of redemption, for then the equitable estate becomes merged in the legal.[2]

an assignment of the mortgage will depend not so much on the form of language as upon the relation between the party advancing the money and the party executing the release or transfer, and their relative duties. Ryer *v.* Gass, 130 Mass. 227; Brown *v.* Lapham, 3 Cush. 551; Gibson *v.* Crehore, 3 Pick. 475. As where the payment is made by one not bound to make it, and is made for the protection of his own interest, there the mortgage is treated as purchased. Ib. So the mortgage is treated as assigned to him who pays the debt if it is manifestly for his interest and consistent with justice, and no contrary interest is expressed or implied. Ib.; Hinds *v.* Ballou, 44 N. H. 619; Leavitt *v.* Pratt, 53 Me. 147.

It is further laid down that payment made on a mortgage by one who has assumed the same must be taken in discharge thereof, without regard to the form of any instrument by which the mortgagee may have attempted to transfer to him his interest. Thompson *v.* Heywood, 129 Mass. 401; McCabe *v.* Swap, 14 Allen, 188; Putnam *v.* Collamore, 120 Mass. 454; Birke *v.* Abbott, 1 N. E. 495, Sup. Court of Indiana, 1885. And in the last of these cases it was held to result from this rule that a purchaser of land, by having assumed the payment of incumbrances, could not on payment of one of them become subrogated to the rights of the incumbrancer, so as to cut off the rights of a later mortgagee (of whose mortgage such purchaser had no actual notice when he purchased). It was declared, upon a review of authorities, overruling Peet *v.* Beers, 4 Ind. 46, and Ayers *v.* Adams, 82 Ind. 109, that the assumption of incumbrances for a valuable consideration made them the primary debt of the purchaser, and did not put him in the situation of a surety to the parties bound before; the purchaser, it was affirmed, is now the principal debtor and they are his sureties. Fairchild *v.* Lynch, 1 Eastern Rep. 190, N. Y. Court of App. 1885; Bowen *v.* Beck, 94 N. Y. 86; Winans *v.* Wilkie, 41 Mich. 264; Heine *v.* Vogel, 69 Mo. 529; Snyder *v.* Robinson, 35 Ind. 311; Ritter *v.* Cost, 99 Ind. 80. Hence payment by him destroyed the incumbrances. See Carlton *v.* Jackson, 121 Mass. 592, 596; Willson *v.* Barton, 52 Vt. 394; Abbott *v.* Keeson, 72 Pa. 183.

It was further decided in Birke *v.* Abbott, contrary to certain cases of the New York courts, that the rule was not affected by the fact that the immediate grantor (himself a grantee after the incumbrances assumed) of the purchaser had not become personally liable to pay off the incumbrances. King *v.* Whitely, 10 Paige, 465; Trotter *v.* Hughes, 12 N. Y. 76. But see Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Vrooman *v.* Turner, 69 N. Y. 280; Pardee *v.* Treat, 82 N. Y. 387. The earlier of the New York cases make the situation of the last purchaser, on his assumption of the incumbrances, depend upon the liability of his grantor, instead of making it dependent upon his own contract; which appears anomalous.

[1] Wilkinson *v.* Simson, 2 Moore, Priv. Coun. R. 275.

[2] James *v.* Marcy, 2 Cowen, R. 246; Jackson *v.* De Witt, 6 Cowen, R. 310; Pelletrave *v.* Jackson, 11 Wend. R. 110; Wade *v.* Howard, 6 Pick. R. 492; St. Paul's *v.* Viscount Dudley and Ward, 15 Ves. 173; Forbes *v.* Moffatt, 18 Ves. 390; Gardner *v.* Gardner, 3 Johns. Ch. R. 53. Equity will not, in the absence of intention in fact, permit a merger when

The rule however is not inflexible, and may be controlled by the express or implied intention of the parties; and where it is manifestly for the interest of the person in whom both the legal and equitable titles unite to keep the incumbrance alive, there Courts of Equity will imply an intention to keep it alive unless the other circumstances of the case repel such a presumption.[1] The same doctrine with the like qualifications will apply to the case where an assignee of a mortgage purchases the equity of redemption, or the assignee of an equity of redemption purchases and takes a conveyance of the mortgage.

§ 1386. **Same.** — Questions have also arisen as to what shall or ought to be deemed a waiver or extinguishment of a mortgage upon personal property by taking other security therefor. It has been held that a creditor having a mortgage for part of his debt upon the funds of his debtor does not necessarily surrender that mortgage or lower its priority by taking a subsequent mortgage upon the same property for his whole debt, or by taking security on the same fund for another debt due to him either solely or jointly with another creditor.[2]

that would work injustice. See Wilkes *v.* Collin, L. R. 8 Eq. 338; Mulford *v.* Peterson, 35 N. J. 127; Stantons *v.* Thompson, 49 N. H. 272; Crosby *v.* Taylor, 15 Gray, 64; Aldrich *v.* Blake, 134 Mass. 582; Adams *v.* Angell, 5 Ch. D. 634; Toulmin *v.* Steere, 3 Mer. 210; Stevens *v.* Mid-Hants Ry. Co., L. R. 8 Ch. 1064; Knowles *v.* Carpenter, 8 R. I. 548; Lyon *v.* McIlvaine, 24 Iowa, 9; Rothschild *v.* Bay City Lbr. Co., 139 Ala. 571, 36 So. 785; Glover *v.* Fitzpatrick, 4 Ind. Ter. 224, 69 S. W. 856; Amos *v.* Livingston, 26 Kans. 106.

[1] See Wilkes *v.* Collin, L. R. 8 Eq. 338; Mulford *v.* Peterson, 35 N. J. 127; Stantons *v.* Thompson, 49 N. H. 272; Crosby *v.* Taylor, 15 Gray, 64; Kellogg *v.* Ames, 41 N. Y. 259; McCabe *v.* Swap, 14 Allen, 188, 191; Kilborn *v.* Robbins, 8 Allen, 466.

[2] Milne *v.* Walton, 2 Younge & Coll. New R. 354; Burdett *v.* Clay, 8 B. Mon. 287; Hill *v.* Beebe, 3 Kern. 556.

CHAPTER XXXI

EXPRESS TRUSTS — ASSIGNMENTS

§ 1387. **Assignments.** — In the next place let us pass to the consideration of ASSIGNMENTS of real and personal property upon special trusts. The most important and extensive of this class of trusts is that which embraces general assignments by insolvents and other debtors for the discharge of their debts, sometimes with priorities and preferences of particular creditors, and sometimes with an equality of rights among all the creditors.[1] The question of the validity of such conveyances and under what circumstances they are deemed fraudulent or bona fide has been already in some measure considered under the head of constructive fraud.[2] In general it may be stated that such priorities and preferences are not deemed fraudulent or inequitable; and even a stipulation on the part of the debtor in such an assignment that the creditors taking under it shall release and discharge him from all their further claims beyond the property assigned will (it seems) be valid and binding on such creditors.[3]

[1] Equity has jurisdiction to set aside, in favor of an assignee in bankruptcy, conveyances in fraud of creditors by the bankrupt. Barnard *v.* Davis, 54 Ala. 565; Ward *v.* Jenkins, 10 Met. 583; Boone *v.* Hall, 7 Bush, 66.

[2] Estwick *v.* Caillaud, 6 Term. Rep. 420; Holbird *v.* Anderson, 5 Term. Rep. 235; Meaux *v.* Howell, 4 East, R. 1; The King *v.* Watson, 3 Price, R. 6; Small *v.* Marwood, 9 B. & Cresw. 300; Pickstock *v.* Lyster, 3 M. & Selw. 371; Marbury *v.* Brooks, 20 U. S. 556, 5 L. Ed. 522; 24 U. S. 786, L. Ed. 423; Wilkes *v.* Ferris, 5 John. Rep. 335; Hyslop *v.* Clarke, 14 John. R. 459; Lippencott *v.* Barker, 2 Binn. R. 174; Halsey *v.* Whitney, 4 Mason, R. 206, 227 to 230.

[3] Halsey *v.* Whitney, 4 Mason, Cir. R. 206; Spring *v.* South Carolina Ins. Co., 21 U. S. 268, 5 L. Ed. 614; Pearpont *v.* Graham, 4 Wash. Cir. R. 232; Brashear *v.* West, 32 U. S. 608, 8 L. Ed. 801; Wheeler *v.* Sumner, 4 Mason, Cir. R. 183. The decisions in New York are against the validity of an assignment with such a clause of release. See Hyslop *v.* Clarke, 14 John. R. 459; Austin *v.* Bell, 20 John. R. 442; Seaving *v.* Brinkerhoff, 5 John. Ch. R. 329; Wakeman *v.* Groner, 4 Paige, R. 23; s. c. 11 Wend.

§ 1388. **All Creditors Need Not Be Parties in Order to Be Entitled to Take under Assignment.** — In order to entitle the creditors named in a general assignment for the benefit of creditors to take under it, it is not necessary that they should be technical parties thereto.[1] It will be sufficient if they have notice of the trust in their favor and they assent to it; and if there be no stipulation for a release, or any other condition in it which may not be for their benefit, their assent will be presumed until the contrary appears.[2] Such a general assignment bona fide made by the debtor and assented to by the assignee will be deemed a valid conveyance founded upon a valuable consideration and good against creditors proceeding adversely to it by attachment or seizure in execution of the property conveyed thereby; at least unless all the creditors for whose benefit the assignment is made repudiate it.[3] Where the creditors are named in the assignment as parties and they are required to execute it before they can take under its provisions, there they must signify their assent in that mode; otherwise they cannot take under the instrument.[4] But where they are not required to be parties to the instrument, there they may take the benefit of the trust by notice to the trustee within

R. 187. See also Ingraham *v.* Wheeler, 6 Conn. 277; Robinson *v.* Belt, 2 Ind. Ter. 360, 51 S. W. 975; Long *v.* Meriden Brittania Co., 94 Va. 594, 27 S. E. 499.

[1] New England Bank *v.* Lewis, 8 Pick. 113; Halsey *v.* Whitney, 4 Mason, R. 206; Smith *v.* Wheeler, 1 Vent. R. 128; 2 Keble, R. 564; Brashear *v.* West, 7 Peters, R. 608; Garrard *v.* Lauderdale, 3 Sim. 1; (*a*) Acton *v.* Woodgate, 2 Mylne & Keen, 492; Lane *v.* Husband, 14 Simons, R. 656.

[2] New England Bank *v.* Lewis, 8 Pick. 113; Halsey *v.* Whitney, 4 Mason, R. 106; Egberts *v.* Wood, 3 Paige, R. 517; Nicoll *v.* Mumford, 4 John. Ch. R. 522; Small *v.* Marwood, 9 B. & Cresw. 300. But contra, Russell *v.* Woodward, 10 Pick. R. 408; Robinson *v.* Thomason, 113 Ala. 526, 20 So. 951; Smith *v.* Herrell, 11 App. D. C. 425; Billongs *v.* Parsons, 17 Utah 22, 53 Pac. 730.

[3] Small *v.* Marwood, 9 B. & Cresw. 300; Halsey *v.* Whitney, 4 Mason, R. 206; Wilt *v.* Franklin, 1 Binn. R. 502, 517; Marbury *v.* Brooks, 20 U. S. 556, 5 L. Ed. 522; 24 U. S. 78, 6 L. Ed. 423; Pickstock *v.* Lyster, 3 Maule & Selwyn, 371; Dey *v.* Dunham, 2 John. Ch. R. 182; Nicoll *v.* Mumford, 4 John. Ch. R. 522. Where a debtor conveyed all his property to trustees for his creditors in consideration of a license and release granted to him by the deed, it was held that a creditor could not have the benefit of it, who having notice of the deed shortly after its execution, seven years after the death of the debtor filed a bill to be allowed to execute it, for the debtor could not have the benefit of the consideration. Lane *v.* Husband, 14 Simons, R. 656.

[4] Garrard *v.* Lord Lauderdale, 3 Sim. R. 1. (*a*) As to this case see Simmonds *v.* Palles, 2 Jones & L. 489; Roberts *v.* Norcross, 69 N. H. 533, 45 Atl. 560; McElwell *v.* McGill, 57 S. C. 6, 35 S. E. 401.

the time prescribed therefor if any, and if none is prescribed, then within a reasonable time and before a distribution is made of the property.[1] Where a specific time is prescribed for the creditors to come in and assent to the assignment as parties thereto or otherwise, there they must comply strictly with the condition or they will be excluded from the benefit of the trust; unless indeed by reason of absence from the country or some other cause any creditor has not within the time prescribed had any knowledge of the existence of the assignment.[2]

§ 1389. **Same.** — It is proper to add that in all such cases of general assignments voluntarily made by the debtor for the benefit of creditors, whether they are specially named in the instrument or only by a general description, if such creditors are not parties thereto and have not executed the same, the assignment is deemed in equity as well as at law to be revocable by the debtor, except as to creditors who have assented to the trust and given notice thereof to the assignee. For until such assent and notice the assignment is treated as between the debtor and the assignee as merely directing the mode in which the assignee shall and may apply the debtor's property for his own benefit.[3]

§ 1390. **Same.** — The trusts arising under general assignments for the benefit of creditors are in a peculiar sense the objects of equity jurisdiction. For although at law there may under some circumstances be a remedy for the creditors to enforce the trusts, that remedy must be very inadequate as a measure of full relief. On the other hand Courts of Equity by their power of enforcing a discovery and account from the trustees, and of making all the creditors as well as the debtor parties to the suit, can administer entire justice and distribute the whole funds in their proper order among all the claimants upon the application of any of them,[4]

[1] See Halsey *v.* Whitney, 4 Mason, R. 206; Acton *v.* Woodgate, 2 Mylne & Keen, 492.

[2] Phenix Bank *v.* Sullivan, 9 Pick. 410; De Caters *v.* Le Ray de Chaumont, 2 Paige, R. 490.

[3] Garrard *v.* Lord Lauderdale, 3 Sim. 1; Wallwyn *v.* Coutts, 3 Meriv. R. 767; s. c. 3 Sim. R. 14; Page *v.* Broom, 4 Russ. R. 6; Acton *v.* Woodgate, 2 Mylne & Keen, 492. See Simmonds *v.* Palles, 2 Jones & L. 489; Glegg *v.* Rees, L. R. 7 Ch. 71.

[4] Hamilton *v.* Houghton, 2 Bligh, R. 171, 189; Brashear *v.* West, 7 Peters, R. 608. A question has arisen under such assignments, whether they take effect from the moment of their execution and before the creditors have assented thereto, or only from the time of such assent. It has been decided that they take effect from the time of their execution upon the ground that being for the benefit of creditors their assent is presumed until the contrary is shown. See Marbury *v.* Brooks, 20 U. S.

either on his own behalf or on behalf of himself and all the other creditors. This remedy is ordinarily resorted to by the government in order to enforce its own right of priority and preference in payment of the debts due to it against the assignees.[1] Sureties on custom-house bonds paid by them are also entitled to the like remedy by way of substitution to the government by the express provisions of law.[2]

§ 1391. **Functions of Court of Equity in Settlement of Trusts.** — It may also be necessary in many cases for the purposes of a due distribution to order a sale of the property; to take an account of and to adjust the conflicting claims of different creditors; to direct the order of preferences and payment of the various debts according to their respective priorities; and to marshal the various funds on which particular creditors may have a lien, so as to secure the due proportion of the assets to each creditor according to his particular rights.[3] For all these purposes (and others might be mentioned) Courts of Equity are the only tribunals competent to afford suitable means of relief. And where trusts are created by general assignments in favor of creditors, with or without any limitation as to the time of their assent thereto, Courts of Equity will upon a suitable application require the creditors within a reasonable time to come in and signify their assent, or otherwise they will be excluded from all the benefit of the trusts.[4] Assignees under general assignments, such as assignees in cases of bankruptcy and insolvency, take only such rights as the assignor or debtor had at the time of the general assignment; and consequently a prior special assignee will hold against them without giving notice thereof.[5]

556, 5 L. Ed. 522, 24 U. S. 78, 6 L. Ed. 423; Smith *v.* Wheeler, 1 Vent. 128; Small *v.* Marwood, 9 B. & Cresw. 300; Nicoll *v.* Mumford, 4 John. Ch. R. 529. A question has also been made whether such an assignment is operative unless all the trustees should assent thereto. But it has been decided that unless the contrary is provided for in the assignment, the assignment is good and vests the property in the assenting trustees, although the other trustees do not assent. Ibid.; Neilson *v.* Blight, 1 John. Cas. 205; Moses *v.* Murgatroyd, 1 John. Ch. R. 119, 129; Shepherd *v.* McIvers, 4 John. Ch. R. 136; Duke of Cumberland *v.* Coddrington, 3 John. Ch. R. 261; Weston *v.* Barker, 12 John. R. 276.

[1] United States *v.* Howland, 17 U. S. 108, 4 L. Ed. 526; United States *v.* Hunter, 5 Mason, 62, 30 U. S. 173, 8 L. Ed. 86.

[2] Act of 1799, ch. 128, § 65.

[3] See United States *v.* Howland, 17 U. S. 108, 4 L. Ed. 526.

[4] Dunch *v.* Kent, 1 Vern. 260, 319; 1 Eq. Abridg. 147, pl. 12; ante, § 1036 *a*.

[5] Muir *v.* Schenck, 3 Hill, R. 228. See also Murray *v.* Lylburn, 2 John. Ch. R. 441, 443; Brown *v.* Heathcote, 1 Atk. 160, 162; Mitford *v.*

§ 1392. **Assignments Upon Special Trusts.** — In regard to particular assignments upon special trusts there is little to be said which is not equally applicable to all cases of jurisdiction exercised over general trusts. But Courts of Equity take notice of assignments of property and enforce the rights growing out of the same in many cases where such assignments are not recognized at law as valid or effectual to pass titles. It is a well-known rule of the common law that no possibility, right, title, or thing in action can be granted to third persons.[1] For it was thought that a different rule would be the occasion of multiplying contentions and suits, as it would in effect be transferring a lawsuit to a mere stranger.[2] Hence a debt or other chose in action could not be transferred by assignment except in case of the king, to whom and by whom at the common law an assignment of a chose in action could always be made; for the policy of the rule was not supposed to apply to the king.[3] So strictly was this doctrine construed that it was even doubted whether an annuity was assignable although assigns were mentioned in the deed creating it.[4] And at law, with the

Mitford, 9 Ves. 87, 100; Jewson *v.* Moulson, 2 Atk. R. 417, 420; Morrall *v.* Marlow, 1 P. Williams, R. 459; post, §§ 1228, 1229, 1411; 1 Deacon on Bank. ch. 13, § 3, pp. 320, 321, Ed. 1827; Scott *v.* Surman, Willes, R. 402, and the Reporter's note; Gladstone *v.* Hadwen, 1 M. & Selw. R. 517, 526; Com. Dig. Bankrupt, D. 19; Carvalho *v.* Burn, 4 B. & Adolph. 382, 398; Leslie *v.* Guthrie, 1 Bing. (N. C.) 697. It seems that notice is necessary to perfect title of a special assignee against the assignee in bankruptcy. Wragge's Case, L. R. 5 Eq. 284; Exparte Caldwell, L. R. 13 Eq. 188. Cornell *v.* Sulter, 23 Ohio Cir. Ct. Rep. 384; In re Wise, 121 Iowa, 359, 96 N. W. 872; In re Jenks, 129 Iowa, 139, 105 N. W. 396; Lippincott *v.* Rich, 19 Utah, 140; 56 Pac. 806; Hinkley *v.* Reed, 182 Ill. 440, 55 N. E. 337; Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491, 51 N. E. 105.

[1] Lampet's Case, 10 Co. R. 48 *a*; 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (*g*); Com. Dig. Chancery, 2 H.; Thallhimer *v.* Brinckerhoff, 3 Cowen, R. 623.

[2] Co. Litt. 232 *b*, Butler's note (1); Prosser *v.* Edmonds, 1 Younge & Coll. 489; Stafford *v.* Buckley, 2 Ves. 101.

[3] Co. Litt. 232 *b*, Butler's note; Stafford *v.* Buckley, 2 Ves. 177, 181; Com. Dig. Assignment, D.; Stafford *v.* Buckley, 2 Ves. 170, 181; Miles *v.* Williams, 1 P. Will. 252.

[4] Co. Litt. 144 *b*, and Hargrave's note (1); Co. Litt. 232 *b*, Butler's note (1). But though a possibility or a contingent interest is not assignable at law, yet it is transmissible and devisable. 1 Fonbl. Eq. B. 1, ch. 4, § 5, and notes (*g*) and (*p*). There are, as we have seen and shall presently more fully see, certain interests which are not assignable; such as pensions and half-pay to support a party in future duties, because it would defeat a great public policy. Davis *v.* Duke of Marlborough, 1 Swanst. 79; M'Carthy *v.* Goold, 1 B. & Beatt. 389; Stone *v.* Lidderdale, 2 Anst. R. 533. Upon similar grounds the assignment of the share in a prize, pendente lite, is void. Stevens *v.* Bagwell, 15 Ves. 139; ante,

exception of negotiable instruments and some few other securities, this still continues to be the general rule unless the debtor assents to the transfer; but if he does assent, then the right of the assignee is complete at law, so that he may maintain a direct action against the debtor upon the implied promise to pay him the same, which results from such assent.[1]

§ 1393. **Same.** — But Courts of Equity have long since totally disregarded this nicety.[2] They accordingly give effect to assignments of trusts and possibilities of trusts and contingent interests and expectancies, whether they are in real or in personal estate, as well as to assignments of choses in action.[3] Every such assignment is considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession.[4] Contingent

§ 297. See also as to assignments, pendente lite, Foster *v.* Deacon, 6 Madd. 59; Harrington *v.* Long, 2 Mylne & Keen, R. 592.

[1] 1 Madd. Ch. Pr. 434 to 437; 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (*g*); Tiernan *v.* Jackson, 30 U. S. 597, 8 L. Ed. 234; Israel *v.* Douglas, 1 H. Black. 239; Williams *v.* Everett, 14 East, 582; Crowfoot *v.* Gurney, 9 Bing. R. 372; Hodgson *v.* Anderson, 3 B. & Cresw. 842; Baron *v.* Husband, 4 B. & Adolph. 611. As between different assignees, quære, whether the second assignee without notice may not, by giving notice to the debtor first, acquire a priority. Muir *v.* Schenck, 3 Hill, R. 228.

[2] The burden of a covenant entered into by a grantee in fee for himself, his heirs and assigns, though not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding in equity upon the owner for the time being, if he has notice thereof. Renals *v.* Colishaw, 9 Ch. D. 125, 129; s. c. 11 Ch. D. 866; Luker *v.* Dennis, 7 Ch. D. 227 (declaring that Keppell *v.* Bailey, 2 Mylne & K. 517, has been overruled). See De Mattos *v.* Gibson, 1 DeG. & J. 282; Catt *v.* Tourle, L. R. 4 Ch. 654; Wilson *v.* Hart, L. R. 1 Ch. 463; Tobey *v.* Moore, 130 Mass. 448; Parker *v.* Nightingale, 6 Allen, 341; Linzee *v.* Mixer, 101 Mass. 512; Sharp *v.* Ropes, 110 Mass. 381; Jeffries *v.* Jeffries, 117 Mass. 184; Peck *v.* Conway, 119 Mass. 546.

[3] Fearne on Conting. Rem. by Butler, 548, 550 (7th ed.); Warmstrey *v.* Tanfield, 1 Ch. Rep. 29; Goring *v.* Bickerstaff, 1 Ch. Cas. 8; 1 Madd. Ch. Pr. 437; 1 Fonbl. Eq. B. 1, ch. 4, § 2, and note (*g*); Wind *v.* Jekyll, 1 P. Will. 573, 574; Kimpland *v.* Courtney, 2 Freem. R. 251; Thomas *v.* Freeman, 2 Vern. R. 563, and Raithby's note (2); Wright *v.* Wright, 1 Ves. R. 411, 412; Mandeville *v.* Welch, 18 U. S. 277, 5 L. Ed. 87; post, § 1419; Jones *v.* Roe, 3 T. R. 93, 94. Per Lord Kenyon; Stokes *v.* Holden, 1 Keen, R. 145; Prosser *v.* Edmonds, 1 Younge & Coll. 481, 496; Com. Dig. Chancery, 2 H. Assignment; ante, §§ 1072, 1367; Langton *v.* Horton, 1 Hare, R. 554, cited; post, § 1419. See Trull *v.* Eastman, 3 Metc. R. 121; Bacon *v.* Bonham, 33 N. J. Eq. 614; East Lewisburg Mfg. Co. *v.* Marsh, 91 Pa. St. 96; Trull *v.* Eastman, 3 Met. 121. But see In re Duggan, L. R. 8 Eq. 697.

[4] Co. Litt. 232 *b*, Butler's note; Lord Carteret *v.* Paschal, 3 P. Will. 199; Duke of Chandos *v.* Talbot, 2 P. Will. 603; 1 Madd. Ch. Pr. 434

rights and interests are not ordinarily assignable at law;[1] and yet they may sometimes be assigned at law if coupled with some present interest.[2] So at law such rights and interests may pass by way of estoppel by lease and release or by fine.[3] But the reach of this doctrine at law falls far short of that now entertained in equity.[4] To make an assignment valid at law the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment.[5] But Courts of Equity will support assignments not only of choses in action and of contingent interests and expectancies, but also of things which have no present actual or potential existence, but rest in mere possibility; not indeed as a present positive transfer operative in presenti, for that can only be of a thing in esse, but as a present contract — to take effect and attach as soon as the thing comes in esse.[6] Thus for example the assignment of the head-matter and whale-oil to be caught in a whaling voyage now in progress will be valid in equity, and will attach to the head-matter and oil when obtained.

§ 1394. **Same.** — In the civil law and in the jurisprudence of the modern commercial nations of Continental Europe there does not seem to have been any foundation for such an objection to the assignment of debts; for all debts were from an early period allowed to be assigned, if not formally, at least in legal effect, and for the most part, if not in all cases, they may now be sued

to 437; Wright *v.* Wright, 1 Ves. R. 411, 412; Com. Dig. Chancery, 4 W. 1.

[1] Mulhall *v.* Quinn, 1 Gray, 105.

[2] Shep. Touch. 238, 239, 322; Arthur *v.* Bokenham, 11 Mod. R. 152; Com. Digest, Assignment A, c. 3. (*b*) Emery *v.* Lawrence, 8. Cush. 150; Hartley *v.* Tapley, 2 Gray, 565.

[3] Doe *d.* Christmas *v.* Oliver, 10 B. & Cressw. 181; Weate *v.* Lower, Pollexf. R. 54; Fearne on Conting. Rem. ch. 6, § 5, p. 363, ed. 1831; Bensely *v.* Burden, 2 Sim. & Stew. 519.

[4] Post, § 1395, *b*.

[5] See Lunn *v.* Thornton, 1 C. B. 379; Hope *v.* Hayley, 5 El. & B. 830, 845; Petch *v.* Tutin, 15 Mees. & W. 110; Moody *v.* Wright, 13 Met. 17; Skipper *v.* Stokes, 42 Ala. 255. The proceeds of a call upon stockholders, made but not collected, may be assigned. Pickering *v.* Ilfracombe Ry. Co., L. R. 3 C. P. 235. And so it seems in equity if determined upon, though not yet made. In re Sankey Coal Co., L. R. 9 Eq. 721.

[6] Mitchell *v.* Winslow, 2 Story, R. 630. See Hope *v.* Hayley, 5 El. & B. 830, 845; Holroyd *v.* Marshall, 6 Jur. (N. S.) 931; Hassie *v.* G. I. Congregation, 35 Cal. 378; Taylor *v.* Palmer, 31 Cal. 240; Lansden *v.* McCarthy, 45 Mo. 106; St. Louis *v.* Clemens, 42 Mo. 69; Tyler *v.* Barrows, 6 Robt. (N. Y.) 104; Groot *v.* Story, 41 Vt. 533; Wright *v.* Bircher, 72 Mo. 179; East Lewisburg Mfg. Co. *v.* Marsh, 91 Pa. St. 96; Bigelow, Estoppel, 371 (3d ed.); Langton *v.* Horton, 1 Hare, 549.

for in the name of the assignee.[1] The Code of Justinian says, "Nominis autem venditio" (distinguishing between the sale of a debt and the delegation or substitution of one debtor for another for the same debt) "et ignorante, vel invito eo, adversus quem

[1] Pothier has stated the old French law upon this subject (which does not in substance probably differ from that of the other modern states of Continental Europe) in very explicit terms in his Treatise on the Contract of Sale, of which an excellent translation has been made by L. S. Cushing, Esq. The doctrines therein stated are in many respects so nearly coincident with those maintained by our Courts of Equity that I have ventured to transcribe the following passages from Mr. Cushing's work: "A credit being a personal right of the creditor, a right inherent in his person, it cannot, considered only according to the subtlety of the law, be transferred to another person, nor consequently be sold. It may well pass to the heir of the creditor, because the heir is the successor of the person and of all the personal rights of the deceased. But in strictness of law it cannot pass to a third person; for the debtor being obliged towards a certain person cannot by a transfer of the credit, which is not an act of his, become obliged towards another. The jurisconsults have nevertheless invented a mode of transferring credits without either the consent or the intervention of the debtor; as the creditor may exercise against his debtor by a mandatary as well as by himself the action which results from his credit. When he wishes to transfer his credit to a third person he makes such person his mandatary, to exercise his right of action against the debtor; and it is agreed between them that the action shall be exercised by the mandatary, in the name indeed of the mandator, but at the risk and on the account of the mandatary, who shall retain for himself all that may be exacted of the debtor in consequence of the mandate, without rendering any account thereof to the mandator. Such a mandatary is called by the jurisconsults Procurator in rem suam, because he exercises the mandate not on account of the mandator, but on his own. A mandate made in this manner is as to its effect a real transfer which the creditor makes of his credit; and if he receives nothing from the mandatary for his consent that the latter shall retain to his own use what he may exact of the debtor, it is donation; if for this authority he receives a sum of money of the mandatary, it is a sale of the credit. From which it is established in practice that credits may be transferred, and may be given, sold, or disposed of by any other title; and it is not even necessary that the act which contains the transfer should express the mandate, in which, as has been explained, the transfer consists. The transfer of an annuity or other credit before notice of it is given to the debtor is what the sale of a corporal thing is before the delivery; in the same manner that the seller of a corporal thing until a delivery remains the possessor and proprietor of it, as has been established in another place. So until the assignee notifies the debtor of the assignment made to him the assignor is not devested of the credit which he assigns. This is the provision of art. 108 of the Custom of Paris: 'A simple transfer does not devest, and it is necessary to notify the party of the transfer and to furnish him with a copy of it.' From which it follows, first, that before notice the debtor may legally pay to the assignor, his creditor, and the assignee has no action, in such case except against the assignor, namely, the action ex empto, ut præstet ipsi habere licere; and consequently that he should remit to him the sum which he is no longer able to exact of the debtor who has legally paid the debt to the assignor.

actiones mandantur, contrahi solet."[1] And Heineccius, after remarking that bills of exchange are for the most part drawn payable to a person or his order, says that although this form be omitted, yet an indorsement thereof may have full effect if the laws of the particular country respecting exchange do not specially prohibit it; because an assignment thereof may be made without the knowledge and against the will of the debtor, and he refers to the passage in the Code in proof of it.[2] But he adds (which is

Second, that before notice the creditors of the assignor may seize and arrest that which is due from the debtor whose debt is assigned; and they are preferred to the assignee who has not before such seizure and arrest given notice of the assignment to him; the assignee in this case is only entitled to his action against the assignor, namely, the action ex empto, in order that the latter præstet ipsi habere licere; and consequently that he should report to him a removal of the seizure and arrests, or pay him the sum which by reason therof he is prevented from obtaining of the debtor. Third, that if the assignor, after having transferred a credit to a first assignee, has the bad faith to make a transfer of it to a second, who is more diligent than the first to give notice of his assignment to the debtor, the second assignee will be preferred to the first, saving to the first his recourse against the assignor. Though the assignee notifies to the debtor the assignment to him, the assignor in strictness of law remains the creditor, notwithstanding the transfer and notice, and the credit continues to be in him. This results from the principles established in the preceding article; but quoad juris effectus, the assignor is considered by the notice of the transfer given to the debtor to be devested of the credit which he assigns, and is no longer regarded as the owner of it; the assignee is considered to be so, and therefore the debtor cannot afterwards legally pay the assignor; and the creditors of the assignor cannot from that time seize and arrest the credit, because it is no longer considered to belong to their debtor. Nevertheless as the assignee even after notice of the transfer is only the mandatary, though in rem suam of the assignor in whose person the credit in truth resides, the debtor may oppose to the assignee a compensation of what the assignor was indebted to him before the notice of the assignment, which however does not prevent him from opposing also a compensation of what the assignee himself owes him; the assignee being himself 'non quidem ex juris subtilitate, sed juris effectu, creditor.'" Pothier on Sales, by Cushing, n. 550, 555 to 559. The modern French law has gotten rid of the subtlety as to the suit being brought in the name of the assignor upon contracts generally; for it may now (whatever might have been the case formerly) be brought in the name of the assignee directly against the debtor. See Troplong des Privil. et Hypoth. Tom. 1, n. 340 to 343; Code Civ. of France, art. 2112; Id. 1689 to 1692; Troplong de la Vente, n. 879 to 882, n. 906, 913.

[1] Cod. Lib. 8, tit. 42, l. 1; 1 Domat, B. 4, tit. 4, §§ 3, 4.

[2] Heinecc. de Camb. cap. 3, § 8; Id. cap. 3, §§ 21 to 25. Heineccius, in a note, says that in Franconia and Leipsic no assignment is of any validity if the formulary of its being payable to order is omitted. The present law of France is the same so far as the general negotiability of bills is concerned, and to give them circulation unaffected by any equities between the payee and the debtor. Pardessus, Droit Comm. Tom. 2,

certainly not our law) that if the bill be drawn payable to the order of Titius, it is not to be paid to Titius but to his indorsee. "Tuncenim Titio solvi non potest sed ejus indossatario."[1] The same general doctrine as to the assignability of bills of exchange payable to a party but not to his order is affirmed in the Ordinance of France of 1673 (art. 12), as soon as the transfer is made known to the drawee or debtor.[2] Indeed the like doctrine prevails now in France, not only in cases of bills of exchange but of contracts generally; so that the assignee may now sue therefor in his own name after the assignment, subject however to all the equities subsisting between the parties before and at the time when the debtor has notice of the assignment.[3]

§ 1395. **Same.** — Contingent interests and expectancies may not only be assigned in equity, but they may also be the subject of a contract, such as a contract of sale when made for a valuable consideration, which Courts of Equity after the event has happened will enforce.[4] But until the event has happened the party contracting to buy has nothing but the contingency, which is a very different thing from the right immediately to recover and enjoy the property. He has not strictly speaking a jus ad rem any more than a jus in re. It is not an interest in the property, but a mere right under the contract.[5] Indeed the same effect takes place in such cases if there be an actual assignment; for in contemplation of equity it amounts not to an assignment of a present interest, but only to a contract to assign when the interest becomes vested.[6] Therefore a contingent legacy which is to vest upon some

art. 339, p. 360; Delvincourt, Instit. Droit Comm. Tom. 1, Liv. 1, tit. 7, Pt. 2, pp. 114, 115. Delvincourt says that the right of a simple bill (not payable to order) is transferable only by an act of transfer made known to the debtor. See also Merlin, Repert. Lettre et Billet de Change, §§ 4, 8, pp. 196, 252 (ed. 1827).

[1] Heinecc. de Camb. cap. 2, § 8.

[2] Jousse sur l'Ordon. 1673, art. 30, p. 123. See also Story on Bills of Exchange, § 19; Greenleaf on Evid. §§ 172, 190.

[3] Pardessus, Droit Comm. Tom. 2, art. 313; Troplong de Priv. et Hypoth. Tom. 1; Troplong de la Vente, n. 879 to 913; Code Civil of France, art. 1689 to 1693; Id. art. 2112; Id. art. 1295; Locre, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, p. 342.

[4] Post, § 1419; Stokes *v.* Holden, 1 Keen R. 145, 152, 153; Stone *v.* Lidderdale, 2 Anst. 553; Tunstall *v.* Boothby, 10 Simons R. 542, 549; Wells *v.* Foster, 8 Mees. & Welsb. 149; Langton *v.* Horton, 1 Hare R. 549, 556, 557; Trull *v.* Eastman, 3 Metc. R. 121; Hannon *v.* Christopher, 34 N. J. Eq. 459; Jenkins *v.* Stetson, 9 Allen, 128.

[5] Stokes *v.* Holden, 1 Keen R. 152, 153; Carleton *v.* Leighton, 3 Meriv. R. 667, 672, and the Reporter's note (*c*).

[6] See Purdew *v.* Jackson, 1 Russ. R. 1, 26, 44, 45, 47, 50.

future event, such as the legatee's coming of age, may become the subject of an assignment or a contract of sale. So even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and in such a case, if made bona fide for a valuable consideration, it will be enforced in equity after the death of the ancestor, not indeed as a trust attaching to the estate, but as a right of contract.[1]

[1] Hobson *v.* Trevor, 2 P. Will. 191; Beckley *v.* Newland, 2 P. Will. 182; Wethered *v.* Wethered, 2 Sim. R. 183; 1 Fonbl. Eq. B. 1, Ch. 4, § 2, notes (*e*), (*g*), (*h*); 1 Madd. Ch. Pr. 437. See Trull *v.* Eastman, 3 Metc. R. 121. Mr. Fonblanque has remarked: "A distinction appears to have been taken in Wright *v.* Wright, 1 Ves. 409, Ves. between assignment of a possibility of an inheritance and assignments of a possibility of a chattel real. The distinction was however overruled; and the cases of Beckley *v.* Newland and Hobson *v.* Trevor were referred to by Lord Hardwicke as conclusive upon the point. It is observable that Lord Kenyon, C. J., in the case of Jones *v.* Roe, 3 Term R. 88, put the case of an heir dealing in respect of his hope of succession as a void contract, it being a bare possibility, and not the subject of a disposition during the life of the ancestor; from which it may be inferred that damages could not be recovered at law for non-performance of such a contract; and yet it appears from the above cases of Beckley *v.* Newland and Hobson *v.* Trevor that such a contract would be decreed in equity if for a valuable consideration. This therefore may be considered as an instance in which a Court of Equity will decree the specific performance of a contract, though damages could not be recovered at law for the non-performance of it." 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (*h*); ante, § 1367. Of the doctrine stated in the text some doubt may perhaps even now be entertained; for it has been held by very able judges that the expectancy of an heir, presumptive or apparent, is not an interest or a possibility capable of being made the subject of an assignment or contract. Carleton *v.* Leighton, 3 Meriv. R. 671, 672; Jones *v.* Roe, 3 T. Rep. 93; Harwood *v.* Tooke, cited 1 Madd. Ch. Prac. 437; Ibid. 548 (2d ed.); s. c. 2 Sim. R. 192. The language however of both of these cases seems susceptible of an interpretation consistent with the text, if we suppose the learned judges were referring to a contract or assignment operating to convey an interest in presenti. Indeed the language of Lord Eldon in Carleton *v.* Leighton, 3 Meriv. R. 667, 672, seems to admit that a covenant to convey the expectancy of an heir might be good by way of contract to be enforced when the estate descended to the heir; for in reference to Beckley *v.* Newland, 2 P. Will. 182, and Hobson *v.* Trevor, 2 P. Will. 191, he said that the cases cited were cases of covenant to settle or assign property which should fall to the covenantor, where the interest which passed by the covenant was not an interest in the land but a right under the contract. The same doctrine as to the obligatory force of such a contract was fully recognized in Wethered *v.* Wethered, 2 Sim. 183; ante, § 1367; post, § 1418; Langton *v.* Horton, 1 Hare R. 549, 556, 557. In re Ship Warre, 8 Price R. 269; Douglass *v.* Russell, 4 Sim. R. 529; s. c. 1 M. & Keen, 488. See Jenkins *v.* Stetson, 9 Allen, 128; Stover *v.* Eyeleshimer, 46 Barb. 84; Powers's Appeal, 63 Pa. St. 443; Hannon *v.* Christopher, 34 N. J. Eq. 459; Wright *v.* Bircher, 72 Mo. 179; Bigelow, Estoppel, 371, 372, 375 (3d ed.).

§ 1396. **Same.** — But although such assignments are valid in equity, yet they will not generally be carried into effect in favor of mere volunteers; nay, not in favor of persons claiming under the consideration of love and affection (such for instance as a wife or children) against the heirs and personal representatives of the assignor, but only in favor of persons claiming for a valuable consideration.[1] And if the assignee of a chose in action is a mere nominal holder and has no interest in the assigned chose in action, it has been held that he is not entitled to sue in his own name in equity, but the suit should be brought in the name of the real party in interest.[2]

§ 1397. **Assignments Which Are against Public Policy Will Not Be Upheld.** — There are however certain cases in which assignments will not be upheld, either in equity or at law, as being against the principles of public policy. Thus for example an officer in the army will not be allowed to pledge or assign his commission by way of mortgage,[3] for his commission is an honorary personal trust. So the full pay or half pay of an officer in the army or navy is not upon principles of public policy assignable either by the party or by operation of law.[4] For officers, as well upon half pay as full pay, are liable at any time to be called into service; and it has been well remarked that emoluments of this sort are granted for the dignity of the State and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons who are liable to be called out in the service of their coun-

[1] Wright *v.* Wright, 1 Ves. 412; 1 Fonbl. Eq. B. 1, ch. 4, § 2, notes (*g*), (*h*); Whitfield *v.* Faussett, 1 Ves. 391; ante, §§ 1077, 1078. See also Collyear *v.* Countess of Mulgrave, 2 Keen R. 81, 98; Collinson *v.* Patrick, 2 Keen R. 123, 134; Stokes *v.* Holden, 1 Keen R. 145, 152, 153; Doungsworth *v.* Blair, 1 Keen R. 795, 801, 802; Ellis *v.* Nimmo, 1 Lloyd & Goold's Reports, 333; Holloway *v.* Headington, 8 Sim. R. 324; Jones *v.* Roe, 3 T. R. 63, 94; Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 181; Callaghan *v.* Callaghan, 8 Clark & Finel. 374.

[2] Field *v.* Maghee, 5 Paige R. 539; Rogers *v.* The Traders' Ins. Co., 6 Paige R. 584, 597, 598. In this latter case Mr. Chancellor Walworth seems to have entertained some doubt whether an agent, effecting a policy in his own name for the benefit of other persons, could sue in equity on the policy; or at least his language may be thought to lead to such a doubt. The point was not before him; for the real question was whether the persons in interest could sue in equity on such a policy in their own names; and it was very properly held that they could.

[3] See Calisher *v.* Forbes, L. R. 7 Ch. 109; Addison *v.* Cox, L. R. 8 Ch. 76. But see L'Estrange *v.* L'Estrange, 1 Eng. L. & E. 153; s. c. 20 L. J. Ch. 39; Collyer *v.* Fallon, 1 Turn. & Russ. 459.

[4] Davis *v.* Duke of Marlborough, 1 Swanst. R. 79; McCarthy *v.* Goold, 1 Ball & Beatt. 387; Stone *v.* Lidderdale, 2 Anst. R. 533.

try ought not to be taken from a state of poverty. And it has been added that it might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned.[1] The fact that half pay is intended in part as a reward for past services does not in any respect change the application of the principle; for it is also designed to enable the party to be always in readiness to return to the public service if he shall at any time be required so to do.[2] The same doctrine has been applied to the compensation granted to a public officer for the reduction of his emoluments or the abolition of his office, who by the terms of the grant might be required to return to the public service. For in such a case the object of the government is to command a right to his future services and to enable the party to perform the duties with suitable means to support him.[3] In like manner the profits of a public office would seem upon a similar ground of public policy not to be assignable.[4]

§ 1398. **Right to Assign Pension.** — But it has been thought that a different principle is properly applicable to pensions, either for life or during pleasure, which are granted purely for past services or as mere honorary gratuities without any obligation to perform future services; for it has been said that as in such a case no future benefit is expected by the State, no public policy or interest is thwarted by allowing an assignment thereof.[5] And this distinction has been strongly insisted upon on various occasions. But it may be fairly questioned whether the public policy in cases of pensions is not thereby materially thwarted and overturned. The object of every such pension is to secure to the party for his past services or honorable conduct a decent support and

[1] Per Lord Kenyon, in Flarty *v.* Odlum, 3 Term R. 681; Stone *v.* Lidderdale, 2 Anst. R. 533; Tunstall *v.* Boothby, 10 Sim. R. 540; Grenfell *v.* Dean of Windsor, 2 Beav. R. 544, 549; Davis *v.* Duke of Marlborough, 1 Swanst. R. 79.

[2] Stone *v.* Lidderdale, 2 Anst. R. 533; Lidderdale *v.* Duke of Montrose, 4 Term R. 248; Priddy *v.* Rose, 3 Meriv. 102.

[3] Wells *v.* Foster, 8 Mees. & Welsb. 149. See Spooner *v.* Payne, 16 Jur. 367; s. c. 10 Eng. L. & E. 202.

[4] See Nichols *v.* Davis, L. R. 4 C. P. 80; Hill *v.* Paul, 8 Clark & Finel. 295, 307; Palmer *v.* Bate, 2 Brod. & Bing. 673; Davis *v.* Duke of Marlborough, 1 Swanst. R. 79.

[5] Stone *v.* Lidderdale, 2 Anst. R. 533; Wells *v.* Foster, 8 Mees. & Welsb. 149; Tunstall *v.* Boothby, 10 Sim. 549; Ex parte Battine, 4 Barn. & Adolph. R. 690. See Feistel *v.* King's College, 10 Beav. 491, assignment of emoluments of a fellow of a college. Revisal of 1905 of North Carolina, § 3732, makes it a misdemeanor to speculate in pension claims. Gill *v.* Dixon, 131 N. C. 89, 42 S. E. 538.

maintenance during his life or during the pleasure of the government. It is essentially designed to be for the personal comfort and dignity of the party and for the honor of the State, and to promote and encourage extraordinary exertions for the public service on the part of all the citizens or subjects. To enable the party therefore to assign his pension is to defeat the very purposes of the government by enabling the assignee to have all the benefit of the bounty of the government, and to encourage on the part of the pensioner at once indifference and profusion, as well as to expose him to all the evils of poverty. However this may be, the authorities seem strongly to support the right of assignment of pensions.

§ 1399. **Same.** — There seems still to be some doubt as to another point connected with this subject, and that is whether a compensation or pension granted during pleasure and not for any certain time, and revocable in its own nature, is properly the subject of an assignment, as being of too uncertain and fleeting a character to pass by assignment; for although mere expectancies may properly pass by assignment, yet they must be of a substantial character, and not ordinarily of such a nature as to rest in the pure discretion of the party granting or withholding them from time to time at his pleasure.[1] Upon this ground the salary

[1] Lord Kenyon, in Flarty *v.* Odlum, 3 Term R. 681, seemed to think the assignment of half pay would be void, on account of its being dependent upon the mere pleasure of the Crown, and too uncertain to pass any interest therein by assignment. See also The King *v.* The Lords Commiss. of the Treasury, 4 Adolph. & Ell. R. 976; Id. 984; Ex parte Ricketts, 4 Adolph. & Ell. 999. The weight of authority seems however in favor of the assignability of half pay. Tunstall *v.* Boothby, 10 Sim. 542, 549; Wells *v.* Foster, 8 Mees. & Welsb. R. 149. In this last case Mr. Baron Parke said: "I concur in the opinion that this action is not maintainable upon the ground that on principles of public policy the allowance granted to the defendant was not assignable by him. It is not necessary in this case to determine whether this is an allowance to which the defendant is entitled as a matter of indefeasible right, or whether it is payable only during pleasure; although I have a strong impression that it subsists only during the joint pleasure of the Treasury and of Parliament, by which the fund for its payment is provided. On the other hand even if it be payable only during pleasure it appears to me that it is not therefore in point of law the less assignable, however little its value would be in consequence of its being liable to be withdrawn at any moment. But viewing the matter on the ground of public policy, we are to look, not so much at the tenure of this pension, whether it is held for life or during pleasure, as whether it is in either case such a one as the law ought to allow to be assigned. The correct distinction made in the cases on this subject is that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life or merely during the pleasure of others. In such a case the

of an assistant parliamentary counsel for the Treasury has been held to be not assignable.[1] A distinction has also been taken between the case of an assignment of the arrearages of full pay or half pay or other compensation connected with the right to future services, and the case of an assignment of the future accruing pay

assignee acquires a title to it both in equity and at law, and may recover back any sums received in respect of it by the assignor after the date of the assignment. But where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable."

[1] Cooper *v.* Reilly, 2 Sim. R. 560. But military prize-money, although resting in the mere bounty of the Crown, is held to be different in its nature and objects from military pay, and treated as a right of property rather than as a personal pension or reward. Alexander *v.* Duke of Wellington, 2 Russ. & Mylne, 35; Stevens *v.* Bagwell, 15 Ves. 139, 152. In this last case the Master of the Rolls (Sir William Grant) said: "The capture of the fort at Chinsurah, in July, 1781, was made by 'The Nymph,' sloop of war, commanded by Lieutenant Stevens, under the orders of Sir Edward Hughes, and by a detachment of the East India Company's forces. If the captured effects had, after the death of Lieutenant Stevens, been condemned as prize to the captors, there can be no doubt that his share would have passed by his will; as though the property was not completely vested in the captors until condemnation, yet after condemnation it is by relation considered as theirs from the time of the capture. The captured effects being condemned to the Crown, no right to any part of the produce can accrue to any one except by the gift of the Crown, and as Lieutenant Stevens died before any gift was made, his will could have no direct operation upon the subject of that gift. But the intention of the Crown in all cases of this kind is to put what is in strictness matter of bounty upon the footing of matter of right. The service performed is thought worthy of reward; and though the party performing it died before payment, the claim of bounty from the Crown is considered as transmissible to his representatives in the same plight and condition as the claim for wages, or any other stipulated or legal remuneration of service. In such cases the Crown never means to exercise any kind of judgment or selection with regard to the persons to be ultimately benefited by the gift. The representatives to whom the Crown gives are those who legally sustain that character. But the gift is made in augmentation of the estate, not by way of personal bounty to them. They take, subject to the same trusts upon which they would have taken wages or prize-money, to which the party from whom they claim might have been legally entitled." Lord Brougham in the former case said: "Reference has been made to the case of Stevens *v.* Bagwell (15 Ves. 139), where that which was a matter of bounty is put upon the footing of a right. So far to be sure as the question regards the transmission of the right from the grantee after it has once vested in him, he may sell or assign the bounty, he may transmit it to his heir or sue for it and say it has become a matter of right and is no longer bounty. But is there a shadow of pretence for asserting that, as against the Crown or against trustees standing in the place of the Crown, prize is a matter of right, and not of bounty? Such a decision will be sought for in vain."

or half pay or other compensation; as the right to the arrearages has become absolute and the assignment thereof may not interfere with any public policy.[1] It seems also that the profits of a public office are not assignable even for the benefit of creditors.[2]

§ 1400. **Right to Assign Tort Action.** — So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void, as contrary to public policy, and as savoring of the character of maintenance, of which we shall presently speak.[3] So a mere right of action for a tort is not for the like reason assignable.[4] Indeed it has been laid down as a general rule that where an equitable interest is assigned in order to give the assignee a locus standi in judicio in a Court of Equity, the party assigning such right must have some substantial possession and some capability of personal enjoyment, and not a mere naked right to overset a legal instrument or to maintain a suit.[5]

[1] Tunstall *v.* Boothby, 10 Sim. R. 542, 549; Ellis *v.* Earl Grey, 6 Sim. R. 214. See also Grenfell *v.* Dean of Windsor, 2 Beav. R. 544, 549.

[2] Hill *v.* Paul, 8 Clark & Finel. 295. The assignment of claims against the United States is prohibited by statute in certain cases. See Becker *v.* Sweetser, 15 Minn. 427; Wanless *v.* United States, 6 Ct. of Cl. 123; Danklessen *v.* Braynard, 3 Daly, 183; Bates's Case, 4 Ct. of Cl. 569.

[3] Dayton *v.* Fargo, 45 Mich. 153. See Hill *v.* Boyle, L. R. 4 Eq. 260; Milwaukee R. Co. *v.* Milwaukee R. Co., 20 Wis. 174; Prosser *v.* Edmonds, 1 Younge & Coll. 481; post, § 411.

[4] Gardner *v.* Adams, 12 Wend. R. 297; Dunkin *v.* Wilkins, 5 Ala. 199; Dickinson *v.* Seaver, 44 Mich. 624; McKee *v.* Judd, 2 Kern. 622; Davis *v.* Herndon, 339 Miss. 484; Linton *v.* Hurley, 104 Mass. 353. Secus, it seems, of a right of action for the value of goods converted where the tort is waived. Hawk *v.* Thorn, 54 Barb. 164. See also Grocers' Bank *v.* Clark, 48 Barb. 26; Rindge *v.* Coleraine, 11 Gray 157.

[5] Prosser *v.* Edmonds, 1 Younge & Coll. 481, 496 to 499. In this case Lord Abinger examined the doctrine at large, and said: "With respect to the question as to the validity of an assignment of a right to file a bill in equity, I must distinguish between this sort of case and the assignment of a chose in action or equity of redemption. It may be said that the assignment of a mortgaged estate is nothing more than an assignment of a right to file a bill in equity. But the equity of redemption arises out of an interest, though only a partial interest. Courts of Law and Equity treat the mortgage as a mere security, and there is an interest left in the mortgagor, which he may assign. But in a case where a party assigns his whole estate and afterwards makes an assignment generally of the same estate to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such a claim would be a question deserving of great consideration. My present impression is that such a claim could not be sustained in equity unless the party who made the assignment joined in the prayer to set it aside. In such a case a second assignment is merely that of a right to file a bill in equity for a fraud; and I should say that some authority is necessary to show that a man can

§ 1401. **Same.** — The distinction between the operation of assignments at law and the operation of them in equity may be very familiarly shown by a few illustrations derived from cases of bailments and consignments. In the common case where money or other property is delivered by a bailor to B for the use of C or to be delivered to C, the acceptance of the bailment amounts to an express promise from the bailee to the bailor to deliver or pay over the property accordingly. In such a case it has been said that the person for whose use the money or property is so delivered

assign to another a right to file a bill for a fraud committed upon himself." And again: "The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this, Whether or not parties who either become purchasers for a valuable consideration, or who take an assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. Now in the course of the argument it was urged that an equitable as well as a legal interest may be the subject of conveyance, and that the assignee of a chose in action may file a bill in equity to recover it, although he cannot proceed at law for that purpose. But where an equitable interest is assigned, it appears to me that in order to give the assignee a locus standing in a Court of Equity the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. For instance that a mortgagor who conveys his estate in fee to a mortgagee has in himself an equitable right to compel a reconveyance when the mortgage-money is paid, is true. But that is a right reserved to himself by the original security; it is a right coupled with possession and receipt of rent, and he is protected so long as the interest is paid; and it does not follow that the assignee of the mortgage and the mortgagee may not adjust their rights without the intervention of a Court of Equity. In the present case it is impossible that the assignee can obtain any benefit from his security except through the medium of the court. He purchases nothing but a hostile right to bring parties into a Court of Equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. So where a person takes an assignment of a bond he has the possession, and although a Court of Equity will permit him to file a bill on the bond, it does not follow that he is obliged to go into a Court of Equity to enforce payment of it. So other cases might be stated to show that where equity recognizes the assignment of an equitable interest, it is such an interest as is recognized also by third persons, and not merely by the party insisting on them. What is this but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries (see Voet, Comm. ad Pandect. Lib. 41, tit. 1, sect. 38), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which upon general principles and by analogy to such acts a Court of Equity will discourage the practice. Mr. Girdlestone was so obliging

may maintain an action at law therefore against the bailee without any further act or assent on the part of the bailee; for a privity is created between them by the original undertaking.[1] But of this doctrine some doubt may perhaps be entertained unless there is some act done by the bailee or some promise made by him

as to furnish me with a case, that of Wood *v.* Downes (18 Ves. 120), in which it appears to me that the principle laid down by Lord Eldon goes the full length of supporting the judgment of allowing this demurrer. That was a bill filed to set aside certain conveyances which it was alleged were obtained by the defendant in consequence of his situation of solicitor to the plaintiffs, the estate comprised in the conveyance not being in their possession at the time, but subject to litigation. Lord Eldon, in decreeing relief, adopted not only the ground that the party was the solicitor of the plaintiffs, but that the transaction was contrary to good policy. He said: 'The objection therefore is not merely that which flows out of the relation of attorney and client, but upon the fact that this was the purchase of a title in litigation, with reference to the laws of maintenance and champerty;' and he accordingly decreed the conveyance to be set aside on the ground of litigated title. Here the proceeding is the converse of that in Wood *v.* Downes. It is not to set aside the conveyance in question, but to establish it. The principle is the same in both cases; for if under the present circumstances Robert Todd had filed his bill against the plaintiffs, I should have declared it to be a void deed, and should have ordered it to be set aside. Upon the same facts therefore I ought to refuse to establish the deed in their favor. But the case does not rest here. There is a short but useful statute which it is proper to refer to, that of the 32d of Hen. VIII., ch. 9, which is a legislative rule on the subject, and consistent with general policy and the principles of Courts of Law and Equity. Under the statute, if the person who parts with his title has not been in actual possession of the land within a year before the sale, he as well as the buyer is liable to the penal consequences of the act. I do not say that that is precisely the case here, because the conveyance purports to contain an ulterior trust for the party assigning, and therefore an action could not be brought against him on the statute. At the same time it is to be observed that from many cases in Anderson and Coke it appears that Courts of Common Law were favorable to actions on the statute, considering them to be highly beneficial, and not without good cause to be restrained. It has been the opinion of some learned persons that the old rule of law, that a chose in action is not assignable, was founded on the principle of the law not permitting a sale of a right to litigate. That opinion is to be met with in Sir William Blackstone and the earlier reporters. Courts of Equity, it is true, have relaxed that rule, but only in the cases which I have mentioned, where something more than a mere right to litigate has been assigned. Where a valuable consideration has passed, and the party is put in possession of that which he might acquire without litigation, there Courts of Equity will allow the assignee to stand in the right of assignor. This is not that case. Robert Todd when he assigned was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity."

[1] Story on Bailments, § 103; Israel *v.* Douglas, 1 H. Black. R. 242; Bac. Abr. Bailment, D.; Farmer *v.* Russel, 1 Bos. & Pull. 295; Priddy *v.* Rofe, 3 Meriv. R. 86, 102; Row *v.* Dawson, 1 Ves. 331.

whereby he shall directly contract an obligation to such person to deliver the money or other property over to him; otherwise it would seem that the only contract would be between the bailor and his immediate bailee.[1] But be this as it may, it is certain that a remedy would lie in equity under the like circumstances as a matter of trust; for it is laid down in a work of very high authority "If a man gives goods or chattels to another upon trust to deliver them to a stranger, chancery will oblige him to do it."[2]

§ 1402. **Same.** — But if a remittance be made of a bill to a bailee to collect the amount and also to pay the proceeds or a part thereof to certain enumerated creditors, there it has been held that the mere receipt of the bill and even the collecting of the contents will not necessarily amount to such an appropriation of the money to the use of the creditors as that they can maintain

[1] See Pigott *v.* Thompson, 3 Bos. & Pull. 149; Williams *v.* Everett, 14 East R. 582; Yates *v.* Bell, 3 Barn. & Ald. 643; Grant *v.* Austen, 3 Price R. 58; Tiernan *v.* Jackson, Story on Bailm. § 103; Prosser *v.* Edmonds, 1 Younge & Col. 481, 496 to 499; Lilly *v.* Hayes, 5 Adolph. & Ellis, 548. Comyns's Digest, Action upon the Case on Assumpsit, B. 13. There is certainly some confusion in the cases in the books on this subject. Lord Alvanley, in Pigott *v.* Thompson, 3 Bos. & Pull. 149, seems to have thought that if A lets land to B, in consideration of which B promises to pay the rent to C, the latter may maintain an action on that promise. But he said that his brothers thought differently. So in Marchington *v.* Vernon, cited in 1 Bos. & Pull. 101, note, Mr. Justice Buller is reported to have said that if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it. Probably it will be found upon a thorough examination of the cases that the true principle on which they have proceeded is, that where the promise is construed to be made to A for the use or benefit of B, A alone can maintain an action thereon. But if there is promise in general terms, which may be construed to be made to B through A, there B may maintain an action thereon. The cases of Williams *v.* Everett, 14 East 582, and Tiernan *v.* Jackson, 30 U. S. 597, 8 L. Ed. 234, contain the fullest expositions of the doctrine. See also the Reporter's learned note (*a*) to Pigott *v.* Thompson, 3 Bos. & Pull. 149. See also Martyn *v.* Hind, Cowp. R. 437; S. P. Lilly *v.* Hayes, 5 Adolph. & Ellis, 348. In ex parte South, 3 Swanst. R. 393, Lord Eldon said: "It has been decided in bankruptcy that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him; on the other hand this doctrine has been brought into doubt by some decisions in the Courts of Law, who require that the party receiving the order should in some way enter into a contract. That has been the course of their decisions, but is certainly not the doctrine of this court." See also Fitzgerald *v.* Stewart, 2 Sim. R. 333; s. c. 2 Russ. & M. 457; Lett *v.* Morris, 4 Sim. R. 609. See Hicock *v.* McKay, 12 Gray, 218; Turner *v.* McCarty, 22 Mich. 265; Mellen *v.* Whipple, 1 Gray, 317; Exchange Bank *v.* Rice, 107 Mass. 37.

[2] Com. Dig. Chancery, 4 W. 5; Id. 2 A. 1; ante, § 608, See also Scott *v.* Porcher, 3 Meriv. R. 658, 659.

a suit at law for the same if there are circumstances in the case which repel the presumption that the bailee agreed to receive, and did receive, the money for the use of the creditors.[1] For until such assent, express or implied, no action lies at law any more than it would lie against a debtor without such assent if a debt were assigned by a creditor in favor of the assignee.[2]

§ 1403. **Rights of Assignee of Draft.** — So if a draft or order is drawn on a debtor for a part or the whole of the funds of the drawer in his hands, such a draft does not entitle the holder to maintain a suit at law against the drawee unless the latter assents to accept or pay the draft.[3] The same principle will apply to a case where an equitable (but not a legal) interest in specific property in the hands of a bailee or factor is intended to be transferred by an assignment to creditors; or where specific property is remitted on consignment for sale with directions to apply the proceeds to the payment of certain specified creditors. In each of these cases some assent to the appropriation, express or implied, by the bailee or consignee must be established to justify a recovery at law by the creditors.[4]

§ 1404. **Same.** — But in cases of this sort the transaction will have a very different operation in equity. Thus for instance if A having a debt due to him from B should order it to be paid to C, the order would amount in equity to an assignment of the debt and would be enforced in equity although the debtor had not assented thereto.[5] The same principle would apply to the case of an assignment of a part of such debt.[6]

[1] Williams *v.* Everett, 14 East, R. 582; Yates *v.* Bell, 3 Barn. & Ald. 643; Grant *v.* Austen, 3 Price, R. 58; Tiernan *v.* Jackson, 30 U. S. 597, 8 L. Ed. 234.

[2] De Bernales *v.* Fuller, 14 East, R. 590, note; post, § 1591.

[3] Mandeville *v.* Welch, 18 U. S. 277, 5 L. Ed. 87; Tiernan *v.* Jackson, 30 U. S. 597, 8 L. Ed. 234; Adams *v.* Claxton, 6 Ves. 231.

[4] Ibid.; Williams *v.* Everett, 14 East, 582; Yates *v.* Bell, 3 B. & Ald. 643; Baron *v.* Husband, 4 B. & Adolph. 611, § 1402. But the assignment will probably be good against the drawer's creditors, even at law.

[5] Ante, §§ 1302, 1313: Ex parte South, 3 Swanst. R. 393; Lett *v.* Morris, 4 Sim. R. 607; Ex parte Alderson, 1 Madd. R. 53; Mandeville *v.* Welch, 18 U. S. 277, 5 L. Ed. 87; Tiernan *v.* Jackson, 30 U. S. 597, 8 L. Ed. 234; See Collyer *v.* Fallon, 1 Turn. & Russ. R. 470, 475, 476; Adams *v.* Claxton, 6 Ves. 230; Row *v.* Dawson, 1 Ves. 331; Priddy *v.* Rose, 3 Meriv. R. 86, 102; Morton *v.* Naylor, 1 Hill, N. Y. Rep. 583; Hutchinson *v.* Simon, 57 Miss. 628. See Kendall *v.* United States, 74 U. S. 113, 19 L. Ed. 85, in regard to the nature of the debt.

[6] Smith *v.* Everett, 4 Bro. Ch. R. 64; Lett *v.* Morris, 4 Sim. R. 607; Morton *v.* Naylor, 1 Hill, N. Y. Rep. 583; Watson *v.* Duke of Wellington, 1 Russ. & M. 602, 605.

In each case a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it.

§ 1405. **Same.** — In regard to the other class of cases above suggested, namely, those where the question may arise of an absolute appropriation of the proceeds of an assignment or remittance directed to be paid to particular creditors, Courts of Equity, like Courts of Law, will not deem the appropriation to the creditors absolute until the creditors have notice thereof and have assented thereto. For until that time the mandate or direction may be revoked or withdrawn, and any other appropriation made by the consignor or remitter of the proceeds.[1] The true test whether an absolute appropriation is made out or not depends upon the point at whose risk the property is; and until the creditor has consented, the property will clearly be at the risk of the assignor or remitter.[2] But if upon notice the creditors should assent thereto and no intermediate revocation should have been made by the assignor or remitter, there in equity the assignee or mandatary will be held a trustee for the creditors, and they may maintain a bill to enforce a due performance of the trust. For although the assignee or mandatary has a perfect right in such a case to refuse the trust, yet he cannot act under the mandate and receive the proceeds and hold them discharged from the trust thus created and still subsisting between the mandator and the creditors.[3] The property comes to his hands clothed with the trust by the act of parties competent to create and establish it; and his assent is in no just sense necessary to give validity to it in equity. If at the time of such assignment or remittance the very arrangement and appropriation of the proceeds had been actually made between the assignor or remitter and the creditors, it would clearly bind the proceeds in the hands of the assignee or mandatary subject to such appropriation, whether he assented to it or not.[4] And it can make no just difference that the arrangement is subsequently

[1] Scott *v.* Porcher, 3 Meriv. R. 662. See also Acton *v.* Woodgate, 2 Mylne & Keen, 492; Wallwyn *v.* Coutts, 3 Meriv. R. 707, 708; s. c. 3 Sim. R. 14; Gerrard *v.* Lord Lauderdale, 4 Russ. & Mylne, 451; Gaskell *v.* Gaskell, 2 Younge & Jerv. 502; Maber *v.* Hobbs, 2 Younge & Jerv. 327; ante, §§ 1312, 1388, 1389. See Glegg *v.* Rees, L. R. 7 Ch. 71; In re Freshfield, 11 Ch. D. 198.

[2] Williams *v.* Everett, 14 East, R. 582; Tiernan *v.* Jackson, 30 U. S. 597, 8 L. Ed. 234. Acquiescence may have the same effect as direct assent. In re Baber, L. R. 10 Eq. 554.

[3] See Yates *v.* Bell, 3 Barn. & Ald. 643.

[4] See Fitzgerald *v.* Stewart, 2 Sim. R. 333; ante, § 1404.

made by the same parties, as they still remain competent to enter into it.[1]

§ 1406. [**The Assignee Represents the Parties to the Deed of Assignment.** — The assignee takes the property of the assignor as he finds it, and the creditors may assert the same rights against the assignee as they had against the assignor. The assignee may be said to represent both parties to the instrument, for it is his duty to collect in the assets and make as much for the creditors as possible, and at the same time obey the directions specified in the conveyance by the assignor. Some courts hold that he is directly the agent of and represents the creditors;[2] while in others he is held to represent the assignor.[3] He takes no greater interest or better title than his assignor possessed. His title to the assigned property is affected with every infirmity and subject to every defence and to every equity that existed in respect thereto in the hands of the assignor. He takes the property as a volunteer and subject to every burden which rested upon it in the hands of the assignor.[4] The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and the mortgagees.[5]]

§ 1407. **Assignment Becomes Absolute from What Time.** — It is true that in every case where a consignment or remittance is made with orders to pay over the proceeds to a third person the appropriation is not absolute; for it amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into by the mandatary with the third person to execute it for his benefit; and it will be revoked by any prior disposition of the property inconsistent with such execution.[6]

[1] See Watson *v.* Duke of Wellington, 1 Russ. & Mylne, R. 602; Hassall *v.* Smithers, 12 Ves. 119. But see Ex parte Heywood, 2 Rose, R. 355.

[2] Hillis *v.* Asay, 105 Ill. App. 667; In re St. Paul etc. Grain Co., 89 Minn. 98, 94 N. W. 218, 99 Am. St. Rep. 549; Sawyer Paper Co. *v.* Continental Printing Co., 77 Mo. App. 184; Exchange & Deposit Bank *v.* Stone, 80 Ky. 109; Blair State Bank *v.* Stewart, 57 Neb. 58, 77 N. W. 370.

[3] Dobyns *v.* Dobyns, 79 Ky. 95, 2 Ky. L. Rep. 274; Bruner *v.* Campbell, 90 Ill. App. 632; Thomas Mfg. Co. *v.* Foote, 46 Minn. 240, 48 N. W. 1019.

[4] Home Sav. Bank *v.* Wheeler, 74 Ill. App. 261.

[5] Stewart *v.* Platt, 101 U. S. 731, 25 L. Ed. 816; Crozier *v.* Cromie, 14 Ky. L. Rep. 858.

[6] Lindsay *v.* Price, 33 Tex. 280; Scott *v.* Porcher, 3 Meriv. R. 662, 664; Acton *v.* Woodgate, 2 Mylne & Keen, 492.

But if no revocation is made and the mandate continues in full force, the trust as such continues for the benefit of such third person who, after his assent thereto notified to the mandatary, may avail himself of it in equity without any reference to the assent or dissent of the mandatary upon such notice; for his receipt of the property binds him to follow the orders of his principal.[1]

§ 1408. **No Particular Form Is Necessary to Constitute an Assignment.** — In order to constitute an assignment of a debt or other chose in action in equity no particular form is necessary. A draft drawn by A on B, in favor of C, for a valuable consideration, amounts (as we have seen) to a valid assignment of so much of the funds of A in the hands of B.[2] So indorsing and delivering a bond to an assignee for a valuable consideration amounts to an assignment of the bond.[3] Indeed any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of that fund.[4] The reason is that the fund being matter

[1] Hassall *v.* Smithers, 12 Ves. 119, 122. Where the assignment, not having been made in accordance with the requirements of law, is consequently invalid as to all creditors who choose to avoid it, the property assigned remains liable to attachment in behalf of the creditors of the assignor until a sufficient number to absorb the fund assigned have expressly notified the assignee of their assent to the provisions of the assignment, and the assignee has made a valid contract to keep the same for them. Merrill *v.* Englesby, 28 Vt. 150.

[2] Row *v.* Dawson, 1 Ves. 332; Crowfoot *v.* Gurney, 9 Bing. R. 372; Smith *v.* Everett, 4 Bro. Ch. R. 64. It should however be drawn upon a designated fund. Attorney-Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325; Hosack *v.* Rogers, 18 Wend. 319 (reversing 6 Paige, 415); McWilliams *v.* Webb, 32 Iowa, 577; Shuttleworth *v.* Bruce, 7 Robt. (N. Y.) 160; Superintendent of Public Schools *v.* Heath, 2 McCart. 22; Harris *v.* Clark, 3 Comst. 119; Hall *v.* Buffalo, 1 Keyes, 193; Burn *v.* Carvalho, 4 Mylne & C. 690; Percival *v.* Dunn, 29 Ch. D. 129. But an order so drawn is a good assignment against creditors of the drawer, without acceptance, even at law, it seems. Kingman *v.* Perkins, 105 Mass. 111. Acceptance could not add to the *title* made. Hovey *v.* Grand Trunk Western R. Co., 135 Mich. 147, 97 N. W. 398, 10 Detroit Leg. N. 701; Jackson *v.* Sevatson, 79 Minn. 275, 82 N. W. 634; Bleakley *v.* Nelson, 56 N. J. Eq. 674, 39 Atl. 912.

[3] Row *v.* Dawson, 1 Ves. 332; Ryall *v.* Rowles, 1 Ves. 348, 375; Townshend *v.* Windham, 2 Ves. 6; 1 Madd. Ch. Pr. 434; Ex parte Alderson, 1 Madd. R. 53; Burn *v.* Carvalho, 4 Mylne & Craig, 690, 702; Yeates *v.* Groves, 1 Ves. Jr. 280, 281; Ex parte South, 3 Swanst. R. 393.

[4] Morton *v.* Naylor, 1 Hill, N. Y. Rep. 583; Burn *v.* Carvalho, 4 Mylne & Craig, 690, 702; Shannon *v.* Hoboken, 37 N. J. Eq. 123. See Bank of Commerce *v.* Bogy, 44 Mo. 13; Schwartz *v.* Messinger, 167 Ill. 474, 47 N. E. 719; Smith *v.* Bates Mach. Co., 79 Ill. App. 519; Bartholomew *v.* First Natl. Bank, 57 Kans. 594, 47 Pac. 519; Howe *v.* Howe, 97 Me. 422, 54 Atl. 908; Knight *v.* Schwandt, 67 Minn. 71, 69 N. W. 626; Gray *v.* Pfeiffer, 59 N. J. Eq. 510, 45 Atl. 967.

Where an attorney was given a note for collection for his own fees

not assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in equity.[1] An assignment of a debt may be by parol as well as by deed.[2] As the assignee is generally entitled to all the remedies of the assignor, so he is generally subject to all the equities between the assignor and his debtor.[3] But in order to perfect his title against the debtor it is indispensable

for services rendered in another case, this was an equitable assignment of the note to him for an amount equal to his fees. Whitehead *v.* Fitzpatrick, 58 Ga. 348; Blakey *v.* New York L. Ins. Co., 28 Ind. App. 428, 63 N. E. 47.

Any order, writing or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. Steingrebe *v.* French Mirror & Glass Beveling Co., 83 Ill. App. 587.

The fact that the money is not yet due, and the party who executes the instrument agrees to collect it and hold it as the agent of the other party does not prevent its being an equitable assignment. Cogan *v.* Conover Mfg. Co., 69 N. J. Eq. 809, 64 Atl. 973; Weaver *v.* Atlantic Roofing Co., 57 N. J. Eq. 547, 40 Atl. 858.

Simply writing the word "approved" upon a statement of account of a sub-contractor does not amount to an equitable assignment of funds of the original contractor. Flaherty *v.* Atlantic Lbr. Co., 58 N. J. Eq. 467, 44 Atl. 186; but "Accepted, John B. Noyes, Street Commissioner", is sufficient. Lamoreux *v.* Morin, 72 N. H. 76, 54 Atl. 1023.

Where a city was given a lien upon abutting property for street improvements, the transfer of improvement certificates to the contractor in part payment is a valid equitable assignment as against the property owner. Storrie *v.* Houston City Street R. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716; but otherwise where the assignment was annulled before any part of it was paid. Hicks *v.* Roanoke Brick Co., 94 W. Va. 741, 27 S. E. 596.

[1] Clemson *v.* Davidson, 5 Binn. R. 392, 398.

[2] Heath *v.* Hall, 4 Taunt. R. 326 to 328; s. c. 2 Rose, R. 271; Tibbets *v.* George, 5 Adolph. & Ellis, 107, 115, 116. Delivery is sufficient. Galway *v.* Fullerton, 2 C. E. Green, 389. One who takes an assignment of a chose in action, not evidenced by a written instrument, acquires title as against the assignor without taking any further steps; but must give notice to the debtor to make his claim valid against a junior assignee. Houser *v.* Richardson, 90 Mo. App. 140; Marsh *v.* Garney, 69 N. H. 236, 45 Atl. 745; Hanchey *v.* Hurley, 129 Ala. 306, 30 So. 742.

[3] 1 Madd. Ch. Pr. 435, 436; Priddy *v.* Rose, 3 Meriv. R. 86; Coles *v.* Jones, 2 Vern. 692; Murray *v.* Lylburn, 2 John. Ch. R. 441. Not where the agreement and corresponding obligation run to "bearer." Ex parte New Zealand Banking Co., L. R. 3 Ch. 154. Or to "order." Ex parte City Bank, L. R. 3 Ch. 758. Secus where, though the obligation runs to "holder", the contract calling for it did not call for an obligation of that kind. In re Natal Investment Co., L. R. 3 Ch. 355. But wherever the terms of the contract show an intention that it should be assignable free from the equities of the original parties, as e. g. in the case of an open letter of credit, equity will see that such intention is respected. Ex parte Asiatic Banking Co., L. R. 2 Ch. 391. And see Dickson *v.* Swansea Ry. Co., L. R. 4 Q. B. 44; Graham *v.* Johnson, L. R. 8 Eq. 36.

that the assignee should immediately give notice of the assignment to the debtor; for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignor before such notice.[1]

§ 1409. [**The Assignment May Be Valid though the Debtor Refused to Accept the Order.** — The assignment is valid as between the parties when it has been executed and delivered, but in order to cut off the rights of junior assignees it is essential that actual notice of the assignment be given to the debtor. After the notice has been given to the debtor it is preferable that he should accept the order and thereafter look to the assignee as the real creditor. But if the debtor refuses to accept the order, though he have funds in his hands applicable to the order and then due or to become due by him to the creditor, this would be a good equitable assignment of the fund.[2] The creditor is not obliged to accept the order unless he has funds in his hands, and in this

[1] Foster *v.* Blackstone, 1 M. & Keen, 297; Timson *v.* Ramsbottom, 2 Keen, R. 35; Meux *v.* Bell, 1 Hare, Ch. R. 73; In re Freshfield, 11 Ch. D. 198; Barron *v.* Porter, 44 Vt. 587; Loomis *v.* Loomis, 26 Vt. 198; Ward *v.* Morrison, 25 Vt. 593; Green *v.* Ingham, L. R. 2 C. P. 525. But see Gayoso Sav. Inst. *v.* Fellows, 6 Cold. 467; Kennedy *v.* Parke, 2 C. E. Green, 415. The necessity for notice by an assignee to a debtor arises where he seeks to protect himself against a payment by the debtor to the original creditor. Young *v.* Upson, 115 Fed. 192; Bunnell *v.* Bronson, 78 Conn. 679, 63 Atl. 396; Columbia *v.* Bank, 116 Ky. 364, 76 S. W. 156, 25 Ky. L. Rep. 561; Nielson *v.* City of Albert Lea, 91 Minn. 388, 98 N. W. 195; Crosby *v.* Kopf, 33 App. Div. 446, 54 N. Y. Supp. 76; Carolina Chem. Co. *v.* McNair, 139 N. C. 326, 51 S. E. 949.

The fact that no notice was given till after the death of the assignor would make no difference, for his creditors would only take such estate as the assignor could have claimed himself in the particular fund immediately prior to his death. Shepherd *v.* Pennsylvania B. Co., 29 Pa. Super. Ct. Rep. 293.

The notice to the debtor must be of such an exact and specific character as to convince him that he is no longer liable to the original creditor, and to place in his hands the means of defence against him, or at least the information necessary to interplead the assignee. Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

If the debtor have funds in his hands applicable to the creditor's order, and he have knowledge of the assignment, he has no right to ignore the order and pay the money to another. Ferguson *v.* Davidson, 147 Mo. 664, 49 S. W. 859; Todd *v.* Meding, 56 N. J. Eq. 83, 38 Atl. 349; but a payment honestly made, without notice of the assignment, is good against the alleged assignee, Lockrow *v.* Cline, 4 Kans. App. 716, 46 Pac. 720; Chapman *v.* Steiner, 5 Kans. App. 326, 48 Pac. 607; Faber *v.* Wagner, 10 N. Dak. 287, 86 N. W. 963.

[2] Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93; State *v.* Conroid, 19 Mont. 104, 47 Pac. 640; Campbell *v.* Grant, 36 Tex. Civ. App. 641, 82 S. W. 794.

event in order to charge him, acceptance is necessary,[1] as where the debtor claims that the original contract was entered into by him through the fraud of the original creditor.[2] Consent to an assignment and acceptance thereof may be implied where the ancestor knows of a contract executed by his son for the part of his father's estate that he expects to inherit and to which he does not object.[3] Even knowledge of the assignment and actual assent thereto will not in all cases be effective in favor of the assignee, for the parties in the very inception of the original contract, and as a part of the consideration therefore, may stipulate that there shall be no assignment of any part thereof, and this will bind the proposed assignee. The debtor has a right to say how many creditors he may have and he can so contract that his debt may not be split up into innumerable portions and thus render himself accountable to men with whom he did not contract and perhaps become involved in litigation that was never contemplated, besides being a useless worry and expense.[4] Where a stipulation of this sort was inserted in a contract for the erection of a public school building, the stipulation is regarded as being solely for the benefit of the municipality, and it may, by the conduct of its officers and employees, not only waive the benefits of the stipulation but actually become liable for an order given.[5]]

§ 1410. **Assignee Entitled to Collaterals Held by Assignor.** — In cases of assignments of a debt where the assignor has collateral securities therefor, the assignee will be entitled to the full benefit of such securities unless it is otherwise agreed between the parties.[6] Thus for example the assignee of a debt secured by a mortgage

[1] Hanchey *v.* Hurley, 129 Ala. 306, 30 So. 742; Shackleford *v.* Kiser, 131 Ala. 224, 31 So. 77.

[2] Andrews *v.* Frierson, 134 Ala. 626, 33 So. 6.

[3] Hackett *v.* Campbell, 10 App. Div. 523, 42 N. Y. Supp. 47; Fuller *v.* Parmenter, 72 Vt. 362, 47 Atl. 1079.

[4] City of Omaha *v.* Standard Oil Co., 55 Neb. 337, 75 N. W. 859.

[5] Hackett *v.* Campbell, 10 App. Div. 523, 42 N. Y. Supp. 47; Staples *v.* City of Somerville, 176 Mass. 237, 57 N. E. 380; Mueller *v.* Northwestern University, 195 Ill. 236, 65 N. E. 110, 88 Am. St. Rep. 194; Turner *v.* Wells, 64 N. J. L. 269, 45 Atl. 641.

[6] Craig *v.* Parkis, 40 N. Y. 181; Perry *v.* Roberts, 30 Ind. 244; Gay *v.* Butler, 6 Bush, 508; Magruder *v.* Campbell, 40 Ala. 611; Lindsay *v.* Bates, 42 Miss. 397; Foster *v.* Fox, 4 Watts & Serg. 92; Wilson *v.* Bowden, 26 Ark. 151; Broome *v.* Bisbee, 14 Fla. 21; Cincinnati Tob. Warehouse Co. *v.* Leslie, 117 Ky. 478, 78 S. W. 413, 25 Ky. L. Rep. 1570, 64 L. R. A. 219; Woodland *v.* Mendenhall, 82 Minn. 483, 85 N. W. 164, 83 Am. St. Rep. 445; Lamm *v.* Armstrong, 95 Minn. 434, 104 N. W. 304, 111 Am. St. Rep. 479; Central Trust Co. *v.* New York Equipment Co., 87 Hun 421, 34 N. Y. Supp. 349.

will be held in equity entitled to the benefit of the mortgage.[1] So in equity, although not at law, if a debtor having goods in the hands of his agent at a foreign port sends a letter to his creditor C, promising to direct B to deliver over the goods to D as the agent of C at the port, and while the letter is on its way to B the debtor becomes bankrupt, the creditor will still be held entitled to the goods.[2]

[1] Pattison *v.* Hull, 6 Cowen, 747; Lindsay *v.* Bates, 42 Miss. 397; Cathcart's Appeal, 1 Harris, 416; Hurt *v.* Wilson, 38 Cal. 363.

[2] Burn *v.* Carvalho, 4 Mylne & Craig, 690. *Sale of Securities Held by Lien.* — The authority which the author here cites, Burn *v.* Carvalho, 4 Mylne & C. 690, though treated as a case of assignment, possibly goes further than might appear from the text. The case has been made the subject of some just animadversion upon the state of the English law concerning the availability of a lien to the creditor. Markby, Elements of Law, §§ 477–479, 3d ed. The learned author of the work cited, whose remarks have suggested this note, has shown in a striking light the backwardness of the English law of securities in contrast with the Roman law. He has shown how the Roman law passed from the stage in which a security for debt amounted merely to a right of detention, and therefore operated only as a pressure upon the debtor, to the final stage where the security passed to the creditor with a necessary right of making the same directly available towards the payment of the debt, by sale. The idea that a security could now be a mere lien, in the sense in which that term is used in the English law, had gone out of date.

We still draw a distinction of some sort between securities such as pledges which may be sold on default and securities which the creditor cannot avail himself of directly if the debtor is obstinate or unable to pay. It might not be difficult to make a general enumeration of cases, common-law and statutory, falling within the one or the other category; but to state why a power of sale should be given in the one class (when not expressly stipulated) and not in the other would certainly not be easy.

The progressive side of judicial law is almost always found in equity; and that is the case, however feeble and halting, here. The tendency of development in our law is in the same direction in which the Roman law steadily marched, i.e. towards making securities of all kinds available to the creditor by sale. But one would look in vain to find the evidence in the action of the common-law judges. Lord Mansfield had no follower in his successor, Lord Kenyon; Lord Mansfield established indeed in the Common-law Courts the equitable principle of the action for money had and received, but Lord Kenyon, more devoted to form, did not hesitate to overrule the attempt of his great predecessor to engraft at law the equitable doctrine of mortgage upon an assignment of a chattel absolute in form but a mere security in intention. Eaton *v.* Jaques, Doug. 455, overruled in Westerdell *v.* Dale, 7 T. R. 306, 312; Coote, Mortgages, 241 (4th ed.), referring to other cases; Markby, ut supra. Lord Mansfield was a century ahead of his time.

The case alluded to at the beginning of this note, Burn *v.* Carvalho, shows on the other hand the general feeling of Courts of Equity towards breaking away from mere form and following out the true intention of the parties. There a debtor wrote to his creditor promising to direct his agent abroad "to hand over to V. [the creditor's agent at the place] property in his hands to cover the amount of bills that *eventually* may not

§ 1411. **Assignment of Right Where Champerty or Maintenance Is Urged.** — It is principally in cases of assignments that Courts of Equity have occasion to examine into the doctrine of champerty and maintenance; and therefore it may be here proper to glance

be paid;" the bills referred to being paper of the debtor which the creditor had indorsed and become liable upon. The debtor thereupon wrote to his agent saying, "I have engaged and made promise to [the creditor] that you should pass into the hands of V. all the property which might exist in your hands on my account. You will arrange with that gentleman the mode in which this order may be carried into effect." Before the letter was received the debtor went into bankruptcy, and assignees were appointed.

This clearly did not amount to an assignment, at least at law; it did not sufficiently ascertain the fund or show the debt to be protected. A previous trial of the case had occurred at law, in an action of trover for an alleged conversion of the goods by the creditor in selling them. Both the Queen's Bench and the Exchequer Chamber held that there had been a conversion. Lord Lyndhurst speaking for the higher court said: "Here is no immediate assignment of any certain and specified amount of property, but at most only an agreement to assign on a contingency [that *eventually* there should be bills unpaid], and goods of an uncertain quantity." 1 Ad. & E. 883, 895. Indeed the court proceeded upon the view that the creditor had no right to hold the goods against the plaintiffs, the debtor's assignees in bankruptcy; that is, the Court of Form considered that the creditor had not even acquired a lien upon the goods, and even expressed the view that no equitable title had been conveyed, giving judgment for the plaintiffs in the whole amount of the proceeds of sale. But the Court of Chancery, to which the case then went on behalf of the creditor, first by the Vice-Chancellor and then on appeal by the Lord Chancellor, sustained the creditor's claim to the same proceeds. The latter said that "the promise and agreement" of the debtor gave the creditor a right in equity to have the property applied in payment of the debt. 4 Mylne & C. at p. 702. And that decision prevailed.

Here then was a case in which a Court of Form had declared, no doubt rightly, that the creditor had not acquired so much as a lien, even with taking possession; but a Court of Equity decided virtually that he *had* acquired a lien, and that he might make the same productive by sale. The Lord Chancellor, it is true, compared the case to, and treated it as, an equitable assignment; saying an order given by a debtor to his creditor, upon a third person, to pay the creditor out of (particular) funds was a binding equitable assignment. 4 Mylne & C. at p. 702. But the case did not in reality come up to that. The third person was to "hand over" or to "pass into the hands" of the plaintiff's agent, the goods; and that too to cover bills that "eventually" might not be paid. That might be more or less, and strictly interpreted would be ground for hesitation about turning over anything. It would seem therefore that there could not have been an assignment in the proper sense even in equity. If this be the case, the "handing over" was merely the putting of security into the hands of the creditor; indeed this is the impression that a reading of the whole case fairly leaves. It was not a sale or an assignment; it was not payment. It was a promise to the creditor, so stated in terms to the depositary, to "hand over" the goods, and a direction to the latter to arrange with the creditor's agent the mode of carrying out the order.

The result is that the case in substance appears to be nothing but a

at this important topic. Champerty (campi partitio) is properly a bargain between a plaintiff or defendant in a cause campum partire, to divide the land or other matter sued for between them if they prevail at law; whereupon the champertor is to carry

promise to put and a putting of security by a debtor into the hands of his creditor, not rising to what would ordinarily be understood as a pledge, and a declaration by a Court of Appeal that the creditor might in equity sell and realize his debt. Mr. Markby has taken the same view of the case. Elements of Law, ut supra. However this may be, if the case is good law, and it has never been doubted, no action of trover on account of a sale of the security by the creditor in *such* a situation could be maintained where the rules of equity prevail over those of strict law, or where equitable pleas and claims are available at law.

How far the case may have the effect to break down the distinction of the English law between mere liens and liens with power of sale, including technical equitable liens, remains to be seen. There would seem to be no ground for any substantial distinction between Burn *v.* Carvalho and cases of security in general in which there are no defined terms touching the rights of the parties; and if that case should lead the way to allowing the creditor in all cases, when not restrained by contract or by some other special and sufficient reason, to make the security available, the result will only be what in some way appears to be inevitable.

The decision of the Court of Chancery in Burn *v.* Carvalho does not appear to have fallen under the consideration of the courts in regard to its bearing upon powers of sale, though it has been referred to as law. Rodick *v.* Gandell, 1 DeG. M. & G. 763, 773, Lord Truro. In a later case, however, before Vice-Chancellor Wood, that learned judge declared, of a claim to a right of sale of a ship by shipbuilders who had a lien upon the vessel, that it was settled by numerous authorities that such a lien did not entitle the creditor to sell the property; and he said that the case was not affected by the fact that the creditor was put to expense in holding the property. What these authorities were he did not indicate; and Burn *v.* Carvalho was not referred to at all, either by court or counsel, so far as the report indicates. Thames Iron Works *v.* Patent Derrick Co., 29 L. J. Ch. 714. That a mere lien conferred only a right to hold was however the view of the same Lord Chancellor who decided Burn *v.* Carvalho, at least in the case of a solicitor's lien upon the papers of his client, though there was no attempt to sell, and could be no sale of such things. Bozon *v.* Bolland, 4 Mylne & C. 354, 358, decided just before Burn *v.* Carvalho. This makes it doubtful whether he meant to assert any different doctrine in the case under consideration; still the case itself appears to justify the useful interpretation put upon it by Mr. Markby.

It must always be an anomaly, as it is at best a state of things explainable on grounds long since obsolete, that a creditor, with a security in his hands, should not be able to avail himself of it actively after default, but must submit to the expense of keeping it with diligence, only then perhaps to see it perish in his hands; nay more, that he cannot, it seems, proceed to execution upon it at common law without abandoning, perhaps to the loss of everything, his lien. See the argument of the plaintiff in Thames Iron Works *v.* Patent Derrick Co., supra. With the case of Burn *v.* Carvalho before a judge untrammelled by binding precedent, it cannot require very great courage to declare that in equity this ought not to be.

on the party's suit at his own expense.[1] Maintenance (of which champerty is a species) is properly an officious intermeddling in a suit which no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it.[2] Each of these is deemed an offence against public justice, and punishable accordingly, both at the common law and by statute, as tending to keep alive strife and contention and to pervert the remedial process of the law into an engine of oppression.[3]

[1] See Harman *v.* Brewster, 7 Bush, 355; Cassedy *v.* Jackson, 45 Miss. 397; 4 Black. Comm. 135; 2 Co. Inst. 564; Williams *v.* Protheroe, 3 Younge & Jerv. 129; Thalimer *v.* Brinkerhoff, 20 John. R. 386; s. c. 3 Cowen, R. 623.

[2] 4 Black. Comm. 135.

[3] Hawkins in his Pleas of the Crown, Vol. 1, B. 1, ch. 86, § 1 (Leach's ed. 1795), says: "It seemeth to be a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate. And it seemeth not to be material whether the title so sold be a good or a bad one, or whether the seller were in possession or not, unless possession were lawful and uncontested." This is laying down the doctrine very broadly; and more broadly than it is laid down in Blackstone's Commentaries (4 Black. Comm. 135). The Statute of 32d Hen. VIII. ch. 9, provides, "That no person or persons whatsoever shall bargain, buy or sell, or by any ways or means obtain, get, or have any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person or persons to any manors, lands, tenements, or hereditaments, but if [unless] such person or persons their ancestors, or they by whom they claim the same, have been in possession of the same, or the reversion or remainder thereof, or taken the rents and profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made, upon pain", &c. 2 Hawk. Pleas of the Crown, by Leach, B. 1, ch. 86, § 4. Mr. Russell (on Crimes, Vol. 1, B. 2, ch. 21, p. 266), says: "Maintenance seems to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. This may be where a person assists another in his pretensions to lands by taking or holding the possession of them by force or subtlety, or where a person stirs up quarrels and suits in relation to matters wherein he is in no way concerned; or it may be where a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him, by assisting either party with money or otherwise in the prosecution or defence of such suit. Where there is no contract to have a part of the thing in suit, the party so intermeddling is said to be guilty of maintenance. But if the party stipulates to have part of the thing in suit, his offence is called champerty." It would seem that where a party purchases the whole matter in controversy and brings the suit not to support the title of another but to support his own title, the case would not fall within the predicament either of maintenance or champerty, as thus defined by Mr. Russell or by Mr. Justice Blackstone, although it may be within the scope of the offence described by Hawkins, or of the Statute of 32 Henry VIII. ch. 9, respecting the buying or selling of pretended or disputed titles. Be this as

§ 1412. **What Constitutes Champerty and Maintenance.** — But the doctrine of the common law as to champerty and maintenance is to be understood with proper limitations and qualifications, and cannot be applied to a person having an interest or believing that he has an interest in the subject in dispute and bona fide acting in the suit; for he may lawfully assist in the defence or maintenance of that suit.[1]

it may, it seems difficult to perceive how the language can be applied to matters of trust in lands, actual or constructive, where the trust, although disputed, falls within the jurisdiction of a Court of Equity. The case of a bill brought for a specific performance of a disputed contract respecting the purchase of lands by an assignee of the seller or buyer turns upon the ground of trust; and yet it has been uniformly held to be within the jurisdiction of Courts of Equity. So the case of the assignment of a disputed debt or chose in action or covenant has been held a good assignment in equity. The true distinction will perhaps be found to be that the doctrine of maintenance and champerty, and buying pretended titles, applies only to cases where there is an adverse right claimed under an independent title, not in privity with that of the assignor or seller, and not under a disputed right claimed in privity or under a trust for the assignor or seller. It is not strictly maintenance for a stranger to advance money for, or to agree to pay the costs of, a suit not yet commenced; for the offence consists in such acts done after a suit is commenced. But Courts of Equity deem such acts as savoring of maintenance; and therefore will not enforce any contracts or rights growing out of them. Wood *v.* Downes, 18 Ves. 125. In Harrington *v.* Long (2 Mylne & K. 592), the Master of the Rolls, defined maintenance somewhat differently from what it is in the text. He said: "Maintenance is where there is an agreement by which one party gives to a stranger the benefit of a suit upon condition that he prosecutes it." See also Prosser *v.* Edmonds, 1 Younge & Coll. 496 to 499; ante, § 1040 *c*; Baker *v.* Whiting, 3 Sumner, R. 475; Hunter *v.* Daniel, 9 Jurist, 527, 531; the comments of Mr. Vice-Chancellor Wigram on Harrington *v.* Long, 2 Mylne & Keen, 592, and Wood *v.* Downes, 18 Ves. 120; Gammons *v.* Gulbranson, 78 Minn. 21, 80 N. W. 779.

[1] In Findon *v.* Parker, 11 Mees. & Welsb. R. 675, 682, Lord Abinger said: "The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they have no right to make. I do not like to give an opinion upon an abstract case, and therefore am not desirous to consider it; but if a man were to see a poor person in the street oppressed and abused and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance; I am not prepared to say that in modern times courts of justice ought to come to that conclusion. However I give no opinion upon that point. In this case I proceed upon the ground that there was reasonable evidence of a common link of interest uniting the proprietors of the lands in question at the time they made the agreement." See also Techell *v.* Watson, 8 Mees. & Welsb. 691; Hunter *v.* Daniel, 4 Hare, R. 420; Flight *v.* Leman, 4 Adolph. & Ellis,

§ 1413. **Same.** — It was chiefly upon the ground of champerty and maintenance that the Courts of Common Law refused to recognize the assignment of debts and other rights of action and securities; although (as we have seen) the same doctrine does not prevail in equity. But still Courts of Equity are ever solicitous to enforce all the principles of law respecting champerty and maintenance; and they will not in any case uphold an assignment which involves any such offensive ingredients.[1] Thus for instance Courts of Equity equally with Courts of Law will repudiate any agreement or assignment made between a creditor and a third person to maintain a suit of the former so that they may share the profits resulting from the success of the suit; for it will be a clear case of champerty.[2] So an assignment of a part of the subject of a pending prize suit to a navy agent in consideration of his undertaking to indemnify the assignor against the costs and charges of the suit will be held void in equity; for it amounts to champerty in being the unlawful maintenance of a suit in consideration of a bargain for part of a thing or some profit out of it.[3] So a bill to enforce a title acquired by a conveyance of real estate from a person out of possession in consideration of money advanced and to be advanced on suits for the recovery thereof will be dismissed, even although the parties are first cousins; for it amounts to maintenance, and is the buying of a pretended title.[4] The

New R. 883; Co. Litt. 368 *b*; Hunter *v.* Daniel, 9 Jurist, 526 (for 1845), where Mr. Vice-Chancellor Wigram comments on the authorities. See Danforth *v.* Streeter, 28 Vt. 490; Fetrow *v.* Merriwether, 53 Ill. 275; Schaferman *v.* O'Brien, 28 Md. 565; Elborough *v.* Ayres, L. R. 10 Eq. 367; Dickinson *v.* Burrell, L. R. 1 Eq. 337; Hilton *v.* Woods, L. R. 4 Eq. 432; Rowe *v.* Beckett, 30 Ind. 154; Edwards *v.* Parkhurst, 21 Vt. 472.

[1] Strachan *v.* Brander, 1 Eden, R. 303, and note; Id. 309; Skapholme *v.* Hart, Rep. Temp. Finch, 477; Burke *v.* Green, 2 B. & Beatt. 517; Wood *v.* Downes, 18 Ves. 125, 126; Wood *v.* Griffith, 1 Swanst. R. 55, 56; Wallis *v.* Duke of Portland, 3 Ves. R. 493, 502; Stone *v.* Yea, Jac. Rep. 426; Arden *v.* Patterson, 5 John. Ch. R. 44, 48, 51.

[2] Hartley *v.* Russell, 2 Sim. & Stu. R. 244. In Hunter *v.* Daniel, 9 Jurist, pp. 526, 581, Sir James Wigram, V. C., said: "I am by no means certain that the opinion of Sir John Leach in that case (Harrington *v.* Long, 2 M. & K. 590) is perfectly consistent with what he decided in Hartley *v.* Russell, 2 Sim. & Stu. 244." See Grell *v.* Levy, 16 C. B. (N. S.) 73; Martin *v.* Clarke, 8 R. I. 389; West *v.* Raymond, 21 Ind. 305; Boardman *v.* Thompson, 25 Iowa, 487. But see Fogerty *v.* Jordan, 2 Robt. (N. Y.) 319; Voorhees *v.* Dow, 51 Barb. 580; Martin *v.* Veeder, 20 Wis. 466.

[3] Stevens *v.* Bagwell, 15 Ves. 156.

[4] Burke *v.* Green, 2 B. & Beatt. 521, 522; Marquis of Cholmondeley *v.* Lord Clinton, 2 Jac. & Walk. 135, 136; Powell *v.* Knowler, 2 Atk.

only exceptions to the general rule are of certain peculiar relations recognized by the law, such as that of father and son, or of an heir apparent, of the husband of an heiress,[1] or of master and servant,[2] and the like.

§ 1414. **Interest in Contract May Be Purchased and Not Amount to Maintenance.** — But consistently with these principles a party may purchase by assignment the whole interest of another in a contract or security or other property which is in litigation, provided there be nothing in the contract which savors of maintenance; that is, provided he does not undertake to pay any costs,[3] or make any advances beyond the mere support of the exclusive interest which he has so acquired.[4] Thus for example it is extremely clear that an equitable interest under a contract of purchase of real estate may be the subject of sale. A person claiming under such an original contract, in case he afterwards sells his purchase to sub-purchasers, becomes in equity a trustee for the persons to whom he so contracts to sell. Without entering into any covenant for that purpose, such sub-purchasers are obliged to indemnify him from the consequence of all acts which he must execute for their benefit. And a Court of Equity not only allows but actually compels him to permit them to use his name in all proceedings for obtaining the benefit of their contract.[5] Such indemnity and such proceedings, under such circumstances, are not deemed maintenance.[6] So if there be a trust estate in lands

224; Bayly *v.* Tyrell, 2 B. & Beatt. 358; Thallhimer *v.* Brinckerhoff, 3 Cowen, R. 623.

[1] Moore *v.* Usher, 7 Sim. R. 384; Lewis *v.* Bell, 58 U. S. 616, 15 L. Ed. 203; Wright *v.* Cain, 93 N. C. 296; Gilleland *v.* Failing, 5 Denio 308; Barker *v.* Barker, 14 Wis. 131. Contra: Barnes *v.* Strong, 54 N. C. 100.

[2] 4 Black. Comm. 135. See Elborough *v.* Ayres, L. R. 10 Eq. 367.

[3] See Grell *v.* Levy, 16 C. B. (N. S.) 73.

[4] See Williams *v.* Protheroe, 5 Bing. R. 309; s. c. 3 Younge & Jerv. 129; Harrington *v.* Long, 2 Mylne & Keen, 592; Thallhimer *v.* Brinckerhoff, 3 Cowen, R. 623. But see Prosser *v.* Edmonds, 1 Younge & Coll. 485, 496 to 499; Hartley *v.* Russell, 2 Sim. & Stu. 244; Hunter *v.* Daniel, 9 Jurist, pp. 526, 531 (for 1845); Rucker *v.* Bolles, 80 Fed. 504, 25 C. C. A. 600; Grandy *v.* Fortune, 119 Ala. 303, 24 So. 425; Independent Ice Co. *v.* Anderson, 106 La. 55, 30 So. 270.

[5] Deaver *v.* Eller, 42 N. C. 24; Dibble *v.* Scott, 58 N. C. 164.

[6] Wood *v.* Griffith, 1 Swanst. R. 55, 56; s. c. Sugden on Vendors, ch. 9, § 6, p. 488 (7th ed.). The case of Arden *v.* Patterson (5 John. Ch. R. 44) may seem to support a different doctrine. That case was decided upon principles perfectly clear with reference to the relation of the parties (attorney and client) and the other circumstances. If it should be thought to lay down the more general doctrine that a purchase cannot be made absolutely of a chose in action or other matter in

either actual or constructive, which however is controverted by the trustee, the cestui que trust (or beneficiary) may nevertheless lawfully assign it; and the assignee may in equity enforce his rights to the same if the assignment does not in the sense above stated savor of maintenance.[1]

§ 1415. **Same.** — This doctrine has been fully recognized by an eminent judge who on one occasion where a sub-contract of this

controversy, it would hardly be reconcilable with the other cases referred to in the text. See also Thallhimer *v.* Brinckerhoff, 3 Cowen, R. 623; Harrington *v.* Long, 2 Mylne & Keen, 590, 592, 593.

[1] Baker *v.* Whiting, 3 Sumner, R. 475, 481 to 484. On this occasion the court said: "The main objection however taken to the operation of this deed is, that at the time of this conveyance by Stimpson to Baker the defendant was in full possession and seisin of the premises, claiming them in his own right, and of course that Stimpson was then disseised and the conveyance to Baker was void under the operation of the common law relative to maintenance and champerty, and the statute of 32d Henry VIII. ch. 9, made in aid thereof. This statute prohibits, under penalties, the buying or selling of any pretended right or title to land unless the vendor is in actual possession of the land or of the reversion or remainder. The object of the statute, as well as of the common law, was doubtless to prevent the buying up of controverted legal titles, which, the owner did not think it worth his while to pursue, upon mere speculation; so that in fact it might properly be deemed the mere purchase of a lawsuit. 4 Black. Comm. 135, 136; Hawk. Pl. of the Crown, B. 1, ch. 83, §§ 1 to 20; Id. B. 1, ch. 84, §§ 1 to 20; Id. B. 1, ch. 86, §§ 1, 4 to 17. The old cases upon this subject have gone a great way further indeed than would now be sustained in Courts of Equity, which have broken in upon some of the doctrines established thereby. But be this as it may, neither the common law nor the statute applies to a trust estate actually existing either by the acts of the parties or by construction of law. Thus a cestui que trust may lawfully dispose of his trust estate notwithstanding his title is contested by the trustee; for the latter can never disseise the former of the trust estate, but so long as it continues the possession of the trustee is treated, at least in a Court of Equity, as the possession of the cestui que trust. There can be no disseisin of a trust, although the exercise of an adverse possession for a great length of time may in equity bar or extinguish the trust. The whole question in the present case turns upon this; whether the defendant Whiting at the time of his purchase of the premises at the sale for taxes in August, 1821, was the agent of the heirs of Jacob Tidd, of Stimpson, and of other proprietors of their undivided shares in the premises. If he was, then upon the acknowledged principles of Courts of Equity he as an agent could not become a purchaser at the sale for himself, but his purchase must be deemed a purchase for his principals. It matters not whether in such a case the defendant intended to purchase for himself and on his own account or not. For Courts of Equity will not tolerate any agent in acts of this sort, since they operate as a virtual fraud upon the rights and interests of his principals, which he is bound to protect. He was bound, as their agent for the premises, to give them notice of the intended sale and to save the property from any sacrifice; and until he had openly and notoriously, and after full notice to the principals, discharged himself from his agency, he could not be permitted in a Court of Equity to become a purchaser

sort occurred in judgment used the following language: "If G & W (the original vendees) during the pendency of the suit in the Exchequer sold the estate to A B, he would have a right in a Court of Equity to insist, as purchaser of the estate, that they should convey to him the fee simple or such title as they had. So insisting he claims no more than they would be entitled to claim if they had not sold their equitable interest. Having sold, they become trustees of that equitable interest; their vendee acquires the same right which they had, that is, a right to call on the original vendors, indemnifying them against all costs and charges, for the use of their names to enable them to execute the sub-contract by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this court, which has always given to parties entering into a subcontract the benefit which the vendors derived from the primary contract." [1]

at the sale. If indeed, as there is much reason to believe, at the time of the sale he had funds of his principals in his own hands sufficient to meet the taxes, and a fortiori if he endeavored to dissuade or to prevent other persons from becoming bidders at the sale, as some of the evidence states, his conduct was, supposing him to be agent, still more reprehensible. The validity of the conveyance then from Stimpson to Baker depends upon the fact whether the defendant Whiting was or was not the agent and mere trustee of the parties; and whether if agent eo instanti that the conveyance under the tax sale was made to him, the law did not attach the trust to the lands in his hands. If it did, then the conveyance of Stimpson to Baker was valid. If it did not, then it was void as falling within the reach of the doctrines respecting maintenance, champerty, and pretended titles. Those doctrines do not apply to trusts created in privity of estate, but to adverse and independent titles between strangers. It is quite a mistake to suppose that a controverted trust may not be assigned by the owner when it is clearly and unequivocally attached to property. If a contract is made for the sale of lands, the contractee may sell and assign the whole or a part, or make a binding sub-contract respecting the same, whether there be a controversy respecting the specific performance of the original contract or not. The case of Wood *v.* Griffith (1 Swanst. R. 55, 56) is fully in point upon this doctrine even when the assignment or sale is made during the pendency of a suit for a specific performance. See also 2 Story on Eq. Jurisp. §§ 1048 to 1051, 1053, 1054; Harrington *v.* Long, 2 Mylne & Keen, R. 590; Hartley *v.* Russell, 2 Sim. & Stu. R. 244. In the case of Prosser *v.* Edmonds, 1 Younge & Coll. R. 497, 498, there was no trust, but a mere naked right to set aside a conveyance for fraud, which distinguishes it from the present case. I repeat it, therefore, that the whole question whether the deed from Stimpson to Baker was a valid conveyance or not, depends upon the point whether at the time the defendant was actually or constructively a trustee of the premises for Stimpson."

[1] Per Lord Eldon, in Wood *v.* Griffith, 1 Swanst. 56.

§ 1416. **Same.** — Upon the like grounds, where a creditor who had instituted proceedings at law and in equity against his debtor entered into an agreement with the debtor to abandon those proceedings and give up his securities in consideration of the debtor's giving him a lien on other securities in the hands of another creditor, with authority to sue the latter, and agreeing to use his best endeavors to assist in adjusting his accounts with the holder and in recovering those securities, it was held that the agreement was lawful, and not maintenance; for there was no bargain or color of bargain that the assignee should maintain the suit instituted in the assignor's name against such creditor having the other securities in consideration of sharing in the profits to be derived from that suit. The agreement was in effect nothing more than an assignment of the equity of redemption of the assignor in the securities held by such creditor in exchange for the prior securities held by the assignee. The authority given to the assignee to sue such creditor was the common legal provision in the case of an assignment of a debt or security.[1]

§ 1417. **Same.** — So where by articles of agreement for the sale of an estate it was agreed between the vendor and purchaser that the purchaser, bearing all the expenses of certain suits commenced by the vendor against an occupier for bygone rents, should have the rents so to be recovered and also any money recovered for dilapidations, and that the purchaser at his own expense and indemnifying the vendor might use the name of the vendor in any action he might think fit to commence therefor, it was held that the agreement was not void for maintenance or champerty.[2]

§ 1418. **Same.** — Indeed there is no principle in equity which prevents a creditor from assigning his interest in a debt after the institution of a suit therefor as being within the statutes against champerty and maintenance. Such an assignment gives the person to whom it is made a right to institute a new proceeding in order to obtain the benefit of the assignment. And the proper mode of doing this is by the assignee's filing a supplemental bill (if the suit is still pending) making the assignor and the debtor defendants. But if the assignment contains an agreement that the assignee is to indemnify the assignor not only against all costs incurred and to be incurred with reference to the subject-matter assigned, but also against all costs to be incurred in that suit for

[1] Hartley *v.* Russell, 2 Sim. & Stu. 244.
[2] Williams *v.* Protheroe, 5 Bing. R. 309; s. c. 3 Younge & Jerv. 129.

collateral objects and claims totally distinct from the subject-matter assigned, it will be held void for maintenance.[1]

§ 1419. **Same.** — So strongly are Courts of Equity inclined to uphold assignments when bona fide made, that even the assignment of freight to be earned in future is good in equity and will be enforced against the party from whom it becomes due.[2] So an assignment of a whale-ship by way of mortgage, and of all oil, head-matter, and other cargo caught or brought home on a whaling voyage, will amount to a good assignment of the future cargo of oil and head-matter obtained in the voyage.[3] And whenever an assignment is made of a debt or other personal property, although it is charged on land, as for example a pecuniary legacy charged on land, the assignment will be treated as an assignment of money only, and therefore it will not be affected by the policy of the registration laws by which conveyances of interests in land are required to be registered.[4]

§ 1420. **Same.** — In Courts of Law these principles of Courts of Equity are now acted on to a limited extent. But still whenever a bond or other debt is assigned and it is necessary to sue at law for the recovery thereof, it must be done in the name of the original creditor, the person to whom it is transferred being treated rather as an attorney than as an assignee, although his rights will be recognized and protected in some measure at law against the frauds of the assignor.[5]

§ 1421. **Assignee May Sue in His Own Name.** — In equity on the other hand the assignee may sue on such an assignment in his own name and enforce payment of the debt directly against

[1] Harrington *v.* Long, 2 Mylne & Keen, 590, 592, 593, 598, 599. The report in this case is somewhat obscure, and does not exactly present the true ground of the decision. But the argument of the counsel for the defendant in pages 598, 599, shows it. Ravenel *v.* Ingram, 131 N. C. 549, 42 S. E. 967.

[2] Leslie *v.* Guthrie, 1 Bing. New Cas. 697; Douglas *v.* Russell, 4 Sim. R. 524; s. c. 1 Mylne & Keen, 488; Watson *v.* Duke of Wellington, 1 Russ. & Mylne, 602, 605. In re Ship Warre, 8 Price, R. 269, note; Curtis *v.* Auber, 1 Jac. & Walk. 506; Robinson *v.* McDonnel, 5 M. & Selw. 228; Langton *v.* Horton, 1 Hare's R. 549, 556, 557.

[3] Langton *v.* Horton, 1 Hare's R. 549, 556, 557; s. c. 5 Beav. 9; Mitchell *v.* Winslow, 2 Story's R. 630.

[4] Malcolm *v.* Charlesworth, 1 Keen, R. 63.

[5] Ryall *v.* Rowles, 1 Ves. 353, 362; Welch *v.* Mandeville, 18 U. S. 277, 5 L. Ed. 87; Tiernan *v.* Jackson, 30 U. S. 597, 8 L. Ed. 234. But see Gibson *v.* Winter, 2 Neville & Perry, R. 277, 283. In many of the States of the Union the assignee of a chose in action may sue in his own name. See Long *v.* Heinrich, 46 Mo. 603; Cook *v.* Bell, 18 Mich. 387; Smith *v.* Chicago R. Co., 23 Wis. 267.

the debtor, making him as well as the assignor (if necessary) a party to the bill. The assignment of a debt does not in equity require even the assent of the debtor in any manner thereto;[1] although to make it effectual for all purposes it may be important to give notice of the assignment to him, since until notice he is not affected with the trust created thereby, and the rights of third persons may intervene to the prejudice of the assignee.[2] The ground of this doctrine is that the creditor has in equity a right to dispose of his own property as he may choose, and to require the debt to be paid to such person as he may direct, without any consultation with the debtor, who holds the debt subject to the rights of the creditor.

§ 1422. **Same.** — It has however been recently held that the assignee of a debt not in itself negotiable is not entitled to sue the debtor for it in equity unless some circumstances intervene which show that his remedy at law is or may be obstructed by the assignor; for otherwise the assignee, although he may not sue therefor in his own name in a Court of Law, yet may sue in the name of the assignor.[3] But if the assignor refuses to allow the assignee to sue for the debt in his name at law, or has done or

[1] Ex parte South, 3 Swanst. R. 393; Spring *v.* South Carolina Ins. Co., 21 U. S. 268, 5 L. Ed. 614.

[2] See Williams *v.* Thorp, 2 Simons, R. 257; Tourville *v.* Naish, 3 P. Will. 307, 308; Langley *v.* Earl of Oxford, Ambler, R. 17; Ashcomb's case, 1 Ch. Cas. 232; Dearle *v.* Hall, 3 Russ. R. 1; Loveridge *v.* Cooper, Id. 30; Wallwyn *v.* Coutts, 3 Meriv. R. 707; s. c. 3 Sim. 14; Collyer *v.* Fallon, 1 Turn. & Russ. 469; Foster *v.* Blackstone, 1 Mylne & Keen, 297; Garrard *v.* Lord Lauderdale, 3 Sim. 1; Elty *v.* Bridges, 3 Younge & Coll. New R. 486, 492. See Société Générale *v.* Tramways Co., 14 Q. B. D. 424.

[3] But see Dhegetoft *v.* London Assur. Co., Mosely, R. 83, and Carter *v.* United Insur. Co. of New York, 1 John. Ch. R. 463, 464; Kirkland *v.* Dryfus, 103 Ga. 127, 29 S. E. 612; but the assignee cannot sue in his own name where there is nothing due to him and the entire amount collected is to be paid by him to the assignor. Stewart *v.* Price, 64 Kans. 191, 67 Pac. 553, 64 L. R. A. 581; Hauze *v.* Powell, 90 Ill. App. 484; Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1069; Coombs *v.* Harford, 99 Me. 426, 59 Atl. 529; Park *v.* Toledo & D. R. Co., 41 Mich. 352, 1 N. W. 1032, in which it is held that the assignor's name might be used in any proper enforcement of the claim, but would not authorize the resort to any other method not warranted by the facts. Lockwood *v.* Bassett, 49 Mich. 546, 14 N. W. 492; International & G. N. R. Co. *v.* Reeves, 35 Tex. Civ. App. 162, 79 S. W. 1099.

Some few of the cases hold that an assignee for collection, for instance an attorney, may sue directly in his own name, though he have no real interest other than as simple collector. Younge *v.* Hudson, 99 Nev. 102, 12 S. W. 632; Howe *v.* Mittelberg, 96 Mo. App. 490, 70 S. W. 396; Huddelson *v.* Polk, 70 Neb. 483, 97 N. W. 624; Walker *v.* Brooks, 125 Mass. 241.

intends to do some act which may or will prevent the assignee from recovering in a suit at law in the name of the assignor, — that, if alleged in the bill, will be sufficient to sustain a suit in equity in the name of the assignee against the debtor.[1] The more general principle established in this country seems to be that wherever an assignee has an equitable right or interest in a debt or other property (as the assignee of a debt certainly has), there a Court of Equity is the proper forum to enforce it; and he is not to be driven to any circuity by instituting a suit at law in the name of the person who is possessed of the legal title.[2]

A cestui que trust may ordinarily sue third persons in a Court of Equity upon his equitable title without any reference to the existence of a legal title in his trustee which may be enforced at law. [It is now very generally held that the action must be prosecuted by the real party in interest, and an assignee has such an interest as will entitle him to bring the action directly in his own name. The complaint ought to show how he claims to be the owner of the cause of action and thus entitled to sue.[3]]

[1] Hammond *v.* Messenger, 9 Simons, R. 327. On this occasion the Vice-Chancellor (Sir R. Shadwell) said: "If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due a right to sue in their names for the debt. It is quite new to me that in such a simple case as that, this court allows in the first instance a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that if special circumstances are stated and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction in the first instance to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed unaccompanied by special circumstances." See also S. P. Rose *v.* Clarke, 1 Y. & Coll. New R. 534, 546.

[2] Townsend *v.* Carpenter, 11 Ohio (Stanton's) Rep. 21. But see contra Walker *v.* Brooks, 125 Mass. 241, reviewing many cases; New York Guar. Co. *v.* Memphis Water Co., 107 U. S. 205, 27, L. Ed. 484, 2 S. Ct. Rep. 279; Hayward *v.* Andrews, 106 U. S. 672, 27 L. Ed. 271, 1 S. Ct. Rep. 544.

Denied in Walker *v.* Brooks, 125 Mass. 241.

[3] Morrison *v.* North American Trans. Co., 178 U. S. 262, 44 L. Ed. 1061, 20 S. Ct. Rep. 869; in which it is held that the assignee has no greater rights than the assignor, and if the assignor could not recover, neither can the assignee. Quan Wye *v.* Chin Lin Hee, 123 Cal. 185, 55 Pac. 783; Uncas Paper Co. *v.* Corbin, 75 Conn. 675, 55 Atl. 165; City Bank *v.* Thorp, 78 Conn. 211, 61 Atl. 428; Krapp *v.* Eldridge, 33

§ 1423. **Same.** — Cases indeed may exist where although the equitable title only has passed by the assignment, yet the remedy under ordinary circumstances may justly be held to remain at law. But these cases may constitute exceptions to the general rule rather than expositions of it; for they turn upon the consideration that under the circumstances a Court of Equity does not possess as ample and appropriate means to grant the proper relief as a Court of Law; or what in effect amounts to the same thing, that a Court of Equity cannot administer entire justice without resorting to the same means, a trial by jury, as a Court of Law. Thus for example if the assignment be of a contract involving the consideration and ascertainment of unliquidated damages, as in case of the assignment of a policy of insurance, there, unless some obstruction exists to the remedy at law, it would seem that a Court of Equity ought not to, or might not, interfere to grant relief; for the facts and the damages are properly matters for a jury to ascertain and decide.[1] But the same objection would not lie to an assignment of a bond or other security for a fixed sum.

Kans. 106, 5 Pac. 372; Gilman *v.* American Producers Controlling Co., 180 Mass. 319, 62 N. E. 267; Waters *v.* Spencer, 44 Misc. Rep. 15, 89 N. Y. Supp. 693; Wallace *v.* Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777.

The consignee generally has the right to sue for penalties for delayed shipments, but where the shipment is for the benefit of the consignor, he may sue in his own name. Stone *v.* Atlantic Coast Line R. Co., 144 N. C. 220, 56 N. C. 932; Rollins *v.* Seaboard Air Line R. Co., 146 N. C. 153, 59 S. E. 671; Davis *v.* Southern R. Co., 147 N. C. 68, 60 S. E. 722.

[1] Dhegetoft *v.* London Assur. Co., Mosely, R. 83; Carter *v.* United Ins. Co., 1 John. Ch. R. 463. These cases were on policies of insurance, and Mr. Chancellor Kent, in the latter case, said: "The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs & Titus, the original assured in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the Chancellor in the analogous case of Dhegetoft *v.* The London Assurance Company, Mosely, R. 83, that at this rate all policies of insurance would be tried in this court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in Parliament. 3 Bro. P. C. 525. The bill in this case states no special ground for equitable relief; nor is any discovery sought which requires an answer."

CHAPTER XXXII

EXPRESS TRUSTS. — WILLS AND TESTAMENTS

§ 1424. **Wills and Testaments.** — In the next place let us pass to the consideration of express trusts of real and personal property created by LAST WILLS AND TESTAMENTS. These are so various in their nature and objects, and so extensive in their reach, that it would be impracticable to comprehend them within the plan of these Commentaries. They are most usually created for the security of the rights and interests of infants, of femes covert, of children, and of other relations; or for the payment of debts, legacies, and portions; or for the sale or purchase or real estate for the benefit of heirs or others having claims upon the testator; or for objects of general or special charity. Many trusts also arise under wills by construction and implication of law. But in whatever way or for whatever purpose or in whatever form trusts arise under wills, they are exclusively within the jurisdiction of Courts of Equity. Indeed so many arrangements, modifications, restraints, and intermediate directions are indispensable to the due administration of these trusts, that without the interposition of Courts of Equity there would in many cases be a total failure of justice.[1]

§ 1425. **A Trust Will Never Fail for Want of a Proper Trustee.** — The truth of this remark will at once be seen by the statement of a very few plain cases to illustrate it. In the first place trusts are often created by will without the designation of any trustee who is to execute them; or it may be matter of doubt upon the terms of the will who is the proper party. Now it is a settled principle in Courts of Equity (as has been already stated) that a trust shall never fail for the want of a proper trustee; and if no

[1] As to what words in a Will, will constitute a charge on real estate for the payment of debts, see post, § 1653.

other is designated, Courts of Equity will take upon themselves the due execution of the trust.[1]

§ 1426. **Same.** — Thus for example if a testator should order his real estate or any part thereof to be sold for the payment of his debts without saying who should sell, in such a case a clear trust would be created. A Court of Law will not in such a case take cognizance of the trust. Nay, so strictly is this rule adhered to, that a Court of Law will not undertake to construe a will so far as it regards mere trusts; and if a case be sent for the opinion of the judges, stating it as a trust, they will decline giving any opinion thereon.[2] But a Court of Equity will not hesitate in such a case to declare who is the proper party to execute the trust; or if no one is designated, it will proceed to execute the trust by its own authority and decree a sale of the land. In the case put of a trust for the payment of debts, if executors are named in the will they will be deemed by implication to be the proper parties to sell, because in equity when lands are directed to be sold they are treated as money; and as the executors are liable to pay the debts and, if the lands were money, as they would be the proper parties to receive it for that purpose, Courts of Equity will hold it to be the intent of the testator that the parties who are to receive and finally to execute the trust are the proper parties to sell for the purpose.[3]

§ 1427. **Same.** — In the next place let us suppose the case of a will giving power to trustees to sell an estate upon some specified

[1] Ante, § 1318; Co. Litt. 290 *b*, Butler's note (1), § 4; Peter *v.* Beverly, 35 U. S. 532, 9 L. Ed. 532; Adams *v.* Adams, 88 U. S. 185, 22 L. Ed. 504.

[2] 1 Madd. Ch. Pr. 436.

[3] See Peter *v.* Beverly, and cases there cited; Wood *v.* White, 4 M. & Craig, 460, 481. In this last case Lord Cottenham said: "The circumstances of this case are so peculiar that there is no probability of any decision having taken place directly in point; but there are rules established strongly analogous, by which a power or trust to sell has been held to be created by implication. If a testator directs that his lands shall be sold and the proceeds distributed by his executors, they have the power to sell, though no such power is in terms given to them. So if a testator merely charges his lands with the payment of his debts, this is so equivalent to a trust for that purpose, that a purchaser is not bound to see to the application of the purchase-money. In both cases the power and trust are implied for the purpose of carrying into effect the declared intention as to the purchase-money," p. 481. Lockton *v.* Lockton, 1 Ch. Cas. 180; Carvill *v.* Carville, 2 Ch. Rep. 301; Blatch *v.* Wilder, 1 Atk. 420; Jackson *v.* Ferris, 15 John. R. 346; Forbes *v.* Peacock, 11 Sim. R. 152, 160.

In such cases the executors by accepting become bound to execute the trusts, and their bondsmen will be liable until a new trustee is ap-

trust, and they should all refuse to execute the trust or should all die before executing it. Now it is a well-known rule of law that powers are never imperative; but the acts to be done under them are left to the free will of the parties to whom they are given. The same rule is applied at law to such powers even when coupled with a trust. Hence in the case supposed the trust would at law be wholly gone. The trustees if living could not at law be compelled to execute the trust; and by their death the power would be entirely extinguished.[1] But a Court of Equity would treat the whole matter in a very different way. It would compel the trustees if living to execute the power because coupled with a trust, although it would not compel them to execute a mere naked power not coupled with a trust.[2] If the trustees should decline or refuse to act at all, the court would appoint other trustees, if necessary, to carry the trust into effect.[3] And if the trustees should die without executing the power, it would hold the trust to survive, and upon a suitable bill in equity by the parties in interest would decree its due execution by a sale of the estate for the specified trust.[4] It is upon the same ground that if a power of appointment is given by will to a party to distribute property among certain classes of persons, as among relations of the testator, the power is treated as a trust; and if the party dies without executing it, a Court of Equity will distribute the property among the next of kin.[5]

pointed and bond given by him. Holbrook *v.* Harrington, 16 Gray, 102.

The implication that the executor is to act as trustee in these cases arises only where the proceeds are to be blended with the personalty or are to be administered by him. It is a question of intention. Rankin *v.* Rankin, 36 Ill. 293; Lippincott *v.* Lippincott, 4 C. E. Green, 121. See Bolton *v.* Jacks, 6 Robt. (N. Y.) 166, 228. In some States it is a matter of statute. See Bell's Appeal, 66 Pa. St. 498; 2 Perry, Trusts, § 501.

[1] Sugden on Powers, ch. 6, § 3, p. 392, &c. (7th ed.); Co. Litt. 113 *a*, Hargrave's note (2); Franklin *v.* Osgood, 14 John. R. 527.

[2] Sugden on Powers, ch. 6, § 3, p. 362, &c. (3d ed.); 1 Fonbl. Eq. B. 1, ch. 4, § 25, n. (*h*); Tollett *v.* Tollett, P. W. 490.

[3] De Peyster *v.* Clendining, 8 Paige, R. 296.

[4] Brown *v.* Higgs, 8 Ves. 570, 574; Richardson *v.* Chapman, 5 Bro. Parl. Cas. 400.

[5] The cases on this point are numerous. See Mr. Jarman's note to 1 Powell on Devises, 294; Davy *v.* Hooper, 2 Vern. 665; Harding *v.* Glynn, 1 Atk. 469; Maddison *v.* Andrew, 1 Ves. 57; Witts *v.* Boddington, 3 Bro. Ch. 95; Cole *v.* Wade, 16 Ves. 27; Birch *v.* Wade, 3 V. & Beam. 198; Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561, 569, 570; Sugden on Powers, ch. 6, § 3, pp. 393 to 398 (3d ed.); Stubbs *v.* Sargon, 2 Keen, R. 255; Butler *v.* Gray, L. R. 5 Ch. 26.

§ 1428. **When Will a Power of Appointment Be Construed as a Trust.** — When and under what circumstances a power of appointment will be construed as a trust or not is a matter of some nicety and difficulty. In general it may be stated that where in case of a will or other instrument the donor of the power has a general intention in favor of a class, and a particular intention in favor of individuals of that class to be selected by the donee of the power, and the particular intention fails from that selection not being made by the donee of the power, the court will treat it as a trust and carry into effect the general intention in favor of the class.[1] Thus for example where the testator bequeathed a certain leasehold estate to A upon trust subject to certain charges, to employ the remainder of the rent to such children of B as A should think most deserving and that will make the best use of it, or to the children of his nephew C if any such there are or shall be, and A died in the testator's lifetime, the bequest to the children was held to be a trust in favor of all the children of B and C.[2] So where the testator directed certain stocks and real estate to remain unalienated until certain contingencies were completed, and then, after giving life estates to his two children in such stocks and real estate, with remainder to their issue, declared that in case his two children should die without leaving lawful issue the same should be disposed of by the survivor of his children by will among his nephews and nieces or their children or either of them, or to as many of them as his surviving child should think proper, it was held to be a trust created in favor of the testator's nephews and nieces and their children, subject to a power of selection and distribution by the surviving child.[3] So where the testator devised to B in tail, and for want of issue of her body he empowered and

[1] Burrough *v.* Philcox, 5 Mylne & Craig, 73, 92. Where the instrument gives the fund to a class, the power being merely to determine the shares, all the class take in default of appointment. But where there is no gift, but only a power to give as the donee of the power may think fit among the members of a class, only those can take, in default of appointment, who are within the class at the time the power is to be exercised, since they alone could have taken had the power been exercised. Lambert *v.* Thwaites, L. R. 2 Eq. 151. See In re Jefferys, L. R. 14 Eq. 136.

Upon the question when the property is to be considered as converted into assets by an attempted exercise of the power, and when it is to go as in case of default of appointment, see Brickenden *v.* Williams, L. R. 7 Eq. 310; Bristow *v.* Skirrow, L. R. 10 Eq. 1; In re Davies, L. R. 13 Eq. 163.

[2] Brown *v.* Higgs, 8 Ves. 574; s. c. 4 Ves. 708, and 5 Ves. 495; 2 Sugden on Powers, 176.

[3] Burrough *v.* Philcox, 5 Mylne & Craig, 73, 92.

authorized her to settle and dispose of the estate to such persons as she thought fit by her will, "confiding" in her not to alienate or transfer the estate from his "nearest family", it was held to be a power coupled with an interest in favor of the heir, who was held to be the nearest family in the sense of the will.[1]

§ 1429. **A Mere Naked Power Given to Two Cannot Be Executed by One.** — In regard to powers too some subtile distinctions have been taken at law which often require the interposition of Courts of Equity. Thus for instance it is a general rule of law that a mere naked power given to two cannot be executed by one; or given to three cannot be executed by two, although the other be dead;[2] for in each case it is held to be a personal trust in all the persons unless some other language is used to the contrary. Then suppose a testator by his will should give authority to A and B to sell his estate and should make them his executors; in such a case it has been said that the survivor could not sell. But if the testator should give authority to his executors (eo nomine) to sell, and should make A and B his executors, there if one should die the survivor (it has been said) could sell.[3] The distinction is nice, but it proceeds upon the ground that in the latter case the power is given to the executors virtute officii, and in the former case it is merely personal to the parties named. Now although this distinction has been doubted and its soundness has been denied, yet it has much authority also in its support where the power is deemed at law to be a mere naked power.[4] Where the power is coupled with an interest the construction might be dif-

[1] Griffiths *v.* Evan, 5 Beav. R. 241. A trust to apply the whole or part of a fund as the trustee may think fit for the maintenance of children is obligatory, compelling the trustee to maintain the children, and if the funds should be paid over to the father, he could use it for maintaining the children though able himself to support them. But where the trust is to apply the whole or such part of the fund as the trustee may think fit for or towards the maintenance of the children, the trust is discretionary and equivalent to a power. In such a case if the trustee does not exercise his discretion but pays the whole over to the father, the father must hold the whole to the use of his children, and cannot deduct the cost of their support, if he is able to support them. Wilson *v.* Turner, 22 Ch. D. 521, commenting on Mundy *v.* Howe, 4 Bro. C. C. 224, and disapproving Ransome *v.* Burgess, L. R. 3 Eq. 773.

[2] Co. Litt. 112 *b*, 113 *a*, and Hargrave's note (2); Boston Franklinite Co. *v.* Condit, 4 C. E. Green, 394; Chapin *v.* First Univ. Soc., 8 Gray, 580; O'Brien *v.* Flint, 74 Conn. 502, 51 Atl. 547; Grace *v.* Perry, 197 Mo. 550, 95 S. W. 875.

[3] Bedford *v.* Bedford, 110 Tenn. 204, 75 S. W. 1017.

[4] See Franklin *v.* Osgood, 14 John. R. 527, 553; Zebach *v.* Smith, 3 Binn. R. 69; 1 Powell on Devises by Jarman, 239, and note (1); Co. Litt. 113 *a*, Hargrave's note (2).

ferent even at law. But at all events if the power is coupled with a trust, Courts of Equity will insist upon its execution upon the principles already stated.[1] Still however the construction upon the very words of the particular will might be very important even in equity; since if the power should survive it would not be necessary to make the heir join in the sale of the property. If it should not survive, he would not be compelled to join in the sale.[2]

§ 1430. **Donee Should Show That His Act Was Done in Reference to the Power.** — It is a general rule that in the execution of a power the donee of the power must clearly show that he means to execute it either by a reference to the power or to the subject-matter of it; for if he leaves it uncertain whether the act is done in execution of the power or not, it will not be construed to be an execution of the power.[3]

[1] Co. Litt. 113 *a*, Hargrave's note (2); Jackson *v.* Burtis, 14 John. R. 391; Sugden on Powers, ch. 2, § 1, pp. 105 to 111 (3d ed.). Mr. Hargrave, in his note to Co. Litt. 113 *a*, has discussed this subject with great acuteness and learning. Mr. Sugden has summed up the result of the decisions in the following propositions: (1) That where a power is given to two or more by their proper names, who are not made executors, it will not survive without express words. (2) That where it is given to three or more generally, as "to my trustees", "my sons", &c., and not by their proper names, the authority will survive whilst the plural number remains. (3) That where the authority is given to executors, and the will does not expressly point to the joint exercise of it, even a single surviving executor may execute it. But (4) that where it is given to them nominatim, although in the character of executors, it is at least doubtful whether it will survive. Sugden on Powers, ch. 3, § 2, art. 1, pp. 165, 166 (3d ed.).

[2] Ibid.; Co. Litt. 290 *b*, Butler's note, § 7; Jackson *v.* Ferris, 15 John. R. 347; Franklin *v.* Osgood, 14 John. R. 527, 553. See Gould *v.* Mather, 104 Mass. 283; Warden *v.* Richards, 11 Gray, 277; Zamboco *v.* Cassavetti, L. R. 11 Eq. 439; Chandler *v.* Rider, 102 Mass. 268; Anderson *v.* McGowan, 45 Ala. 462; Hazel *v.* Hagan, 47 Miss. 277; Loring *v.* Marsh, 2 Cliff. 469; Mastin *v.* Barnard, 33 Ga. 520; Colsten *v.* Chaudet, 4 Bush, 666. Statutes prevail in some States. Shields *v.* Smith, 8 Bush, 601; Dilworth *v.* Rice, 48 Mo. 124.

[3] Sugden on Powers, Vol. 1, ch. 6, § 2, p. 257; Ibid. § 7, p. 373; Ibid. § 8, p. 470; Owens *v.* Dickenson, 1 Craig & Phill. 53; Blagge *v.* Miles, 1 Story's R. 426, 445 to 450. In this last case the court, after referring to the doctrine that the intention governs in wills, said: "Similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last wills and testaments. The main point is to arrive at the intention and object of the donee of the power in the instrument of execution; and that being once ascertained, effect is given to it accordingly. Bennett *v* Aburrow, 8 Ves. 609. The authorities upon the subject may not all be easily reconcilable with each other. But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to

§ 1431. **Same.** — Upon the construction of wills also many difficult questions arise as to the nature and extent of powers and the manner in which they are to be executed. It would

execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts, or deeds, demonstrating the intention. This was directly asserted, not only in Sir Edward Clere's Case (6 Co. R. 17), but it was positively affirmed in Scrope's Case (10 Co. R. 143, 144), where the reason of the rule is stated: 'Quia non refert, an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.' On the other hand, to use the language of Lord Chief Justice Best, in Doe *d.* Nowell *v.* Roake (2 Bing. R. 497, 504), 'No terms, however comprehensive, although sufficient to pass every species of property, freehold or copyhold, real or personal, will execute a power, unless they demonstrate that a testator had the power in his contemplation, and intended by his will to execute it.' Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will or other instrument to the power; (2) Or a reference to the property which is the subject on which it is to be executed; (3) Or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual or a mere nullity; in other words it would have no operation except as an execution of the power. Langham *v.* Nenny, 3 Ves. 467; Bennett *v.* Aburrow, 8 Ves. 609, 616. It seems unnecessary to refer at large to the cases which establish these propositions. They will be found collected generally in Mr. Chance's Treatise on Powers (vol. 2, ch. 13, §§ 1591 to 1714), and in Sir Edward Sugden's Treatise on Powers (vol. 1, ch. 6, § 2, p. 257, &c.; Id. § 7, p. 373, &c.; Id. § 8, p. 430, &c.), and in the opinion of the court, delivered by Lord Chief Justice Best, in Doe *d.* Nowell *v.* Roake (8 Bing. 497). Lord Chief Baron Alexander, in delivering the judgment of the judges in the House of Lords, in Denn *d.* Nowell *v.* Roake (6 Bing. R. 475), reversing the decision in the same case in 2 Bing. R. 497, and affirming that of the King's Bench (5 B. & Cressw. 720), has enumerated the same classes of cases; and he has added that in no instance has a power or authority been considered as executed, unless under such circumstances. Whether this be so or not it is not material to inquire; for there is no pretence to say that because no other cases have as yet occurred there can be no others. That would in fact be to say that the cases governed the general rule as to intention, and not the rule the cases. Lord Chief Justice Best has put these classes of cases upon the true ground. They are instances of the strong and unequivocal proof required to establish the intention to execute the power, but they are not the only cases. Doe *d.* Nowell *v.* Roake, 2 Bing. R. 504. On the contrary if a case of clear intention should arise, although not falling within the predicament of these classes, it must be held that the power is well executed, unless courts of justice are at liberty to overturn principles instead of interpreting acts and

occupy too great a space to enter into a general examination even of the leading authorities upon this subject. But one or two illustrations may not be without use, rather to open the mind to

intentions. I entirely agree with Lord Chief Justice Best in his remark in Roake *v.* Denn (4 Bligh, (N. S.) 22) that 'rules with respect to evidence of intention are bad rules, and I trust I shall live to see them no longer binding on the judges.' The Lord Chancellor (Lord Lyndhurst) said: 'It has been settled by a long series of decisions from the case which has been referred to in the time of Sir Edward Coke, Sir Edward Clere's Case (6 Co. R. 17), down to the present time, that if the will, which is insisted on as an execution of the power, does not refer to the power, and if the dispositions of the will can be satisfied without their being considered to be an execution of the power, unless there be some other circumstances to show that it was the intention of the devisor to execute the appointment by the will, — under such circumstances the court have uniformly held that the will is not to be considered as an execution of the power.' Certainly it is not. But then this very statement leaves it open to inquire into the intention under all the circumstances, which seems to me to be the true and sensible rule upon the subject; and when that intention is thus once ascertained it governs. So it was expressly held in Pomeroy *v.* Partington (3 Term R. 665); and in Griffith *v.* Harrison (4 Term R. 737, 748, 749) the court expressly repudiated the notion that any technical exposition was to be given to the words of a will executing a power, and held that the intention was to be collected from the words according to the ordinary and common acceptation thereof. And again in Bailey *v.* Lloyd (5 Russ. R. 330, 341) the court held that the question of the execution of a power by a will was a mere question of intention, and that intention was to be collected, not from a particular expression, but from the whole will. See 4 Kent's Comm. Lect. 62, pp. 333, 334 (4th ed.). Now Sir Edward Clere's Case (6 Co. R. 17) is not only unquestionable law, and has so been always held, but it affords a strong illustration of the true doctrine. In that case it was held that the power was well executed notwithstanding it was not referred to, because otherwise the devise in the will would be inoperative and void. The testator had no estate in the property devised, but only a power over it; and so ut res magis valeat quam pereat, it was held that he intended to execute the power. Nor is there any objection to the doctrine of Lord Chief Justice Hobart in the Commendam Case (Hob. R. 159, 160), that 'if an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest and not to the power.' This is but saying in other words that where the terms of a devise are perfectly satisfied and inoperative, without any reference to the execution of a power, by working on the interest of the testator in the land, — there it shall not be deemed that he intended to execute the power, but merely to pass his interest. This proceeds upon the plain ground that there is nothing in the will which shows any intention to execute the power; and in cases of doubt the court cannot deem it a good execution of the power. See 4 Kent's Comm. Lect. 62, pp. 333, 334 (4th ed.). Sir Edward Sugden (Sugden on Powers, Vol. 1, ch. 6, § 7, pp. 402, 428) has critically examined and commented upon all the leading authorities; and it appears to me that his criticisms (and he is himself a very high authority upon this subject) are entirely well founded. The courts have indeed, as he abundantly proves, proceeded in some cases upon very narrow and technical grounds, and in

some of the doubts which may arise than to satisfy inquiries.[1] Thus for example where a testator directed that if his personal estate and house and lands at W should not pay his debts, then his executors should *raise* the same out of his copyhold estate, it became a question whether the terms of the power authorized a *sale* of the copyhold estate. It was held that they did.[2]

§ 1432. **Same.** — This is a comparatively simple question. But suppose a will should contain a direction or power to raise money out of the rents and profits of an estate to pay debts or portions, &c.; a question might then arise whether such a power would authorize a sale or mortgage of the estate under any circumstances; as for instance if it were otherwise impracticable without the most serious delays and inconveniences to satisfy the purposes of the trust. Now this is a point upon which great authorities have entertained opposite opinions. The old cases generally inclined to hold that the power should be restricted to the mere application of the annual rents and profits.[3] The more recent cases hold to a more liberal exposition of the power so as to include in it, if necessary for the purposes of the trust, a power to sell or to mortgage the estate.[4] Lord Eldon has significantly

others have adopted a more liberal and just interpretation; and the cases do not all well stand together. The rule of ascertaining the intention however has been recognized at all times; and as Lord Kenyon has well observed, in Pomeroy *v.* Partington (3 Term R. 674, 675), if the judges in construing the particular words of different powers have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them have erred in the application of the general rule to the particular case before them. In a conflict of authorities I own that I should choose to follow those which appear best founded in the reason and analogies of the law. But in cases of wills, where the intention is to govern, no authorities ought to control the interpretation which the court is called upon to make, unless all the circumstances are the same in both cases, and the ground of interpretation in one is entirely satisfactory to the mind as applied to the other. If I were compelled to decide between the cases of Wallop *v.* Lord Portsmouth (Sugden on Powers, ch. 6, § 7, p. 394), Hurst *v.* Winchelsea (2 Ves. Jr. 589), Standen *v.* Standen (2 Ves. Jr. 589), Lewis *v.* Llewellyn (2 Lord Kenyon's R. 44, by Harmer), and the case of Jones *v.* Curry (1 Swanst. R. 66), if there be any dissonance between them, I should much incline to follow the former." See Pease *v.* Pilot Knob Iron Co., 49 Mo. 124.

[1] See Sugden on Powers, ch. 9, §§ 2 to 8, pp. 437 to 454 (3d ed.); 1 Madd. Ch. Pr. 283; 2 Powell on Devises, by Jarman, 644, *b*.

[2] Bateman *v.* Bateman, 1 Atk. 421.

[3] Ivy *v.* Gilbert, 2 P. Will. 13, 19; Trafford *v.* Ashton, 1 P. Will. 418, and Mr. Cox's note; Evelyn *v.* Evelyn, 2 P. Will. 666 to 670, 672; Mills *v.* Banks, 3 P. Will. 1; Okeden *v.* Okeden, 1 Atk. 550, and Mr. Saunders's note.

[4] Green *v.* Belcher, 1 Atk. 505; Baines *v.* Dixson, 1 Ves. 42; Countess of Shrewsbury *v.* Earl of Shrewsbury, 1 Ves. Jr. 233, 234; s. c. 3 Bro.

said with reference to the case of a direction by a testator to pay debts and legacies out of the rents and profits of a term of five hundred years created by his will, that if he were asked out of Westminster Hall what the testator meant by rents and profits, he should say that he probably meant the annual profits only; but that it was a settled rule that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage.[1] Sir Thomas Plumer, speaking on the same subject, has also said: "Whatever might have been the interpretation of these words had the case been new, whatever doubt might have arisen upon them as denoting annual or permanent profits, it is now too late to speculate; this court having by a technical, artificial, but liberal construction, in a series of authorities admitting it not to be the natural meaning, extended those words, when applied to the object of raising a gross sum at a fixed time, when it must be raised and paid without delay, to a power to raise by sale or mortgage unless restrained by other words."[2]

§ 1433. **Same.** — But the true exposition of the modern doctrine established in Courts of Equity on this subject does not in

Ch. R. 120; Trafford *v.* Ashton, 1 P. Will. 415, 419; Allan *v.* Backhouse, 2 Ves. & Beam. 65, 76; 1 Madd. Ch. Pr. 481, 484 to 486. The cases are fully collected in Mr. Jarman's note to 1 Powell on Devises, 234, to which the learned reader is therefore referred.

[1] Allan *v.* Backhouse, 2 Ves. & Beam. 64, 74.

[2] Bootle *v.* Blundell, 1 Meriv. R. 193, 232, 233. The American courts, refusing to follow the early English rule, hold that where there is a general power of disposal, a general bequest or devise will be presumed to include an exercise of the power if there is nothing to show a contrary intent. Willard *v.* Ware, 10 Allen, 263; Amory *v.* Meredith, 7 Allen, 397; Bangs *v.* Smith, 98 Mass. 270; Funk *v.* Eggleston, 92 Ill. 515, 539; Andrews *v.* Brunefield, 32 Miss. 108; White *v.* Hicks, 33 N. Y. 383; Hollister *v.* Shaw, 46 Conn. 248; Bolton *v.* De Peyster, 25 Barb. 539, 564; Collier's Will, 40 Mo. 287, 329; Van Wert *v.* Benedict, 1 Bradf. 114. And this is now the rule by statute in England. In re Wilkinson, L. R. 8 Eq. 487; s. c. 4 Ch. 587; Boyes *v.* Cook, 14 Ch. D. 52.

In determining whether the will, in a case of doubt, is an execution of the power the circumstances surrounding the testator at the time of its execution only can be regarded; subsequent events cannot be considered. Boyes *v.* Cook, supra, overruling In re Ruding, L. R. 14 Eq. 266.

Under the English statute a will may operate as an execution of a power subsequently created. Boyes *v.* Cook, supra; Cofield *v.* Pollard, 3 Jur. (N. S.) 1203; Patch *v.* Shore, 2 Dru. & S. 589; Hodsdon *v.* Dancer, 16 Week. R. 1101. A testator can however execute by will only such

reality deserve to be deemed either technical or artificial, although it is certainly a liberal construction of the words of the testator in order to accomplish his intent. When a testator directs a gross sum to be raised out of the rents and profits of an estate at a fixed time, or for a definite purpose or object which must be accomplished within a short period of time, or which cannot be delayed beyond a reasonable time, it is but fair to presume that he intends that the gross sum shall at all events be raised so that the end may be punctually accomplished; and that he acts under the impression that it may be so obtained by a due application of the rents and profits within the intermediate period. But the rents and profits are but the means; and the question therefore may properly be put, whether the means, if totally inadequate to accomplish the end, are to control the end or are to yield to it. Now if the gross sum cannot be raised out of the rents and profits at all, or not so soon as to meet the exigency contemplated by the testator, it would seem but a reasonable interpretation of his intention to presume that he meant to dispense with the means and at all events to require the sum to be raised. The same principle is applied by Courts of Equity in other analogous cases; as for example in cases of charities where the doctrine of cy-pres is applied,[1] and to cases of elegits on judgments, and to other cases where the debt cannot be paid at all out of the rents and profits, or not within a reasonable time.[2]

§ 1434. **Same.** — Upon the like principles, where a testator by his will charged his real estates with the payment of his debts generally, and then devised the same estates to trustees in trust for other persons, and a question arose in what manner the charge for the payments of debts was to be satisfied, and whether the

powers as are in existence at the time of his death; hence he cannot execute a power contained in the will of a person who survives him. Jones *v.* Southall, 32 Beav. 31.

Where there are two wills, one before and one after the creation of the power which is directed to be executed by last will of the donee, and the later will purports to be the last will, but does not refer in any way to the prior one, it is a question of intention which is the last will and an execution of the power. Pettinger *v.* Ambler, L. R. 1 Eq. 510. See 1 Jarman, Wills, 676 (5 Am. ed. by Bigelow).

[1] Post, §§ 1557 to 1560, 1565 to 1567.

[2] Post, §§ 1619, 1620. A devise of real estate to trustees in fee, upon trust "out of the rents, issues, and profits" "and such other means, except a sale, as they may think proper, to levy and raise sufficient to pay off the charges on the estate", does not give the trustees power to raise the charges either by sale, mortgage, or lease on fines. Bennett *v.* Wyndham, 23 Beav. 521.

trustees had authority to sell or mortgage the estates or a part thereof for the payment of the debts, it was held by the court that the trustees had power to sell or to mortgage the real estates for the payment of the debts as they should think it best for the interest of all concerned in the real estates.[1]

§ 1435. **Same.** — In the next place, independently of the consideration of powers, many very embarrassing questions arise as to the nature and extent of the limitations of trusts properly so called under last wills, as to the persons who are to take, and also as to the interests they are to take in the trust property. Many of these trusts require the positive interposition and direction of

[1] Ball *v.* Harris, 4 Mylne & Craig, R. 264. On this occasion Lord Cottenham said: "In support of the appeal it was not disputed that the directions in the will constituted a charge of the debts upon the real estate. But it was contended, first, that such a charge did not give a power to sell; secondly, that if it did, the lands purchased were not subject to it; and thirdly, that the power to sell, if it existed, did not authorize the mortgage to the plaintiff. The affirmative of the first proposition was acted upon by the Master of the Rolls in Shaw *v.* Borrer, 1 Keen, 559, and the real question is, Was that decision right? I have carefully considered the judgment of the Master of the Rolls upon this point, and I entirely concur with him upon it. The point indeed has been long established. It arose directly in Elliott *v.* Merryman, Barnard. 78, and as there laid down has been recognized in the several cases referred to by the Master of the Rolls, to which may be added the opinions of Lord Thurlow and Lord Eldon in Bailey *v.* Ekins, 7 Ves. 319, and Dolton *v.* Hewen, 6 Madd. 9; for although the point in some of those cases was whether the purchaser was bound to see to the application of the purchase-money, the decision that he was not assumes that the sale was authorized by the charge in the will of the debts upon the estate; that is, that the charge of the debts upon the estate was equivalent to a trust to sell for the payment of them. The case indeed is free from the difficulty which has occurred in some others, for Harris is devisee in trust of the legal fee; and it being established that the will charges the estate with the payment of the debts, it follows that Harris, being trustee for that purpose, must have the power of executing his trust. Such being my opinion as to the effect of the charge of the debts upon the estate, it is unnecessary to advert to the express power to sell with the approbation of the widow and daughter, both of whom are parties to the deposit of the deeds with the plaintiff; for it cannot be doubted but that the purchased lands are subject to the same trusts as the land devised; and this disposes of the second point. The third point is equally untenable; namely, that the right of the trustee to sell did not authorize the mortgage. So long ago as the case of Mills *v.* Banks, 3 P. Will. 1, in 1724, it seems to have been assumed as settled that 'a power to sell implies a power to mortgage, which is a conditional sale', and no case has been quoted throwing any doubt upon that proposition. But this is not a mere power to sell; it is a trust to raise money out of the estate to pay debts. It would indeed be most injurious to the owners of estates charged if the trustee could effect the object of his trust only by selling the estate." Stoff *v.* McGinn, 178 Ill. 46, 52 N. E. 1048; Chandler *v.* Thompson, 62 N. J. Eq. 723, 48 Atl. 583.

Courts of Equity before they can be properly or safely executed by the parties in interest so as to protect them against future litigation and controversy. And it not unfrequently happens that the final administration, settlement, and distribution of the assets of the testator, real and personal, must stand suspended until the aid of some Court of Equity has been invoked and a decretal order is obtained containing a declaration of the nature and extent of these trusts, of the parties who are entitled to take, and of the limitations of their respective interests; and also providing means by reference to a master whereby the cross equities and conflicting claims of various persons, such as creditors, trustees, legatees, devisees, heirs, and distributees, may be clearly ascertained and definitely established.[1] Thus for example upon a will creating a trust for the payment of debts and charging them as well as legacies upon the real estate of the testator, it may often be a matter of serious difficulty to ascertain from the words of the will whether the personal estate is to be wholly exonerated from the payment of the debts and legacies, or whether it is to be the primary fund, and the real estate only to be auxiliary thereto. And in each case, if the charges on the real estate are not sufficient to exhaust the whole, in what manner the charges are to be borne and apportioned among the different devisees and heirs.[2] Until these questions are settled by a Court of Equity upon a bill bringing all the proper parties before it, it will be impossible for the executors or trustees (as the case may be) to proceed to a final settlement of the various claims without manifest danger of having all their proceedings overhauled in some future suit.[3]

§ 1436. **Same.** — Another illustration of the difficulties arising from the language of particular bequests may be gathered from a recent case where the testator bequeathed to his wife £600 per annum during her life, and after her death the said annuity to be

[1] This subject has been already somewhat considered under the heads of Account, Administration, Legacies, and Marshalling of Securities, ante, chs. 8, 9, 10, 13.

[2] See 2 Powell on Devises, by Jarman, ch. 35, pp. 664 to 714, and notes; 1 Madd. Ch. Pr. 466 to 488. See Forrest *v.* Prescott, L. R. 10 Eq. 545; Powell *v.* Riley, L. R. 12 Eq. 175; Jouffret *v.* Loppin, 20 App. Div. 455, 46 N. Y. Supp. 810.

[3] Some of these difficulties have been already touched in considering the doctrines respecting the marshalling of assets and securities. Ante, §§ 758 to 783. See also the notes of Mr. Cox to Howell *v.* Price, 1 P. Will. 294, note (1), and to Evelyn *v.* Evelyn, 2 P. Will. 664, note (1), as to the point when the personal estate is to be deemed the primary fund for the payment of debts and legacies, or not. See also 1 Madd. Ch. Pr. 467 to 588; Id. 498 to 506.

equally divided between A, B, C, D, E, and F, or the survivors or survivor; and the question arose whether the six annuitants were to take annuities for their lives, or were to take the capital stock of such sum in the three per cents in England as would be sufficient to produce the yearly sum of £600. It was held by the Vice-Chancellor that the annuitants were entitled to such capital stock as an absolute interest vested in them, and not to mere life annuities. But this decision was reversed by the Lord Chancellor, upon the ground that upon the true interpretation of the will the annuitants were such for their respective lives only.[1]

[1] Blewitt *v.* Roberts, 10 Simons, R. 491; s. c. on appeal, 1 Craig & Phillips, 274. See also Tweedale *v.* Tweedale, 10 Simons, R. 453. In this last case the Vice-Chancellor said: "I do not see any substantial difference between a gift of an annuity out of personal estate generally, and a gift of an annuity to be satisfied out of a particular fund; because an annuity when it is given generally is to be provided for out of all the personal estate; and if a gift of £300 a year out of the testator's funded property would give to the annuitant the absolute interest in so much of the funded property as would produce £300 a year, what is the substantial difference between that gift and a gift of £300 a year, simply to be satisfied out of so much of the personal estate as would produce the sum? I confess that I do not see any difference myself. I am very much inclined to think that the true construction is, that if it is given simply, it is given absolutely." But the Lord Chancellor, upon the appeal in Blewitt *v.* Roberts, said: "There is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but in the ordinary acceptation of the term used, if it should be said that a testator had left another an annuity of £100 per annum, no doubt would occur of the gift being an annuity for the life of the donee. It is the gift of an annual sum of £100; that is, of as many sums of £100 as the donee shall live years. In Savery *v.* Dyer, Ambl. 139, Lord Hardwicke says: 'If one give by will an annuity not existing before to A, A shall have it only for life.' In that case the gift was of an annuity to A during the life of B, and B having survived A, the question was whether the annuity had ceased notwithstanding the express provisions that it should be during the life of B. It is singular that no other case has been referred to in which this question distinctly arose; but in Innes *v.* Mitchell, 6 Ves. 464, before Sir W. Grant and before Lord Eldon (9 Ves. 212), upon appeal, the annuity was held to be for life only, although there were provisions leading more strongly than anything in this case to an inference that the capital was intended to be given, such as the direction as to the £5,000; without that direction the gift would be of an annuity of £200 to the use of a mother and her children, for her and their use, and the longest liver of her and her children, subject to an equal division of the interest while more than one of them should live, — a gift not very dissimilar from the present; and both those very able judges held that the annuity determined with the life of the survivor. If the gift simply of an annuity of £100 to A is a gift of that sum which shall be sufficient to produce £100 a year, there was sufficient in Innes *v.* Mitchell to give to the mother and her children such a sum as would be sufficient to produce £200 per annum, without reference to

§ 1437. **Descriptions of Devisees as Heirs, Discussed.** — Very embarrassing questions also often arise under last wills and testaments in respect to the persons who are entitled to take under words of general description; as for example under bequests to "children",[1] to "grandchildren", to "younger children", to

the provision as to the £5,000; and yet notwithstanding that provision it was held that there was no gift of any principal sum. It seems to have been supposed that the direction that there should be an equal division of the annuity implied that the principal producing the annuity was to be the subject-matter of the division; but there was a similar direction in Innes *v.* Mitchell and in Jones *v.* Randall, 1 Jac. & Walker, 100; and yet in neither of those cases was there any gift of the principal. It does not appear to me that there is any inconsistency in the cases. To hold that a simple gift of an annuity to A does not give an annuity beyond the life of A, is not inconsistent with holding that a gift of the produce of a fund without limit as to time gives the fund itself. In the former case there is no allusion to any principal sum. It is indeed the course of this court to secure an annuity by investing a capital sum; but a testator with an income much exceeding the annuity given is not very likely to contemplate any such investment. He may indeed be without the immediate means of making it, as for instance if his whole property consisted of long leaseholds. If a testator were minded to give £10,000, can it be supposed that he would set about effecting this object by giving £500 per annum to the intended legatee without making any mention of the £10,000 or of any other capital sum? To carry into effect the gift of an annuity of £500 by raising £10,000 out of the estate would probably be very foreign from the testator's intention. I feel no disposition to question the doctrine laid down by Lord Hardwicke, and followed in the cases I have referred to; and if I did, I should not feel at liberty to depart from a rule established upon such authority." See Yates *v.* Madden, 8 Eng. L. & E. 180, 263; Stokes *v.* Huron, 2 Dru. & W. 89; s. c. 12 Clark & F. 171; Bent *v.* Cullen, L. R. 6 Ch. 235; Langley *v.* Thomas, 6 DeG. M. & G. 645; Alexander *v.* Alexander, Ib. 593.

[1] While a devise to "children" will not ordinarily include "grandchildren", it will be so extended where the only living child died shortly after the making of the will. Dunn *v.* Cory, 56 N. J. Eq. 507, 39 Atl. 368; Waring *v.* Waring, 96 Va. 641, 32 S. E. 150; Brett *v.* Donaghe, 101 S. E. 324.

Who included in the term "grandchildren." Lyon *v.* Baker, 122 Ga. 189, 50 S. E. 44; West *v.* Rassman, 35 Ind. 278, 34 N. E. 991; In re Woodward's Est., 84 Minn. 161, 86 N. W. 1004; Sanson *v.* Bushnell, 25 Misc. Rep. 268, 55 N. Y. Supp. 272; Tiffany *v.* Emmett, 24 R. I. 411, 53 Atl. 281.

Where there is evidence that the property goes to "children then living" this excludes the children of a deceased child. Vaughan *v.* Vaughan's Execr., 97 Va. 322, 33 S. E. 603; or where the devise was to "grandchildren" it would not be construed "great-grandchildren." Bragg *v.* Carter, 171 Mass. 324, 50 N. E. 640.

The term "child" usually means a legitimate child. Gates *v.* Seibert, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; but the facts in this will were such that the illegitimate children take as legitimate. Sullivan *v.* Parker, 113 N. C. 301, 18 S. E. 347; but where there are legitimate and illegitimate children, a devise to "her children and mine", will ex-

"issue",[1] to "heirs",[2] to "next of kin",[3] to "nephews and nieces",[4] to "first and second cousins",[5] to "relations,"[6] to "poor relations",[7] to the "family",[8] to "personal representa-

clude the illegitimate. Bealafeld *v.* Slaughenhaupt, 213 Pa. 565, 62 Atl. 1113. See also Morton *v.* Morton, 62 Neb. 420, 87 N. W. 182. Various illustrations of the construction put upon this word in different situations may be found in the following cases: Osgood *v.* Lovering, 33 Me. 464; Thomson *v.* Ludington, 104 Mass. 193; Tillinghast *v.* De Wolf, 8 R. I. 69; Low *v.* Harmony, 72 N. Y. 408; Castner's Appeal, 88 Pa. St. 478; Feit *v.* Vanatta, 21 N. J. Eq. 84; Taylor *v.* Watson, 35 Md. 519; Moors *v.* Stone, 19 Gratt. 130; Turner *v.* Ivie, 5 Heisk. 222; Cromer *v.* Pinckney, 3. Barb. Ch. 466, 475; Cutter *v.* Doughty, 23 Wend. 513; Clifford *v.* Koe, 5 App. Cas. 447; Allen *v.* Webster, 6 Jur. (N. S.) 574; Edmunds *v.* Fessey, 7 Jur. (N. S.) 282.

[1] "Issue", "descendants", "and offspring." Ingles *v.* McCook, 68 N. J. Eq. 27, 59 Atl. 630; Wright *v.* Mercein, 34 Misc. Rep. 414, 69 N. Y. Supp. 936; In re United States Trust Co., 36 Misc. Rep. 378, 73 N. Y. Supp. 635; Beckley *v.* Riegert, 212 Pa. 91, 61 Atl. 641; Robins *v.* Quinliven, 79 Pa. St. 333; Slater *v.* Dangerfield, 15 Mees. & W. 263; Guthrie's Appeal, 37 Pa. St. 9; Kay *v.* Scates, Ib. 31; Miller's Appeal, 52 Pa. St. 113; Kleppner *v.* Laverty, 70 Pa. St. 70; King *v.* Savage, 121 Mass. 323; O'Byrne *v.* Feeley, 61 Ga. 77; Kingsland *v.* Rapelye, 3 Edw. 1; McPherson *v.* Snowdon, 19 Md. 197; Gordon *v.* Hope, 3 DeG. & S. 351.

[2] Parsons *v.* Parsons, L. R. 8 Eq. 260; Newton's Trusts, L. R. 4 Eq. 171; Gittings *v.* McDermott, 2 Mylne & K. 69; De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 557; Doody *v.* Higgins, 9 Hare, 32; s. c. 2 Kay & J. 729; Jacobs *v.* Jacobs, 16 Beav. 557; Clarke *v.* Cordis, 4 Allen, 466; Lombard *v.* Boyden, 5 Allen, 249; Loring *v.* Thorndike, Ib. 257.

[3] Harris *v.* Newton, 46 L. J. Ch. 268; Withy *v.* Mangles, 4 Beav. 358; s. c. 10 Clark & F. 215; Elmsley *v.* Young, 2 Mylne & K. 780; Wilson *v.* Atkinson, 4 DeG. J. & S. 455; Harrison *v.* Ward, 58 N. C. 236; Jones *v.* Oliver, 3 Ired. Eq. 369; Simmons *v.* Gooding, 40 N. C. 382; Houghton *v.* Kendall, 7 Allen, 72, 77; Morris *v.* Potter, 10 R. I. 58; Gardner *v.* Collins, 27 U. S. 58, 7 L. Ed. 347.

[4] Shull *v.* Johnson, L. R. 2 Eq. 202; Weeds *v.* Bristow, Ib. 333; Cromer *v.* Pinckney, 3 Barb. Ch. 466; Frogley *v.* Phillips, 3 DeG. F. & J. 466; Hogg *v.* Cook, 32 Beav. 641; Sherratt *v.* Mountford, L. R. 8 Ch. 928; s. c. 15 Eq. 305; Wells *v.* Wells, L. R. 18 Eq. 504 (contra Grant *v.* Grant, L. R. 5 C. P. 380, denied in 2 Jarman, Wills, 152, note, 5th Am. ed.); Green's Appeal, 42 Pa. St. 25.

[5] Sanderson *v.* Bayley, 4 Mylne & C. 56; Bridgenorth *v.* Collins, 15 Sim. 541; Stoddart *v.* Nelson, 6 DeG. M. & G. 68; Stephenson *v.* Abingdon, 31 Beav. 305.

[6] Hibbert *v.* Hibbert, L. R. 15 Eq. 372; Varrell *v.* Wendell, 20 N. H. 431; Drew *v.* Wakefield, 54 Me. 291; McNeilledge *v.* Galbraith, 8 Serg. & R. 43; McNeilledge *v.* Barclay, 11 Serg. & R. 103; Cleaver *v.* Cleaver, 39 Wis. 96; Esty *v.* Clark, 101 Mass. 36; Kimball *v.* Story, 108 Mass. 382.

[7] Doyley *v.* Attorney-Gen., 4 Vin. Abr. 485, pl. 16; Widmore *v.* Woodroffe, Amb. 636; White *v.* White, 7 Ves. 423; Attorney-Gen. *v.* Price, 17 Ves. 371; Isaac *v.* Defriez, Ib. 373, note.

[8] Bates *v.* Dewson, 128 Mass. 334; Bowditch *v.* Andrew, 8 Allen, 339, 342; Whelan *v.* Reilly, 3 W. Va. 597; Heck *v.* Kleppenger, 5 Barr, 385; Blackwell *v.* Ball, 1 Keen, 176; Woods *v.* Woods, 1 Mylne & C. 401; Lambe *v.* Eames, L. R. 6 Ch. 597.

tives ",[1] and to "servants." For these words have not a uniform fixed sense and meaning in all cases; but they admit of a variety of interpretations according to the context of the will, the circumstances in which the testator is placed, the state of his family, the character and reputed connection of the persons who may be presumed to be the objects of his bounty, and yet who only in a very lax and general sense can be said to fall within the descriptive words. Thus "child" or "children" is sometimes construed to mean "issue"; and "issue" to mean "children"; "heirs" is sometimes construed to mean "children";[2] "next of kin" is sometimes construed to mean next of blood or nearest of blood, and sometimes only those who are entitled to take under the Statute of Distributions, and sometimes to include other persons;[3] "relations" is sometimes construed to mean the "next of kin" in the strict sense of the words, and sometimes to include persons more remote in consanguinity; "personal representatives" is sometimes construed to mean the "administrators or executors", and sometimes to mean the "next of kin";[4] "executors"[5]

[1] Cox *v.* Curwen, 118 Mass. 198; Brokaw *v.* Hudson, 27 N. J. Eq. 135; Thompson *v.* Younge, 25 Md. 450; Gibbons *v.* Fairlamb, 26 Pa. St. 217; Stook's Appeal, 20 Pa. St. 349; Bridge *v.* Abbot, 3 Bro. C. C. 224; Cotton *v.* Cotton, 2 Beav. 67; Baines *v.* Ottey, 1 Mylne & K. 465; Atherton *v.* Crowther, 19 Beav. 448; Briggs *v.* Upton, L. R. 7 Ch. 376; In re Gryll, L. R. 6 Eq. 589; Dixon *v.* Dixon, 24 Beav. 129.

[2] Head *v.* Randall, 2 Younge & Coll. 231; Minter *v.* Wraith, 13 Simons, R. 52.

[3] Withy *v.* Mangles, 10 Clark & Fin. 215; Cholmondeley *v.* Ashburton, 6 Beav. 86.

[4] S. P. Daniel *v.* Dudley, 1 Phillips, Ch. R. 1, 6. In Holloway *v.* Clarkson, 2 Hare, R. 521; 523, Mr. Vice-Chancellor Wigram said: "The disputed cases have generally arisen out of bequests to 'representatives', 'legal representatives', 'personal representatives', and similar words, and not upon the words 'executors, administrators, and assigns' which occur in the present case. In Bulmer *v.* Jay (4 Sim. 48; s. c. 3 Myl. & K. 197) and in some other cases however a question has arisen upon the effect of the words 'executors and administrators.' If I were compelled to give an opinion upon this part of the case, I should say that the conclusion to be drawn from the more modern, not unsupported by some of the earlier cases, is this, that under a gift simply to 'representatives,' 'legal representatives', 'personal representatives', and to 'executors and administrators', the hand to receive the money is that of the person constituted representative by the Ecclesiastical Courts; but that such person will, in the absence of a clear intention to the contrary, take the property as part of the estate of the person whose representative he is, and not beneficially. Ripley *v.* Waterworth, 7 Ves. 425; Wellman *v.* Bowring, 1 Sim. & Stu. 24, 2 Russ. 374, 3 Sim. 328; Price *v.* Strange, 6 Madd. 159; Palin *v.* Hills, 1 Myl. & K. 470; Hames *v.* Hames, 2 Keen, 646; Grafftey *v.* Humpage, 1 Beav. 46; Daniel *v.* Dudley, Phillips, 1,

[5] See note 5, page 99, supra.

sometimes includes the persons named as executors in the will, and sometimes only such as take upon themselves that office, and " nephews and nieces " will sometimes include great-nephews

11 Sim. 163. In the last case Lord Cottenham strongly expressed his disapprobation of Bulmer *v.* Jay. However the decision upon these cases has been by no means uniform. It has sometimes been decided that the persons intended were the representatives constituted by the Ecclesiastical Court; sometimes that next of kin were intended; sometimes that the representatives by the Ecclesiastical Court took beneficially; and sometimes that they took as representatives and consequently as trustees for the estate of the party whose representatives they were. It will be sufficient to refer to the cases generally as they are collected in Saberton *v.* Skeels, 1 Russ. & Myl. 587, and in Grafftey *v.* Humpage. In considering the cases, as they bear only upon the construction of the words (as words of description) and upon the question of the interest which the legatee takes, it will be found convenient to distinguish the cases in which a legacy has been given to an individual, and in case of his pre-deceasing the testator his representatives have been substituted for him, from the cases of direct limitations to the representatives of an individual named not by way of substitution. In the former cases the courts appear to have treated the representatives as quasi purchasers, and have thereby excluded all argument upon the words as words of limitation." See also Booth *v.* Vicars, 1 Collyer, Ch. R. 6, where the question was who in the sense of the will were the "next legal representatives." Mr. Vice-Chancellor Bruce there said: "The next question is whether the true construction of the bequest is that the executors of Nicholas Vicars and Mary Brown were intended to take in their character of executors or administrators, that is, not beneficially, — a meaning of which, when the context allows or does not forbid it, the words 'legal representatives' are susceptible. There are several remarks however to which this clause is liable which seem to exclude that interpretation also. For in the first place I do not say in materiality, but in order, the words 'executors or administrators' are used just above for another purpose in their strict legal and proper sense, and therefore if he had meant executors and administrators here, the probability is that he would have used the same phrase. In the second place he has used the word 'next' in combination with the words 'legal representatives', which is a word having no connection with the character of executor or administrator. And thirdly, that construction would render the latter half of the bequest mere superfluity, because, supposing that by the words in question executors or administrators are meant, the fund would go in the same way without those words as with them. These are part of the considerations which seem to me to exclude that construction also. It follows, if this view of the subject be right, that the words 'next legal representatives' must in this will import in some form consanguinity; the next question is, in what form? Now the words here are not 'next of kin.' There is no word strictly importing kindred. If the words had been 'next of kin', or 'nearest', or 'next in relationship', it is possible that I might have applied the rule adopted by the Lords Commissioners in Elmsley *v.* Young, and have held that the representatives of whom the statute speaks were excluded. But that is not so. The words 'legal representatives' are the very words which in the Statute of Distributions are used to designate persons who, being of kindred to the deceased, come in as representatives of some one else. As

and great-nieces.[1] The word "family" admits of a still greater variety of applications. It may mean a man's household, con-

to this part of the case I need do no more than refer to the language of the Master of the Rolls in Rowland *v.* Gorsuch, 2 Cox, 187, and to the expressions so recently used by Lord Langdale in Cotton *v.* Cotton, 2 Beav. 70, where he says, 'when it is said that the expression "legal representatives" means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons who, upon the construction of the will, are beneficially entitled in the place of the person to whom the gift was first made, and who in that sense legally represent such person. I must therefore refer to the Statute of Distributions, which points out those who are entitled to claim as the legal representatives in that particular sense of the words.' I also am of opinion upon this will that the words 'next legal representatives' mean the persons who by force of law in right of consanguinity would take the personal estate of those persons beneficially. The next question is whether they are to take per stirpes or per capita. My opinion is that they take per stirpes. The word 'representatives' itself almost forces that interpretation; and when you consider that if one of the two persons mentioned in the will had survived the tenant for life, only a moiety could have gone under the clause of substitution, that construction seems to be rendered absolutely necessary."

[1] Palin *v.* Hills, 1 Mylne & K. 470; Appleton *v.* Rowley, L. R. 8 Eq. 139; Webb *v.* Sadler, L. R. 8 Ch. 419; Alger *v.* Parrott, L. R. 3 Eq. 329; Stockdale *v.* Nicholson, L. R. 4 Eq. 359; Willard *v.* Darrah, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468.

A legally adopted child who lived with the family many years, called the sister of the adopting parent "aunt", and she was introduced as a "niece", she was entitled to a devise to certain "nieces." In re Truman, 27 R. I. 209, 61 Atl. 598.

[1] In Mr. Chitty's Digest, under the title Wills and Devises, XV *b*, a great variety of cases illustrating these statements will be found collected. See also Bridgman's Digest, Legacy and Legatee, 1 Roper on Legacies, §§ 1 to 19, pp. 24 to 167. Examples of the interpretation of these words will be found in Hall *v.* Luckup, 4 Sim. R. 5; Dalzell *v.* Welch, 2 Sim. 319; Horridge *v.* Ferguson, 1 Jacob, R. 583; Lees *v.* Mosley, 1 Younge & Coll. 589; Earl of Orford *v.* Churchill, 3 Ves. & Beam. 59; Lady Lincoln *v.* Pelham, 10 Ves. 166; Bowles *v.* Bowles, 10 Ves. 177; Gittings *v.* McDermott, 2 Mylne & Keen, 69; Mornsby *v.* Blamire, 4 Russ. R. 384; Leigh *v.* Norbury, 13 Ves. 340; Sibley *v.* Perry, 7 Ves. 522; Grant *v.* Lyman, 4 Russ. R. 292; Brandon *v.* Brandon, 3 Swanst. 319; Smith *v.* Campbell, 19 Ves. 400; Mahon *v.* Savage, 1 Sch. & Lefr. 111; Pope *v.* Whitcombe, 3 Meriv. R. 689; Cruwys *v.* Colman, 9 Ves. 319; Worseley *v.* Johnson, 2 Atk. 761; Elmsley *v.* Young, 2 Mylne & Keen, 82; Palen *v.* Hills, 1 Mylne & Keen, 470; Price *v.* Strange, 6 Madd. R. 159; Piggott *v.* Green, 6 Sim. 72; Barnes *v.* Patch, 8 Ves. 604; Crosely *v.* Clare, Ambl. 397; Chambers *v.* Brailsford, 18 Ves. 368; s. c. 19 Ves. 652; Mayott *v.* Mayott, 2 Bro. Ch. R. 125; Charge *v.* Goodyer, 3 Russ. R. 140; Silcox *v.* Bell, 1 Sim. & Stu. 301; Chilcot *v.* Bromley, 12 Ves. 114; Gill *v.* Shelley, 2 Russ. & Mylne, 336; Langston *v.* Langston, 8 Bligh, R. 167; Clopton *v.* Butman, 10 Simons, R. 426; Head *v.* Randall, 2 Y. & Coll. New R. 231; Liley *v.* Hay, 1 Hare, 58, 582; Wright *v.* Atkyns, Turn. & Russ. R. 156; Wood *v.* Wood, 3 Hare, R. 65.

sisting of himself, his wife, children, and servants; it may mean his wife and children, or his children excluding his wife; or in the absence of wife and children it may mean his brothers and sisters or next of kin; or it may mean the genealogical stock from which he may have sprung.[1]

§ 1438. **Same.** — Difficulties may also arise in many cases where there is a bequest or devise to the next of kin, whether they are to take per stirpes or per capita.[2] So also it may be matter of question who are to be deemed the next of kin under bequests of personal property; whether the next of kin under the civil law, or the next of kin under the Statute of Distributions, for they may not be identical.[3] In all these cases the true meaning in which the testator employed the words must be ascertained by considering the circumstances in which he is placed, the objects he had in view, and the context of the will.[4] Where the bequest respects personal or trust property it naturally, nay necessarily, falls within the jurisdiction of Courts of Equity to establish the proper interpretation of such descriptive words in the particular will; and neither executors, nor administrators, nor trustees can safely act in such cases until a proper bill has been brought to ascertain the true nature and character of such bequests or trusts, and to obtain a declaration from the court of the persons entitled to claim under the general descriptive words. Where indeed the estate to which the descriptive words apply is of a legal nature, the interpretation thereof may well belong to Courts of Law. But even in such cases, from the inability of those courts to bring all the proper parties before them in a single suit, as well as from the mixed nature of the subject-matter of the bequest, the questions are most commonly discussed and settled in a declaratory suit before some Court of Equity.

§ 1439. **Same.** — Equally embarrassing questions sometimes

[1] Blackwell *v.* Bull, 1 Keen, R. 176, 181; Lewin on Trustees, 78, 79.

[2] Cases in which parties took per stirpes: Bassett *v.* Granger, 100 Mass. 348; Fisher *v.* Skillman, 3 C. E. Green, 229; Lyon *v.* Acker, 33 Conn. 222; Risk's Appeal, 52 Pa. St. 269. Per capita: Farmer *v.* Kimball, 46 N. H. 435; Pitney *v.* Brown, 44 Ill. 363; Wells *v.* Newton, 4 Bush, 158; Brown *v.* Brown, 6 Bush, 648; Britton *v.* Miller, 63 N. C. 268; Seabury *v.* Brewer, 53 Barb. 662; Mattison *v.* Tunfield, 3 Beav. R. 131; Paine *v.* Wagner, 12 Simon, R. 184.

[3] See on this point 2 Jarman on Wills, p. 37, Law Magazine for May, 1844, pp. 353, 354, 355; Elmsley *v.* Young, 2 Mylne & Keen, 786; Smith *v.* Campbell, 19 Ves. 403; Withy *v.* Mangles, 4 Beav. 366. In this case the subject was much discussed by Lord Langdale.

[4] Blackwell *v.* Bull, 1 Keen, R. 176, 181; O'Dell *v.* Crone, 3 Dow, Parl. R. 61.

arise in cases of residuary legatees, whether they are to take all the personal estate which the testator has not absolutely and effectually disposed of, or it is to be treated as intestate property undisposed of. In the cases of lapsed legacies the doctrine is clearly settled that they belong to the residuary legatees, because their interest is abridged only to the extent of the particular effective legacies. And the same rule seems properly to apply to cases where the testator intended that a legatee should be benefited by a particular bequest, but the legatee cannot be ascertained or the legacy is too vague and void for uncertainty; for in such a case the mere intention that the residuary legatees should not take the whole will not defeat their right to such a legacy.[1]

§ 1440. **Construction of Words of Will Creating a Trust.** — There are also some rules of construction of the words of wills adopted by Courts of Equity in relation to trusts, which are different from those which are adopted by Courts of Law in construing the same words in relation to mere legal estates and interests. We have already had occasion to take notice of this distinction in remarking upon the difference between executed and executory trusts. In the former Courts of Equity follow the rules of law in the interpretation of the words; in the latter they often proceed upon an interpretation widely different.[2]

§ 1441. **Same.** — In regard also to legacies and bequests of chattels and other personal property Courts of Equity (as we have seen) treat all such cases as matters of trust, and the executor as a trustee for the benefit of the legatees, and as to the undisposed residue of such property as a trustee for the next of kin.[3] The rules therefore adopted by Courts of Equity in expounding the words of wills in regard to bequests of personal property are not precisely the same as those adopted by Courts of Law in interpreting the same words as to real estate. For Courts of Equity having in a great measure succeeded to the jurisdiction of the Ecclesiastical Courts over these matters, and these courts in the interpretation of legacies being governed by the rules of the civil law,

[1] The Mayor of Gloucester *v.* Wood, the (English) Jurist for 23d Dec. 1843, pp. 1125, 1128.

[2] Ante, § 1314; 1 Madd. Ch. Pr. 440, 441, 445 to 465; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, and note (*i*). See Thompson *v.* Fisher, L. R. 10 Eq. 207.

[3] Ante, §§ 800, 802, 803; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*) 1; Id. B. 2, ch. 5, § 3, and note (*k*); 1 Madd. Ch. Pr. 466, 467; post, § 1442.

Courts of Equity have followed them in such interpretation rather than the rules of the common law where they differ.[1]

§ 1442. Same. — Cases may easily be put to show how widely Courts of Equity sometimes differ from Courts of Law in their construction of the same words in a will as applied to real estate and as applied to personal estate, giving effect to the presumed intent of the testator to an enlarged and liberal extent not recognized at law. Thus for example if freehold and leasehold estates are devised to a person and the heirs of his body with a limitation over in case he leaves no such heirs, the words will or at least may be construed to mean a dying without leaving such heirs indefinitely as to the freehold estates, and a dying without leaving such heirs living at the time of his death as to the leasehold estates; the effect of which will be very different in the two different species of estates as to the title of the devisee and the validity of the limitation over.[2] Where the remainder over is upon an indefinite failure of such heirs, the first devisee takes an estate tail with a vested remainder over upon the determination of that estate. Now such a remainder over after an estate tail in freehold estates is valid in point of law, and awaits the regular determination of the prior estate. But in leasehold estates it is void as being too remote, and the tenant in tail takes the whole estate; whereas if the devisee is construed to be a dying without issue living at the decease of the first devisee, then in each case the legal effect is the same. The devisee over will be treated as a good contingent remainder to take effect, if at all, at the death of the first devisee. The reason of this difference is that in chattels, whether personal or real, there can be no good remainder limited over after an estate tail, as the tenant in tail is deemed to be the absolute owner. But in freeholds there may be a good remainder after an estate tail by the statute de donis; and the tenant in tail is deemed to be only the qualified owner.[3]

[1] Ante, § 809; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, and notes (*h*), (*i*); Ib. § 5, and note (*l*); Ib. § 6, and note (*o*); Ib. § 7, and notes (*q*), (*r*), (*s*); Id. § 9, and note (*y*); Id. § 11, and note (*a*); Fearne on Cont. Rem. 471, 472, 7th ed. by Butler, and Butler's note (*s*), p. 474; Id. p. 476; Crooke *v.* De Vandes, 9 Ves. 197.

[2] See Forth *v.* Chapman, 1 P. Will. 664; Fearne on Conting. Rem. 472 to 485, 7th ed. by Butler, and his note (*s*); Crooke *v.* De Vandes, 9 Ves. 197, 203, 204.

[3] Forth *v.* Chapman, 1 P. Will. 664; Crooke *v.* De Vandes, 9 Ves. 197, 203, 204; Porter *v.* Bradley, 3 T. R. 143; Pells *v.* Brown, Cro. Jac. 590; Fearne on Conting. Remaind. 472 to 485, Butler's ed. and note (*s*); Id. p. 5, note (*d*). See Ex parte Wynch, 5 DeG. M. & G. 188; Gold-

§ 1443. **Same.** — In the interpretation of the language of wills also Courts of Equity have gone great lengths by creating implied or constructive trusts from mere recommendatory and precatory words of the testator. Thus if a testator should by his will desire his executor to give to a particular person a certain sum of money, it would be construed to be a legacy, although the will should leave it to the executor's own free will how and when and in what manner it should be paid.[1] So if a testator should desire his wife

ney *v.* Crabb, 19 Beav. 338; Parker *v.* Clarke, 6 DeG. M. & G. 104; Hedges *v.* Harpur, 3 DeG. & J. 129; Stewart *v.* Jones, Ib. 532; Wallis *v.* Woodland, 32 Md. 101, In the first of these cases it was held that a bequest to a married woman of an annuity "for her life and the issue lawfully begotten from her body, on failure of which to revert to my heirs", with a request that A and B would act as trustees for the annuitant, so that the annuity might be secured for her sole use and benefit, gave her a life interest only, with a gift in the nature of a remainder to her issue; and that the court, in construing a disposition of personalty by will, is not absolutely governed by the rules applicable at law in the case of realty. The rule of Lord Thurlow in Knight *v.* Ellis, 2 Bro. C. C. 570, that in such cases the heirs shall be regarded as taking by purchase and not by limitation, when that appears to be the intention of the testator, is here reaffirmed, notwithstanding the doubts of other cases. Lyon *v.* Mitchell, 1 Madd. 486, and cases cited. In Goldney *v.* Crabb, 19 Beav. 338, the same rule was adopted in the construction of a will giving leaseholds for life to A, and after her decease to the issue of her body. But where there is a gift of the absolute interest in personalty to the first donee, he will hold the same exonerated from all charge as regards any gift over depending upon some contingency. In re Andrews, 6 Jur. (N. S.) 114; ante, § 604 *a*.

[1] Brest *v.* Offley, 1 Ch. Rep. 246; Burnes *v.* Burnes, 137 Fed. 781, 70 C. C. A. 357; "it is my wish and expectation that my wife Jane shall make her will disposing of the property left by me that she will generously remember the children of my deceased brother," does not create a trust. Russell *v.* United States Trust Co., 136 Fed. 758, 69 C. C. A. 410. A "direction" in a will indicates more than an intent to leave a legacy. In re Buhrmeister's Est., 1 Cal. App. 80, 81 Pac. 752; Sturgis *v.* Payne, 146 Mass. 354, 16 N. E. 21.

It is not necessary to use the word "trust", but the recommendation must be used in a mandatory way. Hughes *v.* Fitzgerald, 78 Conn. 4, 60 Atl. 694; White *v.* Ervine, 24 Ky. L. Rep. 2458, 74 S. W. 247.

"I express the wish that my children continue to live together as they do now", is insufficient to create a trust. Clark *v.* Clark, 99 Md. 356, 58 Atl. 24.

"I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother whom we have undertaken to raise and educate," was held sufficient to create a trust in their favor. Noe *v.* Kern, 93 Mo. 367, 6 S. W. 239, 3 Am. St. Rep. 544; Foster *v.* Willson, 68 N. H. 241, 38 Atl. 1003, 73 Am. St. Rep. 581.

When words of recommendation, request, or the like, contained in a will, must necessarily be followed in order to carry out the clear purpose of the testator, they are to be regarded as words of command or direction.

at or before her death to give certain personal estate among such of his relations as she should think most deserving and approve of, it would be held to be a legacy among such relations.[1] So a bequest to a wife of all the testator's freehold and copyhold estates, "being well assured that she will at her decease dispose of the same amongst all or such of my children as she in her discretion shall think most proper, and as they by their future conduct towards her shall be deserving of the same", would be held to be a trust for such of the children as she should appoint.[2] So a bequest of the testator's personal estate to a wife, and if she should marry again to be secured to her separate use, and recommending the wife to give by her will what she should die possessed of to certain persons whom he named, would be held to create a trust in favor of such persons.[3] So if a testator should give £1,000 to A, desiring, wishing, recommending, or hoping that he will at his death give the same sum or a certain part thereof to B, it would be held to be a trust in favor of B, and A would be a trustee for him.[4] So a bequest to a daughter A, the wife of B, of £10,000, payable six months after the testator's decease, with the following words added, "I *recommend* to my said daughter and her said husband that they do forthwith settle and assure the said sum of £10,000 together with all such sum of money as the said B shall choose, for the benefit of my said daughter A and her children," has been held to be a trust for the children after the decease of A, so that the legacy did not lapse by the death of A in the testator's lifetime.[5]

§ 1444. **What Expressions Are Sufficiently Imperative to Create a Trust.** — In short it may be stated as a general result of the cases, in the language of Lord Eldon, that whether the words of

Knox *v.* Knox, 59 Wis. 172, 18 N. W. 155, 48 Am. Rep. 487; Wolbert *v.* Beard, 128 Wis. 391, 107 N. W. 663.

[1] Harding *v.* Glyn, 1 Atk. 469; Malvin *v.* Keighley, 2 Ves. Jr. 333; Brown *v.* Higgs, 8 Ves. 570, 571; Tibbits *v.* Tibbits, Jac. Rep. 317; Knight *v.* Knight, 3 Beav. R. 148, 172, 173.

[2] Massey *v.* Sherman, Ambler, R. 520, and Mr. Blunt's note; Parsons *v.* Baker, 18 Ves. 476; Prevost *v.* Clarke, 2 Madd. R. 458; Forbes *v.* Ball, 3 Meriv. R. 437. See 2 Roper on Legacies, by White, ch. 21, § 6, pp. 373 to 379, and Lewin on Trusts, ch. 5, § 2, pp. 77 to 81, where most of the cases are collected.

[3] Horwood *v.* West, 1 Sim. & Stu. 387.

[4] Knight *v.* Knight, 3 Beav. R. 148, 172, 173.

[5] Ford *v.* Fowler, 3 Beav. 146. A direction in a will that a certain person should be employed as agent and manager of the testator's estate, whenever his trustees should have occasion for the services of a person in that capacity, has been held not to create a trust which such person could enforce. Finden *v.* Stephens, 2 Phillips, 142.

the will are those of recommendation, or precatory, or expressing hope, or that the testator has "no doubt", if the objects with regard to whom such terms are applied are certain, and the subjects of property to be given are also certain, the words are considered imperative and create a trust.[1] Or as another learned judge has expressed it (in a form indeed open to some criticism), "Wherever any person gives property and points out the object, the property, and the way in which it shall go, that does create a trust unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it."[2]

§ 1445. **Same.** — The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire into positive and peremptory commands is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command; and that in using the one and omitting the other he should not have a determinate end in view. It will be agreed on all sides that where the inten-

[1] Paul *v.* Compton, 8 Ves. 380; Dashwood *v.* Peyton, 18 Ves. 41. See also Malim *v.* Keighley, 2 Ves. Jr. 333; Harland *v.* Trigg, 1 Bro. Ch. R. 142; Wynne *v.* Hank, 1 Bro. Ch. R. 179; 2 Fonbl. Eq. B. 2, ch. 2, § 4, note (*x*); Brown *v.* Higgs, 4 Ves. 709; s. c. 5 Ves. 495; 8 Ves. 561; Tibbits *v.* Tibbits, Jac. R. 317; 2 Madd. Ch. Pr. 6.

[2] Lord Alvanley, in Malim *v.* Keighley, 2 Ves. Jr. 335. See Meredith *v.* Heneage, 1 Sim. R. 542; Pierson *v.* Garnett, 2 Bro. Ch. R. 38, 45; Podmore *v.* Gunning, 7 Sim. R. 644; Wood *v.* Cox, 2 Mylne & Craig, 684. But where the objects of a trust are too indefinite to afford any certainty, there Courts of Equity will not execute it, but the property will fall into the residuum of the testator's estate, as it is clear that the legatee or devisee is not to take for his own use. Stubbs *v.* Sargon, 2 Keen, R. 255; s. c. 3 Mylne & Craig, 507; Ommaney *v.* Butcher, 1 Turn. & Russ. 260; Ford *v.* Fowler, 3 Beav. R. 146, 147; 2 Roper on Legacies, by White, ch. 21, § 6, pp. 373 to 389; Lewin on Trust, ch. 5, § 2, pp. 77 to 81; Knight *v.* Knight, 3 Beav. R. 148, 172 to 174; Knight *v.* Boughton, 11 Clark & Finel. 513, 548. A trust will not be created if such a construction is inconsistent with any positive provision in the will. Shaw *v.* Lawless, 5 Clark & F. 129; Knott *v.* Cottee, 2 Phill. 192. See for further illustration of the rule of the text Briggs *v.* Penny, 4 Macn. & G. 546; Williams *v.* Williams, 1 Sim. (N. S.) 358; Bernard *v.* Minshull, Johns. (Eng. Ch.) 276; Bonser *v.* Kinnear, 2 Giff. 195; Howarth *v.* Dewell, 6 Jur. (N. S.) 1360; Hambleton *v.* Durrington, 36 Md. 434; Irvine *v.* Sullivan, L. R. 8 Eq. 673; Le Merchant *v.* Le Merchant, L. R. 18 Eq. 414; Eaton *v.* Watts, L. R. 4 Eq. 151; Lambe *v.* Eames, L. R. 10 Eq. 267; 6 Ch. 597; Curnick *v.* Tucker, L. R. 17 Eq. 320; Mackett *v.* Mackett, L. R. 14 Eq. 49; Warner *v.* Bates, 98 Mass. 274; Rhett *v.* Mason, 18 Gratt. 541; Carpenter *v.* Miller, 3 W. Va. 174.

tion of the testator is to leave the whole subject as a pure matter of discretion to the good-will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions to excite and aid that discretion but not absolutely to control or govern it, there the language cannot and ought not to be held to create a trust. Now words of recommendation and other words precatory in their nature imply that very discretion as contradistinguished from peremptory orders; and therefore ought to be so construed unless a different sense is irresistibly forced upon them by the context.[1] Accordingly in more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but as far as the authorities will allow, to give to the words of wills their natural and ordinary sense unless it is clear that they are designed to be used in a peremptory sense.[2]

§ 1446. **Same.** — Wherever therefore the objects of the supposed recommendatory trusts are not certain or definite,[3]

[1] See Meredith *v.* Heneage, 1 Sim. R. 542.

[2] Sale *v.* Moore, 1 Sim. R. 534; Meredith *v.* Heneage, 1 Sim. R. 542. In Sale *v.* Moore, 1 Sim. R. 534, the Vice-Chancellor said: "The first case that construed words of recommendation into a command made a will for the testator, for every one knows the distinction between them. The current of decisions of late years has been against converting the legatee into a trustee." See also Meredith *v.* Heneage, 1 Sim. R. 542, where Lord Ch. Baron Richards expressed a similar opinion; and Lord Eldon also in Wright *v.* Atkyns, 1 V. & Beam. 315; Lechmere *v.* Lavie, 2 Mylne & Keen, 197; Lawless *v.* Shaw, 1 Lloyd & Goold, R. 154, and the Reporter's note; Benson *v.* Whittam, 5 Sim. R. 22; Podmore *v.* Gunning, 7 Sim. R. 644; Wood *v.* Cox, 1 Keen, R. 317; s. c. on appeal, 2 M. & Craig, 684. A strong case illustrative of the doctrine now maintained is Ex parte Payne (2 Younge & Coll. 646). There the testator devised his estate to his daughter "as some reward for her affectionate, unwearied, and unexampled attention to him during his illness of many years"; and then added, "I strongly recommend to her to execute a settlement of the said estate and thereby to vest the same in trustees, &c., for the use and benefit of herself for life, with remainder to her husband and his assigns for life, with remainder to all and every the children she may happen to have, if more than one, share and share alike; and if but one, the whole to such one; or to such other uses as my said daughter shall think proper, to the intent that the said estate in the event of her marriage shall be effectually protected and secured"; and Lord Ch. Baron Abinger held that the daughter took an absolute estate. But see Ford *v.* Fowler, 3 Beav. R. 146, 147, and Knight *v.* Knight, 3 Beav. R. 148, 172, 173; ante, § 1443. See Mayor of Gloucester *v.* Wood, 3 Hare, R. 131, 143.

[3] See ante, § 1322; Stubbs *v.* Sargon, 2 Keen, R. 255; s. c. 3 Mylne & Craig, 507; Ommaney *v.* Butcher, 1 Turn. & Russ. 260, 270, 271; Mayor of Gloucester *v.* Wood, 3 Hare, R. 131, 143. In this last case the court held that a bequest to an individual or corporation for a pur-

wherever the property to which it is to attach is not certain or definite, wherever a clear discretion and choice to act or not to act is given, wherever the prior dispositions of the property import absolute and uncontrollable ownership, — in all such cases Courts of Equity will not create a trust from words of this character.[1]

pose which the testator says he has expressed elsewhere, but which from some unexplained cause is not and cannot be ascertained, creates such an uncertainty that a Court of Equity cannot declare what the intention of the testator is, and therefore it is to be deemed void.

