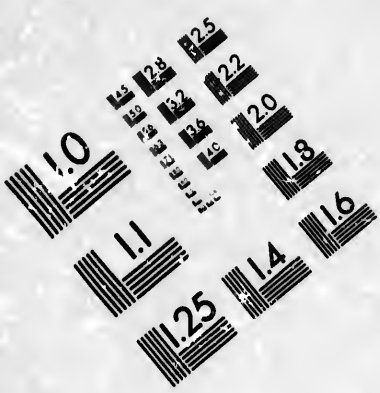

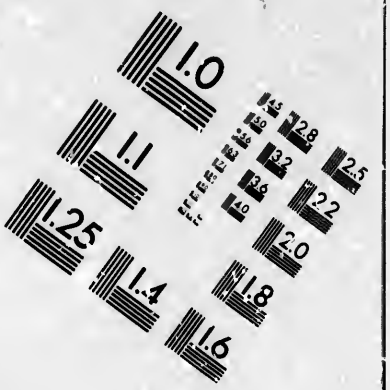

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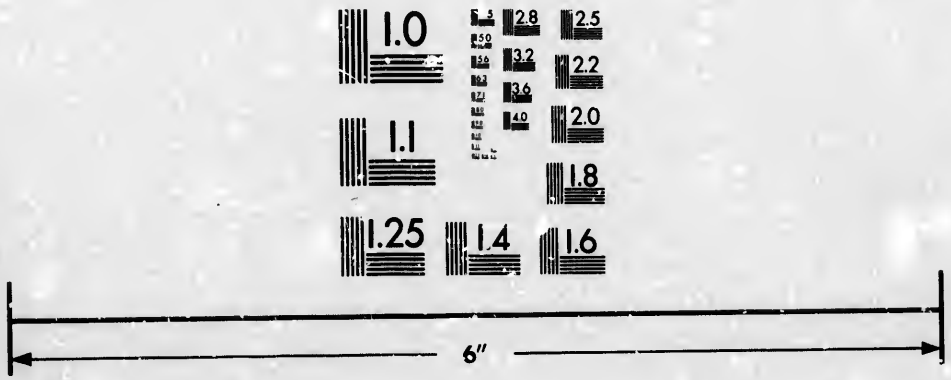

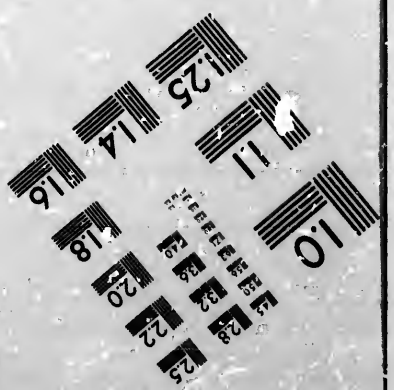

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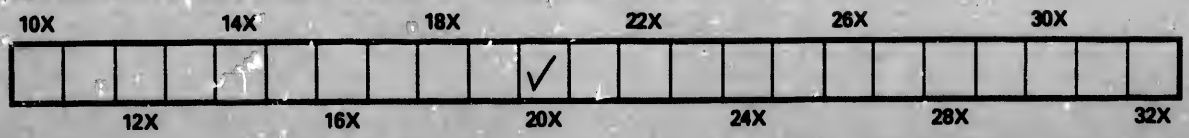

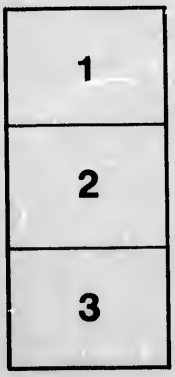

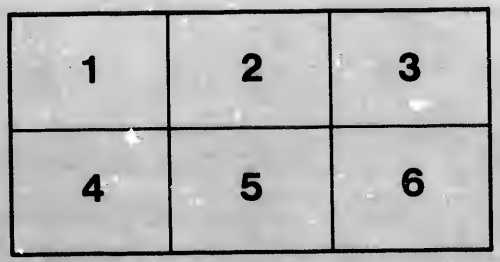

COMMENTARIES

ON

EQUITY JURISPRUDENCE.

