

CURIOSITIES OF ENGLISH LAW.

exercise of its discretion, will not only declare that the parties must have meant something quite different, but will carry its declaration into effect by obliging them to act as if they had, in fact, put their hands to such an agreement as it considers they ought to have entered into. This is the Equitable doctrine with regard to mortgages. A mortgage is a document in which an agreement is purported to be entered into between mortgagor and mortgagee, which neither of them intends shall be carried into effect. In this state of things Equity steps in and says to them, "It is clear neither of you intended to enter into any such agreement as is expressed in this document; you meant to enter into quite a different agreement, and you shall be held to have executed that agreement instead of the one you did in fact execute." In the case of mortgages the assumption of Equity was no more than the truth. It is notoriously the fact that in every mortgage the parties purport to enter into an agreement different from the one they intend to be bound by, and such being the case, Equity had a good excuse for coming to the rescue. The assumption of a power to override the express provisions of written documents, and of the faculty of arriving at the real intention of contracting parties not by a perusal of their written declarations, but by the exercise of a refined instinct of justice, was, however, fraught with much danger; and the success of the experiment as to one class of contracts provided a precedent that led to serious difficulty. It is true that the Judges have from time to time, under the pressure of circumstances, given various reasons for relief against penalties; but according to Lord Macclesfield, "the true ground of relief is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired," and this view of the law, transmitted in Tudor's Leading Cases, continues to be put forward as the pretext for interference, though it has not escaped severe judicial criticism.

The absurdity of the proposition that where a person bargains for a penalty on the non-payment of a stipulated sum at a stipulated time he gets all that he expected or desired, if after an indefinite

lapse of time he obtains the sum without the penalty, has been more than once forcibly exposed by Lord Eldon. In *Hill v. Barclay* (18 Ves. 60) he says: "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 when 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." Here Lord Eldon puts the matter in its true light; the real reason why indiscriminate relief should not be granted against penalties for the non-payment of money at a stipulated time is that by relieving against the penalty you take away all inducement to punctual payment, so that if the principle enunciated by Lord Macclesfield were to be carried out to its logical conclusion, no one would know when he could get in his debts, and all credit would be destroyed. Just as we hang a murderer, not because he has committed a murder, but in order that murders may not in future be committed, in the same way penalties should be enforced, not in order to wreak vengeance on the defaulter, but in order to deter others from making default.

Although the Chancery Judges did not entertain so great a regard for logic as to feel compelled to make it their business to see that no one was obliged to pay his debts till it should be quite convenient for him to do so, still they carried their benevolence with regard to debtors to such an inconvenient extent in decreeing relief against forfeitures of leases for non-payment of rent at any indefinite time after the rent had become payable, that the Legislature had to interfere and obviate what was acknowledged to be a palpable injustice by putting a limit to the time within which relief might be claimed. The admission that a palpable injustice had been inflicted by following out the proposition laid down by Lord Maccles-