[1] Wynne *v.* Hawkins, 1 Bro. Ch. R. 179; Harland *v.* Trigg, 1 Bro. Ch. R. 143; Meredith *v.* Heneage, 1 Sim. R. 542; Moggridge *v.* Thackwell, 7 Ves. 82, 83; Morice *v.* Bishop of Durham, 10 Ves. 536; Cary *v.* Cary, 2 Sch. and Lefr. 189; Tibbits *v.* Tibbits, 19 Ves. 664; Eade *v.* Eade, 5 Madd. R. 118; Curtis *v.* Rippon, 5 Madd. R. 434; 2 Madd. Ch. Pr. 6; 2 Fonbl. Eq. B. 2, ch. 2, § 4, note (*x*); Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 99 to 102. In Wright *v.* Atkyns, 1 Turn. & Russ. 157, Lord Eldon said, that in order to determine whether a trust of this sort is a trust which a Court of Equity will interfere with, it is matter of observation, first, that the words should be imperative; secondly, that the subject must be certain; and thirdly, that the object must be as certain as the subject. The case of Wood *v.* Cox, 2 Mylne & Craig, 684, affords a strong illustration of the first point. In Pope *v.* Pope, 10 Simons, R. 1, the testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, and appointed her sole executrix of his will, and added: "And my reason for so doing is the constant abuse of trustees which I daily witness among men, at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be for their good; and should she marry again, then I wish she may convey to trustees in the most secure manner possible what property she may then possess, for the benefit of the children as they may severally need or deserve, taking justice and affection for her guide;" and at the conclusion of his will he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all their children. It was held that no trust was created for the children. This subject was much considered in the case of Knight *v.* Knight, 3 Beav. R. 148, 172 to 175, where Lord Langdale said: "But it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed or enforced as a trust in this court; and in the infinite variety of expressions which are employed, and of cases which thereupon arise, there is often the greatest difficulty in determining whether the act desired or recommended is an act which the testator intended to be executed as a trust, or which this court ought to deem it to be, or capable of being, enforced as such. In the construction and execution of wills it is undoubtedly the duty of this court to give effect to the intention of the testator whenever it can be ascertained; but in cases of this nature, and in the examination of the authorities which are to be consulted in relation to them, it is unfortunately necessary to make some distinction between the intention of the testator and that which the court has deemed it to be its duty to perform; for of late years it has frequently been admitted by judges of great eminence that by interfering in such cases the court has sometimes rather made a will for the testator than executed

In the nature of things there is a wide distinction between a power and a trust. In the former the party may or may not

the testator's will according to his intention, and the observation shows the necessity of being extremely cautious in admitting any the least extension of the principle to be extracted from a long series of authorities in respect of which such admissions have been made. As a general rule it has been laid down that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favor of another, the recommendation, entreaty, or wish shall beheld to create a trust: first, if the words are so used that upon the whole they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain. In simple cases there is no difficulty in the application of the rule thus stated. If a testator gives £1,000 to A B, desiring, wishing, recommending, or hoping that A B will at his death give the same sum or any certain part of it to C D, it is considered that C D is an object of the testator's bounty, and A B is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish. So if a testator gives the residue of his estate, after certain purposes are answered, to A B, recommending A B after his death to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, although a subject to be ascertained, and that the relations to be selected, although persons or objects to be ascertained, are nevertheless so clearly and certainly ascertainable — so capable of being made certain, that the rule is applicable to such cases. On the other hand if the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words 'free and unfettered', accompanying the strongest expression of request, were held to prevent the words of the request being imperative. Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule. And in such cases we are told (2 Ves. Jr. 632, 633) that the question 'never turns upon the grammatical import of words, — they may be imperative, but not necessarily so; the subject-matter, the situation of the parties, and the probable intent must be considered.' And (10 Ves. 536) 'wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in the will not expressly creating a trust, the indefinite nature and quantum of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to

act in his discretion. In the latter the trust will be executed notwithstanding his omission to act.[1]

§ 1447. **Same.** — In respect to certainty in the description of objects or persons in such recommendatory trusts it may be proper to state that it is not indispensable that the persons should be described by their names. But more general descriptions will often amount to a sufficient designation of the persons to take, such for example as "sons", "children", "family", and "relations", if the context fixes the particular persons who are to take clearly and definitely.[2] Thus a devise to the family of A will often be a sufficient designation, and may be construed to mean the heir at law of A, or the children of A, or even the relations of A, according to the context.[3] And on the other hand the language may be so loosely and indeterminately used as not to amount to a clear designation of any persons, and thus the recommendation may fail to create a trust.

§ 1448. **Same.** — We may illustrate each of these positions by cases which have actually passed into judgment. Thus where a testator devised his leasehold estates to his brother A forever, "hoping he will continue them in the family", it was held that this raised no trust for the family, for no particular objects were pointed out. There was a choice, and the devisee might dispose of the property either way; and if he had sold it the family could not have claimed against the vendee.[4] On the other hand where a testator devised all his leasehold as well as freehold estates, &c.

create a trust, and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended' or, as Lord Eldon expresses it in another case (Turn. & Russ. 159), 'Where a trust is to be raised, characterized by certainty, the very difficulty of doing it is an argument which goes to a certain extent towards inducing the court to say it is not sufficiently clear what the testator intended.'" See also Knight *v.* Boughton, 11 Clark & Finel. R. 548.

[1] Brown *v.* Higgs, 8 Ves. 569, 570, 574; Pushman *v.* Filliter, 3 Ves. 7; Morice *v.* Bishop of Durham, 10 Ves. 536; Winch *v.* Brutton, The (English) Jurist, 1844, Vol. 8, p. 1086. This last case contains a very striking illustration of the doctrine.

[2] See Lambe *v.* Eames, L. R. 6 Ch. 597; Pierson *v.* Garnett, 2 Bro. Ch. R. 38; Forbes *v.* Ball, 3 Meriv. R. 437; 1 Powell on Devises, by Jarman, 274 and note (7); Id. 290, note (3); Jeremy on Equity Jurisd. B. 1, ch. 1, § 2, pp. 100, 101.

[3] See Wright *v.* Atkyns, 17 Ves. 255; s. c. 19 Ves. 301; Cooper, Eq. R. 116; Barnes *v.* Patch, 8 Ves. 604; Cruwys *v.* Colman, 9 Ves. 319; 1 Powell on Devises, by Jarman, 274, note (7); ante, § 1436.

[4] Harland *v.* Trigg, 1 Bro. Ch. R. 142, 144. See Doe *v.* Joinville, 3 East, R. 172; Sale *v.* Moore, 1 Sim. R. 534; Nowlan *v.* Nellighan, 1 Bro. Ch. R. 489; Curtis *v.* Rippon, 5 Madd. R. 434.

"unto his mother and her heirs forever, in the fullest confidence that after her decease she would devise the property to his family", it was held that she took an estate for life with a remainder in trust for the devisor's heir at law, as persona designata.[1]

§ 1449. **Same.** — In the next place as to certainty in the description of property, or rather as to what property is bequeathed. This also may be illustrated by some cases which have already passed into judgment. Thus where a testator bequeathed to his wife all the residue of his personal estate, "not doubting but that she will dispose of what shall be left at her death to our two grandchildren", it was held that the uncertainty of the property to which the bequest should attach (what shall be left) defeated it as a recommendatory trust; for the residue might be just such as the wife chose.[2] So where a testator bequeathed to his wife all the residue of his estate, "recommending to her and not doubting, as she has no relations of her own family, but that she will consider my near relations should she survive me as I should consider them myself in case I should survive her", it was held that the words did not create a trust, from the uncertainty both of the objects and the property to be taken by the relations.[3]

§ 1450. **Same.** — It is in cases of wills that Courts of Equity are frequently called upon to apply the doctrine, as it is commonly called, of cy-pres; and it is by no means confined, as is sometimes supposed, to cases of charities. The doctrine of cy-pres is now sufficiently simple, and is well established, though sometimes of difficult application. If an estate is given to a person for life or indefinitely, and after failure of issue of such person it is given

[1] Wright *v.* Atkyns, 17 Ves. 255; s. c. 19 Ves. 301; Cooper, Eq. R. 116.

[2] Wynne *v.* Hawkins, 1 Bro. Ch. R. 179; Pushman *v.* Filliter, 3 Ves. 7; Eade *v.* Eade, 5 Madd. 118; Curtis *v.* Rippon, 5 Madd. R. 494. See also Harwood *v.* West, 1 Sim. & Stu. 387. In Gilbert *v.* Bennett (10 Simons, R. 371), the testator gave all his property to his wife and two other persons in trust for the undermentioned purpose, namely, to pay the income to his wife for the education and support of his children by her, and after her death the property to be divided among his children; and he gave his furniture, plate, &c. to his wife absolutely. It was held that the children were not entitled to the trust property on their father's death, but that their mother was entitled to the income for her life, she maintaining and educating the children out of it. But see Smith *v.* Bell, 31 U. S. 68, 8 L. Ed. 322.

[3] Sale *v.* Moore, 1 Sim. R. 534; Attorney-Gen. *v.* Hall, cited 2 Cox, R. 355; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 100. See also Podmore *v.* Gunning, 7 Sim. R. 644; Wood *v.* Cox, 1 Keen, R. 317; s. c. on appeal, 2 Mylne & Craig, R. 684; Ex parte Payne, 2 Younge & Coll. 636.

over, the court implies an estate tail in the first taker, sacrificing only in that simple case the life estate in order that all the issue may be embraced in the limitation. The next case which may be noticed is where a testator after giving a particular estate to the first taker has gone on to direct that it shall go to unborn persons in a way which would create a perpetuity with a limitation over on failure of issue of the first taker. The court in such a case is embarrassed with the fact that besides the gift over, which in the simple case first stated would create an estate tail, there is a direction that the estate shall devolve in a manner not allowed by law, but which in common cases previously to Pitt *v.* Jackson [1] would, so far as respected the order of succession, only be consistent with and included in an intention to give an estate tail. The courts were thus placed in this position: the intention to give the estate to particular persons in particular order of succession was manifest, but the specified mode in which those persons were to take being excluded by the rule of law against perpetuities, the question was whether the primary intention to benefit particular persons in a particular order of succession should be accomplished, and the particular mode of giving effect to it be rejected, or the whole will be inoperative. This was the difficulty with which the court had to struggle. "Whether the two expressed intentions, both of which could not be effectuated, were well or ill described by the terms 'general' and 'particular' intention, or whether the criticism upon those expressions is just, appears to me immaterial. It is a mode of characterizing the different and to a certain extent conflicting intentions of the testator which satisfied Lord Eldon and other judges of great eminence. The meaning of the terms is now sufficiently understood. In order to preserve and effect something which the court collects from the will to have been the paramount object of the testator, it rejects something else which is regarded as merely a subordinate purpose, namely, the mode of carrying out that paramount intention." [2]

[1] 2 Bro. C. C. 51.

[2] Mr. Vice-Chancellor Wigram in Vanderplank *v.* King, 3 Hare, R. 1, 12; Pitt *v.* Jackson, 2 Bro. Ch. R. 51. See Hannam *v.* Sims, 2 DeG. & J. 151.

There is probably no place in the law in which "cases" are so lightly regarded as in the construction of written instruments. Unless the question concerns a rule of interpretation as distinguished from the application of a rule, decided cases, to be much relied upon, must be precisely in point on the facts. "Upon the construction of wills," says the Lord Chancellor in Stewart *v.* Jones, 5 Jur. (N. S.) 229; S. C. 3 DeG. & J. 532, "we are not much assisted by a reference to cases unless the

will or the words used are very similar. If this is not so, they are more likely to mislead than to assist, in coming to a correct conclusion. The object of construction is to ascertain the intention of the testator, which is to be collected not from isolated passages but from the whole of the will and the general scope and scheme of it." See also the suggestion of Lord Justice Lindley in an article on the Law Reports in the April number of the Law Quarterly Review, 1885. It is there proposed to omit the reporting of "construction cases" "unless there is good reason for including them"; and in the next number of the same Review, p. 289, a learned writer observes, "Of late years [English] judges have happily set their faces against the citation of cases turning upon obscure sentences in wills, and have made it possible to consign to the waste-paper basket many decisions which the reporters of fifty years ago would have felt bound to print."

CHAPTER XXXIII

EXPRESS TRUSTS.—ELECTION AND SATISFACTION

§ 1451. **Election and Satisfaction.** — It is in cases of wills also that the doctrine respecting ELECTION AND SATISFACTION must frequently though not exclusively[1] arise in practice and is acted upon and enforced by Courts of Equity.[2] Election in the sense here used is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. Every case of election therefore presupposes a plurality of gifts or rights with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice; but he cannot enjoy the benefits of both.[3]

[1] There is no question that the doctrine of election extends to deeds in the English law. See the cases cited in Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. 400, 401. Mr. Swanston seems to think that the doctrine of election in the civil law was confined to wills, and originated in the like application to wills in English Jurisprudence. Perhaps it is questionable whether in the civil law the doctrine was confined to wills. These were the most common instruments under which it would arise, and that may account for most of the cases being put as arising on wills; but the principle in its own nature seems equally applicable to other instruments.

[2] Birmingham *v.* Kirwan, 2 Sch. & Lefr. 449; 2 Madd. Ch. Pr. 40 to 69; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 534 to 537; 1 Roberts on Wills, ch. 1, § 10, pp. 96 to 106; 2 Roper on Legacies, by White, ch. 23, pp. 480 to 579.

[3] Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. R. 394, note (*b*); 3 Wooddes. Lect. 69, p. 491; Thellusson *v.* Woodford, 13 Ves. 220; 2 Madd. Ch. Pr. 40 to 49; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 534 to 538. Mr. Swanston's note is drawn up with great ability and learning, and I have freely used it in the discussion of this topic. The whole subject of election is also most elaborately examined in Roper on Legacies, by White, vol. 2, ch. 23, pp. 480 to 578, to which the attention of the learned reader is invited. It is wholly inconsistent with the nature of these Commentaries to discuss all the minute distinctions belonging to it, interesting and important as they certainly are. Moore *v.* Baker, 4 Ind. App. 115, 30 N. E. 629, 51 Am. St. Rep. 203; Lilly *v.* Menke, 143 Mo. 137, 44 S. W. 730; Ball *v.* Ball, 165 Mo. 312, 65 S. W. 552.

§ 1452. **Express and Positive Election Illustrated.** — Thus for example if a testator should by his will give to a legatee an absolute legacy of ten thousand dollars or an annuity of one thousand dollars per annum during his life at his election, it would be clear that he ought not to have both, and that he ought to be compelled to make an election whether he would take the one or the other. This would be a case of express and positive election. But suppose instead of such a bequest a testator should devise an estate belonging to his son or heir at law to a third person, and should in the same will bequeath to his son or heir at law a legacy of one hundred thousand dollars, or should make him the residuary devisee of all his estate real and personal. It would be manifest that the testator intended that the son or heir should not take both to the exclusion of the other devisee, and therefore he ought to be put to his election which he would take; that is, either to relinquish his own estate or the bequest under the will. This would be a case of implied or constructive election.[1]

§ 1453. **Same.** — Now the ground upon which Courts of Equity interfere in all cases of this sort (for at law there is no direct remedy to compel an election) is, that the purposes of substantial justice may be obtained by carrying into full effect the whole intentions of the testator.[2] And in regard to the cases of implied election it has been truly remarked that the foundation of the doctrine is still the intention of the author of the instrument; an intention which, extending to the whole disposition, is frustrated by the failure of any part. Its characteristic in its application to these cases is that by equitable arrangement full effect is given to a donation of that which is not the property of the donor. A valid gift in terms absolute is qualified by reference to a distinct clause, which though inoperative as a conveyance affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition (although it is destitute of legal validity), not express but implied, which is annexed to the benefit proposed to him. For the donee to accept the benefit while he declines the burden is to defraud the designs of the donor.[3]

[1] There is no rule that a person to whom a testator has made two distinct gifts, one of which is subject to a burden created by the testator, is bound to accept or reject both. It is a question of intention to be gathered from the will. Warren *v.* Rudall, 6 Jur. (N. S.) 395.

[2] Crosbie *v.* Murray, 1 Ves. Jr. 557, 559.

[3] 1 Swanston, R. 394, 395, note (*b*), where the authorities are fully collected; Noys *v.* Mordaunt, 2 Vern. 581, and Mr. Raithby's note; S. C. Gilb. Eq. R. 2; 2 Fonbl. Eq. B. 4, ch. 1, § 5, note (*l*).

In short Courts of Equity in such cases adopt the rational exposition of the will that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it.[1]

§ 1454. **Origin of the Doctrine of Election.** — The doctrine of election, like many other doctrines of Equity Jurisprudence, appears to have been derived from the civil law. By that law a bequest of property which the testator knew to belong to another was not void; but it entitled the legatee to recover from his heir either the subject of the bequest, or, if the owner was unwilling to part with that at a reasonable price, the pecuniary value.[2] Thus it is said in the Institutes that a testator may not only bequeath his own property or that of his heir, but also the property of other persons; so that the heir may be obliged to purchase and deliver it, or if he cannot purchase it, to give the legatee its value.[3]. But ordinarily to give designs of the donor.[4] In short, Courts of Equity in such cases adopt the rational exposition of the will that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, conform-

[1] 1 Powell on Devises by Jarman, 430, 433, note (4); 1 Swanst. R. 393 to 408, note (*b*); Frank *v.* Lady Standish, 15 Ves. 391, note; Streatfield *v.* Streatfield, Cas. t. Talb. 183; Boughton *v.* Boughton, 2 Ves. 12, 14; Boome *v.* Monck, 10 Ves. 616, 617; Walker *v.* Jackson, 2 Atk. 627, 629; Clarke *v.* Guise, 2 Ves. 617; Wilson *v.* Lord Townshend, 2 Ves. Jr. 696; Blake *v.* Banbury, 4 Bro. Ch. R. 21, 24; s. c. 1 Ves. Jr. 514; Thellusson *v.* Woodford, 13 Ves. 220; 2 Madd. Ch. Pr. 40 to 49. Lord Redesdale's remarks on this subject in Birmingham *v.* Kirwan (2 Sch. & Lefr. 449, 450) illustrate the principle very clearly. "The general rule," says he, "is that a person cannot accept and reject the same instrument. And this is the foundation of the law of election on which Courts of Equity particularly have grounded a variety of decisions in cases both of deeds and of wills, though principally in cases of wills; because deeds being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration, which is expressed, requires; and voluntary deeds are generally prepared with greater deliberation and more knowledge of pre-existing circumstances than wills, which are often prepared with less care, and by persons uninformed of circumstances, and sometimes ignorant of the effect even of the language which they use. In wills therefore it is frequently necessary to consider the general purport of the disposition in order to extract from it what is the intention of the testator. The rule of election however I take to be applicable to every species of instrument, whether deed or will, and to be a rule of law as well as of equity."

[2] 2 Domat, B. 4, tit. 2, § 3, art. 3 to 5.

[3] Inst. B. 2, tit. 20, § 4, tit. 24, § 2; Dig. Lib. 30, tit. 1, l. 39, § 7; Dig. Lib. 31, tit. 2, l. 67, § 8; 2 Domat, B. 4, tit. 2, § 2, art. 4; 1 Swanst. 396, note; Pothier, Pand. Lib. 30, tit. 1, n. 125.

[4] Cod. Lib. 6, tit. 42, l. 25.

ing to all its provisions and renouncing every right inconsistent with it.[1]

§ 1455. **Same.** — In the civil law also, wherever the heir or devisee took an estate under a will containing burdensome legacies or any disposition of his own property in the manner above mentioned, he was at liberty to accept or to renounce the inheritance. But (it has been said) he had no other alternative. He could not accept the benefit offered by the will and retain the property of which it assumed to dispose upon the terms of compensation or indemnity to the disappointed claimant. The effect therefore of an election to take in opposition to the will was a renunciation of all the benefits offered by it. The effect of an election to take under the will was different, according to the subject-matter. If the property of which the will assumed to deprive the devisee was pecuniary, he was compelled to perform the bequest to the extent of the principal and interest which he had received; if the property was specific, then a peremptory obligation was imposed upon him to deliver that very thing, although exceeding the amount of the benefit conferred on him.[2]

§ 1456. **Same.**—The earliest cases in which the doctrine of election was applied in English Jurisprudence seem to have been those arising out of wills; although it has since been extended to cases arising under other instruments.[3] It has been said that the doctrine constitutes a rule of law as well as of equity; and that the reason why Courts of Equity are more frequently called upon to consider the subject is that in consequence of the forms of proceeding at law the party cannot be put to elect. In order to enable a Court of Law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner as to be deemed concluded by what he has done; that is, to have elected. This frequently throws the jurisdiction into equity, which can compel

[1] Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. R. 396.

[2] Dillon *v.* Parker, 1 Swanst. 396.

[3] Mr. Swanston's note, 1 Swanst. R. 397, 400, 401; Bigland *v.* Huddleston, 3 Brown, Ch. Cas. 285, note, Belt's edition and his note (3); Green *v.* Green, 2 Meriv. R. 86; s. c. 19 Ves. 665. It appears from Mr. Swanston's note to Dillon *v.* Parker (1 Swanst. R. 397, id. 443, 444), that traces of the interposition of Courts of Equity can be found as early as the reign of Queen Elizabeth. The suggestion of Lord Hardwicke in Boughton *v.* Boughton (2 Ves. 14), that Noys *v.* Mordaunt (2 Vern. R. 581; s. c. Gilb. Eq. R. 2) was the first case, is undoubtedly incorrect; though Sir Thomas Clarke appears to have held the same opinion in Clarke *v.* Guise (2 Ves. R. 618). See Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. R. 399, and Rancliffe *v.* Parkins (6 Dow, R. 149).

the party to make an election, and not to leave it uncertain under what title he may take.[1] Whether any such rule of election is recognized at law has been greatly doubted; although in cases working by way of estoppel there may be a rule sometimes approaching nearly to it.[2]

[1] Lord Redesdale in 2 Sch. & Lefr. 450.

[2] Mr. Swanston, in his learned note to Gretton *v.* Haward, 1 Swanst. 425, note (*a*), has commented on this subject at large. It is so valuable a review of the whole subject that I have ventured to present it in this place. After citing the passage in the text from Lord Redesdale's decision he says: "Lord Rosslyn also is reported to have said, 'The principle of these cases' (cases of election) 'is very clear. The application is more frequent here; but it is recognized in Courts of Law every day. You cannot act, you cannot come forth to a court of justice, claiming in repugnant rights.' 2 Ves. Jr. 696. Lord Mansfield, in a judgment the authority of which on every point has been strongly questioned (Sugden on Powers, 498, et seq.), professed the same opinon. 4 T. R. 743 n. See Goodtitle *v.* Bailey, Cowp. 597. That no court will enforce rights which it recognizes as repugnant may be admitted probably for an universal proposition. But courts which differ in the rights which they recognize necessarily differ in the recognition of repugnancy. In no instance, it is believed (with the exception of the anomalous cases last cited), has a Court of Law adverted to a clause by which a testator assumes to dispose of the property of his devisee in favor of a third person for the purpose of declaring the right of the devisee to the benefit offered by the will, repugnant to his right to retain the property of which that clause purports to dispose. It is obvious that such a clause proceeding from one who is not the owner cannot transfer the legal interest in the property. Being distinct and unconnected, without words or necessary implication of reference, it cannot qualify the prior clause of devise as a condition. Nor can it operate by estoppel against the devisee, no party to the will, and whose title to his own estate is not derived from the testator. Failing therefore to effect, it serves only to denote the purpose of its authority, and becomes the peculiar subject of the jurisdiction of a Court of Equity, which in administering the rights of its suitors by enforcing the obligations affecting their conscience executes the intention in which those obligations originate. The instances in which Courts of Law have applied the maxim 'Allegans contraria non est audiendus' are instances of inconsistent titles, whether to the same subject as a contemporaneous estate for life, and in tail, in the same land (see Jenkins, Cent. 1, Case 27); or the claim of a tenant under and against his landlord (mentioned by Lord Rossyln, 2 Ves. Jr. 696); or to different subjects as dower at once in the land taken and in the land given in exchange (see the case cited, 3 Leon. 271, Perk. § 319); the assertion of one title being incomplete without a negation of the other. It is a maxim not of morality but of logic, and compels election between claims, in respect not of the injustice but of the technical impracticability of their contemporaneous assertion. In Courts of Law the suitor is permitted to assert rights which, so far as the intention of the parties constitutes repugnancy, are confessedly repugnant. If a man make a feoffment in fee of lands or tenements, either before or after marriage, to the use of the husband for life, and after to the use of A for life, and then to the use of the wife for life in satisfaction of her dower, this is no jointure within the statute, &c.; and albeit in that case A should die, leaving the

§ 1457. **Courts of Equity Have Exclusive Jurisdiction to Compel Election.** — But whatever may be the truth of the case as to the recognition of the doctrine of election in Courts of Law, it is very certain that it is principally enforced in Courts of Equity, where indeed the jurisdiction to compel the party to make an election is admitted to be exclusive. But independent of this broad and general ground of jurisdiction, the doctrine must be

husband, and after the death of the husband the wife entereth, yet this is no bar of her dower, but she shall have her dower also. Co. Litt. 36 *b*, and see 4 Co. 2 *b*, Wilmot's Opinions, p. 188; 9 Mod. 152. So if A disseises B, tenant for life or in fee, of the manor of Dale, and afterwards gives the manor of Dale to B and his heirs in full satisfaction of all his rights and actions which he has in or for the manor of Dale, which B accepts; yet B may enter into the manor of Dale, or recover it in any real action. 4 Co. 1 *b*. No legal principle is better established than that on which these decisions proceed; namely, that a freehold right shall not be barred by collateral satisfaction. Co. Litt. 3 *b*, Doct. Plac. 17. The like assertion of rights morally repugnant has been sanctioned in many of the cases in which the courts have overruled a plea of accord and satisfaction (see Peyton's Case, 9 Co. 77; Grymes *v.* Blofield, Cro. El. 541; Co. Litt. 212); the plaintiff being permitted on technical grounds to enforce a claim for which he had received a compensation. A devise or bequest of that which is not the property of the testator is void at law. Bransby *v.* Grantham, Plowd. 525, 526; Litt. § 287; Co. Litt. 185 *b*; Perk. § 526; Godolph. Orph. Leg. Pt. 3, ch. 6, § 5; Swinb. on Wills, Pt. 3, § 3, n. 8, § 5, prope fin. § 6, n. 17; Doct. & Stu. l. 2, ch. 25, p. 126. 'If a man bequeath to one another man's horse, in the law of the realm the legacy is void to all intents; and he to whom the legacy is made shall neither have the horse nor the value of the horse.' Id. l. 2, ch. 55, p. 300, and see 3 Co. 29 *a*. To suppose that more favor would be shown to a clause in a deed purporting to pass the property of a stranger would be to contradict the established principle of construction. Being void thereof to all intents, such clause, whether in a deed or in a will, is inoperative at law either for transferring the subject or for qualifying a previous valid gift. To convert it into a condition, according to the equitable practice, by incorporation with a distinct clause, to which in terms it contains no reference, would be inconsistent with the rule that conditions imposed by the particular intention of the individual (as distinguished from conditions founded in the nature of the relation or contract between the parties, and by us denominated conditions in law) must, conformably to the feudal principle (Craig, Jus Feud. l. 2, dieg. 5, § 4), be expressed. Co. Litt. 201 *a*. Many decisions may be found on the question, What words annexed to the clause of gift for the purpose of connecting it with a distinct clause constitute a condition? 'Ea intentione, ad affectum', which are sufficient in a will (Co. Litt. 236 *b*), are not sufficient in a deed (Co. Litt. 204 *a*). But in no case, it is believed, has a Court at Law inferred a condition from words applicable only to another subject, and void in their obvious sense, as purporting to pass an estate not the property of the author of the clause. The general principle of the law on the subject of repugnant rights is illustrated by the decisions on the concurrent claims to jointure and to dower. The Statute of Uses (27th Hen. VIII. ch. 10) having transferred the legal estate to the cestui que use, all women then married would have become dowable of lands held to the use of their husbands, retaining their

exclusively enforced in equity in all cases of mere trust estates; or where there is the intervention of complicated cross equities between different persons claiming in different degrees and under different limitations and titles; or where conveyances are necessary to be decreed; or where the recompense is not of a nature capable of being applied as a bar at law. Thus (to put a plain case) at the common law no collateral recompense made in satis-

title to lands settled on them in jointure. To prevent this injustice, it is by that statute (§ 6) declared that a woman having an estate in jointure with her husband (five species of which are enumerated) shall not be entitled to dower. And a subsequent clause (§ 9) reserves to the wife a right to refuse a jointure assured during marriage. See Wilmot's Opinions, p. 184 et seq. It has been decided that the species of estates enumerated are proposed only as examples; and the courts have in construction extended the operation of the statute to other instances within its principle though not within its words. Vernon's Case, 4 Co. 1. By the effect of this statute therefore no widow can claim both jointure and dower: jointure before marriage is a peremptory bar of dower; jointure after marriage she has an option to renounce. Lord Redesdale, in support of the proposition, that election is a principle of law (2 Sch. & Lefr. 451), has referred to 3 Leonard, 273. That report (which is cited in 1 Eq. Ca. Abr. Dower B.) contains only the argument of Egerton, Solicitor-General. But the case (Butler *v.* Baker) is fully reported in 3 Co. 25; Poph. 87; 1 And. 348; and the decision proceeded on the construction of the statute. The passage to which Lord Redesdale refers (3 Leon. 272 and 273) is no more than a dictum of Egerton in his argument. It is true however that the demandant in a writ of dower might be barred by plea of entry and acceptance of lands settled in jointure after marriage (Doctrina Plac. p. 149). See the form of pleading, Co. Entr. 172 *a*. But it is also true that the plea is founded on the Act of Hen. VIII. The Act having declared jointure a bar to dower, but reserved to the widow the option of refusing a jointure made after marriage, the question in that case was, 'Whether the widow had accepted or refused the jointure?' If she had not refused under the 9th, she was barred of dower by the 6th section. The acceptance of the jointure constituting the case there specified, the widow was barred, not by her agreement, but by the statute (Dyer, 317 *a*). And it is abundantly clear that acceptance alone without the operation of the statute would not have formed a bar. Vernon's Case, 4 Co. 1; Duchess of Somerset's Case, Dyer, 97 *b*. In Gosling *v.* Warburton (Cro. El. 128, reported under various names, 1 Leon. 136, Owen, 154), also cited by Lord Redesdale and also referred to in Eq. Ca. Ab. ubi supra, a rent-charge was devised expressly 'in recompense of dower.' And the decision establishes only that such a benefit so devised is a jointure within the extended construction of the statute, and cannot be claimed after a recovery of dower. The series of decisions under this statute (the only instances in which the doctrine of election has been applied at law in a manner analogous to its application in equity) being founded expressly on the provisions of the statute, in contrast to the rules of the common law, constitute (it is conceived) a conclusive proof that the doctrine of election is equitable only. And one of the earliest instances (Lacy *v.* Anderson, ante) in which the equitable doctrine was enforced is the case of a copyhold estate devised and accepted in satisfaction of dower, which not being either within the strict or the extended import of the statute, a

faction of dower or of a right of freehold could be pleaded in bar of such right of freehold or of dower.[1] But in equity it would be clearly held obligatory; and the party would be perpetually enjoined against asserting the title at law, or put to an election, as the circumstances of the case might require.[2]

§ 1458. **Same.** — In the actual application of the doctrine of election Courts of Equity proceed upon principles which are wholly incapable of being enforced in the like manner by Courts of Law. Thus for example suppose a case of election under a will which disposes of other property of a devisee, and the devisee should elect to hold his own property and renounce the benefit of the devise under the will, or (as the compendious phrase is) should elect against the will — in such a case it is clear that the party disappointed of his bequest or devise by such an election would at law be wholly remediless. The election would terminate all the interest of the parties respectively in the subject-matter of the devise to them. The election to hold his own estate would of course maintain the original title of the devisee; and his renunciation of the intended benefit in the estate devised to him would leave the same to fall into the residuum of the testator's estate as property undisposed of.

§ 1459. **Same.** — But the subject is contemplated in a very different light by Courts of Equity; for in the event of such an election to take against the instrument Courts of Equity will treat the substituted devise not as an extinguished title, but as a

jointure would not have constituted a bar at law. And the aid of equity was requisite to prevent the disappointment of the testator's express intention. Accordingly many authorities occur in which the doctrine of election is described as exclusively equitable. In the report of Noys *v.* Mordaunt, by Chief Baron Gilbert, it is distinctly stated that 'although the three daughters shall at law take their proportion of the entailed lands as co-heirs in tail, yet the eldest daughter in equity shall have an equivalent out of the fee-simple lands.' Rep. in Eq. 3. Lord Hardwicke repeatedly refers to that case, which he considered the first of the kind, as founded on equity (1 Ves. 306; 3 Bro. P. C. ed. Toml. 178, 179), a benevolent equity (3 Atk. 715); and describes the right to compel election as derived from an equity of the Court of Chancery (2 Atk. 629). That description is in substance adopted by Lord Eldon (6 Dow, R. 179). Lord Chief Justice De Grey has accurately distinguished between the mode of indirectly disposing of the property of a stranger by express condition at law or by implied condition in equity (3 Ves. 530). And Lord Commissioner Eyre describes the practice of putting devisees to election as a strong operation of a Court of Equity (4 Bro. C. C. 24; 1 Ves. Jr. 523)."

[1] Co. Litt. 36 *b*; 1 Swanst. R. 426, 427, note.

[2] Ibid.; Lawrence *v.* Lawrence, 2 Vern. 366, and Mr. Raithby's note (1); 1 Swanst. R. 398, note.

trust in the devisee for the benefit of the disappointed claimants to the amount of their interest therein; or, as it has been well expressed, they will assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints.[1]

§ 1460. **Same.** — The reasoning by which this doctrine is sustained has been stated by Sir William Grant in his usual clear and felicitous manner. "If," said he, "the will is in other respects so framed as to create a case of election, then not only is the estate given to the heir under an implied condition that he shall confirm the whole of the will, but in contemplation of equity the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate over which he had a power a benefit correspondent to that which they are deprived of by such non-compliance. So that the devise is read as if it were to the heir absolutely if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him as shall be equal in value to the estate intended for them."[2]

§ 1461. **Effect upon Property That Devisee Has When He Elects to Take against the Will.** — Another point has arisen in equity (and which indeed must be deemed one which could arise only in equity), and that is whether a devisee electing against the will thereby forfeits the whole of the benefit proposed for him, or so much only as is requisite to compensate by an equivalent those claimants whom he has disappointed, so that he may entitle himself to the surplus. In other words, does such an election induce an absolute forfeiture, or only impose an obligation on the renouncing party to indemnify the claimants whom he disappoints? There is to be found in the authorities much contrariety of opinion incidentally expressed upon this point. But the fair result of the modern leading decisions is that in such a case there is not an absolute forfeiture, but there is a duty of compensation (at least

[1] Gretton *v.* Haward, 1 Swanst. 441, note; Green *v.* Green, 2 Meriv. R. 86; s. c. 19 Ves. 665; Pulteney *v.* Lord Darlington, cited in Green *v.* Green, 2 Meriv. 93, 94, and in Cavan *v.* Pulteney, 2 Ves. Jr. 560.

So where a widow elects to waive the provisions of her husband's will, under the statutes in regard to waiver. Roe *v.* Roe, 6 C. E. Green, 253; Plympton *v.* Plympton, 6 Allen, 178; Firth *v.* Denny, 2 Allen, 468.

[2] Welby *v.* Welby, 2 V. & Beam. 190. See Griggs *v.* Gibson, L. R. 1 Eq. 685; Howells *v.* Jenkins, 1 DeG. J. & S. 617; Wilson *v.* Wilson, 1 DeG. & S. 152; Synge *v.* Synge, L. R. 15 Eq. 389; Pennsylvania Co. *v.* Stokes, 61 Pa. St. 136; Watson *v.* Watson, 128 Mass. 152; Holt *v.* Rice, 54 N. H. 398; Smith *v.* Guild, 34 Me. 443; Havens *v.* Sackett, 15 N. Y. 365; 1 Jarman, Wills, 443 (5th Am. ed.).

where the case admits of compensation) or its equivalent;[1] and that the surplus after such compensation does not devolve upon the heir as a residuum undisposed of by the will but belongs to the donee, the purpose being satisfied for which alone Courts of

[1] See Tibbits *v.* Tibbits, 19 Ves. 662, 663; s. c. 2 Meriv. R. 96, note (*a*). Lord Eldon, in Green *v.* Green, 19 Ves. p. 667, took a distinction between cases of election arising under deeds and those arising under wills, and said: "I have looked into all the text-writers, the cases reported, and all in manuscript of which they are in possession, to see how far the doctrine of this court is settled, whether election requires the party to give up the whole, or only to make compensation for that which he does not permit to go according to the instrument against which he claims. It is impossible to reconcile the doctrine, as it is to be collected from the whole mass of the cases; the text in some asserting that the party must abide by the instrument in toto, in others, according to the language of Lord Chief Justice De Grey, in Pulteney *v.* Lord Darlington, that the devised interest is to be sequestered until satisfaction is made to the disappointed devisee. It is remarkable that in all the cases except one, Bigland *v.* Huddleston, the question arose upon wills affecting title under other instruments. But in that case, although it was argued that the doctrine of election does not apply to a deed, it was determined that it does. And it seems to have been thought that the party having some other interest sought to be affected by the deed must either give up altogether what he is to take under it, or must abide by it altogether. When it is settled that the principle of election does not apply to a deed, as it is a contract, it is very difficult to say compensation only is to be made. In this instance the defendant's father on his marriage agrees to settle the Lawford estate, and makes other provisions, thereby becoming a purchaser of the estate of his wife; and being tenant in tail he did not effectually convey by suffering a recovery. The question in equity therefore is, whether the son shall take his mother's estate without making good that contract under which his mother's estate was purchased. And I incline to think that, electing against a settlement, he is bound to give up the whole benefit to which he is entitled under it, and not merely to make compensation. I do not believe that it will be possible satisfactorily to settle this question without doing that which I find impossible, and which under the present pressure of business cannot be expected from the registers, to enable me to interpret the language of the court, as it appears in the reports, by looking at the decrees; but my present opinion, subject to contradiction upon such a search and to what may be urged on hearing the cause is, that a man claiming under a marriage settlement is a purchaser under it, and if he will not give the price intended by the parties to be paid at his cost, he cannot take under it; and therefore this defendant must give up altogether the estates comprised in this settlement if he chooses to insist on his title to the Lawford estate. In one of the latest cases, Thellusson *v.* Woodford, where this doctrine is very ably discussed, it is laid down generally that a person shall not claim an interest under an instrument without giving full effect to that instrument as far as he can; and therefore having an interest under a will shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will; the principle of election being plain and intelligible that if a person being about to dispose of his own property includes in his disposition, either from mistake or not, property of another, an implication arises that the benefit under that will shall be taken upon the terms of giving effect to the whole dis-

Equity will control his legal right.[1] In this respect the doctrine of Courts of Equity differs, or has been supposed to differ, from that laid down in the civil law. In that law (it is said) an election against the will amounts to an absolute renunciation and forfeiture of all the bounty given by the will, and compensation to the disappointed claimants is unknown.[2]

position. That was upon a will; yet there is authority enough to say that in that case the party is only to give up sufficient to compensate those who are disappointed; but my difficulty on a marriage settlement is that it operates a contract by the parties for all who are to take under it, and how one shall take the subject and retain the price. I doubt whether the principle stated by Lord Chief Justice De Grey, 'that the equity of this court is to sequester the devised interest quousque until satisfaction is made to the disappointed devisee,' can apply to such a case as this. Is it possible in a Court of Equity to say that where a man purchases his wife's estate for the issue of the marriage his son shall be permitted to withhold the price and disappoint that contract of which he takes the benefit?" But see Mr. Belt's note to Freke *v.* Lord Barrington, 3 Bro. Ch. R. 285, note (3). Appeal of Young, 108 Pa. 17.

[1] Mr. Swanston's note in Gretton *v.* Haward, 1 Swanst. 433; Green *v.* Green, 2 Meriv. R. 93; Tibbits *v.* Tibbits, 2 Meriv. R. 96, note; s. c. Jacob, R. 317; 1 Powell on Devises, by Jarman, 435 and note. This note of Mr. Swanston contains an elaborate review of all the leading dicta and authorities, and settles down into the doctrine stated in the text. See also Pulteney *v.* Darlington, cited in Lady Cavan *v.* Pulteney, 2 Ves. Jr. 560, and 1 Swanst. 438, note, and Lord Rosslyn's judgment in 2 Ves. Jr. 560; Welby *v.* Welby, 2 V. & Beam. 190, 191; Ranclyffe *v.* Parkyns, 6 Dow, R. 149; Dashwood *v.* Peyton, 18 Ves. 49 (*a*); Rich *v.* Cockell, 9 Ves. 379; 1 Powell on Devises, by Jarman, 435 and note; Ker *v.* Wauchope, 1 Bligh, R. 1. From what has been stated by Swanston in a preceding note (1 Swanst. 396, note), the civil law is, in his view, different; the election against the will being a forfeiture of the whole bounty of the testator. Mr. Sugden (Sugden on Powers, ch. 6, § 2, pp. 380, 381, 3d ed.) insists that the true rule in the English law is or should be the same.

[2] Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. 396, 2. The propriety of this doctrine of Courts of Equity in regard to both points admits of a most ample vindication, however artificial it may at first seem upon a superficial survey. It has been expounded and vindicated by the same learned writer in a masterly commentary, and his language scarcely admits of abridgment without injury to its force. "Assuming," says he, "that the doctrine of election is equitable only, the infliction of forfeiture on a devisee electing to take against the will beyond the extent of compensation to those whom his election disappoints, would be inconsistent with the principle on which the doctrine rests. By the assumption, the devise of the testator's property has vested the legal estate in the devisee. But a Court of Equity (in the contemplation of which his conscience is affected by the implied condition) interfering to control his legal right for the purpose of executing the intention of the testator, is justified in its interference so far only as that purpose requires. In the common case of election to take against a will containing a devise of the property of the testator to his heir, and a second devise of the property of the heir to a stranger, the express intention of the testator that the heir should enjoy

§ 1462. **Where an Election Is Insisted upon, the Intention of Testator and Language of Will Must Control.** — In regard to the point when an election may be insisted on or not, everything must (it is obvious) depend upon the language of the particular will; and it is difficult therefore to lay down many general rules on the subject. On the one hand it may be stated that in order to raise a case of election there must be a clear intention expressed on the

the subject of the first devise and the stranger the subject of the second, is defeated by the refusal of the heir to convey the latter. And a Court of Equity therefore restrains him in the enjoyment of the first, till the condition under which, in the contemplation of that court, it was conferred on him is satisfied. The intention of the testator, having become impracticable in the prescribed form, is executed by approximation, or, in the technical phrase, cy pres. The devise to the stranger, rendered void as a gift of the specific subject, is effectuated as a gift of value, and effectuated at the expense of the heir by whose interference its strict purport has been defeated. By this arrangement the intention of the testator in favor of the stranger, though defeated in form, is in substance accomplished; his intention in favor of the heir, equally express, remains to be considered. If the value of the estate retained by the heir exceeds the value of the estate designed for him, his own act is his indemnity. The benefit which he enjoys transcends the intention of the testator. But if the value of the estate of which the court deprives him exceeds the value of the estate of which he deprives the devisee, what disposition is to be made of the surplus? Considered as a gift of value (and on that principle the equitable arrangement is founded), the devise to the stranger entitles him to an equal amount, but is no authority for bestowing on him more. And the undisputed intention of the testator being that the subjects of both devises should be enjoyed by the heir and the devisee, what is not transferred to the devisee must remain with the heir. A Court of Equity which assumes jurisdiction to mitigate the rigor of legal conditions, and substitute for a formal a substantial performance, would act with little consistency in enforcing, by the technical doctrine of forfeiture, to the eventual disappointment of the testator's intention, a condition not expressed in the will but supplied by the construction of the court for the single purpose of executing that presumed intention. In the instance of pecuniary claims the question can scarcely arise; since in a choice between two sums of money no probable motive exists for electing the smaller. But supposing that case as a gift to a stranger of the benefit of a settlement, under which the heir of the testator was entitled to £1,000, and a bequest of £5,000 to the heir, and election by him to take under the settlement; by the deduction of £1,000 from the bequest in satisfaction of the disappointed legatee, and by payment to the heir of the remaining £4,000, together with the sum due under the settlement, the intention of the testator would be executed in substance though not in form. The heir would take £5,000 and the legatee £1,000. By any other arrangement that intention, which must inevitably be violated in form, would be substantially defeated. The case of specific gifts may indeed involve some difficulty of appreciation by the existence of local attachments, which admit neither accurate estimation nor adequate compensation. But it is on the principle of appreciation that the court interferes to transfer to one party that which is expressly and at law effectually given to another. And the difficulty has been repeatedly encountered. Should any case

part of the testator to give that which is not his property.[1] A mere recital in a will that A is entitled to certain property, but not declaring the intention of the testator to give it to him, would not be a sufficient demonstration of his intention to raise an election.[2] So if a debtor by his will should recite the amount of the debt and erroneously calculate the sum and direct the payment of it, and also should bequeath to the creditor a legacy, in such a case the creditor would not be put to his election.[3] But he might claim both and dispute the calculation of the amount; for in such a case it is not clear that the testator did not mean to pay the full amount of the actual debt.[4]

§ 1463. **General Devise of Property as a Subject of Election.** — Upon the same ground a case of election cannot ordinarily arise where property is devised in general terms; as a devise of "all my real estate in A," which estate is subject to the claims of a devisee or legatee; for it is not apparent that he meant to dispose of any property but what was strictly his own subject to that charge.

§ 1464. **Same.** — Upon similar grounds, where a testatrix gave a legacy to B in satisfaction of all claims upon the estate, he having at the time a claim upon the testatrix in respect to a legacy under the will of C, it was held that evidence of there being no other claim by B against the testatrix was inadmissible; and that B was not therefore compellable to elect between the benefit under the will of the testatrix and that of C.[5] The obvious reason for the decision is that the language of the testatrix did not by any means clearly point to any extinguishment of the claim

present impediments of this nature practically insurmountable, the doctrine of compensation might become in that instance inapplicable, but would not for that reason cease to be the general rule of the court. By the doctrine of compensation, and the process of sequestration for executing it (though justly described as a strong operation), the intention of the testator is, so far as circumstances admit, effected. By the doctrine of forfeiture that intention would be defeated." 1 Swanst. R. note, pp. 441, 442.

[1] Attorney-Gen. *v.* Earl of Lonsdale, 1 Sim. R. 105; Havens *v.* Sackett, 15 N. Y. 365; Pennsylvania Co. *v.* Stokes, 61 Pa. St. 136; O'Reilly *v.* Nicholson, 45 Mo. 160; Bull *v.* Church, 5 Hill, 206; s. c. 2 Denio, 430; Graham *v.* Roseburgh, 47 Mo. 111.

[2] Dashwood *v.* Peyton, 18 Ves. 41; Forrester *v.* Cotton, Ambl. R. 388; s. c. 1 Eden, R. 532, 535, and note (*c*); Blake *v.* Bunbury, 1 Ves. Jr. 515, 523.

[3] Box *v.* Barrett, L. R. 3 Eq. 344; Price *v.* Price, 133 N. C. 494, 45 S. E. 855; Bible *v.* Marshall, 103 Tenn. 324, 52 S. W. 1077.

[4] Clark *v.* Guise, 2 Ves. 617.

[5] Dixon *v.* Samson, 2 Younge & Coll. 566.

under the will of C, and might well be satisfied by supposing it used solely with reference to any claims ex directo against her estate.

§ 1465. **Same.** — Again if a testator should bequeath property to his wife, manifestly with the intention of its being in satisfaction of her dower, it would create a case of election.[1] But such an intention must be clear and free from ambiguity.[2] And it will not be inferred from the mere fact of the testator's making a general disposition of all his property, although he should give his wife a legacy, for he might intend to give only what was strictly his own subject to dower. There is no repugnancy in such a devise or bequest to her title to dower.[3] Besides, the right to dower being in itself a clear legal right, an intent to exclude that right by a voluntary gift ought to be demonstrated either by express words or by clear and manifest implication. In order to exclude it, the instrument itself ought to contain some provision inconsistent with the operation of such legal right.[4] So the mere gift

[1] 3 Wooddes. Lect. 59, p. 493; Arnold *v.* Kempstead, Ambl. R. 466; s. c. 2 Eden, R. 237, and note, and cases therein cited; 1 Eq. Abridg. 218, B. l, pl. 1; Villareal *v.* Galway, Ambl. R. 682; s. c. 1 Bro. Ch. R. 292, notes; Fuller *v.* Yates, 8 Paige, R. 325. This matter is regulated by statute in many States. Gough *v.* Manning, 26 Md. 347; Ramsour *v.* Ramsour, 63 N. C. 231; Carder *v.* Fayette Co., 16 Ohio St. 353; Plympton *v.* Plympton, 6 Allen, 178; Walker *v.* Upson, 74 Conn. 128, 49 Atl. 904; McGaughey *v.* Eades, 78 Miss. 853, 29 So. 516; Cooper *v.* Cooper, 56 N. J. Eq. 48, 38 Atl. 198.

[2] Bull *v.* Church, 5 Hill, 206; s. c. 2 Denio, 430; Savage *v.* Burnham, 17 N. Y. 561, 571; Lord *v.* Lord, 23 Conn. 327; Fulton *v.* Fulton, 30 Miss. 586; Higginbotham *v.* Cornwell, 8 Gratt. 83; Parker *v.* Sowerby, 4 DeG. M. & G. 321. Bryant *v.* McCune, 49 Mo. 546; the dower right is favored in the law and the testator has no right to give it away, and it will be upheld unless the widow is compelled by express words to make her election, as required by the statute, or the will may not be executed in its integrity without importing the implication into it. Closs *v.* Eldert, 30 App. Div. 338, 51 N. Y. Supp. 881.

[3] French *v.* Davies, 2 Ves. Jr. 576, 577; Lawrence *v.* Lawrence, 2 Vern. 366, and Raithby's note; 1 Swanst. R. 398, note; Greatorex *v.* Cary, 6 Ves. 615; Kitson *v.* Kitson, Prec. Ch. 352; Foster *v.* Cook, 3 Bro. Ch. R. 347; Fuller *v.* Yates, 8 Paige, R. 325. But see Colgate *v.* Colgate, 8 C. E. Green, 372; Atkinson *v.* Littlewood, L. R. 18 Eq. 595.

[4] Birmingham *v.* Kirwan, 2 Sch. & Lefr. 452, 453. See also Pearson *v.* Pearson, 1 Bro. Ch. R. 292, and Mr. Belt's note; Lord Dorchester *v.* Earl of Effingham, Cooper, Eq. R. 319; 3 Wooddes. Lect. 59, p. 493; 4 Kent, Comm. Lect. 55, pp. 57, 58. In Harrison *v.* Harrison (1 Keen, R. 767), Lord Langdale said: "The principle applicable to cases of this kind is that where a testator makes provision for his widow out of his real estates she will not be excluded from dower unless the enjoyment of dower together with the provision made by the will appears to be inconsistent with the intention of the testator as it is to be collected from the language

of an annuity by the testator to his widow, although charged upon all his property, is not sufficient to put her to her election between that and dower, even although the will contains a gift of the whole of the testator's real estate to another person.[1] So the gift of a portion of his real estate to his widow for life or during widowhood

of the will. The application of this principle has frequently occasioned considerable difficulty, and the cases are somewhat conflicting. A rent-charge to a wife has been held not to be a bar of dower in the absence of circumstances showing an intention to exclude her from it." Lord Redesdale's remarks also on this point, in Birmingham *v.* Kirwan, 2 Sch. & Lefr. 452, deserve to be cited at large. "The principle," says he, "then, that the wife cannot have both dower and what is given in lieu of dower being acknowledged at law as well as in equity, the only question in such cases must be whether the provision alleged to have been given in satisfaction of dower was so given or not. If the provision results from contract, the question will be simply whether that was part of the contract. But if the provision be voluntary, a pure gift, the intention must either be expressed in the form of the gift, or must be inferred from the terms of it. It is however to be collected from all the cases that as the right to dower is in itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated either by express words or by clear and manifest implication. If there be anything ambiguous or doubtful, if the court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported. And to make a case of election that is necessary; for a gift is to be taken as pure until a condition appear. This I take to be the ground of all the decisions. Hitchen *v.* Hitchen, Prec. Ch. 133, proceeds clearly on this ground, and all the cases seem to have followed it. And the only question made in all the cases is, whether an intention not expressed by apt words could be collected from the terms of the instrument. Cases of this description can be used only to assist the judgment of the court in deciding what may be deemed sufficient manifestation of intention. And the result of all the cases of implied intention seems to be that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds, &c." In Fuller *v.* Yates, 8 Paige, R. 325, 328, 329, Mr. Chancellor Walworth said: "The right of dower being a legal right, the wife cannot be deprived of it by a testamentary disposition in her favor, so as to put her to an election, unless the testator has manifested his intention to deprive her of dower, either by express words or necessary implication. It is not pretended in this case that the language of the will in respect to the provisions for the wife is at all inconsistent with her claims to dower in the residue of the testator's real estate. The cases on the subject of implied manifestation of intention to exclude the right of dower appear to establish this principle, that, to put the wife to her election, the will must contain provisions which are wholly inconsistent with her claim of dower in the particular portion of the estate as to which the claim of dower is made." Mr. Eden's note to Arnold *v.* Kempstead, 2 Eden, R. 237, is very valuable on this subject. Sutherland *v.* Sutherland, 102 Iowa, 535, 71 N. W. 424, 63 Am. St. Rep. 477; Kiefer *v.* Gillett, 120 Iowa, 107, 94 N. W. 270. See Bending *v.* Bending, 3 Kay & J. 257 (where the subject is considered at length); Cummings *v.* Cummings, 51 Mo. 261; Wigley *v.* Beauchamp, Ib. 544; Camden Ins. Assn. *v.* Jones, 23 N. J. Eq. 171.

[1] Holdich *v.* Holdich, 2 Y. & Coll. New R. 18, 21, 22.

is not sufficient to put her to an election as to the residue of his real estate.[1] The reason is the same in all these cases.

§ 1466. **Application of the Doctrine to Property in Which the Testator Has Some Present Interest.** — It is upon a similar ground that the doctrine of election has been held not to be applicable to cases where the testator has some present interest in the estate disposed of by him, although it is not entirely his own. In such a case, unless there is an intention clearly manifested in the will or (as it is sometimes called) a demonstration plain, or necessary implication, on his part to dispose of the whole estate, including the interest of third persons, he will be presumed to intend to dispose of that which he might lawfully dispose of, and of no more.[2]

§ 1467. **Same.** — Other exceptions may easily be put to the general doctrine of election. Thus for instance if a man should by his will give a child or other person a legacy or portion in lieu or satisfaction of a particular thing expressed, that would not exclude him from other benefits, although it might happen to be contrary to the will; for Courts of Equity will not construe it as meant in lieu of everything else when the testator has said it is in lieu of a particular thing.[3]

§ 1468. **Same.** — Again if a legatee should decline one benefit, charged with a portion given him by a will, he would not be bound to decline another benefit, unclogged with any burden given him by the same will.[4] So if a legatee cannot obtain a particular

[1] Holdich *v.* Holdich, 2 Y. & Coll. New R. 18, 21, 22; Pierce *v.* Pierce, 21 Ind. App. 184, 51 N. E. 954; Bentley *v.* Bentley, 112 Iowa, 625, 84 N. W. 676.

[2] Ranclyffe *v.* Parkyns, 6 Dow, R. 149 to 179, 185; Blake *v.* Bunbury, 1 Ves. Jr. 515, 523. See Grissell *v.* Swinhoe, L. R. 7 Eq. 291; Wilkinson *v.* Dent, L. R. 6 Ch. 339.

[3] East *v.* Cook, 2 Ves. 23; Dillon *v.* Parker, 1 Swanst. R. 404, 405, note. See Wilkinson *v.* Dent, L. R. 6 Ch. 339.

[4] In Wollaston *v.* King, L. R. 8 Eq. 165, 174, Vice-Chancellor James, referring to the rule in Whistler *v.* Webster, 2 Ves. 367, — that no man shall claim any benefit under a will without conforming as far as he can and giving effect to everything in it whereby any disposition is made showing an intention that such a thing shall take place, — said that the rule had not been applied in Carver *v.* Bowles, 2 Russ. & M. 301, and later cases. The rule to be deduced from these cases, he declared, was that election was to be applied between a gift under a will and a claim dehors the will and adverse to it; it was not to be applied between one clause in a will and another clause in the same will. "It would seem a very strange thing," he says, "that in construing the same instrument the court, dealing with a clause in which a fund is expressed to be given partly to A and partly to B, should hold that, the gift to A being void, the testator's intention is that B should take the whole; and then coming to another clause in which another fund is given to B, and no mention of

benefit designed for him by a will, except by contradicting some part of it, he will not be precluded by such contradiction from claiming other benefits under it. The ground of all these exceptions is that it is not apparent from the face of the will that the testator meant to exclude the party from all benefits under the will unless in all respects the purposes of the will were fulfilled by him.[1] But if it should be so apparent or fairly inferable from the nature of the different benefits conferred by the will, there the legatee would be put to his election to take all or to reject all.[2]

A at all, it should hold that there is an implied condition that B should give back part of that which it was the testator's intention that he should take." Andrews *v.* Trinity Hall, 9 Ves. 534; 1 Swanst. 402, note.

[1] Mr. Swanston in his learned note on this point says (1 Swanst. R. 405): "The rule of not claiming by one part of an instrument in contradiction to another has exceptions (Lord Hardwicke, 2 Ves. 33, and see Vern. & Scriv. 53); and the ground of the exceptions seems to be a particular intention denoted by the instrument different from that general intention the presumption of which is the foundation of the doctrine of election. Several cases have been, and several more may be, in which a man by his will shall give a child or other person a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will, for the court will not construe it as meant in lieu of everything else when he has said a particular thing. Lord Hardwicke, East *v.* Cook, 2 Ves. 33. Upon that principle it was decided in Bor *v.* Bor, 3 Bro. P. C. ed. Toml. 167 (see Vern. & Scriv. 53, 54) that the testator having by express proviso made a disposition in the event of his not possessing power to devise certain estates, no implied condition arose against the heir, disappointing the devisee but complying with the proviso. So a legatee who cannot obtain a benefit designed for him by the will except by contradicting some part of it will not be precluded by such contradiction from claiming other benefits under it. Huggins *v.* Alexander, cited 2 Ves. 31. The intention being equal in favor of each part of the testamentary disposition, no reason is afforded for controlling one in order to accomplish the other. Under a will containing a bequest to the testator's widow in satisfaction of all dower or thirds which she might claim out of his real or personal estate, or either of them, and a residuary bequest, which failed, the widow, accepting the specific bequest, was not excluded from her distributive share of the undisposed residue. For if the court could (which it cannot), on a question between the next of kin, advert to the will, it would find there no evidence of an intention to exclude the widow in their favor." Pickering *v.* Lord Stamford, 3 Ves. Jr. 332, 492. Other exceptions might be mentioned, as for example the doctrine of election does not apply as between appointees under a power executed by will where there is an excessive execution of the power so that it is void as to some of the appointees and good as to others. In such cases the appointees whose shares are valid will participate equally with those whose shares are void in the property of which the appointment fails. 1 Powell on Devises, by Jarman, 430, note (*b*); Id. 440; Bristow *v.* Ward, 2 Ves. Jr. 336; Sugden on Powers, ch. 6, § 2, pp. 384, 385 (3d ed.). See Blaiklock *v.* Grindle, L. R. 7 Eq. 215; Coutts *v.* Acworth, L. R. 9 Eq. 519.

[2] Talbot *v.* Earl of Radnor, 3 Mylne & Keen, 252.

§ 1469. **The Doctrine of Election Is Not Applied to the Case of Creditors.** — It may be added that the doctrine of election is not applied to the case of creditors. They may take the benefit of a devise for payment of debts, and also enforce their legal claims upon other funds disposed of by the will; for a creditor claims not as a mere volunteer, but for a valuable consideration, and ex debito justitiæ.[1]

§ 1470. **Testator Must Have Given Property Belonging to Another.** — On the other hand it is sufficient to raise a case of election in equity that the testator does dispose of property which is not his own, without any inquiry whether he did so knowing it not to be his own, or whether he did so under the erroneous supposition that it was his own. If the property was known not to be his own, it would be a clear case of election. If it was supposed erroneously to be his own, still there is no certainty that his intention to devise it would have been changed by the mere knowledge of the true state of the title, and the court will not speculate upon it.[2] So although a part of the benefits proposed

[1] Kidney *v.* Coussmaker, 12 Ves. 154; 1 Powell on Devises, by Jarman, 437, note (5). The Master of the Rolls, in Kidney *v.* Coussmaker (12 Ves. 154), speaking on this subject, says: "Another objection made for the widow is that the creditors take a benefit under the will of the testator by the devise for payment of the debts generally, and therefore they shall not be permitted to disappoint that part of the will by which a provision is made for the widow; that is, that the doctrine of election is to be applied to creditors. It is utterly inapplicable. It never has been so applied, and half the decrees upon marshalling assets are wrong if there is any ground for that claim. It is true, creditors by simple contract cannot have any right except by marshalling against the real estate, unless the testator thinks fit to devise it for satisfaction of the debts generally. Yet they have never been held to stand in the same light as legatees. When the testator lets in such creditors by a charge, it is now settled, whatever doubt may formerly have been entertained upon it, that creditors, under a charge of debts and legacies, are to be paid in preference to legatees; and though the Statute of Fraudulent Devises would undoubtedly prevent a devise for payment of legacies so as to disappoint creditors by specialty, it would not prevent a devise for payment of debts generally, though the effect would be to let in creditors by simple contract, to the prejudice of creditors by specialty. If there is any foundation for this doctrine of election, the case never could have happened where there was a charge upon any part of the estate for debts; whereas the creditors by specialty are permitted, and the creditors by simple contract are by marshalling permitted, to follow the devised estates if there are no estates descended, or if the descended estates have been applied. In this case the decree is wrong upon this doctrine, for the legatees are disappointed by the specialty creditors taking the personal estate." See also Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. R. 408; Day *v.* Day, 2 P. Will. 418; Earl of Darlington *v.* Pulteney, 3 Ves. Jr. 385; Carr *v.* Eastabrooke, 3 Ves. 564.

[2] Whistler *v.* Webster, 2 Ves. Jr. 370; Thellusson *v.* Woodford, 13 Ves.

by a will should fail, the remainder may constitute a case for an election.[1]

§ 1471. **Same.** — Upon the ground of intention also, where a testator has an absolute power to dispose of the subject and an intention is clearly expressed in his will to exercise that power, it will be sufficient to raise a case of election.[2] Therefore if a testator having an absolute power to dispose of an estate should devise it to his heir, although in such a case the heir would take by descent, and the devise be inoperative, whether he admitted or disputed the will; yet as to another estate of the heir which was disposed of by the testator in his will without title, he would be put to his election. For in every such case the heir ought to elect between the estate devised, which comes to him by the bounty of the testator, and his own claims, which are adverse to the will. The estate, descending to the heir under an election made by him to claim against the will, ought to be subject in his hands to the same implied condition as if he had taken it by devise.[3] So if upon the language of a will it is apparent that it is the testator's intention to dispose of all his property at the time of his death, that intention will be considered as raising a case of election in an heir who claims title to the after-purchased real estate of the testator, and at the same time is a devisee under the will. Thus where a testator made a devise and bequest of all his

220; Welby *v.* Welby, 2 Ves. & Beam. 199; Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. 407; 1 Powell on Devises, 435, Jarman's note. This is now the established doctrine, although there are former declarations of opinion to the contrary, which proceeded upon the grounds of the civil law already stated. Ante, § 1078. See Cull *v.* Showell, Ambler, R. 727, and Mr. Blunt's note (4); 3 Wooddes. Lect. Appx. 1; Id. Lect. 59, pp. 493, 494; 2 Sch. & Lefr. 267; Forrester *v.* Cotton, 1 Eden, R. 532, 535, and notes (*a*) and (*c*); s. c. Ambler, R. 389, 390. The doctrine of the civil law is apparently different. "Quod autem diximus, alienam rem posse legari, ita intelligendum est; si defunctus sciebat alienam rem esse; non si ignorabat. Forsitan enim si scivisset alienam rem esse, non legasset.". Inst. Lib. 2, tit. 20, § 4. We have seen that the English doctrine takes the opposite view from the doubt whether the intention would have been changed by knowledge of the fact. See also Inst. Lib. 2, tit. 20, §§ 10, 11, where other curious cases are put.

[1] Newman *v.* Newman, 1 Bro. Ch. R. 186; 1 Swanst. R. 402, note.

[2] Churchman *v.* Ireland, 4 Sim. R. 520; s. c. 1 Russ. & Mylne, 250; Thellusson *v.* Woodford, 13 Ves. 209; 1 Dow, Parl. R. 249; overruling Back *v.* Kett, Jacob, R. 534; Nayler *v.* Wetherell, 4 Sim. R. 114. See Allen *v.* Anderson, 5 Hare, R. 169.

[3] Sugden on Powers, ch. 5, § 2, p. 384 (3d ed.); Whistler *v.* Webster, 2 Ves. Jr. 367; Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. R. 402; Welby *v.* Welby, 2 Ves. & Beam. 187, 190; Thellusson *v.* Woodford, 13 Ves. 224, and note (*a*); Anon. Gilb. Eq. R. 15. See Sugden on Vendors, ch. 4, p. 128, note (3) (2d ed.).

estate and effects, both real and personal, which he should die possessed of, interested in, or entitled to, to trustees for the benefit of his grandchildren, one of whom was his heir at law, and he afterwards purchased other real estate, it was held that upon the true interpretation of the words of the will the testator meant to pass to the trustees not only the estates he had at the date of the will, but all that he should own and possess at the time of his death, and therefore the heir at law ought to be put to his election.[1]

§ 1472. **Right of Remainder-man to Elect.** — It was at one time supposed that the doctrine of election was not applicable to the case of persons claiming a remote interest in property disposed of in a manner adverse to other rights; as for instance to a remainder-man claiming after an estate tail in the property disposed of.[2] The principle of such an exception seems extremely questionable, for (as has been well remarked) the doctrine of election is applied to interests, not in respect of their amount, but of their inconsistency with the testator's intention. And to assume their remoteness or their value as a criterion of the existence or absence of that intention would introduce great uncertainty, which in questions of property is perhaps the worst defect of the law.[3]

§ 1473. **Election Applied to Contingent Interests.** — It may be added that when a party by his will disposes of the absolute right in property in which he has a limited interest only, he necessarily shows an intention to extinguish all other conflicting adverse rights, whether they are present or future, vested or contingent; and consequently it must be wholly unimportant whether the interests so extinguished are great or small, immediate or remote, valuable or trifling. The duty of election then, so far as intention goes, is equally the same in strength and presumption in all cases of this sort, as it imports the gift of one thing to be in lieu or extinguishment of the other. Accordingly the doctrine is now well established that the doctrine of election is equally applicable to all interests whether they are immediate or remote, vested or contingent, of value or of no value, and whether these interests are in real or in personal estate.[4]

[1] See Dewar v. Maitland, L. R. 2 Eq. 834. See Hance v. Truwhitt, 2 Johns. & H. 216.

[2] See Bor v. Bor, cited 3 Bro. Parl. Cas. by Tomlins, 178, note, 1 Swanst. 407, note.

[3] Mr. Swanston's note, 1 Swanst. R. 408.

[4] Wilson v. Lord Townshend, 2 Ves. Jr. 697; Dillon v. Parker, 1 Swanst. 408, note; Webb v. Earl of Shaftsbury, 7 Ves. 488; 1 Powell on Devises, by

§ 1474. **Acts which Will Amount to an Election.** — Questions have also arisen in courts of equity as to what acts or circumstances should be deemed an election on the part of the person bound to make it. We say acts or circumstances; for positive acts of acceptance or of renunciation are not indispensable. Presumptions equally strong may arise from long acquiescence, or from other circumstances of a stringent nature.[1] Upon such a

Jarman, p. 434, note; 2 Madd. Ch. Pr. 40; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 537. A curious point has arisen in regard to the doctrine of election, in cases where a will is not executed so as to pass real estate under the Statute of Frauds, and yet is good as a will of personalty. The question is, whether the heir can take a bequest of personalty under the will without at the same time confirming the devises made of the real estate. It has been decided that in a will of freehold estates not so executed as to pass real estate no such case of election arises, and that the devises are to be deemed blotted out of the will, and the will to be read as if they were not contained in it, although it would be otherwise if there was an express condition annexed to the bequest of the personalty. (*b*) But in case of a specific devise of unsurrendered copyhold the heir would be put to his election. Sir William Grant, in Brodie *v.* Barry (2 Ves. & Beam. 130), said: "I do not understand why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an implied condition concerning real estate annexed to a gift of personal property, as it is admitted it must when such condition is expressly annexed to such gift. For if by a sound construction such condition is rightfully inferred from the whole instrument, the effect seems to be the same as if it were expressed in words. And then if it be rightly decided that a will defectively executed is not to be read against the freehold heir, I have been sometimes inclined to doubt whether any will ought to be read against the copyhold heir; a will, however executed, being as inoperative for the conveyance of copyhold estate (without a surrender) as a will defectively executed is for the conveyance of a freehold estate." Lord Kenyon, in Cary *v.* Askew (1 Cox, R. 244), and Lord Eldon, in Sheddon *v.* Goodrich (8 Ves. 496, 497), expressed doubts of a similar nature. But all these judges admitted the distinction to be clearly established by the authorities. See Hearle *v.* Greenbank, 3 Atk. 715; s. c. 1 Ves. 306, 307; Thellusson *v.* Woodford, 13 Ves. 220, 221; Boughton *v.* Boughton, 2 Ves. 12; Allen *v.* Poulton, 1 Ves. 121; Cookes *v.* Hellier, 1 Ves. 234; Mr. Swanston's note, 1 Swanst. R. 406; Mr. Jarman's note to 1 Powell on Devises, 440; Allen *v.* Anderson, 5 Hare, R. 168.

[1] Tibbets *v.* Tibbets, 19 Ves. 662; Reynard *v.* Spence, 4 Beav. 103; Camden Ins. Assn. *v.* Jones, 8 C. E. Green, 171; Gale *v.* Gale, 48 Ill. 471; Fytche *v.* Fytche, L. R. 7 Eq. 494. See Kearney *v.* Macomb, 1 C. E. Green, 189. But see Maxwell *v.* Hyslop, L. R. 4 Eq. 407; Van Dyke's Appeal, 60 Pa. St. 481. In Hance *v.* Truwhitt, 2 Johns. & H. 216, an express devise of after-acquired realty, made when the devise was inoperative, put the heir to election. See also Dewar *v.* Maitland, L. R. 2 Eq. 834; Orrell *v.* Orrell, L. R. 6 Ch. 302. In re Thayer's Est., 142 Cal. 453, 76 Pac. 41; Sill *v.* Sill, 31 Kans. 248, 1 Pac. 556; Richardson *v.* Justice, 125 N. C. 409, 34 S. E. 441; Bower *v.* Bowen, 139 Ind. 31, 38 N. E. 326; In re Boileau's Est., 201 Pa. 493, 51 Atl. 338; In re White's Est., 23 Pa. Super. Ct. Rep. 552; she should know fully what the husband's debts amount to and any other information that is necessary to give her

subject no general rule can be laid down; but every case must be left to be decided upon its own particular circumstances rather than upon any definite abstract doctrine. Before any presumption of an election can arise it is necessary to show that the party acting or acquiescing was cognizant of his rights.[1] When this is ascertained affirmatively, it may be further necessary to consider whether the party intended an election;[2] whether the party was competent to make an election, for a feme covert, an infant, or a lunatic will not be bound by an election;[3] whether he can restore the other persons affected by his claim to the same situation as if the acts had not been performed or the acquiescence had not existed; and whether there has been such a lapse of time as ought to preclude the court from entering upon such inquiries, upon its general doctrine of not entertaining suits upon stale demands, or after long delays.[4]

§ 1475. [**An Election May Be Effected by the Conduct of the Devisee.** — It is not at all necessary that the devisee execute a written acknowledge of intention to stand by the will, or against it, but it will be deemed sufficient in passing upon the acts and conduct of his with reference to the property under consideration. Merely qualifying as executrix and collecting in the property belonging to the estate does not in itself constitute an election. An election may be made by acts in pais, and if the acts are plain and unequivocal, and done with full knowledge of the widow's rights and of the condition of the estate, it is as binding as though it were formally made. If she makes a deliberate and intelligent

a complete idea as to the value of the estate. Geiger *v.* Geiger, 57 S. C. 521, 35 S. E. 1031.

[1] Dillon *v.* Parker, 1 Swanst. 359, 381; Edwards *v.* Morgan, 13 Price, R. 782; s. c. 1 McClel. 541; 1 Bligh, R. 401.

[2] Wilson *v.* Thornbury, L. R. 10 Ch. 239.

[3] Frank *v.* Frank, 3 Mylne & Craig, 171. Concerning election by persons under disability see Barrow *v.* Barrow, 4 Kay & J. 409 (explaining Lassence *v.* Tierney, 1 Mac. & G. 551, and Field *v.* Moore, 19 Beav. 176). Griggs *v.* Gibson, L. R. 1 Eq. 685; Storring *v.* Borren, 55 Barb. 595; Tiernan *v.* Roland, 15 Pa. St. 430. In these cases it is held that the doctrine may be applied. See also Campbell *v.* Ingilby, 21 Beav. 567; s. c. 1 DeG. & J. 393; Willoughby *v.* Middleton, 2 Johns. & H. 344; Brown *v.* Brown, L. R. 2 Eq. 481; Codrington *v.* Lindsay, L. R. 8 Ch. 578; Wall *v.* Wall, 11 Jur. 403; Whittle *v.* Henning, 2 Phill. 731; Thynne *v.* Glengall, 2 H. L. Cas. 131. Newcomb *v.* Newcomb, 76 Ky. 544, 26 Am. Rep. 222; In re Andrews' Est., 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296; and where the court undertakes to make the election it will take into consideration the entire surroundings, station in life, etc. In re Robinson's Est., 88 Minn. 404, 93 N. W. 314.

[4] Mr. Swanston's note, 1 Swanst. 382, where the principal authorities are collected. See Brice *v.* Brice, 2 Molloy, R. 21.

choice under the will, and thereafter proceeds as though an election were made, she is estopped from claiming under the statute.[1] In North Carolina it has been held that if the legatee proves the will and proceeds to administer the estate thereunder, that this is sufficient evidence of an intention to take under the will.[2] But as a rule other evidence of an intention to elect is necessary. The taking of property allotted to one under a will and holding it for a number of years, without claiming the rights given under the statute, presupposes an election to take under the will and will estop the devisee from then attempting to elect,[3] as well as his heirs;[4] but holding for a few months, without other evidence, is insufficient.[5] The widow has the right to elect and take against the will even though she were present at the time of its execution and she knew then that the devise to her was much less than under the statute she was entitled, and though she wrote her written consent to take the devise as stated, and this appeared on the back of the will.[6] The devisee may change his mind and elect to take against the will, if by so doing he does not injure the rights of innocent third persons that may have intervened.[7] A widow has the right to disaffirm her election if the personal representative or heir have been guilty of practising any fraud upon her or her rights, or in concealing from her unduly the true condition of the estate. It matters not that in any event she would take either what the statute gives her, or else under the will. She has a right to be dealt with fairly and to know what she is getting as much so as a purchaser for value is entitled to enter into and complete a bargain without fraud being practised upon him by the other party.[8]]

§ 1476. **Devisee Need Not Elect till He Has Made a Full Investigation.** — Questions have also arisen in Courts of Equity as

[1] Benedict *v.* Wilmarth, 46 Fla. 535, 35 So. 84; In re Proctor's Est., 103 Iowa, 232, 72 N. W. 516; Reville *v.* Dubach, 60 Kans. 572, 57 Pac. 522; Brightman *v.* Morgan, 111 Iowa, 481, 82 N. W. 954; In re Young's Est., 202 Pa. 431, 51 Atl. 1036.

[2] Treadaway *v.* Payne, 127 N. C. 436, 37 S. E. 460; Allen *v.* Allen, 121 N. C. 328, 28 S. E. 513.

[3] Bennett *v.* Packer, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112; Crumpler *v.* Barfield, 114 Ga. 570, 40 S. E. 808.

[4] Hawkins *v.* Bohling, 168 Ill. 214, 48 N. E. 94.

[5] Bailey *v.* Hughes, 115 Iowa, 304, 88 N. W. 804.

[6] Spratt *v.* Lawson, 176 Mo. 175, 75 S. W. 642.

[7] In re Dunphy's Est., 147 Cal. 95, 81 Pac. 315; Dudley *v.* Pigg, 149 Ind. 363, 48 N. E. 642.

[8] Barden *v.* Barden, 141 Ind. 471, 40 N. E. 1067; Buchanan *v.* Gibbs, 26 Kans. 277.

to the time when and the circumstances under which an election may be required to be made. The general rule is that the party is not bound to make any election until all the circumstances are known and the state and condition and value of the funds are clearly ascertained; for until so known and ascertained it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice.[1] If therefore he should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him.[2] And on the other hand he will be entitled, in order to make an election, to maintain a bill in equity for a discovery, and to have all the necessary accounts taken to ascertain the real state of the funds.[3]

§ 1477. **Satisfaction, Defined.** — These remarks may suffice on the subject of election, a doctrine of no inconsiderable nicety and difficulty in its natural administration in equity; and we shall now proceed to the kindred doctrine of SATISFACTION. Satisfaction may be defined in equity to be the donation of a thing, with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee. It usually arises in Courts of Equity as a matter of presumption where a man, being under an obligation to do an act (as to pay money), does that by will which is capable of being considered as a per-

[1] Newman *v.* Newman, 1 Bro. Ch. R. 186; Boynton *v.* Boynton, 1 Bro. Ch. R. 445; Wake *v.* Wake, 3 Bro. Ch. R. 255; s. c. 1 Ves. Jr. 335; Whistler *v.* Webster, 2 Ves. Jr. 371; Chalmers *v.* Storril, 2 V. & Beam. 222; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*); Wilson *v.* Thornbury, L. R. 10 Ch. 239; Dewar *v.* Maitland, L. R. 2 Eq. 834; Thurston *v.* Clifton, 21 Beav. 447; Kreiser's Appeal, 69 Pa. St. 194; Macknet *v.* Macknet, 29 N. J. Eq. 54; Evans's Appeal, 51 Conn. 435; Watson *v.* Watson, 128 Mass. 152, 155. The cases show that an election made in entire ignorance of one's rights under the law is not binding. Where a son claimed an interest in the stock in trade of the devisor, which was contested by the other heirs at law, he would not be required to elect until the question of the ownership of the stock was first determined. Lamar *v.* McLaren, 107 Ga. 591, 34 S. E. 116.

Where a widow knew of the contents of the will, its admission to probate, and she acted under legal advice as to her rights, the lapse of some time would bar her right to elect and her contention that she was ignorant of the law would make no difference. Shelton *v.* Sears, 187 Mass. 455, 73 N. E. 666.

A devisee who knows of the contents of the will and exercises rights and duties towards the property is presumed to have elected to take under the will. Hoggard *v.* Jordan, 140 N. C. 610, 53 S. E. 220.

[2] Kidney *v.* Coussmaker, 12 Ves. 136; Macknet *v.* Macknet, 29 N. J. Eq. 54.

[3] Pigott *v.* Bagley, 1 McClel. & Younge, 569; Douglas *v.* Douglas, L. R. 12 Eq. 617.

formance or satisfaction of it, the thing performed being ejusdem generis with that which he has engaged to perform. Under such circumstances, and in the absence of all countervailing circumstances, the ordinary presumption in Courts of Equity is that the testator has done the act in satisfaction of his obligation.[1]

§ 1478. **Same.** — It is certainly not a little difficult to vindicate the extent to which this doctrine has been carried in Courts of Equity as a matter of presumption. What is given by a will ought from the character of the instrument ordinarily to be deemed as given as a mere bounty, unless a contrary intention is apparent on the face of the instrument;[2] or, as it has been well expressed, whatever is given by a will is, prima facie, to be intended as a bounty or benevolence.[3] Under such circumstances the natural course of reasoning would be that in order to displace this presumption a clear expression of a contrary intention should be made out on the face of the will.[4] But the doctrine of Courts of Equity has proceeded upon an opposite ground; and the donation is held to be a satisfaction, unless that conclusion is repelled by the nature of the gift, the terms of the will, or the attendant circumstances. For it has been said that a man shall be intended to be just before

[1] Powell on Devises, by Jarman, 433, note (4). There is a presumption that where a parent is indebted to his child, and makes an advancement to such child, it is presumed to be a satisfaction pro tanto of the debt. Glover *v.* Patten, 165 U. S. 394, 41 L. Ed. 760, 17 S. Ct. Rep. 411.

A contract between devisor and one to whom he was liable for personal injuries, that if she would desist from bringing suit, that ample provision would be made for her by will, which was subsequently done, the presumption is that the devise was in satisfaction of the claim for personal injuries. Drinkhouse *v.* Merritt, 134 Cal. 580, 66 Pac. 785.

Where testator had never accounted to the court or to his ward for his guardianship, a devise to the ward of a greater sum than was really due was not of that nature of indebtedness to which the law attaches the presumption that the legacy was in payment of the debt. Tompson *v.* Wilson, 82 Ill. App. 29.

If the testator has property sufficient to pay his debts, which he directs to be paid, and there is no intention evidenced by the will that a devise to one to whom he was indebted is to be in satisfaction of the debt, the legacy will not satisfy the debt. Wade *v.* Dean, 19 Ky. L. Rep. 1426, 43 S. W. 441; see generally, Lisle *v.* Tribble, 92 Ky. 304, 17 S. W. 742, 13 Ky. L. Rep. 595; Adams *v.* Adams, 55 N. J. Eq. 42, 35 Atl. 827; In re Arnton, 106 App. Div. 326, 94 N. Y. Supp. 471; In re Sherman, 24 Misc. Rep. 65, 53 N. Y. Supp. 376; Baptist Female Univ. *v.* Borden, 132 N. C. 476, 44 S. E. 47; and the presumption of satisfaction does not arise where the value of the legacy is contingent. Stewart *v.* Conrad, 100 Va. 128, 40 S. E. 624.

[2] Clark *v.* Sewel, 3 Atk. 97.

[3] Eastwoode *v.* Vincke, 2 P. Will. 616.

[4] But see Weall *v.* Price, 2 Russ. & Mylne, 267, where Sir John Leach intimates that the rule is as it ought to be, but without stating any reasons. See also Jones *v.* Morgan, 2 Younge & Coll. 403, 412.

he is kind; and when two duties happen to interfere at the same point of time, that which is the most honest and best is to be preferred.[1]

§ 1479. **Same.** — But although this may be fair reasoning where there is a deficiency of assets to satisfy both claims or duties, yet it is utterly impossible to apply it to the great mass of cases in which the doctrine of implied satisfaction has prevailed, and where there has been no deficiency of assets to discharge all the claims. The truth is that the doctrine was introduced originally upon very unsatisfactory grounds, and it now stands more upon authority than upon principle. And a strong disposition has been

[1] 2 Fonbl. Eq. B. 4, Pt. 1, ch. 4, § 5, note (*l*). In Pym *v.* Lockyer, 5 Mylne & Craig, 29, 35, Lord Cottenham said: "All the decisions upon questions of double portions depend upon the declared or presumed intention of the donor. The presumption of equity is against double portions, because it is not thought probable when the object appears to be to make a provision, and that object has been effected by one instrument, that the repetition of it in a second should be intended as an addition to the first. The second provision therefore is presumed to be intended as a substitute for, and not as an addition to, that first given; but when the gift is a mere bounty, there is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts. The first question to be asked is, whether the sums given are to be considered as portions or as mere gifts; and upon this subject certain rules have been laid down, all intended to ascertain and to work out the intention of the giver. In the case of a parent a legacy to a child is presumed to be intended to be a portion, because providing for the child is a duty which the relative situation of the parties imposes upon the parent; but that duty which is imposed upon a parent may be assumed by another, who for any reason thinks proper to place himself in that respect in the place of a parent; and when that is so, the same presumption arises against his intending a first gift to take effect as well as a second, because both, in such cases, are considered to be portions. Whether the donor had for this purpose assumed the office of a parent so as to invest his gift with the character of a portion may be proved by extrinsic evidence, such as the general conduct of the donor towards the children, or by intrinsic evidence, from the nature and terms of the gift. If the former be alone relied upon, it may prevail, although it should appear that the donor did not assume all the duties of a parent, or effectually perform those which he had undertaken; the question being merely whether the facts proved fairly lead to the conclusion that he intended to provide a portion for the child and not merely to bestow a gift. Upon this point Powys *v.* Mansfield, founded upon Carver *v.* Bowles (2 Russ. & Mylne, 301), and many other cases, is conclusive. Such evidence of general conduct towards the child is of far less importance than that which relates to the pecuniary provision for it, whether that be found in the instruments containing the gifts or in extrinsic circumstances; and as part of such extrinsic circumstances, the general conduct of the donor towards the family, and particularly towards the other children of it, may very properly be included in the consideration of his object and intentions." Post, § 1483.

manifested in modern times not to enlarge the sphere of its operation, but to lay hold of any circumstances to establish exceptions to it.[1] We shall presently see that it is somewhat differently applied in cases of creditors, properly so called, from what it is in cases of portions and advancements to children; for in the latter cases the presumption of satisfaction is more readily entertained, and acted upon more extensively, than in the former.[2]

§ 1480. **Presumption of Satisfaction of Debt Is Not Conclusive.** — It is obvious, from this description of the doctrine of satisfaction, that the presumption is not conclusive, but may be rebutted by other circumstances attending the will. If the benefit given to the donee possessing the right or claim is different in specie from that to which he is entitled, the presumption of its being given in satisfaction will not arise unless there be an express declaration, or a clear inference from other parts of the will, that such is the intention of the testator.[3] The presumption may be rebutted not only by intrinsic evidence thus derived from the terms of the will itself, but it may also be rebutted by extrinsic evidence, as by declarations of the testator touching the subject, or by written papers explaining or confirming the intention.[4]

§ 1481. **Same.** — Thus for example land given by a will is not deemed to be given in satisfaction of money due to the devisee; and money given by a will is not deemed to be given in satisfaction of an interest of the legatee in hand, unless there is something more in the will explanatory of the intention of the testator.[5] Accordingly it was laid down by Lord Hardwicke in respect to the doctrine of satisfaction, that when a bequest is taken to be by way of satisfaction for money already due to the donee, the thing given in satisfaction must be of the same nature and attended with the same certainty as the thing in lieu of which it is given; and that land is not to be taken in satisfaction for money or money for land.[6]

§ 1482. **Same.** — In regard also to cases where the thing given is ejusdem generis with that due to the donee, the presumption

[1] Clarke *v.* Sewel, 3 Atk. 97. [2] Ibid.

[3] Powell on Devises, by Jarman, 433, note 4; Gilliam *v.* Chancellor, 43 Miss. 437.

[4] Weall *v.* Rice, 2 Russ. & Mylne, 251; Horner *v.* McGaughy, 62 Pa. St. 189.

[5] Bellasis *v.* Uthwatt, 1 Atk. 426, 427; Bengough *v.* Walker, 15 Ves. 507, 512; Chaplin *v.* Chaplin, 3 P. Will. 247. See In re Lawes, 20 Ch. D. 81.

[6] Barrett *v.* Beckford, 1 Ves. 521; Bengough *v.* Walker, 15 Ves. 512; Masters *v.* Masters, 1 P. Will. 423, 424.

that it is given in satisfaction does not necessarily arise, nor is it, as has been already intimated, universally conclusive. To make the presumption of satisfaction hold in any such cases, it is necessary that the thing substituted should not be less beneficial either in amount, or certainty, or value, or time of enjoyment, or otherwise, than the thing due or contracted for.[1] The notion of satisfaction implies the doing or giving of something equivalent to the right extinguished. And it would be a very unjustifiable course to arraign the justice of the testator by presuming that he meant to ask a favor instead of performing a duty.

§ 1483. **Same.** — But where the thing substituted is ejusdem generis, and it is clearly of a much greater value and much more beneficial to the donee than his own claim, there the presumption of an intended satisfaction is generally allowed to prevail.[2] Whether the presumption of an intended satisfaction pro tanto ought to be made in any case where the things are ejusdem generis but less than the claim of the donee, is a matter upon which some diversity of opinion appears to exist; but the weight of authority is certainly in favor of it in cases of portions and advancements.[3]

[1] Blandy *v.* Widmore, 1 P. Will. 324, Mr. Cox's note (1); Lechmere *v.* Earl of Carlisle, 3 P. Will. 225, 226; Atkinson *v.* Webb, 2 Vern. 478.

[2] See 2 Fonbl. Eq. R. 4, Pt. 1, ch. 1, § 5, note (*l*); Id. Pt. 2, ch. 2, § 1, note (*a*); Rickman *v.* Morgan, 2 Bro. Ch. R. 394; 1 Roper on Legacies, by White, ch. 6, pp. 317 to 336; Bellasis *v.* Uthwatt, 1 Atk. 426, Mr. Saunders's note; 2 Roper on Legacies, by White, ch. 18, pp. 58 to 108; Weall *v.* Rice, 2 Russ. & Mylne, 251, 267, 268. If they are of equal value, the presumption is strengthened; and so if they are similar. Atkinson *v.* Littlewood, L. R. 18 Eq. 595, in which however the soundness of the rule is questioned. On the other hand it is settled, as stated by the author in § 1487, that the satisfaction of a mere debt due by a parent to a child by an advancement arises only when the sum advanced equals or exceeds the debt. Reade *v.* Reade, 9 L. R. Ir. 409, 424, 435; Plunket *v.* Lewis, 3 Hare, 322; Chichester *v.* Coventry, L. R. 2 H. L. 71. See In re Lawes, 20 Ch. D. 81. But if the parent's obligation was to provide a portion for his child, then a payment of a sum less than the amount to be provided will, in the absence of other intention, be treated as an advancement pro tanto. Pym *v.* Lockyer, 5 Mylne & C. 29, infra, p. 442, note; Reade *v.* Reade, supra. The presumption however is still against double portions. Reade *v.* Reade, supra; In re Pollock, 28 Ch. D. 552. As to this case see In re Lawes, 20 Ch. D. 81.

[3] The point has been recently decided by Lord Cottenham. Pym *v.* Lockyer, 5 Mylne & Craig, 29, 34, 35, 45 to 55. In this case his lordship reviewed the principal authorities and said: "When upon the first argument of this case I had come to the conclusion that the testator had placed himself in loco parentis, and that the effect of the portions upon the provisions by the will was therefore to be the same as if the testator had been the father of the children, I was startled at the consequences of such a decision, if the rule generally received in the profession and laid down in all the text-books of authority, and apparently founded upon the

§ 1484. **Distinction between Satisfaction and Cases of the Performance of Covenants.** — We are however carefully to distinguish between cases of satisfaction properly so called and cases of the performance of agreements or covenants. In the latter cases the

highest authority, was to regulate the division of the property; the rule to which I refer being, that a portion 'advanced by a father to a child will be a complete ademption of a legacy, though less than the testamentary portion.' 1 Rop. Leg. 318. I could not but feel that in the case before me, and in every other, the effect of the rule would be to defeat the intention of the parent. A father who makes his will dividing his property amongst his children must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If subsequently upon the marriage of any one of them it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced. So far the rule is founded on good sense and adapted to the ordinary transactions of mankind. The supplying the wants of one child for an advancement is not permitted to lessen or destroy the provisions made for the others by giving both provisions to the child advanced; but the supposed rule that the larger legacy is to be adeemed by the smaller provision appears to me not to be founded on good sense, and not to be adapted to the ordinary transactions of mankind, and to be subversive of the obvious intention of the parent. Can it be assumed as a proposition so general as to be the foundation of a rule of property in the absence of any expressed intention, that the marriage of one child and the advancing a portion to such child furnishes ground for the father's altering the mode of distributing his property amongst his children by taking from the portion previously destined for that child, and to the same extent adding to the provision for the others? Is it not on the contrary the usual course and practice that the father upon a child's marriage parts with the control over as little as possible, preferring to reserve to himself the power of disposing of the residue of the portion destined for such child as its future circumstances and situation may require? In doing so the father is not influenced only by the natural preference of bounty to obligation, but adopts a course which he may well be supposed to think most beneficial for his children. Where then is the ground of the presumption that he intended by advancing part of what he had destined as the portion of that child to deprive that child of the remainder? The argument in favor of the proposition appears to me to be founded upon technical reasoning as to the term 'portion', without due consideration of the sense in which that term is used. The giving a portion to a child is said to be a moral debt, but of the amount of which the parent is the only judge; and although the parent has by his will adjudged the amount of that moral debt to be a certain sum, he is supposed by the settlement to have departed from that judgment and to have substituted the amount settled; and this only because the one provision and the other are considered as a portion. This however assumes the portion settled to be intended as a substitution of the portion given by the will, and such intention if proved would remove all doubt; but the question is whether such intention is to be pre-

acts of the party are strictly in pursuance of the contract; in the former they are a substitute or equivalent for the contract, and not intended as a fulfilment of it.[1] Some cases which have actually

sumed in the absence of all proof. Is it not more reasonable to suppose that the intention as to the amount of the portion remains the same, and that the sum settled is only an advance of part of what the will declares to have been the intended amount of the whole? There is no reason for supposing the sum advanced to be the whole portion intended for the child; and if so, there can be no reason for assuming it to be substituted for the whole. The effect of a portion advanced by a parent upon a legacy before given is called an ademption; but if the principle of ademption be applied to this case, the consequence now under consideration will not follow. The gift or alienation of part of what constitutes a specific legacy will not destroy the legacy as to what remains. So the admitted exceptions to this general rule do not seem very consistent with the existence of that part of it now under consideration. The rule is said not to apply when the testamentary portion and the subsequent advancement are not ejusdem generis. This may be very reasonable as indicative of intention, but it is not easy to discover why, if one thousand pounds advanced is to be an ademption of a ten thousand pounds legacy, a gift of stock in trade of the value of £1,500 is not to be an ademption of a legacy of £500 which in Holmes *v.* Holmes, 1 Bro. C. C. 555, (*a*) it was held not to be. So a testamentary gift of a residue or part of a residue is said not to be adeemed by a subsequent advancement, because the amount is uncertain; but in that case the child, if sole residuary legatee, takes as advancement part of what it would, if no such advancement had been made, have taken as residue. The gift under the will operates, though diminished by the amount of the advancement. The Statute of Distributions, the customs of London and York, and the whole doctrine of hotchpot, proceed upon the principle that advancement by a parent does not operate as substitution for, but as part satisfaction of, what the child would otherwise be entitled to; the object being to produce equality and not, according to the rule contended for, inequality between the children. It appears to me therefore that all reasoning and all analogy are against the supposed rule. It remains to be examined whether the authorities are such as to make it my duty to act upon it; and I cannot but express the satisfaction I have felt at having had the cases so thoroughly examined. I think the profession and the public are much indebted to those whose industry and ability have brought the real state of this question so satisfactorily before me." After reviewing the authorities he added: "The result of a careful examination of the authorities is that there is not sufficient authority to support the supposed rule, but that on the contrary the weight of authority is decidedly against it; and as it cannot be supported upon principle, and is in its operation generally destructive of the interests which parents have intended for their children, I think it my duty, notwithstanding the manner in which it has been received in the profession, to decline adopting or following it, and therefore to declare that the advancements upon the respective marriages in this case are to be taken as ademptions, pro tanto only, of the legacies before given." This case is overruled in In re Lawes, 20 Ch. D. 81.

[1] In Goldsmid *v.* Goldsmid (1 Swanst. R. 219) the Master of the Rolls said: "An important distinction exists between satisfaction and performance. Satisfaction supposes intention. It is something different from the contract, and substituted for it." The subject is treated more

passed into judgment may illustrate this distinction. Thus where A on his marriage by articles covenanted to leave his wife B, if she should survive him, £620, and that his executors should pay it in three months after his decease, and A died intestate and without issue, whereby his wife (who survived him) became entitled to a moiety of his personal estate, which was more than the £620, the question arose whether the distributive share of B should be deemed a satisfaction or rather a due performance of the covenant; for the covenant was not broken, the wife being administratrix. And it was held to be a due performance, although it is called in the report a satisfaction.[1] So where A covenanted by marriage articles that his executors should in three months after his decease pay his wife £3,000, and by his will he gave all his property to his executors in trust, to divide it in such ways, shares, and proportions as to them should appear right. The trust failed, whereby his estate became divisible according to the Statute of Distributions, and his wife survived him. It was held

fully in Roper on Legacies, by White, Vol. 2, ch. 18, § 4, pp. 105 to 108. It is there said: "In the discussion of questions of this nature two descriptions of cases have occurred; the one consists of cases called cases of performance, the other of cases of satisfaction. The cases considered in the present section are instances of the former class in which there has been a covenant by a husband to leave or pay to his wife a sum of money at his death, and he dies intestate; and his wife's distributive share of his personalty, under the statute, is equal to or more than the sum stipulated under the covenant. In that case he is held to have performed through the operation of the law what he had covenanted to do. The other case is where the wife takes a benefit to an equal or greater extent under the husband's will, to which the same reasoning is not applicable. But although the bequest is not a performance, still it may be inferred that the testator intended it as a satisfaction of the covenant so as to raise a case of election. Satisfaction, as Sir Thomas Plumer observes, supposes intention; it is something different from the subject of the contract and substituted for it. And the question always arises, Was the thing intended as a substitute for the thing covenanted? — a question entirely of intent. But with reference to performance the question is, Has that identical act which the party contracted to do, been done? Mr. Cox, in his edition of Peere Williams's Reports, has favored the profession with a valuable note upon this subject." See also Devese *v.* Pontet, Prec. Ch. by Finch, p. 240, note; s. c. 1 Cox, 188.

[1] Blandy *v.* Widmore, 1 P. Will. 324, and Mr. Cox's note (1); s. c. 2 Vern. 709; S. P. Lee *v.* Cox, 3 Atk. 422; s. c. 1 Ves. R. 1; S. P. Richardson *v.* Elphinstone, 2 Ves. Jr. 463, 464; Haynes *v.* Mico, 1 Bro. Ch. R. 129 to 131; Kirkman *v.* Kirkman, 2 Bro. Ch. R. 96, 100; Garthshore *v.* Chalie, 10 Ves. 9 to 14; Wilcox *v.* Wilcox, 2 Vern. 558; Lechmere *v.* Earl of Carlisle, 3 P. Will. 225; Rickman *v.* Morgan, 2 Bro. Ch. R. 394, 395; Goldsmid *v.* Goldsmid, 1 Swanst. 219, 221, and note (*c*); Wilson *v.* Pigott, 2 Ves. Jr. 356; Wathan *v.* Smith, 4 Madd. R. 325, 331; Twisden *v.* Twisden, 9 Ves. 427.

that her distributive share being greater than £3,000 was a satisfaction of the covenant.[1]

§ 1485. **Same.** — The ground of each of these decisions seems to have been that there was no breach of the covenant; and as the widow by mere operation of law through the Statute of Distributions received from her husband a larger sum than he had covenanted to pay her, it ought to be held a full performance of his covenant. These decisions do not seem to stand on a very firm foundation as illustrations of the doctrine of satisfaction; for (as has been well observed) considerable doubt might have been entertained whether of two claims so distinct the satisfaction of one ought to be considered as a satisfaction of the other. But Courts of Equity would now hardly deem it fit to re-examine and upon principle to discuss the point thus settled by them, which has been at rest for more than a century. The distinction however between performance of a covenant and satisfaction of a covenant, which grows out of these decisions, may not be unimportant; for there may be a presumptive performance pro tanto in such cases which will be recognized in equity, whatever may be the rule as to a presumptive satisfaction pro tanto in other cases.[2]

§ 1486. **Same.** — And here it may be remarked that the doctrine of satisfaction and also of performance of covenants arising from bequests in wills was well known in the civil law;[3] and it was probably derived from that source, with some variations, into our jurisprudence. Thus in the Digest a case is put of a father covenanting on his daughter's marriage to give her a certain sum as a dotal portion, and afterwards leaving a legacy to her to the same amount; and it was there held that it amounted to a satisfaction of the portion.[4] And other cases are put of a like nature, where parol evidence was held admissible to establish the intention of satisfaction.[5]

[1] Goldsmid *v.* Goldsmid, 1 Swanst. 211.

[2] Garthshore *v.* Chalie, 10 Ves. 9 to 16; Wilcox *v.* Wilcox, 2 Vern. 558; Blandy *v.* Widmore, 1 P. Will. 324, Mr. Cox's note (1); 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*). An absolute bequest of one-fifth of the testator's estate to a son is not a satisfaction of a covenant to assure one-fifth to trustees for the son for life, with remainders to others; and the son will be entitled to a fifth of what remains after satisfying the covenant and other debts. But an election so to take will determine his life estate under the settlement. McCarogher *v.* Whieldon, L. R. 3 Eq. 236.

[3] See post, § 1492, and note 5.

[4] Dig. Lib. 30, tit. 1, l. 84, § 6; post 1114.

[5] Dig. Lib. 30, tit. 1, l. 123.

§ 1487. **Classes of Cases of Satisfaction.** — Questions of satisfaction usually come before Courts of Equity in three classes of cases: (1) in cases of portions secured by a marriage settlement; (2) in cases of portions given by will and an advancement of the donee afterwards in the life of the testator; (3) in cases of legacies to creditors. It may be convenient as well as proper in our brief survey of this subject to examine the doctrine separately in respect to each of these classes, as the application of it is not, or at least may not be, precisely the same throughout in all of them.[1] The first class may be illustrated by stating the case where a portion or provision is secured to a child by marriage settlement or otherwise, and the parent or person standing in loco parentis[2] afterwards by will gives the same child a legacy without expressly directing it to be in satisfaction of such portion or provision. In such a case if the legacy be of a sum as great as or greater than the portion or provision, if it be ejusdem generis, if it be equally certain with the latter and subject to no contingency not applicable to both, and if it be shown that it is not given for a different purpose, then it will be deemed a complete satisfaction.[3] If the legacy be less in amount than the portion or provision, or if it be

[1] See Hinchcliffe *v.* Hinchcliffe, 3 Ves. 527, where Lord Alvanley intimated that there might be a difference between cases of portions by settlement and cases of legacies by will as to subsequent advancements.

[2] The presumption prevailing against double portions or a double provision is not confined to gifts by a parent or a person in loco parentis, but arises whenever the legacy and gift are both in fulfilment of the same natural or moral obligation of providing for the legatee. In re Pollock, 28 Ch. D. 552 (C. A.).

[3] Bellasis *v.* Uthwatt, 1 Atk. R. 427, Mr. Saunders's note; Chaplin *v.* Chaplin, 3 P. Will. 245, 247; 2 Roper on Legacies, by White, ch. 18, pp. 68 to 108; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*); 2 Madd. Ch. Pr. 33; Weall *v.* Rice, 2 Russ. & Mylne, 267. In this last case Sir John Leach said: "The rule of the court is, as in reason I think it ought to be, that if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is prima facie to be presumed that he does not mean a double provision. But this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions, or by extrinsic evidence. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature the two instruments afford intrinsic evidence in favor of a double provision. But in either case extrinsic evidence is admissible of the real intention of the testator. It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as in the opinion of the judge leave the two provisions substantially of the same nature; and every judge must decide that question for himself." See also Jones *v.* Morgan, 2 Younge & Coll. 403, 412; Wharton *v.* Earl of Durham, 3 Mylne & Keen,

payable at a different period or periods, then, although there is some diversity of opinion upon the subject, the weight of authority is that it may be or will be deemed a satisfaction pro tanto, or in full, according to the circumstances.[1]

§ 1488. **Same.** — We have already had occasion to intimate the doubts which may be justly entertained as to the correctness of the reasoning by which Courts of Equity have been led to these results.[2] As an original question, at least where the assets are sufficient to satisfy the portion as well as the legacy, the natural presumption would be that the testator intended the latter as a bounty in addition to the duty already contracted for; a bounty fit for a parent to bestow, and far more reputable to his sense of moral and religious obligation than a mere dry performance of his positive contract recognized by law and resting on a valuable consideration. But here as well as in many other cases, we must be content to declare "Ita lex scripta est"; it is established, although it may not be entirely approved. Even a small variance in the time of payment, or other trifling differences where the value is substantially the same, will not vary the application of the rule, as the present inclination of Courts of Equity is against raising double portions.[3]

478; Reade *v.* Reade, 9 L. R. Ir. 409, 424, 435. See Bennet *v.* Bennet, 10 Ch. D. 474. A voluntary bond given by way of portion to one to whom the donor stands in loco parentis is satisfied by a subsequent gift or portion of a larger sum. In re Lawes, 20 Ch. D. 81. And this though the subsequent gift is by way of a share of stock in trade, if taken at a specified value. Ib., overruling Holmes *v.* Holmes, 1 Bro. C. C. 555, and criticising Bengough *v.* Walker, 15 Ves. 507.

[1] 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*); 2 Roper on Legacies, by White, ch. 18, §§ 1, 2, pp. 69 to 95. It is sometimes provided in marriage settlements that if any advancement on marriage or otherwise shall be made by a parent *in his lifetime*, such advancement shall be deemed made as a part or the whole of the portion provided for in the settlement, unless the contrary appear in writing. In such cases it has been made a question whether a legacy given by the parent by will amounts to a satisfaction pro tanto, as an advancement or portion in his lifetime. It has been decided that it is. Onslow *v.* Mitchell, 18 Ves. 490, 494; Leake *v.* Leake, 10 Ves. 489, 490; 2 Roper on Legacies, by White, ch. 18, § 3, pp. 95 to 104. And (it seems) in such case it is immaterial whether it be the gift of a particular legacy or of a residue. Ibid. But a share from the parent arising from intestacy would not be deemed a satisfaction. Ibid.; Twisden *v.* Twisden, 9 Ves. 413, 427; In re Pollock, 28 Ch. D. 552; Thynne *v.* Glengall, 2 H. L. Cas. 131. See also Hopwood *v.* Hopwood, 5 Jur. (N. S.) 897; In re Weiss, 39 Misc. Rep. 71, 78 N. Y. Supp. 877.

[2] Ante, § 1100.

[3] Ibid.; Onslow *v.* Mitchell, 18 Ves. 492, 493; Twisden *v.* Twisden, 9 Ves. 427; Sparkes *v.* Cator, 3 Ves. 530, 535; 2 Roper on Legacies, by White, ch. 18, § 2, p. 90. But see Weall *v.* Rice, 2 Russ. & Mylne, 267,

§ 1489. **Same.** — The second class may be illustrated by reference to the case where a parent or other person in loco parentis bequeaths a legacy to a child or grandchild, and afterwards in his lifetime gives a portion or makes a provision for the same child or grandchild without expressing it to be in lieu of the legacy.[1] In such a case, if the portion so received or the provision so made, on marriage or otherwise, be equal to or exceed the amount of the legacy, if it be certain and not merely contingent, if no other distinct object be pointed out, and if it be ejusdem generis, then it will be deemed a satisfaction of the legacy, or, as it is more properly expressed, it will be held an ademption of the legacy.[2]

268; where Sir John Leach intimates that the rule is right. This whole subject is very fully considered in Roper on Legacies, by White, vol. 2, ch. 18, pp. 68 to 108. The doctrine as now held is thus summed up: "Where a parent is under obligation by articles of settlement to provide portions for his children, and he afterwards by will or codicil makes a provision for those children, it is a well-established rule of equity that such subsequent testamentary provision shall be considered a satisfaction or performance of the obligation. We have seen that upon questions of satisfaction of debts by legacies, trifling points of difference between the debts and legacies were adjudged sufficient to repel the presumption of satisfaction. But with respect to the satisfaction of portions the rule of presumption is much more favored; the inclination of the Court of Equity being against raising double portions. If therefore the legacies be less in amount than the portions, or payable at different periods, the legacies will notwithstanding be considered satisfactions, either in full or in part, according to circumstances. But though these circumstances of difference are considered insufficient to rebut the presumption of satisfaction, yet where the legacy is contingent or given with a view to some other purpose, the rule of the court is different, and such legacies are not considered as a satisfaction. The inclination however is so strong against double portions that it has been decided that although no legacy is given by a will, yet if by the intestacy of the parent a distributive share of his personal or any real estate devolves upon the child, of equal or greater value than the portion, it shall be a satisfaction of the portion." Double portions were allowed in Paget *v.* Grinfall, L. R. 6 Eq. 7. Indeed the courts have steadily maintained that it is always a question of intention, and where the limitations of the gift essentially differ from the nature of the covenants of the settlement, there is no satisfaction. Chichester *v.* Coventry, L. R. 2 H. L. 71. As to the question what law should prevail in a case of conflict of laws concerning double portions see Campbell *v.* Campbell, L. R. 1 Eq. 383; In re Pollock, 28 Ch. D. 552.

[1] Two facts must be established to show ademption, the advancement and the intention of the testator that it should be in satisfaction of or a substitute for the bequest. Van Houten *v.* Post, 32 N. J. Eq. 709.

[2] Bellasis *v.* Uthwatt, 1 Atk. 427, Mr. Saunders's note; 1 Roper on Legacies, by White, ch. 6, pp. 318 to 329; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 1, § 1 (*a*); Copley *v.* Copley, 1 P. Will. 146; Ex parte Pye and Ex parte Dubost, 18 Ves. 140; Hinchcliffe *v.* Hinchcliffe, 3 Ves. 526, 527; Sparkes *v.* Cator, 3 Ves. 535, 542; Tolson *v.* Collins, 4 Ves. 490, 491; Wallace *v.* Pomfret, 11 Ves. 305; Warren *v.* Warren, 1 Bro. Ch. R. 305, Mr. Belt's note (1);

Trimmer *v.* Bayne, 7 Ves. 515; Ellison *v.* Cookson, 2 Bro. Ch. R. 308, 309; Pym *v.* Lockyer, 5 Mylne & Craig, 29. Of course the contrary is true where the legacy is not certain but contingent, where it is not ejusdem generis, and where it is stated to be for other objects. 2 Fonbl. Eq. B. 4, Pt. 2, ch. 1, § 1, note (*a*). The question may sometimes arise, who is properly deemed to stand in loco parentis to another. It was held by the Vice-Chancellor (Sir L. Shadwell) that no person can be deemed to stand in loco parentis to a child whose father is living and who resides with and is maintained by the father according to his means. He added it may be very different where the father, though living, does not maintain the child, and the latter does not live with him, but lives with the person assuming to stand in loco parentis. Powys *v.* Mansfield, 6 Sim. R. 528. But upon an appeal to the Lord Chancellor (Lord Cottenham) this decree was reversed. On that occasion his Lordship said: "No doubt the authorities leave in some obscurity the question as to what is to be considered as meant by the expression, universally adopted, of one in loco parentis. Lord Eldon however, in Ex parte Pye, has given to it a definition which I readily adopt, not only because it proceeds from his high authority, but because it seems to me to embrace all that is necessary to work out and carry into effect the object and meaning of the rule. Lord Eldon says it is a person '*meaning* to put himself in loco parentis; in the situation of the person described as the lawful father of the child.' But this definition must, I conceive, be considered as applicable to those parental offices and duties to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connection whatever with making a provision for a child; and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer an intention in such person to assume also the duty of providing for the child. The relative situation of the friend and of the father may make this unnecessary, and the other benefits most essential. Sir William Grant's definition is, 'A person assuming the parental character or discharging parental duties'; which may seem not to differ much from Lord Eldon's definition, namely, the referring to the intention rather than to the act of the party. The Vice-Chancellor says it must be a person who has so acted towards the child as that he has thereby imposed upon himself a moral obligation to provide for it; and that the designation will not hold where the child has a father with whom it resides and by whom it is maintained. This seems to infer that the locus parentis assumed by the stranger must have reference to the pecuniary wants of the child, and that Lord Eldon's definition is to be so understood; and so far I agree with it. But I think the other circumstances required are not necessary to work out the principle of the rule or to effectuate its object. The rule, both as applied to a father and to one in loco parentis, is founded upon the presumed intention. A father is supposed to intend to do what he is in duty bound to do, namely, to provide for his child according to his means. So one who has assumed that part of the office of a father is supposed to intend to do what he has assumed to himself the office of doing. If the assumption of the character be established, the same inference and presumption must follow. The having so acted towards a child as to raise a moral obligation to provide for it affords a strong inference in favor of the fact of the assumption of the character; and the child having a father with whom it resides, and by whom it is maintained, affords some inference against it; but neither is conclusive. If indeed the Vice-Chancellor's definition were to be adopted, it would still be to be considered whether in this case Sir John Barrington had not

subjected himself to a moral obligation to provide for his brother's children, and whether such children can be said to have been maintained by their father. A rich unmarried uncle taking under his protection the family of a brother who has not the means of adequately providing for them, and furnishing, through their father, to the children the means of their maintenance and education, may surely be said to intend to put himself, for the purpose in question, in loco parentis to the children, although they never leave their father's roof. An uncle so taking such a family under his care will have all the feelings, intentions, and objects, as to providing for the children, which would influence him if they were orphans. For the purpose in question, namely, providing for them, the existence of the father can make no difference. If then it shall appear from an examination of the evidence that Sir John Barrington did afford to his brother the means of maintaining, educating, and bringing up his children according to their condition of life, and that the father had no means of his own at all adequate to that purpose; that this assistance was regular and systematic, and not confined to casual presents, the repetition of which could not be relied upon; that he held out to his brother and his family that they were to look to him for their future provision, — it will surely follow, if that were material, that Sir John Barrington had so acted towards the children as to impose upon himself a moral obligation to provide for them, and that the children were in fact maintained by him and not by their father. But it has been said that Sir John Barrington would not have been guilty of any breach of moral duty if he had permitted the property to descend to his brother. Undoubtedly he would not, because that would have been a very rational mode of providing for the children; but if he had reason to suppose that his brother would act so unnaturally as to leave the property away from his children, Sir John Barrington would have been guilty of a breach of moral duty towards the children in leaving the property absolutely to their father. I should therefore feel great difficulty in coming to a conclusion that Sir John Barrington had not placed himself in loco parentis to these children, if I thought everything necessary for that purpose which the Vice-Chancellor has thought to be so. Adopting however as I do the definition of Lord Eldon, I proceed to consider whether Sir John Barrington did mean to put himself in loco parentis to the children so far as related to their future provision. Parol evidence has been offered upon two points: first, to prove the affirmative of this proposition; secondly, to prove by declarations and acts of Sir John Barrington, that he intended the provision made by the settlement should be in substitution of that made by the will. That such evidence is admissible for the first of these purposes appears to me necessarily to flow from the rule of presumption. If the acts of a party standing in loco parentis raise in equity a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is depended, namely, whether, in the language of Lord Eldon, he had *meant* to put himself in loco parentis; and as the fact to be tried is the intention of the party, his declarations as well as his acts must be admissible for that purpose. And if the evidence establish the fact that Sir John Barrington did mean to place himself in loco parentis, it will not be material to consider whether his declarations of intention as to the particular provision in question be admissible per se, because the presumption against the double portions which in that case will arise, being attempted to be rebutted by parol testimony, may be supported by evidence of the same kind." Tanton *v.* Keller, 167 Ill. 129, 47 N. E. 376; Roquet *v.* Eldridge, 118 Ind. 147, 20 N. E. 733; In re Ritter's Est.,

If the portion or provision be less than the amount of the legacy, it will at all events be deemed a satisfaction pro tanto;[1] and if the difference between the amounts be slight, it may be deemed a complete satisfaction or ademption.[2] But if the difference be large and important, there the presumption of an intention of substituting the portion for the legacy will not be allowed to prevail.[3]

10 Pa. Super. Ct. Rep. 352; Gallagher *v.* Martin, 102 Md. 115, 62 Atl. 247.

[1] Pym *v.* Lockyer, 5 Mylne & Craig, 29; Kirk *v.* Eddowes, 3 Hare, 509. But small amounts given from time to time will not be so considered. Watson *v.* Watson, 33 Beav. 574; In re Peacock, L. R. 14 Eq. 236; Leighton *v.* Leighton, L. R. 18 Eq. 459.

[2] Suisse *v.* Lord Lowther, The (English) Jurist, April 1, 1843; s. c. 2 Hare, R. 424, 432, 438; 5 Mylne & Craig, 29. In this last case Lord Cottenham said: "All the decisions upon questions of double portions depend upon the declared or presumed intention of the donor. The presumption of equity is against double portions, because it is not thought probable when the object appears to be to make a provision, and that object has been effected by one instrument, that the repetition of it in a second should be intended as an addition to the first. The second provision therefore is presumed to be intended as a substitution for and not as an addition to that first given; but when the gift is a mere bounty, there is no ground for raising any presumption of intention as to its amount, although such amount be comprised in two or more gifts. The first question to be asked is, whether the sums given are to be considered as portions or as mere gifts; and upon this subject certain rules have been laid down, all intended to ascertain and to work out the intention of the giver. In the case of a parent a legacy to a child is presumed to be intended to be a portion, because providing for the child is a duty which the relative situation of the parties imposes upon the parent; but that duty which is imposed upon a parent may be assumed by another, who for any reason thinks proper to place himself in that respect in the place of a parent, and when that is so, the same presumption arises against his intending a first gift to take effect as well as a second, because both in such cases are considered to be portions. Whether the donor had for this purpose assumed the office of a parent, so as to invest his gift with the character of a portion, may be proved by extrinsic evidence, such as the general conduct of the donor towards the children, or by intrinsic evidence, from the nature and terms of the gift. If the former be alone relied upon, it may prevail, although it should appear that the donor did not assume all the duties of a parent, or effectually perform those which he had undertaken; the question being merely whether the facts proved fairly lead to the conclusion that he intended to provide a portion for the child and not merely to bestow a gift. Upon this point Powys *v.* Mansfield, founded upon Carver *v.* Bowles, 2 Russ. & Mylne, 301, and many other cases, is conclusive. Such evidence of general conduct towards the child is of far less importance than that which relates to the pecuniary provision for it, whether that be found in the instruments containing the gifts or in extrinsic circumstances; and as part of such extrinsic circumstances the general conduct of the donor towards the family, and particularly towards the other children of it, may very properly be included in the consideration of his object and intentions."

[3] See 1 Roper on Legacies, by White, ch. 6, § 1, p. 324; Shudal *v.* Jekyll,

§ 1490. **Same.** — The ground of this doctrine seems to be that every such legacy is to be presumed as intended by the testator to be a portion for the child or grandchild, whether called so or not; and that afterwards, if he advances the same sum upon the child's marriage, or any other occasion, he does it to accomplish his original object, as a portion, and that under such circumstances it ought to be deemed an intended satisfaction or ademption of the legacy rather than an intended double portion. And where the sum advanced is less than the legacy, still it may fairly be presumed that the testator, having acted merely in the discharge of a moral obligation, may, from a change of his own views

2 Atk. 516, 519; Debeze *v.* Mann, 2 Bro. Ch. R. 164; s. c. 1 Cox, R. 346; Trimmer *v.* Bayne, 7 Ves. 515 to 518; Ex parte Pye, 18 Ves. 140, 152 to 154; Powys *v.* Mansfield, 6 Sim. 328; Weall *v.* Rice, 2 Russ. & Mylne, 251, 267, 268; Jones *v.* Morgan, 2 Younge & Coll. 403, 412. In this case Lord Abinger said he knew of no distinction as to this point, whether the portion was by a will or by a deed. In Wharton *v.* Earl of Durham, 3 Mylne & Keen, 479, Lord Brougham said: "It is equally certain, and flows equally from the same principles, that we are not to weigh in golden scales the provisions made, and to determine against ademption merely because the two differ in amount or even in kind. A difference of amount has never been held sufficient proof of accumulation; and it has been distinctly held that the circumstance of the sums being payable at different times, and other indifferences, so they be slight, say the books, will not countervail the general presumption of an intention to adeem. The cases of Ex parte Pye and Ex parte Dubost before Lord Eldon, Hartopp *v.* Hartopp before Sir William Grant, and the discussion of the question raised on Sir Joseph Jekyll's will in favor of his niece, sufficiently illustrate this proposition. Nevertheless no case has gone so far as to show that a difference such as the one in this case will have no effect upon the application of the principle; a difference no less than this, that the one portion would have gone to the issue of any marriage contracted by the child, while the other was confined to the offspring of a single bed. On the contrary the cases, especially Roome *v.* Roome, Baugh *v.* Read, and Spinks *v.* Robins, show that differences not greater than this, perhaps less considerable, will suffice to exclude ademption. And one of those cases (Baugh *v.* Read), though ill reported, shows the impossibility of extending the principle of ademption to a legacy where the provision subsequently made was expressed to be in satisfaction of a different claim. The child was entitled to £1,800 under her grandfather's will, and her father had left her a legacy of £8,000. By her settlement the husband covenanted to release the claim to her legacy of £1,800, in consideration of £5,000 portion given by the father, which was expressed to be in satisfaction of the grandfather's legacy. It is to be observed that the question raised there was not whether this should operate as a total ademption of the £8,000 legacy given by the father's will, but only pro tanto. However the court held it not even to be pro tanto an ademption; and yet after satisfying the £1,800 of the grandfather's will there remained upwards of £3,000 over to go in ademption of the father's legacy." But this decision was reversed on appeal to the House of Lords. 3 Clark & F. 146; 10 Bligh (N. S.), 526.

or of his own circumstances, be satisfied that the portion ought to be less.[1]

§ 1491. **Same.** — Now to say the least of it, this is extremely artificial reasoning, and such as an ingenuous mind may find it extremely difficult to follow. Lord Eldon has so characterized it. After admitting it to be the unquestionable doctrine of the court that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving it as a portion, he has strongly remarked: "And by a sort of artificial rule, in the application of which legitimate children have been very harshly treated upon an artificial notion that the father is paying a debt of nature, and a sort of feeling

[1] Pym *v.* Lockyer, 5 Mylne & Craig, R. 20, 34, 35. The reasoning of Mr. Vice-Chancellor Wigram, in Suisse *v.* Lowther, 2 Hare, R. 424, 434, 435, upon the same point is important. He there said: "The language of the court in those cases is that it 'leans against double portions', — a rule which, though sometimes called technical, Lord Cottenham, in Pym *v.* Lockyer (5 Mylne & Craig, 34, 46), said was founded on good sense, and could not be disregarded without disappointing the intentions of donors. But although the presumption is that a parent does not give a child a double portion, it does not follow that every sum of money which a parent may give, even to a child, is intended as a portion. The court has never added up small sums in order to show that if the child claims those sums, as well as the larger provision made for him by the parent, he would be taking a double portion. The question whether the sums given are to be taken as part of the child's portion or not has often arisen; and if the word 'portion' or 'provision' or any similar word is used in the second gift, the court has said the use of that term shows that the sum was given as a provision or 'portion' for the child; and then it is sometimes regarded as a second portion, against which the court presumes. According to Lord Cottenham's decision in Pym *v.* Lockyer (for the first time deciding that point), it is taken to be a satisfaction pro tanto. The older cases rather incline to the proposition that if it were a portion, though less than the portion given by any former instrument, it was to be taken as satisfaction in toto. The reasoning however is that the use of the word 'portion', or 'provision', or any similar word, shows that the testator meant to repeat his former gift, and then the rule applies. In the case of persons not being parent and child, but assumed to stand in loco parentis, the word 'portion' or 'provision' has been used for a different purpose. It has been used in order to show that the party intended to place himself in that situation, and to establish a quasi parental character; and when that was done, the rule as to double portions has been applied. But if there is a simple gift, and the donor has not acted towards the donee in a way to show that he has assumed a particular character, — a quasi parental situation, — in that case it is nothing more than mere bounty to a stranger. I am not aware of any technical sense of the word 'provision' upon which stress has been laid, except in the cases to which I have adverted. No question can arise on the effect of a gift in the nature of a portion in any such sense as these bequests of the Marquis to Suisse. In the doctrine with regard to double portions, some principles have however been laid down which bear very strongly upon the case before me. The

upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part. And in some cases it has gone a length consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and although at the time of making the will he thought he could not discharge that debt with less than £10,000, yet by a change of his circumstances and of his sentiments upon moral obligation, it may be satisfied by the advance of a portion of £5,000." [1] In addition to this strong language,

rule of presumption, as I before said, is against double portions as between parent and child, and the reason is this: a parent makes a certain provision for his children by his will if they attain twenty-one, or marry, or require to be settled in life; he afterwards makes an advancement to a particular child. Looking at the ordinary dealings of mankind, the court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion, as the result of general experience, the court acts upon it, and gives effect to the presumption that a double portion was not intended. If on the other hand there is no such relation, either natural or artificial, the gift proceeds from the mere bounty of the testator, and there is no reason within the knowledge of the court for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument and precisely the same sum by another; there is no reason why the court should assign any limit to that bounty, which is wholly arbitrary. The court as between strangers treats several gifts as prima facie cumulative. The consequence is, as Lord Eldon observed (18 Ves. 147), that a natural child who is in law a stranger to the father stands in a better situation than a legitimate child, for the advancement in the case of the natural child is not prima facie an ademption." Brady *v.* Brady, 78 Md. 461, 28 Atl. 515. Where there are successive irrevocable appointments in favor of the same person, they will be held prima facie substitutional, and election may be enforced. England *v.* Lavers, L. R. 3 Eq. 63. But where the provisions are part of the same scheme of the donor, and intended to be substitutionary, it makes no case of election that one of the provisions fails through defect of power. Thus where the testator appointed property to his daughters equally, who were objects of the power, and then disposed of all his residuary estate to the same daughters in the same way, and directed that the share to which each daughter should become entitled under his will and the appointment should be held in trust for the daughters for life, with remainder to their children, who were not objects of the power, it was held that the daughters took absolute interests under the appointment, and that no case of election against their children was presented. Churchill *v.* Churchill, L. R. 5 Eq. 44.

[1] Ex parte Pye, and Ex parte Dubost, 18 Ves. 151. It is not a little remarkable that the Lord Chancellor, in Hartop *v.* Whitmore (1 P. Will.

it may be added that Courts of Equity make out this sort of doctrine, not upon any clear intention of the testator anywhere expressed by him; but they first create the intention, and then make the parent suggest all the morals and equities of the case upon their own artificial modes of reasoning, of which it is not too much to say that scarcely any testator could ever have dreamed.[1]

682), should have said: "If a father gives a daughter a portion by his will, and afterwards gives to the same daughter a portion in marriage, this, by the laws of all other nations as well as of Great Britain, is a revocation of the portion given by the will; for it will not be intended, unless proved that the father designed two portions to one child." We should be glad to know where the learned chancellor found such a rule recognized by all nations. See also Weall *v.* Rice, 2 Russ. & Mylne, 251, 267.

[1] Lord Thurlow, in Grave *v.* Salisbury (1 Bro. Ch. R. 425, 426), spoke in express disapprobation of the doctrine. "The court," said he, "has however certainly presumed against double portions; and although it has encouraged that conjecture with a degree of sharpness I cannot quite reconcile myself to, whenever an express provision is made directly or as a portion by a parent or person in loco parentis, I will not displace the rule laid down by wiser men, that it shall be a satisfaction, however reluctant I may be to follow it." On the other hand, Sir John Leach, in Weall *v.* Rice, 2 Russ. & Mylne, R. 251, 267, thought the rule right; Lord Brougham, in Wharton *v.* The Earl of Durham, 3 Mylne & Keen, 478, expressed a similar opinion. He said: "That the presumption of law is against double portions no one questions any more than that the rule is founded on good sense. For the parent being only bound by a duty of imperfect obligation to make provision for the child, and being the sole judge what that provision shall be, must, generally speaking, be supposed, when he makes a second arrangement by settlement or otherwise, to put it in the stead of a former one made by will, and not to do that twice over which no law could compel him to do once. Nevertheless, as has oftentimes happened with legal principles, there has been a tendency to push the presumption once established beyond the bounds which the principle it was founded upon would reasonably warrant; and because the doctrine was sound, that a second provision should be taken as substitutionary for a former one, it seems to have been almost concluded that it never could be accumulative. At least, the leaning of the courts has frequently gone so far as to make violent presumptions against the conclusions to be plainly drawn from facts indicating an intention which excluded the general supposition of ademption; and observations have been more than once made in this place, indicating the opinion of the court that the principle had been pressed quite far enough, and ought to receive no more extension. The rule then, as it now stands, must be taken to be this: the second provision will be held to adeem the first, — say the marriage portion to adeem the legacy, — unless from the circumstances of the case an intention appears that the child or other person towards whom the testator has placed himself in loco parentis shall take both; and there is to be no leaning, still less any straining, against inferring such an intention from circumstances any more in this than in any other case." The case of Wharton *v.* the Earl of Durham was reversed in the House of Lords. 10 Bligh, R. 526. But it left the general principle untouched. See also Pym *v.* Lockyer, 5 Mylne and Craig, R. 24, 34, 35, and Suisse *v.* Lord Lowther, 2 Hare, R. 424, 434, 435.

§ 1492. **Same.** — It has been supposed that the origin of this particular doctrine is to be found in the civil law, and that it was transferred from hence into the Equity Jurisprudence of England.[1] But Lord Thurlow has expressed a doubt whether the doctrine of the civil law proceeds so far, and whether it is there taken up on the idea of a debt, or is not rather considered as a presumption repellable by evidence.[2] The language attributed to his Lordship on this occasion seems not exactly to express his true meaning, for in the Equity Jurisprudence of England the presumption may be rebutted by evidence.[3] His meaning probably was that the matter was a mere matter of presumption arising from the whole circumstances of the will; and that there was no such rule in the civil law as that in English Jurisprudence, namely, that prima facie such a portion subsequently given was an ademption of the legacy. No one can doubt that in many cases such a presumption may arise from the circumstances; as for example in a case put in the civil law. A father by his will devised certain lands to his daughter, and afterwards gave the same lands to her as a marriage portion. It was held to be an ademption of the devise. "Filia legatorum non habet actionem, si ea quæ ei in testamento reliquit, vivus pater postea in dotem dederit."[4] So it was held in the same law to be a revocation of the legacy of a debt if it was afterwards collected of the debtor by the testator in his lifetime. The like rule was applied where after the devise of specific property the testator alienated in his lifetime.[5] "Testator supervivens, si eam rem quam reliquerat vendiderit, extinguitur fideicommissum."[6] These cases are so obvious as necessary and intentional ademptions of the legacies, that they require no artificial rules of interpretation to expound the intent. And yet the civil law was so far from favoring ademptions that even in these cases it admitted proof that the testator did not intend to adeem the legacy; the rule being, "Si rem suam legaverit testator, posteaque eam alienaverit; si non adimendi animo vendidit, nihilominus deberi."[7] And again: "Si rem suam testator legaverit eamque necessitate

[1] See ante, § 1486. [2] Grave *v.* Salisbury, 1 Bro. Ch. R. 427.

[3] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 1, note (*a*); Debeze *v.* Mann, 2 Bro. Ch. R. 165, 519; s. c. 1 Cox, R. 346; Shudal *v.* Jekyll, 2 Atk. 512; Trimmer *v.* Bayne, 7 Ves. 515 to 518; 1 Roper on Legacies, by White, ch. 6, § 2, pp. 338 to 353; Ellison *v.* Cookson, 2 Bro. Ch. R. 252, 307; s. c. 3 Bro. Ch. R. 60; 1 Ves. Jr. 100; 2 Cox, R. 220; Guy *v.* Sharpe, 1 Mylne & Keen, 589.

[4] Cod. Lib. 6, tit. 37, l. 11; 2 Domat, B. 4, tit. 2, § 11, art. 11.

[5] Domat, B. 4, tit. 2, § 11, art. 12 to 14, 22.

[6] Id. § 11, art. 13, note; Pothier, Pand. Lib. 34, tit. 4, n. 8, 9.

[7] Inst. Lib. 2, tit. 20, § 12; Id. §§ 10, 11.

urgente alienaverit, fideicommissum peti posse, nisi probetur adimere ei testatorem voluisse. Probationem autem mutatæ voluntatis ab hæredibus exigendam." [1] These cases are sufficient to show how widely variant the doctrine on this subject is in the civil law from that which now prevails in equity.[2]

§ 1493. **Exceptions to the Rule as to Ademption of Legacies.** — There are however in Equity Jurisprudence certain established exceptions to this doctrine of constructive satisfaction or ademption of legacies which deserve particular notice. In the first place it does not apply to the case of a devisee of a mere residue, for it has been said that a residue is always changing. It may amount to something or be nothing; and therefore no fair presumption can arise of its being an intended satisfaction or ademption.[3]

[1] Dig. Lib. 32, tit. 3, l. 11, § 12; Pothier, Pand. Lib. 34, tit. 4, n. 8.

[2] See Pothier, Pand. Lib. 34, tit. 4, n. 8 to 10. Many cases like these have been adjudged precisely in the same way in Equity Jurisprudence as they were in the civil law. Thus an alienation by the testator in his lifetime of the subject-matter of a legacy of the same thing. Hambling *v.* Lister, Ambler, R. 402. So the receipt or recovery of a debt due by the legatee, which had been bequeathed to him, is an ademption of a legacy of the same debt. Rider *v.* Wager, 2 P. Will. 330; 2 Madd. Ch. Pr. 74 to 78; 1 Roper on Legacies, by White, ch. 5, § 1, pp. 286 to 313.

[3] Allen *v.* Allen, 13 S. C. 512, 36 Am. Rep. 716; Van Houten *v.* Post, 32 N. J. Eq. 709; Watson *v.* The Earl of Lincoln, Ambler, R. 327; Farnham *v.* Phillips, 2 Atk. 216; Smith *v.* Strong, 4 Bro. Ch. R. 493; Freemantle *v.* Bankes, 5 Ves. 79. It was said by Lord Hardwicke, in Farnham *v.* Phillips (2 Atk. 216), that there is no case where the devise has been of a residue (for that is uncertain, and at the time of the testator's death may be more or less), in which a subsequent portion given has been held to be an ademption of a legacy. This seems now accordingly to be the established construction. Smith *v.* Strong, 4 Bro. Ch. R. 493; Watson *v.* Earl of Lincoln, Ambler, R. 325, and Mr. Blunt's notes (1) to (5); Freemantle *v.* Bankes, 5 Ves. 79; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 1, § 1, note (*a*). Is there in this respect any difference between the gift of a residue as an ademption of a legacy, and the gift of a residue as an advancement or satisfaction, pro tanto, of a portion secured by a marriage settlement? In Devese *v.* Pontet, 1 Cox, R. 188, s. c. Prec. in Ch. by Finch, 240, note, it was held that bequest of a residue was not any satisfaction of a pecuniary marriage portion, even though there was in the same will a bequest of specific personal property to the party exceeding the stipulated portion. See also Bengough *v.* Walker, 15 Ves. 513, 514; 1 Roper on Legacies, by White, ch. 6, § 1, p. 226; Ackworth *v.* Ackworth, 1 Bro. Ch. 307, note. How would it be in the case of a settlement stipulating for a portion, and that if any advancement should be made in the lifetime of the parent it should be a part satisfaction, unless expressly declared in writing to the contrary, and then a legacy of a residue to the party entitled to such a portion? Would it be a satisfaction or not? See 2 Roper on Legacies, by White, ch. 18, § 3, p. 95, &c.; ante, § 1110, and note 2. In the case of a portion secured by settlement a distributive share in a case of intestacy

§ 1494. **Same.** — Another exception to this doctrine of constructive ademption of legacies may be gathered from the qualification already annexed to the enunciation of it in the preceding pages. It is there limited to the case of a parent or of a person standing in loco parentis. In relation to parents it is applicable only to legitimate children; and in relation to persons standing in loco parentis it is also applicable generally to legitimate children only, unless the party has voluntarily placed himself in loco parentis to a legatee not standing either naturally or judicially in that predicament. All other persons are, in contemplation of law, treated as strangers to the testator.[1]

§ 1495. **The Doctrine of Constructive Ademption Does Not Apply to Strangers.** — But this doctrine of the constructive ademption of legacies has never been applied to legacies to mere strangers,[2] unless under very peculiar circumstances, such as where the legacy is given for a particular purpose and the portion is afterwards, in the lifetime of the party, given exactly for the same purpose and for none other.[3] Except in cases standing upon such peculiar circumstances, and which therefore seem to present a very cogent presumption of an intentional ademption, the rule prevails that a legacy to a stranger, legitimate or illegitimate, is not adeemed by a subsequent portion or advancement in the lifetime of the testator without some expression of such intent manifested in the

to the full amount of the portion will be deemed a satisfaction. Ante, § 1110, and note; Moulson *v.* Moulson, 1 Bro. Ch. R. 82; 2 Roper on legacies, by White, ch. 18, § 4, pp. 105 to 108. But it will not be deemed a satisfaction of a clause in a marriage settlement respecting an advancement in the *lifetime* of the settler. Ante, § 1487, and note; 2 Roper on Legacies, by White, ch. 18, § 4, pp. 105 to 108; Garthshore *v.* Chalie, 10 Ves. 15. But see Thynne *v.* Glengall, 2 H. L. Cas. 131, where this distinction is overturned. And see Dawson *v.* Dawson, L. R. 4 Eq. 504; Montefiore *v.* Guedalla, 6 Jur. (N. S.) 329. These cases show that a gift of the residue, like any other bequest, is adeemed or not by subsequent portions, according to the intention to be derived; and that the question does not turn upon the mere uncertainty of the amount of the residue. But see Graham *v.* Roseburgh, 47 Mo. 111. See also Sims *v.* Sims, 2 Stockt. 158.

[1] See ante, § 1489, and Powys *v.* Mansfield, 6 Sim. 528; s. c. 3 Mylne & Craig, R. 359; Pym *v.* Lockyer, 5 Mylne & Craig, 29, 34, 35, 46; Suisse *v.* Lowther, 2 Hare, R. 424, 434, 435; ante, § 1491; Swarts *v.* Swarts, 98 Ind. 511.

[2] 1 Roper on Legacies, by White, ch. 6, § 2, p. 329; Pym *v.* Lockyer, 5 Mylne & Craig, 24, 34, 35, 46; Suisse *v.* Lowther, 2 Hare, R. 424, 434, 435. See the remarks of Mr. Vice-Chancellor Wigram, cited ante, § 1490, note.

[3] Debeze *v.* Mann, 2 Bro. Ch. R. 165, 519, 521; s. c. 1 Cox, 346; Monck *v.* Lord Monck, 1 B. & Beatt. 303; Rosewell *v.* Bennett, 3 Atk. 77; Roome *v.* Roome, 3 Atk. 181. See Parkhurst *v.* Howell, L. R. 6 Ch. 136.

instrument or by some writing accompanying the portion or advancement.[1]

§ 1496. **Same.** — The reason commonly assigned for this doctrine is, that as there is no such obligation upon such a testator to provide for the legatee as subsists between a parent and child, no inference can arise that the testator intended by the subsequent gift or advancement to perform any such duty in præsenti instead of performing it at his death; and there is no reason why a person may not be entitled to as many gifts as another may choose to bestow upon him.[2] That this reasoning is extremely unsatisfactory as well as artificial may be unhesitatingly pronounced. It leads to this extraordinary conclusion: that a testator in intendment of law means to be more bountiful to strangers than to his own children; that by a legacy to his children he means not to gratify his feelings or affections, but merely to perform his duty; but that by a legacy to strangers he means to gratify his feelings, affections, or caprices, without the slightest reference to his duty. What makes the doctrine still more difficult to be supported upon any general reasoning is, that grandchildren, brothers, sisters, uncles, aunts, nephews and nieces, as well as natural children, are deemed strangers to the testator in the sense of the rule (unless he has placed himself towards them in loco parentis); and that they are in a better condition not only than legitimate children, but even than they would be if the testator formerly acted in loco parentis.[3] Considerations and consequences like these may well induce us to pause upon the original propriety of the doctrine. It is however so generally established that it cannot be shaken but by overthrowing a mass of authority which no judge would feel himself at liberty to disregard.[4]

§ 1497. **Gift to a Creditor as a Satisfaction of the Debt.** — The third and last class of cases to which we have alluded as connected

[1] Roper on Legacies, by White, ch. 6, § 2, pp. 331 to 336; Shudal *v.* Jekyll, 2 Atk. 516; Powell *v.* Cleaver, 2 Bro. Ch. R. 500; Ex parte Dubost, 18 Ves. 152, 153; Whetherby *v.* Dixon, Cooper, Eq. R. 279; Grave *v.* Lord Salisbury, 1 Bro. Ch. R. 425; 18 Ves. 152; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 1, note (*a*).

[2] Roper on Legacies, by White, ch. 6, § 2, pp. 331, 333; Pym *v.* Lockyer, 5 Mylne & Craig, 29, 34, 35; Suisse *v.* Lowther, 2 Hare, R. 424, 434, 435.

[3] Ex parte Dubost, 18 Ves. 152, 153. See also Powys *v.* Mansfield, 6 Sim. R. 528; s. c. 3 Mylne & Craig, R. 359.

[4] Questions of another nature often arise as to what constitutes an advancement of a child, within the meaning of that term in the Statute of Distributions (22d and 23d Charles II. ch. 10). The principal cases on the subject will be found collected in 1 Madd. Ch. Pr. 507, 516.

with the doctrine of satisfaction is where a legacy is given to a creditor. And here the general rule is, that where the legacy is equal to or greater in amount than an existing debt, where it is of the same nature, where it is certain and not contingent, and where no particular motive is assigned for the gift, — in all such cases the legacy is deemed a satisfaction of the debt.[1] The ground of this doctrine is that a testator shall be presumed to be just before he is kind or generous. And therefore, although a legacy is generally to be taken as a gift, yet when it is to a creditor it ought to be deemed to be an act of justice and not of bounty, in the absence of all countervailing circumstances, according to the maxim of the civil law, "Debitor non præsumitur donare."[2]

§ 1498. **Same.** — Some of the observations which have been already made apply, although with diminished force, to this class of cases. For where a man has assets sufficient both for justice and generosity, and where the language of the instrument imports a donation and not a payment, it seems difficult to say why the ordinary meaning of the words should not prevail.[3] Where the sum is precisely the same with the debt, it may be admitted that there arises some presumption, and under many circumstances it may be a cogent presumption, of an intention to pay the debt. But where the legacy is greater than the debt, the same force of presumption certainly does not exist; and if it is less than the debt, then (as we shall presently see) the presumption is admitted to be gone.

§ 1499. **Same.** — It is highly probable that this doctrine was derived from the civil law, where it is clearly laid down, but with limitations and qualifications in some respects different from those which are recognized in Equity Jurisprudence.[4] Where the debt was absolutely due, and for the same precise sum, a legacy to the same amount was deemed a satisfaction of it. But if there was a difference even in the time of payment between the debt and the legacy, the latter was not a satisfaction. "Sin autem, neque modo, neque tempore, neque conditione, neque loco, debitum differatur, inutile est legatum."[5] And so if the legacy was more

[1] 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*); Talbott *v.* Duke of Shrewsbury, Prec. Ch. 394; Jeffs *v.* Wood, 2 P. Will. 131, 132.

[2] Ibid.; Rawlins *v.* Powell, 1 P. Will. 229. See the distinction between cases of debts paid in full before and after the will. 3 Hare, R. 281, 298.

[3] See Chancey's Case, 1 P. Will. 410, and Mr. Cox's note (1); Fowler *v.* Fowler, 3 P. Will. 354; Parker *v.* Coburn, 10 Allen, 82.

[4] Pothier, Pand. Lib. 34, tit. 3, n. 30 to 34.

[5] Pothier, Pand. Lib. 34, tit. 3, n. 31; Dig. Lib. 30 (Lib. prim. de Leg.), tit. 1, l. 29; Inst. Lib. 2, tit. 20, § 14.

than the debt, it seems that it was not a satisfaction. "Quotiens debitor creditori suo legaret, ita inutile esse legatum, si nihil interesset creditoris ex testamento potius agere quam ex pristina obligatione." [1]

§ 1500. **The Doctrine Does Not Apply Where the Legacy Is of Less Amount than the Debt.** — But although the rule as to a legacy being an ademption of a debt is now well established in equity, yet it is deemed to have so little of a solid foundation either in general reasoning or as a just interpretation of the intention of the testator, that slight circumstances have been laid hold of to escape from it and to create exceptions to it.[2] The rule therefore is not allowed to prevail where the legacy is of less amount than the debt, even as a satisfaction pro tanto; nor where there is a difference in the times of payment of the debt and of the legacy; nor where they are of a different nature as to the subject-matter or as to the interest therein; [3] nor where a particular motive is assigned for the gift; nor where the debt is contracted subsequently to the will; nor where the legacy is contingent or uncertain; [4] nor where there is an express direction in the will for the payment of debts; [5] nor where the bequest is of a residue; [6] nor where the debt is a negotiable security; [7] nor where the debt is upon an open and running account.[8] And as to a debt strictly so called, there is no difference whether it is a debt due to a stranger or to a child.[9]

§ 1501. **Status of a Legacy Given by a Creditor to His Debtor.** —On the other hand where a creditor leaves a legacy to his debtor

[1] Pothier, Pand. Lib. 34, tit. 3, n. 33.

[2] See Goodfellow *v.* Burchett, 2 Vern. 298, and Mr. Raithby's note; Chancey's Case, 1 P. Will. 410, Mr. Cox's note (1); Nichols *v.* Judkin, 2 Atk. 301; Richardson *v.* Greese, 3 Atk. 68; 2 Roper on Legacies, by White, ch. 17, pp. 28 to 67; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*); Bell *v.* Coleman, 5 Madd. R. 22. See Smith *v.* Smith, 1 Allen, 129; Van Riper *v.* Van Riper, 1 Green's Ch. 1; Gilliam *v.* Brown, 43 Miss. 641.

[3] Cloud *v.* Clinkenbeard, 8 B. Mon. 397.

[4] Dey *v.* Williams, 2 Dev. & B. Eq. 66.

[5] Strong *v.* Williams, 12 Mass. 391.

[6] Barrett *v.* Beckford, 1 Ves. 519; Devese *v.* Pontent, 1 Cox, 188; s. c. Prec. Ch. by Finch. 240, note; Graham *v.* Roseburgh, 47 Mo. 111.

[7] Carr *v.* Eastbrooke, 3 Ves. 564.

[8] Rawlins *v.* Powell, 1 P. Will. 229. Nor where the legacy is given to the creditor's wife. Hall *v.* Hill, 1 Dru. & War. 94; Mulheran *v.* Gillespie, 12 Wend. 349.

[9] Tolson *v.* Collins, 4 Ves. 483. The principal cases on this subject will be found collected in 2 Roper on Legacies, by White, ch. 17, pp. 28 to 67; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 5, note (*l*); Goodfellow *v.* Burchett, 2 Vern. 298, Mr. Raithby's note; Chancey's Case, 1 P. Will. 410, Mr. Cox's note; 2 Madd. Ch. Pr. 33 to 49; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 114 to 116.

and either takes no notice of the debt or leaves his intention doubtful, Courts of Equity will not deem the legacy as either necessarily or prima facie evidence of an intention to release or extinguish the debt; but they will require some evidence, either on the face of the will or aliunde, to establish such an intention.[1]

§ 1502. **The Doctrine of Cumulation of Legacies Defined.** — Closely allied to the subject of election and satisfaction in cases of legacies is the doctrine as to what is called the cumulation of legacies, or when and under what circumstances legacies given by different instruments or wills are to be deemed cumulative or not. The general rule here is, that where legacies are given by different instruments the presumption is prima facie that two legacies are intended, and that the last is not a mere repetition of the former; nor will the fact that each legacy is for the same amount in money operate to repel the presumption that they are cumulative, unless indeed there are other circumstances to repel it.[2] As for example if the testator connects a motive with both, and that motive is the same, the double coincidence will induce the court to believe that repetition and not accumulation is intended. A fortiori where each instrument gives precisely the same thing, as a horse, or a coach, or a particular diamond ring; or the language shows by express declaration or natural implication that the testator intends a mere repetition, the presumption of accumulation is completely repelled.[3]

[1] 2 Roper on Legacies, by White, ch. 17, p. 28; Id. § 4, pp. 61 to 66.

[2] See England *v.* Lavers, L. R. 3 Eq. 63; Wilson *v.* O'Leary, L. R. 7 Ch. 448.

[3] Hooley *v.* Hatton, 2 Bro. Ch. R. 390, note; Heming *v.* Clutterbuck, 1 Bligh (N. S.), 479; Hunt *v.* Beach, 5 Madd. R. 358; Suisse *v.* Lowther, 2 Hare, R. 432. In this last case Mr. Vice-Chancellor Wigram said: "On questions of repetition or accumulation most of the judges have referred, as Lord Eldon did in the case of Hemming *v.* Gurrey (2 Sim. & Stu. 311; 1 Bligh (N. S.), 479; S. C. nom. Heming *v.* Clutterbuck), to the judgment in Hooley *v.* Hatton (1 Bro. C. C. 390, n.), as containing a sound exposition of the law upon the subject; and in the case of Hurst *v.* Beach (5 Madd. 358), Sir John Leach drew his conclusion from the cases with great precision, and as it appears to me with great accuracy. He stated the rule to be that where legacies are given by different instruments, the presumption is prima facie that two legacies are intended. But inasmuch as if a testator were by one instrument to give a particular ring, or horse, or specific chattel, and were by another instrument to give precisely the same thing, it would follow that the second must be a repetition, so if the bounty given by one instrument be in terms a repetition of that which has gone before, the court has presumed that the second was intended to be repetition and not accumulation. It is clearly decided however that the mere fact that the amount is the same is not such an identification of the second with the first as would prevent both from taking effect as cumulative;

but if in addition to the amounts being the same the testator connects a motive with both, and the express motive is also the same, the double coincidence induces the court to believe that repetition and not accumulation was intended. Except in such cases, and the class of cases to which I am about to advert, the court does not infer that repetition was the object unless it be so declared, or it is to be collected from the words of the will itself. The presumption in the case of several gifts by different instruments being in favor of accumulation, it is clear that the claim of the plaintiff in this case must be strengthened by any circumstances of difference between the two gifts, — whether it be found in the amount, in the character in which it is given, in the mode of employment, in the extent of the interest, or in the motive for the bounty. All these considerations tend, in the judgment of the court, to support the argument in favor of accumulation. Now in the legacy to Suisse by the last codicil there is a particular description of Suisse, which imports a motive of a later date than the former legacies; he is described as 'an excellent man', — and the amount being different and less beneficial to Suisse than the amount of the previous gifts to him, this adds to the presumption already in his favor that a distinct gift was intended; and the only question therefore is, whether there is anything in the word 'provide', as used in the last codicil, which should lead the court to the construction that the legacy is not cumulative."

CHAPTER XXXIV

EXPRESS TRUSTS. — APPLICATION OF PURCHASE-MONEY

§ 1503. **Application of Purchase-money.** — It is in cases of trusts under wills also that questions often arise as to the payment of purchase-money to the trustees, and as to the cases in which the purchaser is bound to look to the due application of purchase-money. This subject therefore, although it may equally apply to other cases of trusts created inter vivos, may be conveniently treated of in this place. It has been remarked by a very learned writer that Courts of Equity have in part remedied the mischiefs (if they can be deemed mischiefs) arising from the admission of trusts with respect to the cestui que trust or beneficiary, by making persons paying money to the trustee, with notice of the trust, answerable in some cases for the proper application of it to the purposes of the trust. But at the same time he thinks it questionable whether the admission of the doctrine is not in general productive of more inconvenience than real good; for although in many instances it is of great service to the cestui que trust, as it preserves his property from peculation and other disasters to which, if it were left to the mere discretion of the trustee, it would necessarily be subject, yet on the other hand it creates great embarrassments to purchasers in many cases, and especially where, as in cases of infancy, the parties in interest are incapable of giving a valid assent to the receipt and application of the purchase-money by the trustee.[1]

[1] Mr. Butler's note to Co. Litt. 290 *b*, note (1), § 12; in Balfour *v.* Welland, 16 Ves. 156, Sir William Grant expressed his dissatisfaction with the doctrine in the following terms: "The objection is, that if they misemploy the price the purchaser may be called upon to pay the money over again; in other words that the purchaser is bound to see to the application of the purchase-money. I think the doctrine upon that point has been carried farther than any sound equitable principle will warrant. Where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice. But where the sale is made

§ 1504. **Same.** — The doctrine is not universally true that a purchaser having notice of a trust is bound to see that the trust is in all cases properly executed by the trustee.[1] As applied to the cases of sales, authorized to be made by trustees for particular purposes (which is the subject of our present inquiries), the doctrine is not absolute that the purchaser is bound to see that the money raised by the sale is applied to the very purposes indicated by the trust. On the contrary there are many qualifications and limitations of the doctrine in its actual application to sales both of personal and of real estate.

§ 1505. **Same.** — The best method of ascertaining the true nature and extent of these qualifications and limitations will be by a separate consideration of them as applied to each kind of estate, since the rules which govern them are in some respects dissimilar, owing to the greater power which a testator has over his real than he has over his personal estate.[2] In regard to real estate it is well known that at the common law it was not bound even for the specialty debts of the testator, except in the hands of his heir; although by a statute in England (3 W. & M. ch. 14) it is made liable for such debts in the hands of his devisee. But as to simple contract debts, until a very recent period the real estate of deceased persons was not liable for the payment of any such debts. The Statute of 3d and 4th William IV. ch. 104, has made all such real estate liable as assets in equity for the payment of all their debts, whether due on simple contract or by specialty.[3] In America the law has been generally altered; and such real estate is made liable to the payment of all sorts of debts as auxiliary to the personal assets. But as to personal estate it was at the common law, and still remains in both countries, directly liable to the payment of all debts; or, as it is commonly expressed, it

by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power; that is, to give a valid discharge for the purchase-money." See also Mr. Sugden's remarks, Sugden on Vendors, ch. 11, § 1, pp. 515, 523 to 531 (7th ed.); Id. (9th ed.), ch. 11, vol. 2, pp. 30 to 56; Dickson *v.* New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058.

[1] An executor or administrator is unlike a trustee in one respect, — that the law does not expect an executor or administrator to give evidence to a purchaser, or enable a purchaser to require evidence from him, that what he is doing is necessary for the due execution of the trust. Oceanic Nav. Co. *v.* Sutherberry, 16 Ch. D. 236, 244, James, L. J.

[2] Sugden on Vendors, ch. 11, p. 515 (7th ed.); Id. (9th ed.), Vol. 2, ch. 1, p. 30.

[3] Williams's Law of Executors and Administrators, Pt. 4, B. 1, ch. 2, § 1, p. 1204 (2d ed.), (1838).

goes to the executors as assets for creditors, to be applied in a due course of administration.[1] It is therefore in a strict sense a trust fund for the payment of debts generally.[2] We shall presently see how this consideration bears upon the topic now under discussion.

§ 1506. **Duty of Purchaser Where Trust Is of a Defined or Limited Nature.** — The general principle of Courts of Equity in regard to the duty of purchasers (not especially exempted by any provision of the author of the trust), in cases of sales of property or charges on property under trusts (for there is no difference in point of law between sales and charges), to see to the application of the purchase-money is this; that wherever the trust or charge is of a defined and limited nature the purchaser must himself see that the purchase-money is applied to the proper discharge of the trust, but wherever the trust is of a general and unlimited nature, he need not see to it.[3] Thus for example if a trust is created to

[1] Sugden on Vendors, ch. 11, p. 515 (7th ed.); Id. (9th ed.), Vol. 2, ch. 11, p. 3.

[2] Ibid.

[3] Madd. Ch. Pr. 352, 496; 2 Madd. Ch. Pr. 103; 1 Powell on Mortgages, ch. 9, pp. 214 to 250, Coventry & Rand's edit. In Elliot *v.* Merryman, Barnard. Ch. R. 78 (cited and approved in Shaw *v.* Borrer, 1 Keen R. 574), the Master of the Rolls said: "The general rule is that if a trust directs that land should be sold for payment of debts generally, the purchaser is not bound to see that the money be rightly applied. If the trust directs that lands should be sold for the payment of certain debts, mentioning in particular to whom those debts are owing, the purchaser is bound to see that the money is applied for payment of those debts. The present case indeed does not fall within either of these rules, because here lands are not given to be sold for the payment of debts, but are only charged with such payment. However the question is, whether that circumstance makes any difference, and his Honor was of opinion that it did not. And if such a distinction was to be made, the consequence would be that whenever lands are charged with the payment of debts generally they could never be discharged of that trust without a suit in this court, which would be extremely inconvenient. No instances have been produced to show that in any other respect the charging land with the payment of debts differs from the directing them to be sold for such a purpose; and therefore there is no reason that a difference should be established in this respect. The only objection that seemed to be of weight with regard to this matter is, that where lands are appointed to be sold for the payment of debts generally, the trust may be said to be performed as soon as those lands are sold; but where they are only charged with the payment of debts, it may be said that the trust is not performed till these debts are discharged. And so far indeed it is true that where lands are charged with the payment of annuities, those lands will be charged in the hand of a purchaser, because it was the very purpose of making the lands a fund for that payment that it should be a constant and subsisting fund; but where lands are not burdened with such a subsisting charge, the purchaser ought not to be bound to look to the application of the money; and that seems to be the true distinc-

sell for the payment of a portion, or of a mortgage, there the purchaser must see to the application of the purchase-money to that specified object. If on the other hand a trust is created, or a devise is made, or a charge is established by a party for the payment of debts generally, the purchaser is exempted from any such obligation.[1]

§ 1507. **Same.** — Upon this ground, where a testator by his will charged his real estate with the payment of debts generally, and afterwards devised his real estate to a trustee upon certain trusts for other persons, it was held that the trustee had a right to sell or mortgage the estate so charged for the payment of the debts; and that upon such sale or mortgage the purchaser or mortgagee was not bound to look to the application of the purchase or mortgage money.[2]

§ 1508. **The Duty of the Purchaser in Sales of Personal Property.** — Let us in the first place consider the doctrine in its application to personal estate, including therein leasehold estates, which are equally with personal chattels subject to the payment of debts. And here the rule is that the personal estate, being liable for the payment of the debts of the testator generally, the purchaser of the whole or of any part of it is not, upon the principle already stated, bound to see that the purchase-money is applied by the executor to the discharge of the debts; for the trust is general and unlimited, it being for the payment of all debts. It is true that there is an apparent exception to the rule; and that is, that he must be a bona fide purchaser without notice that there are no debts, and he must not collude with the executor in any wilful misapplication of the assets.[3] But this proceeds upon the ground

tion." See also Shaw *v.* Borrer, 1 Keen R. 559, 575, 576; Wood *v.* White, 4 Mylne & Craig, 460, 481, 482; Goodrich *v.* Proctor, 1 Gray, 567, 570; Grotenkemper *v.* Bryson, 79 Ky. 353; Miller *v.* Stagner, 25 Ky. L. Rep. 650, 76 S. W. 160; Campbell *v.* Virginia-Carolina Chem. Co., 68 S. C. 440, 47 S. E. 716; Harris *v.* Smith, 98 Tenn. 286, 39 S. W. 343; Claiborne *v.* Holland, 88 Va. 1046, 14 S. E. 915; and if the trustee has the power to invest the proceeds from the sale, the purchaser has nothing to do with the proper exercise of that discretion. Redford *v.* Clark, 100 Va. 115, 40 S. E. 630.

[1] Elliot *v.* Merryman, Barnard. Ch. R. 78; s. c. 2 Atk. 42, cited and approved in Shaw *v.* Borrer, 1 Keen, R. 573, 574; Walker *v.* Smallwood, Ambler, R. 676; Bonney *v.* Ridgard, 1 Cox, R. 145; Jenkins *v.* Hill, 6 Ves. 654; Braithwaite *v.* Britain, 1 Keen, R. 206, 222.

[2] Ball *v.* Harris, 4 Mylne & Craig, R. 264; Eland *v.* Eland, 4 Mylne & Craig, R. 420.

[3] Sugden on Vendors, ch. 11, § 2, pp. 535, 536, 538 to 540 (7th ed.); Id. Vol. 2, ch. 11, § 1, pp. 32 to 40 (9th ed.); 2 Fonbl. Eq. B. 2, ch. 6, § 2, and note (*k*); Co. Litt. 290 *b*, Butler's note (1), § 12; Bonney *v.*

of fraud, which is of itself sufficient to vacate any transaction whatsoever.

§ 1509. **Same.** — It will not make any difference in the application of this general doctrine as to the personal estate, that the testator has directed his real estate to be sold for the payment of his debts, whether he specifies the debts or not, or that he has made a specific bequest of a part of his personal estate for a particular purpose, or to a particular person, although such specific bequest is known to the purchaser, if he has no reason to suspect any fraudulent purpose.[1] The ground of this doctrine is that otherwise it would be indispensable for a person before he could become the purchaser of any personal estate, specifically bequeathed, to come into a Court of Equity to have an account taken of the assets of the testator and of the debts due from him, and in order to ascertain whether it was necessary for the executor to sell, which would be a most serious inconvenience, and greatly retard the due settlement of estates.[2]

§ 1510. **Duty to See to Application of Proceeds from Sale of Real Estate to Pay Debts.** — In the next place in regard to real estate.[3] Where there is a devise of real estate for the payment of debts generally, or the testator charges his debts generally upon his real estate, and the money is raised by the trustee by sale or mortgage, the same rule applies as in cases of personalty, that the purchaser or mortgagee is not bound to look to the application of the purchase-money;[4] and for the same reason, namely, the unlimited and general nature of the trust, and the difficulty of seeing

Ridgard, 1 Cox, R. 145; Hill *v.* Simpson, 7 Ves. 152; Field *v.* Schieffelin, 7 John. Ch. R. 155 to 160; 1 Roper on Legacies, by White, ch. 7, § 2, pp. 374 to 396; Dawson *v.* Ramser, 58 Ala. 573; Grider *v.* Driver, 46 Ark. 109.

[1] Co. Litt. 290 *b*, Butler's note (1), § 12; Humble *v.* Bill, 2 Vern. 444, and Mr. Raithby's note; Ewer *v.* Corbet, 2 P. Will. 148; Nugent *v.* Gifford, 1 Atk. 463; Elliot *v.* Merryman, 2 Atk. 41; Crane *v.* Drake, 2 Vern. 616, and Mr. Raithby's note (4); Langley *v.* Earl of Oxford, Ambler, R. 17, and Id. App. C. Blunt's ed. p. 795; McLeod *v.* Drummond, 14 Ves. 353; s. c. 17 Ves. 153; Keane *v.* Robarts, 4 Madd. R, 332; Andrew *v.* Wrigley, 4 Bro. Ch. R. 125. See Shaw *v.* Borrer, 1 Keen, R. 559.

[2] Ewer *v.* Corbet, 2 P. Will. 148; Langley *v.* Earl of Oxford, Ambler, R. 17; Id. App. C. p. 797, Blunt's ed.

[3] I have contented myself with drawing from Mr. Sugden's learned Treatise on Vendors and Purchasers (ch. 11, § 1, pp. 517 to 535, 7th ed.; Id. ch. 11, Vol. 2, pp. 30 to 57, 9th ed.) nearly all the materials used in this part of the subject. See also 1 Powell on Mortgages, ch. 9, pp. 214 to 250, Coventry & Rand's ed.

[4] Oceanic Nav. Co. *v.* Sutherberry, 16 Ch. D. 236, 244; Storry *v.* Walsh, 18 Beav. 559; Greetham *v.* Cotton, 34 Beav. 615.

to the application of the purchase or mortgage money, without an account of all the debts and assets, under the superintendence of Courts of Equity.[1]

§ 1511. **Same.** — In the case of sales of real estate for the payment of debts generally the purchaser is not only not bound to look to the application of the purchase-money, but if more of the estate is sold than is sufficient for the purposes of the trust, it will not be to his prejudice.[2] Nor will it make any difference in cases of this sort whether the testator charges both his personal and real estate with payment of his debts, or the real only; for ordinarily the personal estate, unless specially exempted, is the primary fund, and if exempted, still the charge on the real estate is general and unlimited.[3] Nor will it make any difference whether the devise directs a sale of the real estate for the payment of debts, or only charges the real estate therewith.[4] Nor will it make any difference that the trust is only to sell, or is a charge for so much as the personal estate is deficient to pay the debts.[5] Nor will it make any difference that a specific part of the real estate is devised for a particular purpose or trust, if the whole real estate is charged with the payment of debts generally by the will.[6] If however the

[1] Sugden on Vendors, ch. 11, § 1, pp. 517, 518 (7th ed.); Id. ch. 11, § 1, Vol. 2, pp. 32 to 40 (9th ed.); Co. Litt. 290 *b*, Butler's note (1), § 12; 2 Fonbl. Eq. B. 3, ch. 6, § 2, and notes (*k*), (*l*); 1 Eq. Abr. 358, C. pl. 1, 4; Williamson *v.* Curtis, 3 Bro. Ch. R. 96; Powitt *v.* Guyon, 1 Bro. Ch. R. 186, and Mr. Belt's note; Balfour *v.* Welland, 16 Ves. 151; Shaw *v.* Borrer, 1 Keen, R. 559, 573 to 576; Ball *v.* Harris, 4 Mylne & Craig, R. 269; Eland *v.* Eland, 4 Mylne & Craig, R. 420; Wormley *v.* Wormley, 21 U. S. 421, 5 L. Ed. 651; Goodrich *v.* Proctor, 1 Gray, 567.

[2] Spaulding *v.* Shalmer, 1 Vern. 301.

[3] Co. Litt. 290 *b*, Butler's note (1), § 12; Cutler *v.* Coxeter, 2 Vern. 302; French *v.* Chichester, 2 Vern. 568; Shaw *v.* Borrer, 1 Keen, R. 559, 575, 576.

[4] Sugden on Vendors, ch. 11, § 1, pp. 522, 523 (7th ed.); Id. ch. 11, Vol. 2, pp. 37 to 39 (9th ed.); Elliot *v.* Merryman, Barnard. R. 78; Shaw *v.* Borrer, 1 Keen, R. 559, 574 to 576; Ball *v.* Harris, 4 Mylne & Craig, R. 264; Eland *v.* Eland, 4 Mylne & Craig, R. 420.

[5] P. 531; Co. Litt. 290 *b*, Butler's note (1), § 12.

[6] This point was directly decided in Shaw *v.* Borrer, 1 Keen, R. 559, 574 to 576. That was the case of a will which charged the real estate generally with the payment of debts and devised an advowson on a special trust. The trustees (one of whom was also executor) had sold the advowson; and the question was whether they could make a good title without the institution of a suit to ascertain whether there was a deficiency of the personal assets, and whether the purchaser was bound to see to the application of the purchase-money. It was held that he was not. Lord Langdale on that occasion said: "It seems therefore clear that a charge of this nature has been and ought to be treated as a trust,

trustees have only a power to sell, and not an estate devised to them, then, unless the personal estate be deficient, the power to sell does not arise.[1]

which gives the creditors a priority over the special purposes of the devise; and no doubt is raised but that on the application of the creditors the court would, in a suit to which the executors were parties, compel the trustees for special purposes to raise the money requisite for payment of the debts. If so, is there any good reason to doubt but that the trustees and executors may themselves do that which the court would compel them to do on the application of the creditors? Though the advowson is devised to trustees for special purposes, the testator has in the first instance charged all his estates with payment of his debts. The charge affects the equitable but not the legal estate; and upon the construction the trusts of the will affect this estate, first, in common with the testator's other property for the payment of debts, and next, separately for the special purposes mentioned in the will. Possibly upon the testator's death it might not be necessary to resort to the real estate at all for the payment of the testator's debts. And if it should be necessary to resort to the real estate, some part ought, in a due administration, to be applied in payment of debts before other parts; and it is said that the necessity for raising money to pay the debts out of the real estate, and, if such necessity exists, the proper selection of that part of the real estate which ought to be first sold, ought to appear, and can only be proved by the master's report in a suit for the administration of assets. It is true that if the administration of assets devolves on the court by the institution of a suit for the purpose, the court in the exercise of its jurisdiction acts with all practicable caution, and proceeds in strict conformity with its established rules. But this is a caution exercised not for the benefit of the creditors or at their instance, for they ask nothing, and have a right to nothing, but payment of their debts; and the question is not what the court thinks it right to do for the benefit of the persons who have claims subject to the debts, but whether the estate subject to debts by the will, and sold and conveyed by the devisees for special purposes at the instance of the executors, would remain in the hands of the purchaser subject to any claims created by or founded on the will; or whether there is any obligation to see that done which the court would do in a suit to administer assets. An argument is deduced from the statutes which has made real estates assets in Courts of Equity for payment of simple-contract debts; but it does not appear to me that the rule which the legislature has thought fit to apply in cases where the real estate is not charged with payment of debts is necessarily to be applied in cases where the testator has charged his real estate with such payment. And on the whole, considering that the charge creates or constitutes a trust for the payment of debts, or as Lord Eldon in one place, adopting the language of Lord Thurlow, expressed it, that 'a charge is a devise of the estate in substance and effect pro tanto to pay the debts', and conceiving that the purchaser is not bound either to inquire whether other sufficient property is applicable, or ought to be applied first in payment of debts, or to see to the application of the purchase-money, I think that the exception must be overruled." The same doctrine was expressly affirmed by Lord Cottenham in Ball *v.* Harris, 4 Mylne & Craig, 264, 267. See also Elliot *v.* Merryman, Barnard. Ch. R. 78; Bailey *v.* Ekins, 7 Ves. 319, 323; Dolton *v.* Hewen, 6 Madd. R. 9.

[1] Ibid.

§ 1512. **Same.** — The rule in all these cases that the purchaser or mortgagee is not bound to look to the application of the purchase-money, is subject to an obvious exception, that if the purchaser or mortgagee is knowingly a party to any breach of trust by the sale or mortgage, it shall afford him no protection.[1] One obvious example of this is where a devisee himself has a right to sell, but he sells to pay his own debt, which is a manifest breach of trust, and the party who concurs in the sale is aware or has notice of the fact that such is its object; for in such a case they are coadjutors in the fraud.[2]

§ 1513. **Same.** — But where in cases of real estate the trust is for the payment of legacies or of specified or scheduled debts, the rule is different; for they are ascertained, and the purchaser may see, and in the view of a Court of Equity he is bound to see, that the money is actually applied in discharge of them.[3] On the other hand cases may occur where the devise is for the payment of debts generally, and also for the payment of legacies, and then the trust becomes a mixed one. In such a case the purchaser is not bound to see to the application of the purchase-money; because to hold him liable to see the legacies paid would in fact involve him in the necessity of taking an account of all the debts and assets.[4]

[1] Eland *v.* Eland, 4 Mylne & Craig, 420, 427; Watkins *v.* Cheek, 2 Sim. & Stu. 199.

[2] Ibid.

[3] Horn *v.* Horn, 2 Sim. & Stu. 448. The purchaser under a decree is bound to see that the directions of the decree are obeyed. Colclough *v.* Sterum, 3 Bligh, R. 181.

[4] Sugden on Vendors, ch. 11, § 2, p. 518 (7th ed.); Id. ch. 11, § 1, Vol. 2, pp. 32, 33, of 9th ed.; Co. Litt. 200 *b*, Butler's note (1), § 12; Rogers *v.* Skillicorne, Ambler, R. 188, and Mr. Blunt's note; Eland *v.* Eland, 4 Mylne & Craig, 420; Watkins *v.* Cheek, 2 Sim. & Stu. R. 199; Johnson *v.* Kennett, 6 Simons, R. 384; s. c. 3 Mylne & Keen, 624. In Eland *v.* Eland, 4 Mylne & Craig, 420, 427, Lord Cottenham, commenting on these cases, said: "With respect to Watkins *v.* Cheek, which was one of the cases, it is only necessary to observe that the ground on which Sir John Leach rested his decision is wholly inapplicable here. Whether the circumstances of that case were sufficiently strong to justify the conclusion at which the learned judge arrived, it is not material to consider, the question being only as to the principle upon which Sir John Leach proceeded. Now the principle of that decision is one which has been long established, and which does not in the least interfere with the rule that where the debts are charged generally the purchaser or mortgagee is not bound to see to the application of the money, — a rule introduced from the peculiarity and necessity of the case. That rule however is subject to this obvious exception, that if the mortgagee or purchaser is party to a breach of trust, it can afford him no protection. One obvious example is, where a devisee has a right to sell but he sells to pay

§ 1514. **Duty of Purchaser Where Parties Entitled to Money Are Infants or Unborn.** — Where the time directed by the devise for a sale of the real estate is arrived, and the persons entitled to the money are infants or are unborn, there the purchaser is not bound to see to the application of the purchase-money, because

his own debt, which is a manifest breach of trust, and the party who concurs in the sale is aware or has notice of the fact that such is its object. That is the whole of the principle laid down in Watkins *v.* Cheek, and whether the facts in that case were strong enough to support the decision is a different and not now a material question. It is only necessary to refer to two or three sentences in the judgment to show that such was the principle. [His Lordship here read part of Sir John Leach's judgment, and proceeded:] That case therefore would be a very good authority here, provided the present case afforded evidence of the mortgagee being party to a breach of trust committed by the devisee. The other case cited was Johnson *v.* Kennett, which no doubt would carry the doctrine a great deal further; for there was no evidence in that case of any breach of trust. But then the purchasers had reason to believe, from the nature of the transaction itself, that the debts had been paid off; and being of that opinion upon the evidence, the Vice-Chancellor considered that the case was the same as if nothing but legacies had been originally charged, in which case not being protected by an immediate charge of debts, the purchaser would not be exonerated from his liability to see the money properly applied. If that doctrine had been supported, it would have gone far to destroy the rule altogether; because before it can come to that the mortgagee must (and if he is to be liable he must in every case) go into an investigation of the fact of how far the debts have been discharged, — exactly that liability to which the law considers that he should not be subjected. That was one of the two grounds on which the Vice-Chancellor rested his judgment in Johnson *v.* Kennett, namely, that the transaction afforded evidence that all the debts had been paid; the other being that from the form of the conveyance it appeared that the party who sold was dealing with the purchasers as owner of the estate. The latter ground is manifestly untenable. What evidence is it of a breach of trust that a party having such an estate, subject to such a charge, sells the estate as his own? He is in truth the owner, subject to a charge; and it is his duty to satisfy the debts, which the sale may be the very means of enabling him to do. When Johnson *v.* Kennett was brought by appeal before Lord Lyndhurst, his Lordship reversed the decree, and observed that the rule of a purchaser being protected from seeing to the application of his purchase-money by a general charge of debts and legacies, had reference to the state of things at the death of the testator; and that if the debts were afterwards paid, leaving the legacies charged, that could not vary the rule. I entirely concur in that opinion; otherwise the mortgagee must in every case in which there is a charge of legacies take upon himself to investigate and ascertain whether the debts have been paid or not. Taking then Watkins *v.* Cheek as proceeding upon the ground of fraud, and taking Johnson *v.* Kennett, decided by Lord Lyndhurst on appeal, as maintaining and not impeaching the rule, I have no doubt that the rule rests exactly as it did before those cases were determined, and has not been shaken by either of them. The present is the case of a devise subject to the payment of debts and legacies; and according to the master's report

he might otherwise be implicated by a trust of long duration.[1] But if an estate is charged with a sum of money payable to an infant at his majority, there the purchaser is bound to see the money duly paid on his arrival at age; for the estate will remain chargeable with it in his hands.[2]

§ 1515. **Purchaser Not Bound to See to Application Where Investment Is Discretionary with Trustee.** — Where the trusts are defined and yet the money is not merely to be paid over to third persons, but it is to be applied by the trustees to certain purposes which require on their part time, deliberation, and discretion, it seems that the purchaser is not bound to see to the due application of the purchase-money;[3] as where it is to pay all debts which shall be ascertained within eighteen months after the sale, or where the trustees are to lay out the money in the funds or in the purchase of other lands upon certain trusts.[4]

§ 1516. **Same.** — These are some of the most important and nice distinctions which have been adopted by Courts of Equity

here is a debt not paid. How then does the case stand? According to the decision, the mortgagee has a right to hold the estate discharge of any obligation to see to the application of the purchase-money, except in so far as she by her own deed undertakes to be responsible. She is only purchaser of so much of the estate as may remain after payment of the annuity and legacies, — and there is no dispute as to her being liable to that extent, — while she is protected from seeing to the application of the mortgage-money beyond. If so, she is then entitled to the whole of the proceeds of the estate as his security, ultra the amount of the excepted legacies, and that amount has been deducted; and so far the mortgagee is safe from any other claim." See Dowling *v.* Hudson, 17 Beav. 248. And where the trust is expressed to be for the payment of debts and legacies, it will make no difference that the purchaser had notice that there were no debts, and that this was so when the testator died. The form of such a bequest implies a confidence in the trustee in regard to the application of the purchase-money; and in such a case it would be unreasonable to require the purchaser to look to its application. Stroughill *v.* Anstey, 1 DeG. M. & G. 635. See also Andrews *v.* Sparhawk, 13 Pick. 393; Hauser *v.* Shore, 5 Ired. Eq. 357; Cadbury *v.* Duval, 10 Barr, 267.

[1] Sugden on Vendors, ch. 11, § 1, p. 519 (7th ed.); Id. ch. 11, § 1, Vol. 2, pp. 32 to 34 (9th ed.); Sowarsby *v.* Lacy, 4 Madd. R. 142; Lavender *v.* Stanton, 6 Madd. R. 46; Breedon *v.* Breedon, 1 Russ. & Mylne, 413.

[2] Dickinson *v.* Dickinson, 3 Bro. Ch. R. 19.

[3] Dickson *v.* New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058; Sugden on Vendors, ch. 11, § 1, pp. 520, 521 (7th ed.); Id. ch. 11, § 1, Vol. 2, pp. 35, 36 (9th ed.); Balfour *v.* Welland, 16 Ves. 151; Wormley *v.* Wormley, 21 U. S. 421, 5 L. Ed. 651; Locke *v.* Lomas, 5 DeG. & S. 326; Parker *v.* Clarkson, 4 W. Va. 407.

[4] See Lining *v.* Peyton, 2 Desaus. 375; Redheimer *v.* Pyson, 1 Spear, Eq. 135; Nicholls *v.* Peak, 1 Beasl. 69; Wormley *v.* Wormley, 21 U. S. 421, 5 L. Ed. 651.

upon this intricate topic; and they lead strongly to the conclusion to which not only eminent jurists but also eminent judges have arrived, that it would have been far better to have held in all cases that the party having the right to sell had also the right to receive the purchase-money, without any further responsibility on the part of the purchaser as to its application.

CHAPTER XXXV

EXPRESS TRUSTS. — CHARITIES

§ 1517. **Charities.** — It is in cases of wills also that we most usually find provisions for public CHARITIES; and to the consideration of this subject, constituting as it does a large and peculiar source of equity jurisdiction under the head of Trusts, we shall now proceed.[1]

§ 1518. **Origin of Charities.** — It is highly probable that the rudiments of the law of charities were derived from the Roman or civil law.[2] One of the earliest fruits of the Emperor Constantine's real or pretended zeal for Christianity was a permission to his subjects to bequeath their property to the church.[3] This permission was soon abused to so great a degree as to induce the Emperor Valentinian to enact a mortmain law, by which it was restrained.[4] But this restraint was gradually relaxed; and in

[1] A considerable portion of the succeeding account of Charities, and of the jurisdiction exercised by Courts of Equity touching the same is, with some additions and alterations, a transcript of the note (1) in the Appendix to 4 Wheaton, Rep. pp. 1 to 23. It becomes necessary therefore to say that that note was written by me at the request of that able and learned reporter, with an express understanding that its author should not then be made known. I now reluctantly disclose the authorship. But in discussing the same subject (which I had fully examined at the time, when I prepared my opinion in the case of The Trustees of the Philadelphia Baptist Association *v.* Smith, since published in the Appendix to 3 Peters's Reports, 481 to 593), it became impossible for me in the present work to avoid going over the same ground, in language or manner substantially different from that note; and I have been compelled therefore to make the present avowal, since I should otherwise seem to have appropriated so large a portion of the labors of another.

[2] In Lord Chief Justice Wilmot's notes of his opinions (pp. 53, 54) it is said: "Donations for public purposes were sustained in the civil law, and applied when illegal cy pres to other purposes, one hundred years before Christianity was the religion of the Empire." And for this is cited Dig. Lib. 33, tit. 2, De Usu Usufruc. Legatarum, §§ 16, 17.

[3] Cod. Theodos. Lib. 16, tit. 2, l. 4.

[4] Cod. Theodos. Lib. 16, tit. 2, l. 20. To those who may not be familiar with the term "mortmain", it may be proper to state that the statutes in England which prohibit corporations from taking lands by devise,

the time of Justinian it became a fixed maxim of Roman Jurisprudence that legacies to pious uses (which included all legacies destined for works of piety or charity, whether they related to spiritual or to temporal concerns) were entitled to peculiar favor and to be deemed privileged testaments.[1]

§ 1519. **Gifts That Are Termed Charitable.** — Thus for example a legacy of ornaments for a church, a legacy for the maintenance of a clergyman to instruct poor children, and a legacy for their sustenance, were esteemed legacies to pious and charitable uses.[2] In all these cases the bequests had their charitable motives independent of the consideration of the merit of the particular legatees. But other legacies, although not of a pious or charitable nature, but yet for objects of a public nature or for a general benefit, were also deemed entitled to the like encouragement and protection. Thus for example a legacy destined for some public ornament or for some public use, such as to build a gate for a city, or for the embellishment and improvement of a public street or square, or as a prize to persons excelling in an art or science, was deemed a privileged legacy and of complete validity.[3] "Si quid relictum sit

even for charities, except in certain special cases, are generally called the Statutes of Mortmain, mortua manu, — for the reason of which appellation Sir Edward Coke offers many conjectures. But (says Mr. Justice Blackstone, 1 Black. Comm. 479) there is one which seems more probable than any that he has given us; namely, that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore holden by them might with great propriety be said to be held in mortua manu. The word is now commonly employed to designate all prohibitory laws which limit, restrain, or annul, gifts, grants, or devises of lands and other corporeal hereditaments to charitable uses. See on this subject 2 Black. Comm. 268 to 274.

[1] 2 Domat, Civil Law, B. 4, tit. 2, § 6, art. 1, 2, 7, pp. 168 to 170, by Strahan; Ferrier, Dict. h. t.; Swinburne, Pt. 1, § 16, p. 103; Trustees of Baptist Assn. *v.* Hart's Execrs., 17 U. S. 1, 4 L. Ed. 499, s. c. 28 U. S. 481, 7 L. Ed. 749.

[2] Whatever is given for the love of God or the love of your neighbor, in the catholic and universal sense — given from these motives and to these ends — free from the stain or taint of every consideration that is personal, private or selfish, is a charity. Garrison *v.* Little, 75 Ill. App. 478; Ford *v.* Ford, 91 Ky. 572, 16 S. W. 451, 13 Ky. L. Rep. 183; Sherman *v.* Congregational Missionary Soc., 176 Mass. 349, 57 N. E. 702; Minns *v.* Billings, 183 Mass. 126, 66 N. E. 593, 97 Am. St. Rep. 420, 5 L. R. A. (N. S.) 686; Osgood *v.* Rogers, 186 Mass. 238, 71 N. E. 306; a devise for the furnishing of a home for working girls, whether in or out of employ, is valid as a charity. In re Daly's Est., 208 Pa. 58, 57 Atl. 180; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; Domat, B. 4, tit. 2, § 6, art. 1, p. 168, art. 2, p. 169.

[3] 2 Domat, B. 4, tit. 2, § 6, art. 3, p. 169.

civitatibus, omne valet, sive in distributionem relinquatur, sive in opus, sive in alimenta, vel in eruditionem puerorum, sive quid aliud." [1] Again: "Civitatibus legari potest etiam, quod ad honorem ornatumque civitatis pertinet. Ad ornatum; puta, quod instruendum forum, theatrum, stadium, legatum, fuerit. Ad honorem; puta, quod ad munus edendum, venationemve, ludos scenicos, ludos Circenses, relictum fuerit; aut, quod ad divisionem singulorum civium ve epulam, relictum fuerit. Hoc amplius, quod in alimenta infirmæ ætatis (puta, senioribus, vel pueris, puellisque), relictum fuerit; ad honorem civitatis pertinere respondetur." [2]

§ 1520. **Wills with Reference to Charities Are Liberally Construed.** — The construction of testaments of this nature was most liberal; and the legacies were never permitted to be lost, either by the uncertainty or failure of the persons or objects for which they were destined. Hence if a legacy was given to the church or to the poor generally, without any description of what church or what poor, the law sustained it by giving it, in the first case, to the parish church of the place where the testator lived, and in the latter case to the hospital of the same place; and if there was none, then to the poor of the same parish.[3] The same rule was applied where instead of a bare legacy the testator appointed as his heir, or devisee, or legatee, the church or the poor. It was construed to belong to the church or the poor of the parish where he resided.[4] So if a legacy were given to God (as seems sometimes to have been the usage in the time of Justinian), it was construed to be a legacy to the church of the parish where the testator resided.[5]

§ 1521. **Same.** — If the testator himself had designated the person by whom the charity was to be carried into effect, he was compellable to perform it. If no person was designated, the bishop or ordinary of the place of the testator's nativity might compel its due execution.[6] And in all cases where the objects were indefinite the legacy was carried into effect under the direction of the judge who had cognizance of the subject.[7] So if a legacy was given for a definite object which either was previously accomplished or which failed, it was nevertheless held valid, and

[1] 2 Domat, B. 4, tit. 2, § 6, art. 3, p. 169; art. 6, p. 170; Dig. Lib. 30, tit. 1, l. 117. [2] Ibid.
[3] 2 Domat, B. 4, tit. 2, § 6, art. 1, p. 169; Ferrier, Dict. h. t.
[4] 2 Domat, B. 4, tit. 2, § 6, art. 4, p. 169.
[5] Ibid.; Novellæ, 141, cap. 9.
[6] 2 Domat, B. 4, tit. 2, § 6, art. 5, p. 169; Cod. Lib. 1, tit. 3, l. 28, § 1.
[7] 2 Domat, B. 4, tit. 2, § 6, art. 5, p. 169; Swinburne, Pt. 1, § 16, p. 104.

applied under judicial discretion to some other object.[1] Thus for example if the testator had left a legacy for building a parish church or an apartment in a hospital, and before his death the church or apartment had been built, or it was not necessary or useful, the legacy did not become a nullity, but it was applied by the proper functionary to some other purposes of piety or charity. And we shall presently see that the like doctrine has been carried to a great extent in the jurisprudence of England on the same subject.

§ 1522. **Same.** — The high authority of the Roman law, coinciding with the religious notions of the times, could hardly fail to introduce these principles of pious legacies into the common law of England, and the zeal and learning of the ecclesiastical tribunals must have been constantly exercised to enlarge their operation. Lord Thurlow[2] was clearly of opinion that the doctrine of charities grew up from the civil law, and Lord Eldon,[3] in assenting to that opinion, has judiciously remarked, that at an early period the ordinary had the power to apply a portion of every man's personal estate to charity; and when afterwards the statute compelled a distribution, it is not impossible that the same favor should have been extended to charity in wills, which by their own force purported to authorize such a distribution. Be the origin however what it may, it cannot be denied that many of the privileges attached to pious legacies have been for ages incorporated into the English law.[4] Indeed in former times the construction of charitable bequests was pushed to the most alarming extravagance. And although it has been in a great measure checked in later and more enlightened times, there are still some anomalies in the law on this subject which are hardly reconcilable with any sound principles of judicial interpretation or with any proper exercise of judicial authority.

§ 1523. **Same.** — The history of the law of charities prior to the Statute of the 43d of Elizabeth, ch. 4, which is emphatically called the Statute of Charitable Uses, is extremely obscure. It may nevertheless be useful to endeavor to trace the general outline of that history, since it may materially assist us in ascertaining how far the present authority and doctrines of the Court of Chan-

[1] 2 Domat, B. 4, tit. 2, § 6, art. 6, p. 170.

[2] White *v.* White, 1 Bro. Ch. Cas. 12.

[3] Moggridge *v.* Tackwell, 7 Ves. 36, 69; Mills *v.* Farmer, 1 Meriv. 55, 94, 95.

[4] Swinb. on Wills, Pt. 1, § 16, pp. 66 to 73; Trustees of Baptist Assn. *v.* Smith, 17 U. S. 1, 4 L. Ed. 499.

cery in regard to charitable uses depend upon that statute, and how far they arise from its general jurisdiction, as a Court of Equity, to enforce trusts, and especially to enforce trusts to pious uses.[1]

§ 1524. **Same.** — It is not easy to arrive at any satisfactory conclusion on this head. Until a comparatively recent period, and indeed until the Report of the Commissioners on the Public Records, published by Parliament in 1827 (to which our attention will be more directly drawn hereafter), few traces could be found, in the volumes of printed reports or otherwise, of the exercise of this jurisdiction in any shape prior to the Statute of Elizabeth. The principal if not the only cases then to be found were decided in the Courts of Common Law, and generally turned upon the question whether the uses were void or not within the statutes against superstitious uses.[2] One of the earliest cases is Porter's Case,[3] which was a devise of lands, devisable by custom, to the testator's wife in fee, upon condition that she should assure the lands devised for the maintenance and continuance of a free school and certain almsmen and almswomen; and it appeared that the heir had entered for condition broken, and conveyed the same lands to the Queen. It was held that the use being for charity was a good and lawful use, and not void by the statutes against superstitious uses, and that the Queen might well hold the land for the charitable uses. Lord Loughborough, in commenting on this case, observed: "It does not appear that this court (that is, Chancery) at that period had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere,[4] as far as the tradi-

[1] Mr. Justice Baldwin, in his very learned and elaborate judgment on the will of Sarah Zane, in the Circuit Court of Pennsylvania, April Term, 1833 (which is in print), has gone into a full consideration of this whole subject, and collected many cases antecedent to the Statute of Elizabeth, which may lead to some question whether the origin commonly assigned to charitable uses is perfectly correct. I have however left the next as it is, upon the authority of the English judges, as a minute inquiry into the subject would lead the reader too far aside from the direct object of these Commentaries. But the judgment of Mr. Justice Baldwin will amply reward a diligent perusal. Mr. Boyle, in his work on Charities, B. 1, ch. 1, pp. 1 to 63 (1837), has given a concise view of the statutes respecting charities prior to that of the 43d Elizabeth. See also Shotwell *v.* Mott, 2 Sandford, R. 45.

[2] See Mr. Justice Baldwin's opinion in the case of Sarah Zane's will, Cir. Ct. Pennsylvania, April Term, 1833.

[3] 1 Co. 22 *b* in 34 and 35 Elizabeth. See also a like decision in Partridge *v.* Walker, cited 4 Co. 116 *b*; Martidale *v.* Martin, Co. Eliz. 288; Thetford School, 8 Co. 130.

[4] Sir Thomas Egerton was made Lord Chancellor in 39 Elizabeth, 1596, and was created Lord Ellesmere, 1 James I., 1603.

tion of the times immediately following goes, there were no such informations as that upon which I am now sitting (that is, an information to establish a charity), but they made out their case as well as they could by law."[1]

§ 1525. **Same.** — So that the result of Lord Loughborough's researches on this point was, that until about the period of enacting the Statute of Elizabeth bills were not filed in chancery to establish charities. It is remarkable that Sir Thomas Egerton and Lord Coke, who argued Porter's Case for the Queen, although they cited many antecedent cases, refer to none which were not decided at law. And the doctrine established by Porter's Case is, that if a feoffment is made to a general legal use not superstitious, although indefinite, although no person is in esse who could be the cestui que use, yet the feoffment is good; and if the use is bad, the heir of the feoffer will be entitled to enter, the legal estate remaining in him.[2]

§ 1526. **Same.** — The absence therefore of all authority derived from any known antecedent equity decisions, upon an occasion when they would probably have been used if any existed, did certainly seem very much to favor the conclusion of Lord Loughborough. And in the absence of any such known antecedent decisions it was not a rash conjecture, for it would be but a conjecture, that Porter's Case having established that charitable uses not superstitious were good at law, the Court of Chancery, in analogy to other cases of trusts, immediately afterwards held the feoffees to such uses accountable in equity for the due execution of them; and that the inconveniences felt in resorting to this new and anomalous proceeding, from the indefinite nature of some of the uses, gave rise within a few years to the Statute of 43 Elizabeth, ch. 4.[3]

§ 1527. **Same.** — This view might also have some tendency to reconcile the language of Lord Loughborough with that of an

[1] Attorney-Gen. *v.* Bowyer, 3 Ves. 714, 726. In Eyre *v.* Countess of Shaftesbury, 2 P. Williams, 119, Sir Joseph Jekyll, M. R., said: "In like manner, in case of charity, the King has pro bono publico an original right to superintend the case thereof; so that, abstracted from the Statute of Elizabeth relating to charitable uses and antecedent to it as well as since, it has been every day's practice to file informations in chancery in the attorney-general's name, for the establishment of charities." Lord Somers, in Cary *v.* Bertie, 2 Vern. R. 333, 342, made remarks to somewhat the same purpose, which Sir Joseph Jekyll cited and approved. Attorney-Gen. *v.* Brereton, 2 Ves. 425, 427.

[2] 3 Ves. Jr. 726.

[3] There was in fact an act passed respecting charitable uses in 39 Elizabeth, ch. 9; but it was repealed by the Act of 43 Elizabeth, ch. 4. Com. Dig. Charitable Uses, N. 14.

opposite character used upon other occasions by other chancellors and judges in reference to the jurisdiction of chancery over charities,[1] as it would show that in cases of feoffments to charitable uses bills to establish those uses might in fact have been introduced or brought into familiar practice by Lord Ellesmere about five years before the Statute of Elizabeth. This would be quite consistent with the fact that such bills were not sustained where the donation was to charity generally, and no trust estate was interposed, and no legal estate was devised to support the uses. It is very certain that at law devises to charitable uses generally without interposing a trustee, and devises to a non-existing corporation or to an unincorporated society, would have been, and in fact were, held utterly void for want of a person having a sufficient capacity to take as devisee.[2] The Statute of Elizabeth in favor of charitable uses cured this defect,[3] and provided (as we shall hereafter have occasion more fully to consider) a new mode of enforcing such uses by a commission under the direction of the Court of Chancery.

§ 1528. **Same.** — Shortly after this statute it became a matter of doubt whether the Court of Chancery could grant relief by original bill in cases within that statute, or whether the remedy was not confined to the proceeding by commission under the statute. That doubt remained until the reign of Charles II, when it was settled in favor of the jurisdiction of the court by original bill.[4] On one occasion when this very question was argued before him, Lord Keeper Bridgman declared that "the King as pater patriæ may inform for any public benefit for charitable uses before the Statute of 30 [43] of Elizabeth for Charitable Uses. But it was doubted the court could not by bill take notice of that statute so as to grant a relief according to that statute upon a bill."[5] On

[1] See post, § 1529. McCord *v.* Ochiltree, 8 Blackf. 15, 22; Grimes *v.* Harmon, 35 Ind. 198.

[2] Anon. 1 Ch. Cas. 207; Attorney-Gen. *v.* Tancred, 1 W. Bl. 90; s. c. Ambler, R. 351; Collinson's Case, Hob. R. 136; s. c. Moore, 888; Widmore *v.* Woodruffe, Ambler, R. 636, 640; Com. Dig. Devise, K.; Baptist Association *v.* Hart's Ex'ors, 4 Wheat. R. 1.

[3] Com. Dig. Charitable Uses, N. 11; Com. Dig. Chancery, 2 N. 10.

[4] Attorney-Gen. *v.* Newman, 1 Ch. Cas. 157; s. c. 1 Lev. 284; Eyre *v.* Countess of Shaftesbury, 2 P. Will. 119; Attorney-Gen. *v.* Brereton, 2 Ves. 425, 427; West *v.* Knight, 1 Ch. Cas. 134; Anon. 1 Ch. Cas. 267; 2 Fonbl. Eq. B. 3, pl. 2, ch. 1, § 1; Parish of St. Dunstan *v.* Beauchamp, 1 Ch. Cas. 193.

[5] Attorney-Gen. *v.* Newman, 1 Ch. Cas. 157. See also 2 Black. Comm. 427; Lord Falkland *v.* Bertie, 2 Vern. 342; Gilb. Eq. R. 172. See also Attorney-Gen. *v.* Mayor, &c. of Dublin, 1 Bligh R. (N. S.) 347, 348;

another occasion soon afterwards, where the devise was to a college, and was held void at law by the judges for a misnomer on a bill to establish the devise as a charity, the same question was argued; Lord Keeper Finch (afterwards Lord Nottingham) held the devise good as an appointment under the Statute of Elizabeth; and he "decreed the charity, though before the statute no such decree could have been made." [1] It would seem therefore to have been the opinion of Lord Nottingham that an original bill would not before the Statute of Elizabeth lie to establish a charity where the estate did not pass at law to which the charitable uses attached.