FOUNDED ON STORY.

BY

THOMAS WARDLAW TAYLOR, M.A.,

MASTER IN CHANCERY.

TORONTO:
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PREFACE.

WHEN this work was commenced more than three years ago, the intention was to prepare an edition of "Story's Equity Jurisprudence," adapted to the system of equity administered in this Province, and to publish it as such.

After some progress had been made in preparing such an edition, the necessary omissions, additions and alterations were found to be so great that the original intention had to be abandoned. While the work, as now presented to the public, is in greater part that of the eminent American jurist, whole sections being copied from his commentaries, and is indebted to him for whatever of value it contains, it would have been unjust to his memory to put it forth as his.

In the preparation of the work the statutory provisions in force in this Province, and especially the changes introduced by recent legislation in Ontario have been carefully kept in view; the leading Canadian cases and other more recent English ones have been cited in support of the various topics treated of; and it is believed the student will find in its pages all that is of importance in Story, or necessary for acquiring a practical knowledge of equity as administered in this Province.

OSGOODE HALL,
March, 1875.

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COMMENTARIES

ON

EQUITY JURISPRUDENCE.

CHAPTER I.

THE NATURE AND CHARACTER OF EQUITY JURISPRUDENCE.

1. Imperfect notions of what properly constitutes equity jurisprudence are so common, and have so often led to mistakes and confusion even in professional treatises on the subject, as to render it important to distinguish the various senses in which the word equity is used. In the most general sense we are accustomed to call that equity, which, in human transactions, is founded on what is termed natural justice, in honesty and right, and which properly arises *ex æquo et bono*(a).

2. It would, however, be a great mistake to suppose that equity, as now administered, embraces a jurisdiction so wide and extensive, as that which would arise from carrying into effect the principles of natural justice. Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Many matters of natural justice are wholly unprovided for, from the difficulty of framing general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to

(a) Story, s. 1.

duties of imperfect obligation, such as charity, gratitude, and kindness(*a*). A large proportion, therefore, of natural equity, in its widest sense, must be left to the conscience of each individual, and cannot be judicially enforced.

3. The term equity is used in a more limited sense when used in contradistinction to strict law, or *strictum et summum jus*. It was in this application of equity that the jurisdiction of the Prætor had its origin. But his power never extended to the direct overthrow or disregard of the positive law. He was bound to stand by that law in all cases, to which it was justly applicable.

4. A more general way in which this sense of equity, as contradistinguished from mere law, is applied, is, to the interpretation and limitation of the words of positive or written laws, by construing them, not according to the letter, but according to their reason and spirit(*b*). Equity, in this sense, must have a place in every rational system of jurisprudence. Every system of human laws must necessarily be defective. The general words of a law may embrace all cases; and yet it may be clear, that all could not have been intentionally embraced. So, words of a doubtful import may be used, or words susceptible of a more enlarged, or of a more restricted meaning, or of two meanings equally appropriate. In all such cases, it is the duty of a judge to consider the object the legislature had in view, and so to construe the words, as will best forward that object. This is an exercise of the power of equitable interpretation. And hence arises a variety of rules of interpretation of laws, according to their nature and operation, whether they are remedial, or penal laws; whether they are restrictive of general right, or in advancement of public justice or policy; whether they are of universal application, or of a private and circumscribed intent(*c*).

(*a*) Story, s. 2.

(*b*) 1 Black. Comm. 61, 62; 3 Black. Comm. 429.

(*c*) Story, s. 7. Many excellent rules of interpretation will be found in Rutherforth's Institutes of Natural Law, B. 2, ch. 7; Bacon's Abr. tit. *Statute;* 1 Black. Comm. 58. See Hayden's case, 5 Rep. 7; Eton College *v.* Bishop of Winchester,

5. The proposition in the Treatise of Equity, attributed to Mr. Ballow, that "In chancery, every particular case stands upon its own circumstances; and although the common law will not decree against the general rule of law, yet chancery doth, so as the example introduce not a general mischief," is sanctioned neither by principle nor by authority. Equity has, in many cases, decided differently from courts of law, but these cases involved circumstances to which a court of law would not advert, but which a court of equity, proceeding on principles of substantial justice, felt bound to respect(*a*).

6. Another proposition, stated by the same author, that "Every matter that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief in equity," is equally untenable. Many cases against natural justice are left wholly to the conscience of the party, and are without any redress, equitable or legal. And so far from a court of equity supplying universally the defects of positive legislation, or peculiarly carrying into effect the intent, as contradistinguished from the text, of the legislature, it is governed by the same rules of interpretation as a court of law. It is the duty of every court of justice to consult the intention of the legislature; and a court of equity is not invested with a more liberal discretion than a court of law(*b*).

7. It has been often said, that courts of equity are not, and ought not, to be bound by precedents, but that every case is to be decided upon circumstances, according to the arbitration or discretion of the judge, acting according to his own notions, *ex æquo et bono*(*c*). There was probably much in the early history of equity in England to justify the statement

Lofft, 416; Salkeld *v.* Johnson, 1 Ha. 210; Warburton *v.* Loveland, 2 Dow & Cl. 480; Hughes *v.* Chester and Holyhead Railway Co., 8 Jur. N. S. 223. See also *Re* Goodhue, 19 Gr. 366.

(*a*) Com. Dig. Chancery, 3, F. 8. And see Cowper *v.* Cowper 2 P. W. 753; Burgess *v.* Wheate, 1 W. Blackst. 123, Fry *v.* Porter, 1 Mod. 300; Kemp *v.* Pryor, 7 Ves. 249.

(*b*) Story, ss. 11, 14; 3 Black. Comm. 431; Sedgewick on Stat. and Constit. Law 187.

(*c*) See Francis, Max. 5, 6; Selden, cited in 3 Black. Comm. 432, 433, 435; 1 Kames, Eq. 19, 20.

that courts of equity were bounded by no certain limits or rules, but acted without restraint upon principles of conscience and natural justice. The decrees of the court of equity were then rather in the nature of awards, formed *pro re nata*, with more probity of intention than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used, as precedents (*a*).

8. For a long period, however, there have been well settled principles upon which courts of equity act. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles, but the principles themselves are as fixed and certain as the principles on which the courts of common law proceed(*b*).

9. Having thus remarked upon some inaccurate or inadequate notions, entertained respecting equity jurisprudence, some more exact and clear statement of it may be given. This may be better done by explanatory observations, than by direct definitions, which are often said in the law to be perilous and unsatisfactory(*c*).

10. The remedies for the redress of wrongs, and for the enforcement of rights, are divided into two classes. First, those rights which are recognized and protected, and those wrongs which are redressed in courts of common law, are called legal rights and legal injuries. Second, those rights which are recognized and protected, and those wrongs which are redressed in courts of equity, are called equitable rights and equitable injuries. The former are rights and wrongs at common law, and the remedies are remedies at common law; the latter are rights and wrongs in equity, and the remedies

(*a*) 3 Black. Comm. 433, 440, 441.

(*b*) Per Lord Redesdale in Bond v. Hopkins, 1 S. & L. 428. And see Gee v. Pritchard, 2 Sw. 414.

(*c*) Story, s. 24.

are remedies in equity. Equity jurisprudence may, therefore, properly be said to be that portion of remedial justice administered by a court of equity, as contradistinguished from that portion of remedial justice administered by a court of common law(*a*).

11. The distinction between courts of common law and courts of equity may also be illustrated by considering: (1) The different natures of the rights they recognize and protect; (2) the different natures of the remedies which they apply; and (3) the different natures of the forms and modes of proceeding which they adopt, to accomplish their respective ends(*b*).