§ 1529. **Same.** — On the other hand the language of other judges leads to the conclusion that antecedent to the Statute of Elizabeth the Court of Chancery did, in virtue of its inherent authority, exercise a large jurisdiction in cases of charities. In Eyre *v.* Shaftesbury [2] Sir Joseph Jekyll said in the course of his reasoning on another point: "In like manner in the case of charity the King pro bono publico has an original right to superintend the care thereof, so that, abstracted from the Statute of Elizabeth relating to charitable uses and antecedent to it as well as since, it has been every day's practice to file informations in chancery in the attorney-general's name for the establishment of charities." In The Bailiffs &c. of Burford *v.* Lenthall,[3] Lord Hardwicke is reported to have said: "The courts have mixed the jurisdiction of bringing informations in the name of the attorney-general with the jurisdiction given them under the Statute of Elizabeth, and proceed either way according to their discretion."

§ 1530. **Same.** — In a subsequent case,[4] which was an information filed by the attorney-general against the master and governors of a school, calling them to account in chancery as having the general superintendency of all charitable donations, the same learned chancellor, in discussing the general jurisdiction of the Court of Chancery on this head, and distinguishing the case before him from others because the trustees or governors were invested

Wilmot's Notes, 24; Shelford on Mortg. & Charities, ch. 4, p. 267; Corpr. of Ludlow *v.* Greenhouse, 1 Bligh R. (N. S.) 48; Wellbeloved *v.* Jones, 1 Sim. & Stu. 43; Attorney-Gen. *v.* Brown, 1 Swanst. R. 265, 290, 291. In Attorney-Gen. *v.* Mayor of Dublin, 1 Bligh (N. S.), Rep. 312, 347, Lord Redesdale said that the Statute of Elizabeth gave a new remedy, but created no new law respecting charities.

[1] Anon. 1 Ch. Cas. 267.

[2] 2 P. Will. 103, 118. Cited also 7 Ves. Jr. 63, 87; and by Mr. Ch. Justice Wilmot, in Wilmot's Notes of Cases, 24.

[3] Atk. 550 (1743).

[4] Attorney-Gen. *v.* Middleton (1751), 2 Ves. 327.

with the visitatorial power, said: "Consider the nature of the foundation. It is at the petition of two private persons by charter of the Crown, which distinguishes this case from cases of the Statute of Elizabeth on charitable uses, or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the particular purposes therein, and no charter given by the Crown to found and regulate it unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court founded on its general jurisdiction, and that is from necessity; because there is no charter to regulate it, and the King has a general jurisdiction of this kind. There must be somewhere a power to regulate. But where there is a charter with proper powers, there is no ground to come into this court to establish that charity; and it must be left to be regulated in the manner the charter has put it or by the original rules of law. Therefore, though I have often heard it said in this court if an information is brought to establish a charity and praying a particular relief and mode of regulation, and the party fails in that particular relief, yet that information is not to be dismissed, but there must be a decree for the establishment.[1] That is always with this distinction where it is a charity at large or in its nature before the Statute of Charitable Uses; but not in the case of charities incorporated and established by the King's charter under the great seal, which are established by proper authority allowed." And again: "It is true that an information in the name of the attorney-general as an officer of the Crown was not a head of the Statute of Charitable Uses, because that original jurisdiction was exercised in this court before. But that was always in cases now provided for by that statute; that is, charities at large not properly and regularly provided for in charters of the Crown."

§ 1531. **Same.** — It was manifestly therefore the opinion of Lord Hardwicke, that, independent of the Statute of Elizabeth, the Court of Chancery did exercise original jurisdiction in cases of charities at large, which he explains to mean charities not regulated by charter. But it does not appear that his attention was called to discriminate between such as could take effect at law by reason of the interposition of a feoffee or devisee capable of taking, and those where the purpose was general charity without the interposition of any trust to carry it into effect. The same remark applies to the dictum by Sir Joseph Jekyll.

[1] S. P. Attorney-Gen. *v.* Brereton, 2 Ves. 425, 427.

§ 1532. **A Court of Equity Will Aid a Defective Conveyance to Effectuate Charitable Intention of Grantor.** — In a still later case,[1] which was an information to establish a charity and aid a conveyance in remainder to certain officers of Christ's College to certain charitable uses, Lord Keeper Henley (afterwards Lord Northington) is reported to have said: "The conveyance is admitted to be defective, the use being limited to certain officers of the corporation and not to the corporate body; and therefore there is a want of proper persons to take in perpetual succession. The only doubt is whether the court shall supply this defect for the benefit of the charity under the Statute of Elizabeth. And I take the uniform rule of this court before, at, and after the Statute of Elizabeth to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus though devises to corporations were void under the Statute of Henry VIII, yet they were always considered as good in equity if given to charitable uses." And he then proceeded to declare that he was obliged, by the uniform course of precedents, to assist the conveyance; and therefore he established the conveyance expressly under the Statute of Elizabeth.

§ 1533. **Same.** — There is some reason to question whether the language here imputed to Lord Northington is minutely accurate. His Lordship manifestly aided the conveyance as a charity in virtue of the Statute of Elizabeth. And there is no doubt that it has been the constant practice of the court since that statute to aid defects in conveyances to charitable uses. But it is by no means clear that such defects were aided before that statute. The old cases, although arising before the statute, were deemed to be within the reach of that statute by its retrospective language, and were expressly decided on that ground.[2] The very case put, of devises to corporations which are void under the Statute of Henry VIII and are held good solely by the Statute of Elizabeth, shows that his Lordship was looking to that statute; for it is plain that a devise void by statute cannot be made good upon any principles of general law. What therefore is supposed to have

[1] Attorney-Gen. *v.* Tancred, 1 W. Bl. 90; s. c. Ambler, 351; 1 Eden R. 10.

[2] Collison's Case, Hob. R. 136; s. c. Moore, 888; Ibid. 882; Sir Thomas Middleton's Case, Moore, 889; Rivett's Case, Moore, 890, and the cases cited in Raithby's note to Attorney-Gen. *v.* Rye, 2 Vern. 453; Duke on Charit. 74, 77, 83, 84, 105 to 113; Bridg. on Charit. 279, 366, 370, 380.

been stated by him as being the practice before the statute is probably, if not founded in the mistake of the reporter, an inadvertent statement of the learned chancellor. The same case is reported in another book, where the language reported to have been used by him is: "The constant rule of the court has always been, where a person has a power to give and makes a defective conveyance to charitable uses, to supply it as an appointment; as in Jesus's College, Collison's Case, in Hobart, 136."[1] Now Collison's Case was expressly held to be sustainable only as an appointment under the Statute of Elizabeth; and this shows that the language of his Lordship was probably meant to be limited to cases governed by that statute.

§ 1534. **Same.** — In a more recent charity case Sir Arthur Piggott, in argument, said: "The difference between the case of individuals and that of charities is founded on a principle which has been established ever since the Statute of Charitable Uses, in the reign of Elizabeth, and has been constantly acted upon from those days to the present." Lord Eldon adopted the remark, and said: "I am fully satisfied as to all the principles laid down in the course of this argument, and accede to them all." His Lordship then proceeded to discuss the most material of the principles and cases from the time of Elizabeth, and built his reasoning, as indeed he had built it before, upon the supposition that the doctrine in chancery, as now established, rested mainly on that statute.[2]

§ 1535. **Same.** — Such were the principal cases, or at least the principal cases which my own researches have brought to my notice, at the time when the present work was first published, wherein the jurisdiction of chancery over charities, antecedent to the Statute of Elizabeth, had been directly or incidentally discussed. The circumstance that no cases prior to that time could then be found in Equity Jurisprudence; the tradition that had passed down to our own times that original bills to establish charities were first entertained in the time of Lord Ellesmere; the fact that the cases immediately succeeding that statute, in which devises void at law were held good in equity as charities, might have been argued and sustained upon the general jurisdiction of the

[1] Ambler, R. 351.

[2] Mills *v.* Farmer, 1 Meriv. R. 55, 86, 94, 100; Moggridge *v.* Thackwell, 7 Ves. 36; Attorney-Gen. *v.* Bowyer, 3 Ves. 714, 726. See the remarks of Lord Eldon in the more recent cases of Attorney-Gen. *v.* Skinner's Company, 2 Rep. R. 420, and Sir John Leach, in Attorney-Gen. *v.* Brentwood School, 1 Mylne & Keen, 376, and Lord Redesdale's remarks in the Attorney-Gen. *v.* Corpor. of Dublin, 1 Bligh R. 347 (N. S.).

court if it then existed, and yet were exclusively argued and decreed upon the footing of that statute. These facts and circumstances did certainly seem to afford a strong presumption that the jurisdiction of the court to enforce charities where no trust is interposed, and where no devisee is in esse, and where the charity is general and indefinite both as to persons and objects, mainly rests upon the constructions (whether ill or well founded is now of no consequence) of the Statute of Elizabeth. And accordingly that conclusion was arrived at and sustained on a very important occasion by the Supreme Court of the United States.[1]

§ 1536. **Same.** — Since that period however the subject has undergone a more full and elaborate consideration, both in Great Britain and in America. Lord Eldon, in a case calling for an expression of his opinion upon the point in 1826, took occasion to observe: "It may not be quite clear that these instruments originally void were held to be valid merely by the effect of the 43d of Elizabeth. It might have been supposed that there was in the court a jurisdiction to render effective an imperfect conveyance for charitable purposes, and the statute has perhaps been construed with reference to such, the supposed jurisdiction of this court; so that it was not by the effect of the 43d Elizabeth alone, but by the operation of that statute on a supposed antecedent jurisdiction in the court, that void devises to charitable purposes were sustained. Out of that supposed jurisdiction this construction of the statute may have arisen."[2] In 1834, in the case of the Brentwood Grammar School, a charity founded in the reign of Philip and Mary came under the consideration of Sir John Leach, the Master of the Rolls, and it then appeared that the charity was mainly to found and endow a grammar school at Brentwood, and was established by a decree of the Court of Chancery as early as the 12th of Elizabeth, although it included also a provision for the support of "five poor folks in Southweald"; and Sir John

[1] This whole subject was most elaborately considered and all the leading authorities investigated by Mr. Ch. Justice Marshall, in delivering the opinion of the court in the case of the Baptist Association *v.* Hart's Ex'ors (4 Wheat. R. 1). In that case the court arrived at the conclusion, upon a full survey of all the authorities, that charities, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, could be established by a Court of Equity either exercising its ordinary jurisdiction or exercising the prerogative of the King as parens patriæ, before the Statute of Elizabeth. See also Gallejo *v.* Attorney-Gen., 2 Leigh, R. 450, 3 Kent, Comm. Lect. 68, p. 508, note (*d*), 4th ed. See McCord *v.* Ochiltree, 8 Blackf. 15; Grimes *v.* Harmon, 35 Ind. 198.

[2] Attorney-Gen. *v.* Skinner's Company, 2 Russ. Ch. R. 407, 420.

Leach, upon the bill before him for the establishment of a proper scheme for the charities, affirmed the original decree.[1] Lord Redesdale, in a very important case before the House of Lords in 1827, expressed himself to the following effect: "We are referred to the Statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction, it created no new law; it created a new and ancillary jurisdiction; a jurisdiction borrowed from the elements which I have mentioned; a jurisdiction created by a commission to be issued out of the Court of Chancery to inquire whether the funds given for charitable purposes had or had not been misapplied, and to see to their proper application; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that statute, and there can be no doubt that by information by the attorney-general the same thing might be done. While proceedings under that statute were in common practice (as appears in that collection which is called Duke's Charitable Uses), you will find it stated that in certain cases, although a commission might issue under the statute, an information by the attorney-general was the better remedy. In process of time indeed it was found that the commission of charitable uses was not the best remedy, and that it was better to resort again to the proceedings by way of information in the name of the attorney-general. The right which the attorney-general has to file an information is a right of prerogative; the King, as parens patriæ, has a right by his proper officer to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases; the case of lunatics, where he has also a special prerogative to take care of the property of a lunatic, and where he may grant the custody to a person who as a committee may proceed on behalf of the lunatic; or where there is no such grant, the attorney-general may proceed by his information." [2]

§ 1537. **Same.** — On a still more recent occasion in Ireland Lord

[1] Attorney-Gen. *v.* Brentwood School, 1 Mylne & Keen, 376.

[2] Attorney-Gen. *v.* The Mayor &c. of Dublin, 1 Bligh (N. S.), 312, 347, 348. See also Corporation of Ludlow *v.* Greenhouse, 1 Bligh (N. S.), 61, 62, 68.

Chancellor Sugden examined the whole subject with great diligence and learning, and reviewed historically the leading authorities. The conclusion at which he arrived was, that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a Court of Equity has at all times interfered to make good that which at law was an illegal or informal gift; and that cases of charity in Courts of Equity in England were valid independently of and previous to the Statute of Elizabeth.[1] But the most authentic and at the same time the most satisfactory information upon the whole subject is to be found in the report of the Commissioners upon the Public Records, published by Parliament in 1827. From this most important document it appears by a great number of cases previous to the statute that cases of charities where there were trustees appointed for general and indefinite charities as well as for specific charities were familiarly known to and acted upon and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as can be gathered from the records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take.[2]

§ 1538. **Same.** — The subject has also of late years undergone a very elaborate discussion in the American courts, and especially in the Supreme Court of the United States, in the interesting and important case of Mr. Girard's Will, in which all the leading authorities were examined and criticised. In this case the court held that there was a jurisdiction in chancery over charitable trusts antecedent to the Statute of Elizabeth, and that although the statute was never in force in Pennsylvania, yet that the common law of that State had always recognized the chancery jurisdiction in cases of charities.[3]

[1] The Incorporated Society *v.* Richards, 1 Connor & Lawson, R. 58; s. c. 1 Drury & Warren, R. 258.

[2] 1 Cooper's Public Records, 355, Calendar of Proceedings in Chancery. See also Vidal *v.* Girard's Executors, 43 U. S. 155, 11 L. Ed. 205.

[3] Vidal, &c. *v.* Girard's Executors, 43 U. S. 155, 11 L. Ed. 205. See Preachers' Aid Soc. *v.* Rich, 45 Me. 552; Burbank *v.* Whitney, 24 Pick. 146; Going *v.* Emery, 16 Pick. 107; Burr *v.* Smith, 7 Vt. 241; Andrew *v.* New York Bible Soc., 4 Sandf. 156; Ayres *v.* Methodist Church, 3 Sandf. 351; Wheeler *v.* Smith, 9 How. 55; McCord *v.* Ochiltree, 8 Blackf. 15, 21 (overruled by Grimes *v.* Harmon, 35 Ind. 198, so far as it holds that the Statute of Elizabeth was in force in Indiana); Beall *v.* Fox, 4 Ga. 404; Carter *v.* Balfour, 19 Ala. 814; Dickson *v.* Montgomery, 1 Swan, 348; Fontain *v.* Ravenel, 58 U. S. 369, 15 L. Ed. 80; Williams *v.* Williams, 4 Seld. 525; Bascomb *v.* Albertson, 34 N. Y. 584; Norris *v.* Thompson, 4 C. E. Green, 307; Howard *v.* American Peace Soc., 49 Me. 288.

§ 1539. **Bequest Must Be Such as Comes within Statute as to Charities.** — But however extensive the jurisdiction may originally have been over the subject of charities, and however large its application, it is very certain that since the Statute of Elizabeth no bequests are deemed within the authority of chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable, or which by analogy are deemed within its spirit and intendment.[1] A bequest may in an enlarged sense be charitable, and yet not within the purview of the statute. Charity, as Sir William Grant (the Master of the Rolls) has justly observed, in its widest sense, denotes all the good affections men ought to bear towards each other; in its more restricted and common sense, relief to the poor. In neither of these senses is it employed in the Court of Chancery.[2] In that court it means such charitable bequests only as are within the letter and the spirit of the Statute of Elizabeth.

§ 1540. **Same.** — Therefore where a testatrix bequeathed the residue of her personal estate to the Bishop of D to dispose of the same "to such objects of benevolence and liberality as the bishop in his own discretion shall most approve of", and she appointed the bishop her executor, on a bill brought to establish the will and declare the residuary bequest void, the bequest was held void upon the ground that objects of benevolence and liberality were not necessarily charitable within the Statute of Elizabeth, and were therefore too indefinite to be executed. On that occasion it was said by the court that no case had yet been decided in which the court had executed a charitable purpose, unless the will had contained a description of that which the law acknowledged to be a charitable purpose, or had devoted the property to purposes of charity in general, in the sense in which that word is used in the Court of Chancery. The devise here was of a trust of so indefinite a nature that it could not be under the control of the court, so that the administration of it could be reviewed by the court, or so that if the trustee died the court itself could execute the trust. It fell therefore within the rule of the court, that where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taking it shall be deemed a trustee, if not

[1] See 2 Roper on Legacies, by White, ch. 19, § 1, pp. 111, 112; Nash *v.* Morley, 5 Beav. R. 177, 182, 183.

[2] Morice *v.* Bishop of Durham, 9 Ves. 399; s. c. 10 Ves. 522; Brown *v.* Yeale, 7 Ves. 50, note (*a*); Moggridge *v.* Thackwell, 7 Ves. 36; Attorney-Gen. *v.* Bowyer, 3 Ves. 714, 726; Coxe *v.* Basset, 3 Ves. 155; Nightingale *v.* Goulburn, 5 Hare, R. 484.

for those who were to take by the will, for those who are to take under the disposition of the law. And the residue was accordingly decreed to the next of kin.[1]

[1] Morice *v.* Bishop of Durham, 9 Ves. 399; s. c. 10 Ves. 522; Trustees of Baptist Association *v.* Hart's Executors, 4 Wheat. 1, 33, 39, 43 to 45. Bequests to the following objects have been held invalid: To "benevolent purposes." James *v.* Allen, 3 Mer. 19. A power of appointment "among such benevolent, religious, or charitable institutions" as the donee might think proper. Norris *v.* Thomson, 4 C. E. Green, 307; s. c. 5 C. E. Green, 489. "To the trustees of Mount Zion Chapel, where I attend, the money to be appropriated according to statement appended", no statement being appended. Aston *v.* Wood, L. R. 6 Eq. 419. The sum of "£6,000 for a hospital, to increase till it amount to [blank], for supporting [blank] boys." Ewen *v.* Bannerman, 2 Dow & C. 74. "To Roman Catholic priests, for prayers for the repose of the testatrix's soul." West *v.* Shuttleworth, 2 Mylne & K. 684. "To Roman Catholic bishops and their successors" in Ireland, no such body being known to the law. Attorney-Gen. *v.* Power, 1 Ball & B. 145. "For the propagation of the Gospel in foreign lands." Carpenter *v.* Miller, 3 W. Va. 174. "For the maintenance of a Jeshuba, or assembly for reading the Jewish law, and advancing their holy religion." Da Costa *v.* De Pas, Ambl. 288; s. c. 2 Swanst. 487, note. "For the political restoration of the Jews to Jerusalem." Habershon *v.* Vardon, 7 Eng. L. & E. 228; s. c. 15 Jur. 961. "To the Infidel Society in Philadelphia, hereafter to be incorporated, for the purpose of building a hall for the free discussion of religion, politics", &c. Zeissweiss *v.* James, 63 Pa. St. 465. See State *v.* Warren, 28 Md. 338, the Statute of Eliz. not being in force. "To trustees to be appointed in another State for an educational institution there." Bascom *v.* Albertson, 34 N. Y. 584, the St. Eliz. not being in force in New York.

Gifts to the following objects have been held valid: "To benevolent and charitable purposes, with recommendation to apply it to domestic servants." Miller *v.* Rowan, 5 Clark & F. 99. "To charitable and deserving objects." In re Sutton, 26 Ch. D. 464. "In the service of my Lord and Master." Powerscourt *v.* Powerscourt, 1 Molloy, 616. "Public and private charities, and to establish a life-boat." Johnston *v.* Swan, 3 Madd. 457. "To be distributed in charity, either to private individuals or public institutions." Horde *v.* Suffolk, 2 Mylne & K. 59. "For promoting charitable purposes, as well of a public as of a private nature, and more especially in relieving distressed persons." Waldo *v.* Caley, 16 Ves. 206. "To such charities as shall be deemed most useful by the executor of [one to whom the property mentioned was given for life]." Wells *v.* Doane, 3 Gray, 201. "For the poor orphans of the state of N. C." Miller *v.* Atkinson, 63 N. C. 537. "For the colored people" of a particular city or State. Meeting Street Baptist Soc. *v.* Hall, 8 R. I. 234; Ex parte Lindley, 32 Ind. 367. But see Grimes *v.* Harmon, 35 Ind. 198 ("to the Orthodox Protestant clergymen of D" for "the education of colored children", there being no such organized body in D). Needles *v.* Martin, 33 Md. 609. "For the Welch circulating charity schools, and for the increase and improvement of Christian knowledge, and promoting religion as most conducive to the said charitable purposes; and moreover to buy Bibles and other religious books, to be divided amongst poor pious persons." Attorney-Gen. *v.* Stepney, 10 Ves. 22. To the "suffering poor" of a town. Howard *v.* American Peace Soc., 49 Me. 288; In re Birkett, 9 Ch. D. 576. The sum of "£1,000

§ 1541. **The Charitable Bequest Should Be Reasonably Definite.** — Upon the like ground a bequest of personalty to trustees to be applied "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general

to poor housekeepers as A shall appoint." Attorney-Gen. *v.* Pearce, 2 Atk. 87. "Towards establishing a bishopric in America." Attorney-Gen. *v.* Chester, 1 Bro. C. C. 444. "For repairs of a monument." Willis *v.* Brown, 2 Jur. 987. "For the perpetual endowment or maintenance of two schools." Kirkbank *v.* Hudson, 7 Price, 213. "To the poor inhabitants of S forever." Attorney-Gen. *v.* Clarke, 1 Ambl. 422. "To promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of S." West *v.* Shuttleworth, 2 Mylne & K. 684. "For the use of Roman Catholic priests in and near London." Attorney-Gen. *v.* Gladstone, 13 Sim. 7. "Charitable, beneficial, and public works" at Dacca, Bengal, for the exclusive benefit of the natives. Mitford *v.* Reynolds, 1 Phill. 185. "For such charities and other public purposes as might lawfully be in T." Delany *v.* Macdermot, L. R. 5 Eq. 60; s. c. 3 Ch. 676. "Poor pious persons, male and female." Nash *v.* Morley, 5 Beav. 177. For a hospital for persons "sick of the small-pox or any other infectious distemper." Attorney-Gen. *v.* Kell, 2 Beav. 575. "To ten worthy men, including some learned men, to purchase meat and wine fit for the service of the two nights of the Passover." Straus *v.* Goldsmid, 8 Sim. 614. "To the widows and orphans of L." Attorney-Gen. *v.* Comber, 2 Sim. & S. 93. For putting out "our poor relations" as apprentices. White *v.* White, 7 Ves. 422. For preaching a sermon on Ascension Day, for keeping the chimes of the church in repair, and for payment to be made to the singers in the gallery. Turner *v.* Ogden, 1 Cox, 316. For supplying water to the town of C for the inhabitants. Jones *v.* Williams, 2 Ambl. 651. For the improvement of the city of Bath. Howse *v.* Chapman, 4 Ves. 542; Attorney-Gen. *v.* Heelis, 2 Sim. & S. 67. "For the benefit, advancement, and propagation of education and learning in every part of the world, as far as circumstances will permit." Whicker *v.* Hume, 14 Beav. 509. "To the Chancellor of the Exchequer, to be appropriated to the benefit and advantage of Great Britain." Nightingale *v.* Goulburn, 5 Hare, 484; s. c. 2 Phill. 594. "For purposes conducing to the good of the county of W and the parish of L especially." Attorney-Gen. *v.* Lonsdale, 1 Sim. 105. See Attorney-Gen. *v.* Carlisle, Ib. 437; Attorney-Gen. *v.* Browne, 1 Swanst. 265; Attorney-Gen. *v.* Dublin, 1 Bligh (N. S.), 312. For the repair of a *family* tomb. Lloyd *v.* Lloyd, 2 Sim. (N. S.) 255; s. c. 10 Eng. L. & E. 139. (Secus if for the repair of the testator's tomb merely. Ib.; In re Birkett, 9 Ch. D. 576. See In re Williams, 5 Ch. D. 735; Wilkinson *v.* Lindgren, L. R. 5 Ch. 570.) Or of an ornamentnl window in a church, though in memory of a particular person. Hoare *v.* Osborne, L. R. 1 Eq. 585. To trustees "to be by them applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes", at their discretion. Rotch *v.* Emerson, 105 Mass. 431. Residuary personalty (following legacies to various charitable institutions) "to and amongst the different institutions, or to any other religious institution or purpose, as A and B might think proper." Wilkinson *v.* Lindgren, L. R. 5 Ch. 570. For the "schooling" of the children of a school district, and for the poor of a county. Heuser *v.* Harris, 42 Ill. 425. For "a school-house and school, to be taught by a female or females, wherein no book of instruction is to be used to teach

utility", has been held void for vagueness and uncertainty, and as not being within the scope of the Statute of Elizabeth.[1]

§ 1542. **Same.** — Upon the like principles a bequest in these words, "In case there is any money remaining, I should wish it to be given in private charity," has been held inoperative; for the objects are too general and indefinite, not being within the Statute of Elizabeth, and not being so ascertained that the trust could be controlled or executed by a Court of Equity.[2] So a bequest to trustees, to such charitable or public purpose or purposes, person or persons, as the trustees should in their discretion think fit, has been held void; for it is in effect a gift in trust, to be absolutely disposed of in any manner that the trustees might think fit, consistent with the laws of the land, which is too general and undefined to be executed.[3] So a bequest for such benevolent, re-

except spelling-books and the Bible." Tainter *v.* Clark, 5 Allen, 66. For the benefit of a "Friends' meeting", it appearing that they applied their funds only to religious worship, schools, aiding the sick, &c., and the purchase and repair of burying-grounds. Devter *v.* Gardner, 7 Allen, 243. To a society for the support of poor women; such being a charity, though a fee is charged for admission. Gooch *v.* Association for Relief, 109 Mass. 558.

Some of the foregoing cases, it will be noticed, turn on the question of definiteness, some on the question whether the object is a charity. Further as to what are charities see Attorney-Gen. *v.* Merrimac Manuf. Co., 14 Gray, 586; Saltonstall *v.* Sanders, 11 Allen, 44; Drury *v.* Natick, 10 Allen, 69; Jackson *v.* Phillips, 14 Allen, 539; Craig *v.* Franklin, 58 Me. 479; Swift *v.* Beneficial Soc., 73 Pa. St. 362; Thomson *v.* Shakespeare, 6 Jur. (N. S.) 281; Chamberlayne *v.* Brockett, L. R. 8 Ch. 206; Beaumont *v.* Oliveira, L. R. 6 Eq. 524; 4 Ch. 309; In re Clark, 1 Ch. D. 497; American Academy *v.* Harvard College, 12 Gray, 582; Loscomb *v.* Wintringham, 7 Eng. L. & E. 164. As to definiteness of objects, Wetmore *v.* Parker, 52 N. Y. 450; Holmes *v.* Mead, Ib. 332; Attorney-Gen. *v.* Soule, 28 Mich. 153; Birchard *v.* Scott, 39 Conn. 63; Trierson *v.* General Assembly, 7 Heisk. 683.

Where the gift to a charity is of a surplus, and that surplus cannot be ascertained by reason of the failure of the prior gift, the gift of the surplus must, it seems, fail. Otherwise where the gift to the charity is merely subject to an honorary trust of uncertain amount. See Hunter *v.* Bullock, L. R. 14 Eq. 45. And where the whole is given to trustees, to apply as much as is necessary to a non-charitable purpose, to which the money cannot be applied, it is a good gift of the whole to the charity. Fisk *v.* Attorney-Gen., L. R. 4 Eq. 521. So where a testator gave £600, the income to be devoted to keeping tombstones in order and the balance to pious Methodists, it was held a good gift to such persons, the prior gift having failed. Dawson *v.* Small, L. R. 18 Eq. 114.

[1] Kendall *v.* Granger, 5 Beav. R. 300.

[2] Ommaney *v.* Butcher, 1 Turn. & Russ. 260, 270. See 2 Roper on Legacies, by White, ch. 19, § 6, pp. 215 to 222; Vesey *v.* Jamson, 1 Sim. & Stu. 69.

[3] Vesey *v.* Jamson, 1 Sim. & Stu. 69.

A devise to a city "of a house for the use and benefit of the white

ligious, and charitable purposes as the trustees should in their discretion think most beneficial, has been held void upon the ground of its generality, as it did not limit the gift to cases of charity, but extended it to those of benevolence also.[1] So a bequest to executors of a fund to apply it to and for such charitable and other purposes as they shall think fit, without being accountable to any persons for their disposition thereof, has been held void on account of its indefiniteness.[2]

§ 1543. **Same.** — So that it appears from these cases that since the Statute of Elizabeth the Court of Chancery will not establish any trusts for indefinite purposes of a benevolent nature not charitable within the purview of that statute, although there is an existing trustee in whom it is vested; but it will declare the trust void, and distribute the property among the next of kin. And yet if there were an original jurisdiction in chancery over all bequests, charitable in their own nature and not superstitious, to establish and regulate them independent of the statute, it is not easy to perceive why an original bill might not be sustained in that court to establish such a bequest, especially where a trustee is interposed to effectuate it; for the statute does not contain any prohibition of such a bequest.

§ 1544. **Same.** — The statute itself begins by a recital that lands, goods, money, &c., had been given, &c., heretofore to certain purposes (which it enumerates in detail), which lands, &c., had not been employed according to the charitable intent of the givers and founders by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver, and employ the same. It then enacts that it shall be lawful for the Lord Chancellor, &c.,

public schools, or for a city hospital, as the city authorities may elect", is not too indefinite. City of Huntsville *v.* Smith, 137 Ala. 382, 35 So. 120; Biscoe *v.* Thweatt, 74 Ark. 545, 86 S. W. 432, and the fact that a discretion is vested in the devisees makes no difference. Spalding *v.* St. Johns. Ind. School, 107 Ky. 382, 54 S. W. 200, 21 Ky. L. Rep. 1107; the devise of a fund to be used in prayers for soul of devisor is valid. Coleman *v.* O'Leary, 114 Ky. 388, 70 S. W. 1068, 24 Ky. L. Rep. 1248; Chamberlain *v.* Stearns, 111 Mass. 267; Haynes *v.* Carr, 70 N. H. 463, 49 Atl. 638. But in one case it was held that a gift to trustees to furnish a memorial window "in their discretion" was not valid. Succession of McCloskey, 52 La. Ann. 1122, 27 So. 705.

[1] Williams *v.* Kershaw, cited 1 Keen, R. 232. But where the bequest was for such religious and charitable purposes as the major part of the trustees should think proper, it was held to be a good bequest to charity within the Statute of Elizabeth. Baker *v.* Sutton, 1 Keen, R. 224, 232, 233.

[2] Ellis *v.* Selby, 1 Mylne & Craig, 286, 298, 299.

to award commissions under the great seal to proper persons, to inquire by juries of all and singular such gifts, &c., breaches of trusts, &c., in respect to such gifts, &c., heretofore given, &c., or which shall hereafter be given, &c., "to or for any the charitable and godly uses before rehearsed"; and upon such inquiry to set down such orders, judgments, and decrees, as the lands, &c., may be duly and faithfully employed to and for such charitable uses before rehearsed, for which they were given; "which orders, judgments, and decrees, not being contrary to the orders, statutes, or decrees of the donors and founders, shall stand firm and good, according to the tenor and purpose thereof, and shall be executed accordingly until the same shall be undone and altered by the Lord Chancellor, &c., upon complaint, by any party grieved, to be made to them." Then follow several provisions excepting certain cases from the operation of the statute which are not now material to be considered. The statute then directs the orders, &c., of the commissioners to be returned, under seal, into the Court of Chancery, &c., and declares that the Lord Chancellor, &c., shall and may "take such orders for the due execution of all or any of the said judgments, orders, and decrees, as to them shall seem fit and convenient." And lastly the statute enacts that any person aggrieved with any such orders, &c., may complain to the Lord Chancellor &c. for redress therein; and upon such complaint the Lord Chancellor, &c., may by such course as to their wisdom shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing, and determining thereof; "and upon hearing thereof shall and may annul, diminish, alter, or enlarge the said orders, judgments, and decrees of the said commissioners as to them shall be thought to stand with equity and good conscience according to the true intent and meaning of the donors and founders thereof"; and may tax and award costs against the persons complaining without just and sufficient cause of the orders, judgments, and decrees before mentioned.[1]

§ 1545. **What Are Proper Subjects upon which to Found a Charitable Bequest.** — The uses enumerated in the preamble of the statute as charitable, are gifts, devises, &c., for the relief of aged, impotent, and poor people; for maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools, and scholars of universities; for repairs of bridges, ports, havens,

[1] See the statute of 43d Elizabeth, ch. 4, at large, 2 Co. Inst. 707; Bridgman on Duke on Charit. ch. 1, pl. 1. These sections, from § 1532 to § 1544, are taken almost literally from 3 Peters, R. App. 486 to 496.

causeways, churches, sea-banks, and highways; for education and preferment of orphans; for or towards the relief, stock, or maintenance for houses of correction; for marriages of poor maids; for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; for relief or redemption of prisoners or captives; and for aid or ease of any poor inhabitants concerning payments of fifteenths, setting out of soldiers, and other taxes.[1] These are all the classes of uses which the statute in terms reaches.

§ 1546. **Same.** — From this summary statement of the contents of the statute it is apparent that the authority conferred on the Court of Chancery in relation to charitable uses is very extensive;[2] and it is not at all wonderful, considering the religious notions of the times, that the statute should have received the most liberal, not to say in some instances the most extravagant, interpretation. It is very easy to perceive how it came to pass that as power was given to the court in the most unlimited terms to annul, diminish, alter, or enlarge the orders and decrees of the commissioners, and to sustain an original bill in favor of any party aggrieved by such order or decree, the court arrived at the conclusion that it might by original bill do that in the first instance which it certainly could do circuitously upon the commission.[3] And as in some cases where the trust was for a definite object, and the trustee living, the court might upon its ordinary jurisdiction over trusts compel an execution of it by an original bill independent of the statute,[4] we are at once let into the origin of the practice of mixing up the jurisdiction by original bill with the jurisdiction under the statute, which Lord Hardwicke alluded to in the passage already quoted,[5] and which at that time was inveterately established. This mixture of the jurisdiction serves also to illustrate the remark of Lord Nottingham in the case already cited;[6] where upon an original bill he decreed a devise to charity void at law to be good in equity as an appointment; although before the Statute of Elizabeth no such decree could have been made.[7]

[1] 2 Fonb. Eq. B. 2, Pt. 2, ch. 1, note (*b*).

[2] See now in England, 16 & 17 Vict. ch. 137; Attorney-Gen. *v.* Dean of Manchester, 18 Ch. D. 596; Glen *v.* Gregg, 21 Ch. D. 513.

[3] See The Poor of St. Dunstan *v.* Beauchamp, 1 Ch. Cas. 193; 2 Co. Inst. 711; Bailiffs, &c., of Burford *v.* Lenthall, 2 Atk. 551; 15 Ves. 305.

[4] Attorney-Gen. *v.* Dixie, 13 Ves. 519; Ex parte Kirkby Ravensworth Hospital, 15 Ves. 305; Green *v.* Rutherforth, 1 Ves. 462; Attorney-Gen. *v.* Earl of Clarendon, 17 Ves. 491, 499; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (*a*); Cooper, Eq. Pl. 292.

[5] Bailiffs, &c., of Burfurd *v.* Lenthall, 2 Atk. 550; ante, § 1529.

[6] Anon. 1 Ch. Cas. 267. [7] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 2, note (*d*).

§ 1547. **What Jurisdiction Controls Where the Charity Is of an Indefinite Nature.** — Upon the whole it seems now to be the better opinion that the jurisdiction of the Court of Chancery over charities where no trust is interposed, or where there is no person in esse capable of taking, or where the charity is of an indefinite nature, is to be referred [1] to the general jurisdiction of that court anterior to the Statute of Elizabeth. This opinion is supported by the preponderating weight of the authorities speaking to the point, and particularly by those of a very recent date which appear to have been most thoroughly considered. The language too of the statute lends a confirmation to this opinion and enables us to trace what would otherwise seem a strange anomaly to a legitimate origin.[2]

§ 1548. **Same.** — Be this as it may, it is very certain that the Court of Chancery will now relieve by original bill or information upon gifts and bequests within the Statute of Elizabeth; and informations by the attorney-general to settle, establish, or direct such charitable donations are very common in practice.[3] Indeed the mode of proceeding by commission under the Statute of Elizabeth has been long abandoned, and the mode of proceeding by information by the attorney-general is now become absolutely universal, so as to amount to a virtual extinguishment of the former remedy.[4] But where the gift is not a charity within the statute, no information lies in the name of the attorney-general to enforce it.[5] And if an information is brought in the name of the attorney-general, and it appears to be such a charity as the court ought to support, although the information is mistaken in the title or in the prayer of relief, yet the bill will not be dismissed; but the court will support it and establish the charity in such manner as by law it may.[6] However, the jurisdiction of

[1] Qu. "is *not* to be referred", &c.? So quoted in 4 Kent, Comm. 508, note, and so printed in earlier editions (e. g. the 2d ed.) of this work. The section would agree better with preceding sections if the "not" were there. It may have been omitted upon a change of view by the author, indicated in §§ 1536 and 1538.

[2] See Preachers' Aid Soc. *v.* Rich, 45 Me. 552, and cases cited ante, § 1538.

[3] Com. Dig. Chancery, 2, N. 1. The proceedings by commission appear practically to have almost fallen into disuse. Edin. Rev. No. lxii. p. 383.

[4] Corporation of Ludlow *v.* Greenhouse, 1 Bligh (N. S.), R. 61, 62, 68.

[5] Attorney-Gen. *v.* Hewer, 2 Vern. 387; Attorney-Gen. *v.* Soule, 28 Mich. 153.

[6] Attorney-Gen. *v.* Smart, 1 Ves. 72; Attorney-Gen. *v.* Jeanes, 1 Atk. 355; Attorney-Gen. *v.* Brereton, 2 Ves. 425; Attorney-Gen. *v.* Middle-

chancery over charities does not exist where there are local visitors appointed; for it then belongs to them and their heirs to visit and control the charity.[1]

§ 1549. **What Charities Are in the Purview of the Statute.** — As to what charities are within the purview of the statute, it may be proper to say a few words in this place in addition to what has been already suggested,[2] although it is impracticable to go into a thorough review of the cases.[3] It is clear that no superstitious uses are within the purview of it; such as are gifts of money for the finding or maintenance of a stipendiary priest; or for the maintenance of an anniversary or obiit; or of any light or lamp in any church or chapel; or for prayers for the dead; or for such purposes as the superior of a convent or her successor may judge expedient.[4] It is equally well settled (as we have seen) that all bequests which in a broad and comprehensive sense may be deemed charities, such as objects of benevolence, liberality, and expanded humanity, are not charities within the purview of the statute; but they must be within the specific enumeration of objects in the statute, to entitle them to be enforced in the Court of Chancery.[5] But there are certain uses which, though not within the strict letter, are yet deemed charitable within the equity of the statute. Such is money given to maintain a preaching minister; to maintain a schoolmaster in a parish; for the setting up a hospital for the relief of poor people; for the building of a sessions house for a city or county; for the making of a new or for the repairing of an old pulpit in a church; for the buying of a pulpit cushion or pulpit cloth; or for the setting of new bells where there are none, or for mending of them where they are out of order.[6]

§ 1550. **Gifts to Charities Receive More Liberal Construction than Gifts to Individuals.** — Charities are also so highly favored

ton, 2 Ves. 327; Attorney-Gen. *v.* Parker, 1 Ves. 43; s. c. 2 Atk. 576; Attorney-Gen. *v.* Whiteley, 11 Ves. 241, 247.

[1] Attorney-Gen. *v.* Price, 3 Atk. 108; Attorney-Gen. *v.* Governors of Harrow School, 2 Ves. 552.

[2] Ante, §§ 1539 to 1541.

[3] They are enumerated with great particularity in Duke on Charitable Uses, by Bridgman; in Com. Dig. Charitable Uses; 2 Roper on Legacies, by White, ch. 19, §§ 1 to 5, pp. 109 to 164. See also 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (*b*).

[4] Duke on Charit. 105; Bridgman on Duke on Charit. 349, 466; Adams *v.* Lambert, 3 Co. Rep. 104; Smart *v.* Prujean, 6 Ves. Jr. 567.

[5] Ante, §§ 1539 to 1541.

[6] Duke on Charit. 105, 113; Bridgman on Duke on Charit. 354; Com. Dig. Charitable Uses, N. 1; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (*b*); Jeremy on Equity Jurisd. B. 1, ch. 6, § 2, pp. 238, 239.

in the law that they have always received a more liberal construction than the law will allow in gifts to individuals.[1] In the first place the same words in a will, when applied to individuals, may require a very different construction when they are applied to the case of a charity. If a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards he appoints no executor, or if having appointed an executor the latter dies in the lifetime of the testator and no other person is appointed in his stead, — in either of these cases, as these bequests are to individuals, the testator will be held intestate, and his next of kin will take the estate. But if a like bequest be given to the executor in favor of a charity, the Court of Chancery will in both instances supply the place of an executor and carry into effect that very bequest which in the case of individuals must have failed altogether.[2]

§ 1551. **Same.** — Again, in the case of an individual, if an estate is devised to such person as the executor shall name, and no executor is appointed, or if, one being appointed, he dies in the testator's lifetime and no other is appointed in his place, the bequest becomes a mere nullity. Yet such a bequest, if expressed to be for a charity, would be good; and the Court of Chancery would in such a case assume the office of an executor and execute it.[3] So if a legacy is given to trustees to distribute in charity and they all die in the testator's lifetime, although the legacy becomes thus lapsed at law (and if the trustees had taken to their own use it would have been gone forever), yet it will be enforced in equity.[4]

§ 1552. **Same.** — Again, although in carrying into execution a bequest to an individual the mode in which the legacy is to take effect is deemed to be of the substance of the legacy, yet where the legacy is to charity, the Court of Chancery will consider charity as the substance; and in such cases, and in such cases only, if the mode pointed out fail, it will provide another mode by which the

[1] 2 Roper on Legacies, by White, ch. 19, § 5, pp. 164 to 222.

[2] Mills *v.* Farmer, 1 Meriv. R. 55, 96; Moggridge *v.* Thackwell, 7 Ves. 36; Ingraham *v.* Ingraham, 169 Ill. 432, 48 N. E. 561; Grand Prairie Seminary *v.* Morgan, 171 Ill. 444, 49 N. E. 516; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[3] Mills *v.* Farmer, 1 Meriv. R. 55, 94; Moggridge *v.* Thackwell, 7 Ves. 37; Attorney-Gen. *v.* Jackson, 11 Ves. 365, 367.

[4] Attorney-Gen. *v.* Hickman, 2 Eq. Cas. Abr. 193; s. c. Bridgman on Duke on Charit. 476; Moggridge *v.* Thackwell, 3 Bro. Ch. Cas. 517; s. c. 1 Ves. Jr. 464; s. c. 7 Ves. 36; Mills *v.* Farmer, 1 Meriv. 55, 100; White *v.* White, 1 Bro. Ch. Cas. 12; Brown *v.* Condit, 70 N. J. Eq. 440, 61 Atl. 1055; Cary *v.* Abbot, 7 Ves. Jr. 490, 6 Rev. Rep. 161.

charity may take effect, but by which no other charitable legatees can take.[1] A still stronger case is, that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but he has left uncertain or to some future act the mode by which it is to be carried into effect, there the Court of Chancery, if no mode is pointed out, will of itself supply the defect and enforce the charity.[2] Therefore it has been held that if a man devises a sum of money to such charitable uses as he shall direct by a codicil annexed to his will, or by a note in writing, and he afterwards leaves no direction by note or codicil, the Court of Chancery will dispose of it to such charitable purposes as it thinks fit.[3] So if a testator bequeaths a sum for such a school as he shall appoint, and he appoints none, the Court of Chancery may apply it for what school it pleases.[4]

§ 1553. **Same.** — The doctrine has been pressed yet further; and it has been established that if the bequest indicate a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention and execute it for the purpose of some other charity agreeably to the law in the room of that contrary to it.[5] Thus a sum of money bequeathed to found a Jews' synagogue has been enforced by the Court of Chancery as a charity, and judicially transferred to the benefit of a foundling hospital![6] And a bequest for the education of poor children in the Roman Catholic faith has been

[1] Heuser *v.* Harris, 42 Ill. 425; Mills *v.* Farmer, 1 Meriv. R. 55, 100; Moggridge *v.* Thackwell, 7 Ves. 36; Attorney-Gen. *v.* Berryman, 1 Dickens, 168; Denyer *v.* Druce, 1 Tamlyn, R. 32; 2 Roper on Legacies, by White, ch. 19, § 5, art. 3, pp. 175 to 181; Attorney-Gen. *v.* Ironmongers' Company, 1 Craig & Phillips, 208, 222, 225; s. c. 2 Beav. R. 313; Attorney-Gen. *v.* The Coopers' Company, 3 Beav. R. 29; Attorney-Gen. *v.* The Drapers' Company, 2 Beav. R. 508.

[2] Mills *v.* Farmer, 1 Meriv. R. 55, 95; Moggridge *v.* Thackwell, 7 Ves. 36; White *v.* White, 1 Bro. Ch. Cas. 12.

[3] Attorney-Gen. *v.* Syderfin, 1 Vern. 224; s. c. 2 Freem. R. 261, and recognized in Mills *v.* Farmer, 1 Meriv. R. 55, and Moggridge *v.* Thackwell, 7 Ves. 36, 70.

[4] 2 Freem. R. 261; Moggridge *v.* Thackwell, 7 Ves. 36, 73, 74.

[5] Da Costa *v.* De Pas, 1 Vern. 251; Attorney-Gen. *v.* Guise, 2 Vern. 266; Cary *v.* Abbot, 7 Ves. 490; Moggridge *v.* Thackwell, 7 Ves. 36, 75; Bridgman on Duke on Charit. Uses, 466; De Themmines *v.* De Bonneval, 5 Russ. R. 288, 292; Attorney-Gen. *v.* Power, 1 B. & Beatt. 145.

The charity must be definite and a mere gift to the poor, to be distributed in the discretion of the executor, is sufficient. Thompson *v.* Brown, 24 Ky. L. Rep. 1066, 70 S. W. 674, 62 L. R. A. 398; Minot *v.* Baker, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 713.

[6] Mills *v.* Farmer, 1 Meriv. R. 55.

decreed in chancery to be disposed of by the King at his pleasure under his sign manual.[1]

§ 1554. [**The Charitable Intention of the Devisor Should Be Clearly Evidenced.** — In the application of the cy pres doctrine, the chancery court will not apply the property to some worthy object of charity because there happens to be no devisee who can take. There must be evidence from the will itself that the intended devise was to a charity and that for some unforeseen reason the charity that was intended to be the recipient of the testator's bounty has ceased to exist or cannot take. The difficulty that arises is usually one of construction of the will, — to find out the intention of the testator. When that is arrived at the rules of law which apply seem to be well settled. If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then, if by a change in circumstances or in the law it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of cy pres will be applied, in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. But if the charitable purpose is limited to a particular object, or to a particular institution and there is no general intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in more cases after it has taken effect, the doctrine of cy pres does not apply, and, in the absence of any limitation over or other provision, the legacy lapses.[2] The fact that the residue is given to a charity

[1] Cary *v.* Abbot, 7 Ves. 490; De Themmines *v.* De Bonneval, 5 Russ. R. 292; Trustees of Baptist Assn. *v.* Smith, 17 U. S. 1, 4 L. Ed. 499. No such power belongs to our courts as that exercised under the King's sign manual in such cases; though the cy pres doctrine prevails in this country as more narrowly exercised in England by virtue of mere equity jurisdiction. Moore *v.* Moore, 4 Dana, 366; Jackson *v.* Phillips, 14 Allen, 539, 576-590; Grimes *v.* Harmon, 35 Ind. 198. This may explain some of our cases in which it is said that the doctrine of cy pres must be rejected, that branch of it exercised by the sign manual being the special object of disapproval. See e. g. Methodist Church *v.* Remington, 1 Watts, 226. For other cases see Beekman *v.* Bonsor, 23 N. Y. 298, 308; Williams *v.* Williams, 4 Seld. 527; Owens *v.* Missionary Soc., 14 N. Y. 380; Attorney-Gen. *v.* Dutch Church, 36 N. Y. 452.

[2] Teele *v.* Bishop of Derry, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401; City of Boston *v.* Doyle, 184 Mass. 373, 68 N. E. 851; Mason *v.* Perry, 22 R. I. 475, 48 Atl. 671; Bowden *v.* Brown, 200 Mass. 269, 86 N. E. 351; Bragg *v.* Litchfield, 212 Mass. 148, 98 N. E. 673; Lynch *v.* South Congregational Parish, 109 Me. 32, 82 Atl.

does not defeat the application of the doctrine of cy pres to another charitable bequest.[1] The matter of the adoption of a scheme for the carrying out of the testator's intentions may be referred to a master or the appellate court may map out a plan, or a proposed plan may be submitted by the trial court[2]; but in the absence of any scheme judicially approved, the trustees of a charity may not make a cy pres application of the estate on their own authority, though desirable.[3] If a general charitable intention appears, and the devise is not of sufficient amount to do what the testator intended, the court will not order the fund to be kept in hand to await the accumulations so that sometime the testator's intention may be carried out to the very letter of his will, but the fund will be disposed of to such charity as will affect the apparent intention.[4]]

§ 1555. [**Same.** — The term "cy pres" is translated to mean "as near as may be." The doctrine of cy pres is therefore the doctrine of nearness or approximation; and it appears in English jurisprudence in three separate departments, yet with similar operation and effect. First, in the law of testaments, where a personal legacy has been given upon a condition precedent, and the literal performance of this condition had become impossible from unavoidable circumstances and without fault of the person to be benefited. Here it is sufficient if the condition be performed as nearly as it can be. Second, in the law of private trusts, where lands are limited to an unborn person for life, with remainder to his first and other sons, successively, in tail. Here, in order to secure the flowing of the testator's bounty to the issue, the limitations may be held to create an estate in tail in the first taker. Third, in the law of charitable trusts, where gifts have

432; City of Keene *v.* Eastman, 75 N. H. 191, 72 Atl. 213; Quimby *v.* Quimby, 175 Ill. App. 367, but not where original devisee has abandoned its work. Stratton *v.* Physio-Medical College, 149 Mass. 505, 21 N. E. 874, 14 Am. St. Rep. 442, 5 L. R. A. 33; Adams *v.* Page, 76 N. H. 96, 79 Atl. 837; Brice *v.* Trustees of Memorial Chapel, 31 R. I. 183, 76 Atl. 774; Academy of Visitation *v.* Clemens, 50 Mo. 167; Women's Christian Assn. *v.* Campbell, 147 Mo. 103, 48 S. W. 960; Trustees of Sailors Snug Harbor *v.* Carmody, 158 App. Div. 738, 144 N. Y. Supp. 24; Mars *v.* Gibbert, 93 S. C. 455, 77 S. E. 131.

[1] Fairhaven *v.* Briggs, 164 Mass. 561, 42 N. E. 118.

[2] Ford *v.* Thomas, 111 Ga. 493, 36 S. E. 841; Osgood *v.* Rogers, 186 Mass. 238, 71 N. E. 306; Codman *v.* Brigham, 187 Mass. 309, 72 N. E. 1008, 105 Am. St. Rep. 394; Attorney-Gen. *v.* Goodell, 180 Mass. 538, 62 N. E. 962.

[3] MacKenzie *v.* Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

[4] Norris *v.* Loomis, 215 Mass. 344, 102 N. E. 419.

been made for charitable purposes, which, either originally or in the course of time, cannot be literally executed. Here the gift will be administered as nearly as may be according to the donor's purpose under general rules of law. In all of these instances it will be observed that the underlying principle is this: Where the testator or donor had two objects in view, one private or general, and the other secondary or particular, and these are, literally speaking, incompatible, the particular object must be sacrificed in order that effect may be given to the general object according to law and "as near as may be" to the testator's or donor's intention. Again, the principle may be more briefly stated as that of applying property as nearly as possible according to the donor's intentions, when those intentions cannot be exactly carried out. But it must clearly appear that the intentions of the testator cannot be carried out in terms. If they by any means can be so performed, there is no room for the doctrine of cy pres.[1]]

§ 1556. [**The Doctrine of Cy Pres Is Not a Universal One.** — The doctrine of cy pres and the strict enforcement of the Statute of Elizabeth has not been adopted by all of the States, and in some it has been expressly denied. It seems though, that in the great majority of the States that the trust will not fail if it can by any possibility be upheld, though if the trust were to fail the doctrine of cy pres would apply if it were recognized in that jurisdiction. For this reason a wide latitude in the construction of charitable gifts has been given.[2] But in some States it has been held that the doctrine does not apply at all.[3] In some others, it

[1] MacKenzie *v.* Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

[2] Lewis *v.* Gaillard, 61 Fla. 819, 56 So. 281; In re Nilson's Est., 81 Neb. 809, 116 N. W. 971; Kemmerer *v.* Kemmerer, 233 Ill. 327, 84 N. E. 256; Mason *v.* Bloomington Library Assn., 237 Ill. 442, 86 N. E. 1044, 143 Ill. App. 39; French *v.* Calkins, 252 Ill. 243, 96 N. E. 877; Hubbard *v.* Worcester Art Museum, 194 Mass. 280, 80 N. E. 490; Grimke *v.* Malone, 206 Mass. 49, 91 N. E. 899; Ely *v.* Malone, 202 Mass. 545, 89 N. E. 166; Richardson *v.* Mullery, 200 Mass. 247, 86 N. E. 319; Nichols *v.* Newark Hospital, 71 N. J. Eq. 130, 63 Atl. 621; Larkin *v.* Wikoff, 75 N. J. Eq. 462, 72 Atl. 98; Erskine *v.* Whitehead, 84 Ind. 357; Hoeffer *v.* Clogan, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 204; Harrison *v.* Brophy, 59 Kans. 1, 51 Pac. 883, 40 L. R. A. 721; Jones *v.* Habersham, 107 U. S. 174, 27 L. Ed. 401, 2 S. Ct. Rep. 336; Festorazzi *v.* St. Joseph's Catholic Church, 104 Ala. 327, 18 So. 394, 53 Am. St. Rep. 48, 25 L. R. A. 360; German Pioneer Verein *v.* Meyer, 70 N. J. Eq. 192, 63 Atl. 835; Tincher *v.* Arnold, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471.

[3] Ould *v.* Washington Hospital, 95 U. S. 303, 24 L. Ed. 450; Universalist Convention *v.* May, 147 Ala. 455, 41 So. 515; McHugh *v.* McCole,

is practically enforced, though not admitted in terms as a correct doctrine of equity. So that, in order that the trust may not fail, where it appears that the devise is for the perpetuation of an unlawful or immoral religious sect the court will direct the application of the fund to a legitimate purpose. Original chancery jurisdiction over charities existed in England, and was exercised there, before the Statute of Elizabeth was passed; and it has now become an established principle of American law, that courts of chancery will sustain and protect a gift, devise, or bequest, or dedication of property to public charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift is a dedication specific and capable of being carried into effect according to the intentions of the donor.[1] Trusts for charitable uses are not dependent for their support upon the Statute of Elizabeth. Before its enactment they had been sustained by the English chancellors in virtue of their general equity powers in numerous cases. And generally, in this country, it has been settled that Courts of Equity have an original and inherent jurisdiction over charities, though the English statute is not in force, and independently of it. It is believed that such is the accepted doctrine in Virginia, Maryland, and North Carolina.[2]]

§ 1557. **Doctrine of Cy Pres Applied When Literal Execution of Gift Becomes Impracticable.** — Another principle equally well established is, that if the bequest be for charity it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are in esse or not, or whether the legatee be a corporation capable in law of taking or not, or whether the bequest can be carried into exact execution or not; for in all these and the like cases the court will sustain the legacy and give it effect according to its own principles.[3] And where a literal execution becomes inexpedient or impracticable, the court will execute

97 Wis. 166, 72 N. W. 631, but the charity will be enforced where it is sufficiently certain and definite. Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924; Loch *v.* Mayer, 50 Misc. Rep. 442, 100 N. Y. Supp. 837; McAuley *v.* Wilson, 16 N. C. 276; Hester *v.* Hester, 37 N. C. 330; Holland *v.* Peck, 39 N. C. 255; Bridges *v.* Pleasants, 39 N. C. 26, 44 Am. Dec. 94; Tilley *v.* Ellis, 119 N. C. 233, 26 S. E. 29.

[1] Mormon Church *v.* United States, 136 U. S. 1, 34 L. Ed. 481, 10 S. Ct. Rep. 792; Perin *v.* Carey, 65 U. S. 465, 16 L. Ed. 701; Fontain *v.* Ravenel, 58 U. S. 369, 15 L. Ed. 80; Beatty *v.* Kurtz, 27 U. S. 566, 7 L. Ed. 521.

[2] Kain *v.* Gibboney, 101 U. S. 362, 25 L. Ed. 813; Erskine *v.* Whitehead, 84 Ind. 357; Barnum *v.* Mayor of Baltimore, 62 Md. 275.

[3] See Preachers' Aid Soc. *v.* Rich, 45 Me. 552; Tappan *v.* Deblois, Ib. 122; Bliss *v.* American Bible Soc., 2 Allen, 334; Philadelphia *v.* Fox,

it as nearly as it can according to the original purpose, or (as the technical expression is) cy pres.[1] This doctrine seems to have been borrowed from the Roman law; for by that law donations for public purposes were sustained, and were applied when illegal cy pres to other purposes, at least one hundred years before Christianity became the religion of the empire.

§ 1558. **Same.** — Thus a devise of lands to the church wardens of a parish (who are not a corporation capable of holding lands) for a charitable purpose, although void at law, will be sustained in equity.[2] So if a corporation for whose use a charity is designed is not in esse and cannot come into existence but by some future act of the Crown, as for instance a gift to found a new college, which requires an act of incorporation, the gift will be held valid and the court will execute it.[3] So if a devise be to an existing corporation by a misnomer which makes it void at law, it will be held good in equity.[4] So where a devise was to the poor generally, the court decreed it to be executed in favor of three public charities in London.[5] So a legacy towards establishing a bishop in America

64 Pa. St. 169; Academy of Visitation *v.* Clemens, 50 Mo. 167; Meeting Street Baptist Soc. *v.* Hail, 8 R. I. 234. But see New *v.* Bonaker, L. R. 4 Eq. 655. Neither change of name nor of location of a corporation to which a gift is made will avoid the gift. Girard *v.* Philadelphia, 7 Wall. 1; Gower *v.* Mainwaring, 2 Ves. 87, 89, per Lord Hardwicke.

[1] Attorney-Gen. *v.* Oglander, 3 Bro. Ch. Cas. 166; Attorney-Gen. *v.* Green, 2 Bro. Ch. Cas. 492; Frier *v.* Peacock, Rep. temp. Finch, 245; Attorney-Gen. *v.* Boultbee, 2 Ves. Jr. 380; Bridgman on Duke on Charit. Uses, 355; Ingles *v.* Trustees of the Sailors' Snug Harbor, 28 U. S. 99, 7 L. Ed. 617; Attorney-Gen. *v.* Wansay, 15 Ves. 232; see Trustees of Baptist Assn. *v.* Smith, 17 U. S. 1, 4 L. Ed. 499. See Heuser *v.* Harris, 42 Ill. 425; McIntire *v.* Zanesville, 17 Ohio St. 352.

[2] Burns, Ecc. Law, 226; Duke, 33, 115; Com. Dig. Chancery, 2, N. 2; Attorney-Gen. *v.* Combe, 2 Ch. Cas. 13; Rivett's case, Moore, 890; Attorney-Gen. *v.* Bowyer, 3 Ves. Jr. 714; West *v.* Knight, 1 Ch. Cas. 135; Highmore on Mortm. 204; Tothill, 34; Mills *v.* Farmer, 1 Meriv. R. 55.

[3] White *v.* White, 1 Bro. Ch. Cas. 12; Attorney-Gen. *v.* Downing, Ambl. R. 550, 571; Attorney-Gen. *v.* Dowyer, 3 Ves. Jr. 714, 727; Inglis *v.* Trustees of Sailors' Snug Harbor, 28 U. S. 99, 7 L. Ed. 617; Swasey *v.* American Bible Soc., 57 Me. 523. Secus perhaps where the Statute of Elizabeth is not in force. State *v.* Warren, 28 Md. 338; Zeissweiss *v.* James, 63 Pa. St. 465.

[4] Minot *v.* Boston Asylum, 7 Met. 417; Tucker *v.* Seamen's Aid Soc., Ib. 188; Winslow *v.* Cummings, 3 Cush. 359. So if there is doubt as to which of two was intended, extrinsic evidence will be received. Bodman *v.* American Tract Soc., 9 Allen, 447; In re Maguire, L. R. 9 Eq. 632; Hosea *v.* Jacobs, 98 Mass. 65; Anon., 1 Ch. Cas. 267; Attorney-Gen. *v.* Plat. Rep. temp. Finch, 221.

[5] Attorney-Gen. *v.* Peacock, Rep. temp. Finch, 245; Owens *v.* Bean, Id. 395; Attorney-Gen. *v.* Syderfin, 1 Vern. 224; Clifford *v.* Francis, 1 Freem. R. 330.

was held good although none was yet appointed.[1] So where a bequest of £1,000 was "to the Jews' Poor, Mile End", and there were two charitable institutions for Jews at Mile End, it not appearing which of the charities was meant, the court held that the fund ought to be applied cy pres, and divided the bequest between the two institutions.[2]

§ 1559. **Same.** — And where a charity is so given that there can be no objects, the court will order a new scheme to execute it. But if objects may, though they do not at present, exist, the court will keep the fund for the old scheme.[3] And when the specified objects cease to exist, the court will new-model the charity.[4] Thus where there was a bequest of the residue of the testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey or Barbary", one fourth to charity schools in London and its suburbs, and one fourth towards necessitated freemen of the company, there being no British slaves in Turkey or Barbary to redeem, the court directed a master to approve of a new scheme cy pres; and in that case it further approved a scheme to give the moiety of the charities to the other fourth parts which were bequeathed.[5]

[1] Attorney-Gen. *v.* Bishop of Chester, 1 Bro. Ch. Cas. 444.

[2] Bennett *v.* Hayter, 2 Beav. R. 81. See In re Kilvert, L. R. 12 Eq. 183; s. c. 7 Ch. 170.

[3] Attorney-Gen. *v.* Oglander, 3 Bro. Ch. Cas. 160. See Attorney-Gen. *v.* Stewart, L. R. 14 Eq. 17.

[4] But see Fisk *v.* Attorney-Gen., L. R. 4 Eq. 521. And as to change of circumstances, requiring alterations in the charity, see Attorney-Gen. *v.* St. John's Hospital, L. R. 1 Ch. 92; Attorney-Gen. *v.* City of London, 3 Bro. Ch. Cas. 171; s. c. 1 Ves. Jr. 243.

[5] Attorney-Gen. *v.* The Ironmongers' Company, 2 Beav. R. 313. On this occasion Lord Langdale said: "With respect to the order of reference it is now necessary that some construction should be given to it, and I am of opinion that the master was bound to consider whether there could be a cy pres application for the first purpose before he proceeded to consider the propriety of the application to the second purpose. But then I am by no means of opinion that he was bound to consider it precisely in the same manner as he would have been bound to do if there had been no other charitable purpose mentioned in the will. Where a fund is to be disposed of cy pres, the court, for the sake of making a disposition, is bound to act upon the suggestions which are before it, however remote, and it is rather astute in ascertaining some application in conformity more or less with the intention of the testator. The case however is different where there are other charitable purposes mentioned in the testator's will itself, and in which a comparison may be instituted between the probability of the testator resorting to something very remote from his original intention and something far less remote from the other objects which are specifically mentioned in the will. I quite agree with the view which has been taken upon the subject in the argument, — that if it

§ 1560. **Court Will Supply Defects in Conveyances.** — In further aid of charities the court will supply all defects of conveyances

could have been found that there was a clear and close approximation to any purpose analogous to the first, the master ought to have preferred it to the second and third, distinctly mentioned in the will; but if such approximation were so remote that there would be very great difficulty in making out the similarity, and it appeared probable that if the subject had been in the contemplation of the testator he would have preferred the other two objects mentioned in his will, then I think it became the duty of the master to look to those second objects and lay aside the first." This decree was varied upon appeal by Lord Cottenham, 1 Craig & Phillips, 508, 522. On this occasion his Lordship said: "It is obviously true that if several charities be named in a will and one fail for want of objects, one of the others may be found to be cy pres to that which has failed; and if so, its being approved by the testator ought to be an additional recommendation; but such other charity ought not, as I conceive, to be preferred to some other more nearly resembling that which has failed. That point however is not open upon the present report, which was made under an order directing the master in settling a scheme to have regard, as near as may be, to the intention of the testator as to the bequest contained in his will touching British captives, and having regard also to the other charitable bequests in the said will. By this I understand that the first subject to be considered is the intention of the testator, to be discovered from the gift in favor of British slaves; subordinately to which, and if possible consistently with it, the other charities are to be considered; and this I conceive would have been the course to be pursued if there had not been any such special directions. Assuming this to be the rule, it appears that the first charity is most general in its objects, being applicable to all British persons who should happen to be in a particular situation; and the second is limited to persons in London and its suburbs; and that the third is confined to freemen of a particular company in London. It would seem therefore that although there is no possibility of benefiting the British community at large in the mode intended by the testator, none being found in the situation he anticipated, it would yet be more consistent with his intention that the same community should enjoy the benefit of his gift in any other way than that it should be confined to any restricted portion of such community. In considering the manner in which such benefit should be conferred, it is very reasonable and proper to look to other provisions in his will in order to see whether he has indicated any preference to any particular mode of administering charity. If a testator had given part of his property to support hospitals for leprosy in any part of England, and another part to a particular hospital, it would be reasonable to adopt the support of hospitals as the mode of applying the disposable funds; but there would not be any ground for giving the whole to the particular hospital. The only case referred to as giving any countenance to such a principle is the unreported case of Attorney-Gen. *v.* Bishop of Llandaff, cited 2 Mylne & Keen, 586, and stated in the master's report in Attorney-Gen. *v.* Gibson, dated 23d of July, 1835. See this case mentioned in 2 Beavan, R. 317, n. It is however to be observed that there is no appearance of that case having been discussed; and that the trust which failed was as unlimited as to the description of slaves as the present; and that the scheme may have been adopted upon the principle I act upon in adopting the second gift in this testator's will as indicative of

where the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any

his preference for a particular charity, and therefore to be preferred in the absence of any other more resembling the object of that which has failed. It may also be observed that the scholarships in that case appear to have been open to every description of candidate. If Lord Eldon had thought this the correct principle to act upon, he would, in Mills *v.* Farmer (19 Ves. 483), have given the whole funds to the two charities named, instead of referring it to the master to approve of a scheme for distributing the funds; having regard, it is true, to those two objects named, which was proper for the purpose of ascertaining what description of charity was most likely to be in conformity with the views of the testator. To assume, because a testator names two charities in his will, that he would have given the amount of both legacies to one if he had foreseen that the other could not be carried into effect, and therefore to give the provision intended for the object which fails to the other, is, or may be, totally inconsistent with the doctrine of cy pres. The two objects may be wholly unconnected, and there may be other charities closely connected with that which the testator intended to favor, but as indicative of the testator's general views and intentions, it may be very proper to observe the course he has pursued in his gifts to other charities. I think therefore that in the absence of any objects bearing any resemblance to the object which has failed, it is very proper to look to the second gift, but only as a guide to lead to what the testator would probably have done himself, and therefore not to be followed further than may be proper to attain that object; but with regard to the third object I cannot see any grounds for considering it as indicative of the testator's general views, or any reason for supposing that he would under any circumstances have wished that provision increased. The objects are restricted within the narrowest limits, and it is in that respect in direct contrast with the extended nature of the first gift; but what appears to me to be conclusive against any reference to the third gift is, that the testator has expressed his reasons for the gift, which can have no application to the moiety undisposed of. He says that the third gift is in consideration of the company's 'care and pains in the execution of his will.' It is true that this compensation is given to the company in the shape of a provision for necessitous decayed freemen of the company, their widows and children, and no doubt is a charity; but in looking for evidence of the testator's general views and intentions with reference to the kind of charities to be favored, it cannot be inferred that he preferred the distressed freemen of the company to all others, because he made a provision for them as a consideration for services to be performed by the company; and this consideration has already increased in a greater ratio than the income of the property, it being well known that a large property may be administered at a less percentage than a small one. I am therefore of opinion that this third gift cannot be referred to for any purpose in settling a scheme for the application cy pres of the funds intended for the first; but I think the most reasonable course to be adopted is to look at the second gift as indicative of the kind of charity preferred by the testator, but making it as general in its application as the first was intended to be, that is open to all who might stand in need of its assistance; which leads to this conclusion, that it should be applied in support of charity schools without any restriction as to place, where the education is according to the Church of England, but not to exceed £20 per year to any one."

statute.[1] The doctrine is laid down with great accuracy by Duke,[2] who says that a disposition of lands, &c., to charitable uses is good, "albeit there be defect in the deed or in the will by which they were first created and raised, either in the party trusted with the use, where he is misnamed, or the like, or in the party or parties for whose use, or that are to have the benefit of the use, or where they are not well named or the like, or in the execution of the estate, as where livery of seisin or attornment is wanting, or the like. And therefore if a copyholder doth dispose of copyhold land to a charitable use without a surrender, or a tenant in tail convey land to a charitable use without a fine, or a reversion without attornment or insolvency, and in divers such like cases, &c., this statute shall supply all the defects of assurance; for these are good appointments within the statute." [3] But a parol devise to charity out of lands being defective as a will, which is the manner of the conveyance which the testator intended to pass it by, can have no effect as an appointment which he did not intend.[4] Yet it has nevertheless been held where a married woman, administratrix of her husband, and entitled to certain personal estates belonging to him (namely a chose in action), afterwards intermarried, and then during coverture made a will disposing of that estate partly to his heirs and partly to charity, that the bequest, although void at law, was good as an appointment under the Statute of Elizabeth for this reason, "that the goods in the hands of administrators are all for charitable uses; and the office of the ordinary and of the administrator is to employ them to pious uses; and the kindred and children have no property nor pre-eminence but under the title of charity." [5]

§ 1561. **Same.** — With the same view the Court of Chancery

See Hoare *v.* Osborne, L. R. 1 Eq. 585. But see New *v.* Bonaker, L. R. 4 Eq. 655.

[1] Case of Christ's College, 1 W. Bl. 90; Attorney-Gen. *v.* Rye, 2 Vern. 453, and Raithby's notes; Rivett's Case, Moore, 890; Attorney-Gen. *v.* Burdet, 2 Vern. 755; Attorney-Gen. *v.* Bowyer, 3 Ves. Jr. 714; Damus's Case, Moore, 822; Collison's Case, Hob. 136; Mills *v.* Farmer, 1 Meriv. R. 55; Attorney-Gen. *v.* Bowyer, 3 Ves. Jr. 714;, 1 Drury & Warren, R. 308.

[2] Duke on Charit. Uses, 84, 85; Bridgman on Duke on Charit. Uses, 355.

[3] Duke on Charit. Uses, 84, 85; Bridg. on Duke on Charit. Uses, 355; Christ's Hospital *v.* Hawes, Bridgman on Duke on Charit. Uses, 371; 1 Burn's Eccl. Law, 226; Tuffnell *v.* Page, 2 Atk. 37; Tay *v.* Slaughter, Prec. Ch. 16; Attorney-Gen. *v.* Rye, 2 Vern. 453; Rivett's Case, Moore, 890; Kenson's Case, Hob. 136; Attorney-Gen. *v.* Burdet, 2 Vern. R. 755; 1 Drury & Warren, R. 308.

[4] Jennor *v.* Harper, Prec. Ch. 389; 1 Burn's Eccl. Law, 226, and see Attorney-Gen. *v.* Bains, Prec. Ch. 271.

[5] Damus's Case, Moore, 822.

was in former times most astute to find out grounds to sustain charitable bequests. Thus an appointment to charitable uses under a will that was precedent to the Statute of Elizabeth, and so was utterly void, was held to be made good by the statute.[1] So a devise which was not within the statute was nevertheless decreed as a charity, and governed in a manner wholly different from that contemplated by the testator, although there was nothing unlawful in his intent; the Lord Chancellor giving as his reason, "summa est ratio quæ pro religione facit." [2] So where the charity was for a weekly sermon to be preached by a person to be chosen by the greatest part of the best inhabitants of the parish, it was treated as a wild direction; and a decree was made that the bequests should be to maintain a catechist in the parish to be approved by the bishop.[3]

§ 1562. **Same.** — So although the Statute of Wills of Henry VIII did not allow devises of lands to corporations to be good, yet such devises to corporations for charitable uses were held good as appointments under the Statute of Elizabeth.[4] Lord Chancellor Cowper, in a case where he was called upon to declare a charitable bequest valid, notwithstanding the will was not executed according to the Statute of Frauds, and in which these cases were cited, observed: "I shall be very loath to break in upon the Statute of Frauds and Perjuries in this case, as there are no instances where men are so easily imposed upon as the time of their dying, under the pretence of charity. . . . It is true the charity of judges has carried several cases on the Statute of Elizabeth great lengths; and this occasioned the distinction between operating by will and by appointment, which surely the makers of that statute never contemplated." [5]

§ 1563. **Same.** — It has been already intimated that the disposition of modern judges has been to curb this excessive latitude of construction assumed by the Court of Chancery in early times. But however strange some of the doctrines already stated may seem to us, as they have seemed to Lord Eldon, yet they cannot now be shaken without doing that (as he has said) in effect which no judge will avowedly take upon himself to do, to reverse decisions that have been acted upon for centuries.[6]

[1] Smith *v.* Stowell, 1 Ch. Cas. 195; Collison's Case, Hob. R. 136.
[2] Attorney-Gen. *v.* Combe, 2 Ch. Cas. 18. [3] Ibid.
[4] Griffith Flood's Case, Hob. 136.
[5] Attorney.-Gen. *v.* Bains, Prec. Ch. 271, and see Adlington *v.* Cann, 3 Atk. 141.
[6] Moggridge *v.* Thackwell, 7 Ves. 36, 87. This of course does not apply to America.

§ 1564. **A Charity Must Be Accepted upon the Same Terms upon Which It Is Given.** — A charity must be accepted upon the same terms upon which it is given, or it must be relinquished to the right heir; for it cannot be altered by any new agreement between the heir of the donor and the donees.[1] And where several distinct charities are given to a parish for several purposes, no agreement of the parishioners can alter or divert them to any other uses.[2]

§ 1565. **Same.** — The doctrine of cy pres as applied to charities was formerly pushed to a most extravagant length.[3] But this sensible distinction now prevails, that the court will not decree the execution of the trust of a charity in a manner different from that intended, except so far as it is seen that the intention cannot be literally executed. In that case another mode will be adopted, consistent with the general intention; so as to execute it, although not in mode, yet in substance. If the mode should become by subsequent circumstances impossible, the general object is not to be defeated, if it can in any other way be obtained.[4] Where there are no objects remaining to take the benefit of a charitable corporation, the court will dispose of its revenues by a new scheme, upon the principle of the original charities cy pres.[5] A new scheme will not however be ordered if the institution is a permanent one and the object of the testator was to benefit that institution generally, although the particular trustee named may have died in the lifetime of the testator; but the legacy will be ordered to be paid over to the proper officer of the institution.[6]

§ 1566. **Same.** — The general rule is, that if lands are given to a corporation for any charitable uses which the donor contemplates to last forever, the heir never can have the land back again.

[1] Rollins *v.* Merrill, 70 N. H. 436, 48 Atl. 1088; Attorney-Gen. *v.* Platt, Rep. temp. Finch, 221, and see Margaret and Regius Professors in Cambridge, 1 Vern. 55.

[2] Mann *v.* Ballet, 1 Vern. 43; 1 Eq. Abr. 99, pl. 4; and see Attorney-Gen. *v.* Gleg, 1 Atk. 356; Ambl. 373.

[3] Attorney-Gen. *v.* Minshall, 4 Ves. Jr. 11, 14; Attorney-Gen. *v.* Whitchurch, 3 Ves. Jr. 141; ante, §§ 1553 to 1560.

[4] Attorney-Gen. *v.* Boultbee, 2 Ves. 380, 387; s. c. 3 Ves. Jr. 220; Attorney-Gen. *v.* Whitchurch, 3 Ves. Jr. 141; Attorney-Gen. *v.* Stepney, 10 Ves. 22; Attorney-Gen. *v.* Ironmongers' Company, 2 Mylne & Keen, 576, 586, 588; s. c. 1 Craig & Phillips, 220, 227; s. c. 2 Beav. R. 313; Attorney-Gen. *v.* The Coopers' Co., 3 Beav. R. 29; Attorney-Gen. *v.* The Drapers' Co., 2 Beav. R. 508; Martin *v.* Marghan, 14 Simons, R. 230; ante, §§ 1552 to 1559.

[5] Not in this country. Jackson *v.* Phillips, 14 Allen, 539.

[6] Walsh *v.* Gladstone, 1 Phillips, Ch. R. 290.

But if it should become impracticable to execute the charity as expressed, another similar charity will be substituted so long as the corporation exists.[1] If the charity does not fail, but the trustees or corporation fail, the Court of Chancery will substitute itself in their stead and thus carry on the charity.[2]

§ 1567. **Application of Increased Revenues in Excess of Original Charity.** — When the increased revenues of a charity extend beyond the original objects, the general rule as to the application of such increased revenues is that they are not a resulting trust for the heirs at law, but they are to be applied to similar charitable purposes, and to the augmentation of the benefits of the charity.[3]

§ 1568. **Abatement of Charitable Gifts in Order to Pay Debts.** — In former times the disposition of chancery to assist charities was so strong that in equity the assets of the testator were held bound to satisfy charitable uses before debts or legacies, although at law the assets were held bound to satisfy debts before charities. But even at law charities were then preferred to other legacies.[4] And this indeed was in conformity to the civil law, by which charitable legacies are preferred to all others.[5] This doctrine however is now altered, and charitable legacies in case of a deficiency of assets abate in proportion as well as other pecuniary legacies.[6]

§ 1569. **Marshalling of Assets in Order to Enforce Charitable Gift.** — Courts of Equity have in modern times also shown a disinclination to marshal the testator's assets in favor of any charitable bequests given out of a mixed fund of real and personal estate without any distinction whether the real estate were free-

[1] See Goode *v.* McPherson, 51 Mo. 126; Attorney-Gen. *v.* Hankey, L. R. 16 Eq. 140, note; In re Prison Charities, Ib. 129; Attorney-Gen. *v.* Wilson, 3 Mylne & Keen, 362, 372.

[2] Attorney-Gen. *v.* Hicks, Highmore on Mortmain, 336, 353, &c.

[3] Attorney-Gen. *v.* Earl of Winchelsea, 4 Bro. Ch. Cas. 373; Highmore on Mortm. 187, 327; Ex parte Jortin, 7 Ves. 340; Attorney-Gen. *v.* Mayor of Bristol, 2 Jac. & Walk. 321; Attorney-Gen. *v.* Dixie, 2 Mylne & Keen, 342; Bridgman on Duke on Charit. Uses, 588; Attorney-Gen. *v.* Hurst, 2 Cox, R. 364; Attorney-Gen. *v.* Wilson, 3 Mylne & Keen, 362, 372; Attorney-Gen. *v.* The Ironmongers' Co., 2 Mylne & Keen, 576, 586, 588; s. c. 2 Beav. R. 313; 1 Craig & Phillips, 220, 227; Attorney-Gen. *v.* The Drapers' Co., 2 Beav. R. 508; Attorney-Gen. *v.* The Coopers' Co., 3 Beav. R. 29; ante, § 1552; post, § 1570. See Attorney-Gen. *v.* Trinity Church, 9 Allen, 422; In re Latymer, L. R. 7 Eq. 353; Attorney-Gen. *v.* Marchant, L. R. 3 Eq. 424; Merchant Tailors' Co. *v.* Attorney-Gen., L. R. 11 Eq. 35; s. c. 6 Ch. 512; Attorney-Gen. *v.* Wax Chandlers' Co., L. R. 8 Eq. 452; s. c. 5 Ch. 503.

[4] High. on Mortm. 67; Swinb. on Wills, Pt. 1, § 16, p. 72.

[5] Fielding *v.* Bound, 1 Vern. 230.

[6] Id., and Raithby's note (2).

hold or leasehold estate, or pure personal estate, or mixed personal estate, and whether these bequests have been particular or residuary, by refusing to direct the debts and other legacies to be paid out of the real estate and reserving the personal to fulfil the charity, although the charity would be void as to the real estate.[1] So that in effect the court appropriates the fund as if no legal objection existed to applying any part of it to the charity bequests, and then holds that so much of these bequests fails as would in that way be to be paid out of the prohibited fund.[2] The ground of this doctrine is said to be that a Court of Equity is not warranted to set up a rule of equity contrary to the common rules of the court merely to support a bequest which might otherwise be contrary to law. Formerly indeed a different rule prevailed, and a marshalling of the assets was allowed in favor of charities; so that where there were general legacies and the testator had charged his estate with the payment of all his legacies, if the personal estate were not sufficient to pay the whole, the court would direct the charity to be paid out of the real estate, so that the will might be performed in toto.[3]

§ 1570. **Same.** — But the modern decisions have completely overturned the old rule, whether wisely or not it is perhaps too late to inquire. The present doctrine has proceeded a step further, and where there is a fund of pure personalty and mixed personalty both applicable to the payment of debts and legacies, and the charitable legacies are charged on the pure personalty and the other legacies and debts are charged on the remainder of the fund, if there is a deficiency of the assets to pay all the debts and legacies, the charity legacies are held to have failed in the proportion of the mixed personalty to the pure personalty. Therefore where the testator directed the charity legacies to be paid out of his pure personal estate, and not out of his leasehold or other

[1] Highmore on Mortm. 355; 1 Roper on Legacies, by White, ch. 15, § 6, p. 835; Mogg *v.* Hodges, 2 Ves. 52; Middleton *v.* Spicer, 1 Bro. Ch. R. 201; Ridges *v.* Morrison, 1 Cox, R. 180; Walker *v.* Childs, Ambler, R. 524; Foster *v.* Blagnen, Ambler, 704; Makeham *v.* Hooper, 4 Bro. Ch. R. 153; Attorney-Gen. *v.* Earl of Winchelsea, 3 Bro. Ch. R. 380, and Belt's note (3); Attorney-Gen. *v.* Hurst, 2 Cox, R. 360; Attorney-Gen. *v.* Tindall, 2 Eden, R. 209, 210; Attorney-Gen. *v.* Caldwell, Ambler, R. 635; Curtis *v.* Hutton, 14 Ves. 537; Hobson *v.* Blackburn, 1 Keen, R. 273; Williams *v.* Kershaw, Id. 274, note; Shelford on Mortmain, 234; The Philanthropic Soc. *v.* Kemp, 4 Beav. R. 581.

[2] Williams *v.* Kershaw, 1 Keen, R. 274, note.

[3] Attorney-Gen. *v.* Graves, Ambl. R. 158, and Mr. Bount's notes (2), (3); Arnold *v.* Chapman, 1 Ves. 108; Attorney-Gen. *v.* Tyndall, 2 Eden, R. 211; Attorney-Gen. *v.* Tompkins, Ambl. R. 217.

real estates, and by the same will charged his leasehold estates with the payment of his debts and funeral and testamentary expenses and legacies not given to charities, and the pure personalty was insufficient to pay the debts, expenses, and legacies, the court refused to marshal the assets so as to charge the leasehold estates with the debts, expenses, or charities, not charitable, but held that the charity legacies failed in the proportion of the mixed personalty to the pure personalty.[1]

§ 1571. **Bequest Not Necessarily Void because of Uncertainty of Persons Who Are to Take.** — It has been already stated that charitable bequests are not void on account of any uncertainty as to the persons or as to the objects to which they are to be applied.[2] Almost all the cases on this subject have been collected, compared, and commented on by Lord Eldon, with his usual diligence and ability, in two recent decisions. The result of these decisions is that if the testator has manifested a general intention to give to charity, the failure of the particular mode by which the charity is to be effected will not destroy the charity. For the substantial intention being charity, equity will substitute another mode of devoting the property to charitable purposes, although the formal intention as to the mode cannot be accomplished.[3] The same

[1] The Philanthropic Soc. *v.* Kemp, 4 Beav. R. 581. But in general where the will directs that the assets shall be marshalled in favor of the charity, this must be done. Gaskin *v.* Rogers, L. R. 2 Eq. 284; Wigg. *v.* Nicholl, L. R. 14 Eq. 92.

[2] Ante, § 1557.

[3] The first was the case of Moggridge *v.* Thackwell, 7 Ves. R. 36, where the testatrix gave the residue of her personal estate to James Vaston, his executors and administrators, "desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters, and appointed Mr. Vaston one of her executors." Mr. Vaston died in her lifetime, of which she had notice; but the will remained unaltered. The next of kin claimed the residue as being lapsed by the death of Mr. Vaston; but the bequest was held valid, and established. In the next case, Mills *v.* Farmer, 1 Meriv. R. 55, the testator by his will, after giving several legacies, proceeded, "the rest and residue of all my effects I direct may be provided for promoting the gospel in foreign parts and in England; for bringing up ministers in different seminaries and other charitable purposes, as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." The bill was filed by the next of kin, praying an account and distribution of the residue, as being undisposed of by the will or any codicil of the testator. The Master of the Rolls held the residuary bequest to charitable purposes void for uncertainty, and because the testator expressed not a present but a future intention to devise this property. Lord Eldon however upon an appeal reversed the decree and established the bequest as a good charitable bequest, and directed it to be carried into effect accordingly. Attorney-Gen. *v.* The Drapers'

principle is applied when the persons or objects of the charity are uncertain or indefinite, if the predominant intention of the testator is still to devote the property to charity.[1] In like manner if the original funds are more than sufficient for the specified objects of charity, the surplus will be applied to other similar purposes.[2]

§ 1572. **Same.** — All these doctrines proceed upon the same ground; that is, the duty of the court to effectuate the general intention of the testator.[3] And accordingly the application of them ceases whenever such general intention is not to be found. If therefore it is clearly seen that the testator had but one particular object in his mind, as for example to build a church at W, and that purpose cannot be answered, the next of kin will take, there being in such a case no general charitable intention.[4] So if a fund should be given in trust to apply the income to printing and promoting the doctrines of the supremacy of the Pope in ecclesiastical affairs in England, the trust would be held void on grounds of public policy,[5] and the property would go to the personal representatives of the party creating the trust; and it would not be liable to be applied to other charitable purposes by the Crown, because it was not intended to be a general trust for charity.[6] Even in the case of gifts or bequests to superstitious uses, which (as we have seen) are not held to be void, but the funds are applied in chancery to other lawful objects of charity,[7] the professed ground of the doctrine is (though certainly it is a most extraordi-

Company, 2 Beav. R. 508; Attorney-Gen. *v.* The Coopers' Company, 3 Beav. R. 29; ante, §§ 1555, 1558.

[1] Ibid. See § 1540.

[2] Attorney-Gen. *v.* Earl of Winchelsea, 3 Bro. Ch. R. 373, 379; Attorney-Gen. *v.* Hurst, 2 Cox, R. 364; Attorney- Gen. *v.* Wilson, 3 Mylne & Keen, 362, 372; Attorney-Gen. *v.* The Drapers' Company, 2 Beav. R. 508; Attorney-Gen. *v.* The Coopers' Company, 3 Beav. R. 29; ante, §§ 1555, 1567. Or given to the same donee if that be a charitable society. Attorney-Gen. *v.* Trinity College, 24 Beav. 383.

[3] Mills *v.* Farmer, 1 Meriv. R. 65, 79, 81, 94, 95, 99; Legge *v.* Asgill, 1 Turn. & Russ. 265, note.

[4] Attorney-Gen. *v.* Hurst, 2 Cox, R. 354, 365; Corbyn *v.* French, 4 Ves. 419, 433; De Garcin *v.* Lawson, 4 Ves. 433, note; Jeremy on Eq. Jurisd. B. 1, ch. 6, § 2, pp. 243 to 245.

[5] So if a gift to relieve persons from the penalties of violating a law. Thrupp *v.* Collett, 26 Beav. 126, 147.

[6] A bequest for the assistance of a "Unitarian Congregation" is valid, and the trust created for the purpose would everywhere be carried into execution. Shrewsbury *v.* Hornby, 5 Hare, 406. See also Miller *v.* Gable, 2 Denio, 492; Scott *v.* Curle, 9 B. Mon. 17; infra, § 1585; De Themmines *v.* De Bonneval, 5 Russ. R. 288.

[7] Ante, § 1553.

nary sort of interpretation of intention) that the party has indicated a general purpose to devote the property to charity; and therefore although his specified object cannot be accomplished, yet his general intention of charity is supposed to be effectuated, by applying the funds to other charitable objects.[1] How Courts of Equity could arrive at any such conclusion it is not easy to perceive, unless indeed where the nature of the gift necessarily led to the conclusion that the object specified was a favorite though not an exclusive object of the donor. To such cases it has in modern times been practically and justly limited.[2]

[1] Ante, § 1553; Moggridge *v.* Thackwell, 7 Ves. 69 to 83; Morice *v.* Bishop of Durham, 9 Ves. 399; s. c. 10 Ves. 522; Mills *v.* Farmer, 1 Meriv. R. 99 to 101; Ommaney *v.* Butcher, 1 Turn. & Russ. R. 260, 270. In De Themmines *v.* De Bonneval (5 Russ. R. 297), the Master of the Rolls said: "The policy of the law will not permit the execution of a superstitious use. But the court avails itself of the general intention to give the property to charity, although the particular charity chosen by the founder be superstitious; and it effectuates the general intention by devoting the fund to some other charitable purpose." How can the court presume an intention of the testator to give to charity generally, when he has expressed himself only as to a particular object, that is, as to a superstitious use?

[2] This practical application of the doctrine was strongly illustrated in a recent case, where a testator gave the residue of his estate to trustees, positively forbidding them to diminish the capital by giving away any part thereof, or that the interest and profit arising be applied to any other use or uses than in the will directed, namely, one half yearly, and every year forever, unto the redemption of British slaves in Turkey and Barbary; one fourth part yearly, and every year forever, unto charity schools in the city and suburbs of London, &c., and not giving to any one above £20 a year; and the other fourth to other specified uses. The question was, What was to become of the income of the moiety for the redemption of the British slaves in Turkey and Barbary, there being, from the altered circumstances of the countries, no objects of this bounty. The Master of the Rolls said on that occasion that the jurisdiction of Courts of Equity with respect to charitable bequests is derived from their authority to carry into execution the trusts of any will or other instrument, and the court is to proceed according to the intention expressed in the will or testament; that the court in the present case had no authority to apply the moiety to any other use, as it would not be executing the expressed intention of the testator; and that it could only be applied to some other use, by a new scheme, under the sanction of the legislature. Upon appeal Lord Chancellor Brougham reversed the decree and held that the court might apply it to a new scheme cy pres. Upon this occasion he said: "When a testator gives one charitable fund to three several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined, it is clear that the court may thus execute his intention, in the event of an impossibility of applying that portion to its original destination. The character of charity is impressed on the whole fund. There is good sense in presuming that had the testator known that one object was to fail he would have given its appropriated fund to the increase of the

§ 1573. **If Charity Is General and Too Indefinite; the Property Will Go to the Next of Kin.** — Hence it has become a general principle in the law of charities, that if the charity be of a general, indefinite, and mere private nature, or not within the scope of the Statute of Elizabeth, it will be treated as utterly void and the property will go to the next of kin. For in such a case, as the trust is not ascertained, it must either go as an absolute gift to the individual selected to distribute it, or that individual must

funds destined to other objects of his bounty; and there is convenience in acting as he would himself have done. This is the foundation of the doctrine cy pres, &c. I should have been disposed to favor the relators' argument, on which the decree must rest, had the will been that one half should be employed in redeeming captives, and in no other way whatever; or that the two fourths should be employed in other charities, and no more than these two fourths in those or any such charities. But that is far from being the case. The testator says: 'The capital shall not be diminished by giving away any part thereof, and the interest shall not be applied to any other use or uses than those hereinafter mentioned.' The object of this general prohibition plainly is to secure the whole fund, principal and interest, to charitable uses; to forbid any alienation of the capital and any diversion of the income to any other purposes than those which he specifies. The expression, 'use or uses', even literally taken, lets in all the charities specified, provided the fund be given among them and not otherwise applied. Undoubtedly the funds must be applied in the proportions specified, — one half to one and one fourth to each of the two other objects; and it would be a breach of trust to give part of the moiety to either of the two other purposes as long as there remained captives to redeem. But then it would be just as much a breach of trust without the prohibitory clause as with it, &c. So in the case of a charity where I bequeath £100 to one object and £50 each to two other objects of bounty, my trustees violate their duty if they give less than £100 to the one and more than £50 to each of the other two; and that, whether I use words of exclusion such as 'no otherwise', 'no other charities', &c., or omit to use them. But when the one object fails, the doctrine of cy pres becomes applicable, although it has no place in legacies to individuals; and the intention to which the court is to approximate will be gathered from the other gifts and from the gift itself. Should words be used which positively exclude such an approximation, as for instance if there be an express direction that each of the charities named shall have so much, and neither more nor less, and one shall not be extended in case the objects of another fail, — then clearly the doctrine can have no place. But that is because the will of the testator has expressly said so; and by acting against his clear intent the court would not be executing cy pres (as near as possible), but departing as far as possible from that intent. This cannot be said of the general words used here, which are abundantly satisfied if no part of the capital is given away at all, and no part of the interest to any other than the specified purposes, Nor is the will at all violated by applying the undisposed and undisposable surplus of one branch to increase the objects of the other branches of the same charity." Attorney-Gen. *v.* Ironmongers' Co., 2 Mylne & Keen, 576, 580, 586 to 589. See also Hayter *v.* Trego, 5 Russ. 113.

be a trustee for the next of kin.[1] If the testator means to create a trust and the trust is not effectually created, or fails, the next of kin must take.[2] On the other hand if the party selected to make the distribution is to take it, it must be upon the ground that the testator did not intend to create a trust, but to leave it entirely to the discretion of the party to apply the fund or not. The latter position is repugnant to the very purpose of the bequest, and therefore the interpretation is that it is the case of a frustrated and void trust.[3]

§ 1574. [**The Property Devised Should Be Described with Sufficient Clearness.** — A description of the devisee as "Georgetown University" whereas the correct corporate name was "Georgetown College" is a sufficient description where it is apparent from the language used in the will that it was this school that was to be the beneficiary. The expression that "a sufficient sum, not to exceed three thousand dollars", etc. is sufficiently definite and the gift will be sustained even though discretion is lodged with trustees as to with which college the fund shall be placed for the purchase and endowment of a scholarship.[4] Where a daughter in her will expressed the desire that her mother, who was one of the beneficiaries in her will, would make a will and give the unspent portion of the devise to her, to such charitable institution for women as she might select, the expression was too indefinite to be held valid.[5] If from a reading of the entire will it can be figured out what amount of money, put at interest, will make the bequest, and the estate is worth that much, the bequest will be sustained.[6] But the language of the will ought to state either in terms what amount or what property is to be devoted, or else it should be capable of being ascertained by computation, and if the amount is left purely in the discretion of the trustee, and it is his will and discretion that makes the pretended charity, rather than the will of the testator, the bequest will be void for

[1] Ante, § 1542; post, § 1593; Trustees of Baptist Assn. *v.* Hart's Ex'rs, 17 U. S. 1, 4 L. Ed. 499; Stubbs *v.* Sargon, 2 Keen, R. 255; Ommaney *v.* Butcher, 1 Turn. & Russ. 260, 270, 271; Fowler *v.* Garlike, 1 Russ. & Mylne, 232.

[2] Ibid.

[3] Ommaney *v.* Butcher, 1 Turn. & Russ. 260, 270; Attorney-Gen. *v.* Pearson, 7 Sim. R. 290; Stubbs *v.* Sargon, 3 Mylne & Craig, 507.

[4] Speer *v.* Colbert, 200 U. S. 130, 50 L. Ed. 403, 26 S. Ct. Rep. 201.

[5] Mills *v.* Newberry, 112 Ill. 123, 1 N. E. 156, 54 Am. Rep. 213; Wilce *v.* Van Anden, 248 Ill. 358, 94 N. E. 42, 140 Am. St. Rep. 212, 21 Ann. Cas. 153.

[6] Crawford *v.* Mound Grove Cemetery Assn., 218 Ill. 399, 75 N. E. 998.

uncertainty.[1] While it is uncertain what property may pass under the residuary clause of a will, the designation of this property to be applied toward charitable purposes is sufficient.[2]]

§ 1575. [**The Parties to Take Should Be Sufficiently Described.** — In the construction of wills where gifts are made to charities, a liberal construction is allowed. The policy of equity is that gifts to charity be sustained as valid if possible, and for this reason if it can be ascertained who was intended to take as trustee, and who as devisee, as a rule the designation will be sufficient. The will should be construed so as to make that certain which may reasonably be made certain. The beneficiaries in public charities must necessarily be described in general terms. They are persons in most cases yet unborn, or churches that have never existed, but which may be erected. Classes may be described, running down through all time, but individuals can only be designated as belonging to such classes. Testators therefore, in their description of parties to be benefited by their public charities, must necessarily be confined to general terms of a class in a certain territory. It would be strange, indeed, if the law should require a testator to be more particular in the description of the objects of his bounty in charitable bequests for the relief of unfortunates, than are the terms of statutes which authorize such bequests to be made. The uncertainty that must exist in such cases is reduced to a certainty if a definite class of beneficiaries is described and a mode is provided for the selection of the particular objects of the bounty.[3] But if there are no such persons, either natural or artificial, and there never were any who could take, the bequest would be void.[4]]

§ 1576. [**Effect of Valid and Invalid Gifts upon the Whole Devise.** — A devise will not necessarily fail because in it there

[1] Succession of McCloskey, 52 La. Ann. 1122, 27 So. 705.

[2] Beurhaus *v.* City of Watertown, 94 Wis. 617, 69 N. W. 986.

[3] Fay *v.* Howe, 136 Cal. 599, 69 Pac. 423; Appeal of Elliot, 74 Conn. 586, 51 Atl. 558; Coit *v.* Comstock, 51 Conn. 352, 50 Am. Rep. 29; Grant *v.* Saunders, 121 Iowa, 80, 95 N. W. 411, 100 Am. St. Rep. 310; Coleman *v.* O'Leary, 114 Ky. 388, 70 S. W. 1068, 24 Ky. L. Rep. 1248; Green *v.* Fidelity Trust Co., 134 Ky. 311, 120 S. W. 283, 20 Ann. Cas. 861; Kurzman *v.* Lowy, 23 Misc. Rep. 380, 52 N. Y. Supp. 83; Bridges *v.* Pleasants, 39 N. C. 26, 44 Am. Dec. 94; Raley *v.* Umatilla County, 15 Oreg. 172, 13 Pac. 890, 3 Am. St. Rep. 142; In re John's Will, 30 Oreg. 494, 47 Pac. 341, 36 L. R. A. 242; Harrington *v.* Pier, 105 Wis. 485, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307.

[4] Buchanan *v.* Kennard, 234 Mo. 117, 136 S. W. 415, Ann. Cas. 1912 D. 50, 37 L. R. A. (N. S.) 993; Spencer *v.* Hay Library Assn., 36 Misc. Rep. 393, 73 N. Y. Supp. 712; Mount *v.* Tuttle, 40 Misc. Rep. 456, 82 N. Y. Supp. 655.

are two definite objects of the devisor's bounty, the one to a definite, ascertained, and legal object, and the other to an object that is unlawful. If the two charities are so interwoven and dependent upon each other as a part of the general scheme of the testator, both charities would fail because of the unlawful part; but if the two may be separated and the one stand without reference to the other, the part that is given to a lawful object will be allowed to stand. Courts have firmly established the principle that valid trusts should not be disregarded because in the instrument creating them one particular trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor.[1]]

§ 1577. **Enforcement by Court in One Jurisdiction of Charitable Bequest in Another.** — It has been made a question whether a Court of Equity sitting in one jurisdiction can execute any charitable bequests for foreign objects in another jurisdiction. The established doctrine seems to be in favor of executing such bequests.[2] Of course this must be understood as subject to the

[1] In re Willey's Est., 128 Cal. 1, 56 Pac. 550; Wheelock *v.* American Tract Soc., 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578; Tilden *v.* Green, 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487, 14 L. R. A. 33; Dexter *v.* Harvard College, 176 Mass. 192, 57 N. E. 371; Webster *v.* Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

[2] Taylor *v.* Bryn Mawr College, 34 N. J. Eq. 101; Chamberlain *v.* Chamberlain, 43 N. Y. 437. See also Attorney-Gen. *v.* Sturge, 19 Beav. 597; New *v.* Bonaker, L. R. 4 Eq. 655; Duggan *v.* Slocum, 83 Fed. 244, 92 Fed. 806, 34 C. C. A. 676; Brigham *v.* Brigham Hospital, 126 Fed. 796, 134 Fed. 513, 67 C. C. A. 393; Mount *v.* Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428; In re Sturgis, 164 N. Y. 485, 58 N. E. 646; Attorney-Gen. *v.* City of London, 3 Bro. Ch. R. 171; s. c. 1 Ves. Jr. 243; Attorney-Gen. *v.* Lepine, 2 Swanst. R. 181; s. c. 19 Ves. 309; Oliphant *v.* Hendrie, 1 Bro. Ch. R. 571, and Mr. Belt's note (1); Society for Propagating the Gospel *v.* Attorney-Gen., 3 Russ. R. 142. In the case of Mr. Boyle's will the bequest was not limited, in terms, to foreign countries or objects, but it was applied to a foreign object under a decree of the Court of Chancery; and when that object failed, a new scheme was directed. Attorney-Gen. *v.* City of London, 3 Bro. Ch. Cas. 171; s. c. 1 Ves. Jr. 243. There are several other cases in which charities for foreign objects have been carried into effect. In the Provost, &c. of Edinburgh *v.* Aubery, Ambl. R. 236, there was a devise of £3,500, South Sea Annuities, to the plaintiffs, to be applied to the maintenance of poor laborers residing in Edinburgh and the towns adjacent. Lord Hardwicke said he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, that is, to some of the courts in Scotland; and therefore he directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the trusts in the will. So in Oliphant *v.* Hendrie, where A by will gave £300 to a religious society in Scotland, to be laid out in the purchase of heritable securities in Scotland, and the interest

implied exception that the objects of the charities are not against the public policy or laws of the State where they are sought to be enforced or put into execution; for no State is under any obligation to give effect to any acts of parties which contravene its own policy or laws.[1] Upon this ground where a bequest was given by the will of a testator in England in trust for certain nunneries in foreign countries, it was held void, and the Court of Chancery refused to enforce it.[2] Upon the same ground a pecuniary legacy given for such purposes as the superior of a foreign convent or her successor shall judge most expedient was held void.[3] But where a testator bequeathed the remainder of his property to the Government of Bengal to be applied to charitable, beneficial, and public works at and in the City of Decca in Bengal, it was held to be a valid charity.[4]

§ 1578. **Same.** — But every bequest which, if it were to be executed in England would be void under its mortmain laws, is not as a matter of course held to be void solely on that account when it is to be executed in a foreign country. There must be some other ingredient making it reprehensible in point of public policy generally, or bringing it within the reach of the mortmain acts. Thus for example money bequeathed by a will to be laid out in lands abroad (as in Scotland) may be a valid bequest and executed by an English Court of Equity, when money to be laid

thereof to be applied to the education of twelve poor children, the court held it a good bequest. 1 Bro. Ch. Cas. 571. In Campbell *v.* Radnor the court held a bequest of £7,000, to be laid out in the purchase of lands in Ireland, and the rents and profits to be distributed among poor people in Ireland, &c., to be valid in law. 1 Bro. Ch. Cas. 271. So a legacy towards establishing a bishop in America was supported, although no bishop was then established. Attorney-Gen. *v.* Bishop of Chester, 1 Bro. Ch. Cas. 444. In the late case of Curtis *v.* Hutton a bequest of personal estate for the maintenance of a charity (a college) in Scotland was established. 14 Ves. 537. And in another still more recent case a bequest in trust to the magistrates of Inverness in Scotland, to apply the interest and income for the education of certain boys, was enforced as a charity. Mackintosh *v.* Townsend, 16 Ves. 330. See also Trustees of Baptist Assn. *v.* Smith, 17 U. S. 1, 4 L. Ed. 499. Nor is the uniformity of the cases broken in upon by the doctrine in De Garcin *v.* Lawson, 4 Ves. Jr. 433, note. There the bequests were to Roman Catholic clergymen, or for Roman Catholic establishments; and were considered as void and illegal, being equally against the policy and the enactments of the British legislature.

[1] Taylor *v.* Bryn Mawr College, 34 N. J. Eq. 101.

[2] De Garcin *v.* Lawson, 4 Ves. 433, note.

[3] Smart *v.* Prujean, 6 Ves. 567; De Themmines *v.* De Bonneval, 5 Russ. R. 292, 297.

[4] Mitford *v.* Raynolds, 1 Phillips Ch. R. 185.

out in lands in England would be held a void bequest as contrary to the mortmain acts of England.[1]

§ 1579. **Same.** — Where money is bequeathed to charitable purposes abroad, which are to be executed by persons within the same territorial jurisdiction where the Court of Equity sits, the latter will secure the fund and cause the charity to be administered under its own direction. But where the charity is to be established abroad and is to be executed by persons there, the court not having any jurisdiction to administer, it will simply order the money to be paid over to the proper persons in the foreign country, who are selected by the testator as the instruments of his benevolence; and will leave it to the foreign local tribunals to see to its due administration.[2]

§ 1580. **Same.** — It is clear upon principle that the Court of Chancery merely in virtue of its general jurisdiction over trusts, independently of the special jurisdiction conferred by the Statute of 43d Elizabeth, ch. 4, must in many cases have a right to enforce the due performance of charitable bequests; for (as has been well observed) the jurisdiction of Courts of Equity with respect to charitable bequests is derived from their general authority to carry into execution the trusts of a will or other instrument according to the intention expressed in that will or instrument.[3] We shall presently see that this is strictly true in all cases where the charity is definite in its objects, is lawful, and is to be executed and regulated by trustees who are specially appointed for the purpose.[4] But there are many cases (as we shall also see) in which the jurisdiction exercised over charities in England can scarcely be said to belong to the Court of Chancery as a Court of Equity, and where it is to be treated as a personal delegation of authority to the chancellor or as an act of the Crown through the instrumentality of that dignitary.[5]

[1] Oliphant *v.* Hendrie, 1 Bro. Ch. R. 571, and Mr. Belt's note; Mackintosh *v.* Townsend, 16 Ves. 330; 2 Madd. Ch. Pr. 50; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (*b*).

[2] The Provost of Edinburgh *v.* Aubery, Ambler, R. 236; Attorney-Gen. *v.* Lepine, 2 Swanst. R. 181; s. c. 19 Ves. 309; Emery *v.* Hill, 1 Russ. R. 112; Minet *v.* Vulliamy, 1 Russ. R. 113, note; Taylor *v.* Bryn Mawr College, 34 N. J. Eq. 101; Chamberlain *v.* Chamberlain, 43 N. Y. 437. But where money was bequeathed by an English will to the President of the United States and others to found a college in Pennsylvania for a purpose which had failed, and the trustees disclaimed, it was held that the bequest fell into the residue. New *v.* Bonaker, L. R. 4 Eq. 655.

[3] Attorney-Gen. *v.* Ironmongers' Co., 2 Mylne & Keen, 581; post, § 1583.

[4] Post, § 1585.

[5] Post, §§ 1581, 1582.

§ 1581. **The Exercise of Jurisdiction Is Personal to the Chancellor.** — The jurisdiction exercised by the chancellor under the Statute of 43d Elizabeth, ch. 4, over charitable uses, is held to be personal in him and not exercised in virtue of his ordinary or extraordinary jurisdiction in chancery; and in this respect it resembles the jurisdiction exercised by him in cases of idiots and lunatics, which is exercised purely as the personal delegate of the Crown.[1] Where a commission has issued under that statute, any person excepting to the decree of the commissioners is treated as a plaintiff in an original cause in chancery, and the respondents as defendants; and in the examination of witnesses in the cause thus brought by way of appeal before the chancellor, neither side is bound by what appeared before the commissioners; but they may set forth new matter if they think proper. If it were not considered on such an appeal as an original cause, the court could know nothing of the merits; for the evidence before a jury or before the commissioners under the commission is not taken in writing, but is viva voce; and therefore it could not be known to the appellate court.[2]

§ 1582. **Same.** — But as the Court of Chancery may also proceed in many although not in all cases of charities by original bill, as well as by commission under the Statute of Elizabeth, the jurisdiction has become mixed in practice; that is to say, the jurisdiction of bringing informations in the name of the attorney-general has been mixed with the jurisdiction given to the chancellor by the statute.[3] So that it is not always easy to ascertain in what cases he acts as a judge administering the common duties of a Court of Equity and in what cases he acts as a mere delegate of the Crown administering its peculiar duties and prerogatives. And again there is a distinction between cases of charity where the chancellor is to act in the Court of Chancery, and cases where the charity is to be administered by the King by his sign manual. But in practice the cases have often been confounded from similar causes.[4]

§ 1583. **Same.** — The general doctrine in England is, that the King as parens patriæ has a right to guard and enforce all charities of a public nature by virtue of his general superintending

[1] 3 Black Comm. 427, 428.

[2] Corporation of Burford *v.* Lenthall, 2 Atk. 552; 3 Black. Comm. 427; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1 and note (*a*).

[3] 3 Black. Comm. 427; Anon. 1 Ch. Cas. 267; West *v.* Knight, 1 Ch. Cas. 134.

[4] Moggridge *v.* Thackwell, 7 Ves. 83 to 86. See Jackson *v.* Phillips, 14 Allen, 539.

power over the public interests, where no other person is intrusted with that right.[1] Wherever therefore money is given to charity generally and indefinitely, without any trustees pointed out who are to administer it, there does not seem to be any difficulty in considering it as a personal trust devolved upon the King as a constitutional trustee to be administered by him, through the only proper functionary known to that government, namely, the Lord Chancellor, who is emphatically for all public purposes of this sort styled the keeper of his conscience.[2] In such a case it is not ordinarily very important whether the chancellor acts as the special delegate of the Crown, or the King acts under the sign manual through his chancellor guiding his discretion. In practice however it has been found very difficult to distinguish in what cases the one or the other course ought, upon the strict principles of prerogative, to be adopted. For where money has been given to trustees for charity generally without any objects selected, the charity has sometimes been administered by the King under his sign manual and sometimes by the Court of Chancery. Lord Eldon, after a full review of all the cases, came to the conclusion (which is now the settled rule) that where there is a general indefinite purpose of charity, not fixing itself upon any particular object, the disposition and administration of it are in the King by his sign manual.[3] But where the gift is to trustees with general

[1] 3 Black. Comm. 427; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (*a*); Attorney-Gen. *v.* Middleton, 2 Ves. 327; Moggridge *v.* Thackwell, 7 Ves. 35, 83; Cary *v.* Bertie, 2 Vern. 333, 342; Eyre *v.* Countess of Shaftsbury, 2 P. Will. 119; Heuser *v.* Harris, 42 Ill. 425.

[2] Ibid.; Cooper, Eq. Pl. Introd. xxvii.; Cary *v.* Bertie, 2 Vern. 333, 342; Mitf. Pl. by Jeremy, 7, 39, 101, note (*g*); Bailiffs of Burford *v.* Lenthall, 2 Atk. 551. In all these cases the mode in which the establishment and administration of the charity is usually accomplished is upon an information filed by the attorney-general ex officio, at the relation of some informant, upon which the Lord Chancellor acts generally in the same manner and by the same proceedings as he would upon a bill in chancery. The whole matter of charities has been regulated by recent statutes (52 Geo. 3, ch. 101; 59 Geo. 3, ch. 91), so that proceedings may now in many cases be had to establish and execute them in a more brief and summary manner than formerly. See 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (*a*); 3 Black Comm. 427; Reeve *v.* Attorney-Gen., 3 Hare, R. 197, 199.

[3] In cases of superstitious uses the charity has been held to be subject to the administration of the Crown, under the sign manual, as an indefinite purpose of charity. See Mills *v.* Farmer, 1 Meriv. R. 100, 101; De Themmines *v.* De Bonneval, 5 Russ. R. 292, 293; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 3, note (*i*); Attorney-Gen. *v.* Herrick, Ambl. R. 712; Da Costa *v.* De Pas, Ambler, R. 228; s. c. 2 Swanst. R. 489, note; 2 Roper on Legacies, by White, ch. 19, § 2, pp. 111 to 117.

objects or with some particular objects pointed out, there the Court of Chancery will take upon itself the administration of the charity, and execute it under a scheme to be reported by a master.[1]

§ 1584. **Same.** — But where a charity is definite in its objects and lawful in its creation, and it is to be executed and regulated by trustees whether they are private individuals or a corporation, there the administration properly belongs to such trustees, and the King as parens patriæ has no general authority to regulate or control the administration of the funds. In all such cases however, if there be any abuse or misuse of the funds by the trustees, the Court of Chancery will interpose, at the instance of the attorney-general or the parties in interest, to correct such abuse or misuse of the funds. But in such cases the interposition of the court is

[1] Moggridge *v.* Thackwell, 7 Ves. 36, 75, 85, 86; Attorney-Gen. *v.* Matthews, 2 Lev. 167; Attorney-Gen. *v.* Herrick, Ambler, R. 712; Da Costa *v.* De Pas, Ambler, R. 228, and Mr. Blunt's note; s. c. 2 Swanst. 489, note; Mills *v.* Farmer, 1 Meriv. R. 55; Attorney-Gen. *v.* Wansay, 15 Ves. 231; Ommaney *v.* Butcher, 1 Turn. & Russ. R. 260, 270; Paice *v.* Archbishop of Canterbury, 14 Ves. 372; Waldo *v.* Caley, 16 Ves. 206; Attorney-Gen. *v.* Price, 17 Ves. 371; 3 Peters, R. 498 to 500; 2 Roper on Legacies, by White, ch. 19, § 5, pp. 164 to 215; Reeve *v.* Attorney-Gen., 3 Hare, R. 191, 197. The following statement of the practice of the Court of Chancery in regard to charities, taken from Mr. Fonblanque on Equity (Vol. 2, B. 2, Pt. 2, ch. 1, § 3, note *i*), may not be unacceptable as a further illustration of the mode of effectuating the objects. "With respect to gifts to charitable uses, where no specific description of objects is pointed out, the Court of Chancery will in respect to the general charitable purpose appearing, direct the mode of giving it effect. Attorney-Gen. *v.* Herrick, Ambl. 712; Attorney-Gen. *v.* The Painters' Co., 2 Cox, R. 56. And this is agreeable to the rule of the civil law, which is so peculiarly favorable to charities, that legacies to pious or public uses shall not fail from the want of certainty as to the particular object intended. See 2 Domat, Civ. Law, 161, 162. If not only the general purpose appear, but also a particular description of persons or objects be referred to though as between such persons or objects the party has made no selection, yet the court will confine its discretion in supplying such omissions within the limits of such general description. White *v.* White, 1 Bro. Ch. R. 12; Moggridge *v.* Thackwell, 3 Bro. Ch. R. 517; Attorney-Gen. *v.* Clarke, Ambl. 422; Waller *v.* Childs, Ambl. 524; Attorney-Gen. *v.* Wansay, 15 Ves. 213. If the object of the gift be certain but not at present in existence, yet if its existence may be expected hereafter, the court will neither consider the gift lapsed nor apply it to a different use. Aylet *v.* Dodd, 2 Atk. 238; Attorney-Gen. *v.* Lady Downing, Ambl. 571; Attorney-Gen. *v.* Oglander, 3 Bro. Ch. Rep. 166. But if the charity or object of the gift be precisely pointed out and fail, it seems then, in general, that it shall not be applied to another. Attorney-Gen. *v.* Bishop of Oxford, 1 Bro. Ch. R. 379; Attorney-Gen. *v.* Goulding, 2 Bro. Ch. R. 429. But see also Attorney-Gen. *v.* City of London, 3 Bro. Ch. R. 171; 1 Ves. Jr. 243; Shanley *v.* Baker, 4 Ves. 732."

properly referable to its general jurisdiction, as a Court of Equity, to prevent abuses of a trust, and not to any original right to direct the management of a charity or the conduct of the trustees.[1] Indeed if the trustees of the charity should grossly abuse their trust, a Court of Equity may go the length of taking it away from them and commit the administration of the charity to other hands.[2] But this is no more than the court will do in proper cases for any gross abuse of other trusts.

§ 1585. **What Constitutes an Abuse or Misuse of Charitable Trusts.** — Some doctrines on the subject of what constitutes such an abuse or misuse of charitable trusts, and especially of trusts of a religious nature by trustees, have been recently promulgated, which are of such deep interest and general application that they seem to require a brief notice in this place.[3] Thus where a meeting-house was founded by certain Protestant Dissenters, and the property vested in trustees upon the trust to be used "for the worship and service of God", it has been held that no doctrines ought to be allowed to be taught in it which were opposed to the opinions of the founders, although those opinions were not expressed in the trust deed and no particular doctrines were there required to be taught; and that it would be a breach of trust in the trustees to allow any other doctrines than those of the founders to be so taught. So that if the founders were Trinitarians, no Unitarian doctrine should be allowed to be taught there; and e converso, if the founders were Unitarian, the doctrines of Trinitarians should not there be taught. The effect of this doctrine is to expound the language of the instrument not upon its own terms, but to incorporate into them the presumed parol intentions of the parties not expressed in the instrument. It hence assumes, as a necessary result, that the founders never could intend that any other reli-

[1] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 1, § 1, note (*a*); Id. § 3, note (*i*); Attorney-Gen. *v.* Middleton, 2 Ves. 328; Cook *v.* Duckenfield, 2 Atk. 567, 569; Attorney-Gen. *v.* Foundling Hospital, 4 Bro. Ch. R. 165; s. c. 2 Ves. Jr. 42; Philadelphia Baptist Assn. *v.* Smith, 17 U. S. 1, 4 L. Ed. 499. See Attorney-Gen. *v.* Boucherett, 25 Beav. 116; Attorney-Gen. *v.* Moore, 4 C. E. Green, 503.

[2] Attorney-Gen. *v.* Mayor of Coventry, 7 Bro. Parl. Cas. 236; Attorney-Gen. *v.* Earl of Clarendon, 17 Ves. 491, 499; Attorney-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. R. 389; Bridgman on Duke on Char. Uses, 574, &c.; In re Chertsey Market, 6 Price, R. 261. Under what circumstances a Court of Equity will sanction the alienation of charitable property, see Attorney-Gen. *v.* South Sea Co., 4 Beav. R. 453; Brown *v.* Meeting St. Baptist Soc., 9 R. I. 177.

[3] A charitable society cannot dissolve and divide the funds among themselves. In re New South Church, 13 Allen, 497.

gious doctrines than what they themselves then professed should be taught therein throughout all future times.[1]

§ 1586. **The Discovery of Charitable Donations Is to Be Encouraged.** — It seems that with a view to encourage the discovery of charitable donations given for indefinite purposes it is the practice for the Crown to reward the persons who make the communi-

[1] Attorney-Gen. *v.* Pearson, 7 Sim. R. 290; Attorney-Gen. *v.* Shore, 7 Sim. R. 309, note. In this latter case, commonly known as the case of Lady Hewley's charity, Lord Lyndhurst, in giving judgment, stated the general ground of the doctrine in these words: "In every case of charity, whether the object of the charity be directed to religious purposes or to purposes purely civil, it is the duty of the court to give effect to the intent of the founder, provided this can be done without infringing any known rule of law. It is a principle that is uniformly acted upon in Courts of Equity. If, as they have stated, the terms of the deed of foundation be clear and precise in the language and clear and precise in the application, the course of the court is free from difficulty. If on the other hand the terms which are made use of are obscure, doubtful, or equivocal, either in themselves or in the application of them, it then becomes the duty of the court to ascertain by evidence as well as it is able what was the intent of the founder of the charity, in what sense the particular expressions were used. It is a question of evidence, and that evidence will vary with the circumstances of each particular case. It is a question of fact to be determined, and the moment the fact is known and ascertained, then the application of the principles is clear and easy. It can scarcely be necessary to cite authorities in support of these principles. They are founded in common sense and common justice; but if it were necessary to refer to any authority, I might refer to the case which has been already mentioned, the case of the Attorney-General *v.* Pearson, and to another case which was cited at the bar, the case in the House of Lords. Throughout those judgments the principles which have been stated were acknowledged and acted upon by a noble and learned judge, of more experience in Courts of Equity, and more experience in questions of this nature, than any other living person. I look upon it then that these principles are clear and established; that they admit of no doubt whatever." The case was finally carried to the House of Lords, where the decree of the court below was affirmed, but upon grounds somewhat different from and more qualified than those which governed in that court. Upon that occasion the judges of the Courts of Law were called upon to express their opinions; and not agreeing in their views, they delivered their opinions seriatim, all being in favor of the affirmance of the decree except Mr. Justice Maule. The opinions are full of learning and instruction upon that most difficult question, how far parol evidence is admissible, of the opinions of the donor to explain and modify the sense of the language used by him. The report in the House of Lords will be found in 9 Clark & Fin. 355. See also 1 Greenl. of Ev. § 295, note 1, 2d ed. It is not my design to enter into any comments upon the doctrine stated in the text. That the judgments are free from difficulty, and that they stand upon as unquestionable principles as the learned judges suppose in their reasoning, may admit of serious doubt and discussion. No such doctrine has as yet ever been promulgated in America; and from the peculiar circumstances of the country and the diversity of religious opinions it is improbable that it ever will be. But see ante, § 1572, note; Miller *v.*

cation, if they can bring themselves within the scope of the charity, by giving them a part of the fund; and the like practice, whether well or ill founded, takes place also in relation to escheats.[1]

§ 1587. **Statutes of Limitation Do Not Bar Charitable Trusts.** — It seems that the Statute of Limitations and the bar from lapse of time will not be allowed to prevail in cases of charitable trusts in the same manner as it would in cases of mere private trusts. Thus in the case of a charitable trust where a corporation had purchased with notice of the trust, and had held the property under an adverse title for one hundred and fifty years, it was decided that the corporation should reconvey the property upon the original trusts.[2]

§ 1588. **Same.** — These are the principal doctrines and decisions under the Statute of Elizabeth respecting charitable uses, which it seems most important to bring in review before the learned reader. It may not be useless to add that the Statute of Mortmain and Charities of the 9th of Geo. II. ch. 36, has very materially narrowed the extent and operation of the Statute of Elizabeth, and has formed a permanent barrier against what the statute declares to be a "public mischief", which "had of late greatly increased by many large and improvident alienations or dispositions, made by languishing and dying persons or others, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs."[3]

§ 1589. **Same.** — This Statute of 9th George II. ch. 36, was never extended to or adopted by the American Colonies generally.[4] But certain of the provisions of it and of the older Statutes of

Gable, 2 Denio, R. (N. Y.) 492. The English rule has since been adopted in some cases. Princeton *v.* Adams, 10 Cush. 129, 132; Kniskern *v.* Lutheran Church, 1 Sandf. Ch. 439. See also Attorney-Gen. *v.* Bunce, L. R. 6 Eq. 563 (where there had been a gradual change in the society from membership in one religious denomination to another); Roshi's Appeal, 69 Pa. St. 462; Schorr's Appeal, 67 Pa. St. 138; Attorney-Gen. *v.* Moore, 4 C. E. Green, 503.

[1] Per Lord Eldon, in Moggridge *v.* Thackwell, 7 Ves. 36, 71.

[2] Attorney-Gen. *v.* Christ's Hospital, 3 Mylne & Keen, 344.

[3] The following recent cases among others touch this subject: In re Watmough, L. R. 8 Eq. 272; Booth *v.* Carter, L. R. 3 Eq. 757; Sinnett *v.* Herbert, L. R. 7 Ch. 232; Lewis *v.* Allenby, L. R. 10 Eq. 668; Nethersole *v.* School for Blind, L. R. 11 Eq. 1; Chester *v.* Chester, L. R. 12 Eq. 444; Wilkinson *v.* Barber, L. R. 14 Eq. 96; Springett *v.* Jenings, L. R. 10 Eq. 488; Jones *v.* Badley, L. R. 3 Eq. 635; s. c. 3 Ch. 362; Ashworth *v.* Munn, 15 Ch. D. 363; Holdsworth *v.* Davenport, 3 Ch. D. 185; Mitchell *v.* Moberly, 6 Ch. D. 655; Chandler *v.* Howell, 4 Ch. D. 651.

[4] Attorney-Gen. *v.* Stewart, 2 Meriv. R. 143.

Mortmain[1] have been adopted by some of the States of the Union.[2] And it deserves the consideration of every wise and enlightened American legislator, whether provisions similar to those of this celebrated statute are not proper to be enacted in this country with a view to prevent undue influence and imposition upon pious and feeble minds in their last moments, and to check an unfortunate propensity (which is sometimes found to exist under a bigoted fanaticism), the desire to acquire fame as a religious devotee and benefactor at the expense of all the natural claims of blood and parental duty.

[1] The 7th of Edw. I. stat. 2, De Religiosis; the 13th of Edw. I. ch. 32; the 15th of Richard II. ch. 5; and the 23d of Hen. VIII. ch. 10.

[2] Binney, R. App. 626; Laws of New York, sess. 36, ch. 60, § 4; Jackson *v.* Hammond, 2 Cain. Cas. in Err. 337.

CHAPTER XXXVI

IMPLIED TRUSTS

§ 1590. **Implied Trusts.** — We have now, in pursuance of the plan already laid down,[1] gone over some of the most important branches of express trusts, and shall next proceed to the consideration of some of the more usual cases of IMPLIED TRUSTS, including therein cases of constructive and resulting trusts.[2] Implied trusts may be divided into two general classes: first, those which stand upon the presumed intention of the parties; secondly, those which are independent of any such intention and are forced upon the conscience of the party by operation of law; as for example in cases of meditated fraud, imposition, notice of an adverse equity, and other cases of a similar nature. It has been said to be a general rule that the law never implies and a Court of Equity never presumes a trust except in case of absolute neces-

[1] Ante, §§ 1324 to 1326.

[2] Lord Nottingham's judgment, in Cook *v.* Fountain, 3 Swanst. R. 585, contains a classification of trusts and of the general principles which regulate implied trusts. "All trusts," said he, "are either, first express trusts which are raised and created by act of the parties; or implied trusts which are raised or created by act or construction of law. Again, express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof or violent and necessary presumption. These last are commonly called presumptive trusts; and that is when the court upon consideration of all circumstances, presumes there was a declaration either by word or writing, though the plain and direct proof thereof be not extant. In the case in question there is no pretence of any proof that there was a trust declared either by word or in writing; so the trust, if there be any, must either be implied by the law or presumed by the court. There is one good, general, and infallible rule, that goes to both these kinds of trusts. It is such a general rule as never deceives; a general rule to which there is no exception; and that is this; the law never implies, the court never presumes, a trust but in case of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate. And so at last every case in court will become casus pro amico."

sity.[1] Perhaps this is stating the doctrine a little too strongly. The more correct exposition of the general rule would seem to be that a trust is never presumed or implied as intended by the parties unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions.

§ 1591. **Trusts Which Are Founded in the Supposed Intent of the Parties.** — And first let us consider such implied trusts as are founded in the supposed intention of the parties. The most simple form perhaps in which such an implied trust can be presented is that of money or other property delivered by one person to another, to be by the latter paid or delivered over to and for the benefit of a third person. In such a case (as we have seen [2]) the party so receiving the money or other property holds it upon a trust; a trust necessarily implied from the nature of the transaction in favor of such beneficiary, although no express agreement has been entered into to that effect.[3] But even here the trust is not under all circumstances absolute; for if the trust is purely voluntary and without any consideration, and the beneficiary has not become a party to it by his express assent after notice of it, it is revocable;[4] and if revoked, then the original trust is gone and an implied trust results in favor of the party who originally created it.[5]

§ 1592. **A Resulting Trust Will Arise Where a Trust Created by Deed or Will Fails.** — Another form in which a resulting trust may appear is where there are certain trusts, created either by will or deed, which fail in whole or in part,[6] or which are of such an indefinite nature that Courts of Equity will not carry them into

[1] Cook *v.* Fountain, 3 Swanst. R. 591.

[2] Ante, § 1401; Com. Dig. Chancery, 4 W. 5.

[3] 4 Kent, Comm. Lect. 61, p. 307, 3d ed.; Com. Dig. Chancery, 4 W. 5; McClung *v.* Colwell, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. Rep. 961.

[4] See Paul *v.* Paul, 19 Ch. D. 47, reversing 15 Ch. D. 580, and deciding that a settlor cannot revoke a trust which he has finally and conclusively declared, though in favor of a volunteer. See also Light *v.* Scott, 88 Ill. 239.

[5] Ante, § 1312; Linton *v.* Hyde, 2 Madd. R. 94; Priddy *v.* Rose, 3 Meriv. R. 102; Dearle *v.* Hall, 3 Russ. R. 1; Loveridge *v.* Cooper, 3 Russ. R. 30; Page *v.* Broom, 4 Russ. R. 6; Wallwyn *v.* Coutts, 3 Meriv. R. 707; s. c. 3 Simons, R. 14; Garrard *v.* Lord Lauderdale, 3 Simons, R. 1; s. c. 2 Russ. & Mylne, 451; Leman *v.* Whitely, 4 Russ. R. 427.

[6] It was early held, in a case in which Lord Mansfield dissented from the opinion of the majority, that where the trusts had all failed by the decease of the cestui que trust, and the grantor had also deceased, both without heirs, thus making a case for an escheat but for the creation of the trust, equity had no power to compel the trustee to convey the estate

effect, or which are illegal in their nature and character, or which are fully executed and yet leave an unexhausted residuum. In all such cases there will arise a resulting trust to the party creating the trust, or to his heirs and legal representatives, as the case may require.[1]

§ 1593. **Conveyance of Land, without Consideration, Gives Rise to Resulting Trust.** — Another common transaction which gives rise to the presumption of an implied resulting use or trust is where a conveyance is made of land or other property without any consideration, express or implied, or any distinct use or trust

to the Crown to perfect the title by escheat. Burgess *v.* Wheate, 1 W. Black, 123; s. c. 1 Eden, 177. This practically established the right (though the point itself was expressly left undecided) of the trustee to hold the property. And the later decisions confirmed this position. Fawcett *v.* Lowther, 2 Ves. 300; Middleton *v.* Spicer, 1 Bro. C. C. 201; Walker *v.* Denne, 2 Ves. Jr. 170; Williams *v.* Lonsdale, 3 Ves. 752; Cox *v.* Parker, 22 Beav. 168. See also Smith *v.* Spencer, 6 DeG. M. & G. 631; Peacock *v.* Stockford, 7 DeG. M. & G. 129; Dunne *v.* Dunne, Ib. 207; Ware *v.* Watson, Ib. 248. But the rule has finally been changed by statute. 47 & 48 Vict. ch. 71, § 4.

[1] Stubbs *v.* Sargeon, 2 Keen, R. 255; Ommaney *v.* Butcher, 1 Turn. & Russ. R. 260, 270; Wood *v.* Cox, 2 Mylne & Craig, 684; s. c. 1 Keen, 317; Cook *v.* Hutchinson, 1 Keen, 42, 50; ante, §§ 979 *a*, 979 *b*, 1071, 1073, 1156, 1157, 1183. In Cook *v.* Hutchinson, 1 Keen, R. 42, 50, where a father made a deed to a son upon certain trusts for himself, his wife, and her children by him, after his decease, and no trust was declared of the surplus, it was held that there was no resulting trust to the father, and that the son took the surplus. On this occasion Lord Langdale said: "Upon this deed a question is made whether there is or is not a resulting trust to the grantor as to the surplus, with respect to which there is no declaration of trust; and for the purpose of determining that question it is necessary to look carefully to the language of the deed and to the circumstances of the particular case. In general, where an estate or fund is given in trust for a particular purpose, the remainder, after that purpose is satisfied, will result to the grantor; but that resulting trust may be rebutted even by parol evidence, and certainly cannot take effect where a contrary intention, to be collected from the whole instrument, is indicated by the grantor. The distinctions applicable to cases of this kind are pointed out in the case of King *v.* Denison, by Lord Eldon, who adopts the principles laid down by Lord Hardwicke in Hill *v.* The Bishop of London. The conclusion to which Lord Hardwicke comes is, that the question, whether there is or is not a resulting trust, must depend upon the intention of the grantor. 'No general rule,' he observes, 'is to be laid down unless where a real estate is devised to be sold for payment of debts, and no more is said; there it is clearly a resulting trust. But if any particular reason occurs why the testator should intend a beneficial interest to the devisee, there are no precedents to warrant the court to say it shall not be a beneficial interest.' Let us consider what was the intention of the grantor of this deed. The father, being upwards of eighty years of age, executes a deed which recites that he was desirous of settling the property to which he was entitled, therein described, in such manner as to make a provision for himself during his life, and for his wife and children after

stated. In such a case the intent is presumed to be that it shall be held by the grantee for the benefit of the grantor as a resulting trust.[1] But if there be an express declaration that it is to be in trust or for the use of another person, nothing will be presumed against such a declaration. And if there be either a good or a valuable consideration, there equity will immediately raise a use or trust correspondent to such consideration,[2] in the absence of any controlling declaration or other circumstances.

§ 1594. **Same.** — This is in strict conformity to the rule of the common law applied to resulting uses, which indeed were originally nothing but resulting trusts. Thus a feoffment made without consideration was at a very early period of the common law held to be made for the use of the feoffor.[3] Lord Bacon, after repudiating a distinction set up in Dyer, 146 *b*, assigning the origin of this doctrine to the time of the statute Quia emptores, said: "The intendment of an use to the feoffor, where the feoffment was made without consideration, grew long after when uses waxed general, and for this reason; because when feoffments were made it grew doubtful whether the estates were in use or in purchase, because purchases were things notorious, and uses were things secret. The chancellor thought it more convenient to put the purchaser to prove his consideration than the feoffor and his heirs to prove the trust, and so made the intendments towards the use, and put the proof upon the purchaser."[4] Be the origin of the doctrine how-

his death, and for such other purposes as were thereinafter expressed. This was the object he had in view; this was his intention as expressed in the instrument. He proceeds to make a release and assignment of the property comprised in the deed to his son 'upon the trusts thereinafter declared concerning the same;' and when he comes to declare those trusts he does not exhaust the whole of the property. But I am of opinion that this is immaterial; for after having carefully looked through the whole of this deed I have come to the conclusion, considering the relation between the parties, and the object and purport of the instrument, that the father intended to part with all beneficial interest in the property, and that he meant his son to have the benefit of that part of the property of which the trusts are not expressly declared." See Fowler *v.* Garlike, 1 Russ. & Mylne, 232; post, § 1596. See Aston *v.* Wood, L. R. 6 Eq. 419; Hargadine *v.* Henderson, 97 Mo. 375, 11 S. W. 218.

[1] 2 Black. Comm. 330; Bac. Abr. Uses and Trusts (1); Id. Trusts (C); Com. Dig. Chancery, 4 W. 3. See also Burgess *v.* Wheate, 1 Eden, R. 206, 207; post, § 1597.

[2] Ibid.; post, § 1596. Jacobsen *v.* Nealand, 122 Iowa, 372, 98 N. W. 158; Heath *v.* Carter, 20 Ind. App. 83, 50 N. E. 318; Rogers *v.* Rogers, 52 S. C. 388, 29 S. E. 812.

[3] Dyer *v.* Dyer, 2 Cox, R. 92, 93; post, § 1597.

[4] Bacon on Uses, 317; 2 Fonbl. Eq. B. 2, ch. 2, § 1, and note (*d*); Id. § 2, notes (*h*), (*i*).

ever as it may, it is firmly established in Equity Jurisprudence in matters of trust. And it is not in any manner affected by the provisions of the Statute of Frauds of 29th Charles II. ch. 3; for that statute contains an express exception of "trusts arising by implication, and transferred and extinguished by acts of law." [1]

§ 1595. **Same.** — The same principle applies to cases where a man makes a feoffment or other conveyance and parts with or limits a particular estate only, and leaves the residue undisposed of. In such a case the residue will result to the use of the feoffor or grantor, even though the feoffment or conveyance be made for a consideration. For it is the intent which guides the use; and here the party having expressly declared a particular estate of the use, the presumption is that if he had intended to part with the residue, he would have declared that intention also.[2] This distinction however is to be observed in cases where a consideration, although purely nominal, is stated in the deed. If no uses are declared, the grantee will take the whole use; and there will be no resulting use for the grantor, because the payment even of a nominal consideration shows an intent that the grantee should have some use; and no other being specified, he must take the whole use. But where a particular use is declared, there the residue of the use results to the grantor; for the presumption that the grantor meant to part with the whole use is thereby repelled.[3]

[1] Co. Litt. 290 *b*, Butler's note, § 8; Bac. Abr. Trusts (C); Lamplugh *v.* Lamplugh, 1 P. Will. 112, 113; 2 Fonbl. Eq. B. 2, ch. 2, § 4, note (*r*); Id. ch. 5, § 5, note (*q*); ante, § 972. In cases within the Statute of 29 Charles II., ch. 3, it is not necessary that the trust should be in writing. It is sufficient if it is manifested and proved by writing; that is, there should be evidence in writing proving that there was such a trust. Sugden on Vendors, ch. 15, § 1, pp. 612 to 614 (7th ed.); Livermore *v.* Aldrich, 5 Cush. 431; Kendall *v.* Mann, 11 Allen, 15, 17; Titcomb *v.* Morrill, 10 Allen, 15, 17. An oral agreement to hold premises, voluntarily conveyed by absolute deed, for the benefit of the grantor does not create a trust "by implication" of law. Campbell *v.* Brown, 129 Mass. 23; Titcomb *v.* Morrill, supra. See Bartlett *v.* Bartlett, 14 Gray, 278; Gerry *v.* Stimson, 60 Me. 186; Haigh *v.* Kaye, L. R. 7 Ch. 469; Jackson *v.* Cleveland, 15 Mich. 469. Aliter, it seems, if the grantee acts in a relation of confidence (e. g. as guardian) towards him for whom he declares to hold. Snell *v.* Elam, 2 Heisk. 82. See Johnson *v.* Dougherty, 3 C. E. Green, 406.

[2] 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (*a*); Id. § 4, notes (*m*), (*n*); Id. ch. 6, § 1, note (*a*); Co. Litt. 23; Shortridge *v.* Lampugh, 2 Lord Raym. 798; s. c. 7 Mod. 71; Lloyd *v.* Spillet, 2 Atk. 149, 150; Pybus *v.* Mitford, 1 Vent. 372; Benbow *v.* Townsend, 1 Mylne & Keen, 506; post, § 1598.

[3] As the doctrine of resulting uses and trusts is founded upon a mere implication of law, it may be proper here to observe that parol evidence is generally admissible for the purpose of rebutting such resulting use or trust. See 2 Fonbl. Eq. B. 2, ch. 5, § 3, note (*l*), and cases there cited;

§ 1596. **Same.** — The same principle applies to cases where the whole of the estate is conveyed or devised, but for particular objects and purposes or on particular trusts. In all such cases, if those objects or purposes or trusts, by accident or otherwise, fail and do not take effect, or if they are all accomplished and do not exhaust the whole property, there a resulting trust will arise for the benefit of the grantor or devisor and his heirs.[1]

Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 86 to 94. See Benbow *v.* Townsend, 1 Mylne & Keen, 506; post, § 1202; Cripps *v.* Jee, 4 Bro. Ch. R. 472. The late case of Leman *v.* Whitney (4 Russ. R. 422) stands upon the utmost limits of the doctrine of the inadmissibility of parol evidence as to resulting trusts. A son had conveyed an estate to his father nominally as purchaser for the consideration expressed in the deed of £400, but really as a trustee, in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son. The father died shortly afterwards, before any money was raised, having by his will made a general devise of all his real estate. The case was held by Sir John Leach to be within the Statute of Frauds, and that parol evidence was not admissible to prove the trust. On this occasion the learned judge said: "There is here no pretence of fraud, nor is there any misapprehension of the parties with respect to the effect of the instruments. It was intended that the father should by legal instruments appear to be the legal owner of the estate. There is here no trust arising or resulting by the implication or construction of law. The case of Cripps *v.* Jee is the nearest to this case in its circumstances. There the estate being subject to certain incumbrances the grantor mortgaged the equity of redemption by deeds of lease and release to two persons of the name of Rogers, as purchasers for a consideration stated in the deed; the real intention of the parties being that the Rogerses should be mere trustees for the grantor and should proceed to sell the estate, and after paying the incumbrances should pay the surplus money to the grantor. In the book of accounts of one of the Rogerses there appeared an entry in his handwriting of a year's interest paid to an incumbrancer on the estate on an account of the grantor, and other entries of the repayment of that interest to Rogers by the grantor; and there was also evidence of a note and bond given by the Rogerses to a creditor of the grantor, in which they stated themselves to be trustees of the estate of the grantor. Lord Kenyon held that this written evidence being inconsistent with the fact that the Rogerses were the actual purchasers of the equity of redemption, further evidence was admissible to prove the truth of the transaction. Unfortunately there is here no evidence in writing which is inconsistent with the fact that the father was the actual purchaser of this estate; and it does appear to me that to give effect to the trust here would be in truth to repeal the Statute of Frauds. Considering myself bound therefore to treat this case as a purchase by the father from the plaintiff, there does however arise an equity for the plaintiff which, consistently with the facts stated and proved, and under the prayer for general relief, he is entitled to claim. It is stated and proved that no part of the alleged price or consideration of £400 was ever paid by the father to the plaintiff; and the plaintiff therefore, as vendor, has a lien on the estate for this sum of £400, and the decree must be accordingly." Ante, § 1592; Squire *v.* Harder, 1 Paige, R. 494.

[1] 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (*a*); Id. B. 2, ch. 8, § 2, note (*a*);

§ 1597. **Purchase Money Furnished by One, and Title Taken in Name of Another, Raises a Trust.** — Upon similar grounds, where a man buys land in the name of another and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration money.[1] This as an

Cruse *v.* Barley, 3 P. Will. 20, and Mr. Cox's note (1); Ripley *v.* Waterworth, 7 Ves. 425, 435; 2 Powell on Devises, by Jarman, ch. 3, pp. 32 to 36, and ch. 5, pp. 77 to 102; 4 Kent, Comm. Lect. 61, p. 307 (4th ed.); Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 13; Id. pp. 130, 131; Hobart *v.* Countess of Suffolk, 2 Vern. 644; Hill *v.* Bishop of London, 1 Atk. 618 to 620; Robinson *v.* Taylor, 1 Ves. Jr. 44; s. c. 2 Bro. Ch. R. 589; Stanfield *v.* Habergham, 10 Ves. 273; Tregonwell *v.* Sydenham, 3 Dow, R. 194; Chitty *v.* Parker, 2 Ves. Jr. 271; Northen *v.* Carnegie, 4 Drew. 587; In re Pollard, 32 L. J. Ch. 657; Easterbrooks *v.* Tillinghast, 5 Gray, 17; Fisk *v.* Attorney-Gen., L. R. 4 Eq. 521; Wild *v.* Banning, L. R. 2 Eq. 577.

A gift "of the whole or any part" of the income of a fund for the maintenance of a person does not carry the surplus income. Secus if the gift were of the whole income for such purpose. In re Sanderson, 3 Kay & J. 497. In Clarke *v.* Hilton, L. R. 2 Eq. 810, a gift to a grandson, subject to certain trusts which did not exhaust the fund, was held to give him a beneficial interest in the surplus. See Straat *v.* Uhrig, 56 Mo. 482.

[1] Com. Dig. Chancery, 3 W. 3; 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (*a*); 3 Wooddes. Lect. 57, pp. 438, 439; Co. Litt. 290 *b*, Butler's note (1), § 8; Sugden on Vendors, ch. 15, § 2, pp. 615 to 620 (7th ed.); Bac. Abr. Uses (I.); Id. Trusts (C.); Younge *v.* Peachy, 2 Atk. 256; Lloyd *v.* Spillet, 2 Atk. 150, and Mr. Sanders's note (2); Scott *v.* Fenhoullet, 1 Bro. Ch. R. 69, 70; Lane *v.* Dighton, Ambler, R. 409, 411; Finch *v.* Finch, 15 Ves. 50; Mackreth *v.* Symmons, 15 Ves. 350; Wray *v.* Steele, 2 V. & Beam. 388; 2 Madd. Ch. Pr. 98; Boyd *v.* McLean, 1 John. Ch. R. 582; Botsford *v.* Burr, 2 John. Ch. R. 405; Steere *v.* Steere, 5 John. Ch. R. 1; Powell *v.* Monson and Brimfield Manufacturing Company, 3 Mason, R. 362, 363; 4 Kent, Comm. Lect. 61, pp. 305, 306 (4th ed.); 2 Madd. Ch. Pr. 97, 98, 108; Jackson *v.* Moore, 6 Cowen, R. 706; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 85 to 94. Mr. Sanders, in his note (2) to Lloyd *v.* Spillet, 2 Atk. 150, referring to this same position as it is there laid down by Lord Hardwicke, remarks, "With respect to this position the following observations occur. If the consideration money is expressed in the deed to be paid by the person in whose name the conveyance is taken, and nothing appears in such conveyance to create a presumption that the purchase-money belonged to another, then parol proof cannot be admitted after the death of the nominal purchaser to prove a resulting trust, for that would be contrary to the Statute of Frauds and Perjuries. Kirk *v.* Webb, Prec. Ch. 84; Walter de Chirton's Case, Ibid. 88; Heron *v.* Heron, Ibid. 163; Newton *v.* Preston, Ibid. 103; Gascoyne *v.* Thuring, 1 Vern. 336; Hooper *v.* Eyles, 2 Vern. 480; Crop *v.* Norton, 2 Atk. 75. But if the nominal purchaser in his lifetime gives a declaration of or confesses the trust, then it takes it out of the statute. Ambrose *v.* Ambrose, 1 P. Will. 322; Ryall *v.* Ryall, 1 Atk. 59, 60. In Lane *v.* Dighton, Ambl. R. 409, there was evidence, in Mr. Dighton's handwriting, that the trust stocks had been sold and the money laid out from time to time in the purchase of land. So if it appears on the face of the conveyance (whether by recital or otherwise) that the purchase was made with the money of a third person, that will create a trust in his favor. Kirk *v.* Webb, Prec. Ch. 84; Deg *v.* Deg,

established doctrine is now not open to controversy. But there are exceptions to it, which stand upon peculiar reasons (to be presently noticed), and which are quite consistent with the general doctrine. The clear result of all the cases, without a single exception, is (as has been well said by an eminent judge) that the trust of the legal estate, whether freehold, copyhold, or leasehold;

2 P. Will. 414; Ryall *v.* Ryall, 1 Atk. 59; Young *v.* Peachy, 2 Atk. 257." As to the proper proof of the payment of the purchase-money in such a case, Mr. Maddock, in his treatise on the Principles and Practice in Chancery (vol. 2, p. 98), says: "Such proof may appear either from expressions or recitals in the purchase-deed (see 2 Vern. 168; Prec. Ch. 104; Kirk *v.* Webb, Ibid. 84, cited 1 Sanders on Uses, p. 258); or from some memorandum or note of the nominal purchaser (O'Hara *v.* O'Neal, 2 Eq. Abr. 745); or from his answer to a bill of discovery (Cottington *v.* Fletcher, 2 Atk. 155; but see Edwards *v.* Moore, 4 Ves. 23, cited 1 Sand. 258); or from papers left by him and discovered after his death (Ryall *v.* Ryall, Ambl. R. 413; Lane *v.* Dighton, Ibid. 409). But whether after the death of the supposed nominal purchaser parol proof alone is admissible against the express declaration of the deed, has been a subject of controversy (see 1 Sand. on Uses, p. 259, and the note to Lloyd *v.* Spillet, 2 Atk. 150; Roberts on Frauds, p. 99; Sugd. Vend. and Purch. 616, 617 (7th ed.); 2 Sugden on Vendors, pp. 136, 137, 9th ed.), although it seems it may. See Lench *v.* Lench, 10 Ves. 511." See also Boyd *v.* McLean, 1 John. Ch. R. 582, where the subject is very fully and learnedly discussed by Mr. Chancellor Kent in his judgment. See also Botsford *v.* Burr, 2 John. Ch. R. 404; Blodgett *v.* Hildreth, 103 Mass. 484; Johnson *v.* Quarles, 46 Mo. 423. Or where a man buys land for, and with money of, another, taking title in his own name, to hold for him who furnished the money. Kendall *v.* Mann, 11 Allen, 15; Click *v.* Click, 1 Heisk. 607. See Mallory *v.* Mallory, 5 Bush, 464; Gibson *v.* Foote, 40 Miss. 788; Thomas *v.* Chicago, 55 Ill. 403; Dryden *v.* Hanway, 31 Md. 254; Green *v.* Drummond, Ib. 71; Kelley *v.* Jenness, 50 Maine, 455; Roberts *v.* Ware, 40 Cal. 634; Waterman *v.* Seeley, 28 Mich. 77; Six *v.* Shaner, 26 Md. 415; Glidewell *v.* Spaugh, 26 Ind. 319. Payment must be made at the time, or in pursuance of an agreement made at the time. Barnard *v.* Jewett, 97 Mass. 87; Nixon's Appeal, 63 Pa. St. 279. But payment may be made in land. Clark *v.* Clark, 43 Vt. 685. Or in services. White *v.* Sheldon, 4 Nev. 280; Lyon *v.* Lyon, 1 Tenn. Ch. 225.

If title is taken in the name of another to save the land from creditors, it has been held that no trust will be raised. Cutler *v.* Tuttle, 4 C. E. Green, 549. But see Hutchins *v.* Heyward, 50 N. H. 491. And compare Ownes *v.* Ownes, 8 C. E. Green, 60; Harvey *v.* Varney, 98 Mass. 118. In Massachusetts an executory contract in writing to convey land conveyed to the grantee in fraud of creditors is valid, though perhaps it could not be specifically enforced. Harvey *v.* Varney, supra. Contra in New Jersey. Ownes *v.* Ownes, 8 C. E. Green, 60. See Cutler *v.* Tuttle, 4 C. E. Green, 549, 562; Baldwin *v.* Campfield, 4 Halst. Ch. 891. But even in New Jersey a naked trustee of land, the title to which is vested in the cestui que trust, may be compelled to convey to the beneficiary in accordance with the trustee's written declaration of trust, though the conveyance was made to the trustee in fraud of creditors. Ownes *v.* Ownes, supra.

Of course an oral agreement or declaration of trust to reconvey to a voluntary grantor would not be binding. Campbell *v.* Brown, 129 Mass.

whether taken in the names of the purchaser and others jointly, or in the name of others without the purchaser; whether in one name or several, whether jointly or successively (*successive*), results to the man who advances the purchase-money. This is a general proposition, supported by all the cases, and there is nothing to contradict it.[1] And it goes on a strict analogy to the rule of the common law that where a feoffment is made without consideration the use results to the feoffer.[2] In truth it has its origin

23; Titcomb *v.* Morrill, 10 Allen, 15.; Lewis *v.* Wells, 85 Fed. 896; Wilson *v.* Edwards, 79 Ark. 69, 94 S. W. 927; In re Fisher's Est., 128 Iowa 18, 102 N. W. 797; Neel *v.* Moore, 19 Ky. L. Rep. 918, 39 S. W. 1042; Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190; Hickson *v.* Culbert, 19 S. Dak. 207, 102 N. W. 774; Bible *v.* Marshall, 103 Tenn. 324, 52 S. W. 1077; Flanary *v.* Kane, 102 Va. 547, 47 S. E. 312; Despard *v.* Bennett, 53 W. Va. 443, 44 S. E. 448; Lee *v.* Timken, 10 App. Div. 213, 41 N. Y. Supp. 979, 75 N. Y. St. Rep. 1356.

The matters must not arise out of a fraudulent transaction. If the grantee took the title for the purpose of defrauding another, the grantor will not now be allowed to set up a trust. Tiffany *v.* Tiffany, 103 Iowa, 133, 72 N. W. 428.

But in Michigan, by statute, no trust would arise by the payment of money by one and taking property in name of another. Hamilton *v.* Wickson, 131 Mich. 71, 90 N. W. 1032, 9 Detroit Leg. N. 235; Minneapolis R. Co. *v.* Lund, 91 Minn. 45, 97 N. W. 452.

Where the title to property has been taken in the name of one other than the real owner, equity neither creates nor enforces such a trust contrary to the real ascertained intent of parties who are capable of acting for themselves. Morris *v.* Clare, 132 Mo. 232, 33 S. W. 1123; Funk *v.* Hensler, 31 Wash. 528, 72 Pac. 102.

It is presumed that the conveyance was intended as an advancement when made to one as to whom the alleged owner was under obligation to support, for instance, the wife in this case. Bailey *v.* Dobbins, 67 Neb. 548, 93 N. W. 687.

[1] Lee *v.* Browder, 51 Ala. 288; Pinney *v.* Fellows, 15 Vt. 538; Hays *v.* Quay, 68 Pa. St. 263; Harvey *v.* Ledbetter, 48 Miss. 95; Hutchins *v.* Heyward, 50 N. H. 491; McCarroll *v.* Alexander, 48 Miss. 128; Woodford *v.* Stephens, 51 Mo. 443; Pamphrey *v.* Brown, 5 W. Va. 107; Blodgett *v.* Hildreth, 103 Mass. 484. And there may be a resulting trust pro tanto in favor of one who furnishes part of the purchase-money. Kelley *v.* Jenness, 50 Me. 455. But it must be a specific aliquot part. McGowan *v.* McGowan, 14 Gray, 119; Olcott *v.* Bynum, 84 U. S. 44, 21 L. Ed. 570. See further as to payment of part, Dudley *v.* Bachelder, 53 Me. 403; Fleming *v.* McHale, 47 Ill. 282; Thalman *v.* Canon, 24 N. J. Eq. 127; Roberts *v.* Ware, 40 Cal. 634. Actual payment is held necessary. Remington *v.* Campbell, 60 Ill. 516.

Whether a secret purpose in an agent to get money to buy land for himself which the principal desires him to buy for him, together with dissuasion by the agent of the principal against acting in the matter, is fraud, the agent having accordingly bought for himself, see Collins *v.* Sullivan, 135 Mass. 461. And see Walker *v.* Locke, 5 Cush. 90; Haigh *v.* Kaye, L. R. 7 Ch. 469; Jenkins *v.* Eldredge, 3 Story, 181.

[2] Lord Ch. Baron Eyre, in Dyer *v.* Dyer, 2 Cox, R. 92, 93; 2 Sugden

in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit rather than for that of another; and that the conveyance in the name of the latter is a matter of convenience and arrangement between the parties for other collateral purposes. The same doctrine is applied to cases where securities are taken in the name of another person. As if A takes a bond in the name of B for a debt due to himself, B will be a trustee of A for the money.[1]

§ 1598. **Same.** — But the doctrine is strictly limited to cases where the purchase has been made in the name of one person and the purchase-money has been paid by another. For where a man employs another person by parol as an agent to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase-money is paid by the principal, there, if the agent denies the trust and there is no written agreement or document establishing it, he cannot by a suit in equity compel the agent to convey the estate to him; for (as has been truly said) that would be decidedly in the teeth of the Statute of Frauds.[2] [But if the agent has undertaken to purchase property for his principal and he has taken the title in his own name, he has no right to violate his contract and retain the possession of this property, and a Court of Equity would compel him to convey to his principal or to account for the value of the same.[3]]

§ 1599. **Resulting Trust Will Not Be Allowed where it Would Be Contrary to Public Policy.** — There is an exception to the doctrine of a resulting trust in favor of a purchaser who pays the money and takes the conveyance in the name of a third person,

on Vendors, ch. 15, § 2, pp. 134, 135 (9th ed.); Id. pp. 615 to 617 (7th ed.); Botsford *v.* Burr, 2 John. Ch. R. 405 to 410.

[1] Ebrand *v.* Dancer, 2 Ch. Cases, 26; s. c. 1 Eq. Abr. 382, pl. 11; 2 Madd. Ch. Pr. 101; Lloyd *v.* Read, 1 P. Will. 607; Rider *v.* Kidder, 10 Ves. 366.

[2] Bartlett *v.* Pickersgill, 1 Eden, 515; s. c. 4 East, 577, note; 2 Sugden on Vendors, ch. 15, § 2, p. 139 (9th ed.). See also Rastel *v.* Hutchinson, 1 Dick. 44; Rex *v.* Boston, 4 East, R. 572; Crop *v.* Norton, 2 Atk. 74; s. c. 9 Mod. R. 233; Botsford *v.* Burr, 2 John. Ch. R. 405, 408 to 410; Collins *v.* Sullivan, 135 Mass. 461; Howland *v.* Blake, 97 U. S. 624, 24 L. Ed. 1027; Watson *v.* Erb, 33 Ohio St. 35; Kendall *v.* Mann, 11 Allen, 15, 17; Bostleman *v.* Bostleman, 24 N. J. Eq. 103; Remington *v.* Campbell, 60 Ill. 516; Burden *v.* Sheridan, 36 Iowa, 125.

[3] Bellinger *v.* Collins, 117 Iowa, 173, 90 N. W. 609; Dodge *v.* Black, 21 Ky. L. Rep. 992, 53 S. W. 1039; Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486; Owen *v.* Monroe Co, Alliance, 77 Miss. 500, 27 So. 383; Pettit *v.* Carpenter, 86 Mo. App. 452; Tecumseh Natl. Bank *v.* Russell, 50 Neb. 277, 69 N. W. 763; Seacoast R. Co. *v.* Wood, 65

which stands upon a principle of public policy, and that is that Courts of Equity will never raise a resulting trust where it would contravene any statutable provisions founded in public policy, or would assist the parties in evading these provisions.[1] Thus if an alien for the purpose of evading any law of a State prohibiting aliens from holding real estate should purchase land and pay the money, and take a conveyance in the name of a third person without any written declaration of trust, there Courts of Equity would never raise or enforce a resulting trust in favor of the alien purchaser in fraud of the rights of the State or the law of the land.[2]

§ 1600. **Presumption that a Trust Exists May Be Rebutted.** — But there are other exceptions to the doctrine of a resulting or implied trust, even where the principal has paid the purchase-money, as has been already intimated; or perhaps more properly speaking as the resulting or implied trust is, in such cases, a mere matter of presumption, it may be rebutted by other circumstances established in evidence, and even by parol proofs which satisfactorily contradict it.[3] And resulting or implied trusts in such cases may in like manner be rebutted, as well to part of the land as to part of the interest in the land purchased in the name of another.[4] Thus where A took a mortgage in the name of B, declaring that he intended the mortgage to be for B's benefit, and that the principal after his own death should be B's, and A received the interest therefor during his lifetime, it was held that the mortgage belonged to B after the death of A.[5] But a more common case of rebutting the presumption of a trust is where the purchase may be fairly

N. J. Eq. 530, 56 Atl. 337; Preston *v.* Preston, 202 Pa. 515, 52 Atl. 192; Morris *v.* Reigel, 19 S. Dak. 26, 101 N. W. 1086; Jackson *v.* Pleasonton, 95 Va. 654, 29 S. E. 680.

[1] Legett *v.* Dubois, 5 Paige, R. 114; See Cutler *v.* Tuttle, 4 C. E. Green, 549; Ownes *v.* Ownes, 8 C. E. Green, 60; Harvey *v.* Varney, 98 Mass. 118; Haigh *v.* Kaye, L. R. 7 Ch. 469; Miller *v.* Davis, 50 Mo. 572; Wheeler *v.* Kirtland, 23 N. J. Eq. 18; Closs *v.* Bopp, Ib. 270.

[2] Ibid.

[3] Dyer *v.* Dyer, 2 Cox, R. 93; 1 Eq. Abr. 3, pl. 1 to 5, pp. 380, 381; Lloyd *v.* Read, 1 P. Will. 607; Graham *v.* Graham, 1 Ves. Jr. 275; Maddison *v.* Andrew, 1 Ves. 57, 61; Co. Litt. 290 *b*, Butler's note (1), § 8; Ryall *v.* Ryall, 1 Atk. 59; s. c. Ambler, R. 413; Botsford *v.* Burr, 2 Johns. Ch. R. 405; Boyd *v.* McLean, 1 Johns Ch. R. 582; Bartlett *v.* Pickersgill, 1 Eden, R. 515; Lench *v.* Lench, 10 Ves. 517; Sugden on Vendors, ch. 15, § 2, pp. 615 to 628 (7th ed.); Com. Dig. Chancery, 4 W. 4; Benbow *v.* Townsend, 1 Mylne & Keen, 506; Cook *v.* Hutchinson, 1 Keen, R. 42, 50, 51.

[4] Lane *v.* Dighton, Ambler, R. 409; Lloyd *v.* Spillet, 2 Atk. 150; Benbow *v.* Townsend, 1 Mylne & Keen, 506.

[5] Benbow *v.* Townsend, 1 Mylne & Keen, 506.

deemed to be made for another from motives of natural love and affection. Thus for example if a parent should purchase in the name of a son, the purchase would be deemed prima facie as intended as an advancement, so as to rebut the presumption of a resulting trust for the parent.[1] But this presumption that it is an advancement may be rebutted by evidence manifesting a clear intention that the son shall take as a trustee.[2]

§ 1601. **Purchase by Parent, in Name of Child, as an Exception to the Rule.** — The moral obligation of a parent to provide for his children is the foundation of this exception, or rather of this rebutter of a presumption; since it is not only natural, but reasonable in the highest degree, to presume that a parent by purchasing in the name of a child means a benefit for the latter in discharge of this moral obligation, and also as a token of parental affection.[3] This presumption in favor of the child being thus founded in natural affection and moral obligation ought not to be frittered away by nice refinements.[4] It is perhaps rather to be lamented that it has been suffered to be broken in upon by any sort of evidence of a merely circumstantial nature.[5]

[1] Sidmouth *v.* Sidmouth, 2 Beav. R. 447; Bennet *v.* Bennet, 10 Ch. D. 474; In re de Visme, 2 DeG. J. & S. 17; Gilbert *v.* Gilbert, 2 Abb. Dec. 256; Farrell *v.* Lloyd, 69 Pa. St. 239; Culp *v.* Price, 107 Iowa 133, 77 N. W. 848; Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190; Harris *v.* Elliott, 45 W. Va. 245, 32 S. E. 176.

[2] Scawan *v.* Scawan, 1 Younge & Coll. N. R. 65; Fowkes *v.* Pascoe, L. R. 10 Ch. 343; Marshal *v.* Crutwell, L. R. 20 Eq. 328. So of a check given by a father to pay his son's debt. In re Blockley, 29 Ch. D. 250; Doll *v.* Gifford, 13 Colo. App. 67, 56 Pac. 676; Evans *v.* Curtis, 190 Ill. 197, 60 N. E. 56; Irvine *v.* Irvine, 28 Ky. L. Rep. 262, 89 S. W. 193.

[3] Bennet *v.* Bennet, 10 Ch. D. 474. In this case it is laid down that where one person stands in such a relation to another as to create an obligation to make provision for him, and there is either a purchase or an investment in the name of the latter, or in the joint names of both, of an amount which would constitute a provision, the presumption of a gift arises. The presumption of gift arises from a moral obligation to give. Jessel, M. R. But this, it is declared, does not apply to a mother. Ib.; Holt *v.* Frederick, 2 P. Wms. 357; In re de Visme, 2 DeG. J. & S. 17. But see Sayre *v.* Hughes, L. R. 5 Eq. 376.

[4] Finch *v.* Finch, 15 Ves. 50; Dyer *v.* Dyer, 2 Cox, R. 93, 94; 2 Fonbl. Eq. B. 2, ch. 5, § 2, and notes (*d*), (*i*); Lord Gray *v.* Lady Gray, 1 Eq. Abr. 381, pl. 6; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 88 to 90; Com. Dig. Chancery, 4 W. 4.

[5] See McGinniss *v.* Edgell, 39 Iowa, 419. Lord Ch. Justice Eyre, in Dyer *v.* Dyer, 2 Cox, R. 92, has discussed this matter with great ability. "It is the established doctrine," said he, "of a Court of Equity that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more nominees being a child or children of the purchaser, is to operate by rebutting the resulting trust. And it has been determined in so many cases that the

1602. **Same.** — The same doctrine applies to the case of securities taken in the name of a child. The presumption is that it is intended as an advancement unless the contrary is established

nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question; namely, that such circumstance shall rebut the resulting trust, and that it shall so do as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law; surely then it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea without very certain guides. In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shows the father intended an advancement, and therefore the resulting trust is rebutted. But then a circumstance is added to this, namely, that the son happened to be provided for; then the question is, Did the father intend to advance a son already provided for? Lord Nottingham could not get over this; and he ruled that in such a case the resulting trust was not rebutted; and in Pole *v.* Pole, in Vesey, Lord Hardwicke thought so too. And yet the rule in a Court of Equity, as recognized in other cases, is, that the father is the only judge as to the question of a son's provision. That distinction therefore of the son being provided for or not, is not very solidly taken or uniformly adhered to. It is then said that a purchase in the name of a son is a prima facie advancement; and indeed it seems difficult to put it in any way. In some of the cases some circumstances have appeared which go pretty much against that presumption; as where the father has entered and kept possession, and taken the rent; or where he has surrendered or devised the estate; or where the son has given receipts in the name of the father. The answer given is, that the father took the rents as guardian of his son. Now would the court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered that these are subsequent acts; whereas the intention of the father, in taking the purchase in the son's name, must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son being under age, he could not give receipts in any other manner. But I own this reasoning does not satisfy me. In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be that the first taken might surrender the whole lease, that shall make the other lessees trustees for him. But this custom operates on the legal estate, not on the equitable interest; and therefore this is not a very solid argument. When the lessees are to take *successivé*, it is said that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father. And to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may

in evidence.[1] And the like presumption exists in the case of a purchase of a husband in the name of his wife, and of securities taken in her name.[2] Indeed the presumption is stronger in the case of a wife than of a child, for she cannot at law be the trustee of her husband. The same rule applies to the case of a joint purchase by the husband in the name of himself, his wife, and his daughters; and it will be presumed an advancement and provision for the wife and his daughter, and the husband and wife will be held to take one moiety by entireties, and the daughter to take the other moiety.[3]

§ 1603. **Same.** — Hence also it is that where a purchase is

be many prudential reasons for putting in the life of a child in preference to that of any other person. And if, in that case, it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea. To be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent. But where the estate must necessarily be taken to him in succession, the inference is very different. These are the difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided." The cases are also fully collected in Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 89 to 92. See Cook *v.* Hutchinson, 1 Keen, 42, 50.

[1] Ebrand *v.* Dancer, 2 Ch. Cas. 26; s. c. 1 Eq. Abr. 382, pl. 11; Lloyd *v.* Read, 1 P. Will. 607; Rider *v.* Kidder, 10 Ves. 366; 2 Madd. Ch. Pr. 101; Scawin *v.* Scawin, 1 Younge & Coll. New R. 65.

[2] See Hill *v.* Pine River Bank, 45 N. H. 300; Groff *v.* Rohrer, 35 Md. 327; Cairns *v.* Colburn, 104 Mass. 274; Cotton *v.* Wood, 25 Iowa, 43; Johnson *v.* Johnson, 16 Minn. 512; Thomas *v.* Chicago, 55 Ill. 403; Peiffer *v.* Lytle, 58 Pa. St. 386; In re Curteis, L. R. 14 Eq. 217. But see Persons *v.* Persons, 25 N. J. Eq. 250; McCartney *v.* Fletcher, 11 App. D. C. 1; Watt *v.* Watt, 19 Ky. L. Rep. 25, 39 S. W. 48; Viers *v.* Viers, 175 Mo. 444, 75 S. W. 395; Veeder *v.* McKinley Trust Co., 67 Neb. 548, 93 N. W. 687; Hayes *v.* Horton, 46 Oreg. 597, 81 Pac. 386; Beringer *v.* Lutz, 188 Pa. St. 364, 41 Atl. 643.

The presumption may be rebutted, and nothing but clear, strong proof will suffice to do this. Smithsonion Inst. *v.* Meech, 169 U. S. 398, 42 L. Ed. 793, 18 S. Ct. Rep. 396; Price *c.* Kane, 112 Mo. 412, 20 S. W. 609; Flanner *v.* Burler, 131 N. C. 155, 42 S. E. 547.

[3] 2 Fonbl. Eq. B. 2, ch, 5, § 3; Back *v.* Andrew, 2 Vern. R. 120; Cook *v.* Hutchinson, 1 Keen, R. 42, 50; Devine *v.* Devine, 180 Ill. 447, 54 N. E. 336; Andrew *v.* Andrew, 114 Iowa, 524, 87 N. W. 494.

If the father knew that his daughter was paying half of the purchase price and he purposely made the deed to the husband, no trust would arise in her favor. Lewis *v.* Stanley, 148 Ind. 351, 47 N. E. 677.

Where husband and wife received a conveyance to the wife, in consideration of both of them taking care of the grantor, the husband's mother in her old age, the fact that the wife became insane and was unable to carry out her contract would not raise a trust in favor of the husband. Burkhardt *v.* Burkhardt, 107 Iowa, 369, 77 N. W. 1069.

made by a father in the joint names of himself and of a child unprovided for (whatever may be the case as to a child otherwise provided for), if the father dies, the child will hold the estate and have the benefit thereof by survivorship against the heir at law of the father, and against all volunteers claiming under the father, and also against purchasers from him with notice.[1] So where a father transferred stock from his own name into the joint names of his son and of a person whom the father and son employed as their banker to receive dividends, and the father told the banker to carry the dividends, as they were received, to the son's account, and they were accordingly received and enjoyed by the son during his father's lifetime, it was held that the transfer created an executed trust for the son, and that he was absolutely entitled to the stock.[2]

§ 1604. **The Right of Survivorship as Applied to Trust Estates.** — In the case of joint purchases made by two persons who advance and pay the purchase-money in equal proportions and take a conveyance to them and their heirs, it constitutes a joint-tenancy, that is, a purchase by them jointly of the chance of survivorship, and of course the survivor will take the whole estate. This is the rule at law, and it prevails also in equity under the same circumstances; for unless there are controlling circumstances, equity follows the law.[3] But wherever such circumstances occur, Courts of Equity will lay hold of them to prevent a survivorship and create a trust; for joint-tenancy is not favored in equity.[4] Thus if a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the

[1] See Fowkes *v.* Pascoe, L. R. 10 Ch. 343; Batstone *v.* Salter, Ib. 431; Marshal *v.* Crutwell, L. R. 20 Eq. 328; 2 Fonbl. Eq. B. 2, ch. 5, § 2, note (*d*). Mr. Atherley, in his Treatise on Marriage Settlements, ch. 33, pp. 473 to 484, and Mr. Sugden, in his Treatise on Vendors and Purchasers, ch. 15, §§ 1, 2, pp. 607 to 628 (7th ed.), have examined this whole subject with great care and ability; and the learned reader is referred to these works for a full statement of the doctrines and the cases. See also 2 Madd. Ch. Pr. 99, 100.

[2] Crabb *v.* Crabb, 1 Mylne & Keen, 511.

[3] Lake *v.* Gibson, 1 Eq. Abridg. p. 290, A. pl. 3; Moyse *v.* Gayles, 2 Vern. 385; 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (*g*); Sugden on Vendors, ch. 17, § 1, pp. 607 to 615 (7th ed.); 2 Sugden on Vendors, ch. 15, § 1, pp. 127 to 132 (9th ed.); Rigden *v.* Vallier, 2 Ves. 258; 2 Madd. Ch. Pr. 102. See also Caines *v.* Lessee of Grant, 5 Binn. R. 119; Robinson *v.* Preston, 4 Kay & J. 505; Bone *v.* Pollard, 24 Beav. 283; Cipperly *v.* Cipperly, 4 Thomp. & C. 342; Honore *v.* Hutchings, 8 Bush, 687; Maloy *v.* Sloans, 44 Vt. 311.

[4] Parteriche *v.* Powlet, 1 West. R. 7; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 86; 2 Madd. Ch. Pr. 102.

purchase-money, he will be entitled to his share as a resulting trust.[1] So if two persons advance a sum of money by way of mortgage and take a mortgage to them jointly, and one of them dies, the survivor shall not have the whole money due on the mortgage, but the representative of the deceased party shall have his proportion as a trust; for the nature of the transaction as a loan of money repels the presumption of an intention to hold the mortgage as a joint-tenancy.[2] So if two persons jointly purchase an estate and pay unequal proportions of the purchase-money, and take the conveyance in their joint names, in case of the death of either of them there will be no survivorship; for the very circumstance that they have paid the money in unequal proportions excludes any presumption that they intended to bargain for the chance of survivorship.[3] They are therefore deemed to purchase

[1] Wray *v.* Steele, 2 Ves. & B. 388. Under the English Registry Acts in cases of a joint purchase of a ship by two persons, and the bill of sale taken in the name of one, no trust would arise in favor of the other. Ex parte Houghton, 17 Ves. 251; 2 Madd. Ch. Pr. 101, 102; Ex parte Yallop, 15 Ves. 60; Abbott on Shipp. P. 1, ch. 2, pp. 33 to 35; 2 Sugden on Vendors, ch. 35, § 2, pp. 139, 140 (9th ed.).

[2] Petty *v.* Styward, 1 Ch. Rep. 31 [57]; s. c. 1 Eq. Abridg. 290, pl. 1; 2 Fonbl. Eq. B. 2, ch. 4, § 4, note (*g*); Rigden *v.* Vallier, 2 Ves. 258; s. c. 3 Atk. 731; 2 Powell on Mortg. 671, by Coventry & Rand, and notes; Randall *v.* Phillips, 3 Mason, R. 378.

[3] Mr. Vesey in his note (*b*) to Jackson *v.* Jackson, 9 Ves. 597, 598, doubts the soundness of the distinction between an equality and an inequality of advances in the purchase of an estate by joint purchasers, as leading to a different conclusion as to the right of survivorship. "If," says he, "the advance of consideration generally will not prevent the legal right, the mere inequality of proportion which may naturally be attributed to the relative value of the lives ought not to have that effect." On the other hand Mr. Sugden thinks the distinction satisfactory and well founded. "Where," says he, "the parties advance the money equally, it may fairly be presumed that they purchased with the view to the benefit of survivorship. But where the money is advanced in unequal proportions, and no express intention appears to benefit the one advancing the smaller proportion, it is fair to presume that no such intention existed. The inequality of proportion can scarcely be attributed to the relative value of the lives; because neither of the parties can be supposed not to know that the other may, immediately after the purchase, compel a legal partition of the estate, or may sever the joint-tenancy by a clandestine act." Sugden on Vendors, ch. 15, § 1, p. 607, note I. (7th ed.); S. P. and note; 2 Sugden on Vendors, ch. 15, § 1, pp. 127, 128, note I. (9th ed.). There is much force in these observations of the latter learned author. But the real ground of the distinction probably is that joint-tenancy is not favored in equity; that where there is nothing demonstrating an apparent intent to vary the rule of law, it must prevail; so that in cases of equal advances no such intent is apparent. But that where the advances are unequal, there is nothing in the transaction necessarily leading to the conclusion that the parties mean to follow the rule of law; and then a

as in the nature of partners, and to intend to hold the estate in proportion to the sums which each has advanced.[1]

§ 1605. **The Rights of Partners Who Survive.** — The same rule is uniformly applied to joint purchasers in the way of trade, and for purposes of partnership and for other commercial transactions by analogy to, and in expansion and furtherance of, the great maxim of the common law, "Jus accrescendi inter mercatores pro beneficio commercii locum non habet."[2] In cases therefore where real estate is purchased for partnership purposes and on partnership account, it is wholly immaterial in the view of a Court of Equity in whose name or names the purchase is made and the conveyance is taken, whether in the name of one partner or of all the partners, whether in the name of a stranger alone or of a stranger jointly with one partner. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property not subject to survivorship, and the partners are deemed the cestuis que trust thereof.[3] A Court of Law may, nay must, in general, view it only according to the state of the legal title. And if the legal title is vested in one partner or in a stranger, a bona fide purchaser of real estate from him, having no notice either express or constructive of its being partnership property, will be entitled to hold it free from any claim of the partnership.[4] But if he has such notice, then in equity he is clearly bound by the trust; and he takes it cum onere exactly like every other purchaser of a trust estate.[5]

Court of Equity is not bound to presume any intention to follow it; since it may work an inequality in point of right and justice. In other words a Court of Equity will not adopt a rule of law which has no foundation in general justice or convenience, unless it is compelled to do so by the absence of all circumstances which will enable it to control it. See ante, § 1597.

[1] Lake *v.* Gibson, 1 Eq. Abridg. 290, A. pl. 3; Rigden *v.* Vallier, 2 Ves. R. 258; Caines *v.* Grant's Lessee, 5 Binn. 119. But see 2 Sugden on Vendors, pp. 131 to 135; Id. 139 (9th ed.); the case of joint purchasers where one pays all the money; McGee *v.* Wells, 52 S. C. 472, 30 S. E. 602.

[2] Co. Litt. 182 *a*; 2 Fonbl. Eq. B. 2, ch. 4, § 2, and note (*h*); Lake *v.* Craddock, 3 P. Will. 158; Jackson *v.* Jackson, 9 Ves. 591, 593, 597.

[3] Bell *v.* Phyn, 7 Ves. 453; Ripley *v.* Waterworth, 7 Ves. 425, 435; Townshend *v.* Devaynes, Montague on Partn. 97, in note; Balmain *v.* Shore, 9 Ves. 500; Lake *v.* Craddock, 3 P. Will. 158; s. c. Sugden on Vendors, ch. 15, pp. 607 to 614 (7th ed.); Jackson *v.* Jackson, 9 Ves. 591, 593, 594, 597; Selkrig *v.* Davies, 2 Dow, R. 231; Collyer on Partn. B. 2, ch. 1, § 1, art. 4, pp. 68 to 70; Hoxie *v.* Carr, 1 Sumner, R. 182 to 186; ante, §§ 917, 918; Fawcett *v.* Whitehouse, 1 Russ. & Mylne, 132.

[4] Ibid.

[5] Ibid; and especially Hoxie *v.* Carr, 1 Sumner, R. 182, 183. We have already seen (ante, § 917) that such real estate, belonging to a partnership,

§ 1606. **Partnership Property Treated as a Trust Fund for Creditors.** — But although generally speaking whatever is purchased with partnership property to be used for partnership purposes is thus treated as a trust for the partnership in whosesoever name the purchase may be made, yet there may be cases in which, from the nature of the thing purchased, the partner in whose name it is purchased may upon a dissolution of the partnership be entitled to hold it as his own, so that it will be trust property sub modo only. Thus for example an office may be purchased or a license be obtained in the name of a partner out of the partnership funds (as for example a stockbroker's license, or the office of a clerk in court), to be used during the continuance of the partnership for partnership purposes by the person obtaining the same. But it will not follow that, upon the dissolution of the partnership, such partner is to hold the same and act as a stockbroker or clerk in court, performing all the duties alone for the benefit of the other partners.[1]

§ 1607. **Executor as a Trustee.** — Another illustration of the doctrine of implied and resulting trusts arises from the appointment of an executor of a last will and testament. In cases of such an appointment the executor is entitled, both at law and in equity (for in this respect equity follows the law), to the whole surplus of the personal estate, after payment of all debts and charges for his own benefit, unless it is otherwise disposed of by the testator.[2] The inclination of Courts of Equity has been strongly evinced to lay hold of any circumstances which may rebut the presumption of such a gift to the executor; and some very nice and curious distinctions have been taken in England in order to escape from the operation of the general rule. In America the surplus is by law universally distributable among the next of kin in the absence of all contrary expressions of intention by the testator, and therefore it is scarcely necessary to present these distinctions at large. In general it may be stated that at law the appointment of an executor vests in him all the personal estate of the testator, and the surplus after the payment of all debts will belong to him. But in equity, if it can be collected from any circumstance or expression in the will that the testator intended his executor to have only the office and not the beneficial interest, such intention will

is generally, if not universally, treated as personal property of the partnership. Ante, § 918; post, §§ 1650, 1661.

[1] Clark *v.* Richards, 1 Younge & Coll. 351.

[2] 2 Madd. Ch. Pr. 83 to 85; 2 Fonbl. Eq. B. 2, ch. 2, § 5, note (*k*); Jeremy on Eq. B. 1, ch. 1, § 2, pp. 122 to 129.

receive effect, and the executor will be deemed a trustee for those on whom the law would have cast the surplus in cases of a complete intestacy.[1]

§ 1608. **Effect of Appointment of Debtor as Executor.** — In like manner at law a testator by the appointment of his debtor to be

[1] Read *v.* Stedman, 26 Beav. 495. See Bird *v.* Harris, L. R. 9 Eq. 204; Wager *v.* Wager, 89 N. Y. 161. 2 Fonbl. Eq. B. 2, ch. 5, § 3, note (*k*); 2 Madd. Ch. Pr. 83, 84. Mr. Fonblanque has collected most of the distinctions on this subject in his learned note (*k*), above referred to. The following extract is made from that note, as every way useful to students. "The cases," says he, "upon the subject are numerous, and not easily reconcilable. I will however endeavor to extract the several rules which have governed their decision. 1. As the exclusion of the executor from the residue is to be referred to the presumed intention of the testator that he should not take it beneficially, an express declaration that he should take as trustee will of course exclude him; Pring *v.* Pring, 2 Vern. 99; Graydon *v.* Hicks, 2 Atk. 18; Wheeler *v.* Sheers, Mosely, 288, 301; Dean *v.* Dalton, 2 Bro. Ch. R. 634; Bennet *v.* Bachelor, 3 Bro. Ch. 28; 1 Ves. Jr. 63; Barrs *v.* Fewkes, 2 Hem. & M. 60; Clarke *v.* Hilton, L. R. 2 Eq. 810; Read *v.* Stedman, 26 Beav. 495; and the exclusion of one executor as a trustee will consequently exclude his co-executor; White *v.* Evans, 4 Ves. 21; unless there be evidence of a contrary intention; Williams *v.* Jones, 10 Ves. 77; Pratt *v.* Sladden, 14 Ves. 193; Dawson *v.* Clark, 15 Ves. 416; and see Dalton *v.* Dean, to show that a direction to reimburse the executors their expenses is sufficient to exclude them. 2 Bro. R. 634. 2. Where the testator appears to have intended by his will to make an express disposition of the residue, but by some accident or omission such disposition is not perfected at the time of his death, as where the will contains a residuary clause but the name of the residuary legatee is not inserted, the executor shall be excluded from the residue. Bp. of Cloyne *v.* Young, 2 Ves. 91; Lord North *v.* Pardon, 2 Ves. 495; Hornsby *v.* Finch, 2 Ves. Jr. 78; Oldham *v.* Carleton, 2 Cox, R. 400. See Travers *v.* Travers, L. R. 14 Eq. 275. 3. Where the testator has by his will disposed of the residue of his property, but by the death of the residuary legatee in the lifetime of the testator it is undisposed of at the time of the testator's death. Nichols *v.* Crisp, Amb. 769; Bennet *v.* Bachelor, 3 Bro. Ch. R. 28. 4. The next class of cases in which an executor shall be excluded from the residue is where the testator has given him a legacy expressly for his care and trouble; which, as observed by Lord Hardwicke in Bp. of Cloyne *v.* Young, 2 Ves. 97, is a very strong case for a resulting trust, not on the foot of giving all and some, but that it was evidence that the testator meant him as a trustee for some other, for whom the care and trouble should be, as it could not be for himself. Foster *v.* Munt, 1 Vern. 473; Rachfield *v.* Careless, 2 P. Will. 157; Cordel *v.* Noden, 2 Vern. 148; Newstead *v.* Johnstone, 2 Atk. 46."

Even where the residue was given "absolutely" to the executors "charged" with certain legacies, there being pecuniary legacies to the executors, they were held excluded from beneficial interest in the residue, in Saltmarsh *v.* Barrett, 29 Beav. 474; s. c. 3 DeG. F. & J. 279. "5. Though the objection to the executor's taking part and all has been thought a very weak and insufficient ground for excluding him from the residue, as the testator might intend the particular legacy to him in case of the personal estate falling short, yet it has been allowed to prevail; and it is

his executor extinguishes his debt, and it cannot be revived, although a debt due by an administrator would only be suspended. The reason of the difference is that the one is the act of the law

now a settled rule in equity that if a sole executor has a legacy generally and absolutely given to him (for if given under certain limitation, which will be hereafter considered, it will not exclude), he shall be excluded from the residues. Cook *v.* Walker, cited 2 Vern. 676; Joslin *v.* Brewitt, Bunb. 112; Davers *v.* Dewes, 2 P. Will. 40; Farrington *v.* Knightly, 1 P. Will. 544; Vachell *v.* Jefferies, Prec. Ch. 170; Petit *v.* Smith, 1 P. Will, 7. Nor will the circumstance of the legacy being specific be sufficient to entitle him. Randall *v.* Bookey, 2 Vern. 425; Southcot *v.* Watson, 3 Atk. 229; Martin *v.* Rebow, 1 Bro. Ch. R. 154; Nesbit *v.* Murray, 5 Ves. 149. Nor will the testator's having bequeathed legacies to his next of kin vary the rule. Bayley *v.* Powell, 2 Vern. 361; Wheeler *v.* Sheers, Mosely, 288; Andrew *v.* Clark, 2 Ves. 162; Kennedy *v.* Stainsby, E. 1755, stated in a note, 1 Ves. Jr. 66; for the rule is founded rather on a presumption of intent to exclude the executor than to create a trust for his next of kin, and therefore if there be no next of kin, a trust shall result for the Crown. Middleton *v.* Spicer, 1 Bro. Ch. R. 201. 6. Where the testator appears to have intended to dispose of any part of his personal estate. Urquhart *v.* King, 7 Ves. 225. 7. Where the residue is given to the executors as tenants in common, and one of the executors dies, whereby his share lapses, the next of kin, and not the surviving executors, shall have the lapsed share. Page *v.* Page, 2 P. Will. 489; 1 Ves. Jr. 66, 542. With respect to co-executors, they are clearly within the first three stated grounds on which a sole executor shall be excluded from the residue. And as to the fourth ground of exclusion, it seems to be now settled that a legacy given to one executor expressly for his care and trouble will, though no legacy be given to his co-executor, exclude. White *v.* Evans, 4 Ves. 21. As to the fifth ground of exclusion of a sole executor, several points of distinction are material in its application to co-executors. A sole executor is excluded from the residue by the bequest of a legacy, because it shall not be supposed that he was intended to take part and all. But if there be two or more executors, a legacy to one is not within such objection, for the testator might intend a preference to him pro tanto. Colesworth *v.* Brangwin, Prec. Ch. 323; Johnson *v.* Twist, cited 2 Ves. 166; Buffar *v.* Bradford, 2 Atk. 220. So where several executors have unequal legacies, whether pecuniary or specific, they shall not be thereby excluded from the residue. Brasbridge *v.* Woodroffe, 2 Atk. 69; Bowker *v.* Hunter, 1 Bro. Ch. R. 328; Blinkhorn *v.* Feast, 2 Ves. 27. But where equal pecuniary legacies are given to two or more executors, a trust shall result for those on whom, in case of an intestacy, the law would have cast it. Petit *v.* Smith, 1 P. Will. 7; Carey *v.* Goodinge, 3 Bro. Ch. R. 110; Muckleston *v.* Brown, 6 Ves. 64. But see Heron *v.* Newton, 9 Mod. 11. Qu. Whether distinct specific legacies, of equal value, to several executors will exclude them? It now remains to consider in what cases an executor shall not be excluded from the residue. Upon which it may be stated as a universal rule that a Court of Equity will not interfere to the prejudice of the executor's legal right, if such legal right can be reconciled with the intention of the testator, expressed by or to be collected from his will. And therefore even the bequest of a legacy to the executor shall not exclude if such legacy be consistent with the intent that the executor shall take the residue; as where a gift to the executor is an exception out of another legacy. Griffith *v.* Rogers, Prec. Ch. 231; Newstead *v.* John-

and the other is the act of the party.[1] But in equity a debt due by an executor is not extinguished; and it will go to the same party who would be entitled to the surplus estate if the debt were due from a third person.[2]

§ 1609. **Purchase of Property by Trustee with Funds of Cestui Que Trust.** — Another illustration of the doctrine of implied trusts arises from acts done by trustees apparently within the scope and objects of their duty. Thus for instance if a trustee, authorized to purchase lands for his cestuis que trust or beneficiaries, should purchase lands with the trust money and take the conveyance in his own name, without any declaration of the trust, a Court of Equity would in such a case deem the property to be held as a resulting trust for the persons beneficially entitled thereto.[3] For in such a case a Court of Equity will presume that the party meant to act in pursuance of his trust and not in violation of it. So where a man has covenanted to lay out money in the purchase of lands, or to pay money to trustees to be laid out in the purchase of lands, if he afterwards purchases lands to the amount, they will be affected with the trust; for it will be presumed, at least until the contrary absolutely appears, that he purchased in fulfilment

stone, 2 Atk. 45; Southcot *v.* Watson, 3 Atk. 229. Or where the executorship is limited to a particular period, or determinable on a contingency, and the thing bequeathed to the executor upon such contingency taking place is bequeathed over. Hoskins *v.* Hoskins, Prec. Ch. 263. Or where the gift is only a limited interest, as for the life of the executor. Lady Granville *v.* Duchess of Beaufort, 1 P. Will. 114; Jones *v.* Westcome, Prec. Ch. 316; Nourse *v.* Finch, 1 Ves. Jr. 356. Or where the wife is executrix, and the bequest is of her paraphernalia. Lawson *v.* Lawson, 7 Bro. P. C. 521; Ball *v.* Smith, 2 Vern. 675; 3 Wooddes. Lect. 59, pp. 495 to 503."

[1] Hudson *v.* Hudson, 1 Atk. 461.

[2] Ibid; 3 Wooddes. Lect. 49, pp. 504, 505; Phillips *v.* Phillips, 1 Ch. Cas. 292; Brown *v.* Selwin, Cas. t. Talbot, 240.

[3] 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (*c*); Deg *v.* Deg, 2 P. Will. 414; Sugden on Vendors, ch. 15, § 3, pp. 628 to 630 (7th ed.); Lane *v.* Dighton, Ambler, R. 409; Perry *v.* Phellips, 4 Ves. R. 107; s. c. 17 Ves. 173; Bennet *v.* Mayhew, cited 1 Bro. Ch. R. 232; 2 Bro. Ch. R. 287; Brainard *v.* Buck, 184 U. S. 99, 46 L. Ed. 449, 22 S. Ct. Rep. 458; Affirming 16 App. D. C. 595; Waterman *v.* Buckingham, 79 Conn. 286, 64 Atl. 212; Frankenstein *v.* North, 79 Ill. App. 669; Graham *v.* Graham, 85 Ill. App. 460; Ray *v.* Ferrell, 127 Ind. 570, 27 N. E. 159; Pillars *v.* McConnell, 141 Ind. 670, 40 N. E. 689; Zunkel *v.* Colson, 109 Iowa, 695, 81 N. W. 175; Marsh *v.* Davis, 33 Kans. 326, 6 Pac. 612; Locheim *v.* Eversole, 29 Ky. L. Rep. 464, 93 S. W. 52; Dougan *v.* Bemis, 95 Minn. 220, 103 N. W. 882; Harney *v.* Donohoe, 97 Mo. 141, 10 S. W. 191; Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543; Wiano Land Co. *v.* Webster, 75 Mo. App. 457; Concordia Trust Co. *v.* Parrotte, 62 Neb. 629, 87 N. W. 348; Green *v.* Green, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525; Stone *v.* Kahle, 22 Tex. Civ. App. 185, 54 S. W. 375; Francis *v.* Cline, 96 Va. 201, 31 S. E. 10; Hill *v.* True, 104 Wis. 294, 80 N. W. 462.

of his covenant.[1] In every such case however it must be clear that the land has been paid for out of the trust money; and if this appears, a trust will be implied not only when the party may be presumed to act in execution of the trust, but even when the investment is in violation of the trust. For in every such case, where the trust money can be distinctly traced, a Court of Equity will fasten a trust upon the land in favor of the persons beneficially entitled to the money.[2]

§ 1610. **Acts of Trustees with Regard to Trust Property Are Deemed for Benefit of Cestui Que Trust.** — Upon grounds of an analogous nature the general doctrine proceeds that whatever acts are done by trustees in regard to the trust property shall be deemed to be done for the benefit of the cestui que trust and not for the benefit of the trustee.[3] If therefore the trustee makes any contract, or does any act in regard to the trust estate for his own benefit, he will nevertheless be held responsible therefor to the cestui que trust, as upon an implied trust. Thus for example if a

[1] Sowden *v.* Sowden, 1 Cox, R. 165; s. c. 1 Bro. Ch. R. 582; Wilson *v.* Foreman, 1 Dick. 593; s. c. cited and commented on in 10 Ves. 519; Lench *v.* Lench, 10 Ves. 516; Gartshore *v.* Chalie, 10 Ves. 9; Lewis *v.* Madocks, 17 Ves. 58; Perry *v.* Phellips, 17 Ves. 173; Savage *v.* Carroll, 1 B. & Beatt. 265; Waite *v.* Horwood, 2 Atk. 159; Sugden on Vendors, ch. 15, § 3, pp. 628 to 630 (7th ed.); Id. § 4, pp. 630 to 634; Atherley on Marr. Sett. ch. 28, pp. 412 to 415; Id. pp. 434 to 442.

[2] Taylor *v.* Plumer, 3 M. & Selw. 562; Cunard *v.* Atlantic Ins. Co., 26 U. S. 448, 7 L. Ed. 189; Liebman *v.* Harcourt, 2 Meriv. 513; Chedworth *v.* Edwards, 8 Ves. 46; s. c. 1 Madd. Ch. P. 128, note (*e*); Ryall *v.* Ryall, 1 Atk. 59; s. c. Ambler, R. 412, 413; Lane *v.* Dighton, Ambler, R. 409; Atherley on Marr. Sett. ch. 28, pp. 442 to 444; Bennett *v.* Mayhew, cited 1 Bro. Ch. R. 232, 2 Bro. Ch. R. 287; Buckeridge *v.* Glasse, 1 Craig & Phillips, 126. In the case of a purchase of land by a trustee in his own name in pursuance of the trust, the cestui que trust is entitled to the estate. But where it is purchased with trust money in violation of the trust, Mr. Atherley is of opinion that the cestui que trust has a lien only on the estate, and not a right to the estate. There is much sound sense in the distinction; but he admits that Bennett *v.* Mayhew is apparently against it. Atherley on Marr. Sett. ch. 28, pp. 443, 444. It is of course to be understood that the cestui que trust is not in any case, where the trust money is invested in lands or other things in fraud or breach of the trust, bound to take the land or to insist on his lien. He has an election to do so or not. Ibid.; Oliver *v.* Piatt, 44 U. S. 333, 11 L. Ed. 622.

So too where the fund is invested in personalty, as in railway stocks. Ex parte Cooke, 4 Ch. D. 123. See § 1663.

[3] 4 Kent, Comm. Lect. 61, pp. 306, 307 (3d ed.); Davoue *v.* Fanning, 2 John. Ch. R. 252; White *v.* Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132; Booth *v.* Bradford, 114 Iowa, 562, 87 N. W. 685; Frazier *v.* Jenkins, 64 Kans. 615, 68 Pac. 24, 57 L. R. A. 575; Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543; but if the parties agree, this may be done. Miller *v.* Dodge, 28 Misc. Rep. 640, 59 N. Y. Supp. 1070.

trustee should purchase a lien or mortgage on the trust estate at a discount, he would not be allowed to avail himself of the difference, but the purchase would be held a trust for the benefit of the cestui que trust.[1] So if a trustee should renew a lease of the trust estate, he would be held bound to account to the cestui que trust for all advantages made thereby.[2] And if a trustee should misapply the funds of the cestui que trust, the latter would have an election either to take the security or other property in which the funds were wrongfully invested, or to demand repayment from the trustee of the original funds.[3]

§ 1611. **Acts of Agent with Reference to Property of His Principal Will Be Deemed in Behalf of Principal.** — The same principle will apply to persons standing in other fiduciary relations to each other. Thus for example if an agent who is employed to purchase for another purchases in his own name or for his own account, he will be held to be a trustee of the principal at the option of another.[4] So if he is employed to purchase up a debt of his principal and he does so at an undervalue or discount, the principal will be entitled to the benefit thereof, in the nature of a trust.[5] In this predicament sureties are also held to be who purchase up the securities of the principal on which they are sureties; and the principal will be entitled to the benefit of every such purchase at the price given for them.[6]

§ 1612. **Vendor Treated as Trustee for Vendee in Contract to Sell.** — Another class of cases illustrating the doctrine of implied trusts is that which embraces what is commonly called the equitable conversion of property. By this is meant an implied or equitable change of property from real to personal, or from personal to real, so that each is considered transferable, transmissible, and descendible, according to its new character as it arises out of the contracts or other acts and intentions of the parties. This

[1] Green *v.* Winter, 1 John. Ch. R. 26; Morret *v.* Parke, 2 Atk. 54; Forbes *v.* Ross, 2 Bro. Ch. R. 430; Van Horn *v.* Fonda, 5 John. Ch. R. 409; Evestorn *v.* Tappan, 5 John. Ch. R. 514.