12. Courts of equity enforce rights which courts of common law either do not recognize at all, or, if they recognize them, leave wholly to the conscience of the parties. Thus, estates vested in persons upon particular trusts and confidences, technically called trusts, are wholly without any cognizance at the common law; and the abuses of such trusts and confidences are beyond the reach of legal process. But they are cognizable in courts of equity; and hence are called equitable estates; and the parties beneficially interested, have there a remedy for all wrongs and injuries, whether arising from negligence, or positive misconduct. Courts of equity will also interfere and grant relief in many cases of losses and injuries by mistake, accident, and fraud; of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; of penalties and forfeitures, of impending irreparable injuries, or meditated mischiefs, which courts of common law take no notice of(*c*).

13. The remedies applied by courts of equity are also very different, in their nature, mode, and degree, from those of courts of common law, when each has jurisdiction over the same subject-matter. Thus, courts of equity interfere by injunction to prevent wrongs being done, while courts of com-

(*a*) Story, s. 25. And see Snell, 3.
(*b*) Story, s. 26.
(*c*) Story, s. 29.

mon law grant redress only, when the wrong is done. So if a contract is broken, courts of equity often compel the party specifically to perform the contract; whereas courts of law can only give damages for the breach of it(*a*).

14. Courts of common law have certain prescribed forms of action, to which the party seeking relief must resort, and if there be no prescribed form to suit the particular case, he is without remedy.

15. In an action at law only a general and unqualified judgment can be given for the plaintiff or defendant. But in many cases such a judgment, without qualification or condition, will not do entire justice to either party. Some modification of the rights of both parties may be necessary; some restraints on one side or on the other, or on both; some adjustments involving reciprocal obligations, or duties; some compensatory, or preliminary, or concurrent proceedings to fix, control, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or the redress of injuries. In all such cases courts of common law cannot give the desired relief, because they have no suitable forms of remedy(*b*).

16. Courts of equity have also prescribed forms of proceeding, but they are flexible, and can be adapted to different cases. The courts can adjust their decrees, so as to suit peculiar circumstances, and they can vary, qualify, restrain, and model the remedy, to suit mutual and adverse claims, controlling equities, and the substantial rights of all parties. Besides, while courts of common law are compelled to limit their inquiry to the very parties to the suit before them, however deeply others may be interested in the event; courts of equity can bring before them all parties interested in the sub-

(*a*) Story, s. 30. By the Com. Law Pro. Act, Con. Stat. U. C., c. 22, the courts of common law are now enabled to issue writs of injunction, both interlocutory and final, as well as most other writs calculated to enforce specific relief.

(*b*) Story, s. 27; Mitford Eq. Pl. 3, 4.

ject-matter, however numerous, and adjust the rights of all(a).

17. Courts of equity also address themselves to the conscience of the defendant, requiring him to answer the matters of fact stated in the plaintiff's bill, and to set up the facts which he relies on for his defence, upon oath.

18. Perhaps the most general, if not the most precise, description of a court of equity, is, that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law(b). The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert jurisdiction(c). It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity(d). And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of courts of equity is, therefore, sometimes concurrent with the jurisdiction of courts of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it(e).

CHAPTER II.

THE ORIGIN AND HISTORY OF EQUITY JURISPRUDENCE.

19. The origin of the court of chancery is involved in the same obscurity, which attends the investigation of many other

(a) Story, s. 28.
(b) Cooper, Eq. Pl. 128, 129; Mitford, Eq. Pl. 112, 123.
(c) Southampton Dock Co. *v.* Southampton H. & P. Board, L. R. 11 Eq. 254.
(d) See Chapman *v.* Chapman, L. R. 9 Eq. 276; Ramshire *v.* Boulton, L. R. 8 Eq. 294; Hill *v.* Lane, L. R. 11 Eq. 215; Hoare *v.* Brembridge, L. R. 14 Eq. 522; L. R. 8 Chan. 22.
(e) Story, s. 33.

questions, of high antiquity, relative to the common law(*a*). In England the administration of justice was originally confided to the *Aula Regis*, or great Court or Council of the King, as the Supreme Court of Judicature, which, in those early times, undoubtedly administered justice, according to the rules of both law and equity, or of either, as the case might require (*b*). When that court was broken up, and its jurisdiction distributed among various courts, the Common Pleas, the King's Bench, and the Exchequer, each received a certain portion, and the Court of Chancery obtained a portion also(*c*). But at that period, the idea of a court of equity, as contradistinguished from a court of law, does not seem to have subsisted in the original plan of partition, or to have been in the contemplation of the sages of the day(*d*).

20. It cannot however be doubted that the court of chancery, in the exercise of its ordinary jurisdiction, is a court of very high antiquity, but it is not so easy to ascertain the origin of the equitable or extraordinary jurisdiction of the court(*e*).

21. But that the jurisdiction of chancery was established, and in full operation during the reign of Richard II., is admitted. The extensive use or abuse of the powers of chancery had at this period provoked the jealousy of parliament, and efforts were made to restrain and limit its authority. The invention of the writ of subpœna about the 5th of Richard II., gave great efficiency, if not expansion, to the jurisdiction. The struggles of parliament against the court continued throughout a number of reigns, but the crown steadily supported the court and resisted all appeals against its jurisdiction, until finally, in the time of Edward IV., the process by bill and subpœna became the daily practice of the court(*f*).

(*a*) Mitford, Eq. Pl. 1; Com. Dig. Chancery, A. 1; 4 Inst. 79.

(*b*) 3 Black. Comm. 50; 1 Reeves, Hist. 62, 63.

(*c*) 3 Black. Comm. 50; Com. Dig. Chancery, A. 1, 2, 3; Bac. Abridg. Court of Chancery, C.

(*d*) Story, s. 39.

(*e*) See on this subject, Com. Dig. Chancery, A. 2; 2 Inst. 552; 4 Inst. 82; Rex. *v.* Hare, 1 Str. 151, 160; 3 Black. Comm. 50.

(*f*) Parkes, Hist. Chan. 39; 3 Black. Comm. 52; 4 Inst. 82; 2 Reeves, Hist. 194.

22. Until the publication of the proceedings of the Commissioners on the Public Records, the opinion prevailed that there were no petitions of the chancery remaining of record before the 15th of Henry VI. Many hundreds have however been found commencing about the time when the 17 Rich. II., ch. 6, was passed. Most of these ancient petitions appear to have been presented complaining of assaults, and trespasses, and a variety of outrages, which were cognizable at common law; but for which the complainant could not obtain redress, on account of the protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the county(*a*).

23. It thus appears that the earliest exercise of equity jurisdiction was to remedy defects in common-law proceedings; and, that equity jurisdiction was entertained then upon the same ground which now constitutes the principal reason for interference; namely, that a wrong is done, for which there is no plain, adequate, and complete remedy in the courts of common law(*b*). The introduction at a later period of Uses or Trusts gave new activity and extended operation to the jurisdiction of the court; but did not, as many have supposed, originate it. As there was no remedy at law to enforce the observance of such uses or trusts, the relief given in such cases was merely a new application of the old principles of the court(*c*).

24. The Court of Chancery in this Province is entirely the creation of statute. By the Constitutional Act(*d*), passed in 1792, the law of England was introduced, but no court of equity existed until one was created by the 7 Wm. 4, c. 2, passed on the 4th of March, 1837. By that and subsequent Acts(*e*), the court has the like jurisdiction and power, as by the laws of

(*a*) Story, s. 47.

(*b*) See Harg. Law Tracts, 333; 1 Eq. Ca. Abrid. Courts, B(*a*).

(*c*) Story, s. 49; 4 Reeves, Hist. 368; 3 Black. Comm. 54; Bacon's Ord. in Chan. by Beames.