[2] Holdridge *v.* Gillespie, 2 John. Ch. R. 30; Griffin *v.* Griffin, 1 Sch. & Lefr. 352; James *v.* Dean, 11 Ves. 392; Nesbitt *v.* Tredenick, 1 B. & Beatt. 46, 47; Wilson *v.* Troup, 2 Cowen, R. 195.

[3] Steele *v.* Babcock, 1 Hill, N. Y. Rep. 527.

[4] Lees *v.* Nuttall, 1 Russ. & Mylne, 53; s. c. Tamlyn's Rep. 382; Carter *v.* Palmer, 11 Bligh, R. 397, 418, 419. But see ante, § 1598. Clendenning *v.* Hawk, 10 N. Dak. 90, 86 N. W. 114; Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; Triplett *v.* Woodward, 98 Va. 187, 35 S. E. 455; Dorr *v.* Camden, 55 W. Va. 226, 46 S. E. 1014, 65 L. R. A. 348; Moore *v.* Petty, 135 Fed. 668, 68 C. C. A. 306.

[5] Ibid. [6] Reed *v.* Norris, 2 Mylne & Craig, 361, 374.

change is a mere consequence of the common doctrine of Courts of Equity, that where things are agreed to be done they are to be treated for many purposes as if they were actually done.[1] Thus (as we have already had occasion to consider) where a contract is made for the sale of land, the vendor is in equity immediately deemed a trustee for the vendee of the real estate, and the vendee is deemed a trustee for the vendor of the purchase-money. Under such circumstances the vendee is treated as the owner of the land, and it is devisable and descendible as his real estate. On the other hand the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him as other personalty, and is distributable in the same manner on his death.[2] So land articled to be sold and turned into money is reputed money; and money articled or bequeathed to be invested in land is ordinarily deemed to be land.[3]

§ 1613. **Same.** — So if money is devised to be laid out in the purchase of land which is to be settled on one and his heirs, the person for whose benefit the purchase is to be made may come into a Court of Equity and have the money paid to him without any purchase of the land; for he has a complete title to the same as owner.[4] But if he should die before any purchase is made or the money is paid, so that the question comes between his heir or devisee and executors or administrators which of them shall have the money, in such a case Courts of Equity will decree it to the

[1] See Pulteney *v.* Darlington, 1 Bro. Ch. R. 237; Burgess *v.* Wheate, 1 Eden, R. 186, 194, 195; 1 Fonbl. Eq. B. 1, ch. 6, § 9, note (*t*), Com. Dig. Chancery, 4 W. 10.

[2] Ante, § 1079; Craig *v.* Leslie, 16 U. S. 577, 4 L. Ed. 460; Beverly *v.* Peter, 35 U. S. 532, 9 L. Ed. 522.

[3] Ante, § 790, and note 1; 3 Wooddes. Lect. 58, pp. 466 to 468; 2 Madd. Ch. Pr. 108 to 110; Sugden on Vendors, ch. 4, § 1, p. 160 (7th ed.); 1 Fonbl. Eq. B. 1, ch. 6, § 9, and notes (*s*), (*t*); Id. B. 1, ch. 4, § 2, note (*n*); Atherley on Marr. Sett. ch. 28, pp. 428 to 430; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 95; Fletcher *v.* Ashburner, 1 Bro. Ch. R. 497, and Mr. Belt's note. The parties may elect to treat it otherwise if they choose. The subject of equitable conversion is treated very fully in Leigh and Dalzell's Treatise on the equitable doctrine of the conversion of property. See also 2 Fonbl. Eq. B. 2, ch. 8, § 2, and note (*a*); and the very valuable note of Mr. Cox to Cruse *v.* Varley, 3 P. Will. 22, note (1); 2 Powell on Devises, by Jarman, ch. 4, pp. 60 to 76; 2 Madd. Ch. Pr. 108 to 112. Lord Thurlow was of opinion against the original propriety of the doctrine. After quoting what he called the cant expression that in equity what is to be done is considered as done, he added: "Either that idea should have been carried fully out, or it should have been abandoned. I think it should have been the latter." See Com. Dig. Chancery, 4 W. 10, 4 W. 15, 16.

[4] Ante, § 1079; post, § 1658.

heir or devisee, precisely as if the land had been purchased in his lifetime upon the ground above stated.[1]

§ 1614. **Same.** — So if real estate be charged with the payment of debts, so far as may be necessary for the payment of such debts it will be treated as converted into personal estate. But unless the testator or other party has indicated a different intention, the real estate will not be deemed converted out and out, but it will retain its character of realty so far as the charge does not extend, until it is actually converted.[2]

§ 1615. **Same.** — In general Courts of Equity do not incline to interfere to change the quality of the property as the testator or intestate has left it, unless there is some clear act or intention by which he has unequivocally fixed upon it throughout a definite character either as money or as land. For (it has been said) there is not a spark of equity between the next of kin and the heir as to the right of property in such cases; and therefore the general principle adopted is that the heir shall take all the property which has attached to it the quality of real estate, if there is not some other definite and specific purpose to which it is entirely devoted.[3]

§ 1616. **What Will Amount to an Intention to Convert Realty into Personalty.** — What circumstances do or do not amount to proof of an absolute intention to convert real property into personal or personal into real property is sometimes a question of nice consideration and intrinsic difficulty. Thus where a testatrix devised a real estate and afterwards sold it, and the purchase was not completed until after her death, the question arose to whom the purchase-money belonged, whether to her personal representatives or to the devisee; and it was held that it belonged to the former, notwithstanding the Statute of 1 Vict. ch. 23, § 23, respecting wills.[4] So where A contracted to sell a real estate,

[1] 2 Fonbl. Eq. B. 2, ch. 8, § 2, and note (*a*); Id. § 3.

[2] Bourne *v.* Bourne, 2 Hare R. 35.

[3] Chitty *v.* Parker, 2 Ves. Jr. 271; Cruse *v.* Barley, 3 P. Will. 20, and Mr. Cox's note (1); 2 Fonbl. Eq. B. 2, ch. 8, § 2, note (*a*).

[4] Fanar *v.* Earl of Winterton, 5 Beav. R. 1, 8. In this case Lord Langdale said: "The question whether the devisees can have any interest in that part of the purchase-money which was unpaid depends on the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial interest. In equity she had alienated the land, and instead of her beneficial interest in the land she had acquired a title to the purchase-money. What was really hers in right and equity was not the land but the money, of which alone she had a right to dispose; and though she had a lien upon the land and might have refused to convey till the money was paid, yet that lien was a mere security, in or to which she had no right or interest except for the purpose of enabling her to

and the contract was valid at the time of his death, but the purchaser by his laches lost his right of a specific performance, it was held that the real estate belonged to the next of kin as personal estate, and not to the heir at law.[1]

§ 1617. **Equitable Liens as a Species of Trust Estate.** — In the next place we may enter upon the consideration of that class of implied trusts arising from what are properly called equitable liens,

obtain the payment of the money. The beneficial interest in the land which she had devised was not at her disposition, but was by her act wholly vested in another at the time of her death; and the case is clearly distinguishable from cases in which testators, notwithstanding conveyances made after the dates of their wills, have retained estates or interests in the property which remain subject to their disposition."

[1] Curre *v.* Bowyer, 5 Beav. R.. 6, note; Moor *v.* Rainsbeck, 12 Simon, 139.

But it was held in Nelson *v.* Hagerstown Bank, 27 Md. 51, that where land was sold under decree during the lifetime of the owner, and the sale was not confirmed till after his death, there was no conversion. So where, for convenience of selling, a deed was made by several owners to one person, the deed providing for the distribution of proceeds among the grantors. Lynn *v.* Gephart, 27 Md. 547.

That a devisee is an alien and cannot take real estate is not sufficient ground for inferring an intention that he should take as personalty. Sharp *v.* St. Sauveur, L. R. 7 Ch. 343.

The exercise of the right of conversion may be delegated e. g. to the donee of a power or to trustees, as well as exercised by the owner of the estate. Webb *v.* Sadler, L. R. 14 Eq. 533; s. c. 8 Ch. 419; In re Ibbitson, L. R. 7 Eq. 226; Atwell *v.* Atwell, L. R. 13 Eq. 23. In the first of these cases a marriage settlement contained a power of appointment among the children of the marriage. In default of appointment the estates were limited to the use of such children, shares to vest at twenty-one or marriage. A power of sale was given, with provisions for reinvesting the proceeds in real estate, but not an absolute trust for sale. A son attained twenty-one and died. The donee of the power afterwards appointed two fourths of the fund to living children, without appointing the rest, and declared that in case of sale the parties interested in the fund should take as personal estate; he afterwards sold under the power. The court held that the real estate was converted, at least in regard to the two fourths which had been appointed.

But where proceeds of the sale of land had been invested by trustees in government stocks, and had so remained for fifty years, and the interests under the will had vested, it was held that the trustees had no power to convert the property into real estate. Rich *v.* Whitfield, L. R. 2 Eq. 583.

The grant of a mere power of sale however does not work a conversion unless it is imperative. Edward's Appeal, 47 Pa. St. 144; Anewalt's Appeal, 42 Pa. St. 414. But it seems that if it clearly appear to have been the testator's intention that land should be sold, there will be a conversion though the trustee, donee, or executor be not absolutely directed to sell; for the owner may of course exercise the right of conversion himself. Dodge *v.* Pond, 23 N. Y. 69.

As to the power of a guardian to convert see Singleton *v.* Love, 1 Head, 357.

by which we are to understand such liens as exist in equity, and of which Courts of Equity alone take cognizance. A lien (as has been already said) [1] is not, strictly speaking, either a jus in re or a jus ad rem; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.

§ 1618. **Liens at Law Discussed.** — At law a lien is usually deemed to be a right to possess and retain a thing until some charge upon it is paid or removed.[2] There are few liens which at

It seems the courts cannot, by any power of their own merely, effect a conversion, further at all events than is actually necessary in the administration of justice. Thus it is that land damages for land taken under the law of eminent domain remain land. Durando *v.* Durando, 23 N. Y. 331. So too it is that the surplus proceeds of the sale of land of a decedent, ordered by court for the payment of debts and the like, remain real estate. Oberle *v.* Leech, 3 C. E. Green, 346, 575. And see Jones *v.* Edwards, 8 Jones, 336; Pence *v.* Pence, 11 Ohio St. 290; Varnum *v.* Meserve, 8 Allen, 158. So again where land of a female infant is sold by decree of court, the proceeds will be treated as realty, so far at least as the common-law rights of the husband are concerned. Woods *v.* Reeves, 58 N. C. 271. But where the testator's widow, who was a life tenant, and the devisees in remainder petitioned for a sale of real estate, which was decreed accordingly, it was held that the proceeds retained the character of real estate as regarded the widow, but that as regarded the devisees there was a conversion. Large's Appeal, 54 Pa. St. 383.

Of course conversion through the courts may be effected by operation of statute; but even then, it seems, only in so far as the statute reasonably interpreted requires, having regard to the interests of all parties to be affected. See in regard to the first part of the proposition Arnold *v.* Dixon, L. R. 19 Eq. 113; Steed *v.* Preece, L. R. 18 Eq. 192; Wallace *v.* Greenwood, 16 Ch. D. 32; Mordaunt *v.* Benwell, 19 Ch. D. 302. In regard to the qualifying part, Foster *v.* Foster, 1 Ch. D. 588; Mildway *v.* Quicke, 6 Ch. D. 553.

Concerning the time when the conversion is deemed to take place, where that is not expressly fixed by the instrument which authorizes or which effects the conversion, it is held that where a will simply requires real estate to be converted into money, it is to be treated as converted from the time of the testator's death. Wurt *v.* Page, 4 C. E. Green, 365. See also Ex parte McBee, 63 N. C. 332; Green *v.* Johnson, 4 Bush, 164; Hocker *v.* Gentry, 3 Met. (Ky.) 463; Rawlings *v.* Landes, 2 Bush, 158; Smithers *v.* Hooper, 23 Md. 273; Scudder *v.* Vanarsdale, 2 Beasl. 109; Ross *v.* Drake, 37 Pa. St. 373; High *v.* Worley, 33 Ala. 196. So of the converse case of the conversion of personalty. Taylor *v.* Johnson, 63 N. C. 381. And where an act of Parliament provided for the extinction of rights of holders of certain navigation shares which were realty, upon their transfer to a certain railway company, which was to pay for the same in shares of its own stock, it was held that the shares were converted from the time of the passage of the act. Cadman *v.* Cadman, L. R. 13 Eq. 470.

[1] Ante, § 681; Brace *v.* Duchess of Marlborough, 2 P. Will. 491; Ex parte Knott, 11 Ves. 617.

[2] Ante, § 681; Ex parte Heywood, 2 Rose, Cas. 355, 357.

law exist in relation to real estate. The most striking of this sort undoubtedly is the lien of a judgment creditor upon the lands of his debtor. But this is not a specific lien on any particular land; it is a general lien over all the real estate of the debtor, to be enforced by an elegit or other legal process upon such part of the real estate of the debtor as the creditor may elect.[1] The lien itself is treated as a consequence of the right to take out an elegit; and it is applied not only to present real estate in possession, but also to reversionary interests in real estate.[2] In respect to personal property a lien is generally (perhaps in all cases with the exception only of certain maritime liens, such as seaman's wages and bottomry bonds) recognized at law to exist only when it is connected with the possession or the right to possess the thing itself. Where the possession is once voluntarily parted with, the lien is ordinarily at law gone.[3] Thus for example the lien on goods

[1] Averell *v.* Wade, 1 Lloyd & Goold's Rep. 252.

[2] Harris *v.* Pugh, 4 Bing. R. 335; Burton *v.* Smith, 38 U. S. 464, 10 L. Ed. 248; United States *v.* Morrison, 29 U. S. 124, 7 L. Ed. 804; Gillmor *v.* Dale, 27 Utah, 372, 75 Pac. 932; Gilbert on Executions, 38, 39; 2 Tidd, Practice (9th ed.), 1034; Gregory *v.* Morris, 96 U. S. 619, 24 L. Ed. 740; Fishel *v.* Morris, 57 Conn. 547, 18 Atl. 717, 6 L. R. A. 82; Gardner *v.* Le Fevre, 180 Mich. 219, 146 N. W. 653, Ann. Cas. 1916A, 618; Tedder *v.* Wilmington etc. R. Co., 124 N. C. 344, 32 S. E. 714; Block *v.* Dowd, 120 N. C. 402, 27 S. E. 129; McDougald *v.* Crapon, 95 N. C. 292; Aviaus *v.* Brickley, 65 Wis. 26, 26 N. W. 188, 56 Am. Rep. 611.

[3] Heywood *v.* Waring, 4 Camp. R. 291; Story on Bailm. § 440; Hollis *v.* Claridge, 4 Taunt. R. 807; Chase *v.* Westmore, 5 M. & Selw. 180; Hanson *v.* Meyer, 6 East. R. 614; Hartly *v.* Hitchcock, 1 Starkie, R. 408. Lord Ellenborough, in Heywood *v.* Waring, 4 Camp. R. 295, said: "Without possession there can be no lien. A lien is a right to hold. And how can that be held which was never possessed?" Even at the common law there may be a right approaching to a lien without possession of personal property. This has been recently held in the case of Dodsley *v.* Varley, 12 Adolph. & Ellis, R. 632, where Lord Denman, in delivering the opinion of the court, said: "The facts were that the wool was bought while at the plaintiff's; the price was agreed on, but it would have to be weighed; it was then removed to the warehouse of a third person, where Bamford collected the wools which he purchased for defendant from various persons, and to which place the defendant sent sheeting for the packing up of such wools. There it was weighed, together with the other wools, and packed, but it was not paid for. It was the usual course for the wool to remain at this place until paid for. No wish was expressed to take the opinion of the jury on the fact of agency, the defendant's counsel acquiescing in that of the judge, provided the circumstances would amount to it in point of law. We agree that they might; therefore all these must be taken to be the acts of the defendant. Then, he has removed the plaintiff's wool to a place of deposit for his own wools; he has weighed it with his other purchases of wools; he has packed it in his own sheeting; everything is complete but the payment of the price. It was argued that because by the course of dealing he was not to remove the wool to a dis-

for freight, the lien for the repairs of domestic ships, and the lien on goods for a balance of accounts, are all extinguished by a voluntary surrender of the thing to which they are attached.[1] Liens at law generally arise either by the express agreement of the parties, or by the usage of trade which amounts to an implied agreement, or by mere operation of law.[2]

§ 1619. **Enforcement of Liens by Courts of Equity.** — In enforcing liens at law Courts of Equity are in general governed by the same rules of decision as Courts of Law, with reference to the nature, operation, and extent of such liens.[3] But in some special cases Courts of Equity will give aid to the enforcement and satisfaction of liens in a manner utterly unknown at law. Thus for example at law a creditor is only entitled to have a moiety of the lands of the judgment debtor extended upon an elegit, and must wait until he can be reimbursed for the amount of his judgment out of the rents and profits. But where the payment of the judgment cannot be attained at all by a mere application of the rents and profits (as if the interest upon the judgment exceeds the annual rents and profits), or where the payment cannot be obtained out of the rents and profits within a reasonable time, Courts of Equity will accelerate the payment by decreeing a sale of the moiety of the lands; for it would be gross injustice to the judgment creditor to compel him to wait for satisfaction of his debt out of the assets of his debtor for an unreasonable length of time, when he had a

tance before payment of the price, the property had not passed to him, or that the plaintiff retained such a lien on it as was inconsistent with the notion of an actual delivery. We think that upon this evidence the place to which the wools were removed must be considered as the *defendant's* warehouse, and that he was in actual possession of it there as soon as it was weighed and packed; that it was thenceforward at his risk, and if burnt must have been paid for by him. Consistently with this however the plaintiff had not what is commonly called a lien determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have stated, with the possession having passed to the buyer, so that there may have been a delivery to and actual receipt by him."

[1] Abbott on Shipp. Pt. 2, ch. 3, § 10; Id. Pt. 3, ch. 1, § 7, p. 171; Ex parte Deeze, 1 Atk. 228; Ex parte Shank, 1 Atk. 234; Franklin *v.* Hosier, 4 Barn. & Ald. 341; Ex parte Bland, 2 Rose, Cas. 91.

[2] Post, §§ 1647, 1648.

[3] Gladstone *v.* Birley, 2 Meriv. R. 403; Oxenham *v.* Esdaile, 2 Younge & Jer. 500; Leeds *v.* Marine Insurance Company, 19 U. S. 565, 5 L. Ed. 332.

clear lien on the property for the full amount.[1] For the same reason Courts of Equity will accelerate payment by directing a sale where the real estate, bound by the judgment, is a mere dry reversion; for in such a case there must, or at least there may unavoidably, be a long delay before the party can be paid out of the rents and profits.[2]

§ 1620. **Same.** — Courts of Equity will also enforce the security of a judgment creditor against the equitable interest in the freehold estate of his debtor, treating the judgment as in the nature of a lien upon such equitable interest. But in all cases of this sort the judgment creditor must have pursued the same steps as he would have been obliged to do to perfect his lien if the estate had been legal.[3] Thus for example it is necessary for the judgment creditor to sue out an elegit at law before his lien will be treated as complete. If therefore he seeks relief in equity against the equitable freehold estate of his debtor, it is equally indispensable for him first to sue out an elegit; for until that time he has not made a final election. And not only must the suing out of an elegit be proved, but it must also be averred in the bill, otherwise the latter will be demurrable.[4]

§ 1621. **Same.** — It is upon the same ground that where there is a specialty debt binding the heirs, and the debtor dies, whereby

[1] Stileman *v.* Ashdown, Ambler, R. 13; s. c. 2 Atk. 477, 608; Burton *v.* Smith, 38 U. S. 464, 10 L. Ed. 248; 2 Tidd, Pract. (9th ed.) 935; O'Gorman *v.* Comyn, 2 Sch. & Lefr. 137, 150; Tennant's Heirs *v.* Patton, 6 Leigh, R. 196.

[2] Ibid.; Coutts *v.* Walker, 2 Leigh, R. 268; Burton *v.* Smith, ante; see also Robinson *v.* Tonge, 3 P. Will. 398, 401; Tyndale *v.* Warre, Jacob, R. 212.

[3] Carver *v.* Peck, 131 Mass. 291; Smith *v.* Hurst, 10 Hare, 30; McDermutt *v.* Strong, 4 Johns. Ch. 687; Reubens *v.* Joel, 3 Kern. 488, 490, 492; Wiggin *v.* Heywood, 118 Mass. 514; Whiteford *v.* Hootman, 104 Ill. App. 562; Poole *v.* French, 71 Kans. 391, 80 Pac. 997; but the judgment debtor must have the equitable estate in possession, First Natl. Bank *v.* Tighe, 49 Neb. 299, 68 N. W. 490.

[4] Neate *v.* Duke of Marlborough, 3 Mylne & Craig, 407, 415. On this occasion Lord Cottenham said: "In the first place I find Lord Redesdale not only laying it down that it is necessary that the judgment creditor, suing in this court, should have issued an elegit, but expressly saying that if that is not done it is a ground of demurrer. And there was great force in the argument at the bar, that though his Lordship's attention had been distinctly called to the point, yet when a subsequent edition of his Treatise on Pleading was published, and, as I have always understood, under his superintendence, the same passage was preserved. I also find Lord Lyndhurst stating it as a general rule, though that was not the point on which the decision of the appeal before him was to turn, that an elegit is necessary. For myself, I never entertained the least doubt of it; and certainly, though I have not had particular occasion to look into the ques-

a lien attaches upon all the lands descended in the hands of his heirs, Courts of Equity will interfere in aid of the creditor, and in proper cases accelerate the payment of the debt. At law the creditor can only take out execution against the whole lands, and

tion, if I had been asked what the rule of the court was, I should at once have answered that when a party comes here as a judgment creditor, for the purpose of having the benefit of his judgment, he must have sued out execution upon the judgment. And in all the authorities referred to, though in some of them the distinction appears to be so far taken that in the case of a fieri facias the creditor must go the whole length of having a return, there is no case, except the solitary one in Dickens, which decides that the suing out of the elegit is not necessary as a preliminary step. With respect to authority therefore there can be no doubt; for there is not only the authority of Lord Redesdale and that of Lord Lyndhurst in the House of Lords, but there is also what is stated at the bar to be the uniform understanding and practice of the profession. The conclusion at which I arrive however as to what on principle ought to be the rule, is derived from a consideration of the nature of the jurisdiction which the court exercises in such cases. That jurisdiction is not for the purpose of giving effect to the lien, which is supposed to be created by the judgment. It is true that for certain purposes the court recognizes a title by the judgment; as for the purpose of redeeming, or, after the death of the debtor, of having his assets administered. But the jurisdiction there is grounded simply upon this, that inasmuch as the court finds the creditor in a condition to acquire a power over the estate by suing out the writ, it does what it does in all similar cases; it gives to the party the right to come in and redeem other incumbrancers upon the property. So again after the debtor is dead, if, under any circumstances, the estate is to be sold, the court pays off the judgment creditor, because it cannot otherwise make a title to the estate; and the court never sells the interest of a debtor subject to an elegit creditor. That was very much discussed in the case of Tunstall *v.* Trappes. But there was there a necessity for a sale; and the question was not as to the right of the judgment creditor against his debtor, he being willing, but where, from other circumstances, a sale having become indispensable, it was necessary to clear the estate from the claims of parties who had charges upon it. It is therefore not correct to say that, according to the usual acceptation of the term, the creditor obtains a lien by virtue of his judgment. If he had an equitable lien, he would have a right to come here to have the estate sold; but he has no such right. What gives a judgment creditor a right against the estate is only the act of Parliament; for, independently of that, he has none. The act of Parliament gives him, if he pleases, an option by the writ of elegit, — the very name implying that it is an option, — which, if he exercises, he is entitled to have a writ directed to the sheriff, to put him in possession of a moiety of the lands. The effect of the proceeding under the writ is, to give to the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this court, not to obtain a greater benefit than the law, that is, the act of Parliament, has given him, but to have the same benefit, by the process of this court, which he would have had at law if no legal impediment had intervened. How then can there be a better right; or how can the judgment, which, per se, gives the creditor no title against the land, be considered as giving him a title here? Suppose he never sues out the writ, and never therefore exercises his option, is this court to

hold them as he would under an elegit until the debt is fully paid.[1] But in equity the creditor will also be entitled to an account of the rents and profits received by the heir since the descent cast. And Courts of Equity will go further, and decree a sale of the inheritance in order to accelerate the payment of the debt, if it cannot otherwise be satisfied within a reasonable period.[2] The same doctrine is applied to reversions after an estate for life, and even after an estate tail; for they will be decreed to be sold to satisfy a bond debt of the ancestor which binds the heir, in order to accelerate the payment of the debt.[3] And indeed Courts of Equity have in the case of advowsons gone further, and have decreed an advowson in gross to be sold to satisfy a bond creditor, holding such an advowson to be assets at law, even if not extendible on an elegit.[4]

§ 1622. **Liens which Arise from Constructive Trusts.** — But there are liens recognized in equity whose existence is not known or obligation enforced at law, and in respect to which Courts of Equity exercise a very large and salutary jurisdiction.[5] In regard to these liens it may be generally stated that they arise from constructive trusts. They are therefore wholly independent of

give him the benefit of a lien to which he has never chosen to assert his right? The reasoning would seem very strong that, as this court is lending its aid to the legal right (and Lord Redesdale expressly puts it under that head, namely, the right to recover in ejectment), the party must have previously armed himself with that which constitutes his legal right; and that which constitutes the legal right is the writ. This court in fact is doing neither more nor less than giving him what the act of Parliament and an ejectment would, under other circumstances, have given him at law."

[1] Bac. Abridg. Heir & Ancestor, H. 1; 2 Tidd. Pract. (9th ed.) pp. 936 to 938.

[2] Curtis *v.* Curtis, 2 Bro. Ch. R. 633, 634; Tyndale *v.* Warre, Jacob, R. 212.

[3] Tyndale *v.* Warre, Jacob, R. 212.

[4] Robinson *v.* Tonge, 3 P. Will. 308, 401; Kinaston *v.* Clark, 2 Atk. 204, 206. There have been doubts whether an advowson in gross was assets at law; but the weight of authority certainly is, that it is. See Lord Hardwicke's opinion in Westfaling *v.* Westfaling, 3 Atk. 464, 465; Co. Litt. 374 *b*, Com. Dig. Assets, 2 G. 1; Robinson *v.* Tonge, 3 P. Will. 401; s. c. 3 Bro. Parl. Cas. 556. Sir Thomas Plumer however, in Tyndale *v.* Warre (Jacob, R. 221), held that an advowson in gross was not assets at law; but still, if not, it was assets in equity. His words were: "It would seem therefore that the circumstance of its not being applicable to the payment of debts by a court of law does not decide what is to be done here; as in the case of an advowson, which yields no present profit, and is not assets at law, and yet is decreed to be sold in equity."

[5] Gladstone *v.* Birley, 2 Meriv. R. 403. See Leeds *v.* Mercantile Ins. Co., 19 U. S. 565, 5 L. Ed. 332.

the possession of the thing to which they are attached as a charge or incumbrance, and they can be enforced only in Courts of Equity.[1] The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached.[2] Of this we have a strong illustration in the well-known doctrine of Courts of Equity, that the vendor of land has a lien on the land for the amount of the purchase-money,[3] not only against the vendee himself, and his heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase money remains unpaid.[4] To the extent of the lien the vendee becomes a

[1] See ante, §§ 1408, 1424 to 1435.

[2] Neate *v.* Duke of Marlborough, 3 Mylne & Craig, 407, 415; ante, § 1621, note 1. Blight *v.* Bank, 6 B. Mon. 192, 17 Am. Dec. 136.

[3] In New England such lien can exist only by virtue of written agreement. Ahrend *v.* Odiorne, 118 Mass. 261; Arlin *v.* Brown, 44 N. H. 102; Perry *v.* Grant, 10 R. I. 334; Atwood *v.* Vincent, 17 Conn. 575. The lien, it is commonly held, is not an equitable estate in the land; it has no existence, it is said, until established by decree of court, and then is subject to other equities. Hightower *v.* Rigsby, 56 Ala. 126; Gilman *v.* Brown, 1 Mason, 191; Wooten *v.* Bellinger, 17 Fla. 289. In this view the lien is only a trust; and this appears to be the view of the author. Some courts however consider it as in the nature of an equitable mortgage, qualifying the purchaser's ownership; while still other courts deny that it is either. Wooten *v.* Bellinger, supra.

Equity cannot make a decree in personam for a deficiency on a bill to enforce a vendor's lien or to foreclose a mortgage. Cobb *v.* Duke, 36 Miss. 60; Canal Bank *v.* Hudson, 111 U. S. 66, 28 L. Ed. 354, 4 S. Ct. Rep. 303.

[4] Ante, § 1078; 4 Kent, Comm. Lect. 58, pp. 151 to 154 (3d ed.); Burgess *v.* Wheate, 1 W. Bl. 150; s. c. 1 Eden, R. 210; Mackreth *v.* Symmons, 15 Ves. 329, 339, 337, 342 to 350; Garson *v.* Green, 1 John. Ch. R. 308; Hughes *v.* Kearney, 1 Sch. & Lefr. 132; Champion *v.* Brown, 6 John. R. 402, 403; Bayley *v.* Greenleaf, 20 U. S. 46, 5 L. Ed. 393; Daniels *v.* Davison, 16 Ves. 249; s. c. 17 Ves. 433; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*e*); 2 Madd. Ch. Pr. 105, 106; McLearn *v.* McLellan, 35 U. S. 625, 9 L. Ed. 559. Sir Thomas Clarke (the Master of the Rolls), in Burgess *v.* Wheate, 1 W. Black. R. 150; s. c. 1 Eden, R. 211, said: "Where a conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So where money was [is] paid prematurely, the money would be considered as a lien on the estate of the vendor for the personal representatives of the purchaser, which would leave things in statu quo. Mr. Sugden seems to have doubted whether this lien exists in favor of the vendee, who has paid the purchase-money. For alluding, as it should seem, to such a case, he says: 'Where a lien is raised for purchase-money under the usual equity in favor of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But in the case under consideration equity must not simply give a security for an existing debt, it must first *raise* a debt against the express agreement of the parties. The purchase-money was a debt due to the vendor, which, upon principle, it would be difficult to make him repay. What power has a Court of Equity to rescind a contract like this? The question might perhaps arise if the vendor was seek-

trustee for the vendor; and his heirs and all other persons claiming under them with such notice are treated as in the same predicament.[1]

§ 1623. **The Doctrine of the Vendor's Lien Stated.** — This lien of the vendor of real estate for the purchase-money is wholly independent of any possession on his part; and it attaches to the estate as a trust equally, whether it be actually conveyed or only be contracted to be conveyed.[2] It has often been objected that the creation of such a trust by Courts of Equity is in contravention of the policy of the Statute of Frauds.[3] But whatever may be the original force of such an objection, the doctrine is now too firmly

ing relief in equity; but in this case he must be a defendant. If it should be admitted that the money cannot be recovered, then of course he must retain the estate also until some person appears who is by law entitled to require a conveyance of it.' Sugden on Vendors, ch. 5, p. 258 (7th ed.); Id. Vol. 1, p. 284 (9th ed.). Lord Eldon cited the same position of Sir Thomas Clarke, in his very words, without objection or observation, in Mackreth *v.* Symmons, 15 Ves. 345. And afterwards, in the same case (p. 353), he used language importing an approval of it. 'This,' said he, 'comes very near the doctrine of Sir Thomas Clarke, which is very sensible, that where the conveyance or the payment has been made by surprise (meaning, it is supposed, "prematurely," in the sense of Sir T. Clarke), there shall be a lien.' The ground asserted by Mr. Sugden for his doubt does not seem sufficient to sustain it. He assumes that there is no debt between the parties, which is the very matter in controversy; for in the view of a Court of Equity the payment of the purchase-money may well be deemed a loan upon the security of the land until it has been conveyed to the vendee. At least there is quite as much reason to presume it as there is to presume the land, when conveyed, to be still a security for the purchase-money due to the vendor. In the latter case, though there is a debt due by the vendee, it does not follow that it is a debt due by the land. In the former, if the estate cannot be conveyed and is not conveyed, the money is really a debt due to the vendee. At all events in equity it is not very clear what principle is impugned by deeming the money a lien upon the ground of presumed intention. See also Oxenham *v.* Esdaile, 3 Y. & Jerv. 264; Ludlow *v.* Grayall, 11 Price, R. 58. In Finch *v.* Earl of Winchelsea, 1 P. Will. 278, 282, Lord Chancellor Cowper said: 'Articles made for a valuable consideration and the money paid, will, in equity, bind the estate and prevail against any judgment creditor mesne between the articles and the conveyance.'"

[1] 4 Kent, Comm. Lect. 58, p. 152 (3d ed.); McLearn *v.* McLellan, 35 U. S. 625, 9 L. Ed. 559. The lien may, it seems, be enforced against a married woman who purchases land. Carpenter *v.* Mitchell, 54 Ill. 126; Gordon *v.* Manning, 44 Miss. 756. Though the husband gives his notes for the purchase-money. Davis *v.* Pearson, 44 Miss. 508.

[2] Sugden on Vendors, ch. 12, p. 541 (7th ed.); Smith *v.* Hubbard, 2 Dick. R. 730; McLearn *v.* McLellan, 35 U. S. 625, 9 L. Ed. 559; Dodsley *v.* Varley, 12 Adolph & Ellis, 632, 633; ante, § 1618; Rewis *v.* Williamson, 51 Fla. 529, 41 So. 449; Bryson *v.* Collmer, 33 Ind. App. 494, 71 N. E. 229; Balow *v.* Teutonia Fire Ins. Co., 77 Mich. 540, 43 N. W. 924; Eubank *v.* Finnell, 118 Mo. App. 535, 94 S. W. 591.

[3] Stat. 29 Charles II. 3.

established to be shaken by any mere theoretical doubts.[1] Courts of Equity have proceeded upon the ground that the trust, being raised by implication, is not within the purview of that statute, but is excepted from it. It is not perhaps so strong a case as that of a mortgage implied by a deposit of the title-deeds of real estate, which seems directly against the policy of the statute, but which nevertheless has been unhesitatingly sustained.[2]

§ 1624. [**The Doctrine of the Vendor's Lien Is Not of Universal Application.** — The doctrine of the vendor's lien is not of universal application in all of the States, and reference must be had to the statutes and decisions of the State about which inquiry is being made. The registration statutes, in some of the States, have displaced this doctrine, and it is held that although the purchase money in full has not been paid, unless a mortgage or other security has been taken for the balance due, and unless the instrument evidencing the deferred payment has been duly registered, even actual notice that there was a balance of the unpaid purchase money due, this would not be sufficient notice to bind a subsequent purchaser. Strictly speaking, there is no such a lien, as an incumbrance upon property, but it is only a right in equity to be declared the owner of an indebtedness in a given amount, it being the balance of the purchase price, and that supposed right may be finally reduced to judgment, when it becomes, in law, an actual and potential lien, and as such is notice to subsequent purchasers or incumbrancers.[3] An equitable lien is neither a jus in re nor a jus ad rem, but simply a right to possess and retain property until some charge attaching thereto has been paid or discharged.[4]]

§ 1625. **Same.** — The principle upon which Courts of Equity have proceeded in establishing this lien in the nature of a trust is, that a person who has gotten the estate of another ought not in conscience as between them to be allowed to keep it and not to pay the full consideration money. A third person having full knowledge that the estate has been so obtained ought not to be permitted to keep it without making such payment, for it attaches to him also as a matter of conscience and duty. It would otherwise happen that the vendee might put another

[1] Coote on Mortg. 227; Mackreth *v.* Symmons, 15 Ves. 339.

[2] Ante, § 1020; post, § 1635.

[3] Sessner *v.* Palmatier, 89 Cal. 89, 24 Pac. 789, 13 L. R. A. 187; Fitzell *v.* Leahy, 72 Cal. 477, 14 Pac. 198; Redwood Lbr. Co. *v.* Durphy, 8 Cal. App. 664, 97 Pac. 702; Bray *v.* Booker, 6 N. Dak. 526, 72 N. W. 933.

[4] Webb *v.* Lyon, 40 N. C. 67.

person into a predicament better than his own, with full notice of all the facts.[1]

§ 1626. **Origin of the Doctrine.** — It has been sometimes suggested that the origin of this lien of the vendor might be attributed to the tacit consent or implied agreement of the parties. But although in some cases it may be perfectly reasonable to presume such a consent or agreement, the lien is not, strictly speaking, attributable to it, but stands independently of any such supposed agreement.[2] On other occasions the lien has been treated as a natural equity having its foundation in the earliest principles of Courts of Equity.[3] Thus it has been broadly contended that according to the law of all nations the absolute dominion over property sold is not acquired by the purchaser until he has paid the price or has otherwise satisfied it, unless the vendor has agreed to trust to the personal credit of the buyer.[4] For a thing may well be deemed to be unconscientiously obtained, when the consideration is not paid.[5] Upon this ground the Roman law declared the lien to be founded in natural justice. "Tamen recte dicitur, et jure gentium, id est, jure naturali, id effici."[6] And therefore when Courts of Equity established the lien as a matter of doctrine, it had the effect of a contract, and the lien was held to prevail although perhaps no actual contract had taken place.[7]

§ 1627. **Same.** — The true origin of the doctrine may with high probability be ascribed to the Roman law, from which it was imported into the Equity Jurisprudence of England.[8] By the Roman

[1] Mackreth *v.* Symmons, 15 Ves. R. 340.

[2] Nairn *v.* Prowse, 6 Ves. 752; Chapman *v.* Tanner, 1 Vern. 267; Simpson *v.* McAllister, 56 Ala. 228; Roper *v.* Day, 48 Ala. 509; Nichols *v.* Glover, 41 Ind. 24; Cordova *v.* Hood, 84 U. S. 1, 21 L. Ed. 587.

[3] Chapman *v.* Tanner, 1 Vern. R. 267, 268; Blackburne *v.* Gregson, 1 Bro. Ch. R. 424; 1 Fonbl. Eq. B. 1, ch. 5, § 8.

[4] By Mr. Scott and Mr. Mitford, in argument, in Blackburne *v.* Gregson, 1 Cox, R. 94.

[5] Hughes *v.* Kearney, 1 Sch. & Lefr. 135. It was formerly doubted, in consequence of an expression which fell from Lord Hardwicke, in Pollexfen *v.* Moore, 3 Atk. R. 273, whether this lien of the vendor could exist in favor of a third person; as for example if the vendor, having such a lien, should exhaust the personal estate of the deceased purchaser, whether legatees should have a right to stand in his place against the real estate in the hands of the heir, as upon the marshalling of the assets. That doubt is now removed, and the affirmative established in Selby *v.* Selby, 4 Russell, R. 336. See also Lord Eldon's remarks in Mackreth *v.* Symmons, 15 Ves. 338, 344; and Sir Wm. Grant's decision in Trimmer *v.* Bayne, 9 Ves. 209; and Sugden on Vendors, ch. 12, pp. 549 to 556 (7th ed.); Id. Vol. 2, pp. 73 to 76 (9th ed.).

[6] Inst. Lib. 2, tit. 1, § 41. [7] Mackreth *v.* Symmons, 15 Ves. 337.

[8] Mackreth *v.* Symmons, 15 Ves. 344.

law the vendor of property sold had a privilege or right of priority of payment in the nature of a lien on the property for the price for which it was sold, not only against the vendee and his representatives, but against his creditors and also against subsequent purchasers from him. For it was a rule of that law, that although the sale passed the title and dominion in the thing sold, yet it also implied a condition that the vendee should not be master of the thing so sold, unless he had paid the price or had otherwise satisfied the vendor in respect thereof, or a personal credit had been given to him without satisfaction. "Quod vendidi," said the Digest, "non aliter fit accipientis quam si aut pretium nobis solutum sit aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfactione." [1] "Ut res emptoris fiat, nihil interest utrum solutum sit pretium, an eo nomine fidejussor datus sit." [2] The doctrine was still more explicitly laid down in the Institutes. "Venditiæ vero res, et traditæ, non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit; veluti expromissore aut pignore dato. Sed si is qui vendidit fidem emptoris sequutus fuerit, dicendum est statim rem emptoris fieri.[3] The rule was equally applied to the sale of movable and of immovable property, and equally applied whether there had been a delivery of possession to the vendee or not. If there was no such delivery of possession, then the vendor might retain the property as a pledge until the price was paid. If there was such a delivery of possession, then the vendor might follow the property into the hands of any person to whom it had been subsequently passed, and reclaim it or the price.[4] "Venditor enim, quasi pignus, retinere potest eam rem quam vendidit." [5] And a part payment of the price did not exonerate the property from the privilege or lien for the residue. "Hæreditatis venditæ pretium pro parte accepti," said the Digest, quoting Scævola, "reliquum emptore non solvente, quæsitum est, an corpora hære-

[1] Dig. Lib. 18, tit. 1, l. 19; Pothier, Pand. Lib. 41, tit. 1, n. 60.

[2] Ibid., l. 53; Pothier, Pand. Lib. 41, tit. 1, n. 60.

[3] Inst. Lib. 2, tit. 1, § 41.

[4] 1 Domat, B. 3, tit. 1, § 5, art. 4; Inst. Lib. 2, tit. 1, § 41. The same rule exists in the French law in regard to immovables. But in regard to movables, when delivered to the vendee, there is no sequel (as it is phrased in the French law) by way of privilege or lien against the property, except while it remains in the hands of the purchaser. If he has sold it, the right of privilege or lien for the price is gone. 1 Domat, B. 3, tit. 1, § 5, art. 4, and note.

[5] Id. Dig. Lib. 19, tit. 1, l. 13, § 8; Pothier, Pand. Lib. 41, tit. 1, n. 60, 61; Id. Lib. 19, tit. 1, n. 5.

ditaria pignoris nomine teneantur? Respondi; nihil proponi cur non teneantur." [1]

§ 1628. **Same.** — This close analogy, if not this absolute identity of the English doctrine of the lien of the vendor with that of the Roman Law of privilege on the same subject, seems to demonstrate a common origin; although in England the lien is ordinarily confined to cases of the sale of immovables, and it does not extend to movables where there has been a transfer of possession.[2] There are however some exceptions from the doctrine in each law, founded upon the same general principle, but admitting of some diversity in respect to its practical application.

§ 1629. **Same.** — We have seen that the lien by the Roman law ceased (1) where the price was actually paid; (2) where anything was taken in satisfaction of the price, although payment had not been positively made; (3) where a personal credit was given to the vendee excluding any notion of a lien. "Aut pretium nobis solutum sit," said the Digest; "aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfactione." [3] Pothier has deduced the conclusion that in the civil law the question whether a personal credit was given to the vendee or not was to be judged of by all the circumstances of the case. Whenever it was doubtful whether such credit was given or not, there it was

[1] 1 Domat, B. 3, tit. 1, § 5, art. 4; Dig. Lib. 18, tit. 4, l. 22; Pothier, Pand. Lib. 19, tit. 1, n. 5.

[2] See Blackburne *v.* Gregson, 1 Cox, R. 100; arguendo, Mackreth *v.* Symmons, 15 Ves. 344. See Haggerty *v.* Palmer, 6 John. Ch. R. 437; Cowell *v.* Simpson, 16 Ves. 278, 280, 281. See Ex parte Western Ass. Soc., L. R. 11 Eq. 164; Foxworth *v.* Bullock, 44 Mis. 457. If a note is given for the price of land and personalty, the payee can enforce a lien pro tanto for the price of the land. Swain *v.* Cato, 34 Tex. 395.

[3] Dig. Lib. 18, tit. 1, l. 19; Inst. Lib. 2, tit. 1, § 41. Vinnius distinguishes between a payment and a satisfaction. "Satisfaciendi verbum generalius est quam solvendi. Qui solvit, utique et satisfacit; at non omnis satisfactio solutio est. Satisfacit, et qui non liberatur; veluti, si quis fidejussorem vel pignora det; solutione vero obligatio tollitur." Vinnius also says that a personal credit given to the vendor without satisfaction is a waiver of the lien. For, commenting on the words of the Institute, "Sed si is qui vendidit, fidem emptoris sequutus fuerit," he says: "Id est, fidem emptori de pretio habuerit sine ulla satisfactione." What will amount to such personal credit, he adds, depends on circumstances; but an agreement for postponement of payment to a future day would be such a personal credit, and would discharge the lien. "Quod ex circumstantiis æstimandum; veluti si dies solutioni dicta sit." And for this he cites the Code. Cod. Lib. 4, tit. 54, l. 3. He then proceeds: "Aut si, cum emptor pecuniam ad manum non haberet, venditor dixerit; I, licet; nunc non requiro; postea dabis." Vinn. ad Inst. Lib. 2, tit. 1, § 41, Comm. (2).

not to be presumed unless made certain by the vendee.[1] In every other case either a payment or a satisfaction of the price was necessary to discharge the property. The giving of a pledge or security for the price was deemed equivalent to payment. "Qualibet ratione, si venditori de pretio satisfactum est, veluti expromissore aut pignore dato, proinde sit ac si pretium solutum esset."[2]

§ 1630. **Same.** — Now the same principle is applied in English Jurisprudence. Generally speaking, the lien of the vendor exists; and the burden of proof is on the purchaser to establish that in the particular case it has been intentionally displaced or waived by the consent of the parties.[3] If under all the circumstances it remains in doubt, then the lien attaches. The difficulty lies in determining what circumstances are to be deemed sufficient to repel or displace the lien, or to amount to a waiver of it. And upon the authorities this is left in such a state of embarrassment that a learned judge has not hesitated to say that it would have been better at once to have held that the lien should exist in no case, and that the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know without the judgment of a court in what cases it would and in what it would not exist.[4] At present that certainty cannot be generally affirmed.

§ 1631. **Some Applications of the Doctrine.** — In the first place it seems that if upon the face of the conveyance the consideration is expressed to be paid, and even if a receipt therefor is indorsed upon the back of it, and yet in point of fact the purchase-money has not been paid, the lien is not gone, but it attaches against the vendee and all persons claiming as volunteers or with notice under him.[5]

[1] Pothier, Pand. Lib. 41, tit. 1, note 60. In this position Vinnius agrees with Pothier, contrary to what is held by some other jurists. "In dubio qui rem emptori tradit, non videtur sequi fidem emptoris, nisi emptor contrarium doceat." Vinn. ad Inst. Lib. 2, tit. 1, § 41, Comm. (3).

[2] Dig. Lib. 18, tit 1, l. 53; Pothier, Pand. Lib. 41, tit. 1, n. 60; Inst. Lib. 2, tit. 1, § 41.

[3] Mackreth *v.* Symmons, 15 Ves. 342, 344, 348, 349; Hughes *v.* Kearney, 1 Sch. & Lefr. 135, 136; Nairn *v.* Prowse, 6 Ves. 752; Garson *v.* Green, 1 John. Ch. R. 308, 309; Sugden on Vendors, ch. 12, pp. 541 to 560 (7th ed.); Id. Vol. 2, ch. 12, pp. 57 to 76 (9th ed.). Moore *v.* Worthy, 56 Ala. 163; Simpson *v.* McAllister, Ib. 228; Dowling *v.* McCall, 124 Ala. 633, 26 So. 959; Tillar *v.* Clayton, 76 Ark. 405, 88 S. W. 972; Fenter *v.* McKinstry, 91 Ill. App. 255; Henes *v.* Henes, 5 Ind. App. 100, 31 N. E. 832; Dunton *v.* Outhouse, 64 Mich. 419, 31 N. W. 411.

[4] Lord Eldon, in Mackreth in Symmons, 15 Ves. 340.

[5] Hughes *v.* Kearney, 1 Sch. & Lefr. 135, 136; Winter *v.* Anson, 3 Russ. 488; s.c. 1 Sim. & Stu. 434; Saunders *v.* Leslie, 2 B. & Beatt. 514, 515;

§ 1632. **Same.** — In the next place the taking of a security for the payment of the purchase-money is not of itself, as it was in the Roman law, a positive waiver or extinguishment of the lien.[1] It is perhaps to be regretted that it has not been so held; as when a rule so plain is once communicated, if the vendor should not take an adequate security he would lose his lien by his own fault.[2] But the taking of a security has been deemed at most as no more than a presumption, under some circumstances, of an intentional waiver of the lien, and not as conclusive of the waiver.[3] And if a security is taken for the money, the burden of the proof has been

Sugden on Vendors, ch. 12, pp. 541 to 557 (7th ed.); Id. col. 2, ch. 12, pp. 57 to 76 (9th ed.). Lord Redesdale, in Hughes *v.* Kearney, 1 Sch. & Lefr. 135, said, "If a person claiming as a purchaser admitted that the consideration was not paid, this would be taken prima facie as a fraud, and it would lie on him to show that it was not a fraud." Manly *v.* Slason, 21 Vt. 271; Moore *v.* Worthy, 56 Ala. 163; Simpson *v.* McAllister, Ib. 228; Haygood *v.* Marlowe, 51 Ala. 478; Blevins *v.* Blankenship, 9 Ky. L. Rep. 851, 7 S. W. 175.

[1] Mackreth *v.* Symmons, 15 Ves. 342, 344, 347 to 349; Nairn *v.* Prowse, 6 Ves. 759, 760; Garson *v.* Green, 1 John. Ch. R. 308; 4 Kent, Comm. Lect. 58, pp. 152, 153 (3d edit.). This subject was very fully examined by Lord Eldon in his elaborate judgment in Mackreth *v.* Symmons, 15 Ves. 330, 336, 342. In one part of that judgment he used the following language: "If I had found it laid down in distinct and inflexible terms that where the vendor of an estate takes a security for the consideration, he has no lien that would be satisfactory; as when a rule so plain is once communicated, the vendor, not taking an adequate security, loses the lien by his own fault. If on the other hand a rule has prevailed, as it seems to me, that it is to depend not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence (as it is sometimes called), or to declaration plain, or manifest intention (the expressions used upon other occasions), of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual, it is obvious that a vendor taking a security, unless by evidence, manifest intention, or declaration plain he shows his purpose, cannot know the situation in which he stands, without the judgment of a court how far that security does contain the evidence, manifest intention, or declaration plain upon that point. That observation is justified by a review of the authorities, from which it is clear that different judges would have determined the case differently. And if some of the cases that have been determined had come before me, I should not have been satisfied that the conclusion was right." It is greatly to be regretted that the English Jurisprudence, instead of dealing in nice distinctions, had not followed out the plain and convenient rule of the civil law, that the taking of any security or giving any credit was an extinguishment of the lien.

[2] Ibid.

[3] Ibid; Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756; Eudora Min. & Dev. Co. *v.* Barclay, 122 Ala. 506, 26 So. 113; Kent *v.* Williams, 114 Cal. 537, 46 Pac. 462; Franklin *v.* Walker, 171 Ill. 405, 49 N. E. 566; Skinner *v.* Purnell, 52 Mo. 96; Jones *v.* Rush, 156 Mo. 364, 57 S. W. 118; McClellan *v.* Coffin, 93 Ind. 456; Lawson *v.* Cundiff, 81 Mo. App. 169; Shelley *v.* Estes, 83 Mo. App. 310; Spence *v.* Palmer, 115 Mo. App. 76, 90 S. W. 749.

adjudged to lie on the vendee to show that the vendor agreed to rest on that security and to discharge the land.[1] Nay even the taking of a distinct and independent security, as for instance of a mortgage on another estate, or of a pledge of other property, has been deemed not to be conclusive evidence that the lien is waived.[2]

[1] Hughes *v.* Kearney, 1 Sch. & Lefr. 135, 136; Saunders *v.* Leslie, 2 B. & Beatt. R. 514, 515.

[2] Ibid.; Saunders *v.* Leslie, 1 Ball & Beatt. R. 514, 515. In Nairn *v.* Prowse, 6 Ves. 752, where the question was, whether the taking of a special security, by way of pledge, was a waiver of the lien, Sir William Grant (Master of the Rolls) held that it was. Upon that occasion he said, "Upon the question as to the claim set up by Mitchell to a lien, it is now settled that equity gives the vendor a lien for the price of the estate sold, without any special agreement. But supposing he does not trust to that, but carves out a security for himself, it still remains matter of doubt, and has not received any positive decision, whether that does or does not amount to a waiver of the equitable lien, so as to preclude the vendor from resorting back to that lien, the security proving insufficient. Without entering into that question, whether every security necessarily amounts to a waiver, it is impossible to contend that there may not be a security that will have that effect, that will be a waiver. By conveying the estate without obtaining payment a degree of credit is necessarily given to the vendee. That credit may be given upon the confidence of the existence of such a lien. The knowledge of that may be the motive for permitting the estate to pass without payment. Then it may be argued that taking a note or a bond cannot materially vary the case. A credit is still given to him, and may be given from the same motive; not to supersede the lien, but for the purpose of ascertaining the debt and countervailing the receipt indorsed upon the conveyance. But if the conveyance be totally distinct and independent, will it not then become a case of substitution for the lien, instead of a credit given because of the lien? Suppose a mortgage was made upon another estate of the vendee, will equity at the same time give him what is in effect a mortgage upon the estate he sold; the obvious intention of burdening one estate being that the other shall remain free and unincumbered? Though in that case the vendor would be a creditor if the mortgage proved deficient, yet he would not be a creditor by lien upon the estate he had conveyed away. The same rule must hold with regard to any other pledge for the purchase-money. In this case the vendor trusts to no personal security of the vendee, but gets possession of a long annuity of £100 a year; which, according to the rise or fall of stock, might or might not be sufficient for the purchase-money. He has therefore an absolute security in his hands, not the personal security of the vendee. Could the vendee have any motive for parting with his stock but to have the absolute dominion over the land? It is impossible it could be intended that he should have this double security, — an equitable mortgage and a pledge; which latter, if the stock should rise a little, would be amply sufficient to answer the purchase-money." Lord Eldon, in Mackreth *v.* Symmons, 15 Ves. 348, in commenting on this case, said: "The Master of the Rolls, in his judgment, admitting the general doctrine as to the vendor's lien, observes upon the question whether a security taken will be a waiver, that by conveying the estate without payment a degree of credit is given to the vendee which may be given upon the confidence of the existence of such lien. And it may be argued that taking a note or a bond cannot materially vary the case; a

The taking of bills of exchange drawn on and accepted by a third person, or by the purchaser and a third person, has also been deemed not to be a waiver of the lien, but to be merely a mode of payment.[1] And it has been laid down as clear doctrine that in

credit is still given to him, and may be given from the same motive, not to supersede the lien, but for the purpose of ascertaining the debt and countervailing the receipt indorsed upon the conveyance. There is great difficulty to conceive how it should have been reasoned almost in any case that the circumstance of taking a security was evidence that the lien was given up, as in most cases there is a contract under seal for payment of the money. The Master of the Rolls having before observed that there may be a security which will have the effect of a waiver, proceeds to express his opinion that, if the security be totally distinct and independent, it will then become a case of substitution for the lien instead of a credit given on account of the lien; meaning that not a security but the nature of the security may amount to satisfactory evidence that a lien was not intended to be reserved. And [he] puts the case of the mortgage of another estate, or any other pledge, as evidence of an intention that the estate sold shall remain free and unincumbered. It must not however be understood that a mortgage taken is to be considered as a conclusive ground for the inference that a lien was not intended; as I could put many instances that a mortgage of another estate for the purchase-money would not be decisive evidence of an intention to give up the lien, although in the ordinary case a man has always greater security for his money upon a mortgage than value for his money upon a purchase. And the question must be, whether, under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock does it necessarily follow that the vendor, consulting the convenience of the purchaser by permitting him to have the chance of the benefit, therefore gives up the lien which he has? Under all the circumstances of that case the judgment of the Master of the Rolls was satisfied that the conclusion did follow. But the doctrine as to taking a mortgage or a pledge would be carried too far, if it is understood as applicable to all cases that a man taking one pledge therefore necessary gives up another; which must, I think, be laid down upon the circumstances of each case, rather than universally."

[1] Hughes *v.* Kearney, 1 Sch. & Lefr. 135, 136; Gibbons *v.* Baddall, 2 Eq. Abr. 682, note; Grant *v.* Mills, 2 Ves. & B. 306; Cooper *v.* Spottiswoode, Tamlyn, R. 21; Ex parte Peake, 1 Madd. R. 349; Ex parte Loring, 2 Rose, R. 79; Saunders *v.* Leslie, 2 B. & Beatt. 514; Sugden on Vendors, ch. 12, pp. 544 to 549 (7th ed.); Id. Vol. 2, ch. 12, pp. 57 to 67 (9th ed.). But see as to additional security Way *v.* Patty, 1 Ind. 102; Sears *v.* Smith, 2 Mich. 243; Vail *v.* Foster, 4 Comst. 312; Follett *v.* Reese, 20 Ohio, 546; Boynton *v.* Champlin, 42 Ill. 57; McClure *v.* Harris, 12 B. Mon. 261; Johnson *v.* Sugg, 13 Smedes & M. 346. It is clear that to take the note of the buyer is not a waiver of the lien, and it is difficult to understand how the taking other security can be treated as indicating an intention to forego the right. Burrus *v.* Roulhac, 2 Bush, 39. But if the taking of collateral security of a third person be considered presumptive evidence of a waiver (Way *v.* Patty and other cases supra), the presumption may readily be overturned either by evidence of express agreement or of facts indicative of intention at the time to retain the lien. Fonda *v.* Jones, 42 Miss. 792; Manly *v.* Slason, 21 Vt. 271; Sanders *v.* McAffee, 41 Ga. 684; Hallock *v.* Smith, 3 Barb. 367; Ex parte Western Ass. Soc., L. R. 11 Eq. 164; Dureth *v.*

Briggs, 47 Mo. 356. And where the lien is expressly retained in the deed, the evidence of subsequent waiver must, it seems, be such as would show satisfaction of a mortgage debt. Hines *v.* Perkins, 2 Heisk. 395; Mitchell *v.* Butt, 45 Ga. 162.

It has been held that the taking in part payment a note secured by a lien upon another tract does not waive the lien in question. Denny *v.* Steakly, 2 Heisk. 156; Shinn *v.* Fredericks, 56 Ill. 439. While to take in payment a deed of another tract is held a waiver, though the title to that tract fail. Willard *v.* Reas, 26 Wis. 540. See however Duke *v.* Balmé, 16 Minn. 306; McDole *v.* Purdy, 23 Iowa, 277. Taking back a mortgage was in Young *v.* Wood, 11 B. Mon. 123, and in Pease *v.* Kelly, 3 Oreg. 417, considered a waiver. Contra Wasson *v.* Davis, 34 Tex. 159. See Armstrong *v.* Ross, 5 C. E. Green, 109. Indeed it seems clear in principle that it is not the mere taking of a security which destroys the lien; there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and destructive of it. Angus *v.* McLachlan, 23 Ch. D. 330, commenting on Cowell *v.* Simpson, 16 Ves. 275. See also Manly *v.* Slason, 21 Vt. 271; Bach *v.* Symes, T. & R. 87, 92; Hewison *v.* Guthrie, 2 Bing. N. C. 755, 759. Further see Wood *v.* Sullens, 44 Ala. 686; Gordan *v.* Manning, 44 Miss. 756; Effinger *v.* Ralston, 21 Gratt. 430; McLaurie *v.* Thomas, 39 Ill. 291; Hecht *v.* Spears, 27 Ark. 229; Jones *v.* Doss, Ib. 517; Wilkes *v.* Smith, 4 Heisk. 86; Young *v.* Atkins, Ib. 529; Thorpe *v.* Dunlap, Ib. 674; Harville *v.* Lowe, 47 Ga. 214; Garson *v.* Green, 1 John. Ch. R. 308. The rule however is manifestly founded on a supposed conformity with the intention of the parties upon which the law raises an implied contract; and therefore it is not inflexible, but ceases to act where the circumstances of the case do not justify such a conclusion. What circumstances shall have such an effect seem indeed to be a matter of a good deal of delicacy and difficulty. And the difficulty is by no means lessened by the subtle doubts and distinctions of recent authorities. It seems indeed to be established that prima facie the purchase-money is a lien on the land; and it lies on the purchaser to show that the vendor agreed to waive it (Hughes *v.* Kearney, 1 Sch. & Lefr. 132; Mackreth *v.* Symmons, 15 Ves. 329; Garson *v.* Green, 1 John. Ch. Rep. 308); and a receipt for the purchase-money, indorsed upon the conveyance, is not sufficient to repel this presumption of law. But how far the taking a distinct security for the purchase-money shall be held to be a waiver of the implied lien has been a vexed question. There is a pretty strong if not decisive current of authority to lead us to the conclusion that merely taking the bond, note, or covenant of the vendee himself for the purchase-money will not repel the lien; for it may be taken to countervail the receipt of the payment usually indorsed on the conveyance. Hughes *v.* Kearney, 1 Sch. & Lefr. 132; Nairn *v.* Prowse, 6 Ves. 752; Mackreth *v.* Symmons, 15 Ves. 329; Blackburne *v.* Gregson, 1 Bro. Ch. Cas. 420; Garson *v.* Green, 1 John. Ch. R. 308; Gibbons *v.* Baddall, 2 Eq. Cas. Abr. 682, note; Coppin *v.* Coppin, 2 P. Will, 291; cases cited in Sugden on Vendors, ch. 12, p. 541 (7th ed.), &c. But where a distinct and independent security is taken, either of other property or of the responsibility of third persons, it certainly admits of a very different consideration. There the rule may properly apply, that "expressum facit cessare tacitum;" and where the party has carved out his own security the law will not create another in aid. This was manifestly the opinion of Sir William Grant in a recent case, where he asks, "If the security be totally distinct and independent, will it not then become a case of substitution for the lien instead of a credit given because of the lien?" And he then puts the case of a mortgage on another estate for the purchase-money, which he holds to be a discharge

of the lien, and asserts that the same rule must hold with regard to any other pledge for the purchase-money. Nairn *v.* Prowse, 6 Ves. 752. And the same doctrine was asserted in a very early case where a mortgage was taken for a part of the purchase-money, and a note for the residue. Bond *v.* Kent, 2 Vern. 281. Lord Eldon, with his characteristic inclination to doubt, has hesitated upon the extent of this doctrine. He seems to consider that whether the taking of a distinct security will have the effect of waiving the implied lien or not depends altogether upon the circumstances of each case, and that no rule can be laid down universally; and that therefore it is impossible for any purchaser to know, without the judgment of a court, in what cases a lien would and in what cases it would not exist. His language is, "If, on the other hand, a rule has prevailed (as it seems to me) that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security as amounting to evidence (as it is sometimes called), or to declaration plain, or manifest intention (the expression used on other occasions) of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual, it is obvious that a purchaser taking a security, unless by evidence, manifest intention, or declaration plain he shows his purpose, cannot know the situation in which he stands, without the judgment of a court how far that security does contain the evidence, manifest intention, or declaration plain upon that point." Mackreth *v.* Symmons, 15 Ves. 329, 342; Austin *v.* Halsey, 6 Ves. Jr. 475. If indeed this be the state of the law upon this subject, it is reduced to a most distressing uncertainty. But on a careful examination of all the authorities I do not find a single case in which it has been held, if the vendor takes a personal collateral security binding others as well as the vendee, as for instance a bond or note with a surety or an indorser, or a collateral security by way of pledge or mortgage, that under such circumstances a lien exists on the land itself. The only case that looks that way is Elliot *v.* Edwards, 3 Bos. & Pull. 181, where, as Lord Eldon says, the point was not decided. And it was certainly a case depending upon its own peculiar circumstances, where the surety himself might seem to have stipulated for the lien by requiring a covenant against an assignment of the premises without the joint consent of himself and the vendor. Lord Redesdale too has thrown out an intimation (Hughes *v.* Kearney, 1 Sch. & Lefr. 132) that it must appear that the vendor relied on it as security; and he puts the case: "Suppose bills given as part of the purchase-money, and suppose them drawn on an insolvent house, shall the acceptance of such bills discharge the vendor's lien? They are taken not as a security, but as a mode of payment." In my humble judgment this is begging the whole question. If upon the contract of purchase the money is to be paid in cash, and bills of exchange are afterwards taken in payment which turn out unproductive, there the receipt of the bills may be considered as a mere mode of payment. But if the original contract is that the purchase-money shall be paid at a future day, and acceptances of third persons are to be taken for it, payable at such future day, or a bond with surety payable at such future day, I do not perceive how it is possible to assert that the acceptances or bond are not relied on as security. It is sufficient however that the case was not then before his Lordship, and that he admits that taking a distinct security would be a waiver of the lien. On the other hand there are several cases in which it is laid down that if other security be taken, the implied lien on the land is gone. To this effect certainly the case of Fawell *v.* Heelis (Ambler, R. 724; s. c. 2 Dick. R. 485) is an authority however it may on its own circumstances have been shaken. And the doctrine is explicitly asserted and acted upon in Mairn *v.* Prowse, 6 Ves. Jr. 752. See also Bond *v.* Kent, 2 Vern. 281. In our own country

general where a bill, note, or bond is given for the whole or a part of the purchase-money, the vendor does not lose his lien for so much of the purchase-money as remains unpaid, even though it is

a very venerable judge of equity has recognized the same doctrine. He says: "The doctrine that the vendor of land not taking a security nor making a conveyance retains a lien upon the property is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the vendee or of a purchaser with notice. But if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost." Cole *v.* Scott, 2 Wash. 141. Looking to the principle upon which the original doctrine of lien is established, I have no hesitation to declare that taking the security of a third person for the purchase-money ought to be held a complete waiver of any lien upon the land, and that in a case standing upon such a fact it would be very difficult to bring my mind to a different conclusion. At all events it is prima facie evidence of a waiver; and the onus is on the vendor to prove by the most cogent and irresistible circumstances that it ought not to have that effect. Such was the result of my judgment upon an examination of the authorities, when a very recent case before the Master of the Rolls first came to my knowledge. I have perused it with great attention, and it has not in any degree shaken my opinion. The case there was of acceptances of the vendee and of his partner in trade taken for the payment of the purchase-money. It was admitted that there was no case of a security given by a third person in which the lien had been held to exist. But the Master of the Rolls, without deciding what would be the effect of a security, properly so denominated, of a third person, held in conformity to the opinion of Lord Redesdale that bills of exchange were merely a mode of payment, and not a security. This conclusion he drew from the nature of such bills, considering them as mere orders on the acceptor to pay money of the drawer to the payee; and that the acceptor was to be considered, not as a surety for the debt of another, but as paying the debt out of the debtor's funds in his hands. Grant *v.* Mills, 2 Ves. & Beam. R. 309. With this conclusion of the Master of the Rolls I confess myself not satisfied, and desire to reserve myself for the case when it shall arise in judgment. It is founded on very artificial reasoning, and not always supported in point of fact by the practice of the commercial world. The distinction however on which it proceeds admits by a very strong implication that the security of a third person would repel the lien. If indeed the point were new, there would be much reason to contend that a distinct security of the party himself would extinguish the lien on the land, as it certainly does the lien upon personal chattels. Cowell *v.* Simpson, 16 Ves. Jr. 275. In applying the doctrine to the facts of the present case, I confess that I have no difficulty in pronouncing against the existence of a lien for the unpaid part of the purchase-money. The property was a large mass of unsettled and uncultivated lands, to which the Indian title was not as yet extinguished. It was, in the necessary contemplation of all parties, bought on speculation, to be sold out to sub-purchasers, and ultimately to settlers. The great objects of the speculation would be materially impaired and embarrassed by any latent incumbrance the nature and extent of which it might not always be easy to ascertain, and which might by a subdivision of the property be apportioned upon an almost infinite number of purchasers. It is not supposable that so obvious a consideration should not have been within view of the parties; and, viewing it, it is very difficult to suppose that they could mean

secured to be paid at a future day, or not until after the death of the purchaser.[1]

§ 1633. **Lien of Vendor Extends to His Personal Representative.** — The lien of the vendor is not confined to himself alone, but in

to create such an incumbrance. A distinct and independent security was taken by negotiable notes payable at a future day. There is no pretence that the notes were a mere mode of payment, for the indorsers were by the theory of the law and in fact conditional sureties for the payment. And in this respect the case is distinguishable from that of receiving bills of exchange, where by the theory of the law the acceptor is not a surety, but merely pays the money of the drawer in pursuance of his order. Hughes *v.* Kearney, 1 Sch. & Lefr. 132; Grant *v.* Mills, 2 Ves. & Beam. R. 309. The securities themselves were, from their negotiable nature, capable of being turned immediately into cash; and in their transfer from hand to hand they could never have been supposed to draw after them in favor of the holder a lien on the land for their payment. But I pass over these and some other peculiar circumstances of this case, and put it upon the broad and general doctrine that here was the security of a third person taken as such, and that extinguished any implied lien for the purchase-money. See also Brown *v.* Gilman, 4 Wheat. R. 290 to 292; Fish *v.* Howland, 1 Paige, R. 20; Stafford *v.* Van Rensselaer, 9 Cowen, R. 316. Mr. Chancellor Kent, in his Commentaries (4 Kent, Comm. Lect. 58, pp. 151 to 153 (3d ed.)), has summed up the general doctrine, as well as the exceptions to it, with great clearness and accuracy. He holds that the better opinion is, that taking a note, bond, or covenant of the vendee himself is not a waiver of the lien, for such instruments are only the ordinary evidence of a debt. But that taking a note, bill, or bond, with a distinct security, or taking a distinct security exclusively by itself, either in the shape of real or personal property from the vendee, or taking the responsibility of a third person, is evidence that the vendor does not repose upon the lien but upon an independent security, and it discharges the lien. This conclusion he deduces from a survey of the American as well as the English authorities. See also 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*e*); Id. B. 1, ch. 5, § 8, note (*l*).

[1] Winter *v.* Lord Anson, 3 Russ. R. 488, 490, overruling the Vice-Chancellor's decision; s. c. 1 Sim. & Stu. 434. See Fawell *v.* Heelis, Ambler, R. 724, and Mr. Blunt's note. How far the taking of an independent and distinct security from a third person would affect the lien has not perhaps been absolutely decided in England. Grant *v.* Mills, 2 Ves. & Beam. 306, 309. Indeed the whole doctrine respecting the effect of taking a security is established in England upon grounds not very satisfactory under any circumstances. See Ex parte Loring, 2 Rose, Cas. 80. In the case of Gilman *v.* Brown, 1 Mason, R. 212, the whole doctrine was reviewed at large, and a different conclusion was arrived at from that stated in the text. The following extract may not be wholly unacceptable as presenting the reasoning opposed to that maintained in some of the late English authorities: "The doctrine that a lien exists on the land for the purchase-money, which lies at the foundation of the decision of the commissioners as well as of the present defence, deserves a very deliberate consideration. It can hardly be doubted that this doctrine was borrowed from the text of the civil law; and although it may now be considered as settled as between the vendor and vendee and all claiming under the latter with notice of the non-payment of the purchase money, yet its complete establishment may be referred to a comparatively recent period. Lord Eldon has given us

case of his death it extends to his personal representatives.[1] It may also be enforced in favor of a third person, notwithstanding the doubts formerly expressed by Lord Hardwicke.[2] As for example it may be enforced by marshalling assets in favor of legatees and creditors, and giving them the benefit by the way of substitution to the vendor when he seeks payment out of the personal assets of the vendee.[3] So if a subsequent incumbrancer or purchaser from the vendee is compelled to discharge the lien of the vendor, he will in like manner be entitled to stand substituted in his place against other claimants under the vendor on the estate, and to have the assets marshalled in his favor.[4]

§ 1634. **Lien of Vendor Exists against Rights of Volunteers.** — We have already had occasion to state that the lien of the vendor

an historical review of all the cases (Mackreth *v.* Symmons, 15 Ves. 329), from which he deduces the following inferences. First, that, generally speaking, there is such a lien. Secondly, that in those general cases in which there would be a lien, as between vendor and vendee, the vendor will have the lien against a third person who had notice that the money was not paid. These two points, he adds, seem to be clearly settled; and the same conclusion has been adopted by a very learned chancellor of our own country.

[1] Ante, §§ 1618 to 1620; Whetstone *v.* Baker, 140 Ind. 213, 39 N. E. 868; Hurst *v.* Hurst, 25 Ky. L. Rep. 714, 76 S. W. 325; Simily *v.* Adams, 88 Mo. App. 621; Williams *v.* Baker, 100 Mo. App. 284, 73 S. W. 339; McWhorter *v.* Stewart, 39 App. Div. 212, 57 N. Y. Supp. 137. The same rule applies to one who holds a contract by assignment. Elmslie *v.* Thurman, 87 Miss. 537, 40 So. 67.

[2] Pollexfen *v.* Moore, 3 Atk. 273.

[3] Ante, § 1626; Selby *v.* Selby, 4 Russ. R. 336; Mackreth *v.* Symmons, 15 Ves. 339, and note (*a*); Id. 345.

[4] Manlove *v.* Bale, 1 Vern. 84. It was decided in Clark *v.* Royle (3 Sim. R. 499) that where A conveyed an estate to B, and in consideration thereof B covenanted with A to pay an annuity to him of £60 for life, and £3,000 to other persons in event of his (B's) marrying, the covenant did not create a lien on the estate in favor of the persons entitled to the £3,000. See also Foster *v.* Blackstone, 1 Mylne & K. 296, 310. But if notes given for the purchase-money are assigned by the vendor, the lien, it is held, will not on this account pass. Thompson *v.* Pyland, 3 Head. 537; Green *v.* Demoss, 10 Humph. 371; Dixon *v.* Dixon, 1 Md. Ch. 220; Lindsey *v.* Bates, 42 Miss. 397; Ross *v.* Heintzen, 36 Cal. 313. But see Johns *v.* Sewell, 33 Ind. 1; Watt *v.* White, 33 Tex. 421.

Indeed it is said that when the vendor transfers the purchaser's note for value without indorsing it, or by an indorsement without recourse, and without an engagement that it shall be paid, the lien becomes extinguished. Hightower *v.* Rigsby, 56 Ala. 126 (criticising White *v.* Stover, 10 Ala. 443); Hall *v.* Click, 5 Ala. 363.

If however the vendor has not parted with the title, or if he has by agreement retained an express lien, an assignee of the note for the purchase-money may enforce the lien. Thompson *v.* Pyland, 3 Head, 537; Robinson *v.* Harbour, 42 Miss. 795; Hutton *v.* Moore, 26 Ark. 382. But comp. Sheppard *v.* Thomas, 26 Ark. 617; Hurlock *v.* Smith, 39 Md. 436. Thus

exists against the vendee and against volunteers and purchasers under him with notice or having an equitable title only.[1] But it does not exist against purchasers under a conveyance of the legal estate made bona fide for a valuable consideration without notice, if they have paid the purchase-money.[2] The lien will also prevail against assignees claiming by a general assignment under the bankrupt and insolvent laws;[3] and against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors; for in such cases the assignees are deemed to possess the same equities only as the debtor himself would possess.[4] So it will prevail against a judgment creditor of the vendee before an actual conveyance of the estate has been made to him;[5] and as it should seem also against such a judgment creditor after the

the holder by assignment of notes given for the purchase-money of land, where a bond for title has been given by the vendor, may in equity enforce his claim by subjecting the land to its payment, against the holder of the title bond and purchasers from him with notice. Hutchinson *v.* Crane, 100 Ill. 269; Wright *v.* Troutman, 81 Ill. 374. And where the purchaser at the request of the vendor makes the notes for the purchase-money payable to a third person by way of gift from the vendor, the payee can enforce a lien. Hamilton *v.* Gilbert, 2 Heisk. 680; Latham *v.* Staples, 46 Ala. 462.

The rule of vendor's lien applies in favor of an equitable owner, e. g. by title bond, who procures a conveyance direct from the holder of the legal title to the purchaser. Johns *v.* Sewell, 33 Ind. 1.

A surety for the purchase-money will on payment be subrogated to the benefit of the lien; and if the purchaser has sold in the meantime and received only part payment, his lien for the balance will, it seems, be postponed to the lien to which his surety becomes subrogated on payment in whole or in part by him. The surety's position indeed may be shown in a still stronger light. In Carter *v.* Sims, 2 Heisk. 166, the original vendor took notes of a sub-purchaser in part payment, and a surety, who had paid the balance, was held to have required thereby a lien prior in right to that of the original vendor himself in respect of the notes of the sub-purchaser. Again where one pays the purchase-money in relief of the purchaser, he will be entitled to a lien with priority over the purchaser's homestead rights. Magee *v.* Magee, 51 Ill. 500.

[1] Ante, § 1631.

[2] Ante, §§ 1078, 1079; Sugden on Vendors, ch. 12, § 3, p. 557 (7th ed.); 2 Madd. Ch. Pr. 105, 106; Cator *v.* Bolingbroke, 1 Bro. Ch. R. 302; Mackreth *v.* Symmons, 15 Ves. 336, 339 to 341, 347, 353, 354; Champion *v.* Brown, 6 John. Ch. R. 402, 403; Boon *v.* Barnes, 23 Miss. 136.

[3] Blackburne *v.* Gregson, 1 Bro. Ch. R. 420, by Belt; Sugden on Vendors, ch. 12, § 3, p. 577 (7th ed.); Mitford *v.* Mitford, 9 Ves. 100; Grant *v.* Mills, 2 Ves. & Beam. 306; Chapman *v.* Tanner, 1 Vern. 267; Ex parte Peake, 1 Madd. R. 356.

[4] Fawell *v.* Heelis, Ambler, R. 726; Sugden on Vendors, ch. 12, § 3, p. 558 (7th ed.). See Bayley *v.* Greenleaf, 20 U. S. 56, 5 L. Ed. 393.

[5] Finch *v.* Earl of Winchelsea, 1 P. Will, 278; 4 Kent, Comm. Lect. 58. See Walton *v.* Hargroves, 42 Miss. 18. But see Ellis *v.* Temple, 4 Cold. 315.

conveyance, for each party as a creditor would have a lien on the estate sold, with an equal equity; and in that case the maxim applies, "Qui prior est in tempore, potior est in jure." [1]

§ 1635. **Distinction between General and Particular Assignment for Creditors.** — But there is a clear distinction between the case of such a general assignment to assignees for the benefit of creditors generally, and a particular assignment to specified creditors for their particular security or satisfaction. The former are deemed to take as mere volunteers, and not as purchasers for a valuable consideration strictly so called.[2] The latter, if a conveyance of the property has been actually made and they have no notice of the purchase-money being unpaid to the vendor, are deemed entitled to the same equities as any other bona fide particular purchasers.[3]

§ 1636. **Deposit of Title Deeds, as Giving a Lien.** — Liens of an analogous nature may be created by a deposit of title-deeds as a security for advances of money, thus constituting an equitable mortgage on the estate included in the title-deeds. But this subject has been already considered in a previous part of these Commentaries.[4]

§ 1637. **Liens May Be Created upon Balance of Purchase Money, Left in Hands of Third Person.** — So liens may be created on the purchase-money due on the sale of an estate in favor of a vendee, if it is agreed that the money shall be deposited in the hands of a third person to be applied in discharge of prior incumbrances to the extent of such incumbrances.[5] Indeed there is

[1] The lien will not, it seems, prevail against the judgment creditor where the creditor made his advance on the faith of a record title apparently perfect. Hulett *v.* Whipple, 58 Barb. 224. See Adams *v.* Buchanan, 49 Mo. 64; McCann *v.* White, Ib. 96; Watt *v.* White, 33 Tex. 421. Other securities must be exhausted before the lien can be enforced against judgment creditors. Watt *v.* White, supra.

Where the debt is outlawed, a revival of it will not revive the lien against judgment creditors. Avent *v.* McCorkle, 45 Miss. 221. Compare Ruth's Appeal, 54 Pa. St. 173.

A mechanic's lien takes precedence, it seems, in Louisiana, of the vendor's lien. Jamison *v.* Barelli, 20 La. An. 452. See Bayley *v.* Greenleaf, 20 U. S. 56, 5 L. Ed. 393; and Mackreth *v.* Symmons, 15 Ves. 354.

[2] Brown *v.* Heathcote, 1 Atk. 160, 162; Jewson *v.* Moulson, 2 Atk. 417, 420; Mitford *v.* Mitford, 9 Ves. R. 87, 100; Worrall *v.* Morlar, cited in Mr. Cox's note to 1 P. Will. 459; Com. Dig. Bankrupt, D. 19; Scott *v.* Surman, Willes, R. 402, and the Register's note; Simond *v.* Hilbert, 1 Russ. & Mylne, 729; ante, § 1391; post, § 1843.

[3] Mitford *v.* Mitford, 9 Ves. 100; Bayley *v.* Greenlead, 20 U. S. 46, 5 L. Ed. 393.

[4] Ante, § 1366.

[5] Farr *v.* Middleton, Prec. Ch. 174, 175.

generally no difficulty in equity in establishing a lien not only on real estate but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement at least against the party himself, and third persons who are volunteers or have notice. For it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust.[1] Thus for example if a tenant for life of real estate should by covenant agree to set apart and pay the whole or a portion of the annual profits of that estate to trustees for certain objects, it would create a lien in the nature of a trust on those profits against him and all persons claiming as volunteers or with notice under him.[2] So if a father on the marriage of his son should covenant to settle lands of a particular annual value on his son, this would create a lien for that amount on his real estate generally, if he should die before he had settled any such lands according to his covenant.[3] So if a person should covenant that he will on or before a certain day secure an annuity by a charge upon freehold estates, or by investment in the funds, or by the best means in his power, such covenant will create a lien upon any property to which he becomes entitled before the date of the covenant and the day so limited for its performance.[4]

[1] Collyer *v.* Fallon, 1 Turn. & Russ. 469, 475, 476; Legard *v.* Hodges, 1 Ves. Jr. 478; ante, §§ 1392 to 1424; Dodsley *v.* Varley, 12 Adolph. & Ellis, 632; Pinch *v.* Anthony, 8 Allen, 536.

[2] Legard *v.* Hodges, 4 Ves. Jr. 478.

[3] See also Power *v.* Bailey, 1 Ball & Beatt. 49; Gardner *v.* Townsend, Coop. Eq. R. 303. But see post, § 1249 and note 2, the cases where such a covenant would be a lien and where it would not. The distinction in the cases seems generally to be between a covenant to settle particular lands and a covenant to settle lands generally, not specifying any in particular. The former constitutes a lien in the particular lands specified. The latter does not on the lands generally. Roundell *v.* Breary, 2 Vern. R. 482.

As to this case, and as to Wellesley *v.* Wellesley in the next note, see Mornington *v.* Keane, 2 DeG. & J. 292. It is here declared that a covenant on or before a certain day, either by charge on freehold estates, or by an investment in the funds, or by the best means which might be then in his power, to secure the payment of an annuity to a trustee for the wife of the covenantor, is not sufficient to create a charge on the covenantor's property. See post, § 1657.

[4] Wellesley *v.* Wellesley, 4 Mylne & Craig, 561. In this case Lord Cottenham said: "That this court will grant a specific performance of an agreement for a grant of an annuity cannot now be questioned; and this agreement appears to me to contain within itself all that is necessary to give it legal validity; but if this court is to execute the agreement, it must do so according to the terms of it. The terms are, on a day certain to charge the annuity on lands, or on an investment of stock, or by the best means in his power. I think it quite immaterial, for the present purpose, whether this gave to the husband an option, or whether he has other lands

§ 1638. **Trust Funds May Be Recovered Wherever Found.** — Upon similar principles, where a vendee has sold the estate to a bona fide purchaser without notice, if the purchase-money has not been paid, the original vendor may proceed against the estate for his lien, or against the purchase-money in the hands of such purchaser for satisfaction; for in such a case the latter not having paid his money takes the estate cum onere, at least to the extent of the unpaid purchase-money. And this proceeds upon a general ground that where trust-money can be traced, it shall be applied to the purposes of the trust.[1]

§ 1639. **Same.** — But although a lien will be created in favor of a vendor for the purchase-money on the sale of an estate, yet if the consideration of the conveyance is a covenant to pay an annuity to the vendor, and another covenant to pay a part of the money to third persons, it seems that the latter, not being parties to the conveyance, will not generally have any lien thereon for the payment of such money; for they stand in no privity to establish a lien, at least unless the original agreement import an intention to create such a lien.[2]

§ 1640. **The Doctrine of Marshalling as Applied to Trust Estates.** — Another class of cases affected by similar principles, and where a sort of marshalling of securities or rights of priority between different incumbrancers and different purchasers may exist,

besides these vested in these defendants, upon which he can now charge the annuity; because the bill alleges that he refuses to charge it in any manner, and this court will not permit him, under the pretence of exercising an option, to evade the performance of his contract. In Deacon *v.* Smith (3 Atk. 323) there was an option; but it did not prevent the court from acting upon the one alternative. The property acquired by the arrangement of December, 1834, must be considered as subsequently acquired property; but that contracts to charge property subsequently acquired will be enforced is sufficiently established. Lyde *v.* Mynn and the cases upon which that decision was founded are conclusive upon that subject. The contract is not to purchase lands for the purpose of the agreement; but one alternative is to charge lands in February, 1835, and at that time he had a power of charging lands. It is the same as a contract to charge such lands as he might have at that time; and if so, such was Metcalfe *v.* The Archbishop of York (1 Mylne & Craig, 547; s. c. 6 Sim. 224) and Lyde *v.* Mynn (1 Mylne & Keen, 683; s. c. 4 Sim. 505), and such was Tooke *v.* Hastings, as reported in 2 Vern. 97. In Lewis *v.* Maddocks (17 Ves. 48), a contract, upon marriage, to settle all personal estate of which the husband might become possessed during the coverture was enforced against an estate he had purchased in part, with personal property so acquired."

[1] See Lench *v.* Lench, 10 Ves. 511; Ex parte Morgan, 12 Ves. 6.

[2] Clark *v.* Royle, 3 Sim. R. 409; Foster *v.* Blackstone, 1 M. & Keen, 297; Colyear *v.* Countess of Mulgrave, 2 Keen, 81, 98; ante, § 1633.

is where a lien covers several parcels of land and the owner thereof subsequently conveys some of the parcels to different purchasers or incumbrancers; in such cases the question arises, Who, as between the owner and the subsequent incumbrancers and purchasers, and also as between the incumbrancers and purchasers, themselves, is primarily chargeable with the lien, and which of the lands is to be first subjected to the charge? The general rule now acted upon by Courts of Equity is, that where there is a lien upon different parcels of land for the payment of the same debt, and some of those lands still belong to the person who in equity and justice owes or ought to pay the debt, and other parcels of the land have been transferred by him to third persons, his part of the land as between himself and them shall be primarily chargeable with the debt.[1] This would seem highly reasonable as to the original incumbrancer.[2] But it has been further held that if he has sold or transferred different parcels of the land at different times to different persons as incumbrancers or purchasers, there as between themselves they are to be charged in the reverse order of the time of the transfers to them; that is to say the parcels last sold are to be first charged to their full value and so backwards until the debt is fully paid; for it is said that the last purchasers are to take only as far as they may without disturbing the rights of the prior incumbrancers or purchasers, who being prior in point of time have a superiority of right.[3] But there seems great reason

[1] See ante, § 649. [2] See the authorities cited in next note.

[3] Gill *v.* Lyon, 1 John. Ch. R. 447; Stevens *v.* Cooper, 1 John. Ch. R. 425; Clowes *v.* Dickinson, 5 John. Ch. R. 235; Stoney *v.* Shultz, 1 Hill, Ch. R. 500; James *v.* Hubbard, 1 Paige, R. 228; Gouverneur *v.* Lynch, 2 Paige, R. 300; Guion *v.* Knapp, 6 Paige, R. 35; Skeel *v.* Spraker, 8 Paige, R. 182; Patty *v.* Pease, 8 Paige, R. 277; Schryser *v.* Teller, 9 Paige, R. 173; Commercial Bank of Erie *v.* Western Reserve Bank, 11 Ohio (Stanton) 444, 452; Hartley *v.* O'Flaherty, Lloyd & Goold, R. 216; temp. Plunk. See Cowden's Est. 1 Barr, 267 (overruling Presbyterian Cong. *v.* Wallace, 3 Rawle, 109); Holden *v.* Pike, 24 Me. 427; Wikoff *v.* Davis, 3 Green, Ch. 24; Chase *v.* Woodbury, 6 Cush. 143; Bradley *v.* George, 2 Allen, 392; George *v.* Kent, 7 Allen, 16; Gaskill *v.* Line, 2 Beasl. 400; Mount *v.* Potts, 8 C. E. Green, 188; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Lyman *v.* Lyman, 32 Vt. 79; Carter *v.* Neal, 24 Ga. 546; Life Ins. Co. *v.* Cutler, 3 Sandf. 176; Dickey *v.* Thompson, 8 B. Mon. 312; McCullum *v.* Turpie, 32 Ind. 146; Lock *v.* Fulford, 52 Ill. 166; Barney *v.* Myers, 28 Iowa, 472; Payne *v.* Avery, 21 Mich. 524. But where each parcel is sold subject to the mortgage, they contribute ratably, not inversely. Briscoe *v.* Power, 47 Ill. 447; Hoy *v.* Bramhall, 4 C. E. Green, 74, 563; Varney *v.* Myers, supra.

Where there have been partial releases, the residue is liable in proportion to its value (with reference to the lots released) at the time of the release. Stillman *v.* Stillman, 6 C. E. Green, 126; Taylor *v.* Short, 27

to doubt whether this last position is maintainable upon principle; for as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estate mortgaged to him, it is difficult to perceive that either has in consequence thereof any superiority of right or equity over the other.[1] On the contrary there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them according to the relative values of the estates. And so the doctrine has been asserted in the ancient as well as the modern English cases on the subject.[2]

§ 1641. **Joint Owner Who Has Repaired Property Has Lien for Improvements.** — Another species of lien is that which results to one joint owner of any real estate, or other joint property from repairs and improvements made upon such property for the joint benefit and for disbursements touching the same. This lien, as we shall presently see, sometimes arises from a contract express or implied between the parties, and sometimes it is created by Courts of Equity upon mere principles of general justice, especially where any relief is sought by the party who ought to pay his proportion of the money expended in such repairs and improvements; for in such cases the maxim well applies, "Nemo debet locupletari ex alterius incommodo." [3]

§ 1642. **Same.** — And in the first place in respect to repairs, improvements, and disbursements upon real estate. It seems that at the common law if there are two tenants in common or joint-tenants of a house or mill, and it should fall into decay and the one is willing to repair and the other is not, he that is willing to repair shall have a writ de reparatione facienda; for owners are bound, pro bono publico, to maintain houses and mills which are for the habitation and use of man.[4] It is not perhaps quite certain, from

Iowa, 361. But this is only where there is actual notice of equities against such release. Inglehart *v.* Crane, 42 Ill. 261; George *v.* Wood, 9 Allen, 80.

[1] Ante, §§ 639 to 647.

[2] Sir W. Herbert's Case, 3 Co. R. 12; Barnes *v.* Rackster, 1 Younge & Coll. New Rep. 401. See also Lanoy *v.* Duchess of Athol, 2 Atk. 448; Aldrich *v.* Cooper, 8 Ves. 391; Averall *v.* Wade, 1 Lloyd & Goold, R. 252; Bugden *v.* Bignold, 2 Younge & Coll. New R. 377; The American Law Magazine for April, 1844, art. 5, pp. 64 to 82; Sofer *v.* Kemp, 6 Hare, R. 155.

[3] Jenkyns's Cent. 4; Branch, Maxims, 124; post, §§ 1644, 1645; Dig. Lib. 50, tit. 17, l. 206.

[4] Co. Litt. 200 *b*; Loring *v.* Beacon, 4 Mass. R. 576; Doane *v.* Badger, 12 Mass. R. 65; Fitz. N. Brev. 127 *a*. In Converse *v.* Ferre (11 Mass. R. 326) it was said by Mr. Chief Justice Parker, in delivering the opinion of the court, that no action lies at the common law by one tenant in com-

the manner in which this doctrine is laid down, whether the writ applied merely to repairs on other things constituting real estate or appurtenant thereto. But it seems clear that it did not extend to improvements (not being repairs) made upon real estate generally, nor to any cases where the repairs were made under an express or implied contract; for in the latter case contribution could be obtained in a common action founded on the contract.

§ 1643. **Doctrine of Contribution as Applied to Co-tenants, Who Have Improved the Common Property.** — But the doctrine of contribution in equity is larger than it is at law; and in many cases repairs and improvements will be held to be not merely a personal charge, but a lien on the estate itself. Thus for example it has been held that if two or more persons make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements and dies, this will be a lien on the land and a trust for the representatives of him who advanced it.[1]

mon, who has expended more than his share in repairing the common property, against the deficient tenants. But this seems not easily reconcilable with what is said in Doane *v.* Badger, 12 Mass. R. 70, 71. See Registrum Brev. 153, and Fitz. N. Brev. 127. There certainly may be a distinction between a right by action to compel repairs and a right of contribution in invitum after repairs made. Calvert *v.* Aldrich, 99 Mass. 74; Bowman *v.* Pettit, 68 Ark. 126, 56 S. W. 780; Bossier *v.* Herwig, 112 La. 539, 36 So. 557.

Contra: Sweet *v.* Stevens, 23 Ky. L. Rep. 407, 63 S. W. 41.

[1] Lake *v.* Craddock, 1 Eq. Abr. 291; s. c. 3 P. W. 158; 2 Fonbl. Eq. B. 2, ch. 4, § 2, note (*g*); Sugden on Vendors, ch. 15, § 1, p. 637 (7th ed.). See also Scott *v.* Nesbitt, 14 Ves. 444. Mr. Sugden, in his Treatise on Vendors (ch. 15, § 1, p. 611, 7th ed.; Id. Vol. 2, ch. 15, § 1, pp. 131, 132, 9th ed.), says: "It seems that where two or more persons purchase an estate, and one for instance pays all the money, and the estate is conveyed to them both, the one who paid the money cannot call upon those who paid no part of it to repay him their shares of the purchase-money, or to convey their shares of the estate to him; for by payment of all the money he gains neither a lien nor a mortgage, because there is no contract for either. Nor can it be construed a resulting trust, as such a trust cannot arise at an after period; and perhaps the only remedy he has is to file a bill against them for a contribution. See Wood *v.* Birch, and Wood *v.* Norman, Rolls, 7 and 8 March, 1804, the decree in which case does not however authorize the observation; but the author conceives it to follow from what fell from the Master of the Rolls at the hearing. Whenever therefore two persons agree to purchase an estate, it should be stipulated in the agreement that if by the default of either of them the other shall be compelled to pay the whole or greater part of the purchase-money the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs, unless he or they shall within a stated time repay the sum advanced on their account, with interest in the mean time. But it has been held that if one of two joint-tenants of a lease renew at his own expense, and the other party repay the full benefit of it, the one advancing the money shall have a charge on the other moiety of the estate for a moiety

§ 1644. **Same.** — In many cases of this sort the doctrine may proceed upon the ground of some express or implied agreement as to the repairs and improvements between the joint purchasers and an implied lien following upon such an agreement.[1] But Courts of Equity have not confined the doctrine of compensation or lien for repairs and improvements to cases of agreement or of joint purchases. They have extended it to other cases where the party making the repairs and improvements has acted bona fide and innocently, and there has been a substantial benefit conferred on the owner, so that ex æquo et bono he ought to pay for such benefit.[2] Thus where a tenant for life under a will has gone on to finish improvements permanently beneficial to an estate which were begun by the testator, Courts of Equity have deemed the expenditure a charge for which the tenant is entitled to a lien.[3] So where a party lawfully in possession under a defective title has made permanent improvements, if relief is asked in equity by the true owner he will be compelled to allow for such improvements.[4] So

of his advances on account of the fines, although such other moiety of the estate be in strict settlement at the time of the renewal. The case was considered to fall within the principle upon which mortgagees who renew leasehold interests have been decreed entitled to charge the amount upon the lands (Hamilton *v.* Denny, 1 Ball. & Beatt. 199)."

[1] See Gladstone *v.* Birley, 2 Meriv. R. 403.

[2] See Sugden on Vendors, ch. 16, § 10, pp. 720, 721 (7th ed.). See Rathbun *v.* Colton, 15 Pick. 471; 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; Moy *v.* Moy, 111 Iowa, 161, 82 N. W. 481; Fenton *v.* Wendell, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502, 4 Detroit Leg. N. 1057; Patrick *v.* Young Men's Christian Assn., 120 Mich. 185, 79 N. W. 208, 6 Detroit Leg. N. 11; Bennett *v.* Bennett, 84 Miss. 493, 36 So. 452; Carson *v.* Broady, 56 Neb. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Leavitt *v.* Locke, 68 N. H. 17, 40 Atl. 395; Clapp *v.* Nichols, 31 App. Div. 531, 52 N. Y. Supp. 128; Pipkin *v.* Pipkin, 120 N. C. 161, 26 S. E. 697; Polk *v.* Gunther, 107 Tenn. 16, 64 S. W. 25; Ballou *v.* Ballou, 94 Va. 350, 26 S. E. 840, 64 Am. St. Rep. 733; Legg *v.* Legg, 34 Wash. 132, 75 Pac. 130; Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911.

[3] Hibbert *v.* Cooke, 1 Sim. & Stu. 552. See Sohier *v.* Eldredge, 103 Mass. 345, 351. But see Floyer *v.* Bankes, L. R. 8 Eq. 115; Taylor *v.* Foster, 22 Ohio St. 255.

[4] Robinson *v.* Ridley, 6 Madd. R. 2. See also Attorney-Gen. *v.* Baliol College, 9 Mod. R. 411; Bright *v.* Boyd, 1 Story, R. 478. In this case the question was much discussed whether a bona fide purchaser under a defective title without notice was entitled to be paid for his improvements upon the estate against the true owner. On that occasion the judge who delivered the opinion of the court 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

money bona fide laid out in improvements on an estate by one joint owner will be allowed on a bill by the other if he ask for a

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. 2 Story on Eq. Jurisp., §§ 2018, 2019; Green *v.* Biddle, 21 U. S. 79, 5 L. Ed. 564. 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. See also 2 Story, Eq. Jurisp., §§ 1644, 1645. 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. Ibid. 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 had 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 such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a 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 answer-

ing 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,' says the Institutes, 'illud constat; si in possessione constituto ædificatore, soli Dominus petat domum suam esse, me solvat pretium materiæ et mercedes fabrorum; posse cum 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; Vinn. Com. ad. Iast. 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, 21 U. S. 79, 5 L. Ed. 564. 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, arts. 552, 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 extended 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. & 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, n. 43; Pothier, De la Propriété, n. 343. Now in the present case it cannot be overlooked that the lands of the testator now in controversy were sold for the payment of his just debts under the authority of the law, although

partition.[1] So if the true owner stands by and suffers improvements to be made on an estate without notice of his title, he will not be permitted in equity to enrich himself by the loss of another, but the improvements will constitute a lien on the estate.[2] For it has been well said, "Jure naturæ æquum est neminem cum alterius detrimento et injuria fieri locupletiorem."[3] A fortiori this doctrine will apply to cases where the parties stand in a fiduciary relation to each other; as where an agent stands by, and without notice of his title suffers his principal to spend money in improvements upon the agent's estate.[4]

§ 1645. **Same.** — In all cases of this sort however the doctrine proceeds upon the ground either that there is some fraud or that the aid of a Court of Equity is required; for if a party can recover the estate at law, a Court of Equity will not, unless there is some fraud, relieve a purchaser or bona fide possessor on account of money laid out in repairs and improvements.[5]

the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the prerequisites. It was not therefore in a just sense a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (Boyd) have been relieved from a charge to which they were liable by law. So that he is now enjoying the lands free from a charge which in conscience and equity he and he only, and not the purchaser, ought to bear. To the extent of the charge from which he has been thus relieved by the purchaser, it seems to me that the plaintiff, claiming under the purchaser, is entitled to reimbursement, in order to avoid a circuity of action, to get back the money from the administrator, and thus subject the lands to a new sale, or at least in his favor in equity to the old charge. I confess myself to be unwilling to resort to such a circuity in order to do justice where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge, to which they are ex æquo et bono in the hands of the present defendant clearly liable." The point was afterwards directly affirmed when the case came again before the court in 2 Story, R. 605. Canal Bank *v.* Hudson, 111 U. S. 66, 28 L. Ed. 354, 4 S. Ct. Rep. 303. See McLaughlin *v.* Barnum, 31 Md. 425; Sale *v.* Crutchfield, 8 Bush, 636; Miner *v.* Beekman, 50 N. Y. 337; Smith *v.* Drake, 8 C. E. Green, 302; North Hudson R. Co. *v.* Booraem, 28 N. J. Eq. 450.

[1] Swan *v.* Swan, 8 Price, 518.

[2] Green *v.* Biddle, 21 U. S. 79, L. Ed. 564; Shine *v.* Gough, 1 B. & Beatt. 444; Cawdor (Lord) *v.* Lewis, 1 Younge & Coll. 427; Bright *v.* Boyd, 1 Story, R. 478, 493; Neil *v.* Harris, 121 Ga. 647, 49 S. E. 773; Burk *v.* Lane Lbr. Co., 28 Ky. L. Rep. 545, 89 S. W. 686.

[3] Dig. Lib. 50, tit. 17, l. 206.

[4] Lord Cawdor *v.* Lewis, 1 Younge & Coll. 427.

[5] Sugden on Vendors, ch. 16, § 10, pp. 721, 722 (7th ed.); Id. ch. 22, § 1, Vol. 3, pp. 436, 437 (10th ed.). See also Moore *v.* Cable, 1 John. Ch. R. 385; Green *v.* Winter, 1 John. Ch. R. 26, 39; Putnam *v.* Ritchie, 6 Paige, R. 390, 403 to 405; Bright *v.* Boyd, 1 Story, R. 478, 494 to 497; ante, §§ 517, 518.

§ 1646. **Same.** — The civil law seems to have proceeded upon a far broader principle of natural justice. For by that law any bona fide possessor, as for instance a creditor who had laid out money in preserving, repairing, or substantially improving an estate, was allowed a privilege or lien for such meliorations. "Creditor qui ob restitutionem ædificiorum crediderit, in pecuniam quam crediderit privilegium exigendi habebit."[1] "Pignus insulæ creditori datum, qui pecuniam ob restitutionem ædificii exstruendi mutuam dedit, ad eum quoque pertinebit qui redemptori, domino mandante, nummos ministravit."[2] Indeed Domat lays it down as a general doctrine that those whose money has been laid out on improvements of an estate, such as making a plantation or erecting buildings upon it, or augmenting the apartments of a house, or for other like causes, have by the civil law a privilege upon those improvements as upon a purchase with their own money.[3]

§ 1647. **Liability of Co-tenant to Contribute to Expenses of Repairs of Personal Property.** — In the first place in respect to repairs, improvements, and disbursements upon personal property. Here the civil law gave a privilege or lien upon the thing in favor of all artificers and other persons who had laid out their money in such meliorations. Thus it is said: "Quod quis navis fabricandæ, vel emendæ, vel armandæ, vel instruendæ, causa, vel quoquo modo crediderit vel ob navem venditam petat, habet privilegium post fiscum."[4]

§ 1648. **Contribution to Repairs of Vessels.** — The like privilege or lien does not exist in English Jurisprudence in respect to domestic ships.[5] But in America it has been held to exist in regard to foreign ships repaired in home ports, and also in regard to domestic ships repaired in foreign ports, in favor of artificers and material-men.[6] And a master of a ship who has paid for such

[1] Dig. Lib. 12, tit. 1, l. 25; 1 Domat, B. 3, tit. 1, § 5, arts. 6, 7; Bright *v.* Boyd, 1 Story, R. 478, 494 to 497.

[2] Dig. Lib. 20, tit. 2, l. 1; 1 Domat, B. 3, tit. 1, § 5, arts. 5 to 7; ante, § 1237, note.

[3] 1 Domat, B. 3, tit. 1, § 5, art. 7; ante, § 1644.

[4] Dig. Lib. 42, tit. 5, l. 34, 26; 1 Domat, B. 3, tit. 1, § 5, arts. 7, 9; Story, Comm. on Agency, §§ 355 to 357.

[5] Abbott on Shipp. Pt. 2, ch. 2, § 10, p. 108, § 11, p. 109 (ed. 1829); Ex parte Bland, 2 Rose, Cas. 91; Watkinson *v.* Bernardiston, 2 P. Will. 367; Stewart *v.* Hall, 2 Dow, R. 29. See Hussey *v.* Christie, 13 Ves. 594; Ex parte Halkett, 3 V. & Beam. 135.

[6] Abbott on Shipp. Pt. 2, ch. 2, § 15, note by Story (1) (ed. 1829); The Aurora, 14 U. S. 105, 4 L. Ed. 45; The General Smith, 17 U. S. 438.

repairs is substituted in point of claim to the rights of such artificers and material-men. He has also by our law a lien on the freight for his disbursements on the voyage,[1] although the lien has been recently denied in England.[2]

§ 1649. **Same.** — Upon another point also some diversity of judgment has been expressed; and that is how far as between part-owners a lien exists on the ship itself for any expenses incurred by one or more of them beyond their shares in building, repairing, or fitting out the ship upon a joint voyage. In respect to the proceeds of the joint adventure on the voyage, no doubt seems to be entertained that they are liable to the disbursements and charges of the outfit in the nature of a lien, and therefore that no part-owner can take any portion of the profits until after such expenditures are paid and deducted. In this respect the part-owners are treated as partners in the joint adventure.[3] But the point whether the ship itself is liable for such expenditures as constituting a lien on it turns upon somewhat different considerations. Lord Hardwicke held that the ship was so liable, and that the part-owners of a ship, although tenants in common and not joint-tenants, have a right notwithstanding to consider the chattel as used in partnership, and liable as partnership effects to pay all debts whatever to which any of them are liable on account of the ship.[4] Lord Eldon has expressed a directly contrary opinion, and has held the ship not to be liable for such expenditures.[5]

4 L. Ed. 609; The St. Jago de Cuba, 22 U. S. 409; 6 L. Ed. 122; Peyroux *v.* Howard, 32 U. S. 324; 8 L. Ed. 700.

[1] Abbott on Shipp. ubi supra; Ex parte Cheesman, 2 Eden, R. 181; The Ship Packet, 3 Mason, R. 263, 264; Hodson *v.* Butts, 7 U. S. 140, 2 L. Ed. 391; Milward *v.* Hallett, 2 Cain. R. 77; White *v.* Baring, 4 Esp. R. 22; ante, § 1216.

[2] In the case of Hussey *v.* Christie (9 East, R. 426), the Court of King's Bench decided that the master has no such lien on the freight. Lord Eldon seems to have entertained a different opinion in Hussey *v.* Christie, 13 Ves. 594; Ex parte Halkett, 3 Ves. & B. 135; s. c. 19 Ves. 474. So did Lord Northington in Ex parte Cheesman, 2 Eden, 181. In the case of Smith *v.* Plummer, 1 Barn. & Ald. 575, the Court of King's Bench held that the master had no lien on the freight for his disbursements on the voyage on account of the ship. That doctrine has not been adopted in America, and seems not quite reconcilable with prior decisions. See also Richardson *v.* Campbell, 5 Barn. & Ald. 203, note (*a*).

[3] Abbott on Shipp. Pt. 1, ch. 3, §§ 9, 10, pp. 77, 78 (ed. 1829).

[4] Doddington *v.* Hallet, 1 Ves. R. 497, and Belt's Supplement, 205, 206; Abbott on Shipp. Pt. 1, ch. 3, § 10, p. 78 (ed. 1829).

[5] Ex parte Younge, 2 Ves. & B. 242; Ex parte Harrison, 2 Rose, Cas. 76, 78. Mr. Abbott, in his treatise on Shipping, expressed doubts as to the correctness of Lord Hardwicke's judgment. Lord Eldon, in Ex parte Younge, 2 Ves. & Beam. 242, adopted Mr. Abbott's doubts; and

§ 1650. **Interests in Partnership Property, as a Trust.** — Another species of tacit or implied trust, or perhaps, strictly speaking, of tacit or implied pledge or lien, is that of each partner in and upon the partnership property, whether it consists of lands or stock or chattels or debts, as his indemnity against the joint debts, as well as his security for the ultimate balance due to him for his own share of the partnership effects.[1] We have already had occasion to allude to this sort of lien in considering joint purchases in the name of one partner, and it is only necessary here to refer to it in this more general form.[2]

§ 1651. **Devise to Third Person for Benefit of a Creditor as a Trust.** — Another class of implied liens or trusts arises where property is conveyed inter vivos, or is bequeathed or devised by

the remarks of the latter, having been omitted in the last English edition, I take the liberty to restore them. They are as follows: "It seems to have been considered that part-owners might have a lien on each other's shares of a ship, as partners in trade have on each other's shares of their merchandise. But I do not find this point to have been ever decided, and there is a material difference between the two cases. Partners are at law joint-tenants of their merchandise. One may dispose of the whole property. But part-owners are tenants in common of a ship. One cannot sell the share of another. And if this general lien exists, must prevail against a purchaser, even without notice; which does not seem consistent with the nature of the interest of a tenant in common. It is true indeed that as long as the ship continues to be employed by the same persons no one of them can be entitled to partake of the profits until all that is due in respect to the part he holds in the ship has been discharged. But as one part-owner cannot compel another to sell the ship, there does not appear to be any mode by which he can enforce against the other's share of the ship, in specie, the payment of his part of the expenses." In Mumford *v.* Nicoll, 4 John. Ch. R. 522, Mr. Chancellor Kent acted upon the authority of the case, Ex parte Younge, in opposition to the case of Doddington *v.* Halkett. But his decree was overturned by the Court of Appeals, in 20 John. R. 611, where the majority of the judges who delivered their opinions seemed inclined to support the opinion of Lord Hardwicke. And in the case before them, which was somewhat special in its circumstances, where the parties were part-owners and engaged in a partnership adventure in which the ship was eventually sold, and one of the part-owners got possession of the proceeds, the court held him entitled to retain for outfits, repairs, and expenses incurred by him for the voyage, but not for a general balance due on former voyages and adventures. See Green *v.* Briggs, 6 Hare, 395. But see Brodie *v.* Howard, 17 C. B. 109; Hewitt *v.* Sturdevant, 4 B. Mon. 458; 3 Kent, Comm. 40, 155. Further Maclachlan, Merchant Shipping, 96, 107.

[1] Collyer on Partn. B. 2, ch. 1, § 1, p. 65; West *v.* Skipp. 1 Ves. 239, 456; Hoxie *v.* Carr, 1 Sumner, R. 181, 182; Nicoll *v.* Mumford, 4 John. Ch. R. 522; Lake *v.* Gibson, 1 Eq. Abr. A. 3, pp. 290, 291, § 1670.

[2] Ante, § 1606; post, § 1670. No trust is created where assets are divided on dissolution with undertakings by each partner to pay certain specific debts. Giddings *v.* Palmer, 107 Mass. 269.

last will and testament, subject to a charge for the payment of debts or to other charges in favor of third persons.[1] In such cases, although the charge is treated as between the immediate parties to the original instrument as an express trust in the property, which may be enforced by such parties or their proper representatives, yet as between the trustee and cestuis que trust who are to take the benefits of the instrument it constitutes an implied or constructive trust only, — a trust raised by Courts of Equity in their favor, as an interest in rem capable of being enforced by them directly by a suit brought in their own names and right. Thus for example if a devise is made of real estate charged with the payment of debts generally, it may be enforced by any one or more creditors against the devisee, although there is no privity of contract between him and them.[2]

§ 1652. **Same.** — There is also a distinction between a devise of an estate in trust to pay debts and other charges, and a devise of an estate charged with or subject to debts or other charges. In the former case the devise is construed to be a mere trust to pay the debts or other charges, giving no beneficial interest to the devisee, but holding him, after the debts and charges are paid, a mere trustee for the heir as to the residue. In the latter case the devise is construed to convey the whole beneficial interest to the devisee, subject only to the payment of the debts or other charges. The distinction may seem nice, but it is clearly established as a matter of intention.[3]

[1] See Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, pp. 94 to 134.

[2] See King *v.* Denison, 1 Ves. & B. 272, 276.

[3] King *v.* Denison, Ves. & Beam. 273; Hill *v.* Bishop of London, 1 Atk. R. 620; Craig *v.* Leslie, 16 U. S. 563, 4 L. Ed. 460. Lord Eldon, in King *v.* Denison, 1 Ves. & Beam. 272, stated this distinction in a very clear manner. "But I will here," said he, "point out the nicety of distinction, as it appears to me, upon which this court has gone. If I give to A and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest subject to a particular purpose. The latter is a devise for a particular purpose with no intention to give him any beneficial interest. Where therefore the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose the surplus goes to the devisee, as it is intended to be given to him." See Gardner *v.* Gardner, 3 Mason, 178.

§ 1653. **Same.** — Charges of the nature which we are now considering are often created by the express and positive declarations of deeds and wills; but they not infrequently also arise by implication, from general forms of expression used in such instruments. Thus in cases of wills a testator often devises his estate "after payment of his debts", or "his debts being first paid"; or he begins by directing "that all his debts shall be paid", and afterwards he makes a full disposition of his estate.[1] The question in such cases has often arisen, whether his debts are to be treated as a charge upon his real estate; or in other words, whether he has given all his real estate to the devisees, subject to and chargeable with his debts, in aid of his personal estate. The settled doctrine now is, that the debts in all such cases constitute by implication a charge on the real estate;[2] for whether the direction be in the introduction or in any other part of the will, that all the debts of the testator shall be paid, or the devise be of his real estate after the payment of all his debts, it is deemed equally clear that he intends that all his debts shall be paid; which in case of a deficiency of his personal assets can be done only by charging his real estate. The testator is thus deemed to intend to perform an act of justice before he does an act of generosity. This course of decision has undoubtedly been produced by a strong desire on the part of Courts of Equity to prevent gross injustice to creditors, and to compel debtors to do that which is morally right and just; or, as it has been expressively said, that men may not sin in their graves.[3]

[1] As to the effect upon a testator's general personal estate of a settlement of real estate, with a provision for the payment of debts at death, see Trott *v.* Buchanan, 28 Ch. D. 446.

[2] King *v.* Denison, 1 Ves. & B. 273, 274; Knightly *v.* Knightly, 2 Ves. Jr. 328; Shallcross *v.* Findon, 3 Ves. 738; Williams *v.* Chitty, 545; Clifford *v.* Lewis, 6 Madd. Ch. Pr. 33; Lupton *v.* Lupton, 2 John. Ch. R. 623; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 2; 1 Madd. Ch. Pr. 483 to 488. The cases are very fully and ably collected by Mr. Jarman in his edition of Powell on Devises, vol. 2, ch. 34, pp. 644 to 653; Graves *v.* Graves, 8 Sim. R. 43, 54 to 56. This last case was exceedingly strong. The testator by his will directed all his debts, legacies, and personal charges to be paid as soon as conveniently might be after his death; afterwards he devoted a particular estate to the payment of his debts, legacies, and personal charges in aid of his personal estate; and he devised the residue of his estate in strict settlement. It was held that the preliminary words charged all his real estate, and that the subsequent words did not cut down the intent to the particular estate; but that all the real estate was liable if the specific real estate would not pay all the debts, legacies, and personal charges. Dover *v.* Gregory, 10 Simons, R. 393; Parker *v.* Marchant, 1 Younge & Coll. New R. 290; Humphries *v.* Davis, 100 Ind. 369.

[3] Thomas *v.* Britnell, 2 Ves. 314; 2 Powell on Devises, by Jarman, ch. 34, p. 653; Price *v.* North, 1 Phillips, Ch. R. 83. See Corwine *v.*

§ 1654. **Same.** — The principal exceptions to this doctrine seem to be reducible to two heads; first, where the testator after generally directing his debts to be paid (without charging any funds expressly) has provided or pointed out a specific fund for that purpose;[1] secondly, where the debts are directed to be paid by the executors and no lands are devised to them to which by implication the debts could be attached.[2] Each of these exceptions proceeds upon the same ground of presumed intention in the testator. If the testator assigns a specific fund for the payment of his debts, that (naturally enough) is construed to exclude any intention to appropriate a more general fund for the same purpose; "Expressio unius est exclusio alterius."[3] If the testator directs a particular person to pay, he is presumed, in the absence of all other circumstances, to intend him to pay out of the funds with which he is intrusted, and not out of other funds over which he has no control. If the executor is pointed out as the person to pay, that excludes the presumption that other persons not named are required to pay.[4] The distinction seems very nice, but it is

Corwine, 24 N. J. Eq. 579, Gurlick *v.* Clark, 3 Thomp. & C. 315; Bynum *v.* Hill, 71 N. C. 319; Chapin *v.* Waters, 116 Mass. 140; Lapham *v.* Clapp, 10 R. I. 543.

[1] Thomas *v.* Britnell, 2 Ves. 313; 2 Powell on Devises, by Jarman, ch. 34, pp. 653, 654. But see Graves *v.* Graves, 8 Sim. R. 43; supra, § 1653; Price *v.* North, 1 Phillips, Ch. R. 83.

[2] Brydges *v.* Landen, cited 3 Ves. Jr. 550; Keeling *v.* Brown, 5 Ves. 359; Powell *v.* Robins, 7 Ves. 209; Willan *v.* Lancaster, 3 Russ. R. 108; 2 Powell on Devises, by Jarman, ch. 34, p. 654; Symons *v.* James, 2 Younge & Coll. New R. 301. See Wisden *v.* Wisden, 2 Smale & G. 396; Cook *v.* Dawson, 3 DeG. F. & J. 127.

[3] But see Graves *v.* Graves, 8 Sim. R. 43, 54 to 56; ante, § 1653. See Doolittle *v.* Hilton, 63 Me. 537.

[4] The same general doctrine, with the like exceptions, will perhaps apply to cases where legacies as well as debts are in question, although formerly a distinction was certainly taken between them. See Knightly *v.* Knightly, 2 Ves. Jr. 328; Chitty *v.* Williams, 3 Ves. 551; Keeling *v.* Brown, 5 Ves. 361; Davis *v.* Gardner, 2 P. Will. 187, and Mr. Cox's note (1); Trott *v.* Vernon, Prec. Ch. 430; 2 Powell on Devises, by Jarman, ch. 34, pp. 659 to 663; 1 Roper on Legacies, by White, ch. 12, § 2, pp. 574 to 595. Where the executor is devisee of the real estate, a direction to him to pay debts and legacies will amount to a charge of both debts and legacies on the real estate. Aubrey *v.* Middleton, 2 Eq. Abr. 497, pl. 16; Alcock *v.* Sparhawk, 2 Vern. 228; s. c. 1 Eq. Abr. 198, p. 4; Barker *v.* Duke of Devonshire, 3 Meriv. R. 310; 2 Powell on Devises, by Jarman, ch. 34, pp. 657, 658. But if a limited interest were given in the realty to the executor, or to one of the executors only, it might be different. See Keeling *v.* Brown, 5 Ves. 359. Where a testator devised his lands in trust to be sold, declaring that the produce should go in the same manner as the personal estate, and afterwards he made a bequest of his personal estate "after payment of his debts", it was held that the

intelligible in theory, however difficult it may be in its application to particular cases.

§ 1655. **Same.** — Perhaps it would have been more satisfactory and conformable to the real intention of the testator in all cases of this sort, to have held that where the testator directed all his debts to be paid without specifying any particular fund out of which they were exclusively to be paid, it should, in the absence of all positive controlling words, be construed as a general declaration that all his debts should be paid out of his estate, whether real or personal (the latter being the primary and the former the secondary fund for this purpose), without any regard to the person who might be directed as executor, or otherwise, to pay them; except that he was to be deemed the immediate trustee, or conduit, through whom the duty was to be discharged. But whether this suggestion be well founded or not, it is certain that the more recent authorities do not appear to place any stress upon the fact that the executor is himself directed to pay the debts, if he be also devisee of the estate, or residuary legatee and devisee, as well as executor; for in such a case the presumption that he is solely to pay out of the personal estate or funds in his hands as executor is repelled by showing that the real estate is also under his control and management. Therefore where the testator by his will directed all his just debts and funeral charges to be paid and satisfied by his executor thereinafter named, and then after giving legacies and an annuity he gave all his real and personal estate to his nephew A, and absolutely appointed him executor, it was held that the debts were chargeable on the real estate.[1] So where the testator ordered all his just debts and funeral charges, and the charges of proving his will, to be fully discharged by his executor thereinafter named, and after giving several pecuniary legacies he devised to his son A all his copyhold estates which had been surrendered to the use of his will, and gave him the rest and residue

real estate was charged with the debts. Kidney *v.* Coussmaker, 1 Ves. Jr. 436. A devise of the residue of the testator's estate, with a previous direction to pay debts and legacies, will amount to a charge upon the real estate. Hassel *v.* Hassel, 2 Dick. R. 526; Aubrey *v.* Middleton, 2 Eq. Abr. 497, pl. 16; Bench *v.* Biles, 4 Madd. R. 187; 2 Powell on Devises, by Jarman, ch. 34, pp. 657, 661. The distinctions in many of the cases are extremely nice, and it is not practicable to give them at large without occupying too large a space in this work. See also Henvell *v.* Whitaker, 3 Russ. R. 343; Dover *v.* Gregory, 10 Simons, R. 393. See Corwine *v.* Corwine, 8 C. E. Green, 368; Wertz's Appeal, 69 Pa. St. 173; Brisben's Appeal, 70 Pa. 405.

[1] Henvell *v.* Whitaker, 3 Russ. R. 343; Finch *v.* Hattersley, 3 Russ. R. 345, note.

of his estate and effects of what nature or kind soever, and appointed him sole executor and residuary legatee, it was held that the debts were chargeable upon the real estate.[1]

§ 1656. **Assumption of Another's Debt as an Implied Lien or Trust.** — Another class of implied liens or trusts arises, or rather is continued by implication, where a party who takes an estate which is already subject to a debt or other charge makes himself personally liable by his own express contract or covenant for the

[1] Dover *v.* Gregory, 10 Simons, R. 393, 399. On this occasion the Vice-Chancellor (Sir L. Shadwell) said: "I perfectly well recollect that the case of Henvell *v.* Whitaker was argued with great earnestness on both sides, and I must say that in my opinion the decision in that case is right. I am willing that this will should be construed according to the intention of the testator. First of all, there is a plain intention that the executor should pay the debts and the funeral expenses, of course; and it does not amount to an evidence of intention that he is not to pay the debts, because he is to pay the funeral expenses. And as the testator says, 'I order and ordain that all my just debts and funeral expenses, and the charges of proving this my will, shall be fully discharged by my executor hereinafter named,' he denotes an intention that his executor should pay his debts, and should pay them by the means which the testator has supplied him with, either by a gift of property or by suffering it to descend. If the heir had been a stranger, there would have been sufficient in the will to enable him to take the fee. There is an intention that he should pay the debts; and the fact that the testator gives the copyholds without words of inheritance shows that he meant that the debts should be paid out of the copyholds. The court in construing a will is bound to give a meaning to every word if it can, and not to reject any words as being surplusage if it can be avoided. I admit that the expression 'residuary legatee' ordinarily would apply to a person who is to take the undisposed-of personal estate. But where the testator has given all the rest and residue of his estate and effects whatsoever or wheresoever, or of what nature or kind soever, unto and to the use of his son, John Ayer, and then says, 'whom I hereby appoint sole executor and residuary of this my will', those words may be fairly construed to mean that he intended his son should take all his property, of every description, which he had not before given. I think that I am bound by the case of Henvell *v.* Whitaker to hold that the debts in this case are charged on the copyholds." See Parker *v.* Marchant, 1 Younge & Coll. New R. 290. See, when the personal estate is deemed exonerated by a charge of debts upon the real estate, Colvile *v.* Middleton, 3 Beav. R. 570. See Harper *v.* Munday, 7 DeG. M. & G. 369; ante, § 1654. "Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or in trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, as in Henvell *v.* Whitaker, 3 Russ. 343, or only a life interest, as in Finch *v.* Hattersley, Ib. 345 *a*, or no beneficial interest at all, as in Hartland *v.* Murrell, 27 Beav. 204." Fry, J., in Bailey *v.* Bailey, 12 Ch. D. 268, 273; Jessel, M. R., in In re Tanqueray-Williaume, 20 Ch. D. 465, 476. See the last case and Stroughill *v.* Anstey, 1 DeG. M. & G. as to the time when it may be presumed by a purchaser that the debts have been paid.

same debt or charge. In such a case the original lien or charge is not only not [1] displaced thereby, but the real estate is treated throughout as the primary fund. So that in case of the death of the debtor, as between his heirs, devisees, and distributees the debt if paid out of his personal assets will still be deemed a primary charge upon the real estate, and as such followed in favor of creditors, legatees, and others entitled to the personal assets.[2] Thus for example where a settler upon a marriage settlement created a trust term in his real estate for the raising of portions, and also covenanted to pay the amount of the portions, it was held to be a charge primarily on the real estate, and the personal estate to be auxiliary only. On that occasion it was said by the Master of the Rolls (Sir William Grant): "It is difficult to conceive how a man can make himself a debtor (although by the same instrument he charges the real estate) without subjecting his personal assets in the first instance to the payment of the debt. Here the settler certainly makes himself a debtor by his covenant. Where a person becomes entitled to an estate subject to a charge and then covenants to pay it, the charge still remains primarily on the real estate, and the covenant is only a collateral security; because the debt is not the original debt of the covenantor." [3]

[1] This word, which appears in editions of the time of the author, has disappeared from editions since his death. Of course it belongs in the text.

[2] 1 Madd. Ch. Pr. 397; Ante, §§ 574, 1003.

[3] Lechmere *v.* Charlton, 15 Ves. 197, 198; McLearn *v.* McLellan, 35 U. S. 625, 9 L. Ed. 559; 1 Madd. Ch. Pr. 397. There are many other cases in which, although the party covenants to pay money, the land is treated as the primary fund to be applied to discharge the debt. Some of these cases have already been mentioned under the head of Marshalling Assets, in the first volume of this work. A curious question arose in the case of McLearn *v.* McLellan, supra. There A has purchased a plantation on which he put slaves, and paid part of the purchase-money in his lifetime and gave a judgment for the residue. He then died, leaving his son B his devisee of the land and slaves. B, in order to obtain possession of the land mortgaged, gave his own bond, secured by a mortgage on the land and slaves, for the remaining unpaid part of the judgment. B afterwards died, leaving a part of the debt unsatisfied, and afterwards the mortgage was foreclosed, and the debt paid by a sale of the lands decreed on the foreclosure. The next of kin of A were aliens, capable of taking his personal estate but incapable of taking lands; and the latter therefore descended to other persons who were citizens. One question was, whether under all the circumstances the unpaid purchase-money ought to be borne out of the personal estate or out of the real estate of B. The heirs of the real estate insisted that it ought to be paid out of the personal estate, and so they were entitled to come on the personal estate for the amount for which the land was sold. The court held that it ought to be apportioned on both funds. Mr. Justice McLean, in delivering the opinion of the

§ 1657. **Same.** — It may be considered as a general rule (though not as a universal rule) that a covenant by a settler to convey and

court, said: "The important question must now be considered, how this mortgage debt shall be discharged. Shall it be paid out of the real estate, or out of the personal, or out of both? That the land should not be wholly exempt from this incumbrance is clear by every rule of equity which applies to cases of this description. In addition to the consideration that the mortgage binds the land, the fact that a considerable part of the debt was incurred for its purchase cannot be wholly disregarded. Nor would it comport with the principles of equity to make the whole debt a charge upon the land to the exemption of the personal property, as the lien of the mortgage covers the personal as well as the real property, and as at least a part of the debt was contracted on other accounts than the purchase of the land. The rights of the foreign heirs, under the laws of Georgia, are to be regarded equally as those of the domestic heirs. Each have interests in the property of the deceased, which are alike entitled to the consideration and protection of a Court of Chancery. Suppose James H. M'Learn had died leaving a will, by which he devised different tracts of land to different persons capable of taking by devise, and the entire real estate was encumbered by a mortgage or other lien, which, after the will took effect, had been paid by sale of one of the tracts of land. Could a Court of Chancery hesitate, in such a case, to require a contribution from the devisees not affected by the sale, so as to make the lien a charge upon all the land? The plainest dictates of justice would require this, whether regard be had to the rights of the devisees or to the intention of the testator. And is not the case put analogous to the one under consideration? By the act of the elder M'Learn, his property, both real and personal, was incumbered. The heirs, both foreign and domestic, of the younger M'Learn, who take this property, take it charged with the continued incumbrance. That James M'Learn had a right, and was bound to continue this charge upon his property, no one will dispute. He might have left the debt, with the consent of the creditor, if there had been no prior lien, to be discharged out of his estate, as the law authorized; and in such case it would have been payable out of the personal estate. Or he might have made the debt a specific charge on his personal property or on his real. But he did neither. He charged its payment, in pursuance of the judgment lien, on his property, both personal and real. This lien, as between the distributees, fixes the rule by which their rights must be decided. The domestic heirs cannot claim to receive the land free from the lien of the mortgage, nor can the foreign heirs claim the personal property exempt from it. In equity it would seem that each description of heirs should contribute to the payment of the mortgage debt in proportion to the fund received. This rule, while it would do justice to the parties, would give effect to the intention of the ancestor. That intention is clearly shown by the lien created on the property, and by the rules of equity such intention must be regarded. The decision of this case must rest upon familiar and well-established principles in equity; and these principles will be shown by a reference to adjudicated cases. In the case of Pollexfen *v.* Moore, 3 Atk. 272, it appears Moore in his lifetime agreed to purchase an estate from the plaintiff for £1,200, but died before he had paid the whole purchase-money. Moore, by will, after giving a legacy of £800 to the defendant, his sister, devises the estate purchased, and all his personal estate, to John Kemp, and makes him his executor. The executor commits a devastavit on the personal estate, and dies, and

the estate descends upon his son and heir at law. Pollexfen brought his bill against the representative of the real and personal estate of Moore and Kemp, to be paid the remainder of the purchase-money. Mrs. Moore, the sister and legatee of Thomas Moore, brings her cross-bill, and prays, if the remainder of the purchase-money should be paid to Pollexfen out of the personal estate of Moore and Kemp, that she may stand in his place, and be considered as having a lien upon the purchased estate for her legacy of £800. And the Lord Chancellor said 'that the estate which has descended from John Kemp, the executor of Moore, upon Bayle Kemp, comes to him liable to the same equity as it would have been against the father, who has misapplied the personal estate; and in order to relieve Mrs. Moore I will direct Pollexfen to take his satisfaction upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and will leave this last fund open, that Mrs. Moore, who can at most be considered only as a simple contract creditor, may have a chance of being paid out of the personal assets.' This case shows that in England the rule which requires the personal property to be first applied in the payment of debts is deviated from where the justice of the case and the rights of parties interested require it. Had the debt due to Pollexfen been directed to be paid out of the personal property, it would have left no part of that fund to pay the legacy of Mrs. Moore; and for this reason the debt was decreed to be paid out of the land. Now if the mortgage debt in the present case shall be directed to be paid out of the personal fund, it would defeat the foreign heirs, whose claim to the property under the law of Georgia, cannot be less strong than a bequest. In 3 Johns. Ch. Rep. 252, it is laid down as between the representatives of the real and personal estate, that the land is the primary fund to pay off a mortgage. And in 2 Bro. 57, Lord Kenyon, as Master of the Rolls, laid down the same rule: that where an estate descends or comes to one subject to a mortgage, although the mortgage be afterwards assigned, and the party enter into a covenant to pay the money borrowed, yet that shall not bind his personal estate. There is no doctrine better established than that the purchase of land subject to a mortgage debt does not make the debt personal; and on the question being raised, such debt has been uniformly charged on the land. And this principle is not changed where additional security has been given. In the case of Evelyn *v.* Evelyn, 2 P. Wms. 659, where A mortgaged the land for £1,500, his son B covenanted with the assignee of the mortgagee to pay the money. He succeeded to the premises after the death of his father, and died intestate. The question was, whether his personal estate under the covenant should be applied in payment of the mortgage; and it was decided that the land should be charged, and the covenant was only considered as additional security. In the case of Waring *v.* Ward, 7 Ves. 334, Lord Eldon says: 'The principle upon which the personal estate is first liable in general cases is that the contract primarily is a personal contract, the personal estate receiving the benefit; and being primarily a personal contract, the land is bound only in aid of the personal obligation to fulfil that personal contract.' It has long been settled therefore that upon a loan of money, the party meaning to mortgage in aid of the bond, covenant, or simple contract debt, if there is neither bond nor covenant, his personal estate, if he dies, must pay the debt for the benefit of the heir. But suppose a second descent cast, and the question arises, the personal estate of the son and his real estate having descended to the grandson; then the personal estate of the son shall not pay it, as it never was the personal contract of the son. And this is the well-established rule on this subject. If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the

personal contract; and on the decease of the mortgagor his personal estate will be considered the primary fund, because the contract was personal. But if the estate descend to the grandson of the mortgagor, then the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor. And so if the contract was in regard to the realty, the debt is a charge on the land. It is in this way that a Court of Chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees. In the case under consideration the mortgage was given by James H. M'Learn, but was not given to secure a debt created by him. The mortgage merely changed the security, but did not affect the extent of the judgment lien. And this judgment was obtained chiefly for the purchase-money of the estate. In effect the debt for which the judgment was obtained against Archibald M'Learn, and for which the mortgage was given, constituted an equitable lien on the land; and had the mortgage covered only the land, it must have been considered the primary fund. The debt for which the mortgage was given was not the personal contract of James H. M'Learn, but the contract of his ancestor in the purchase of the estate. But if the contract was personal, and might have been a charge on the personal estate devised to James H. M'Learn, yet the character of the debt in this respect is changed in the hands of the present heirs. In the language of Lord Eldon this debt cannot be a charge on the personalty, because it was not created by the personal contract of James H. M'Learn. This, under the authorities cited, would be the rule for the payment of the mortgage debt if James H. M'Learn had not executed a mortgage on the personal as well as the real property, which as devisee he received from his father. This mortgage on the personal property cannot be considered in the light of additional security to the lien which before existed. If it could be considered in this light, the land would still be the primary fund, and the personal mortgage as surety or auxiliary to the land. But this mortgage can in no respect be considered as additional security. It might have been so considered in reference to the equitable lien of the vendor for the purchase-money, as such lien was limited to the land; but the lien of the judgment obtained against the ancestor of James H. M'Learn, and for which the mortgage was substituted, extended, as before remarked, to the personal as well as real estate of the defendant. The debt then for which the mortgage was given did not arise from the personal contract of James H. M'Learn, but by the contract of his ancestor; and the mortgage was given in discharge of the judgment. This created no new lien upon the personal property. It came to James H. M'Learn under the will of his father, subject to the lien of the judgment. The mortgage then did not and was not intended to create any new charge upon the personalty, but to continue in a different form that which already existed. In this view the charge upon the personal estate can no more be disregarded than the charge upon the real; and in this respect this case differs from the cases referred to. The charge on both funds under the mortgage may be compared to a will devising the funds to the respective heirs now before the court, as the statute provides, and leaving the debts as a charge upon his real and personal property. Can any one doubt that such a bequest would be considered by a Court of Chancery as a charge upon both funds? Now although James H. M'Learn has made no will, as in the supposed case, yet he gave a mortgage to continue the charge on the personal property, which existed under the judgment; and the law of Georgia fixes the rule of descent. This act of the ancestor, connected with the Georgia law of descent, gives as decided and clear a direction to the property, both real and personal, under the mortgage, as if in his last will James H. M'Learn had so devised it. Both

settle lands (not specifying any in particular), will not constitute a specific lien on his lands; and the covenantee will be deemed a

funds being charged with the mortgage debt must be applied to its payment in proportion to their respective amounts. And as the property, both real and personal, has been converted into money, the proportionate part of each can be applied to this payment without difficulty." See also Berrington *v.* Evans, 3 Younge & Coll. 384, 392.

At common law there were two distinct cases of the sort referred to in the text: —

1. The devisor himself creates a charge upon the land devised by him. In that case his personalty still was to pay off the charge, unless he manifested in the will a different purpose. Hewes *v.* Dehon, 3 Gray, 205, 208. If then the creditor enforced payment out of the land, a trust arose against the legatees and distributees to make the devisee good. And the case would be similar where the party who created the incumbrance died intestate; if the land was taken, the heir would have the benefit of the trust. See Hewes *v.* Dehon, supra.

2. The devisor (or intestate) acquires an estate already incumbered. In that case the land devised (or descended) subject to the charge must, both at common law and by statute, have had to pay off the same, unless the decedent manifested a different purpose. Hewes *v.* Dehon, supra; McLenahan *v.* McLenahan, 3 C. E. Green, 101. If in this case the creditor has enforced payment out of the personalty, a trust arises in favor of the legatees or distributees, as affected, against the devisee (or heir). But if in this second case the devisor entered into any personal undertaking with the creditor to pay off the charge, this at common law shifted the burden from the land to the personal estate bequeathed. It was not enough however to charge the personalty that the devisor might have been compelled to pay off the incumbrance between himself and the original debtor who had created the charge. Scott *v.* Beecher, 5 Madd. 96. That would always be the case between the grantor and the grantee of an incumbered estate. Campbell *v.* Shrum, 3 Watts, 60; Trevor *v.* Perkins, 5 Whart. 244. To have the effect referred to, the devisor must have made himself by contract personally and directly liable at law for the debt, to the owner of the incumbrance. Even giving a covenant or bond for the purpose would not be enough "unless accompanied with circumstances showing a decided intention to make thereby the debt personally his own." Cumberland *v.* Codrington, 3 Johns. Ch. 229, 257, 272; Tweddell *v.* Tweddell, 2 Bro. C. C. 101, 152; Butler *v.* Butler, 5 Ves. 534.

The rule of the common law has however been changed by statute in England and in some of the States of the Union. By that change the land must pay off the incumbrance in both cases (i. e. whether the devisor or intestate created the incumbrance or acquired the land after it was created), unless in the case of a will there shall be a different expression of intention, or, in New York, an "express direction in the will." 17 & 18 Vict. ch. 113; 30 & 31 Vict. ch. 69; 40 & 41 Vict. ch. 34; 1 Rev. Stats. N. Y. 749, ed. 1829; 1 Edmonds's Stats. at Large, 790, § 4.

It is not enough to charge the personalty under such statutes, even where the debt is the proper debt of the devisor, that the devisor has directed his executor to pay all his debts. Woolstencroft *v.* Woolstencroft, 6 Jur. (N. S.) 866. And the same would be true of a residuary gift of real and personal estate "subject to the payment of debts." Lewis *v.* Lewis, L. R. 13 Eq. 218.

The same sort of implied trust from the disturbance of the estate may

creditor by specialty only.[1] But in some cases of this sort in favor of a dowress Courts of Equity have established a lien upon real property by what has been called a very subtle equity, where perhaps it would be difficult to maintain it in ordinary cases. Thus where a man before marriage gave a bond to convey sufficient freehold or copyhold estates to raise £600 per annum for his intended wife in bar of dower, and the intended wife, by a memorandum subscribed to the bond, declared her free acceptance of the jointure in bar and satisfaction of dower, and the marriage took effect, and the husband died without having conveyed any such estates, it was decreed that she should be deemed specialty creditor, and entitled to be paid the arrears of her annuity out of his personal estate in the course of administration; and if that was not sufficient, then out of the real estates in the settlement of which he was tenant in tail, provided such deficiencies did not exceed the amount of the dower which she would

arise of course where there is no expression of intention, direct or indirect, on the part of the testator or intestate. In such a case the intendment of the law in regard to the settlement of the estate supplies the place of the decedent's will, and governs between the beneficiaries. And if between them one branch of the estate has been unduly affected by the payment of debts, a trust will be implied in favor of those who have suffered, requiring those who have had the temporary advantage to make good the situation. See ante, §§ 678, 761, 772.

[1] Sugden on Vendors, ch. 15, § 4, p. 633 (7th ed.); Freemoult *v.* Dedire, 1 P. Will. 429; Finch *v.* Earl of Winchelsea, 1 P. Will. 277; Williams *v.* Lucas, 1 P. Will. 430, Mr. Cox's note (1); s. c. 2 Cox, R. 160; Berrington *v.* Evans, 3 Younge & Coll. 384, 392. Mr. Fonblanque says (1 Fonbl. Eq. B. 1, ch. 5, § 7, note *d*) that a covenant to settle or convey particular lands will not create at law a lien upon the land; but that in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for a valuable consideration, and without notice of such covenant. For which he cites Finch *v.* Earl of Winchelsea, 1 P. Will. 282; Freemoult *v.* Dedire, 1 P. Will. 429; Jackson *v.* Jackson, 4 Bro. Ch. R. 462 (which turned on the execution of a power), and Coventry *v.* Coventry, 2 P. Will. 222; 1 Str. R. 596; Gilb. Eq. R. 160; s. c. at the end of Francis's Maxims in Equity (ed. 1739). He adds in the next note (2 Fonbl. Eq. B. 1, ch. 5, § 7, note *e*) that a general covenant to settle lands of a certain value, without mentioning any lands in particular, will not create a specific lien on any of the lands of the covenantor, and therefore cannot be specifically decreed in equity (Freemoult *v.* Dedire, 1 P. Will. 429); but if the covenantor expressly declare the settlement to be in execution of his power over lands, though the particular land to be charged be not specified, equity will ascertain them. For which he cites Coventry *v.* Coventry, ubi supra. This apparent exception proceeds upon the ground that the power, being to be executed out of particular lands, is a specification when executed of the particular lands to be charged. But see ante, § 1131, p. 472, and note 1.

have been entitled to thereout in case she had not accepted the annuity for her life.[1]

§ 1658. **Liability by Contract for Debt Due Originally by Another, as a Trust.** — Another class of implied trusts which may be mentioned under this head is that which arises under contract or otherwise by operation of law from a claim which may be directly enforced at law against one party, but to the due discharge of which another party is ultimately liable. In such a case a Court of Equity treats it as a trust by the party ultimately liable, which may be directly enforced in favor of the party ultimately entitled to the benefit of it. In other words a Court of Equity will make the party immediately liable, who is or may be at law or in equity made ultimately liable. Thus for example if a chose in action not negotiable at all or not negotiable by the local law, except to create a legal right of action between the immediate debtor or indorser and his immediate indorsee or assignee, should be passed to a remote assignee or indorsee, the latter would be entitled in equity directly to sue the party who was ultimately or circuitously liable for the debt to the antecedent holder or creditor.[2] Upon the same ground if a trust is created for the benefit of a party who is to be the ultimate receiver of the money or other thing which constitutes the subject-matter of the trust, he may sustain a suit in equity to have the money or other thing directly paid or delivered to himself;[3] for in such a case he is entitled to dispose of it as the absolute owner.

§ 1659. **Duty of Devisee to Refund Amount Over-paid to Him, as a Trust.** — Another illustration of implied trusts may be found in the common case of a suit in equity by a creditor of an estate to recover his debt from legatees or distributees who have received payment of their claims from the executor (acting by mistake but bona fide and without fault) before a due discharge of all the debts. In such a case the executor who has so distributed the assets may be sued at law by the creditor. But the legatees and distributees, although there was an original deficiency of assets, are not at law suable by the creditor. Yet he has a clear right in

[1] Foster *v.* Foster, 3 Bro. Ch. R. 489, 493; s. c. under the name of Tew *v.* Earl of Winterton, 1 Ves. Jr. 451; Sugden on Vendors, ch. 15, § 4, pp. 633, 634 (7th ed.); 1 Madd. Ch. Pr. 471, 472. See ante, § 1231.

[2] Riddle *v.* Mandeville, 9 U. S. 322, 3 L. Ed. 114.

[3] Russel *v.* Clarke's Execrs., 11 U. S. 69, 3 L. Ed. 271; McCall *v.* Harrison, 1 Brock. Cir. R. 126; ante, §§ 790 to 793, 1613.

See Buck *v.* Swasey, 35 Me. 41, 52; Cromwell *v.* Brooklyn Ins. Co., 44 N. Y. 42; Powers *v.* Powers, 28 Wis. 659; Exchange Bank *v.* Rice, 107 Mass. 37, 42.

equity, in such a case, to follow the assets of the testator into their hands as a trust fund for the payment of his debt. The legatees and distributees are in equity treated as trustees for this purpose; for they are not entitled to anything except the surplus of the assets after all the debts are paid. Besides, they, in the case put, being ultimately responsible to pay the debt to the executor out of such assets, if the executor should be compelled to pay it to the creditor by a suit at law, may be made immediately liable to the creditor in equity.[1] But the other is the more broad and general ground, as the creditor may sometimes have a remedy where the executor, if he has paid over the assets, might not have any against the legatees or distributees.[2]

§ 1660. **The Capital of a Corporation as a Trust Fund for the Benefit of Creditors.** — Perhaps to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of constructive trusts by operation of law) we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien or right of priority of payment on it, in preference to any of the stockholders in the corporation. Therefore if a corporation is dissolved, the contracts of such corporation are not thereby deemed extinguished, but they survive the dissolution of the corporation, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of a bona fide purchaser; for such property will be held affected with a trust primarily for the creditors of the company, and subject to their right secondarily for the stockholders in proportion to their interests therein.[3] Upon the like

[1] Riddle *v.* Mandeville, 9 U. S. 322, 3 L. Ed. 114; Culbreath *v.* Culbreath, 7 Ga. 64, 50 Am. Dec. 375; Cline *v.* Waters, 28 Ky. L. Rep. 679, 90 S. W. 231; Aull *v.* St. Louis Trust Co., 149 Mo. 1, 50 S. W. 289; Brinkworth *v.* Hazlett, 64 Neb. 592, 90 N. W. 537; Atkinson *v.* Farmer, 6 N. C. 291; Lyle *v.* Siler, 103 N. C. 261, 9 S. E. 491; McClung *v.* Sieg, 54 W. Va. 467, 46 S. E. 210, 66 L. R. A. 884.

[2] Anon. 1 Vern. 162; Newman *v.* Barton, 2 Vern. 205; Noel *v.* Robinson, 1 Vern. 94, and Mr. Cox's note (1).

[3] Mumma *v.* The Potomac Co., 33 U. S. 286, 8 L. Ed. 945; Sawyer *v.* Hoag, 84 U. S. 610, 21 L. Ed. 731; Putnam *v.* New Albany R. Co., 83 U. S. 390, 21 L. Ed. 361; Curran *v.* State of Arkansas, 56 U. S. 304, 14 L. Ed. 705; Curry *v.* Woodward, 53 Ala. 371; Reid *v.* Eatonton Mfg., Co., 40 Ga. 98, 2 Am. Rep. 563; Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412; Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74; Adler *v.* Milwaukee Patent Brick Co., 13 Wis. 57.

ground the capital stock of an incorporated bank is deemed a trust fund for all the debts of the corporation; and no stockholder can entitle himself to any dividend or share of such capital stock until all the debts are paid. And if the capital stock should be divided, leaving any debts unpaid, every stockholder receiving his share of the capital stock would in equity be held liable pro rata to contribute to the discharge of such debts out of the fund in his own hands.[1] This however is a remedy which can be obtained in equity only; for a Court of Common Law is incapable of administering any just relief, since it has no power of bringing all the proper parties before the court, or of ascertaining the full amount of the debts, the mode of contribution, the number of the contributors, or the cross equities and liabilities which may be absolutely required for a proper adjustment of the rights of all parties as well as of the creditors.[2]

§ 1661. **Partnership Assets Regarded as a Trust Fund for Payment of Creditors.** — A case of an analogous nature is that of partnership property on which the joint creditors in case of insolvency are deemed in equity to have a right of priority of payment before the private creditors of any separate partner. The joint property is deemed a trust fund, primarily to be applied to the discharge of the partnership debts against all persons not having a higher equity.[3] A long series of authorities (as has been truly said) has established this equity of the joint creditors to be worked out through the medium of the partners;[4] that is to say,

[1] Wood *v.* Dummer, 3 Mason, R. 308; Vose *v.* Grant, 15 Mass. R. 505, 517, 522; Spear *v.* Grant, 16 Mass. R. 9, 15; Curson *v.* African Co., 1 Vern. R. 121; s. c. Skinner, R. 84.

[2] Ibid. So the officers of a corporation may be restrained from applying the property of the corporation to any illegal purpose, and of course compelled to make restitution when any such illegal application has been made. Frost *v.* Belmont, 6 Allen, 152; Citizens' Loan Assn. *v.* Lyon, 29 N. J. Eq. 78. See further as to what will justify interference Merchants' Line *v.* Waganer, 71 Ala. 581; Dimpfell *v.* Ohio R. Co., 110 U. S. 209; 28 L. Ed. 121, 3 S. Ct. Rep. 573, Detroit *v.* Dean, 106 U. S. 537, 27 L. Ed. 300, 1 S. Ct. Rep. 560; Hawes *v.* Oakland, 104 U. S. 450, 26 L. Ed. 827; Brewer *v.* Boston Theatre, 104 Mass. 378.

The relation of trustees and cestuis que trust subsists between directors of companies and the shareholders. Flitcroft's Case, 21 Ch. D. 519, 525. See Vol. 1, p. 332, note.

[3] Ante, §§ 1606, 1650; State *v.* Emmons, 99 Ind. 452; Holmes *v.* Miller, 19 Ky. L. Rep. 660, 41 S. W. 432; In re Edwards' Est., 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681; In re Stewart's Est., 193 Pa. St. 347, 44 Atl. 434; Maddocks *v.* Skinker, 93 Va. 479, 25 S. E. 535; Lewis *v.* Crane, 50 W. Va. 239, 40 S. E. 347.

[4] Campbell *v.* Mullet, 2 Swanst. R. 574; West *v.* Skip, 1 Ves. 237, 455; Ex parte Ruffin, 6 Ves. 126 to 128; Wood *v.* Dummer, 3 Mason,

the partners have a right inter sese to have the partnership property first applied to the discharge of the partnership debts, and no partner has any right except to his own share of the residue; and the joint creditors are in case of insolvency substituted in equity to the rights of the partners as being the ultimate cestuis que trust of the fund to the extent of the joint debts. The creditors indeed have no lien, but they have something approaching to a lien; that is, they have a right to sue at law, and by judgment and execution to obtain possession of the property;[1] and in equity they have a right to follow it as a trust into the possession of all persons who have not a superior title. But in the mean time the creditors cannot prevent the partners from transferring it by a bona fide alienation.[2]

§ 1662. **Same.** — Having considered some of the more important classes of implied trusts arising from the presumed intention of the parties, we may next pass to the consideration of those implied trusts (or perhaps, more properly speaking, those constructive trusts) which are independent of any such intention and are forced upon the conscience of the party by the mere operation of law. Some cases of this sort have been already incidentally mentioned under former heads. But a concise review of the general doctrine seems indispensable in this place to a thorough understanding of equitable jurisdiction.

§ 1663. **Receipt of Money by One Who Cannot Conscientiously Withhold it, as a Trust.** — One of the most common cases in which a Court of Equity acts upon the ground of implied trusts in invitum is where a party has received money which he cannot conscientiously withhold from another party.[3] It has been well remarked that the receiving of money which consistently with conscience cannot be retained is in equity sufficient to raise a trust in favor of the party for whom or on whose account it was received.[4] This

R. 312, 313; Murray *v.* Murray, 5 John. Ch. R. 60; Taylor *v.* Fields, 4 Ves. 396; Young *v.* Keighley, 15 Ves. 557; ante, §§ 1606, 1650.

[1] Ibid; Ex parte Ruffin, 6 Ves. 126 to 128; Ex parte Williams, 11 Ves. 3, 5, 6; Ex parte Kendall, 17 Ves. 521, 526.

[2] Ante, § 918.

[3] Com. Dig. Chancery, 2 A. 1; Id. 4 W. 5.

[4] Fonbl. Eq. B. 2, Ch. 1, § 1, note *b*.

See ante, § 1610; Scott *v.* Rand, 118 Mass. 215; Child *v.* Thorley, 16 Ch. D. 151. Thus one who has a debt due from a trustee or an executor who is a trustee, and, knowing that it is a private debt, should apply, or allow to be applied, the estate of the testator or a trust fund of any description in payment of that debt, that being in no way connected with the trust fund, must repay all the money so applied. Child *v.* Thorley, 16 Ch. D. 151; Wilson *v.* Moore, 1 Mylne & K. 337.

Town of Bristol *v.* Town of New Britain, 71 Conn. 201, 41 Atl. 548;

is the governing principle in all such cases. And therefore whenever any interest arises, the true question is, not whether money has been received by a party of which he could not have compelled the payment, but whether he can now, with a safe conscience, ex æquo et bono retain it.[1] Illustrations of this doctrine are familiar in cases of money paid by accident, or mistake, or fraud.[2] And the difference between the payment of money under a mistake of fact, and a payment under a mistake of law, in its operation upon the conscience of the party, presents the equitable qualifications of the doctrine in a striking manner.[3]

§ 1664. **Same.** — It is true that Courts of Law now entertain jurisdiction in many cases of this sort, where formerly the remedy was solely in equity; as for example in an action of assumpsit for money had and received, where the money cannot conscientiously be withheld by the party;[4] following out the rule of the civil law, "Quod condictio indebiti non datur ultra quam locupletior factus est qui accepit."[5] But this does not oust the general jurisdiction of Courts of Equity over the subject-matter, which had for many ages before been in full exercise, although it renders a resort to them for relief less common as well as less necessary than it formerly was.[6] Still however there are many cases of this sort where it is indispensable to resort to Courts of Equity for adequate relief, and especially where the transactions are complicated, and a discovery from the defendant is requisite.[7]

§ 1665. **Receipt of Property from Trustee, Knowing It Is Had in Violation of the Trust.** — Another instance perhaps more comprehensive in its reach in which Courts of Equity act by creating trusts in invitum is where a party purchases trust property, know-

Hulse *v.* American Exp. Co., 65 Ill. App. 596; Blanchard *v.* Low, 164 Mass. 118, 41 N. E. 118; Lane *v.* Pere Marquette Boom Co., 62 Mich. 63, 28 N. W. 786; Truax *v.* Bliss, 139 Mich. 153, 102 N. W. 635, 11 Detroit Leg. N. 764; Scott *v.* Ford, 45 Oreg. 531, 78 Pac. 742, 68 L. R. A. 469; Dotterer *v.* Scott, 29 Pa. Super. Ct. Rep. 553.

[1] Ibid.

[2] Or theft. Equity will e. g. charge land, paid for in part with money known to have been stolen from a bank, with a trust in favor of the bank. National Bank *v.* Barry, 125 Mass. 20. See Newton *v.* Porter, 69 N. Y. 133.

[3] 2 Fonbl. Eq. B. 2, Ch. 1, § 1, note (*b*).

[4] Farmer *v.* Arundel, 2 W. Black. R. 824; Moses *v.* Macferland, 2 Burr. 1012; Bize *v.* Dickason, 1 Term. R. 185; Bilbie *v.* Lumley, 2 East, R. 469.

[5] 2 Burr. 1011. See also Dig. Lib. 12, tit. 6, passim.

[6] Ante, § 60.

[7] 2 Fonbl. Eq. B. 2, Ch. 1, § 1, note (*b*).

ing it to be such, from the trustee in violation of the objects of the trust. In such a case Courts of Equity (as we have before had occasion to state[1]) force the trust upon the conscience of the guilty party, and compel him to perform it, and to hold the property subject to it, in the same manner as the trustee himself held it.[2] It has been truly said by an eminent judge that the only thing to be inquired of in a Court of Equity in cases of this sort is, whether the property bound by the trust has come into the hands of persons who were either compellable to execute the trust or to preserve the property for the persons entitled to it.[3] It is upon this ground and this alone that persons colluding with the executor or administrator in a known misapplication of the assets of the estate are made responsible for the property in their hands; for they are treated as purchasers with notice, and thus as mere trustees of the parties who are entitled to the assets, the latter being a trust fund under the administration of the executor or administrator.[4]

§ 1666. **Same.** — Upon similar principles, wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner or cestui que trust.[5] The general

[1] Ante, §§ 395 to 405; 4 Kent, Comm. Lect. 60 (4th ed.). See also 2 Fonbl. Eq. B. 2, ch. 6, § 1, note (*a*); Id. § 2, note (*h*). See also Powell *v.* Monson and Brimfield Manuf. Co., 3 Mason, R. 347; Com. Dig. Chancery, 4 W. 28.

[2] 2 Madd. Ch. Pr. 103, 104; Jeremy on Eq. Jurisd. B. 2, ch. 3, pp. 281, 282; ante, § 395; Adair *v.* Shaw, 1 Sch. & Lefr. 243, 262; Mechanics' Bank of Alexandria *v.* Seton, 26 U. S. 309, 7 L. Ed. 152; Wilson *v.* Mason, 5 U. S. 100, 2 L. Ed. 29; Russell *v.* Clark's Ex'rs, 11 U. S. 69, 3 L. Ed. 271; Murray *v.* Ballou, 1 John. Ch. R. 566.

See Child *v.* Thorley, 16 Ch. D. 151; Wilson *v.* Moore, 1 Mylne & K. 337; In re Hallett, 13 Ch. D. 696, 708; Stroud *v.* Gwyer, 6 Jur. (N. S.) 719; Smith *v.* Perry, 56 Ala. 266; Oliver *v.* Piatt, 44 U. S. 401, 11 L. Ed. 622; Reynolds *v.* Ætna L. Ins. Co., 28 App. Div. 591, 51 N. Y. Supp. 446; Schwartz *v.* Gerhardt, 44 Oreg. 425, 75 Pac. 698; Skaggs *v.* Mann, 46 W. Va. 209, 33 S. E. 110.

[3] Lord Redesdale, in Adair *v.* Shaw, 1 Sch. & Lefr. 262. See also Leigh *v.* Macauley, 1 Younge & Coll. 265, 266.

[4] Hill *v.* Simpson, 7 Ves. 166.

[5] A fortiori if the property has been rightfully sold by an agent or trustee, if the proceeds of the sale can be distinctly and separately traced, the property belongs in equity and often in law to the principal. Thus for example if a factor sells goods consigned to him for sale, and takes notes for the purchase-money, those notes, if he fails, will belong to his principal and not to his own assignees or representatives. Ex parte Dumas, Atk. 232, 233; Scott *v.* Surman, Willes, R. 400; Thompson *v.* Perkins, 3 Mason, R. 232; Burdett *v.* Willett, 2 Vern. R. 638; Grigg *v.* Cocks,

proposition which is maintained both at law and in equity upon this subject is, that if any property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it or those who represent him in right (not being bona fide purchasers for a valuable consideration without notice) any more valid claim in respect to it than they respectively had before such change. An abuse of a trust can confer no rights on the party abusing it or on those who claim in privity with him.[1] This principle is fully recognized at law, in all cases where it is susceptible of being brought out, as a ground of action or of defence in a suit at law. In Courts of Equity it is adopted with a universality of application.[2]

§ 1667. **Same.** — Thus for instance if A is trusted by B with money to purchase a horse for him, and A purchases a carriage with that money in violation of the trust, B is entitled to the carriage and may, if he chooses so to do, sue for it at law.[3] So if A entrusts money with a broker to buy Bank of England stock for him, and he invests the money in American stocks, A is entitled to and may maintain an action at law for those stocks, in whosesoever hands he finds them, not being a purchaser for a valuable consideration without notice.[4] It matters not in the slightest degree into whatever other form different from the original the change may have been made, whether it be that of promissory notes, or of goods, or of stock; for the product of a substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such.[5] The right ceases only when the means of ascertainment fail; which of course is the case when the subject-matter is

4 Simon, R. 438; ante, § 1638; Wilkins *v.* Stearns, 1 Younge & Coll. New R. 431; Clapp *v.* Emery, 98 Ill. 523, 531; Smith *v.* Perry, 56 Ala. 266; Newton *v.* Porter, 69 N. Y. 133; National Bank *v.* Barry, 125 Mass. 20.

[1] Taylor *v.* Plumer, 3 M. & Selw. 574 to 576. See Ex parte Cooke, 4 Ch. D. 123. The judgment of Lord Ellenborough in this case is very masterly, and deserves an attentive perusal. Conard *v.* Atlantic Ins. Co., 26 U. S. 448, 7 L. Ed. 189; Oliver, &c. *v.* Piatt, 44 U. S. 401, 11 L. Ed. 622.

[2] Ibid.; Hassal *v.* Smithers, 12 Ves. 119; 2 Fonbl. Eq. B. 2, ch. 5, § 1, note (*c*); Murray *v.* Lylburn, 2 John. Ch. R. 441; Lewin on Trustees, ch. 11, § 2, pp. 201 to 204.

[3] Taylor *v.* Plumer, 3 Maule & Selw. 574, 575, 576.

[4] Fawcett *v.* Whitehouse, 1 Russ. & Mylne, 132, 149; Com. Dig. Chancery, 4 W. 30; Giddings *v.* Eastman, 5 Paige, R. 501. See Strond *v.* Gwyer, 6 Jur. U. S. 719.

[5] In re Hallett, 13 Ch. D. 696.

turned into money, and mixed and confounded in a general mass of property of the same description.[1]

§ 1668. **Same.** Cases may readily be put where this doctrine would be enforced in equity under circumstances in which it could not be applied at law. Thus for instance if a trustee in violation of his duty should lay out the trust money in land and take a conveyance in his own name, the cestui que trust would be without any relief at law. But a Court of Equity would hold the cestui que trust to be the equitable owner of the land, and would decree it to him accordingly; not upon any notion of his having ratified the act, but upon the mere ground of a wrongful conversion creating in foro conscientiæ a trust in his favor.[2]

§ 1669. **Any Profit Made by Trustee Belongs to Cestui Que Trust.** — Upon similar grounds, where a trustee or other person standing in a fiduciary relation makes a profit out of any transactions within the scope of his agency or authority, that profit will belong to his cestui que trust; for it is a constructive fraud upon the latter to employ that property contrary to the trust and to retain the profit of such misapplication; and by operation of equity the profit is immediately converted into a constructive trust in favor of the party entitled to the benefit.[3] For the like reason a trustee becoming a purchaser of the estate of his cestui que trust is deemed incapable of holding it to his own use, and it may be set aside by the cestui que trust. Nor is the doctrine confined to trustees strictly so called. It extends to all other persons standing in a fiduciary relation to the party, whatever that relation may be.[4]

[1] Giddings *v.* Eastman, 5 Paige, R. 561; May *v.* Le Claire, 78 U. S. 217, 20 L. Ed. 50; Copeman *v.* Gallant, 1 P. Will. 319; Ryall *v.* Rolle, 1 Atk. 172.

The receipt by a cestui que trust of benefits from a breach of trust which he induced the trustee to commit creates, it is held, no liability on the part of the cestui que trust to indemnify the trustee. Raby *v.* Ridehalgh, 7 DeG. M. & G. 104; Butler *v.* Butler, 5 Ch. D. 554, 557. See however Sawyer *v.* Sawyer, 28 Ch. D. 595, a case of a married woman cestui que trust, entitled for her separate use.

[2] Lane *v.* Dighton, Ambler, R. 409, 411, 413; 3 M. & Selw. 579; Lench *v.* Lench, 10 Ves. 511, 517; Boyd *v.* McLean, 1 John. Ch. R. 582; Lewis *v.* Madocks, 17 Ves. 57, 58; Phayre *v.* Peree, 3 Dow, R. 116; Sugden on Vendors, ch. 15, § 3, p. 628 (7th ed.); Liebman *v.* Harcourt, 2 Meriv. R. 513; Murray *v.* Lylburn, 2 John. Ch. R. 442, 443. Nor will the Statute of Limitations run in favor of a trustee against the cestui que trust ordinarily. Lister *v.* Pickford, 11 Jur. (N. S.) 649.

[3] Stroud *v.* Gwyer, 6 Jur. (N. S.) 719. See Ex parte Cooke, 4 Ch. D. 123.

[4] Smith *v.* Perry, 56 Ala. 266; Clapp *v.* Emery, 98 Ill. 523, 531; In

§ 1670. **Same.** — In cases of this sort the cestui que trust (the beneficiary) is not at all bound by the act of the other party. He has therefore an option to insist upon taking the property, or he may disclaim any title thereto and proceed upon any other remedies to which he is entitled either in rem or in personam.[1] The substituted fund is only liable to his option.[2] But he cannot insist upon opposite and repugnant rights. Thus for example if a trustee of land has sold the land in violation of his trust, the beneficiary cannot insist upon having the land and also the notes given for the purchase-money; for by taking the latter, at least so far as respects the purchaser, he must be deemed to affirm the sale. On the other hand, by following his title in the land he repudiates the sale.[3]

§ 1671. **Same.** — So where an executor or trustee instead of executing any trust as he ought, as by laying out the property either in well-secured real estates or in government securities, takes upon himself to dispose of it in another manner, or where, being intrusted with stock, he sells it in violation of this trust, — in every such case the parties beneficially entitled have an option to make him replace the stock or other property; or if it is for their benefit, to affirm his conduct and take what he has sold it for with interest, or what he has invested it in, and if he has made more, they may charge him with that also.[4] But they cannot insist upon repugnant claims, such as for instance in the case of a sale of stock to have the stock replaced, and to have interest (instead of the dividends), or to take the money and have the dividends as if it had remained stock.[5]

§ 1672. **Same.** — Wherever a trustee is guilty of a breach of trust by the sale of the trust property to a bona fide purchaser for a valuable consideration without notice, the trust in the property

re Hallett, 13 Ch. D. 696; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 3, pp. 141 to 149; Wormley *v.* Wormley, 21 U. S. 421, 5 L. Ed. 651; Bulkley *v.* Wilford, 2 Clark & Finnel. R. 177; Brown *v.* Lynch, 1 Paige, R. 147; Fellows *v.* Fellows, 4 Cowen, R. 682; Giddings *v.* Eastman, 5 Paige, R. 561.

[1] Docker *v.* Somes, 2 Mylne & Keen, 655; May *v.* Le Claire, 78 U. S. 217, 20 L. Ed. 50.

[2] Watts *v.* Girdlestone, 6 Beav. R. 188, 190, 191; post, § 1681.

[3] Murray *v.* Lylburn, 2 John. Ch. R. 441, 442, 444, 445; Murray *v.* Ballou, 1 John. Ch. R. 581.

[4] Pocock *v.* Reddington, 5 Ves. 800; Harrison *v.* Harrison, 2 Atk. 121; Bostock *v.* Blakeney, 2 Bro. Ch. R. 653; Forrest *v.* Elwes, 4 Ves. 497; Earl Powlet *v.* Herbert, 1 Ves. Jr. 297; Byrchell *v.* Bradford, 6 Madd. R. 235.

[5] Ibid., and Long *v.* Stewart, 5 Ves. 800, note (*a*); Crackelt *v.* Bethune, 1 J. & Walk. 586.

is extinguished.[1] But if afterwards he should repurchase or otherwise become entitled to the same property, the trust would revive and reattach to it in his hands; for it will not be tolerated in equity that a party shall by his own wrongful act acquire an absolute title to that which he is in conscience bound to preserve for another. In equity even more strongly than at law the maxim prevails that no man shall take advantage of his own wrong.[2] Even at law if a disseisor alienes the land and descent is cast, and afterwards the disseisor reacquires the land by descent or purchase, the disseisee may re-enter, although otherwise the mesne descent cast would have barred his entry.[3]

§ 1673. **In Cases of Fraud, Court of Equity Will Treat Offending Party Who Has Converted Property as a Trustee.** — The truth is that Courts of Equity in regard to fraud, whether it be constructive or actual, have adopted principles exceedingly broad and comprehensive in the application of their remedial justice; and especially where there is any fraud touching property, they will interfere and administer a wholesome justice, and sometimes even a stern justice in favor of innocent persons who are sufferers by it without any fault on their own side. This is often done by converting the offending party into a trustee and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien.[4] Thus a fraudulent purchaser will be held a mere trustee for the honest but deluded and cheated vendor.[5] A person who has fraudulently procured a fine to be levied in his favor by an idiot or lunatic will be held a trustee for the benefit of the persons who are prejudiced by the fraud.[6] A person who lies by and without notice suffers his own estate to be sold or incumbered in favor of an innocent purchaser or lender will be held a trustee of the estate for the latter.[7] An heir preventing a charge or devise of an estate to another by a promise to

[1] This proposition must be taken with the qualification that the purchase money has been paid. Dillon *v.* Farley, 114 Iowa 629, 87 N. W. 677; Sparks *v.* Ball, 91 Ky. 502, 16 S. W. 272, 13 Ky. L. Rep. 34, 34 Am. St. Rep. 236; Bailey *v.* Dyer, 23 Ky. L. Rep. 1585, 65 S. W. 595; Groye *v.* Robards, 36 Mo. 523; Chowen *v.* Phelps, 26 Mont. 524, 69 Pac. 54; Deans *v.* Gay, 132 N. C. 227, 43 S. E. 643; Price *v.* Krasnoff, 60 S. C. 172, 38 S. E. 413; Magnolia Park Co. *v.* Tinsley, 96 Tex. 364, 73 S. W. 5; Settegast *v.* O'Donnell, 16 Tex. Civ. App. 56, 41 S. W. 84.

[2] 2 Fonbl. Eq. B. 2, ch. 5, § 5, and note (*p*); Bovey *v.* Smith, 2 Ch. Cas. 124; s. c. 1 Vern. R. 84; Com. Dig. Chancery, 4 W. 25.

[3] Ibid., and Litt. § 395; Co. Litt. 242 *a*.

[4] See 1 Fonbl. Eq. B. 1, ch. 2, § 2, note (*k*).

[5] Ante, §§ 269 to 460.

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

[7] Ante, §§ 513 to 519.

perform the same personally will be held a trustee for the latter to the amount of the charge or beneficial interest intended.[1] An agent authorized to purchase an estate for another, who purchases the same for himself, will be held a trustee of his principal.[2] But it is unnecessary to pursue this subject further, as many illustrations of a like nature have been already given under the heads of Actual Fraud and Constructive Fraud.[3]

§ 1674. **Liabilities of Trustees.** — Having thus gone over most of the important heads of Equity Jurisprudence falling under the denomination of express or implied trusts, we shall conclude this subject by a short review of some of the doctrines as to the nature and extent of the responsibility of trustees and as to the remedies which may be resorted to, to enforce a due performance of trusts.

§ 1675. **Where Rights are Doubtful, Trustee Should Seek Advice and Direction of the Court.** — It is not easy, in a great variety of cases, to say what the precise duty of a trustee is, and therefore it often becomes indispensable for him before he acts to seek the aid and direction of a Court of Equity.[4] We have already seen that his acts done to the prejudice of the cestui que trust (or beneficiary) are sometimes such as are binding and cannot be recalled, and sometimes are such as a Court of Equity will not punish by treating them as breaches of trust.[5] But the cases in which such acts will be deemed violations of trust for which a trustee will be held responsible in equity are difficult to be defined. It has been often said that what he may be compelled to do by a suit he may voluntarily do without a suit. But this (as we have also seen) is a doctrine requiring many qualifications and by no means to be generally relied on for safety.[6]

§ 1676. **Trustee Should Exercise Good Faith and Due Diligence in Protection of Estate.** — In a general sense a trustee is bound by his implied obligation to perform all those acts which are necessary and proper for the due execution of the trust which he has

[1] Ante, § 361. [2] Ante, § 439. [3] Ante, §§ 525 to 545.

[4] See Fairbanks *v.* Belknap, 135 Mass. 179, 181; Proctor *v.* Heyer, 122 Mass. 525; Richardson *v.* Hall, 124 Mass. 228; Minot *v.* Taylor, 129 Mass. 160; Dodge *v.* Morse, Ib. 423; Macy *v.* Nantucket, 121 Mass. 351; Treadwell *v.* Cordis, 5 Gray, 341; Treadwell *v.* Salisbury Manuf. Co., 7 Gray, 393; Clay *v.* Gurley, 62 Ala. 14; Cowles *v.* Pollard, 51 Ala. 445; Mersman *v.* Mersman, 136 Mo. 244, 37 S. W. 909; Read *v.* Citizens St. R. Co., 110 Tenn. 316, 75 S. W. 1056; Stephenson *v.* Norris, 128 Wis. 242, 107 N. W. 343.

[5] Ante, §§ 977 to 979, 995, 997.

[6] Ante, § 979; 2 Fonbl. Eq. B. 2, ch. 7, § 2, and note (*c*).

undertaken.[1] But as he is supposed merely to take upon himself the trust as a matter of honor, conscience, friendship, or humanity, and as he is not entitled to any compensation for his services, at least not without some express or implied stipulation for that purpose,[2] he would seem, upon the analogous principle applicable to

[1] Com. Dig. Chancery, 4 W. 25; Fyler *v.* Fyler, 3 Beav. R. 550.

[2] 2 Fonbl. Eq. B. 2, ch. 7, § 3; Manning *v.* Manning, 1 John. Ch. R. 527, 532 to 535; Arnold *v.* Garner, 2 Phillips, Ch. R. 231. The same rule refusing compensation to trustees and to others standing in similar relations is found in the Roman law, and was probably thence transferred into Equity Jurisprudence. Mr. Chancellor Kent has elaborately defended it, in his opinion in the case of Manning *v.* Manning, 1 John. Ch. R. 534, from which the following extract is made: "Nor does the rule strike me as so very unjust, or singular and extraordinary; for the acceptance of every trust is voluntary and confidential, and a thousand duties are required of individuals in relation to the concerns of others, and particularly, in respect to numerous institutions, partly of a private and partly of a public nature, in which a just indemnity is all that is expected and granted. I should think it could not have a very favorable influence on the prudence and diligence of a trustee, were we to promote, by the hope of reward, a competition, or even a desire, for the possession of private trusts that relate to the moneyed concerns of the helpless and infirm. To allow wages or commissions for every alleged service, how could we prevent abuse? The infant or the lunatic cannot watch their own interest. 'Quis custodiet ipsos custodes?' The rule in question has a sanction in the wisdom of the Roman law, which equally with ours refused a compensation, and granted an indemnity to the trustee of the minor's estate. The maxim in that law was that 'lucrum facere ex pupilli tutela tutor non debet.' And the tutor or curator was entitled only to his reasonable and just expenses incurred in behalf of the estate, such as travelling charges, costs of suit, &c., unless a certain allowance was granted by the person by whom he was appointed. 'Sumptuum qui bona fide in tutelam, non qui in ipsos tutores fiunt, ratio haberi solet; nisi ab eo, qui eum dat, certum salarium ei constitutum est. Item sumptus litis tutor reputabit, et viatica, si ex officio necesse habuit aliquo excurrere vel proficisci.' Dig. 26, tit. 7, l. 33; Idem, 26, tit. 7, l. 58; Idem, 27, tit. 3, l. 1, 9. It is probable that this same principle which we find in some, has been infused into the municipal law of most, of the nations of Europe, because most of them have adopted the civil law. Domat B. 2, tit. Tutors, tit. 2, § 3, art. 5, 35; Ersk. Inst. B. 1, tit. 7, §§ 31, 32. The same rule was known in the early age of the common law and applied to the guardian in socage. He was entitled only to his allowance for his reasonable costs and expenses when called to render an account of the guardianship of the estate of the ward. Litt. § 123. And this was the provision in the statute of Marlbridge, 52 H. III. ch. 17, declaring the duties of the guardian in socage. 'Salvis ipsis custodibus rationabilibus misis suis.'" The rule has been also applauded by great equity judges in England in modern times. Lord Cottenham, in Home *v.* Pringle, 8 Clark & Fin. 264, 287, expressed a strong approval of the rule, and said in the case where a trustee had been appointed cashier to the trustees, "This is the real question, because it is not necessary to hold that the appointment is illegal in order to maintain the principle that the party who, having accepted the office of trustee, which, unless otherwise provided

bailments, bound only to good faith and reasonable diligence, and, as in case of a gratuitous bailee, liable only for gross negligence.[1] It would be difficult however to affirm that Courts of Equity do

for by the trust, must be performed gratuitously, accepts another office inconsistent with that of trustee, shall not be permitted to derive any emolument out of the trust property in respect of such employment. That the office of trustee and of factor or cashier to the property are inconsistent cannot be disputed. If the execution of the trust requires such appointment, it becomes the duty of the trustee to exercise his discretion and judgment in the selection of the officers and his vigilant superintendence of their proceedings when appointed; all which is lost to the trust when a trustee is appointed to the execution of those duties; therefore the Courts of Equity in England in such cases refuse to the trustee any remuneration which would come to others from the appointment, which produces the salutary effect of deterring trustees from making such appointments when not actually required, and when such necessity exists preserves to the trust the superintendence and control of the trustees over the officer they may appoint. I should be sorry to give any sanction to a contrary practice in Scotland. There can be no reason for any difference in the rule upon this subject in the two countries. The benefit of the rule as acted upon in England is not disputed, and as there is no decision to the contrary, there cannot be any reason for sanctioning a contrary rule in Scotland." I confess that I have not been able quite so clearly to see or so strongly to approve the policy of the rule. Trusts may be very properly considered as matters of honor and kindness and of a conscientious desire to fulfil the wishes and objects of friends and relatives. But the duties and responsibilities of the office of a trustee are sufficiently onerous and perplexing in themselves, and mistakes, even of the most innocent nature, are sometimes visited with severe consequences. Nor can any one reasonably expect any trustee to devote his time or services to a very watchful care of the interests of others when there is no remuneration for his services, and there must often be a positive loss to himself in withdrawing from his own concerns some of his own valuable time. To say that no one is obliged to take upon himself the duty of a trustee is to evade and not to answer the objection. The policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interest, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes as the only indemnity for services of an important and anxious nature. The very circumstance that trustees now often stipulate for a compensation before accepting the office, and that Courts of Equity now sanction such an allowance, is a distinct proof that the rule does not work well, and is felt to be inconvenient or unreasonable in practice. The rule to disallow compensation to trustees has not been generally adopted in America. See Meacham *v.* Sterne, 9 Paige, 399; Barrel *v.* Joy, 16 Mass. R. 22; Dewey *v.* Allen, 1 Pick. 147. See Clack *v.* Carlton, 7 Jur. (N. S.) 441; Crosskill *v.* Bower, 32 Beav. 86; Tyrrell *v.* Bank of London, 10 H. L. Cas. 26; Barrett *v.* Hartley, L. R. 2 Eq. 789. How far the right to compensation is affected by misconduct see McKnight *v.* Walsh, 8 C. E. Green, 136; Commonwealth *v.* Eagle Ins. Co., 14 Allen, 344; Succession of Liles, 24 La. An. 490; Walker *v.* Walker, 76 U. S. 743, 19 L. Ed. 814; Belknap *v.* Belknap, 5 Allen, 468; Tatum *v.* McLellan, 56 Miss. 352.

[1] Story on Bailments, §§ 173, 174; 2 Fonbl. Eq. B. 2, ch. 7, § 4, note (i). See also Dig. Lib. 26, tit. 7, l. 7, § 2; Pine *v.* White, 175 Mass. 585,

in fact always limit the responsibility of trustees, or measure their acts by such a rule.[1]

§ 1677. **Same.** — In respect to the preservation and care of trust property it has been said that a trustee is to keep it as he keeps his own. And therefore if he is robbed of money belonging to his cestui que trust without his own default or negligence (or perhaps, strictly speaking, without his own gross default or negligence),[2] he will not be chargeable. He is even allowed in equity to establish by his own oath the amount so lost, for he cannot possibly in ordinary cases have any other proof.[3] So if he should deposit the money with a banker in good credit to remit it to the proper place by a bill drawn by a person in due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible.[4] The rule in all cases of this sort is that where a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses.[5]

§ 1678. **Trust Funds Should Not Be Mixed with Private Property.** — In all cases however in which a trustee places money in the

56 N. E. 967; Taft *v.* Smith, 186 Mass. 31, 70 N. E. 1031; Winder *v.* Nock, 104 Va. 759, 52 S. E. 561, 3 L. R. A. (N. S.) 415; and where his gross negligence has been shown, he will not be entitled to his commissions, Ward *v.* Shire, 23 Ky. L. Rep. 1279, 65 S. W. 8.

[1] See Short *v.* Walker, 9 Beav. R. 497. See Speight *v.* Gaunt, 22 Ch. D. 727; S. C. 9 App. Cas. 1; Bostock *v.* Floyer, L. R. 1 Eq. 26; Sculthorpe *v.* Tipper, L. R. 13 Eq. 232; Hobday *v.* Peters, 28 Beav. 603; Ex parte Greaves, 8 DeG. M. & G. 291; Hopgood *v.* Parkin, L. R. 11 Eq. 74; Sutton *v.* Wilders, L. R. 12 Eq. 373; Briggs *v.* Taylor, 28 Vt. 180; Cavender *v.* Cavender, 114 U. S. 464, 29 L. Ed. 212, 5 S. Ct. Rep. 955.

[2] Story on Bailments, §§ 174, 183.

[3] Morley *v.* Morley, 2 Ch. Cas. 2; Knight *v.* Lord Plimouth, 3 Atk. 480; S. C. 1 Dick. R. 120, 127; Jones *v.* Lewis, 2 Ves. 240; 2 Fonbl. Eq. B. 2, ch. 7, § 4.

[4] Knight *v.* Lord Plimouth, 3 Atk. 480; Jones *v.* Lewis, 2 Ves. 240, 241; Rowth *v.* Howell, 3 Ves. 564; Massey *v.* Banner, 4 Madd. R. 416, 417; Ex parte Belchier & Parsons, Ambler, R. 219, and Mr. Blunt's note (4); Adams *v.* Claxton, 6 Ves. 226; 2 Fonbl. Eq. B. 2, ch. 7, § 4. See Try *v.* Tapson, 28 Ch. D. 268; Rehden *v.* Wesley, 29 Beav. 213; Wilkins *v.* Hogg, 8 Jur. (N. S.) 25; Hume *v.* Richardson, Ib. 686; Wood *v.* Myrick, 17 Minn. 408.

[5] Ex parte Belchier *v.* Parsons, Ambl. R. 219. The same rule applies here as in cases of personal representatives of a deceased party, who are treated as trustees. In Clough *v.* Bond, 3 Mylne & Craig, 490, 496, Lord Cottenham, speaking on this subject, said: "It will be found to be the result of all the best authorities upon the subject that, although a personal representative, acting strictly within the line of his duty and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have

hands of a banker he should take care to keep it separate and not mix it with his own in a common account; for if he should so mix it, he would be deemed to have treated the whole as his own, and he would be held liable to the cestui que trust for any loss sustained by the banker's insolvency.[1]

possessed it, yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable; Phillips *v.* Phillips (2 Freem. Ch. Ca. 11); or if he leave money due upon personal security which, though good at the time, afterwards fails. Powell *v.* Evans (5 Ves. 839); Tebbs *v.* Carpenter (1 Madd. 290). And the case is stronger if he be himself the author of the improper investment, as upon personal security or an unauthorized fund. Thus he is not liable upon a proper investment in the 3 per cents for a loss occasioned by the fluctuations of that fund; Peat *v.* Crane (2 Dick. 499, note); but he is for the fluctuations of any unauthorized fund. Hancom *v.* Allen (2 Dick. 498); Howe *v.* Earl of Dartmouth (7 Ves. 137. See p. 150). So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if without such necessity he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator." Langford *v.* Gascoyne (11 Ves. 333); Lord Shipbrook *v.* Lord Hinchinbrook (11 Ves. 252; 16 Ves. 477); Underwood *v.* Stevens (1 Mer. 712). And see Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 Younge & Coll. New R. 16, 28. Speight *v.* Gaunt, 22 Ch. D. 727; s. c. 9 App. Cas. 1. Thus a trustee may employ a broker to effect investments of the trust-money where that is the common course. Ib. See Ex parte Cooke, 4 Ch. D. 123.

[1] Massey *v.* Banner, 4 Madd. Ch. R. 416, 417; Freeman *v.* Fairlie, 3 Meriv. R. 29; Clarke *v.* Tipping, 9 Beav. R. 284; School Dist. *v.* First Natl. Bank, 102 Mass. 174; Cook *v.* Addison, L. R. 7 Eq. 466; Brown *v.* Adams, 21 Law T. (N. S.) 71; In re Hallett, 13 Ch. D. 696; Central Natl. Bank *v.* Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. Ed. 693. See Gibert *v.* Gonord, 54 L. J. Ch. 439. Compare Stroud *v.* Gwyer, 6 Jur. N. S. 719. Where an estate is bought partly with trust money and partly with other money, the cestui que trust is not entitled to the whole estate; he is only entitled to a lien upon the estate for the amount of the trust fund. In re Pumfrey, 22 Ch. D. 255, 260. A fortiori where the trustee has mixed the trust fund, even money, with his own, the cestui que trust cannot elect to take the property bought because it was not bought with the trust fund, but simply with a mixed fund. In re Hallett, 13 Ch. D. 696. In this case it was declared that there was no distinction in this respect between an express trustee, an agent, a bailee, a collector of rents, or other person in a fiduciary position. The Master of the Rolls overruled Ex parte Dale, 11 Ch. D. 772, and several early cases.

§ 1679. **Same.** — In respect to the manner of managing funds and laying out money on securities, and even in respect to allowing trust money to remain in the hands of debtors, considerable strictness is required by the rules of Courts of Equity. It has been remarked by Lord Hardwicke that these rules should not be laid down with a strictness to strike terror into mankind acting for the benefit of others and not for their own;[1] and that as a trust is an office necessary in the concerns between man and man, and which if faithfully discharged is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to loss which he could not foresee and consequently not prevent, would be a manifest hardship and would be deterring every one from accepting so necessary an office.[2]

§ 1680. **Same.** — There is manifest good sense in these remarks. But it would be difficult to affirm that the rules of Courts of Equity have always proceeded upon so broad and liberal a basis. The true result of the considerations here suggested would seem to be, that where a trustee has acted with good faith in the exercise of a fair discretion and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property.[3] On the contrary Courts of Equity have laid down some artificial rules for the exercise of the discretion of trustees, which import (to say the least) extraordinary diligence and vigilance in the management of the trust property.

§ 1681. **Liability of Trustee Who Has Invested Trust Funds in Unauthorized Securities.** — Thus for example if a trustee should lay out trust funds in any stock in which a Court of Equity itself is not in the habit of directing funds in its own possession to be laid out, although there should be no mala fides, yet if the stock

A bank receiving money deposited in a fiduciary way cannot claim any lien upon it against the depositor. Knatchbull *v.* Hallett, 13 Ch. D. 696 (that the depositor need not be technically a trustee); Farmers' Bank *v.* King, 57 Pa. 202; Van Alen *v.* American Bank, 52 N. Y. 1 (that notice to the bank is not necessary). See Gibert *v.* Gonord, 54 L. J. Ch. 439.

[1] Ex parte Belchier & Parsons, Ambler, R. 219; 2 Madd. Ch. Pr. 1142.

[2] Knight *v.* Earl of Plimouth, 1 Dick. R. 126, 127; s. c. 3 Atk. 480; 2 Madd. Ch. Pr. 114; Powell *v.* Evans, 5 Ves. 843; Thompson *v.* Brown, 4 John. Ch. R. 629.

[3] See Hart *v.* Ten Eyck, 2 John. Ch. R. 76; Thompson *v.* Brown, 4 John. Ch. R. 619, 629.

should fall in value he would be held responsible for the loss.[1] In other words a Court of Equity will in such cases require that a trustee should act with all the scrupulous circumspection, caution, and wisdom with which the court itself, from its long experience and superior means of information, is accustomed to act; a doctrine certainly somewhat perilous to trustees, and startling to uninstructed minds. It is, to adopt the language of Lord Bacon, substituting for the private conscience of the trustee "the general conscience of the realm, which is chancery."[2]

§ 1682. **Same.** — If trustees are directed to invest trust-money in government or other securities or real security, and they do neither, they are responsible at the option of the cestuis que trust, either for the money or the stock which might have been purchased therewith at the time when the investment ought to have been made.[3]

§ 1683. **Same.** — So if a trustee should invest trust-money in mere personal securities, however unexceptionable they might seem to be, in case of any loss by the insolvency of the borrower he would be held responsible; for in all cases of this sort Courts of Equity require security to be taken on real estate, or on some other thing of permanent value.[4] Nay, it will be at the peril of the trustee, if trust-money comes to his hands (such as a debt due

[1] Hancom *v.* Allen, 2 Dick. 498; Trafford *v.* Boehm, 3 Atk. 444; Adye *v.* Feuilleteau, 2 Dick. R. 499, note; s. c. 1 Cox, 24; Peat *v.* Crane, 2 Dick. 449, note. See also Jackson *v.* Jackson, 1 Atk. 513; Knight *v.* Earl of Plimouth, 1 Dick. R. 126, 127; Holland *v.* Hughes, 16 Ves. 114; Fyler *v.* Fyler, 3 Beav. R. 550. See Stewart *v.* Sanderson, L. R. 10 Eq. 26; Budge *v.* Gummow, L. R. 7 Ch. 719; Whitney *v.* Smith, L. R. 4 Ch. 513; In re Colne Co., 1 DeG. F. & J. 53; Harris *v.* Harris, 29 Beav. 107; Ungless *v.* Tuff, 30 L. J. Ch. 784; Wynne *v.* Warren, 2 Heisk. 118; Smith *v.* Byers, 41 Ga. 439. Further as to investments in England see 22 & 23 Vict. ch. 35; 23 & 24 Vict. ch. 38; 30 & 31 Vict. ch. 132; 34 & 35 Vict. ch. 47, § 13; In re Wedderburn, 9 Ch. D. 112; In re Langford, 2 Johns. & H. 458; Equitable Soc. *v.* Fuller, 1 Johns. & H. 379; In re Speight, 22 Ch. D. 727. Brigham *v.* Morgan, 185 Mass. 27, 69 N. E. 418; In re Hart's Est., 203 Pa. 480, 53 Attl. 364; In re Carr's Est., 24 Pa. Super. Ct. Rep. 369; Carr *v.* Morris, 85 Va. 21, 6 S. E. 613; Whitehead *v.* Whitehead, 85 Va. 870, 9 S. E. 10.

[2] Bacon on Uses, by Rowe, p. 10; Gilbert *v.* Kolb, 85 Md. 627, 37 Atl. 423; In re Bartol, 182 Pa. St. 407, 38 Atl. 527; In re Goudley's Est., 201 Pa. 491, 51 Atl. 315; Watkins *v.* Stewart, 78 Va. 111.

[3] Watts *v.* Girdlestone, 6 Beav. R. 188, 190; ante, § 1670. See the Jurist, Vol. 9 (1845), p. 227.

[4] Adye *v.* Feuilleteau, 1 Cox, R. 24; Ryder *v.* Bickerton, 3 Swanst. R. 80; s. c. 1 Eden, R. 149, note, and Mr. Eden's note (*a*), p. 150; Holmes *v.* Dring, 2 Cox, R. 1; Wilkes *v.* Steward, Cooper, Eq. R. 6. Even a bond of several persons is not distinguished from the bond of one person. "It was never heard of," said Lord Kenyon, Master of the Rolls, "that a

from a third person), to suffer it to remain upon the mere personal credit of the debtor, although the testator who created the trust had left it in that very state.[1] The principle is even carried further; and in cases of personal securities taken by a trustee he is made responsible for all deficiencies, and is also chargeable for all profits if any are made; so that he acquires a double responsibility, although in such cases he may have acted with entire good faith in the exercise of what he supposed to be a sound discretion.[2]

§ 1684. **Duty of Trustee to Defend Trust Property.** — In relation to trust-property it is the duty of the trustee, whether it be real estate or be personal estate, to defend the title at law in case of any suit being brought respecting it; to give notice, if it may

trustee could lend an infant's money on private security. This is a rule that should be rung in the ears of every person who acts in the character of a trustee; for an act may very probably be done with the best and honestest intention, yet no rule in a Court of Equity is so well established as this." Holmes *v.* Dring, 2 Cox, R. 1, 2. Lord Northington, in Harden *v.* Parsons (1 Eden, R. 148), laid down a much more limited doctrine, and held that a letting of money on personal security was not per se gross negligence and a breach of trust, and that other circumstances must be shown to charge the trustee. He said: "It is agreed that there is no text-writer that lays down the rule, nor any case which establishes it. If so, we must resort to the inquiry into the nature of the office and duty of a trustee as considered in a Court of Equity. No man can require or with reason expect a trustee to manage his property with the same care and discretion that he would his own. Therefore the touchstone by which such cases are to be tried is, whether the trustee has been guilty of a breach of trust or not. If he has been guilty of gross negligence, it is as bad in its consequences as fraud, and is a breach of trust. The lending of trust-money on a note is not a breach of trust without other circumstances crassæ negligentiæ." But the later cases have entirely overthrown this doctrine, however reasonable it may seem to be. Ibid., Mr. Eden's note (*a*). See also Walker *v.* Symonds, 3 Swanst. R. 62, 63. Mr. Chancellor Kent, in Smith *v.* Smith, 4 John. Ch. 281, 441, seemed inclined to adopt the doctrine of Lord Northington, and to think the modern English rule as to lending money on personal security too strict.

The present state of law is far from uniform on this subject. See Harding *v.* Larned, 4 Allen, 426; Clark *v.* Garfield, 8 Allen, 427; Richardson *v.* Boynton, 12 Allen, 138; Brown *v.* French, 125 Mass. 410; Worrall's Appeal, 22 Pa. St. 44; Ackerman *v.* Emott, 4 Barb. 626; 1 Perry, Trusts, §§ 453 et seq., 459. White *v.* Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132; Tucker *v.* State, 72 Ind. 242; In re Hall, 164 N. Y. 196, 58 N. E. 11.

[1] Lowson *v.* Copeland, 2 Bro. Ch. R. 156, and Mr. Belt's note; Powell *v.* Evans, 5 Ves. 844; Tibbs *v.* Carpenter, 1 Madd. R. 290.

[2] Adye *v.* Feuilleteau, 3 Swanst. R. 84, note; s. c. 1 Cox, R. 24. See Holmes *v.* Dring, 2 Cox, R. 1. As to the liability of trustees upon subscription for shares in companies on behalf of the trust estate see Lumsden *v.* Buchanan, 4 Macq. 950; Eager *v.* Barnes, 31 Beav. 579; In re Glasgow, 4 App. Cas. 581; Bell's Case, Ib. 550; Buchan's Case, Ib. 583; Ker's Case, Ib. 599; Cunninghame *v.* Glasgow Bank, Ib. 607.

be useful and practicable, of such suit to his cestui que trust; to prevent any waste or delay or injury to the trust-property;[1] to keep regular accounts;[2] to afford accurate information to the cestui que trust of the disposition of the trust-property; and if he has not all the proper information, to seek for it and if practicable to obtain it.[3] Finally, he is to act in relation to the trust-property with reasonable diligence, and in cases of a joint trust he must exercise due caution and vigilance in respect to the approval of and acquiescence in the acts of his co-trustees; for if he should deliver over the whole management to the others and betray supine indifference or gross negligence in regard to the interests of the cestui que trust, he will be held responsible.[4]

§ 1685. **Same.** — These remarks apply to the ordinary case of a trustee having a general discretion and exercising his powers without any special directions. But where special directions are given by the instrument creating the trust, or special duties are imposed upon the trustee, he must follow out the objects and intentions of the parties faithfully, and be vigilant in the discharge of his duties. There are necessarily many incidental duties and authorities belonging to almost every trust, which are not expressed. But these are to be as steadily acted upon and executed as if they were expressed. It would be impossible, in a work like the present, to make even a general enumeration of these incidental duties and authorities of a trustee, as they must always depend upon the peculiar objects and structure of the trust.[5]

[1] He should keep leasehold property free from the risk of forfeiture. In re Fowler, 16 Ch. D. 723.

[2] Freeman *v.* Fairlie, 3 Meriv. R. 29, 41; Pearse *v.* Green, 1 Jac. & Walk. 135, 140; Adams *v.* Clifton, 1 Russ. R. 297. Richardson *v.* Van Auken, 5 App. D. C. 209; Perrin *v.* Lepper, 172 Mich. 454, 40 N. W. 859; Wooden *v.* Kerr, 91 Mich. 188, 51 N. W. 937.

[3] Walker *v.* Symonds, 3 Swanst. R. 58, 73. A trustee cannot object that the performance of his duties would be inconvenient, or burdensome, or involve him in litigation. First Natl. Ins. Co. *v.* Salisbury, 130 Mass. 303.

[4] Oliver *v.* Court, 8 Price, R. 127; post, § 1689; Fellrath *v.* Peoria German School Assn., 66 Ill. App. 77; Meldon *v.* Devlin, 31 App. Div. 146, 53 N. Y. Supp. 172; In re Beatty's Est., 214 Pa. 449, 63 Atl. 975.

If the trustee has not active oversight and complete charge, he will not be liable for the wrong of his co-trustee. Hunter *v.* Hunter, 50 Mo. 445; Meldon *v.* Devlin, 31 App. Div. 146, 53 N. Y. Supp. 172; In re Westerfield, 32 App. Div. 324, 53 N. Y. Supp. 25.

[5] The works of Mr. Hampson and Mr. Willis on the duties and responsibilities of trustees contain an enumeration of many particulars. In all cases of doubt it is best to act under the direction of a Court of Equity, which trustees at all times have a right to ask. See Mitf. Eq. Pl. by Jeremy, 133, 134; Leech *v.* Leech, 1 Ch. Cas. 249.