(*d*) 32 Geo. III. c. 1.

(*e*) 12 Vic. c. 64, s. 8; 13 & 14 Vic. c. 50, s. 4; 16 Vic. c. 159, s. 21; 20 Vic. c. 56, s. 1.

England were at that date possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say; (1) In all cases of fraud and accident; (2) and in all matters relating to trusts, executors and administrators, co-partnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates; (3) and also, to stay waste; (4) to compel the specific performance of agreements; (5) to compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same; (6) to prevent multiplicity of suits; (7) to stay proceedings in a court of law prosecuted against equity and good conscience; (8) to decree the issue of Letters Patent from the Crown to rightful claimants; (9) to repeal and avoid Letters Patent issued erroneously, or by mistake or improvidently, or through fraud; (10) and generally, the like jurisdiction and power as the Court of Chancery in England possessed on the 10th day of June, 1857, as a court of equity(*a*), to administer justice in all cases in which there exists no adequate remedy at law(*b*).

25. The rules of decision in the court are, except when otherwise provided, the same as governed the Court of Chancery in England, in like cases, on the 4th day of March, 1837. And the court possesses power to enforce obedience to its orders, decrees and judgments, to the same extent as was then possessed by the court in England(*c*).

26. The court may also grant an injunction to stay waste in a proper case, notwithstanding that the party in possession claims by an adverse legal title(*d*). And it has jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and to pronounce such wills and testaments void for fraud, or undue influence or otherwise, in the same manner and to the same extent as the court has

(*a*) The Court in this Province has none of the jurisdiction possessed by the Court of Chancery in England on the petty bag side, and therefore is not a court of record.
(*b*) Con. Stat U. C. c. 12, s. 26.
(*c*) 7 Wm. 4, c. 2, s. 6.
(*d*) 20 Vic. c. 56, s. 4.

jurisdiction to try the validity of deeds and other instruments(*a*).

27. The court has also jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England, to a decree for a restitution of conjugal rights(*b*).

28. The court possesses the same equitable jurisdiction in matters of revenue, as is possessed by the Court of Exchequer, in England(*c*).

CHAPTER III.

GENERAL VIEW OF EQUITY JURISDICTION.

29. Courts of equity, in the exercise of their jurisdiction may, in a general sense, be said to differ from courts of common law, in the modes of trial, in the modes of proof, and in the modes of relief. One or more of these elements will be found essentially to enter, as an ingredient, into every subject over which they exert their authority.

30. Three things, said Coke, are to be judged of in the court of conscience or equity, covin, accident, and breach of confidence(*d*). But although fraud, accident, and trust are proper objects of equity jurisdiction, to say that they are exclusively cognizable therein, is by no means correct; courts of law in

(*a*) 12 Vic. c. 64, s. 9.

(*b*) 7 Wm. 4, c. 2, s. 3; 20 Vic. c. 56, s. 2.

(*c*) 28 Vic. c. 17, s. 2; 33 Hen. 8, c. 39, s. 79; Att.-Gen. *v.* Halling, 15 M. & W. 687; *Ex parte* Colebrooke, 7 Price, 87; Colebrooke *v.* Att.-Gen. 7 Price, 146; Manning Ex. Pr. 101. And see Miller *v.* Att.-Gen. 9 Gr. 558; Norwich *v.* Att.-Gen. 9 Gr. 563.

(*d*) 4 Inst. 84; Com. Dig. Chancery, Z.; Bac. Abr. Court of Chancery, C.; 3 Black. Comm. 431; Earl of Bath *v.* Sherwin, Prec. Ch. 261; s. c. 4 Bro. P. C. 373; Rex. *v.* Hare & Mann. 1 Str. 149.

many cases, take cognizance of fraud. Thus reading a deed falsely to an illiterate person, whether by the grantee, or by a stranger, avoids it as to the other party, even at law(*a*). Many cases of accident, such as losses of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions, and other like cases, are remediable at law. And even trusts, are sometimes cognizable at law; as, for instance, cases of bailments, and that larger class of cases, where the action for money had and received for another's use is maintained *ex æquo et bono*(*b*).

31. There are, on the other hand, cases of fraud, accident, and trust, in which neither courts of law, nor of equity, presume to grant relief. Thus, where the law has determined a matter, with all its circumstances, equity cannot intermeddle. And, therefore, in such cases, notwithstanding accident, or unavoidable necessity, equity will not interfere(*c*). So, there can be no relief where a man by accident omits to make a will, appointment, or gift, in favor of some friend or relative; or leaves his will unfinished(*d*). Many cases of the non-performance of conditions precedent are equally without redress(*e*). So, cases of trust exist, in which the parties must abide by their own false confidence in others, without any aid from courts of justice. Thus, in cases of illegal contracts, or those in which one party has placed property in the hands of another for illegal purposes, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the former must abide by his loss. The maxim, *In pari delicto melior est conditio possidentis, et defendentis*, is equally respected in courts of equity, as in courts of law(*f*). On the other hand, where the fraud is perpetrated by one party only, if it

(*a*) Thoroughgood's case, 2 Rep. 9 a; Hobart, 126, 296, 330, 426; Shulter's case, 12 Rep. 90.

(*b*) Story, s. 60.

(*c*) Heard *v.* Stanford, Cas. t. Talb. 174.

(*d*) Whitton *v.* Russell, 1 Atk. 448.

(*e*) Popham *v.* Bamfield, 1 Vern. 83; Lord Falkland *v.* Bertie, 2 Vern. 333.

(*f*) Holman *v.* Johnson, Cowper, 341; Smith v. Bromley, Doug. 696 note. And see Batty *v.* Chester, 5 Beav. 103; McGill *v.* McGlashan, 6 Gr. 324; Langlois *v.* Baby, 10 Gr. 358; 11 Gr. 21.

involves a public crime, and redress cannot be obtained, except by a discovery of the facts from him personally, still the case is one of irremediable injury, as the law will not compel him to accuse himself of a crime(*a*).

32. In addition to those maxims which are acted upon as well in courts of law as in courts of equity, and besides various other maxims which in terms apply to particular parts of the system of equity, there are certain maxims and general axioms peculiar to equity, which are of frequent recurrence, and which it is of the greatest use rightly to understand and to bear in mind.

33. The maxim, that "Equity will not suffer a wrong without a remedy," lies at the foundation of a large portion of equity jurisprudence as a suppletory system. But the principle conveyed by that maxim must be understood with certain limitations. It must be regarded as referring exclusively to rights which come within a class enforceable by law, or capable of being judicially enforced, without occasioning a greater detriment or inconvenience to the public, than would result from leaving them to be enforced in *foro conscientiæ*. And it must also be understood to refer to cases where the party who is remediless at law, has not sacrificed or lost his remedy by his own act or laches(*b*), and to cases where there is no equal or superior adverse right. Thus if a man should destroy his own remedy to distrain for rent, and debt would not lie, he would not be relievable in equity(*c*). So, in cases proper for law, a man must defend himself by legal pleadings, and a court of equity will not relieve against either mispleading, or where there is a neglect and want of a plea, or no proper plea put in in time, for it was the man's own fault(*d*). And where, upon a motion for injunction to restrain proceedings upon an

(*a*) See Dixon *v.* Enoch, L. R. 13 Eq. 394, for a statutory exception to the rule in England.

(*b*) Francis Max. 6, s. 3.

(*c*) 1 Roll. Abr. 375, pl. 3.