§ 1686. **Duty of Trustee to Put Property Out at Interest.** — In regard to interest upon trust funds the general rule is that if a trustee has made interest upon those funds, or ought to have invested them so as to yield interest, he shall in each case be chargeable with the payment of interest.[1] In some cases Courts of Equity will even direct annual or other rests to be made, the effect of which will be to give to the cestui que trust the benefit of compound interest. But such an interposition requires extraordinary circumstances to justify it.[2] Thus for example if a trustee, in manifest violation of his trust, has applied the trust funds to his own benefit and profit in trade, or has sold out the trust stock and applies the proceeds to his own use, or has conducted himself fraudulently in the management of the trust funds, or has wilfully refused to follow the positive directions of the instrument creating the trust as to investments, — in these and the like cases Courts of Equity will apply the rule of annual or semi-annual rests, if it will be most for the benefit of the cestui que trust.[3] The true rule in equity in such cases is, to take care that all the gain shall go to the cestui que trust.[4]

§ 1687. **Same.** — The object of this whole doctrine is to compensate the cestui que trust, and to place him in the same situation as if the trustee had faithfully performed his own proper duty. It has even a larger and more comprehensive aim founded in pub-

[1] 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*p*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 543, 544; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 3, pp. 145, 146; Dunscomb *v.* Dunscomb, 1 John. Ch. R. 508; Manning *v.* Manning, Id. 527; Schieffelin *v.* Stewart, 1 John. Ch. R. 620. See Commonwealth *v.* Eagle Ins. Co., 14 Allen, 344, 348; Anderson *v.* Gregg, 44 Miss. 170; Knapp *v.* Marshall, 56 Ill. 362; Stroud *v.* Gwyer, 6 Jur. (N. S.) 719; Docker *v.* Somes, 2 Mylne & K. 655; Vyse *v.* Foster, L. R. 8 Ch. 309; s. c. 7 H. L. 318; Isler *v.* Brock, 134 N. C. 620, 46 S. E. 951.

[2] Raphael *v.* Boehm, 11 Ves. 91; s. c. 13 Ves. 407, 590; Schieffelin *v.* Stewart, 1 John. Ch. R. 620; Evertson *v.* Tappen, 5 John. Ch. R. 497, 517; Dornford *v.* Dornford, 12 Ves. 127; Connecticut *v.* Jackson, 1 John. Ch. R. 13; Foster *v.* Foster, 2 Bro. Ch. 616; Davis *v.* May, 19 Ves. 383; Sevier *v.* Greenway, 19 Ves. 413; Webber *v.* Hunt, 1 Madd. R. 13; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 545; 2 Madd. Ch. Pr. 114, 115. See Walker *v.* Walker, 9 Wall. 743; Hook *v.* Payne, 14 Wall. 252; King *v.* Talbot, 40 N. Y. 76; McKnight *v.* Walsh, 8 C. E. Green, 136; Ogden *v.* Larrabee, 57 Ill. 389; Vaughan *v.* Bibb, 46 Ala. 153; Nelson *v.* Booth, 5 Jur. (N. S.) 28; Matthewson *v.* Davis, 191 Ill. 391, 61 N. E. 68; St. Paul Trust Co. *v.* Strong, 85 Minn. 1, 88 N. W. 256; Kane *v.* Kane, 146 Mo. 605, 48 S. W. 446.

[3] Ibid.

[4] Schieffelin *v.* Stewart, 1 John. Ch. R. 620, 624, 625; 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*p*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 543, 544; Com. Dig. Chancery, 4 W. 25.

lic policy, which is, to secure fidelity by removing temptation and by keeping alive a sense of personal interest and personal responsibility.[1] It seems however to have been of a comparatively late introduction into Equity Jurisprudence, and probably was little known in England at an earlier period than the reign of Charles the Second.[2]

§ 1688. **Same.** — The Roman law acted with the same protective wisdom and foresight. In that law if a guardian or other trustee was guilty of negligence in suffering the money of his ward to remain idle, he was chargeable at least with the ordinary interest. "Quod si pecunia mansisset in rationibus pupilli, præstandum quod bona fide percepisset aut percipere potuisset, sed fœnori dare, cum potuisset, neglexisset, cum id, quod ab alio debitore nomine usurarum cum sorte datur, ei qui accipit totum sortis vice fungitur, vel fungi debet."[3] But where the guardian or other trustee went beyond the point of mere negligence and was guilty of a gross abuse of his trust, the Roman law sometimes inflicted upon him a grievous interest in the nature of a compound interest, but often greatly exceeding it.[4] "Quoniam ubi quis ejus pecuniam, cujus tutelam negotiave administrat, aut magistratus municipii publicam in usus suos convertit, maximas usuras præstat. Sed istius diversa causa est, qui non sibi sumsit ex administratione nummos, sed ab amico accepit, et ante negotiorum administrationem. Nam illi de quibus constitutum est (cum gratuitam certe integram et abstinentem omni lucro præstare fidem deberent) licentia, qua videntur abuti, maximis usuris, vice cujusdam pœnæ, subjiciuntur."[5]

§ 1689. **Liability for Acts of Co-trustees.** — In cases where there are several trustees the point has often arisen how far they are to be deemed responsible for the acts of each other. The general rule is that they are responsible only for their own acts, and not for the acts of each other, unless they have made some agreement

[1] Schieffelin *v.* Stewart, 1 John. Ch. R. 620, 624, 625; 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*p*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, pp. 543, 544; Com. Dig. Chancery, 4 W. 25.

[2] Ibid.; Ratcliffe *v.* Graves, 1 Vern. R. 196, 197; s. c. 2 Ch. Cas. 152.

[3] Dig. Lib. 26, tit. 7, l. 58, § 1; Id. l. 7, §§ 3, 4; Dunscomb *v.* Dunscomb, 1 John. Ch. R. 510, 511; 1 Domat, B. 2, tit. 1, § 3, art. 22, 27; Pothier, Pand. Lib. 27, tit. 3, n. 45 to 51.

[4] See Pothier, Pand. Lib. 27, tit. 3, n. 47; 1 Domat, B. 5, tit. 5, § 1, art. 14.

[5] Dig. Lib. 3, tit. 5, l. 38. See also Dig. Lib. 26, tit. 7, l. 7, §§ 4 to 10; Cod. Lib. 5, tit. 56; Pothier, Pand. Lib. 3, tit. 5, n. 43; 2 Voet ad Pand. Lib. 26, tit. 7, § 9; Schieffelin *v.* Stewart, 1 John. Ch. R. 628, 629.

by which they have expressly agreed to be bound for each other, or they have by their own voluntary co-operation or connivance enabled one or more to accomplish some known object in violation of the trust.[1] And the mere fact that trustees who are authorized to sell lands for money or to receive money jointly execute a receipt therefor to the party who is debtor or purchaser will not ordinarily make either liable, except for so much of the money as has been received by him, although ordinarily in the case of executors it would be different. The reasons assigned for the doctrine and the difference are as follows. Trustees have all equal power, interest, and authority, and cannot act separately as executors may, but must join both in conveyances and receipt. For one trustee cannot sell without the other, or make a claim to receive more of the consideration money, or to be more a trustee than the other. It would therefore be against natural justice to charge them (seeing they are thus compellable either not to act at all or to act together) with each other's receipts, unless there be some default or negligence on their own part independent of joining in such receipt.[2]

§ 1690. **Liability of Executor for Acts of Co-executor.** — But it is otherwise with regard to executors; for where there are two executors, it is clear that each has a several right to receive the debts due to the estate, and all other assets which shall come to his hands, and he is consequently solely responsible for the assets which he receives. They are therefore not compellable to join in receipts,[3] and each is competent by his own separate receipt to discharge any debtor to the estate. If then they join in a receipt, it is their own voluntary act, and equivalent to an admission of

[1] Ante, § 1684; Taylor *v.* Roberts, 3 Ala. (N. S.) 83; Bernard *v.* Bagshaw, 9 Jur. (N. S.) 220.

[2] 2 Fonbl. Eq. B. 2, ch. 7, 5; Fellows *v.* Mitchell, 1 P. Will. 83, and Mr. Cox's note (1); Churchill *v.* Lady Hobson, 1 P. Will. 241, and Mr. Cox's note (1); Leigh *v.* Barry, 3 Atk. 584; Ex parte Belchier *v.* Parsons, Ambler, 219, and Mr. Blunt's note. See Hulme *v.* Hulme, 2 Mylne & Keen, 682. See Hunter *v.* Hunter, 50 Mo. 445; Stowe *v.* Bowen, 99 Mass. 194; Lee *v.* Sankey, L. R. 15 Eq. 204; Charlton *v.* Durham, L. R. 4 Ch. 433. The rule that a trustee is liable only for his own receipts does not apply where one trustee assists or enables another to receive the money, as by joining with him in a release for the money. Thompson *v.* Finch, 22 Beav. 316. See Pearce *v.* Pearce, Ib. 248.

[3] Nor can they be compelled to join in a petition to the Probate Court to sell real estate. Southwick *v.* Morrell, 121 Mass. 520; Mercer *v.* Glass, 15 Ky. L. Rep. 710, 25 S. W. 114; Cheever *v.* Ellis, 114 Mich. 477, 108 N. W. 390, 13 Detroit Leg. N. 341, 11 L. R. A. (N. S.) 296; In re Johnson, 42 Misc. Rep. 651, 87 N. Y. Supp. 733; Caskie *v.* Harrison, 76 Va. 85; Hart *v.* Hart, 31 W. Va. 688, 8 S. E. 562.

their willingness to be jointly accountable for the money.[1] It follows a fortiori that if one executor after receiving the assets voluntarily pays them over to the other executor, he becomes responsible for the due application and administration of those assets by the other executor.[2] So if one executor knows that the assets received by the other executor are not applied according to the trusts of the will or in a due course of administration, and he stands by and acquiesces in it or suffers the assets to be wasted by such executor without any effort to require or compel a due execution of the trusts, and à due application of the assets in the course of the administration thereof, he will be held liable for any waste or misapplication of such assets.[3] It will be otherwise

[1] Ibid.; Murrell *v.* Cox, 2 Vern. 570; Aplyn *v.* Brewer, Prec. Ch. 173; Moses *v.* Levi, 3 Younge & Coll. 359, 367.

[2] Edmonds *v.* Crenshaw, 39 U. S. 166, 10 L. Ed. 402. On this occasion Mr. Justice M'Lean, in delivering the opinion of the court, said: "Where there are two executors in a will it is clear that each has a right to receive the debts due to the estate, and all other assets which shall come into his hands, and he is responsible for the assets he receives. This responsibility results from the right to receive and the nature of the trust; and how can he discharge himself from this responsibility? In this case the defendant has attempted to discharge himself from responsibility by paying over the assets received by him to his co-executor. But such payment cannot discharge him. Having received the assets in his capacity of executor, he is bound to account for the same; and he must show that he has made the investment required by the will, or in some other mode, and in conformity with the trust has applied the funds. One executor, having received funds, cannot exonerate himself and shift the trust to his co-executor by paying over to him the sums received. Each executor has a right to receive the debts due to the estate and discharge the debtors; but this rule does not apply as between the executors. They stand upon equal ground, having equal rights and the same responsibilities. They are not liable to each other, but each is liable to the cestuis que trust to the full extent of the funds he receives." Douglass *v.* Satterlee, 11 Johns. 16; Fairfax's Executors *v.* Fairfax, 9 U. S. 19, 3 L. Ed. 24.

[3] Clark *v.* Clark, 8 Paige, R. 152; Williams *v.* Nixon, 2 Beav. R. 472. In this last case Lord Langdale said: "There can be no doubt that if an executor knows that the moneys received by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it without doing anything on his part to procure the due execution of the trusts, he will in respect of that negligence be himself charged with the loss; but in cases of this kind it is always to be observed that the testator himself having invested certain persons with the character of executors has trusted them to the extent to which the law allows them to act as executors; and in that character each has a separate right of receiving and of giving discharges for the property of the testator. In this particular case the testator having money in the funds, and other property to a considerable amount, directed certain annuities to be paid, and bequeathed his residuary estate in the mode stated. Both executors proved the will, and thereupon each of them became entitled to receive the property. One of them did receive the property, — the dividends

however if one executor has no knowledge of the receipt, or misapplication, or waste of the assets by the other.[1]

§ 1691. **Same.** — The propriety of the doctrine which in favor of trustees makes them liable only for their own acts and receipts has never been questioned, and indeed stands upon principles of general justice. It has been well said that it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him by his joining in the receipt is but *notional*.[2] There is a good deal more question as to the distinction which is made unfavorably in regard to executors. In truth upon general reasoning it seems

upon the stocks and funds, and the other personal estate. If Mr. Nixon knew that his co-executor was misapplying the moneys thus received, and acquiesced in it, he became himself liable, because he was a witness and an acquiescing party to the misapplication or breach of trust; but if he was not aware of the misapplication, I know of no case in which the court has gone the length of saying that an executor shall be held personally answerable for standing by and permitting his co-executor to do that which, for anything he knows to the contrary, was a performance of the trusts of the will. In this case it is clear Mr. Nixon must have known there was stock in the funds. He might have known that the dividends arising from that stock were from time to time received by Mr. Mills; knowing that, he might nevertheless have full reason to believe that they were duly applied according to the trusts and directions of the will in satisfaction of the annuities, or of the rent of the leasehold estates possessed by the testator at his death, and which was payable out of the whole estate. The argument for the plaintiffs proceeds upon this, that you are to impute to Mr. Nixon a knowledge of all that he might have known. It is said he proved the will, and must therefore have known its contents, and what was to be done in pursuance of the trusts; this is a presumption which I think the law itself will draw, and he must therefore be taken to have known the contents of the will; then it is argued that on proving the will he was bound to make a statement upon oath respecting the value of the property, and therefore became acquainted with the particulars. He might have had some knowledge of it to the limited extent which can be known on such occasions; but I cannot impute to him a knowledge of the exact state or amount of the property or of the claims upon it, or the clear amount of the balance in the hands of his co-executor. I certainly do not recollect any case in which the principle has been carried to the extent to which it has been here pressed; and if in this case I were to charge Mr. Nixon generally with all the assets received by his co-executor, I must in every other case say that an executor who does not personally act, and who having no reason to suspect any misapplication by his co-executor permits him to act alone, is liable for every misapplication committed by his co-executor; I do not think I can lay down any such rule." Post, §§ 1693, 1694; Hewlett *v.* Beede, 2 Cal. App. 561, 83 Pac. 1086; Grundy *v.* Drye, 104 Ky. 825, 48 S. W. 155, 20 Ky. L. Rep. 970; Palmer *v.* Ward, 91 App. Div. 449, 86 N. Y. Supp. 990. Miller *v.* Ladd, 85 Fed. 703, 29 C. C. A. 394.

[1] In re Provost's Est., 87 App. Div. 86, 84 N. Y. Supp. 29.

[2] Lord Cowper, in Fellows *v.* Mitchell, 1 P. Will. 83.

difficult to maintain its sound policy or practical convenience or intrinsic equity. It has on this account been sometimes struggled against. But it is now finally established as a general rule in the Equity Jurisprudence of England, although perhaps not universally in that of America.[1]

§ 1692. **Same.** — But although the general rule in regard to trustees is that they shall be liable only for their own acts and receipts, yet some nice distinctions have been indulged by Courts of Equity which require notice in this place. Thus for example

[1] 2 Fonbl. Eq. B. 2, ch. 7, § 5, and note (*l*); Mr. Cox's note (1) to Fellows *v.* Mitchell, 1 P. Will. 83, and to Churchill *v.* Lady Hobson, 1 P. Will. 241, and Mr. Eldon's note to Westley *v.* Clarke, 1 Eden, R. 360; Murrell *v.* Cox, 2 Vern. 570. Lord Harcourt struggled against it in Churchill *v.* Lady Hobson, 1 P. Will. 241. In Westley *v.* Clarke (1 Eden, R. 357), Lord Northington shook it to its very foundation. His Lordship there said: "This bill is brought by a legatee to charge two executors with assets not actually received by them, but for which they had given a receipt; and by that, as the plaintiffs insist, made themselves liable for the actual receipt of the money by the third. And the claim is founded on this, that it is a general rule in this court that if executors join in a receipt they make themselves all liable in solido, because it is an unnecessary act, as each executor has an absolute power over the personal assets and rights of the testator. And that the contrary rule holds with respect to trustees that they are not answerable for joint receipts, each in solido, but only in proportion to what they actually receive. But though there are distinctions in the books concerning the acts of trustees and those of executors, according to the cases cited for that purpose, yet those distinctions seem not to be taken with precision sufficient to establish a general rule; for a joint receipt will charge trustees in solido each, if there is no other proof of the receipt of the money. As if a mortgage is devised in trust to three trustees, and the mortgagor with his witness meets them to pay it off; the money is laid on the table, and the mortgagor having obtained a reconveyance and receipt for his money withdraws, each trustee is answerable in solido. On the contrary, in the case of Churchill *v.* Hobson, where executors gave a joint receipt, only one was held liable. And this authority, which is not an exception of any particular case but an exception grounded on circumstances, shows there is no such rule. So that the rule seems to amount to no more than that a joint receipt given by executors is a stronger proof that they actually joined in the receipt, because generally they have no occasion to join for conformity. But if it appears plainly that one executor only received and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason and without being in a capacity to control the act of their co-executor either before or after that act was done, what grounds has any court in conscience to charge him? Equity arises out of a modification of acts where a very minute circumstance may make a case equitable or iniquitous. And though former authorities may and ought to bind the determination of subsequent cases with respect to rights, as in the right of curtesy or dower, yet there can be no rule for the future determination of this court concerning the acts of men." Lord Alvanley admitted the rule with great reluctance in Hovey *v.* Blakeman (4 Ves. 607, 608), insisting that it was not conclusive; and his remarks

it has been said that where they join in a receipt for money, and it is not distinguishable on the face of the receipt, or by other proper proofs, how much has been received by one and how much by the other trustee, it is reasonable to charge each with the whole.[1] The case has been likened to that of a man wilfully mixing his own corn or money with that of another, where he who has made the difficulty shall not be permitted to avail himself of it, but if there is any loss he shall bear it himself.[2]

§ 1693. **Same.** — Perhaps the truest exposition of the principle which ought in justice to regulate every case of this sort, whether it be the case of executors or of guardians or of trustees, is that

have great cogency and clearness. But it is now established by what must be deemed overruling authority. See Sadler *v.* Hobbs, 2 Bro. Ch. R. 114; Scurfield *v.* Howes, 3 Bro. Ch. R. 94, 95; Chambers *v.* Minchin, 7 Ves. 197 to 199 (in which Lord Eldon vindicated the rule against the objections taken to it); Brice *v.* Stokes, 11 Ves. 324; Doyle *v.* Blake, 2 Sch. & Lefr. 242; Joy *v.* Campbell, 1 Sch. & Lefr. 341; Shipbrook *v.* Lord Hinchinbrook, 16 Ves. 477, 479, 480. In the recent case of Moses *v.* Levi (3 Younge & Coll. 359, 367) Mr. Baron Alderson affirmed the rule, and held that one executor who had paid over money to his co-executor for the purpose of paying the same to residuary legatees was guilty of negligence, and therefore liable for the misapplication of the money by the co-executor. He then added: "If the case stood on this ground alone, it appears to me that it would come within the principle of Lord Shipbrook *v.* Lord Hinchinbrook (11 Ves. 252), Underwood *v.* Stevens (1 Meriv. R. 712), and Langford *v.* Gascoyne (11 Ves. 333), in which it is laid down generally that if an executor permits his co-executor to obtain possession of money which he had at any time in his own possession, and afterwards the co-executor misapplies the money, both executors are personally responsible. And that it would not fall within the case of Bacon *v.* Bacon (5 Ves. 331) and that class of cases, in which it was held that the executor shall be allowed the benefit of what he has handed over to his co-executor in the due and ordinary course of the administration of the testator's estate." Mr. Chancellor Kent, in his reasoning in Monell *v.* Monell (5 John. Ch. R. 283), so far as it goes, seems to repel the distinction between trustees and executors. See also Manahan *v.* Gibbons, 19 John. R. 427, 440; Sutherland *v.* Brush, 7 John. Ch. R. 22, 23; Crosse *v.* Smith, 7 East, R. 256, 257. See Stowe *v.* Bowen, 99 Mass. 194.

[1] Fellows *v.* Mitchell, 1 P. Will. 83; s. c. 2 Vern. 504, 515; 2 Fonbl. Eq. B. 2, ch. 7, § 5; Birmingham *v.* Wilcox, 120 Cal. 467, 52 Pac. 822; Fellrath *v.* Peoria German School Assn., 66 Ill. App. 77; but the cestui que trust may, by contract, look to only one of the trustees. Hessey *v.* Hessey, 1 Ky. L. Rep. 424.

If the trust estate has been entirely managed and controlled by one of the trustees, the other will not be liable. Meldon *v.* Devlin, 20 Misc. Rep. 56, 45 N. Y. Supp. 333.

Generally, see Barroll *v.* Foreman, 88 Md. 188, 40 Atl. 883; In re Westerfield, 32 App. Div. 324, 53 N. Y. Supp. 25; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

[2] Hart *v.* Ten Eyck, 2 John. Ch. R. 108; Mumford *v.* Murray, 6 John. Ch. R. 1, 16.

which has been adopted by a learned equity judge in our own country. It is that if two executors, guardians, or trustees join in a receipt for trust-money, it is prima facie, although not absolutely conclusive, evidence that the money came to the hands of both. But either of them may show by satisfactory proof that his joining in the receipt was necessary or merely formal, and that the money was in fact all received by his companion. And without such satisfactory proof he ought to be held jointly liable to account to the cestui que trust for the money upon the fair implication resulting from his acts, that he did not intend to exclude a joint responsibility.[1] But wherever either a trustee or an executor by his own negligence or laches suffers his co-trustee or co-executor to receive and waste the trust fund or assets of the testator when he has the means of preventing such receipt and waste by the exercise of reasonable care and diligence, then and in such a case such trustee or executor will be held personally responsible for the loss occasioned by such receipt and waste of his co-trustee or co-executor.[2]

§ 1694. **Same.** — The mere appointment by the trustees of one of them to be the factor of the others for the property is not of itself such a breach of trust as subjects the other trustee to all the consequences of it, nor does it make them liable as such for permitting the factor trustee to retain balances in his hands unless they are thereby guilty of gross negligence. Still however by the appointment of such trustee as factor they become liable for his default as agent, although not as trustee, in the same way that they would be liable for the defaults of any other person whom they might appoint to the office.[3] And a trustee by becoming the factor or cashier of the trust-property does not thereby incur any additional liability in respect to its management beyond what he was subject to as trustee.[4]

§ 1695. **Same.** — Again, if by any positive act, direction, or agreement of one joint executor, guardian, or trustee, the trust-money is paid over and comes into the hands of the other when it might and should have been otherwise controlled or secured by

[1] Monell *v.* Monell, 5 John. Ch. R. 296. See also Harvey *v.* Blakeman, 4 Ves. 596; Crosse *v.* Smith, 7 East, R. 244; Scurfield *v.* Howes, 3 Bro. Ch. R. 93, and Mr. Belt's notes; Westley *v.* Clarke, 1 Eden, R. 357; Joy *v.* Campbell, 1 Sch. & Lefr. 341; Sutherland *v.* Brush, 7 John. Ch. R. 22.

[2] Clark *v.* Clark, 8 Paige, R. 152; ante, § 845 *a*; Edmonds *v.* Crenshaw, 39 U. S. 166, 10 L. Ed. 402; Williams *v.* Nixon, 2 Beav. R. 472; ante, §§ 1690–1691.

[3] Horne *v.* Pringle, 8 Clark & Fin. R. 264. [4] Ibid.

both, there each of them will be held chargeable for the whole.[1] So if one trustee should wrongfully suffer the other to detain the trust-money a long time in his own hands without security, or should lend it to the other on his simple note, or should join with the other in lending it to a tradesman upon insufficient security, — in all such cases he will be deemed liable for any loss.[2] A fortiori one trustee will be liable who has connived at or been privy to an embezzlement of the trust-money by another; or if it is mutually agreed between them that one shall have the exclusive management of one part of the trust-property and the other of the other part.[3]

[1] Gill *v.* Attorney-General, Hardres, R. 314; Lord Shipbrook *v.* Lord Hinchinbrook, 16 Ves. 479, 480; Sadler *v.* Hobbs, 2 Bro. Ch. R. 116; Underwood *v.* Stevens, 1 Meriv. R. 712; Adair *v.* Shaw, 1 Sch. & Lefr. 272; Joy *v.* Campbell, 1 Sch. & Lefr. 341; Monell *v.* Monell, 5 John. Ch. R. 294 to 296; Bone *v.* Cooke, 1 McCleland, R. 168. It is not easy to reconcile the language used in all the cases as to what acts, directions, and omissions of one trustee shall make him chargeable. Lord Redesdale, in Joy *v.* Campbell (1 Sch. & Lefr. 341), states the doctrine thus: "The distinction seems to be with this respect to a mere signing; that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving. But if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge. And the true question in all those cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it amounted to a direction to pay his co-executor, for it could have no other meaning. He became responsible for the application of the money just as if he had received it. But this does not apply to what is done in the discharge of a necessary duty of the executor; for example an executor living in London is to pay debts in Suffolk, and remits money to his co-executor to pay these debts. He is considered to do this of necessity. He could not transact business without trusting some persons; and it would be impossible for him to discharge his duty if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way. It would be the same were one executor in India and another in England, the assets being in India but to be applied in England. There the co-executor is appointed for the purpose of carrying on such transactions; and the executor is not responsible, for he must remit to somebody; and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence."

[2] Sadler *v.* Hobbs, 2 Bro. Ch. R. 114; Keble *v.* Thomson, 3 Bro. Ch. R. 112; Langston *v.* Ollivant, Cooper, R. 33; Caffrey *v.* Darby, 6 Ves. 488; Bone *v.* Cooke, 1 McCleland, R. 168; Brice *v.* Stokes, 11 Ves. 319; Chambers *v.* Minchin, 7 Ves. 197, 198; 2 Fonbl. Eq. B. 2, ch. 7, § 5, note (*k*); Mumford *v.* Murray, 6 John. Ch. R. 1, 16.

[3] 2 Fonbl. Eq. B. 2, ch. 7, § 5, note (*k*) and (*l*); Gill *v.* Attorney-Gen., Hardres, 314; Boardman *v.* Mossman, 1 Bro. Ch. R. 68; Bate *v.* Scales, 14 Ves. 402; Oliver *v.* Court, 8 Price, 127.

§ 1696. **Cestui Que Trust May Waive Misconduct of Trustee by His Own Negligence.** — But here it may be important to take notice of another illustration of the doctrine that Courts of Equity administer their aid only in favor of persons who exercise due diligence to enforce their rights and are guilty of no improper acquiescence or delay, upon the maxim so often referred to, "Vigilantibus, non dormientibus, æquitas subvenit." Hence if there be a clear breach of trust by a trustee, yet if the cestui que trust or beneficiary has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a Court of Equity will not relieve him, but leave him to bear the fruits of his own negligence or infirmity of purpose.[1]

§ 1697. **How Is a Debt Occasioned by Breach of Trust, Considered.** — In cases of a breach of trust the question has arisen in what light the debt created by such breach of trust is to be viewed; whether it is to be deemed a debt by simple contract, and so binding upon the personal assets only of the trustee, or a debt by specialty. At law, so far as any remedy exists there, the debt is treated as a simple contract debt, even though the trust arises under a deed executed by the trustees, and contains a clause that no trustee shall be chargeable or accountable for any money arising in execution of the trust, except what he shall actually receive, unless there be some correspondent covenant also on the part of the trustees. For this is a common clause of indemnity in trust deeds; and the true sense of it is, that the trustees shall not be accountable for more than they receive. They are in fact accountable for what they actually receive, but not accountable as under a covenant.[2]

§ 1698. **Same.** — The rule in Courts of Equity is the same. The debt created by a breach of trust is there considered but as a simple contract debt even although circumstances of fraud appear;[3] unless indeed there be some acknowledgment of the

[1] Broadhurst *v.* Balguay, 1 Younge & Coll. New R. 16, 28 to 32; James *v.* James, 55 Ala. 525; Ashurst's Appeal, 60 Pa. St. 54, 315. It is not a waiver of the right of relief that the cestui que trust, with knowledge of the breach of trust, obtains from the trustee part of that to which he is entitled, unless an intention so to do can be clearly inferred from the facts. Harston *v.* Tenison, 20 Ch. D. 109. As to the consent of a married woman cestui que trust, not being sui juris, see Fletcher *v.* Green, 33 Beav. 426; Dixon *v.* Dixon, 9 Ch. D. 587; Quimby *v.* Uhl, 130 Mich. 198, 89 N. W. 722, 9 Detroit Leg. N. 1; Dresser *v.* Travis, 39 Mis. Rep. 358, 79 N. Y. Supp. 924; Brown *v.* Brown, 107 Tenn. 349, 65 S. W. 413.

[2] Bartlett *v.* Hodgson, 1 T. Rep. 42.

[3] Vernon *v.* Vawdry, 2 Atk. 119; 2 Fonbl. Eq. B. 2, ch. 7, § 1, note (*b*); 2 Madd. Ch. Pr. 114.

debt by the trustee under seal.[1] But in cases of this sort, if the specialty creditors exhaust the personal assets, Courts of Equity will let a simple contract creditor of this sort, equally with other simple contract creditors, stand in the place of the specialty creditors in order to obtain satisfaction out of the real estate of the testator.[2]

§ 1699. **Trustees May Be Removed.** — Courts of Equity will not only hold trustees responsible for any misapplication of trust-property and any gross negligence or wilful departure from their duty in the management of it, but they will go further, and in cases requiring such a remedy they will remove the old trustees and substitute new ones.[3] Indeed the appointment of new trustees is an ordinary remedy, enforced by Courts of Equity in all cases where there is a failure of suitable trustees to perform the trust, either from accident, or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause.[4]

§ 1700. **Same.** — The doctrine seems to have been carried so far by the courts as to remove a joint trustee from a trust who wished to continue in it, without any direct or positive proof of his personal default, upon the mere ground that the other co-trustees would not act with him; for in a case where a trust is to be executed, if the parties have become so hostile to each other

[1] See Isaacson *v.* Harwood, L. R. 3 Ch. 225; Holland *v.* Holland, L. R. 4 Ch. 449.

[2] Cox *v.* Bateman, 2 Ves. 18, 19.

[3] January *v.* Rutherford, 9 Paige, R. 273. See Lathrop *v.* Smalley, 8 C. E. Green, 192; Attorney-Gen. *v.* Garrison, 101 Mass. 223; Attorney-Gen. *v.* Barbour, 121 Mass. 568; In re Eastern R. Co., 120 Mass. 412; Satterfield *v.* John, 53 Ala. 127; Hussey *v.* Coffin, 1 Allen, 354; Drake *v.* Green, 10 Allen, 124; In re Moravian Soc., 26 Beav. 101 (temporary absence); Ewing *v.* Ewing, 38 Ind. 390 (departure from the State); In re Bridgman, 6 Jur. (N. S.) 1065 (bankruptcy). Upon the question who should be appointed see In re Tempest, L. R. 1 Ch. 485. A joint stock company, whose directors are appointed for a definite period, has no inherent power to remove them. Imperial Hotel Co. *v.* Hampson, 23 Ch. D. 1. Secus, it seems, in England, of the head of a municipal corporation, in a case of incapacity. Ib. p. 7, Jessel, M. R.; May *v.* May, 167 U. S. 310, 42 L. Ed. 179, 17 S. Ct. Rep. 824; Manhattan *v.* Illinois Staats-Zeitung Co., 90 Ill. App. 315; City of St. Louis *v.* Wenneker, 145 Mo. 230, 47 S. W. 105, 68 Am. St. Rep. 561; Gaston *v.* Hayden, 98 Mo. App. 683, 73 S. W. 938; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660.

[4] Ellison *v.* Ellison, 6 Ves. 663, 664; 2 Fonbl. Eq. B. 2, ch. 7, § 1, note (*a*); Lake *v.* DeLambert, 4 Ves. 592; 2 Madd. Ch. Pr. 133; Millard *v.* Eyre, 2 Ves. Jr. 94; Buchanan *v.* Hamilton, 5 Ves. 722; Hibbard *v.* Lambe, Ambler, R. 309; Com. Dig. Chancery, 4 W. 7.

that they will not act together, the very danger to the due execution of the trust and the due disposition of the trust fund requires such an interposition to prevent irreparable mischief.[1]

§ 1701. **Same.** — But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust.[2] It is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course.[3] But the acts or omissions must be such as to endanger the trust-property, or to show a want of honesty, or a want of a proper capacity to execute the duties, or a want of reasonable fidelity.[4]

§ 1702. **The Status of Trusts Situated in a Foreign Country.** — Before concluding the subject of trusts it may be proper to say a few words in regard to such trusts as either attach to trust-property situate in a foreign country, or are properly to be executed in a foreign country. The considerations belonging to this branch of Equity Jurisprudence are not indeed limited to cases of trust; and therefore we shall here bring them together in one view, as for the most part they are equally applicable to every subject within the reach of equitable relief.

§ 1703. **Same.** — The jurisdiction of Courts of Equity in regard to trusts as well as to other things is not confined to cases where the subject-matter is within the absolute reach of the process of the court called upon to act upon it, so that it can be directly and finally disposed of or affected by the decree. If the proper parties are within the reach of the process of the court, it will be sufficient to justify the assertion of full jurisdiction over the subject-matter in controversy.[5] The decrees of Courts of Equity do indeed primarily and properly act in personam, and at most collaterally

[1] Arvedale *v.* Ettrick, 2 Ch. Cas. 130; Disbrow *v.* Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614, 167 N. Y. 606, 60 N. E. 1110; In re Myer's Est., 203 Pa. St. 413, 54 Atl. 1093; but a mere unfriendly feeling between the trustee and cestui que trust is not alone sufficient. Anderson *v.* Kemper, 116 Ky. 339, 76 S. W. 122, 25 Ky. L. Rep. 538; Polk *v.* Linthicum, 100 Md. 615, 60 Atl. 455, 69 L. R. A. 920; In re Nathan's Est., 191 Pa. St. 404, 43 Atl. 313; In re Price's Est., 209 Pa. 210, 58 Atl. 280.

[2] Portsmouth *v.* Fellows, 5 Madd. R. 450; Mayor, &c. of Coventry *v.* Attorney-Gen., 2 Bro. Parl. Rep. 236; s. c. 7 Bro. Parl. R. by Tomlins, 235.

[3] Attorney-Gen. *v.* Coopers' Co., 19 Ves. 192.

[4] Satterfield *v.* John, 53 Ala. 127; Lathrop *v.* Smalley, 8 C. E. Green, 192; Cavender *v.* Cavender, 114 U. S. 464, 29 L. Ed. 212, 5 S. Ct. Rep. 955.

[5] Mead *v.* Merrit, 2 Paige, R. 402; Mitchell *v.* Bunch, 2 Paige, R. 606, 615; Com. Dig. Chancery, 4 W. 27. But see Jenkins *v.* Lester, 131 Mass. 355; Leland *v.* Smith, ib. 358, note.

only in rem.[1] Hence (as we have already seen) the specific performance of a contract for the sale of lands lying in a foreign country will be decreed in equity whenever the party is resident within the jurisdiction of the court.[2] So an injunction will under the like circumstances be granted to stay proceedings in a suit in a foreign country.[3]

§ 1704. **Same.** — These are not however peculiar or privileged cases for the exercise of jurisdiction; for Courts of Equity will in all other cases where the proper parties are within the territorial sovereignty, or within the reach of the territorial process, administer full relief, although the property in controversy is actually situate in a foreign country, unless indeed the relief which is asked is of a nature which the court is incapable of administering. Many instances of this sort may readily be adduced to illustrate this general doctrine and its exceptions. Thus a party resident in England who is a joint tenant of land situate in Ireland, may be decreed to account for the profits of such land in the Court of Chancery in England.[4] But a bill for a partition of lands situate in Ireland will not be entertained in a Court of Chancery in England; because (as has been said) it is in the realty, and the court cannot award a commission into Ireland; and a bill for a partition is in the nature of a writ of partition at the common law, which lieth not in England for lands in Ireland.[5]

§ 1705. **Same.** — The same doctrine is applied to cases of trusts attached to land in a foreign country. They may be enforced by a Court of Equity in the country where the trustee is a resident, and to whose process he may rightfully be subjected.[6] It is also applied to cases of mortgages of lands in foreign countries. And a bill to foreclose or redeem such a mortgage may be brought in any Court of Equity in any other country where the proper parties are resident.[7] It was aptly said by Lord Kenyon, when Master

[1] Penn *v.* Lord Baltimore, 1 Ves. R. 444; Mitchell *v.* Bunch, 2 Paige, R. 615.

[2] Ante, § 743; Penn *v.* Lord Baltimore, 1 Ves. R. 444.

[3] Ante, §§ 899, 900.

[4] Com. Dig. Chancery, 3 X. 4 W. 27; Cartwright *v.* Pettus, 2 Ch. Cas. 214.

[5] Cartwright *v.* Pettus, 2 Ch. Cas. 214; Carteret *v.* Petty, 2 Swanst. R. 323; s. c. 1 Eq. Abr. C. 133; Com. Dig. Chancery, 3 X. 4 E. 4 W. 27; Earl of Kildare *v.* Eustace, 2 Ch. Cas. 188; s. c. 1 Vern. 419, 422; 1 Eq. Abr. 133, C. 4; Butterfield *v.* Nogales Copper Co., 9 Ariz. 212, 80 Pac. 345; Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208.

[6] Earl of Kildare *v.* Eustace, 1 Vern. 419, 422; 1 Eq. Abr. 133.

[7] Toller *v.* Carteret, 2 Vern. 494; s. c. 1 Eq. Abr. 134, pl. 5, Com. Dig. Chancery, 3 X.

of the Rolls, in a case then before him: "It was not much litigated that the Courts of Equity here have an equal right to interfere with regard to judgments and mortgages upon the lands in a foreign country as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is that this court cannot act upon the land directly, but acts upon the conscience of the person here." And after citing some cases to this effect, he added: "These cases clearly show that with regard to any contract made in equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situate in England." [1]

§ 1706. **Same.** — The same doctrine is applied to cases of frauds touching contracts or conveyances of real property situate in a foreign country. Thus if a rent-charge is fraudulently obtained on lands lying in Ireland, a bill to set it aside will be sustained in the Court of Chancery in England if the defendant is a resident there.[2] Courts of Equity have gone even further, and have in effect as between the parties overhauled the judgments of foreign courts and even the sales made under those judgments, where fraud has intervened in those judgments, or a grossly inequitable advantage has been taken. In such cases they do not indeed disregard such judgments, or directly annul or control them; but they arrive at the equities between the parties in the same manner as they would if the proceedings had been mere matters in pais, subject to their general jurisdiction.[3]

§ 1707. **Same.** — In some instances language has been used which may be supposed to limit the jurisdiction to cases where the lands, though situate abroad, are yet within the general sovereignty of the nation exerting the equitable jurisdiction; as for instance suits in the Chancery of England in regard to contracts, trusts, frauds, and other matters touching lands in Ireland or in the Colonies of Great Britain. Lord Hardwicke on one occasion said on this subject: "The different Courts of Equity are held under the same Crown, though in different dominions; and therefore, considering this as a court abroad, the point of jurisdiction is the same as if in Ireland. And it is certain where the provision

[1] Lord Cranstown *v.* Johnston, 3 Ves. Jr. 182; Earl of Derby *v.* Duke of Athol, 1 Ves. R. 202; Gascoine *v.* Douglas, 2 Dick. 431.

[2] Earl of Arglasse *v.* Muschamp, 1 Vern. 75.

[3] Lord Cranstown *v.* Johnston, 3 Ves. Jr. 140; Jackson *v.* Petrie, 10 Ves. 165; White *v.* Hall, 12 Ves. 321; Story on Conflict of Laws, §§ 544, 545; Com. Dig. Chancery, 3 X. 4 W. 27.

is in England, let the cause of suit arise in Ireland or the plantations, if the bill be brought in England, as the defendant is here, the courts do 'agere in personam', and may by compulsion of the person and process of the court compel him to do justice."[1] But this language, properly interpreted, was meant to apply only to the case then before the court, which was a suit respecting matters arising in a British colony and subjected to judicial decision there. Upon any other interpretation it would be inconsistent with the principles upon which Courts of Equity profess to act in matters of jurisdiction.

§ 1708. **Same.** — Indeed Lord Hardwicke himself in another case where a bill was brought for possession of land in Scotland, and for a discovery of the rents and profits, deeds and writings thereof, and of fraud in obtaining the deeds, asserted the jurisdiction as to the fraud and discovery, and said that this would have been a good bill as to fraud and discovery, if the lands had been in France and the persons were resident here; for the jurisdiction of the court as to frauds is upon the conscience of the party.[2]

§ 1709. **Same.** — The same principle has been asserted by the Supreme Court of the United States in its broadest form; and it has been held that in cases of fraud, of trust, or of contract, the jurisdiction of a Court of Equity is sustainable wherever the person may be found, although lands not within the jurisdiction of that court may be affected by the decree.[3]

§ 1710. **Same.** — Still it must be borne in mind that the doctrine is not without limitations and qualifications; and that to justify the exercise of the jurisdiction in cases touching lands in a foreign country the relief sought must be of such a nature as the court is capable of administering in the given case.[4] We have already seen that a bill for a partition of lands in a foreign country will not be entertained in a Court of Equity, upon the ground that the relief cannot be given by issuing a commission to such foreign country.[5] Perhaps a more general reason might be given, founded upon the principles of international law; and that is, that real estate cannot be transferred or partitioned or charged, except according to the laws of the country in which it is situated.

§ 1711. **Same.** — Another case illustrative of the same qualification may be put, which has actually passed into judgment. A

[1] Foster *v.* Vassall, 3 Atk. 589. [2] Angus *v.* Angus, 1 West. R. 23.
[3] Massie *v.* Watts, 10 U. S. 148, 3 L. Ed. 181.
[4] See Jenkins *v.* Lester, 131 Mass. 355.
[5] Ante, § 1704; Cartwright *v.* Pettus, 2 Ch. Cas. 214; s. c. 1 Eq. Abridg. 133; Carteret *v.* Petty, 2 Swanst. R. 323.

bill was brought in the English Court of Chancery for the delivery of the possession of a moiety of land in St. Christopher's, and likewise for an account of the rents and profits thereof. Upon demurrer it was held that the court had no jurisdiction to put persons into possession in a place where they had their own methods on such occasions, to which the party might have recourse; for lands in the plantations (it was said) are no more under the jurisdiction of the court than lands in Scotland, for it "agit in personam" only. But the bill as to the rents and profits was retained.[1]

§ 1712. **Same.** — The like decision was made in another case already alluded to, upon a bill brought in the same court for possession of lands in Scotland, and for a discovery of the rents and profits, deeds and writings thereof, and fraud in obtaining the deed. A plea was put in, insisting that the matter was without the jurisdiction of the court. But it was overruled, and the court said that it could act upon the person as to the fraud and discovery.[2] So where a bequest was made for a charity to be administered in Scotland, the English Court of Chancery declined to take the administration of it into its own hands, deeming it proper to be acted on by the Courts of Scotland.[3]

[1] Roberdeau *v.* Rous, 1 Atk. 543; ante, §§ 1707, 1708.
[2] Angus *v.* Angus, 1 West. R. 23; ante, § 1708.
[3] Provost, &c. of Edinburgh *v.* Auber, Ambler, R. 226; Attorney-Gen. *v.* Lepine, 2 Swanst. R. 182; Emery *v.* Hill, 1 Russell, R. 112; Minet *v.* Vulliamy, id. 113, note; ante, §§ 1695 to 1698.

CHAPTER XXXVII

PENALTIES AND FORFEITURES

§ 1713. **Penalties and Forfeitures.** — Having thus gone over some of the principal heads of trusts which are cognizable in equity, we shall now proceed to another important branch of equity jurisdiction, to wit, that which is exercised in cases of PENALTIES AND FORFEITURES for breaches of conditions and covenants. Originally in all cases of this sort there was no remedy at law, but the only relief which could be obtained was exclusively sought in Courts of Equity. Now indeed by the operation of statutes made for the purpose relief may be obtained at law both in England and America in a great variety of cases, although some cases not within the purview of these statutes are still cognizable in equity alone. The original jurisdiction however in equity still remains, notwithstanding the concurrent remedy at law;[1] and therefore it properly falls under the present head.[2]

§ 1714. **Nature of Penalties.** — Before entering upon the examination of this subject it may be well to say a few words in regard to the nature and effect of conditions at the common law, as it may help us more distinctly to understand the nature and extent of equity jurisdiction in regard to conditions. At law (and in general the same is equally true in equity) if a man undertakes to do a thing either by way of contract or by way of condition, and it is practicable to do the thing, he is bound to perform it or he must suffer the ordinary consequences; that is to say, if it be a matter of contract he will be liable at law for damages for the non-performance; if it be a condition, then his rights dependent upon the performance of the condition will be gone by

[1] See ante, § 63 *a*; Seton *v.* Slade, 7 Ves. 274.

[2] A bill to restrain forfeiture cannot be maintained if it does not show any danger of irreparable injury. Walker *v.* Brooks, 125 Mass. 241. Secus if it does. Ib.; Florence Sewing Machine Co. *v.* Grover Sewing Machine Co., 110 Mass. 1.

the non-performance. The difficulty which arises is to ascertain what shall be the effect in cases where the contract or condition is impossible to be performed; or where it is against law; or where it is repugnant in itself or to the policy of the law.[1]

§ 1715. **Impossible Conditions Bringing about Penalties.** — In regard to contracts, if they stipulate to do anything against law or against the policy of the law, or if they contain repugnant and incompatible provisions, they are treated at the common law as void; for in the first case the law will not tolerate any contracts which defeat its own purposes, and in the last case the repugnancy renders it impossible to ascertain the intention of the parties; and until ascertained it would be absurd to undertake to enforce it. On the other hand if the parties stipulate for a thing impossible to be done, and known on both sides to be so, it is treated as a void act and as not intended by the parties to be of any validity.[2] But if only one party knows it to be impossible and the other does not, and is imposed upon, the latter may compel the former to pay him damages for the imposition.[3] So if the thing is physically possible but not physically possible for the party, still it will be binding upon him if fairly made; for he should have weighed his own ability and strength to do it.[4]

§ 1716. **Same.** — In regard to conditions they may be divided into four classes: (1) Those which are possible at the time of their creation, but afterwards become impossible either by the act of God or by the act of the party; (2) Those which are impossible at the time of their creation; (3) Those which are against law or public policy, or are mala in se or mala prohibita; (4) Those which are repugnant to the grant or gift by which they are created or to which they are annexed.[5] The general rule of the common law in regard to conditions is that if they are impossible at the time of their creation, or afterwards become impossible by the

[1] See Butler's note (1) to Co. Litt. 206 *a*, and 1 Fonbl. Eq. B. 1, ch. 4, § 1, and notes (*a*), (*b*), (*c*).

[2] 1 Fonbl. Eq. B. 1, ch. 4, § 1, and note (*a*); Id. § 2; Id. § 3, note (*r*); Id. § 4, note (*s*); Pullerton *v.* Agnew, 1 Salk. 172; Com. Dig. Condition, D. 1.

[3] Ibid.

[4] Thornborrow *v.* Whiteacre, 2 Ld. Raym. 1164. A Court of Equity would relieve against a contract like that in 2 Ld. Raym. 1164, and James *v.* Morgan, 1 Lev. R. 111, upon the ground of fraud, or imposition, or unconscionable advantage taken of the party. Ante, §§ 188, 331.

[5] This is the classification by Mr. Butler in his learned note (1) to Co. Litt. 206 *a*; and it is copied by Mr. Fonblanque into his note to 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (*c*); Id. § 3, notes (*q*), (*r*); Id. § 4, notes (*s*), (*t*), (*u*). See also Com. Dig. Condition, D. 1 to 8.

act of God or of the law or of the party who is entitled to the benefit of them (as for example the feoffor of an estate or the obligee of a bond), or if they are contrary to law, or if they are repugnant to the nature of the estate or grant, they are void. But if they are possible at the time and become subsequently impossible by the act of the party who is to perform them, then he is treated as in delicto, and the condition is valid and obligatory upon him. But the operation of this rule will or may, as we shall presently see, under different circumstances of its application produce directly opposite results.[1]

§ 1717. **What Is an Impossible Condition.** — In the view of the common law a condition is considered as impossible only when it cannot by any human means take effect; as for example that

[1] Lord Coke's Comments, Co. Litt. 206 *a*, on this subject are very valuable, and part of them are therefore here extracted. He begins by remarking that there are divers diversities which are worthy of observation, and then he adds: "First between a condition annexed to a state in lands or tenements upon a feoffment, gift in tail, &c., and a condition of an obligation, recognizance, or such like. For if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c., shall not be avoided. As if a man maketh a feoffment in fee upon condition that the feoffor shall, within one year, go to the city of Paris about the affairs of the feoffee, and presently after the feoffor dieth, so as it is impossible by the act of God that the conditions should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the state, yet there is a precedency before the re-entry, namely, the performance of the condition. And if the land should by construction of law be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed which was made for his benefit. And it appeareth by Littleton that it must not be to the damage of the feoffee; and so it is if the feoffor shall appear in such a court the next term, and before the day the feoffor dieth, the estate of the feoffee is absolute. But if a man be bound by recognizance or bound with condition, that he shall appear the next term in such a court, and before the day the conusee or obligor dieth, the recognizance or obligation is saved; and the reason of the diversity is because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, namely, the performance of the condition. But the bond or recognizance is a thing in action, an executory, whereof no advantage can be taken until there be a default in the obligor; and therefore in all cases where a condition of a bond, recognizance, &c., is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c., there the obligation, &c., is saved. But if the condition of a bond, &c., be impossible at the time of the making of the condition, the obligation, &c., is single. And so it is in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute; but if the condition precedent be impossible, no state or interest shall grow thereupon." See also Butler's note to Co. Litt. 206 *b*, 207 *a*; post, § 1719.

the obligee shall go from the church of St. Peter at Westminster to the church of St. Peter at Rome within three hours. But if it be only in a high degree improbable, and such as it is beyond the power of the obligee to effect, it is then not deemed impossible.[1]

§ 1718. **Conditions Precedent and Subsequent Distinguished.** — Conditions of all these various kinds will have a very different operation where they are conditions precedent, from what they will have where they are conditions subsequent. Thus for example if an estate is granted upon a condition subsequent, that is to say, to be performed after the estate is vested, and the condition is void for any of the causes above stated, there the estate becomes absolute.[2] But if the condition is precedent or to be performed before the estate vests, there the condition being void the estate which depends thereon is void also, and the grantee shall take nothing by the grant; for he hath no estate until the condition is performed.[3] Thus if a feoffment is made to a man in fee simple on condition that unless he goes from England to Rome in twenty-four hours, or unless he marries A before such a day, and she dies before that day or marries the feoffor, or unless he kills another, or in case he alienes in fee, and then and in every such case the estate shall be void and determine, — in all these cases the condition is void or impossible, and being a condition subsequent the estate is absolute in the feoffee.[4] But if on the other hand a grant be made to a man that if he kills another, or if he goes from England to Rome within twenty-four hours, or if he marries A before such a day and before that day she dies, or if he does not aliene an estate before such a day and he has already aliened it, then and in that event he shall have an estate in fee, — in all these cases, the condition being void or impossible and being a condition precedent, no estate ever vests in the grantee.[5]

§ 1719. **Same.** — On the other hand if a bond or other obligation be upon a condition which is impossible, illegal, or repugnant at the time when it is made, the bond is single and the obligor is bound to pay it. But if the condition be possible at the time when it is made and afterwards becomes impossible by the act of God or of the law or of the obligee, there the bond is saved and

[1] Co. Litt. 206 *a* and Mr. Butler's note (1); Com. Dig. Condition, D. 2.

[2] 2 Black. Comm. 156, 157; Com. Dig. Condition, D. 1 to 4; Co. Litt. 206 *a*; 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (*c*).

[3] Ibid.; Cary *v.* Bertie, 2 Vern. R. 339, 340.

[4] 2 Black. Comm. 157; Co. Litt. 206 *a*. [5] Ibid.

the obligor is not bound to pay it.[1] So if the condition is in the disjunctive and gives liberty to do one thing or another at the election of the obligor; and both are possible at the time but one part afterwards by the act of God or of the obligee becomes impossible, the obligation is saved.[2] But if one part only was possible at the time, then the other part if possible ought to be performed.[3]

§ 1720. **Same.** — The Roman law, if it does not entirely coincide with the common law on the subject of conditions, is in many respects founded on similar considerations. If an impossible condition was annexed to a stipulation, the stipulation was by that law void. "Si impossibilis conditio obligationibus adjiciatur nihil valet stipulatio."[4] "Item, quod leges fieri prohibent, si perpetuam causam (prohibitionis) servaturum est, cessat obligatio."[5] That rule of course applied to the case where the condition constituted a part of the stipulation. "Impossibilium nulla obli-

[1] Com. Dig. Condition, D. 1; Thornborrow *v.* Whiteacre, 2 Ld. Raym. 1164; 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (*b*); Graydon *v.* Hicks, 2 Atk. 18; Jones *v.* Earl of Suffolk, 1 Bro. Ch. R. 528; Co. Litt. 206 *a*; ante, § 1304; 1 Roll. Abridg. 450, pl. 10; Abbott on Shipp. Pt. 3, ch. 11, § 3. Although the general rule seems to be, as stated in the text, that where the condition although possible becomes afterwards impossible to be performed, the obligation is saved, yet it is not to be taken as universally true, either at law or in equity, that where a covenant or contract is to be performed by a party (not secured or sought to be enforced by a penalty), and he is afterwards prevented from performing it by the act of God or by inevitable casualty, that he is thereby exonerated from the covenant or contract, and not liable in damages for the non-performance. The contrary is certainly true in a variety of cases. But it is not easy, if indeed it be practicable, to reconcile all the authorities, or to say exactly in what cases the performance is excused or not. Ante, §§ 101 to 104. See Abbott on Shipp. Pt. 3, ch. 1, §§ 14 to 16 *b*; Id. ch. 2, § 3; Id. Pt. 3, ch. 7, §§ 17, 19; Barker *v.* Hodgson, 3 Maule & Selw. 267; Edwin *v.* East India Company, 2 Vern. 210, 212; Blight *v.* Page, 3 Bos. & Pull. 295, note; Sjoerds *v.* Luscombe, 16 East, 201; Shubrick *v.* Selmond, 3 Burr. R. 1637; Paradine *v.* Jane, Aleyn, R. 27; Brecknock Canal Company *v.* Pritchard, 6 Term R. 750; Atkinson *v.* Ritchie, 10 East, R. 530; Bullock *v.* Dommitt, 6 Term R. 650; Madeiros *v.* Hill, 8 Bing. R. 231, 235. Many of the cases on both sides are collected in Story on Bailm. §§ 25, 35, 36, and in Platt on Covenants, Pl. 6, ch. 2, pp. 582 to 584; and Chitty on Contracts, by Perkins, pp. 567, 569 (Am. ed. 1839).

As to impossibility of performing building contracts see Roberts *v.* Bury Comm'rs, L. R. 4 C. P. 755; s. c. 5 C. P. 310; Jones *v.* St. John's College, L. R. 6 Q. B. 115.

[2] Com. Dig. Condition, D. 1; Laughter's Case, 5 Co. R. 21; 1 Fonbl. Eq. B. 1, ch. 4, § 3, and note (*q*).

[3] Ibid.

[4] Inst. B. 3, tit. 20, § 11; Pothier, Pand. Lib. 45, tit. 1, n. 40, 98.

[5] Pothier, Pand. Lib. 45, tit. 1, n. 39; Dig. Lib. 45, tit. 1, l. 35, § 1.

gatio est." [1] Pothier states the doctrine of the civil law in the following manner: The condition of a thing impossible, unlawful, or contrary to good morals, under which one promises anything renders the act absolutely void when it lies in fesance (in faciendo), and no obligation springs from it.[2] As if I have promised you a sum of money upon condition that you make a triangle without angles, or that you shall go naked through the streets.[3]

§ 1721. **Same.** — In another place a distinction is taken in the Roman law approaching nearer to that in the common law. "Impossibilis conditio cum in faciendum concipitur, stipulationibus obstat; aliter atque si talis conditio inseratur stipulationi, si in cœlum non ascenderit; nam utilis et præsens est, et pecuniam creditam continet." [4]

§ 1722. **Same.** — A condition was accounted impossible in the Roman law when it consisted of a thing of which nature forbids the existence. "Impossibilis autem conditio habetur cui natura impedimento est, quominus existat." [5] But a stipulation which was not possible to be complied with by the party stipulating, but was possible to another person, was held obligatory. "Si ab eo stipulatus sim qui efficere non possit quum allii possible sit; jure factam obligationem, Sabinus scribit." [6] The same principles were still more emphatically expounded in other places in the Digest. "Non solum stipulationes impossibili conditione adplicatæ nullius momenti sunt; sed etiam cæteri quoque contractus (veluti emptiones, locationes) impossibili conditione interposita, æque nullius momenti sunt. Quia in ea re quæ ex duorum pluriumve consensu agitur, omnium voluntas spectetur; quorum, procul dubio, in hujusmodi actu talis cogitatio est, ut nihil agi existiment apposita ea conditione quam sciant esse impossibilem." [7]

§ 1723. **Same.** — From what has been already said it is obvious that if a condition or covenant was possible to be performed, there was an obligation on the party at the common law to perform it punctiliously. If he failed so to do, it was wholly immaterial whether the failure was by accident, or mistake, or fraud, or negligence. In either case his responsibility dependent upon it became absolute, and his rights dependent upon it became forfeited or extinguished. Thus for example if a bond was made with a

[1] Dig. Lib. 50, tit. 17, l. 185. [2] Pothier, Oblig. n. 204. [3] Ibid.
[4] Dig. Lib. 45, tit. 1, l. 7; Inst. Lib. 3, tit. 20, § 11; Pothier, Oblig. n. 204; Pothier, Pand. Lib. 45, tit. 1, n. 98.
[5] Inst. Lib. 3, tit. 20, § 11.
[6] Dig. Lib. 45, tit. 1, l. 137, § 5; Pothier, Pand. Lig. 45, tit. 1, n. 39.
[7] Ibid.

penalty of £1,000 upon condition that if £100 were paid to the obligee on or before a certain day it should be void, if it was not paid at the day from any cause whatsbever, except the fault of the obligee, the obligation became single, and the obligor was compellable at law to pay the whole penalty. So if an estate was conveyed upon condition that if a certain sum of money was paid to the grantee on or before a certain day it should be void (which constituted what we now call a mortgage), if the money was not paid at the day, the estate became (as we have seen), at law, absolute.[1] So (as has been already stated) if a sale was made of an estate to be paid for at a particular day, if the money was not paid at the day, the right of the vendee to enforce a performance of the contract at law was extinguished. On the other hand if the vendor was unable or neglected, at the day appointed, to make a conveyance of the estate, the sale as to him became utterly incapable of being enforced at law.[2]

§ 1724. **Rules in Equity with Reference to Broken Conditions.** — Courts of Equity do not hold themselves bound by such rigid rules, but they are accustomed to administer as well as to refuse relief in many cases of this sort, upon principles peculiar to themselves; sometimes refusing relief, and following out the strict doctrines of the common law as to the effect of conditions and conditional contracts; and sometimes granting relief upon doctrines wholly at variance with those held at the common law. It may be necessary therefore to consider each distinct class of cases separately, so that the principles which govern in each may be more clearly developed.

§ 1725. **Origin of Jurisdiction in Cases of Penalties.** — In the first place as to relief in cases of penalties annexed to bonds and other instruments the design of which is to secure the due fulfilment of the principal obligation.[3] The origin of equity jurisdiction in cases of this sort is certainly obscure, and not easily traced to any very exact source. It is highly probable that relief was first granted upon the ground of accident, or mistake, or fraud, and was limited to cases where the breach of the condition was by the non-payment of money at the specified day. In such cases Courts of Equity seem to have acted upon the ground that by compelling the obligor to pay interest during the time of his de-

[1] Ante, §§ 1004, 1012. [2] Ante, §§ 771, 772, 776, 777.

[3] Mr. Evans, in a learned note to Pothier on Obligations (Vol. 2, Number 12, pp. 81 to 111), has given a very elaborate review of the doctrine of penal obligations, to which I invite the particular attention of the reader. See also Newland on Contracts, ch. 17, pp. 307 to 311.

fault the obligee would be placed in the same situation as if the principal had been paid at the proper day.[1] They wholly overlooked (as has been said) the consideration that the failure of payment at that day might be attended with mischievous consequences to the obligee, which (in a rational sense) never could be cured by any subsequent payment thereof with the addition of interest.[2] Upon this account doubts have sometimes been expressed as to the solidity of the foundation on which the doctrine of affording relief in such cases rests.[3]

§ 1726. **Same.** — But whatever may be the origin of the doctrine, it has been for a great length of time established and is now expanded so as to embrace a variety of cases not only where money is to be paid but where other things are to be done and other objects are contracted for. In short, the general principle now adopted is, that wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof or the damage really incurred by the non-performance.[4] In every such case the true test (generally if not universally [5]) by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation

[1] Reynolds *v.* Pitt, 19 Ves. 140.

[2] Ibid.

[3] Ibid. See Hill *v.* Barclay, 18 Ves. 58, 60.

[4] Sloman *v.* Walter, 1 Bro. Ch. R. 418; 1 Fonbl. Eq. B. 1, ch. 3, § 2, note (*d*); Id. B. 1, ch. 6, § 4, note (*h*); Skinner *v.* Dayton, 2 John. Ch. R. 535; Sanders *v.* Pope, 12 Ves. 282; Davis *v.* West, 112 Ves. 475. If the penalty consist merely in requiring performance of what is (1) either really due, or (2) what on performance of the contract will become due later, it will, it seems, be enforced, or at least will not be relieved against. Thus a stipulation in a compromise of a debt by taking a mortgage for a smaller sum, that if that is not paid at a stated time the whole debt shall revive, appears to be valid even in equity. Thompson *v.* Hudson, L. R. 2 Eq. 612; s. c. 2 Ch. 255; 4 H. L. 1. So too equity will refuse to relieve against an agreement that on failure to pay when due an instalment of a debt, the whole debt shall then be treated as due. Sterne *v.* Beck, 11 Week. R. 791. And it has been declared that equity will not relieve against a covenant that on underletting or removing goods from premises a year's rent shall be paid in advance. Dermott *v.* Wallack, 68 U. S. 61, 17 L. Ed. 680. Indeed it has been held that equity will not relieve against an agreement that if deferred purchase-money is not paid at the date agreed a certain higher rate of interest shall be charged. Herbert *v.* Salisbury Ry. Co., L. R. 2 Eq. 221. Secus of a stipulation that if interest is not paid when due, a higher rate may be charged. Parker *v.* Butcher, L. R. 3 Eq. 762.

Reasonable fines of a society will not be relieved against. Parker *v.* Butcher, supra; Shannon *v.* Howard Assn., 36 Md. 383.

[5] Post, § 1732.

can be made or not. If it cannot be made, then Courts of Equity will not interfere. If it can be made, then if the penalty is to secure the mere payment of money, Courts of Equity will relieve the party upon paying the principal and interest.[1] If it is to secure the performance of some collateral act or undertaking, then Courts of Equity will retain the bill and will direct an issue of quantum damnificatus; and when the amount of damages is ascertained by a jury upon the trial of such an issue, they will grant relief upon payment of such damages.[2]

§ 1727. **Same.** — The same doctrine has been applied by Courts of Equity to cases of leases where a forfeiture of the estate and an entry for the forfeiture is stipulated for in the lease in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent.[3] It has also been applied to cases where a specific performance of contracts is sought to be enforced, and yet the party has not punctually performed the contract on his own part but has been in default.[4] And in cases of this sort ad-

[1] Ibid.; 2 Fonbl. Eq. B. 5, ch. 1, § 1, and notes (*a*), (*b*). Elliott *v.* Turner, 13 Simons, R. 477.

[2] Astley *v.* Weldon, 2 Bos. & Pull. 346, 350; Hardy *v.* Martin, 1 Cox, R. 26; Skinner *v.* Dayton, 2 John. Ch. R. 534, 535; Benson *v.* Gibson, 3 Atk. 395; Errington *v.* Aynesley, 2 Bro. Ch. R. 343; Com. Dig. Chancery, 4 D. 2.

[3] In Hill *v.* Barclay (18 Ves. 58) Lord Eldon, speaking of the relief given in cases of non-payment of rent, said it was "upon a principle long acknowledged in this court, but utterly without foundation." Why without foundation? It proceeds upon the intelligible principle that the right of re-entry is intended as a mere security. If it is so intended, there is the same ground for relief as in case of a forfeiture by non-payment of the money due upon a mortgage at the day appointed. Nobody doubts the justice and conscientiousness of interfering in the latter case. Why is it not equally proper in the former? See ante, § 776, and note (*a*); Wilson *v.* Jones, 1 Bush, 173; Gregory *v.* Wilson, 9 Hare, 683; s. c. 10 Eng. L. & E. 138. Like relief has been afforded at law by stay of proceedings where there was no gross negligence or wilful default. Atkins, *v.* Chilson, 11 Met. 112.

[4] Ante, §§ 771 to 778; 1 Fonbl. Eq. B. 1, ch. 6, § 4, note (*h*); Davis *v.* West, 12 Ves. 475; Sanders *v.* Pope, 12 Ves. 282; Peachy *v.* the Duke of Somerset, 1 Str. R. 453; Wadman *v.* Calcraft, 10 Ves. 67, 70; Hill *v.* Barclay, 18 Ves. 58, 59; s. c. 16 Ves. 403, 405. But equity will not enforce performance of an agreement for a lease where there have been breaches of the agreement which would have amounted to a forfeiture had a lease been granted. Gregory *v.* Wilson, 9 Hare, 683. See Rankin *v.* Lay, 2 DeG. F. & J. 65; Rogers *v.* Tudor, 6 Jur. (N. S.) 692. Indeed in England equity will not refuse to decree specific performance of a contract to renew a lease except for a gross breach, if there is no clause of re-entry. Hare *v.* Burges, 5 Week. R. 585. But see Gannett *v.* Albree, 103 Mass. 372. Further see ante, § 776, note (*a*).

mitting of compensation there is rarely any distinction allowed in Courts of Equity between conditions precedent and conditions subsequent; for it has been truly said that although the distinction between conditions precedent and conditions subsequent is known and often mentioned in Courts of Equity, yet the prevailing though not the universal distinction as to condition there is between cases where compensation can be made and cases where it cannot be made, without any regard to the fact whether they are conditions precedent or conditions subsequent.[1]

§ 1728. **A Penalty Designed Merely as a Security Ought Not to Prejudice Rights of Complainant.** — The true foundation of the relief in equity in all these cases is that as the penalty is designed as a mere security, if the party obtains his money or his damages

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (*c*); Id. B. 1, ch. 6, § 4, note (*h*); Id. ch. 6, § 5, and note (*k*); Bertie *v.* Falkland, 2 Vern. 339, 344; s. c. 1 Salk. 479; Popham *v.* Bampfield, 1 Vern. 83, and Mr. Raithby's note (1); Hayward *v.* Angell, 1 Vern. R. 223; Grimston *v.* Bruce, 1 Salk. 156; Taylor *v.* Popham, 1 Bro. Ch. R. 168; Hollinrake *v.* Lister, 1 Russ. R. 508; Rose *v.* Rose, Ambl. R. 332; Wyllie *v.* Wilkes, Doug. R. 522; Woodman *v.* Blake, 2 Vern. 222; Cage *v.* Russell, 2 Vent. R. 352; Wallis *v.* Crimes, 1 Ch. Cas. 89. There is some diversity in the cases upon the subject of conditions precedent and conditions subsequent as acted upon in Chancery. Thus for example it was said in Popham *v.* Bampfield (1 Vern. 83) that there was a difference between conditions precedent and conditions subsequent; "for precedent conditions must be literally performed, and this court (a Court of Equity) will never vest an estate where by reason of a condition precedent it will not vest at law. But of conditions subsequent which are to divest an estate it is otherwise. Yet of conditions subsequent there is this difference to be observed; for against all condition subsequent this Court (of Equity) cannot nor ought to relieve. When the court can in any case compensate the party in damages for the non-precise performance of the condition, there it is just and equitable to relieve." In the case of Hayward *v.* Angell (1 Vern. R. 223) the Lord Keeper said: "In all cases where the matter lies in compensation, be the condition precedent or subsequent, he thought there ought to be relief." In Cary *v.* Bertie (2 Vern. R. 339) Lord Holt, assisting the Lord Chancellor, said: "In cases of conditions subsequent that are to defeat an estate these are not favored in law; and if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited. And a Court of Equity may relieve to prevent the devesting of an estate, but cannot relieve to give an estate that never vested." The Lord Chancellor in the same case said: "As the condition was the performance of a collateral act, and did not lie in compensation, he did not see anything that could be a just ground for relief in a Court of Equity." Id. p. 344; s. c. 1 Salk. 231. We shall presently see that in some cases of forfeiture for breach of covenant Courts of Equity will not grant relief upon the principle that compensation can be made. In Wallis *v.* Crimes (1 Ch. Cas. 90) the Lord Keeper decided that wherever a condition precedent was in the nature of a penalty, equity ought to relieve. See also Bland *v.* Middleton, 2 Ch. Cas. 1.

he gets all that he expected and all that in justice he is entitled to.[1] And notwithstanding the objections which have been sometimes urged against it this seems a sufficient foundation for the jurisdiction. In reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that if he omits to do the act he shall suffer an enormous loss wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side. And law as a science would be unworthy of the name if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties which are constantly interfered with by Courts of Equity upon the broad ground of public policy or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation. The whole system of Equity Jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury.[2]

[1] Skinner *v.* Dayton, 2 John. Ch. R. 535; Peachy *v.* The Duke of Somerset, 1 Str. 447, 453; 1 Fonbl. Eq. B. 1, ch. 6, § 4, note (*h*).

[2] See Newland on Contracts, ch. 17, pp. 307 to 311. Lord Eldon has taken uncommon pains to express his dissatisfaction with the principle of allowing relief in equity against penalties and forfeitures, and also of the dispensation with a punctilious performance of contracts by Courts of Equity. In Hill *v.* Barclay, 18 Ves. 59, 60, he used the following language: "The original cases upon this subject are of different sorts. The court has very long held in a great variety of classes of cases that in the instance of a covenant to pay a sum of money the court so clearly sees, or rather fancies, the amount of damage arising from non-payment at the time stipulated that it takes upon itself to act as if it was certain that, giving the money five years afterwards with interest, it gives a complete compensation. That doctrine has been recognized without any doubt upon leases with reference to non-payment of rent, upon conditions precedent as to acts to be done, payment of money in cases of specific per-

§ 1729. **Same.** — The same principle of general justice is applied in favor of the party entitled to the security of the penalty wherever the other party has unreasonably deprived him of his right

formance, and various other instances. But the court has certainly affected to justify that right which it has assumed, to set aside the legal contracts of men, dispensing with the actual specific performance, upon the notion that it places them as near as can be in the same situation as if the contract had been with the utmost precision specifically performed. Yet the result of experience is that where a man, having contracted to sell his estate, is placed in this situation that he cannot know whether he is to receive the price when it ought to be paid, the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the court can offer as compensation." See also s. c. 16 Ves. 403, 405. The whole argument of Lord Eldon is that Courts of Equity decree what they presume is a compensation, but what in a given case may be no just compensation. Now in the first place this is no objection to an interference in all cases where a complete and adequate compensation can be given, but only to an interference where the facts establish that there cannot be such a complete and adequate compensation. And this is the very exception which, theoretically at least, Courts of Equity adopt. In the next place it is supposed by Lord Eldon (Reynolds *v.* Pitt, 19 Ves. 140) that interest for the delay of payment of money is not or may not be an adequate compensation for the omission to pay at the time appointed. That objection equally applies to the allowance of interest at law as a compensation. It may in a given case be inadequate to the particular loss sustained by the creditor, yet it is uniformly acted upon without hesitation, and the creditor will not be permitted to recover a greater compensation. The reason is that interest is a certain and general rule adapted to ordinary circumstances; and it would be inconvenient to go into a particular examination of all the circumstances of each case in order to ascertain the loss or injury. The general rule of interest is adopted because it meets the ordinary grievance and compensates for it. All general rules must work occasional mischiefs. Besides there would be injustice in compelling a debtor to pay losses of a collateral nature not embraced in or connected with his own contract, over which he could have no control, and which might be imputable to the rashness or improvidence or want of skill of his creditor. No system of laws could provide for all the remote consequences of the non-performance of any act. Human justice must stop, as it ought, at the direct and immediate and necessary consequences of acts and omissions, and not aim beyond a reasonable indemnification for them. At least the common law of England, equally with equity, has adopted this as the basis of its usual remedial justice.

See National Land Co. *v.* Perry, 23 Kans. 140; Gram *v.* Wasey, 45 Mich. 223. The fact that a penalty is intended to enforce performance is no obstacle to specific performance. Ante, § 715. But where the intention is to set a true value upon the breach of covenant, equity will not interfere to prevent a breach. Carnes *v.* Nesbitt, 7 Hurl. & N. 778; Wolf Creek Co. *v.* Shultz, 71 Pa. St. 180; White *v.* Arlett, 1 Bond, 319; Hamaker *v.* Schroers, 49 Mo. 406; Shute *v.* Hamilton, 3 Daly, 462; Curran *v.* Houston, 201 Ill. 442, 66 N. E. 228; Robinson *v.* Board of Education, 98 Ill. App. 100; Eberts *v.* Fisher, 44 Mich. 551, 7 N. W. 211; Gram *v.* Wasey, 45 Mich. 223, 7 N. W. 84; Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859; Watson *v.* Gross, 112 Mo. App. 615, 87 S. W. 104;

to enforce it until it is no longer adequate to secure his rights.[1] Hence it is that Courts of Equity will decree the obligee of a bond interest beyond the penalty of the bond where by unfounded and protracted litigation the obligor has prevented the obligee from prosecuting his claim at law for a length of time which has deprived the latter of his legal rights when they might otherwise have been made available at law. In such cases Courts of Equity do no more than supply and administer within their own jurisdiction a substitute for the original legal rights of the obligee of which he has been unjustifiably deprived by the misconduct of the obligor.[2] So if a mortgagor has given a bond with a penalty as well as a mortgage for the security of a debt, although the creditor suing on the bond can recover no more than the penalty even when the interest due thereon exceeds it, yet if he sues on the mortgage Courts of Equity will decree him all the interest due upon the debt, although it exceeds the penalty; for the bond is but a collateral security.[3] And in such a case it will not make any difference that the mortgage is given by a surety.[4]

§ 1730. **Same.** — It is not improbable that Courts of Equity adopted this doctrine of relief in cases of penalties and forfeitures from the Roman law, where it is found regularly unfolded and sustained upon the clear principles of natural justice. The Roman law took notice not only of conditions strictly so called, but also of clauses of nullity and penal clauses. The former were those in which it was agreed that a covenant should be null or void in a certain event; the latter were those where a penalty was added to a contract for non-performance of that which was stipulated.[5] The general doctrine of that law was that clauses of nullity and penal clauses were not to be executed according to the rigor of their terms. And therefore covenants were not of course dissolved, nor forfeitures or penalties positively incurred, if there was not a punctilious performance at the very time fixed by the contract. But the matter might be required to be submitted to the discretion of the proper judicial tribunal, to decide upon it according to all the circumstances of the case and the nature and

Miller *v.* Willett, 70 N. J. Eq. 396, 62 Atl. 178; Wheeling R. Co. *v.* Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 321.

[1] Barnett *v.* Nichols, 56 Miss. 622.

[2] The East India Co. *v.* Campion, 11 Bligh, R. 159, 187, 188. See also Pulteney *v.* Warren, 6 Ves. 92; Grant *v.* Grant, 3 Russ. R. 598; s. c. 3 Sim. R. 340; Duvall *v.* Terrey, Shower, Parl. Cas. 15; Hale *v.* Thomas, 1 Vern. R. 349, 350; Peers *v.* Baldwin, 2 Eq. Abridg. 611; Post, § 1522.

[3] Clarke *v.* Lord Abingdon, 17 Ves. 106.

[4] Ibid.

[5] 1 Domat, B. 1, tit. 1, § 4, art. 18, pp. 50, 51.

objects of the clauses.[1] Indeed penalties were in that law treated altogether, as in reason and justice they ought to be, as a mere security for the performance of the principal obligation.[2]

§ 1731. **Penalties and Liquidated Damages Distinguished.** — But we are carefully to distinguish between cases of penalties strictly so called and cases of liquidated damages. The latter properly occur when the parties have agreed that in case one party shall do a stipulated act or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of the damages sustained by such act or omission. In cases of this sort Courts of Equity will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages;[3] provided always that the damages do not assume the character of gross extravagance or of wanton and unreasonable disproportion to the nature or extent of the injury. But on the other hand Courts of Equity will not suffer their jurisdiction to be evaded merely by the fact that the parties have called a sum damages which is in fact and in intent a penalty, or because they have designedly used language and inserted provisions which are in their nature penal and yet have endeavored to cover up their objects under other disguises.[4] The principal difficulty in cases of this sort is to ascertain when the sum stated is in fact designed to be nomine pœnæ, and when it is properly designed as liquidated damages.[5]

[1] Domat, B. 1, tit. 1, § 4, art. 19, p. 51; Dig. Lib. 45, tit. 1, l. 135, § 2; Id. l. 122; Pothier, Oblig. n. 345, 349, 350.

[2] Pothier, Oblig. n. 341, 342, 345.

[3] Skinner *v.* White, 17 John. R. 369; Wagner *v.* City of Monroe, 52 La. Ann. 2132, 28 So. 229; Van Tuyl *v.* Young, 23 Ohio Cir. Ct. Rep. 15; Smith *v.* Detroit Gold Min. Co., 17 S. Dak. 413, 97 N. W. 17.

[4] Ropes *v.* Upton, 125 Mass. 258; Bird *v.* Lake, 1 Hem. & M. 111; Howard *v.* Woodward, 34 L. J. Ch. 47; s. c. 10 Jur. (N. s.) 1123. See Coles *v.* Sims, 5 DeG. M. & G. 1.

[5] Lowe *v.* Peers, 4 Burr. 22, 25; Astley *v.* Weldon, 2 Bos. & Pull. 346; Skinner *v.* Dayton, 2 John. Ch. R. 535; 1 Fonbl. Eq. B. 1, ch. 3, § 2, note (*d*). Many of the cases are collected in Mr. Evans's note to Pothier on Obligations (Vol. II. No. 12, pp. 85 to 98). See also Jeremy on Eq. Jurisd. B. 1, Pt. 1, ch. 4, § 3, pp. 477, 478; Eden on Injunct. ch. 2, p. 21, and note (*e*); Shiel *v.* McNett, 9 Paige, 101. As the really difficult cases on this subject turn mainly upon the interpretation to be put upon the particular language of the contract, it is doubtful how far cases not precisely in point can be regarded as guides. The following cases however contain a variety of examples of the rulings of the courts upon special provisions: Kemble *v.* Farren, 6 Bing. 141; Hinton *v.* Sparkes, L. R. 3 C. P. 161; Wallis *v.* Smith, 21 Ch. D. 243; In re Newman, 4 Ch. D. 724; Atkyns *v.* Kinnear, L. R. 4 Ex. 776; Magee *v.* Lavell, L. R. 9 C. P. 107; Betts *v.* Burch, 4 Hurl. & N. 506; Ranger *v.* Great Western Ry. Co.,

§ 1732. **It Is a Rule in Equity Never to Enforce a Penalty or Forfeiture.** — In the next place in regard to cases of forfeitures. It is a universal rule in equity never to enforce either a penalty

5 H. L. Cas. 72; Sparrow *v.* Paris, 7 Hurl. & N. 594; Cushing *v.* Drew, 97 Mass. 445; Streeper *v.* Williams, 48 Pa. St. 450; Dwinel *v.* Brown, 54 Me., 468; Morse *v.* Rathbun, 42 Mo. 594; Hise *v.* Foster, 17 Iowa, 23; Streeter *v.* Rush, 25 Cal. 67; Lightner *v.* Menzel, 35 Cal. 452; Ryan *v.* Martin, 16 Wis. 57; Gobble *v.* Linder, 76 Ill. 157; Wallis *v.* Carpenter, 13 Allen, 19; Shreve *v.* Brereton, 51 Pa. St. 175; Colwell *v.* Lawrence, 36 N. Y. 71; Staples *v.* Parker, 41 Barb. 648; Long *v.* Towe, 42 Mo. 545; First Orthodox Church *v.* Walrath, 27 Mich. 392; Cook *v.* Finch, 19 Minn. 407; Lee *v.* Overstreet, 44 Ga. 507.

The language of able judges in late cases upon this perplexing subject will show the difficulties that have beset the way of even a general rule. "If the substance of the agreement is that a party shall not do a particular act, and that is the evident object and purpose of the agreement, and it is provided that if there is a breach of this agreement the party shall pay a stated sum, which does not clearly appear to be an alternative which he has the right to adopt instead of performing his contract, there would seem to be no reason why a Court of Equity should not restrain him from doing the act, and thus carry out the intention of the parties." Ropes *v.* Upton, 125 Mass. 258, 260, Endicott, J. That is, the insertion of a sum as liquidated damages will not necessarily exclude the jurisdiction of equity. Ib.

A dictum of Lord Coleridge in Magee *v.* Lavell, L. R. 9 C. P. 107, 111, has been the subject of some discussion. The learned Chief Justice there says: "The general principle of law appears to me to be, where a contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." Jessel, M. R., says of this dictum: "It is exactly opposed to what Lord Ch. J. Tindal says in Kemble *v.* Farren, 6 Bing. 141. The mere fact of the stipulation varying in importance cannot show that the parties did not fix a sum where the damage is not ascertainable, but I am bound to say that though that is my opinion, and that I should have thought it was quite clear, I find that in the case of In re Newman, 4 Ch. D. 724, 731, a decision of the Court of Appeal, that dictum is approved of." Wallis *v.* Smith, 21 Ch. D. 243, 264.

It seems to be only another way of putting the dictum of Lord Coleridge to say that where a sum of money is stated to be payable either by way of liquidated damages or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is a penalty. Wallis *v.* Smith, 21 Ch. D. 243, 256: In re Newman, 4 Ch. D. 724. But Jessel, M. R., thinks this bad law, though binding upon him. Wallis *v.* Smith, supra.

Where the sum to be forfeited is for breaches of uncertain nature and amount, it is a case of liquidated damages. Wallis *v.* Smith; Kemble *v.* Farren, 6 Bing. 141.

Some cases however are settled with sufficient clearness. Thus where the sum to be dealt with is already in the hands of a stakeholder or a third person by way of deposit, and that deposit is to be applied in payment of the sum, it is a case of liquidated damages. Wallis *v.* Smith, at p. 250; Hinton *v.* Sparkes, L. R. 3 C. P. 161; Lea *v.* Whitaker, L. R. 8 C. P. 70; Magee *v.* Lavell, L. R. 9 C. P. 107, 116.

or a forfeiture.[1] Therefore Courts of Equity will never aid in the devesting of an estate for a breach of a covenant on a condition subsequent,[2] although they will often interfere to prevent the devesting of an estate for a breach of a covenant or condition.[3]

§ 1733. **Same.** — But there seems to be a distinction taken in equity between penalties and forfeitures. In the former, relief is always given if compensation can be made, for it is deemed a mere security.[4] In the latter, although compensation can be made, relief is not always given. It is true that the rule has been often laid down, and was formerly so held, that in all cases of penalties and forfeitures (at least upon a condition subsequent) Courts of Equity would relieve against the breach of the condition and the forfeiture if compensation could be made, even although the act or omission was voluntary.[5] The same doctrine was formerly applied in many cases of conditions precedent where the parties could be put in the same situation as if they had been strictly performed.[6]

Again an agreement by a borrower of money at a stipulated rate of interest that if he does not pay the interest when due, he will pay 1 per cent as "commission" per month upon what he ought to have paid until he shall pay what was due, is not a penalty and is lawful. General Credit Co. *v.* Glegg, 22 Ch. D. 549. Secus however of an agreement to pay interest at a certain rate, but if not duly paid, then at a certain higher rate. Hollis *v.* Wyse, 2 Vern. 289; Strode *v.* Parker, Ib. 316; Parker *v.* Butcher, L. R. 3 Eq. 762.

[1] Livingston *v.* Tompkins, 4 John. Ch. R. 431; Popham *v.* Bampfield, 1 Vern. 83; Carey *v.* Bertie, 2 Vern. R. 339; ante, § 1727; 1 Fonbl. Eq. B. 1, ch. 6, § 5; Horsburg *v.* Baker, 26 U. S. 232, 7 L. Ed. 125; Keller *v.* Lewis, 53 Cal. 113; White *v.* Port Huron R. Co., 13 Mich. 356; Warner *v.* Bennett, 31 Conn. 468; Smith *v.* Jewett, 40 N. H. 530; United States *v.* McRae, L. R. 4. Eq. 327; Burr *v.* Duryee, 68 U. S. 531, 17 L. Ed. 650; Jones *v.* New York Guaranty Co., 101 U. S. 622, 25 L. Ed. 1030; Cheney *v.* Bilby, 74 Fed. 52, 20 C. C. A. 291; Beecher *v.* Beecher, 43 Conn. 556; Douglas *v.* Union Mut. Life Ins. Co., 127 Ill. 101, 20 N. E. 51; Birmingham *v.* Lesan, 77 Me. 494, 1 Atl. 151; Attorney-Gen. *v.* Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 22; Jones *v.* Robbins, 29 Me. 351, 50 Am. Dec. 593; Lincoln *v.* Quynn, 68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446; Lyon *v.* Travelers' Ins. Co., 55 Mich. 141, 20 N. W. 829, 54 Am. Rep. 354; Fitzhugh *v.* Maxwell, 34 Mich. 138; Gordon *v.* Brown, 39 N. C. 399; Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

[2] Ibid. [3] Ibid. [4] Henry *v.* Tupper, 29 Vt. 358.

[5] Ante, § 1727; Popham *v.* Bampfield, 1 Vern. 33; Hayward *v.* Angell, 1 Vern. R. 222; Northcote *v.* Duke, Ambler, R. 513; 1 Fonbl. Eq. B. 1, ch. 6, § 4, and note (*g*); Sanders *v.* Pope, 12 Ves. 289; Cage *v.* Russel, 2 Vent. 352; Wafer *v.* Mocato, 9 Mod. R. 112; Hack *v.* Leonard, 9 Mod. R. 91; Com. Dig. Chancery, 3 L.

[6] See Taylor *v.* Popham, 1 Bro. Ch. R. 168; Hollinrake *v.* Lister, 1 Russ. R. 508; Com. Dig. Chancery, 2 Q. 4, 7, 8.

§ 1734. **Same.** — But the doctrine at present maintained seems far more narrow. It is admitted indeed that where the condition or forfeiture is merely a security for the non-payment of money (such as a right of re-entry upon non-payment of rent), there it is to be treated as a mere security and in the nature of a penalty, and is accordingly relievable.[1] But if the forfeiture arises from the breach of any other covenants of a collateral nature, as for example of a covenant to repair, there, although compensation might be ascertained, and made upon an issue quantum damnificatus, yet it has been held that Courts of Equity ought not to relieve, but should leave the parties to their remedy at law.[2]

[1] Ante, § 1727; Hill *v.* Barclay, 16 Ves. 403, 405; s. c. 18 Ves. 58, 60; Wadham *v.* Calcraft, 10 Ves. 68, 69; Reynolds *v.* Smith, 19 Ves. 140.

The uncertainty as to the extent of the injury which may ensue is a criterion by which to determine whether it is a case of liquidated damages or a penalty. Powell *v.* Burroughs, 54 Pa. St. 329.

Whenever the measure to determine what otherwise would be a loss or damage, is uncertain and difficult to be ascertained, it is held to be liquidated damages. Wolf Creek Co. *v.* Schultz, 71 Pa. St. 186.

A stipulation in a mortgage that in the event it became necessary to foreclose, that an attorney's fee should be added to the debt, is proper, where the amount is reasonable. Nelson *v.* Everett, 29 Iowa 184; Contra: Van Marler *v.* McMillan, 39 Mich. 304; Bullock *v.* Taylor, 39 Mich. 137; such a provision is in the nature of a penalty, and if unreasonable, may be reduced by the court. Daily *v.* Maitland, 88 Pa. St. 384.

[2] Wadham *v.* Calcraft, 10 Ves. 68, 69; Hill *v.* Barclay, 16 Ves. 403, 405; s. c. 18 Ves. 59, 60, 61; Reynolds *v.* Pitt, 19 Ves. 140, 241; Bracebridge *v.* Buckley, 2 Price, R. 200. The contrary doctrine was maintained in Hack *v.* Leonard, 9 Mod. R. 91; and Webber *v.* Smith, 2 Vern. R. 103. Klein *v.* Insurance Co., 104 U. S. 88, 26 L. Ed. 662. See also Wheeler *v.* Connecticut Ins. Co., 82 N. Y. 543; Hagar *v.* Buck, 44 Vt. 285; Gregory *v.* Wilson, 9 Hare, 683; Nokes *v.* Gibbon, 3 Drew. 681; Croft *v.* Goldsmid, 24 Beav. 312; Hills *v.* Rowland, 4 DeG. M. & G. 430. A fortiori if, where the provision for forfeiture is not to be treated as a security, compensation cannot be made for a breach, will equity refuse to relieve (unless the case can be brought within some qualification of the rule). Klein *v.* Insurance Co., supra.

But notwithstanding the strong terms in which the rule is sometimes declared, as in the case last cited, there are circumstances under which both Courts of Law and Courts of Equity will refuse to entertain a forfeiture, though the provision for a forfeiture is an independent one, that is, not inserted merely as a security. The following are circumstances of the kind: —

1. Where there has afterwards been a waiver (which of course implies knowledge) of the delinquency or the forbidden act. Whitehead *v.* Bennett, 9 Week. R. 626; Bridges *v.* Longman, 24 Beav. 27; Bodine *v.* Exchange Ins. Co., 51 N. Y. 117; Wing *v.* Harvey, 5 DeG. M. & G. 265; Buckbee *v.* United States Ins. Co., 18 Barb. 541.

2. Where the alleged forfeiture was properly due to the prior or contemporaneous act or conduct of the party seeking to avail himself of the forfeiture, or of such party's agent; as where an insurance agent with

§ 1735. **Same.** — It is not perhaps very easy to see the ground of this distinction between these two classes of cases. It is rather stating the distinction than the reason of it to assert that in the one case the amount of damages by the non-payment of the rent is certain and fixed; in the other case the damages are uncertain and unliquidated. But in the case of a penalty such a distinction is wholly repudiated, because the penalty is treated as a security. The forfeiture is also treated as a security in cases of non-payment of rent. And in other cases of covenant, if the damages are capable of being ascertained by a jury, and will in a legal and equitable sense be an adequate compensation, the reason is not very clear why under such circumstances the forfeiture

apparent authority dispenses with a provision of the policy requiring payment of the premium in advance or on a particular day. Boehen *v.* Williamsburgh Ins. Co., 35 N. Y. 131; Bodine *v.* Exchange Ins. Co., 51 N. Y. 117; Miller *v.* Life Insurance Co., 12 Wall. 285; Southern Ins. Co. *v.* Booker, 9 Heisk. 606; Sheldon *v.* Connecticut Ins. Co., 25 Conn. 207; Bragdon *v.* Appleton Ins. Co., 42 Me. 259. Or where residence of the assured in a forbidden country is sanctioned by the underwriter's agent. Wing *v.* Harvey, 5 DeG. M. & G. 265. So where there has been a practice on the part of the one who claims the forfeiture of apprising the opposite party concerning the time, place, or mode of performance, the omission to do which without warning has naturally misled the plaintiff into the particular delinquency or act. Helme *v.* Philadelphia Ins. Co., 61 Pa. St. 107; New York Life Ins. Co. *v.* Eggleston, 96 U. S. 572, 24 L. Ed. 841; Buckbee *v.* United States Ins. Co., 18 Barb. 541; Union Ins. Co. *v.* Pottker, 33 Ohio St. 459; Mayer *v.* Mutual Ins. Co., 38 Iowa, 304. So also where there has been a practice of waiving strict performance, apt to mislead and actually misleading in the particular case. Buckbee *v.* United States Ins. Co., supra. The following cases further illustrate this head: In re Albert Assur. Co., L. R. 9 Eq. 703; Insurance Co. *v.* Eggleston, supra; Insurance Co. *v.* McCain, Ib. 84; Hagar *v.* American Ins. Co., 69 N. Y. 435.

3. Possibly a general custom in the particular business to do some act towards the plaintiff the omission of which would be apt to lead to the delinquency. Helme *v.* Philadelphia Ins. Co., supra. But it is worthy of consideration whether any general custom of disregarding a proper stipulation of a contract should bind one who has not so participated therein as to be justly treated as guilty of misleading the plaintiff.

4. A state of things, such as war, making it unlawful or highly unsafe, to perform at the stipulated time; performance being tendered within a reasonable time after the removal or cessation of the difficulty. Cohen *v.* New York Ins. Co., 50 N. Y. 610; Sands *v.* N. Y. Ins. Co., Ib. 626; Wheeler *v.* Connecticut Ins. Co., 82 N.Y. 543, 551. But if performance, not being illegal, is still reasonably possible or safe, the delinquency will not, it is conceived, be excused.

5. Accidental omission where, if injury result to the other party, compensation can readily be made, and time is not of the essence of the contract. Henry *v.* Tupper, 29 Vt. 358. See Klein *v.* Insurance Co., 104 U. S. 88; Wheeler *v.* Connecticut Ins. Co., 82 N. Y. 543. If time is of the essence of the engagement, as with regard to the day of payment

may not be equally treated as a security for such damages. The most probable ground for the distinction is, what has been judicially hinted at, that it is a dangerous jurisdiction; that very little information upon it can be collected from the ancient cases, and scarcely any from those in modern times; that it was originally adopted in cases of penalties and forfeitures for the breach of pecuniary covenants and conditions upon unsound principles; and therefore that it ought not to be extended, as it rarely works real compensation or places the parties upon an equality and mutuality of rights and remedies.[1] It has been further insisted that the authorities do not bear out the proposition that Courts of Equity will, in cases of forfeiture for the breach of any covenant, give relief upon the principle of compensation.[2]

§ 1736. **Same.** — Indeed the doctrine seems now to be asserted in England, that in all cases of forfeiture for the breach of any

of insurance premiums, it seems clear that mere accident will not excuse the breach; for the parties have stipulated for exact performance. To prevent the forfeiture there should be some added equity. Thus it is held in insurance cases that neither the sickness nor the insanity of the insured at the time for payment of the premium will excuse non-payment then, for another might pay for the insured. Klein *v.* Insurance Co., supra; Wheeler *v.* Connecticut Ins. Co. supra. In the first of these cases it was held immaterial that the plaintiff, in whose favor the insurance ran, did not know of the contract at the time when the payment in question became due. The assured, it was said, was her agent, and she was bound by his knowledge. Indeed there appears to be no distinction between wilful or obstinate and accidental neglect; and this whether the question relate to time or to any other matter of agreement, such as a covenant to repair in a lease. See Gregory *v.* Wilson, 9 Hare, 683, 689, as to covenants to repair, explaining expressions of Lord Eldon in Hill *v.* Barclay, 18 Ves. 56, and in Reynolds *v.* Pitt, 19 Ves. 134. But where the delinquency is purely accidental, the court will doubtless be more readily inclined to look into the nature of the contract and the special circumstances of the case to see if the forfeiture may not be overlooked. See Henry *v.* Tupper, 29 Vt. 358. Whether the breach consist in the non-payment of money or of some other stipulated act is immaterial, as the foregoing cases show and as Henry *v.* Tupper expressly decides. And this must be true of all questions, as well as of accident, touching forfeiture.

[1] See the opinions expressed by Lord Eldon in Wadham *v.* Calcraft, 10 Ves. 67; Hill *v.* Barclay, 16 Ves. 403, 405; s. c. 18 Ves. 58 to 64; Reynolds *v.* Pitt, 19 Ves. 140, 141; Ex parte Vaughan, 1 Turn. & Russ. 434. Mr. Baron Wood's opinion in Bracebridge *v.* Buckley, 2 Price, R. 200, contains the reasons for the opposite doctrine, which are well worthy of consideration. Mr. Chancellor Kent, in Skinner *v.* Dayton, 2 John. Ch. R. 535, seems to have held the same doctrine as Mr. Baron Wood. See also Livingston *v.* Tompkins, 4 John. Ch. R. 431; 1 Fonbl. Eq. B. 1, ch. 4, § 1, note (*c*); Id. ch. 6, § 4, notes (*g*) and (*h*); Id. § 5, note (*k*); Keating *v.* Sparrow, 1 B. & Beat. 373, 374; Eden on Injunct. ch. 2, pp. 21 to 26; Com. Dig. Chancery, 2 Q. 3 to 5, 8, 9.

[2] White *v.* Warner, 2 Meriv. R. 459.

covenant other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of a just compensation.[1] And the same rule is applied to cases where there is not only a clause for re-entry, in case of non-payment of rent, but also a proviso that if the rent is not duly paid the lease shall be void; for the construction put in equity upon this latter clause is, that it is a mere security for the payment of the rent.[2] Indeed a strong inclination has been exhibited, even in the Courts of Law, to construe such a proviso to make the lease voidable, and not absolutely void, so as to make any subsequent receipt of rent or other act affirming the lease to be a confirmation thereof.[3]

[1] Eaton *v.* Lyon, 3 Ves. 692, 693; Bracebridge *v.* Buckley, 2 Price R. 200; Hill *v.* Barclay, 16 Ves. 403, 405; s. c. 18 Ves. 58 to 64; Rolfe *v.* Harris, 2 Price, R. 206, note; White *v.* Warner, 2 Meriv. R. 459; Eden on Injunct. ch. 2, pp. 22, 23, and Mr. Eden's note to Northcote *v.* Duke, 2 Eden, R. 322; Com. Dig. Chancery, 2 Q. 2 to 4.

See Weston *v.* Metropolitan Asylum Dist., 8 Q. B. D. 387; s. c. 9 Q. B. D. 404. Relief will be granted against a grossly inequitable forfeiture. National Land Co. *v.* Perry, 23 Kans. 140.

[2] Bowser *v.* Colby, 1 Hare Ch. R. 109.

[3] Arnsby *v.* Woodward, 6 Barn. & Cressw. 519; Rede *v.* Farr, 6 M. & Selw. 121. In Bowser *v.* Colby, 1 Hare Ch. R. 109, 128, 130 to 132, this whole subject was examined with great ability by Mr. Vice-Chancellor Wigram. On that occasion he said: "The next point taken was that there are two different species of provisos in leases: in some a common clause of re-entry on non-payment of rent, thereby determining the lease and nothing more; in others a proviso declaring that if the rent is not paid the lease shall be void, and there being in this case a proviso, 'that the lease shall become absolutely void,' it is said that there is now nothing for the court to act upon, — no lease existing which it can restore to the tenant, and therefore that the court will not interfere. If it could have been shown that a Court of Equity gave relief only before the landlord had entered, the argument might have been well founded; but inasmuch as in most of the cases relief has been given upon bills filed after the landlord has entered, the argument must be fallacious, for when the landlord has entered, the lease is equally at an end in a Court of Law, whether there is a proviso for re-entry simply or a proviso that it is to be void on non-payment of rent. It is said however that the contract of the parties is different, — that where it is declared that the lease shall become absolutely void on non-payment of the rent, the true construction is that the parties mean the lease shall in fact be at an end, and no relief shall be given against the consequence of the non-payment of rent. I can by no means accede to this construction. The legal effect in one case is that if the landlord re-enters, the lease is determined; in the other case it is determined without his re-entry. The contract of the parties is that in one case the lease shall not be at an end by the mere non-payment of rent unless the landlord shall re-enter, and then that it shall be at an end; and in the other case that the non-payment of rent alone shall determine the lease. In both cases the same consequence is to follow, though from different acts. In both the contract is the same in this sense,

Whether this narrow limitation of the doctrine is defensible upon the original principles which seem to have guided Courts of Equity in interfering in cases of penalties and forfeitures, namely, that they are to be treated as mere securities for the performance of the stipulated acts, and not strictly as conditions to limit and determine rights and estates ex rigore juris, according to the

that there are certain acts to take place which are to determine the lease altogether. The indenture of demise in this case, after the covenants for payment of rent, rendering the accounts, and against the demise or assignment of the premises, provides that if the lessee should not pay the reserved rents within a given time, or should make default in the performance of the other covenants on his part, or should become insolvent or the term should be taken in execution, then it shall be lawful for the lessor to re-enter upon and repossess the premises as in his former estate and to expel the lessee. If the proviso had ended here, it would have been no more than the common power of re-entry in the case of a breach of covenant; and if the landlord entered under this power, the legal consequence would follow, that the lease would become to all intents and purposes forfeited, and the term would be void. The remainder of the proviso, that 'the lease, as to the term hereby granted, shall in that case be forfeited, and the same term shall cease and determine and be utterly null and void, as if the same had never been made and create,' expresses nothing more than what the law itself would imply if those words had not been found there. It appears from the case of Taylor *v.* Knight, and from Lord Eldon's observations in Hill *v.* Barclay, that the court formerly used to consider (the lease being gone at law by the re-entry), that the only way it could give relief was by creating a new lease until the statute, recognizing the right of the tenant to be relieved, dispensed with that form of relief, and declared that the last lease should be deemed to have continuance. The analogy to the case of mortgages fortifies the same reasoning. The object of the proviso in both cases is to secure to the landlord the payment of his rent; and the principle of the court is, — whether right or wrong is not the question, — that if the landlord has his rent paid him at any time it is as beneficial to him as if it were paid upon the prescribed day. It is not however necessary that I should pronounce any opinion upon the case of a lease being absolutely void, for in this case I think it was voidable only. The most recent case I have been able to find on the subject is a case of Arnsby *v.* Woodward. A lease had been granted, with a proviso that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, the term thereby granted, or so much thereof as should be then unexpired, 'should cease, determine, and be utterly void, and it should be lawful to and for' the landlord 'upon the demised premises wholly to re-enter, and the same to hold to his own use, and to expel' the lessee. There the declaration that the lease shall be void by the non-payment precedes the power of re-entry, a consequence of law which of course attaches to the forfeiture of the lease. In this case the clause of re-entry comes first and the declaration of the legal consequences follows. In that case, Doe *v.* Bancks, and another case of Rede *v.* Farr, were cited; and Lord Tenterden holding that, notwithstanding those clear words making it void, the acceptance of subsequent rent would keep the lease alive, said that, taking the two clauses together, the sound construction of them gave to the landlord a right to re-enter, to be exercised or not at his election; otherwise the latter

common law, may perhaps admit of serious question.[1] But in the present state of the authorities this restricted doctrine may be affirmed to possess a general if not a conclusive weight in the English Courts of Equity. Perhaps in America the doctrine would be received with more hesitation; and it has been held in a contract for the sale of land reserving to the vendor a right to hold the contract forfeited, if the vendee should make default in due payment of the purchase-money, that the vendor was not at liberty to enforce the forfeiture suddenly without previous notice to the vendee; and that any receipt of a part of the purchase-money after default of due payment will, or at least may, amount to a waiver of the forfeiture.[2] This seems to proceed upon the ground

clause, 'it shall be lawful to re-enter,' would have no effect. He has no difficulty, except that the words which declared the lease void preceded the common power to enter; but if he might transpose those words and put the right to re-enter first there would be no difficulty, because the other would be a mere legal consequence. This is a strong case when it is considered that all the old cases went to show that where the construction of the proviso made the lease actually void, no acceptance of rent could set up a term which had ceased by the very contract of the parties. I do not mean to give any opinion of what in abstract cases would be the difference in a Court of Equity between the effect of the common power of re-entry and a clause that the lease shall be void. It is not difficult to suggest circumstances in which the court might give no relief where the lease was to be void; as for example if the landlord sought the assistance of the court to give effect to the forfeiture. I found myself upon the construction of the words in the proviso now before me, in which construction I am supported by the judgment of the Court of Queen's Bench, in Arnsby *v.* Woodward. I consider it in effect only a clause for re-entry, and the case is therefore in that view one in which a Court of Equity is enabled to give relief." See also Harris *v.* Troup, 8 Paige, R. 423.

This is true especially if the parties have waited long to enforce their alleged right of forfeiture. National Land Co. *v.* Perry, 23 Kans. 140; Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633; Drake *v.* Lacoe, 157 Pa. St. 17, 27 Atl. 538; Vermont Copper Min. Co. *v.* Ornsby, 47 Vt. 709; Craig *v.* Hukill, 37 W. Va. 520, 16 S. E. 363; Krutz *v.* Robbins, 12 Wash. 7, 40 Pac. 415, 50 Am. St. Rep. 871, 28 L. R. A. 676; McGraw Oil Co. *v.* Kennedy, 65 W. Va. 595, 64 S. E. 1027, 28 L. R. A. (N. S.) 959; Maginnis *v.* Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833.

[1] Suppose a mortgage were made upon a condition to perform certain covenants, and among other things a covenant to repair, and there should be a breach of the covenant, would a Court of Equity refuse to allow the mortgagor to redeem, upon making full compensation? In the case of a bond, with condition to repair, would a Court of Equity refuse, after a breach to interfere, to prevent the recovery of the penalty, if compensation could be made?

[2] Harris *v.* Troup, 8 Paige, R. 425. Compare Griggs *v.* Landis, 6 C. E. Green, 494; Wing *v.* Harvey, 5 DeG. M. & G. 255; Buckbee *v.* United States Ins. Co., 18 Barb. 541; Helme *v.* Philadelphia Ins. Co., 61 Pa. St. 107; Union Ins. Co. *v.* Pottker, 33 Ohio St. 459; ante, § 1734.

that such a reservation is but a mere security for the purchase-money.

§ 1737. **Courts of Equity Will Not Interfere in Cases of Forfeiture for the Breach of Conditions where there Cannot Be any Just Compensation Decreed.** — Be this as it may, it is clearly established that Courts of Equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there cannot be any just compensation decreed for the breach. Thus for example in the case of a forfeiture for the breach of a covenant, not to assign a lease without license or to keep leasehold premises insured, or to renew a lease within a given time, no relief will be given; for they admit of no just compensation or clear estimate of damages.[1]

§ 1738. **Forfeiture of Stock for Failure to Comply With Conditions.** — It is upon grounds somewhat similar, aided also by considerations of public policy and the necessity of a prompt performance in order to accomplish public or corporate objects, that Courts of Equity, in cases of the non-compliance by stockholders with the terms of payment of their instalments of stock at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture.[2] The same rule is, for the

[1] Grimston *v.* Lord Bruce & ux. 1 Salk. 156, 2 Vern. R. 594; Wafer *v.* Mocato, 9 Mod. R. 112; Lovat *v.* Lord Ranelagh, 3 V. & Beam. 24; Rolfe *v.* Harris, 2 Price, R. 206, n.; White *v.* Warner, 2 Meriv. R. 459; 1 Fonbl. Eq. B. 1, ch. 6, § 12, and note (c); City of London *v.* Mitford, 14 Ves. 58; Reynolds *v.* Pitt, 19 Ves. 134; Com. Dig. Chancery, 2 Q. 3, 8 to 10. See the changes in England effected by the statutes 22 & 23 Vict. ch. 35, § 4, and the Conveyancing Act of 1881, § 14; and see Quilter *v.* Mapleson, 9 Q. B. D. 672; Ex parte Dyke, 22 Ch. D. 410.

[2] Sparks *v.* Proprietors of Liverpool Water Works, 13 Ves. 433, 434. Prendergast *v.* Turton, 1 Younge & Coll. New R. 98, 110 to 112. This case was a mining concern, and by one of the regulations if any instalments called for were not punctually paid, the shares should be forfeited as well as the prior instalments which had been paid. The directors had declared the shares of the plaintiff forfeited. The bill was brought to reinstate the plaintiff in his rights. On this occasion Mr. Vice-Chancellor Bruce said: "The point which has struck me from the beginning (and upon which everything that could be said has been said by counsel) is the time at which the suit has been instituted, having regard to the peculiar nature of the property and the circumstances of the case. This is a mineral property,— a property therefore of a mercantile nature, exposed to hazard, fluctuations, and contingencies of various kinds, requiring a large outlay, and producing perhaps a considerable amount of profit in one year and losing it the next. It requires, and of all properties perhaps the most requires, the parties interested in it to be vigilant and active in asserting their rights. This rule, frequently asserted by Lord Eldon, is consonant with reason and justice. Lord Eldon always acted upon it, and has been followed by subsequent judges of great knowledge,

same reasons, applied to cases of subscription to government loans, where the shares of the stock are agreed to be forfeited by the want of a punctual compliance with the terms of the loan as to the time and mode and place of payment.[1]

experience, and eminence. Now in the present case, conceding for the sake of argument that the shareholders could not be compelled to contribute beyond £50 a share, and did no wrong in declining to make advances beyond that sum, yet the result of all the circumstances of this case appears to have been that the mine could not be carried on without further outlay. The plaintiffs objected to this further outlay; and then a considerable discussion ensued which was substantially concluded in 1828. Some subsequent letters were written, but they did not, I think, materially vary that state of the case. The residence of the plaintiffs was occasionally in Jersey and occasionally in England; but they never appear to have been absent from the Queen's dominions. In this state of things, the concern not improving, and the plaintiff and Miss Kent refusing to contribute to its necessities beyond the amount already stated, some parties are found who are willing to stem the difficulties and incur the hazard; and from this period through several years, down to 1835, they venture to carry on the concern. In 1836 affairs begin to look better, and the mine, whether legally or illegally, wisely or unwisely, is in that year new modelled, and the shareholders are turned into what are called scrip-holders. Matters go on in this manner in 1836 and 1837, and it was not till November, 1837, when the result of the struggle had appeared, that, after a profit had been made by the unassisted efforts of those who still adhered to the speculation, the plaintiff and Miss Kent applied for and claimed their shares. Negotiations were then set on foot, demands and refusals took place in the ordinary way, and it was not till September, 1838, that the bill was filed; but the demand may be taken as made in 1837. I was anxious, being impressed very much with Mr. Simpkinson's opening of the case, as it related to the conduct of the directors to have the time which so elapsed in some way accounted for, — to have the chasm between the years 1828 and 1837 in some manner filled up, — to have the conduct of the plaintiffs during that time in some measure explained, — to have the case placed in a position upon which the court could fasten itself in order to give the plaintiffs that property which they might have been entitled to had they presented themselves here in due time. But I am unable to find the means of doing this. Here is a mineral property, the subject of great uncertainty and fluctuation. After its character has been established with much difficulty, — after a period of nine years, during which they rendered no assistance to the concern, a claim is brought forward by those who are now willing to share in its prosperity. It appears to me that although this is a case to be decided in equity only, and at the hearing, and not on any interlocutory motion, it is impossible to say (consistently with my views of what are the principles of this court) that the plaintiffs can be assisted."

See Ludlow *v.* Dutch Ry. Co., 21 Beav. 43; Isbester *v.* Murphy Mfg. Co., 95 Ill. App. 105; Crissey *v.* Cook, 67 Kans. 20, 72 Pac. 541; Elizabeth City Cotton Mills *v.* Dunstan, 121 N. C. 12, 27 S. E. 1001, 61 Am. St. Rep. 654; Raht *v.* Sevier Min. Co., 18 Utah 290, 54 Pac. 889; Clise Inv. Co. *v.* Washington Sav. Bank, 18 Wash. 18, 50 Pac. 575.

[1] But the terms of forfeiture must be strictly pursued. Johnson *v.* Lyttle's Iron Agency, 5 Ch. D. 687; Garden Gully Co. *v.* McLister, 1 App. Cas. 39.

§ 1739. **A Court of Equity Will Not Interfere where Penalty or Forfeiture Was Imposed by Statute.** — Where any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, there Courts of Equity will not interfere to mitigate the penalty or forfeiture if incurred; for it would be in contravention of the direct expression of the legislative will.[1] The same principle is generally (perhaps not universally) applied to cases of forfeiture founded upon the customs of manors, and the general customs of certain kinds of estates such as copyholds; for in all these cases the forfeiture is treated as properly founded upon some positive law or some customary regulations which had their origin in sound public policy, and ought to be enforced for the general benefit.[2]

§ 1740, [**Relief Against Forfeitures Occasioned by Negligence.** — While relief against forfeitures is a common subject to be dealt with in Courts of Equity, they will not, however, as a general rule interfere to prevent the enforcement of a contract or condition, which would exercise a forfeiture of the rights of the complainant, if he has been dilatory and neglectful of his rights, or where he has wilfully disregarded the terms of the contract and utterly failed to help himself.[3] The party seeking relief from a forfeiture must show that circumstances which exclude the idea of wilful neglect or of gross carelessness, have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived.[4]]

§ 1741. [**Forfeiture Produced by Defendant Will Not Be Allowed to Prevail against Rights of Complainant.** — The policy of Courts of Equity is against the enforcement of conditions that would lead to the decree of a forfeiture, and where one seeks to bring himself within the reason and spirit of the rule, and enforce

[1] Peachy *v.* Duke of Somerset, 1 Str. R. 447, 452 to 455; Keating *v.* Sparrow, 1 B. & Beatt. 373, 374; Powell *v.* Redfield, 4 Blatchf. C. C. 45; Clark *v.* Barnard, 108 U. S. 436, 27 L. Ed. 780, 2 S. Ct. Rep. 878; Southern Bldg. & Loan Assn. *v.* Anniston Loan Assn., 101 Ala. 582, 15 So. 123, 29 L. R. A. 120, 46 Am. St. Rep. 138; Germantown R. Co. *v.* Titler, 60 Pa. St. 124; State *v.* Hall, 70 Miss. 678, 13 So. 39; Smith *v.* Mariner, 5 Wis. 551, 68 Am. Dec. 73. Contra: Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633.

[2] Peachy *v.* Duke of Somerset, 1 Str. R. 447, 452; s. c. Prec. Ch. 568, 570, 574. But see Nash *v.* Earl of Derby, 2 Vern. 537, and Mr. Raithby's note (1); Thomas *v.* Porter, 1 Ch. Cas. 95; Hill *v.* Barclay, 18 Ves. 64.

[3] Parsons *v.* Smilie, 97 Cal. 647, 32 Pac. 702.

[4] Jones *v.* Robbins, 29 Me. 351, 50 Am. Dec. 593; Hipwill *v.* Knight, 1 Younge & Coll. 415; Dumond *v.* Sharts, 2 Paige 182; Noyes *v.* Clark, 7 Paige 179, 32 Am. Dec. 620; Noyes *v.* Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657; Hancock *v.* Carlton, 6 Gray, 39.

the instrument in terms, it is usually where the complainant is entitled to the condition or object sought, as a matter of law, although it be in terms a forfeiture or penalty. If in the dealings between the parties, one has overreached the other, as if fraud, accident, or a mistake has been induced, or if the defendant has purposely and intentionally brought such conditions and influences to bear upon the complainant, that he has been compelled to abandon his interest in the contract or property, or fail to properly perform his covenants, so that, strictly speaking, a forfeiture has occurred, a Court of Equity will intervene and prevent the enforcement of the forfeiture. It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the non-performance, and this rule applies with especial fitness where the party is impelled by personal interest, as where an ancestor made a contract with defendant to give him his property at his death, upon condition that he live with and suitably provide for his wants, and prior to the death of the ancestor, his heirs at law compelled the defendant to leave the home of the ancestor, and he was not in fact living with the donor at the time of his death, and was not providing for his wants, as he had contracted to do, at the time of donor's death. A Court of Equity looks at the substance rather than the form, and it will not permit an injustice of this sort to be effected, so that the contract cannot be fulfilled to the letter, and then decree a forfeiture. Of course it must not be understood that in all cases of conditions precedent where the contract cannot be absolutely and unconditionally performed, a Court of Equity will nevertheless decree that a substantial compliance with the terms has been effected and therefore, prevent a forfeiture, but it is in this class of cases of conditions precedent, where an interested party has purposely brought about such conditions that a strict performance of the covenants is not possible, that Courts of Equity will relieve against a forfeiture of the estate.[1]]

[1] Harwood *v.* Shoe, 141 N. C. 161, 53 S. E. 616; Harris *v.* Wright, 118 N. C. 422, 24 S. E. 751; Whitlock *v.* Auburn Lbr. Co., 145 N. C. 120, 58 S. E. 909.

A Court of Equity will not permit the mortgagee to take an unconscientious advantage of the mortgagor, who was willing to pay at the time prescribed, but who is unable to do so on account of the act of the other party, occasioned by a trick to defraud. Noyes *v.* Clark, 7 Paige 179, 32 Am. Dec. 620.

CHAPTER XXXVIII

INFANTS

§ 1742. **Infants.** — We shall next proceed to the consideration of another portion of the exclusive jurisdiction of Courts of Equity, partly arising from the peculiar relation and personal character of the parties who are the proper objects of it, and partly arising from a mixture of public and private trusts of a large and interesting nature. The jurisdiction here alluded to is that which is exercised over the persons and property of infants, idiots, lunatics, and married women.

§ 1743. **Jurisdiction of Court of Equity over Estates of Infants.** — And in the first place as to the jurisdiction over the persons and property of INFANTS. The origin of this jurisdiction in Chancery (for to that court it is practically confined, as the Court of Exchequer, as a Court of Equity, does not seem entitled to exercise it [1]) is very obscure, and has been a matter of much juridical discussion. The common manner of accounting for it has been thought by a learned writer to be quite unsatisfactory.[2] It is that the King is bound by the law of common right to defend his subjects, their goods, chattels, lands, and tenements; and therefore in the law every royal subject is taken into the King's protection. For which reason an idiot or lunatic who cannot defend or govern himself, or order his lands, tenements, goods, or chattels, the King of right, as parens patriæ, ought to have in his custody and rule him and them.[3] And for the same reason the King, as

[1] 3 Black. Comm. 427; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*). Mr. Justice Blackstone (3 Black. Comm. 427) has said: "The Court of Exchequer can only appoint a guardian ad litem to manage the defence of the infant if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice. But when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal, indiscriminately, will take care of the property of the infants." See also 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*); Wellesley *v.* Wellesley, 2 Bligh, (N. S.) 136, 137.

[2] Hargrave's note (70) to Co. Litt. 89 *a*, § 16.

[3] Fitz. N. B. 232; Eyre *v.* Countess of Shaftsbury, 2 P. Will. 118; Beverley's Case, 4 Co. R. 123, 124.

parens patriæ, ought to have the care of the persons and property of infants where they have no other guardian of either.[1]

§ 1744. **Same.** — The objection urged against this reasoning is, that it does not sufficiently account for the existing state of the jurisdiction; for there is a marked distinction between the jurisdiction in cases of infancy and that in cases of lunacy and idiocy. The former is exercised by the chancellor in the Court of Chancery as a part of the general delegation of the authority of the Crown virtute officii, without any special warrant; whereas the latter is exercised by him by a separate commission under the sign manual of the King, and not otherwise.[2] It is not safe or correct therefore to reason from one to the other, either as to the nature of the jurisdiction or as to the practice under it.[3]

§ 1745. **Same.** — An attempt has also been made to assign a different origin to the jurisdiction and to sustain it, by considering guardianship as in the nature of a trust; and that therefore the jurisdiction has a broad and general foundation, since trusts are the peculiar objects of equity jurisdiction.[4] But this has been thought to be an overstrained refinement; for although guardianship may properly be denominated a trust in the common acceptation of the term, yet it is not so in the technical sense in which the term is used by lawyers, or in the Court of Chancery. In the latter trusts are invariably applied to property (and especially to real property) and not to persons.[5] It may be added that guardianship considered as a trust would equally be within the jurisdiction of all the Courts of Equity; whereas in England it is limited to the chancellor sitting in chancery.[6]

§ 1746. **Same.** — An attempt has also been made to derive the jurisdiction from the writ of Ravishment of Ward, and the writ De Recto de Custodia, at the common law, but with as little success. For, independently of the consideration that these writs were returnable into a Court of Common Law, it is not easy to see how a jurisdiction to decide between contending competitors for the right of guardianship can establish a general authority in

[1] Eyre *v.* Countess of Shaftsbury, 2 P. Will. 118, 119; 3 Black. Comm. 427; Cary *v.* Bertie, 2 Vern. 333, 342.

[2] Co. Litt. 89 *a*, Hargrave's note (70), § 16; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*); Sheldon *v.* Fortescue Aland, 3 P. Will. 104, 107, and Mr. Cox's note A.; Sherwood *v.* Sanderson, 19 Ves. 285.

[3] Ex parte Whitfield, 2 Atk. 315; Ex parte Phillips, 19 Ves. 122.

[4] See Duke of Beaufort *v.* Berty, 1 P. Will. 705; post, §§ 1758 to 1760.

[5] Co. Litt. 89 *a*, Hargrave's note (70), § 16.

[6] Ante, § 1743; post, §§ 1758, 1764, 1766; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*).

the Court of Chancery to appoint a guardian in all cases where one happens to be wanting.[1]

§ 1747. **Same.** — It has been further suggested that the appointment of guardians in cases where the infants had none belonged to the chancellor in the Court of Chancery before the erection of the Court of Wards; and that upon the abolition of that court it reverted to the King in his Court of Chancery as the general protector of all the infants in the kingdom.[2] But this (it has been objected) is rather an assertion than a proof of the jurisdiction; for it is difficult to trace it back to any such ancient period. The earliest instance which has been found of the actual exercise of the jurisdiction by the chancellor to appoint a guardian upon petition without bill is said to be that of Hampden in the year 1696. Since that period indeed it has been constantly exercised without its once being called in question. Mr. Hargrave has not hesitated to say that although the jurisdiction is now unquestionable, yet it seems to have been an usurpation, for which the best excuse was that the case was not otherwise sufficiently provided for.[3]

[1] Co. Litt. 89 *a*, Hargrave's note (70), § 16; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*).

[2] 3 Black. Comm. 426, 427; Morgan *v.* Dillon, 9 Mod. R. 139, 140; 1 Wooddes. Lect. 17, p. 463; Hughes *v.* Science, Macpherson on Infants, ch. 6, p. 74, and Appendix. In this case Lord Hardwicke said: "The court has originally exercised a superintendent jurisdiction over guardians in behalf of infants, to prevent abuses either in their persons or estates, as well as in behalf of the Crown and inferior lords who had formerly a great interest in the wardship of infants. Afterwards the Court of Wards being created took the jurisdiction out of the Chancery for the time. But as soon as that court came to be dissolved, the jurisdiction devolved again upon this court, and infants have ever since been considered as under the immediate care of chancery." Post, § 1748, note; s. c. Ambler, R. 302, note (2). Mr. Fonblanque has upon this subject remarked: "From this it might be inferred that the jurisdiction of the Court of Wards and Liveries was protective of infants in general; whereas the Statute of Henry VIII., by which the Court of Wards was erected, expressly confines the jurisdiction of that court to wards of the Crown. And it is scarcely necessary to remark that when a new court is erected it can have no other jurisdiction than that which is expressly conferred; for a new court cannot prescribe. 4 Inst. 200. But if the statute 32 H. VIII. does not confer a general jurisdiction in the case of infants, but merely a particular jurisdiction as to wards of the court, it should seem to follow that the general superintendence of the Crown over infants as pater patriæ, if it existed at common law, was not affected by the statute except in those cases to which it expressly refers. What those cases were are particularly enumerated by the statute, and also in the instructions to the Court of Wards and Liveries, prefixed to Ley's Reports. See also Reeve's Hist. Eng. Law, v. 4, p. 259." 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*).

[3] Hargrave's note (70), § 16, Co. Litt. 89 *a*; 2 Fonbl. Eq. B. 2, Pt. 2,

He has added, that although the care of infants as well as of idiots and lunatics should be admitted to belong to the Crown, yet that something further is necessary to prove that the chancellor is the person constitutionally delegated to act for the King.[1]

§ 1748. **Same.** — Notwithstanding the objections thus urged against the legitimacy of the origin of the jurisdiction, it is highly probable that it has a just and rightful foundation in the prerogative of the Crown, flowing from its general power and duty as parens patriæ, to protect those who have no other lawful protector.[2] It has been well said that it will scarcely be controverted that in every civilized State such a superintendence and protective power does somewhere exist. If it is not found to exist elsewhere, it seems to be a just inference, from the known prerogatives of the Crown as parens patriæ in analogous cases, to presume that it vests in the Crown.[3] It is no slight confirmation of this inference that it has been constantly referred to such an origin in all the judicial investigations of the matter,[4] as well as in the discussions of very learned elementary writers.[5]

ch. 2, § 1, note (*a*). There is very great reason to question this conclusion of the learned author; nor is it very likely that at so late a period as 1696 a clear usurpation of an authority of this nature should have been either claimed by the Chancellor or tolerated by Parliament. In Fitzherbert, Natura Brevium (p. 27, L.), a very ancient work of great authority, it is said that "the King, by his letters patent, may make a general guardian for an infant, to answer for him in all actions or suits brought or to be brought in all manner of courts." It is added, "And the infant shall have a writ in the Chancery for to remove his guardian, directed unto the justices, and for to receive another, &c. and the court at their discretion may remove the guardian and appoint another guardian."

[1] Ibid.

[2] The learned reader is referred to the elaborate note of Mr. Hargrave to Co. Litt. 89 *a*, note (70), § 16, for the objections to the jurisdiction, which are there fully considered; and also to the equally elaborate note of Mr. Fonblanque (2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*)) for the answers to those objections. The view of the matter taken in the text is almost exclusively derived from the note of Mr. Fonblanque. Lord Eldon, in De Manneville *v.* De Manneville (10 Ves. 63, 64), after referring to the notes of Mr. Hargrave and Mr. Fonblanque, stated that "the latter had stated the principle very correctly." See also Morgan *v.* Dillon, 9 Mod. 139, 140.

[3] See Beverley's Case, 4 Co. R. 123, 124; Bract. Lib. 3, cap. 9; Eyre *v.* Countess of Shaftsbury, 2 P. Will. 118, 123. See also 1 Madd. Ch. Pr. 262, 263.

[4] Eyre *v.* Countess of Shaftsbury, 2 P. Will. 118, 123; Butler *v.* Freeman, Ambler, R. 302; Hughes *v.* Science, 2 Eq. Abridg. 756; De Manneville *v.* De Manneville, 10 Ves. 63, 64; Morgan *v.* Dillon, 9 Mod. 139, 140; 1 Madd. Ch. Pr. 262.

[5] 3 Black. Comm. 427; Fitz. Nat. Brev. 27; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*); 1 Madd. Ch. Pr. 262, 263. In Butler *v.* Freeman,

§ 1749. **Same.** — Assuming then that the general care and superintendence of infants did originally vest in the Crown when they had no other guardian, the question by whom and in what manner the prerogative should be exercised would not seem open to much controversy. Partaking as it does more of the nature of a judicial administration of rights and duties in foro conscientiæ than of a strict executive authority, it would naturally follow, ea ratione, that it should be exercised in the Court of Chancery as a branch of the general jurisdiction originally confided to it. Accordingly the doctrine now commonly maintained is, that the general superintendence and protective jurisdiction of the Court of Chancery over the persons and property of infants is a delegation of the rights and duty of the Crown; that it belonged to that court and was exercised by it from its first establishment; and that this general jurisdiction was not even suspended by the Statute of Henry VIII., erecting the Court of Wards and Liveries.[1]

Ambler, R. 302, Lord Hardwicke is reported to have said, with reference to this subject: "This court does not act on the footing of guardianship or wardship. The latter is totally taken away by the Statute of Car. II. And, without claiming the former and disclaiming the latter, it has a general right, delegated by the Crown as pater patriæ, to interfere in particular cases for the benefit of such who are incapable to protect themselves." In the case of Hughes *v.* Science, cited in Ambler, R. 302, Mr. Blunt's note (2), the same learned judge said: "The law of the country has taken great care of infants, both their persons and estates, and particularly to prevent marriages to their disparagement. For that purpose it had assigned them guardians, and if a stranger married without the guardian's consent, it was considered a ravishment of ward, and the party was deemed punishable by fine and imprisonment; and so it was if the guardian himself married the infant to another to its disparagement. And the court has originally exercised a superintendent jurisdiction over guardians in behalf of infants, to prevent abuses either in their persons or estates as well as in behalf of the Crown, and inferior lords, who had formerly a great interest in the wardship of infants. Afterwards indeed the Court of Wards being created took the jurisdiction out of chancery for a time. But as soon as that court came to be dissolved, the jurisdiction devolved again upon the court, and infants have ever since been considered as under the immediate care of chancery. Whenever a suit is commenced here on their behalf, and even without suit, the court every day appoints guardians on petition; and the marriage of an infant to his guardian or any other without the consent of the court, where a suit is depending here in behalf of their infant, has been always treated and punished as a contempt. See Serj. Hill's MSS., Vol. VI. p. 8." s. c. cited at large in Macpherson on Infants, Appendix I. See also Lord Eldon's remarks in De Manneville *v.* De Manneville, 10 Ves. 63, 64.

[1] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*); Morgan *v.* Dillon, 9 Mod. 139, 140; De Manneville *v.* De Manneville, 10 Ves. 63, 64; Ex parte Phillips, 19 Ves. 122; Cary *v.* Bertie, 2 Vern. R. 342; Wellesley *v.* Duke of Beaufort, 2 Russ. R. 20, 21; Wellesley *v.* Wellesley, 2 Bligh, R.

§ 1750. **Same.** — The jurisdiction over idiots and lunatics is distinguishable from that over infants in several respects. The former is a personal trust in the Lord Chancellor, and especially delegated to him under the sign manual of the King; and from

(N. S.) 129, 136; Id. 142. Lord Eldon, in the celebrated case of Wellesley *v.* Duke of Beaufort (2 Russ. 20), speaking on the subject of the jurisdiction of the Court of Chancery over infants, and especially of its interfering between parent and child, said: "I do apprehend that notwithstanding all the doubts that may exist as to the origin of this jurisdiction, it will be found to be absolutely necessary that such a jurisdiction should exist, subject to correction by appeal, and subject to the most scrupulous and conscientious conviction of the judge, that he is to look most strictly into the merits of every case of this kind, and with the utmost anxiety to be right. It has been questioned whether this jurisdiction was given to this court upon the destruction of the Court of Wards (which however it is impossible to say could have been the case when we recollect the nature of the jurisdiction), or whether it is to be referred to circumstances and principles of a different nature; more especially whether it belongs to the King as parens patriæ, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown around them. With respect to the doctrine that this authority belongs to the King, as parens patriæ, exercising a jurisdiction by this court, it has been observed at the bar that the court had not exercised that jurisdiction unless where there was property belonging to the infant to be taken care of in this court. Now whether that be an accurate view of the law or not, whether it is founded on what Lord Hardwicke says in the case of Butler *v.* Freeman, 'that there must be a suit depending relative to the infant or his estate' (applying however the latter words rather to what the court is to do with respect to the maintenance of infants); or whether it arises out of a necessity of another kind, namely, that the court must have property in order to exercise this jurisdiction, — that is a question to which perhaps sufficient consideration has not been given. If any one will turn his mind attentively to the subject, he must see that this court has not the means of acting, except where it has property to act upon." The same case was afterwards carried to the House of Lords upon appeal, and Lord Redesdale in delivering his opinion in the House of Lords on that occasion, in affirmation of the decree below, said: "We find that now for a hundred and fifty years the Court of Chancery has assumed an authority with respect to the care of infants, and it has assumed that authority to the extent in which it was assumed for this reason. As long as the feudal tenures remained, generally speaking infants who had lost their parents were under the protection of the law which then existed with respect to the treatment and the care of the children. When that was at an end, it was thought fit, by a particular statute, to enable the father to make an appointment of a guardian for his children, giving to him the power which that statute gave to select proper persons for that purpose. As I observed before, if he makes an improper selection, if the person whom he has so selected misconduct himself, it is perfectly clear that a power has been assumed to control that conduct. Now upon what does Lord Somers, upon what does Lord Nottingham, upon what does Lord Hardwicke, upon what ground does every chancellor who has been sitting on the bench in the

his decree no appeal lies except to the King in council.[1] On the other hand the latter belongs to the Court of Chancery, and it may be exercised as well by the Master of the Rolls as by the Lord Chancellor; and therefore an appeal does lie from the decision of the Court of Chancery in cases of infants to the House of Lords.[2]

§ 1751. **Same.** — It may be asked why, if no particular warrant be necessary to enable the Court of Chancery to exercise its protective power and care over infants, a separate commission

Court of Chancery since that time, place the jurisdiction? They all say that it is a right which devolves to the Crown, as parens patriæ, and that it is the duty of the Crown to see that the child is properly taken care of. We all know that many jurisdictions are given to the Crown, many powers are given to the Crown, but those powers are all to be exercised by responsible ministers. It is not the King who takes on himself to determine who is to be a proper guardian of the children; but he is to delegate to different ministers the different kinds of powers which belong to him, that there may be, according to the language of our law, persons responsible to the King and the people for their good conduct in the administration of their trust. I therefore have no doubt in the world that it must be taken to be a jurisdiction rightly assumed, for a hundred and fifty years past unquestionably assumed, by the chancellors sitting in the Court of Chancery. Lord Somers resembled the jurisdiction over infants to the care which the court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown in the same way. There is no particular law upon the subject. The law merely declares that the King has the care of the persons who are of insane mind, and that he is to take care of their property. If they are absolute idiots, the property devolves to him during their lives, and he is to provide only for their maintenance. If they are not idiots, but persons who have lucid intervals, then the King is to take care of their property, to take care of their persons, to take care of their maintenance. And whatever property may be accumulated in the mean time he is a trustee of it for the benefit of those who may be entitled at their death, or to them if they should ever recover. With respect to the case of infants, can there be a stronger proof that it was conceived to be reserved to the Crown than this: that the City of London claim, as an immemorial right, and a right which must have been derived to them from the Crown, the care of orphans, and that they have most extraordinary powers for that purpose, extending to enable the Court of Orphans to commit to Newgate a person who disobeys their order? That has been allowed in a Court of Common Law; and it is founded upon usage which must have been founded originally upon a grant from the Crown of such powers to the Corporation of London. I think there can be no doubt therefore that the law of this country has reserved to the King the prerogative for the protection of infants, to be executed in such a manner as the constitution requires him to execute all his prerogatives." Wellesley *v.* Wellesley, 2 Bligh, R. (N. S.) 129 to 135. In pages 134 to 136 the subject is further examined and illustrated by his Lordship. See also Id. pp. 141, 142, Lord Manner's opinion.

[1] Sheldon *v.* Fortescue Aland, 3 P. Will. 104, 107, Mr. Cox's note (A); Rochfort *v.* Earl of Ely, 6 Bro. Parl. Cas. 329; Sherwood *v.* Sanderson, 19 Ves. 285; Ex parte Phillips, 19 Ves. 122, 123.

[2] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*); Oxenden *v.* Compton, 2 Ves. Jr. 71, 72.

under the sign manual should be necessary to confer on the chancellor the jurisdiction over idiots and lunatics, since that also has been referred to the protecting prerogative of the Crown as parens patriæ. The answer which has been given (and perhaps it is a true one) is, that in point of fact the custody of the persons and property of idiots and lunatics, or at least of those who held lands, was not anciently in the Crown but in the lord of the fee. The Statute (De Prerogativa Regis) of the 7th of Edward II., ch. 9 (or, as Lord Coke and others suppose, some earlier statute [1]) gave to the King the custody of idiots and also vested in him the profits of the idiot's lands during his life.[2] By this means the Crown acquired a beneficial interest in the lands; and as a special warrant from the Crown is in all cases necessary to any grant of its interest, the separate commission which gives the Lord Chancellor jurisdiction over the persons and property of idiots may be referred to this consideration.[3] With respect to lunatics the Statute of 17 Edward II. ch. 10, enacted that the King should provide that their lands and tenements should be kept without waste. It conferred merely a power which could not be considered as included within the general jurisdiction antecedently conferred on the Court of Chancery; and therefore a separate and special commission became necessary for the delegation of this new power.[4]

[1] See 2 Co. Inst. 14; 2 Reeves's Hist. ch. 12, pp. 307, 308; 1 Black. Comm. 302, 303; Fitz. N. Brev. 232.

[2] Lord Coke, in 2 Inst. 14, speaking of the provision in Magna Charta, ch. 4, says: "At the making of this statute the King had not any prerogative in the custody of the lands of idiots during the life of the idiots; for if he had, this act would have provided against waste, &c., committed by the committee or assignee of the King, to be done in his possessions as well as in the possessions of wards. But at this time the guardianship of idiots, &c., was to the lords and others according to the course of the common law." In Beverley's Case (4 Co. Rep. 126) it is expressly declared that the Statute of 17 Edward II. ch. 9, is but an affirmance or declaration of the common law. So Mr. Justice Blackstone, in his Commentaries (1 Black. Comm. 303), treats it. Lord Coke thinks that this prerogative was given to the Crown by some statute not now extant in the reign of Edward I., after Bracton wrote his work, and before that of Britton. 2 Inst. 14. See also Lord Northington's opinion in Ex parte Grimstone, Ambler, R. 707.

[3] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (a); De Manneville *v.* De Manneville, 10 Ves. 63, 64; 1 Black. Comm. 303, 304.

[4] Ibid. Lord Loughborough, in Oxenden *v.* Lord Compton (2 Ves. Jr. 71, 72; s. c. 4 Bro. Ch. R. 231), considered the Statute of 17 Edw. II. ch. 10, as merely in affirmance of the antecedent rights of the Crown. His language on that occasion was: "That leads to the principle upon which the administration of the estates of lunatics stands; and how it is committed, not to the Court of Chancery, but to a certain great officer of the Crown. The statute (17 Edward II. ch. 10) is not introductive

There is, under the statute, a difference between the case of an idiot and that of a lunatic in this respect. In the case

of any new right of the Crown. The better opinion inclines that way, and the words of the statute put it past all doubt. The object was to regulate and define the prerogative, and to restrain the abuse of treating the estates of lunatics as the estates of idiots." Again: "The course upon the statute has been that the Crown has committed to a certain great officer of the Crown, not of necessity the person who has the custody of the Great Seal (namely, the Lord Chancellor or Lord Keeper), though it usually attends him by a warrant from the Crown which confers no jurisdiction, but only a power of administration. If that power is abused, if anything wrong is done, or error committed, the appeal is immediately to the King, and not in the ordinary course attending the established jurisdiction of the kingdom. The orders that are made by persons charged with the custody of lunatics are appealable to the King in Council." Lord Apsley, in Ex parte Grimstone (Ambler, R. 707; s. c. 4 Bro. Ch. R. 235, note), said: "It (the right of the Crown over idiots and lunatics) certainly existed before the Statute De Prerogativa Regis. 17 Edw. II. ch. 9, 10. The writ does not go of course, but must be sued for. After the return to the commission the Great Seal, by virtue of the King's sign manual, grants the custody merely to save the application to the King in person. After the custody is granted, the Great Seal acts in matter relative to the lunatic, not under the sign manual, but by virtue of its general power as keeper of the King's conscience. It is usual to take bonds from the committees to account and submit to orders, but I do not apprehend it is absolutely necessary. The court makes many orders, and enforces them by attachments, which orders, and the manner of enforcing them, are not warranted by the sign manual, but by the general powers of the court." In the Corporation of Burford *v.* Lenthall (2 Atk. 553) Lord Hardwicke said: "Before the Courts of Wardship were erected the jurisdiction was in this court both as to lunatics and idiots, therefore all these commissions were taken out in this court and returned here; and, after the Court of Wards was taken away by act of Parliament, it reverted back to the Court of Chancery; and the sign manual of the King is a standing warrant to the Lord Chancellor to grant the custody of the lunatics, and is a beneficial thing in case of idiocy, because the King could not only give the custody of idiots, but the rents and profits of idiots' lands, to persons." Again, in Re Heli (3 Atk. 635) he said: "One part of the chancellor's power in relation to idiots and lunatics is by virtue of a sign manual of the King upon his coming to the Great Seal, and countersigned by the two secretaries of State, empowering him to take care of such persons in the right of the Crown, and to make grants from time to time of the idiots' or lunatics' estates." If one might venture to make a suggestion in a case where there seems no small diversity of opinion, it would be that upon general principles the King, as parens patriæ, has an original prerogative to take care of persons and property of infants, of idiots, and of lunatics in all cases where no other guardianship exists. So long as any special guardianship exists by law or custom in other persons the prerogative of the Crown is inactive, but not suspended. The jurisdiction generally belongs to the Court of Chancery as delegate of the Crown, except where it is specially or personally delegated or restricted by statute. The Statute De Prerog. Regis, ch. 9, 10, has rendered special commissions for certain purposes necessary to be granted under the sign manual; and the jurisdiction being in fact com-

of a lunatic the King is a mere trustee; in the case of an idiot he has a beneficial interest.[1]

§ 1752. **Same.** — But whatever may be the true origin of the jurisdiction of the Court of Chancery over the persons and property

mitted to the same person has in practice become mixed. If this view of the subject be admitted to be correct, it will clear away some of the difficulties now encumbering the subject.

[1] In Re Fitzgerald, 2 Sch. & Lefr. 436. The difference is fully expounded by Lord Redesdale in Re Fitzgerald (2 Sch. & Lefr. 436). "There is a difference," said he, "in the case of an idiot and a lunatic in this respect. In the case of a lunatic the King is a mere trustee; in the case of an idiot he has a beneficial interest. In point of form in the terms of the grant to the committee the grant of a lunatic's estate is a grant liable to account, and the other is a grant to a certain degree without account; that is, the King is not bound to do more than provide for the maintenance of the idiot, and is entitled by his prerogative to the surplus of his estate. The words of the statutes (which are said in Beverleys' Case, 4 Co. 126, 127, to be only declaratory of the common law) differ as to the provisions for the care of the property of an idiot and a lunatic. In the one case the King, having an interest, is said 'to have the custody of an idiot, his lands,' &c. But with respect to the other the words of the statute, and the language of those who have written on the subject, are that 'the King shall provide, when any happen to fail of his wit, that their lands and tenements shall be safely kept without waste, and that they and their household shall be maintained with the profit, and that the residue shall be kept to their use, to be delivered to them when they come to right mind.' So that the meaning simply is that in the one case the King shall have a personal benefit, but that in the other he is only to act as parens patriæ, as the person to take care of those who are incompetent to take care of themselves. And the statute with respect to lunatics expressly provides, 'nec rex aliquid de exitibus recipiat ad opus suum.' These are direct negative words, that the King cannot take the profits for his own use; but as to what is not in itself profitable, as the presentation to a church, the King takes. Then the statute proceeds to direct that if the party shall die in this condition, the residue shall be distributed for the benefit of his soul according to the superstition of the times in which the statute was made, which is certainly now to be taken as a direction to preserve the residue for those entitled to the personal estate of the lunatic on his death independent of that statute." Again in Lysaght *v.* Royse (2 Sch. & Lefr. 153), the same learned chancellor said: "Some doubt occurs to me as to the validity of the grant of the estate of the idiot. Under warrant of the King's sign manual, countersigned by the Lords of the Treasury, the chancellor has the ordering and disposition of the persons and estates of idiots and lunatics. This authority is given to him (as stated in the warrant) in consideration of its being his duty as chancellor to issue the commissions on which the inquiry as to the fact of idiocy or lunacy is to be made. The warrant certainly gives to the chancellor the right of providing for the maintenance of idiots and lunatics, and for the care of their persons and estates. For lunatics the Crown is merely a trustee. But in the case of an idiot the Crown is absolutely entitled to the profits, subject to the maintenance of the idiot. And I doubt whether the warrant thus given to the chancellor is a warrant for passing letters patent granting to any person for his own benefit the surplus profits of the estate of the idiot."

of infants, it is now conceded on all sides to be firmly established, and beyond the reach of controversy.[1] Indeed it is a settled maxim that the King is the universal guardian to infants, and ought, in the Court of Chancery, to take care of their fortunes.[2] We shall now proceed to the consideration of some of the more important functions connected with this authority, — in the appointment and removal of guardians; in the maintenance of infants; in the management and disposition of the property of infants; and lastly in the marriage of infants.

§ 1753. **Appointment and Removal of Guardians.** — In the first place in regard to the appointment and removal of guardians. The Court of Chancery will appoint a suitable guardian to an infant where there is none other, or none other who will or can act, at least where the infant has property; for if the infant has no property, the court will perhaps not interfere. It is not however from any want of jurisdiction that it will not interfere in such a case, but from the want of means to exercise its jurisdiction with effect; because the court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this part of its jurisdiction usefully and practically only where it has the means of doing so; that is to say, by its having the means of applying property for the use and maintenance of the infant.[3] Guardians appointed by the court are treated as officers of the court, and are held responsible accordingly to it.[4]

§ 1754. **Court Has Its Discretion as to Appointment of Proper Guardian.** — The question of who are to be appointed guardians is generally one of discretion merely; and the court ordinarily refers it to a master, especially if the guardianship be contested

[1] See In re Jackson, 21 Ch. D. 786; Lynch *v.* Rotan, 39 Ill. 14; Downin *v.* Lessors, 35 Md. 474; Lee *v.* Lee, 55 Ala. 590; In re Stockman, 71 Mich. 180, 38 N. W. 876; Strubbe *v.* Kings County Trust Co., 60 App. Div. 548, 69 N. Y. Supp. 1092.

[2] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1; Wellesley *v.* Duke of Beaufort, 2 Russ. R. 19; Duke of Beaufort *v.* Berty, 1 P. Will. 702, 706.

[3] Lord Eldon, in Wellesley *v.* Duke of Beaufort, 2 Russ. R. 21. The court will appoint a guardian upon petition without a bill being filed; and it is done upon the petition of the infant himself or of some person in his behalf. See Da Costa *v.* Mellish, 2 Atk. 14; s. c. 2 Swanst. R. 533, where it is better reported; and in West's Rep. 299; Ex parte Mountfort, 15 Ves. 445; Ex parte Salter, 2 Dick. R. 769; Wilcox *v.* Drake, 2 Dick. R. 631; s. c. cited Jacob's R. 251, note (*c*); Curtis *v.* Rippon, 4 Madd. R. 462; Ex parte Myerscough, 1 Jack. & Walk. 151; Ex parte Richards, 3 Atk. 518; Ex parte Birchell, 3 Atk. 813; Ex parte Woolscombe, 1 Madd. R. 213; Ex parte Wheeler, 16 V. 266; In re Jones, 1 Russ. R. 478; Bradshaw *v.* Bradshaw, 1 Russ. R. 528; 1 Madd. Ch. Pr. 167, 268.

[4] Wellesley *v.* Duke of Beaufort, 2 Russ. R. 1, 20, 21; post, § 1768.

between two or more parties to appoint guardians, leaving the person in whose custody the infant actually is to retain that custody until the coming in of the master's report. But if there are testamentary guardians, the court has no jurisdiction to interfere.[1] If the testamentary appointment however be one that contemplates the residence of the child in the country of its birth, as in Scotland for example, and the child be removed to a residence in England, it seems that the Court of Chancery in England will appoint guardians there; and the testamentary appointment will be looked at only as an expression of the parent's preferences, to which the court will give great influence.[2] But at the same time the court will look at all the circumstances, and not appoint the persons for whom the parent has expressed a preference, if they are resident in Scotland, unless the court is satisfied that it was his intention to appoint them guardians generally, and not guardians for Scotland merely.[3]

§ 1755. **Authority of Court of Chancery to Remove Guardians.** — In the next place, as to the removal of guardians.[4] The Court of Chancery will not only remove guardians appointed by its own authority, but it will also remove guardians at the common law, and even testamentary or statute guardians, whenever sufficient cause can be shown for such a purpose.[5] In all such cases the

[1] See Wardwell *v.* Wardwell, 9 Allen, 518. The appointment and removal of guardians is largely regulated by statute in this country. But conferring jurisdiction in the matter upon another court does not take away the jurisdiction of equity. Lee *v.* Lee, 55 Ala. 590; In re Stockman, 71 Mich. 180, 38 N. W. 876; Camp *v.* Pitman, 90 N. C. 615; Jones *v.* Bowman, 13 Wyo. 79, 77 Pac. 439, 67 L. R. A. 860.

The guardian should be of character, and his appointment is in the discretion of the court. Succession of Hoyle, 109 La. 623, 33 So. 625; In re Jacquet, 40 Misc. Rep. 575, 82 N. Y. Supp. 986.

[2] See Miller *v.* Harris, 14 Sim. 540; In re Johnstone, 2 Jones & L. 222.

[3] Beattie *v.* Johnson, 1 Phillips, Ch. R. 17; s. c. in House of Lords, 10 Clark & Fin. 42; Albert *v.* Perry, 1 McCart. 540.

[4] See Perkins *v.* Finnegan, 105 Mass. 501; West *v.* Forsythe, 34 Ind. 418; Crawford *v.* Creswell, 55 Ala. 497; Cottrell *v.* Booth, 166 Ind. 469, 76 N. E. 546; McGill *v.* McEvoy, 85 Md. 286, 37 Atl. 218, the guardian should not be removed simply because he went to Europe in search of his health, and he left the business of the estate entrusted to the servants of the ward's father and there was no evidence that the business was injured on account of the guardian's absence; but the guardian will be removed where he wastes the estate. King *v.* King, 73 Mo. App. 78; Ury *v.* Brown, 129 N. C. 270, 40 S. E. 4. The use of the ward's property in the guardian's business is sufficient for his removal; and if the feeling of the guardian towards the ward is hostile, the guardian will be removed. In re Mansfield's Est., 206 Pa. 64, 55 Atl. 764.

[5] In Foster *v.* Denny, 2 Ch. Cas. 238, the Lord Chancellor said: "Where there is a guardianship by the common law this court will intermeddle

guardianship is treated as a delegated trust for the benefit of the infant, and if it is abused, or in danger of abuse, the Court of Chancery will interpose not only by way of remedial justice but of preventive justice.[1] Where the conduct of the guardian is less reprehensible, and does not require so strong a measure as a removal, the court will, upon special application, interfere, and regulate and direct the conduct of the guardian in regard to the custody and education and maintenance of the infant; and if necessary it will inhibit him from carrying the infant out of the country, and it will even appoint the school where he shall be educated.[2] In like manner it will in proper cases require security to be given by the guardian if there is any danger of abuse or injury to his person or to his property.[3]

and order; but being here a guardian by act of Parliament I cannot remove him or her." But this doctrine seems to have been denied by Lord Macclesfield, in the Duke of Beaufort *v.* Berty (1 P. Will. 703), who asserted the jurisdiction of the court to be the same over statute guardians as over common-law guardians. Lord Hardwicke held the same opinion in Butler *v.* Freeman, Ambler, R. 302, and Roach *v.* Garvan, 1 Ves. 160. Lord Eldon, in Wellesley *v.* Duke of Beaufort (2 Russ. R. 1, 21, 22), fully recognized the same doctrine, as did also Lord Redesdale and Lord Manners in their opinions in Wellesley *v.* Wellesley, 2 Bligh, R. (N. S.) 128 to 130, 145, 146. In the Duke of Beaufort *v.* Berty (1 P. Will. 705), Lord Macclesfield said: "If the guardian chose to make use of methods that might turn to the prejudice of the infant, the court will interfere and order the contrary, and that this was granted upon the general power and jurisdiction which it had over all trusts; and a guardianship was most plainly a trust." Mr. Fonblanque, 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*), and § 2, note (*h*), seems to have thought that a testamentary guardian cannot be removed; although his conduct may be regulated by the court and he may be restricted from doing any acts to the prejudice of the infant. But it appears to me that he is not warranted in this opinion by the authorities. See Eyre *v.* Countess of Shaftsbury, 2 P. Will. 107; 1 Wooddes. Lect. 17, p. 461; Morgan *v.* Dillon, 9 Mod. 139 to 141; Com. Dig. Chancery, 3 O. 4, 5; Spencer *v.* Earl of Chesterfield, Ambler, R. 146; Okeefe *v.* Casey, 1 Sch. & Lefr. 106; Tombes *v.* Elers, 1 Dick. 88; Smith *v.* Bate, 2 Dick. 631; Ex parte Crumb, 2 John. Ch. R. 439. But in Ingham *v.* Bickerdike (6 Madd. 276) the Vice-Chancellor seems to have thought that the court cannot remove a testamentary guardian, though it might appoint some other person to superintend the maintenance and education of the infant.

[1] Wellesley *v.* Duke of Beaufort, 2 Russel, R. 1, 20, 21; Wellesley *v.* Wellesley, 2 Bligh, R. (N. S.) 128 to 130; Id. 141, 142, 145, 146; Duke of Beaufort *v.* Berty, 1 P. Will. 704, 705; Com. Dig. Chancery, 3 O. 4, 5.

[2] Duke of Beaufort *v.* Berty, 1 P. Will. 703, 704; De Manneville *v.* De Manneville, 10 Ves. 65; Lyons *v.* Blenkin, Jacob's R. 245; Skinner *v.* Warner, 2 Dick. R. 779; Tombes *v.* Elers, 1 Dick. 88; Talbot *v.* Earl Shrewsbury, 4 Mylne & Craig, R. 672.

[3] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*); Foster *v.* Denny, 2 Ch. Cas. 237; Hanbury *v.* Walker, 3 Ch. R. 58; 1 Madd. Ch. Pr. 263, 264,

§ 1756. **Same.** — The Court of Chancery will not only interfere to remove guardians for improper conduct, but it will also assist guardians in compelling their wards to go to the school selected by the guardian, as well as in obtaining the custody of the persons of their wards when they are detained from them. This may not only be done by the chancellor acting as any other judge, by a writ of habeas corpus, but it may also be done on a petition without any bill being filed in the court.[1]

§ 1757. **Jurisdiction of the Court over Protection and Education of Ward.** — The jurisdiction of the Court of Chancery extends to the care of the person of the infant so far as is necessary for his protection and education, and to the care of the property of the infant for its due management and preservation and proper application for his maintenance.[2] It is upon the former ground principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents as guardians by nature or by nurture, in regard to the custody and care of their children.[3] For although in general

268, 269; Lee *v.* Lee, 55 Ala. 590; Monell *v.* Monell, 5 Johns. Ch. 297; Lemon *v.* Hansbarger, 6 Gratt. 301.

[1] Eyre *v.* Countess of Shaftsbury, 2 P. Will. 103, 118, 120; Goodall *v.* Harris, 2 P. Will. 561, 562; Ex parte Hopkins, 3 P. Will. 152, and Mr. Cox's note; Hall *v.* Hall, 3 Atk. 721; Da Costa *v.* Mellish, West's R. 300; s. c. 2 Swanst. 533, 537, note; Reynolds *v.* Teynham, 9 Mod. R. 40; Wright *v.* Naylor, 5 Madd. R. 77.

[2] Clark *v.* Clark, 8 Paige, R. 152; In re Spence, 2 Phillips Ch. R. 247. For illustrations see Nunn *v.* Hancock, L. R. 6 Ch. 850; Mostyn *v.* Brooke, L. R. 4 H. L. 304; s. c. 2 DeG. J. & S. 353; Frith *v.* Cameron, L. R. 12 Eq. 169.

[3] Mr. Hargrave, in his learned note, 66, §§ 12, 13, to Co. Litt. 88 *b*, has brought together the general principles and doctrine applicable to guardianship by nature, guardianship by socage, and guardianship by nurture, the first and last of which are often confounded and used in a loose and indeterminate sense. At the common law, guardianship by nature is of the heir apparent only (and not of all the children), and belongs to the father and mother and other ancestor standing in that predicament to the infant. It lasts until twenty-one years of age, and extends no further than the custody of the infant's person. Guardianship by socage arises wholly out of tenure, and exists only when the infant is seised of lands or other hereditaments lying in tenure and in socage. It extends to the person and all the estates (including the socage estates) of the infant, and lasts until the infant arrives at the age of fourteen. It belongs to such of the infant's next of blood as cannot have by descent the socage estate, in respect to which the guardianship arises by descent without any distinction between the whole blood and the half blood. Guardianship by nature occurs only when the infant is without any other guardian; and none can have it except the father or mother. It lasts until the age of fourteen years, and extends only over the person. See 1 Black. Comm. 461, 462; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 2, note (*h*).

parents are entrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed, whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children, — in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian and to take care of them and to superintend their education.[1] As between husband and wife, the custody of the

[1] The cases on this subject are numerous. Duke of Beaufort *v.* Berty, 1 P. Will. 703; Whitfield *v.* Hales, 12 Ves. 492; De Manneville *v.* De Manneville, 10 Ves. 59, 60, 62, 63; Shelley *v.* Westbroke, Jacob's R. 266; Lyons *v.* Blenkin, Jacob's R. 245; Roach *v.* Garvan, 1 Dick. R. 88; Lord Shipbrook *v.* Lord Hinchinbrook, 2 Dick. 547; Creuse *v.* Orby Hunter, 2 Cox, R. 242; Wellesley *v.* Duke of Beaufort, 2 Russ. R. 1, 20, 21; s. c. 2 Bligh, (N. S.) pp. 128 to 130, 141, 142; Com. Dig. Chancery, 3 O. 4, 5; Ball *v.* Ball, 2 Simons, R. 35; Ex parte Mountfort, 15 Ves. 445. The language "to act as guardian" is here used with reference to the remark of Lord Eldon in Ex parte Mountfort (15 Ves. 446), where his Lordship said: "In certain cases the court will upon petition, without a bill, appoint, not a guardian, which cannot be during the father's life, but a person to act as guardian." See In re Pulbrook, 11 Jur. 185; Curtis *v.* Curtis, 5 Jur. N. S. 1147; post, § 1764, and note 1. Cruel treatment, Neville *v.* Reed, 134 Ala. 317, 32 So. 659, 92 Am. St. Rep. 35; Heineman's Appeal, 96 Pa. St. 112, 42 Am. Rep. 532, where the child's health was injured because the guardian negligently failed to secure the services of a physician. Brooke *v.* Logan, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177; or where the father was a hard drinker, Lally *v.* Fitzhenry, 85 Iowa 49, 51 N. W. 1155, 16 L. R. A. 681; State *v.* Libbey, 44 N. H. 321, 82 Am. Dec. 223; Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452; Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

The child's welfare is always a matter of first importance in the appointment of a guardian. Neville *v.* Reed, 134 Ala. 317, 32 So. 659, 92 Am. St. Rep. 35. And where the contest is between parents, neither has a right that will be regarded to the detriment of the child. Kelsey *v.* Green, 69 Conn. 291, 37 Atl. 679, 38 L. R. A. 471; Miller *v.* Miller, 38 Fla. 227, 20 So. 989, 56 Am. St. Rep. 166; Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639, 57 Am. St. Rep. 220; Lally *v.* Fitzhenry, 85 Iowa 49, 51 N. W. 1155; 16 L. R. A. 681; Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726; Merritt *v.* Swimley, 82 Va. 433, 3 Am.

children generally belongs to the husband;[1] and the latter cannot by an agreement with his wife[2] alienate to her the right to the custody and care of the children.[3]

§ 1758. **The Right of Parents to Custody of Children.** — Considerations of another nature may often operate in deciding who, as between the parents themselves, shall have the custody of the children of the marriage in cases where the parents do not live together. Ordinarily indeed the father will be entitled to the custody of his infant children. Thus for example if the infant be a daughter and of very tender years, and the mother under all the circumstances be the most suitable to take care of her person and education, a Court of Chancery will confer the custody on the mother; when, if the infant were of riper years and more discretion, and especially if a son, he would be entrusted for his education and superintendence to the custody and care of his father, if no real objection to his character or conduct existed.[4]

St. Rep. 115; Green *v.* Campbell, 35 W. Va. 698, 17 S. E. 308, 38 Am. St. Rep. 57; Nugent *v.* Powell, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

[1] See Agar-Ellis *v.* Lascelles, 24 Ch. D. 317; In re Elderton, 25 Ch. D. 220; In re Taylor, 4 Ch. D. 157; In re North, 11 Jur. 7; Commonwealth *v.* Briggs, 16 Pick. 203. And it is said that a Court of Law has no power to take children from the father. In re Hakewill, 12 C. B. 223. See further Ex parte Skinner, 9 Moore, 278; King *v.* Greenhill, 6 Nev. & M. 244; Rex *v.* Morely, 5 East, 224, note; Rex *v.* Hopkins, 7 East, 579; infra, p. 680, note (*b*).

[2] Or with others. Regina *v.* Smith, 17 Jur. 24; s. c. 16 Eng. L. & E. 221; Mayne *v.* Bredwin, 1 Halst. Ch. 454.

[3] The People *v.* Mercein, 3 Hill, R. 399.

[4] Ex parte Wollstonecraft, 4 John. Ch. R. 80; Ex parte Waldron, 13 John. R. 419; The People *v.* Mercein, 8 Paige, R. 47, 55, 56. In this last case Mr. Chancellor Walworth said: "The decision of the case so far as respects the infant daughter of the relator depends upon different principles, as from her tender years she is wholly incapable at this time of exercising any volition whatever in regard to her future residence. The court therefore must for the present decide that question for her, with reference not only to her own immediate safety, but also with a due regard for her future welfare. In such a case as this it is not material perhaps to inquire whether the chancellor in allowing the writ of habeas corpus acts as a mere commissioner under the statute, or as a court proceeding by virtue of an inherent power derived from the common law, but regulated in the exercise of that power by the special provisions of the Revised Statutes on the subject. Were it necessary, however, I think there would be no difficulty in showing that the power of the chancellor to issue a habeas corpus is not derived solely from the statute, but is also an inherent power in the court derived from the common law; although the authority of this court, as well as of the Supreme Court, to award the writ and to proceed thereon is to be exercised in conformity to the several provisions of the Revised Statutes. 2 R. S. 573, § 73. A writ of habeas corpus ad subjiciendum however is not, either by the common

§ 1759. **Same.** — The jurisdiction thus asserted, to remove infant children from the custody of their parents and to superintend their education and maintenance, is admitted to be of extreme delicacy, and of no inconsiderable embarrassment and responsibility. But it is nevertheless a jurisdiction which seems indispensable to the sound morals, the good order, and the just protection of a civilized society. On a recent occasion, after it had been acted upon in chancery for one hundred and fifty years, it was attempted to be brought into question, and was resisted, as unfounded in the true principles of English Jurisprudence. It was however confirmed by the House of Lords with entire unanimity; and on that occasion was sustained by a weight of authority and reasoning rarely equalled.[1]

§ 1760. **Same.** — It may not be without use to glance at some of the leading considerations suggested on that occasion.[2] The opposition to the jurisdiction was founded upon the right of the father to have the care and custody of his children. That right

law or under the provisions of the Revised Statutes, the proper mode of instituting a proceeding to try the legal right of a party to the guardianship of an infant. This court therefore upon such a writ will exercise its discretion in disposing of the custody of the infant, upon the same principles which regulate the exercise of a similar discretion by other courts and officers who are authorized to allow the writ in similar cases. And such was the decision of Chancellor Kent in the case of Wollstonecraft (4 John. Ch. Rep. 80), referred to by the counsel on the argument. In the exercise of such a discretion however the natural rights of parents to the custody of their infant children are not wholly to be lost sight of by the court or officer before whom the writ is returnable. And where, as in this case, it unfortunately happens that the parents are living separate from each other, either with or without a legal decree authorizing a suspension of matrimonial cohabitation, a summary inquiry as to the relative merits and demerits of each may frequently become necessary to enable the court to make a proper disposition of their infant children who are brought up on habeas corpus. For this reason it was that the relator and the defendant in the present case were permitted to occupy the court for so many days in the investigation of the causes which have led to the separation between the relator and his wife; which causes the defendant insists are sufficient to justify the wife in her refusal to return to matrimonial cohabitation, and to authorize him by the laws of this State to give to her and to her infant daughter shelter and protection." United States *v.* Green, 3 Mason, R. 482, 485; The King *v.* De Manneville, 5 East, R. 221; De Manneville *v.* De Manneville, 10 Ves. 52; Ex parte Schumpert, 6 Rich. 344; Ex parte Woodward, 17 Eng. L. & E. 77; Baird *v.* Torrey, 6 C. E. Green, 384, reversing 3 C. E. Green, 195.

[1] Wellesley *v.* Wellesley, 2 Bligh, (N. S.) 124, 128 to 145; S. C. 2 Russ. R. 1, 20, 21. Jurisdiction in England has been changed by the Judicature Act of 1873; the Queen's Bench Division of the High Court of Justice being given concurrent authority. See In re Goldsworthy, 2 Q. B. D. 75.

[2] The reasoning in the text is extracted from the very able opinion of Lord Redesdale in Wellesley *v.* Wellesley, 2 Bligh, R. (N. S.) 128 to 141.

in a general sense is not to be disputed.[1] But the true question is whether the father, having that right, is to be at liberty to abuse it. Why is the parent by law ordinarily entrusted with the care of his children? Simply because it is generally supposed that he will best execute the trust reposed in him; for that it is a trust, and of all trusts the most sacred, no one can well doubt.

§ 1761. **Same.** — In the case of ordinary guardians there is no question as to the authority of the court. Even in the case of a guardian appointed under the statute which enables the father to appoint a guardian to his children, it is clear that as a case of delegated trust, — a trust which the law has enabled the father when he ceases to live to give to others for the benefit of his children, — the authority of the court to interfere and to control the conduct of such a guardian in case of any abuse scarcely admits of dispute. What ground then is there to deny the like authority in the case of a parent?

§ 1762. **Same.** — Why is not the conduct of a father to be considered as a trust, as well as the conduct of a person appointed as guardian? It is true that the law compels the father to maintain his infant children; but it does no more than compel a bare maintenance. He cannot be compelled, whatever his property may be, to allow to his children what might be deemed a liberal allowance for their maintenance and education, but only so much as is a bare maintenance. But if the children have property of their own, there exists a right to apply that property which belongs to the children most beneficially for their support and education.

§ 1763. **Poverty of Parents as Ground upon Which Court Will Allow Children to Be Supported Out of Their Own Estate.** — Upon what ground is the court in any case required to maintain children out of their own property and not at the expense of their father? It is because the father either has not the means or is an improper person to have the care of his children.[2] When it is proposed to take the maintenance and education of children out of his control,

[1] The custody of an illegitimate child belongs to the mother. In re Casey, 10 Q. B. D. 454; Marshall *v.* Reams, 32 Fla. 499, 14 So. 95, 37 Am. St. Rep. 118. But the court will exercise its discretion and award the custody to the mother, even though the putative father undertake to appoint a guardian by his will. Ramsay *v.* Thompson, 71 Md. 315, 18 Atl. 592, 6 L. R. A. 705.

[2] See Tompkins *v.* Tompkins, 3 C. E. Green, 303; Commonwealth *v.* Lee, 120 Ky. 433, 86 S. W. 990, 27 Ky. L. Rep. 806; Burba *v.* Richardson, 14 Ky. L. Rep. 233; In re Wilber's Est., 27 Misc. Rep. 53, 57 N. Y. Supp. 942; In re Davis' Est., 184 N. Y. 299, 77 N. E. 259.

he may refuse to supply them with more than a bare maintenance; and yet it may be indispensable for their character, their morals, their interest, and their station in society that they should receive a good education. It is for that reason that the court takes upon itself to apply a part of their property for their suitable maintenance and education, instead of accumulating the income of it for their benefit until they are capable of taking possession of it themselves.[1] This jurisdiction of the court as to maintenance is unquestionable. It is a jurisdiction with respect to the income of the property of the children to apply it for their benefit, and it stands upon the same general principles as other interferences of the court in cases of property.

§ 1764. **Same.** — It is impossible to say that the father has any such absolute right to the care and custody of his children as the objection supposes. What are the grounds on which the custody of the children is given to the father? First protection, then care, then education.[2] Is it not clear, if the father does not give that protection, if he does not maintain the children, that the law interferes for the purpose of compelling the maintenance of the children?[3] Is it not clear, if the father cruelly treats the children in any manner, that a Court of Criminal Jurisdiction will interfere for the purpose of preventing that ill-treatment? Upon

[1] See In re Howarth, L. R. 8 Ch. 415; Brophy *v.* Bellamy, Ib. 798.

[2] As to religious training see In re Newbury, L. R. 1 Ch. 263; s. c. 1 Eq. 431; Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539; In re Skinner, L. R. 3 P. C. 451; Andrews *v.* Salt, L. R. 8 Ch. 622; Agar-Ellis *v.* Lascelles, 10 Ch. D. 49; s. c. 24 Ch. D. 17; Andrews *v.* Salt, L. R. 8 Ch. 622; In re Besant, 11 Ch. D. 508; In re Clarke, 21 Ch. D. 817. See ante, § 1757.

The father is liable if his conduct has been such that it has been necessary for him to be deprived of the custody of his child. Leibold *v.* Leibold, 158 Ind. 60, 62 N. E. 627; Rankin *v.* Rankin, 83 Mo. App. 335. He is liable for medical attention to his child. Leach *v.* William, 30 Ind. App. 413, 66 N. E. 172. But he is not liable to a surgeon for a serious operation upon his child, which operation was of doubtful success, and to the performance of which he protested at the time. Detwiler *v.* Bowers, 9 Pa. Super. Ct. Rep. 473. Nor is he liable, as a general rule, for dental services to his child, who was temporarily absent from home, and where there was no immediate necessity for the service. Ketchem *v.* Marsland, 18 Misc. Rep. 450, 42 N. Y. Supp. 7; nor is he liable for the board and support of his daughter, who, upon the divorce between himself and her mother, voluntarily left his home and went to live with the mother, there being no provision in the decree with reference to the custody of the child. This is upon the ground that the father has the right to support his child in his own home. Glynn *v.* Glynn, 94 Me. 465, 48 Atl. 105. But if in the decree the custody was given to the mother, his liability ceases. Brow *v.* Brightman, 136 Mass. 187.

[3] See § 1758.

what ground then can it be said that there is no jurisdiction whatsoever in the country which can control the conduct of the father in the education of his children? If such a defect could exist in our jurisprudence, it would strike all civilized countries with astonishment.

§ 1765. **Same.** — It is said that there is nothing from which this jurisdiction can be inferred as belonging to the Court of Chancery, except the dicta in the books and the actual exercise of it in that court for one hundred and fifty years. The very circumstance of such an actual exercise of the authority for such a period is conclusive in favor of its rightful origin; for in many cases under the constitution of England no other ground except the actual exercise of authority can be assigned for its legitimacy. The origin cannot be ascertained. How came there to be a House of Lords and a House of Commons? No one has been able to ascertain the exact origin of either. Much of the jurisdiction of the Court of King's Bench and of the Court of Exchequer is beyond the reach of any man to trace to its source or to say when and how it originated.

§ 1766. **Same.** — The truth is that in the constitution of the government of England all powers in the administration of justice which are necessary in themselves are vested in the Crown, and are so vested to be exercised by those ministers of the Crown to whom the jurisdiction has usually been delegated. The present jurisdiction must be taken to be delegated to the Court of Chancery whenever there is a suit respecting property in that court. If there was a suit respecting property in the Court of Exchequer as a Court of Equity to take care of property belonging to an infant, the Court of Exchequer would exercise that jurisdiction as an incident; that is to say, it would take care that the property which was to be administered under its direction should be properly administered. Such is the general course of reasoning by which the jurisdiction of the Court of Chancery has been maintained and established in the highest appellate court of England.[1]

§ 1767. **Same.** — It would be a subject of curious inquiry to ascertain the nature and extent of the parental power in the Roman law, and also the nature and extent of the powers and duties of guardians in the same law, and the manner of their appointment; but it would lead us too far from the immediate object of these Commentaries. It is highly probable that the common law as well as the Equity Jurisprudence of England has

[1] See Wellesley *v.* Wellesley, 2 Bligh, (N. S.) 128 to 141.

borrowed many of its doctrines on this subject from this source. Guardians (who were appointed on the death of the father) were in the Roman law of two sorts: (1) tutors, who were guardians of males until their age of fourteen years, and of females until their age of twelve years; and (2) curators, who were then appointed their guardians, and continued such until the minors respectively arrived at the age of twenty-five years, which was the full majority of the Roman law. Guardians were usually selected from the nearest relations, and might be nominated by the father or mother during their lifetime. But they were required to be appointed and confirmed by the proper judge or magistrate of the place where the minor resided; and they were removable for personal misconduct, or for ill treatment of the minor, or for bad management of his estate. But while any one remained guardian he was bound to take care of the person of the minor, to provide suitable maintenance out of his estate, to superintend his morals and education, and to exercise a prudent management over his estate.[1] In many respects indeed the Court of Chancery in the exercise of its authority over infants implicitly follows the very dictates of the Roman code.

§ 1768. **Same.** — It might seem upon principle that this jurisdiction of the Court of Chancery ought not to be confined to cases where a suit is depending for property in that court, although it might well be so confined, as to other Courts of Equity in England.[2] It would seem to belong to the Court of Chancery as the general delegate of the Crown acting as parens patriæ, for the protection of the persons and property of those who are unable to take care of themselves and yet possess the means of maintenance and are without any other suitable guardian;[3] and upon that ground that it ought to reach all cases where the person or the property of the infant required the protection of the court, without any inquiry whether there was a ground for actual litigation or not.[4] But in practice it seems to be limited to cases where a suit is actually pending in chancery upon a bill filed, even when the whole gravamen of the bill is a mere fiction.[5]

[1] See 1 Domat, B. 2, tit. 1, §§ 1 to 7; Dig. Lib. 26, tit. 1 to 10; Inst. Lib. 1, tit. 20 to 26, and Vinn. Comm. Ibid.; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 3.

[2] Ante, § 1766.

[3] Ante, § 1748; Duke of Beaufort *v.* Wellesley, 2 Russ. R. 20, 22; Wellesley *v.* Wellesley, 2 Bligh, (N. S.) 135 to 137; Butler *v.* Freeman, Ambler, R. 302; Smith's Prac. in Chan. 3d edition.

[4] See In re Graham, L. R. 10 Eq. 530.

[5] It often occurs that a bill is filed for the sole purpose of making an

§ 1769. **What Constitutes an Infant a Ward of Chancery.** — We are next led to the consideration of what constitutes an infant a ward of chancery, in respect to whom the court interferes in a great variety of cases when it would not if the infant did not stand in that predicament in relation to the court. Properly speaking, a ward of chancery is a person who is under a guardian appointed by the Court of Chancery.[1] But wherever a suit is instituted in the Court of Chancery relative to the person or property of an infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court and as being under its especial cognizance and protection.[2]

§ 1770. **Same.** — The power of the Court of Chancery to appoint a guardian and make an infant a ward of the court is not, it seems, limited to cases where the infant is domiciled in the country and actually has property there, but reaches cases where the infant is but temporarily in the country and all the property is in a foreign country. Thus an infant domiciled in Scotland and having a guardian or tutor there, and being in England solely for purposes of education, has been held liable to be made a ward in chancery upon a bill filed in England, although the whole property is in fact in Scotland and under the power of the guardian or tutor there.[3]

§ 1771. **Necessity for Order of Court in Dealing with Property of Ward.** — In all cases where an infant is a ward of chancery no act can be done affecting the person or property or state of the minor, unless under the express or implied direction of the court itself.[4] Every act done without such a direction is treated as a

infant a ward of chancery; but in such a case the bill always states, however untruly, that the infant has property within the jurisdiction, and the bill is brought against the person in whose supposed custody or power the property is. Johnstone *v.* Beattie, 10 Clark & Fin. 42. Why such a mere fiction should be resorted to has never, as it seems to me, been satisfactorily explained; and why the Lord Chancellor, exercising the prerogative of the Crown as parens patriæ, might not in his discretion appoint a guardian to an infant having no other guardian, without any bill being filed, seems difficult to understand upon principle. But the practice seems founded upon narrower ground.

[1] See Goodall *v.* Harris, 2 P. Will. 560, 562; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*b*); see Hughes *v.* Science, Ambler, R. 302, note.

[2] Butler *v.* Freeman, Ambler, R. 301; Hughes *v.* Science, Ambler, R. 302, in note; Eyre *v.* Countess of Shaftsbury, 2 P. Will. 112; Wright *v.* Naylor, 5 Madd. R. 77; Wellesley *v.* Wellesley, 2 Bligh, (N. S.) 137. See Rivers *v.* Durr, 46 Ala. 418; Brown *v.* Collins, 25 Ch. D. 56.

[3] Johnstone *v.* Beattie, 10 Clark & Fin. 42.

[4] See Goodall *v.* Harris, 2 P. Will. 560, 562; Butler *v.* Freeman, Ambler,

violation of the authority of the court; and the offending party will be arrested upon proper process for the contempt and compelled to submit to such orders and such punishment by imprisonment as are applied to other cases of contempt. Thus for example it is a contempt of the court to conceal or withdraw the person of the infant from the proper custody,[1] to disobey the orders of the court in relation to the maintenance or education of the infant, or to marry the infant without the proper consent or approbation of the court.[2] Of the latter more will be presently stated.[3] Indeed when once the Court of Chancery has thus directly or indirectly assumed authority over the person or property of an infant as its ward, it acts throughout with all the anxious care and vigilance of a parent; and it allows neither the guardian nor any other person to do any act injurious to the rights or interests of the infant.[4]

§ 1772. **Court Will Look after Maintenance of Ward.** — In the next place in regard to the maintenance of infants. Whenever

R. 302, 303; Hughes *v.* Science, Ambler, R. 302, note; Johnstone *v.* Beattie, 10 Clark & Fin. 42, 84, 85. In this case Lord Lyndhurst said: "It is proper that I should state that, according to the uniform course of the Court of Chancery, which I understand to be the law of that court, which has always been the law of that court upon the institution of a suit of this description, the plaintiff, the infant, became a ward of the court, — became such ward by the very fact of the institution of the suit; and being a ward of the court it was the duty of the court to provide for the care and protection of the infant, and as the court cannot itself personally superintend the infant, it appoints a guardian, who is an officer of the court, for the purpose of doing that on behalf of the court, and as the representative of the court, which the court cannot do itself personally. If there be a parent living within the jurisdiction of the court, or if there be a testamentary guardian within the jurisdiction of the court, the court in that case does not interfere for the purpose of appointing a person to discharge the duty, which is imposed upon the court itself, of taking care of the person of the infant; but the parent or the testamentary guardian is subject to the orders and control of the court precisely in the same way as an officer appointed by the authority of the court for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery; and it has always been so far as I have been able to understand and comprehend." But see Wallace *v.* Holmes, 9 Blatchf. C. C. 65; and compare Atkinson *v.* Atkinson, 8 Allen, 15. As to the right of a guardian to avoid his infant ward's deed see Chandler *v.* Simmons, 97 Mass. 508. And to bind the ward's estate by contract, Hicks *v.* Chapman, 10 Allen, 463.

[1] The solicitor of a person suspected of concealing the ward may be compelled to give information. Ramsbotham *v.* Senior, L. R. 8 Eq. 575.

[2] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, and notes (*b*), (*c*); Hughes *v.* Science, Ambler, R. 302, note (2); s. c. Macpherson on Infants, Appendix I.

[3] Post, § 1776.

[4] See Lee *v.* Lee, 55 Ala. 590, 599.

the infant is a ward of chancery and a suit is depending in the court, the court will of course upon petition direct a suitable maintenance for the infant, having a due regard to the rank, the future expectations, the intended profession or employment, and the property of the latter.[1] But where there is already a guardian in existence not deriving his authority from the Court of Chancery, and where there is no suit in the court touching the infant or his property (thus making the infant quasi a ward of the court) there formerly existed much difficulty on the part of the court in interfering upon the petition, either of the guardian or of the infant, to direct a suitable maintenance of the latter. The effect of this doubt was to allow the guardian to exercise his discretion at his own peril, and thus to leave much to his sense of duty, and much more to his habits of bold or of timid action in assuming responsibility. At present a different course is pursued; and in ordinary cases, at least where the property is small, the court will upon petition, without requiring the more formal proceedings by bill, settle a due maintenance upon the infant.[2] Lord Hardwicke, in vindication of this latter course, said: "There may be a great convenience in applications of this kind, because it may be a sort of check upon infants with regard to their behavior; and it may be an inducement to persons of worth to accept of the guardianship, when they have the sanction of this court for anything they do on account of maintenance, and likewise of use in saving the expense of a suit to an infant's estate." [3] These are considerations which certainly ought never to be lost sight of in regulating the practice of the court; for it seems not to be a question as to the jurisdiction of the court.

§ 1773. **Same.** — But in regard to the maintenance of infants out of their own property, we are not to understand that it is to be allowed as a matter of course, by a Court of Equity, either out

[1] See Wellesley *v.* Wellesley, 2 Bligh, (N. S.) 135 to 137. See In re Howarth, L. R. 8 Ch. 415; Brophy *v.* Bellamy, Ib. 798; De Witte *v.* Palin, L. R. 14 Eq. 251.

[2] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, and note (*d*); Ex parte Whitfield, 2 Atk. 315; Ex parte Thomas, Ambler, R. 146; Ex parte Kent, 3 Bro. Ch. R. 88; Ex parte Salter, 2 Dick. R. 769; s. c. 3 Bro. Ch. 500; Ex parte Mountforth, 15 Ves. 445; Ex parte Myerscough, 1 Jac. & Walk. 152; Corbet *v.* Tottenham, 1 B. & Beatt. 59, 60; Ex parte Green, 1 Jac. & Walk. 253; Ex parte Starkie, 3 Sim. R. 339; Ex parte Lakin, 4 Russ. R. 307; Ex parte Molesworth, 4 Russ. R. 308, note; 1 Madd. Ch. Pr. 267, 268, 272; Clay *v.* Pennington, 8 Sim. R. 359; Bridge *v.* Brown, 2 Younge & Coll. New R. 181.

[3] Ex parte Whitfield, 2 Atk. 316.

of the income or the principal thereof. On the contrary the court will examine into the circumstances of the case, and if the father is of ability to maintain the infant out of his own property, the court will ordinarily withhold all allowance from the property or income of the infant for the maintenance of the latter.[1]

[1] Thompson *v.* Griffin, 1 Craig & Phillips, 317, 320. On this occasion Lord Cottenham said: "If the property of the children had been derived from the bounty of a stranger, there could be no doubt but that the father, being of ability to maintain his children, could not be entitled to any allowance out of the income of their property for that purpose; but the claim of the father rests upon the distinction which has been taken between the cases in which the property of the children is derived from the bounty of a stranger, and those in which they are entitled to it under the marriage settlement of their parents, such as Mundy *v.* Lord Howe, Stocken *v.* Stocken, and Meacher *v.* Young. It appears to me that the distinction between those two classes of cases has been carried quite as far as can be justified upon principle. In some of them it has been said that in the case of marriage settlements the father is a purchaser, and therefore entitled to an allowance for the maintenance of his children, and thereby to be relieved from the burden which the law throws upon him of maintaining them himself. No doubt he is so, if the contract contained in the settlement gives him such a benefit; but before he can be entitled to it he must show that such was his contract. So in the case of a legacy from a stranger, if the intention to be found in the construction of the will appears to have been that the father should have such a benefit, the court is bound to give it to him. In both cases the question is one of construction and intention. In all the cases referred to there were distinct and positive trusts to apply the income to the maintenance of the children applicable, according to the construction put upon the whole of the provision, to the case of a surviving father. If in these cases the construction was correct, the order for maintenance must have been so; for if the settlement had expressed in terms what the court thought it sufficiently expressed upon the construction of the whole of the provisions, there could be no doubt but that such a trust would be carried into effect. In the present case I find no such trust; I find indeed a power, and in the case of the freehold property which is vested in the infant a mere power, at the discretion of the trustees, to apply part of that income which would otherwise belong to the infants for the purposes of their maintenance and education. If they do not exercise that power, the whole income belongs to the children. The father contends that he by the authority of this court can compel them to exercise that power for the purpose of giving the whole or part of this income to him. This would be going far beyond any of the other cases. I cannot upon this settlement find any trust for the benefit of the father, or any contract that he should be relieved, out of the settled property, from the burden of supporting his children." See Stocken *v.* Stocken, 4 Sim. R. 152; s. c. 4 Mylne & Craig, 95; Mundy *v.* Lord Howe, 4 Bro. Ch. R. 223; Meacher *v.* Young, 2 Mylne & Keen, R. 490; Bruin *v.* Knott, 1 Phillips, Ch. R. 572. See Stephens *v.* Howard, 32 N. J. Eq. 244; Tompkins *v.* Tompkins, 3 C. E. Green, 303; Carmichael *v.* Hughes, 6 Eng. L. & E. 71; Ransome *v.* Burgess, L. R. 3 Eq. 773; Stopford *v.* Canterbury, 11 Sim. 82; Bruin *v.* Knott, 1 Phill. 572; Sparhawk *v.* Buell, 9 Vt. 41; McKnight *v.* Walsh, 8 C. E. Green, 136; Beasley *v.* Watson, 41 Ala. 234; Mulhern *v.* McDavitt, 16 Gray, 404; Welch *v.* Burris, 29 Iowa, 186; Griffith *v.* Bird, 22 Gratt. 73.

§ 1774. **Same.** — The court also is not limited in its authority in regard to maintenance to cases where the infant is resident within the territorial jurisdiction of the court, or the maintenance is to be applied there. But in suitable cases and under suitable circumstances it will order maintenance for an infant out of the jurisdiction, taking care to impose such conditions and restrictions on the party applying for it as will secure a proper application of the money.[1]

§ 1775. **What Is a Proper Maintenance.** — In allowing maintenance the Court of Chancery will have a liberal regard to the circumstances and state of the family to which the infant belongs; as for example if the infant be an elder son and the younger children have no provision made for them, an ample allowance will be allowed to the infant so that the younger children may be maintained.[2] Similar considerations will apply to a father or mother of the infant who is in distress or narrow circumstances.[3] On the other hand in allowing maintenance the court usually confines itself within the limits of the income of the property. But where the property is small, and more means are necessary for the due maintenance of the infant, the court will sometimes allow the capital to be broken in upon.[4] But without the express sanction of the court a trustee or guardian will not be permitted of his own accord to break in upon the capital.[5]

§ 1776. **The Court Will Protect the Infant's Property against Wrongful Interference of Another.** — In the next place in regard to the management and disposal of the property of in-

[1] Stephens *v.* James, 1 Mylne & Keen, 627; Logan *v.* Farlie, Jacob, R. 193; Jackson *v.* Hankey, Jacob, R. 265; cited also in 1 Mylne & Keen, 627.

[2] 2 Fonbl. Eq. B. 2, ch. 2, § 1, note (*d*); Harvey *v.* Harvey, 2 P. Will. 21, 22; Lanoy *v.* Duke of Athol, 2 Atk. 447; Petre *v.* Petre, 3 Atk. 511; Burnet *v.* Burnet, 1 Bro. Ch. R. 179, and Mr. Belt's note.

[3] Roach *v.* Garvan, 1 Ves. 160; Bradshaw *v.* Bradshaw, 1 Jac. & W. 647; 1 Madd. Ch. Pr. 275, 276; Heysham *v.* Heysham, 1 Cox, R. 179; Allen *v.* Coster, 1 Beav. R. 201. See McKnight *v.* Walsh, 8 C. E. Green, 136, 142, 143.

[4] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*d*); Barlow *v.* Grant, 1 Vern. 255; Harvey *v.* Harvey, 2 P. Will. 22, 23; Ex parte Green, 1 Jac. & Walk. 253; 1 Madd. Ch. Pr. 276; Walker *v.* Wetherell, 6 Ves. 474; In re England, 1 Russ. & Mylne, 499; Ex parte Swift, 1 Russ. & Mylne, 575; Clay *v.* Pennington, 8 Simons, R. 359. James *v.* Buchanan, 6 Ky. L. Rep. 446; Gott *v.* Culp, 45 Mich. 265, 7 N. W. 767; Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859.

[5] Walker *v.* Wetherell, 6 Ves. 474; see In re Coe, 4 Kay & J. 199; Caffey *v.* McMichael, 64 N. C. 507; Johnston *v.* Haynes, 68 N. C. 514; Calhoun *v.* Calhoun, 41 Ala. 369; Wiggle *v.* Owen, 45 Miss. 691; Jarret *v.* Andrews, 7 Bush. 311.

fants.[1] And here the Court of Chancery will exercise a vigilant care over guardians in their management of the property of the infant. It will carry its aid and protection in favor of infants so far as to reach other persons than those who are guardians strictly appointed. For if a man intrudes upon the estate of an infant and takes the profits thereof, he will be treated as a guardian and held responsible therefor to the infant in a suit in equity.[2]

§ 1777. **Guardians are Not Ordinarily Allowed to Effect a Conversion of the Estate.** — Guardians will not ordinarily be permitted to change the personal property of the infant into real property, or the real property into personalty, since it may not only affect the rights of the infant himself, but also of his representatives if he should die under age.[3] But guardians may under particular circumstances, where it is manifestly for the benefit of the infant, change the nature of the estate; and the court will support their conduct if the act be such as the court itself would have done under the like circumstances by its own order. The act of the guardian in such a case must not be wantonly done, but it must be for the manifest interest and convenience of the infant.[4] It is true that it has been said that there is no equity in such a case between the representatives of the infant. But nevertheless the court has an obvious regard to the circumstance that these representatives may be affected thereby,[5] and it is

[1] Equity may order the sale of an infant's real estate if that will be for the benefit of his estate. Crawford *v.* Creswell, 55 Ala. 497; Ex parte Jewett, 16 Ala. 409. Equity has jurisdiction also to direct the raising of money by means of mortgage upon the estate of an infant for the purpose of paying the cost of repairs absolutely necessary, in a case where the infant is absolutely entitled to the estate subject to trusts, the legal estate being in trustees. In re Jackson, 21 Ch. D. 786.

[2] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, and note (*f*); 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*k*); ante, § 511.

[3] 1 Madd. Ch. Pr. 269, 270; 1 Fonbl. Eq. B. 1, ch. 2, § 5, note (*b*); Inwood *v.* Twyne, Ambler, R. 417; s. c. 2 Eden, R. 148, and Mr. Eden's note. Camden *v.* Murray, 16 Ch. D. 161; In re Jackson, 21 Ch. D. 786; Attridge *v.* Billings, 57 Ill. 489; Matthews *v.* Heyward, 2 S. C. 239; Horton *v.* McCoy, 47 N. Y. 21. But see Kann's Est. 69 Pa. St. 219; Paul *v.* York, 1 Tenn. Ch. 547.

[4] Inwood *v.* Twyne, Ambler, R. 418, and Mr. Blunt's note; s. c. 2 Eden, R. 148, and Mr. Eden's note; 1 Madd. Ch. R. 269; Mason *v.* Day, Prec. Ch. 319; 1 Fonbl. Eq. B. 1, ch. 2, § 5, note (*f*); Tullit *v.* Tullit, Ambler, R. 370; Ex parte Grimstone, Ambler, R. 708; Pierson *v.* Shore, 1 Atk. 480.

[5] Inwood *v.* Twyne, Ambler, R. 418, and Mr. Blunt's note; s. c. 2 Eden R. 147, 152, and Mr. Eden's note. See also Oxenden *v.* Lord Compton, 2 Ves. Jr. 69, 70; Ware *v.* Polhill, 11 Ves. 278; Pierson *v.* Shore, 1 Atk. 480; Ex parte Grimstone, Ambler, R. 707; s. c. 2 Ves. Jr. 235, note.

always inclined to keep a strict hand over guardians, in order to prevent partiality and misconduct.[1] For the purpose of preventing any such acts of the guardian, in case of the death of the infant before he arrives of age, from changing improperly the rights of the parties who as heirs or distributees would otherwise be entitled to the fund, it is the constant rule of Courts of Equity to hold lands purchased by the guardian with the infant's personal estate or with the rents and profits of his real estate, to be personalty and distributable as such; and on the other hand to treat real property (as for example timber cut down on a fee simple estate of the infant), turned into money, as still for the same purpose real estate.[2] On these accounts, and also from the manifest hazard which guardians must otherwise run, it is common for them to ask the positive sanction of the court to any acts of this sort. And when the court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it if it had remained in its original state.[3]

[1] Inwood *v.* Twyne, Ambler, R. 418, and Mr. Blunt's note; s. c. 2 Eden, R. 147, 152, and Mr. Eden's note. See also Oxenden *v.* Lord Compton, 2 Ves. Jr. 69, 70; Ware *v.* Polhill, 11 Ves. 278; Pierson *v.* Shore, 1 Atk. 480; Ex parte Grimstone, Ambler, R. 707; s. c. 2 Ves. Jr. 235, note.

[2] 1 Madd. Ch. Pr. 269, 270; Gibson *v.* Scudamore, 1 Dick. R. 45; s. c. Select Cas. in Ch. 63, and Moseley, R. 6; Earl of Winchelsea *v.* Norcliffe, 1 Vern. 434, and Mr. Raithby's note (3); Tullit *v.* Tullit, Ambl. R. 370; Witter *v.* Witter, 3 P. Will. 101, and Mr. Cox's note (1); Rook *v.* Worth, 1 Ves. 461; Pierson *v.* Shore, 1 Atk. 480, 481; Mason *v.* Day, Prec. Ch. 319; Ex parte Grimstone, cited 4 Bro. Ch. R. 235, note; Ware *v.* Polhill, 11 Ves. 278. See Kann's Estate, 69 Pa. St. 219; Horton *v.* McCoy, 47 N. Y. 21; Clay *v.* Brittingham, 34 Md. 675.

[3] Ashburton *v.* Ashburton, 6 Ves. 6; Sergeson *v.* Sealy, 2 Atk. 413; Webb *v.* Lord Shaftsbury, 6 Madd. 100; Ex parte Phillips, 19 Ves. 122, 123; Tullit *v.* Tullit, Ambl. R. 370; 2 Fonbl. Eq. B. 1, ch. 2, § 5, note (*f*). In this respect the Court of Chancery acts differently in cases of infancy from what it does in lunacy. Lord Eldon, in Ex parte Phillips, 19 Ves. 122, 123, explained the difference and the reasons of it as follows: "In the case of the infant the Lord Chancellor is acting as the Court of Chancery; not so in lunacy, but under a special, separate commission from the Crown, authorizing him to take care of the property, and for the benefit of the lunatic. In the case of the infant it is settled that as a trustee out of court cannot change the nature of the property, so the court, which is only a trustee, must act as the trustee out of court; and finding that a change will be for the benefit of the infant, must so deal with it as not to affect the powers of the infant over his property even during his infancy, when he has powers over one species of property, not over the other. It may be for the benefit of an infant, in many cases, that money should be laid out in land if he should live to become adult; but if not it is a great prejudice to him, taking away his dominion by the power of disposition he has over personal property, so long before he has it

§ 1778. **Consent of Court to Marriage of Ward Was Essential at Common Law.** — In the next place in regard to the marriage of infants. This is a most important and delicate duty of the Court of Chancery, which it exercises with great caution in relation to all persons who are wards of the court. No person is permitted to marry a ward of the court without the express sanction of the court, even with the consent of the guardian. If a man should marry a female ward without the consent and approbation of the court, he and all others concerned in aiding and abetting the act will be treated as guilty of a contempt of the court;[1] and the husband himself, even though he were ignorant that she was a ward of the court, will still be deemed guilty of a contempt.[2]

over real estate. The court therefore with reference to his situation, even during infancy, as to his powers over property, works the change, not to all intents and purposes, but with this qualification: that if he lives he may take it as real estate, but without prejudice to his right over it during infancy as personal property. A lunatic stands on quite a different footing. At the instant of a lucid interval he has precisely the same power of disposition over one species of property as over the other, in different modes and forms, I admit. The Lord Chancellor, acting under a special commission from the Crown, does what is for his benefit, taking the advice and assistance of the presumptive next of kin and heir as to the management of the property that may or may not be their own. A case has occurred of a lunatic, seised ex parte paterna of estate A, and ex parte materna of estate B, the latter being subject to a mortgage, and timber cut upon A, having been applied in discharge of the mortgage upon B; it was, on a question between heirs, held that A was not to be recouped. Upon these grounds, had the application been to sell a part of the real estate for the payment of debts, the court finding that the maintenance of the lunatic would be better provided for and his advantage promoted by disposing of a real estate, inconvenient, ill-conditioned, &c. that it would be for his benefit so to pay the debts, and keep together the personal estate, would have no difficulty in making such an application; and so in cutting down timber upon the estate, augmenting the personal property, it goes as personal property, and the different form of disposition is not regarded when a lucid interval arrives. Upon these principles this sort of distinction, whether solid or not, is settled, and I think there is sufficient to maintain it; but if settled, I have no inclination to disturb it." See also Oxenden *v.* Lord Compton, 2 Ves. Jr. 69, 70 to 78; Ex parte Grimstone, Ambler, R. 707; Ex parte Degge, 4 Bro. Ch. R., 235, note. Some statute provisions have been made in England on the subject of the estate of infants, and the rights of guardians relative thereto, which may be found succinctly stated in Jeremy on Eq. Jurisd. B. 1, ch. 5, § 3, pp. 232, 233. As to the power of a guardian to bind his ward's estate see Wood *v.* Truax, 39 Mich. 628.

[1] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*b*); Eyre *v.* Countess of Shaftsbury, 2 P. Will. 111, 112, 115; Butler *v.* Freeman, Ambl. R. 302; Edes *v.* Brereton, West, R. 348; More, 2 Atk. 157; Herbert's Case, 3 P. Will. 116; Hughes *v.* Science, Ambl. R. 302, note; 1 Madd. Ch. Pr. 277, 278; Nicholson *v.* Squire, 16 Ves. 259.

[2] Ibid. Some auxiliary provisions to secure due marriages and pro-

§ 1779. **Same.** — In all cases where the Court of Chancery appoints a guardian, or committee in the nature of a guardian, to have the care of an infant, it is accustomed to require the party to give a recognizance that the infant shall not marry without the leave of the court; which form is rarely altered, and only upon special circumstances. So that if an infant should marry, though without the privity or knowledge or neglect of the guardian or committee, yet the recognizance would in strictness be forfeited, whatever favor the court might upon an application think fit to extend to the party when he should appear to have been in no fault.[1]

§ 1780. **Same.** — With a view also to prevent the improper marriages of its wards, the court will, where there is reason to suspect an intended and improper marriage without its sanction, by an injunction not only interdict the marriage, but also interdict communications between the ward and the admirer; and if the guardian is suspected of any connivance, it will remove the infant from his care and custody and place the infant under the care and custody of a committee.[2] Lord Hardwicke has justly remarked that this jurisdiction is highly important in its exercise under both of these aspects: in the first place when it is exercised by way of punishment of such as have done any act to the prejudice of the ward; in the next place by the still more salutary and useful exercise by way of prevention, when it restrains persons from doing any act to disparage the ward before the act has been completed.[3]

§ 1781. **Same.** — In case of an offer of marriage of a ward the court will refer it to a master to ascertain and report whether the match is a suitable one, and also what settlement ought to be made. And where a marriage has been actually celebrated without the sanction of the court, the court will not discharge the husband who has been committed for the contempt, until he has actually made such a settlement upon the female ward as upon a reference to a master shall under all the circumstances be deemed

tection to infants have been made by the Marriage Act of 4 Geo. IV. ch. 76, which however it is here unnecessary to enumerate. They are stated in Jeremy on Eq. Jurisd. B. 1, ch. 5, § 3, pp. 225, 226.

[1] Eyre *v.* Countess of Shaftsbury, 2 P. Will. 112; Dr. Davis's Case, 1 P. Will. 698.

[2] Smith *v.* Smith, 3 Atk. 304; Pearce *v.* Crutchfield, 14 Ves. 206; Beard *v.* Travers, 1 Ves. 313; Shipbrook *v.* Hinchinbrook, 2 Dick. 547, 548; Roach *v.* Garven, 1 Dick. 88.

[3] Smith *v.* Smith, 3 Atk. 305.

equitable and proper.[1] It will not make any difference in the case that the ward has since arrived of age, or is ready to waive her right to a settlement; for the court will protect her against her own indiscretion and the undue influence of her husband.[2]

§ 1782. [**The Duties of the Guardian with Respect to the Ward's Estate and Property.** — A guardian bears practically the same relationship to the ward and his estate and property, as is sustained by fiduciaries and others occupying positions of trust and confidence. The degree of care and prudence required of a guardian, acting without fraud in the affairs of his trust, is not higher than that which an ordinarily prudent man exercises in his own affairs of a like nature. If it be to the best interest of the ward, he may pay debts and expenses, with the advice and consent of the court, out of the principal when there is no income available for that purpose. He cannot discharge the duties enjoined upon him by statute unless he is permitted to exercise in a measure his own judgment and discretion. Within the sphere of his duty, the powers of a guardian are no less than those of the absolute owner of the property. For the time being, the law is substituted for the will of the beneficiary, and whatever the law requires to be done, or whatever changes are necessarily made in the personal property, they stand upon the same footing as if they had been made by the owner.[3] The guardian ought not to permit his own individual interests to become intermingled or in contact with the interests of the ward, and certainly he ought not to allow himself to be placed in circumstances where it would be likely that especial advantages would accrue to him, or an undue advantage might have been taken of his ward. This is not neces-

[1] 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*b*); Stevens *v.* Savage, 1 Ves. Jr. 154; Winch *v.* James, 4 Ves. 386; Bathurst *v.* Murray, 8 Ves. 74, 78; Ball *v.* Coutts, 1 V. & Beam. 300, 301, 303; 1 Madd. Ch. Pr. 279 to 281.

[2] Ibid.; Stackpole *v.* Beaumont, 3 Ves. 98. What the settlement should be must necessarily vary with the circumstances of the parties and the nature of the case. On this point Mr. Jeremy has well summed up the general result of the authorities. Jeremy on Eq. Jurisd. B. 1, ch. 5, § 3, pp. 230, 231. How far Courts of Equity in this country would interfere in matters treated by the author in the last four sections, query? See Kenny *v.* Udall, 5 Johns. Ch. 464, 473; s. c. 3 Cowen, 591; Van Epps *v.* Van Deusen, 4 Paige, 64; Van Duzer *v.* Van Duzer, 6 Paige, 366; Chambers *v.* Perry, 17 Ala. 726.

[3] Wainright *v.* Burroughs, 1 Ind. App. 393, 27 N. E. 591; Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747; Gott *v.* Culp, 45 Mich. 265, 7 N. W. 767; Perrin *v.* Lepper, 72 Mich. 454, 40 N. W. 859; Reynold's Appeal, 70 Mo. App. 576; Taylor *v.* Kellogg, 103 Mo. App. 258, 77 S. W. 130; Elliott *v.* Howell, 78 Va. 297.

sarily for the reason that the guardian has obtained an undue advantage by virtue of his office, but he ought to keep his own properties and interests so far separated from those of his ward that not even a suspicion of wrong-doing might arise.[1]]

§ 1783. [**The Liability of the Guardian for Loss to the Estate.** — Since the guardian is required to guard and protect the estate of his ward just as he would his own private property, it follows that the rule of reason in the collection of the property and its protection is the same as would be applied to any one else. It is the duty of the guardian to invest properly the funds coming to his hands, belonging to his wards, and for his failure to do so he will incur responsibility according to the nature of the case and its attendant circumstances. The guardian is not generally liable where a loss occurs through a mere error of judgment, without any wilful default on his part, when the act done was within the power under which he acted.[2] So, if the guardian has a fund to be collected for the ward, and he uses due diligence in the selection of the agent for making the collection, and he did select an agent of good repute, and such agent collected the money due thereon, and kept it, the guardian is not liable to his ward for the loss.[3] But if the guardian undertakes to make the collection, and he is dilatory about his duties and fails to receive what is proper, and what, by due diligence, could have been collected in full, he is liable to his ward for the consequent loss.[4]]

§ 1784. [**The Guardian's Right to Transfer the Title to the Ward's Property.** — While a guardian of the property has the right to possess and use the property for the advantage of the ward, this does not impliedly confer upon him the right to mortgage, convey or in any manner to dispose of the property, unless

[1] Taylor *v.* Culvert, 138 Ind. 67, 37 N. E. 531; Perry *v.* Elgin, 15 Ky. L. Rep. 855, 26 S. W. 4; Ingram *v.* Heintz, 112 La. 496, 36 So. 507; Moyer *v.* Fletcher, 56 Mich. 508, 23 N. W. 198; Patterson *v.* Booth, 103 Mo. 402, 15 S. W. 543; Thornton *v.* Gilman, 67 N. H. 392, 39 Atl. 900; Horton *v.* Maine, 21 R. I. 126, 46 Atl. 403.

[2] Beach *v.* Moser, 4 Kans. App. 66, 46 Pac. 202; Elliott *v.* Howell, 78 Va. 297; Myers *v.* Zetelle, 21 Gratt. 758; and Messer's Appeal, 126 Pa. St. 115, 17 Atl. 543.

[3] Beach *v.* Moser, 4 Kans. App. 66, 46 Pac. 202; but where the funds had been collected by the guardian and she entrusted her attorney to make the investment, and he defaulted, she is personally liable to the ward, Abrams *v.* United States Fidelity and Guar. Co., 127 Wis. 579, 106 N. W. 1091, 5 L. R. A. (N. S.) 575, 115 Am. St. Rep. 1091.

[4] Taylor *v.* Kellogg, 103 Mo. App. 258, 77 S. W. 130; Boaz *v.* Milliken, 83 Ky. 634, 7 Ky. L. Rep. 777; Reynold's Appeal, 70 Mo. App. 576; Windon *v.* Stewart, 43 W. Va. 711, 28 S. E. 776.

possibly there is an express authority and direction conferred in the will, where he acquires his office as testamentary guardian. Otherwise, it is essential that he apply to the court for license to incumber or dispose of or sell the ward's estate. If he has undertaken to dispose of the estate without having obtained his leave, the transaction is of no validity, and a contract made in pursuance of his unauthorized act cannot be the subject of damages for its breach.[1] A guardian may not do, without express authority, that which the infant could not do, to affect the title to the lands of his ward, and a ratification by the guardian would make no difference. The guardian has no power to convey the lands of his ward without pursuing the course defined by statute. It cannot be possible that he may do by estoppel in pais that which he may not do by express grant.[2]]

[1] Le Roy *v.* Jacobsky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977; Morris *v.* Goodwin, 1 Ind. App. 481, 27 N. E. 985; Meiggs *v.* Hoagland, 68 App. Div. 182, 74 N. Y. Supp. 234; De Armit *v.* Milnor, 20 Pa. Super. Ct. Rep. 369; Kester *v.* Hill, 42 W. Va. 611, 26 S. E. 376.

[2] Funk *v.* Rentchler, 134 Ind. 68, 33 N. E. 364; Rocque's Heirs *v.* Levecque's Heirs, 110 La. 306, 34 So. 454; Dellinger *v.* Foltz, 93 Va. 729, 25 S. E. 998.

CHAPTER XXXIX

IDIOTS AND LUNATICS

§ 1785. **Idiots and Lunatics.** — With this brief exposition of the jurisdiction and doctrines of the Court of Chancery in regard to infants, we may dismiss the subject and proceed to the consideration of the jurisdiction in relation to IDIOTS and LUNATICS. The remarks which have been already made to distinguish the jurisdiction of the court in this class of cases from that exercised in cases of infants have in a great measure anticipated and brought under discussion the explanations proper for this place.[1] If the preceding views of this subject are correct, the Court of Chancery may be properly deemed to have had originally, as the general delegate of the authority of the Crown as parens patriæ, the right not only to have the custody and protection of infants, but also of idiots and lunatics, when they have no other guardian.[2]

[1] Ante, § 1749, and notes.

[2] Ante, § 1750; Beverley's Case, 4 Co. R. 126; 1 Black. Comm. 303; Ex parte Grimstone, Ambler, R. 707; s. c. cited 2 Ves. Jr. 235, note; Ex parte Degge, 4 Bro. Ch. R. 235, note; Oxenden *v.* Lord Compton, 2 Ves. Jr. 71; Eyre *v.* Countess of Shaftsbury, 2 P. Will. 118, 119; Cary *v.* Bertie, 2 Vern. 342, 343; 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, § 1, note (*a*).

Equity accordingly has original jurisdiction to give directions as to the guardianship and maintenance of persons of unsound mind not so found. Vane *v.* Vane, 2 Ch. D. 124; In re Brandon, 13 Ch. D. 773. See however In re Bligh, 12 Ch. D. 364. And see an article on the English Lunacy Laws in the April No., 1885, of the Law Quarterly Review.

But the Court of Chancery is not the curator either of the person or of the estate of an insane person whom it cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that chancery entertains jurisdiction. Jones *v.* Lloyd, L. R. 18 Eq. 265; Wilder *v.* Pigott, 22 Ch. D. 263, 268. The court has jurisdiction to order a sale of land for a lunatic's support, or to pay for money expended by his guardian. Dodge *v.* Cole, 97 Ill. 338. See Warfield *v.* Fisk, 136 Mass. 219.

In managing the estates of lunatics equity has regard to their maintenance and comfort more than to the claims of creditors. In re Pink,

§ 1786. **Jurisdiction of Court of Equity over Estates of Idiots and Lunatics.** — But the Statutes of 17 Edw. II. ch. 9, 10, introduced some new rights, powers, and duties of the Crown; and since that period the jurisdiction has become somewhat mixed in practice; but it is principally in modern times exerted under these statutes. The jurisdiction therefore is now usually treated as a special jurisdiction for many purposes (certainly not for all) derived from the special authority of the Crown, under its sign manual, to the chancellor personally, and not as belonging to him as chancellor, or as sitting in the Court of Chancery. So that (it has been said) the sign manual does not confer on him any jurisdiction, but only a power of administration.[1] From this circumstance (as we have seen) the practice under the two branches of the jurisdiction is not the same, nor are the doctrines of the judge the same in all respects.[2] Still for the most part they agree in substance; and in a work like the present there would be little utility in a more minute and comprehensive enumeration of the distinctions and differences between them.[3]

§ 1787. **Same.** — But whatever may be the true origin of the authority of the Crown as to idiots and lunatics, it is clear that the chancellor does not in all cases act under the special warrant by the sign manual. The warrant gives to the chancellor the right of providing for the maintenance of idiots and lunatics, and for the care of their persons and estates, and no more.[4] When a person is ascertained to be an idiot or lunatic, the chancellor proceeds under his special warrant to commit the custody of the person and estate of the idiot or lunatic, sometimes to the same person and sometimes to different persons, according to circumstances, and to direct for him a suitable maintenance.[5] After the

23 Ch. D. 577. Concerning allowances in favor of one who has voluntarily maintained a lunatic, see In re Weaver, 21 Ch. D. 615.

[1] Ex parte Phillips, 19 Ves. 122; Oxenden *v.* Lord Compton, 2 Ves. Jr. 72.

[2] Ante, § 1750, and notes.

[3] As to the present jurisdiction in England under the Judicature Act of 1873 see In re Lamotte, 4 Ch. D. 325; In re Watson, 19 Ch. D. 384.

[4] Lysaght *v.* Royse, 2 Sch. & Lefr. 153. In order that the chancellor should deal with the property of a lunatic at all it is necessary that a commission should be taken out, or that the lunatic should be a party in a cause; otherwise the court has no jurisdiction. Gilbee *v.* Gilbee, 1 Phillips, Ch. R. 121.

[5] Dormer's Case, 2 P. Will. 263; Sheldon *v.* Fortescue Aland, 3 P. Will. 110; Lysaght *v.* Royse, 2 Sch. & Lefr. 153; Ex parte Chumley, 1 Ves. Jr. 296; Ex parte Baker, 6 Ves. 8; Ex parte Pickard, 3 Ves. & B. 127. In the matter of Webb, 2 Phillips, Ch. R. 10.

custody is so granted and maintenance is assigned, the chancellor acts in other matters, relative to lunatics at least,[1] not under the warrant by the sign manual, but in virtue of his general power as holding the Great Seal, and keeper of the King's conscience. It is usual indeed to take bond from the committees to account and submit to the orders of the Court of Chancery, but it is not absolutely necessary so to do. The Court of Chancery is in the habit of making many orders and enforcing them by attachment; which orders and the manner of enforcing them are not warranted by the sign manual, but are warranted by the general power of the court.[2]

§ 1788. **Practice in Ascertaining Mental Incapacity.** — In regard to the manner of ascertaining whether a person is an idiot

[1] See Lysaght *v.* Royse, 2 Sch. & Lefr. 153.

[2] Ante, § 1775; Ex parte Grimstone, Ambler, R. 707; Ex parte Degge, 4 Bro. Ch. R. 235, note; Ex parte Fitzgerald, 2 Sch. & Lefr. 432, 438; Oxenden *v.* Lord Compton, 2 Ves. Jr. 69; s. c. 4 Bro. Ch. R. 231; Nelson *v.* Duncombe, 9 Beav. R. 211. Lord Redesdale, in Ex parte Fitzgerald (2 Sch. & Lefr. 438), has gone at large into this subject. The following extract sufficiently illustrates the text: "The issuing of the commission is under the direction of the Great Seal, and the care and custody of the person and estate is a matter which, after the abolition of the Court of Wards and Liveries, seems to have fallen back to the Crown, to be provided for upon a special application for the purpose. At the same time the duty thus thrown on the Crown was often difficult. It was to be performed by the Crown according to the advice upon which the King might constitutionally act, and it has therefore long been the practice from time to time to authorize by the King's sign manual the person holding the Great Seal to exercise the discretion of the Crown in providing for the care and custody of the persons and estates of lunatics, which has been usually done by grants to committees. But I apprehend that, though the discretion of the Crown has thus been delegated to the person holding the Great Seal, yet the superintendence of the conduct of the committee in the management both of the property and the person originates in the authority of the court itself as the court from which the commission inquiring of the lunacy issues, and into which the inquisition is returned, and which makes the grant founded on the inquisition; for which grant the sign manual (which is countersigned by the lords of the treasury) is a general warrant. The reason given in the warrant for delegating the power of appointing the committee to the person holding the Great Seal is because the jurisdiction of issuing the commission, and consequently of acting upon it, is by law in the Great Seal. And I conceive that the warrant itself implies no more, and that nothing is communicated by it but simply the selection of the person to whom the grant shall be made. But as the King is bound in conscience to execute the trust reposed in him by the statute, and cannot do it otherwise than by bailiff, the chancellor or person holding the Great Seal is the proper authority to direct and control the authority of the person so appointed bailiff. It is the duty therefore of the person holding the Great Seal to see that the committee does not use his office to the prejudice of the lunatic in his lifetime, or of those entitled to his property after his death,

or lunatic or not, a few words will suffice. Upon a proper petition addressed to the chancellor, not as such, but as the person acting under the special warrant of the Crown,[1] a commission issues out of Chancery on which the inquiry is to be made as to the asserted idiocy or lunacy of the party.[2] The inquisition is always had and the question tried by a jury, whose unimpeached verdict becomes conclusive upon the fact.[3] The commission is not confined to idiots and lunatics, strictly so called, but in modern times it is extended to all persons who, from age,[4] infirmity, or other misfortune, are incapable of managing their own affairs,[5] and therefore are properly deemed of unsound mind, or non compotes mentis.[6]

§ 1789. **Jurisdiction Not Confined to Lunatics Domiciled in This Country.** — The jurisdiction of the Court of Chancery over lunatics is not confined to lunatics domiciled within the country; but a commission of lunacy may issue where the lunatic has lands or

that being manifestly the duty of the Crown imposed by the law investing it with the care of persons in this situation." There is some obscurity from the language used in the books as to the point whether the Lord Chancellor acts as administering the general powers of a Court of Equity, technically speaking, as to the orders and decrees which he makes in cases of lunacy, or only as keeper of the King's conscience and delegate of the Crown, or virtute officii as chancellor in cases beyond the special commission. The truth seems to be that he acts merely as delegate of the Crown, and exercising its personal prerogative as parens patriæ in Chancery, and not as a Court of Equity. Hence it is that from his orders and decrees in cases of lunacy an appeal lies to the King in council; whereas if he acted in such cases as a Court of Equity an appeal would lie from said orders and decrees to the House of Lords. See Sheldon *v.* Fortescue Aland, 3 P. Will. 107, and note; Oxenden *v.* Lord Compton, 2 Ves. Jr. 69; s. c. 4 Bro. Ch. R. 235; Sherwood *v.* Sanderson, 19 Ves. 285. Yet the language used in Ex parte Grimstone, Ambler, R. 707, and in 2 Sch. & Lefr. 438, above cited, might lead to an opposite result.

[1] See Sherwood *v.* Sanderson, 19 Ves. 285.

[2] Lysaght *v.* Royse, 2 Sch. & Lefr. 153; Ex parte Fitzgerald, 2 Sch. & Lefr. 438. In the matter of Webb, 2 Phillips, Ch. R. 10; in the matter of Joanna Gordon, 2 Ibid. 242. Howard *v.* Howard, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610.

[3] See Rogers *v.* Walker, 6 Barr, 371; In re Lasher, 2 Barb. Ch. 97; In re Collins, 3 C. E. Green, 253.

[4] In re Collins, 3 C. E. Green, 253. See Regina *v.* Shaw, L. R. 1 C. C. 145. Hiett *v.* Shull, 36 W. Va. 563, 15 S. E. 146.

[5] See In re Monaghan, 3 Jones & L. 254.

[6] Gibson *v.* Jeyes, 6 Ves. 273; Ridgway *v.* Darwin, 8 Ves. 66; Ex parte Cranmer, 12 Ves. 446; Sherwood *v.* Sanderson, 19 Ves. 285. Some statutes have in modern times been passed in England relating to idiots, lunatics, and persons non compotes mentis authorizing certain acts to be done on their behalf by the committee under the direction of the Court of Chancery. They will be found summarily stated in Jeremy on Eq. Jurisd. B. 1, ch. 4, pp. 213, 214.

other property within the State, although he is domiciled abroad.[1]

§ 1790. [**The Duties of a Guardian of an Insane Ward.** — A guardian of an insane ward has much the same duties as those enumerated for an infant ward. Of course the impaired health and physical condition of the insane ward demands greater care and attention than in an ordinary guardianship. But no man, on account of his being curious, or any other idiosyncrasy that he may have acquired, ought to be committed to the custody of a guardian. He ought to be what is termed an insane person under the provisions of the particular statutes in question.[2] What are reasonable charges and expenses for an infant ward cannot be compared to the actual expenses for necessities of an insane ward. It is the duty of the guardian to provide for him suitable surroundings and he is entitled to credit for larger expenditures for the insane ward and his aged wife, than he would ordinarily be allowed.[3] The guardian is responsible for the ward's safety and control and he has the right, within reason, to control the ward and if his condition requires, to remove him from one place to another, within the jurisdiction of the court.[4] If the ward can be better looked after in the home of the guardian, it is proper that he be provided for there, even though the guardian, upon the death of the ward, be an heir at law.[5] It is the paramount duty of the committee of a lunatic to attend to her personal wants and comforts, and to furnish her, so far as the funds in his hands will allow, with not only all the necessaries of life, but all the proper recreation and amusements consistent with her former habit of living. It is his duty, likewise, to avail himself of medical advice, and all other reasonable means that may tend to the restoration of his ward, or the amelioration of her condition. The care, health, and comfort of the lunatic alone are to be considered; and this without reference to the interests of the next of kin, heirs at law and expectants. He may also provide for the payment of the lunatic's customary contributions to the church

[1] Southcote's Case, 2 Ves. 402; Perkins's Case, 2 Johns, Ch. R. 121; Petit's Case, 2 Paige, R. 174; in the matter of Gause, 9 Paige, R. 416; in the matter of the Princess Bariantinski, 1 Phillips, Ch. R. 375. See In re Fowler, 2 Barb. Ch. 305; In re Garnier, L. R. 13 Eq. 532. In re Fidelity Trust Co., 27 Misc. Rep. 118, 57 N. Y. Supp. 361.

[2] Van Dusen *v.* Newcomer, 40 Mich. 90.

[3] Deming *v.* Paynter, 19 Ky. L. Rep. 1123, 42 S. W. 1112.

[4] State *v.* Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

[5] Plummer *v.* Gibson, 59 N. J. Eq. 68, 45 Atl. 284; In re Nutting, 74 App. Div. 468, 77 N. Y. Supp. 696.

which she had been in the habit of attending, and to the making of a proper allowance to the lunatic, to be expended by herself, for gifts to her friends, dependents, servants, or in charity. While it is the duty of the guardian to use great economy in the preservation of the estate coming into his hands, yet the well-being and comfort of the ward are of primary consideration.[1]]

§ 1791. [**The Effect of Contracts of Lunatic.** — The contracts of lunatics, imbeciles, idiots, and a person who is non compos mentis, from whatever form of mental disease he may be suffering, as a rule, are not absolutely void, but are voidable. Indeed, some contracts, such as for necessaries, are valid and enforceable. The authorities differ as to the conditions under which the avoidance in equity of executed contracts of conveyances voidable for the cause stated may be made, even as against the other contracting party or grantee. There are cases which hold that restitution of the consideration received is not one of the conditions.[2] Much the greater number of cases, however, hold a contrary doctrine, and support the proposition that a deed cannot be set aside on the ground of the grantor's incompetency where the grantee acted in ignorance of the incompetency, and fairly and in good faith, unless the consideration received be refunded, or the grantee restored to his original position, and injustice thus avoided.[3]

[1] In re Knapp's Est. 18 Misc. Rep. 285, 41 N. Y. Supp. 156.

[2] Gibson *v.* Soper, 6 Gray 279, 66 Am. Dec. 414; Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705; Crawford *v.* Scovell, 94 Pa. 48, 39 Am. Rep. 766.

The liability of an infant and a person non compos mentis for necessaries is not strictly a legal but an equitable liability. In law, there is an absence of a sufficient mental capacity, but equity supplies the deficiency and will decree a liability. For instance, where the wife procured a dental plate, which was a necessary, though without the knowledge or consent of the husband, yet he is liable. Gilman *v.* Andrus, 28 Vt. 241, 67 Am. Dec. 713. Or if the husband voluntarily abandon his family, necessary supplies furnished to them are chargeable to the husband, he being regarded in equity as the principal debtor. Walker *v.* Laighton, 31 N. H. 111; Town of Rumney *v.* Keyes, 7 N. H. 571.

[3] Coburn *v.* Haywood, 76 Conn. 484, 57 Atl. 116, 100 Am. St. Rep. 1000; Moore *v.* Calkins, 85 Cal. 177, 24 Pac. 729; Scanlan *v.* Cobb, 85 Ill. 296; Ashcraft *v.* De Armond, 44 Iowa 229; Gribben *v.* Maxwell, 34 Kans. 8, 7 Pac. 584, 55 Am. Rep. 233; Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Young *v.* Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Riggan *v.* Green, 80 N. C. 236, 30 Am. Rep. 77; Carr *v.* Holliday, 21 N. C. 344; Odom *v.* Riddick, 104 N. C. 521; West *v.* Seaboard Air Line Ry., 151 N. C. 231, 65 S. E. 979; Pearson *v.* Coc, 71 Tex. 246, 9 S. W. 124, 10 Am. St. Rep. 740; Lincoln *v.* Buckmaster, 32 Vt. 652; Flach *v.* Gottschalk, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 7 Detroit Leg. N. 447,

Courts of Equity ever watch with a zealous care every contract made with persons non compos mentis, and always interfere to set aside their contracts, however solemn, in all cases of fraud, or where the contract or act is not seen to be just in itself, or for the benefit of such persons; but where a purchase is made in good faith, without knowledge of the incapacity, and no advantage is taken, for a full consideration, and that consideration goes manifestly to the benefit of the lunatic, Courts of Equity will not interfere therewith.[1]]

84 Am. St. Rep. 563; Jamison *v.* Culligan, 151 Mo. 410, 52 S. W. 224; Merritt *v.* Merritt, 43 App. Div. 68, 59 N. Y. Supp. 357.

[1] Creekmore *v.* Baxter, 121 N. C. 31, 27 S. E. 994; Borum *v.* Bell, 132 Ala. 85, 31 So. 454; Smith *v.* Forsythe, 28 Ky. L. Rep. 1034, 90 S. W. 1075; Shaw *v.* Thompson, 33 Mass. 198, 26 Am. Dec. 655; Bricknell *v.* Spear, 38 Misc. Rep. 389, 77 N. Y. Supp. 920.

CHAPTER XL

MARRIED WOMEN

§ 1792. **Married Women.** — We may next proceed to the consideration of the peculiar jurisdiction exercised by Courts of Equity in regard to the persons and property of MARRIED WOMEN; and principally in regard to their property. It is not our design in these Commentaries to enter upon any consideration of the general doctrines relative to the rights, duties, powers, and interests of husband and wife, which are recognized at the common law. That would properly belong to a treatise of a very different nature. It will be sufficient for our present purpose to examine those particulars only which are peculiar to Courts of Equity, or in which a remedial justice is applied by them beyond or unknown to the common law.

§ 1793. **The Fiction of the Unity of Husband and Wife at Common Law.** — It is well known that at the common law the husband and wife are treated for most purposes as one person; that is to say, the very being or legal existence of the woman as a distinct person is suspended during the marriage, or at least is incorporated and consolidated with that of her husband.[1] Upon this principle of the union of person in husband and wife depend almost all the legal rights, duties, and disabilities which either of them acquire by or during the marriage.[2] For this reason a man cannot grant anything to his wife or enter into a covenant with her; for the grant would be to suppose her to possess a distinct and separate existence. And therefore it is also generally true that contracts made between husband and wife when single are avoided by the intermarriage.[3] Upon the same ground it is that

[1] 1 Black. Comm. 442. I have qualified Blackstone's text by adding the words "for most purposes"; for in some respects even at law she is treated as a distinct person; as for example she may commit crimes separately from her husband; she may act as an attorney for him or for others; she may levy a fine; she may swear articles of peace against him.

[2] Ibid. [3] Ibid.

if the wife be injured in her person or property during the marriage, she can bring no action for redress without the concurrence of her husband; neither can she be sued without making her husband also a party in the cause.[1] All this is very different in the civil law, where the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries,[2] and may also by agreement with each other have a community of interest in the nature of a partnership.

§ 1794. **Rights of Husband in Wife's Property at Common Law.** — It is also a settled rule of the common law, founded in like principles, that in virtue of the marriage the husband becomes entitled to all the personal estate, including the choses in action of the wife, and may appropriate the whole to his own use. Hence if a promissory note or bond be given to a woman before marriage by a third person to secure an annuity to her upon her subsequent marriage, her husband may release the note or bond, and by the release of the security the annuity itself is gone.[3] It would be otherwise if the annuity were secured on land, for then the husband could not release it without the concurrence of his wife; and in order to extinguish the security she must join with him in levying a fine of the land.[4]

§ 1795. **Suits by Wife with Respect to Her Separate Property.** — Now in Courts of Equity, although the principles of law in regard to husband and wife are fully recognized and enforced in proper cases, yet they are not exclusively considered. On the contrary Courts of Equity for many purposes treat the husband and wife as the civil law treats them, as distinct persons, capable (in a limited sense) of contracting with each other, of suing each other, and of having separate estates, debts, and interests.[5] A wife may in a Court of Equity sue her husband and be sued by him.[6] And in cases respecting her separate estate, she may also be sued without him,[7] although he is ordinarily required to be

[1] 1 Black. Comm. 443.

[2] Ibid. 444; 1 Fonbl. Eq. B. 1, ch. 2, § 6, and note (*h*).

[3] Hare *v.* Becker, 12 Simons, R. 465. [4] Ibid.

[5] Arundell *v.* Phipps, 10 Ves. 144, 149; Livingston *v.* Livingston, 2 John. Ch. R. 539.

[6] Cannel *v.* Buckle, 2 P. Will. 243, 244. Fritz *v.* Fernandez, 45 Fla. 318, 34 So. 315; In re Deaver's Est. 126 Iowa 701, 102 N. W. 825, 106 Am. St. Rep. 374; Lombard *v.* Moss, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273; Frankel *v.* Frankel, 173 Mass. 214, 53 N. E. 398, 73 Am. St. Rep. 266; Reed *v.* Painter, 145 Mo. 341, 46 S. W. 1089; Woodward *v.* Woodward, 148 Mo. 241, 49 S. W. 1001.

[7] Dubois *v.* Hole, 2 Vern. 613, and Mr. Raithby's note (1). See

joined, for the sake of conformity to the rule of law, as a nominal party whenever he is within the jurisdiction of the court and can be made a party.[1]

§ 1796. **Contracts between Husband and Wife.** — In the further illustration of this subject we shall consider: first, the cases in which contracts between husband and wife will be recognized and enforced in equity; secondly, the manner in which a wife may acquire a separate estate, and her powers and interest therein; thirdly, the equity of the wife to a settlement out of her own property not reduced into the possession of her husband; and fourthly, her claim in equity for maintenance and alimony.

§ 1797. **Contracts Made Prior to Marriage are Extinguished upon Subsequent Marriage of the Parties.** — And first in regard to contracts between husband and wife. By the general rules of law, as has been already stated, the contracts made between husband and wife before marriage become by their matrimonial union utterly extinguished.[2] Thus for example if a man should give a bond to his wife or a wife to her husband before marriage, the contract created thereby would at law be discharged by the intermarriage.[3] Courts of Equity, although they generally follow the same doctrine, will, in special cases in furtherance of the manifest intentions and objects of the parties, carry into effect such a contract made before marriage between husband and wife, although it would be avoided at law.[4] An agreement therefore entered into by husband and wife before marriage for the mutual settlement of their estates, or of the estate of either upon the other upon the marriage, even without the intervention of trustees, will be enforced in equity although void at law; for equity will not suffer the intention of the parties to be defeated by the very

Travers *v.* Bulkeley, 1 Ves. 383; 1 Fonbl. Eq. B. 1, ch. 2, § 6, notes (*k*) and (*p*); Brooks *v.* Brooks, Prec. Ch. 24; Kirk *v.* Clark, Prec. Ch. 275; Lampert *v.* Lampert, 1 Ves. Jr. 21; Griffith *v.* Hood, 2 Ves. 452.

[1] See Lilia *v.* Airey, 1 Ves. Jr. 278; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*p*); Lillard *v.* Wilson, 178 Mo. 145, 77 S. W. 74; Niemeyer *v.* Niemeyer, 70 Md. App. 609; Briggs *v.* Devoe, 89 App. Div. 115, 84 N. Y. Supp. 1063; In re Dailey's Est. 43 Misc. Rep. 552, 89 N. Y. Supp. 538; Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49.

[2] Ante, § 1793. Dillon *v.* Dillon, 24 Ky. L. Rep. 781, 69 S. W. 1099; Schilling *v.* Darmody, 102 Tenn. 439, 52 S. W. 291, 73 Am. St. Rep. 892. Contra: Spencer *v.* Stockwell, 76 Vt. 176, 56 Atl. 661.

[3] Com. Dig. Baron & Feme, D. 1; Cro. Car. 551; Co. Litt. 264 *b*.

And would not be revived by the death of the husband. Abbott *v.* Winchester, 105 Mass. 115; Chapman *v.* Kellogg, 102 Mass. 246; Smiley *v.* Smiley, 18 Ohio St. 543.

[4] Rippon *v.* Dawding, Ambl. R. 566, and Mr. Blunt's note.

act which is designed to give effect to such a contract.[1] On this ground, where a wife before marriage gave a bond to her intended husband that in case the marriage took effect she would convey her estate to him in fee, the bond was after the marriage carried into effect in equity, although it was discharged at law; upon that occasion the Lord Chancellor said: "It is unreasonable that the intermarriage, upon which alone the bond was to take effect, should itself be a destruction of the bond. And the foundation of that notion is that at law the husband and wife being one person, the husband cannot sue the wife on this agreement; whereas in equity it is constant experience that the husband may sue the wife or the wife the husband; and the husband might sue the wife upon this very agreement." [2]

§ 1798. **Same.** — Even at law a bond given by a husband to his intended wife, upon a condition not to be performed in his lifetime (as for instance to leave her at his death £1,000), would not be extinguished by the intermarriage; for marriage extinguishes such contracts only as are for debts, or things which are due in præsenti or in futuro, or upon a contingency which may occur during the coverture. But where the debt or thing cannot be due until after the coverture is dissolved, the contract is only suspended, and not extinguished during the coverture.[3] A fortiori such an agreement would be specifically decreed in a Court of Equity.[4] Therefore where a husband covenanted before marriage with his intended wife that she should have power to dispose of £300 of her estate, he was afterwards held bound specifically to

[1] Moore *v.* Ellis, Bunb. R. 205; Fursor *v.* Penton, 1 Vern. 408; Cotton *v.* Cotton, Prec. Ch. 41; s. c. 2 Vern. 290, and Mr. Raithby's note; Bradish *v.* Gibbs, 3 John. Ch. R. 523, 540 to 547; 1 Fonbl. Eq. B. 1, ch. 2, § 6, notes (*n*) and (*o*).

[2] Cannel *v.* Buckle, 2 P. W. 243, 244; s. c. 2 Eden, R. 252 to 254. Moore *v.* Moore, 47 N. Y. 467; Walter *v.* Walter, 48 Mo. 140. Under the statutes in regard to separate property see Minnier *v.* Minnier, 4 Lans. 421; Adams *v.* Curtis, Ib. 164.

[3] Gage *v.* Acton, Com. Rep. 67, 68; s. c. 1 Lord Raym. 516; s. c. 1 Salk. 325; Milbourn *v.* Ewart, 5 T. Rep. 381; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*).

A covenant to pay an annuity revives on the death of the husband. Fitzgerald *v.* Fitzgerald, L. R. 2 P. C. 83.

[4] Acton *v.* Acton, Prec. Ch. 237; s. c. 2 Vern. 480; Watkyns *v.* Watkyns, 2 Atk. 96; Prebble *v.* Boghurst, 1 Swanst. R. 318, 319; Lampert *v.* Lampert, 1 Ves. Jr. 21; Com. Dig. Baron & Feme, D. 1; Id. Chancery, 2 M. 11; Newland on Contr. ch. 6, pp. 111, 112; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*); Rippon *v.* Dawding, Ambler, R. 566, and Mr. Blunt's note. There are some early cases the other way, but they are now overruled. Darcey *v.* Chute, 1 Ch. Cas. 21; Pridgeon *v.* Executors of Pridgeon, 1 Ch. Cas. 117, 118.

perform it.[1] The wife may even execute a power to dispose of property so reserved to her in favor of her husband.[2]

§ 1799. **Contracts Made after Marriage.** — In regard to contracts made between husband and wife after marriage a fortiori the principles of the common law apply to pronounce them a mere nullity; for there is deemed to be a positive incapacity in each to contract with the other. But here again, although Courts of Equity follow the law, they will under particular circumstance give full effect and validity to post-nuptial contracts.[3] Thus for example if a wife having a separate estate should bona fide enter into a contract with her husband to make him a certain allowance out of the income of such separate estate for a reasonable consideration, the contract, although void at law, would be held obligatory, and would be enforced in equity.[4] So if the husband should after marriage for good reasons contract with his wife that she should separately possess and enjoy property bequeathed to her, the contract would be upheld in equity.[5] So if husband

[1] Fursor *v.* Penton, 1 Vern. 408, and Mr. Raithby's note; Wright *v.* Cadogan, 2 Eden, R. 252; Com. Dig. Baron & Feme, D. 1; Id. Chancery, 2. M. 31; Bradish *v.* Gibbs, 3 John. Ch. R. 540, 544.

[2] Bradish *v.* Gibbs, 3 John. Ch. R. 523, 536. But see Milnes *v.* Busk, 2 Ves. Jr. 498.

[3] As in regard to money loaned by the wife to the husband out of her separate or individual property. Medsker *v.* Bonebrake, 108 U. S. 66, 27 L. Ed. 654, 2 S. Ct. Rep. 351; Atlantic Bank *v.* Tavener, 130 Mass. 407; Thoms *v.* Thoms, 45 Miss. 263; Simmons *v.* Thomas, 34 Mo. 31; Hoxie *v.* Price, 31 Wis. 82. And as to the converse case of money loaned by the husband to the wife see Butler *v.* Butler, 14 Q. B. D. 831. But a promissory note made to a married woman by a firm of which her husband is a member is considered in Massachusetts absolutely void, though made for full value, and is not enforceable even in equity against the partner not her husband. Fowle *v.* Torrey, 135 Mass. 87, two judges dissenting. And this too though the consideration of the note was money loaned by the married woman out of her separate estate, so long as no fraud was practised upon her and no agreement made that the property was to be held or kept as her separate property. Ib. Sed qu. See the dissenting opinion of Mr. Justice Field for the authorities bearing upon the question.

[4] Moore *v.* Freeman, Bunb. R. 205. It is laid down that if the wife consents to her husband's receiving the income of her separate estate from the trustee thereof, the husband and wife having lived together, she will not be entitled to an account for arrears against either the trustee or her husband. Dixon *v.* Dixon, 9 Ch. D. 587. See Caton *v.* Rideout, 1 Mac. & G. 599; Payne *v.* Little, 26 Beav. 1; Darkin *v.* Darkin, 17 Beav. 578, 581. If she has not consented, she may recover the arrears. Ib.; Parker *v.* Brooke, 9 Ves. 583.

[5] Harvey *v.* Harvey, 1 P. Will. 125, 126; s. c. 2 Vern. R. 659, 760, and Mr. Raithby's note; Com. Dig. Chancery, 2 M. 11, 12, 14; Bradish *v.* Gibbs, 3 John. Ch. R. 523, 540.

and wife for a bona fide and valuable consideration should agree that he should purchase land and build a house thereon for her, and she should pay him therefor out of the proceeds of her own real estate, if he should perform the contract on his side she also would be compelled to perform it on her side.[1] Nay, if an estate should be devised to a husband for the separate use of his wife, it would be considered as a trust for the wife, and he would be compelled to perform it.[2]

§ 1800. **Same.** — It is upon similar grounds that a wife may become a creditor of her husband by acts and contracts during marriage, and her rights as such will be enforced against him and his representatives. Thus for example if a wife should unite with her husband to pledge her estate, or otherwise to raise a sum of money out of it to pay his debts or to answer his necessities, whatever might be the mode adopted to carry that purpose into effect, the transaction would in equity be treated according to the true intent of the parties. She would be deemed a creditor or a surety for him (if so originally understood between them) for the sum so paid; and she would be entitled to reimbursement out of his estate, and to the like privileges as belong to other creditors.[3]

§ 1801. **Gifts by Husband to Wife.** — In respect also to gifts or grants of property by a husband to his wife after marriage they are ordinarily (but not universally) void at law. But Courts of Equity will uphold them in many cases where they would be held void at law, although in other cases the rule of law will be recognized and enforced. Thus for example if a husband should by deed grant all his estate or property to his wife, the deed would be held inoperative in equity as it would be in law; for it could in no just sense be deemed a reasonable provision for her (which is all that Courts of Equity hold the wife entitled to), and in giving her the whole he would surrender all his own interests.[4]

§ 1802. **Same.** — But on the other hand if the nature and circumstances of the gift or grant, whether it be express or implied,

[1] Livingston *v.* Livingston, 2 John. Ch. R. 537, 539. See also Townshend *v.* Windham, 2 Ves. 7.

[2] Darley *v.* Darley, 3 Atk. 399; Rich *v.* Cockell, 9 Ves. 375; post, § 1805.

[3] Tate *v.* Austin, 1 P. Will. 264, and Mr. Cox's note; s. c. 2 Vern. 689, and Mr. Raithby's note; Neimcewicz *v.* Gahn, 3 Paige, R. 614; Pawlet *v.* Delaval, 2 Ves. 663, 669; Clinton *v.* Hooper, 3 Bro. Ch. R. 201; Innes *v.* Jackson, 16 Ves. 356, 367; s. c. 1 Bligh, R. 104, 114, 115 to 127; 1 Eq. Abridg. 62; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*); 1 Roper on Husb. and Wife, ch. 4, § 1, pp. 143 to 162.

[4] Beard *v.* Beard, 3 Atk. 2; Warlick *v.* White, 86 N. C. 139.

are such that there is no ground to suspect fraud, but it amounts only to a reasonable provision for the wife, it will, even though made after coverture, be sustained in equity.[1] Thus for example gifts made by the husband to the wife during the coverture, to purchase clothes or personal ornaments, or for her separate expenditures (commonly called pin-money), and personal savings and profits made by her in her domestic management which the husband allows her to apply to her own separate use,[2] will be held to vest in her as against her husband (but not as against his creditors) an unimpeachable right of property therein, so that they may be treated as her exclusive and separate estate.[3] It is true that Courts of Equity will require clear and incontrovertible evidence to establish such gifts as a matter of intention and fact; but when that is established, full effect will be given to them.[4] A fortiori such allowances provided for by marriage articles, or by a settlement before marriage even without the intervention of trustees, will be deemed valid in equity to all intents and purposes, not only against the husband but also against his creditors. And if such allowances are invested in jewels or other ornaments, or property, the latter will be entitled to the same protection against the husband and his creditors.[5]

[1] Walter *v.* Hodge, 2 Swanst. R. 106, 107; Lucas *v.* Lucas, 1 Atk. 270, 271. See Schreiber *v.* Dinkel, 54 L. J. Ch. 241. So of a contract on good consideration and partially executed. Kesner *v.* Trigg, 98 U. S. 50, 25 L. Ed. 83; Sims *v.* Rickets, 35 Ind. 181, 9 Am. Rep. 679; Corcoran *v.* Corcoran, 119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 112 Am. St. Rep. 390; Merchants and Laborers' Bldg. Assn. *v.* Scanlan, 144 Ind. 11, 42 N. E. 1008; Fitzgerald *v.* Fitzgerald, 168 Mass. 488, 47 N. E. 431; Wooden *v.* Wooden, 72 Mich. 347, 40 N. W. 460; Straus *v.* Parshall, 91 Mich. 475, 51 N. W. 1117; Reagle *v.* Reagle, 179 Pa. St. 89, 36 Atl. 191; Watts *v.* Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258.

[2] Slanning *v.* Style, 3 P. Will. 337.

[3] 2 Roper on Husb. and Wife, ch. 17, § 1, pp. 132, 137 to 139; Wilson *v.* Pack, Prec. Ch. 295, 297; Sir Paul Neal's case, cited in Prec. Ch. 44; Lucas *v.* Lucas, 1 Atk. 270; Walter *v.* Hodge, 2 Swanst. 106, 107; Graham *v.* Londonderry, 3 Atk. 393 to 395; Clark *v.* Meyers, 24 Ky. L. Rep. 380, 68 S. W. 853; Adams *v.* Baker, 24 Nev. 375, 55 Pac. 362; Bailey *v.* Gardner, 31 W. Va. 94, 5 S. E. 636, 13 Am. St. Rep. 847.

[4] McLean *v.* Longlands, 5 Ves. 78, 79; Walter *v.* Hodge, 2 Swanst. R. 103 to 107; Roberts *v.* Haines, 112 Ga. 842, 38 S. E. 109; Georgia Banking Co. *v.* Tice, 124 Ga. 459, 52 S. E. 916; Monahan *v.* Monahan, 77 Vt. 133, 59 Atl. 169, 70 L. R. A. 935; Tyrner *v.* Davenport, 63 N. J. Eq. 288, 49 Atl. 463; Taylor *v.* Wands, 55 N. J. Eq. 491, 37 Atl. 315, 62 Am. St. Rep. 818; Elliott *v.* Hawley, 34 Wash. 585, 76 Pac. 93, 101 Am. St. Rep. 1016.

[5] Ibid.; 2 Roper on Husb. and Wife, ch. 18, § 4, pp. 165, 166; 1 Roper on Husb. and Wife, ch. 8, §§ 1, 2, pp. 288 to 327; Offley *v.* Offley, Prec. Ch. 6, 27; King *v.* Wells, 106 Iowa 649, 77 N. W. 338; Ingals *v.*

§ 1803. **The Nature of Pin-Money.** — Pin-money is a very peculiar sort of gift for a particular purpose and object, and whether it is secured by a settlement or otherwise, it is still required to be applied to those purposes and objects.[1] It is not deemed to be an absolute gift, or, as it is sometimes said, out and out, by the husband to the wife. It is not considered like money set apart for the sole and separate use of the wife during coverture, excluding the jus mariti; but it is a sum set apart for a specific purpose, due or given to the wife in virtue of a particular arrangement, payable and paid by the husband in virtue of that arrangement and for that specific purpose. Pin-money is a sum paid in respect to the personal expense of the wife for her dress and pocket-money; and hence, as the very name seems to import, it has a connection with her person, and is to deck and attire it. The husband therefore, as well as the wife, may be said to have an interest in it; for the wife is to dress (it has been said) according to his rank and not her own. It is upon this ground that Courts of Equity refuse to go back to call upon the husband to pay beyond the arrears of a year, although stipulated for by a marriage settlement; for the money is meant to dress the wife during the year so as to keep up the dignity of the husband, and not for the accumulation of the fund. This provides a check and control to the husband. It prevents the wife from misspending the money. It secures the appropriation of the money to its natural and original purpose. It is with this view quite as much as on account of the presumed satisfaction by acquiescence, that Courts of Equity have established the principle above stated, not to allow the wife to claim pin-money beyond the year. On the same ground it is that the personal representatives of the wife are not allowed to make any claim for the arrears of pin-money, not even for arrears of a year; for the allowance has a sole regard to the personal dress and expenses of the wife herself during that period. And hence also it is that if the wife becomes insane and remains so until her death, if the husband has maintained her and taken suitable care of her according to her rank and condition, Courts of Equity will not allow her personal representatives to make any claim for any arrearages of pin-money even secured by a marriage settlement.[2]

Alexander, 138 Mo. 358, 39 S. W. 801; Carson *v.* Carson, 204 Pa. 466, 54 Atl. 348.

[1] Jodrell *v.* Jodrell, 9 Beav. R. 45; Kee *v.* Vasser, 37 N. C. 553, 40 Am. Dec. 442; Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402.

[2] Howard *v.* Digby, 8 Bligh, R. 224, 246 to 250; Id. 252, 257, 261, 262,

§ 1804. **Same.** — Under the like consideration in a great measure falls the right of the wife to her paraphernalia; a term originally of Greek derivation (where it means something reserved over and above dower, or a dotal portion) and afterwards imported into the civil law, and from thence adopted into the language of

266, 267, 269, 271. The whole of this section is abstracted from the elaborate and able opinion of the Lord Chancellor in this case. In one part of his opinion the noble Lord said: "It is wonderful indeed how little there is to be found upon the subject of pin-money, notwithstanding its occurring almost every time that a marriage takes place among persons of large fortune. You cannot even get a definition from the books upon which you can rely; you cannot trace the line which divides it from the separate property of the wife with any distinctness, or in a way on which you can depend. And as to authority, either of decisions or dicta or text-writers or obiter dicta or judges, there is nothing that furnishes a clear and steady light on the subject; the cases running from pin-money into separate estate and from separate estate into pin-money in such a way that when a text-writer quotes a case, Brodie *v.* Barry (2 Ves. & B. 36) for instance, in support of a doctrine touching pin-money, you look at the book and find it has nothing to do with pin-money, and does not support the proposition for which it is cited." Again, "It is a very material fact in a case where authority is so little to be had, that the general opinion of all those who give pin-money either to their own wives or to the wives of their sons upon marriage should be entirely coincident with the view to which the argument had led; namely, that it is a sum allowed to save the trouble of a constant recurrence by the wife to the husband upon every occasion of a milliner's bill, upon every occasion of a jeweller's account coming in. I mean not the jeweller's account for the jewels, because that is a very different question; but I mean for the repair and the wear and tear of trinkets, and for pocket-money, and things of that sort. I do not of course mean the carriage and the house and the gardens, but the ordinary personal expenses. It is in order to avoid the necessity of a perpetual recurrence by the wife to the husband that a sum of money is settled at the marriage which is to be set apart to the use of the wife for the purpose of bearing those personal expenses." Again, "It is meant for the wife's expenditure on her person: it is to meet her personal expenses and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife. It is a fund which she may be made to spend during the coverture by the intercession and advice and at the instance of her husband. I will not go so far as to say, because it is not necessary for the purpose of this argument, that he might hold back her pin-money if she did not attire herself in a becoming way. I should not be afraid however of stretching the proposition to that extent. But I am not bound here to do so, because if during her coverture a claim were made by her (and this is one distinction between the claim of the wife and the claim of her personal representatives after her death), the absurd and incredible state of things that I have put as the consequence of their argument — the case of her attiring herself in an unbecoming manner — never could happen if the pin-money is only to be claimed by herself; for in that case the Duke would of course say, 'If you do not dress as you ought to do, what occasion have you for pin-money?' He need not refuse, but he remonstrates; he uses that influence which the law supposes him legitimately to have over his wife, and sees that

the common law,[1] in which it includes all the personal apparel and ornaments of the wife which she possesses, and which are suitable to her rank and condition in life.[2] At law the husband in his lifetime may dispose of her paraphernalia, excepting indeed her necessary apparel; and they are liable to the claims of creditors, with the like exception.[3] But the wife is, even at law, entitled to her paraphernalia against his representatives; for the husband cannot by will dispose of them or leave them to his representatives.[4] Courts of Equity fully recognize this right of the husband and his creditors; although in case of the latter, if there are any other personal assets of the husband, they will after his death be marshalled against his representatives in favor of the widow.[5]

§ 1805. **Same.** — There is however a distinction upon this subject of paraphernalia which is entitled to consideration. Where

the fund is duly expended for its proper purpose. Now the purpose is not the purpose of the wife alone: it is for the establishment; it is for the joint concern; it is for the maintenance of the common dignity; it is for the support of that family whose brightest ornament very probably is the wife; whose support and strength is the husband, but whose ornament is the wife. It is to support the dignity and splendor of the joint establishment, consisting of husband and wife, that part of the whole expenditure is for the support of the wife herself. Then does it not follow from thence that the husband has a direct interest in the expenditure of the pin-money? He has a right to have the pleasure of it, to have the credit of it, to be spared the eyesore of a wife appearing as misbecomes his station. That is the destination and the object of pin-money." See Jodrell *v.* Jodrell, 9 Beav. R. 45.

[1] "Si res dentur in ea quæ Græci παράφερνα dicunt quæ Galli peculium appellant." Dig. Lib. 23, tit. 3, l. 9, § 3. As to these the Code declared: "Ut vir in his rebus quas extra dotem mulier habet quas Græci παράφερνα dicunt, nullam uxore prohibente habeat communionem, nec aliquam ei necessitatem imponant, &c. Nullo modo (ut dictum est) muliere prohibente, virum in paraphernis se volumus immiscere." Cod. Lib. 5, tit. 14, l. 8; 1 Domat, B. 1, tit. 9, § 4, pp. 180 to 182.

[2] 2 Black. Comm. 435.

[3] 2 Black. Comm. 435, 436; Graham *v.* Londonderry, 3 Atk. 393; Townshend *v.* Windham, 2 Ves. 7; Burton *v.* Pierpont, 2 P. Will. 79; Parker *v.* Harvey, 4 Bro. Parl. R. 609, by Tomlins; s. c. 3 Bro. Parl. Cas. 187.

[4] Ibid.; Tipping *v.* Tipping, 1 P. Will. 729, 730; Seymore *v.* Tresilian, 3 Atk. 358, 359; Ridout *v.* Earl of Plymouth, 2 Atk. 105; Northey *v.* Northey, 2 Atk. 77; s. c. 9 Mod. R. 270.

[5] Townshend *v.* Windham, 2 Ves. 7; Tipping *v.* Tipping, 1 P. Will. 729; Burton *v.* Pierpont, 2 P. Will. 79, 80; Tynt *v.* Tynt, 2 P. Will. 542, 544, and Mr. Cox's note (1); Probert *v.* Clifford, Ambler, R. 6, and Mr. Blunt's note; Incledon *v.* Northcote, 3 Atk. 438; Snelson *v.* Corbett, 3 Atk. 369; Aldrich *v.* Cooper, 8 Ves. 397; Boynton *v.* Parkhurst, 1 Bro. Ch. R. 576; s. c. 1 Cox, 106; Aguilar *v.* Aguilar, 5 Madd. R. 414; 2 Roper on Husb. and Wife, ch. 17, § 3, pp. 144, 145, and note.

the husband either before or after marriage gives to his wife articles of paraphernal nature, they are not treated as absolute gifts to her as her own separate property; for if they were, she might dispose of them at any time, and he could not appropriate them to his own use. But they are deemed as technically paraphernalia, to be worn by the wife as ornaments of her person, and so to be deemed gifts sub modo only.[1] But if the like articles were bestowed upon her by a father, or by a relative, or even by a stranger, before or after marriage, they would be deemed absolute gifts to her separate use; and then, if received with the consent of the husband, he could not, nor could his creditors, dispose of them any more than they could of any other property received and held to her separate use.[2]

§ 1806. **The Effect of Post-nuptial Marriage Settlements.** — And although (as we have seen [3]) post-nuptial contracts for a settlement entered into by husband and wife, or husband and wife and children, will not, if they are purely voluntary, be enforced against the husband or his heirs or personal representatives, yet this doctrine is to be received with this qualification, that it is done in pursuance of a duty on the part of the husband which a Court of Equity would enforce. For if a husband should voluntarily enter into a contract to make a settlement, or should actually make a settlement upon his wife and children in consideration of personal property coming by distribution or bequest to her from her relatives, to no greater extent than what a Court of Equity would upon a suitable application by bill direct him to make, in such a case the post-nuptial contract or settlement will not only be held valid and obligatory upon him and his representatives, but equally so against his creditors.[4]

§ 1807. **How May Wife Acquire Separate Estate.** — In the next place as to the manner in which a married woman may acquire a separate estate and as to her powers and interests therein. It is well known that the strict rules of the old common law would not permit the wife to take or enjoy any real or personal estate

[1] Graham *v.* Londonderry, 3 Atk. R. 393 to 395; Ridout *v.* Earl of Plymouth, 2 Atk. 104.

[2] Graham *v.* Londonderry, 3 Atk. 393 to 395; 2 Roper on Husb. and Wife, ch. 17, § 3, p. 143.

[3] Ante, § 1395.

[4] Wickes *v.* Clarke, 8 Paige, R. 161; Seward *v.* Jackson, 8 Cowen, R. 406; ante, §§ 1799, 1800. See Bridgford *v.* Riddell, 55 Ill. 261; Kesner *v.* Trigg, 98 U. S. 50, 25 L. Ed. 83; Dudley *v.* Pigg, 149 Ind. 363, 48 N. E. 642; Powell *v.* Meyers, 23 Ky. L. Rep. 795, 64 S. W. 428; De Farges *v.* Ryland, 87 Va. 404, 12 S. E. 805, 24 Am. St. Rep. 659.

separate from or independent of her husband. And although these rules have been in some degree relaxed and modified in modern times, yet they have still a very comprehensive influence and operation in Courts of Law.[1] On the other hand Courts of Equity have for a great length of time admitted the doctrine that a married woman is capable of taking real and personal estate to her own separate and exclusive use, and that she has also an incidental power to dispose of it.[2]

§ 1808. **Same.** — The power to hold real and personal property to her own separate and exclusive use may be and often is reserved to her by marriage articles or by an actual settlement made before marriage; and in that case the agreement becomes completely obligatory between the parties after marriage, and regulates their future rights, interests, and duties. In like manner real and personal property may be secured for the separate and exclusive use of a married woman after marriage, and thus the arrangement may acquire a complete obligation between the parties.[3]

§ 1809. **Same.** — It was formerly supposed that the interposition of trustees was in all arrangements of this sort, whether made before or after marriage, indispensable for the protection of the wife's rights and interests. In other words it was deemed absolutely necessary that the property of which the wife was to have the separate and exclusive use should be vested in trustees for her benefit; and that the agreement of the husband should be made with such trustees, or at least with persons capable of contracting with him for her benefit.[4] But although in strict propriety that should always be done and it usually is done in regular and well-considered settlements, yet it has for more than a century been established in Courts of Equity that the intervention of trustees is not indispensable; and that whenever real or personal property is given or devised or settled upon a married woman either before or after marriage for her separate and exclusive use without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband and of his creditors

[1] See Coomes *v.* Elling, 3 Atk. 679; 2 Roper on Husb. and Wife, ch. 18, p. 151. See Agar *v.* Blethyn, 1 Tyrw. & Grang. 160.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*); 2 Roper on Husb. and Wife, ch. 18, pp. 151 to 266. As to statutory separate estates see Kelly *v.* Turner, 74 Ala. 513.

[3] Ante, § 500; Wickes *v.* Clarke, 8 Paige R. 161.

[4] Harvey *v.* Harvey, 1 P. Will. 125; Burton *v.* Pierpont, 2 P. Will. 79; Peacock *v.* Monk, 2 Ves. 190.

also.[1] In all such cases the husband will be held a mere trustee for her;[2] and although the agreement is made between him and her alone, the trust will attach upon him and be enforced in the same manner and under the same circumstances that it would be if he were a mere stranger.[3] It will make no difference whether the separate estate be derived from her husband himself or from a mere stranger; for as to such separate estate when obtained in either way her husband will be treated as a mere trustee and prohibited from disposing of it to her prejudice.

§ 1810. **Same.** — Under what circumstances property given, secured, or bequeathed to the wife will be deemed a trust for her separate and exclusive use is a matter which upon the authorities involves some nice distinctions. There is no doubt that when, from the terms of the gift, settlement, or bequest, the property is expressly or by just implication designed to be for her separate and exclusive use (for technical words are not necessary), the intention will be fully acted upon; and the rights and interests of the wife sedulously protected in equity.[4] But the question which most frequently arises is, what words are sufficiently expressive of such a purpose; for the purpose must clearly appear beyond any reasonable doubt, otherwise the husband will retain his ordinary, legal, and marital rights over it.[5]

[1] 2 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*); 2 Roper on Husb. and Wife, ch. 18, pp. 151 to 157; Parker *v.* Brooke, 9 Ves. 583; 2 Roper on Legacies, by White, ch. 21, § 5, p. 370; Bennett *v.* Davis, 2 P. Will. 316, decided in 1725; Lucas *v.* Lucas, 1 Atk. 270; Pawlet *v.* Delavel, 2 Ves. 666, 667; Slanning *v.* Style, 3 P. Will. 337 to 339; Wollfe *v.* Budder, Bunb. R. 187; Darley *v.* Darley, 3 Atk. 399; Rich *v.* Cockell, 9 Ves. 375; Davison *v.* Atkinson, 5 T. Rep. 434; Bradish *v.* Gibbs, 3 John. Ch. R. 540; Shirley *v.* Shirley, 9 Paige, 363; Lee *v.* Prieaux, 3 Bro. Ch. R. 383; Woodmeston *v.* Walker, 2 Russ. & Mylne, 197; Major *v.* Lansley, 2 Russ. & Mylne, 355.

[2] See Porter *v.* Bank of Rutland, 19 Vt. 410; Blanchard *v.* Blood, 2 Barb. 352; Ellis *v.* Woods, 9 Rich. Eq. 19.

[3] Ante, § 1799.

[4] Darley *v.* Darley, 3 Atk. R. 399; Tyrrell *v.* Hope, 2 Atk. 561; Stanton *v.* Hall, 2 Russ. & Mylne, 175; Newlands *v.* Paynter, 10 Sim. R. 377; s. c. 4 Mylne & Craig, 408; post, § 1813; Bank of Louisville, *v.* Gray, 84 Ky. 565, 2 S. W. 168, 8 Ky. L. Rep. 664; Harte *v.* Leete, 104 Mo. 315, 15 S. W. 976; Price *v.* Planters Natl. Bank, 92 Va. 468, 23 S. E. 887, 32 L. R. A. 214; Metler *v.* Metler, 92 Va. 510, 23 S. E. 891; Dezendorf *v.* Humphrey, 95 Va. 473, 28 S. E. 880; Holliday *v.* Hively, 198 Pa. St. 335, 47 Atl. 988; Jones *v.* Jones, 96 Va. 749, 32 S. E. 463; Ellison *v.* Straw, 116 Wis. 207, 92 N. W. 1094.

[5] Lumb *v.* Milnes, 5 Ves. 517; Brown *v.* Clark, 3 Ves. 166; Ex parte Ray, 1 Madd. R. 199; Rich *v.* Cockell, 9 Ves. 370, 377; Wills *v.* Sayers, 4 Madd. R. 409; Massey *v.* Parker, 2 Mylne & K. 174.

See Stuart *v.* Kissam, 2 Barb. 493; Taylor *v.* Stone, 13 Smedes & M. 653; Logan *v.* Thrift, 20 Ohio St. 62; Boal *v.* Morgner, 46 Mo. 48;

§ 1811. **Expressions in Instrument which Indicate the Grant of a Separate Estate.** — On the one hand if the language of a marriage settlement made before marriage, or of a gift or bequest to a married woman after marriage, be that she is to have the property "to her sole use or disposal"; or "to her separate use or disposal";[1] or "to her sole use and benefit";[2] or "for her own use and at her own disposal";[3] or "to her own use during her life independent of her husband";[4] or "that she shall enjoy and receive the issues and profits";[5] or that it is an allowance as or for pin-money (eo nomine);[6] in all these cases the marital rights of her husband will be excluded and the property will be for her exclusive use. So a bequest to a married woman, "her receipt to the executors to be a sufficient discharge to the executors", is equivalent to saying to her sole and separate use.[7] So money paid to the husband "for the livelihood of the wife", and money given to a married woman for her own use "independent of her husband", and money or stock given to such a married woman "not to be disposed of by her husband without her consent", will be construed to give her the property to her sole and separate use.[8] So a bequest to a married woman and her infant daughter to be equally divided between them, share and share alike, "for their own use and benefit independent of any other person", will be construed to mean to their sole and separate use.[9] So a be-

Merrill *v.* Bullock, 105 Mass. 486; Hathaway *v.* Seaman, 8 Bush, 391; Charles *v.* Coker, 2 S. Car. 122.

[1] Adamson *v.* Armitage, Cooper, Eq. R. 283; s. c. 19 Ves. 416; Wills *v.* Sayers, 4 Madd. R. 409; 2 Roper on Legacies, by White, ch. 21, § 5, pp. 370, 371; Russell *v.* Andrews, 120 Ala. 222, 24 So. 573; Leete *v.* State Bank of St. Louis, 141 Mo. 574, 42 S. W. 1074; Holliday *v.* Hively, 198 Pa. St. 335, 47 Atl. 988; Haymond *v.* Jones, 33 Gratt. 317. No particular form of words is necessary to create a separate estate for the wife. Dezendorf *v.* Humphrey, 95 Va. 473, 28 S. E. 880.

[2] —— *v.* Lyne, 1 Younge, R. 562.

[3] Prichard *v.* Ames, 1 Turn. & Russell, 222; Stanton *v.* Hall, 2 Russ. & Mylne, 175.

[4] Wagstaff *v.* Smith, 9 Ves. 520. See Dixon *v.* Olmius, 2 Cox, R. 414.

[5] Tyrrell *v.* Hope, 2 Atk. 561.

[6] Herbert *v.* Herbert, Prec. Ch. 44; Milles *v.* Wikes, 1 Eq. Abridg. 66; 2 Roper on Husb. and Wife, ch. 17, § 1, p. 132.

[7] Lee *v.* Prieaux, 3 Bro. Ch. R. 381; Lumb *v.* Milnes, 6 Ves. 517; Tyler *v.* Lake, 2 Russ. & Mylne, 183; —— *v.* Lyne, 1 Younge, R. 562; Stanton *v.* Hall, 2 Russ. & Mylne, 180; Blacklow *v.* Laws, 2 Hare, R. 40, 49.

[8] Darley *v.* Darley, 3 Atk. 399; Wagstaff *v.* Smith, 9 Ves. 520, 524; Johnes *v.* Lockhart, 3 Bro. Ch. R. 383, note; Tyler *v.* Lake, 2 Russ. & Mylne, 183.

[9] Margetts *v.* Barringer, 7 Sim. R. 482; Simons *v.* Horwood, 1 Keen, R. 7.

quest to a married woman "for her benefit independent of the control of her husband", will receive the like construction.[1] In all these cases the words manifest an unequivocal intent to exclude the power and marital rights of the husband.

§ 1812. **Rights in Separate Estate May Be Qualified.** — But even her own power over her separate property may be qualified. Thus where there was a bequest of money and leaseholds to a feme sole "for her own absolute use without liberty to sell or assign during her life", it was held that she took the property absolutely, but without any power to dispose of it during her life; or in other words with a restriction against alienation during her life.[2] And other qualifications may, as we shall presently see, be annexed to her power of disposal or enjoyment thereof.[3]

§ 1813. **Same.** — On the other hand a gift or bequest after marriage to a married woman, "for her own use and benefit",[4] or "to pay the same into her own proper hands to and for her own use and benefit",[5] or to pay an annuity "into her proper hands for her own proper use and benefit",[6] have been held not to amount to a sufficient expression of an intention to exclude the marital rights of the husband; for although the money is to be paid into her own hands or to her own use, yet there is nothing in that inconsistent with its being subject to his marital rights.[7] So an annuity given in trust for a married woman for life "to pay the same to her and her assigns", will not exclude the marital rights of the husband.[8]

[1] Simons *v.* Horwood, 1 Keen, R. 7.

[2] Baker *v.* Newton, 2 Beav. R. 112; Shonk *v.* Brown, 61 Pa. St. 320.

[3] Post, § 1814.

[4] Kensington *v.* Dollond, 2 Mylne & K. 184; Wills *v.* Sayers, 4 Madd. R. 409; Roberts *v.* Spicer, 5 Madd. R. 491; 2 Roper on Legacies, by White, ch. 21, § 5, pp. 371, 372.

[5] Tyler *v.* Lake, 2 Russ. & Mylne, 183.

[6] Blacklow *v.* Laws, 2 Hare, R. 49.

[7] This doctrine is maintained expressly in the authorities; but there are certainly antecedent dicta or opinions the other way. See Lumb *v.* Milnes, 5 Ves. 520; Hartley *v.* Hurle, 5 Ves. 545; Adamson *v.* Armitage, Cooper, Eq. R. 283; s. c. 19 Ves. 416; Ex parte Ray, 1 Madd. R. 199. But these opinions seem to have proceeded in a good measure upon a misunderstanding of the case of Johnes *v.* Lockhart, now correctly reported in 3 Bro. Ch. R. 383, Mr. Belt's note, where the doctrine of the text is explicitly supported. The case of Brown *v.* Clark (3 Ves. 166) shows how nicely language is sometimes interpreted to sustain the marital rights of the husband.

[8] Dakins *v.* Berisford, 1 Ch. Cas. 194. See also Lumb *v.* Milnes, 5 Ves. 517; Stanton *v.* Hall, 2 Russ. & Mylne, 175. A bequest to the wife's sole and separate use will not exclude the husband from taking under the Statute of Distributions, where there is no issue. Cooney *v.*

§ 1814. **Same.** — A distinction was formerly taken between the case of a gift or bequest to a married woman and the case of a gift or bequest to an unmarried woman generally, and not in the contemplation of an immediate marriage or as a provision for that event. For it was said that if a gift or bequest should be made to an unmarried woman to be at her own disposal or for her sole and separate use or independent of her husband, the title would vest absolutely in her as owner; and the property would not upon her subsequent marriage be held by her in any other manner than her other absolute property, but it would be subject to the marital rights of her husband.[1] This distinction has however been since

Woodburn, 33 Md. 320. Nor will a devise to the same effect prevent the husband's taking by the curtesy. Appleton *v.* Rowley, L. R. 8 Eq. 139.

[1] Massey *v.* Parker, 2 Mylne & K. 174; Kensington *v.* Dollond, 2 Mylne & K. 184; Brown *v.* Pocock, 2 Mylne & K. 189; Newton *v.* Reid, 4 Sim. R. 141; Woodmeston *v.* Walker, 2 Russ. & Mylne, 197; Benson *v.* Benson, 6 Sim. R. 126; Knight *v.* Knight, 6 Sim. 121; Jacobs *v.* Amyatt, 1 Madd. R. 376, note; Stiffe *v.* Everitt, 1 Mylne & Craig, 37. This question has been much discussed in the English courts, and no small diversity of opinion has been expressed on it by the learned judges in equity. The doctrine stated in the text is supported by the cases above cited. But the Vice-Chancellor (Sir Lancelot Shadwell), in Davies *v.* Thornycroft, 6 Sim. R. 420, held that there was no difference whether the bequest or trust was for the separate use of a married woman or an unmarried woman; for in each case it would be a trust for her separate use, and good as such against a present or future husband. See also Maber *v.* Hobbs, 2 Younge & Coll. 317. The same doctrine was held by Sir John Leach in Anderson *v.* Anderson, 2 Mylne & Keen, 427. In Bradley *v.* Hughes, 8 Sim. R. 149, the Vice-Chancellor admitted that it was now settled that if property be given for the separate use of a woman during a particular coverture, she may after that coverture is gone alienate it, even though it is intended for her separate use. In Scarborough *v.* Borman, decided in November, 1838, 17 Law Jour. pp. 10 to 24, the Master of the Rolls (Lord Langdale) held that a gift to the sole and separate use of an unmarried woman was good against an after-taken husband. In the very recent case of Nedby *v.* Nedby, before the Lord Chancellor (Lord Cottenham) in January, 1839 (4 Mylne & Craig, 367), the point was directly made; but the Lord Chancellor refused to decide it on an interlocutory motion, at the same time admitting the authorities to be in conflict. In the subsequent cases of Tullett *v.* Armstrong, and Scarborough *v.* Borman, 4 Mylne & Craig, 377 to 407, the subject was most elaborately discussed, and all the authorities were reviewed by Lord Cottenham, and he held that a gift to the sole and separate use of a woman, married or unmarried, with a clause against anticipation, was good against an after-taken husband. And in Newlands *v.* Paynter (4 Mylne & Craig, 408), he held it to be equally good against such husband without any such clause against anticipation. See the English Law Magazine for May, 1842, pp. 285 to 301. See what is a proper clause against anticipation, Barrymore *v.* Ellis, 8 Simons, R. 1; Brown *v.* Bamford, before Sir L. Shadwell, V. Ch. in May, 1842. See Massy *v.* Rowen, L. R. 4 H. L. 288. Compare In re Tarsey, L. R. 1 Eq. 561.

qualified if not entirely overruled, and the doctrine seems now well established that property may be secured to an unmarried woman or a married woman with a clause against anticipation; and in such a case it will be good against the marital rights of any future husband.[1] And the same doctrine seems applicable to every case where property is given to the separate use of a woman, whether married or unmarried at the time, without any such clause; for in such a case, if no other agreement is made between the parties, the future husband upon his marriage is deemed to adopt the property in the state in which he finds it as her separate property, and he is bound in equity not to disturb it.[2]

§ 1815. **Liability of Wife in Trading with Separate Estate.** — Cases also may occur of a separate estate, and even of a separate liability of a wife, of a more enlarged nature. Thus by the custom of London a married woman may carry on trade within the city as a sole trader, and be liable as such.[3] And the right to carry on trade on her sole account may, independently of any such custom, be established by an agreement between the husband and wife before or after marriage. When such an agreement is entered into before marriage, it stands upon a valuable consideration; and therefore if there is the interposition of trustees, it will be maintained against the husband and his creditors as well at law as in equity. In such a case the trustees of the wife will be entitled to the property assigned and to the increase and profits thereof, for her sole and separate use and benefit. The wife will even at law be considered as the mere agent of her trustees, and her possession as their possession. Even if no trustees are interposed, the property will in the like case be protected in equity against the claims of the husband and his creditors, and excepted out of the general rules which govern in cases of husband and wife.[4]

[1] Tullett *v.* Armstrong, 4 Mylne & Craig, 377, 390; Scarborough *v.* Borman, 4 Mylne & Craig, R. 379; Baggott *v.* Meux, 1 Phillips, Ch. R. 627. In some States the trust, to be sustained, must be in contemplation of an immediate marriage. Wells *v.* McCall, 64 Pa. St. 207; Ogden's Appeal, 70 Pa. St. 501. See 2 Perry, Trusts, § 652, and note.

[2] Newlands *v.* Paynter, 4 Mylne & Craig, R. 408, 417, 418. See the English Law Magazine for May, 1842, pp. 285 to 301. Barrymore *v.* Ellis, 8 Simons, R. 1; Brown *v.* Bamford, before Sir L. Shadwell, V. Chanc. in May, 1842; (*d*) Ashton *v.* McDougall, 5 Beav. R. 56; Schafroth *v.* Ambs, 46 Md. 114.

[3] Roper on Husb. and Wife, ch. 16, p. 125. See Wortman *v.* Price, 47 Ill. 22.

[4] 2 Roper on Husb. and Wife, ch. 18, § 4, pp. 165, 186; Jarman *v.* Woolloton, 3 T. R. 618; Haselinton *v.* Gill, 3 T. R. 620, note.

§ 1816. **Post-Nuptial Agreement Allowing Wife to Trade with Her Separate Estate Is Founded upon Valuable Consideration.** — Where the agreement for a separate trade by the wife occurs after marriage and it is founded upon a valuable consideration, the like protection will be given at law if the property is vested in trustees; and the property and the income and profits thereof will be held secure for the wife against the husband and his creditors.[1] A fortiori the doctrine will be enforced in equity. But if it is a voluntary agreement, it will be good against the husband only, and not against his creditors.[2] Care however must be taken in all these cases that the negotiations are not carried on in the name of the wife, as by taking notes or other securities in her name; for then they will at law be held to belong to the husband, although in equity it will be otherwise.[3]

§ 1817. **Right of Abandoned Wife to Use Separate Estate and Income as against Husband and His Creditors.** — We here perceive that the law will give effect to such agreements only when those forms have been observed which will vest the property in parties capable of enforcing the proper rights of the wife in legal tribunals; as is the case where the property is vested in trustees for her sole use and benefit in order to enable her to carry on trade. But Courts of Equity will go further; and if there is any such agreement before marriage resting in articles and without trustees, by which she is to be permitted to carry on business on her sole and separate account, or if without any such ante-nuptial agreement the husband should permit her after marriage to carry on business on her sole and separate account, all that she earns in trade will be deemed to be her separate property and disposable by her as such, subject however to the claims of third persons properly affecting it.[4] In the former case the earnings will, in equity, be supported for her separate use against her husband and his creditors; in the latter against him only, unless the permission after marriage arises from a valuable consideration.[5] So if a husband should desert his wife, and she should be enabled by the aid of her friends to carry on a separate trade (as that of a milliner),

[1] 1 Roper on Husb. and Wife, ch. 8, § 2, pp. 303 to 331.

[2] Ibid.

[3] 2 Roper on Husb. and Wife, ch. 18, § 4, pp. 169, 170; Barlow *v.* Bishop, 1 East, R. 432.

[4] 2 Roper on Husb. and Wife, ch. 18, § 4, pp. 171 to 176.

[5] 2 Roper on Husb. and Wife, ch. 17, § 4, pp. 171, 172; Gore *v.* Knight, 2 Vern. 535; Sir Paul Neal's Case, cited in Herbert *v.* Herbert, Prec. Ch. 44; Slanning *v.* Style, 3 P. Will. 337; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*m*).

her earnings in such trade will be enforced in equity against the claims of her husband.[1]

§ 1818. **The Wife's Right to Dispose of Her Separate Estate.** — It remains to say a few words on the subject of the wife's power to dispose of her separate property, and of its liability for her contracts and debts. Wherever a trust is created or a power is reserved by a settlement to enable the wife after marriage to dispose of her separate property either real or personal, it may be executed by her in the very manner provided for, whether it be by deed or other writing, or by a will or appointment.[2] And Courts of Equity will in all cases enforce against heirs, devisees, and trustees, as well as against the husband and his representatives, the rights of the donee or appointee of the wife.[3] But where no such settlement, trust, or power is created before marriage, but it rests in a mere agreement between the husband and wife, it was formerly a matter of doubt whether the wife could dispose of her separate real estate so as effectually to bind it, although it was admitted that she had a full power to dispose of her personal estate.

§ 1819. **Same.** — The distinction and the reasons for it are very clearly stated by Lord Hardwicke. "Agreements," said he, "for settling estates to the separate use of the wife on marriage

[1] Cecil *v.* Juxon, 1 Atk. 278; Lamphir *v.* Creed, 8 Ves. 599; s. c. better reported in 2 Roper on Husb. and Wife, ch. 18, § 4, p. 173; Com. Dig. Chancery, 2 M. 11. Where the wife carries on trade under an agreement made before marriage and the property is vested in trustees, the husband would not be liable to the payment of the debts relative to such trade, even at law. But if no trustees intervened, and the agreement was after marriage, then the husband would be liable for the debts at law. At least he would be liable unless a credit was exclusively given to the wife in relation to the trade, or the trade had been carried on without his sanction or permission. If however he should be liable at law, a Court of Equity would relieve him, at least to the extent of making the funds in the trade applicable to the payment of the debts. See 2 Roper on Husb. and Wife, ch. 18, § 4, pp. 174, 175. As to right of her earnings, see Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30; Revisal of 1905 of North Carolina, §§ 2100, 2117; Manning *v.* Manning, 79 N. C. 300; Vandiford *v.* Humphrey, 139 N. C. 65, 51 S. E. 893; Levi *v.* Marsha, 122 N. C. 565, 29 S. E. 832.

[2] Or in any other way known to the law, in the absence of negative words in the instrument giving the power. Green *v.* Sutton, 50 Mo. 186. But see contra McClintic *v.* Ochiltree, 4 W. Va. 249. And see Young *v.* Young, 7 Cold. 461; Dunn *v.* Dunn, 1 S. C. 350.

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*q*); Peacock *v.* Monk, 2 Ves. 191; Doe *v.* Staples, 2 T. R. 695; Wright *v.* Englefield, Ambl. R. 468; s. c. 2 Eden, R. 239; Oke *v.* Heath, 1 Ves. 135; Marlborough *v.* Godolphin, 2 Ves. 75; Southby *v.* Stonehouse, 2 Ves. 610, 612; Pybus *v.* Smith, 3 Bro. Ch. R. 339; Dowell *v.* Dew, 1 Younge & Coll. N. R. 345. See Wood *v.* Wood, L. R. 10 Eq. 220.

are very frequent, relating both to real and personal estate. As to personal, undoubtedly where there is an agreement between husband and wife before marriage, that the wife shall have to her separate use either the whole or particular parts, she may dispose of it by an act in her life or will. She may do it by either, though nothing is said of the manner of disposing of it. But there is a much stronger ground in that case than there can be in the case of real estate, because that is to take effect during the life of the husband; for if the husband survives he is entitled to the whole, and none can come into a share with the husband on the Statute of Distributions. Then such an agreement binds and bars the husband, and consequently bars everybody. But it is very different as to real estate; for her real estate will descend to her heir at law, and that more or less beneficially; for the husband may be tenant by the curtesy if they have issue, otherwise not. But still it descends to her heir at law. Undoubtedly on her marriage a woman may take such a method that she may dispose of that real estate from going to her heir at law; that is, she may do it without a fine. But I doubt whether it can be done but by way of trust or of power over an use." [1]

§ 1820. **Same.** — But this doubt, however powerfully urged upon technical principles, has been overcome; and the doctrine is now firmly established by the highest authority, that in such a case Courts of Equity will compel the heir of the wife to make a conveyance to the party in whose favor she has made a disposition of the real estate; in other words, he will be treated as a trustee of the donee or appointee of the wife.[2] So that it may now be laid down as a general rule that all ante-nuptial agreements for securing to a wife separate property will, unless the contrary is stipulated or implied, give her in equity the full power of disposing of the same, whether real or personal, by any suitable act or instrument in her lifetime, or by her last will, in the same manner and to the same extent as if she were a feme sole.[3] And in all cases where a power

[1] Peacock *v.* Monk, 2 Ves. 191.

[2] Wright *v.* Cadogan, 6 Bro. Parl. Cas. 156; s. c. Ambler, R. 468; 2 Eden, R. 239; Doe *v.* Staple, 2 Term. Rep. 695; Cannel *v.* Buckle, 2 P. Will. 243; Rippon *v.* Dawding, Ambler, R. 565, and Mr. Blunt's note; 2 Fonbl. Eq. B. 2, ch. 2, § 6, note (*q*); Bradish *v.* Gibbs, 3 John. Ch. R. 539, 540, 551.

[3] Ibid.; Roper on Husb. and Wife, ch. 19, § 1, pp. 177 to 198; 2 Fonbl. Eq. B. 1, ch. 2, § 6, note (*q*); Hulme *v.* Tenant, 1 Bro. Ch. R. 20; Wagstaff *v.* Smith, 9 Ves. 520; Parkes *v.* White, 11 Ves. 220; Grigby *v.* Cox, 1 Ves. 517; Cotter *v.* Layer, 2 P. Will. 623; Bradish *v.* Gibbs, 3 John. Ch. R. 540 to 551.

for this purpose is reserved to her by means of a trust which is created for the purpose, she may execute the power without joining her trustees, unless it is made necessary by the instrument of trust.[1]

§ 1821. **Same.** — In regard to the power of the wife to dispose of her separate property where no trust is interposed, but it rests merely upon a post-nuptial agreement of the husband, there is a material distinction whether it be personal estate or whether it be real estate. In the former case her power to dispose of it can affect her husband's rights only, and therefore his assent is conclusive upon him.[2] But it is very different in respect to her real estate; for here her own heirs are or may be deeply affected in their interests by descent. Now by the general principles of law a married woman is during her coverture disabled from entering into any contract respecting her real property, either to bind herself or to bind her heirs. And this disability can be overcome only by adopting the precise means allowed by law to dispose of her real estate; as in England by a fine, and in America by a solemn conveyance.[3] It is true that the husband by his own post-

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*q*); Grigby *v.* Cox, 1 Ves. 517; Essex *v.* Atkins, 14 Ves. 547; Jaques *v.* Methodist Episcopal Church, 17 John. R. 548; s. c. 3 John. Ch. R. 86 to 114; 2 Roper on Husband and Wife, ch. 20, § 2, p. 215. This doctrine is necessary to be limited to cases where there is no restraint upon the wife by the instrument giving her the separate property, as to her power of disposing of it. What terms in the instrument will create either an express or virtual restraint upon her power of disposing of such separate property has been a matter often discussed, and upon the authorities there is some nicety of construction. See on this subject Wagstaff *v.* Smith, 9 Ves. 520; Parkes *v.* White, 11 Ves. 220; Fettiplace *v.* Gorges, 3 Bro. Ch. R. 8; s. c. 1 Ves. Jr. 46; Glyn *v.* Baster, 1 Younge & Jerv. 329; Acton *v.* White, 1 Sim. & Stu. 429; Lee *v.* Muggeridge, 1 Ves. & B. 118; Sturgis *v.* Corp. 13 Ves. 190; Mores *v.* Huish, 5 Ves. 692; Sockett *v.* Wray, 4 Bro. Ch. R. 483; Sugden on Powers, ch. 2, § 1, pp. 113 to 119 (3d ed.). See also the case of the Methodist Episcopal Church *v.* Jaques, 3 John. Ch. R. 86 to 114, where the authorities are elaborately examined by Mr. Chancellor Kent; and the same case on appeal, 17 John. R. 548. See also 2 Roper on Husb. and Wife, ch. 19, §§ 1, 2, pp. 177, 181; Ibid. ch. 20, § 1, pp. 199 to 206; Ibid. ch. 21, § 1, pp. 229 to 235. When a married woman has an absolute power to dispose of property she may execute it in any manner capable of transferring it. When she has a power only over it, she must dispose of it in the manner prescribed by the power. And this distinction is very important; for in many cases Courts of Equity will not interpose to aid the defective execution of powers in favor of volunteers, whatever it may do in favor of purchasers. See ante, §§ 241 to 252; 2 Roper on Husb. and Wife, ch. 20, §§ 1, 2, pp. 199 to 220.

[2] Wright *v.* Englefield, Ambler, R. 468; Dillon *v.* Grace, 2 Sch. & Lefr. 463; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*q*); Peacock *v.* Monk, 2 Ves. 191; Major *v.* Landsley, 2 Russ. & Mylne, 355.

[3] Dillon *v.* Grace, 2 Sch. & Lefr. 456, 462 to 464; Wright *v.* Cadogan,

nuptial agreement with his wife may bind his own interest in her real estate and convert himself into a trustee for her. But he cannot trench upon the rights of her heir who is no party to such an agreement. And under such circumstances the latter will take her real estate by descent, unaffected by any of the trusts springing from the agreement.[1]

§ 1822. **Same.** — The remarks which have been made apply to the case of the real estate of the wife already vested in her, as affected by her own ante-nuptial or post-nuptial agreement with her husband. But the question may arise as to her rights and power over real estate which is given by a third person to her during her coverture for her separate use, with a power to dispose of the same, where no trustees are interposed to protect the exercise of the power.[2] As to this the received doctrine seems to be, that if an estate is during coverture given to a married woman and her heirs for her separate use without more, she cannot in equity dispose of the fee from her heirs; but she must dispose of it, if at all, in the manner prescribed by law, as by a fine.[3] But if in such a case a clause is expressly superadded that she shall have power to dispose of the estate so given to her during her coverture, there Courts of Equity will treat such a power as enabling her effectually to dispose of the estate, notwithstanding no trustees are interposed.[4] The reason of the distinction is, that the term "for her separate use" is not supposed to indicate any intention to give her more than the sole use and power of disposal of the profits of the real estate during the life of her husband;

2 Eden, R. 257 to 259. Vicroy *v.* Vicroy, 20 Ky. L. Rep. 47, 45 S. W. 75; Camp *v.* Carpenter, 52 Mich. 375, 18 N. W. 113; Slocum *v.* Ray, 123 N. C. 571, 31 S. E. 829, 68 Am. St. Rep. 830.

[1] 2 Roper on Husband and Wife, ch. 19, § 1, pp. 179 to 181.

The wife may by post-nuptial agreement acquire the right to will away her real estate as if sole. Pride *v.* Bubb, L. R. 7 Ch. 64.

[2] There is no doubt that a gift of personal estate or of the rents and profits of real estate to a married woman for her separate use during her life would give her a complete power to dispose of the same. See 2 Roper on Husb. and Wife, ch. 19, § 2, p. 182; Hulme *v.* Tenant, 1 Bro. Ch. R. 16, 19 to 21; Fettiplace *v.* Gorges, 1 Ves. Jr. 46; s. c. 3 Bro. Ch. R. 8, and Mr. Belt's note; Peacock *v.* Monk, 2 Ves. 191; Roach *v.* Haynes, 8 Ves. 589; Parkes *v.* White, 11 Ves. 220, 221; Rich *v.* Cockell, 9 Ves. 369, 375; Wagstaff *v.* Smith, 9 Ves. 520; Brandon *v.* Robinson, 18 Ves. 435, 436; ante, § 1821.

[3] 2 Roper on Husb. and Wife, ch. 19, § 2, p. 182.

[4] See 2 Roper on Husb. and Wife, ch. 16, § 2, pp. 102 to 104; Ibid. ch. 19, § 2, p. 181; Maundrell *v.* Maundrell, 10 Ves. 254, 255; Clancy on Marr. Women, ch. 5, pp. 282, 287; Peacock *v.* Monk, 2 Ves. 190; Downs *v.* Timperon, 4 Russ. R. 334.

and more expressive words are indispensable to demonstrate the more enlarged intention of conferring an absolute power to dispose of the whole fee. Unless such an absolute power to dispose of the whole fee is conferred on the wife, she takes the estate in fee subject to the ordinary disabilities resulting from her coverture. As her separate estate her husband cannot intermeddle with it; but her heir will take it by descent, as he would any other property vested in her in fee.[1]

§ 1823. **Wife's Right to Income from Her Separate Personal Estate.** — As to personal property and the income of real property, we have already seen that if they are given for the separate use of a married woman, she has in equity a full power to dispose of them at her pleasure.[2] But qualifications may be attached to the gift which will control this absolute power; and on the other hand this absolute power may exist, notwithstanding words accompany the gift which may seem prima facie intended to confer the power sub modo only. Thus for example if there be an express limitation to a married woman *for life* with a power to dispose of the same property by will, there her interest will be deemed a partial interest, and equivalent to a life estate only; and she cannot dispose of the property absolutely, except in the manner prescribed by the power.[3]

§ 1824. **Same.** — On the other hand if the property is expressly given to a married woman "to her for her sole and separate use", without saying *for life*, and she is further authorized to dispose of the same by will, in such a case the gift will be construed to confer on her the absolute property, and consequently she may dispose of it otherwise than by will; for the absolute property being given, the power becomes nugatory and is construed to be nothing more than an anxious expression of the donor that she may have an uncontrolled power of disposing of the property.[4] So if a limita-

[1] 2 Roper on Husb. and Wife, ch. 19, § 2, p. 182.

[2] Ante, §§ 1819, 1820, note; Major *v.* Lansley, 2 Russ. & Mylne, 355.

[3] Reid *v.* Shergold, 10 Ves. 370, 379; 2 Roper on Husb. and Wife, ch. 20, §§ 1, 2, pp. 200 to 211.

[4] Elton *v.* Shephard, 1 Bro. Ch. R. 532, and Mr. Belt's note; 2 Roper on Husb. and Wife, ch. 20, § 1, pp. 200, 201; Barford *v.* Street, 16 Ves. 135; Irwin *v.* Farrer, 19 Ves. 86; ante, § 974 *a*. Some very nice distinctions exist in the cases on this subject. Thus in Bradley *v.* Westcott, 13 Ves. 445, 451, where A bequeathed to his wife B all his personal estate for life, to be at her absolute disposal during that period, and after her death he gave such of his wife's jewels, &c., household furniture and plate which she should be possessed of at the time of her death, together with £500, to such persons as she should appoint by her will, and in default of such appointment the same to fall into the residuum of his personal

tion be to a married woman for life for her sole and separate use, with a particular power of appointment of the property, and in default of any appointment the property is limited to her personal representatives, she will, or at least may, under such circumstances be deemed the absolute owner; and as such she will have an unqualified power to dispose of the property generally without any exercise of the power of appointment.[1]

estate, which he afterwards bequeathed to other persons, Sir William Grant held that the wife took an estate for life only in the whole, with a power of appointment. On that occasion he said: "The distinction is perhaps slight which exists between a gift for life with a power of disposition superadded, and a gift to a person indefinitely with a superadded power to dispose by deed or will. But that distinction is perfectly established, that in the latter case the property vests. A gift to A and to such persons as he shall appoint is absolute property in A without any appointment. But if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that person to anything." In Barford *v.* Street (16 Ves. 135), where there was a gift for life to A, with a power of appointment by deed or writing or will, and some special limitations, it was held that A had an estate for life, with an unqualified power of appointing the inheritance; and that comprehended everything. So that A was held to be entitled as absolute owner. The case of Irwin *v.* Farrer, 19 Ves. 86, is still stronger. See also the case of Smith *v.* Bell, 6 Peters, R. 68; Acton *v.* White, 1 Sim. & Stu. 429; Randall *v.* Russell, 3 Meriv. R. 190; Phillips *v.* Chamberlain, 4 Ves. 53, 54, 58; Hales *v.* Margerum, 3 Ves. 299; Heatley *v.* Thomas, 15 Ves. 597; s. c. 2 Roper on Husb. and Wife, ch. 20, § 1, p. 204, and note; Langham *v.* Nenny, 3 Ves. 469, 470; Lee *v.* Muggeridge, 1 Ves. & B. 118, 123; Pybus *v.* Smith, 1 Ves. Jr. 189; Witts *v.* Dawkins, 12 Ves. 501; Browne *v.* Like, 14 Ves. 302; 2 Roper on Husb. and Wife, ch. 20, §§ 1, 2, p. 199; Sockett *v.* Wray, 4 Bro. Ch. R. 483, and Mr. Belt's note; ante, § 1073. Mr. Chancellor Kent has critically reviewed the authorities in his learned opinion in the case of the Methodist Episcopal Church *v.* Jaques, 3 John. Ch. R. 86 to 114.

[1] See 2 Roper on Husb. and Wife, ch. 20, § 1, p. 200, note (*a*); Ibid. pp. 211 to 213; Anderson *v.* Dawson, 15 Ves. 532, 536; Richards *v.* Chambers, 10 Ves. 584; Sanders *v.* Franks, 2 Madd. R. 147, 155; Clancy on Marr. Women, ch. 6, pp. 294 to 308; ante, § 974 *a*. See also Proudley *v.* Fielder, 2 Mylne & Keen, 57; Barrymore *v.* Ellis, 8 Sim. R. 1; Owens *v.* Dickinson, 1 Craig & Phillips, 45. The doctrine stated in the text, that where there is a bequest to a married woman for life for her sole and separate use, with a power of appointment, and in default of such appointment to her personal representatives, she may under such circumstances take the absolute interest, is fully supported by the language of Sir William Grant in Anderson *v.* Dawson (15 Ves. 533, 536), and is distinguished by him from the case where in default of the appointment the property is to go "to her next of kin." "There is," said he, "a great difference between a limitation to the executors and administrators and a limitation to the next of kin. The former is as to personal property the same as a limitation to the right heirs as to real estate. But a limitation to the next of kin is like a limitation to heirs of a particular description; which would not give the ancestor having a particular estate the whole property in the land." Mr. Roper (2 Roper on Husb. and Wife, ch. 20, § 2, pp. 211 to

§ 1825. **Gift of Separate Property to Husband.** — A married woman having this general power of disposing of her separate property, the question naturally arises, whether she may bestow it by appointment or otherwise upon her husband, or whether the legal disability attaches to such a transaction. Upon this subject the doctrine is now firmly established in equity, that she may bestow her separate property by appointment or otherwise upon

213) however thinks the doctrine ill-founded. His remarks are as follows: "The reader's attention is requested to the circumstance that in the cases before stated upon the present subject, with the exception of Sockett *v.* Wray, the ultimate limitation of the property in default of the wife's appointment was not to herself, but to a stranger or to her next of kin. Because it has been intimated in some of those cases that although an express estate be given to the wife's separate use for life, with a power to dispose of the principal, yet if in default of appointment such principal be limited to her executors or administrators and not to her next of kin, the absolute interest in the fund will vest in her, and be disposable with her husband's concurrence, without resort to the particular power given her for the purpose. The principle of the distinction is this: that in the first case the wife is to be considered complete mistress or owner of the property, the effect of such limitation being compared to that of a limitation to her right heirs, which in the instance of real estates vests the absolute inheritance. But that in the second case the limitation to the wife's next of kin, being the same in effect as that to particular heirs, which if the subject were lands would not pass the fee to a donee or devisee, will not therefore vest the absolute interest in personal estate in the wife; and consequently that in order to dispose of the capital the wife must have resort to her special power. It is however submitted that this analogy between real and personal estates is not applicable to the subject now under consideration. But that when the limitation in default of appointment is to the wife's executors or administrators, it will be required that she should execute her power in order to dispose of the fund during her marriage. The reasons are these: admitting the limitation to impart to the wife the absolute interest in the fund, yet she being a married woman the effect of such a limitation to her is quite different from a similar one to a man or to a single woman. For in the instance of such a limitation to a married woman who is under a legal incapacity to dispose of property during coverture, there is no repugnancy nor inconsistency between a limitation to her of the absolute interest and a particular power of disposition over it during the marriage; as appears in a former part of this work relating to powers, and also under the title Curtesy, where it is shown that an equitable interest for the wife's separate use for life in real estate and the ultimate limitation to her of the fee simple do not unite in such a manner as to merge the particular estate and extinguish the special limitation to her separate use for life. The analogy therefore mentioned in the commencement of these observations is inapplicable to limitations to married women; and it does not authorize the conclusion that when the wife has an estate to her separate use for life in personal property, with a power of appointment, and the absolute interest is limited to her, if she do not execute the power she has, in analogy to similar limitations of real estates at law, such an absolute estate as of necessity enables her to dispose of the property without regard to her special authority to do so. This necessity therefore not existing,

her husband as well as upon a stranger. But at the same time Courts of Equity examine every such transaction between husband and wife with an anxious watchfulness and caution and dread of undue influence; and if they are required to give sanction or effect to it, they will examine the wife in court and adopt other precautions to ascertain her unbiassed will and wishes.[1]

§ 1826. **Same.** — Courts of Equity will not only sanction such a disposition of the wife's separate property in favor of her husband when already made, but they will also in proper cases, upon her application and consent given in court, decree such property to be passed to her husband, whether it be in possession or reversion, in such manner as she shall prescribe.[2] In the same way her separate estate may be charged with and made liable for his debts.[3] But Courts of Equity have no authority, even with the

and when the settler's intention in giving such a power is considered, as also the anxiety of a Court of Equity to protect the wife's property against improvident dispositions of it from restraint, &c., during the marriage, it seems but reasonable that when an express estate for life in personalty is limited to her for her separate use, with a power of appointment, and in default of its execution to her, her executors or administrators, the same appointment should be considered necessary, as has been decided to be so when the ultimate limitation in default of appointment is to her next of kin." There are also some nice distinctions in Richards *v.* Chambers, 10 Ves. 584; Ellis *v.* Atkinson, 3 Bro. Ch. R. 565, and Mr. Belt's note, which, unless they proceed upon the peculiar ground that there was a contingent interest by survivorship in the wife, would seem to favor Mr. Roper's opinion. See also Field *v.* Sowle, 4 Russ. R. 112; Clancy on Married Women, ch. 6, pp. 294 to 308.

[1] 2 Roper on Husb. and Wife, ch. 20, § 2, pp. 216, 217, 222 to 224; Pybus *v.* Smith, 1 Ves. Jr. 189, 194; Parkes *v.* White, 11 Ves. 209, 222, &c., and Methodist Episcopal Church *v.* Jaques, 3 Johns. Ch. R. 86 to 114; Bradish *v.* Gibbs, 3 Johns. Ch. R. 523, where the authorities are elaborately examined. See also Milnes *v.* Busk, 2 Ves. Jr. 498, 500; Pickard *v.* Roberts, 3 Madd. R. 386; Essex *v.* Atkins, 14 Ves. 542; Despain *v.* Wagner, 163 Ill. 598, 45 N. E. 129; Hannaford *v.* Dowdle, 75 Ark. 127, 86 N. W. 818; Leach *v.* Rains, 149 Ind. 152, 48 N. E. 858; Wicks *v.* Dean, 103 Ky. 69, 44 S. W. 397, 19 Ky. L. Rep. 1708.

Where any particular form is required of the probating officer to state that in his opinion the conveyance is not prejudicial to the rights of the wife, his failure to make this certificate is fatal to the validity of the conveyance. Revisal of 1905 of North Carolina, § 2107; Sims *v.* Ray, 96 N. C. 87, 2 S. E. 443; Long *v.* Rankin, 108 N. C. 338, 12 S. E. 987.

[2] See 2 Roper on Husb. and Wife, ch. 20, § 2, pp. 224 to 226; Pickard *v.* Roberts, 3 Madd. R. 386; Sturgis *v.* Corp, 13 Ves. 190; Headen *v.* Rosher, 1 McClel. & Younge, 89; Allen *v.* Papworth, 1 Ves. 163; s. c. Belt's Supplement, 88; Sperling *v.* Rochfort, 8 Ves. 164, 175; Clark *v.* Pistor, cited 3 Bro. Ch. R. 346, note; Id. 567; Chesslyn *v.* Smith, 8 Ves. 183.

[3] Demarest *v.* Wynkoop, 3 Johns. Ch. R. 144; Field *v.* Sowle, 4 Russ. R. 112.

consent of the wife, to transfer to the husband any property secured to her sole and separate use for life where no power of disposition is reserved to her over the property or beyond the power reserved to her.[1] And therefore if the husband should receive such property, he will ordinarily be compelled to account therefor. The same rule will apply where the husband has by a settlement contracted to allow a specific annual sum (not money) for her sole and separate use, as for example £100 or £1,000 a year; for in such cases if he does not pay it, he will be held liable for the arrears.[2] Where indeed the husband with the consent of his wife is in the habit of receiving the income, profits, and dividends of her separate estate, Courts of Equity regard the transaction as showing her voluntary choice thus to dispose of it for the use and benefit of the family; and they will not ordinarily require him to account therefor beyond the income, profits, and dividends received during the then last year,[3] any more than they will to account for arrears of the wife's pin-money beyond the last three.[4] But a distinction would

[1] Richards *v.* Chambers, 10 Ves. 580. There is a distinction between reversionary property given for the separate use of the wife and reversionary property which is given for her use generally. The former she may dispose of to her husband, but not the latter. See Sturgis *v.* Corp. 13 Ves. 190, and Pickard *v.* Roberts, 3 Madd. R. 386; 1 Roper on Husb. and Wife, ch. 6, § 2, pp. 246 to 248; 2 Roper on Husb. and Wife, ch. 19, § 2, p. 184.

[2] Howard *v.* Digby, 8 Bligh, R. 224, 257, 258.

[3] Square *v.* Dean, 4 Bro. Ch. R. 326; Powell *v.* Hankey, 2 P. Will. 82, 83; Thomas *v.* Bennett, 2 P. Will. 341; Fowler *v.* Fowler, 3 P. Will. 353; Smith *v.* Camelford, 2 Ves. Jr. 698; Brodie *v.* Barry, 2 Ves. & B. 36; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*); Parkes *v.* White, 11 Ves. 225; Townshend *v.* Windham, 2 Ves. 7; Milnes *v.* Busk, 2 Ves. Jr. 488; 2 Roper on Husb. and Wife, ch. 20, § 2, pp. 220 to 222; Methodist Episcopal Church *v.* Jacques, 3 John. Ch. R. 90 to 92; Howard *v.* Digby, 8 Bligh, R. N. S. 224; S. C. 4 Sim. R. 588; 5 Sim. R. 330.

[4] Howard *v.* Digby, 8 Bligh, R. N. S. 224; reversing the decision of the Vice-Chancellor (Sir L. Shadwell) in the same case, 4 Sim. R. 588; S. C. 5 Sim. R. 330; ante, § 1803; Barber *v.* Barber, 125 Ga. 226, 53 S. E. 1017; Bristor *v.* Bristor, 93 Ind. 281; Denny *v.* Denny, 123 Ind. 240, 23 N. E. 519; Carpenter *v.* Hazelrigg, 103 Ky. 538, 45 S. W. 666, 20 Ky. L. Rep. 231; Lehman *v.* Conlon, 105 La. 431, 39 So. 879; Stockslager *v.* Mechanics' Loan & Sav. Inst., 87 Md. 232, 39 Atl. 742; Toms *v.* Flack, 127 N. C. 420, 37 S. E. 471; Faircloth *v.* Borden, 130 N. C. 263, 41 S. E. 381; Yocum *v.* Allen, 58 Ohio St. 280, 50 N. E. 909, in which it is held that the burden of proof is on the husband to show that the property is his, and that his wife gave it to him. Griffith *v.* Griffith, 187 Pa. St. 306, 41 Atl. 30; McConville *v.* National Valley Bank, 98 Va. 9, 34 S. E. 891; Comer *v.* Hayworth, 30 Ind. App. 144, 65 N. E. 595, 96 Am. St. Rep. 335; Winn *v.* Riley, 151 Mo. 61, 52 S. W. 27, 74 Am. St. Rep. 517; Bergey's Appeal, 60 Pa. St. 408, 100 Am. Dec. 578; Donovan *v.* Griffith, 215 Mo. 149, 114 S. W. 621, 128 Am. St. Rep. 458, 15 Ann. Cas. 724, 20 L. R. A. (N. S.) 825.

probably be taken between the year's arrears of pin-money and the year's arrears of the wife's other separate personal estate, so that her personal representatives might claim the latter but not the former.[1]

§ 1827. **Liability of Separate Estate for Debts Contracted during Coverture.** — In the next place let us examine how far the separate property of the married woman is liable for any contracts, debts, or other charges created by her during her coverture. At law she is during the coverture generally incapable of entering into any valid contract to bind either her person or her estate.[2] In equity also it is now clearly established that she cannot by contract bind her person or her property generally. The only remedy allowed will be against her separate property.[3] The reason of this

The crops raised by the husband on the lands of the wife belong to her as against the creditors of the husband. Foreman *v.* Citizens' State Bank, 128 Iowa 661, 105 N. W. 163; Webster *v.* Sherman, 33 Mont. 448, 84 Pac. 878; Lewis *v.* Johns, 24 Cal. 98, 85 Am. Dec. 49; Dean *v.* Bailey, 50 Ill. 481, 99 Am. Dec. 533; Wells *v.* Batts, 112 N. C. 283, 17 S. E. 417; Bray *v.* Carter, 115 N. C. 16, 20 S. E. 164; Branch *v.* Ward, 114 N. C. 148, 19 S. E. 104; Rawlings *v.* Neal, 122 N. C. 173, 29 S. E. 93; Olson *v.* O'Connor, 9 N. Dak. 504, 84 N. W. 359, 81 Am. St. Rep. 647; Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769; Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30; Dayton *v.* Walsh, 47 Wis. 113, 2 N. W. 65, 32 Am. Rep. 757.

Contra: Sharp *v.* Wood, 21 Ky. L. Rep. 189, 51 S. W. 15; Patton *v.* Smith, 130 Ky. 819, 114 S. W. 315, 23 L. R. A. (N. S.) 1124.

[1] Howard *v.* Digby, 8 Bligh, R. 224.

[2] Marshall *v.* Rutton, 8 T. R. 545; 2 Roper on Husb. and Wife, ch. 21, § 2, pp. 235, 236; Eberwine *v.* State, 79 Ind. 266; Candy *v.* Coppock, 85 Ind. 594; Green *v.* Page, 80 Ky. 368, 4 Ky. L. Rep. 192; Jenne *v.* Marbel, 37 Mich. 319; Kenton Ins. Co. *v.* McClellan, 43 Mich. 564, 6 N. W. 88; Edwards *v.* McEnhill, 51 Mich. 160, 16 N. W. 322; June *v.* Labadie, 132 Mich. 135, 92 N. W. 937, 9 Detroit Leg. N. 541; Citizens' State Bank *v.* Smont, 62 Neb. 223, 86 N. W. 1068; Vann *v.* Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461; Crockett *v.* Doriott, 85 Va. 240, 3 S. E. 128.

But statutes have been enacted in many of the States authorizing married women to contract as though they were feme sole. Huss *v.* Culver, 70 Mo. App. 514; Niemeyer *v.* Niemeyer, 70 Mo. App. 609; Busch *v.* Klein, 38 App. Div. 624, 55 N. Y. Supp. 917; Buck *v.* Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285; Laws of N. C. 1911, chap. 109; Montgomery *v.* American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.

Where the statute refers to contracts as to her separate estate, and she has no such estate, she cannot contract. Hirth *v.* Hirth, 98 Va. 121, 34 S. E. 964; Kriz *v.* Peege, 119 Wis. 105, 95 N. W. 108.

[3] See Mr. Belt's note (3) to Hulme *v.* Tenant, 1 Bro. Ch. R. 20; Sockett *v.* Wray, 4 Bro. Ch. R. 485; Nantes *v.* Corrock, 9 Ves. 189; Jones *v.* Harris, 9 Ves. 496, 497; Stuart *v.* Lord Kirkwall, 3 Madd. 387; Gardner *v.* Gardner, 22 Wend. R. 526; Owens *v.* Dickenson, 1 Craig & Phillips, 48; Francis *v.* Wigzell, 1 Madd. R. 258. In this last case the principal authorities are collected and commented on by Sir Thomas Plumer, and

distinction between her separate property and her other property is that as to the former she is treated as a feme sole having the general power of disposing of it; but as to the latter all the legal disabilities of a feme covert attach upon her.[1]

§ 1828. **Same.** — The doctrines maintained by Courts of Equity as to the nature and extent of the liability of the separate estate

the doctrine in the text maintained. In Aylett *v.* Ashton, 1 Mylne & Craig, 105, 111, the Master of the Rolls (now Lord Cottenham) said: "The doctrine as to how far the court will execute a contract entered into by a feme covert as to her separate estate was very fully discussed, and all the cases were cited by Sir Thomas Plumer in the case of Francis *v.* Wigzell (1 Madd. 258). It was there decided, and clearly in conformity with all previous decisions, that the court has no power against a feme covert in personam, but that if she has separate property the court has control over that separate property. In all cases however the court must proceed in rem against the property. A feme covert is not competent to enter into contracts so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before. A personal contract would be within the incapacity under which a feme covert labors. Sir T. Plumer says: 'There is no case in which this court has made a personal decree against a feme covert. She may pledge her separate property, and make it answerable for her engagements; but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree against her, the bill cannot be sustained.' Sir T. Plumer there refers to Hulme *v.* Tenant (1 Bro. C. C. 16) before Lord Thurlow, and to Nantes *v.* Corrock (9 Ves. 182), where Lord Eldon, following the case before Lord Thurlow, lays down the rule in precisely the same terms. The present bill does not seek to affect the separate property except through Mrs. Ashton personally. If it had sought to affect the property upon the ground that the contract had given the plaintiff a right against the property, the suit would have been brought against the trustees; for there must be some trustees of that part of the property which is settled to Mrs. Ashton's separate use, although their names do not appear. Although a feme covert has power, and the court has jurisdiction, over the rents and profits of her separate property, no case has given effect to her contracts against the corpus of her separate estate." See also Milnes *v.* Busk, 2 Ves. Jr. 498, 499, where Lord Rosslyn comments upon the then prevailing doctrines at law, and doubts them. See Davis *v.* Smith, 75 Mo. 219; Bonebrake *v.* Tauer, 67 Kans. 827, 72 Pac. 521; Revisal of 1905 of North Carolina, § 2094; Bazemore *v.* Mountain, 126 N. C. 313, 35 S. E. 542; Carolina Interstate Bldg. and Loan Assn. *v.* Black, 119 N. C. 323, 25 S. E. 975; she is liable for medical services to herself, Cartens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606; but she is not liable on a contract to pay for medical services to her husband, Buck *v.* Patterson, 75 Mich. 397, 42 N. W. 949; Leake *v.* Lucas, 65 Neb. 359, 93 N. W. 1019, 62 L. R. A. 190. Generally: Hirshfield *v.* Waldron, 83 Mich. 116, 47 N. W. 239; Ruhl *v.* Heintze, 97 App. Div. 442, 89 N. Y. Supp. 1031; Chickering *v.* White, 127 Wis. 83, 106 N. W. 797.

[1] See Stuart *v.* Lord Kirkwall, 3 Madd. R. 387; Gardner *v.* Gardner, 22 Wend. R. 526; Owens *v.* Dickinson, 1 Craig & Phillips, 48. In this last case Lord Cottenham said: "This married woman, as it appears

of a married woman for her debts and other charges created during her coverture are somewhat artificial in their texture, and therefore require to be carefully distinguished from each other, as they cannot all be resolved into the general proposition that she is as to such property to be deemed a feme sole. In the first

by the settlement, had a separate estate, subject to her appointment by will or deed, or other instrument in writing attested by one witness. Having by her mark put her signature to the document which recognized the £210 as a debt, which in certain circumstances she was to be liable to pay to the plaintiff, she makes her will, and by her will charges all her debts upon property which she had power to dispose of. Now that document alone within the authority of cases which have been decided would have been operative upon her separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and as I apprehend very inaccurately used, in cases where the court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power nor to the subject-matter of the power; nor indeed in many of the cases has there been any power existing at all. Besides, as it was argued in the case of Murray *v.* Barlee, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid pari passu; whereas if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear therefore that there is nothing in such a transaction which has any resemblance to the execution of a power. What it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid or by what means it is to be paid; and it is not correct according to legal principles to say that a contract to pay is to be construed into a contract to pay out of a particular property so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord Thurlow, in Hulme *v.* Tenant, is more correct. According to that view the separate property of a married woman being a creature of equity, it follows that if she has a power to deal with it she has the other power incident to property in general; namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied. Now these considerations are important, because it was part of the argument that a married woman, although she can enter into a species of contract, and bind herself by a promissory note (for that was the case put), yet that she cannot be considered as having creditors; and therefore when she makes her will, and directs that her debts are to be paid, that part of the will cannot be carried into effect. But all the cases suppose she can have creditors. The holder of her promissory note has her contract, which equity considers her capable of entering into; and it would be a very strong proposition to say that when she has by an instrument under her

place her separate property is not in equity liable for the payment of her general debts or of her general personal engagements.[1] So far Courts of Equity follow the analogies of the common law. If therefore a married woman should during her coverture contract debts generally without doing any act indicating an intention to charge her separate estate with the payment of them, Courts of Equity will not entertain any jurisdiction to enforce payment thereof out of such separate estate during her life.[2]

§ 1829. **Same.** — But in the second place her separate estate will in equity be held liable for all the debts, charges, incumbrances, and other engagements which she does expressly or by implication charge thereon; for, having the absolute power of disposing of the whole, she may a fortiori dispose of a part thereof.[3] Her agreement however creating the charge is not (it has been said), properly speaking, an obligatory contract, for as a feme covert she is incapable of contracting, but is rather an appoint-

hand acknowledged her debt and promised to pay it, she is not to be considered as creating an obligation which binds her. There is however no ground for supporting such a proposition, and it would be interfering very much with the rights which this court considers are attached to the property of a married woman to put such a construction on her contract." Post, § 1832.

[1] But her separate estate is held liable in equity for her debts contracted before marriage, where her husband has become bankrupt. Chubb *v.* Stretch, L. R. 9 Eq. 555. Contra, Vanderheyden *v.* Mallory, 1 Const. 452.

[2] 2 Roper on Husb. and Wife, ch. 21, § 2, pp. 235 to 238; Id. 241, and note; Duke of Bolton *v.* Williams, 2 Ves. 138, 150, 156; s. c. 4 Bro. Ch. R. 297; Jones *v.* Harris, 9 Ves. 498; Stewart *v.* Kirkwall, 3 Madd. R. 387; Greatley *v.* Noble, 3 Madd. R. 94; Aguilar *v.* Aguilar, 5 Madd. R. 418. The qualification "during her life" is important; for it has been said that after her death such general creditors will be entitled to satisfaction out of her assets. But then, though they may be creditors by bond, they will not be entitled to any preference, but must come in pari passu with her simple contract creditors. 2 Roper on Husb. and Wife, ch. 21, § 3, pp. 238, 245, note, citing Anon., 18 Ves. 258; Gregory *v.* Lockyer, 6 Madd. R. 90. The circumstances of these cases however do not appear; and the wife may have charged her separate estate (for aught that appears) with the payment of all her debts. But in Norton *v.* Turvill (2 P. Will. 144) it was held that all the separate estate of a married woman was after her death a trust for the payment of her debts; and upon that ground a bond debt contracted by her generally after marriage was enforced against it. See Court *v.* Jeffery, 1 Sim. & Stu. 105, and Mr. Roper's note, supra. Vanderheyden *v.* Mallory, 1 Const. 452.

[3] Hulme *v.* Tenant, 1 Bro. Ch. R. 16, 20; s. c. 2 Dick. 560; Brown *v.* Like, 14 Ves. 302; 2 Roper on Husb. and Wife, ch. 21, § 3, pp. 240, 241, 247, 248; Peacock *v.* Monk, 2 Ves. 190; Grigby *v.* Cox, 1 Ves. 517; Greatley *v.* Noble, 3 Madd. R. 94.

ment out of her separate estate. The power of appointment is incident to the power of enjoyment of her separate property, and every security thereon executed by her is to be deemed an appointment pro tanto of the separate estate.[1]

§ 1830. **Same.** — Upon the ground of interest as well as power, where freeholds are conveyed by release to trustees, to the use of a feme covert, for her separate use for life, or to the use of such person as she should by writing sealed, &c., appoint, and in default of such appointment in trust to pay the rents to her for her separate use, and the husband and wife by writing not under seal for valuable consideration undertook to execute a mortgage of the property when required, and her husband died before any mortgage was executed, it was held that the agreement was binding upon the surviving wife.[2]

§ 1831. **There Should Be a Clear Intention that Debt Was a Charge upon Separate Estate.** — The great difficulty however is to ascertain what circumstances in the absence of any positive expression of an intention to charge her separate estate shall be deemed sufficient to create such a charge, and what sufficient to demonstrate an intention to create only a general debt. It is agreed that there must be an intention to charge her separate

[1] Stuart *v.* Lord Kirkwall, 3 Madd. 387; Greatley *v.* Noble, 3 Madd. R. 94; Field *v.* Sowle, 4 Russ. R. 112. The language of the last case may be presumed to apply to the express power of appointment therein given. But the language of the other cases seems intentionally general. See also Aguilar *v.* Aguilar, 5 Madd. 418. But see Owens *v.* Dickenson, 1 Craig & Phillips, 48, 52 to 54.

[2] Stead *v.* Nelson, 2 Beav. R. 245, 238. On this occasion Lord Langdale said: "This estate was vested in Mrs. Waterworth for her life for her separate use. Now supposing a legal estate to have been vested in her, a Court of Law would take no notice of the words 'for her separate use', but in this court those words would give her, during coverture, the same right over the estate as she would have had if she had been a feme sole. Having that right, she enters into a contract whereby, in consideration of a sum of £120, she agrees to execute a mortgage of this estate. That which was vested in her, and over which her power extended, was her life estate. It is true that her life might be prolonged beyond the life of her husband; if so, the consequence would be that she would then have, both in equity as well as at law, an absolute power of disposition over that life estate, and I cannot say that I think that the analogy of a reversionary interest in a chose in action in any way applies to this case. It appears to me that she had a power to enter into this agreement which must be specifically performed with costs, and it must be declared that the plaintiff's mortgage is entitled to priority over that of Mr. Tolson." But compare Harris *v.* Mott, 14 Beav. 169; s. c. 7 Eng. L. & E. 245. Further see Pemberton *v.* Johnson, 46 Mo. 342; Carpenter *v.* Mitchell, 50 Ill. 470; Pollen *v.* James, 45 Miss. 129; Ross *v.* Armstrong, 5 C. E. Green, 109; Fiske *v.* McIntosh, 101 Mass. 66.

estate, otherwise the debt will not affect it.[1] The fact that the debt has been contracted during the coverture either as a principal or as a surety for herself, or for her husband or jointly with him, seems ordinarily to be held prima facie evidence to charge her separate estate without any proof of a positive agreement or intention so to do.[2] It has been remarked that this rule of holding that a general security executed by a married woman, pur-

[1] Where the consideration of an undertaking entered into by a married woman goes to the benefit of her separate estate, equity will decree that her debt created thereby shall be paid from such estate to the extent to which her power of disposal may go. Phœnix Ins. Co. *v.* Abbott, 127 Mass. 558; Willard *v.* Eastham, 15 Gray, 328; Heburn *v.* Warner, 112 Mass. 271; Benson *v.* Simmers, 21 Ky. L. Rep. 1060; Farmers' Bank *v.* Boyd, 67 Neb. 497, 93 N. W. 676.

[2] Hulme *v.* Tenant, 1 Bro. Ch. R. 16; s. c. 2 Dick. 560; Heatley *v.* Thomas, 15 Ves. 596; Bullpin *v.* Clarke, 17 Tes. 365; Stuart *v.* Lord Kirkwall, 3 Madd. R. 387. See Gardner *v.* Gardner, 22 Wend. 526; Owens *v.* Dickenson, 1 Craig & Phillips, 48, 52 to 54; Crosby *v.* Church, 3 Beav. R. 489. In this last case Lord Langdale said: "If a married woman could not dispose of her separate estate without making a direct reference to it, or without showing an express intention to charge it, there would be an end of the question; but I apprehend there are many ways in which a married woman may render her separate property liable to a charge, without having in the transaction made any direct charge on, or made any reference to, the property settled to her separate use." In Tullett *v.* Armstrong (4 Beav. R. 319, 323) the same learned judge used language still more comprehensive: "It is perfectly clear that when a woman has property settled to her separate use she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as married woman, could only be satisfied by means of her separate estate; and therefore the inference is conclusive that there was an intention, and a clear one, on her part, that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound. Again I apprehend it to be clear that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act. But in a case where she enters into no bond, contract, covenant, or obligation, and in no way contracts to do any act on her part, where the instrument which she executes does not purport to bind or to pass anything whatever that belongs to her, and where it must consequently be left to mere inference whether she intended to affect her estate in any manner or way whatever, the case is entirely different either from the case where she executes a bond, promissory note, or other instrument, or where she enters into a covenant or obligation by which she, being a married woman, can be considered as binding her separate estate." Williams *v.* Urmston, 35 Ohio St. 296; New York L. Ins. Co. *v.* Miller, 22 Ky. L. Rep. 230, 56 S. W. 975; Wachovia Natl. Bank *v.* Ireland, 122 N. C. 571, 29 S. E. 835; National Exch. Bank *v.* Cumberland Lbr. Co., 100 Tenn. 479, 47 S. W. 85; Fouse *v.* Gilfillan, 45 W. Va. 213, 32 S. E. 178.

porting only to create a personal demand and not referring to her separate property, shall be intended as prima facie an appointment or charge upon her separate property, is a strong case of constructive implication by Courts of Equity founded more upon a desire to do justice than upon any satisfactory reasoning. The main argument in favor of it seems to be that the security must be supposed to have been executed with the intention that it shall operate in some way, and that it can have no operation except as against her separate estate. If this reasoning be correct, it will equally apply to all her general pecuniary engagements; for she has no other means of satisfying them except out of her separate estate.[1] To this extent the doctrine has not as yet been established, although the tendency of the more recent decisions is certainly in that direction. Indeed it does seem difficult to make any sound or satisfactory distinction on the subject as to any particular class of debts, since the natural implication is, that if a married woman contracts a debt she means to pay it; and if she means to pay it, and she has a separate estate, that seems to be the natural fund which both parties contemplate as furnishing the means of payment.[2]

[1] 2 Roper on Husb. and Wife, ch. 21, § 3, pp. 243, 244, note.

[2] This subject was a good deal discussed in Murray *v.* Barlee, 4 Sim. R. 82, by the Vice-Chancellor, and on appeal of that case, by Lord Chancellor Brougham, in 3 Mylne & Keen, 209, in which he affirmed the Vice-Chancellor's decision, and acted upon the ground stated in the text. On that occasion his Lordship said: "That at law a feme covert cannot in any way be sued even for necessaries is certain. Bind herself or her husband by specialty she cannot; and although living with him and not allowed necessaries, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him, yet even in respect of these she herself is free from all suit. This is her position of disability or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is not more recognized than is the cestui que trust or the mortgagor, the legal estate, which is the only interest the law recognizes, being in others. But though this is now settled law, we know that it was not always so; or at least that an exception was admitted to what all men allow to be the general rule. When Corbett *v.* Poelnitz was decided, Lord Mansfield said that as times alter, new customs and manners arise; and he held, with the concurrence of all his learned brothers, that where the wife has a separate maintenance, and lives apart from her husband, receiving credit upon the possession of that estate, she ought to be bound; and the action was accordingly held to lie. That this great and accomplished judge imported his views on the subject from those Courts of Equity which he had once adorned as an advocate, I have no doubt; but it is certain that the decision never received the assent of Westminster Hall. That those who pronounced it very strongly adhered to it there can be no question. Mr. Justice Buller, sitting in

[If the wife have property and she permits the husband, as her agent, to erect improvements thereon, her estate is liable for the

this court a few years after, recites it among other clear points, and plainly refers to it more emphatically than to the rest in these words: 'All these things have been determined, and I know no reason why these decisions should not be as religiously and as sacredly observed as any judgment, in any time, by any set of men. I believe they are founded in good sense and are adapted to the transactions, the understanding, the welfare of mankind.' Compton *v.* Collinson. He adds that the reasons on which these decisions were founded were so satisfactory both to the parties interested and to the profession that no writ of error had ever been brought. It happened however that this was a very groundless panegyric. The profession were always much divided upon the point, and latterly the general opinion was against it. A case for the opinion of the Court of Common Pleas was directed by Mr. J. Buller in Compton *v.* Collinson; and though the certificate of the judges, when that case came to be argued, was in conformity with the law as then laid down by Lord Mansfield, yet Lord Loughborough in delivering the judgment of the court observed, after an elaborate review of the cases, that it could not be considered as a settled point that an action might be maintained against a married woman separated from her husband by consent, and enjoying a separate maintenance. A few years afterwards that judgment which had been pronounced to be as worthy of religious and sacred observance as any judgment ever delivered was overruled on the fullest consideration, and after two arguments, by the unanimous determination of all the judges. Marshall *v.* Rutton. The doors of the Courts of Common Law were thus shut against an admission of the equitable principle, and the law was fixed that in those courts the wife could in no way be sued by reason of her having separate property and living apart from her husband. But in equity the case is wholly different. Her separate existence, both as regards her liabilities and her rights, are here abundantly acknowledged; not indeed that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and her trustees. It may be added that the current of decisions has generally run in favor of such recognition. The principle has been supposed to be carried further in Hulme *v.* Tenant than it had ever been before, because there a bond, in which the husband and wife joined, and which indeed so far as the obligation of the wife was concerned was absolutely void at law, was allowed to charge the wife's estate, vested in trustees to her separate use, though such estate could be only reached by implication, and though till then the better opinion seemed to be that the wife could only bind her separate estate by a direct charge upon it. Lord Eldon repeatedly expressed his doubts as to this case; but it has been constantly acted upon by other judges, and never in decision departed from by himself. It is enough to mention Heatley *v.* Thomas and Bullpin *v.* Clarke, both before Sir William Grant, who in the latter case held the wife's separate estate to be charged by a promissory note for money lent to her; which at law could never have charged the husband in any way, directly or indirectly. The same was held as to a bill of exchange, accepted by a feme covert in Stuart *v.* Lord Kirkwall, and an agreement by the wife as to her separate estate, in Master *v.* Fuller. In all these cases I take the foundation of the doctrine to be this: the wife has a separate estate subject to her own control, and exempt from all other interference or authority. If she cannot affect it

no one can; and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is whether or not she has validly incumbered it. At first the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power was always of course considered as made in execution of it. But so if by any reference to the estate it could be gathered that such was her intent, the same conclusion followed. Thus if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a feme covert without any reference to her separate estate, it was held, in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instruments thus made by her have any validity or operation; in the same manner as an instrument which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, although no direct reference is made to the power. Such is the principle, and it goes the full length of the present case. But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all. This point was discussed in Greatley *v.* Noble; and the present Master of the Rolls appears, in the subsequent case of Stuart *v.* Lord Kirkwall, to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in Greatley *v.* Noble, although he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point. I own I can conceive no reason for drawing any such distinction. If in respect of her separate estate the wife is in equity taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing where that act requires none? Is there any equity reaching written dealings with the property which extends not also to dealing in other ways; as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, Kenge *v.* Delavall, makes no mention of such a distinction, for there, being indebted generally is all that is stated as grounding the claim; and in Lilia *v.* Airey, the party who had furnished necessary supplies to the wife was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for £60; the court however held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond. But the present is by no means a case of mere

value of the improvements furnished;[1] but if the material man did not look to the wife or to her separate estate for payment, his debt is only against the husband.[2]]

§ 1832. **Same.** — In the earlier cases indeed the doctrine was put upon the intelligible ground that a married woman is, as to her separate property, to be deemed a feme sole; and therefore

general charge. If it were, I have no doubt that the claim would well lie; but there are written promises. I hold a retainer in writing to imply a promise to pay, whatever shall be reasonably and lawfully demanded by the solicitor or attorney acting under that retainer. So if there be no formal retainer, but only a written acknowledgment or adoption of the professional conduct, or instructions in writing to proceed further, the party who gives such written instructions in effect promises to pay whatever may lawfully become due to one acting in obedience to them; that is, to pay the costs which shall be taxed. The present case is in almost the whole if not the whole of it covered by such written authority, although such written authority was not necessary to bind Mrs. Barlee's separate estate. I am of opinion therefore that the decree of his Honor ordering the solicitor's bill to be taxed is well founded. Nothing could more effectually defeat the very purpose of such settlements than denying power to the wife thus to charge her estate. She is meant to be protected by the separate provisions from all oppression and circumvention, and to be made independent of her husband as well as of all others. If she cannot obtain professional aid, and that with the facility which other parties find in obtaining it, she is not on equal terms with them. If the husband or the trustees can hold her at arm's length, and refuse her the proceeds of the fund held by them for her use, and if they can by a verbal retainer engage a solicitor while she can only obtain such help by executing a mortgage or by granting bonds or notes, she is not on the same footing with them. I hold therefore that so far from a solicitor's or attorney's bill being less entitled to favor in Courts of Equity when sued upon, as against the separate estate of a married woman, the argument is all the other way." See also the learned note of Mr. Roper, in his Treatise on Husband and Wife (ch. 21, § 3, pp. 241 to 247), which contains a very elaborate review of the leading authorities, and in a great measure exhausts the subject. From that note the materials in the text have been partly drawn. See also Clancy on Married Women, ch. 9, pp. 331 to 346. In Vandergucht *v.* De Blaquiere (8 Sim. R. 315), the Vice-Chancellor held that where a married woman divorced from her husband, and entitled to alimony under a decree of the Ecclesiastical Court, accepted a bill of exchange for articles of dress supplied to her by the drawer of the bill, and made it payable at her banker's, to whom the alimony was paid, she did not thereby charge her alimony.

[1] Dailey *v.* Cain, 11 Ky. L. Rep. 936, 13 S. W. 424; Tarr *v.* Muir, 21 Ky. L. Rep. 988, 107 Ky. 283, 53 S. W. 663; Ware *v.* Long, 24 Ky. L. Rep. 696, 69 S. W. 797; Popp *v.* Connery, 138 Mich. 84, 101 N. W. 54, 11 Detroit Leg. N. 478, 110 Am. St. Rep. 304; Bankard *v.* Shaw, 199 Pa. 623, 49 Atl. 230; Mitchell *v.* Jodon, 22 Pa. Super. Ct. Rep. 304; Finger *v.* Hunter, 130 N. C. 529, 41 S. E. 890; Ball *v.* Paquin, 140 N. C. 83, 52 S. E. 410.

[2] Poe *v.* Ekert, 102 Iowa 361, 71 N. W. 579; Cate *v.* Rollins, 69 N. H. 426, 43 Atl. 122; Hesselbach *v.* Savage, 57 App. Div. 632, 69 N. Y. Supp. 429; City Natl. Bank *v.* Cobb, 58 S. C. 231, 36 S. E. 569.

that her general engagements, although they would not bind her person, should bind her separate property.[1] This however (as we have seen) is not the modern doctrine; for by that it seems to turn upon the intention of the married woman to create a charge on her separate estate, either as an appointment or as a disposition of it by a contract in the nature of an appointment.[2] The difficulty then is to distinguish upon any clear reasoning what ground of general presumption exists to infer an intention not expressed, to charge any particular debt upon her separate estate which would not ordinarily apply to all her general debts. If she gives a promissory note, or an acceptance, or a bond, to pay her own debt,[3] or if she joins in a bond with her husband to pay his debts, the decisions have gone the length of charging it on her separate estate, either as a contract or as an appointment, without any distinct circumstance establishing her intention.[4] Where indeed she lives apart from her husband and has a separate estate and maintenance secured to her, there may be good ground to hold that all her debts, contracted for such maintenance, and in the course of her dealings with tradesmen, are understood by

[1] Hulme *v.* Tenant, 1 Bro. Ch. R. 16, and Mr. Belt's note; Peacock *v.* Monk, 2 Ves. 193; Norton *v.* Turvill, 2 P. Will. 144; Lilia *v.* Airey, 1 Ves. Jr. 277, 278; Mansfield, C. J., in Nurse *v.* Craig, 5 Bos. & Pull. 162, 163; Angell *v.* Hadden, 2 Meriv. R. 163.

[2] Roper on Husb. and Wife, ch. 21, § 3, p. 243, note; Sperling *v.* Rochfort, 8 Ves. 175 to 178; Jones *v.* Harris, 9 Ves. 497, 498; Whistler *v.* Newman, 4 Ves. Jr. 129; Stuart *v.* Kirkwall, 3 Madd. R. 387; Field *v.* Sowle, 4 Russ. 112; Mansfield, C. J., in Nurse *v.* Craig, 5 Bos. & Pull. 162, 163. But see Owens *v.* Dickenson, Craig & Phillips, 48, 52 to 54; ante, § 1827. Something more is required than the mere existence of such facts as would create a debt against a single woman. Johnson *v.* Gallagher, 7 Jur. N. S. 273; S. C. 3 DeG. F. & J. 494; Oakley *v.* Pound, 1 McCart. 178. See further Butler *v.* Cumpston, L. R. 7 Eq. 16; Matthewman's Case, L. R. 3 Eq. 781; Rogers *v.* Ward, 8 Allen, 387; White *v.* McNett, 33 N. Y. 371.

[3] Rogers *v.* Ward, 8 Allen, 387; Batchelder *v.* Sargent, 47 N. H. 262. See Davis *v.* Smith, 75 Mo. 219; Johnson *v.* Gallagher, 7 Jur. N. S. 273; S. C. 3 DeG. F. & J. 494; London Bank *v.* Lamprière, L. R. 4 P. C. 572; Picard *v.* Hine, L. R. 5 Ch. 274. Kitchin *v.* Chapin, 64 Neb. 144, 89 N. W. 632, 57 L. R. A. 914, 97 Am. St. Rep. 637; McDonald *v.* Bluthenthal, 117 Ga. 120, 43 S. E. 422.

[4] Stanford *v.* Marshall, 2 Atk. 68; Hulme *v.* Tenant, 1 Bro. Ch. R. 16; S. C. 2 Dick. 560; Master *v.* Fuller, 4 Bro. Ch. R. 19; S. C. 1 Ves. Jr. 513; Stuart *v.* Kirkwall, 3 Madd. R. 387; Field *v.* Sowle, 4 Russ. R. 112; Bullpin *v.* Clarke, 17 Ves. 365; Heatley *v.* Thomas, 15 Ves. 596; Power *v.* Bailey, 1 B. & Beatt. 49; Wagstaff *v.* Smith, 9 Ves. 520; Clerk *v.* Miller, 2 Atk. 379; Clancy on Married Women, ch. 9, pp. 331 to 346. But compare Willard *v.* Eastham, 15 Gray, 328. And see Yale *v.* Dederer, 18 N. Y. 265; Kelso *v.* Tabor, 52 Barb. 125.

both parties to be upon the credit of her separate funds for maintenance.[1]

§ 1833. **The Wife's Equity for a Settlement.** — In the next place let us proceed to the consideration of what is commonly called the equity of a wife to a settlement out of her own property. It is well known that at the common law marriage amounts to an absolute gift to the husband of all the goods, personal chattels, and other personal estate of which the wife is actually or beneficially possessed at that time in her own right, and of such other goods, personal chattels, and personal estate as come to her during the marriage.[2] But to her choses in action, such as debts due by obligation or by contract or otherwise, the husband is not absolutely entitled unless they are reduced into possession during her life.[3] In regard to chattels real of which the wife is or may be possessed during the coverture the husband has a qualified title. He has an interest therein in her right; and he may by his alienation during the coverture absolutely deprive her of her right therein. But if he does not alienè them, she will be entitled to them if she survives him; and if he survives her, he will be entitled to them in virtue of his marital rights.[4]

§ 1834. **Same.** — These general explanations of the state of the common law as to the respective right of husband and wife in regard to her personal property are sufficient to enable us to understand the origin, nature, and character of the wife's equity to a settlement. We have already seen the protective power which Courts of Equity exert to preserve the control and disposition of married women over property secured or given to their separate use, and also to preserve the rights and interests of wards of the

[1] 2 Roper on Husb. and Wife, ch. 21, § 3, pp. 244, 245, note; Ibid. ch. 22, § 4, pp. 305 to 307; Lilia *v.* Airey, 1 Ves. Jr. 277; Mansfield, C. J., in Nurse *v.* Craig, 5 Bos. & Pull. 162, 163. See Johnson *v.* Gallagher, 7 Jur. N. S. 273; s. c. 3 DeG. F. & J. 494; London Bank *v.* Lamprière, L. R. 4 P. C. 572, 591; McHenry *v.* Davies, L. R. 10 Eq. 88; Johnson *v.* Cummins, 1 C. E. Green, 97.

[2] 1 Roper on Husb. and Wife, ch. 5, § 2, p. 169; Co. Litt. 300, 351 *a*, and Butler's note (1); Com. Dig. Baron & Feme, E. 3; Clancy on Marr. Women, B. 1, ch. 1, pp. 1 to 3.

[3] Co. Litt. 351 *a*, and Mr. Butler's note (1); 2 Roper on Husb. and Wife, ch. 5, § 4, pp. 204, 205; Clancy on Married Women, B. 1, ch. 1, pp. 3 to 9; Perdew *v.* Jackson, 1 Russ. R. 66.

[4] 2 Roper on Husb. and Wife, ch. 5, § 2, pp. 173 to 187; Ibid., Addenda, No. 3, p. 221; Clancy on Marr. Women, B. 1, ch. 1, pp. 9 to 11; Co. Litt. 46 *b*; Ibid. 251 *b*, and Butler's note (1); Doe *v.* Polgream, 1 H. Black. 535; Com. Dig. Baron & Feme, E. 2, F. 1; Pale *v.* Mitchell, 2 Eq. Abr. 138, pl. 4; Donne *v.* Hart, 2 Russ. & Mylne, 360; post, §§ 1841, 1844. But see Bisset on Estates for Life, 187, 188, 192, 193, 195.

court. Whenever the husband has reduced the personal estate of his wife, of whatever original nature it may be, whether legal or equitable, into possession, he becomes thereby the absolute owner of it and may dispose of it at his pleasure.[1] And this being the just exercise of his legal marital rights, Courts of Equity will not interfere to restrain or limit it.[2] Wherever also he is pursuing the common remedies at law for the purpose of reducing such personal property into possession, Courts of Equity for the same reason are, or at least (it is said) ought to be, ordinarily passive.[3] We say ordinarily; because it is not perhaps quite certain that Courts of Equity will not interfere by way of injunction to suits at law for the wife's personal property against the husband under special circumstances. In one class of cases, that of legacies to the wife, when they are sued for by the husband in the Ecclesiastical Courts, it is certain that an injunction will be allowed for the purpose of enforcing the wife's equity to a settlement.[4]

[1] Clancy on Marr. Women, B. 5, ch. 1, pp. 442 to 444; Jewson *v.* Moulson, 2 Atk. 420; Murray *v.* Elibank, 10 Ves. 90. See as to what will be a reduction into possession by the husband of the wife's choses in action or not. Searing *v.* Searing, 9 Paige, R. 283; Mardree *v.* Mardree, 9 Ired. 295; McCaa *v.* Woolf, 42 Ala. 389; Latourette *v.* Williams, 1 Barb. 9; Dunn *v.* Sargent, 101 Mass. 336; Young's Est. 65 Pa. St. 101; Aitchison *v.* Dixon, L. R. 10 Eq. 589; Fleet *v.* Perrins, L. R. 4 Q. B. 500.

[2] Ibid.

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*k*); Vaughan *v.* Buck, 13 Sim. R. 404; s. c. 1 Phillips, R. 75.

[4] Ante, §§ 798, 799, 805, 806, 1223. Anon. 1 West, R. 581; Clancy on Married Women, B. 5, ch. 1, pp. 443, 463, 464; Jewson *v.* Moulson, 2 Atk. 419, 420; Harrison *v.* Buckle, 1 Str. 238; Gardner *v.* Walker, 1 Str. 503. There are instances in which bills in equity have been entertained to restrain the husband from enforcing his legal remedies to reduce his wife's choses in action into possession, for the purpose of enforcing her equity to a settlement. Winch *v.* Page, Bunb. R. 86; Mason *v.* Masters, cited in 1 Eden, R. 506. See also Jewson *v.* Moulson, 2 Atk. 420; Ellis *v.* Ellis, 1 Viner, Abrid. Suppt. 476; Clancy on Marr. Women, B. 5, ch. 2, pp. 463, 464; Id. 466 to 470; 1 Roper on Husb. and Wife, ch. 7, § 1, pp. 257, 258; Id. 274. Mr. Clancy insists that there is no just ground upon which the Courts of Equity should decline to interfere in cases where the husband is seeking at law to recover the wife's legal choses in action. His reasoning is entitled to great consideration from its intrinsic force; and there are certainly authorities in its favor, although he admits that the prevalent spirit of the cases is against it. Clancy on Marr. Women, B. 5, ch. 2, pp. 466 to 470. Mr. Jacob, in his late edition of Roper on Husband and Wife (Vol. I. 271, 272), expressly denies that there is any sound principle for making a distinction between a trust term and any other equitable chose in action of the wife. It were to be wished that the principle could, as a matter of general justice, be maintained in equity. In Pierce *v.* Thornely (2 Sim. R. 167) the Vice-Chancellor held a doctrine which seems to cover the very case. "At law," said he, "where judgment had been recovered by the husband and

§ 1835. **When Is Wife Entitled to a Settlement.** — The principal if not the sole cases in which Courts of Equity now interpose to secure to the wife her equity to a settlement are, first, where the husband seeks aid or relief in a Court of Equity in regard to her property; secondly, where he makes an assignment of her equitable interests; thirdly, where she seeks the like relief as plaintiff against her husband or his assignees in regard to her equitable interests.[1] In the first case the court lays hold of the occasion, upon the ground of the maxim that he who seeks equity must do equity, to require the husband to make a suitable settlement upon the wife (if not already made) out of that property, or some other property, for her due maintenance and support in case of her survivorship, according to the rank and condition and circumstances of the parties.[2] In the second case the same principle is applied to other persons claiming under the husband as to himself. In the third case the doctrine may seem more artificial; but it is in truth enforcing against the husband her admitted equity to prevent an irreparable injustice.[3]

§ 1836. **Same.** — The general theory of this branch of Equity Jurisprudence may be thus succinctly stated: By marriage the husband clearly acquires an absolute property in all the personal estate of his wife capable of immediate and tangible possession. But if it is such as cannot be reduced into possession except by an action at law or by a suit in equity, he has only a qualified interest therein, such as will enable him to make it an absolute interest by reducing it into possession. If it is a chose in action properly so called, that is, a right which may be asserted by an action at law, he will be entitled to it if he has actually reduced it into possession

wife, the husband alone could levy execution. But a Court of Equity will not, unless the wife consents, permit the husband to recover the whole of his wife's choses in action, but will require a settlement to be made upon her." See also Kenny *v.* Udall, 5 John. Ch. R. 477; and Van Epps *v.* Van Deusen, 4 Paige, R. 74. In the latter case Mr. Chancellor Walworth was of opinion that an injunction ought to go to a proceeding at law in order to enforce the wife's equity to a settlement.

[1] Clancy on Marr. Women, B. 5, ch. 1, pp. 441, 445; Id. ch. 2, p. 456; post, § 1845. The wife has no equity to a settlement except in the surplus after payment of her debts contracted before marriage. Carrick *v.* Ford, L. R. 4 Ch. 247.

[2] Clancy on Marr. Women, B. 5, ch. 1, pp. 441, 442; Beresford *v.* Hobson, 1 Madd. 363; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*k*).

[3] Clancy on Marr. Women, B. 5, ch. 2, pp. 470 to 475. In Eedes *v.* Eedes, 11 Simons, R. 569, 570, the Vice-Chancellor (Sir L. Shadwell) said: "where a wife is entitled to a chose in action which consists of a principal sum and not merely income, she may file a bill against her husband and the trustees for a settlement."

(for a judgment is not sufficient) in his lifetime. But if it is a right which must be asserted by a suit in equity, as where it is vested in trustees who have the legal property, he has still less interest. He cannot reach it without application to a Court of Equity, in which he cannot sue without joining her with him; although perhaps a Court of Law might permit him to do so, or at least to use her name without her consent. If the aid of a Court of Equity is asked by him in such a case, it will make him provide for her unless she consents to give such equitable property to him.[1]

§ 1837. **Wife's Right to Settlement Includes a Protection for Her Children.** — It is called the wife's equity. But in truth it is never limited to the wife; for in all cases where a settlement is decreed, it is the invariable practice to include a provision for the issue of the marriage through the instrumentality of the equity of the wife.[2] This equity will not only be administered at the instance of the wife and her trustees, but also where the husband sues in equity for her property at the instance of her debtor.[3] We shall presently see in what manner the wife may waive the right to such a settlement, and what will be the effect of her waiver, and what other circumstances will deprive her and her issue of the right.[4]

§ 1838. **Same.** — It is not easy to ascertain the precise origin of this right of the wife, or the precise grounds upon which it was first established. It has been said that it is an equity grounded upon natural justice; that it is that kind of parental care which a Court of Equity exercises for the benefit of orphans, and that as a father would not have married his daughter without insisting upon some provision, so a Court of Equity, which stands in loco parentis, will insist on it.[5] This is not so much a statement of

[1] Langham *v.* Nenny, 3 Ves. Jr. 469; Bond *v.* Simmons, 3 Atk. 20; Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402.

[2] Murray *v.* Lord Elibank, 13 Ves. 6; Steinmetz *v.* Halthin, 1 Glyn. & Jam. R. 64; s. c. cited in Pierce *v.* Thornely, 2 Sim. R. 167; Wilson *v.* Wilson, 1 Jac. & Walk. 459, 460. In the matter of Anne Walker, 1 Lloyd & Goold's R. 299, 323.

See Mercier *v.* West Kansas City Land Co., 72 Mo. 473, where however the form of the conveyance was such as to give the wife an absolute estate in equity. A power of appointment should be reserved to the settler in default of issue. James *v.* Couchman, 33 Week. R. 452.

[3] Clancy on Marr. Women, B. 5, ch. 1, p. 465; Davy *v.* Pollard, Finch, Ch. R. 377; s. c. 1 Eq. Abridg. 64, pl. 2.

[4] See post, § 1847. In the matter of Anne Walker, 1 Lloyd & Goold's R. 299.

[5] Jewson *v.* Moulson, 2 Atk. 419; Kenny *v.* Udall, 5 John. Ch. R. 474;

the origin as it is of the effect and value of the jurisdiction. The truth seems to be that its origin cannot be traced to any distinct source. It is the creature of a Court of Equity, and stands upon its own peculiar doctrine and practice. It is in vain to attempt by general reasoning to ascertain the nature or extent of the doctrine, and therefore we must look entirely to the practice of the court for its proper foundation and extent.[1]

§ 1839. **Out of What Property Settlement Allowed.** — And in the first place a settlement will be decreed to the wife whenever the husband seeks the aid or relief of a Court of Equity to procure the possession of any portion of his wife's fortune.[2] In such a case it is of no consequence whether the fortune accrues before or during the marriage, whether the property consists of funds in the possession of trustees or of third persons, or whether it is in the possession of the court or under its administration or not; for under all these circumstances the equity of the wife will equally attach to it.[3] This equity of the wife was for a long time supposed to be confined to the absolute personal property of the wife. It was afterwards extended to the rents and profits of the real estate in which she has a life interest,[4] although it was not then generally extended as against the husband personally to equitable interests in which she had a life-estate only.[5] It seems now to

Thomas *v.* Sheppard, 2 McCord Eq. 36, (s. c.) 16 Am. Dec. 632. But this right of the wife does not obtain in North Carolina. McKinnon *v.* McDonald, 57 N. C. 1, 72 Am. Dec. 574.

[1] Murray *v.* Elibank, 10 Ves. 90, s. c. 13 Ves. 6; Duvall *v.* Farmers' Bank, 4 Gill. and J. (Md.) 282, 23 Am. Dec. 558.

[2] Jewson *v.* Moulson, 2 Atk. 419, 420; Sleech *v.* Thorington, 2 Ves. 561; Attorney-Gen. *v.* Whorwood, 1 Ves. 538, 539; Bosvil *v.* Brander, 1 P. Will. 459, Mr. Cox's note; Howard *v.* Moffat, 2 John. Ch. R. 206, 208; Fabre *v.* Colden, 1 Paige, R. 166; Smith *v.* Kane, 2 Paige, R. 303; Clancy on Marr. Women, B. 5, ch. 2, pp. 456 to 475; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*k*); Sturgis *v.* Champneys, 5 Mylne & Craig, 97, 101 to 104; Hanson *v.* Keating, The Jurist, 1844, Vol. 8, p. 949.

[3] 2 Roper on Husb. and Wife, ch. 7, § 1, p. 259.

[4] Clancy on Marr. Women, B. 5, ch. 1, p. 445; Burdon *v.* Dean, 2 Ves. Jr. 607; Sturgis *v.* Champneys, 5 Mylne & Craig, 97, 101 to 103.

[5] Elliott *v.* Cordell, 5 Madd. R. 155, 156. In this case a legacy was given to a married woman of the dividends of £9,000 three per cents during her life, with a bequest over. The husband and wife joined in a sale of her life-estate, and he became bankrupt. The wife afterwards filed a bill for a provision against the purchaser, but it was refused. The Vice-Chancellor (Sir John Leach), on that occasion said: "I find no authority for the equity claimed by the wife as against the particular assignee in the case of an interest given to the wife for her life; and it does not follow as a corollary or consequence from any established doctrine of the court. Where an absolute equitable interest is given to the wife, the court will not permit the husband to possess it without making

have acquired a wider range, and is at present applied to all cases of the real estate of the wife, whether legal or equitable, where the

a provision for the wife or her express consent, and all who claim under the husband must take his interest subject to the same equity. But where an equitable interest is given to the wife for her life only, this court does permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife. And if the husband becomes bankrupt, or takes the benefit of an insolvent debtor's act, this court will fasten the same obligation of maintaining the wife out of the property of this description, which devolves by act of law upon the general assignee; for when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife. But the same principle does not necessarily apply to a particular assignee for a valuable consideration, who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it. If however I considered it to be useful that the same rule should be applied to the particular assignee as to the general assignee, which may be doubted, by declaring this rule in the absence of all direct authority, and of all authority leading necessarily to the same conclusion, I fear that I should not be administering the actual law of this court, but I should be making a new law, and I cannot venture to assume such a jurisdiction." In Stanton *v.* Hall, 2 Russ. & Mylne, 175, a devise was in trust to A, the husband, for life, of certain rents and profits; if he attempted to assign the same, or became bankrupt or insolvent, then upon trust to pay his wife an annuity of £100 during his life, and after his death an annuity to his widow of £30. It was held that the annuity was not the separate estate of the wife, but passed to the husband's assignee for value, and that against that assignee the wife had no equity for a settlement out of the annuity. On that occasion the Lord Chancellor (Brougham) said: "The case involves the question how far a married woman to whom an annuity for life was bequeathed in terms which have been adjudged not to vest it in her as her separate estate, is entitled to claim a settlement out of it, against one who was a purchaser for valuable consideration from her husband, the husband having afterwards become insolvent. And as Elliott *v.* Cordell, 5 Madd. 149, if it should be held to be law, decides the question, I have looked with some attention into that case, and also into the former authorities; and I find no warrant for supposing that Elliott *v.* Cordell introduced any new doctrine upon the subject. The same doctrine in principle was recognized long before by Sir W. Grant, although undoubtedly neither in Mitford *v.* Mitford (9 Ves. 87), nor in Wright *v.* Morley (11 Ves. 12), was the point raised and disposed of formally. It was however repeatedly referred to in those cases, and it is perfectly plain from the language there used that the opinion of Sir W. Grant would have excluded the wife's claim as against particular assignees. If the question were now for the first time raised whether Courts of Equity had not gone further than principle warranted in allowing the claim against particular assignees in cases where a capital sum is at stake, some doubt might perhaps be entertained. But in a case like Elliot *v.*

husband or his assignee is obliged to come into a Court of Equity to enforce his rights against the property.[1]

§ 1840. **Right of Wife to Settlement in This Country Where She is a Non-resident.** — There are some exceptions to the general doctrine however which deserve notice. In the first place if both the husband and wife are subjects of and residents in a foreign country where he would be entitled to his wife's fortune without making any settlement upon her, in such a case Courts of Equity sitting in another jurisdiction will as to personal property of the wife within their jurisdiction follow the local law and do what the local tribunals would ordain under similar circumstances; for the rights of the husband and wife are properly subject to the local law of their own sovereign.[2]

§ 1841. **The Husband Is Not Entitled to Wife's Property until He Provides Settlement.** — It has however been said, and with great apparent force, that the equity which a Court of Equity "administers in securing a provision and maintenance for the wife is founded upon the well-known rule of compelling a party who seeks equity to do equity; and it is not possible to conceive a case more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life-estate of the wife upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life-estate be attainable by the husband or his assignee at law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this court, equity, though it follows the law and therefore gives to the husband or his assignee the life-estate of the wife, yet it withholds its assistance of that purpose until it has secured for the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both."[3] But, as we shall presently see, the doctrine is even applied to cases where the wife actively seeks to assert her equity as plaintiff,[4]

Cordell, where the question related to a mere life-interest, and where, prior to the assignment, there was no failure on the part of the husband to maintain his wife, the Vice-Chancellor would have gone a great step further had he listened to the argument in favor of the wife's equity." Post, § 1417.

[1] Sturgis *v.* Champneys, 5 Mylne & Craig, 97, 105 to 107; Hanson *v.* Keating, The Jurist, 1844, Vol. 8, p. 949; Ibid. 465, 466; post, § 1842.

[2] Sawer *v.* Shute, 1 Anst. R. 63.

[3] Sturgis *v.* Champneys, 5 Mylne & Cr. 105. [4] Ibid.

so that the maxim scarcely seems to meet the exigencies of such a case.[1]

§ 1842. **Right of Husband to Use Wife's Leasehold Estate.** — Another exception seems to be where the wife's property is a leasehold estate or a term for years held in trust for her. In such a case it has been said that the husband may assign the term for a valuable consideration and thereby dispose of it without the wife having any claim against his assignee; and if he does not dispose if it, there is some doubt whether the wife has any equity against him.[2] It is extremely difficult to perceive the exact grounds upon which this exception rests. It constitutes a seeming anomaly resting more upon authority than principle; and as such it has been several times doubted,[3] and perhaps ought now to be deemed overruled.[4] But however questionable it may be in its origin, and however it may seem to be at variance with the received doctrine in other analogous cases of assignment by the husband, it has had no inconsiderable weight of judicial authority in its favor. It has even been carried to this extent, that the husband may by his assignment of the reversionary interest in a term of years held in trust for the wife bind that interest so as to deprive her of her equity therein, although he could not in the same way dispose of her reversionary interest in any choses in action or personal chattels.[5] The sole ground of the doctrine seems to

[1] Hanson *v.* Keating, The Jurist, 1844, Vol. 8, p. 949.

[2] Turner's Case, 1 Vern. 7; Pitt *v.* Hunt, 1 Vern. 18; s. c. 1 Eq. Abr. 58, pl. 2, 3; Jewson *v.* Moulson, 2 Atk. 420, 421; Co. Litt. 351 *a*; Butler's note (1); Newland on Contr. ch. 7, pp. 124 to 127; Atherley on Marr. Sett. ch. 23, pp. 345 to 348; Bosvil *v.* Brander, 1 P. Will. 459, and Mr. Cox's note (1); Tudor *v.* Samyne, 2 Vern. 270; Packer *v.* Wyndham, Prec. in Ch. 418, 419; Walter *v.* Saunders, 1 Eq. Abr. 58; Bates *v.* Dandy, 2 Atk. 208; s. c. 3 Russ. R. 72, note; Id. 76; ante, § 1833.

[3] See Mr. Raithby's note to Turner's case, 1 Vern. 7; Jewson *v.* Moulson, 2 Atk. R. 417, 420; Sturgis *v.* Champneys, 5 Mylne & Cr. 97, 106, 107; Hanson *v.* Keating, The Jurist, 1844, Vol. 8, p. 949; Macaulay *v.* Philips, 4 Ves. 19; Franco *v.* Franco, 4 Ves. 528; Clancy on Married Women, B. 5, ch. 4, pp. 507, 508; Mr. Cox's note (1) to Bosvil *v.* Brander, 1 P. Will. 459; Doyly *v.* Perfull, 1 Ch. Cas. 225; Atherley on Marr. Set. ch. 23, pp. 345 to 348; 1 Roper on Husb. and Wife, ch. 5, § 2, p. 177, and note; Id. 178; post, § 1413; Sturgis *v.* Champneys, 5 Mylne & Cr. 97 to 103.

[4] Sturgis *v.* Champneys, 5 Mylne & Craig, 97, 104 to 107; Hanson *v.* Keating, The Jurist, 1844, Vol. 8, p. 949; Id. 466; ante, § 1840. See In re Carr, L. R. 12 Eq. 609.

[5] Donne *v.* Hart, 2 Russ. & Mylne, 360; Honner *v.* Morton, 3 Russ. R. 65; Purdew *v.* Jackson, 1 Russ. R. 1; post, § 1845. But see Sturgis *v.* Champneys, 5 Mylne & Cr. 97; Hanson *v.* Keating, The Jurist, 1844, Vol. 8, p. 949.

have been that the husband may dispose of the wife's contingent, reversionary, legal interest in a term for years, and that there is no difference in equity between the legal interests in and the trusts of a term for years.[1] Perhaps these latter cases would now be deemed to be subject to the same doubts and difficulties which affected and overcame the authority of that which has just been considered.[2]

§ 1843. **Husband's Assignees, upon His Insolvency, Liable to Provide Settlement.** — Secondly, in regard to the wife's equity to a settlement in cases where the husband has made an assignment of her choses in action or other equitable interests. It has been long settled that the assignees in bankruptcy or insolvency of the husband, and also his assignees for the payment of debts due to his creditors generally, are bound to make a settlement upon the wife out of her choses in action and equitable interest assigned to them, whether they are absolute interests or life interests only in her, in the same way, and to the same extent, and under the same circumstances, as he would be bound to make one; for it is a general principle that such assignees take the property subject to all the equities which affect the bankrupt or insolvent or general assignor.[3] Such assignees also take the property subject to the wife's right of survivorship in case the husband dies before the assignees have reduced her choses in action and equitable interests into possession.[4]

§ 1844. **Same.** — The principal controversy which has arisen is whether a special assignee or purchaser from the husband, for a

[1] Donne *v.* Hart, 2 Russ. & Mylne, R. 361, 364.

[2] Sturgis *v.* Champneys, 5 Mylne & Cr. 97; Hanson *v.* Keating, The Jurist, 1844, Vol. 8, p. 949.

[3] 1 Roper on Husb. and Wife, ch. 7, § 1, p. 268; Clancy on Married Women, B. 5, ch. 3, pp. 476 to 493; Id. ch. 4, p. 494; 1 Madd. Ch. Pr. 385, 386; Jewson *v.* Moulson, 2 Atk. 420; Jacobson *v.* Williams, 1 P. Will. 382; Bosvil *v.* Brander, 1 P. Will. 458, and Mr. Cox's note; Newland on Contr. ch. 7, pp. 122 to 129; Burdon *v.* Dean, 2 Ves. Jr. 607, 608; Pryor *v.* Hill, 4 Bro. Ch. R. 139, and Mr. Belt's notes; Oswell *v.* Probert, 2 Ves. Jr. 680; Mitford *v.* Mitford, 9 Ves. 87, 97, 100; Elliot *v.* Cordell, 5 Madd. R. 149; Mumford *v.* Murray, 1 Paige, R. 620; Smith *v.* Kane, 2 Paige, R. 303; Van Epps *v.* Van Deusen, 4 Paige, R. 64; Eedes *v.* Eedes, 11 Simons, R. 569, 570; Sturgis *v.* Champneys, 5 Mylne & Craig, 97, 103, 104; Thomas *v.* Sheppard, 2 McCord Eq. 36, 16 Am. Dec. 632; Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Van Epps *v.* Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516.

[4] Pierce *v.* Thornely, 2 Sim. R. 167; Honner *v.* Morton, 3 Russ. R. 64, 68, 69; Gayer *v.* Wilkinson, 1 Bro. Ch. R. 49, and note; Clancy on Married Women, B. 1, ch. 8, pp. 124 to 132; Mitford *v.* Mitford, 9 Ves. 87, 97, 99; Van Epps *v.* Van Deusen, 4 Paige, R. 64, 72; Purdew *v.* Jackson, 1 Russ. R. 64.

valuable consideration, of her choses in action, or equitable interests, is bound to make such a settlement. It is now firmly established that he is bound to make such a settlement;[1] but (it has been said) that, subject to such provision, he will be entitled to the choses in action, and equitable interests so assigned, discharged from the title of the wife by survivorship, if she should survive him.[2] Here again a distinction has been insisted upon between such a special assignee, or purchaser, and a general assignee in bankruptcy or otherwise; for in the latter case the wife is admitted to have an equity for a settlement out of her equitable interest for her life, whereas in the former case it has been said

[1] 1 Roper on Husb. and Wife, ch. 7, § 1, pp. 268 to 273; Ibid. ch. 6, § 2, pp. 227 to 246; 2 Roper on Husb. and Wife, Addenda, No. 3, pp. 509 to 522; Clancy on Married Women, B. 1, ch. 8, pp. 110 to 136; Ibid. B. 5, ch. 4, pp. 494 to 510; Mitford *v.* Mitford, 9 Ves. 87, 97, 99; Elliot *v.* Cordell, 5 Madd. R. 149; 1 Madd. Ch. Pr. 386; Macaulay *v.* Philips, 4 Ves. 19; Like *v.* Beresford, 3 Ves. 506; Pryor *v.* Hill, 4 Bro. Ch. R. 139; Purdew *v.* Jackson, 1 Russ. R. 1, 70; Honner *v.* Morton, 3 Russ. R. 64, 68; Pope *v.* Crashaw, 4 Bro. Ch. R. 326; Kenny *v.* Udall, 5 John. Ch. R. 473 to 479; s. c. 3 Cowen, R. 590; Harwood *v.* Fisher, 1 Younge & Coll. 112; Johnson *v.* Johnson, 1 Jac. & Walk. 472, 479. In this respect the case of general assignees differs from that of a special assignee for a valuable consideration, if the doctrine be correct that the latter will take against the right of the wife by survivorship. In the former case the assignees take subject to the wife's right by survivorship. Mitford *v.* Mitford, 9 Ves. 87, 97, 99, 100. The ground of the distinction, if it exists (which is doubtful), is not perhaps at first sight very obvious. But in the case of a special assignee it is said that equity considers the assignment of the husband as amounting to an agreement that he will reduce the property into possession. It likewise considers that which a party agrees to do as actually done. And therefore when the husband has the present power of reducing the property into possession, his assignment of the choses in action of the wife will be regarded as a reduction of it into possession. Honner *v.* Morton, 3 Russ. R. 68, 69. But why may not the same principle be applied to the case of a general assignment by the husband for the benefit of his creditors? And as to the rule in equity, it is a rule applicable properly to the husband himself and to his rights. Why should it affect the right of survivorship of the wife when there is no actual reduction into possession? See the Lord Chancellor's observations in Druce *v.* Denison, 6 Ves. 394; 2 Roper on Husb. and Wife, Addenda, No. 3, pp. 509 to 522. Sir Thomas Plumer, in his able judgment in Purdew *v.* Jackson (1 Russ. R. 63, 64), said: "An opinion has certainly prevailed that a distinction subsists between an assignment by operation of law and an assignment for a valuable consideration to an individual by contract; that the former is no bar to the right of the surviving wife, but that the latter is. And I think both kinds of assignment ought to have the same effect, and that it would be a manifest inconsistency to decide the contrary." See also Ibid. p. 53, and Pierce *v.* Thornely, 2 Sim. R. 167. But in the cases of Elliot *v.* Cordell, 5 Madd. R. 149, and Stanton *v.* Hall, 2 Russ. & Mylne, 355, cited ante, § 1839, the distinction is insisted on.

[2] Ibid.

she has no such equity for a settlement, as indeed ordinarily she would not have against her husband.[1] But there is great reason to doubt the soundness of this distinction, and the doctrine seems now firmly established by the recent authorities, that no assignment made by the husband of the wife's choses in action for a valuable consideration, which choses in action are capable of being immediately reduced into possession, will convey any right to the assignee or purchaser against the wife if she survives her husband, and neither her husband nor the assignee or purchaser has reduced them into possession during the husband's lifetime;[2] and that in cases of choses in action capable of being so reduced, the property belongs absolutely to the wife by right of survivorship, in the same manner as it does in case of reversionary choses in action.[3]

§ 1845. **Same.** — In respect to reversionary choses in action,[4] and other reversionary equitable interests of the wife, in personal chattels (although not, as we have seen, to her immediate and present equitable interests[5] in chattels real), the doctrine has been for a long time well settled, and in a manner most favorable to her rights.[6] For no assignment by the husband, even with

[1] Clancy on Married Women, B. 5, ch. 4, p. 494; Elliot *v.* Cordell, 5 Madd. R. 149; ante, § 1408; Stanton *v.* Hall, 2 Russ. & Mylne, 355; Purdew *v.* Jackson, 1 Russ. 1; Ibid. 53. See also Major *v.* Lansley, 2 Russ. & Mylne, 359; post, § 1414, note (1).

[2] Note, supra.

[3] Elwyn *v.* Williams, the English Jurist, April 24, 1843, pp. 337, 338; Ellison *v.* Elwyn, 13 Simons, R. 309; Honner *v.* Morton, 3 Russell, R. 65; Purdew *v.* Jackson, 1 Russ. R. 70. In this last case Sir Thomas Plumer said: "After this repeated consideration of the subject I still continue of opinion that all assignments made by the husband of the wife's outstanding personal chattels, which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy or under the insolvent acts, or to trustees for the payment of debts, or to a purchaser for a valuable consideration, pass only the interest which the husband has subject to the wife's legal right by survivorship;" and this doctrine was fully recognized and affirmed in Ellison *v.* Elwyn, 13 Simons, 309, 317.

[4] It has been decided that a wife's equity to a settlement does not extend to a reversionary interest in stock. Osborn *v.* Morgan, 8 Eng. L. & E. 192; s. c. 16 Jur. 52.

[5] Ante, § 1842.

[6] It has been recently held that the husband may assign his wife's contingent reversionary interest in a term of years held in trust for her, and oust her of her equity. On that occasion the Master of the Rolls (Sir John Leach) said: "It is clear that the wife's contingent legal interest in a term may be sold by her husband; and there is no difference in equity between the legal interest in, and the trust of, a term." Donne *v.* Hart, 2 Russ. & Mylne, R. 360. See Major *v.* Lansley, 2 Russ. & Mylne, 355; Purdew *v.* Jackson, 1 Russ. R. 1; Ibid. 50.

her consent, and joining in the assignment, will exclude her right of survivorship in such cases. The assignment is not, and cannot from the nature of the thing amount to a reduction into possession of such reversionary interests; and her consent, during the coverture, to the assignment, is not an act obligatory upon her.[1] Nay, in such a case the wife's consent in court to the transfer of such reversionary interest to or by her husband will not be allowed. That consent is not acted upon by the court, except where she is to part with her equity to a settlement, or with her own present

[1] Hornsby *v.* Lee, 2 Madd. R. 16; Purdew *v.* Jackson, 1 Russ. 1, 62, 67, 69, 70; Morley *v.* Wright, 11 Ves. 17; Elliot *v.* Cordell, 5 Madd. R. 149; Honner *v.* Morton, 3 Russ. R. 65, 88; Stamper *v.* Barker, 5 Madd. R. 157; Mitford *v.* Mitford, 9 Ves. 87; Stanton *v.* Hall, 2 Russ. & Mylne, R. 175; Stiffe *v.* Everitt, 1 Mylne & Craig, 37, 41. This last case first came on before Sir C. C. Pepys when Master of the Rolls. It was a case where a testator had given his residuary estate to trustees for the separate use of his daughter, then unmarried, for life without power of anticipation. She afterwards married, and joined with her husband in a petition to have the fund transferred to him absolutely. The court refused it. The Master of the Rolls then said: "That the doubt he felt was one which the authorities cited left quite untouched, namely, how far, where an annuity or life-interest in a fund was given to a married woman and not settled to her separate use, the husband, with her concurrence, was capable of effectually disposing of her entire life-estate, seeing that she might outlive her husband, and then as to such part of it as would be enjoyed by her after the coverture determined her interest would be reversionary only. He should be glad to be furnished with any cases which would relieve him from this difficulty; but unless some authority for it was produced, he must decline to make the order." Afterwards, when he became Lord Chancellor, he reheard the cause, and said: "When this petition came on to be heard it was assumed that the only question was the authority of some late decisions with respect to property left to the separate use of a woman not married at the time. But I suggested another difficulty, namely, with respect to the power of the husband to dispose of his wife's life-interest when not settled to her separate use; and the petition stood over for the purpose of enabling the petitioners' counsel to produce cases in favor of such right. I have since been informed that no such cases are to be found. It is, I believe, certain that there are none; and the question is whether, consistently with the doctrine established in Purdew *v.* Jackson (1 Russ. 1) and Honner *v.* Morton (3 Russ. 65), any such power can exist. This very point is just alluded to in a note to Purdew *v.* Jackson (1 Russ. 71, note), but there is no decision upon it. I do not see how, consistently with the cases of Purdew *v.* Jackson and Honner *v.* Morton, the husband can make a title to such of the dividends of the fund as may accrue after his own death and during the life of his wife surviving him." The case of Major *v.* Lansley (2 Russ. & Mylne, 359) may seem at first view to contradict or to qualify the generality of the doctrine stated in the text. But there were several circumstances in that case materially distinguishing it from the cases referred to in the text. One circumstance was that in that case the annuity (which was assigned by the husband and wife), although a reversionary interest, was devised to the separate use of the wife; and of course she had the same complete

and immediate separate property; and is never acted on for the purpose of parting with her reversionary property or with her right of survivorship.[1] If the assignment could be deemed on the part of the husband to be an agreement to reduce such reversionary interest into possession, yet, being incapable of being performed, it could not be treated upon any principle of equity as if it had been performed.[2] It is this supposed ability of the husband to reduce it into possession which constitutes the sole ground (if indeed that is sufficient) of giving effect to his assignment of an immediate and present equitable interest of the wife against her right of survivorship in favor of a purchaser for a valuable consideration.[3]

power to dispose of it as she had of any other equitable property vested in her for her separate use; and she joined in the assignment of her husband. Another was that there were no trustees interposed, and the legal interest of the annuity therefore devolved upon her husband for the joint lives of himself and the wife, and she had only an equitable interest therein, and the assignment could operate upon that equitable interest. Another was that the reversionary interest fell into possession before the death of the husband, and he had by the assignment covenanted that he and his wife would levy a fine of the annuity; which however was not done at the time of his death. The court thought that under these circumstances the legal estate in the annuity coming to the wife by the death of the husband did not defeat the title of the assignee to the equitable interest therein under the assignment as a bona fide purchase for a valuable consideration.

[1] Richards *v.* Chambers, 10 Ves. 580, 686; Pickard *v.* Roberts, 3 Madd. R. 386; Macaulay *v.* Philips, 4 Ves. 18; 1 Roper on Husb. and Wife, ch. 6, § 2, pp. 246 to 248; 2 Roper on Husb. and Wife, ch. 19, § 2, p. 184; Id. ch. 20, § 2, p. 222; Woollands *v.* Crowcher, 12 Ves. 174, 177; Sturgis *v.* Corp, 13 Ves. 191, 192; Honner *v.* Morton, 3 Russ. R. 64, 86, 87; Major *v.* Lansley, 2 Russ. & Mylne, 359. See also Clancy on Married Women, B. 5, ch. 8, pp. 344 to 346.

[2] This was until lately a matter of controversy which was acutely and severely debated in the profession. But it is put finally at rest by the decisions in Purdew *v.* Jackson, 1 Russ. R. 1, and Honner *v.* Morton, 3 Russ. R. 65.

[3] In Honner *v.* Morton (3 Russ. 75) Lord Chancellor Lyndhurst said: "This fund was a chose in action of the wife; it was her reversionary chose in action. Whether the husband has the power of assigning his wife's reversionary interest in a chose in action is a question which has been repeatedly agitated, and has excited considerable interest both at law and in equity. At law the choses in action of the wife belong to the husband if he reduces them into possession; if he does not reduce them into possession, and dies before his wife, they survive to her. When the husband assigns the chose in action of his wife, one would suppose on the first impression that the assignee would not be in a better situation than the assignor, and that he too must take some steps to reduce the subject into possession in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession. It likewise

§ 1846. Wife Is Entitled to Settlement Out of Equitable Interests against Husband. — Thirdly, the equity of a wife to a settlement will not only be enforced in regard to her choses in action and equitable interests under the circumstances above mentioned against the husband and his assignees, where he or they are plaintiffs seeking aid and relief in equity, but it will also be enforced where she or her trustee brings a suit in equity for the purpose of asserting it.[1] This was formerly matter of no inconsiderable doubt, as it was (not unnaturally) supposed that the jurisdiction rested solely upon the ground that parties seeking relief in equity should do equity; and if they were not seeking any relief, then that the court remained passive. But the doctrine is now firmly established that whenever the wife is entitled to this equity for a settlement out of her equitable interests against her husband or his assignees, she may assert it in a suit, as plaintiff, by bringing a bill in the name of her next friend.[2] And certainly there is much good sense in disallowing any distinction founded upon the mere consideration who is plaintiff on the record; for her equity is precisely the same whether she is plaintiff or whether she is defendant. If it is a substantial right, it ought to be enforced in her favor whenever it is withheld from her.[3]

§ 1847. Same. — We have seen that when the husband comes into a Court of Equity for relief as to any property which he claims in her right, jure mariti, he will be obliged to submit to the terms of the court, and make a settlement or provision for

considers what a party agrees to do as actually done; and therefore where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. On the other hand I should also infer that where the husband has not the power of reducing the chose in action into possession, his assignment does not transfer the property till by subsequent events he comes into the situation of being able to reduce the property into possession; and then his previous assignment will operate on his actual situation, and the property will be transferred.

[1] Sturgis *v.* Champneys, 5 Mylne & Craig, 99 to 107; Hanson *v.* Keating, The Jurist, 1844, Vol. 8, p. 949; Gilchrist *v.* Cator, 1 De Gex & S. R. 188.

[2] Bosvil *v.* Brander, 1 P. Will. 458, and Mr. Cox's note (1); Clancy on Married Women, B. 5, ch. 2, pp. 471 to 475; 1 Roper on Husb. and Wife, ch. 7, § 1, pp. 260 to 263; Elibank *v.* Montelieu, 5 Ves. 737; Ellis *v.* Ellis, 1 Viner, Suppt. 475; Gardner *v.* Walker, 1 Str. 503; Harrison *v.* Buckle, 1 Str. R. 238; Roberts *v.* Roberts, 2 Cox, R. 422; Tanfield *v.* Davenport, Tothill, R. 119; Carr *v.* Taylor, 10 Ves. 574; Van Duzer *v.* Van Duzer, 6 Paige, R. 366; Sturgis *v.* Champneys, 5 Mylne & Craig, 97, 103, 104.

[3] See Gardner *v.* Walker, 1 Str. R. 503, 504; Van Duzer *v.* Van Duzer, 6 Paige, R. 366.

her; otherwise the court will not render him any assistance. If he does not choose to make any such settlement or provision, the court will not ordinarily take from him the income and interest of his wife's fortune so long as he is willing to live with her and maintain her, and there is no reason for their living apart. The most the court will do under such circumstances is to secure the fund, allowing him, whenever it is deemed proper under its order, to receive the income and interest.[1] The effect of this proceeding is, that the wife will have the chance of taking it by survivorship.[2] But where the husband refuses her a maintenance, or deserts her, the rule, as we shall presently see, is different.[3] The like doctrine, subject to the like exceptions and limitations, is applied to assignees in bankruptcy, and to other general assignees, claiming title under the husband.[4] We have already seen that a voluntary post-nuptial settlement, made by a husband upon his wife in consideration of personal property having come to her as distributee or legatee, will be upheld in equity, even against creditors, if it be a reasonable settlement, and such as a Court of Equity would have enforced upon a bill brought for the purpose in favor of the wife.[5]

§ 1848. **The Wife Is Not Entitled to a Settlement if She Is Already Provided For.** — Let us pass in the next place to the consideration of the circumstances under which this equity to a settlement may be waived or lost. And here it need scarcely be said that if the wife is already amply provided for under a prior settlement, the very motive and ground for the interference of a Court of Equity in her favor is removed.[6] But she will not ordinarily be barred by an inadequate settlement, unless it be by an express contract made before marriage.[7]

§ 1849. **The Wife's Equity for a Settlement Is Generally Personal to Her.** — The wife's equity for a settlement is generally

[1] Sleech *v.* Thorington, 2 Ves. 562; Watkyns *v.* Watkyns, 2 Atk. 96, 98; Bond *v.* Simmons, 3 Atk. 20; Packer *v.* Wyndham, Prec. Ch. 412; Macaulay *v.* Philips, 4 Ves. 15; Murray *v.* Elibank, 10 Ves. 90; Johnson *v.* Johnson, 1 Jac. & Walk. 472; 1 Roper on Husband and Wife, ch. 7, § 2, pp. 276, 277.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*k*); 1 Roper on Husband and Wife, ch. 7. § 2, pp. 277, 278.

[3] Post, §§ 1854 to 1856.

[4] 1 Roper on Husband and Wife, ch. 7, § 2, p. 277. See Corsbie *v.* Free, Craig & Phillips, 64.

[5] Wickes *v.* Clarke, 8 Paige, R. 161.

[6] Clancy on Married Women, B. 5, ch. 1, p. 441; Martin *v.* Martin, 1 Comst. 473; Giacometti *v.* Prodgers, L. R. 14 Eq. 253 s. c. 8 Ch. 338.

[7] Clancy on Married Women, B. 5, ch. 1, p. 441.

understood to be strictly personal to her; and it does not extend to her issue unless it has been asserted and perfected by her in her lifetime. If therefore she should die entitled to any equitable interest and leave a husband, and her children are unprovided for by any settlement, still her husband will be enabled to file a bill to recover the same without making any provision for the children.[1] In truth the equity of the children is not an equity to which in their own right they are entitled. It cannot therefore be asserted against the wishes of the wife or in opposition to her rights. The court in making a settlement of the wife's property always attends to the interests of the children; because it is supposed that in so doing it is carrying into effect her own desires to provide for her offspring. But if she dissents, the court withholds all rights from the children.[2] But the right of the children

[1] 1 Roper on Husband and Wife, ch. 7, § 1, p. 263; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*k*); Clancy on Married Women, B. 5, ch. 7, pp. 532 to 536; Scriven *v.* Tapley, Ambler, R. 509; s. c. 2 Eden, R. 337; Macaulay *v.* Philips, 4 Ves. 18; Lloyd *v.* Williams, 1 Madd. R. 467; Johnson *v.* Johnson, 1 Jac. & Walk. 479; Harper *v.* Ravenhill, 1 Tamlyn, R. 144; Murray *v.* Elibank, 10 Ves. 84, 88, 89; s. c. 13 Ves. 1, 8.

[2] Hodgens *v.* Hodgens, 11 Bligh, R. 104 to 106. On this occasion Lord Cottenham said: "The equity of the children is not an equity to which they are in their own right entitled. In making the settlement of the wife's property the interests of the children are always attended to, because it must be supposed to be the object, and it is the duty of the court, in carrying that object into effect, to provide for those whom the mother of the children would be anxious to provide for; but as between the mother and the children I know of no authority for saying that the court has jurisdiction to take from the mother that which the court has given to the mother as against the right of the husband, for the purpose of creating a benefit to the children. That the children have no equity of their own, that it is only the equity that they obtain through the means of the consent of the mother, is sufficiently clear when I call to your Lordships' recollection the fact that if the mother, having attained the age of twenty-one, comes into court and consents that the property shall be paid over to the husband, the court will permit it to be paid over without reference to the interests of the children. But in no instance are the children permitted to assert an independent equity of their own, and in no instance has that right ever been permitted against the mother. It is against the father that the court exercises jurisdiction to exclude him from those rights which the law would otherwise give him; and then the court deals with those rights as between the mother whose property it is, and as between the children of the marriage, in such a way as may be thought for the interests of the family. But the question is, whether the children have any right of their own against their mother to deprive her of that income which is given to her by a settlement, though not actually executed, yet in the hands of the master at the time when the party thought proper to submit to the jurisdiction of the court." Helms *v.* Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Hill *v.* Hill, 3 Strobh. Eq. (s. c.) 94.

to the benefit of a settlement attaches upon the wife's filing a bill for that purpose; and if she should die pending the proceedings without waiving the right to a settlement, the children may by a supplemental bill enforce their claim.[1]

§ 1850. **Wife May Waive Right to Settlement and Direct that Property Be Turned over to Husband.** — It is competent however for the wife at any time pending the proceedings, and before a settlement under the decree is completed, or at least before proposals are made under that decree by her consent given in open court or under a commission, to waive a settlement, and to agree that the equitable fund shall be wholly and absolutely paid over to her husband.[2] In such an event both she and her children will be deprived of all right whatsoever in and over the fund.[3] But a female ward of the Court of Chancery who has been married without its authority and in contempt of it will not be allowed by the court to dispense with a settlement out of her property.[4] On

[1] Rowe *v.* Jackson, 2 Dick. R. 604; Murray *v.* Elibank, 13 Ves. 1, 89; Steinmitz *v.* Halthin, 1 Glyn. & Jam. 64; Clancy on Married Women, B. 5, ch. 6, pp. 527 to 529; Id. ch. 8, pp. 537 to 544; Groves *v.* Perkins, 6 Sim. R. 576, 584; Groves *v.* Clarke, 1 Keen, R. 138, 139; In re Walker, 1 Lloyd & Goold, R. 324, 325; De La Garde *v.* Lemprière, 6 Beav. R. 344.

As to the form of the settlement see Spirett *v.* Willows, L. R. 4 Ch. 407; Croxton *v.* May, L. R. 9 Eq. 404; Walsh *v.* Wason, L. R. 8 Ch. 482; In re Suggitt, L. R. 3 Ch. 215; James *v.* Couchman, 33 Week. R. 452; Mercier *v.* West Kansas City Land Co., 72 Mo. 473; Groverman *v.* Diffenderffer, 11 Gill and J. (Md.) 15.

[2] There are many cases in this point. But it was directly recognized by Lord Chancellor Cottenham, in Hodgens *v.* Hodgens, 11 Bligh, R. 103 to 105, in the House of Lords. As to the mode of her examination when she does not appear in open court, but it is under a commission, see Minet *v.* Hyde, 2 Bro. Ch. R. 663, and Mr. Belt's note; Bourdillon *v.* Adair, 3 Bro. Ch. R. 237; Campbell *v.* French, 3 Ves. 321; Clancy on Married Women, B. 5, ch. 8, pp. 539 to 542; In re Walker, 1 Lloyd & Goold, R. 324, 325; De La Garde *v.* Lemprière, 6 Beav. R. 344. She may withdraw her consent before the transfer is completed. Penfold *v.* Mould, L. R. 4 Eq. 562.

[3] Murray *v.* Elibank, 10 Ves. 88, 90; s. c. 13 Ves. 1, 5, 6, 8; Macaulay *v.* Philips, 4 Ves. 18, 19; Fenner *v.* Taylor, 1 Sim. R. 169; s. c. 2 Russ. & Mylne, 190; Lloyd *v.* Williams, 1 Madd. R. 450, 466; 1 Roper on Husband and Wife, ch. 7, § 1, pp. 264 to 266; Hodgens *v.* Hodgens, 11 Bligh, R. 103 to 105. But see Clancy on Married Women, B. 5, ch. 6, pp. 524 to 527; Id. 531; where the author is of opinion that the wife, after proposals for a settlement made by the husband under a decretal order, cannot waive a settlement so as to take away the rights of her children, though she may before. See also Ex parte Gardner, 2 Ves. 672, and Mr. Belt's note and his Suppl. p. 438.

[4] 2 Roper on Husband and Wife, ch. 7, § 1, pp. 267, 268; Clancy on Married Women, B. 5, ch. 6, p. 525; Id. ch. 11, pp. 579, 580. Upon this point Lord Cottenham, in Hodgens *v.* Hodgens, 11 Bligh, R. 103, said: "In cases either where the husband has been guilty of contempt in

the contrary the court will insist upon such a settlement's being made by the husband, notwithstanding her consent to the contrary. And the court will often by way of punishment in gross cases do what it is not accustomed to do on common occasions, require a settlement of the whole of the wife's property to be made on her and her children.[1]

§ 1851. **Same.** — The equity of the wife to a settlement may not only be waived by her, but it may also be lost or suspended by her own misconduct.[2] Thus if the wife should be living in adultery apart from her husband, a Court of Equity will not interfere upon her own application to direct a settlement out of her choses in action or other equitable interests; for by such misconduct she has rendered herself unworthy of the protection and favor of the court.[3] On the other hand a Court of Equity will not in such a case upon the application of the husband decree such equitable property of the wife to be paid over to him; for he is at no charge for her maintenance, and it is only in respect to his duty to maintain her that the law gives him her fortune.[4]

§ 1852. **The Wife May Waive Her Right by Her Own Misconduct.** — Where indeed the wife has entitled herself to a settlement and it has been decreed by a Court of Equity, there the court will

marrying a ward or where he has not been guilty of such contempt, if a Court of Equity has jurisdiction over the property of the ward, it undoubtedly in making settlements constantly and almost uniformly, I may say, provides for the interests of the children. The case we have now to consider is, where the husband has been guilty of a gross contempt, and where the settlement to be made and the objects to be provided for by that settlement are to be considered with reference to the situation in which he, the husband, stands as respects himself and the property of the ward, with regard to whom he has been guilty of an offence by marrying without the consent of the court." Jewson *v.* Moulson, 2 Atk. 417; Pearce *v.* Crutchfield, 16 Ves. Jr. 48; Halsey *v.* Halsey, 9 Ves. Jr. 471.

[1] Like *v.* Beresford, 3 Ves. 506; Stackpole *v.* Beaumont, 3 Ves. 89, 98; Ball *v.* Coutts, 1 Ves. & Beam. 303; Clancy on Married Women, B. 5, ch. 1, pp. 450 to 454.

[2] See In re Lush, L. R. 4 Ch. 591; Sharpe *v.* Foy, Ib. 35, fraud on creditors; Schindel *v.* Schindel, 12 Md. 294.

[3] 1 Roper on Husb. and Wife, ch. 7, § 1, p. 275; Carr *v.* Estabrooke, 4 Ves. 146; Ball *v.* Montgomery, 2 Ves. Jr. 197, 199; Sidney *v.* Sidney, 3 P. Will. 269. But if the wife be a ward of the Court of Chancery and married without its consent, there, although she is living in adultery, the court will insist on a settlement for a contempt of its authority. Ball *v.* Coutts, 1 Ves. & Beam. 302, 304; 1 Roper on Husband and Wife, ch. 7, § 2, p. 276; Clancy on Married Women, B. 5, ch. 11, pp. 586 to 588. And in case of a jointure, or articles for a jointure before marriage, the right to the settlement is not forfeited by the adultery of the wife. Sidney *v.* Sidney, 3 P. Will. 269.

[4] Ibid.

not withhold or vary her right in consequence of any misconduct on her part, even although the decree has not been carried into execution. Nor will the court in such a case, at the instance of the husband who has misconducted himself, entertain a suit for a settlement against the wife or her children, and thereby relieve him from his ordinary duty of maintaining them.[1]

§ 1853. **Same.** — But we must be careful to distinguish between an application made for a settlement on the wife which is addressed to the equity of the court, and which is administered by it sua sponte upon the merits of the parties, and is not founded in any antecedent vested rights, and other applications where the parties stand upon their own positive vested rights under a settlement, or under a valid contract for a settlement made before marriage. In the latter cases Courts of Equity cannot refuse to protect or support those vested rights on account of any misconduct in the wife; and it will be no answer to a suit brought by her for a settlement in such cases that she has been guilty of adultery.[2]

§ 1854. **Alimony Allowed Wife in What Cases.** — Let us in the next place consider under what circumstances Courts of Equity will allow alimony to a married woman. The wife's equity already mentioned, as it is ordinarily administered against her husband or against his particular assignee for a valuable consideration, is by decreeing a settlement which secures to her a provision for her maintenance commencing from the death of her husband.[3] When the same equity is administered upon a general assignment of his property in bankruptcy or otherwise, the settlement secures a present and immediate provision for the maintenance of the wife, because the general assignment of his property renders him incapable of giving her a suitable support.[4] In each case the equity is administered out of the equitable funds which are brought under the control of the court, and are subject to its order. The object of the court in each case is to secure to her a maintenance out of such equitable funds whenever she stands in need of it.

[1] Hodgens *v.* Hodgens, 11 Bligh, R. 62.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*k*); Clancy on Married Women, B. 5, ch. 11, p. 588; Sidney *v.* Sidney, 3 P. Will. 269, 276, and Mr. Cox's note (2); In re Walker, 1 Lloyd & Goold, R. 326, 327. But it seems that a covenant before marriage, that in case of any separation taking place between the husband and wife, the husband shall make a certain provision for his wife, is void; as it may be an inducement to the wife to be guilty of the worst conduct. Cocksedge *v.* Cocksedge, 14 Sim. 244.

[3] Clancy on Married Women, B. 5, ch. 9.

[4] Ibid.

§ 1855. **Same.** — So if it is apparent from the state of the case that the husband must remain in future without funds to maintain his wife, and there is an equitable fund belonging to her within the reach of a Court of Equity, it will decree the income of the whole fund to be applied primarily to the maintenance of the wife during her lifetime, and after her death the principal to be divided among her children. Thus if the husband has become insolvent and has taken advantage of an Insolvent Act, which discharges his person but not his future effects, there a Court of Equity will secure the whole fund in the manner above mentioned, for the benefit of the wife and children; for it is apparent that there is no certainty that he can ever have any means of supporting his wife and children. In this respect the case differs from that of a discharge under the Bankrupt Laws; for in the latter case the future effects of the bankrupt are not liable to his creditors. It is upon this difference that Courts of Equity will not give the whole fund to the wife and children in cases of bankruptcy as they will in cases of insolvency.[1]

§ 1856. **Same.** — But it is obvious that cases may arise calling for relief in favor of the wife under very different circumstances from those above stated. Thus a woman may be totally abandoned and deserted by her husband, or she may be driven from his home and compelled by his ill-treatment and cruelty to seek an asylum elsewhere. The question therefore may arise, whether under such circumstances Courts of Equity have a general authority to decree alimony to the wife when she is left without any other adequate means of maintenance. To this question, propounded in its general form, it can scarcely be said that according to the result of the authorities an answer in the affirmative can be given in positive terms. Although it is clearly the duty of the husband to provide a suitable maintenance for his wife if it is within his power, yet according to the course of the English authorities it seems not to be an obligation or duty of which Courts of Equity will decree the specific performance by directing in such

[1] See Brett *v.* Greenwell, 3 Younge & Coll. 230 to 232; Beresford *v.* Hobson, 1 Madd. R. 362. In Foden *v.* Finney, 4 Russ. R. 428, the whole fund in the court being less than £200 (which is the lowest sum for which the court gives the wife the benefit of her equity), the court ordered the whole to be paid over to the husband, notwithstanding he had deserted her, and left her without support for ten years. This case seems difficult to be maintained on principle. It was disapproved in In re Cutler, 15 Jur. 911; s. c. 6 Eng. L. & Eq. 97. But that was done in Gardner *v.* Marshall, 14 Sim. 575, although the husband was a bankrupt.

a case a separate maintenance.[1] The proper remedy is by an action in a Court of Common Law to be brought against the husband by any person who shall under such circumstances supply the wife with necessaries according to her rank and condition; for by compelling the wife thus to leave him, the husband sends her abroad with a general credit for her maintenance.[2] Or if this reliance should be precarious, the wife may make an application to the proper Ecclesiastical Court for a decree a mensa et thoro, or for a restitution of conjugal rights; and as incident thereto (but not, as it seems, as an exercise of original jurisdiction) the latter court may pronounce a decree for a suitable alimony.[3]

§ 1857. **Same.** — It has indeed been said that upon a writ of supplicavit in chancery by the wife for security of the peace against her husband the court may, as an incident to the exercise of that jurisdiction, decree a separate maintenance to her.[4] But it has been also said that there is no modern instance of any such exercise of authority.[5]

§ 1858. **Same.** — In America a broader jurisdiction in cases of alimony has been asserted in some of our Courts of Equity; and it has been held that if a husband abandons his wife and separates himself from her without any reasonable support, a Court of Equity may in all cases decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much

[1] Ball *v.* Montgomery, 2 Ves. 195, 196; Head *v.* Head, 3 Atk. 550; Legard *v.* Johnson, 3 Ves. 359 to 361; Clancy on Married Women, B. 5, ch. 9, pp. 549, 550. See also Foden *v.* Finney, 4 Russ. 428, 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*). But see Galland *v.* Galland, 38 Cal. 265.

[2] Guy *v.* Pearkes, 18 Ves. 196, 197; Harris *v.* Morris, 4 Esp. R. 41; Hodges *v.* Hodges, 1 Esp. R. 441; Bolton *v.* Prentice, 2 Str. R. 1214; Hindley *v.* Marquis of Westmeath, 6 B. & Cres. 200, 213. See Eames *v.* Sweetser, 101 Mass. 78. As to money furnished for support see Deare *v.* Soutten, L. R. 9 Eq. 151.

[3] Ball *v.* Montgomery, 2 Ves. 195; Clancy on Married Women, B. 5, ch. 9, pp. 549, 550; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n.* 2); Horton *v.* Horton, 75 Ark. 22, 86 S. W. 824; Eickhoff *v.* Eickhoff, 14 Colo. App. 127, 59 Pac. 411; Campbell *v.* Campbell, 115 Ky. 656, 74 S. W. 670, 25 Ky. L. Rep. 53; Steele *v.* Steele, 85 Mo. 224; Weideman *v.* Weideman, 57 Ohio St. 101, 48 N. E. 506; Boyd *v.* Boyd, 22 Tex. Civ. App. 200, 54 S. W. 380.

[4] Ball *v.* Montgomery, 2 Ves. 195; Duncan *v.* Duncan, 19 Ves. 394; Lambert *v.* Lambert, 2 Bro. Parl. R. 18, by Tomlins; but counsel, arguendo, p. 283. See, for the form of a supplicavit, Clancy on Married Women, B. 5, ch. 1, p. 454; Fitz. Nat. Brev. 238, 239; Gilb. Forum Roman. ch. 11, p. 202; In re Ann Walker, 1 Lloyd & Goold, R. 326. 327.

[5] 2 Roper on Husb. and Wife, ch. 22, § 4, p. 309, note; Id. § 5, pp. 317 to 320; Clancy on Married Women, B. 5, ch. 1, pp. 453 to 455; Adams *v.* Adams, 100 Mass. 365.

good sense and reason in this doctrine, that it might be wished it were generally adopted.[1]

§ 1859. **Same.** — But although Courts of Equity do not assert any general jurisdiction to decree a suitable maintenance for the wife out of her husband's property because he has deserted her or ill treated her,[2] yet on the other hand they do not abstain altogether from interference in her favor.[3] Whenever the wife has any equitable property within the reach of the jurisdiction of Courts of Equity they will lay hold of it; and in the case of the desertion or ill treatment of the wife by the husband, as well as in the case of his inability or refusal to maintain her, they will decree her a suitable maintenance out of such equitable funds.[4] The general ground on which this jurisdiction is asserted is, that the law, when it gives the property of the wife to the husband, imposes upon him the correspondent obligation of maintaining her; and that obligation will fasten itself upon such equitable property in the nature of a lien or trust, which Courts of Equity when neces-

[1] Purcell *v.* Purcell, 4 Hen. & Mumf. 597. See Patterson *v.* Patterson, 1 Halst. Ch. 389. A claim for alimony ceases with the death of the husband. Gaines *v.* Gaines, 9 B. Mon. 295.

[2] During the time of the Commonwealth in England there was a suspension of all ecclesiastical tribunals, and their powers were conferred on the Commissioners of the Great Seal, who then exercised the authority to decree alimony according to the doctrine of the ecclesiastical law. See Russell *v.* Bodvil, 1 Ch. Rep. 186; Whorewood *v.* Whorewood, 1 Ch. Cas. 250; Finch, Ch. R. 153; 1 Ch. Rep. 223. See also Clancy on Married Women, B. 6, ch. 9, p. 550; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*); Head *v.* Head, 3 Atk. 295; Legard *v.* Johnson, 3 Ves. 359, 360.

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*); Clancy on Married Women, B. 6, ch. 9, pp. 549 to 567; Head *v.* Head, 3 Atk. 295, 548.

[4] Nicholls *v.* Danvers, 2 Vern. 671, and Mr. Raithby's notes; Oxenden *v.* Oxenden, 2 Vern. 493; s. c. Prec. in Ch. 239; Williams *v.* Callow, 2 Vern. 752; Lambert *v.* Lambert, 2 Bro. Parl. R. 18, by Tomlins; Wright *v.* Morley, 11 Ves. 20, 21, 23; Bullock *v.* Menzies, 4 Ves. 798, 799; Duncan *v.* Duncan, 19 Ves. 394, 396, 397; Sleech *v.* Thorington, 2 Ves. 561; 1 Roper on Husb. and Wife, ch. 7, § 2, pp. 276 to 287; Burdon *v.* Dean, 2 Ves. Jr. 607; Atherton *v.* Nowell, 1 Cox, R. 229; Clancy on Marr. Women, B. 5, ch. 9, pp. 549 to 567; Elliott *v.* Cordell, 5 Madd. 156; Peters *v.* Grote, 7 Sim. R. 238; Gilchrist *v.* Cator, 1 DeG. & S. 188; Edwards *v.* Abrey, 2 Phill. 37. In the latter case the surplus income of the wife's separate property, after providing for her maintenance, was paid to the husband; but the court refused to apply any part of the principal fund to reimburse the husband what he had actually paid for her past maintenance. Steger *v.* Steger, 165 Ill. 579, 46 N. E. 788; Thomas *v.* Thomas, 109 Ill. App. 352; Jones *v.* Jones, 111 Ill. App. 396; Day *v.* Day, 71 Kans. 385, 80 Pac. 974; Cooper *v.* Cooper, 17 Mich. 205; Van Vleck *v.* Van Vleck, 21 App. Div. 631, 47 N. Y. Supp. 472; Kunze *v.* Kunze, 5 N. Y. Ann. Cas. 8, 53 N. Y. Supp. 938; Bauer *v.* Bauer, 42 Misc. Rep. 557, 87 N.Y. Supp. 607; Hawley *v.* Hawley, 95 App. Div. 274, 88 N. Y. Supp. 606.

sary will, in pursuance of their duty, enforce. If the equitable property has been fraudulently transferred into the possession of the husband, or of a third person for his use, the same equity will be enforced against it in their hands; and if it has passed into the possession of a bona fide purchaser without notice, the other property of the husband will be held liable as a substitute.[1]

§ 1860. **Same.** — Courts of Equity will also for the like reasons interfere and decree a suitable maintenance to the wife under the like circumstances, whenever there is a positive agreement between the parties for the purpose, or whenever there has been a decree for alimony upon proceedings in the Ecclesiastical Courts.[2] In the former case no more is done than in other cases of contract between parties to enforce their mutual obligations by a specific performance.[3] In the latter case it would seem to be but the ordinary equity of carrying into effect the decree of a competent court against the property of a party who seeks by fraud or otherwise to evade it.[4] However it has been recently held in England that no bill ought to be maintained in equity to enforce any decree

[1] Colmer *v.* Colmer, Mosel. R. 113; Watkyns *v.* Watkyns, 2 Atk. 96; Clancy on Marr. Women, B. 5, ch. 9, pp. 562 to 566.

[2] 1 Roper on Husband and Wife, ch. 7, § 2, p. 278, note (*a*); Angier *v.* Angier, Prec. Ch. 497, 498; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*).

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 6; note (*n.* 2); Angier *v.* Angier, Prec. Ch. 496; Lasbrook *v.* Tyler, 1 Ch. R. 44; Head *v.* Head, 3 Atk. 547, 548; Watkyns *v.* Watkyns, 2 Atk. 96; Oxenden *v.* Oxenden, 2 Vern. 493; s. c. Prec. Ch. 239; Fletcher *v.* Fletcher, 2 Cox, R. 99, 102, 104; Legard *v.* Johnson, 3 Ves. 359 to 361.

[4] See Mildmay *v.* Mildmay, 1 Vern. 53, 54; Whorewood *v.* Whorewood, 1 Ch. Cas. 250; Fletcher *v.* Fletcher, 2 Cox, R. 107; Colmer *v.* Colmer, Mosel. R. 121; 1 Roper on Husband and Wife, ch. 7, § 2, p. 278, note (*a*); 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n.* 2); Head *v.* Head, 3 Atk. 295; Denton *v.* Denton, 1 Johns. Ch. R. 364; Read *v.* Read, 1 Ch. Cas. 115; Ex parte Whitmore, 1 Dick. R. 143. The question arose in Stones *v.* Cooke, 7 Sim. R. 22, whether a bill is maintainable in equity by the executors of the wife against her husband for an account and arrears of alimony decreed by an Ecclesiastical Court, which remained unpaid at the time of her death. The point was left undecided by the Vice-Chancellor. It was suggested that the Ecclesiastical Court might enforce the payment in such a case; and if so, that would show that the Courts of Equity need not interfere. But this was thought by the court doubtful, and therefore the bill was retained for a hearing. But the Lord Chancellor (Lord Lyndhurst) reversed the decree and dismissed the bill. Stones *v.* Cooke, 8 Sim. R. 321, note. In Earl Digby *v.* Howard (4 Sim. R. 588) it was held by the Vice-Chancellor, where the Duchess of Norfolk was entitled to pin-money, and became lunatic and remained so until her death, and the Duke received all the rents and maintained her during her life, that the Duke was liable in equity for all the arrears, as she was incapable of consent. But this decision was reversed in the House of Lords. Howard *v.* Digby, 8 Bligh, R. 224, (N. S.); s. c. 5 Sim. R. 330.

for alimony in the Ecclesiastical Court after the death of the wife.[1] The reason is suggested to be that alimony is the proper and exclusive subject for discussion in the Ecclesiastical Court, whose province it is to determine what ought to be the amount, for how long it is to be granted, and what operates to discharge it.[2]

§ 1861. **Same.** — This equity of a wife to a maintenance out of her own equitable estate is generally confined to cases of the nature above mentioned; that is to say, where the husband abandons or deserts her, or where he refuses to maintain her, or where by reason of his insolvency he is incapable of affording a suitable maintenance for her. Unless some one of these ingredients exists, Courts of Equity will decline to interfere. If therefore the separation of the wife from her husband is voluntary on her part, and is caused by no cruelty or ill treatment; or if he is bona fide ready

See Wilson *v.* Wilson, 14 Sim. R. 405, reviewing the cases in which articles of separation have been decreed to be specifically performed.

A decree for alimony makes the wife a creditor, and she may impeach a fraudulent conveyance of her husband. Chase *v.* Chase, 105 Mass. 385; Allen *v.* Allen, 100 Mass. 373.

[1] So after the death of the *husband*. Gaines *v.* Gaines, 9 B. Mon. 295.

[2] Stones *v.* Cooke, 8 Sim. 321, note. On this occasion Lord Lyndhurst is reported to have said: "Alimony is the proper and exclusive subject for discussion in the Ecclesiastical Court. It is the province of that court to determine what ought to be its amount, for how long it is to be granted, and what operates to discharge it. There is no instance in modern times of such a bill as the present being filed. During the Rebellion bills were filed for alimony, but they were filed in consequence of the abolition of the Ecclesiastical Courts. The decisions during that period do not apply, as they proceed upon the peculiar state of circumstances then existing. Other cases where maintenance has been allowed to the wife were cited, but neither do they apply, as they were cases arising out of the fraudulent conduct of the husband, or they were cases of trust. The simple question is, whether, where the alimony has been suffered to run in arrear, a bill can be maintained by the executors of a wife against the husband. It was said that in analogy to the cases in which this court grants the writ of ne exeat regno, and on principle, the bill might be sustained; but it is impossible to look into those cases without seeing how very reluctantly the court has acted in giving relief. See Shaftoe *v.* Shaftoe and Dawson *v.* Dawson. Then it was said that the party will be without remedy, because executors cannot maintain a suit in the Ecclesiastical Court. That argument operates, I think, the other way; for executors may maintain suits in the Ecclesiastical Court, but not for arrears of alimony. It should seem therefore that the claim must cease with the death of the wife. That is probably the principle, but it does not follow that therefore this court has jurisdiction. There is no instance of such a bill as the present being filed against a husband by the executors of the wife, and I should be very averse to establish a precedent. The authorities do not warrant it. The cases in which the court has granted the writ of ne exeat regno do not warrant it, nor from the circumstance of the Ecclesiastical Court not interfering can I found any jurisdiction in this court." See also Vandergucht *v.* De Blaquiere, 8 Sim. R. 315, 322.

and willing and able to maintain her, and she without good cause chooses to remain separate from him; or if she already has a competent maintenance, — in all such cases Courts of Equity will afford her no aid whatever in accomplishing a purpose which is deemed subversive of the true policy of the matrimonial law and destructive of the best interests of society.[1] A fortiori where the wife has eloped, and is living in a state of adultery, they will withhold all countenance to such grossly immoral conduct; and they will leave the wife to bear as she may the ordinary results of her own infamous abandonment of duty.[2]

§ 1862. **Continuance of Articles of Separation Will Not Be Decreed if Parties Desire to Again Live Together.** — So earnest indeed are Courts of Equity to promote the reconciliation of parties living in a state of separation, that they will on no occasion whatever enforce articles of separation by decreeing a continuance of the separation.[3] It has indeed been often questioned whether deeds of separation between husband and wife through the intervention of trustees ought not to be held utterly void to all intents and purposes, as against the policy of the law not only in their direct provisions for the separation, but also in respect to all collateral and accessorial provisions, such as a stipulation for a separate maintenance.[4] But the authorities on this subject have

[1] Clancy on Marr. Women, B. 5, ch. 9, pp. 560, 561; Id. ch. 10, pp. 572, 573; 2 Roper on Husband and Wife, ch. 22, § 5, pp. 313 to 322; 1 Roper on Husband and Wife, ch. 7, § 2, pp. 281 to 283; Duncan *v.* Duncan, 19 Ves. 394; s. c. Cooper, Eq. R. 224; Bullock *v.* Menzies, 4 Ves. 798; Macaulay *v.* Philips, 4 Ves. 19, 20; Watkyns *v.* Watkyns, 2 Atk. 97; Hendricks *v.* Hendricks, 4 Ky. L. Rep. 724; Kefauver *v.* Kefauver, 22 Ky. L. Rep. 386, 57 S. W. 467; Roberts *v.* Hardy, 89 Mo. App. 86.

The intention as expressed in the instrument will largely govern. If either party occasionally visits the other, but they do not resume the relationship of husband and wife, this is not a sufficient rescission of the contract. Daniels *v.* Benedict, 97 Fed. 367, 38 C. C. A. 592.

[2] Watkyns *v.* Watkyns, 2 Atk. 96; Ball *v.* Montgomery, 2 Ves. Jr. 191, 198, 199; Carr *v.* Estabrooke, 4 Ves. 146; Clancy on Marr. Women, B. 5, ch. 10, pp. 568, 579; Pearson *v.* Pearson, 125 Ga. 132, 54 S. E. 194.

[3] Wilkes *v.* Wilkes, 2 Dick. R. 791; Worrall *v.* Jacob, 3 Meriv. 267; Westmeath *v.* Westmeath, Jac. R. 126; s. c. 1 Dow, R. 519, (N. S.); St. John *v.* St. John, 11 Ves. 529; The People *v.* Mercein, 8 Paige, R. 47, 57; Frampton *v.* Frampton, 4 Beav. 287, 293.

Contra now, at least in England. Besant *v.* Wood, 12 Ch. D. 605, 620, where Jessel, M. R., calls attention forcibly to the change of view of the judges in regard to public policy on this subject. See also Wilson *v.* Wilson, 1 H. L. Cas. 538; Rowley *v.* Rowley, L. R. 1 H. L. Scotch, 63; Hart *v.* Hart, 18 Ch. D. 670; Clark *v.* Clark, 10 P. D. 188.

[4] See Westmeath *v.* Salibsury, 5 Bligh, R. (N. S.) 356; s. c. 1 Dow & Clarke, R. 519; Evans *v.* Evans, 1 Hagg. Consist. R. 36. On this occasion Lord Stowell said: "The law has said that married persons shall

perhaps gone too far to enable Courts of Equity to adopt this broad principle, even if it were as unquestionable and salutary in morals and policy as it has been thought to be.[1]

§ 1863. **Effect of Deed of Separation.** — The principal distinctions on this subject as they are now established seem to be as follows: In the first place a deed of separation does not relieve

not be *legally* separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves; and it is my duty to see whether those reasons exist in the present case. To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom and that real humanity that regards the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case as in many others the happiness of some individuals must be sacrificed to the greater and more general good."

[1] St. John *v.* St. John, 11 Ves. 529; Westmeath *v.* Westmeath, Jacob, R. 134 to 143; Newl. on Contr. ch. 6, pp. 115 to 121; Worrall *v.* Jacob, 3 Meriv. 267; Id. 259, note (*g*). See 2 Roper on Husb. and Wife, ch. 22, § 1, p. 270, note (*b*); Clancy on Married Women, B. 4, ch. 4, pp. 397 to 421; Westmeath *v.* Salisbury, 5 Bligh, R. (N. S.) 339, 354; Jodrell *v.* Jodrell, 9 Beav. R. 45. Mr. Roper in his learned note (2 Roper on Husband and Wife, ch. 22, § 1, pp. 270 to 277) has summed up the general reasoning on each side of this point with great ability and clearness. I have drawn the distinctions in the text principally from his labors and those of Mr. Clancy. Clancy on Married Women, B. 4, ch. 4, pp. 397 to 421. See also Westmeath *v.* Salisbury, 5 Bligh, R. (N. S.) 339, where this subject is elaborately discussed. Lord Eldon, in delivering his opinion in this case, expressed his disapprobation of the doctrine in the following terms (pp. 398, 399): "According to the law of this country marriage is an indissoluble contract. It can only be dissolved a vinculo matrimonii by the legislature, and that contract once entered into imposes upon the husband and wife, both with respect to themselves and with respect to their offspring, most important and most sacred duties; so important and so sacred that it does seem a little astonishing that it ever should have happened that it should be thought that they could, by a mutual agreement between themselves, destroy all the duties they owed to each other and all the duties they owed to their offspring. I do not go through

the wife from any of the ordinary disabilities of coverture.[1] In the next place a deed of separation entered into by the husband and wife alone, without the intervention of trustees, is utterly void.[2] In the next place a deed for an immediate separation, with the intervention of trustees, will not be enforced so far as it regards any covenant for separation, but only so far as maintenance is covenanted for by the husband, and the trustees covenant to exonerate him from any debts contracted therefor.[3] In the next.

what has been stated in a great variety of cases upon the subject, nor do I refer to them for any other purpose than that of stating that which I think can admit of no contradiction, that it is impossible for any person to read the judgments I have had the honor to pronounce upon the subject without seeing that I never could originally have been a party to any such doctrine. But when decision followed decision, when men whose professional knowledge, whose talents, and whose abilities I was bound not only to respect but to revere, had so often in Courts of Law stated doctrines to which I could not agree, it seemed to me a most improper thing that I should take upon myself to say that those doctrines were wrong, without putting the matter into the most solemn course of inquiry; and I believe it will be found, if your Lordships look at the judgments to which I am referring, that I was always exceedingly anxious that a case of this important nature should be brought before the House of Lords." See also The People *v.* Mercein, 8 Paige, R. 47, 67; s. c. 3 Hill, R. 399.

[1] Marshall *v.* Rutton, 8 T. R. 545.

[2] Legard *v.* Johnson, 3 Ves. 352, 359, 361; Westmeath *v.* Salisbury, 5 Bligh, (N. S.) 375.

[3] Legard *v.* Johnson, 3 Ves. 359, 360; 2 Roper on Husb. and Wife, ch. 22, § 2, p. 270, and note; Id. 287; Westmeath *v.* Westmeath, Jacob, R. 126; Worrall *v.* Jacob, 3 Meriv. 267; Jee *v.* Thurlow, 2 B. & Cressw. 547; Elworthy *v.* Bird, 2 Sim. & Stu. 372; Rodney *v.* Chambers, 2 East, R. 283; Westmeath *v.* Salisbury, 5 Bligh, R. (N. S.) 339, 375. A covenant on the part of the trustees to indemnify the husband against the maintenance of the wife will be a legal foundation for a covenant on his part to furnish a specific maintenance for her when there is a general trust-deed between the parties. Westmeath *v.* Salisbury, 5 Bligh, R. (N. S.) 375; Id. 356. The subject of the legality of deeds of separation between husband and wife was much discussed in the very recent case of Jones *v.* Waite, 5 Bing. New Cas. 341, in the Exchequer Chamber, where it was held by three judges against two that a deed of separation having been drawn up between husband and wife, a promise by a third person to pay certain debts and expenses for which the husband was solely liable, if he could execute the deed of separation, was held to be a valid promise; Lords Abinger and Denman being against the decision, and Patterson, Alderson, and Littledale, justices, being in favor of it. Lord Denman on this occasion said: "If I could venture to lay down any principle which alone seems safely deducible for all these cases (which he cited), it is this: that when a husband has, by his deed, acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation, on being relieved from liability for her debts, he shall not be allowed to impeach the validity of that covenant." The whole case deserves deliberate examination, and

place, if a deed of separation contains a covenant purporting to preclude the parties from any future suit for the restitution of conjugal rights, the covenant will be utterly void.[1] In the next place, a deed containing a covenant with trustees for a future separation of the husband and wife, and for her maintenance, consequent thereon, will be utterly void.[2] In the next place, even in case of a deed for an immediate separation, if the parties come together again there is an end to it with respect to any future as well as to the past separation.[3]

§ 1864. **Same.** — Such are some of the more important instances of the exercise of jurisdiction by Courts of Equity in regard to married women for their protection, support, and relief; in some of which they are merely auxiliary to the common law, and in others again they proceed upon principles wholly independent if not in contravention of that system. Upon a just survey of the doctrines of Courts of Equity upon this subject it is difficult to resist the impression that their interposition is founded in wisdom, in sound morals, and in a delicate adaptation to the exigencies of a polished and advancing state of society. And here, as well as

it was argued with great ability and learning. See also Hindley *v.* The Marquis of Westmeath, 6 B. & Cressw. 200.

[1] Ibid.

[2] Durant *v.* Titley, 7 Price, R. 577; Hindley *v.* Westmeath, 6 B. & Cressw. 200; Westmeath *v.* Salisbury, 5 Bligh, R. (N. S.) 339, 367, 373, 375, 393, 395, 396, 400, 415 to 417; St. John *v.* St. John, 11 Ves. 526.

[3] Fletcher *v.* Fletcher, 2 Cox, R. 99; 3 Bro. Ch. R. 619; Bateman *v.* Countess of Ross, 1 Dow, R. 235; Westmeath *v.* Salisbury, 5 Bligh, R. (N. S.) 375, 395; St. John *v.* St. John, 11 Ves. 537; 2 Roper on Husband and Wife, ch. 22, § 1; p. 273, note; Id. § 5, p. 316; Clancy on Married Women, B. 4, ch. 4, pp. 405, 413 to 417; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n.* 2). Whether a covenant for a separate maintenance would now be enforced against the husband in case of an immediate separation, after the husband was willing to receive his wife again and cohabit with her, and there was no reason to suppose it to be otherwise than a bona fide effort at reconciliation, is perhaps questionable. See on this point the authorities collected and commented on by Mr. Clancy. Clancy on Married Women, B. 4, ch. 4, pp. 405 to 420. Mr. Clancy thinks that where the separation is intended to be temporary it would not be enforced; where it is intended to be permanent it would. See also 2 Roper on Husband and Wife, ch. 22, § 5, pp. 314 to 316; Id. 320 to 322. But see the judgment in Westmeath *v.* Salisbury, 5 Bligh, R. (N. S.) 339 to 421. In this country equity has, it has been said, no control, apart from statute, of husband and wife except in regard to property; it cannot compel cohabitation or a restoration of conjugal rights. Cruger *v.* Douglas, 4 Edw. 433; Coverdill *v.* Coverdill, 3 Har. (Del.) 13; 1 Bishop, Mar. & Div. § 31. Query as to the rule in England. See Connelly *v.* Connelly, 2 Engl. L. & E. 570; s. c. 14 John. 437; Besant *v.* Wood, 12 Ch. D. 605; Clark *v.* Clark, 10 P. D. 188, opinion of Baggallay, L. J.

in the exercise of the jurisdiction in regard to infants and lunatics, we cannot fail to observe the parental solicitude with which Courts of Equity administer to the wants, and guard the interests, and succor the weakness of those who are left without any other protectors in a manner which the common law was too rigid to consider or too indifferent to provide for.

CHAPTER XLI

SET-OFF

§ 1865. **Set-off.** — It remains for us to take notice of a few other matters, over which Courts of Equity exercise a jurisdiction, either in its own nature exclusive, or at least exclusive for particular objects and under particular circumstances. Upon these however our commentaries will necessarily be brief, as they either are not of very frequent occurrence, or they are in a great measure embraced under the heads which have been already discussed.

§ 1866. **Nature of the Jurisdiction of Set-off.** — And in the first place let us consider the subject of SET-OFF as an original source of equity jurisdiction.[1] It is not easy to ascertain the true nature and extent of this jurisdiction, since it has been materially affected in its practical application in England by the Statutes of 2 Geo. II. ch. 22, and 8 Geo. II. ch. 34 in regard to set-off at law in cases of mutual unconnected debts,[2] and by the more enlarged operation of the bankrupt laws, in regard to set-off both at law and in equity, in cases of mutual debts and mutual credits.[3]

§ 1867. **Same.** — It was said by a late learned Chancellor, that before the statutes of set-off at law, and the statutes of mutual debts and credits in bankruptcy, "this court [that is, the Court of Chancery as a Court of Equity] was in possession of it [i. e. the doctrine of set-off], as grounded upon principles of equity, long before the law interfered. It is true where the court does not find a natural equity going beyond the statute [of set-off], the construction is the same in equity as at law. 'But that does not affect the general doctrine upon natural equity. So as to mutual

[1] Set-off was formerly called Stoppage. See Downam *v.* Matthews, Prec. Ch. 582; Jeffs *v.* Wood, 2 P. Will. 128, 129.

[2] See Bac. Abr. by Guillim, Title Set-off, A, B, C.

[3] See Stat. 4 & 5 Anne, ch. 17; 5 Geo. I. ch. 11; 5 Geo. II. ch. 30; 46 Geo. III. ch. 135; 6 Geo. IV. ch. 16; Babbington on Set-off, ch. 5, p. 116, &c.

debts and credits Courts of Equity must make the same construction as the law. But both in law and in equity that statute, enabling a party to prove the balance of the account upon mutual credit, has gone much further than the party could have gone before, either in law or in equity, as to set-off." [1] This is not a very instructive account of the doctrine, for it leaves in utter obscurity what were the particular cases in which Courts of Equity did interpose upon principles of natural equity.[2]

§ 1868. **Same.** — Lord Mansfield has expressed his views of the subject of set-off in equity in the following language: "Natural equity says that cross demands should compensate each other by deducting the less sum from the greater, and that the difference is the only sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said that each must sue and recover separately in separate actions. It may give light to this case and the authorities cited if I trace the law relative to the doing complete justice in the same suit, or turning the defendant round to another suit, which under various circumstances may be of no avail. Where the nature of the employment, transaction, or dealings necessarily constitutes an account consisting of receipts and payments, debts and credits, it is certain that only the balance can be the debt; and by the proper forms of proceeding in Courts of Law or Equity the balance only can be recovered. After a judgment or decree 'to account', both parties are equally actors. Where there were mutual debts unconnected, the law said they should not be set off, but each must sue. And Courts of Equity followed the same rule, because it was the law; for had they done otherwise, they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this in the case of bankrupts; and it was provided for by 4 Anne, ch. 17, § 11, and 5 Geo. II. ch. 30, § 28. This clause must have everywhere the same construction and effect, whether the question arises upon a summary petition, or a formal bill, or an action at law. There can be but one right construction; and therefore if courts differ, one must be wrong. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring, that Parliament interposed by 2 Geo. II.

[1] Lord Eldon in Ex parte Stephens, 11 Ves. 27; Greene *v.* Darling, 5 Mason, R. 207, 208; Ex parte Blagden, 19 Ves. 467.

[2] The general principles of the English Law as to set-off are well summed up in Mr. Evans's edition of Pothier on Obligations, Vol. 2, p. 112, No. 13.

ch. 22, and 8 Geo. II. ch. 24, § 5. But the provision does not go to goods, or other specific things wrongfully detained. And therefore neither Courts of Law nor Equity can make the plaintiff, who sues for such goods, pay first what is due to the defendant, except so far as the goods can be construed a pledge; and then the right of the plaintiff is only to redeem." [1]

§ 1869. **Equity Generally Follows the Law as to Set-off.** — If this be a true account of the matter, then it would seem that Courts of Equity did not, antecedently to the statutes of set-off, exercise any jurisdiction as to set-off, unless some peculiar equity intervened independently of the mere fact of mutual unconnected accounts.[2] As to connected accounts of debt and credit, it is certain that both at law and in equity, and without any reference to the statutes, or the tribunal in which the cause was depending, the same general principle prevailed, that the balance of the accounts only was recoverable; which was therefore a virtual adjustment and set-off between the parties.[3] But there is some reason to doubt whether Lord Mansfield's statement of the jurisdiction of equity in cases of set-off is to be understood in its general latitude, and without some qualifications. It is true that equity generally follows the law as to set-off; but it is with limitations and restrictions.[4] If there is no connection between the demands, then the rule is as it is at law.[5] But if there is a connection between the demands, equity acts upon it, and allows a set-off under particular circumstances.[6]

[1] Green *v.* Farmer, 4 Burr. 2220.

[2] See Walker *v.* Brooks, 125 Mass. 241; Wolcott *v.* Jones, 4 Allen, 367; Spaulding *v.* Backus, 122 Mass. 553; Tate *v.* Evans, 54 Ala. 16; Simmons *v.* Williams, 27 Ala. 507; Tuscumbia R. Co. *v.* Rhodes, 8 Ala. 206, 220; Martin *v.* Mohr, 56 Ala. 221, 223.

[3] Dale *v.* Sollet, 4 Burr. 2133.

[4] See Duncan *v.* Lyon, 3 John. Ch. R. 358, 359; Dale *v.* Cooke, 4 John. Ch. R. 11; Howe *v.* Sheppard, 2 Sumner, R. 109, and cases there cited; Green *v.* Darling, 5 Mason, R. 207; Peters *v.* Soame, 2 Vern. R. 428; Gordon *v.* Lewis, 2 Sumner, Rep. 628.

[5] Spaulding *v.* Backus, 122 Mass. 553; Walker *v.* Brooks, 125 Mass. 241.

[6] Whitaker *v.* Rush, Ambler, R. 407, 408, and Mr. Blunt's note (4); Hurlbert *v.* Pacific Ins. Co., 2 Sumner, R. 471; Rawson *v.* Samuel, 1 Craig & Phillips, 161, 172, 173; Clark *v.* Cost, 1 Craig & Phillips, 54.

Though equity, it is said, at first assumed jurisdiction on the ground that one demand in justice should compensate a counter-demand, and that it was unjust to attempt at law to enforce payment of more than the balance, — now the court exercises it only (1) when a legal demand is interposed to an equitable suit, (2) when an equitable demand cannot be enforced at law, and the other party is suing there, or (3) where both the demands are partly legal, and the party seeking the benefit of the set-off

§ 1870. [**What Is Meant by a Claim of Set-off.** — Set-off is a counter demand which the defendant has against the plaintiff, and it usually arises out of a transaction extrinsic to the plaintiff's cause of action. If the set-off allowed be more than the allowable claim of the plaintiff, judgment for the excess may, in the action, be awarded to the defendant against the plaintiff.[1] A set-off, strictly speaking, is not a defence to the action in which it may be filed. It is simply a cross-action; and as such it must state facts sufficiently to constitute, not a defence to the action in which it may be filed, but a cause of action against the opposite party.[2] Where there are several defendants sued, in order for the alleged demand to constitute a proper set-off against the plaintiff's cause of action, it must be joint and in favor of each defendant against the plaintiff.[3]]

§ 1871. **Courts of Equity Grant Relief, Where There are Mutual Debts, Independently of the Statutes of Set-off.** — In the first place it would seem that independently of the statutes of set-off Courts of Equity in virtue of their general jurisdiction are accustomed to grant relief in all cases where, although there are mutual and independent debts, yet there is a mutual credit between the parties founded at the time upon the existence of some debt due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt as a means of discharging it.[4] Thus for example if A should be

can show some equitable ground of protection. Tuscumbia R. Co. *v.* Rhodes, 8 Ala. 206, 220; Martin *v.* Mohr, 56 Ala. 221, 223.

Mere unliquidated damages from a tort will not be set off in equity. Chambers *v.* Wright, 52 Ala. 444.

[1] Lloyd *v.* Manufacturer's Warehouse Co., 102 Ill. App. 553; Wabash R. Co. *v.* Bowring, 103 Mo. App. 158, 77 S. W. 106.

[2] Kennedy *v.* Richardson, 70 Ind. 530; Kennedy *v.* Davisson, 46 W. Va. 433, 33 S. E. 291; Washington *v.* Timberlake, 74 Ala. 259; Robinson *v.* L'Engle, 13 Fla. 482; McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Kinard *v.* Sanford, 64 Ga. 630; Whitaker *v.* Pope, 48 Ga. 13; Sandwich Mfg. Co. *v.* Kelly, 26 Ill. App. 394; Breen *v.* Sullivan, 5 Ill. App. 4491; Reed *v.* Darlington, 19 Iowa, 349; Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; Annan *v.* Houck, 4 Gill (Md.) 325; Cook *v.* Mills, 5 Allen, 36; Ward *v.* Fellers, 3 Mich. 281; Kingman *v.* Draper, 14 Ill. App. 577; Raymond *v.* State, 54 Miss. 562; Russell *v.* Owen, 61 Mo. 185; Chase *v.* Strain, 15 N. H. 535; People *v.* Dennison, 84 N. Y. 272; Battle *v.* Thompson, 65 N. C. 406; Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. St. 640, 64 Atl. 398; Felper *v.* Hershour, 128 Pa. St. 587, 18 Atl. 419; Everson *v.* Fry, 72 Pa. St. 326; Union Bank *v.* Heyward, 15 S. C. 296; Smith *v.* Wainwright, 24 Vt. 97.

[3] Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584.

[4] See Ex parte Prescott, 1 Atk. 331. In Hankey *v.* Smith (3 T. R. 507,

indebted to B in the sum of £10,000 on bond, and B should borrow of A £2,000 on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties as to the £2,000 as an ultimate set-off pro tanto from the debt of £10,000. But if the bonds were both payable at the same time, the presumption of such a mutual credit would be converted almost into an absolute certainty. Now in such a case a Court of Law could not set off these independent debts against each other. But a Court of Equity would not hesitate to do so upon the ground either of the presumed intention of the parties or of what is called a natural equity.[1] If in such a case there should be an express

note), it seems to have been thought by the court that to constitute mutual credit within the Bankrupt Acts it is not necessary that the parties mean particularly to trust to each other in each transaction. Therefore where a bill of exchange accepted by A got into the hands of B, and B bought sugars of A, intending to cover the bill, it was held to be a case of mutual credit, although A did not know that the bill was in B's hands. Lord Kenyon said the mutual credit was constituted by taking the bill on the one hand and selling the sugars on the other hand; to which Buller, J., assented. The distinction between a mutual debt and a mutual credit is in this view extremely nice. In Trench *v.* Fenn (Coke, Bank. Laws, 569, 4th ed.; 554, 5th ed.; s. c. 3 Doug. R. 257), Mr. Justice Buller said, wherever there is a trust between two men on each side, that makes a mutual credit. In Olive *v.* Smith (5 Taunt. R. 60), Mr. Justice Gibbs said that Lord Mansfield, in Trench *v.* Fenn, adopted it as a principle, that wherever there is a mutual trust, that is, wherever one party being indebted to another intrusts that other with goods, it is a case of mutual credit. See also Atkinson *v.* Elliot (7 T. R. 376); Olive *v.* Smith (5 Taunt. R. 67, 68). In Key *v.* Flint (8 Taunt. R. 23), Mr. Justice Dallas said that mutual credit meant something different from mutual debts. Mutual credit must mean mutual trust. In Rose *v.* Hart (8 Taunt. R. 499, 506) the court narrowed the extent of former decisions, and held that in order to constitute a mutual credit the demands must be of such a nature as must terminate in cross debts. See Easum *v.* Cato, 5 B. & Ald. 861. See Astley *v.* Gurney, L. R. 4 C. P. 714.

[1] Lord Lanesborough *v.* Jones, 1 P. Will. 326; Ex parte Flint, 1 Swanst. 33, 34; Downam *v.* Matthews, Prec. Ch. 580, 582. See also a decision of Lord Hale, cited in Chapman *v.* Derby, 1 Vern. R. 117; Jeffs *v.* Wood, 2 P. Will. 128, 129; Melioruccbi *v.* Royal Exchange Ass. Co., 1 Eq. Abr. 8, pl. 8; s. c. Ambler, R. 408, note by Mr. Blunt; James *v.* Kynnier, 5 Ves. 110; Hawkins *v.* Freeman, 2 Eq. Abr. 10, pl. 10. In the case of Lord Lanesborough *v.* Jones (1 P. Will. 326), Lord Chancellor Cowper said, that it was natural justice and equity that in all cases of mutual credit only the balance should be paid. In that case there was a mortgage by A to B for £1,500, and a debt due by B to A on notes for £1,400 upon different transactions. In Jeffs *v.* Wood (2 P. Will. 129), the Master of the Rolls said: "But it may be a doubt whether an insolvent person may in equity recover against his debtor to whom he at the same time owes a greater sum, although I own it is against conscience that A should be demanding a debt against B, to whom he is indebted in a larger sum

agreement to set off the debts against each other pro tanto, there could be no doubt that a Court of Equity would enforce a specific performance of the agreement, although at the common law the party might be remediless.[1]

§ 1872. **Jurisdiction in Equity Where There Is a Legal Debt on One Side and an Equitable Debt on the Other.** — In the next place as to equitable debts, or a legal debt on one side and an equitable debt on the other, there is great reason to believe that whenever there is a mutual credit between the parties touching such debts, a set-off is, upon that ground alone, maintainable in equity; although the mere existence of mutual debts without such a mutual credit, might not, even in a case of insolvency, sustain it.[2] But

and would avoid paying it. However it seems that the least evidence of an agreement for a stoppage will do. And in these cases equity will take hold of a very slight thing to do both parties right." In Green *v.* Darling, 5 Mason, R. 207 to 213, the principal cases in respect to set-off in equity are collected.

[1] Jeffs *v.* Wood, 2 P. Will. 128, 129; Whitaker *v.* Rush, Ambler, R. 408; Hawkins *v.* Freeman, 2 Eq. Abr. 10, pl. 10. In winding up the affairs of an insolvent corporation or stock company in England debts cannot be set off against calls. Black's Case, L. R. 8 Ch. 254. But a shareholder in an unlimited company which is being wound up may be allowed to set off a debt due to him from the company on an independent contract, against calls made on his shares under the winding up. Gibbs's Case, L. R. 10 Eq. 312. Secus of a shareholder in a limited company. Ib. at p. 327; Grissell's Case, L. R. 1 Ch. 528. The case of Brighton Arcade Co. *v.* Dowling, L. R. 3 C. P. 175, seems in conflict with Grissell's Case. See Gibbs's Case, at p. 330.

[2] See Lord Lanesborough *v.* Jones, 1 P. Will. 326; Curson *v.* African Company, 1 Vern. 122, Mr. Raithby's note; Jeffs *v.* Wood, 2 P. Will. 128, 129; Ryall *v.* Rowles, 1 Ves. 375, 376; s. c. 1 Atk. 185; James *v.* Kynnier, 5 Ves. 110; Gale *v.* Luttrell, 1 Y. & Jerv. 180; Cheetham *v.* Crook, 1 McClel. & Y. 307; Piggott *v.* Williams, 6 Madd. 95; Taylor *v.* Okey, 13 Ves. 180. In Ex parte Prescott (1 Atk. R. 231), Lord Hardwicke said, that in cases of bankruptcy, before the making of the Act of 5 Geo. II. ch. 30, if a person was a creditor he was obliged to prove his debt under the commission, and receive perhaps a dividend only of 2*s.* 6*d.* in the pound from the bankrupt's estate, and at the same time pay the whole to the assignee of what he owed to the bankrupt. So that it seems that insolvency alone would not constitute a sufficient equity. See Lord Lanesborough *v.* Jones (1 P. Will. 325); James *v.* Kynnier (5 Ves. 110). In Simson *v.* Hart (14 Johns. R. 63, 76) it seems to have been thought that the fact of insolvency created an equity, or at least fortified it.' See also Sewall *v.* Sparrow, 16 Mass. R. 24; Lyman *v.* Estes, 1 Greenl. R. 182; Peters *v.* Soame, 2 Vern. R. 428. In Green *v.* Darling (5 Mason, R. 212) the court, after citing the principal decisions, summed up the result in the following language: "The conclusion which seems deducible from the general current of the English decisions (although most of them have arisen in bankruptcy), is that Courts of Equity will set off distinct debts where there has been a mutual credit upon the principles of natural justice to avoid circuity of suits, following the doctrine of compensation of

the mere existence of cross demands will not be sufficient to justify a set-off in equity.[1] Indeed, a set-off is ordinarily allowed in equity only when the party, seeking the benefit of it, can show some equitable ground for being protected against his adversary's demand; the mere existence of cross demands is not sufficient. A fortiori a Court of Equity will not interfere, on the ground of

the civil law to a limited extent. That law went further than ours, deeming each debt suo jure set off or extinguished pro tanto; whereas our law gives the party an election to set off if he chooses to exercise it. But if he does not, the debt is left in full force, to be recovered in an adversary suit. Since the statutes of set-off of mutual debts and credits Courts of Equity have generally followed the course adopted in the construction of the statutes by Courts of Law, and have applied the doctrine to equitable debts. They have rarely if ever broken in upon the decisions at law, unless some other equity intervened which justified them in granting relief beyond the rules of law, such as has been already alluded to. And on the other hand Courts of Law sometimes set off equitable against legal debts, as in Bottomley *v.* Brooke (cited 1 T. R. 619). The American courts have generally adopted the same principles as far as the statutes of set-off of the respective States have enabled them to act." The court adhered to the same doctrine in Howe *v.* Sheppard, 2 Sumner, R. 409, 414, 416; and Gordon *v.* Lewis, 2 Sumner, R. 628, 633, 634.

Riddick *v.* Moore, 65 N. C. 382; Condon *v.* Shehan, 46 Miss. 710; Spaulding *v.* Backus, 122 Mass. 553. But see Smith *v.* Felton, 43 N. Y. 419; Chicago R. Co. *v.* Field, 86 Ill. 270; Brewer v. Norcross, 2 C. E. Green, 219; Fulkerson *v.* Davenport, 70 Mo. 541; Reppy v. Reppy, 46 Mo. 571; Field *v.* Oliver, 43 Mo. 200; Hamilton *v.* Van Hook, 26 Texas, 302. Clearly a party whose debt is not due has no equitable claim to have it set off against a debt of his own already due in the hands of an insolvent person. Spaulding *v.* Backus, supra; Bradley *v.* Angel, 3 Comst. 475; Reppy *v.* Reppy, supra.

However, it is held that the contingent liability of a surety not being available as a set-off at law (because no action could be brought upon it while contingent) may be ground of interference in equity in a proper case. A surety e. g. upon an administrator's bond, being indebted to the administrator by promissory note on which a judgment at law has been rendered in favor of an assignee, may enjoin the judgment and establish an equitable set-off to it for money which he has been compelled to pay since the judgment, upon showing that the administrator is insolvent, and that the note was transferred in fraud of creditors. Wood *v.* Steele, 65 Ala. 436.

[1] Rawson *v.* Samuel, Craig & Phillips, 161, 178, 179; Whyte *v.* O'Brien, 1 Simons & Stu. 551. In the case of Rawson *v.* Samuel, Lord Cottenham said: "We speak familiarly of equitable set-off as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross demands is not sufficient; Whyte *v.* O'Brien (1 S. & S. 551); although it is difficult to find any other ground for the order in Williams *v.* Davies (2 Sim. 461) as reported. In the present case there are not even cross demands, as it cannot be assumed that the balance of the account will be found to be in favor of the defendants at law. Is there then any equity in preventing a party who has recovered damages at law from receiving them because he may be found to be indebted upon the balance

an equitable set-off, to prevent the party from recovering a sum awarded to him for damages for a breach of contract merely because there is an unsettled account between him and the other party in respect to dealings arising out of the same contract.[1]

of an unsettled account to the party against whom the damages have been recovered? Suppose the balance should be found to be due to the plaintiff at law, what compensation can be made to him for the injury he must have sustained by the delay? The jury assess the damages as the compensation due at the time of their verdict. Their verdict may be no compensation for the additional injury which the delay in payment may occasion. What equity have the plaintiffs in the suit for an account to be protected against the damages awarded against them? If they have no such equity, then there can be no good ground for the injunction. Several cases were cited in support of the injunction; but in every one of them except Williams *v.* Davies it will be found that the equity of the bill impeached the title to the legal demand. In Beasley *v.* Arcy (2 Sch. & Lefr. 403, n.) the tenant was entitled to redeem his lease upon payment of the rent due; and in ascertaining the amount of such rent a sum was deducted which was due to the tenant from the landlord for damage done in cutting timber. Both were ascertained sums, and the equity against the landlord was, that he ought not to recover possession of the farm for non-payment of rent whilst he owed the tenant a sum for damage to that same farm. In O'Connor *v.* Spaight (1 Sch. & Lefr. 305) the rent paid formed part of a complicated account; and it was impossible without taking the account to ascertain what sum the tenant was to pay to redeem his lease. In Ex parte Stephens (11 Ves. 24) the term equitable set-off is used; but the note having been given under a misrepresentation, and a concealment of the fact that the party to whom it was given was at the time largely indebted to the party who gave it, the note was ordered to be delivered up as paid. In Piggott *v.* Williams (6 Madd. R. 95) the complaint against the solicitor for negligence went directly to impeach the demand he was attempting to enforce. In Lord Cawdor *v.* Lewis (1 Y. & Coll. 427) the proposition is too largely stated in the marginal note; for in the case the action for mesne profits was brought against the plaintiff, who was held, as against the defendant, to be in equity entitled to the land. None of these cases furnish any grounds for the injunction in the case before me."

As costs in a suit in equity and costs in a suit at law, though relating to the same subject. Throckmorton *v.* Crowley, L. R. 3 Eq. 196. But set-off has been allowed in equity between notes for purchase-money and an indemnity bond as to title, the amount due on the bond being liquidated. Stone *v.* Fargo, 55 Ill. 71. See Detroit R. Co. *v.* Gregg, 12 Mich. 45; Platt *v.* Larter, 94 Fed. 610; Porter *v.* Roseman, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222.

[1] Rawson *v.* Samuel, Craig & Phil. 172. There is no equity to retain a sum due because cross demands to a larger amount are about falling due. Jeffryes *v.* Agra Bank, L. R. 2 Eq. 674; Smith's Case, L. R. 1 Ch. 538; Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677; Porter *v.* Roseman, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222; Berger *v.* Clendinen, 88 Md. 151, 40 Atl. 705; Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69; Reed *v.* Bank of Newburgh, 1 Paige, 215; Power *v.* Reeder, 9 Dana, 9; Long *v.* Majestre, 1 Johns. Ch. 305; Kirkman *v.* Vanlier, 7 Ala. 217; Crossley *v.* New Orleans, 20 Fed. 352; State *v.* Churchill, 48 Ark. 426; Garner *v.* Reiss, 25 Minn. 475.

§ 1873. **Same.** — However where there are cross demands between the parties of such a nature that if both were recoverable at law they would be the subject of a set-off, then and in such a case if either of the demands be a matter of equitable jurisdiction the set-off will be enforced in equity.[1] As for example if a legal debt is due to the defendant by the plaintiff, and the plaintiff is the assignee of a legal debt due to a third person from the plaintiff which has been duly assigned to himself, a Court of Equity will set off the one against the other, if both debts could properly be the subject of a set-off at law.[2]

§ 1874. **Joint Debt Cannot be Set-off against a Separate Debt.** — In the next place Courts of Equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity which will justify even such an interposition.[3] Thus for example if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and mis-

[1] Clarke *v.* Cost, 1 Craig & Phillips, R. 154, 160.

[2] Ibid.; Williams *v.* Davies, 2 Simons, R. 461.

Notice of assignment of an equitable chose in action cuts off the right of set-off as to a debt falling due thereafter though arising on a contract made before the notice, where the contract does not appear to have been made with special reference to a right of set-off. Watson *v.* Mid-Wales Ry. Co., L. R. 2 C. P. 593. Nor can an obligor set off against his obligation a claim against a mesne assignee of the same who has assigned to the present holder. Downey *v.* Thorp, 63 Pa. St. 322.

[3] Ex parte Twogood, 11 Ves. 517; Addis *v.* Knight, 2 Meriv. R. 121; Duncan *v.* Lyon, 3 John. Ch. R. 351, 352; Dale *v.* Cooke, 4 John. Ch. R. 13 to 15; Harvey *v.* Wood, 5 Madd. R. 460; Tucker *v.* Osley, 9 U. S. 35, 3 L. Ed. 29; Vulliamy *v.* Noble, 3 Meriv. R. 617; Whitaker *v.* Rush, Ambler, R. 407; Bishop *v.* Church, 3 Atk. 691; Jackson *v.* Robinson, 3 Mason, R. 144, 145; Murray *v.* Toland, 3 John. Ch. R. 573; Medlicot *v.* Bowes, 1 Ves. 208; Leeds *v.* The Marine Insur. Company, 19 U. S. 565, 5 L. Ed. 332. In Tucker *v.* Oxley (4 Cranch, 34) the Supreme Court of the United States held that under the bankrupt laws of the United States, where a suit was brought by the assignee of one partner (who had become a bankrupt) for a separate debt due to him by the defendant, who was a creditor of the partnership, the joint debt due by the partners might be set off by the creditor against the separate debt due by him to the partner who had become bankrupt. There were however special circumstances in the case. The partnership had been dissolved, and the separate debt was contracted afterwards with the bankrupt partner, who had agreed on the dissolution of the partnership to pay the joint debts, and who testified that he intended that the separate debt should, when contracted, be a credit for the joint debt. This might well constitute a case of mutual credit. But the court relied on the provisions of the bank-

applies it so that the latter is drawn in to act differently from what he would if he knew the facts, that will constitute in a case of bankruptcy a sufficient equity for a set-off of the separate debt created by such misapplication against the joint debt.[1] So if one of the joint debtors is only a surety for the other, he may in equity set off the separate debt due to his principal from the creditor; for in such a case the joint debt is nothing more than a security for the separate debt of the principal; and upon equitable considerations a creditor who has a joint security for a separate debt cannot resort to that security without allowing what he has received on the separate account for which the other was a security.[2] Indeed it may be generally stated that a joint debt may in equity be set off against a separate debt where there is a clear series of transactions establishing that there was a joint credit given on account of the separate debt.[3]

§ 1875. **Jurisdiction in Equity Will Be Extended beyond That in Law Where Peculiar Equities Intervene.** — It has been already suggested that Courts of Equity will extend the doctrine of set-off and claims in the nature of set-off beyond the law in all cases where peculiar equities intervene between the parties. These are so very various as to admit of no comprehensive enumeration. Some cases however illustrative of the doctrine may readily be put. Thus if an agent having a title to an estate should allow his principal to expend money upon the estate without any notice of that title, he will not be permitted after a recovery at law in ejectment to maintain an action at law against the principal for mesne profits; but Courts of Equity will require that to the extent of the improvements there shall be a set-off or compensation allowed to the principal against the mesne profits.[4] So if an agent in his own name should procure a policy of insurance to be under-

rupt laws, which in fact on this point did not differ from those of the English bankrupt laws.

Blake *v.* Langdon, 19 Vt. 485; Fulkerson *v.* Davenport, 70 Mo. 541; Stammers *v.* Elliott, L. R. 4 Eq. 675; s. c. 3 Ch. 195; Spurr *v.* Snyder, 35 Conn. 172; Upham *v.* Wyman, 7 Allen, 499. Where a partner has allowed his separate debt to be offset against the firm's debt, equity will give relief. Pierce *v.* Fynney, L. R. 12 Eq. 69.

[1] Ex parte Stephens, 11 Ves. 24; Ex parte Blagden, 19 Ves. 466, 467; Ex parte Hanson, 12 Ves. 348; Vulliamy *v.* Noble, 3 Meriv. R. 621.

[2] Ex parte Hanson, 12 Ves. 346; s. c. 18 Ves. 232; Dale *v.* Cooke, 4 Johns. Ch. R. 15; Cheetham *v.* Crook, 1 McClell. & Y. 307.

[3] Vulliamy *v.* Noble, 3 Meriv. 521, 593, 617, 618; Tucker *v.* Oxley, 9 U. S. 35, 3 L. Ed. 29.

[4] Lord Cawdor *v.* Lewis, 1 Younge & Coll. 427, 433. See Moneypenny *v.* Bristow, 2 Russ. & Mylne, 117.

written for his principal, he will be personally liable for the premium of insurance to the underwriters; and if he has also in his own name procured another policy to be underwritten to the same principal, and a loss occurs under the latter policy on which he sues the underwriters, they may in equity, if not at law, set off the premiums due on the first policy against such loss.[1]

§ 1876. [**Set-off May Not Be Claimed in Court of Equity, except in Especial Cases, if There Is an Adequate Remedy at Law.** — A party litigant may not set off his claim in a Court of Equity, if he has already litigated it in a Court of Law, or, if it has not been theretofore determined in law, he has an adequate remedy in that court. The doctrine of res adjudicata fully applies and an unsuccessful claimant ought not to be allowed to interfere with the just claim of an adversary by coming into a Court of Equity, — and there seeking to establish a right of which a Court of Law has full and complete jurisdiction.[2] For instance, if the right of set-off claimed consists of an action for damages for fraud, this matter could be fully and completely determined at law, and a Court of Equity should not interfere.[3] But if, from the very nature of the circumstances, exact justice cannot be obtained at law, then a Court of Equity will interfere.[4] Set-offs in equity are older than any statutes of off-sets, and decreeing them, in cases of strict mutuality, even, has been long a ground of jurisdiction. State statutes do not deprive courts of the United States of jurisdiction in equity, even if by providing a remedy at law they would a State court.[5]]

§ 1877. [**Compensation Defined.** — The civil law theory of compensation arises whenever there are mutual debts. The law strikes a balance between the parties, and the relation of debtor and creditor only exists for the balance in favor of the one against the other. Compensation is a reciprocal acquittal of debts between the persons who are indebted the one to the other. It is not enough to make compensation that there be a debt on the one

[1] Leeds *v.* The Marine Insurance Company, 19 U. S. 565, 5 L. Ed. 332. As to set-off against factors who sell in their own name see Ex parte Dixon, 4 Ch. D. 133.

[2] Walker *v.* Wigginton, 50 Ala. 579; Menifee *v.* Ball, 7 Ark. 520; Barker *v.* Walbridge, 14 Minn. 469; Dungan *v.* Miller, 19 N. J. Eq. 218; Collins *v.* Clayton, 53 Ga. 649; Field *v.* Oliver, 43 Mo. 200.

[3] Blackwell *v.* Oldham, 4 Dana, 195; Bulkeley *v.* Welch, 31 Conn. 339.

[4] Quick *v.* Lemon, 105 Ill. 578; Smith *v.* Donvell, 5 Gill. 84; Graves *v.* Hull, 27 Miss. 419; Ainslee *v.* Boynton, 2 Barb. 258; Smith *v.* Ross, 22 Tenn. 220; Smith *v.* Dickinson, 100 Wis. 574, 76 N. W. 766.

[5] Sowles *v.* Plattsburg First Natl. Bank, 100 Fed. 552.

side and the other, but it is moreover necessary that both the debts be clear and liquid; that is, certain, and not liable to dispute.[1] Some confusion has arisen by confounding compensation with set-off. The former is an acknowledged principle of the civil law jurisprudence. Whenever there were cross debts, as soon as it occurred, without the act of either party, or even their knowledge at the time of the existence of such cross debts, it by operation of law struck the balance between the parties. A demand so held was payment to the extent of its amount, and the balance defined the character of debtor and creditor. This principle is unknown to the common law jurisprudence, except in the single instance of running accounts between merchants. Set-off was also unknown to the common law. Each party was left to his cross action for the collection of their respective debts.[2] Compensation rests upon the principle of good faith. It is not permitted where its operation would involve a deception and a disappointment of the just expectation and confidence of the party against whom it is set up. Hence, if a creditor should buy goods at the shop of his debtor in such a manner as to hold out the idea that he would pay for them in cash; and after receiving the goods should propose a set-off, his conduct would be considered as not in good faith and compensation would not be allowed.[3] If one of the accounts is barred by limitations, it cannot be used to set off his indebtedness to the plaintiff.[4]]

§ 1878. [**Recoupment Defined.** — The doctrine of recoupment rests upon the principle that it is just and equitable to settle in one action, thus avoiding a multiplicity of suits, all claims growing out of the same contract or transaction. But it does not authorize the court to extend the statute or set-off, and allow a claim by way of recoupment which is founded upon an independent and distinct contract or transaction.[5] Recoupment is a defence arising out of the subject matter of the plaintiff's claim. It is an innovation upon the strict rules of the common law, sanctioned

[1] Howard *v.* Randolph, 73 Tex. 454, 11 S. W. 495; Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Haydel *v.* Roussel, 1 La. Ann. 35; Stewart *v.* Harper, 16 La. Ann. 181.

[2] Holliman *v.* Rogers, 6 Tex. 91.

[3] Nolan *v.* Shaw, 6 La. Ann. 40; Bogert *v.* Edgerton, 11 La. Ann. 73; Vincent *v.* Gandolfo, 12 La. Ann. 526; McKee *v.* Amonett, 6 La. Ann. 207; Mutual Natl. Bank *v.* Keenan, 35 La. Ann. 1129.

[4] Nolan *v.* Shaw, 6 La. Ann. 40; Campbell *v.* Park, 11 Tex. Civ. App. 455, 33 S. W. 754.

[5] Home Sav. Bank *v.* Boston, 131 Mass. 277; Mayberry *v.* Leech, 58 Ala. 339.

by the courts for the purpose of doing equity between the parties. It tends to promote justice and avoid a multiplicity of suits. It is necessary that this defence arise out of and be connected with the transaction or contract upon which the suit is brought, but it is not essential that the opposing claims should be of the same character.[1] But while it is said that by the application of the doctrine of recoupment, circuity is avoided, and the rights of parties adjusted in one and the same suit, it must be understood that such adjustment is only by way of abatement or reduction, and that no other judgment can be rendered than such as is authorized by the rules of the common law. The defendant is not allowed to recover any balance. He uses his demand in mitigation of damages only He may recoup to the extent of the plaintiff's damages, but he cannot, as in the case of set-off, recover any excess in his favor.[2]]

§ 1879. **Same.** — We may conclude this very brief review of the doctrine of set-off as recognized in Courts of Equity, a doctrine which is practically of rare occurrence in cases not within the statutes of set-off, either at law generally or in bankruptcy, by a few remarks upon the same subject as it is found recognized in the civil law. In the latter the doctrine was well known under the title of Compensation, which may be defined to be the reciprocal acquittal of debts between two persons who are indebted the one to the other;[3] or, as it is perhaps better stated by Pothier, "compensation is the extinction of debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another."[4] The civil law itself expressed it in a still more concise form. "Compensatio est debiti et crediti inter se contributio."[5]

§ 1880. **Same.** — The civil law treated compensation as founded upon a natural equity, and upon the mutual interest of each party to have the benefit of the set-off rather than to pay what he owed,

[1] Lloyd *v.* Manufacturer's Warehouse Co., 102 Ill. App. 551; Finney *v.* Cadwallader, 55 Ga. 75.

[2] Ward *v.* Fellers, 3 Mich. 281; Kingman *v.* Draper, 14 Ill. App. 577; Wadhams *v.* Swan, 109 Ill. 46; Baltimore R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775; Lufborrow *v.* Henderson, 30 Ga. 482; Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298; Michigan Yacht Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109.

[3] 1 Domat, Civ. Law, B. 4, tit. 2, § 1, art. 1.

[4] Pothier on Oblig. by Evans, n. 587 (n. 622 of French editions). Pothier has examined the whole subject with great ability, and given a full exposition of the doctrines of the civil law in his Treatise on Obligations, Pt. 3, ch. 4, n. 587 to 605 (n. 622 to 640 of French editions).

[5] Dig. Lib. 16, tit. 2, l. 1; Pothier Pand. Lib. 16, tit. 2, n. 1.

and then to have an action for what was due to himself. "Ideo compensatio necessaria est quia interest nostra potius non solvere quam solutum repetere."[1] Baldus adds another and very just reason, that it avoids circuity of action. "Quod potest brevius per unum actum expediri compensando, incassum protraheretur per plures solutiones et repetitiones."[2]

§ 1881. **Claim of Set-off May Be Pleaded in Plaintiff's Action, or New Action May Be Brought to Enforce the Claim.** — It has been truly said that the English doctrine of set-off has been borrowed from the Roman Jurisprudence. But there are several important differences between compensation in the civil law and set-off in our law.[3] In the first place in our law if the party has a right of set-off, he is not bound to exercise it; and if he does not exercise it, he is at liberty to commence an action afterwards for his own debt.[4] But in the civil law it was otherwise; for the cross debt to the same amount was by mere operation of law, and independent of the acts of the parties extinguished.[5] In support of this there are many texts of the civil law. "Posteaquam placuit inter omnes id quod invicem debetur, *ipso jure* compensari."[6] "Unusquisque creditorem suum, eundemque debitorem, petentem summovet si paratus est compensare."[7] "Si totum petas, plus petendo causa cadis."[8] "Si quis igitur compensare potens, solverit, condicere poterit, quasi indebito soluto."[9]

§ 1882. **The Right of Set-off Is Confined to Claims Arising in Debts.** — In the next place in our law the right of compensation

[1] Dig. Lib. 16, tit. 2, l. 3. See also Inst. Lib. 4, tit. 6, § 30.

[2] Cited by Pothier on Oblig. n. 587 (n. 623 of French editions).

[3] Mr. Chancellor Kent, in Duncan *v.* Lyon (3 John. Ch. R. 359), used the following language: "The doctrine of set-off was borrowed from the doctrine of compensation in the civil law. Sir Thomas Clarke shows the analogy in many respects on this point between the two systems; and the general rules in the allowance of compensation or set-off by the civil law as well as by the law of those countries in which that system is followed are the same as the English law. To authorize a set-off the debts must be between the parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated. They must be certain and determinate debts. Dig. 16, tit. 2, de Compensationibus, Code Lib. 4, tit. 31, l. 14, and Code Lib. 5, tit. 21, l. 1; Ersk. Inst. vol. 2, 525, 527; Pothier, Trait. des Oblig. No. 587 to 605; Ferriere sur. Inst. tom. 6, 110, 113." See also Whitaker *v.* Rush, Ambler, R. 407 and 408.

[4] Pothier, by Evans, App. 112, No. 13; Baskerville *v.* Brown, 2 Burr. 1229.

[5] Pothier on Oblig. n. 599 [635]; 1 Domat, B. 4, tit. 2, § 1, art. 4.

[6] Dig. Lib. 16, tit. 2, l. 21; Pothier, Pand. Lib. 16, tit. 2, n. 3.

[7] Dig. Lib. 16, tit. 2, l. 2; Pothier, Pand. Lib. 16, tit. 2, n. 1.

[8] Pothier, Pand. Lib. 16, tit. 2, n. 3.

[9] Ibid. n. 5; Dig. Lib. 16, tit. 2, l. 10, § 1.

or set-off is confined to debts properly so called or to claims strictly terminating in such debts. In the civil law the right was more extensive; for not only might debts of a pecuniary nature be set off against each other, but debts or claims for specific articles of the same nature (as for corn, wine, or cotton) might also be set off against each other. All that was necessary was that the debt or claim to be compensated should be certain and determinate and actually due, and in the same right and of the same kind as that on the other side.[1] The general rule was: "Aliud pro alio, invito creditori, solvi non potest."[2] "Ejus quod non ei debetur qui convenitur, sed alli compensatio fieri non potest."[3] "Quod in diem debetur non compensabitur, antequam dies venit, quanquam dari oporteat."[4] "Compensatio debiti ex pari specie, et causa dispari, admittitur; velut si pecuniam tibi debeam, et tu mihi pecuniam debeas, aut frumentum, aut cætera, hujusmodi, licet ex diverso contractu, compensare vel deducere debes."[5] The only exception to the rule was in case of deposits; for it was said, "In causa depositi compensationi locus non est; sed res ipsa reddenda est."[6]

§ 1883. **Compensation Should Be Allowed of Such Debts as Were Due to the Party Himself.** — In another provision of the civil law we may distinctly trace an acknowledged principle of Equity Jurisprudence upon the same subject.[7] The rule that compensation should be allowed of such debts only as were due to the party himself and in the same right had an exception in the case of sureties. A person who was surety for a debt might not only oppose as a compensation what was due from the creditor to himself, but also what was due to the principal debtor. "Si quid a fidejussore petatur, æquissimum est eligere fidejussorem quod ipsi, an quod reo debetur, compensare malit; sed et, si utrumque velit compensare, audiendus est."[8]

[1] 1 Domat, Civ. Law, B. 4, tit. 2, § 2, art. 1 to 9; Pothier on Oblig. n. 588, 590 (n. 623, 626 of the French editions); Pothier, Pand. Lib. 16, tit. 2, n. 11 to 24; Cod. Lib. 4, tit. 31, l. 141.

[2] Pothier on Oblig. n. 588 (n. 623 of the French editions); Dig. Lib. 12, tit. 1, l. 2, § 1.

[3] Cod. Lib. 4, tit. 31, l. 9; Pothier, Pand. Lib. 16, tit. 2, n. 15.

[4] Dig. Lib. 16, tit. 2, l. 7; Pothier, Pand. Lib. 16, tit. 2, n. 12.

[5] Pothier, Pand. Lib. 16, tit. 2, n. 22.

[6] Pothier, Pand. Lib. 16, tit. 2, n. 8; Cod. Lib. 4, tit. 31, l. 11; 1 Domat, Civ. Law, B. 4, tit. 2, § 2, art. 6.

[7] Ante, § 1764.

[8] Dig. Lib. 16, tit. 2, l. 5; Pothier, Pand. Lib. 16, tit. 2, n. 16; Pothier on Oblig. n. 595 [631].

§ 1884. **Same.** — There was another exception in the civil law which has not received the same favor in ours. It was generally true that a debt due from the creditor to a third person could not be insisted on by the debtor as a compensation even with the assent of such third person: "Creditor compensare non cogitur quod alii quam debitori suo, debet; quamvis creditor ejus pro eo qui convenitur ob debitum proprium velit compensare." [1] Yet where the debtor had procured a cession or assignment of the debt of such third person, he might after notice to the creditor insist upon it by way of compensation. "In rem suam procurator datus, post litis contestationem, si vice muta conveniatur, æquitate compensationis utetur." [2]

§ 1885. **Same.** — These may suffice as illustrations of the civil law on the subject of compensation or set-off. The general equity and reasonableness of the principles upon which the Roman superstructure is founded make it a matter of regret that they have not been transferred to their full extent into our system of Equity Jurisprudence. Why indeed in all cases of mutual debts independently of any notion of mutual credit Courts of Equity should not have at once supported and enforced the doctrine of the universal right of set-off as a matter of conscience and natural equity it is not easy to say. Having affirmed the natural equity, it seems difficult to account for the ground upon which they have refused the proper relief founded upon it. The very defect of the remedy at law furnishes an almost irresistible reason for such equitable relief. The doctrine of compensation has indeed been felicitously said to be among those things "quæ jure aperto nituntur." [3] The universality of its adoption in all the systems of jurisprudence which have derived their origin from Roman fountains demonstrates its persuasive justice and sound policy.[4] The common law in rejecting it from its bosom seems to have reposed upon its own sturdy independence or its own stern indifference. But the marvel is that Courts of Equity should have hesitated to foster it when their own principles of decision seem to demand the most comprehensive and liberal action on the subject.

[1] Dig. Lib. 16, tit. 2, l. 18; Pothier, Pand. Lib. 16, tit. 2, n. 16; Pothier on Oblig. n. 594 [629].

[2] Dig. Lib. 16, tit. 2, l. 18; Pothier, Pand. Lib. 16, tit. 2, n. 15; Pothier on Oblig. n. 594 (n. 629 of the French editions).

[3] See Mr. Blunt's note to Whitaker *v.* Rush, Ambler, R. 408; note (6).

[4] See Pothier on Oblig. Pt. 3, ch. 4, n. 587 to 605 (n. 622 to 640 of the French editions); 1 Stair's Inst. B. 1, ch. 18, § 6; Ersk. Inst. B. 3, tit. 4, §§ 11 to 20; Heinecc. Elem. Juris. Germ. Lib. 2, tit. 17, § 475.

§ 1886. [**What Is a Counterclaim.** — A counterclaim is a subject of Code pleading, and is any matter arising out of, or connected with, the cause of action, which might be the subject of an action in favor of the defendant, or tend to reduce the plaintiff's claim for damages. Prior to the introduction of the system of Code pleading, it was unknown. It is more comprehensive in its nature than either recoupment or set-off. It embraces both recoupment at common law and the cross bill in equity.[1] Where the defendant seeks to recoup damages of the plaintiff, his claim cannot exceed that demanded by the plaintiff; but where the defendant sets up a counterclaim, his claim may be in excess of that of the plaintiff's and he may have judgment for the excess.[2] The counterclaim always arises in favor of the defendant and against the plaintiff's alleged cause of action, and cannot be pleaded by plaintiff against the defendant's defence.[3]]

[1] Shipman Coal Min. Co. *v.* Pfeiffer, 11 Ind. App. 445, 39 N. E. 291; White *v.* Reagan, 32 Ark. 281; Deford *v.* Hutchinson, 45 Kans. 318, 25 Pac. 641, 11 L. R. A. 257; Teague *v.* James, 63 N. C. 91; Gaither *v.* Gibson, 63 N. C. 93; Valentine *v.* Holloman, 63 N. C. 475; McHard *v.* Williams, 8 S. Dak. 381, 66 N. W. 930, 59 Am. St. Rep. 766; McArthur *v.* Green Bay Co., 34 Wis. 139.

[2] Bloom *v.* Lehman, 27 Ark. 489; Hurst *v.* Everett, 91 N. C. 399.

[3] Gatling *v.* Carteret County, 92 N. C. 536, 53 Am. Rep. 432.

CHAPTER XLII

ESTABLISHING WILLS

§ 1887. **Establishing Wills.** — It has been already stated in another part of these Commentaries that the proper jurisdiction as to the validity of last wills and testaments belongs to other tribunals. Where a will respects personal estate it belongs to the Ecclesiastical Courts; and where it respects real estate it belongs to the Courts of Common Law.[1] But although this is regularly true, and Courts of Equity will not in an adversary suit entertain jurisdiction to determine the validity of a will, yet whenever a will comes before them as an incident in a cause they necessarily entertain jurisdiction to some extent over the subject; and if the validity of the will is admitted by the parties, or if it is otherwise established by the proper modes of proof, they act upon it to the fullest extent.[2] If either of the parties should afterwards bring a new suit to contest the determination of the validity of the will so proved, the Court of Equity which has so determined it would certainly grant a perpetual injunction.[3]

§ 1888. **Proof of Will by Admissions of Parties.** — The usual manner in which Courts of Equity proceed in such cases is this: If the parties admit the due execution and validity of the will, it is deemed ipso facto sufficiently proved. If the will is of personal estate and a probate thereof is produced from the proper Ecclesi-

[1] Ante, §§ 184, 238; Sheffield *v.* Duchess of Buckinghamshire, 1 Atk. 629, 630; Pemberton *v.* Pemberton, 13 Ves. 297; Jones *v.* Jones, 3 Meriv. R. 161, 170. See Barker *v.* Ray, 2 Russ. R. 63.

See Allen *v.* McPherson, 1 H. L. Cas. 191; Meluish *v.* Milton, 3 Ch. D. 27; Broderick's Will, 88 U. S. 503, 22 L. Ed. 599; Ellis *v.* Davis, 109 U. S. 485, 27 L. Ed. 1006, 3 S. Ct. Rep. 327; Smith *v.* Harrison, 2 Heisk. 230; Townsend *v.* Townsend, 4 Cold. 70. In the last case equity set up a lost will; and in Smith *v.* Harrison the court took jurisdiction to reinstate the probate on the ground that a verdict against the will on an issue of devisavit vel non had been obtained by fraud.

[2] See Morrison *v.* Arnold, 19 Ves. 670, 671.

[3] Sheffield *v.* Duchess of Buckinghamshire, 1 Atk. R. 630; 3 Wooddes. Lect. 59, p. 477.

astical Court, that is ordinarily deemed sufficient. But if the parties are dissatisfied with the probate and contest the validity of the will, the Court of Equity in which the controversy is depending will suspend the determination of the cause in order to enable the parties to try its validity before the proper ecclesiastical tribunal, and will then govern itself by the result.[1] If the will is of real estate and its validity is contested in the cause, the court will in like manner direct its validity to be ascertained either by directing an issue to be tried or an action of ejectment to be brought at law,[2] and will govern its own judgment by the final result.[3] If the will is established in either case, a perpetual injunction may be decreed.[4]

§ 1889. **Jurisdiction of Courts of Equity in Establishing of Wills.** — But it is often the primary although not the sole object of a suit in equity brought by devisees and others in interest to establish the validity of a will of real estate; and thereupon to obtain a perpetual injunction against the heir at law and others to restrain them from contesting its validity in future.[5] In such cases the jurisdiction exercised by Courts of Equity is somewhat analogous to that exercised in cases of bills of peace; and it is founded upon the like considerations, in order to suppress interminable litigation and to give security and repose to titles.[6] In every case

[1] Sheffield *v.* Duchess of Buckinghamshire, 1 Atk. R. 630; 3 Wooddes. Lect. 59, p. 477.

[2] The heir may at his option have the issue devisavit vel non or an ejectment. Grove *v.* Young, 6 Eng. L. & E. 28; s. c. 15 Jur. 810; infra, note 5 to § 1447.

[3] Attorney-Gen. *v.* Turner, Ambl. R. 587.

[4] Leighton *v.* Leighton, 1 P. Will. 671; Boyse *v.* Rossborough, Kay, 71; s. c. 3 DeG. M. & G. 817; 6 H. L. Cas. 1.

[5] Bootle *v.* Blundell, 19 Ves. 494, 509; Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, pp. 297, 298; Id. ch. 4, § 5, p. 489; Leighton *v.* Leighton, 1 P. Will. 671; Colton *v.* Wilson, 3 P. Will. 192; Devonsher *v.* Newenham, 2 Sch. & Lefr. 199; Harris *v.* Cotterell, 3 Meriv. 678, 679; Morrison *v.* Arnold, 19 Ves. 670, 671.

See Grove *v.* Bastard, 2 Phill. 619; Boyse *v.* Rossborough, Kay, 71; s. c. 3 DeG. M. & G. 817; 6 H. L. Cas. 1. But a purchaser of land the title to which is derived under a will is not entitled to have the will established, or to have a conveyance by the heir to him, unless some reasonable ground exists for doubting the validity of the will. McCulloch *v.* Gregory, 3 Kay & J. 12. How far the rule of establishing a will, in an action by a devisee or a purchaser, obtains in this country is not clear.

[6] Ante, § 1173. The heir at law cannot come into equity for the purpose of having an issue to try the validity of the will at law, unless it is by consent; for he may bring an ejectment. But if there are any impediments to the proper trial of the merits on such an ejectment, he may come into equity to have them removed. Jones *v.* Jones, 3 Meriv. R. 161, 170; Bates *v.* Graves, 2 Ves. Jr. 288; 1 Powell on Devises, by Jarman, ch. 15,

of this sort Courts of Equity will, unless the heir waives it, direct an issue of devisavit vel non (as it is technically although according to Mr. Wooddeson barbarously expressed [1]) to ascertain the validity of the will.[2] But it will not feel itself bound by a single verdict either way if it is not entirely satisfactory; but it will direct new trials until there is no longer any reasonable ground for doubt.[3] The general rule established in Courts

p. 628, note (1). Courts of Equity do not seem to have any direct or original authority to establish the validity of a will of real estate per se, but only as incidental to some other object, as carrying into effect trusts, marshalling assets, &c. For if no obstacles intervene, the devisee, if he has a legal estate, may sue at law. If after repeated trials at law in such a case the will is established by a satisfactory verdict and judgment, Courts of Equity will then interfere and grant a perpetual injunction against the heir to prevent endless litigation, as it does in other cases. Bootle *v.* Blundell, 19 Ves. 502.

[1] 2 Wooddes. Lect. 59, p. 478; Bates *v.* Graves, 2 Ves. Jr. 287.

[2] Pemberton *v.* Pemberton, 11 Ves. 53; s. c. 13 Ves. 290; Dawson *v.* Chater, 9 Mod. 90; Levy *v.* Levy, 3 Madd. R. 245; 2 Fonbl. Eq. B. 6, ch. 3, § 7, note (*t*); Bootle *v.* Blundell, 19 Ves. 501, 502. The following extract from the report of the Chancery Commissioners to Parliament, in March, 1826, and the explanatory paper of Mr. Beames (p. 84), shows very distinctly the practice of the Courts of Equity in establishing wills: "In a suit for establishing a will the heir at law is, by the long-established practice of the court, entitled to an issue devisavit vel non. But he cannot be compelled to decide whether he will or not require such issue until the hearing of the cause, when he will have had an opportunity of considering the evidence taken in the cause, and of satisfying his mind, so far as that evidence extends, whether he should or not have the matter investigated by the viva voce examination of the witnesses on the trial of an issue. If he should elect to have such an issue, as all the expense incurred in examining witnesses would, in the event of their being in existence at the time of the issue being tried, be wholly useless, and the evidence they had given in equity might possibly be made an improper use of by the heir when he came to try the issue, and at all events that evidence might not improbably in some measure affect that testimony which the witnesses might give on such trial, it seems expedient to provide that in all such suits for the establishment of wills neither party shall, before the hearing, enter into any evidence either to support or question the will, except that the plaintiff shall examine the attesting witnesses upon the usual interrogatories, and which apply only to the formal execution of the will, and the heir may cross-examine such witnesses." See also White *v.* Wilson, 13 Ves. 87, 91, 92; Bootle *v.* Blundell, 19 Ves. 494, 505, 509; Tatham *v.* Wright, 2 Russ. & Mylne, 1. In Whitaker *v.* Newman, 2 Hare, R. 299, on a bill to establish a will the heir admitted by his answer the execution of the will, but alleged that it was revoked by a subsequent will, by which the estate was devised to the heir, which subsequent will was unintentionally destroyed, and submitted that the subsequent will ought to be established, or that there was an intestacy; the court refused an issue devisavit vel non, and no evidence having been given of the alleged revocation, established the original will.

[3] 3 Wooddeson, Lect. 59, p. 478, note (*c*); Attorney-Gen. *v.* Turner, Ambler, R. 587; Pemberton *v.* Pemberton, 11 Ves. 50, 52; s. c. 13 Ves.

of Equity is that upon every such issue and trial at law all the witnesses to the will should be examined if practicable, unless the heir should waive the proof.[1] But the rule is not absolutely inflexible, but it will yield to peculiar circumstances.[2]

290; Bootle *v.* Blundell, 19 Ves. 499 to 501; Fowkes *v.* Chadd, 2 Dick. 576.

As to when a new trial will be granted see Waters *v.* Waters, 2 DeG. & S. 591; McGregor *v.* Topham, 3 H. L. Cas. 132; Hitch *v.* Wells, 10 Beav. 84.

[1] Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, pp. 297, 298; Bootle *v.* Blundell, 19 Ves. 499, 502, 505, 509; Ogle *v.* Cooke, 1 Ves. 177; Tatham *v.* Wright, 2 Russ. & Mylne, 1.

[2] The doctrine was much considered in Tatham *v.* Wright (2 Russ. & Mylne, 1), which was first heard before the Master of the Rolls (Sir John Leach), who in speaking on this point said: "The effect of establishing a will in this court is to conclude all future questions respecting its validity; and the caution of this court requires therefore, before a will be established upon evidence here, that all the attesting witnesses shall be examined. If this court requires the aid of a court of law and the intervention of a jury to determine the validity of a will, it does not necessarily follow that a court of law must in such a case depart from its own rules and adopt those of a Court of Equity. When all the witnesses are not examined in the Court of Law and the cause comes on for further directions in a Court of Equity, there may be cases in which a Court of Equity, referring to its own principles, may not have its conscience fully satisfied by the verdict of the jury; as for instance where the general competence of the testator being admitted the question depends on the competency at the particular time of executing the will. There the attesting witnesses being the persons who can give the best testimony as to the special fact, it may be reasonable in the Court of Equity to send the case back in order that all the witnesses may be examined. But when, as in the present case, the question depends not upon the particular state of the testator's mind at the making of the will but upon his general competency throughout a long life, the attesting witnesses to the will may not be persons capable of speaking to the fact of general competency, and not therefore the most material witnesses in the consideration of a Court of Equity. It is further to be observed that the bill filed in this case is not by the devisees, to establish the testamentary instrument, but it is a bill by the heir at law, claiming against these instruments to have a legal estate put out of his way, in order that he may try the validity of these instruments by ejectment; and no decree in this cause would be conclusive upon the question of the validity of the will. The plaintiff might, by redeeming the mortgage, get in the outstanding legal estate by an assignment of the mortgage, or even upon the hearing, upon further directions, he might still contend that he ought not to be concluded by the trial of the issues, and that the Court of Equity should still permit him to proceed by restraining the defendants from opposing to him the legal estates. It is not however for the present purpose necessary to advert to these distinctions. The complaint that the two other witnesses were not examined is made by the heir to whom they were tendered, who had full opportunity of examining them, but thought fit to decline that examination. He declined it because he wished to have the technical advantage which, by the rules of law, results from considering those persons witnesses of his opponent. Can he therefore with effect say that it must be inferred that the witnesses, if examined,

When by these means upon a verdict the validity of the will is fully established, the court will by its decree declare it to be well

could have given evidence in his favor when it was his own choice that such evidence should not be laid before the court?" The cause was reheard before Lord Chancellor Brougham, with the assistance of Lord Chief Justice Tindal and Lord Chief Baron Lyndhurst. Lord Chief Justice Tindal, in delivering the opinion of himself and the Lord Chief Baron, said: "It may be taken to be generally true that in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the court upon the question devisavit vel non, this court will not decree the establishment of the will, unless the devisee has called all the subscribing witnesses to the will or accounted for their absence. And there is good reason for such a general rule. For as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will before his right of trying the title of the devisee is taken from him. In that case it is the devisee who asks for the interference of this court, and he ought not to obtain it until he has given every opportunity to the heir at law to dispute the validity of the will. This is the ground upon which the practice is put in the cases of Ogle *v.* Cooke (1 Ves. 177) and Townsend *v.* Ives (1 Wils. 216). But it appears clearly, from the whole of the reasoning of the Lord Chancellor in the case of Bootle *v.* Blundell (1 Mer. 193, Cooper, 136), that this rule, as a general rule, applies only to the case of a bill filed to establish the will (an establishing bill, as Lord Eldon calls it in one part of his judgment), and an issue directed by the court upon that bill. And even in cases to which the rule generally applies, this court, it would seem, under particular circumstances, may dispense with the necessity of the three witnesses being called by the plaintiff in the issue. For, in Lowe *v.* Jolliffe (1 W. Black. 365), where the bill was filed by the devisees under the will, and an issue devisavit vel non was tried at bar, it appears, from the report of the case, that the subscribing witnesses to the will and codicil, who swore that the testator was utterly incapable of making a will, were called by the defendant in the issue, and not by the plaintiff; for the Reporter says, 'to encounter this evidence, the plaintiff's counsel examined the friends of the testator, who strongly deposed to his sanity;' and again the Chief Justice expressed his opinion to be that all the defendant's witnesses were grossly and corruptly perjured. And after the trial of this issue the will was established. In such a case to have compelled the devisee to call these witnesses would have been to smother the investigation of the truth. Now in the present case the application to this court is not by the devisee seeking to establish the will, but by the heir at law calling upon this court to declare the will void, and to have the same delivered up. The heir at law does not seek to try his title by an ejectment, and apply to this court to direct that no mortgage or outstanding terms shall be set up against him to prevent his title from being tried at law; but seeks to have a decree in his favor in substance and effect to set aside the will. This case therefore stands upon a ground directly opposed to that upon which the cases above referred to rests. So far from the heir at law being bound by a decree which the devisee seeks to obtain, it is he who seeks to bind the devisee; and such is the form of his application that if he fails upon this issue he would not be bound himself. For the only result of a verdict in favor

proved and that it ought to be established, and will grant a perpetual injunction.[1]

§ 1890. [**Construction of Will Never Determined in Probate Proceeding.** — The matters and things to be determined upon the probate of a will, are the mental capacity of the testator, the factum of the making of the will, and its due execution according to law. The question of a construction of the will, or any clause thereof is never properly before the court in a proceeding to establish the instrument.[2]]

of the will would be that the heir at law would obtain no decree, and his bill would be dismissed, still leaving him open to his remedies at law. No decided case has been cited in which the rule has been held to apply to such a proceeding, and certainly neither reason nor good sense demands that this court should establish such a precedent under the circumstances of this case. If the object of the court in directing an issue is to inform its own conscience by sifting the truth to the bottom, that course should be adopted with respect to the witnesses which by experience is found best adapted to the investigation of the truth. And that is not attained by any arbitrary rule that such witnesses must be called by one, and such by the other party; but by subjecting the witnesses to the examination in chief of that party whose interest it is to call him from the known or expected bearing of his testimony, and to compel him to undergo the cross-examination of the adverse party against whom his evidence is expected to make." Lord Brougham expressed his own opinion in the following language: "There is a broad line of distinction between cases where the moving party seeks to set the will aside, and cases where the moving party is a devisee seeking to establish it; the rule which makes it imperative to call all the witnesses to a will must be considered as applicable to the latter only."

[1] Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, pp. 297, 298, and cases before cited.

See Boyse *v.* Rossborough, Kay, 71. If the heir does not dispute the will, but acts under it, merely denying that certain lands pass under the language of the will, equity has full jurisdiction to determine this question without granting an issue of devisavit vel non, or it may grant such issue at its discretion. Rickets *v.* Turquand, 1 H. L. Cas. 472.

It is the duty of the executor to procure the probate of the will. Zimner *v.* Saier, 155 Mich. 388, 119 N. W. 433, 130 Am. St. Rep. 575; Dodd *v.* Anderson, 197 N. Y. 466, 90 N. E. 1137, 27 L. R. A. (N. S.) 336, 18 Ann. Cas. 738.

The executor and the heir at law have no right, by agreement, as to the administration upon the estate and the distribution of the property, to withhold the will from probate. Heath *v.* Heath, 18 Misc. Rep. 521, 42 N. Y. Supp. 1087; Adams *v.* Adams, 22 Vt. 50.

[2] In re Cobb, 49 Cal. 599; Wettea *v.* Habersham, 60 Ga. 193; Neimand *v.* Seemann, 136 Iowa 713, 114 N. W. 48; Bliss *v.* Macomb, 129 Mich. 127, 88 N. W. 390; In re Hobbins, 41 Mont. 39, 108 Pac. 7; Dietz's case, 41 N. J. Eq. 284, 7 Atl. 443; In re Murray, 141 N. C. 588, 54 S. E. 435; Taylor *v.* Hilton, 23 Okla. 354, 100 Pac. 537, 18 Ann. Cas. 385; Montrose *v.* Byrne, 24 Wash. 288, 64 Pac. 534; Frame *v.* Thormann, 102 Wis. 653, 79 N. W. 39, affirmed 176 N. S. 350, 44 L. Ed. 500, 20 S. Ct. Rep. 446; Cox *v.* Cox, 101 Md. 168, 13 S. W. 1055.

§ 1891. **Perpetuation of Testimony of Witnesses to Will.** — If however the devisees have no further present object than merely to establish the will by perpetuating the testimony of the witnesses thereto, this may be done (as we shall presently see) by a proper bill for the purpose; and the latter is indeed what is usually meant by proving a will in chancery.[1]

§ 1892. **Proof of Will by Testimony of Non-resident Witnesses.** — It may be proper also to take notice in this place (although it more frequently arises in the exercise of the auxiliary or assistant jurisdiction) that Courts of Equity in cases of this sort, where the original will is lodged in the custody of the register of the Ecclesiastical Court, and it may be necessary to be produced before witnesses resident abroad whose testimony is to be taken under a commission to prove its due execution, will direct the original will to be delivered out by such officer to a fit person to be named by the party in interest, such party first giving security, to be approved by the judge of the Ecclesiastical Court, to return the same within a specified time. If there is any dispute about the security for the safe custody and return of the will, it will be referred to a master to settle and adjust the same.[2] If the commission is to be executed within the realm and the witnesses are therein, the Court will direct the original will to be brought into its own registry to lie there until the court has done with it,[3] or to be delivered out on giving security.[4]

[1] 3 Black. Comm. 450. Boyse *v.* Rossborough, Kay, 71; s. c. 3 DeG. M. & G. 817; 6 H. L. Cas. 1.

[2] Frederick *v.* Aynscompe, 1 Atk. R. 627, 628.

[3] Ibid.

[4] Morse *v.* Roach, 2 Str. 961. See Eyres *v.* Broderick, 15 Jur. 865; s. c. 5 Eng. L. & E. 599.

CHAPTER XLIII

AWARDS

§ 1893. **Awards.** — Courts of Equity also formerly exercised a large jurisdiction in matters of AWARDS. But by means of statutes which have been passed both in England and America the jurisdiction has become in a practical sense, although not in a theoretical view, greatly narrowed and is now of rare occurrence. It may not however be without use to refer to some of the more ordinary cases in which that jurisdiction was originally exerted, and still may be exerted in cases where no statute of the States interferes with the due exercise thereof. And it is constantly to be borne in mind that the subsequent remarks, even when not so expressly qualified, are to be understood with this limitation, that there are no statutable provisions which vary or control the general jurisdiction of equity in matters of award.[1]

[1] Com. Dig. Chancery, 2 K. 1 to 6; Stat. 9 & 10 Will. III. ch. 15; Bac. Abr. Arbitration and Award, B. The Statute of 9 & 10 Will. III. ch. 15, in England, authorizing submissions to arbitrations to be made a rule of the Court of King's Bench or other court of record, has very materially changed the jurisdiction of the English Courts of Equity over awards made under submissions made in pursuance of the statute. In Nichols *v.* Roe, 3 Mylne & Keen, 431, the subject, how far an award made upon a submission pursuant to the statute ousted the jurisdiction of Courts of Equity was much discussed. Lord Chancellor Brougham decided against the jurisdiction, and said: "It is necessary to observe that this was a submission, not in a cause depending either here or at law, but by agreement with the usual power for either party to make the submission a rule of the Court of King's Bench or other court of record. It was therefore altogether under and within the Statute of 9 & 10 W. III. ch. 15, and consequently the proceedings must be governed by that statute, and so must all the rights and equities of the parties. As there was the accustomed clause in the agreement that no action or suit in equity should be brought by either party to impeach the award, I shall say a word upon that in order to dismiss the point. It has frequently been denied that any such agreement can ever oust the jurisdiction of this court; and in Nichols *v.* Chalie (14 Ves. 265), Lord Eldon said the point had never been determined. I need not now determine it; the party against whom the bill to set aside the award is filed, might, had he thought fit, have availed

§ 1894. **Award May Be Set Aside for Accident, Fraud, or Mistake.** — In cases of fraud, mistake, or accident Courts of Equity may, in virtue of their general jurisdiction, interfere to set aside

himself of it by plea; but it is quite unnecessary towards the decision of the present question that anything should be said upon the matter. When we examine the elaborate remarks of Lord Eldon in Nichols *v.* Chalie, and what he afterwards says in the subsequent case of Gwinett *v.* Bannister (14 Ves. 530), and compare those passages with Lord Loughborough's judgment in Lord Lonsdale *v.* Littledale (2 Ves. Jr. 451), and look into the arguments at the bar, — in all the three cases it is matter of surprise that any doubt should ever have been entertained on the subject. For the statute is undoubtedly repealed in its most express provision, if the jurisdiction continues to reside in this court after the parties have resorted elsewhere under the act. There can be no more plain or distinct terms used than those of the latter part of the first section of the act. After directing process of contempt to issue for enforcing performance of the award, it proceeds thus: 'Which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made to appear on oath to such court that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption or other undue means.' I may stop here to observe that the courts have long extended this exception to cases of mistake in law. Kent *v.* Elstob (3 East, 13). Now this prohibition is plainly made to preclude all review of the award, either at law or in equity, excepting on those special grounds. But it is also to be intended as giving to that court only in which the submission is made a rule, the power of reviewing the award; for if the literal meaning of the words were adopted, namely, that in the excepted cases either party might go to a Court of Equity and make it appear on oath that there were grounds for impeaching the award, — first, this would prove too much, for it would enable the same party to go to some other Court of Law; and who ever heard of the Court of Common Pleas setting aside an award made a rule of court in the King's Bench, or who ever made such an attempt? Indeed the second section expressly confines the application to the court in which the submission was made a rule; for it says that 'any arbitration or umpirage, procured by corruption or undue practices, shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of Law or Equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties.' Secondly, the words used in the exception to the prohibition of the first section that the ground of impeachment must be made to appear on oath to such court, are the words always used to describe proceedings by affidavit; and the Courts of Law and Equity are here — and they are throughout the statute mentioned in the same manner, so that the proceeding is to be alike in all — not a submission made a rule of the Court of Law, and then a bill filed in equity to set it aside, but the submission to be made a rule, either of a Court of Law or a Court of Equity, and application made to the same court by affidavit on the behalf of those seeking to impeach the award. It must be further observed that the second section affixes a period of limitation, — a time within which the application must be made, where there are grounds to bring the case within the exception. It shall be 'before the

awards upon the same principles and for the same reasons which justify their interference in regard to other matters where there is no adequate remedy at law.[1] And if there be no statute to the

last day of the next term after such arbitration or umpirage made and published to the parties.' This is very material; for the provision would be rendered wholly nugatory by allowing the party to come here and file his bill and move for his injunction, which I presume he may do within the usual period, — that is, at any time within twenty years. Such being my clear opinion on the construction of the statute and its bearing upon this question, I have only to observe on the cases that the older ones are not in similar circumstances to the present, though as far as they go they bear out the doctrine I contend for, and tend to exclude the jurisdiction. In this view reference may be had to Kampshire *v.* Young (2 Atk. 155); Chicot *v.* Lequesne (2 Ves. 315), and Spettigue *v.* Carpenter (3 P. Wms. 361). But the parallel cases are the more recent ones in the time of Lord Loughborough and Lord Eldon which I have already mentioned, — Lord Lonsdale *v.* Littledale, Nichols *v.* Chalie, and Gwinett *v.* Bannister. The first of these cases was the one in which the court sustained its jurisdiction; and Lord Eldon, in Nichols *v.* Chalie, makes some strong observations upon Lord Loughborough's argument in its favor, and plainly doubts, if he does not quite deny, the authority of the case. But what prevents its application to the question now before the court is, that Lord Lonsdale *v.* Littledale did not arise at all under the Statute of 9 & 10 W. III. In that case a verdict had been taken at the trial of a cause for nominal damages, subject to a reference, and the award was made a rule of court. This is explicitly allowed by Lord Loughborough not to be a case within or under the statute. It is true that his Lordship goes on to state his opinion that even if the case were one of a reference under the statute he should still hold the equitable jurisdiction not to be excluded. But this is merely an extra-judicial dictum from which, for the reasons above assigned, I take leave to dissent. Lord Eldon in Nichols *v.* Chalie nearly overruled it, and in Gwinett *v.* Bannister he did so altogether. These two cases, and the last especially, appear to close the question; and Lord Eldon in commenting upon the statute adopts the same construction which I have put upon it. It was a case precisely the same with the present in every particular save one, — that here the bill was filed before the submission was made a rule of court, and in that case the bill was filed after the submission was made a rule of court. But I do not think that this makes any material difference. In —— *v.* Mills (17 Ves. 419) a similar distinction was taken; but Lord Eldon disposed of the application on another ground, and said nothing of this. But surely the mere filing of a bill cannot be held to destroy the force of the statutory provision, more especially as the party filing the bill might any moment have applied to the Court of King's Bench. He says his adversary had not made it a rule of court, and so he could not move. There never was a greater mistake; he might himself have made it a rule and then moved. If not, any one possessed of an award in this form could defeat his adversary's right of moving to set aside the award by not making the submission a rule of court till the period had elapsed within which the statute allows the motion to be made impeaching it. The constant practice is the other way." See also Nichols *v.* Chalie, 14 Ves. 264.

[1] See Duncan *v.* Lyon, 3 John. Ch. R. 356; Champion *v.* Wenham, Ambler, R. 245; Knox *v.* Symmonds, 1 Ves. Jr. 369; South Sea Company

contrary, an agreement by the party on entering into an arbitration not to bring any action or suit in equity to impeach the award made under it will be held not obligatory if there be in fact from fraud, or mistake, or accident, or otherwise, a good ground to impeach it or to require it to be set aside.[1]

§ 1895. **Same.** — It is well known that when a suit is brought at the common law upon an award, no extrinsic circumstances or matter of fact dehors the award can be pleaded or given in evidence to defeat it. Thus for example fraud, partiality, misconduct,[2] or mistake of the arbitrators is not admissible to defeat it.[3]

v. Bumstead, 2 Eq. Abr. 80, pl. 8; Gartside *v.* Gartside, 3 Anst. 735; Earl *v.* Stocker, 2 Vern. 251; Ives *v.* Metcalfe, 1 Atk. 64; Emery *v.* Wase, 5 Ves. 846, 847; Attorney-Gen. *v.* Jackson, 5 Hare, R. 366. That an award is unconscionable and oppressive towards one of the parties may be good cause for setting it aside in equity, if the plaintiff is free from fault. Brewer *v.* Bain, 60 Ala. 153; Bailey *v.* England, 1 Pa. 12, 39 Atl. 455; Osborn *v.* Blanton, 109 Ga. 196, 34 S. E. 306; White Star Min. Co. *v.* Hultberg, 220 Ill. 578, 77 N. E. 327; Roberts *v.* Consumer's Can Co., 102 Md. 362, 62 Atl. 585, 111 Am. St. Rep. 377; Davis *v.* Henry, 121 Mass. 150; Dobson *v.* Central R. Co., 38 Misc. Rep. 582, 78 N. Y. Supp. 82; Henry *v.* Hilliard, 120 N. C. 479, 27 S. E. 130; Mayberry *v.* Mayberry, 121 N. C. 248, 28 S. E. 349; Commercial Union Assur. Co. *v.* Parker, 119 Ill. App. 126; Robinson *v.* Shanks, 118 Ind. 125, 20 N. E. 713; Hewitt *v.* Village of Reed City, 124 Mich. 6, 82 N. W. 616, 7 Detroit Leg. N. 95, 50 L. R. A. 128, 83 Am. St. Rep. 309; Hyeronimus *v.* Allison, 52 Mo. 102; McDonald *v.* Lewis, 18 Wash. 300, 51 Pac. 387.

[1] See Nichols *v.* Chalie, 14 Ves. 264, 269; Nichols *v.* Rowe, 3 Mylne & Keen, 431; Street *v.* Rigby, 6 Ves. 815; Chesslyn *v.* Dalby, 2 Younge & Coll. 170.

[2] Contra generally, it seems, in this country. Bean *v.* Farnham, 6 Pick. 269; Boston Water Co. *v.* Gray, 6 Met. 131; Strong *v.* Strong, 9 Cush. 560; Conrad *v.* Massasoit Ins. Co., 4 Allen, 20; Mickles *v.* Thayer, 14 Allen, 114; Ferson *v.* Drew, 19 Wis. 225. See also Gaylord *v.* Norton, 130 Mass. 74; Hoosac Tunnel Co. *v.* O'Brien, 137 Mass. 424. Indeed fraud may be a ground for collaterally impeaching even a judgment. See Bigelow, Estoppel, 157–165, 195, 241–245, 3d ed. Billmyer *v.* Hamburg-Bremen Ins. Co., 57 W. Va. 42, 49 S. E. 901; Roberts *v.* Consumers' Can Co., 102 Md. 362, 62 Atl. 585, 111 Am. St. Rep. 377; Garvin *v.* Garvin, 55 S. C. 360, 33 S. E. 458; Bartlett *v.* Bartlett, 116 Wis. 450, 93 N. W. 473.

[3] Wills *v.* Maccarmic, 2 Wils. R. 148; Bac. Abr. Arbitrament and Award, K.; Graddick *v.* Thompson, 8 East, 344; Underhill *v.* Van Cortlandt, 2 John. Ch. R. 336, 367; s. c. 17 John. R. 405; Kyd on Awards, ch. 7, p. 327.

That mistake of law or of fact is no ground of objection to an award, unless it is manifest on the face of the record, or unless it is obvious or very gross, or unless it is produced by the fraud or misconduct of the opposite party, is clear. Infra, note 3 to § 1454; Withington *v.* Warren, 10 Met. 431; Boston Water Co. *v.* Gray, 6 Met. 131, 169, 170 (where the court speak of obvious mistake); Strong *v.* Strong, 9 Cush. 560, 569; Cutting *v.* Carter, 29 Vt. 72; Matthews *v.* Matthews, 1 Heisk. 669. So in equity. Davis *v.* Henry, 121 Mass. 150. In this last case the court

But Courts of Equity will, in all such cases, grant relief, and upon due proofs will set aside the award.[1]

§ 1896. **Court of Equity Will Grant Relief from a Plain Mistake of Law as Fact, on Part of Arbitrators.** — In regard to a mistake of the arbitrators it may be in a matter of fact or in a matter of law. If upon the face of the award there is a plain mistake of

say: "When it is sought to set aside an award upon the ground of a mistake committed by arbitrators, it is not sufficient to show that they came to a conclusion of fact erroneously, however clearly it may be demonstrated that the inference drawn by them was wrong. It must be shown that, by some error, they were so misled or deceived that they did not apply the rules which they intended to apply to the decision of the case, so that upon their own theory a mistake was made which has caused the result to be something different from that which they had reached by their reason and judgment. Boston Water Co. *v.* Gray, 6 Met. 131, 169; Carter *v.* Carter, 109 Mass. 306; Spoor *v.* Tyzzer, 115 Mass. 40." This appears to be the "obvious" mistake considered by Shaw, C. J. See 6 Met. 169, 170, where examples are stated; and these are repeated in Vanderwerker *v.* Vermont Cent. R. Co., 27 Vt. 130.

An injunction may be granted against proceeding with an arbitration, where a party has been guilty of fraud or other serious misconduct, or an arbitrator of corruption. Pickering *v.* Cape Town Ry. Co., L. R. 1 Eq. 84; Beddow *v.* Beddow, 9 Ch. D. 89. So where, in Cutting *v.* Carter, 29 Vt. 72, one of the parties to an arbitration procured an allowance in his own favor by withholding his books and papers from inspection, when he was conscious that his claim was unfounded, and that a free inspection would disclose the fact, equity set aside the award. And wherever a party before arbitrators procures the allowance of a claim which he knows to be fictitious, doing this upon fictitious or fabricated testimony, equity will set aside the award, and enjoin the party from suing thereon. Ib.; Emerson *v.* Udall, 13 Vt. 477. Probably such facts would also avail to impeach a mere award collaterally, as in a suit upon it. It will help to an understanding of the case to bear in mind that an award not entered as a judgment of court is not properly speaking res judicata, but the result of an agreement of parties in the ordinary way. Hence the question appears simply to be, what that agreement in any respect fairly implies. See e.g. Nickels *v.* Hancock, 7 DeG. M. & G. 300, an award in excess of the authority. A *judgment* of that sort could not well happen if the court had jurisdiction. But see as to an award by *statutory* commissioners, alleged to be ultra vires, Baleman *v.* Boynton, L. R. 1 Ch. 359.

[1] Lord Harris *v.* Mitchell, 2 Vern. 485; Chicot *v.* Lequesne, 2 Ves. 315; Brown *v.* Brown, 1 Vern. 159, Mr. Raithby's note (1); Lingwood *v.* Eade, 2 Atk. 501; Morgan *v.* Mather, 2 Ves. Jr. 15. The Statute of 9 & 10 Will. III. ch. 15, has in England made great alterations in the exercise of this general jurisdiction; for it seems that an award under that statute is not generally remediable in equity on account of fraud or misconduct of the arbitrators; but only in the court of which the submission is made a rule and within the time therein prescribed. See Auriol *v.* Smith, 1 Turn. & Russ. 121, 126, 127, 134 to 136; ante, § 1893.

The jurisdiction over awards in pais remains. Hamilton *v.* Rankin, 3 DeG. & S. 782. In this country see Sisk *v.* Garry, 27 Md. 401; Fletcher *v.* Hubbard, 43 N. H. 58; Elkins *v.* Page, 45 N. H. 310; Pulliam *v.* Pensoneau, 33 Ill. 375; Malmsbury Ry. Co. *v.* Budd, 2 Ch. D. 113; Wolff *v.*

law or of fact material to the decision, which misled the judgment of the arbitrators, there can be little or no reason to doubt that Courts of Equity will grant relief.[1] But the difficulty is whether the mistake of fact or of law is to be made out by extrinsic evidence, and whether a mistake of law upon a general submission, involving the decision both of law and fact, constitutes a valid objection. Upon these points the decisions of Courts of Law and Courts of Equity are not reconcilable with each other; and it is not easy to lay down any doctrine which may not be met by some authority.[2]

§ 1897. **In Absence of Reservation Made in Submission, Arbitrators May Decide Law as Well as Facts.** — Perhaps the following will be found to be the doctrines most reconcilable with the leading authorities: Arbitrators being the chosen judges of the parties are in general to be deemed judges of the law as well as of the facts applicable to the case upon them.[3] If no reservation is made in the submission, the parties are presumed to agree that every question both as to law and fact necessary for the decision is to be included in the arbitration. Under a general submission therefore the arbitrators have rightfully a power to decide on the law and on the fact.[4] And under such a submission they are not bound to award on mere dry principles of law, but they make their award according to the principles of equity and good conscience.[5] Subject therefore to the qualifications hereafter mentioned, a general award cannot be impeached collaterally, or by evidence aliunde, for any mistake of law or of fact, unless there be some fraud or misbehavior in the arbitrators.[6] These qualifications will now be stated.

Shelton, 51 Ala. 425; Merchants' Natl. Bank *v.* City of East Grand Forks, 94 Minn. 246, 102 N. W. 703; Mayberry *v.* Mayberry, 121 N. C. 248, 28 S. E. 349; Brown *v.* Harness, 11 Ind. App. 426, 38 N. E. 1098; Corrigan *v.* Rockefeller, 67 Ohio St. 354, 66 N. E. 95.

[1] Corneforth *v.* Greer, 2 Vern. 705; Ridout *v.* Payne, 1 Ves. 11; s. c. 3 Atk. 494; Chambers *v.* Chambers Glass Co., 185 Pa. 105, 39 Atl. 822; City of Portsmouth *v.* Norfolk County, 31 Gratt. 727.

[2] In Chace *v.* Westmore (13 East, R. 358), Lord Ellenborough said: "I fear it is impossible to lay down any general rule upon this subject in what cases the court will suffer an award to be opened. It must be subject to some degree of uncertainty, depending upon the circumstances of each case."

[3] Hoosac Tunnel Co. *v.* O'Brien, 137 Mass. 424.

[4] See Boston Water Co. *v.* Gray, 6 Met. 131; Fairchild *v.* Adams, 11 Cush. 549; Jensen *v.* Deep Creek Farm Co., 27 Utah 66, 74 Pac. 427.

[5] Knox *v.* Symmonds, 1 Ves. Jr. 369; South Sea Company *v.* Bumstead, 2 Eq. Abr. 80, pl. 8; Shepard *v.* Merrill, 2 John. Ch. R. 276; Delver *v.* Barnes, 1 Taunt. R. 48, 51.

[6] Morgan *v.* Mather, 2 Ves. Jr. 15 to 17, 22; Knox *v.* Symmonds, 1 Ves.

§ 1898. **If Arbitrators Refer Questions of Law to Judicial Inquiry and They Mistake the Law in a Material Point, the Award Will Be Set Aside.** — First, in regard to matters of law. If arbitrators refer any point of law to judicial inquiry by spreading it on the face of their award, and they mistake the law in a palpable and material point, their award will be set aside.[1] If they admit the law but decide contrary thereto upon principles of equity and good conscience, although such intent appear upon the face of the award, it will constitute no objection to it. If they mean to decide strictly according to law and they mistake it, although the mistake is made out by extrinsic evidence, that will be sufficient

Jr. 369; Chace *v.* Westmore, 13 East, 357, 358; Todd *v.* Barlow, 2 John. Ch. R. 551; Herrick *v.* Blair, 1 John. Ch. R. 101; Underhill *v.* Van Cortlandt, 2 John. Ch. R. 339, 361; Greenhill *v.* Church, 3 Ch. R. 49 [88]; Cavendish *v.* ——, 1 Ch. Cas. 279; Brown *v.* Brown, 1 Vern. 157; Emery *v.* Wase, 5 Ves. 846; Ives *v.* Medcalfe, 1 Atk. 64; Tittenson *v.* Peat, 3 Atk. 529; Champion *v.* Wenham, Ambler, R. 245; Boutillier *v.* Tick, 1 Dowl. & Ryl. 366; Wood *v.* Griffith, 1 Swanst. 43; Com. Dig. Chancery, 2 K. 6. In Knox *v.* Symmonds (1 Ves. Jr. 369), Lord Thurlow said: "A party to an award cannot come to have it set aside upon the simple ground of erroneous judgment in the arbitrator; for to his judgment they refer their disputes, and that would be a ground for setting aside every award. In order to induce the court to interfere there must be something more; as corruption in the arbitrator, or gross mistake, either apparent upon the face of the award or to be made out by evidence. But in case of mistake it must be made out to the satisfaction of the arbitrator, and the party must convince him that his judgment was influenced by that mistake, and that if it had not happened he should have made a different award. But this relates only to a general reference to arbitration of all matters in dispute between the parties. But upon a reference to an arbitrator to inquire into facts, &c., the reference is to him in the character of a master, and the court is to draw the conclusion; and if the arbitrator has taken upon himself to do so, the court will see that he has drawn a right conclusion. Upon a general reference to arbitration of all matters in dispute between the parties the arbitrator has a greater latitude than the court in order to do complete justice between the parties; for instance he may relieve against a right which bears hard upon one party, but which having been acquired legally and without fraud could not be resisted in a court of justice." See Nichols *v.* Roe, 3 Mylne & Keen, 438, 439.

See Moseley *v.* Simpson, L. R. 16 Eq. 226, 739; Cleland *v.* Hedly, 5 R. I. 163; Speer *v.* Bidwell, 44 Pa. St. 23. But an action cannot be maintained against an arbitrator under a rule of court, for misconduct. Hoosac Tunnel Co. *v.* O'Brien, 137 Mass. 424. Secus of an attorney in the cause, for conspiring successfully with an arbitrator to obtain an unjust award. Ib.

[1] Knox *v.* Symmonds, 1 Ves. Jr. 369; Ridout *v.* Payne, 3 Atk. 494; Kent *v.* Elstop, 3 East, R. 18; White *v.* White, 21 Vt. 250; Jones *v.* Boston Mill Corp., 6 Pick. 148, 154; Estes *v.* Mansfield, 6 Allen, 69; Speer *v.* Bidwell, 44 Pa. St. 23; Brewer *v.* Bain, 60 Ala. 153; White Star Min. Co. *v.* Hultberg, 220 Ill. 578, 77 N. E. 327.

to set it aside.[1] But their decision upon a doubtful point of law, or in a case where the question of law itself is designedly left to their judgment and decision, will generally be held conclusive.[2]

§ 1899. **Judgment of Arbitrators as to Matters of Fact is Ordinarily Deemed Conclusive.** — Secondly, in regard to matters of fact the judgment of the arbitrators is ordinarily deemed conclusive.[3] If however there is a mistake of material fact apparent upon the face of the award, or if the arbitrators are themselves satisfied of the mistake and state it (although it is not apparent on the face of the award), and if in their own view it is material to the award, then, although made out by extrinsic evidence, Courts of Equity will grant relief.[4]

[1] Kleine *v.* Catara, 2 Gallis. R. 70, 71; Young *v.* Walter, 9 Ves. 364, 366; Blennerhassett *v.* Day, 2 Ball & Beatt. 120; Ainslee, Goff, Kyd on Awards, ch. 7, pp. 351 to 354 (2d ed.); s. c. cited in Delver *v.* Barnes, 1 Taunt. R. 48, 53, note (*a*); Richardson *v.* Nourse, 3 Barn. & Ald. 237; White *v.* White, 21 Vt. 250; West Jersey R. Co. *v.* Thomas, 6 C. E. Green, 205; Ruckman *v.* Ransom, 23 N. J. Eq. 118. And equity will hear the testimony of the arbitrators on this subject, and if it appear that a mistake of law or of fact was made, but for which a different result would have been reached, the award will, it is held in England, be set aside or referred back. In re Dare Valley Ry. Co., L. R. 6 Eq. 429. See Buccleuch *v.* Metropolitan Board of Works, L. R. 5 H. L. 418. This in terms is wider than the Massachusetts rule, supra, § 1895, but perhaps no more is meant. Johnson *v.* Noble, 13 N. H. 286, 38 Am. Dec. 485; Muldrow *v.* Norris, 2 Cal. 74, 56 Am. Dec. 313.

[2] Ching *v.* Ching, 6 Ves. 282; Young *v.* Walter, 9 Ves. 364; Chace *v.* Westmore, 13 East, R. 357; Campbell *v.* Twemlow, 1 Price, R. 81; Steff *v.* Andrews, 2 Madd. R. 6, 9; Wood *v.* Griffith, 1 Swanst. 55; Underhill *v.* Van Cortlandt, 2 John. Ch. 339; Roosevelt *v.* Thurman, 1 John. Ch. R. 220, 226; Richardson *v.* Nourse, 3 Barn. & Ald. 237; Sharman *v.* Bell, 5 Maule & Selwyn, 504. Even at law, in Chace *v.* Westmore (13 East, R. 358), Lord Ellenborough said: "But it is enough to say in the present case, where the merits in law and fact were referred to a person competent to decide upon oath, we will not open the award, unless it could be shown to be so notoriously against justice and his duty as an arbitrator that we could infer misconduct on his part." Jones *v.* Boston Mill Corp., 6 Pick. 148.

[3] See Price *v.* Williams, 1 Ves. Jr. 365; s. q. 3 Bro. Ch. R. 163; Morgan *v.* Mather, 2 Ves. Jr. 15 to 18, 20, 22; Dick *v.* Milligan, 2 Ves. Jr. 23; Goodman *v.* Sayers, 2 Jac. & Walk, 249, 259.

That is, where the arbitrators have drawn inferences from actual facts or, it seems, from what may be deemed a probable state of facts. See Boston Water Co. *v.* Gray, 6 Met. 131, 169. A mere error of judgment is no ground for interference, since the judgment of a chancellor on facts is as fallible as that of an arbitrator. Vanderwerker *v.* Vermont Cent. R. Co., 27 Vt. 130. See Jones *v.* Boston Mill Corp., 6 Pick. 148.

[4] Knox *v.* Symmonds, 1 Ves. Jr. 369. See Rogers *v.* Dallimore, 6 Taunt. R. 111. These distinctions are principally drawn from the case of Kleine *v.* Catara (2 Gallis. R. 71), where the principal authorities are collected. See also Bac. Abr. Arbitrament and Award, K.; Com. Dig. Chancery,

§ 1900. **A Court of Equity Will Not Enforce Specific Performance of Agreement to Refer Case to Arbitrators.** — Courts of Equity will not enforce the specific performance of an agreement to refer any matter in controversy between adverse parties, deeming it against public policy to exclude from the appropriate judicial tribunals of the State any persons who in the ordinary course of things have a right to sue there.[1] Neither will they for the same reason compel arbitrators to make an award;[2] nor when they have made an award will they compel them to disclose the grounds of their judgment.[3] The latter doctrine stands upon the same ground of public policy as the others; that is to say, in the first instance, not to compel a resort to these domestic tribunals, and on the other hand not to disturb their decisions when made, except upon very cogent reasons.[4]

§ 1901. **An Award Constitutes a Bar to Any Suit for the Same Subject-Matter While Unimpeached.** — When an award has

2 K. 1 to 6; Kyd on Awards, ch. 7, pp. 327 to 380 (2d ed.); Watson on Arbitration, ch. 9, § 4, pp. 161 to 178; Attorney-Gen. *v.* Jackson, 5 Hare, R. 366.

See Boston Water Co. *v.* Gray, 6 Met. 131, 169; In re Dare Valley Ry. Co., L. R. 6 Eq. 429; Bissell *v.* Morgan, 56 Barb. 369.

[1] Kill *v.* Hollister, 1 Wils. R. 129; Mitchell *v.* Harris, 4 Bro. Ch. R. 312, 315; s. c. 2 Ves. Jr. 131; Street *v.* Rigby, 6 Ves. 815, 818; Crawshay *v.* Collins, 1 Swanst. R. 40; Agar *v.* Macklew, 2 Sim. & Stu. 418; Gourlay *v.* Somerset, 19 Ves. 431; Tobey *v.* The County of Bristol, 3 Story, R. 800.

[2] Kyd on Awards, ch. 4, p. 100 (2d Lond. ed.). In this respect our law differs from the Roman law; for by the latter arbitrators would, unless under special circumstances, be compelled to make an award when they had taken the office upon themselves. Dig. Lib. 4, tit. 8, l. 3, §§ 1, 3; Kyd on Awards, ch. 4, pp. 98, 99, and note (2d Lond. ed.).

[3] Anon. 3 Atk. 644; Story on Eq. Plead. § 825, note 1. See Willisford *v.* Watson, L. R. 14 Eq. 572; Law *v.* Garret, 8 Ch. D. 26.

[4] An agreement to arbitrate which ousts the jurisdiction of the courts is void as against public policy, and is so treated in equity as well as at law. Pearl *v.* Harris, 121 Mass. 390; Wood *v.* Humphrey, 114 Mass. 185; Tobey *v.* Bristol, 3 Story, 800. But on the other hand there may be a valid condition precedent to arbitrate before suing in the courts. Scott *v.* Avery, 8 Ex. 487; s. c. 5 H. L. Cas. 811; Wood *v.* Humphrey, supra; Rowe *v.* Williams, 97 Mass. 163; Cobb *v.* New England Ins. Co., 6 Gray, 192, 204; Scott *v.* Liverpool, 3 DeG. & J. 334; Jones *v.* St. Johns College, L. R. 6 Q. B. 115; Elliott *v.* Royal Assur. Co., L. R. 2 Ex. 237; Sharpe *v.* San Paulo Ry. Co., L. R. 8 Ch. 597; Gray *v.* Wilson, 4 Watts, 39; Herrick *v.* Belknap, 27 Vt. 673; Hill *v.* More, 40 Maine, 515. For such a condition admits the right of the parties to go to the courts, but only prescribes a necessary preliminary step. Wood *v.* Humphrey, supra. A fortiori will any general agreement to arbitrate be good which does not profess to prevent the parties from resorting to the courts at any time. Scott *v.* Avery, supra; Rowe *v.* Williams, supra; Smith *v.* Lloyd, 26 Beav. 507. E. g. a rule or by-law of a society that all disputes among the members shall be settled by arbitration. Smith *v.* Lloyd, supra. Nor does it

actually been made, and it is unimpeached and inimpeachable, it constitutes a bar to any suit for the same subject-matter both at law and in equity.[1] And Courts of Equity will in proper cases enforce a specific performance of an award which is unexceptionable, and which has been acquiesced in by the parties, if it is for the performance of any acts by the parties in specie, such as a conveyance of lands; and such a specific performance will be decreed almost as if it were a matter of contract instead of an award.[2]

§ 1902. **Specific Performance of Award Is in Discretion of Court.** — But as the specific performance of awards as well as of contracts rests in the sound discretion of the court, if, upon the face of the award or otherwise it appears that there are just objections to enforcing it, Courts of Equity will not interfere.[3] On the other hand where an award has been long acquiesced in or acted upon by both parties, even although objections might have been originally urged against it, an application to set it aside will not be entertained.[4]

§ 1903. **Coincidences between the Civil Law and Our Law as to Awards.** — It is curious to remark the coincidences between the

matter that the agreement is that the "award shall be final." Rowe *v.* Williams, supra. Further see Vickers *v.* Vickers, L. R. 4 Eq. 529; Dinham *v.* Bradford, L. R. 5 Ch. 519; Richardson *v.* Smith, Ib. 648; Kimberly *v.* Dick, L. R. 13 Eq. 1.

[1] After the award is made the arbitrator is functus officio, and cannot rectify even a clerical error. Mordue *v.* Palmer, L. R. 6 Ch. 22; Gardner *v.* Newman, 135 Ala. 522, 33 So. 179; McClelland *v.* Hammond, 12 Colo. App. 82, 54 Pac. 538; Terre Haute R. Co. *v.* Harris, 126 Ind. 7, 25 N. E. 831; West *v.* Averill Grocery Co., 109 Iowa 488, 80 N. W. 555; Groat *v.* Pracht, 31 Kans. 656, 3 Pac. 274; Searles *v.* Lum, 81 Mo. App. 607.

[2] Hall *v.* Hardy, 3 P. Will. 187; Thompson *v.* Noel, 1 Atk. 62; Norton *v.* Mascall, 2 Ch. Rep. 304; s. c. 2 Vern. 24; Wood *v.* Griffith, 1 Swanst. 54; Bouck *v.* Wilber, 4 John. Ch. R. 405; Com. Dig. Chancery, 2 K. Lord Hardwicke, in Thompson *v.* Noel (1 Atk. 62), said: "A bill to carry an award into execution, where there is no acquiescence in it by the parties to the submission or agreement by them afterwards to have it executed, would certainly not lie; but the remedy to enforce performance of the award must be taken at law." See also Bishop *v.* Webster, 1 Eq. Abr. 51; s. c. 2 Vern. 444; Jones *v.* Boston Mill Corp., 6 Pick. 148; Caldwell *v.* Dickinson, 13 Gray, 365; Shelton *v.* Alcox, 11 Conn. 240; Burke *v.* Parke, 5 W. Va. 122; Akely *v.* Akely, 16 Vt. 450. In the last of these cases a party having obtained an award for the conveyance of certain real estate, a question was raised, based on certain dicta of early cases, whether it was not necessary that the award should have been confirmed by the party against whom it was made; and the question was, on a review of the authorities, decided in the negative. See Sears *v.* Vincent, 8 Allen, 507; supra, note 1, Lord Hardwicke's rule.

[3] Auriol *v.* Smith, 1 Turn. & Russ. R. 187, 189, 190; Eyre *v.* Good, 2 Ch. Rep. 19 [34]; Wood *v.* Griffith, 1 Swanst. 54; Emery *v.* Wase, 5 Ves. 846; Com. Dig. Chancery, 2 K. 2.

[4] Jones *v.* Bennett, 1 Bro. Parl. R. 411, 428.

civil law and our law in regard to arbitrations and awards. Whether we are to attribute this to the origin of the latter in the established jurisprudence of the former, or to the same good sense, prevailing in different nations and establishing the like equitable principles on the same subject, founded on public policy and private convenience, it is not necessary to discuss. But it is certain that the Roman law has much to commend it in the reasonableness of its doctrines.

§ 1904. **Arbitration Defined.** — Arbitration, called compromise (compromissum), was a mode of terminating controversies much favored in the civil law, and was usually entered into by reciprocal covenants or obligations, with a penalty or with some other certain or implied loss,[1] and the award was deemed to partake of the character of a judicial proceeding.[2] "Compromissum ad similitudinem judiciorum redigitur, et ad finiendas lites pertinet."[3] "Ex compromisso placet exceptionem non nasci, sed pœnæ petitionem."[4] The general conclusiveness of awards when made within the legitimate powers of the arbitrators was firmly established upon the same principles which ought universally to prevail to suppress litigation. "Stari autem debet sententiæ arbitri, quam de re dixerit, sive æqua, sive iniqua sit; et sibi imputet qui compromisit."[5]

§ 1905. **Fraud as an Exception to the Conclusiveness of Awards.** — The leading though not the only exception to the conclusiveness of awards, when regularly made, was the fraud or corruption of the parties or of the arbitrators. "Posse eum uti doli mali exceptione." Again: "Etiamsi appellari non potest, doli mali exceptionem in pœnæ petitione obstaturam."[6] Another exception was, that the arbitrators had, in their award, exceeded their

[1] Pothier, Pand. Lib. 4, tit. 8, n. 13, 14; Dig. Lib. 4, tit. 8, l. 11, § 2, 3; Ibid. l. 13, § 1; Ibid. l. 27, § 6.

[2] If there was a simple agreement to stand by the award without any penalty or equivalent, it seems that in the civil law there was originally no remedy to enforce it. Justinian in some cases, but not adequately (as it should seem), provided for this defect. See Kyd on Awards, ch. 1, pp. 8, 9 (2d Lond. ed.), which cites Dig. Lib. 4, tit. 8, l. 27, §§ 6, 7, where it is said: "Et si quis presens arbitrum sententiam dicere prohibuti, pœna committetur. (§ 6.) Sed si pœna non fuisset adjecta compromisso, sed simpliciter, sententiæ stari quis promiserit, incerti adversus eum foret actio." § 7. See also Cod. Lib. 2, tit. 56, l. 4, 5.

[3] 1 Domat, B. 1, tit. 14, § 1, art. 2; Dig. Lib. 4, tit. 8, l. 1; Pothier, Pand. Lib. 4, tit. 8, n. 1.

[4] 1 Domat, B. 1, tit. 14, § 1, art. 3; Dig. Lib. 4, tit. 8, l. 2.

[5] Dig. Lib. 4, tit. 8, l. 27, § 2; Pothier, Pand. Lib. 4, tit. 8, n. 39, 40.

[6] Dig. Lib. 4, tit. 8, l. 32, § 14; Ibid. l. 31; Pothier, Pand. Lib. 4, tit. 8, n. 40, 47, 48.

authority; for if they had, it was void. "De officio arbitri tractantibus sciendum est, omnem tractatum ex ipso compromisso sumendum. Nec enim aliud illi licebit quam quod ibi, ut efficere posset, cautum est. Non ergo quodlibet statuere arbiter poterit, nec in re qualibet; nisi de qua re compromissum est, et quatenus compromissum est." [1]

§ 1906. **Same.** — Subject to exceptions of this nature, it has been justly remarked by an eminent judge that the prætor at Rome would not interfere with the decisions of these domestic tribunals for the very reasons which have been adopted in modern times; because they put an end to suits, and the arbitrators were judges of the parties' own choice.[2] "Tametsi neminem prætor cogit arbitrium recipere (quoniam hæc res libera et soluta est, et extra necessitatem jurisdictionis posita); attamen ubi semel quis in se receperit arbitrium, ad curam et sollicitudinem suam hanc rem pertinere prætor putat; non tantum quod studeret lites finiri, verum quoniam non deberent decipi qui eum, quasi virum bonum, disceptatorem inter se elegerunt." [3] Indeed when once arbitrators had taken upon themselves that office, they were compellable by the prætor to make an award. "Quisquamne potest negare æquissimum fore prætorem interponere se debuisse, ut officium, quod in se recepit, impleret. Et quidem arbitrum cujuscunque dignitatis coget officio quod susceperit, perfungi." [4] In this respect there is a marked distinction between our law and the civil law.[5]

§ 1907. [**The Parties Have the Right to Be Present and to Participate in the Meetings.** — The parties to the controversy have the right to be present at the time the meetings are held, and to participate in them. Of course it is not contemplated that the hearings shall be conducted with the same degree of formality that prevails in courts of justice, yet, so far as practicable, the same rules and methods of procedure govern the arbitrators in their deliberations. It is their duty to hear the parties, and the witnesses that they have to offer, although their award may be based upon incompetent testimony; but it is not their duty to go through

[1] Dig. Lib. 4, tit. 8, l. 32, § 15; 1 Domat, B. 1, tit. 4, § 2, art. 6; Pothier, Pand. Lib. 4, tit. 8, n. 41, 42.

[2] Mr. Chancellor Kent, in Underhill *v.* Van Cortlandt, 2 John. Ch. R. 368.

[3] Dig. Lib. 4, tit. 8, l. 3, § 1; Pothier, Pand. Lib. 4, tit. 8, n. 22.

[4] Dig. Lib. 4, tit. 8, l. 3, §§ 1, 3; Kyd on Awards, 98, 99, and note (2d Lond. ed.).

[5] Ante, § 1900.

books that were improperly kept, and not offered in evidence, in determining the right of the case in question.[1] If a party offers the testimony of a witness in evidence, it should be received by the arbitrators, and if they fail to do it, upon the ground that they understood they were to hear only the statements of the parties, the award will be set aside.[2] But if the arbitrators have notified a party of the time and place of the hearings, and he has failed either to come or to offer his testimony, he will be concluded by the award rendered upon the testimony offered.[3] It is usual for each party to select an arbitrator, and the two select an umpire, but an umpire is not absolutely essential to the validity of an award, unless the submission requires it.[4] While the arbitrators selected may have the right to choose an umpire, they ought not to do this until they have made an honest effort to agree among themselves.[5]]

§ 1908. [**Rendition of Award by Arbitrators.** — As a general rule, in the absence of an agreement to the contrary, an award rendered by a majority of the arbitrators is sufficient and binding, but the result must be participated in by all of the members. It is their duty to hear all of the evidence and deliberate upon their findings together. The reason for this is obvious. The arbitrators, for the time being, constitute the court and jury, and it might work a gross injustice to one party if the evidence were offered piecemeal before the arbitrators. Even where it is sufficient for the award to be rendered by a majority of the arbitrators, it should appear that those who were in the minority actually appeared and took part in the proceedings.[6]]

§ 1909. [**Scope of Matters Inquired about by Arbitrators.** — The power of arbitrators is limited to the precise question submitted, and they could not lawfully go beyond the terms of the submission in order to do general justice. If they exceed the

[1] Manson *v.* Wilcox, 140 Cal. 206, 73 Pac. 1004; Carlson *v.* St. Paul Fire Ins. Co., 37 Mont. 118, 94 Pac. 756, 127 Am. St. Rep. 715; Cohn *v.* Wemme, 47 Oreg. 146, 81 Pac. 981, 8 Ann. Cas. 508; Lumbard *v.* Holdiman, 115 Ill. App. 458.

[2] Salstead *v.* Seaman, 82 N. Y. 27, 37 Am. Rep. 536.

[3] Van Winkle *v.* Continental Fire Ins. Co., 55 W. Va. 286, 47 S. E. 82.

[4] Vincent *v.* German Ins. Co., 120 Iowa 272, 94 N. W. 458; Harvin *v.* Denton, 87 Miss. 238, 39 So. 456.

[5] Christenson *v.* Carleton, 69 Vt. 91, 37 Atl. 226.

[6] Hartford Fire Ins. Co. *v.* Bonner, 44 Fed. 151, 11 L. R. A. 623; Omaha Water Co. *v.* Omaha, 162 Fed. 225, 8 C. C. A. 205, 15 Ann. Cas. 498; Stose *v.* Heissner, 120 Ill. 433, 11 N. E. 161, 60 Am. Rep. 563; Moore *v.* Ewing, 1 N. J. L. 144, 1 Am. Dec. 195; Blin *v.* Hay, 2 Tyler (Vt.) 304, 4 Am. Dec. 738; Bray *v.* Staples, 149 N. C. 89, 62 S. E. 780.

powers conferred upon them, it will render their award void, unless the excess can be separated from the part which is within the submission. When the part of the award which is bad is not so clearly separable from the rest that it cannot be seen that the good part is not affected by the invalid part, then the award will be void in toto, and a void award, like a void contract, will not be specifically enforced.[1] If one of the parties to the arbitration has rights against the other party, and he has not especially set up a cross bill against his adversary, an adjustment of this matter by the arbitrators does not vitiate their award.[2] The award ought to be rendered with such certainty that there is nothing left for dispute between the parties with reference to the matters contained in the submission. The purpose of the arbitration was that a speedy and convenient method of adjusting the differences be had and the award ought to be prepared so as to leave no ground for future controversy.[3]]

[1] City of Mobile *v.* Wood, 95 Fed. 537; Brown *v.* Mize, 119 Ala. 10, 24 So. 453; Bogan *v.* Daughdrill, 51 Ala. 312; Ehrman *v.* Stanfield, 80 Ala. 121; Bartlett *v.* Bartlett, 116 Wis. 450, 93 N. W. 473; Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486.

[2] McCune *v.* Lytle, 197 Pa. 404, 47 Atl. 190.

[3] Whitcher *v.* Whitcher, 49 N. H. 176, 6 Am. Rep. 486; Smith *v.* Potter, 27 Vt. 304, 65 Am. Dec. 198.

CHAPTER XLIV

WRITS OF NE EXEAT REGNO AND SUPPLICAVIT

§ 1910. **Writs of Ne Exeat Regno and Supplicavit.** — Having thus reviewed most of the branches of the exclusive jurisdiction of Courts of Equity which arise from or are dependent upon the subject-matter of the controversy, we are next led to the consideration of those branches of exclusive jurisdiction which arise from, or are dependent upon, the nature of the remedy to be administered. The peculiar remedies in equity in cases of concurrent jurisdiction have already been fully discussed; and much therefore which would otherwise be appropriate for remark in this place has been already anticipated. The peculiar remedies connected with the exclusive jurisdiction in equity seem to be principally the process of Bill of Discovery, properly so called; the process of Bill for Perpetuating Evidence; and the processes called the writ of NE EXEAT REGNO and the writ of SUPPLICAVIT.[1] The two former are properly embraced in what is called the auxiliary or assistant jurisdiction of Courts of Equity, and will therefore be reserved for examination thereafter. The two latter will be discussed in the present chapter.

§ 1911. **The Nature of the Writ.** — The writ of Ne Exeat Regno, or, as it is sometimes termed, Ne Exeat Regnum, is a prerogative writ, which is issued, as its name imports, to prevent a person

[1] The authority to award an issue to be tried by a jury, though a peculiar remedy, is an incident both to the concurrent and the exclusive jurisdiction of Courts of Equity. The granting or refusing of such an issue is in all cases except in questions of the validity of wills (ante, §§ 260, 1888) a matter of discretion, and is designed merely to assist the conscience of the court in deciding upon some matter of fact. It seems rather therefore to belong to the practice of the court than to constitute a part of its peculiar jurisdiction. See on this subject O'Connor *v.* Cook, 8 Ves. 536; Short *v.* Lee, 2 Jac. & Walk. 496, 497; Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, pp. 295 to 299; 2 Fonbl. Eq. B. 6, ch. 3, § 7, and notes (*t*), (*u*); Matthews *v.* Warner, 4 Ves. R. 206; Lancashire *v.* Lancashire, 9 Beav. R. 259.

from leaving the realm.[1] It is said that it is a process unknown to the ancient common law, which in the freedom of its spirit allowed every man to depart the realm at his pleasure.[2] Its origin is certainly obscure. But it may be traced up to a very early period, although some have thought that its date is later than the reign of King John; since by the great charter, granted by him, the unlimited freedom to go from and return to the kingdom at their pleasure was granted to all subjects. "Liceat unicuique de cætero exire de regno nostro, et redire salvo et secure per terram et per aquam, salva fide nostra, nisi tempore guerræ, per aliquod breve tempus, propter communem utilitatem regni."[3] The period between the reign of King John and that of Edward I. has been accordingly assigned by some writers as the probable time of its introduction. A proceeding somewhat similar in its nature and objects, though not in the precise form of the modern writ, is distinctly mentioned by Fleta and Britton;[4] and the Statute of 5 Rich. II (ch. 2, §§ 6, 7) prohibited all persons whatsoever from going abroad, excepting lords and great men and merchants and soldiers.[5]

§ 1912. **Same.** — In Fitzherbert's Natura Brevium two forms of writs are given against subjects leaving the realm without license, the one applicable to clergymen and the other to laymen.[6] And it is there remarked by Fitzherbert that by the common law every man may go out of the realm at his pleasure, without the King's leave; yet because every man is bound to defend the King and his realm, therefore the King, at his pleasure, by his writ, may command a man that he go not beyond the seas or out of the realm without license; and if he do the contrary, he shall be punished for disobeying the King's command.[7] From this language it may be inferred, as his opinion, that the right of the King was a part of the common law, not at all incompatible with the ordinary right of the subject to leave the realm; but a restric-

[1] Beames on Ne Exeat, p. 1; 1 Black. Comm. 137, 266. Most of the materials which are contained in this chapter have been drawn from the concise but perspicuous treatise of Mr. Beames, entitled "A Brief View of the Writ of Ne Exeat Regno, London, 1812." I have not omitted however to compare the observations of the author with the original authorities.

[2] Beames on Ne Exeat, p. 1. [3] Beames on Ne Exeat, p. 3.

[4] Fleta, 383, §§ 1, 2; Britton, ch. 122, cited in Beames on Ne Exeat, pp. 4, 5.

[5] Beames on Ne Exeat, p. 6. See Placita Anglo-Normannica, 291, for a great case between William the Conqueror and his subject Odo, Bishop of Bayeux, anno 1082.

[6] Fritz. Nat. Brev. 85. [7] Ibid.

tion upon that right, which might be imposed by the Crown for great political purposes. This is manifestly the view of the matter taken by Lord Coke, who deems it a part of the prerogative of the Crown at the common law, and not dependent upon any statute "pro bono publico regis et regni." [1]

§ 1913. **Same.** — Be the origin of this writ however as it may, it was originally applied only to great political objects and purposes of State for the safety or benefit of the realm.[2] The time when it was first applied to mere civil purposes in aid of the administration of justice is not exactly known, and seems involved in the like obscurity as its primitive existence. It seems however to have been so applied as early as the reign of Queen Elizabeth.[3] In the reign of King James I it seems to have been so firmly established as a remedial civil process grantable in chancery that it was made the subject of one of Lord Bacon's Ordinances. It is there declared that "Writs of Ne Exeat Regnum are properly to be granted according to the suggestion of the writ in respect of attempts prejudicial to the King and State; in which case the Lord Chancellor will grant them upon prayer of any of the principal secretaries, without cause showing, or upon such information as his Lordship shall think of weight. But otherwise also they may be according to the practice of *long time used*, in case of interlopers in trade, great bankrupts in whose estates many subjects are interested, or other cases that concern multitudes of the King's subjects; also in case of duels and divers others." [4]

§ 1914. **The Writ of Ne Exeat Regno with Reference to Cases of Private Rights Is Applied with Great Jealousy.** — The ground then upon which it is applied to civil cases being, as is here stated, custom or usage, it has been in practice uniformly confined to

[1] 2 Co. Inst. 54.

[2] Ex parte Brunker, 3 P. Will. 312; Anon. 1 Atk. 521; Flack *v.* Holm, 1 Jac. & Walk. 405, 413, 414.

[3] Tothill, in his Transactions (p. 136), mentions three cases, one in the 32d of Elizabeth and two in the 19th of James I. See also Beames, Ord. of Chanc. p. 40, note (148); Beames on Ne Exeat, p. 16. Lord Chancellor Talbot, in Ex parte Brunker (3 P. Will. 312), said: "In all my experience I never knew this writ of Ne Exeat Regno granted or taken out without a bill in equity first filed. It is true it was originally a State writ, but for some time (though not very long) it has been made use of in aid of the subjects for the helping them to justice. But still as custom has allowed this latter use to be made of it, it ought to go no further than can be warranted by usage, which always has been to have a bill first filed." A copy of the modern writ will be found in Beames on Ne Exeat, pp. 19, 20, and Hinde's Practice, p. 613.

[4] Beames, Ord. in Chanc. pp. 39, 40, Ord. 89; Beames on Ne Exeat, pp. 16, 17.

cases within the usage, and therefore it is perhaps impossible to expound its true use or limitation upon principle.[1] It has been strongly said that it is applied to cases of private right with great caution and jealousy.[2]

§ 1915. **The Use of the Writ in the United States.** — The writ of the Ne Exeat Regno is also in use in America, where it is treated not as a prerogative writ but as a writ of right in the cases in which it is properly grantable.[3] But generally the same limitations which are imposed as to the remedy in England exist in our present practice. In short the writ and its attributes are almost entirely derived from the English authorities and practices.[4]

§ 1916. **The Writ Will Not Be Granted except in Cases of Equitable Debts and Claims.** — In general it may be stated that the writ of Ne Exeat Regno will not be granted unless in cases of equitable debts and claims; for in regard to civil rights it is treated as in the nature of equitable bail.[5] If therefore the debt be such as that it is demandable in a suit at law, the writ will be refused;

[1] Ex parte Brunker, 3 P. Will. 313; Etches *v.* Lance, 7 Ves. 417; De Carriere *v.* De Calonne, 4 Ves. 590.

[2] Tomlinson *v.* Harrison, 8 Ves. 32; Whitehouse *v.* Partridge, 3 Swanst. 379.

[3] See Samuel *v.* Wiley, 50 N. H. 353; Breck *v.* Smith, 54 Barb. 212; Dean *v.* Smith, 23 Wis. 483; Ex parte Harker, 49 Cal. 465; Malcolm *v.* Andrews, 68 Ill. 101; Myer *v.* Myer, 25 N. J. Eq. 28; Bonesteel *v.* Bonesteel, 28 Wis. 245. It is said that it cannot issue against a woman. Adams *v.* Whitcomb, 46 Vt. 708.

[4] By the Act of Congress of 2d March, 1793, ch. 22, § 5, it is provided that "Writs of Ne Exeat may be granted by any judge of the Supreme Court of the United States in cases where they may be granted by the Supreme or a Circuit Court. But no writ of Ne Exeat shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States." In re Cohen, 136 Fed. 999; In re Lipke, 98 Fed. 970.

[5] Beames on Ne Exeat, p. 30; Seymour *v.* Hazard, 1 John. Ch. R. 1; Ex parte Brunker, 3 P. Will. 312; Atkinson *v.* Leonard, 3 Bro. Ch. R. 218; Jackson *v.* Petrie, 10 Ves. 163, 165; Whitehouse *v.* Partridge, 3 Swanst. R. 377 to 379; Dawson *v.* Dawson, 7 Ves. 173; Haffey *v.* Haffey, 14 Ves. 261; Stewart *v.* Graham, 19 Ves. 313, 314; Hyde *v.* Whitfield, 19 Ves. 344; Flack *v.* Holm, 1 Jac. & Walk. 405, 413, 414; Jenkins *v.* Parkinson, 2 Mylne & Keen, 5. In Wyatt's Practical Register, p. 289, it is said: "It is now mostly used where a suit is commenced in this court against a man, and he, designing to defeat the other of his just demand, or to avoid the justice and equity of this court, is about to go beyond sea, or however that the duty will be endangered if he goes." The usual affidavit on which the writ is granted states both of these facts. Beames on Ne Exeat, pp. 26 to 28; MacDonough *v.* Gaynor, 18 N. J. Eq. 249; Cable *v.* Alvord, 27 Ohio St. 654; Bonesteel *v.* Bonesteel, 28 Wis. 245.

for in such a case the remedy at law is open to the party.[1] If bail may be required, it can be insisted on in the action at law; if not required at law, that furnishes no ground for the interference of a Court of Equity to do what in effect as to legal demands the law inhibits.[2]

§ 1917. **Same.** — It has been said in the preceding remarks that in general the writ of Ne Exeat Regno lies only upon equitable debts and claims. There are to this general statement two recognized exceptions, and two only. The one is a case of alimony decreed to a wife which will be enforced against her husband by a writ of Ne Exeat Regno if he is about to quit the realm;[3] the other is the case of an account on which a balance is admitted by the defendant, but a larger claim is insisted on by the creditor.[4]

§ 1918. **The Wife's Right to Alimony.** — In regard to alimony it has been said that it arose from compassion, and because the Ecclesiastical Courts could not take bail.[5] Whether this be the real origin of the jurisdiction in equity may admit of some doubt. The truer ground perhaps for equitable interference would seem to be, that although alimony is a fixed sum and not strictly an equitable debt, yet the Ecclesiastical Courts are unable to furnish a complete remedy to enforce the due payment thereof; and therefore Courts of Equity ought to interfere to prevent the decree from being defeated by fraud.[6] It does not seem however that

[1] Dawson *v.* Dawson, 7 Ves. 173; Russell *v.* Ashby, 5 Ves. 96; Blaydes *v.* Calvert, 2 Jac. & Walk. 211, 213; Smedberg *v.* Mark, 6 John. Ch. R. 138.

[2] Porter *v.* Spencer, 2 John. Ch. R. 169, 170; Crosley *v.* Marriot, 2 Dick. R. 609; Gardner *v.* ——, 15 Ves. 444.

[3] Read *v.* Read, 1 Ch. Cas. 115; Shaftoe *v.* Shaftoe, 7 Ves. 71; Dawson *v.* Dawson, 7 Ves. 173; Anon. 2 Atk. 210.

[4] Beames on Ne Exeat, pp. 30 to 34; Id. p. 38; 2 Madd. Ch. Pr. 182 to 187; Cooper, Eq. Pl. ch. 3, pp. 149, 150; Bronk *v.* State, 43 Fla. 461, 31 So. 248, 99 Am. St. Rep. 119; but not where neither of the parties resides in the State in which the action is pending. Dithman *v.* Dithman, 68 N. J. Eq. 533, 59 Atl. 644.

[5] Beames on Ne Exeat, 30; Anon. 2 Atk. 210; Vandergucht *v.* De Blaquiere, 8 Sim. R. 315. The Vice-Chancellor (Sir L. Shadwell) in this case said: "The cases that have been cited in the course of the argument do not furnish any authority to show that this court has ever exercised any jurisdiction with respect to alimony except in granting the writ of Ne Exeat Regno. The interference of the court in granting that writ has arisen from the peculiar circumstances that the Ecclesiastical Court cannot compel the husband to find bail. And if the husband makes it appear that he does not intend to leave the kingdom, the court will not grant the writ, although he may not intend to pay what is due from him." See also Stones *v.* Cooke, 8 Sim. R. 321, note (*q*).

[6] See Cooper, Eq. Pl. Introd. p. 34. In Read *v.* Read, 1 Ch. Cas. 115; Ex parte Whitmore, 1 Dick. R. 143, Shaftoe *v.* Shaftoe, 7 Ves. 171, and

in modern times Courts of Equity have assumed or acted upon the jurisdiction to this extent.[1] In cases of alimony it is said that Courts of Equity will not interfere unless alimony has been already decreed, and then only to the extent of what is due.[2] But if there is an appeal from the decree pronouncing alimony, and a fortiori if no alimony has been decreed, and the case is a lis pendens, Courts of Equity will abstain from granting the writ.[3]

§ 1919. **Matters of Account Are Properly Cognizable with Reference to Writs of Ne Exeat Regno.** — In regard to a bill for an account where there is an admitted balance due by the defendant to the plaintiff, but a larger sum is claimed by the latter, there is not any real deviation from the appropriate jurisdiction of Courts of Equity;[4] for matters of account are properly cognizable therein. The writ of Ne Exeat Regno may therefore well be supported as a process in aid of the concurrent jurisdiction of Courts of Equity; and accordingly it is now put upon this intelligible and satisfactory ground.[5]

§ 1920. **The Equitable Demand Must Be Certain.** — As to the nature of the equitable demand for which a Ne Exeat Regno will be issued, it must be certain in its nature, and actually payable and not contingent.[6] It should also be for some debt or pecuniary demand. It will not lie therefore in a case where the demand is

Dawson *v.* Dawson, 7 Ves. 173, no such ground as compassion is suggested. In New York, where the jurisdiction as to divorce and alimony is vested in the Court of Chancery, the Chancellor will, pendente lite, grant a writ of Ne Exeat Republica against the husband. Denton *v.* Denton, 1 John. Ch. R. 364, 441; 1 Fonbl. Eq. B. 1, ch. 2.

[1] Stones *v.* Cooke, 8 Sim. R. 321, note (*q*).

[2] Shaftoe *v.* Shaftoe, 7 Ves. 171; Dawson *v.* Dawson, 7 Ves. 173; Haffey *v.* Haffey, 14 Ves. 261. See Angier *v.* Angier, Prec. Ch. 497; Cooper, Eq. Pl. ch. 3, pp. 149, 150; 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (*n*).

[3] Coglar *v.* Coglar, 1 Ves. Jr. 94; Haffey *v.* Haffey, 14 Ves. 261; Street *v.* Street, 1 Turn. & Russ. 322.

[4] Jones *v.* Sampson, 8 Ves. 593; Russell *v.* Ashby, 5 Ves. 96; Amsinck *v.* Barklay, 8 Ves. 597; Dick *v.* Swinton, 1 Ves. & Beam. 371; Stewart *v.* Graham, 19 Ves. 313; Flack *v.* Holm, 1 Jac. & Walk. 405, 413; Porter *v.* Spencer, 2 John. Ch. R. 169 to 171; Mitchell *v.* Bunch, 2 Paige, R. 606, 617 to 619.

[5] Jones *v.* Alephsin, 16 Ves. 471; Howden *v.* Rogers, 1 Ves. & Beam. 132 to 134; Atkinson *v.* Leonard, 3 Bro. Ch. R. 218; Blaydes *v.* Calvert, 2 Jac. & Walk. 213.

[6] Anon. 1 Atk. 521; Rico *v.* Gualtier, 3 Atk. 500; Shearman *v.* Shearman, 3 Bro. Ch. R. 370; Whitehouse *v.* Partridge, 3 Swanst. 377, 378; Morris *v.* McNeil, 2 Russ. R. 604; Porter *v.* Spencer, 2 John. Ch. R. 169; Rhodes *v.* Consius, 3 Rand (Va.) 188, 18 Am. Dec. 715; Williams *v.* Williams, 3 N. J. Eq. 715; but the rule only applies where money is involved, rather than specific property. Edwards *v.* Massey, 8 N. C. 359.

of a general unliquidated nature or is in the nature of damages.[1] The equitable debt need not however be directly created between the parties. It will be sufficient if it is fixed and certain. Thus the cestui que trust or assignee of a bond may have a writ of Ne Exeat Regno against the obligor.[2]

§ 1921. **The Writ Does Not Lie in Favor of a Non-resident Plaintiff.** — We may conclude what is thus briefly said upon this subject by stating that the writ will not be granted on a bill for an account in favor of a plaintiff who is a foreigner out of the realm because he cannot be compelled to appear and account. And on the other hand it may be granted against a foreigner transiently within the country, although the subject-matter originated abroad, at least to the extent of requiring security from him to perform the decree made on the bill filed.[3]

§ 1922. **The Nature of the Writ of Supplicavit.** — The other process to which we have alluded as belonging to the exclusive jurisdiction of chancery is the Writ of Supplicavit. It is in the nature of the process at the common law to find sureties of the peace upon articles filed by a party for that purpose.[4] It is

[1] See Etches *v.* Lance, 7 Ves. 417; Cock *v.* Ravie, 6 Ves. 283. See also Bridge *v.* Hindall, Rep. temp. Finch, 257; Beames on Ne Exeat, 36, 37, 53 to 55; Whitehouse *v.* Partridge, 3 Swanst. 377, 378; Blaydes *v.* Calvert, 2 Jac. & Walk. 212; Graves *v.* Griffith, 1 Jac. & Walk. 646; Flack *v.* Holm, 1 Jac. & Walk. 405, 407; Smedberg *v.* Mark, 6 John. Ch. R. 138; Mattocks *v.* Tremain, 3 John. Ch. R. 75; De Rivafinoli *v.* Corsetti, 4 Paige, R. 264.

[2] Grant *v.* Grant, 3 Russ. R. 598; Leake *v.* Leake, 1 Jac. & Walk. 605.

[3] Hyde *v.* Whitefield, 19 Ves. 343, 344. See Done's case, 1 P. Will. 263. It seems a matter still subject to some little doubt, whether the writ is grantable against a foreigner who happens to be within the country, although the objection may not prevail where he is a subject domiciled in a foreign country or in a colony. See Beames on Ne Exeat, pp. 44 to 48; Grant *v.* Grant, 3 Russ. R. 598. The case of Flack *v.* Holm (1 Jac. & Walk. 405, 411, 414, 415) affirms the jurisdiction against a foreigner domiciled abroad and transiently within the realm, in the case of a balance of account on which he might have been sued at law and held to bail. This seems to have been the main ground of the decision. "It is," said Lord Eldon in that case, "but a civil process to hold a person to bail for an equitable debt under the same circumstances as those in which, if it were a legal debt, he might be held to bail at law." See also Howden *v.* Rogers, 1 Ves. & Beam. 129. In Woodward *v.* Schatzell (3 John. Ch. R. 412), Mr. Chancellor Kent affirmed the jurisdiction in relation to foreigners and citizens of other States transiently within the territorial jurisdiction of the State of New York, stating however that the writ would be discharged upon giving security to abide the decree. See also the same point ruled in Mitchell *v.* Bunch, 2 Paige, R. 606, 617 to 620.

[4] See Baynum *v.* Baynum, Ambler, R. 63, 64. In Lord Bacon's Ordinances there is one regulating the issuing of this writ. Ord. 87, in Beames's Ord. Chan. p. 39. On this Mr. Beames has remarked in his note (144):

however rarely now used, as the remedy at the common law is in general adequate; although (as we have seen [1]) it is sometimes resorted to by a wife against her husband, and in that case it is said that the Court of Chancery as an incident may grant maintenance or alimony to the wife if she is compelled to live apart from her husband.[2]

§ 1923. **Same.** — Lord Chief Baron Gilbert has given a full description of the nature and objects of this writ; and it will be sufficient for all the purposes of our present inquiry to state them in his words: "It is granted upon complaint and oath made of the party where any suitor of the court is abused and stands in danger of his life, or is threatened with death by another suitor. The contemnor is taken into custody and must give bail to the sheriff; and if he moves to discharge the writ of supplicavit, the court hears both parties on affidavit and continues or discharges it as the case appears before them. If they order the contemnor to give security for his good behavior (for this writ is in the nature of a Lord Chief Justice's warrant to apprehend a man for a breach of the peace), he must do it by recognizance to be taken before one of the masters of the court, who must be in the commission of the peace. He is to find sureties to be of his good behavior. If

"This writ as now issuing is founded on the Statute 21 Jac. I. ch. 8, which must have passed about five years after the making of the present Ordinances, if they really were published on the 29th Jan. 1618, as asserted in the Judicial Authority of the Master of the Rolls, p. 100. In addition to the authorities cited in the notes subjoined to Heyn's Case, the reader may be referred to Stoell *v.* Botelar, 2 Ch. Rep. 68; Ex parte Gumbleton, 9 Mod. 232; s. c. 2 Atk. 70; Hilton *v.* Biron, 3 Salk. 248; Ex parte Lewis, Mosel. 191; Ex parte Gibson, Ib. 198; Gilb. For. Rom. 202; Com. Dig. Chancery, 4 R. and Forcible Entry, D. 16, 17. The Collec. Jurid. 193 carries supplicavits so high as the reigns of Henry VII. and Henry VIII., when both parties, plaintiff and defendant, were bound over to their good behavior."

[1] Clavering's Case, 2 P. Will. 202; Snelling *v.* Flatman, 1 Dick. 6; Stoell *v.* Botelar, 2 Ch. R. 68; Baynum *v.* Baynum, Ambler, R. 63, 64.

[2] Ibid.; Ball *v.* Montgomery, 2 Ves. Jr. 195; Duncan *v.* Duncan, 19 Ves. 396; Tunnicliff's Case, 1 Jac. & Walk. 348; Dobbyn's Case, 3 Ves. & Beam. 183; Heyn's Case, 2 Ves. & Beam. 182; King *v.* King, 2 Ves. 578; s. c. Ambl. R. 240, 333; Baynum *v.* Baynum, Ambler, R. 63, 64. An application of this sort was made by a married woman in Codd *v.* Codd (2 John. Ch. R. 141), and Mr. Chancellor Kent seems on that occasion to have doubted whether the writ ought now to be granted in chancery, as the remedy at law was complete. But it is difficult, upon the authorities, to maintain this doubt. See Beames's Orders in Chancery, p. 39, note (144). The jurisdiction to grant such a writ, in a case in which the conduct of the husband was such as to justify a divorce, was refused in Adams *v.* Adams, 100 Mass. 365, though the wife had religious and conscientious scruples against applying for a divorce.

he beats or assaults the party a second time, the court will order the recognizance to be put in suit and permit the party to recover the penalty; for the recognizance is never to be sued but by leave of the court. But this proceeding very rarely or never happens. So if any suitor of the court is arrested either in the face of the court or out of the court as he is going and coming to attend and follow his cause (for so far the court does and will protect every man), upon complaint made thereof, sitting the court, they will send out the tipstaff and bring in the bailiffs and prisoner into court instantly, sitting the court, and they will order them forthwith to discharge him or lay them by the heels, and the plaintiff in the action upon complaint and oath made thereof will certainly stand committed. He shall lie in prison till he petitions, submits, and begs pardon, and pays the costs to the other party." [1]

§ 1924. **Same.** — We may close this head of exclusive processes by adverting to certain proceedings which, although not unknown to the Courts of Common Law, seem as a matter of right and authority independent of the consent of parties to belong exclusively to Courts of Equity. We refer to the practice, in doubtful matters of fact, of directing an issue to be tried at law to ascertain the same, and in matters of law, of sending the point for the opinion of a Court of Law, and then acting upon the final result in either case in the Court of Equity directing the issue or opinion. We have already seen the application of the former proceeding to the issue of devisavit vel non in bills for the establishment of wills.[2]

§ 1925. **Same.** — The nature and objects of these proceedings cannot be better stated than they are by Mr. Justice Blackstone. "The Chancellor's decree," says he, "is either interlocutory or final. It very seldom happens that the first decree can be final or conclude the cause; for if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions that it will not bind the parties thereby, but usually directs the matter to be tried by jury, especially such important facts as the validity of a will, or whether A is the heir at law to

[1] Gilbert's Forum Rom. pp. 202, 203; 2 Harrison's Ch. Pr. by Newland, ch. 79, p. 563. Clavering's Case (2 P. Will. 202) and Stoell *v.* Botelar (2 Ch. Rep. 68) are instances of the actual granting of the writ under circumstances like those stated by Gilbert in his Forum Rom. pp. 202, 203. It is usual to discharge persons committed for want of surety on articles of peace, and on a supplicavit, after a year, if nothing new happens and the threat or danger does not continue. Baynum *v.* Baynum, Ambler, R. 63; Ex parte Grosvenor, 3 P. Will. 103.

[2] Ante, § 1910.

B, or the existence of a modus decimandi, or real and immemorial composition for tithes. But as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the Court of King's Bench or at the Assizes upon a feigned issue. For (in order to bring it there and have the point in dispute and that only put in issue) an action is feigned to be brought wherein the pretended plaintiff declares that he laid a wager of £5 with the defendant that A was heir at law to B, and then avers that he is so, and brings his action for the £5. The defendant allows the wager, but avers that A is not the heir to B; and thereupon that issue is joined which is directed out of chancery to be tried, and thus the verdict of the jurors at law determines the fact in the Court of Equity. These feigned issues seem borrowed from the sponsio judicialis of the Romans, and are also frequently used in the Courts of Law by consent of the parties to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause. So likewise if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the Court of King's Bench or Common Pleas, upon a case stated for that purpose, wherein all the material facts are admitted and the point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides and certify their opinion to the Chancellor. And upon such certificates the decree is usually founded." [1]

[1] 3 Black. Comm. 452, 453. Feigned issues, under the Code pleading system, have generally been abolished. Lapreese *v.* Falls, 7 Ind. 695; O'Brien *v.* Bowes, 10 App. Pr. 106; Brinkley *v.* Brinkley, 56 N. Y. 192; Carroll *v.* Daniel, 95 N. Y. 255; Randall *v.* Randall, 114 N. Y. 471; Sloan *v.* Westfield, 11 S. C. 445; Ivy *v.* Clawson, 14 S. C. 272; Revisal of 1905 of North Carolina, § 357; Harkey *v.* Houston, 65 N. C. 137.

A controversy may now be submitted without action, where it appears by affidavit that the action is real and instituted for the purpose of determining an actual question involved between the parties. Forney *v.* County of Huntingdon, 6 Pa. Super. Ct. Rep. 397; Zarkowski *v.* Schroeder, 60 App. Div. 457, 69 N. Y. Supp. 893; Marshall *v.* Hayward, 67 App. Div. 137, 73 N. Y. Supp. 592; Kelly *v.* Hogan, 69 App. Div. 251, 74 N. Y. Supp. 682; In re Yerkes Est. 97 App. Div. 632, 89 N. Y. Supp. 869, the parties necessarily being named plaintiff and defendant, so that judgment may be rendered against the one or the other. Miller *v.* Cambria County, 25 Pa. Super. Ct. Rep. 591. But it is not necessary that there be a prayer for relief. City of Altoona *v.* Morrison, 24 Pa. Super. Ct. Rep. 417.

§ 1926. **Same.** — When the court orders an issue of fact, and a verdict is founded upon the issue in favor of either party, it is not necessarily conclusive upon either party; and, notwithstanding the verdict, the party against whom it is given has a right to proceed in the cause and to go into evidence in support of his case, notwithstanding the court upon a motion for a new trial (which the court is at full liberty to entertain) refuses to disturb the verdict. Generally speaking such a verdict is treated as conclusive between the parties; for persons who have had an ample opportunity of bringing before a jury such evidence as they think proper and material to the case are generally satisfied with the result, at least if the result of the investigation be such as not to lead to an order for a new trial. Still in point of practice and in point of law (as has been suggested) the verdict is not conclusive. But from the inconvenience of the practice of proceeding after the verdict and in opposition thereto to a hearing of the cause, the court will as a matter in its discretion refuse an issue unless upon an understanding by both parties to abide the result, unless the court should disturb the verdict.[1]

[1] Ansdell *v.* Ansdell, 4 Mylne & Craig, 449, 454. On this occasion Lord Cottentam said: "Now that the verdict founded on the interlocutory application is not conclusive, — conclusive in point of law it cannot be, — but conclusive, I mean, according to the practice of this court, I apprehend is free from all doubt. It is a matter of extreme importance undoubtedly in any subsequent investigation; but it is merely that which it would be at law; namely, a matter of evidence, but not conclusive evidence, between the parties. Of necessity therefore the defendants here were at liberty to go into the case which they had made, and if possible to raise sufficient doubt in the mind of the court as to whether the result of the former investigation had been so satisfactory as to justify the court in acting upon that finding and that result without additional and further investigation. It is obvious that this course of proceeding is open to very grave objection and to very great danger, and it will deserve the consideration of those before whom similar causes may come in future, — certainly if any such cause should come before me I shall give it my most serious consideration before directing any issue on an interlocutory application, — whether such an issue should be directed without putting the parties to an undertaking to abide by the result. The mere circumstance of an issue being necessary to enable the court to deal with the interlocutory application is of itself sufficient to support an order for an injunction until the parties shall be in a situation to try the facts. A plaintiff can very seldom if ever — indeed I know not that he can ever — be in a situation to render it necessary for him to ask for such an issue. The doubt which directs and is the ground of such an issue assumes that it would be sufficient for his purpose. On the other hand the defendant may be very deeply interested in having what he asserts to be his rights not interfered with, without the opportunity at the earliest possible moment of having those rights put into a course of investigation and trial; and the defendant therefore can never complain that the option is tendered

to him of submitting to have his rights, if they do exist, suspended by an injunction or of proceeding to an immediate trial, undertaking that the result of that trial, subject to the jurisdiction of the court as to any application for a new trial, shall be conclusive upon the rights of the parties. As at present advised, and according to the opinion I at present entertain, it will be very difficult to induce me, after the experience I have had in this cause, to direct any issue on interlocutory application without calling on the defendant to treat the result as conclusive of the case on the matter of fact." Miller *v.* Evansville Natl. Bank, 99 Ind. 272; Wendell *v.* Highstone, 52 Mich. 552, 18 N. W. 354; Barnes *v.* Lynch, 9 Okla. 156, 59 Pac. 995.

CHAPTER XLV

BILLS OF DISCOVERY AND BILLS TO PRESERVE AND PERPETUATE EVIDENCE

§ 1927. **Auxiliary or Assistant Jurisdiction.** — We shall now proceed to the third and last head of equity jurisdiction proposed to be examined in these Commentaries; that is to say, the auxiliary or assistant jurisdiction which indeed is exclusive in its own nature, but being applied in aid of the remedial justice of other courts may well admit of a distinct consideration.

§ 1928. **Same.** — In a general sense Courts of Equity may be said to be assistant to other courts in a variety of cases in which the administration of justice could not otherwise be usefully or successfully attained. Thus for example they become assistant to Courts of Law by removing legal impediments to the fair decision of a question depending thereon; by preventing a trustee, lessee, or mortgagee from setting up an outstanding term to defeat an ejectment brought to try a title to land, or by suppressing a deed or devise fraudulently obtained and set up for the same purpose.[1] They are in like manner assistant to other courts by rendering their judgments effectual; as by setting aside fraudulent conveyances which interfere with them; by providing for the safety of property pending litigation; and by suppressing multiplicity of suits and oppressive actions.[2] But these topics have already been sufficiently, although incidentally, considered in the preceding pages.[3]

§ 1929. **Same.** — What we propose particularly to consider in the subsequent discussions is the remedial process of Bills of Dis-

[1] Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Cooper, Eq. Pl. Introd. pp. 33, 34; Id. ch. 3, p. 143; Harrison *v.* Southcote, 1 Atk. 540; Mitford, Eq. Pl. by Jeremy, 4, 5, 111, 134, 135, 143 to 145; Id. 281.

[2] Ibid.; Cooper, Eq. Pl. ch. 3, pp. 146 to 149, 157; 2 Fonbl. Eq. B. 6, ch. 3, § 1.

[3] Ante, §§ 576 to 578, 1141 to 1145.

covery, Bills to perpetuate Testimony, and Bills to take Testimony de bene esse pending a suit; all of which are most important instruments to be employed as adminicular to the remedial justice of other courts.[1]

§ 1930. **There Can Be No Further Discovery Where Sufficient Information Has Been Obtained from the Answer.** — In the first place as to bills of discovery. It has been already remarked that every bill in equity may properly be deemed a bill of discovery, since it seeks a disclosure from the defendant on his oath of the truth of the circumstances constituting the plaintiff's case as propounded in his bill.[2] But that which is emphatically called in equity proceedings a bill of discovery is a bill which asks no relief, but which simply seeks the discovery of facts resting in the knowledge of the defendant, or the discovery of deeds, or writings, or other things in the possession or power of the defendant, in order to maintain the right or title of the party asking it in some suit or proceeding in another court.[3] The sole object of such a bill then being a particular discovery, when that discovery is obtained by the answer, there can be no further proceedings thereon.[4] To

[1] Mitf. Eq. Pl. by Jeremy, 148, 149, 185, 186.

[2] Ante, § 689; Mitf. Eq. Pl. by Jeremy, 53; Id. 183 to 185; Story on Eq. Pl. § 311.

[3] Ante, § 689; Cooper, Eq. Pl. ch. 1, § 4, p. 58; Id. 60; Mitf. Eq. Pl. by Jeremy, pp. 8, 53, 148, 306, 307; 1 Madd. Ch. Pr. 160. It was said by Lord Hardwicke in Montague *v.* Dudman (2 Ves. 398) that "A bill of discovery lies here in aid of some proceedings in this court in order to deliver the party from the necessity of procuring evidence, or to aid in the proceeding in some suit relating to a civil right in a Court of Common Law, as an action." On the subject of discovery I beg leave to refer the reader to the very able work of Mr. Wigram on Points of Discovery, and of Mr. Hare on Discovery. In these two works the subject seems completely exhausted. See also Story on Eq. Plead. § 34, &c.

[4] Mitford, Eq. Pl. by Jeremy, 16; Lady Shaftsbury *v.* Arrowsmith, 4 Ves. 71. Mr. Fonblanque has made some remarks upon the nature and dangers of this branch of equity jurisdiction, which are certainly entitled to serious consideration. "There is," says he, "no branch of equitable jurisdiction of more extensive application than that which enforces discovery; and where kept within its due limits there is none more conducive to the claims of justice. To compel a defendant to discover that which may enable the plaintiff to substantiate a just or to repel an unjust demand, is merely assisting a right or preventing a wrong. But as the most valuable institutions are not exempt from abuse, this power, which ought to be the instrument of justice, may be rendered the instrument of oppression. A plaintiff by his bill may without the least foundation impute to the defendant the foulest frauds, or seek a discovery of transactions in which he has no real concern; and when the defendant has put in his answer denying the frauds or disclosing transactions (the disclosure of which may materially prejudice his interest), the plaintiff may dismiss his bill with costs, satisfied with the mischief he may have occasioned by the

maintain a bill of discovery it is not necessary that the party should otherwise be without any proof of his case; for he may maintain such a bill, either because he has no proof or because he wants it in aid of other proof.[1] But in general it seems necessary, in order to maintain a bill of discovery, that an action should be already commenced in another court to which it should be auxiliary. There are exceptions to this rule, as where the object of discovery is to ascertain who is the proper party against whom the suit should be brought. But these are of rare occurrence.[2]

§ 1931. **Defects in Common Law System of Procedure as Giving Rise to Jurisdiction.** — One of the defects in the administration of justice in the Courts of Common Law arises from their want of power to compel a complete discovery of the material facts in controversy by the oaths of the parties in the suit.[3] And hence (as we have seen) one of the most important and extensive sources of the jurisdiction of Courts of Equity is their power to compel the parties upon proper proceedings to make every such discovery.[4]

§ 1932. **Inability of Law Court to Compel Production of Writings.** — Another defect of a similar nature is the want of a power in the Courts of Common Law to compel the production of deeds, books, writings, and other things which are in the custody or power of one of the parties, and are material to the right, title, or defence of the other.[5] This defect is also remediable in Courts of Equity,

publicity of his charge, or with the advantage which he may have obtained by an extorted disclosure. The rule which requires the signature of counsel to every bill affords every security against such an abuse which forensic experience and integrity can supply; but it cannot wholly prevent it. The court alone can counteract it; and in vindication of its process must feel the strongest inclination to interpose its authority." 2 Fonbl. Eq. B. 6, ch. 3, § 1, note (*a*).

[1] Finch *v.* Finch, 2 Ves. 492; Montague *v.* Dudman, 2 Ves. 398; March *v.* Davidson, 9 Paige, 580; Many *v.* Beekman Iron Company, 9 Paige, 188. It would be otherwise if the bill were for relief as well as discovery. Ibid.

[2] Moodaly *v.* Moreton, 2 Dick. R. 652; Angell *v.* Angell, 1 Sim. & Stu. 83; Mendes *v.* Barnard, 1 Dick. 65; City of London *v.* Levy, 8 Ves. 404; Parrott *v.* Chesterton Natl. Bank, 88 Md. 515, 41 Atl. 1067; Wolf *v.* Wolf, 2 Har. & G. 382, 18 Am. Dec. 313, in which it was held that discovery may be had in an action then pending, though it was auxiliary to the maintenance of a suit yet to be brought. Contra: Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435.

[3] 3 Black. Comm. 381; 2 Fonbl. Eq. B. 6, Ch. 3, § 1. [4] Ibid.

[5] 2 Black. Comm. 382; Com. Dig. Chancery, 3 B.

So if the court can suppose that the discovery may in any way be material in support or defence of a suit. Peck *v.* Ashley, 12 Met. 478.

The defect referred to in this and in the preceding section has been removed by statute very generally. Keeley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14.

which will compel the production of such books, deeds, writings, and other things.

§ 1933. **Same.** — The Roman law provided similar means by the oath of the parties and by a bill of discovery to obtain due proofs of the material facts in controversy between the parties. There seem originally to have been three modes adopted for this purpose. One was upon a due act of summons to require the party without oath to make a statement or confession generally relative to a matter in controversy. Another was to require him to answer before the proper judge to certain interrogatories propounded in the form of distinct articles which the judge might in his discretion order him to answer upon oath. The third was to require the adverse party to answer upon oath as to the fact in controversy, the party applying for the answer consenting to take the answer so given upon oath as truth. On this account it was called the decisive or decisory oath, and it admitted of no countervailing and contradictory evidence. In the two former cases other proofs were admissible.[1] "Ubicunque judicem æquitas moverit, æque oportere fieri interrogationem, dubium non est."[2] "Voluit prætor adstringere eum qui convenitur, ex sua in judicio responsione, ut vel confitendo, vel mentiendo, sese oneret."[3]

§ 1934. **Bills of Discovery under the Roman Law.** — In the Roman law bills of discovery were called Actiones ad exhibendum when they related to the production of things, or deeds, or documents, in which another person had an interest.[4] When they required the answer of the party on oath to interrogatories, they were called Actiones interrogatoriæ.[5] It seems that originally interrogatory actions might be propounded at any time before suit brought by any party having any interest. But we are informed in the Digest that in the time of Justinian they had become obsolete, and interrogatories were propounded only in cases in litigation. "Interrogatoriis autem actionibus hodie non utimur quia nemo cogitur ante judicium de suo jure aliquod respondere. Ideoque minus frequentantur, et in desuetudinem abierunt. Sed tantummodo, ad probationes litigatoribus sufficiunt ea quæ ab adversa parte expressa fuerint apud judices, vel in hereditatibus, vel in aliis rebus quæ in causis vertuntur."[6] The Roman law also required that the party seeking a discovery of facts should

[1] 1 Domat, B. 1, tit. 6, § 5, pp. 458, 459; Id. § 5, art. 4, 5.
[2] Dig. Lib. 11, tit. 1, l. 21. [3] Dig. Lib. 11, tit. 1, l. 4.
[4] Pothier, Pand. Lib. 10, tit. 4, n. 1 to 7; Id. n. 8 to 30.
[5] Pothier, Pand. Lib. 11, tit. 1, n. 1 to 24, and note (2). [6] Ibid.

have a legal capacity to sustain himself in court, and that the discovery should respect some right of action.[1] It does not seem important further to trace out the analogies of the Roman law on this subject; and with these brief hints, showing the probable origin of the like proceeding in our Courts of Equity, we may return to the subject of bills of discovery.

§ 1935. **Bills for Discovery Are Favored in Equity for the Promotion of Justice.** — As the object of this jurisdiction in cases of bills of discovery is to assist and promote the administration of public justice in other courts, they are greatly favored in equity, and will be sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction.[2] We shall therefore proceed to the consideration of some of the circumstances which may constitute an objection to such bills, leaving the reader silently to draw the conclusion that if none of these nor any of the like nature intervene, the jurisdiction to compel the discovery sought will be strictly enforced.

§ 1936. **The Grounds upon Which a Bill of Discovery May Be Resisted.** — The principal grounds upon which a bill of discovery may be resisted have been enumerated by a learned writer as follows: (1) That the subject is not cognizable in any municipal court of justice. (2) That the court will not lend its aid to obtain a discovery for the particular court for which it is wanted. (3) That the plaintiff is not entitled to the discovery by reason of some personal disability. (4) That the plaintiff has no title to the character in which he sues. (5) That the value of the suit is beneath the dignity of the court. (6) That the plaintiff has no interest in the subject-matter, or title to the discovery required, or that an action will not lie for which it is wanted. (7) That the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery. (8) That the policy of the law exempts the defendant from the discovery. (9) That the defendant is not bound to discover his own title. (10) That the discovery is not material in the suit. (11) That the defendant is a mere witness. (12) That the discovery called for would criminate the defendant.[3] Some of these grounds of objection are equally applicable to bills asking for relief; and others

[1] Pothier, Pand. Lib. 11, tit. 1, n. 1 to 24, and note (2).

[2] 1 Madd. Ch. Pr. 160 to 178; Jeremy on Eq. Jurisd. B. 2, ch. 1, pp. 257 to 262.

[3] Cooper, Eq. Pl. ch. 3, § 3, pp. 189, 190. See also Mitf. Eq. Pl. by Jeremy, 185 to 200; Com. Dig. Chancery, 3 B. 2; Jeremy on Eq. Jurisd. B. 2, ch. 1, § 3, pp. 268, 269; Story on Eq. Plead. §§ 549 to 604.

are so obvious upon the mere statement of them as to require no further exposition. It may however be proper to unfold the principles with more particularity by which a few of them are governed.

§ 1937. **It Must Clearly Appear that the Plaintiff Has a Title to the Discovery Which He Seeks.** — In the first place it must clearly appear upon the face of the bill that the plaintiff has a title to the discovery which he seeks; or in other words that he has interest in the subject-matter to which the discovery is attached, capable and proper to be vindicated in some judicial tribunal.[1] A mere stranger cannot maintain a bill for the discovery of the title of another person. Hence an heir at law cannot during the life of his ancestor maintain a bill for a discovery of facts or deeds material to the ancestor's estate; for he has no present title whatsoever, but only the possibility of a future title.[2] Nor has a party a right to any discovery, except of facts and deeds and writings

[1] Brown *v.* Dudbridge, 2 Bro. Ch. R. 321, 322; Cooper, Eq. Pl. ch. 3, pp. 166, 167, 171, 194, 195; Brownsword *v.* Edwards, 2 Ves. 243, 247; Mitf. Eq. Pl. by Jeremy, 154, 156, 157, 187; Story on Eq. Plead. §§ 503 to 508.

[2] Cooper, Eq. Pl. ch. 1, § 4, p. 58; Ibid. ch. 3, p. 197; Mitf. Eq. Pl. by Jeremy, 189 to 191; Buden *v.* Dore, 2 Ves. 445. But see Metcalf *v.* Hervey, 1 Ves. 248; Ivy *v.* Kekewick, 2 Ves. Jr. 679; Glegg *v.* Legh, 4 Madd. R. 193, 208; Jeremy on Eq. Jurisd. B. 2, ch. 1, pp. 262, 263. Yet it has been held that if the discovery sought is of a matter which would show the defendant incapable of having any interest or title, as for example whether the defendant, claiming real estate under a devise, is an alien and consequently incapable of holding it, a bill of discovery will lie. Mitford, Eq. Pl. by Jeremy, p. 197; Attorney-Gen. *v.* Duplessis, Parker, R. 144, 155 to 162. The ground of the decision seemed to be that the disability of alienage is neither a penalty nor a forfeiture. Ibid. 163, 164. And this decision was affirmed in the House of Lords. 5 Bro. Parl. R. 91; s. c. 2 Ves. 286. Lord Hardwicke however held a different doctrine in the case of Duplessis, and insisted that she was not bound to discover whether she was an alien. Finch *v.* Finch, 2 Ves. 494. Mr. Wigram in his recent Treatise on the Law of Discovery (which did not reach my hands until after the text had been prepared for the press) lays down the following as fundamental propositions on this subject. (1) It is the right, as a general rule, of the plaintiff in equity to examine the defendant upon oath as to all matters of fact which being well pleaded in the bill are material to the proof of the plaintiff's case, and which the defendant does not by his form of pleading admit. (2) Courts of Equity as a general rule oblige a defendant to pledge his oath to the truth of his defence. With this (if a) qualification the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case; and it does not extend to the discovery of the manner in which or of the evidence by means of which the defendant's case is to be established, or to any discovery of the defendant's evidence. Wigram, Points in Law of Discovery, pp. 21, 22; Story on Eq. Plead. §§ 572 to 574.

necessary to his own title or under which he claims; for he is not at liberty to pry into the title of the adverse party.[1]

§ 1938. **A Devisee Is Entitled to a Discovery of Title Deeds as against Heir at Law.** — Even an heir at law has not a right to the inspection of deeds in the possession of a devisee unless he is an heir in tail; in which latter case he is entitled to see the deeds creating the estate tail, but no further.[2] On the other hand a devisee is entitled against the heir at law to a discovery of deeds relating to the estate devised.[3]

§ 1939. **Same.** — The reason of this distinction may not at first view be apparent; but the ground upon which it is asserted is this: The title of an heir at law is a plain legal title. All the family deeds together would not make his title better or worse. If he cannot set aside the will, he has nothing to do with the deeds. He must make out his title at law, unless there are incumbrances standing in his way, which indeed a Court of Equity would remove in order to enable him to assert his legal title. But in the

[1] Cooper, Eq. Pl. ch. 3, pp. 171, 173, 194; Sackvill *v.* Ayleworth, 1 Vern. R. 105; Dursley *v.* Fitzhardinge, 6 Ves. 260; Allan *v.* Allan, 15 Ves. 131.

See ante, § 952; Haskell *v.* Haskell, 3 Cush. 540; Kettlewell *v.* Barstow, L. R. 7 Ch. 686; Commissioners *v.* Glasse, L. R. 15 Eq. 302; Girdlestone *v.* North British Assur. Co., L. R. 11 Eq. 197; Roberts *v.* Oppenheim, 26 Ch. D. 724. The defendant cannot refuse to produce private letters from a stranger. Hopkinson *v.* Burghley, L. R. 2 Ch. 447. But he cannot be required to produce documents concerning the compromise of a dispute between himself and a stranger. Warrick *v.* Queen's College, L. R. 4 Eq. 254. Further as to inspection of documents see Dent *v.* Dent, L. R. 1 Eq. 186; Patch *v.* Ward, Ib. 436; Piffard *v.* Beeby, Ib. 623; Clinch *v.* Financial Corp., L. R. 2 Ch. 271; Swansea Ry. Co. *v.* Budd, Ib. 274.

Nor has he any right to ask for discovery, where his purpose merely is to ascertain the other's defence, or matters wholly unconnected with his own case. Jacksonville R. Co. *v.* Peninsular Land Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33; Franklin *v.* Crane, 80 N. J. Eq. 509, 85 Atl. 408, 43 L. R. A. (N. S.) 604; Ex parte Scharpf, 74 Ohio St. 1, 77 N. E. 276, 6 L. R. A. (N. S.) 325; Commonwealth *v.* Perkins, 124 Pa. St. 36, 16 Atl. 525, 2 L. R. A. 223; but he is entitled to examine records if they are pertinent to his own case, even though they form a part of the adversary's defence, Dock *v.* Dock, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617.

[2] Cooper, Eq. Pl. ch. 1, § 4, pp. 58, 59; Ibid. ch. 3, § 3, pp. 197, 198; Shaftsbury *v.* Arrowsmith, 4 Ves. 71. In Shaftsbury *v.* Arrowsmith (4 Ves. 71), Lord Rosslyn explained the ground of the doctrine in favor of the heir in tail, that it was removing an impediment which prevented the trial of a legal right. He afterwards added: "Permitting a general sweeping survey into all the deeds of the family would be attended with very great danger and mischief; and where the person claims as heir of the body it has been very properly stated that it may show a title in another person if the entail is not well barred."

[3] Cooper, Eq. Pl. ch. 1, § 4, p. 59; Ibid. ch. 3, § 3, pp. 197, 198; 2 Fonbl. Eq. B. 6, ch. 3, § 2.

case of an heir in tail a will is no answer to him; although a will established is an answer to an heir at law. An heir in tail has beyond the general right such an interest in the deed creating the entail that he has a right to the production of it. But an heir at law has no interest in the title-deeds of an estate unless it has descended to him.[1]

§ 1940. **Same.** — On the other hand a devisee claiming an estate under a will cannot without a discovery of the title-deeds maintain any suit at law. The heir at law might not only defeat his suit by withholding the means to trace out his legal title, but might also defend himself at law by setting up prior outstanding incumbrances; and thus he might prevent the devisee from having the power of trying the validity of the will at law.[2] Whether this distinction is well founded may perhaps be thought to admit of some question. That the devisee should in such a case be entitled to a discovery seems plain enough. That the heir at law is not equally well entitled to a discovery of the deeds under which the estate is claimed in order to ascertain the extent to which he is disinherited may not appear quite so plain.[3]

§ 1941. **The Party Must State a Case Which Will Show a Good Cause of Action.** — In the next place the party must not only show that he has an interest in the subject-matter of the bill to which the required discovery relates, but he must also state a

[1] Shaftsbury *v.* Arrowsmith, 4 Ves. 67.

[2] Duchess of Newcastle *v.* Lord Pelham, 8 Viner, Abrid. Discovery, M. pl. 12; 1 Bro. Parl. Cas. 392; Cooper, Eq. Pl. ch. 1, § 4, p. 59.

[3] It is obvious that the distinction is not satisfactory to Mr. Fonblanque. In 2 Fonbl. Eq. B. 6, ch. 3, § 2, note (*g*), he says: "And an heir at law, although not entitled to come into equity upon an ejectment bill for possession yet he is entitled to come into equity to remove terms out of the way which would otherwise prevent his recovering possession at law, and also has a right to another relief before he has established his title at law, namely, that the deed and will may be produced and lodged in proper hands for his inspection; for any heir at law has a right to discover by what means and under what deed he is disinherited." For this he relies upon Harrison *v.* Southcote (1 Atk. 539, 540), where Lord Hardwicke asserts the proposition in the same language; and Floyer *v.* Sydenham (Select Cas. in Ch. 2), which is directly in point. If it were clear that if the will were established, the title of the heir would be gone, the objection to a bill of discovery by him might not be unreasonable; for then he would have no title to the estate, and of course no title to a discovery of the deeds of it. But it may depend upon the very terms of the instrument as a settlement, or the boundaries stated in different deeds where the purchase has been of different parcels at different times, whether he is disinherited or not. In such a case an inspection may be very important to him. See Cooper, Eq. Pl. ch. 3, § 3, p. 198; Aston *v.* Lord Exeter, 6 Ves. 288; Hylton *v.* Morgan, 6 Ves. 294.

case which will, if he is the plaintiff at law, constitute a good ground of action, or, if he is the defendant at law, show a good ground of defence in aid of which the discovery is sought.[1] If it is clear that the action or the defence is unmaintainable at law, Courts of Equity will not entertain a bill for any discovery in support of it, since the discovery could not be material, but must be useless.[2] This however is so delicate a function that Courts of Equity will not undertake to refuse a discovery upon such grounds unless the case is entirely free from doubt. If the point be fairly open to doubt or controversy, Courts of Equity will grant the discovery and leave it to Courts of Law to adjudicate upon the legal rights of the party seeking the discovery.[3]

§ 1942. **Courts of Equity Will Not Entertain a Bill for Discovery in Suit Not Purely of a Civil Nature.** — In the next place Courts of Equity will not entertain a bill for a discovery to aid the promotion or defence of any suit which is not purely of a civil nature. Thus for example they will not compel a discovery in aid of a criminal prosecution, or of a penal action, or of a suit in its nature partaking of such a character, or in a case involving moral turpitude; for it is against the genius of the common law to compel a party to accuse himself; and it is against the general principles of equity to aid in the enforcement of penalties or forfeitures.[4]

[1] See Primmer *v.* Patten, 32 Ill. 528.

[2] Debigge *v.* Lord Howe, cited Mitf. Eq. Pl. by Jeremy, 187, and cited also in 3 Bro. Ch. R. 155; Wallis *v.* Duke of Portland, 3 Ves. Jr. 494; Lord Kensington *v.* Mansell, 13 Ves. 240; Story on Equity Pleading, §§ 319, 556 to 559; Macaulay *v.* Shackell, 1 Bligh, R. (N. S.) 120; Thomas *v.* Tyler, 3 Younge & Coll. 255; Hare on Discovery, 43 to 46.

[3] Thomas *v.* Tyler, 3 Younge & Coll. 255, 261, 262; Hare on Discovery, 43 to 46; Story on Equity Pleading, §§ 560 to 568. If the bill filed by a defendant at law suggests specific defects in the title of his adversary, the discovery will be granted, although the case made by the bill is not the assertion of an affirmative title in the party bringing the bill. Smith *v.* Duke of Beaufort, 1 Phillips, Ch. R. 209.

See Thompson *v.* Dunn, L. R. 5 Ch. 573.

A creditor who has exhausted his remedy at law may maintain a bill in equity against his debtor for discovery of assets and for relief. Treadwell *v.* Brown, 44 N. H. 551. But after judgment at law against a party he cannot maintain a bill in equity for discovery of matters of purely legal nature unless he can show proper excuse for not availing himself of them at law. McCollum *v.* Prewitt, 37 Ala. 573.

It is no objection to discovery that it anticipates what is sought by the decree, if the facts are needed for proof. Chichester *v.* Donegal, L. R. 4 Ch. 416. Compare Kettlewell *v.* Barstow, L. R. 7 Ch. 686.

[4] Mitford, Eq. Pl. by Jeremy, 186, 193 to 198; Wigram on Discovery, 2d edit. p. 81, §§ 130, 131 to 134; 1 Madd. Ch. Pr. 173, 174; Cooper, Eq. Pl. ch. 3, § 3, pp. 191, 192, 202, 203, 205, 206; Montague *v.* Dudman, 2 Ves. 398; Thorpe *v.* Macauley, 5 Madd. R. 229, 230; Shackell *v.* Macaulay,

§ 1943. **Equity Will Not Entertain Bill for Discovery in Another Court if That Court Is Competent to Grant Same Relief.** — In the next place Courts of Equity will not entertain a bill for a discovery to assist a suit in another court if the latter is of itself competent to grant the same relief; for in such a case the proper exercise of

2 Sim. & Stu. 79; s. c. 1 Bligh, R. (N. S.) 96; Claridge *v.* Hoare, 14 Ves. 64, 65; U. States *v.* Bank of Virginia, 1 Peters, R. 100, 104; Wallis *v.* Duke of Portland, 3 Ves. 494; Franco *v.* Bolton, 3 Ves. 368; Earl of Suffolk *v.* Green, 1 Atk. 450; King *v.* Burr, 3 Meriv. R. 693; Finch *v.* Finch, 2 Ves. 492; Jeremy on Eq. Jurisd. B. 2, ch. 1, pp. 265 to 267; Greenleaf *v.* Queen, 1 Peters, R. 138; Horsburg *v.* Baker, 1 Peters, R. 232 to 236; Hare on Discovery, pp. 131 to 135; Ibid. 140 to 144; Story on Eq. Plead. §§ 521, and note, 522 to 526, 553, 575 to 588, 591 to 594, 824, 825, note (1). Lord Hardwicke, in Montague *v.* Dudman (2 Ves. 398), held that a discovery did not lie to aid a mandamus. In the cases of Thorpe *v.* Macauley, 5 Madd. R. 229, 230, and Shackell *v.* Macaulay, 2 Sim. & Stu. 79; s. c. 2 Russ. R. 550, note, bills of discovery to aid a suit for a libel were dismissed as improper, as they partake of criminal nature. The case of Shackell *v.* Macaulay was carried to the House of Lords, where the decision was affirmed so far as it authorized a commission to take testimony abroad. 1 Bligh, Rep. (N. S.) 96, 133, 134. In Wilmot *v.* Maccabe (4 Sim. R. 263) the Vice-Chancellor seems to have thought that the decision in the House of Lords, in Shackell *v.* Macaulay, justified the court in requiring a discovery in cases of a civil action for libel. Mr. Hare maintains the same doctrine. Hare on Discovery, 116, 117. But it does not seem to me that the decision justifies any such conclusion. See also Southall *v.* ——, 1 Younge, R. 308. The case of Glynn *v.* Houston (1 Keen, R. 329), is directly in point to establish that a discovery cannot in a civil action be compelled of facts which would subject the party to penal consequences. See also Story on Eq. Plead. §§ 553, note (3), 575 to 588; Ibid. §§ 597, 598. Where the suit involves penalties, if the plaintiff is competent to waive them, and does waive them in his bill of discovery, it is maintainable. Mitford, Eq. Pl. by Jeremy, 195 to 197, 205, 206; Story on Eq. Plead. § 598. See United States *v.* McRae, L. R. 4 Eq. 327; s. c. 3 Ch. 79. And there are other exceptions; as where the party expressly by contract has agreed to discover. Ibid.; Hare on Discovery, 137 to 139. There is another exception in regard to forfeitures deserving notice in this place. It is that a bill of discovery will lie for a disclosure of money lost at play and of the securities given for it. But this stands, at least in modern times, upon the provisions of the Statute of 9 Anne, ch. 14, giving a bill of discovery. Rawden *v.* Shadwell, Ambler, R. 268, and Mr. Blunt's note (3); Newman *v.* Franco, 2 Anst. R. 519; Andrews *v.* Berry, 3 Anst. R. 634, 635. There are however said to be older cases which support it upon general principles. 14 Viner, Abr. Gaming, D. pl. 3, citing Suckling *v.* Morley, Tothill, 84 (this is probably a mistake of the true page in the edition of 1649; the case will be found at p. 23). See ante, § 302; 1 Fonbl. Eq. B. 1, ch. 4, § 6, note (*c*). In Green *v.* Weaver, 1 Sim. R. 404, it was held that a London broker was compellable to make a discovery in aid of an action brought against him by his employer for misconduct, although it subjected him to the penalty of his bond given for his faithful discharge of his official duties. Another exception (if indeed properly considered it is an exception) is where the bill seeks a discovery of a fraud or of fraudulent acts of the defendant; if they do not subject him to criminal proceedings, he is bound to make the discovery.

the jurisdiction should be left to the functionaries of the court where the suit is depending.[1] Neither will Courts of Equity entertain such bills in aid of a controversy pending before arbitrators; for they are not the regular tribunals authorized to administer justice, and being judges of the parties' own choice, they must submit to the inconveniences incidental thereto.[2] But it con-

Janson *v.* Solarte, 2 Younge & Coll. 132, 136; Hare on Discovery, 140, 142; Green *v.* Weaver, 1 Sim. R. 404, 427, 432. See also Story on Eq. Plead. § 589, and note (3). See Robinson *v.* Robinson, 35 Eng. L. & E. 558; Currier *v.* Railroad, 48 N. H. 321; Lindsley *v.* James, 3 Cold. 477. Nor is it an excuse for not producing documents that they may subject the party to a penalty in a foreign country, though that may be his own country. King of Sicilies *v.* Wilcox, 15 Jur. 214; s. c. 2 Eng. L. & E. 122. Compare United States *v.* McRae, L. R. 4 Eq. 327; s. c. 3 Ch. 79. Snow *v.* Mast, 63 Fed. 623; Wolf *v.* Wolf, 2 Har. & G. 382, 18 Am. Dec. 213; Southern Ry. Co. *v.* Bush, 122 Ala. 470, 26 So. 168, in which it is held that the privilege is personal to the witness and if he does not claim the protection, his employer cannot. Marshall *v.* Riley, 7 Ga. 367; French *v.* Venneman, 14 Ind. 282; Bay State Iron Co. *v.* Goodall, 39 N. H. 223, 75 Am. Dec. 219; Reynolds *v.* Burgess Sulphite Fibre Co., 71 N. H. 332, 51 Atl. 1057, 93 Am. St. Rep. 535, 57 L. A. 949; Marsh *v.* Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164; Yemato Trading Co. *v.* Brown, 27 Hun 248, 63 How. Pr. 283; Horstman *v.* Kaufman, 97 Pa. St. 147, 39 Am. Rep. 802.

[1] Mitf. Eq. Pl. by Jeremy, 186; Cooper, Eq. Pl. ch. 3, § 3, pp. 191, 192; Dunn *v.* Coates, 1 Atk. 288; Anon. 2 Ves. 451; Gelston *v.* Hoyt, 1 John. Ch. R. 547; Story on Equity Plead. § 555. Mr. Chancellor Kent, in Gelston *v.* Hoyt, 1 John. Ch. R. 547, 548, used this expressive language on this point: "If a bill seeks discovery in aid of the jurisdiction of a Court of Law, it ought to appear that such aid is required. If a Court of Law can compel the discovery, a Court of Equity will not interfere. And facts which depend upon the testimony of witnesses can be procured or proved at law, because Courts of Law can compel the attendance of witnesses. It is not denied in this case but that every fact material to the defence at law can be proved by ordinary means at law without resorting to the aid of this court. The plaintiffs did not come here for any such aid, and it ought not to be afforded unless they call for it and show it to be necessary. I should presume from the bill itself that every material fact relative to the ownership of the vessel could be commanded without resorting to this court; and such trials at law are not to be delayed and discoveries required when the necessity of such delay and discovery is not made to appear. This would be perverting and abusing the powers of this court. Unless therefore the bill states affirmatively that the discovery is really wanted for the defence at law, and also shows that the discovery might be material to that defence, it does not appear to be reasonable and just that the suit at law should be delayed. The bill is therefore defective and insufficient in this point of view." But see March *v.* Davidson, 9 Paige, R. 580; Story on Eq. Plead. § 319, where it appears that the doctrine is not correct as to mere bills for discovery, but at most applies only where the bill is for discovery and relief. Heath *v.* Erie R. Co., 9 Blatchf. C. C. 316. But see ante, vol. 1, pp. 30, 78, in notes; Shotwell *v.* Smith, 5 C. E. Green, 79.

[2] Cooper, Eq. Pl. ch. 3, § 3, p. 192; Street *v.* Rigby, 6 Ves. 821; Story on Eq. Plead. §§ 554, 555.

stitutes no objection to a bill of discovery that it is to assist proceedings in a court which sits in a foreign country, if in amity with that where the bill is filed; for it is but a just exercise of that comity which the mutual necessities and mutual convenience of all nations prescribe in their intercourse with each other.[1] Neither does it constitute any objection to a bill of discovery that the suit which it is to aid has not yet been commenced; for it may be indispensable to enable the party rightly to frame his action and declaration.[2]

§ 1944. **No Discovery Will Be Compelled of Matters of a Professional Nature.** — In the next place no discovery will be compelled where it is against the policy of the law from the particular relation of the parties. Thus for instance if a bill of discovery is filed against a married woman, to compel her to disclose facts which may charge her husband, it will be dismissed; for a married woman is not permitted to be a witness for or against her husband in controversies with third persons.[3] Upon the same ground a person standing in the relation of professional confidence to another, as his counsel or attorney, will not be compelled to disclose the secrets of his client.[4] The same

[1] Cooper, Eq. Pl. ch. 3, § 3, p. 191; Mitf. Eq. Pl. by Jeremy, 186, note (*q*); Daubigny *v.* Davallen, 2 Anst. R. 467, 468; Mitchell *v.* Smith. 1 Paige, R. 287.

[2] Moodaly *v.* Moreton, 1 Bro. Ch. R. 469, 571; s. c. 2 Dick. 652; Cooper, Eq. Pl. ch. 3, § 3, p. 192; Story on Eq. Plead. §§ 321, 560; Marion Natl. Bank *v.* Abell, 88 Ky. 428, 11 S. W. 300, 10 Ky. L. Rep. 980; Harris *v.* Richardson, 92 Minn. 353, 100 N. W. 92; Campbell *v.* Brock, 38 App. Div. 137, 56 N. Y. Supp. 540; Brown *v.* Georgi, 26 Misc. Rep. 128, 56 N. Y. Supp. 923; but a party is not entitled to the examination where it appears that he has sufficient information to prepare his pleadings at hand, and he only desires to ascertain the exact amount of damage sustained. Taylor *v.* American Ribbon Co., 38 App. Div. 144, 56 N. Y. Supp. 667; Brummer *v.* Cohen, 47 App. Div. 470, 62 N. Y. Supp. 241; Stanton *v.* Friedman, 47 App. Div. 621, 62 N. Y. Supp. 291; Cutting *v.* Baltimore etc. R. Co., 51 App. Div. 628, 64 N. Y. Supp. 258; Snow-Church Co. *v.* Snow-Church Surety Co., 80 App. Div. 40, 80 N. Y. Supp. 512; but he may have the order if the contract expressly authorizes it. Ballenberg *v.* Wahn, 103 App. Div. 34, 92 N. Y. Supp. 830.

[3] Cooper, Eq. Pl. ch. 5, § 3, p. 196; Le Texier *v.* Margrave of Anspach, 5 Ves. 322; s. c. 15 Ves. 159; Baron *v.* Grillard, 3 V. & Beam. 165; Cartwright *v.* Green, 8 Ves. 405, 408; Story on Eq. Plead. §§ 519, 556, 557; McCartney *v.* Fletcher, 10 App. D. C. 572.

She may be required to give evidence where the action is against others and the liability of her husband would be only contingent. Fitch *v.* Hill, 11 Mass. 286.

[4] Cooper, Eq. Pl. ch. 5, pp. 295, 300; Mitf. Eq. Pl. by Jeremy, 284, 288; Bulstrod *v.* Letchmere, 2 Freem. 5; s. c. 1 Ch. Cas. 277; Parkhurst *v.* Lowten, 2 Swanst. 194, 216; Sandford *v.* Remington, 2 Ves. Jr. 189.

applies to communications and transactions between patient and physician.[1]

§ 1945. **Only Facts Material to Plaintiff's Case Will Be Compelled to Be Discovered.** — In the next place no discovery will be compelled, except of facts material to the case stated by the plaintiff;[2] for otherwise he might file a bill, and insist upon a knowledge of facts wholly impertinent to his case, and thus compel disclosures in which he had no interest, to gratify his malice or his curiosity or his spirit of oppression. In such a case his bill would most aptly be denominated a mere fishing bill. But cases of immateriality may be put far short of such unworthy objects. Thus if a mortgagor should seek by a bill of discovery to ascertain whether the mortgagee was a trustee or not, that would ordinarily be deemed an improper inquiry, since, unless special circumstances

Lord Redesdale (Mitf. Eq. Pl. by Jeremy, 288) says: "If a bill seeks a discovery of a fact from one whose knowledge of the fact was derived from the confidence reposed in him as counsel, attorney, or arbitrator, he may plead in bar of the discovery that his knowledge of the fact was so obtained." Mr. Cooper (Eq. Pl. ch. 5, p. 300) adopts similar language. In the cases referred to by Lord Redesdale I do not find arbitrators mentioned; nor do I find that arbitrators are exempted from disclosing facts which have been stated before them, but only from stating the grounds of their award. See Gregory *v.* Howard, 3 Esp. R. 113; Habershon *v.* Troby, 3 Esp. R. 38; Slack *v.* Buchannan, Peake, R. 5; Brown *v.* Brown, 1 Vern. 158, 159; Story on Eq. Plead. §§ 231, 599 to 603; Adams *v.* Barry, 2 Y. & Coll. N. R. 107. Wilson *v.* Northampton Ry. Co., L. R. 14 Eq. 477; MacFarlan *v.* Rolt, Ib. 580; Minet *v.* Morgan, L. R. 8 Ch. 361 (communications with predecessors in title); Bustros *v.* White, 1 Q. B. D. 423; Wheeler *v.* Le Marchant, 17 Ch. D. 609; Friend *v.* London Ry. Co., 2 Ex. D. 437; Bristol *v.* Cox, 26 Ch. D. 678. But see of letters passing between counsel and client *before* suit In re Mason, 22 Ch. D. 609. Communications between co-defendants after suit are not ordinarily privileged. Hamilton *v.* Knott, L. R. 16 Eq. 112; National Bank of West Grove *v.* Earle, 196 Pa. St. 217, 46 Atl. 268; but this does not apply to matters learned by the attorney from others prior to the formation of the relationship, or since it ceased. Crosby *v.* Berger, 11 Paige, 377, 42 Am. Dec. 117.

[1] Lowenthal *v.* Leonard, 20 App. Div. 330, 46 N. Y. Supp. 818.

[2] See Finch *v.* Finch, 2 Ves. 492; Gelston *v.* Hoyt, 1 John. Ch. R. 548, 549; Story on Eq. Plead. §§ 319, 565. See Lindsley *v.* James, 3 Cold. 477; Whyte *v.* Ahrens, 26 Ch. D. 717; Wier *v.* Tucker, L. R. 14 Eq. 25; Minet *v.* Morgan, L. R. 8 Ch. 361. In trade-mark cases the names of the defendant's customers need not be disclosed. Carver *v.* Pinto Leite, L. R. 7 Ch. 90; Moore *v.* Craven, Ib. 94, note. See Murray *v.* Clayton, L. R. 15 Eq. 115; Benbow *v.* Low, 16 Ch. D. 93; Kelley *v.* Boettcher, 85 Fed. 55, 29 C. C. A. 14; Dickinson *v.* Lewis, 34 Ala. 638; Burns *v.* Hill, 19 Ga. 169; Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 41 Am. St. Rep. 375; Lancy *v.* Randlett, 80 Me. 169, 13 Atl. 686, 6 Am. St. Rep. 169; State *v.* District Court, 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831; Camp *v.* Ward, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929.

were shown, it could not be material to the plaintiff whether any trust were reposed in the mortgagee or not.[1]

§ 1946. **Arbitrators Are Not Compellable to Disclose Grounds for Making Award.** — In general arbitrators are not compellable by a bill of discovery to disclose the grounds on which they made their award; for (it has been said) it would be a great inconvenience to compel them to set forth the particular reasons of their decision; and it would be a discouragement of suitable persons to take upon themselves such an office.[2] Perhaps a stronger ground against it is, that the arbitrators are not obliged by law to give any reason for their award; and if they act with good faith, being the judges chosen by the parties, their decision ought ordinarily to be conclusive.[3] But if they are charged with corruption, fraud, or partiality, they must answer to that.[4]

§ 1947. **That Defendant Is a Mere Witness and Has No Interest in the Suit Is a Good Objection to a Bill for Discovery.** — In the next place it is ordinarily a good objection to a bill of discovery that it seeks the discovery from a defendant who is a mere witness and has no interest in the suit; for as he may be examined in the suit as a witness, there is no ground to make him a party to a bill of discovery, since his answer would not be evidence against any other person in the suit.[5]

§ 1948. **Same.** — There are some exceptions to this rule as to witnesses; but they are all founded upon special circumstances, and in general they do not seem applicable to mere bills of discovery, but only to bills for discovery and relief. Thus if arbitrators are made parties to a bill to set aside an award, it is a good

[1] Cooper, Eq. Pl. ch. 3, § 8, pp. 198 to 200; Montague *v.* Dudman, 2 Ves. 399; Mitford, Eq. Pl. by Jeremy, 191, 192; Harvey *v.* Morris, Rep. temp. Finch, 214; Story on Eq. Plead. § 565. When documents are material see Compagnie du Pacifique *v.* Peruvian Guano Co., 11 Q. B. D. 55. A person cannot be required to produce a muniment of title which he swears does not impeach his present title or aid the opposite party. Minet *v.* Morgan, L. R. 8 Ch. 361.

[2] Cooper, Eq. Pl. ch. 3, § 3, p. 201; Steward *v.* East India Company, 2 Vern. 380; Anon. 3 Atk. 644; Story on Eq. Plead. §§ 519, 599, 825, note (1).

[3] Tittenson *v.* Peat, 3 Atk. 529.

[4] Ibid.; Ives *v.* Medcalfe, 1 Atk. 63.

[5] Cooper, Eq. Pl. ch. 3, § 3, pp. 200, 201; Fenton *v.* Hughes, 7 Ves. 287; Mitf. Eq. Pl. by Jeremy, 188; Neuman *v.* Godfrey, 2 Bro. Ch. R. 332 to 334; Cookson *v.* Ellison, 2 Bro. Ch. R. 252; Story on Eq. Plead. §§ 234, 262, 323, 519, 570; Terrell *v.* Southern Ry. Co., 164 Ala. 423, 51 So. 254, 20 Ann. Cas. 901; Howell *v.* Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371. The examination may be had at the instance of any one for whose benefit the action is brought. Strudwick *v.* Broadnax, 83 N. C. 401.

ground of objection on their part that they are mere witnesses.[1] But if the bill charges them with corruption, fraud, or other gross misconduct, then they are compellable to make the discovery and to answer the bill. For they shall never be permitted to deprive the injured party of their evidence by their own fraud or gross misconduct; and if the case is maintained, they will be held liable for costs.[2] So an attorney or solicitor who assists his client in obtaining a fraudulent deed, although a mere witness, may be made a party and compelled to make a discovery.[3]

§ 1949. **Same.** — Another exception is the case of making the secretaries, bookkeepers, and other officers of a corporation, and under certain circumstances even other members of the corporation, parties to bills of discovery and relief, also to bills for discovery, merely against the corporation. The ground upon which this exception has been maintained is, that a corporation, being an artificial person, cannot be compelled to make any discovery on oath, but only under its common seal; and therefore it cannot make any satisfactory answer, nor be liable for perjury for any false answer. By making the secretary or other officer of the corporation a party, an answer under oath may be obtained from those persons as to the facts within their knowledge. Besides, their answer may enable the plaintiff to arrive at the means of obtaining better information.[4] Some dissatisfaction has been expressed with this mode of reasoning. The first of the grounds is extremely questionable; and if it were now to be considered for the first time, it would hardly be deemed correct. The latter ground is very singular; for it assigns as the ground of making a person who is a witness a defendant, that it is in order to enable the plaintiff to deal better, and with more success, with the other

[1] Story on Eq. Plead. §§ 235, 323, 519.

[2] Cooper, Eq. Pl. ch. 3, § 3, p. 202; Mitf. Eq. Pl. by Jeremy, 161, 188, 189; Chicot *v.* Lequesne, 2 Ves. 315, 318; Lingood *v.* Croucher, 2 Atk. 395; Lonsdale *v.* Littledale, 2 Ves. Jr. 451; Dummer *v.* Corporation of Chippenham, 14 Ves. 252; Story on Eq. Plead, §§ 235, 323, 519, 570.

[3] Cooper, Eq. Pl. ch. 3, § 3, p. 201; Mitford, Eq. Pl. by Jeremy, 189; Bennet *v.* Vade, 2 Atk. 324; Bowles *v.* Stewart, 1 Sch. & Lefr. 227.

[4] Wych *v.* Meal, 3 P. Will. 311, 312; Mitf. Eq. Pl. by Jeremy, 188, 189; Anon., 1 Vern. 117; Story on Eq. Plead. § 235.

In order to examine a corporation, the officers and agents as such may be examined. Blair *v.* Sioux City R. Co., 109 Iowa 369, 80 N. W. 678; Gunn *v.* New York etc. R. Co., 171 Mass. 417, 50 N. E. 1031; People *v.* Armour, 18 App. Div. 584, 46 N. Y. Supp. 317; Nixon *v.* Clear Creek Lbr. Co., 150 Ala. 602, 43 So. 805, 9 L. R. A. (N. S.) 1255; Jacksonville R. Co. *v.* Peninsular Land Co., 27 Fla. 1, 9 So. 661, 17 L. R. A. 33; Post *v.* Toledo R. Co., 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86; Howell *v.* Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371.

parties upon the record, — a ground wholly repugnant to the general principles of Courts of Equity on the subject of parties.[1] The doctrine however is now so firmly established that it is (practically speaking) impossible to overturn it.[2]

§ 1950. **Defendant May Object to Bill for Discovery if He Is a Bona Fide Purchaser for Value.** — In the next place a defendant may object to a bill of discovery that he is a bona fide purchaser

[1] Fenton *v.* Hughes, 7 Ves. 288 to 291; Dummer *v.* Corporation of Chippenham, 14 Ves. 252. Lord Eldon has commented strongly on the doctrine of this exception in Fenton *v.* Hughes (7 Ves. 289), and the statement in the text is drawn from his judgment in that case.

[2] Ibid. In the late case of Glasscott *v.* Copper Miners' Company, 11 Simons, R. 305, which was a bill for a discovery by a defendant in aid of an action at law, Sir L. Shadwell said: "Then the question is, whether such a bill can be sustained. In my opinion there is abundance of authority for sustaining such a bill. It is very remarkable that the second edition of Lord Redesdale's Treatise, which was published in the year 1787, contains word for word the same passage as we find in the fourth edition, which was published in his lifetime and with his sanction, and which therefore does clearly show that his Lordship did after the lapse of forty years entertain the opinion which he published in the year 1787. Lord Redesdale was a great observer of what took place in this court; and we can hardly suppose that he forgot the cases in which he himself had been engaged as counsel, as he was in Moodaly *v.* Moreton, which was heard in 1785. Now though it may be perfectly true that the observation made by Sir John Leach in the case of Angell *v.* Angell may have contained very good reasons why the demurrer should have been allowed so far as it was a bill for a commission, still his honor's opinion, supposing it to be right, would be no authority against the proposition which is involved in the decision of that case, namely, that a bill for discovery only may be filed against a corporation and its officers. And it appears to me that any observations which were made upon the collateral point concerning the commission have nothing at all to do with the question whether a bill of discovery only may be filed against a company and its officers. Then the language of Lord Redesdale in both the editions to which I have referred is in the most general form: 'It has been usual,' says his Lordship, 'where a discovery of entries in the books of the corporation or of any act done by the corporation has been necessary, to make their secretary or bookkeeper or other officer a party.' And if you make any other officer than a secretary or a bookkeeper a party, which this language plainly imports, it seems to follow that you may make not only the secretary but the governor and the deputy-governor, &c., and any other person a party, with respect to whom there is an averment that he has or that he and others have in their custody books and papers which relate to the matters in the bill mentioned, and whereby the truth of those matters would appear. And I cannot but think, notwithstanding all that has been said on this subject, that I am actually bound by the authority which I find, which I must take to have been considered as the law for the length of time from 1787 to 1827, and which I myself have always understood to be the law of the court." The official liquidator in a winding up is in a position as to duty to answer interrogatories similar to that of an officer of a corporation made defendant to a bill of discovery. Ex parte Contract Corp., L. R. 2 Ch. 350. Compare Gooch's Case, L. R. 7 Ch. 207.

of the property for a valuable consideration, without notice of the plaintiff's claim. We have already had occasion to take notice of this protection which Courts of Equity throw round innocent purchasers, and that it applies not only to bills of relief but to bills of discovery.[1] To entitle himself to this protection however the purchaser must not only be bona fide, and without notice, and for a valuable consideration, but he must have paid the purchase-money.[2] So he must have purchased the legal title, and not be a mere purchaser without a semblance of title; for even the purchaser of an equity is bound to take notice of and is bound by a prior equity;[3] and between equities the established rule is that he who has the prior equity in point of time is entitled to the like priority in point of right.[4] But it is not indispensable to protect himself against a bill of discovery that he should be the purchaser of a legal title. For the rule in equity is, that if a defendant has in conscience a right equal to that claimed by the person filing a

[1] McNeil *v.* Magee, 5 Mason, R. 269, 270; Jeremy on Eq. Juris. B. 2, ch. 1, pp. 263, 264; Cooper Eq. Pl. ch. 5, p. 300; Mitford, Eq. Pl. by Jeremy, 274, 275. Mr. Butler's note to Co. Litt. 290 *b*, note 1, § 13; Stanhope *v.* Earl Varney, 2 Eden, R. 81.

[2] Wood *v.* Mann, 1 Sumner, R. 506; Flagg *v.* Mann, 2 Sumner, R. 487; Mr. Butler's note to Co. Litt. 290 *b*, note (1), § 13; Stanhope *v.* Earl Varney, 2 Eden, R. 81; Willoughby *v.* Willoughby, 1 Term R. 763, 767. In this last case Lord Hardwicke said: "In the first place he must be a purchaser for a price paid or for a valuable consideration. He must be a purchaser bona fide, not affected with any fraud or collusion. He must be a purchaser without notice of the prior conveyance or of the prior charge or incumbrance; for notice makes him come in fraudulently. And here when I speak of a purchaser for a valuable consideration I include a mortgagee, for he is a purchaser pro tanto. If he has no notice and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance or of some prior charge or incumbrance, and if he also take an assignment of the term to a trustee for him or to himself where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession, or if he has lost his possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance." Maundrell *v.* Maundrell, 10 Ves. 246, 259, 260, 270; Jones *v.* Bowles, 3 Mylne & Keen, 581, 596, 597, 598.

[3] Vattier *v.* Hinde, 32 U. S. 252, 8 L. Ed. 675. But see Payne *v.* Compton, 2 Younge & Coll. 457; Story on Eq. Pl. §§ 604 to 805.

[4] Fitzsimmons *v.* Ogden, 11 U. S. 2, 3 L. Ed. 249; Boone *v.* Chiles, 35 U. S. 177, 9 L. Ed. 388. Payne *v.* Compton, 2 Younge & Coll. 457.

The rule of purchaser for value without notice does not apply, between equitable interests, where the circumstances are such as to require equity to determine the priorities. An equitable conveyance passes no more than the grantor has; and in determining the priority of securities the maxim applies "qui prior est in tempore potior in jure." Phillips *v.* Phillips, 4 DeG. F. & J. 208; Cave *v.* Cave, 15 Ch. D. 639, 646.

bill against him, although he is not clothed with a perfect legal title, this circumstance, in his situation as defendant, renders it improper for a Court of Equity to compel him to make any discovery which may hazard his title.[1] It seems that a judgment-creditor, proceeding in invitum, does not, in the view of a Court of Equity, stand in that position in which he requires or receives the same favor as a purchaser whose right is enforced through the conscience of the other party.[2]

§ 1951. **Same.** — In short Courts of Equity will not take the least step imaginable against an innocent purchaser in such a predicament; and will on the other hand allow him to take every advantage which the law gives him; for there is nothing which can attach itself upon his conscience in such a case in favor of an adverse claim.[3] Where Courts of Equity are called upon to administer justice upon grounds of equity against a legal title they allow a superior strength to the legal title when the rights of the parties are in conscience equal. And where a legal title may be enforced in a court of ordinary jurisdiction, to the prejudice of an equitable title, Courts of Equity will refuse assistance to the legal title against the equitable title when the rights are in conscience equal.[4] On the other hand if a plaintiff comes into equity seeking relief upon a legal title against a bona fide purchaser of an equitable title, if he is entitled to relief in such a case (which is perhaps doubtful), still he must obtain it upon the strength of his own case and his own evidence; and he is not entitled to extract from the conscience of the innocent defendant any proofs to support it.[5]

[1] Mitford, Eq. Pl. by Jeremy, 199; Story on Eq. Pl. §§ 603, 604, 604 *a*, 805.

[2] Langton *v.* Horton, 1 Hare, R. 547, 563; Doe, dem. Coleman *v.* Britain, 2 B. & Ald. 93; Skeeles *v.* Shearly, 8 Sim. R. 153; s. c. 3 Mylne & Craig, 112; Story on Eq. Pl. § 807 *a*.

[3] Jerrard *v.* Saunders, 2 Ves. Jr. 458; Wood *v.* Mann, 1 Sumner, R. 507 to 509.

[4] Mitford, Eq. Pl. by Jeremy, 199, 200; Wortley *v.* Birkhead, 2 Ves. 573, 574. The only recognized exceptions are in favor of a plaintiff against a judgment creditor holding the estate on his judgment, and in favor of a dowress against an innocent purchaser. Ibid. See Wood *v.* Mann, 1 Sumner, R. 507 to 509.

[5] See Senhouse *v.* Earl, 2 Ves. 450. Lord Loughborough, in Jerrard *v.* Saunders (2 Ves. Jr. 458), said: "I believe it is decided that you cannot even have a bill to perpetuate testimony against him" (a purchaser for a valuable consideration without notice). The case of Seybourne *v.* Clifton, cited 2 Vern. 159, s. c. 1 Eq. Abr. 354, certainly favors that doctrine. But the case was not decided on any such point. And Lord Eldon, in Dursley *v.* Fitzhardinge, 6 Ves. 263, has manifestly doubted it. Mr.

§ 1952. **Same.** — And not only is a bona fide purchaser for a valuable consideration without notice protected in equity against a plaintiff seeking to overturn that title, but a purchaser with notice under such a bona fide purchaser without notice is entitled to the like protection. For otherwise it would happen that the title of such a bona fide purchaser would become unmarketable in his hands, and consequently he might be subjected to great losses if not utter ruin.[1]

§ 1953. **Who Is a Bona Fide Purchaser within the Meaning of the Rule.** — The question sometimes arises as to who is to be treated as a bona fide purchaser in the sense of the rule; and it has been held that a judgment creditor by elegit is not entitled to be deemed such, but he takes only such rights in the premises as the judgment debtor rightfully possessed. Thus for example a judgment creditor cannot hold an estate subject to an equitable mortgage by an elegit executed on the estate of the debtor mortgagor except subject to such equitable mortgage, although he had no notice of the mortgage at the time of the elegit.[2]

Cooper however asserts the doctrine on the authority of the other cases. Cooper, Eq. Pl. ch. 1, § 3, pp. 56, 57; Id. ch. 5, pp. 283, 287. See also Mitford, Eq. Pl. by Jeremy, 279, 280; Bechinall *v.* Arnold, 1 Vern. R. 354, and Mr. Raithby's note. Lord Abinger, in Payne *v.* Compton, 2 Younge & Coll. 457, 461, held that a plea of bona fide purchaser for a valuable consideration without notice was a good defence in equity to a bill by a plaintiff who was the owner of the legal estate. See also Wood *v.* Mann, 1 Sumner, R. 507 to 509.

[1] Varick *v.* Briggs, 6 Paige, R. 323, 329; Bennett *v.* Walker, 1 West R. 130; Jackson *v.* McChesney, 7 Cowen, R. 360.

[2] Whitworth *v.* Guagain, The Jurist, May 4, 1844, p. 374; s. c. 3 Hare R. 416. "The defendants, between whom and the plaintiffs the contest in the cause exists, are judgment creditors of George Cooke, whose judgments were entered up after the mortgage to the plaintiffs, and who have since by means of elegits obtained actual possession of the lands comprised in the mortgage; and the question between them is, which of the two is in equity to be preferred to the other? In considering that question I shall here repeat what I have on more than one occasion already said respecting Lord Cottenham's judgment when this cause was before him upon motion, namely, that I am satisfied he did not intend by what he said finally to decide the point now before me. However strong the leaning of his mind may have been in favor of the judgment creditor, he not only did not intend to decide, but intended that it should be reserved. And I therefore consider myself not only at liberty but bound to decide the cause according to my own understanding of the law. Now if the question be not decided by that judgment, I have certainly a very strong opinion upon it. The more I consider the case the more satisfied I feel that I stated the general principle correctly in Langton *v.* Horton, when I said that a creditor might under his judgment take in execution all that belonged to his debtor and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability

§ 1954. **Same.** — Upon the same principle a jointress is entitled to protect herself against the discovery of her jointure deed if the party seeking the discovery is not capable of confirming the jointure, or if being capable he does not offer by his bill to confirm

under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the cestui que trust against the judgment creditor of the trustee. The judgment of Lord Cottenham in Newlands *v.* Paynter (4 Mylne & Cr. 408) is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. Lodge *v.* Lysely (4 Sim. 70) is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor. Again take the case of an equitable charge to pay debts, or legacies, or any other equitable interest except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrancer to be preferred to the judgment creditor of the debtor in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of Williams *v.* Craddock (4 Sim. 316), the counsel as well as the court were of opinion that an interest by way of equitable mortgage was entitled in this court to the same protection against judgments as other equitable claimants. In the argument of this case both parties referred to and drew conclusions from the proposition that in a Court of Equity a purchaser for value who obtains a conveyance of the legal interest, without notice of an equity affecting the specific subject of his purchase, will in equity as at law have a better title to that subject than the mere equitable claimant. The proposition thus admitted and necessarily admitted by both parties is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts and all equitable interests of every description must be subject to the judgments against the trustee. For a purchaser for value without notice from a fraudulent trustee having got the legal estate will unquestionably be preferred in equity to the cestui que trust; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust or other equitable interest from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is for the present purpose distinguishable from that of an ordinary cestui que trust. Again it follows conversely that if the equitable interest of an ordinary cestui que trust or any other equitable interest is not subject to judgments against the trustee, though executed, then those judgments, though executed, are not analogous to purchases for value. In other words, the judgment creditor of a trustee is not a purchaser for value in the contemplation of a Court of Equity. The proposition that a judgment creditor is a purchaser for value would prove too much for the defendant's purpose. It would affect all equitable interests alike. But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary cestui que trust and other equitable interests (charges for example to pay debts and legacies paramount to the title of the debtor), which it was admitted would be preferred in equity — that

it.[1] If he is capable and offers to confirm it, the discovery will be granted as soon as the confirmation is made, but not before. For otherwise it might happen that after the discovery his offer might become ineffectual by the intervention of other interests.[2]

§ 1955. [**The Right of Complainant to Compel Production of Books and Papers.** — As an incidental part of the relief to be obtained in a Court of Equity, in the order requiring discovery of the matters to be inquired about, it is also within the province and usual for the court to direct the witness to appear, at a given time and place, and bring with him and produce such books, papers, and memoranda as he shall have in his possession, or in his custody or control, and allow an inspection by his adversary, and also that a copy of same be taken if desired. It is not necessary, in order to warrant the court in directing the production of a document, that the applicant should show a property title therein, but it is enough for him to show that he is justly entitled thereto by way of evidence in the preparation and trial of his case, and that such evidence is necessary to enable him fully to prosecute or defend the same. It is not necessary, however, to aver or show that, without the discovery sought, the plaintiff will be unable to prove his case.[3] But if the other party

the interest of the equitable mortgagee was imperfect, that of the cestui que trust perfect. In what respect is the interest of the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect no doubt it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think it is not) in the one case than in the other."

So of a creditor deriving title under levy of execution. Hart *v.* Farmers' Bank, 33 Vt. 252. See Farmers' Bank *v.* Teeters, 31 Ohio St. 36; Kinyon *v.* Young, 44 Mich. 339; Abell *v.* Howe, 43 Vt. 403. But see Danbury *v.* Robinson, 1 McCart. 213.

[1] Mitford, Eq. Pl. by Jeremy, 199; Cooper, Eq. Pl. 197, 208, 284; Portsmouth *v.* Effingham, 1 Ves. 30; Id. 430; Chamberlain *v.* Knapp, 1 Atk. 52; Senhouse *v.* Earl, 2 Ves. 450; Leech *v.* Trollop, 2 Ves. 662; Ford *v.* Peering, 1 Ves. Jr. 76.

[2] Leech *v.* Trollop, 2 Ves. 662.

[3] Arnold *v.* Pawtuxet Valley Water Co., 18 R. I. 189, 26 Atl. 55, 19 L. R. A. 602; Bryant *v.* Peters, 3 Ala. 160; Fuller *v.* Hollender, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456; State *v.* Milwaukee Elec. R. Co., 136 Wis. 179, 116 N. W. 900, 18 L. R. A. (N. S.) 672; Lawless *v.* Fleming, 56 N. J. Eq. 615, 40 Atl. 638; Ellinger *v.* Equitable Life Assur.

knows the contents of the documents that he desires to examine, the order will not lie.[1]]

§ 1956. [**Who May Be Required to Produce Papers.** — As a general rule, only parties to the record proper may be required to produce books and papers. Of course the reason for this is obvious. In order for one to be considered a party in interest, he ought to have at least some pecuniary interest in the controversy and be a trifle more than a mere personal representative,[2] but a party for whose benefit the suit was brought has such an interest in the matter that he may ask for the order,[3] but a next friend has not such an interest as a real party.[4]]

§ 1957. **Bills to Perpetuate Testimony Are Used when the Testimony Is in Danger of Being Lost before the Hearing.** — Let us now pass to the consideration of bills to preserve and perpetuate testimony. The object of all bills of this sort is to preserve and perpetuate testimony when it is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation.[5] Bills of this sort are obviously indispensable for the purposes of public justice, as it may be utterly impossible for a party to bring his rights presently to a judicial decision; and unless in the intermediate time he may perpetuate the proofs of those rights, they may be lost without any default on his side. The civil law adopted similar means of preserving testimony which was in danger of being otherwise lost.[6]

§ 1958. **Same.** — This sort of bill (as has been remarked by Mr. Justice Blackstone) " is most frequent when lands are devised by will away from the heir at law, and the devisee in order to perpetuate the testimony of the witnesses to such will exhibits a bill in chancery against the heir, and sets forth the will verbatim therein, suggesting that the heir is inclined to dispute its validity;

Soc., 132 Wis. 259, 111 N. W. 567, 11 L. R. A. (N. S.) 1089; Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276, 6 L. R. A. (N. S.) 325; Whitten *v.* Western Union Tel. Co., 141 N. C. 361, 54 S. E. 299; McDonald *v.* Carcon, 94 N. C. 497; Austin *v.* Sechrest, 91 N. C. 214; McLeod *v.* Bullard, 84 N. C. 515.

[1] Sheek *v.* Sain, 127 N. C. 266, 37 S. E. 334.

[2] Sweetzer *v.* Claflin, 74 Tex. 667, 12 S. W. 395; Morley *v.* Green, 11 Paige 240, 42 Am. Dec. 112; Revisal of 1905 of North Carolina, §§ 1656, 1657.

[3] Strudwick *v.* Broadnax, 83 N. C. 401.

[4] Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641.

[5] Cooper, Eq. Pl. ch. 1, § 3, p. 52; Mitf. Eq. Pl. by Jeremy, 148, 149; Com. Dig. Chancery, R.

[6] 1 Domat, B. 3, tit. 6, § 3; Dig. Lib. 9, tit. 2, l. 40; Gilb. For. Roman. ch. 7, pp. 118, 119; Mason *v.* Goodburne, Rep. temp. Finch, 391.

and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will, after which the cause is at an end without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery." [1]

§ 1959. **Same.** — The jurisdiction which Courts of Equity exercise to perpetuate testimony has been thought to be open to great objections, although it seems indispensable for the purposes of public justice. First, it leads to a trial on written depositions which is deemed (at least in Courts of Common Law) to be much less favorable to the cause of truth than the viva voce examination of witnesses. But what is still more important, inasmuch as those depositions can never be used until after the death of the witnesses, and are not indeed published until after their death, it follows that whatever may have been the perjury committed in those depositions, it must necessarily go unpunished. The testimony therefore has this infirmity, that it is not given under the sanction of those penalties which the general policy of the law imposes upon the crime of perjury. It is for these reasons that Courts of Equity do not generally entertain bills to perpetuate testimony for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice.[2]

§ 1960. **A Bill for Perpetuation of Testimony Will Not Lie if an Immediate Hearing May Be Had.** — If therefore it be possible that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate testimony, Courts of Equity will not entertain any bill for the purpose. For the party under such circumstances has it fully in his power to terminate the controversy by commencing the proper action; and therefore there is no reasonable ground to give the advantage of deferring his proceedings to a future time, and to substitute thereby written depositions for viva voce evidence. But on the other hand if the party who files the bill can by no means bring the matter in controversy into immediate judicial investigation, which may happen when his title is in remainder, or when he himself is in actual possession of the property, or when he is in the

[1] 2 Black. Comm. 450.

[2] Angell *v.* Angell, 1 Sim. & Stu. 83; Duke of Dorset *v.* Girdler, Prec. Ch. 531, 532; 1 Madd. Ch. Pr. 152, 153; Cann *v.* Cann, 1 P. Will. 567 to 569.

present possession of the rights which he seeks to perpetuate by proofs, — in every such case Courts of Equity will entertain a suit to secure such proofs. For otherwise the only evidence which could support his title, possession, or rights might be lost by the death of his witnesses, and the adverse party might purposely delay any suit to vindicate his claims with a view to that very event.[1]

§ 1961. **Classes of Cases in which Bill to Perpetuate Testimony Will Lie.** — As to the right to maintain a bill to perpetuate testimony there is no distinction whether it respects a title or claim to real estate, or to personal estate, or to mere personal demands; or whether it is to be used as matter of proof in support of the plaintiff's action, or as matter of defence to repel it.[2] But there is this

[1] Angell *v.* Angell, 1 Sim. & Stu. 83; Duke of Dorset *v.* Girdler, Prec. Ch. 531; Dew *v.* Clarke, 1 Sim. & Stu. 114; Cooper, Eq. Pl. ch. 1, § 3, pp. 53 to 55; Com. Dig. Chancery, R. These grounds are fully expounded in the case of Angell *v.* Angell (1 Sim. & Stu. 83), as indeed they had been before expounded in the case of the Duke of Dorset *v.* Girdler, Prec. Ch. 531. From the opinion of the court in the latter case the following extract is made, as it exhibits the pith of the whole doctrine. "If one is out of possession, having only right to fishery or common rent-charge, he who brings such bill ought never to be allowed to do so, but a demurrer to it will be good, because he may and ought first to enter his action and establish his title at law; otherwise publication not being to pass till after the death of the witness (as in those cases it never does without special order of the court), they may be guilty of the grossest perjury, and yet go unpunished. Besides that, the party having a remedy at law, the other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering of the truth. But if a man is in actual possession, and is only threatened with disturbances by another who pretends a right, he has no other way in the world to perpetuate the testimony of his witnesses but by such a bill as this is, for not being actually interrupted or disturbed he can bring no action at law. And in such a case if their demurrer should be allowed, there is an end of all bills to perpetuate the testimony of witnesses to wills, and such like wherein the parties pray no relief, nor ought to do, but only a commission for the examination of their witnesses. And yet even in these cases, if the plaintiff should afterwards be evicted or disturbed, these depositions cannot be made use of, so long as the witnesses are living, and may be had to be examined before a jury." It is said by Mr. Cooper (Cooper, Eq. Pl. ch. 1, § 3, p. 52) that Lord Nottingham in Mason *v.* Goodburne (Rep. temp. Finch, 391) decided the first and leading case on this subject. The marginal note in that case is far more full than the report of the judgment. Bills to perpetuate the testimony of the subscribing witnesses to a will are often brought where the devisee is in possession, and the heir may afterwards choose to contest its due execution. See Harris *v.* Cotterell, 3 Meriv. 678, Zych *v.* American Car and Foundry Co., 127 Fed. 723; Hanford *v.* Ewen, 79 Ill. App. 327.

[2] Earl of Suffolk *v.* Green, 1 Atk. 450. A bill to perpetuate testimony is demurrable if brought by the defendant in a pending suit. Spencer *v.* Peek, L. R. 3 Eq. 415.

difference between a bill of discovery and a bill to perpetuate testimony, that the latter may be brought in in many cases where the former cannot be. Thus in cases which involve a penalty or forfeiture of a public nature a bill of discovery will not lie at all. And in cases which involve only a penalty or forfeiture of a private nature it will not lie unless the party entitled to the benefit of the penalty or forfeiture waives it.[1] But no such objection exists in regard to a bill to perpetuate testimony; for the latter will lie not only in cases of a private penalty or forfeiture without waiving it where it may be waived, as in cases of waste or of the forfeiture of a lease, but also in cases of public penalties, such as for the forgery of a deed or for a fraudulent loss at sea.[2]

§ 1962. **Difference between Bill to Perpetuate Testimony and Bill for Discovery in Regard to Bona Fide Purchaser for Value.** — There is also perhaps another difference between the case of a bill of discovery and that of a bill to perpetuate testimony, in regard to a bona fide purchaser for a valuable consideration without notice. We have seen that the former bill is not maintainable against him.[3] But as the latter asks for no discovery, and only seeks to perpetuate testimony which might be used at the time if the circumstances called for it and an action were brought it does not seem open to the same objection. And there is this reason for the distinction, that otherwise the plaintiff might lose his legal rights by the mere defect of testimony, which if he could maintain a suit he would clearly be entitled to.[4]

§ 1963. **The Plaintiff Must Show His Interest in the Subject-matter and the Probability of Its Loss.** — It follows from the very nature and objects of such bills that the plaintiff who is desirous of perpetuating evidence must by his bill show that he has some interest in the subject-matter, and that it may be endangered if the testimony in support of it is lost.[5] Courts of Equity will not however perpetuate testimony in support of the right of a plaintiff which may be immediately barred by the defendant.[6] But if the

[1] Story on Eq. Plead. §§ 521 to 526, 553, 824.

[2] Earl of Suffolk *v.* Green, 1 Atk. 450; Jeremy on Eq. Jurisd. B. 2, § 1, pp. 266, 267, ch. 2, § 2, pp. 277, 278.

[3] Ante, § 1950.

[4] Dursley *v.* Fitzhardinge, 6 Ves. 263, 264; ante, § 1960; Gordon *v.* Close, 2 Bro. Parl. Cas. 473, 477, 479.

[5] Cooper, Eq. Pl. ch. 1, § 3, p. 52; Mitf. Eq. Pl. by Jeremy, 57; Mason *v.* Goodburne, Rep. temp. Finch, 391; Dursley *v.* Fitzhardinge, 6 Ves. 261, 262; Earl of Belfast *v.* Chichester, 2 Jac. & Walk. 449, 451.

[6] Cooper, Eq. Pl. ch. 1, § 3, pp. 53, 54; Dursley *v.* Fitzhardinge, 6 Ves. 260 to 262; Earl of Belfast *v.* Chichester, 2 Jac. & Walk. 451, 452.

interest be a present vested one not liable to such an objection, it is perfectly immaterial how minute that interest may be, or how distant the possibility of its coming into actual possession and enjoyment may be. A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is nevertheless a present estate, although with reference to chances it may be worth little or nothing.[1] On the other hand, although the contingency may be ever so proximate and valuable, yet if the party has not by virtue of that an estate (as in the case of the heir of a lunatic), Courts of Equity will not interfere to perpetuate evidence touching it.[2]

§ 1964. **Same.** — If the bill is sustained and the testimony is taken, the suit terminates with the examination, and of course is not brought to a hearing.[3] But the decretal order of the court granting the commission directs that the depositions when taken shall remain to perpetuate the memory thereof, and to be used in case of the death of the witnesses or their inability to travel, as there shall be occasion.[4]

§ 1965. **Distinction between Bills to Perpetuate Testimony and Bills to Take Testimony De Bene Esse.** — There is another species of bills having a close analogy to that to perpetuate testimony and often confounded with it, but which in reality stands upon distinct considerations. We allude to bills to take testimony de bene esse, and bills to take the testimony of persons resident abroad to be used in suits actually pending in the country where the bills are filed.[5] There is this broad distinction between bills of this sort and bills to perpetuate testimony, that the latter are

[1] Ibid.; Allan *v.* Allan, 15 Ves. 136; Earl of Belfast *v.* Chichester, 2 Jac. & Walk. 451, 452. Hanford *v.* Ewen, 79 Ill. App. 327.

[2] Ibid.; Sackvill *v.* Ayleworth, 1 Vern. 105, 106.

But in In re Tayleur, L. R. 6 Ch. 416, the court, without deciding whether the bill would lie, passed an order allowing the committee to pay the expenses of any bill which might be brought with the approval of a master to perpetuate testimony as to two wills made before lunacy.

[3] Cooper, Eq. Pl. ch. 1, § 3, p. 52; Mitf. Eq. Pl. by Jeremy, p. 51, and note (*u*); Hall *v.* Hoddesdon, 2 P. Will. 162; Anon. 2 Ves. 497; Anon. Ambler, R. 237; Vaughan *v.* Fitzgerald, 1 Sch. & Lefr. 316; 3 Black. Comm. 450.

[4] Rep. temp. Finch, 391, 392.

[5] 3 Black. Comm. 438; Gilb. Forum Roman. 140. When depositions which are taken in a suit to perpetuate testimony are required to be used in a trial at law not under the control of the court, the order is that the depositions be published, and that the officer attend with and produce to the court of law the record of the whole proceedings, and that the parties may make such use of them as by law they can. Attorney-Gen. *v.* Ray, 2 Hare, R. 518.

and can be brought by persons only who are in possession under their title, and who cannot sue at law and thereby have an opportunity to examine their witnesses in such suit. But bills to take testimony de bene esse may be brought not only by persons in possession but by persons who are out of possession, in aid of the trial at law.[1] There is also another distinction between them, which is, that bills de bene esse can be brought only when an action is then depending and not before.[2]

§ 1966. **In What Case Bill to Preserve Testimony Will Lie.** — By the common law it is well known that the Courts of Law have no authority to issue commissions to take the testimony of witnesses de bene esse in any case.[3] But Courts of Equity have been

[1] Cooper, Eq. Pl. ch. 1, § 3, p. 57; 1 Madd. Ch. Pr. 153; Jeremy on Eq. Jurisd. B. 2, ch. 2, § 2, pp. 277, 278.

[2] Angell *v.* Angell, 1 Sim. & Stu. 83. The case of Phillips *v.* Carew (1 P. Will. 117) seems to decide that a bill of this sort might be brought although no action was pending, and merely in contemplation of an action where the plaintiff's witnesses were aged or infirm. But in Angell *v.* Angell, 1 Sim. & Stu. 83, 93, the Vice-Chancellor (Sir John Leach) held an opposite doctrine, that which is stated in the text. On that occasion he said, referring to the case in 1 P. Will. 117: "The principle of that case, supposing it to be correctly reported, is not however very satisfactory. Written depositions, on account of the infirmity which I have before referred to, are never to be received where, with reasonable diligence, viva voce testimony may be had; and the circumstance that the witnesses are aged and infirm should be rather a reason for the action being immediately brought to give the better chance of their living till the trial than a reason for permitting the action to be indefinitely delayed at the pleasure of the plaintiff. Whenever such a case occurs again the principle of Phillips *v.* Carew, 1 P. Will. 117, will come to be reconsidered." In the same case he added: "If a bill for a commission to examine witnesses abroad to be used on a trial at law were entertained before an action actually commenced, then, inasmuch as it is not pretended that there is any time limited within which the future action is to be brought, this consequence might follow, that the plaintiff in the bill having obtained this written testimony, not given under the sanction of the penalties of perjury, might delay his action until after the deaths of those witnesses for the adverse party resident in this country and subject to viva voce examination, whose evidence might be in opposition to this written testimony, and thus the justice of the case might be defeated. On the other hand no reason of justice or even of convenience to the party plaintiff in such a bill requires that he should be permitted to file it before he has actually commenced his action. The necessary effect of such a bill is to suspend the trial until the commission is returned, and to secure to him the benefit of his foreign evidence; and all further delay of trial is injustice to the other party. I am therefore of opinion, both upon authority and upon principle, that a bill for a commission to examine witnesses abroad in aid of a trial at law where a present action may be brought is demurrable, if it do not aver that an action is pending."

[3] Mitford, Eq. Pl. by Jeremy, 149; 3 Black. Comm. 383; Macaulay *v.* Shackell, 1 Bligh, R. (N. S.) 119, 130. This defect has long since been cured

constantly in the habit of exercising such jurisdiction in aid of trials at law, where the subject-matter admits of present judicial investigation and a suit is actually pending in some court.[1] They will for example, upon a proper bill, grant a commission to examine

in America, and indeed the authority given to our Courts of Common Law to take the depositions of witnesses, both at home and abroad, has been carried to an extent far beyond what has been exercised by Courts of Equity. A recent statute in England has conferred authority upon the Courts of Common Law to take the depositions of witnesses abroad. See Stat. 13 George III. ch. 63, §§ 40, 44, and Stat. 1 Will. IV. ch. 22; 1 Starkie, Evid. 275, 276 (2d Lond. ed. 1833).

[1] In Macaulay *v.* Shackell, 1 Bligh, R. (N. S.) 119, Lord Eldon said: "The original jurisdiction of granting commissions was under the Great Seal, because no commission at one time could be granted in Common-Law Courts." Lord Eldon in the same case (pp. 130, 131) cited an extract from the reasons of appeal, in the case of Davie *v.* Verelst in the House of Lords, which contains a full exposition of the grounds of the jurisdiction. It is as follows: "The order appealed from proceeds upon a fundamental maxim in the administration of justice, namely, that both sides are to be heard, and the parties are to be heard by their evidence and witnesses to matters of fact. The end of the order in question, which was for a commission, is to give the respondents an opportunity of bringing over their evidence from a foreign country to maintain the truth of the justification which they have pleaded. The Courts of Law pay an attention to Audi alteram partem as far as the powers of a Court of Law can go, and therefore will put off trials upon an affidavit made by the defendant showing that he has material witnesses abroad who are expected home in a reasonable time, it not being the fault but the misfortune of the party that his witnesses are not within the reach of the process of the court whereby their attendance on the trial may be compelled. This reasoning goes only to the putting off the trial where there are witnesses abroad who are expected to be here in a reasonable time, and not when the witnesses were not expected to be here, and their testimony was to be sought by sending a commission to them, instead of waiting for their coming home here to be examined. But where witnesses reside abroad, and cannot or will not personally attend in England, the power of the Courts of Law is at an end, as they have no means of examining witnesses abroad. But the Court of Chancery having an authority to issue commissions under the Great Seal for various purposes, and amongst others for examining witnesses in causes in that court, the suitors, defendants at law, have availed themselves of the power of the Court of Chancery to come in and supply the failure of justice by preferring their bills there, containing a state of their case and of the proceedings at law with the defendants' misfortune, that their witnesses being resident abroad and not compellable to appear at the trial, they cannot have the benefit of their testimony, and therefore praying that the court will relieve them against this accident and grant them a commission for the examination of their witnesses, to the end that their depositions may be read at law; and, as it would be nugatory to try the causes without evidence, praying also that the plaintiff at law may be restrained by injunction from proceeding in the meantime till the return of the commission. Both the Courts of Chancery and of Exchequer, as Courts of Equity, have always entertained these bills as belonging to one of their great sources of jurisdiction, the relief against such accidents as are beyond the power of Courts of Law to aid."

witnesses who are abroad and who are material witnesses to the merits of the cause, whether the adverse party will consent thereto or not.[1] They will also entertain a bill to preserve the testimony of aged and infirm witnesses resident at home, and of witnesses about to depart from the country, to be used in a trial at law in a suit then pending, if they are likely to die before the time of trial may arrive.[2] They will even entertain such a bill to preserve the testimony of a witness who is neither aged nor infirm, if he is a single witness to a material fact in the cause.[3] This latter case stands upon the same general ground as the other; that is to say, the extreme danger to the party of an irreparable loss of all the evidence on which he may rely in support of his right in the trial at law; for that which depends upon a single life must be practically treated as being very uncertain in its duration.[4]

§ 1967. **Bills to Take Testimony De Bene Esse of Non-residents Lie Only in Civil Cases.** — In regard to commissions to take the testimony of witnesses abroad, although they are grantable in civil actions only, yet they are not confined to cases purely ex contractu, or touching rights of property; but they are grantable in cases of suits for civil torts, although such torts may also be indictable. Thus for example a commission will be granted to

[1] Moodalay *v.* Morton, 1 Bro. Ch. R. 469; Thorpe *v.* Macauley, 5 Madd. R. 218, 231; Mendizabel *v.* Machado, 2 Sim. & Stu. 483; 1 Madd. Ch. Pr. 152; Angell *v.* Angell, 1 Sim. & Stu. 83, 93; Mitf. Eq. Pl. by Jeremy, 149; Jeremy on Eq. Jurisd. B. 2, ch. 2, § 1, pp. 271, 272; Cock *v.* Donovan, 3 Ves. & Beam. 76; Hinde's Pract. 305; Devis *v.* Turnbull, 6 Madd. 232.

[2] Mitford, Eq. Pl. by Jeremy, 51, 52, and note (*y*); Id. 149, 150; Cooper, Eq. Pl. ch. 1, § 3, p. 57; Jeremy on Eq. Jurisd. B. 2, ch. 2, § 1, pp. 270, 271. If a witness is seventy years old he is deemed aged within the rule, and the commission goes of course. Fitzhugh *v.* Lee, Ambler, R. 65; Rowe *v.* ——, 13 Ves. 261, 262; Prichard *v.* Gee, 5 Madd. R. 364.

[3] Angell *v.* Angell, 1 Sim. and Stu. 83, 92, 93; Shirley *v.* Earl Ferrers, 3 P. Will. 77, 78; Pearson *v.* Ward, 1 Cox, R. 177; Hankin *v.* Middleditch, 2 Bro. Ch. R. 641, and Mr. Belt's note; Cholmondeley *v.* Oxford, 4 Bro. Ch. 157; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*). In Cholmondeley *v.* Oxford, 4 Bro. Ch. R. 157, a commission was granted to take the depositions of the witnesses who were sworn to be the only persons who had knowledge of the material facts, without stating their age. When the commission is granted to take the examination of a single witness, the affidavit to obtain it must state that the particular witness knows the fact and is the only person that knows it. The belief of the person making the affidavit is not sufficient. Rowe *v.* ——, 13 Ves. 261. In all other cases an affidavit is required, as for example that the witness is seventy years of age, or is in a dangerous state. Bellamy *v.* Jones, 8 Ves. 31; Barton, Suit in Eq. 53, 54, note.

[4] Mitford, Eq. Pl. by Jeremy, 150; Shirley *v.* Earl Ferrers, 3 P. Will. 77.

take the testimony of witnesses abroad, in order to establish a justification in a civil suit for a libel, although the justification involves a criminal charge against the plaintiff and the libel may be the subject of an indictment.[1]

§ 1968. **Same.** — Some confusion exists in the authorities as to the publication of the testimony in the three distinct classes of cases before mentioned; first, on examinations of witnesses de bene esse pending a cause; secondly, on examinations of witnesses in a bill merely to prove a will per testes, as it is called, that is, by the subscribing witnesses; and thirdly, on examinations of witnesses on common bills to perpetuate testimony, as for example to perpetuate the testimony respecting a will, or a deed, or a modus, or the legitimacy of a marriage.[2] The true rule as to the publication of the testimony in these several classes of cases is as follows: As to the first, the examinations are not published but by the consent of the parties or on a strong case made to the court.[3] As to the second, they stand on a distinct ground, because none but subscribing witnesses are examined; and they are examined to the question of the sanity of the testator merely, as incidental, and their publication is of course.[4] As to the third, publication is not ordinarily allowed during the lifetime of the witnesses, because of the dangers incident thereto, there being no limits as to the points to which the witnesses are examined.[5] But the publication is a matter resting in the sound discretion of the court, upon the special circumstances of the case, and it will be allowed or refused accordingly.[6] In this last class of cases (of

[1] Macaulay *v.* Shackell, 1 Bligh R. U. S. 96.

[2] Harris *v.* Cotterell, 3 Meriv. 680.

[3] Ibid.; Gilb. For. Roman. 140. As for example upon proof that the witness is since dead, or is unable to attend the trial at law. Webster *v.* Pawson, 2 Dick. 540; Price *v.* Bridgman, 1 Dick. 144; Bradley *v.* Crackenthorp, 1 Dick. R. 182; Gason *v.* Wordsworth, 2 Ves. 336, 337; Dew *v.* Clark, 1 Sim. & Stu. 108; Gilb. Forum Roman. 140. If the witness is alive at the time of the trial and capable of attending, and within the jurisdiction, his deposition cannot be used. If the case be a bill in equity and the testimony is taken de bene esse, and the witness is living and within the jurisdiction when the examinations are to be taken in chief, he must be examined over again, as other witnesses. Gilb. Forum Roman. 140, 141. See also Harrison's Pract. by Newland, pp. 275 to 280, edit. 1808.

[4] Harris *v.* Cotterell, 3 Meriv. 678 to 680.

[5] Barnsdale *v.* Lowe, 2 Russ. & Mylne, 142.

[6] Harris *v.* Cotterell, 3 Meriv. R. 678 to 680. However, it is said that there are very few cases in which a publication has ever been ordered during the lifetime of the witnesses. Barnsdale *v.* Lowe, 2 Russ. & Mylne, 142. As to some in which it has been ordered doubts have been expressed. Ibid.; Wyatt, Pract. Reg. 73.

bills to perpetuate testimony), when the examinations are taken the case is considered to be at an end; or at least as suspended until the anticipated action is brought; and then at a suitable period an order for the publication thereof may be obtained from the court upon a proper case made, such as the death or absence of the witnesses, or their inability to attend the trial.[1]

[1] Abergavenny *v.* Powell, 1 Meriv. R. 433; Teale *v.* Teale, 1 Sim. & Stu. 385; Morrison *v.* Arnold, 19 Ves. 671. In the case of Morrison *v.* Arnold (19 Ves. 672), Lord Eldon used the following language: "The question, upon the motion to publish these depositions, the witnesses being still living, is, What is the practice where witnesses have been examined, not de bene esse, but upon a different principle, to have their testimony recorded in perpetuam rei memoriam; the course being in a suit for that purpose, that after the examination of the witnesses there is an end of the cause. It is laid down in the text-books that ordinarily the depositions cannot be published during the lives of the witnesses; and that doctrine appears to be as old as the time of Lord Egerton, who regretted that such was the practice upon the inconvenience that if the facts stated by the witness are false, that cannot be established against him in any species of prosecution, as that fact can only be established by the production of the deposition, which cannot be produced until the witness is dead. That word, *ordinarily*, which is found in most of the books of practice on this subject, struck me as large enough to admit the exercise of a sound discretion by the court, and it seems to be capable of another construction, as there are cases where the depositions may be published, although the witness is not dead, if for instance he is too infirm to travel. The general rule, I am persuaded, is not to permit the deposition to be read during the life of the witness, and I think it will appear that such orders as are to be found proceed upon affidavit that the witness is dead; and some, after the declaration that the deposition of the particular witness shall be read, add, with a considerable degree of caution, that the depositions of the other witnesses shall not be read, affording both affirmative and negative evidence of the practice." He afterwards added: "After considerable research there is not a single instance, except of a person sick, incapable of travelling, or prevented by accident; all the orders, but in those excepted cases, stating that the witness is dead. And though struck with the circumstance that he swears with considerable security, as the depositions are not to be opened until after his death, I am afraid to make a precedent contrary to all the authorities; and further, looking at the first will, and what the trustees under it are about, I doubt whether a bill to perpetuate testimony is in this particular case exactly the bill that should have been filed."

CHAPTER XLVI

PECULIAR DEFENCES AND PROOFS IN EQUITY

§ 1969. **Peculiar Defences and Proofs.** — We have thus reviewed the principal topics of Equity Jurisprudence as connected with the three great divisions of its jurisdiction; namely, its Concurrent Jurisdiction, its Exclusive Jurisdiction, and its Auxiliary Jurisdiction. Imperfect as this exposition of it necessarily has been from the vast mass and variety of the materials, as well as from the intrinsic difficulty of ascertaining in many cases the exact limits and boundaries of its operations, enough has been shown to enable the attentive reader to ascertain the general outlines and proportions of the system, and its beautiful adaptation to the general concerns and actual business of human life. He cannot fail to have observed to what an immeasurable extent beyond the prescribed bounds of the common law its remedial justice reaches; with what wonderful flexibility it applies itself to all the changing circumstances which require the relief to be modified and adjusted, with a nice regard to the rights and interests and even to the compassionate claims of the adverse parties; and by what a curious though artificial machinery it sifts the consciences of the parties and detects the latent springs of action and draws as it were from the secret recesses of the heart its hidden purposes and its yet questionable designs. He cannot fail to have observed with what deep solicitude and promptitude it interferes in cases of fraud, accident, and mistake; how eager it is to succor the distressed, to assist the infirm, to protect the weak, to guard the credulous against the arts of the cunning and profligate, and to save the rash and inexperienced from the natural effects of their own acts of folly and their own misguided and violated confidence. He cannot fail to have approved its bold and sometimes even stern denunciations against vice and craftiness, its uncompromising support of the purest morality, and its unflinching resistance to oppression and meditated wrong. Above all he cannot fail to

have been struck with that admirable invention of judicial policy which interposes preventive guards against impending dangers and mischiefs, and which does not, like the slow and reluctant arm of the common law, wait until the destructive blow has been dealt and then content itself with an attempt to remedy in damages what may be in a just sense incapable of compensation. If here and there he shall have seen an artificial doctrine reared up which it is now difficult to vindicate upon sound reasoning or public convenience, let him consider that it occupies but a narrow space in the general system; that it is the necessary result of the different modes of thought in different ages; and that if it has the touch of human infirmity in its structure, its very failings lean to virtue's side, and serve in some degree to fence in as well as to embarrass the interests of those who stand in constant need of the guardianship of the law. Let him also remember the profound remark of Lord Bacon, that there are in nature certain fountains of justice whence all civil laws are derived but as streams; yet that like as waters do take tinctures and tastes from the very soils through which they run, so do civil laws vary according to the regions or governments where they are planted, though they proceed from the same fountains.[1] If he should perceive that even Equity Jurisprudence has its blemishes and imperfections in its inability to reach some cases of gross injustice or of violated right and duty, and he should be tempted to utter the lamentation of an eminent jurist of antiquity, that we do not seek to cherish the solid and expressive form of true law and genuine justice, but that we content ourselves with the mere shadow and semblance of it, nay, that even these we do not follow, as it is desirable we should do, since they are drawn from the best examples of nature and truth,[2] let him also ponder on the consoling truth so beautifully expressed by the same master mind, that the wisdom of laws in stooping to the concerns of human life must necessarily stop far short of the wisdom of philosophy.[3]

§ 1970. **Same.** — We shall close the present work by adverting to a few peculiarities of equity jurisdiction for which a more

[1] Lord Bacon's Works, Advancement of Learning, p. 219 (London ed. 1803).

[2] "Sed nos veri juris, germanæque justitiæ, solidam et expressam effigiem nullam tenemus; umbra et imaginibus utimur; eas ipsas utinam sequeremur! Feruntur enim ex optimis naturæ et veritatis exemplis." Cic. De Offic. Lib. 3, § 17.

[3] "Sed aliter leges, aliter philosophi, tollunt astutias. Leges quatenus manu tenere possunt; philosophi quatenus ratione et intelligentia." Ibid.

appropriate place has not been found, or which if noticed before seem fit to be brought again into view before they are finally dismissed.

§ 1971. **Defences Which Are Common to Courts of Equity and Unknown to Courts of Law.** — There are some defences which are peculiar to Courts of Equity and are unknown to Courts of Common Law. So also there are some peculiarities in relation to evidence unknown to the practice of the latter courts which yet lie at the very foundation of the practice of the former. Upon each of these subjects we shall say a few words by way of illustration, leaving the full exposition of them to works more appropriate for that purpose.

§ 1972. **Same.** — In the first place as to defences peculiar to Courts of Equity; for of those which are equally available at law we do not here propose to speak.[1] The Statutes of Limitations when they are addressed to Courts of Equity as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity (as for example in matters of account), to which they directly apply, seem equally obligatory in each court. It has been very justly observed that in such cases Courts of Equity do not act so much in analogy to the statutes as in obedience to them.[2] In a great variety of other cases Courts of Equity act

[1] Ante, § 55.

[2] Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 607, 629, 630. In Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 630, Lord Redesdale said: "But it is said that Courts of Equity are not within the Statutes of Limitations. This is true in one respect. They are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that Courts of Equity act merely by analogy to the statutes; they act in obedience to them. The Statute of Limitations, applying itself to certain legal remedies for recovering the possession of lands, for recovering of debts, &c., equity, which in all cases follows the law, acts on legal titles and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies. Nevertheless in thus administering justice according to the means afforded by a Court of Equity it follows the law. The true jurisdiction of Courts of Equity in such cases is to carry into execution the principles of law where the modes of remedy afforded by Courts of Law are not adequate to the purposes of justice, to supply a defect in the remedies afforded by Courts of Law. The law has appointed certain simple modes of proceeding which are adapted to a great variety of cases. But there are cases under peculiar circumstances and qualifications to which, though the law gives the right, those modes of proceeding do not apply. I do not mean to say that in the exercise of this jurisdiction Courts of Equity may not in some instances have gone too far, though they have been generally more strict in modern times. So Courts of Law, fancying that they had the means of administering full

upon the analogy of the limitations at law. Thus for example if a legal title would in ejectment be barred by twenty years' adverse [1] possession, Courts of Equity will act upon the like limitation and apply it to all cases of relief sought upon equitable titles or claims touching real estate.[2] Thus for example if the mortgagee has been in possession of the mortgaged estate for twenty years without acknowledging the existence of the mortgage, it will be presumed that the mortgage is foreclosed and that he holds by an absolute title.[3] If the mortgagor has been in possession of the mortgaged estate for the like space of time without acknowledging the mortgage debt, it will be presumed to be paid. If the judgment creditor has lain by for twenty years without any effort to enforce his judgment, and it has not been acknowledged by the debtor within that time, it will be presumed to be satisfied.[4]

relief, have sometimes proceeded in cases which were formerly left to Courts of Equity, and at one period this also seems to have been carried too far. I think therefore Courts of Equity are bound to yield obedience to the Statute of Limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include Courts of Equity; for when the legislature, by statute, limited the proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of Equity also." But see McKnight *v.* Taylor, 42 U. S. 197, 11 L. Ed. 86; Tatam *v.* Williams, 3 Hare, R. 347, 357, 358, 359; Folly *v.* Hill, 1 Phillips, Ch. R. 399. See Smith *v.* Davidson, 40 Mich. 632; Bickel's Appeal, 86 Pa. St. 204; Kelly *v.* Hurt, 74 Mo. 561; Dodge *v.* Essex Ins. Co., 12 Gray, 65; Wilhelm *v.* Caylor, 32 Md. 151; Ayer *v.* Stewart, 14 Minn. 97; In re Cornwall, 9 Blatchf. C. C. 114. It is laid down that when an injunction is sought in aid of a legal right, the court is bound to grant it if the legal right is established. And lapse of time will not bar the granting of it if it will not bar the legal right. Fullwood *v.* Fullwood, 9 Ch. D. 176, Fry, J.

There is no rule in equity any more than at law that mere non-suing by a specialty creditor for any period within the statutory limit is such neglect as to deprive him of the right to require payment of the specialty debt. In re Baker, 20 Ch. D. 230.

[1] Shorter *v.* Smith, 56 Ala. 208.

[2] Miller *v.* McIntyre, 31 U. S. 61, 8 L. Ed. 320; Coulson *v.* Walton, 34 U. S. 62, 9 L. Ed. 51; Peyton *v.* Stith, 30 U. S. 485, 8 L. Ed. 200; Piatt *v.* Vattier, 34 U. S. 405, 9 L. Ed. 173; and the other cases cited in note (3) to p. 736; Boone *v.* Chiles, 35 U. S. 177, 9 L. Ed. 388; White *v.* Parnther, 1 Knapp, R. 228, 229; Smith *v.* Davidson, 40 Mich. 632.

[3] Ante, §§ 1375, 1376; McGuire *v.* Lynch, 126 Cal. 576, 59 Pac. 27; Jones *v.* Foster, 175 Ill. 459, 51 N. E. 862; Tibbs *v.* Reid, 105 Ky. 331, 49 S. W. 6, 20 Ky. L. Rep. 1208.

Nor can he assert any rights against him in possession that he could not assert against the original mortgagor. Schafer *v.* Hauser, 111 Mich. 622, 70 N. W. 136, 3 Detroit Leg. N. 801, 35 L. R. A. 835, 66 Am. St. Rep. 403.

[4] White *v.* Parnther, 1 Knapp, R. 228, 229; Grenfell *v.* Girdlestone, 2

And in all these cases Courts of Equity will act upon these facts as a positive bar to relief in equity.[1] But a defence peculiar to Courts of Equity is that founded upon the mere lapse of time and the staleness of the claim in cases where no statute of limitations directly governs the case. In such cases Courts of Equity act sometimes by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging for the peace of society antiquated demands by refusing to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights.[2]

Younge & Coll. 662, 680; Dexter *v.* Arnold, 3 Sumner, R. 152. Cheever *v.* Perley, 11 Allen 584. Alsup *v.* Stewart, 194 Ill. 595, 62 N. E. 795, 88 Am. St. Rep. 169; Munro *v.* Barton, 98 Me. 250, 56 Atl. 844; Bentley *v.* Callaghan, 79 Miss. 302, 30 So. 709; Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 727; City of St. Louis *v.* Priest, 103 Mo. 652, 15 S. W. 988; Combs *v.* Goldsworth, 109 Mo. 151, 18 S. W. 1130; Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Taylor *v.* Planet Property Co., 78 Mo. App. 137; Ely *v.* Wilson, 61 N. J. Eq. 94, 47 Atl. 806, in which it is held that there the mortgagor has sold off lots, included in the mortgaged premises, that the grantees may hold adversely to the mortgagee as to the portions purchased by them, and yet he would hold the remainder under his mortgage; Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466.

[1] Ibid.

[2] Mitf. Eq. Pl. by Jeremy, 269 to 274; 1 Fonbl. Eq. B. 1, ch. 4, § 27, and note (*q*). It does not seem necessary at this time to cite at large the authorities which establish this doctrine. They are as full and conclusive upon the subject as they can well be both in England and America. The leading cases on this subject of the English courts are Smith *v.* Clay, Ambler, R. 645; Bond *v.* Hopkins, 1 Sch. & Lefr. 413, 428; Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 607, 630 to 640; Stackhouse *v.* Barnston, 10 Ves. 466, 467; Ex parte Dewdney, 15 Ves. 496; Beckford *v.* Wade, 17 Ves. 96; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 1, 138 to 152; Portlock *v.* Gardner, 1 Hare, R. 594; Vigors *v.* Pike, 8 Clarke & Fin. 650. In America the subject has been largely discussed, and the same doctrine sanctioned in many cases. See Kane *v.* Bloodgood, 7 John. Ch. R. 93; Dexter *v.* Arnold, 3 Sumner, 152; Decouche *v.* Savetier, 3 John. Ch. R. 190; Murray *v* Coster, 20 John. R. 576, 582; Prevost *v.* Gratz, 19 U. S. 481, 5 L. Ed. 311; Hughes *v.* Edwards, 22 U. S. 489, 6 L. Ed. 142; Elmendorf *v.* Taylor, 23 U. S. 168, 6 L. Ed. 289; Willison *v.* Watkins, 28 U. S. 44, 7 L. Ed. 596; Miller *v.* McIntire, 31 U. S. 61, 8 L. Ed. 320; Piatt *v.* Vattier, 34 U. S. 405, 9 L. Ed. 173; Sherwood *v.* Sutton, 5 Mason, R. 143, 145, 146; McKnight *v.* Taylor, 42 U. S. 197, 11 L. Ed. 86; Bowman *v.* Wathen, 42 U. S. 235, 11 L. Ed. 97; Gould *v.* Gould, 1 Story, R. 537; Story on Eq. Pleading, §§ 813, 814. In Smith *v.* Clay, Ambl. R. 645, Lord Camden said: "A Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court. Therefore in

§ 1973. Statutes of Limitation Do Not Run so Long as the Relation of Trustee and Cestui Que Trust Exists. — It is often

Fitter *v.* Lord Macclesfield, Lord North said rightly that though there was no limitation to a bill of review, yet after twenty-two years he would not reverse a decree but upon very apparent error. 'Expedit reipublicæ ut sit finis litium,' is a maxim that has prevailed in this court in all times without the help of an act of Parliament. But as the court has no legislative authority, it could not properly define the time of bar by a positive rule to an hour, a minute, or a year. It was governed by circumstances. But as often as Parliament had limited the time of actions and remedies, to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the legislature had fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And therefore in all cases where the legal right has been barred by Parliament the equitable right to the same thing has been concluded by the same bar." In Bond *v.* Hopkins (1 Sch. & Lefr. 429) Lord Redesdale said: "Nothing is better established in Courts of Equity (and it was established long before this act) than that where a title exists at law and in conscience, and the effectual assertion of it at law, is unconscientiously obstructed, relief should be given in equity; and that where title exists in conscience, although there be none at law, relief should also, although in a different mode, be given in equity. Both these cases are considered by Courts of Equity as affected by the Statute of Limitations; that is, if the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title as would bar him if his title were solely at law, he shall be barred in equity. But that is all the operation this statute has or ought to have on proceedings in equity." In Cholmondeley *v.* Clinton, 2 Jac. & Walk. 141, Sir Thomas Plumer said: "In the Courts of Equity of this country the principle has been always, as I shall hereafter show, strongly enforced. They have refused relief to stale demands even in cases where no statutable limitation existed; and whenever any statute has fixed the periods of limitations by which the claim if it had been made in a Court of Law would have been barred, the claim has been by analogy confined to the same period in a Court of Equity." Again he added (p. 151), after citing the cases: "These cases show, first that Courts of Equity have at all times upon general principles of their own, even where there was no analogous statutable bar, refused relief to stale demands where the party has slept upon his right and acquiesced for a great length of time; and secondly, that whenever a bar has been fixed by statutes to the legal remedy in a Court of Law, the remedy in a Court of Equity has in the analogous cases been confined to the same period. I should not have thought it necessary to cite authorities upon points so long and so clearly established, had not the present decision tended, as it appears to me it does, to call them in question; and had it not been of such transcendent importance that no doubt should exist upon questions so materially affecting the title to real property." The judgment of Mr. Baron Alderson in Grenfell *v.* Girdlestone, 2 Younge & Coll. 662, 678 to 681, is very full and able to the same point of the effect in equity of lapse of time. So is that of Lord Wynford in White *v.* Parnther, 1 Knapp, R. 226, 228,

suggested that lapse of time constitutes no bar in cases of trust.[1] But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and cestui que trust is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other

and the judgment of the Supreme Court of the United States in Boone *v.* Chiles, 10 Peters, R. 177. See also Tatam *v.* Williams, 3 Hare, R. 347, 357, 358. In this last case Mr. Vice-Chancellor Wigram said: "In this court there is direct and very high authority for the proposition that a Court of Equity will not after six years' acquiescence, unexplained by circumstances or countervaled by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner. Barber *v.* Barber, 18 Ves. 286; Ault *v.* Goodrich, 4 Russ. 430; Bridges *v.* Mitchell, Gilb. Eq. Rep. 224; Bunb. 217; 15 Vin. Ab. Tit. Limitation, E. 2, pl. 7. p. 110 (a case spoken of by Lord Eldon in Foster *v.* Hodgson, 19 Ves. 185, as a case of authority), to which may be added also the case of Martin *v.* Heathcote, 2 Eden, 169, and Lord Henley's note upon that case. Ibid. The authority of the case of Barber *v.* Barber, and consequently the authority of the other cases, is without doubt much shaken by the observations of Lord Brougham in moving the judgment of the House of Lords in the case of Robinson *v.* Alexander, 8 Bligh, (N. S.) 352; 3 Cl. & Fin. 717. For, notwithstanding Lord Cottenham's remark in Mirehouse *v.* Scaife, 2 Myl. & Cr. 704, to the effect that the judgment of the House of Lords in any given case does not involve an approbation of all the reasons which each peer may have given for his vote, so as to make those reasons binding upon courts of inferior jurisdiction, it is impossible not to defer to the opinion to which I have adverted, and perhaps difficult to explain the judgment of the House of Lords upon any other reasons, notwithstanding the special circumstances of that case. But Lord Brougham in that case acknowledged in the clearest manner that, whether by analogy to the statute or for any reason six years was or was not a bar in that case, it was the duty of a Court of Equity to consider whether under circumstances of delay a decree should be made. In this case it is unnecessary that I should rely upon the cases which have decided that this court will not give relief after six years of delay wholly unaccounted for, inasmuch as in this case it was not six years, but a clear period of thirteen years, which elapsed between the death of Foster and the filing of the bill and no excuse is given for that delay." Ante, §§ 1375, 1376.

See Burrow *v.* Debo, 47 Mich. 242; Zoellner *v.* Zoellner, 46 Mich. 511 (nine years); Sable *v.* Maloney, 48 Wis. 331 (nearly fifteen years); Oakley *v.* Hurlbut, 100 Ill. 204 (fourteen years); Nudd *v.* Powers, 136 Mass. 273 (three years' delay to enforce a charge on land not fatal); Morse *v.* Hill, Ib. 60; Bliss *v.* Prichard, 67 Mo. 181 (nine years); Brown *v.* Buena Vista, 95 U. S. 157, 24 L. Ed. Equity acts upon the circumstances of each particular case in determining upon the effect of lapse of time. Sullivan *v.* Portland R. Co., 94 U. S. 806, 24 L. Ed. 324. It often treats lapse of time for a shorter period than that of the Statute of Limitations as a presumptive bar. Godden *v.* Kimmell, 99 U. S. 201, 25 L. Ed. 431; Stearns *v.* Page, 48 U. S. 819, 12 L. Ed. 928; Badger *v.* Badger, 2 Cliff. 154. It is not laches to wait until one is in a legal condition to sue. Gamble *v.* Folsom, 49 Mich. 141.

[1] An executor cannot rely on lapse of time in defence of a claim for breach of trust by his testator. Brittlebank *v.* Goodwin, L. R. 5 Eq. 545.

proper relief for the cestui que trust.[1] But where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust or the acts of the parties, or other circumstances give rise to presumptions unfavorable to its continuance, — in all such cases a Court of Equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust, and a fortiori it will apply with increased strength to cases of implied or constructive trusts.[2]

§ 1974. **Courts of Equity Act in Analogy to Statutes of Limitations in Proper Cases.** — Courts of Equity not only act in

[1] See Stone *v.* Stone, L. R. 5 Ch. 74; Burdick *v.* Garrick, Ib. 233; Woodhouse *v.* Woodhouse, L. R. 8 Eq. 514; Carpenter *v.* Cushman, 105 Mass. 417; McCandless's Estate, 61 Pa. St. 9; Albretch *v.* Wolf, 58 Ill. 186; Howe *v.* Rogers, 32 Tex. 218. A cestui que trust not under disability may however be barred of his equity by a possession adverse to the trustee and himself. Merriam *v.* Hassam, 14 Allen, 516. Indeed if there be a competent trustee, the adverse possession may be good though the cestui que trust is under disability. Mason *v.* Mason, 43 Ga. 435; Crook *v.* Glenn, 30 Md. 55; 2 Perry, Trusts, §§ 864 et seq.

Sterling *v.* Sterling, 77 Minn. 12, 79 N. W. 525; Morris *v.* Morris, 48 W. Va. 430, 37 S. E. 570.

The statute never runs against express trusts until by some declaration or act of the trustee, an end is put to the relation of trustee and cestui que trust, and the latter is put to his action. Greenleaf *v.* Land and Lbr. Co., 146 N. C. 505, 60 S. E. 424.

[2] Prevost *v.* Gratz, 9 U. S. 481, 5 L. Ed. 311; Portlock *v.* Gardner, 1 Hare, R. 594, 603, 604; Attorney-Gen. *v.* Fishmonger's Co., 5 Mylne & Cr. 16, 17. In this last case Lord Cottenham said: "It was argued, upon the principle that this court recognizes no limitation of time in cases of trust, that no regard was to be paid in this case to the lapse of four hundred years which have passed away since the title of the company appears to have accrued. Such a doctrine would be most dangerous, and might if acted upon prove destructive of many of the best titles in the kingdom. If there be no doubt as to the origin and existence of a trust, the principles of justice and the interests of mankind require that the lapse of time should not enable those who are mere trustees to appropriate to themselves that which is the property of others; but in questions of doubt whether any trust exists, and whether those in possession are not entitled to the property for their own benefit, the principles of justice and the interests of mankind require that the utmost regard should be paid to the length of time during which there has been enjoyment inconsistent with the existence of the supposed trust. One of the principal reasons for admitting limitations of suits is the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power. Upon this principle this court has in many instances limited the period within which it will exercise its power; and it would indeed be strange if in cases in which it has not done so it were altogether to disregard the lapse of time as applicable to the evidence upon which it is called upon to act." Wedderburn *v.* Wedderburn, 4 Mylne & Cr. 41.

Where the trustee has taken possession of the property in litigation,

obedience and in analogy to the Statutes of Limitations in proper cases, but they also interfere in many cases to prevent the bar of the statutes where it would be inequitable or unjust.[1] Thus for example if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law, Courts

in execution of an express trust, his fiduciary relation would continue until some open, notorious, pronounced act in hostility to that fiduciary relation should occur. McGuire *v.* Nugent, 103 Mo. 161, 15 S. W. 551.

See Knight *v.* Bowyer, 2 DeG. & J. 421; Bridgman *v.* Gill, 24 Beav. 302; Bright *v.* Legerton, 7 Jur. (N. S.) 559; Vyvyan *v.* Vyvyan, 30 Beav. 65; Needles *v.* Martin, 33 Md. 609; Sluman *v.* Wilson, L. R. 13 Eq. 36. That the statute may be pleaded to a suit to enforce an implied trust see McClane *v.* Shepherd, 6 C. E. Green, 76; Ashurst's Appeal, 60 Pa. St. 290; Board of Supervisors *v.* Herrington, 50 Ill. 232.

But a distinction must be observed between the case of property held for another, and property held in one's own right subject to a trust in favor of another. Thus where lands are devised to trustees, and an express trust is created for the payment of legacies, the claim of the legatees is not barred by the Statute of Limitations, and no presumption of payment arises from the lapse of twenty years. But where land is devised subject to the payment of a legacy, and the devisee holds the land for twenty years without recognizing the legacy, a presumption of payment arises. The devisee holds in his own right; the trustee holds in right of the legatee. Watson *v.* Saul, 5 Jur. (N. S.) 404; s. c. 1 Giffard, 188. The latter case is the "derivative" possession of text-writers. See Markby, Elements of Law, § 583 (3d ed.).

However if property is given to executors "in trust" to pay legacies, the statute will run; nothing beyond the ordinary duty of an executor being imposed, there is no express trust. Cadbury *v.* Smith, L. R. 9 Eq. 37.

Indeed it is held by very high authority that lapse of time and enjoyment by an executor of the testator's assets in a manner inconsistent with the trusts of the will, coupled with consent of the beneficiaries, may raise an inference of a gift by them to the executor; though of course when the possession and time are in accordance with the trusts of the will, no such inference can arise. Pillgrim *v.* Pillgrim, 18 Ch. D. 93 (C. A.), distinguishing Ray *v.* Ray, G. Coop. 261. See also Fenwick *v.* Laycock, 2 Q. B. 108.

A parol gift of land of which the donee takes possession is not held as a trust in right of the donor; it is held in right of the donee, and the donee may acquire a good title under the Statute of Limitations. Graham *v.* Craig, 81 Pa. St. 459.

Equity will not interfere to establish a partnership, settle its dealings, and declare one of the partners a trustee for the other after the lapse of more than twenty years since the plaintiff's right accrued, when during the whole period the defendant denied and disregarded the alleged rights of the plaintiff. Phillippi *v.* Phillippi, 61 Ala. 41.

[1] Ecclesiastical Com. *v.* Northern Ry. Co., 4 Ch. D. 845, 859; Brooksbank *v.* Smith, 2 Younge & C. Ex. 58; Bond *v.* Hopkins, 1 Sch. & L. 429; Barnett *v.* Nichols, 56 Miss. 622; Sturgis *v.* Morse, 3 DeG. & J. 1; s. c. 24 Beav. 541. Raymond *v.* Schriever, 63 Neb. 719, 89 N. W. 308; Whaley *v.* Catlett, 103 Tenn. 347, 53 S. W. 131; Boren *v.* Boren, 38 Tex. Civ. App. 139, 85 S. W. 48; Stearns *v.* Hochbrunn, 24 Wash. 206, 64 Pac. 165.

of Equity will interpose and remove the bar out of the way of the other injured party.[1] A fortiori they will not allow such a bar to prevail by mere analogy to suits in equity, where it would be in furtherance of a manifest injustice.[2] Thus if a party should apply to a Court of Equity and carry on an unfounded litigation, protracted under circumstances and for a length of time which should deprive his adversary of his right to proceed at law on account of the Statute of Limitations having in the intermediate

[1] Booth *v.* Lord Warrington, 4 Bro. Parl. Cas. 163, by Tomlins; s. c. 1 Bro. Parl. Cas. 445; Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 634; South Sea Comp. *v.* Wymondsell, 3 P. Will. 143; Deloraine *v.* Browne, 3 Bro. Ch. R. 633, 646, and Mr. Belt's note; Story on Eq. Plead. § 751.

[2] Bond *v.* Hopkins, 1 Sch. & Lefr. 413, 431; Fonbl. Eq. B. 1, ch. 4, § 27, note (*q*); Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 630, 640. In Bond *v.* Hopkins, 1 Sch. & Lefr. 430 to 435, Lord Redesdale made an elaborate exposition of this doctrine. From his opinion on that occasion the following extract is made. "But it is said that the bar arising from lapse of time ought not to be removed. Why not as well as a satisfied term, if used against conscience? But it is contended that the bar arising from the Statute of Limitations ought not to be removed, because the enactment of the statute is positive. The answer is, the positive enactment has nothing to do with the case. The question is not whether it shall operate in a case provided for by the positive enactment of the statute; but whether it shall operate in a case not provided for by the words of the act, and to which the act can apply only so far as it governs decisions in Courts of Equity; that is, whether it shall prevent a Court of Equity doing justice according to good conscience, where the equitable title is not barred by lapse of time, although the legal title is so barred. It is admitted that in a case where this court may decree possession (supposing the suit instituted in time) it will not be prevented by the Statute of Limitations from doing justice by a direct decree, although before the time of making that decree the lapse of time would bar proceedings on a legal title. But it is said it cannot do justice indirectly; that is, it cannot do justice where it thinks fit to put the question of title in a train of discussion at law, by directing a trial at law to ascertain facts and the law arising on those facts; which is only one mean of doing justice used by Courts of Equity, and a mean used because the court will not break in on legal proceedings more than is necessary for the purposes of justice, but will suffer the course of the law to proceed as far as with justice it can. It is admitted, even in that indirect mode of administering relief, if a term for years or any other temporary bar be an impediment to justice, it may be put out of the way. There is no difficulty made upon that part of the case. It is admitted also that where the court is to act directly and by itself, it is not bound by the words of the statute, or by the spirit of it, provided the suit in equity is instituted in due time. It should seem to follow (though there were no case) that when it acts indirectly it should be no more barred by the statute than when it acts directly. Barnesly *v.* Powell, 1 Ves. 285, is an authority to show that if the court could not from the nature of the case do justice indirectly by putting the title in a course of trial in another court, it ought to act upon the matter itself, and give direct relief. But it is clear that Courts of Equity have, under the correction of the court of dernier resort, and with the acquiescence of

time run against it, Courts of Equity would themselves supply and administer within their own jurisdiction a substitute for that original legal right of which the party had been thus deprived, and by their decree give him the fullest benefit of it.[1]

§ 1975. **Statutes of Limitation Begin to Run from What Time.** — The question often arises, in cases of fraud and mistake and

the legislature, decided on the principles on which the Master of the Rolls' decree is founded. M'Kenzie *v.* Powis, 4 Bro. Ch. 328; Pincke *c.* Thornycroft, 1 Bro. Ch. 289; s. c. Dom. Proc. 1784, reported in Cruise on Fines, 366; and many other cases. In the first of these cases the appeal was on the single ground that the Court of Equity had not set the Statute of Limitations out of the way. It is evident that Courts of Equity had been then in the habit of removing the statute out of the way for so much time as had run pending the cause in equity. The court of dernier resort thought that from the circumstances of that case it should be wholly put out of the way."

As to mistake in the execution of a contract see McCormack *v.* McCormack, 1 L. R. Ir. 119.

[1] Pulteney *v.* Warren, 6 Ves. 73; The East India Co. *v.* Campion, 11 Bligh, R. 158, 186, 187. Upon this last occasion Lord Chancellor Cottenham said: "The case of Pulteney *v.* Warren, which was urged at the bar on behalf of the respondent, and which I had occasion lately to consider together with several others, established only this principle, that where a party applies to a Court of Equity, and carries on an unfounded litigation protracted under circumstances, and for a length of time which deprives his adversary of his legal rights, the Court of Equity considers that it should itself supply and administer within its own jurisdiction a substitute for that legal right of which the party so prosecuting an unfounded claim has deprived his adversary. It was upon that principle that Lord Eldon made the order in Pulteney *v.* Warren, because there a party had by litigation improperly deprived his opponent of his legal remedy. It is for such reason that a Court of Equity will give a party interest out of the penalty of a bond where by unfounded litigation the obligor has prevented the obligee from prosecuting his claim at the time when his legal remedy was available. Upon that principle it is that when a party by unfounded litigation has prevented an annuitant from receiving his annuity, the court will in some cases give interest upon the annuity. All those cases depend upon the same principle of equity."

Missouri etc. R. Co. *v.* Pratt, 73 Kans. 210, 85 Pac. 141; Davis *v.* Ramaga, 23 Ky. L. Rep. 1420, 65 S. W. 340; Chesapeake R. Co. *v.* Speakman, 114 Ky. 628, 71 S. W. 633, 24 Ky. L. Rep. 1449, 63 L. R. A. 193; Exchange Bank *v.* Thomas, 115 Ky. 832, 74 S. W. 1086, 25 Ky. L. Rep. 228; Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663; San Antonio R. Co. *v.* Gurley, 92 Tex. 229, 47 S. W. 513; but the fact that the defendant's son was the city attorney, and it was his duty as such, to enforce payment by his father of his taxes, failure to bring action would not deprive the father of the plea of the statute of limitations, City of Houston *v.* Stewart, 40 Tex. Cr. App. 499, 90 S. W. 49; Tomlinson *v.* Bennett, 145 N. C. 281, 59 S. E. 37. A mere promise by defendant's attorneys to have the claim investigated, without any agreement as to waiver of the statute of limitations or any other right, will not prevent the statute being pleaded upon action brought. Brown *v.* Seaboard Air Line Ry. 147 N. C. 218, 60 S. E. 898.

acknowledgments of debts, and of trusts and charges on lands for payment of debts, under what circumstances, and at what time, the bar of the Statute of Limitations begins to run. In general it may be said that the rule of Courts of Equity is, that the cause of action or suit arises when and as soon as the party has a right to apply to a Court of Equity for relief.[1] In cases of fraud or mistake it will begin to run from the time of the discovery of such fraud or mistake, and not before.[2] And an acknowledgment of a debt or judgment, to take the case out of the Statute of Limitations,

[1] Whalley *v.* Whalley, 3 Bligh. R. 1.

[2] Brooksbank *v.* Smith, 2 Younge & Coll. 58. In this case Mr. Baron Alderson said: "Then is the Statute of Limitations a bar to the remedy sought by this bill? It seems to me that it is not so. The statute does not absolutely bind Courts of Equity; but they adopt it as a rule to assist their discretion. In cases of fraud however they hold that the statute runs from the discovery, because the laches of the plaintiff commences from that date on his acquaintance with all the circumstances. In this Courts of Equity differ from Courts of Law, which are absolutely bound by the words of the statute. Mistake is, I think, within the same rule as fraud. Here therefore the statute was not applicable, for the mistake was first discovered within six years before the filing of the bill. I think therefore that the decree should be for the plaintiffs, but without costs; and as they have offered to take the £1,000, which is the whole of the stock that remains, I think they should be bound by that offer." See also Blair *v.* Browley, 5 Hare, R. 542; s. c. 2 Phillips, Ch. R. 354; Hough *v.* Richardson, 3 Story, R. 659.

See Godden *v.* Kimmell, 99 U. S. 201, 25 L. Ed. 431; Ecclesiastical Com. *v.* Northern Ry. Co., 4 Ch. D. 845; Parham *v.* McCrary, 6 Rich. Eq. 140 (that ignorance of the evidence to establish the fraud will not prevent the running of the statute); Meader *v.* Norton, 78 U. S. 442, 20 L. Ed. 184; Evans *v.* Bacon, 99 Mass. 213; Foot *v.* Farrington, 41 N. Y. 164; Henry *v.* Winnebago, 52 Ill. 299. The right of a party injured to rescind a fraudulent transaction remains only for a reasonable time after discovery of the fraud. Royal Bank *v.* Grand Junction R. Co., 125 Mass. 490, 494; Evans *v.* Bacon, 99 Mass. 213; Learned *v.* Foster, 117 Mass. 365; Boston & M. R. Co. *v.* Bartlett, 10 Gray, 384; In re Pinto Silver Min. Co., 8 Ch. D. 273, 284; Allen *v.* Allen, 47 Mich. 74.

The question of time is one for the sound discretion of the court. Royal Bank *v.* Grand Junc. R. Co., supra; Brown *v.* Buena Vista Co., 95 U. S. 157, 24 L. Ed. 422.

The more exact rule appears to be that the statute begins to run not from the time when knowledge of the fraud was obtained, but from the time when, under the circumstances, knowledge ought by reasonable diligence to have been obtained. Vane *v.* Vane, L. R. 8 Ch. 383; Chatham *v.* Hoare, L. R. 9 Eq. 571. And mere dulness of perception will not, it seems, be taken into account to prevent the bar of the statute. Manby *v.* Bewicke, 3 Kay & J. 342. See also Bridgman *v.* Gill, 24 Beav. 302; Smith *v.* Acton, 26 Beav. 210; Cox *v.* Dolman, 2 DeG. M. & G. 592; Oldham *v.* Oldham, 58 N. C. 89; Franklin *v.* Redenhous, Ib. 420. Clapp *v.* Greenlee, 100 Iowa, 586, 69 N. W. 1049; Baird *v.* Omaha Bridge Co., 111 Iowa, 627, 82 N. W. 1020; Sioux City R. Co. *v.* O'Brien County, 118 Iowa, 582, 92 N. W. 857; Battorff *v.* Lewis, 121 Iowa, 27,

or bar by lapse of time, must be made, not to a mere stranger but to the creditor or some one acting for him, and upon which the creditor is to act or confide.[1] A general direction in a will of personal estate to pay debts will not stop the running of the Statute of Limitations, or, if the bar has already attached, remove it.[2] The same rule is equally applicable to the case of a devise or charge upon real estate for the payment of debts. In no case will it take the debt out of the operation of the Statute of Limitations and prevent the running of the statute.[3] But a direction to pay certain scheduled debts out of a particular fund of personal estate will take these debts, to the extent of the fund, out of the Statute of Limitations, and prevent its running.[4] And the like doctrine would probably be applied to cases of trust, or charges upon real estate for the payment of scheduled debts. If the statute has begun to run in the lifetime of the testator, it will continue to run after his death, and will not cease to run during the period which may elapse between his death and the time at which a personal representative is constituted.[5] [But it will not

95 N. W. 262; City of Louisville *v.* Anderson, 79 Ky. 344, 2 Ky. L. Rep. 344, 42 Am. Rep. 220; German Security Bank *v.* Columbia Trust Co., 27 Ky. L. Rep. 581, 85 S. W. 761; Carter *v.* Leonard, 65 Neb. 670, 91 N. W. 574; De Forest *v.* Walters, 153 N. Y. 229, 47 N. E. 294; Perry *v.* Williams, 40 Misc. Rep. 57, 81 N. Y. Supp. 204; Oldham *v.* Medearis, 90 Tex. 506, 39 S. W. 919; Harris *v.* Flowers, 21 Tex. Civ. App. 669, 52 S. W. 1046; American Freehold Mortgage Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377; Wright *v.* Isaacks, 43 Tex. Civ. App. 223, 95 S. W. 55.

[1] Grenfell *v.* Girdlestone, 2 Younge & Coll. 662.

When a title has been extinguished by the Statute of Limitations, no mere acknowledgment by the person who has acquired under the statute a title, as good as if a conveyance had been made to him, can restore the old title. Sanders *v.* Sanders, 19 Ch. D. 373; In re Alison, 11 Ch. D. 284, overruling Stansfield *v.* Hobson, 3 DeG. M. & G. 620. O'Hara *v.* Murphy, 196 Ill. 599, 63 N. E. 1081; Wetz *v.* Greffe, 71 Ill. App. 313; Yarborough *v.* Gilland, 77 Miss. 139, 24 So. 170; Hill *v.* Hill, 51 S. C. 134, 28 S. E. 309; Dorsey *v.* Gunkle, 18 S. Dak. 454, 101 N. W. 36.

[2] Freake *v.* Cranefeldt, 3 Mylne & Craig, 499.

[3] Freake *v.* Cranefeldt, 3 Mylne & Craig, 499, 502; Burke *v.* Jones, 2 Ves. & B. 275; Scott *v.* Jones, 4 Clark & Fin. 382; Fergus *v.* Gore, 1 Sch. & Lefr. 107; Hargreaves *v.* Michell, 6 Madd. R. 326; Hughes *v.* Wynne, 1 Turn. & Russ. 307; Rendell *v.* Carpenter, 2 Younge & Jerv. 484. But see Crallan *v.* Oulton, 3 Beav. R. 1, 6, 7.

[4] Williamson *v.* Naylor, 3 Younge & Coll. 208, 210, note. Glassell *v.* Glassell, 147 Cal. 510, 82 Pac. 42.

[5] Freake *v.* Cranefeldt, 3 Mylne & Craig, 499; Scott *v.* Jones, 4 Clark & Finnelly, R. 382. It seems that in England it is in the discretion of the executor or administrator, under ordinary circumstances, to plead the Statute of Limitations to a debt due by his testator or intestate or not; and if he acts bona fide and reasonably in not pleading it and pays the debt, the payment will be good. Norton *v.* Frecker, 1 Atk. 526; Castle-

run during the contest of the will; or pending the appointment of the personal representative.]

§ 1976. **Same.** — It has been held at law that where there is a joint contract, which is severed by the death of one of the contractors, nothing can be done by the personal representative of the deceased party, by acknowledgment of the debt or otherwise, to take the case out of the Statute of Limitations against the survivor.[1] How far the principle upon which this doctrine has been held can be applied to the right which a creditor has in equity, against the estate of a deceased party, and how far the equitable right which the creditor of joint and several debtors may have to avail himself of the equities subsisting between the debtors may be affected by agreements among the debtors themselves, do not appear to be points clearly settled, and therefore will deserve consideration whenever they shall arise.[2]

§ 1977. **Same.** — Upon similar grounds of fraud, although the Statute of Frauds is ordinarily a good bar both at law and in equity to a suit on a parol contract respecting lands, yet if there has been any act of part performance, that will in equity avoid the operation of the statute; for otherwise it would become an instrument of fraud for designing parties.[3] The like principle applies to cases of judgments and decrees which have been procured by fraud and are set up to defeat the rights of innocent persons.[4]

§ 1978. **A Former Decree in a Suit in Equity as a Defence in Equity in Action between Same Parties and Respecting Same Subject-matter.** — A former decree in a suit in equity between the same parties, and for the same subject-matter, is also a good defence in equity, even although it be a decree merely dismissing the bill, if the dismissal is not expressed to be without prejudice.[5]

ton *v.* Fanshaw, Prec. Ch. 100; Ex parte Dewdney, 15 Ves. 498; Shewen *v.* Vanderhorst, 1 Russ. & Mylne, 349; s. c. 2 Russ. & Mylne, 75; 2 William's Law of Executors, pp. 1282, 1283 (2d ed.). A different rule prevails in some of the American States; and the executor or administrator is not allowed to pay debts barred by the statute. Coe *v.* Finlayson, 41 Fla. 169, 26 So. 704; Douglass *v.* McCarer, 80 Ind. 91; Wilson *v.* Illinois Cent. R. Co., 29 Ky. L. Rep. 148, 92 S. W. 572; Hughes *v.* Boone, 114 N. C. 54, 19 S. E. 63.

[1] Atkins *v.* Tredgold, 2 Barn. & Cressw. 23; Slater *v.* Lawson, 1 Barn. & Adolph. 396.

[2] Crallan *v.* Oulton, 3 Beav. R. 1. [3] Ante, § 1045.

[4] Cooper on Eq. Pl. ch. 5, p. 266. Acquiescence in a void sale will not, it is said, be fatal within the period of limitation; secus of a sale merely voidable. Sloan *v.* Frothingham, 65 Ala. 593.

[5] Cooper Eq. Pl. ch. 5, p. 260.

Here Courts of Equity act in analogy to the law in some respects but not in all; for the dismissal of a suit at law, or even a judgment at law, is not in all cases a good bar to another action.

§ 1979. **An Account Stated Constitutes a Bar to a Bill in Equity to Account.** — An account stated constitutes also a good bar to a bill in equity to account, although it will constitute no bar to an action at law for the same subject-matter.[1] But then (as we have seen), equitable circumstances may be shown which will remove the whole effect of the bar.[2]

§ 1980. **The Plea of Purchase for Value without Notice, as a Peculiar Equitable Defence.** — The plea of a purchase for a valuable consideration without notice is also a defence peculiarly belonging to Courts of Equity, and is utterly unknown to the common law. But upon this sufficient has already been said in the antecedent portions of these Commentaries.[3]

§ 1981. **The Want of Proper Parties to a Bill, as an Equitable Defence.** — The want of proper parties to a bill is also a good defence in equity, at least until the new parties are made, or a good reason shown why they are not made. At law a plea of the like nature is sometimes a good defence in bar, and is sometimes only a matter in abatement. But the plea in equity is of a far more extensive nature than at law; and it often applies where the objection would not at law have the slightest foundation. The direct and immediate parties having a legal interest are those only who can be required to be made parties in a suit at law. But Courts of Equity frequently require all persons who have remote and future interests, or equitable interests only, or who are directly affected by the decree, to be made parties; and they will not, if they are within the jurisdiction, and capable of being made parties, proceed to decide the cause without them. Hence it is that in Courts of Equity persons having very different and even opposite interests are often made parties defendant. It is the great object of Courts of Equity to put an end to litigation, and to settle if possible in a single suit, the rights of all parties interested or affected by the subject-matter in controversy.[4] Hence the general rule in equity is, that all persons are to be made

[1] Cooper, Eq. Pl. ch. 5, p. 277. [2] Ibid.

[3] §§ 64, 152, 208, 237, 510, 575, 1950, 1951.

[4] Cooper, Eq. Pl. ch. 1; p. 34. Merchants Bldg. Co. *v.* Chicago Bldg. Co., 108 Ill. App. 54; Beecher *v.* Foster, 51 W. Va. 605, 42 S. E. 647; Donovan *v.* Campion, 85 Fed. 71, 29 C. C. A. 30; Florida Land Phosphate Co. *v.* Anderson, 50 Fla. 501, 39 So. 392; Indian River Mfg. Co. *v.* Wooten, 48 Fla. 271, 37 So. 731.

parties who are either legally or equitably interested in the subject-matter and result of the suit, however numerous they may be, if they are within the jurisdiction, and it is, in a general sense, practicable so to do. There are exceptions to the rule, and modifications of it, which form a very important part of the practical doctrines of Courts of Equity on the subject of pleading. But they properly belong to a distinct treatise on that particular subject.[1]

§ 1982. **The Rules of Evidence in Equity Are the Same as Those at Law.** — In the next place in relation to evidence peculiar to Courts of Equity. In general it may be stated that the rules of evidence are the same in equity as they are at law,[2] and that questions of the competency or incompetency of witnesses and of other proofs are also the same in both courts. Without adverting to minor differences and distinctions, there are however two respects in which Courts of Equity differ from Courts of Law in the modes of obtaining and acting upon evidence. In the first place Courts of Law, unless under very special circumstances, do not allow of the evidence of witnesses by written depositions, but require it to be given viva voce. On the other hand almost all testimony is positively required by Courts of Equity to be by written deposition; the admission of viva voce evidence at the hearing being limited to a very few cases, such as proving a deed or a voucher referred to in the case.[3]

§ 1983. **Methods of Proof in Cases in Equity.** — But a more important difference in the next place is, that in Courts of Law the testimony of the parties themselves in civil suits is ordinarily if not universally excluded. But in Courts of Equity the parties, plaintiffs as well as defendants, may reciprocally require and use the testimony of each other upon a bill and cross bill for the purpose. And in every case the answer of the defendant to a bill filed against him upon any matter stated in the bill and responsive to it is evidence in his own favor.[4] Nay, the doctrine

[1] See Cooper on Eq. Pl. ch. 1, § 2, pp. 21 to 42; Mitf. Eq. Pl. by Jeremy, 163 to 181; West *v.* Randall, 2 Mason, R. 190 to 196; Story on Eq. Plead. §§ 72 to 238.

[2] Manning *v.* Lechmere, 1 Atk. 453; Glynn *v.* Bank of England, 2 Ves. 41; Gilbert's Forum Roman. 147. Dougherty *v.* Randall, 3 Mich. 581; White *v.* Jones, 83 Miss. 231, 35 So. 450; Sullivan *v.* McLenans, 2 Iowa, 437, 65 Am. Dec. 780; Buttlar *v.* Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. Rep. 648; Lyons *v.* Miller, 6 Grat. 427, 52 Am. Dec. 129.

[3] 2 Madd. Ch. Pract. 330, 331; Higgins *v.* Mills, 5 Russ. R. 287; 2 Daniel, Chan. Pract. 441 to 446.

[4] In like manner Courts of Equity admit the testimony of certain persons to facts which perhaps they would not be or might not be competent

of equity goes further; for not only is such an answer proof in favor of the defendant as to the matters of fact of which the bill seeks a disclosure from him, but it is conclusive in his favor unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other circumstances and facts which give to it a greater weight than the answer, or which are equivalent in weight to a second witness.[1] Or, to express the doctrine in another form, it is an invariable rule in equity that where the defendant in express terms negatives the allegations of the bill, and the evidence is only of one person affirming as a witness what has been so negatived, the court will neither make a decree nor send the case to be tried at law, but will simply dismiss the bill.[2] The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation of fact which he makes, and thereby he admits the answer to be evidence of that fact. If it is testimony, it is equal to the testimony of any other witness; and as the plaintiff cannot prevail unless the balance of proof is in his favor, he must either have two witnesses, or some circumstances in addition to a single witness, in order to turn the balance. We say a second witness or circumstances; for certainly there may be circumstances entirely equivalent to the testimony of any single witness.[3]

to prove in a Court of Law. Thus an accounting party may in equity discharge himself by his own oath of small sums under forty shillings, provided that they do not in the whole exceed the sum of one hundred pounds. 2 Fonbl. Eq. B. 6, ch. 1, § 1, and note (c); Remsen v. Remsen, 2 John. Ch. R. 501. See also Holstcomb v. Rivers, 1 Ch. Cas. 127, 128; Peyton v. Green, 1 Ch. Rep. 78 [146]; Anon. 1 Vern. R. 283; Marshfield v. Weston, 2 Vern. 176; s. c. 1 Eq. Abr. 11, pl. 14; Whicherly v. Whicherly, 1 Vern. 470; Morely v. Bonge, Mosel. R. 252. But he will not be allowed as plaintiff to charge another person in the same way upon his own oath. Everard v. Warren, 2 Ch. Cas. 249; 2 Fonbl. Eq. B. 6, ch. 1, § 1; Marshfield v. Weston, 2 Vern. 176; s. c. 1 Eq. Abr. 11, pl. 14. I have said that perhaps the same evidence might not be allowed at law. Mr. Fonblanque (ubi supra) intimates that it would not be. But Lord Hardwicke, in Robinson v. Cumming (2 Atk. 410), suggested the contrary. Childs v. Carlstein, 76 Fed. 86; Dewey Hotel Co. v. United States Electric Lighting Co., 17 App. D. C. 356; Fields v. Colby, 102 Mich. 449, 60 N. W. 1048.

[1] Pember v. Mathers, 1 Bro. Ch. R. 52; Walton v. Hobbs, 2 Atk. 19; Janson v. Rany, 2 Atk. 140; Arnot v. Biscoe, 1 Ves. 97; Cooth v. Jackson, 6 Ves. 40; East India Company v. Donald, 9 Ves. 275, 283; Pilling v. Armitage, 12 Ves. 78; Cooke v. Clayworth, 18 Ves. 12; Savage v. Brocksopp, 18 Ves. 335; Clark's Executors v. Van Reimsdyk, 13 U. S. 160, 3 L. Ed. 688; Smith v. Brush, 1 Johns. Ch. R. 459, 462; Flagg v. Mann, 2 Sumner, R. 489.

[2] 2 Fonbl. Eq. B. 6, ch. 2, § 3, note (g); Pember v. Mathers, 1 Bro. Ch. R. 52; Mortimer v. Orchard, 2 Ves. Jr. R. 243.

[3] Clark's Executors v. Van Reimsdyk, supra; Gresley on Evidence, 4.

[A party may now take the stand as a witness in his own behalf, both at law and in equity.]

§ 1984. **When Answer Sets Up Matters in Defence or Avoidance, That Is No Proof of the Facts as Stated.** — We are however carefully to distinguish between cases of this sort, where the answer contains positive allegations as to facts responsive to the bill, and cases where the answer admitting or denying the facts in the bill sets up other facts in defence or avoidance. In the latter cases the defendant's answer is no proof whatsoever of the facts so stated, but they must be proved by independent testimony.[1]

§ 1985. **Proof of the Matters by Witnesses.** — In the civil law (as we have seen) the parties to a suit might be interrogated upon articles propounded to them under the direction of the judge as to the facts in controversy. "Ubicunque judicem æquitas moverit, æque oportere fieri interrogationem, dubium non est." [2] And by the rules of law two witnesses were generally required for the establishment of all the material facts not made out in writing, or by the solemn admission of the parties in court. "Ubi numerus testium non adjucitur, etiam duo sufficient. Pluralis enim elocutio duorum numero contenta est." [3] "Sanximus ut unius testimonium nemo judicum in quacumque causa facile patiatur admitti. Et nunc manifeste sancimus ut unius omnino testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat." [4]

[1] Gilbert's For. Roman. 51, 52; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 88 to 90.

[2] Dig. Lib. 11, tit. 1, l. 21; 1 Domat, B. 3, tit. 6, § 5, art. 4; Id. § 6, art. 3, 4, 6, 9.

[3] Dig. Lib. 22, tit. 5, l. 12; 1 Domat, B. 3, tit. 6, § 3, art. 13.

[4] Cod. Lib. 4, tit. 20, l. 9, § 1; Pothier, Pand. Lib. 22, tit. 5, n. 19. Mr. Justice Blackstone, in his Commentaries (3d vol. 370), comments somewhat severely and perhaps not very justly on this rule of the civil law. "One witness," says he, "(if credible) is sufficient evidence to a jury of any single fact, although undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy, and therefore does not always demand the testimony of two, as the civil law universally requires. 'Unius responsio testis omnino non audiatur.' To extricate itself out of which absurdity the modern practice of the Civil Law Courts has plunged itself into another. For as they do not allow a less number than two witnesses to be plena probatio, they call the testimony of one, although never so clear and positive, semi plena probatio only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses when they have one only to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf, and administer to him what is called the suppletory oath; and if his evidence happens to be in his own favor this immediately converts the half proof into a whole one, by this ingenious device satisfying at once the forms of the Roman

These coincidences between the civil law and Equity Jurisprudence, if they do not demonstrate a common origin of the doctrines on this subject, serve at least to show that they have a firm foundation in natural justice. The canon law has followed the rule of the civil law.[1]

§ 1986. **In Equity, Parol Evidence Is Not Competent to Contradict, Qualify, or Vary a Written Instrument.** — In the next place the same general rule prevails in equity as at law, that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments; and that the interpretation of them must depend upon their own terms. But in cases of accident, mistake, or fraud Courts of Equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat the terms of written instruments.[2] So they will allow parol evidence to rebut a presumption, or an equity arising out of written instruments. But in these latter cases they do not interfere with or repel the proper construction of the instrument itself, but only the artificial rules of presumption or of equity, which they themselves have created or applied to cases perfectly indeterminate in their nature, and admitting of either construction according to the real intent of the party.[3]

§ 1987. **A Résumé of the Subject.** — With these few remarks we may dismiss these supplementary topics as to peculiarities of defence and of evidence in Courts of Equity. And here these Commentaries are regularly brought to their close according to their original design. Let not however the ingenuous youth imagine that he also may here close his own preparatory studies of Equity Jurisprudence, or content himself for the ordinary purposes of practice with the general survey which has thus been presented to his view. What has been here offered to his attention is designed only to open the paths for his future inquiries;

law and acknowledging the superior reasonableness of the law of England, which permits one witness to be sufficient where no more are to be had, and, to avoid all temptations of perjury, lays it down as an invariable rule that 'nemo testis esse debet in propria causa.'"

[1] Evans *v.* Evans, The Jurist, 1844, Vol. 8, p. 1055.

[2] 2 Starkie, Evid. title, Parol Evidence, pp. 544 to 577 (2d Lond. ed.); 1 Phillips on Evid. ch. 10, §§ 1 to 3; Id. Pt. 2, ch. 5, §§ 1, 2 (8th ed. 1838); 1 Fonbl. Eq. B. 1, ch. 3, § 11, and note (*o*); 2 Fonbl. Eq. B. 2, ch. 2, § 6, and note (*e*); Id. B. 2, ch. 5, § 3, and note (*l*); Croome *v.* Lediard, 2 Mylne & Keen, R. 260, 261.

[3] Mr. Phillips, in his Treatise on Evid. Pt. 2, ch. 10, § 3, Id. Pt. 2, ch. 5, §§ 1, 2 (8th ed. 1838), has fully collected the cases on this subject. See also on the same subject 2 Starkie on Evid. pp. 568 to 570 (2d London ed. 1833); 2 Fonbl. Eq. B. 2, ch. 5, § 3, note (*l*).

to stimulate his diligence to wider and deeper and more comprehensive examinations; to awaken his ambition to the pursuit of the loftiest objects of his profession; and to impress him with a profound sense of the ample instruction and glorious rewards which await his future enterprise and patient devotion in the study of the first of human sciences, the Law. He has as yet been conducted only to the vestibule of the magnificent temple reared by the genius and labors of many successive ages to Equity Jurisprudence. He has seen the outlines and the proportions, the substructions and the elevations, of this wonderful edifice. He has glanced at some of its more prominent parts, and observed the solid materials of which it is composed, as well as the exquisite skill with which it is fashioned and finished. He has been admitted to a hasty examination of its interior compartments and secret recesses. But the minute details, the subtle contrivances, and the various arrangements which are adapted to the general exigencies and conveniences of a polished society, remain to invite his curiosity and gratify his love of refined justice. The grandeur of the entire plan cannot be fully comprehended but by the persevering researches of many years. The masterpieces of ancient and modern art still continue to be the study and admiration of all those who aspire to a kindred excellence; and new and beautiful lights are perpetually reflected from them which have been unseen or unfelt before. Let the youthful jurist who seeks to enlighten his own age or to instruct posterity be admonished that it is by the same means alone that he can hope to reach the same end. Let it be his encouragement and consolation that by the same means the same end can be reached. It is but for him to give his days and nights with a sincere and constant vigor to the labors of the great masters of his own profession, and although he may now be but a humble worshipper at the entrance of the porch, he may hereafter entitle himself to a high place in the ministrations at the altars of the sanctuary of justice.

[The three following chapters, subject to some slight changes, were added to the work by the late Chief Justice Redfield. A few later cases are cited in the notes.]

CHAPTER XLVII

ESTOPPELS IN EQUITY

§ 1988. **Estoppels in Equity.** — The subject of equitable estoppels, or estoppels in fact, although not formally discussed in any of the preceding chapters and not named in terms, is nevertheless incidentally alluded to in connection with constructive fraud, the Statute of Limitations, and laches,[1] and has become one of great practical importance; and it seems necessary to a full understanding of the present state of equity law in regard to it that we should give it more than a passing notice. It forms a very essential element in that fair dealing and rebuke of all fraudulent misrepresentation which it is the effort of Courts of Equity constantly to check.

§ 1989. **[What is an Equitable Estoppel.** — An equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded from asserting rights which might otherwise exist as against another person who has in good faith relied upon such conduct, and has been thereby led to change his position for the worse, and who, on his part, acquires some corresponding rights. The doctrine is founded upon equity and good conscience; and the party claiming the estoppel must have done something, paid something, or in some way changed his position for the worse, so that he will not be left, or cannot be put back, in his former condition, in case the other party is allowed to assert his original rights. Nobody ought to be estopped from averring the truth, or asserting a just demand, unless by his acts, words, or conduct or neglect his now averring the truth, or asserting the demand would work some wrong to some person, who had been induced to do something, by reason of what he has said or done, or omitted to say or do.[2] The party may waive his right to insist upon the inequitable conduct of the other by waiting an unreasonable time to assert his rights, after ascertaining the real truth of the situation, or if he was aware of the situation in which he was placed at the time the improper conduct occurred.[3] In order to

[1] Ante, § 64.

[2] The Alberta, 24 Fed. 379; Richardson *v.* Olivier, 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113; Davis *v.* Davis, 26 Cal. 23, 85 Am. Dec. 157; Nell *v.* Dayton, 43 Minn. 242, 45 N. W. 229; Griffith *v.* Rife, 72 Tex. 185, 12 S. W. 168; Miller Furn. Co. *v.* Ft. Smith Ice Co., 66 Ark. 287, 50 S. W. 508; Ricketts *v.* Scothorn, 57 Neb. 51, 77 N. W. 365, 42 L. R. A. 794, 73 Am. St. Rep. 491; First Natl. Bank *v.* Dean, 60 N. Y. Super. Ct. 299, 17 N. Y. Supp. 375; Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307.

[3] Nash *v.* Baker, 40 Neb. 294, 58 N. W. 706.

create an estoppel, it is necessary that the defendant, either by language or conduct should have, first, falsely represented or concealed a material fact; second, the false representation or concealment must have been knowingly made; third, the party pleading the estoppel must have been ignorant of the facts; fourth, the representation must have been made with the intention that it should be acted upon; fifth, the party pleading it must have been misled thereby to his injury in some substantial matter. If the plaintiff knew the truth, he had no right to rely upon a falsehood; and in a plea of this kind it is imperative that he should show his want of knowledge.[1]]

§ 1990. **The Doctrine of Estoppel Applied Where Rights Once Valid are Lost by Delay.** — It applies to all cases where rights once valid are lost by delay, and the implied acquiescence resulting from such delay. In a late case[2] in the Court of Appeal in Chancery before the Lords Justices it was held that where the plaintiff had the right to prevent a party from erecting buildings upon his own land in consequence of the covenants of his grantor with the grantor of the plaintiff, and he gave notice of such right and of an intention to enforce it before any expense was incurred, and followed such notice by a bill for an injunction, although not filed till four months afterward, he was not estopped by his delay, it appearing that the plaintiff could not sooner establish his right to enforce the prohibition.

§ 1991. **Same.** — So too in another case before the same court it was held that where the party had acquiesced in the violation of a covenant to a certain extent, this afforded sufficient objection to the granting of an interlocutory injunction against a greater violation of it.[3]

§ 1992. **Same.** — So also where a married woman entitled to the income of a legacy for her separate use continued for fifteen years, with full notice of the circumstances affecting her rights, to receive the income on the footing that the legacy was liable to contribute in favor of the residuary legatees to a loss occurring on the reinvestment of part of the estate, and it was afterwards decided that the legacy was not liable so to contribute, but must be paid in full, it was held that she could not recover from the residuary legatees the sums which she had before acquiesced in allowing to be paid to them,[4] and which they had expended as their own in faith of such acquiescence. Such acquiescence constituted an equitable estoppel upon any such claim, since it had been acted upon in good faith by the other party.

§ 1993. **The Doctrine of Estoppel Does Not Apply Where One Sees Another Improve Property, and at the Time the Improvements Were Made Knew the Real State of the Title.** — The equitable rule however as to the effect of a person's lying by and allowing another to expend money on his property does not apply where the money is expended with knowledge of the real state of the title.[5] But in a late

[1] Brigham Young Trust Co. *v.* Wagner, 12 Utah 1, 40 Pac. 764; First Natl. Bank *v.* Williams, 126 Ind. 423, 26 N. E. 75; Roberts *v.* Trammell, 15 Ind. App. 445, 40 N. E. 162.

[2] Coles *v.* Sims, 5 DeG. M. & G. 1.

[3] Child *v.* Douglas, 5 DeG. M. & G. 739. See Mitchell *v.* Steward, L. R. 1 Eq. 541; Western *v.* MacDermott, L. R. 1 Eq. 499.

[4] Stafford *v.* Stafford, 1 DeG. & J. 193. See Bate *v.* Hooper, 5 DeG. M. & G. 338.

[5] Rennie *v.* Young, 2 DeG. & J. 136; Seabury *v.* Stewart, 22 Ala. 207, 58 Am. Dec. 254; Mahoney *v.* Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351; Price *v.*

case [1] it was decided that where a landlord stands by and sees a tenant lay out money on the faith of a promised lease, this, though not strictly part-performance, may raise an equity analogous to that which is raised when one stands by and sees another expend money on his land believing he has good title. And this principle affects corporations and other joint-stock companies the same as it does individuals.[2] However, where a partner in a joint-stock company after his shares were declared forfeit lay by for seven years while the affairs of the concern were greatly depressed, until they began to be more prosperous, and then filed his bill to be let in to a share of the profits, it was held that he must be considered as having acquiesced in the action of the directors in declaring his shares forfeited, and that he was not entitled to the relief sought.[3] But the principle of this case was held not to apply where the surviving partner had refused to give the representatives of a deceased partner all the information as to the state of the concern which was necessary to enable them to exercise a sound discretion as to whether they should claim an interest and take a share in the risks of the concern.[4]

§ 1994. **Consummation of a Contract by Misrepresentation, as an Estoppel.** — Where a party by misrepresentation draws another into a contract, he may be compelled to make good the representation if that be possible ; but if not, the other party may avoid the contract. And the same principle applies although the party making the representation believed it to be true, if in the due discharge of his duty he ought to have known the fact.[5] Third parties who by false representations induce others to enter into contracts are estopped from afterwards falsifying their

Stratton, 45 Fla. 535, 33 So. 644; Rippe *v.* Badger, 125 Iowa 725, 101 N. W. 642, 106 Am. St. Rep. 336; Lindt *v.* Uhlein, 116 Iowa 48, 89 N. W. 214; Cryer *v.* McGuire, 148 Ky. 100, 146 S. W. 402, Ann. Cas. 1913 E. 485; Stamper *v.* Bradley, 21 Ky. L. Rep. 806, 53 S. W. 16; Lemerand *v.* Flint etc. R. Co., 117 Mich. 309, 75 N. W. 763, 5 Detroit Leg. N. 247; and a mortgagee has no more right to take an unlawful possession of the mortgaged premises than any one else, Frear *v.* Hardenbergh, 5 Johns. 272, 8 Am. Dec. 356; McKenzie *v.* Gussner, 22 N. Dak. 445, 134 N. W. 33, 37 L. R. A. (N. S.) 918 ; Keister *v.* Cubine, 101 Va. 768, 45 S. E. 285.

[1] Nunn *v.* Fabian, L. R. 1 Ch. 35 ; Thornton *v.* Ramsden, 4 Giff. 519 ; Crook *v.* Corporation of Seaford, L. R. 10 Eq. 678 ; 6 Ch. 551.

[2] Strand *v.* Music Hall Co., 14 W. R. 6 ; Hill *v.* South Staffordshire Ry. Co., 2 DeG. J. & S. 230 ; Wilson *v.* West Hartlepool Ry. Co., Ib. 475 ; Steevens Hospital *v.* Dyas, 15 Ir. Ch. 405. See as to equitable estoppel from standing by and allowing building, Davies *v.* Sear, L. R. 7 Eq. 427 ; Bankart *v.* Tennant, L. R. 10 Eq. 141 ; Raritan Water Co. *v.* Veghte, 6 C. E. Green, 463 ; Millingar *v.* Sorg, 61 Pa. St. 471 ; Evansville *v.* Pfisterer, 34 Ind. 36 ; Donovan *v.* Firemen's Ins. Co., 30 Md. 155 ; Brooks *v.* Curtis, 4 Lans. 283.

[3] Prendergast *v.* Turton, 1 Younge & C. 98.

[4] Lord Cranworth, in Clements *v.* Hall, 2 DeG. & J. 173.

[5] Pulsford *v.* Richards, 17 Beav. 87. It is here held that persons who take shares in the formation of a railway company, and the directors who form it, are mutually contracting parties, and the prospectus is a representation forming the basis of the contract for the sale of such shares. So one allowing his name to appear as shareholder to induce others to take stock is estopped to deny his being such. Bridger's Case, L. R. 9 Eq. 74. So an infant allowing his name to remain for two years after coming of age, with full knowledge of facts. Mitchell's Case, L. R. 9 Eq. 363. And see Ebbett's Case, L. R. 5 Ch. 302.

statements, and if necessary may be compelled to make them good. But where a contract is entered into upon the false statement of one not a party, it is no ground of avoiding the contract. Misrepresentation may be either by the suppression of truth or the suggestion of falsehood ; but to be the ground for avoiding the contract, it must be such that it is reasonable to infer that in its absence the party deceived would not have entered into the contract.[1]

§ 1995. **Same.** — This principle has often been applied to the proceedings of joint-stock companies not strictly in accordance with the requirements of their charter. Thus where power was given by the deed of settlement at a meeting of two-thirds in number and value of the shareholders, to borrow money on debentures, and the directors borrowed money on debentures upon the resolution of a meeting at which the requisite number did not attend, and the debentures were issued to persons present at the meeting, and the money applied in payment of the debts of the company, and interest paid on the loans for two years, it was held that the original issue of debentures was invalid, but that it was cured by the subsequent acquiescence of the company.[2]

§ 1996. **Long Acquiescence in Irregular Proceedings Whereby One's Rights Are Injuriously Affected May Become a Complete Bar.** — In a recent case before the Master of the Rolls, Lord Romilly,[3] it is declared that lapse of time and acquiescence on the side of the party whose interests are alleged to have been injuriously affected by irregular proceedings will be a complete bar unless the transaction is tainted with fraud, meaning thereby an act involving grave moral guilt. Upon this ground an agreement between the shareholders and directors of a joint-stock company was upheld, although admitted to have been originally ultra vires, and that the books of the company accessible to the shareholders did not show the real nature of the transaction. And in cases of actual fraud the Courts of Equity feel great reluctance to interfere where the party complaining does not apply for redress at the earliest convenient moment after the fraudulent character of the transaction comes to his knowledge. The party upon whose rights or interests a fraud is attempted should not be allowed, after the fact comes to his knowledge, to speculate upon the possible advantages to himself of confirming or repudiating the transaction. He must repudiate it at once and surrender his securities.[4]

[1] Pulsford *v.* Richards, 17 Beav. 87. It is here held that persons who take shares in the formation of a railway company, and the directors who form it, are mutually contracting parties, and the prospectus is a representation forming the basis of the contract for the sale of such shares. So one allowing his name to appear as shareholder to induce others to take stock is estopped to deny his being such. Bridger's Case, L. R. 9 Eq. 74. So an infant allowing his name to remain for two years after coming of age, with full knowledge of facts. Mitchell's Case, L. R. 9 Eq. 363. And see Ebbett's Case, L. R. 5 Ch. 302.

[2] The Magdalena Steam Nav. Co. In re, 6 Jur. (N. S.) 975. See the cases reviewed in regard to acquiescence in equity in 2 Redfield on Railw. 353–355, § 220. See also Laird *v.* Birkenhead R. Co., 6 Jur. (N. S.) 140 ; Bankart *v.* Houghton, 27 Beav. 425.

[3] Smallcomb's Case, L. R. 3 Eq. 769. This case was affirmed in the House of Lords, L. R. 3 H. L. 249. See also Brotherhood's Case, 31 Beav. 365, which was professedly followed in the preceding case.

[4] Parks *v.* Evansville R. 23 Ind. 567. See as to the laches which will prevent an allottee from throwing up his shares for alleged non-fulfilment of condition of application Perrett's Case, L. R. 15 Eq. 250. After wind-

§ 1997. **Same.** — Upon similar grounds courts refuse to disturb settlements long acquiesced in, although between parties holding confidential relations to each other, and of such a nature as to give one great advantage over the other in making such settlements ;[1] as for instance between trustee and cestui que trust.[2] And the acknowledgment of money received in the account of the trustee on behalf of the cestui que trust is evidence against the latter.

§ 1998. **Same.** — This subject is extensively discussed and the cases reviewed in an important cause before the House of Lords in the early part of 1858.[3] The Lord Chancellor Chelmsford maintained an essential difference between executory and executed interests in regard to the effect of laches in asserting the claim. In regard to the former, and where it is requisite to resort to a Court of Equity to be put in possession of them, " It is," says the learned judge, " an invariable principle of the court that the party must come promptly, — that there must be no unreasonable delay ; and if there is anything on his part which amounts to laches, Courts of Equity have always said, 'We will refuse you relief.' With regard to interests which are executed, the consideration is entirely different. There mere laches will not disentitle the party to relief by a Court of Equity, but a party may by standing by, as it has been metaphorically called, waive or abandon any right which he may possess. . . . I apprehend where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right except by acts which are equivalent to an agreement or to a license."[4]

§ 1999. **Estoppel by Agency Where Money is Paid upon Representations of Supposed Agents, in Presence of Ostensible Principal, Who Remains Silent.** — But where upon the occasion of a transaction money is, with the privity and in the presence of any person, paid upon the faith of a representation which that person understands (and knows is about to be thus acted upon, and that his not disputing will be regarded as confirmation of it, and he remains silent), he is bound to fulfil the purpose for which it was made.[5] This was the case of one tenant in common contracting for the sale of the entire estate ; other tenants being present when a portion of the purchase-money was paid to the mortgagee, and making no objection, were held bound by the agreement.

§ 2000. **The Doctrine of Estoppels in Pais in Ordinary Cases Grows Out of a Fraudulent Purpose and a Fraudulent Result.** — This doctrine of estoppels in pais in ordinary cases grows out of a fraudulent purpose and a fraudulent result. If indeed the element of deception

ing-up order it is too late to seek to repudiate subscription for fraud in the prospectus. Oakes *v.* Turquand, L. R. 2 H. L. 325 ; Kent *v.* Freehold, &c. Co., L. R. 3 Ch. 493. And see as to laches which will disentitle the party deceived to relief as against the directors individually Peek *v.* Gurney, L. R. 13 Eq. 79 ; s. c. L. R. 6 H. L. 377. It seems if the original allottee would be estopped to complain of the fraud, his transferee is in no better position. Ibid.

[1] Bright *v.* Legerton, 6 Jur. (N. S.), 1179. [2] Ibid.

[3] Clarke *v.* Hart, 6 H. L. Cas. 633.

[4] The learned judge here quotes the language of Lord Denman, in Pickard *v.* Sears, 6 Ad. & Ellis, 469 ; and that of Parke, B., in Freeman *v.* Cooke, 2 Exch. 654.

[5] Davies *v.* Davies, 6 Jur. (N. S.) 1320. See also Martin *v.* Righter, 2 Stockton, Ch. 510. The rule is defined in Eldred *v.* Hazlett, 33 Pa. St. 307 ; Blackwood *v.* Jones, 57 N. C. 54.

is wanting, there is no estoppel ; as if both parties were equally conusant of the facts, and the declaration or silence of one party produced no change in the conduct of the other, he acting solely upon his own judgment.[1] There must be deception and change of conduct in consequence, in order to estop the party from showing the truth.[2]

§ 2001. **An Estoppel May Be Founded upon the Dedication of a Way to the Public.** — An estoppel may occur in regard to the dedication of land to public use from the circumstances under which it is done and the acts which it induces in others.[3] As where one sells house-lots adjoining a space held out as an open street or public square, and valuable erections and improvements are made in faith of such professions, there arises forthwith an irrevocable dedication of such property to public use in the form indicated.[4]

§ 2002. **The Subsequent Acquiescence In a Defective Deed, as an**

[1] Eldred *v.* Hazlett, 33 Pa. St. 307 ; Bigelow, Estoppel, 519 et seq. 3d ed. That equity does not favor estoppels against the truth, see Rhodes *v.* Childs, 64 Pa. St. 18.

[2] White *v.* Langdon, 30 Vt. 599. So a recital in a deed contrary to the fact, but made by mistake, will not create an estoppel. Brooke *v.* Haymes, L. R. 6 Eq. 25 ; Empson's Case, L. R. 9 Eq. 597. One who is privy to the execution of a deed cannot claim that it is an act of bankruptcy. Ex parte Stray, L. R. 2 Ch. 384. As to whether devisees and those claiming under them are bound by estoppel where testator undertook to create a term for the raising of an annuity the legal estate not being in him but in mortgagees, and the devisees paid the mortgage and got in the legal estate and sold to a purchaser without notice of the annuity, see Clemow *v.* Geach, L. R. 6 Ch. 147.

[3] See Holdane *v.* Coldspring, 21 N. Y. 474 ; Baker *v.* Johnston, 21 Mich. 319 ; Gilbert *v.* Manchester, 55 N. H. 298.

[4] Rives *v.* Dudley, 56 N. C. 126. But a mere permission to build on one's land a toll-bridge does not amount to a dedication of the land to public use. Ibid.

London Bank *v.* City of Oakland, 90 Fed. 691, 33 C. C. A. 237; Kriger *v.* Constable, 116 Fed. 722, affirmed, 128 Fed. 908, 63 C. C. A. 634 and City of Mobile *v.* Fowler, 147 Ala. 403, 41 So. 468, in which it is held that a dedication is not effected in the absence of registration of the map, Lewis *v.* City of Lincoln, 55 Neb. 1, 75 N. W. 154 ; Morris *v.* Jersey City, 63 N. J. Eq. 45, 51 Atl. 387 ; Nodine *v.* City of Union, 42 Oreg. 613, 72 Pac. 582. The matter of dedication is a question of intention, and generally a dedication will be presumed where the map has been made, lots sold adjacent thereto and references made to streets and alleys, although the map is never recorded, Davies *v.* Epstein, 77 Ark. 221, 92 S. W. 19 ; McLean *v.* Llewellyn Iron Works, 2 Cal. App. 346, 83 Pac. 1082 ; Price *v.* Stratton, 45 Fla. 535, 33 So. 644 ; Corning *v.* Woolner, 206 Ill. 190, 69 N. E. 53 ; Owen *v.* Village of Brockport, 208 Ill. 35, 69 N. E. 952 ; Alden Coal Co. *v.* Challis, 103 Ill. App. 52 ; Strunk *v.* Pritchett, 27 Ind. App. 582, 61 N. E. 973 ; Backman *v.* City of Oskaloosa, 130 Iowa 600, 104 N. W. 347 ; Flournoy *v.* Breard, 116 La. 224, 40 So. 684 ; Finnegan *v.* City of St. Joseph, 123 Mich. 330, 82 N. W. 51, 6 Detroit Leg. N. 1085 ; Smith *v.* City of St. Paul, 72 Minn. 472, 75 N. W. 708 ; McGinnis *v.* City of St. Louis, 157 Mo. 191, 57 S. W. 755 ; Loughman *v.* Long Island R. Co., 83 App. Div. 629, 81 N. Y. Supp. 1097 ; Collins *v.* Asheville Land Co., 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720 ; Bailliere *v.* Atlantic Shingle Co., 150 N. C. 637, 64 S. E. 754 ; City of Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43.

Estoppel. — In a late case where a married woman executed a deed inter partes, whereby she attempted to make her husband's debt a charge upon her separate estate, the court held the deed itself inoperative ; but inasmuch as the woman, after she became discovert, did not repudiate the deed, but for some years continued to recognize it as a valuable security, it was considered that she thereby confirmed it. So that her adoption and confirmation should have the same effect as if the deed had been executed by her de novo.[1]

§ 2003. **Acquiescence, Generally, as an Estoppel.** — In a late case [2] before the House of Lords, on appeal from the Court of Session in Scotland, the Lord Chancellor discusses this question of estoppel in fact, or acquiescence in adversary claims of right, somewhat in detail. He is reported thus : [3] " It is a universal law that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." And again : " If a party has an interest to prevent an act being done, and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have, had it been done by his previous license."

§ 2004. **Same.** — So also in a very late case,[4] where the subject of the sale of shares in a joint-stock company through the instrumentality of a prospectus issued by the directors of the company came in question, it was held that where the representations contained in the prospectus are believed by the company to be correct at the time the prospectus issued, and a person agrees to accept shares upon the faith of them, and without making inquiries, the company cannot enforce the agreement after the representations have been discovered to be false. The company were bound to know they were true before making them ; and, having made them, are now bound to make them good to those who have acted upon the faith of them, or else relinquish all advantage gained by them.

§ 2005. **The Equitable Construction of a Contract or a Duty Is Similar to the Legal One.** — It is sometimes attempted to be maintained that Courts of Equity require a more perfect good faith and visit a severe condemnation upon parties for any departure from its strict observance than Courts of Law. It may be true that they are sometimes enabled by means of their different modes of procedure to effect more perfect justice between parties, and thus seemingly to redress some departures from honesty and fair dealing in a more exemplary manner than can be done in Courts of Law. But it is well settled that there is no equitable construction of a contract or a duty different from its legal one. The same is true in the construction of statutes.[5]

§ 2006. **Land-owners May Be Restrained from Maintaining Ejectment against Public Service Corporations, Where the Rights**

[1] Skottowe *v.* Williams, 3 DeG. F. & J. 535. The English doctrine seems to be that a married woman may be estopped by her recital in a deed as though sole. See In re Fiddey, L. R. 7 Ch. 773. So by her acquiescence, see Jones *v.* Higgins, L. R. 2 Eq. 538.

[2] Cairncross *v.* Lorimer, 7 Jur. (N. S.) 149. [3] Ibid.

[4] New Brunswick Ry. Co. *v.* Muggeridge, 7 Jur. (N. S.) 132.

[5] Scott *v.* Liverpool, 3 DeG. & J. 334.

Have Been Long Enjoyed. — There are many other cases of equitable estoppel which we can only present as illustrations of the principle. Courts of Equity will interfere by injunction to restrain land-owners from maintaining ejectment against a canal company who have been permitted by such owner to occupy the land sued for during forty years by paying an agreed rent; and also from erecting a bridge upon the land on the ground of acquiescence in the company's use of the land, they undertaking to put in force their statutory powers to acquire the land.[1]

§ 2007. **Same.** — So also where the successive owners of freehold lands with which the parish lands were mixed, being also tenants from year to year of the parish lands, and having for a long time paid a certain rent to the parish, and taken receipts from the collectors expressed "for rent of parish lands," it was held that the present owners could not be allowed to prove that the very land belonging to the parish was not in their possession, and that the rent had been paid by them and their immediate predecessors by virtue of a contract of indemnity between them and the occupiers of the parish land, their conduct being equivalent to a representation that they had parish land in their possession in which the parish had been induced to trust and to act accordingly. And it was also held that a purchaser of land, from an owner who had thus been paying rent to the parish, must be regarded as having notice that part of the land purchased belonged to the parish.[2]

§ 2008. **A Vendee Who Seeks to Defend against Securities, on the Ground of Fraud, Should Interpose His Objection without Delay.** — And in cases of alleged fraud in the sale of real estate (and the rule is the same in other cases of sales), where the vendee seeks to defend against the securities at law, or to have them set aside by a Court of Equity on the ground of fraud, it is incumbent upon him to interpose the objection at the earliest possible moment; and if after he discovers the existence of the facts which are claimed to constitute fraud he continues to act under the contract except for the mere purpose of preserving the property for the party ultimately entitled, he will be held to have affirmed the contract with full knowledge of all the facts.[3] And where the defendant in a bill to redeem expressly waives all objection to such redemption upon the payment of the sum due in equity, and so states in his answer, he cannot afterwards be allowed to insist that the mortgage was foreclosed before the commencement of the suit.[4] So also where the mortgagor executes a bond and mortgage to secure the debt of a third party to the mortgagee, he will not be at liberty to defend against it upon the ground of any equities between himself and the original debtor. As a general rule the

[1] Somersetshire Coal Canal Co. *v.* Harcourt, 2 DeG. & J. 596. See also Duke of Beaufort *v.* Patrick, 17 Beav. 60; Mold *v.* Wheatcroft, 27 Beav. 510. See also Cumberland Valley Railw. *v.* McLanahan, 59 Pa. St. 23, where it is declared that valuable improvements having been made by a railway company on the faith of a license, it is not within the Statute of Frauds; and subsequent ratification by parol is equivalent to precedent authority. Atlanta Ry. Co. *v.* Barker, 105 Ga. 534, 31 S. E. 452; Seaboard Air Line Ry. *v.* Olive, 142 N. C. 257, 55 S. E. 263; Porter *v.* Aberdeen etc. R. Co., 148 N. C. 563, 62 S. E. 741.

[2] Attorney-Gen. *v.* Stephens, 1 K. & J. 724.

[3] Jennings *v.* Broughton, 5 DeG. M. & G. 126; Downer *v.* Smith, 32 Vt. 22; Farebrother *v.* Gibson, 1 DeG. & J. 602; Gatling *v.* Newell, 9 Ind. 572.

[4] Strong *v.* Blanchard, 4 Allen, 538.

assignee of a mortgage takes the mortgage subject to all the equities subsisting against it in the hands of the mortgagee.[1] But if the mortgagor when applied to for information misleads the assignee as to the amount due, or conceals his equitable defence, or stands silently by and permits the assignee in good faith to pay his money and take an assignment for its full nominal value, he cannot afterwards set up his equitable defence against the claim of the assignee for full payment.[2]

§ 2009. **Delay as a Waiver of the Right to Claim That Another Is Estopped.** — In a somewhat remarkable case [3] which came before the Master of the Rolls in 1856, the decision is placed upon the ground of delay in instituting proceedings. The facts upon which the claim rested were briefly these: In 1818 the plaintiffs, who carried on business at Emsden, in Hanover, consigned a cargo of wheat to defendant's testator, doing business in London. The wheat was kept in warehouse unsold until 1825, and then sold for less than the expense already incurred in storage. In 1832 proceedings were instituted in the Hanoverian courts to recover the balance of the expense above the price; and after going by appeal throughout all the tribunals of the kingdom, resulted in a judgment for the defendant for a balance of £1,350, being the value of his wheat probably. This judgment was accompanied with reasons stating that the contract was to be governed by the law of Hanover, and was rendered in 1842. The debtor died in England four years after, and his executors were appointed in due course, and the bill was brought in 1855 to compel payment out of his assets. As no excuse for the delay was given, the learned judge said: "I have thought that a due regard to justice and the necessity of compelling parties to enforce their demands with diligence requires me to dismiss this bill."

§ 2010. **Same.** — The late English cases with regard to questions of nuisance seem to assume the ground that in the case of extensive public works, or even those of a more private character, which are liable to cause serious damage to the adjoining land-owners by obstructing the flow of water or otherwise, it is the duty of the party complaining to take proceedings while the works are in progress, or at the earliest convenient period after the full extent of the damage is fairly ascertainable; and if

[1] Hadley *v.* Clark, 8 Idaho, 497, 69 Pac. 319; Selby *v.* Sanford, 7 Kans. App. 781, 54 Pac. 17; Lang *v.* Dietz, 191 Ill. 161, 60 N. E. 841; Hill *v.* Minor, 79 Ind. 48; Foy *v.* Armstrong, 113 Iowa, 629, 85 N. W. 753; Miller *v.* Thompson, 34 Mich. 10; Smith *v.* Graham, 34 Mich. 302; Goos *v.* Goos, 57 Neb. 294, 77 N. W. 687; McGregor *v.* Eastern Bldg. & Loan Assn., 5 Neb. 563, 99 N. W. 509; Cummings *v.* Jackson, 55 N. J. Eq. 805, 38 Atl. 763; Brown *v.* Elwell, 17 Wash. 442, 49 Pac. 1068; if there is a disputed claim and the purchaser withholds a part of the purchase price, as an off-set against that claim, in the event it is held valid, he will not be precluded from contesting the validity of the matters in dispute, Steckel *v.* Standley, 107 Iowa, 694, 77 N. W. 489; but where the purchaser does not assume the payment of a mortgage, and the deed is taken subject to valid liens upon the property, this does not estop the purchaser from contesting back taxes that are not valid liens, Stough *v.* Badger Lbr. Co., 70 Kans. 713, 79 Pac. 737. Where a mortgage was about to be contested by the alleged mortgagor, as having been obtained by duress, his assignee would have the same right to contest, Gray *v.* Freeman, 37 Tex. Civ. App. 556, 84 S. W. 1105.

[2] Lee *v.* Kirkpatrick, 1 McCarter, 264.

[3] Reimers *v.* Druce, 23 Beav. 145. See also Ware *v.* Regent's Canal Co., 3 DeG. & J. 212.

this be not done, a Court of Equity will not interfere, but leave the parties to their legal remedies.[1]

§ 2011. **Deed Antedated by Married Woman, as of Time When She Was Single without Knowledge of Grantee, as an Estoppel.** — In the case of Lowell *v.* Daniels [2] the question how far a married woman who executes a deed of land in her maiden name and antedated at a period before the marriage, with the fraudulent purpose of imposing upon some one to be affected by it, and without disclosing the fact of her marriage, is estopped thereby, or estops her heirs from setting up her title, is extensively discussed by court and counsel, and the conclusion reached that it will have no effect in regard to her title, either upon herself or her heirs, in estopping her from setting up her title, either as against her grantee, or his grantee without notice. But this view would not, it seems, be generally accepted.[3]

§ 2012. **The Party Claiming the Estoppel Should Use Due Diligence to Ascertain the Truth.** — A party setting up an equitable estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth.[4]

§ 2013. [**The Matter Relied on as an Estoppel Must be Clearly Set Forth.** — In order for an estoppel to be effected the matter relied upon, whether it be an act, conduct, silence, acquiescence or record, must be clearly and unmistakably set out ; if it be by a writing, the statement must be particular, clear and unambiguous. It must be such a declaration as would be evidence by way of admission or otherwise.[5]]

§ 2014. [**The Estoppel Affects Both Parties and Privies.** — Where the principal actor has conducted himself in such a way that the matters and things in question estop him, they apply equally to estop his privies in both blood and estate ; and the rule applies to those standing in a fiduciary capacity and who acted at the time for the cestui que trust.[6] A party may conduct himself in such a manner upon a trial, or he may set up such a defence, that his sworn pleading may be binding upon him and those claiming under him, in a subsequent action. The pleadings of a party in one suit may be used in evidence against him in another ; not directly as an estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts.[7] Estoppels must be mutual. Strangers can neither take advantage of nor be bound by an estoppel.[8] To entitle

[1] Hicks *v.* Hunt, Johnson, 372. So also in Chapman *v.* Ry. Co., 6 Ohio N. S. 119.

[2] 2 Gray, 161.

[3] See Frazier *v.* Gelston, 35 Md. 298 ; Bigelow *v.* Foss, 59 Me. 162 ; Carpenter *v.* Carpenter, 10 C. E. Green, 194 ; Patterson *v.* Lawrence, 90 Ill. 174 ; Connolly *v.* Branstler, 3 Bush, 702 ; Drake *v.* Glover, 30 Ala. 382 ; In re Lush, L. R. 4 Ch. 591 ; Bigelow, Estoppel, 513, 3d ed. See post, § 2018.

[4] Moore *v.* Bowman, 47 N. H. 494 ; Trenton Banking Co. *v.* Duncan, 86 N. Y. 221 ; Budd *v.* Kraus, 79 Ind. 137 ; Wolfe *v.* Town of Sullivan, 133 Ind. 331, 32 N. E. 1017 ; Glass *v.* Murphy, 4 Ind. App. 530, 30 N. E. 1097 ; Gray *v.* Zelmer, 66 Kans. 514, 72 Pac. 228 ; Brian *v.* Bonvillain, 111 La. 441, 35 So. 632 ; Bales *v.* Perry, 51 Mo. 449 ; Hiskey *v.* Pacific States Sav. Co., 27 Utah 409, 76 Pac. 20.

[5] Claflin *v.* Boston etc. R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638.

[6] Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386.

[7] Booth *v.* Lenox, 45 Fla. 191, 34 So. 566.

[8] Harris *v.* Amoskeag Lbr. Co., 101 Ga. 641, 29 S. E. 302 ; Brown *v.*

a party to claim that another is estopped by his representations, they must have been made to him, or they must have been of such a character, and made under such circumstances, that the party making them must be taken to have contemplated that they would be communicated to and acted on by him, in which case they will be considered as addressed generally to all who may have occasion to act on them.[1]]

§ 2015. [**Estoppel by Instruments Conveying Title.** — When a party has represented himself to be the owner of property, his solemn act in parting with the title or possession, whether the instrument be a deed, mortgage, or bill of sale, is binding upon him and he will not be allowed to deny the existence of his own title ;[2] nor will the lessor be allowed to deny that he in fact owned the demised premises.[3] This rule does not, of course, operate to prevent a grantor from showing that land is included in the conveyance by mistake, or that the conveyance was procured by fraud.[4] A quit-claim deed does not profess to convey any perfect title and will not, of itself, operate as an estoppel against either the grantor or the grantee as to the nature or extent of the title.[5] The same applies to bills of sale, and the bargainor will not be allowed to deny the title that he has attempted to transfer.[6] Nor will the mortgagor be allowed to dispute the title that he has conveyed to the mortgagee.[7] Where the husband has conveyed property by mortgage, he will not be allowed to deny his title and claim that in fact belonged to his wife, and thus defeat the mortgagee of his security and debt.[8]]

§ 2016. [**Right of Parties to Question the Validity of Their Bond.** — Where parties, principal and surety, have entered into an agreement to indemnify others ; or to secure an advantage by a delay in performing duties that should have been performed at the proper time, or for any other reason where a bond is required for the faithful performance of some obligation or duty, the parties are estopped to question the validity of the proceeding that caused the execution of the bond, and also the validity of the bond itself. Where they have profited by its supposed validity, they will not now be allowed to profit by alleging its invalidity.[9] Where

Haigh, 113 La. 563, 37 So. 478 ; Inhabitants of Worcester *v.* Green, 19 Mass. 425 ; Southern Pine Lbr. Co. *v.* Rogers, 23 Tex. Civ. App. 535, 64 S. W. 794 ; Rosenberger *v.* Gibson, 165 Mo. 16, 65 S. W. 237 ; Williamson *v.* Jones, 43 W. Va. 563, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

[1] Hodge *v.* Ludlum, 45 Minn. 290, 47 N. W. 805.

[2] Steele *v.* Culver, 158 Mo. 136, 59 S. W. 67 ; Pence *v.* McPherson, 30 Ind. 66 ; Robinson *v.* Atkins, 105 La. 790, 30 So. 231 ; Call *v.* Shewmaker, 24 Ky. L. Rep. 686, 69 S. W. 749 ; Allebach *v.* Hunsicker, 132 Pa. 349, 19 Atl. 139.

[3] Blackburn *v.* Muskogee Land Co., 6 Ind. Ter. 232, 91 S. W. 31.

[4] Van Husan *v.* Omaha Bridge Co., 118 Iowa, 366, 92 N. W. 47.

[5] Olmstead *v.* Tracy, 105 Mich. 299, 108 N. W. 649, 13 Detroit Leg. N. 452, 116 Am. St. Rep. 299 ; Townsend *v.* Outten, 95 Va. 536, 28 S. E. 958.

[6] Campbell *v.* Morgan, 111 Ga. 200, 36 S. E. 621.

[7] Woods *v.* Soncy, 184 Ill. 568, 56 N. E. 1015 ; Allen *v.* Knutson, 96 Minn. 340, 104 N. W. 963.

[8] Layson *v.* Cooper, 174 Mo. 211, 73 S. W. 472, 97 Am. St. Rep. 545 ; Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620 ; Holland *v.* Jones, 48 S. C. 267, 26 S. E. 606.

[9] Mueller *v.* Kelly, 8 Colo. App. 527, 47 Pac. 72 ; Byers *v.* Gilmore, 10 Colo. App. 79, 50 Pac. 370 ; Duncan *v.* Thomas, 17 Colo. App. 522, 69

one is made a nominal party in an attachment suit, he having the actual possession of the property sought to be attached, he cannot give bond for the redelivery of the property to him, and later set up title to the property in himself. To claim that the property which he had agreed to produce for the satisfaction of the judgment, was his, would be entirely inconsistent with the undertaking, and in contravention thereof.[1] The fact that the crime for which a defendant is bound to answer, is incorrectly stated in the appearance bond, is of no avail to the sureties. The reason of the rule is that, the entering into a recognizance being the voluntary act of the party, he admits the authority of the magistrate, and acknowledges the regularity of the proceedings in which the bond is taken, even though no crime in fact be charged, or correctly charged in the face of the bond.[2] So where a bond is given to abide an award, the rendition of the award upon a mistake of fact or law will not relieve the surety from liability.[3]]

§ 2017. [**A Defective Instrument as an Estoppel.** — As a general rule, since the matter relied upon as an estoppel, must be clearly set forth, and free from ambiguity, an instrument which is so defective in form or substance as to be insufficient to convey title, is not such an instrument as will create an estoppel.[4] Where property belonging to the State has by the unauthorized act of the tax assessor, been listed in the name of a private citizen, and subsequently sold for taxes the State is not estopped to claim its own property.[5] The rule does not apply to a deed, perfect in form, where the grantor was induced to sign it, without any negligence on her part, not knowing that it was a deed to her property, and where it was never intended for delivery to an innocent third party.[6]]

§ 2018. [**Estoppel by Conduct of Married Women.** — In some States married women retain their common law privileges of coverture and are not allowed to contract, save in certain instances with reference to their own property. Even where the common law rule obtains, while she may not be allowed as a feme covert to contract, where she has voluntarily entered into a contract, or tacitly, or silently, or without objection allowed another to suffer an injury by her act, or failure to act, she will be estopped as though she were a feme sole. The property held by women at the time of their marriage continues to be theirs after marriage. They may, during coverture, receive, hold, use and enjoy property of all kinds, and the rents, issues, and profits thereof, and the avails of their contracts and industry, free from the control of their husbands. They are ca-

Pac. 310; United States *v.* Boyd, 8 App. D. C. 440; Stroud *v.* Hancock, 116 Ga. 332, 42 S. E. 496; Wall *v.* Mount, 121 Ga. 831, 49 S. E. 778; Carver *v.* Carver, 77 Ind. 498; Olds *v.* City Trust Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356; Olson *v.* Royem, 75 Minn. 228, 77 N. W. 818; Hummel *v.* Del Greco, 40 Tex. Civ. App. 510, 90 S. W. 339; Anderson *v.* Commonwealth, 105 Va. 533, 54 S. E. 305.

[1] Allyn *v.* Cole, 3 Neb. 235, 91 N. W. 505; Haxtun *v.* Sizer, 23 Kans. 310; Case *v.* Steele, 34 Kans. 90, 8 Pac. 242; Staples *v.* Fillmore, 43 Conn. 510; Pierce *v.* Whitting, 63 Cal. 538.

[2] People *v.* Russell, 35 Misc. Rep. 765, 16 N. Y. Cr. R. 57, 72 N. Y. Supp. 1; and if the penalty of the bond is omitted, it makes no difference as to relieving the surety, Rollins *v.* Ebbs, 138 N. C. 140, 50 S. E. 577.

[3] Patton *v.* Garrett, 116 N. C. 847, 21 S. E. 679.

[4] Van Dyke *v.* Van Dyke, 119 Ga. 830, 47 S. E. 192; State *v.* State Bank, 5 Ind. 353; Thompson *v.* Currier, 70 N. H. 259, 47 Atl. 76; Hall *v.* Ditto, 11 Ky. L. Rep. 667, 12 S. W. 941.

[5] Slattery *v.* Heilperin, 100 La. 86, 34 So. 139.

[6] Mardin *v.* Dorthy, 12 App. Div. 188, 42 N. Y. Supp. 827.

pable, in some cases, of making contracts by parol and under seal. In some cases they are bound by their contracts, and liable for some of their torts, and in others, they are jointly liable for their torts together with the husband. Their power to contract, and to convey real estate, is, however, so far qualified that they cannot contract with their husbands, relative to the real estate of either, or authorize their husbands to convey their real estate, except in some cases where the approval of the probating officer is had ; and in general, in all conveyances by married women, their husbands must join. Married women cannot enjoy these enlarged rights of action and of property and remain irresponsible for the ordinary legal and equitable results of their conduct. Incident to this power of married women to deal with others is the capacity to be bound, and to be estopped by their conduct, when the enforcement of the principle of estoppel is necessary for the protection of those with whom they deal.[1]]

§ 2019. [**Representations in the Nature of Opinions or Future Acts or Promises May Not be Made the Foundation of an Estoppel.** — The representation must generally be the statement of a fact, and it can rarely happen that the statement of a legal proposition will conclude the party making it from denying its correctness, except when it is understood to mean nothing but a simple statement of fact. The rule in this regard is, that when the statement or conduct is resolvable into the statement of a fact, as distinguished from a statement of law, the party making it is not bound. The representation must, in all ordinary cases, have reference to a present or past state of things ; for if it be concerning something in the future, it must generally be either a mere statement of an intention or opinion. The intent of a party, however positive and fixed, is necessarily uncertain as to its fulfilment, and must depend on contingencies, and be subject to change and modification by subsequent events and circumstances.[2]]

§ 2020. [**Estoppel by Consenting to Court Proceedings.** — Where parties have come into court and sought and obtained relief through proceedings regularly had therein, they will not afterwards be allowed to claim that the court had no jurisdiction, or to discountenance the validity of its process. The courts will not allow a suitor to come in and submit himself to the jurisdiction, and receive benefits from its judgments, and then deny the existence of or validity of the records, though he has acquiesced in the proceedings.[3] And where a railroad company has acquired rights in an adjoining property owner's land, and has paid him damages

[1] Dobbin *v.* Cordiner, 41 Minn. 165, 42 N. W. 870, 16 Am. St. Rep. 683, 4 L. R. A. 333 ; Warner *v.* Watson, 35 Fla. 402, 17 So. 654 ; Williamson *v.* Jones, 43 W. Va. 563, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694 ; Noel *v.* Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423 ; Temples *v.* Equitable Mort. Co., 100 Ga. 503, 28 S. E. 232 ; Newman *v.* Moore, 94 Ky. 147, 21 S. W. 759, 42 Am. St. Rep. 343.

[2] Mason *v.* Harper's Ferry Bridge Co., 28 W. Va., 639 ; Marsh *v.* City of Bridgeport, 75 Conn. 495, 54 Atl. 196 ; Whitewell *v.* Winslow, 134 Mass. 343 ; Hazell *v.* Bank of Tipton, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22 ; Hayden *v.* Matthews, 4 App. Div. 338, 38 N. Y. Supp. 905 ; Adkins *v.* Adkins, 48 Ind. 12.

[3] Three States Lbr. Co. *v.* Blanks, 133 Fed. 479, 66 C. C. A. 353 ; Consolidated Reservoir Co. *v.* New Loveland Land Co., 27 Colo. 521, 62 Pac. 364 ; Carr *v.* Farrell, 62 Kans. 565, 64 Pac. 22 ; Loeb *v.* Struck, 19 Ky. L. Rep. 935, 42 S. W. 401 ; Ray *v.* McLain, 106 La. 780, 31 So. 315 ; Deering Harvester Co. *v.* Donovan, 82 Minn. 162, 84 N. W. 745, 83 Am. St. Rep. 417.

for the taking, he will not be allowed to set up, in an injunction proceeding to stop the operation of the system, that the railroad company did not in fact exist, but only on paper.[1] Nor can a party allege the want of jurisdiction or validity of a proceeding for divorce, brought by her in another State, where she voluntarily brought the action as plaintiff, and procured a decree.[2]]

§ 2021. [**What Is Included in an Estoppel.** — It is a well settled rule in regard to an estoppel by deed that, even in the case of a strict estoppel as between the parties to the deed, the estoppel is, in its operation, commensurate only with the interest or estate conveyed.[3] An estoppel by conduct never extends beyond the reasonable inferences to be drawn from that conduct. For instance, where a landlord had allowed his tenant, who had rented from month to month, to remain in possession over the second year after the termination of the lease, and stood by and saw the tenant fill the stables with provender sufficient for a year, and to make other evidences of remaining for another year, he would then be estopped to demand a termination of the lease.[4]]

§ 2022. [**Pleading the Alleged Estoppel.** — In order to take advantage of facts or circumstances creating an estoppel, those facts must be clearly set forth in the answer or other pleading and especially pleaded and relied upon as an estoppel. It is not sufficient that the defence be generally stated in the answer. A general denial will not raise the issue that must necessarily be raised by a proper plea of the matters relied upon in bar of the alleged rights of the adversary, nor is it open for the reception of the essential proof in such matters. Evidence in support of an estoppel is not properly admissible in an action, nor is the peculiar remedy in bar available, unless a plain, concise plea of the defence relied upon is specially set up.[5] Consequently, it follows that the plea of an estoppel cannot be first raised upon appeal.[6]]

§ 2023. [**Silence as a Means of Effecting an Estoppel.** — If one maintain silence when he ought to speak, the equity of the law will debar

[1] Ilgenfritz *v.* Toledo etc. R. Co., 136 Mich. 634, 99 N. W. 878, 11 Detroit Leg. N. 156.

[2] Lacey *v.* Lacey, 38 Misc. Rep. 196, 77 N. Y. Supp. 235.

[3] Drake *v.* Howell, 133 N. C. 162, 45 S. E. 539.

[4] Irvine *v.* Scott, 85 Ky. 260, 3 S. W. 163, 8 Ky. L. Rep. 911; Hall *v.* Moore, 3 Neb. 574, 92 N. W. 294.

[5] Boston etc. Smelting Co. *v.* Reed, 23 Colo. 523, 48 Pac. 515; Wilmot *v.* McPadden, 78 Conn. 276, 61 Atl. 1069; Fidelity & Deposit Co. *v.* Nisbet, 119 Ga. 316, 46 S. E. 444; Fleener *v.* Claman, 112 Ind. 288, 14 N. E. 76; Peters *v.* Griffee, 108 Ind. 121, 8 N. E. 727; Kiefer *v.* Klinsick, 144 Ind. 46, 42 N. E. 447; Ransom *v.* Stanberry, 22 Iowa, 334; Spencer *v.* Papach, 103 Iowa, 513, 70 N. W. 748; Continental Ins. Co. *v.* Clark, 126 Iowa, 274, 100 N. W. 524; Palmer Oil & Gas Co. *v.* Blodgett, 60 Kans. 712, 57 Pac. 947; Peyton *v.* Old Woolen Co., 122 Ky. 361, 28 Ky. L. Rep. 1303, 91 S. W. 719; Western Realty Co. *v.* Musser, 97 Mo. App. 114, 71 S. W. 100; Boales *v.* Ferguson, 55 Neb. 565, 76 N. W. 18; Metropolitan Life Ins. Co. *v.* Howle, 68 Ohio St. 614, 68 N. E. 4; Nickum *v.* Burckhardt, 30 Oreg. 464, 47 Pac. 788, 60 Am. St. Rep. 822; Read *v.* Citizens' St. Ry. Co., 110 Tenn. 316, 75 S. W. 1056; Reynolds *v.* Pascoe, 24 Utah, 219, 66 Pac. 1064; Webb *v.* John Hancock Mut. Life Ins. Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; Tyler *v.* Tyler, 78 Mo. App. 240.

[6] Boston etc. Smelting Co. *v.* Reed, 23 Colo. 523, 48 Pac. 515; Watkins *v.* Iowa Cent. R. Co., 123 Iowa, 390, 98 N. W. 910.

him from speaking when in conscience he ought to remain silent,[1] but mere silence, or some act done, where the means of knowledge are equally open to both parties, will not estop a party if he acted or remained silent.[2] A party may by his silence and long acquiescence in an alleged injury, waive and completely forfeit his right to recover therefor. In a case where an adjoining landowner knew that his fence was down and that his neighbor's cattle had broken through and trespassed over a long period of time, his silence and inactivity to maintain his rights would cause him to lose his right to impound the cattle, and hold them for the entire damage, just as the neighbor was about to remove to another location.[3] It is essential that the party in whose favor the estoppel operates must have altered his position in reliance upon the words or conduct of the party estopped.[4] For an estoppel to arise from silence, the person upon whom the duty to speak rests must have an opportunity to speak, and knowledge of the circumstances requiring him to speak. In other words, his silence must amount to bad faith ; and that, of course, cannot be predicated of silence in regard to a transaction of which one has no knowledge or means of knowledge.[5]]

[1] Fair Haven etc. R. Co. *v.* City of New Haven, 77 Conn. 67, 60 Atl. 651 ; Shepard *v.* Eldridge, 171 Mass. 516, 51 N. E. 9, 41 L. R. A. 617, 68 Am. St. Rep. 446 ; Michigan Paneling Mach. Co. *v.* Parsell, 38 Mich. 475 ; Haines *v.* Barber, 113 App. Div. 696, 100 N. Y. Supp. 75 ; Nicholas *v.* Austin, 82 Va. 817, 1 S. E. 132 ; Cantley *v.* Morgan, 51 W. Va. 304, 41 S. E. 201 ; Despard *v.* Bennett, 53 W. Va. 443, 44 S. E. 448 ; Virginia-Carolina Chem. Co. *v.* Kirven, 130 N. C. 161, 41 S. E. 1.

[2] Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307.

[3] Adair *v.* Curry, 106 Mo. App. 578, 80 S. W. 967 ; but long silence in complaining of an encroachment upon the street, will not estop, Garvey *v.* Harbison, 213 Pa. 177, 62 Atl. 778.

[4] Columbus State Bank *v.* Carrig, 3 Neb. 592, 92 N. W. 324.

[5] Pettyjohn *v.* National Exch. Bank, 101 Va. 111, 43 S. E. 203.

CHAPTER XLVIII

RAILWAYS AND OTHER COMPANIES

§ 2024. **Railways and Other Companies.** — We can give here little more than the outline of equity jurisdiction connected with railways and other joint-stock companies. The subject is discussed in detail in a work devoted exclusively to the subject of railways,[1] and we have ventured to refer to this work as containing our own views, since it would be little less than affectation to appear here to have drawn our present suggestions from any other source.

§ 2025. **Courts of Equity Will Not Assume the Control of Railway Construction.** — In regard to injunctions affecting railway companies Courts of Equity have declined to assume the control of railway construction.[2] But such companies may be restrained from taking land after their statutory powers have ceased, and from doing other acts exceeding their powers.[3]

§ 2026. **Right of a Corporation to Surrender Charter in Order to Engage in Other Business.** — It has also been held that a joint-stock company cannot use the joint property except within the legitimate scope of their charter ; that the shareholders are bound by such modifications of their charter as are not fundamental but merely auxiliary to the main design ; and that if a majority of the company obtain an alteration of their charter which is fundamental, as to enable them to build an extension of their road, any shareholder who has not assented to the act may restrain the company by injunction from applying the funds of the original organization to the extension.[4] So too a company will be restrained by

[1] Redfield on Railways, §§ 205 to 224.

[2] Webb *v.* Manchester & Leeds Ry. Co., 4 My. & Cr. 116. But where two railroads have rights in same tunnel, though equity will not appoint a receiver or permanently supersede the managers of the road, it will, in case of disagreement, regulate their use of the common property. Delaware R. Co. *v.* Erie R. Co., 6 C. E. Green, 298.

[3] Redfield on Railways, § 205, pl. 2, 6. Morris *v.* Greenville R. Co., 59 N. J. Eq. 372, 46 Atl. 638 ; Edison Elec. Light Co. *v.* Merchants etc. Elec. Co., 200 Pa. 209, 49 Atl. 766, 86 Am. St. Rep. 712 ; City of Madison *v.* Madison Gas Co., 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 116 Am. St. Rep. 944.

[4] Stevens *v.* Rut. & Bur. Ry. Co., 1 Law Register, 154 ; Redfield on Railways, 194, where the substance of this very elaborate and satisfactory opinion of Chancellor Bennett will be found. See also Natusch *v.* Irving, 2 Cooper, Ch. Cas. 358. See Wilson *v.* Wills Valley R. Co., 33 Ga. 466 ; Durfee *v.* Old Colony, &c. R. Co., 5 Allen, 230 ; Blatchford *v.* Ross, 54 Barb. 42 ; Stewart *v.* E. & W. Trans. Co., 17 Minn. 372.

injunction from surrendering their charter with a view to obtain another for a different purpose.[1]

§ 2027. **Same.** — Upon the question how far the directors of a railway or other similar company can apply the funds of the company to objects fundamentally different from those specified in their charter, there is no difference of opinion in regard to the principle, but infinite diversity in the application of the rule.[2] This may be shown by a statement of some of the cases.

§ 2028. **Same.** — It seems to be settled that a fundamental alteration of the objects of the charter, as by allowing a railway to purchase steamboats, will release subscribers who had taken stock.[3] And the fact that the project will tend to improve the value of the original stock will not excuse the departure from the fundamental purpose of the original charter.[4] But such acts of the directors as come within the general powers conferred by the charter will not exonerate subscribers.[5] And it has sometimes been held that an act of the directors which violated the terms of a subscription, but which did not affect the interest of the subscriber, will not release the contract.[6] Courts of Equity often compel corporations to act within the requirements of their charter where they attempt a departure which would be likely to cause irreparable mischief to any one.[7]

§ 2029. **Injunctions against Companies Whose Business Materially Affects the Public, Will Be Issued with Great Caution.** — Injunctions are issued with great caution by the English Courts of Equity where their effect would be to cause serious loss to these extensive companies, and whose business materially interests the public.[8] An injunction will not be granted for the purpose of trying the constitutionality of the company's act. For all preliminary purposes, and until the hearing upon the merits, that will be assumed to be constitutional.[9] Injunction will be granted to restrain railway companies from seeking a certain rate of profit, and securing the capital of a steam-packet company to act in connection with the railway with a view thereby to enhance its profits.[10] So too a railway company will be restrained from purchasing shares in another railway company or applying their funds in its support;[11] or

[1] Ward *v.* Society of Attorneys, 1 Colly, 370.

[2] See Redfield on Railways, Chap. 9, § 10 ; § 56, pp. 91 to 96.

[3] Hartford & N. H. Railway *v.* Crosswell, 5 Hill, 383.

[4] Macedon Pl. Road Co. *v.* Lapham, 18 Barb. 312. But see Granville Railway *v.* Coleman, 5 Rich. 118.

[5] Faulkner *v.* Hebard, 26 Vt. 452 ; Redfield on Railways, 95 and notes.

[6] Banet *v.* Alton Ry., 13 Illinois, 504 ; Danbury Ry. *v.* Wilson, 22 Conn. 435.

[7] Redfield on Railways, chap. ix. sec. x. ; § 214, pp. 500 to 503. The injury resulting to a gas company from competition by another corporation acting outside the territory to which it was alleged to be limited, is held not sufficient to entitle the plaintiff to relief. Pudsey Coal Gas Co. *v.* Bradford, L. R. 15 Eq. 167. And see as to restraint of acts ultra vires, and to injury of plaintiff, Erie R. Co. *v.* Delaware R. Co., 6 C. E. Green, 283 ; Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218 ; Rogers Works *v.* Erie R. Co., 5 C. E. Green, 379. Mayfield *v.* Alton R. Co., 100 Ill. App. 614.

[8] Redfield on Railways, § 206 *b*, and cases cited in notes.

[9] Deering *v.* The York Ry. Co., 31 Me. 172.

[10] Colman *v.* Eastern Ry. Co., 10 Beav. 1 ; Bagshaw *v.* Eastern Ry. Co., 7 Hare, 114 ; s. c. affirmed 2 M. & G. 389.

[11] Solomon *v.* Laing, 12 Beav. 339 ; Great Western Ry. *v.* Rushout, 5

from giving up the management of its line to another company ;[1] or from building part of their line and abandoning the remainder ;[2] or from procuring an illegal amalgamation.[3]

§ 2030. **Right of Stockholder to Enjoin Ultra Vires Use of Corporate Funds.** — The directors of a life-insurance company, not being authorized thereto by their deed of settlement, cannot by a transfer of the business and the liabilities of another life-insurance company to their own company fetter their shareholders with such liabilities.[4] It is proper to enjoin a corporation at the suit of one stockholder from employing their powers or funds for the accomplishment of purposes not within their charter.[5]

§ 2031. **Same.** — Courts of Equity have assumed to exercise control in some cases and within certain limits in regard to railway and other joint-stock companies, petitioning the legislature for a change of their corporate powers. But the exercise of such control is now reduced within narrow limits, and scarcely extends beyond the application of their existing funds to enterprises fundamentally different from those which they were pledged to support and carry forward.[6] In a late case it is held that applications to the legislature on public grounds cannot be restrained by Courts of Equity ; but that those of a private nature may be, in the discretion of the courts.[7]

§ 2032. **Same.** — The subject of the interference of Courts of Equity in regard to the conduct and management of railway and other similar corporations is thus discussed by an eminent equity judge, Lord Langdale, M. R. :[8] " The class of cases in which this court has often been called upon to interfere are those which arise out of a combination of acts which are in themselves illegal and considered as breaches of contract, with the public acts which are breaches of contract express or implied with the subscribers to the undertaking, and acts erroneous or breaches of contract incapable of being rectified by the shareholders themselves in the exercise of their own powers." The conclusion to which the English courts have come in regard to this question is, that whenever the acts complained of are capable of being rectified by the shareholders themselves in the exercise of their corporate powers, equity will not interfere,

DeG. & Sm. 290 ; Balt. & O. Railway Co. *v.* Wheeling, 13 Gratt. 40 ; Central R. Co. *v.* Collins, 40 Ga. 582. And see Goodin *v.* Cincinnati R. Co., 18 Ohio (N. S.), 169 ; Davis *v.* Old Colony R. Co., 131 Mass. 258, and cases there reviewed.

[1] Beman *v.* Rufford, 6 Eng. L. & Eq. 106 ; Winch *v.* Rich. Ry. Co., 13 Eng. L. & Eq. 506 ; Great Northern Ry. Co. *v.* Eastern Counties Ry. Co., 12 Eng. L. & Eq. 224.

[2] Cohen *v.* Wilkinson, 12 Beav. 125, 138 ; s. c. affirmed, 1 M. & G. 481. But see this question more fully discussed, and the cases cited, in Redfield on Railways, 488, 489, § 210.

[3] Parker *v.* Dun. Nav. Co., 1 DeG. & Sm. 192. See the cases also upon this point in Redfield on Railways, 623, § 254.

[4] In re The Era Ins. Co., 6 Jur. (N. S.) 1334. See Clinch *v.* Financial Co., L. R. 4 Ch. 117.

[5] Gifford *v.* New Jersey Ry. Co., 2 Stockton, Ch. 171.

[6] Redfield on Railways, § 212.

[7] Lancaster Ry. Co. *v.* N. W. Ry. Co., 2 K. & J. 293. See also Merritt *v.* Shrewsbury Ry. Co., 3 Eng. L. & Eq. 144 ; Durfee *v.* Old Colony R. Co., 5 Allen, 230.

[8] Brown *v.* Monmouthshire Ry. Co., 4 Eng. L. & Eq. 113 ; s. c. 13 Beav. 32.

but leave questions of internal management and regulation to be settled by the shareholders in corporate meeting.[1] But where the charter of the company prescribes a particular course to be pursued by the directors and agents of the company, and they are acting in violation of the requirement and to the injury of shareholders, a Court of Equity will interfere by way of injunction.[2] Equity will interfere by injunction in many other cases where the officers of corporations are acting in violation of duty either general or specific.[3]

§ 2033. **Equitable Control of Construction of Railway Crossings.** — Equity in obvious cases will interfere and control the action of railway companies in regard to the construction of their works, directing the mode of crossing highways at the instance of the trustees having the charge of the maintenance of such highways.[4] It is considered that railway companies perform important public functions, in regard to many of which they are under the control of a board of supervision created by the supreme legislative authority, denominated railway commissioners; and Courts of Equity regard the decisions and orders of this board within the sphere of their proper jurisdiction as conclusive, unless reversed in some mode prescribed by law. They will therefore carry such orders into effect without inquiring into the reasons which induced the commissioners to make the order.[5]

§ 2034. **Duty of Officers of Corporation to Account for Trust Funds.** — So too Courts of Equity will require the officers of joint-stock companies to account for moneys received in trust for the company. The directors of a company on the transfer of its business to another company received from the latter a large sum for compensation, the particulars of which they withheld from the members; and it was held that they were trustees of the money for the members, and they were ordered, on application for an interlocutory injunction, to pay it into court.[6]

§ 2035. **Same.** — But the acts of corporate officers will receive a favorable construction, and will be upheld when not in violation of the spirit of their charter. The directors of a company were prohibited by their

[1] Redfield on Railw. 490, § 211.

[2] Allen *v.* Talbot, 30 Law Times, 316.

[3] Redfield on Railw. chap. xxviii. sec. vii. § 211, pp. 489, 496, where the cases are fully discussed. See Hilles *v.* Parrish, 1 McCarter, 380, where the learned chancellor adopts the rule laid down by Chief-Justice Taney, in Bank of Augusta *v.* Earle, 13 Peters, 519, 588; namely, "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. . . . It must dwell in the place of its creation, and cannot migrate to another sovereignty." The same rule is reaffirmed by Mr. Justice Thompson in Runyan *v.* Coster, 39 U. S. 122, 10 L. Ed. 382. See also Miller *v.* Ewer, 27 Me. 509. That equity has no jurisdiction to restrain an officer of a corporation from performance of his usual duties, but may restrain any particular wrong or injury by him, and may, on notice and cause shown on hearing remove him, but not by injunction without notice or hearing, see People *v.* Albany R. Co., 55 Barb. 344.

[4] Redfield on Railways, §§ 207, 208, and cases cited; Springfield *v.* Connecticut River Ry., 4 Cush. 63; Chicago etc. R. Co. *v.* City of Milwaukee, 97 Wis. 418, 72 N. W. 1118; Hayes *v.* Milwaukee etc. R. Co., 111 U. S. 228, 28 L. Ed. 410, 4 S. Ct. Rep. 369.

[5] Hodges on Railways, 671; Newry Ry. *v.* Ulster Ry., 39 Eng. L. & Eq. 553.

[6] Gaskell *v.* Chambers, 26 Beav. 360.

charter from giving bills of exchange, but they had power to borrow on mortgage. They however gave bills to secure an existing debt, and a mortgage was at the same time executed under the seal of the company, which was made subject to redemption on payment of the bills. It was held that the mortgage was given to secure the debt, and not the payment of the bills, and therefore was not invalid on that account ; and that upon a bill of foreclosure the deed of the company must be treated as valid until set aside by an independent proceeding.[1]

§ 2036. **Specific Performance of Railway Contracts.** — Courts of Equity often interfere by way of decreeing specific performance of contracts of railways with each other and with natural persons ; such as contracts by one company to permit another to run upon its track, contracts in regard to farm accommodations, and contracts with land-owners, and many others.[2] The discussion of this subject in its full extension would occupy more space than could be reasonably devoted to it in a chapter of this general character.

§ 2037. **Same.** — Where a railway company agreed with a land-owner through whose estate the railway was to pass, to construct and maintain a " siding " connected with their railway at a particular point, together with all necessary approaches thereto for public use, for the reception and delivery of goods, it was held that specific performance of the agreement to construct might be decreed without making any decree in regard to maintaining them when constructed.[3] Upon this point the learned Vice-Chancellor said : " I think that it is no objection to specific performance," " that there is a clause in the agreement that the party making it shall keep it in repair when made." " I may order that the work shall be done ; and the question of repairs will be a matter of inquiry when a breach of that part of the agreement occurs."

§ 2038. **Same.** — In this case an inquiry arose in regard to the extent of the term " siding ", and there occurred the usual contradiction in the testimony of the experts. On the part of the plaintiff it was deposed by numerous witnesses that it imported nothing less than all the appliances of a furnished station for the receipt and discharge of freight, with a servant of the company in constant attendance to accommodate the public ; and on the part of the defendant that nothing more was intended by the term than a side-track where cars could be set aside for the discharge and receipt of freight, the responsibility of lading and unlading resting with the owners chiefly. The learned judge said : " I cannot give much credit to the witnesses who say that a siding, according to their interpretation of the word, means numerous other things, which may no doubt be very convenient, but which are not covered by the true signification of the word. According to that construction the words should be equivalent to a siding with all proper conveniences connected therewith ; but nothing of that kind is specified in the agreement." And again : " If he " (the plaintiff) " had wished to have a station made, it would have been easy to have said so ; the meaning of that word is familiar to every one."

[1] Scott *v.* Colburn, 26 Beav. 276.

[2] Great Northern Ry. *v.* Manchester Ry., 10 Eng. L. & Eq. 11 ; Redfield on Railways, § 213, pp. 498–500 ; id. 54—56 ; id. 107–110 ; id. 445 ; id. 647–662.

Louisville etc. R. Co. *v.* Mississippi etc. R. Co., 92 Tenn. 681, 22 S. W. 920.

[3] Lytton *v.* Great Northern Ry. Co., 2 K. & J. 394. See also Sanderson *v.* C. & W. Ry. Co., 11 Beav. 497.

§ 2039. **Same.** — Equity interferes also to restrain one railway company from interfering with the exclusive franchises of another which have been secured to them by legislative grant. But this question involves such an extensive inquiry into important and difficult constitutional questions that we can do little more than refer to some of the leading cases upon the subject.[1]

[1] Dartmouth College *v.* Woodward, 17 U. S. 518, 4 L. Ed. 629 ; Providence Bank *v.* Billings, 29 U. S. 514, 7 L. Ed. 939 ; Charles River Bridge *v.* Warren Bridge, 36 U. S. 420, 9 L. Ed. 773 ; Redfield on Railways, § 214, pp. 500–503 ; id. § 231, pp. 537–562.

CHAPTER XLIX

THE EFFECTS OF JUDGMENTS AT LAW. — FOREIGN JUDGMENTS

§ 2040. **Effect of Judgments at Law.** — As Courts of Law constitute a jurisdiction altogether independent of and foreign to that of Courts of Equity, the control which Courts of Equity assume to exercise over the judgments of such courts is very much the same which it exercises over the judgments of courts altogether foreign to the forum where the Court of Equity exists. It may be important therefore to obtain clear views of the grounds and the mode of this interference, that we may be the better able to comprehend the true limits of the jurisdiction, and thus to define with accuracy and precision where any excess is liable to occur, and especially where it may be proper to invoke the interference of Courts of Equity in regard to judgments at law.

§ 2041. **Equity Never Attempts to Exercise Any Supervisory Power Over Proceedings in Court of Law.** — Equity never attempts to act upon the Court of Law itself, and does not claim any supervisory power over such courts or the proceedings therein.[1] It acts solely upon the party, and will enjoin him in a proper case from pursuing any claim in a Court of Law over which the Courts of Equity have a concurrent jurisdiction and a more perfect means of doing complete justice. This it never attempts to accomplish after judgment, in a matter where the Court of Law had concurrent jurisdiction, by declaring the judgment void or setting it aside, but only by enjoining the party from proceeding to enforce it.[2]

§ 2042. **Relief in Equity from Judgment Where Mistake First Discovered Since Rendition of Judgment.** — And this it will never do upon the ground of mistake or error in the judgment of the Court of Law, or that the Court of Equity in deciding the same questions decided by the Court of Law would have come to a different conclusion; but only upon the ground that the party had some defence against the claim, which has occurred or first come to his knowledge since the trial in the Court of Law, whereby it would be a virtual fraud in the party recovering at law now to insist upon enforcing his judgment.[3] But where the

[1] Ante, § 1195, and cases cited. [2] Gairity *v.* Russell, 40 Conn. 405.

[3] Paddock *v.* Palmer, 19 Vt. 581; ante, § 367.

In the application to have the judgment set aside, it should appear that the moving party had used due diligence to prepare his case for trial, and negligence on his part must be lacking: Pickford *v.* Talbott, 225 U. S. 651, 56 L. Ed. 1240, 32 S. Ct. Rep. 687; United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295; Levystein *v.* O'Brien, 106 Ala. 352, 17 So. 550, 54 Am. St. Rep. 56, 30 L. R. A. 707; Garrett *v.* Lynch, 45 Ala. 204; Carnall *v.* Looper, 35 Ark. 107; Taylor *v.* Sutton, 15 Ga. 103, 60 Am.

fact existed before the trial at law, upon which the relief in equity is claimed, and is also known to the party suing in equity, or might have been discovered by the exercise of diligence, and is as much a defence at law as in equity, no redress can ordinarily be obtained in equity.[1]

§ 2043. **In Cases of Concurrent Jurisdiction, an Adjudication by a Court of Law Is Conclusive upon a Court of Equity.** — In matters where the jurisdiction of the Courts of Law and Equity is entirely concurrent, the adjudication of the Court of Law is conclusive upon Courts of Equity. And a Court of Equity will not interfere to relieve a party from such adjudication, except upon the ground of newly discovered matter since the trial, of fraud in obtaining the judgment, or of some inevitable accident or mistake. But where the party has equitable rights not cognizable in a Court of Law, which would in a Court of Equity have prevented such an adjudication as was made in the Court of Law, the judgment will interpose no obstacle to redress in equity, since the Court of Law had no proper jurisdiction of the subject-matter forming the basis of redress in equity.[2]

Dec. 682 ; Hill *v.* Harris, 51 Ga. 628 ; Chapman *v.* Salfisberg, 111 Ill. App. 102 ; Chicago etc. R. Co. *v.* Hay, 119 Ill. 493, 10 N. E. 29 ; Tutt *v.* Ferguson, 13 Kans. 45 ; Carolus *v.* Koch, 72 Mo. 645 ; Power *v.* Butler, 4 N. J. Eq. 465 ; Metropolitan Elec. R. Co. *v.* Johnston, 158 N. Y. 739, 53 N. E. 1128 ; Grantham *v.* Kennedy, 91 N. C. 148 ; Turner *v.* Davis, 132 N. C. 187, 43 S. E. 637 ; Henderson *v.* Mitchell, Bailey Eq. 113, 21 Am. Dec. 526; Ex parte Davidge, 72 S. C. 16, 51 S. E. 269 ; Rust *v.* Ware, 6 Gratt. 50, 52 Am. Dec. 100 ; Ludington *v.* Handley, 7 W. Va. 269 ; Barber *v.* Rukeyser, 39 Wis. 590.

[1] Ante, §§ 1218, 1219 ; Gibbons *v.* Bressler, 61 Ill. 110 ; Smith *v.* Allen, 63 Ill. 474. Equity will not aid a defendant to avail himself of a discharge under the bankrupt law. Foote *v.* Perry, 40 Ind. 40. If there is fraud or collusion in prosecuting actions at law, or if a judgment so obtained is used to oppress or defraud, equity may interfere and enjoin or correct the wrong, if there is no adequate remedy at law. Hablitzel *v.* Latham, 35 Iowa 550 ; Jennings *v.* Whittemore, 2 Thomp. & C. 397 ; Busen *v.* Foster, 6 Heisk. 333. If a party has lost his remedy against an erroneous or irregular judgment, without his own fault, equity may interfere. Connery *v.* Swift, 9 Nev. 39 ; Dalton *v.* Lemburth, 9 Nev. 192. See also Loss *v.* Obrey, 7 C. E. Green, 52 ; Wingate *v.* Haywood, 40 N. H. 437 ; Currier *v.* Esty, 110 Mass. 543. But if a defendant elects his remedy in a suit against him, equity will not relieve him from the effect of his choice. Penn. *v.* Reynolds, 23 Gratt. 518. And if a party has the means of correcting the erroneous judgment by appeal or writ of error or otherwise, equity cannot interfere. Lyme *v.* Allen, 51 N. H. 442. See ante, §§ 1222, 1223.

[2] Dunham *v.* Downer, 31 Vt. 239 ; Lansing *v.* Eddy, 1 Johns. Ch. 49 ; Simpson *v.* Hort, 1 Johns. Ch. 98 ; S. C. on appeal, 14 Johns. 63 ; Clifton *v.* Livor, 24 Ga. 91. It is no objection to the conclusiveness of the finding of a Court of Equity that the party had in fact full remedy at law, so that in truth the Court of Equity never had any proper jurisdiction of the case. And it makes no difference in this respect whether such want of jurisdiction appear upon the face of the bill, but, not being insisted upon, is disregarded by the Court of Equity, and a decree passes upon the merits, or such defect of jurisdiction is shown by the proofs in support of the answer ; and the case is dismissed upon that ground upon the final hearing. Munson *v.* Munson, 30 Conn. 425. As to the conclusiveness of judgments in ejectment in the American practice, see Miles *v.* Caldwell.

§ 2044. **Remedy in Equity Where Judgment Was Obtained by Fraud, or There Has Been a Discovery of New Evidence.** — And although some of the earlier decisions look almost like granting new trials in equity in regard to all matters adjudicated at law where there has been surprise at the trial or newly discovered evidence,[1] the more recent and better considered cases will justify no such proposition.[2] The new trial is never granted in terms. There can be in no such case anything like another trial in the Court of Law. The case is effectually ended there. But where there was a distinct fraud in the proceedings by which the judgment at law was obtained, as by giving no notice of the suit or one calculated to mislead the defendant and thus deprive him of an opportunity to be heard in the trial at law ; or in any similar mode making the trial at law fictitious or fallacious ; and also where the defendant at law through accident or mistake, and without default in the proper degree of watchfulness and care required of careful men in their own concerns of equal importance fails to present his defence fully, Courts of Equity will in their discretion grant relief by reëxamining the case upon its merits, and either enjoining the party from pursuing the judgment at law, or, where some portion of the claim is due, granting such an injunction as to a portion of it ; or upon condition that the plaintiff shall pay into court whatever sum is due upon the judgment, with reasonable costs.[3]

[1] Gainsborough *v.* Gifford, 2 P. Wms. 424. In a late case, where the question is examined, the law is thus stated : " The early English cases which have been brought to our notice, and which we have before had occasion to examine, and some of the American cases, and especially Colyer *v.* Langford, 1 A. K. Marshall, 237, seem to go upon the ground that a bill will be entertained for a new trial in an action determined at law upon very much the same grounds that new trials are granted at law, where the Courts of Law have no means of granting a new trial in the case [or for any reason decline to interfere]. But the numerous cases in this State, from Essex *v.* Berry, 2 Vt. 161, to Warner *v.* Conant, 24 Vt. 351, have established the rule upon a very much narrower basis. The rule of the best considered and more recent cases upon the subject is, that the party must have failed in obtaining redress in the suit at law by the fraud of the opposite party, or inevitable accident or mistake, without any default either of the party or his counsel. That is the rule laid down in Emerson *v.* Udall, 13 Vt. 477, and Pettes *v.* Bank of Whitehall, 17 Vt. 435. The rule in Connecticut, Carrington *v.* Hollabaird, 17 Conn. 530 ; s. c. 19 id. 84, is laid down in almost the same terms, — stress being laid upon the fact that the plaintiff's failure to obtain justice at law has been ' without fault on his part.' " Burton *v.* Wiley, 26 Vt. 430, 432.

[2] But see ante, § 1221.

[3] Emerson *v.* Udall, 13 Vt. 477 ; Cutting *v.* Carter, 29 Vt. 72 ; Stone *v.* Seaver, 5 Vt. 549. Pelzer Mfg. Co. *v.* Hamburg-Bremen Fire Ins. Co., 71 Fed. 826 ; Radzuwert *v.* Watkins, 53 Neb. 412, 73 N. W. 679 ; McCall *v.* Looney, 4 Neb. 715, 96 N. W. 238 ; Hill *v.* Hill, 62 N. J. Eq. 442, 41 Atl. 943 ; Handley *v.* Jackson, 31 Oreg. 552, 50 Pac. 915, 65 Am. St. Rep. 839 ; Opie *v.* Clancy, 27 R. I. 42, 60 Atl. 635 ; Holland *v.* Trotter, 22 Gratt. 136 ; Rosenberger *v.* Bowen, 84 Va. 660, 5 S. E. 697 ; Thomas *v.* Jones, 98 Va. 323, 36 S. E. 382.

The burden of showing the mistake or excusable neglect is upon the moving party : Jeffries *v.* Aaron, 120 N. C. 167, 26 S. E. 696 ; Mauney *v.* Gidney, 88 N. C. 200 ; Stith *v.* Jones, 119 N. C. 428, 25 S. E. 1022 ; Sikes *v.* Weatherly, 110 N. C. 131, 14 S. E. 511 ; Taylor *v.* Pope, 106 N. C. 267, 11 S. E. 257 ; Gwathney *v.* Savage, 101 N. C. 103, 7 S. E. 661.

§ 2045. **Same.** — But a creditor is not in a condition to claim the interference of a Court of Equity in removing conveyances made by his debtor of the property which it is claimed should go in payment of debts, until he has perfected his own title against such debtor by judgment and levy.[1] Nor will a Court of Equity set aside the levy of an execution upon real estate on the ground of alleged defects and irregularities in the same. The proper remedy in such case will be by application to the court rendering the judgment, and where the levy remains of record.[2]

§ 2046. **Judgment Can Be Impeached in Equity for Fraud in Its Procurement.** — It seems to be conclusively settled that a judgment can only be impeached in a Court of Equity for fraud in its concoction.[3] It is said there is no case in which equity has ever undertaken to question a judgment for irregularity. The power of a Court of Law is always exercised in such cases in sound discretion, and the relief is frequently granted on terms. This court cannot impose any such terms or take any such cognizance of the case.[4] If then the judgment of a court of competent jurisdiction can only be enjoined in a Court of Equity upon the ground of fraud (and this fraud must have been practised in the very act of obtaining the judgment or else it will be concluded by the judgment at law, where fraud is equally a defence as in equity), it remains to inquire how far foreign judgments, whether in Courts of Law or Equity, will come under a similar rule.

§ 2047. **The Force and Effect of Foreign Judgments.** — Notwithstanding the occasional vacillation of the English courts, and especially the Courts of Equity, in regard to the conclusive character of the contract resulting from the judgment of a court of competent jurisdiction in a country foreign to the forum where its validity and fairness is attempted to be brought in question, the general tendency of all the decisions is certainly in that direction. In some of the earlier English cases [5] there seems to be manifested a disposition to treat foreign judgments as only prima

[1] Castle *v.* Bader, 23 Cal. 75.

[2] Boles *v.* Johnston, 23 Cal. 226. See also Hurlbut *v.* Mayo, 1 D. Chip. Vt. 387. But see Ramsden *v.* O'Keefe, 9 Minn. 74.

[3] See Flower *v.* Lloyd, 10 Ch. D. 327 ; Patch *v.* Ward, L. R. 3 Ch. 203 ; Bigelow, Estoppel, 164, 165, 3d ed.

[4] Chancellor Kent in Shottenkirk *v.* Wheeler, 3 Johns. Ch. 275, 280. This decision is based upon Baker *v.* Morgan, 2 Dow, 526 (1814). The learned chancellor adds : " The doctrine, coming from such masters of equity as Lord Redesdale and Lord Eldon, is undoubtedly to be considered as correctly declared. If there had been any case warranting the interference of chancery with an irregular judgment, they would have known it." The same principle is reaffirmed by the same learned judge in De Riemer *v.* De Cantillon, 4 Johns. Ch. 85 ; French *v.* Shotwell, 6 Johns. Ch. 235 ; s. c. 5 Johns. Ch. 555 ; and in 20 Johns. 668. See also Elliott *v.* Balcom, 11 Gray, 286, where the general subject of relief in Courts of Equity against final judgments in courts of general jurisdiction is considerably discussed. In Hubbard *v.* Eastman, 47 N. H. 507, it is said that any fact which proves it to be against good conscience to execute a judgment, and of which the injured party could not have availed himself in the court rendering the judgment as a defence against the action, or where he was prevented from so doing by fraud or accident, unmixed with any fault or negligence on his part, will justify the interference of a Court of Equity.

[5] Sinclair *v.* Fraser, 1 Doug. 5 ; Phillips *v.* Hunter, 2 H. Bl. 402, 410 ; Walker *v.* Witter, 1 Doug. 1.

facie evidence of indebtedness, and examinable in the forum where they were attempted to be enforced. But this rule was subsequently qualified to some extent, and they were regarded as not examinable unless in regard to the jurisdiction of the foreign court over the subject-matter and the parties.[1] A very learned and able opinion is given by the Vice-Chancellor in Martin *v.* Nicolls [2] as late as 1830, in which the learned judge, Sir Lancelot Shadwell, after an elaborate review of all the former cases in England, maintains that it does appear most distinctly that the old law is in favor of the proposition that a foreign judgment is not examinable in the courts of Westminster Hall. And a demurrer is here allowed to a bill which asked for a commission to examine witnesses abroad in aid of the plaintiff's defence to a suit upon a foreign judgment, and for a discovery of the ground upon which the judgments were rendered. This rule has been acquiesced in in England for the most part until the present time.

§ 2048. **Same.** — As Courts of Equity are frequently called to determine upon the validity of foreign judgments,[3] it will not be out of place here to state briefly the results of the latest decisions upon the subject. The question is considered very much at length in Riemers *v.* Druce,[4] and the following propositions declared: A foreign judgment sought to be enforced in this country is impeachable for error, upon the very face of it, sufficient to show that it ought not to have been rendered. The reasons attached to a foreign judgment are part of the record, and to be treated as an integral part of the judgment. In the case of The Bank of Australia *v.* Nias [5] it is decided upon full consideration that an act of the colonial legislature, by which actions in favor of or against corporations are allowed to be maintained in the name of their chairman, and shall have the same effect to bind the property of the corporators as if they were made parties to the suit by service of process personally, is a valid law, and not repugnant to the law of England or to natural justice; and that a judgment recovered in such an action after service upon the chairman had the same effect beyond the territory of the colony which it would have had if the defendant had been personally served with process; that although a foreign or colonial judgment is impeachable to some extent, as for the purpose of showing want of jurisdiction, *e. g.* that the party was not served with process, or that the judgment was fraudulently obtained, yet the judgment is not examinable upon the merits, as that the contract sued upon was not made or was obtained by fraud, or that the judgment was erroneous. In this latter proposition we apprehend this case is rather to be relied upon than that of Riemers *v.* Druce.

§ 2049. **Same.** — For it will be found extremely difficult, we apprehend, to fix upon any limitation to the rule of holding a foreign judgment

[1] Tarleton *v.* Tarleton, 4 M. & S. 21; Buchanan *v.* Rucker, 9 East, 192.

[2] 3 Simons, 458.

[3] Ante, § 1706.

[4] 23 Beav. 145. Thum *v.* Pyke, 8 Idaho 11, 66 Pac. 157; Field *v.* Field, 117 Ill. App. 307; Chicago etc. R. Co. *v.* Campbell, 5 Kans. App. 423, 49 Pac. 321; Chicago Title & Trust Co. *v.* Smith, 185 Mass. 363, 70 N. E. 426, 102 Am. St. Rep. 350; Hamilton *v.* Plummer, 67 Mich. 135, 34 N. W. 278; Stewart *v.* Northern Assur. Co., 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101; Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872.

The defendant may set up the defence that fraud was practised upon him in the court of the State in which the judgment was rendered. Levin *v.* Gladstein, 142 N. C. 482, 55 S. E. 371.

[5] 16 Q. B. 717.

revisable for error apparent upon its face, unless it be error of that gross character which shows the judgment to have been given upon grounds repugnant to natural justice or else to the universally recognized laws of morality and decency in all Christian States. This proposition is not countenanced in any of the late English cases to the extent claimed in Riemers *v.* Druce. And in the elaborate judgment of the House of Lords in Ricardi *v.* Garcias,[1] the conclusiveness of such judgments as a merger of the original cause of action is fully recognized, and its freedom from impeachment except upon the grounds recognized by the Queen's Bench in the Bank of Australia *v.* Nias.[2]

§ 2050. **Same.** — Accounts recorded in the Court of Chancery in Jamaica in a suit instituted against executors who had proved the testator's will in that island were ordered, in a suit against them in England, to be taken as prima facie evidence of the truth of the matters therein contained, with liberty to the plaintiffs to surcharge and falsify.[3]

§ 2051. **The Binding Effect upon Courts of Last Resort of Their Own Declarations of the Law.** — The question how far courts of last resort are bound by their own declarations of the law is one of considerable difficulty. Lord Chancellor Campbell, in an important case before the House of Lords,[4] pronounces the rule to be clearly recognized that such declarations as to the existing state of the law are as much binding upon the court of last resort as upon inferior tribunals, and can only be altered by act of Parliament, notwithstanding every member of the court become convinced that they are in fact erroneous ; but that observations of different members beyond the ratio decidendi, which is propounded and acted upon in giving judgment, are of no force beyond their intrinsic weight.

§ 2052. **The Practice of Fraud in Procuring Foreign Judgments.** — One point incidentally alluded to, both in the original text of the learned author [5] and in the present chapter,[6] has not been brought out with such distinctness as its importance in connection with the subject of Equity Jurisprudence obviously deserves. We allude to the question of fraud in foreign judgments. If the opinion be well founded that domestic and foreign judgments as to the conclusiveness of the contract resulting from the adjudication stand upon equal footing, which is certainly the inclination of the English decisions upon the question, then it is clear that a Court of Equity cannot enjoin such judgment upon the ground of any fraud in the original transaction out of which the judgment arose, since that might have been considered in the court rendering the judgment as ground of defence, and is therefore concluded by the judgment.

[1] 12 Clark & Fin. 368.

[2] It seems mistake of English law as to an English contract, apparent on the face of the proceedings, is not ground of defence to a foreign judgment. Godard *v.* Gray, L. R. 6 Q. B. 139. A judgment of a foreign court on default, the defendant not being a subject of nor resident in the country, cannot be enforced. Schibsby *v.* Westenholz, L. R. 6 Q. B. 155. See Bishoff *v.* Wethered, 9 Wall. 812. A decree of divorce rendered in a State of the Union where the wife is actually resident, though not the State of her husband's domicile, is binding in other States. Cheever *v.* Wilson, 9 Wall. 108. Whether it is conclusive on the question of the wife's being actually resident, quaere. Ib.

[3] Sleight *v.* Dawson, 3 K. & J. 292. But see Simpson *v.* Fogo, 6 Jur. (N. S.) 949.

[4] Attorney-Gen. *v.* Windsor, 6 Jur. (N. S.) 833; S. C. 8 H. L. Cas. 369.

[5] Ante, § 1706.

[6] Ante, § 2042.

§ 2053. **The Question of Jurisdiction Is Open for Consideration in Equity upon Validity of Foreign Judgment.** — The only question of fraud which is open to examination in a Court of Equity as a ground for enjoining the judgment of any court having jurisdiction of the case, whether domestic or foreign, is such as intervened in the proceedings by which the judgment was obtained.[1] All questions prior to the proceedings by which the judgment was obtained are necessarily concluded by it. And indeed many irregularities in these latter, such as defects in process or in service, are also concluded where there is an appearance.[2]

§ 2054. **Same.** — It was accordingly held in a recent case [3] that the decree of a foreign court proceeding in rem could not be so far disregarded as to allow an action at law, as for a conspiracy in assigning the claim by the real owner to a foreigner to enable him to enforce it in the foreign court against property there, which could only be done on behalf of citizens of that country, when in fact the transfer as alleged in the declaration was merely colorable, and to enable the assignee to carry forward the proceedings in his own name for the benefit of the assignor, but which could not have been maintained if the fact of the real interest being still remaining in him had been known.

[1] Sample *v.* Barnes, 55 U. S. 70, 14 L. Ed. 330 ; Emerson *v.* Udall, 13 Vt. 477 ; Atkinsons *v.* Allen, 12 Vt. 619.

[2] Walker *v.* Robbins, 55 U. S. 584, 14 L. Ed. 552. The following may be referred to as leading cases upon the subject in the American courts : Truly *v.* Warner, 46 U. S. 142, 12 L. Ed. 88 ; Humphreys *v.* Leggett, 50 U. S. 297, 13 L. Ed. 145 ; Suidam *v.* Beals, 4 McLean, 12 ; Hendrickson *v.* Hinckley, 58 U. S. 443, 15 L. Ed. 123. See also Adams's Eq., note of the Am. editor, 197, and cases cited.

[3] Castrique *v.* Behrens, 7 Jur. (N. S.) 1028. See Castrique *v.* Imrie, L. R. 4 H. L. 414.

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