(*d*) Anon. 1 Vern. 119; Stephenson *v.* Wilson, 2 Vern. 696; *Ex parte* Goodwyn, 2 Vern. 696; Blackhall *v.* Coombes, 2 P. W. 70; Morrison *v.* McLean, 7 Gr. 167. But see Robinson *v.* Bell, 2 Vern. 146; Lady Gainsborough *v.* Gifford, 2 P. W. 424.

execution at law, it was shewn that the facts upon which the plaintiff's right in equity was founded had been raised as a defence to the action by way of equitable plea, the motion was refused(*a*). But it has also been held, that although if an equitable defence be properly raised at law and adjudicated upon, the adjudication cannot be reviewed by a court of equity; yet where the defence was not properly raised at law, and consequently judgment passed against it, the party entitled to the benefit of it is not precluded from raising it in equity(*b*).

34. The common maxim, that "Equity follows the law"(*c*). *Equitas sequitur legem*, is susceptible of various interpretations. It may mean, either that equity adopts and follows the rules of law in all cases, to which those rules may, in terms be applicable; or, that equity in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law. It is true in both of these senses, as applied to different cases and different circumstances. In neither sense, is it universally true, or rather it is not of universal application(*d*). Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it, as a court of law(*e*). If the law commands, or prohibits a thing to be done, equity cannot enjoin the contrary, or dispense with the obligation. And yet there are cases in which equity, so far from following the law, openly abandons it. Thus, if an heir-at-law should, by parol, promise his father to pay his sisters' portions, if he would not direct timber to be felled to raise them; although discharged at law, he would in equity

(*a*) Boulton *v.* Cameron, 9 Gr. 297; Terrell *v.* Higgs, 1 D. & J. 388; Farebrother v. Welchman, 3 Drew. 122. And see Pomeroy *v.* Boswell, 7 Gr. 163; Crabb *v.* Parsons, 18 Gr. 674. See also 29 & 30 Vic. c. 42, s. 3.

(*b*) Craig *v.* Gore Dist. Mutual Ins. Co. 10 Gr. 137; Arnold *v.* Allinor, 16 Gr. 213, reversing decision of V. C. Mowat, s. c. 15 Gr. 37; Phelps *v.* Prothero, 7 D. M. & G. 722; Evans *v.* Brembridge, 8 D. M. & G. 100; Waterlow *v.* Bacon, L. R. 2 Eq. 514.

(*c*) See Earl of Bath *v.* Sherwin, 10 Mod. 1; Cowper *v.* Cowper, 2 P. W. 753.

(*d*) Burgess *v.* Wheate, 1 W. Black, 137.

(*e*) Kemp *v.* Pryor, 7 Ves. 249; Bac. Abr. Court of Chancery, C.

be deemed liable to pay them, in the same way as if they had been charged on the land(*a*).

35. In many cases, equity acts, by analogy to the rules of law in relation to equitable titles and estates. Thus, although the statutes of limitations are in their terms applicable to courts of law only, equity by analogy, acts upon them, and refuses relief under like circumstances. Equity always discountenances laches, and holds, that laches are presumable in cases where it is positively declared at law. Thus, in cases of equitable titles in land, equity requires relief to be sought within the same period in which an ejectment would lie at law(*b*). And, in cases of personal claims, it requires relief to be sought within the period prescribed for personal suits of a like nature(*c*). There are, however, cases in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief(*d*); and on the other hand there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief(*e*).

36. The maxim, that equity follows the law, is one liable to many exceptions, and it cannot be generally affirmed, that, where there is no remedy at law in the given case, there is none in equity; or, on the other hand, that equity, in the administration of its own principles, is utterly regardless of the rules of law(*f*).

(*a*) Story, s. 64; Dalton *v.* Poole, 1 Vent. 318; Raw *v.* Potts, 2 Vern. 239. And see Hobbs *v.* Norton, 1 Vern. 136; Neville *v.* Wilkinson, 1 Bro. C. C. 543; Devenish *v.* Baines, Prec. Ch. 3; Oldham *v.* Litchfield, 2 Freem. 285; Thynn *v.* Thynn, 1 Vern. 296; 11 Ves. 638, 639; Loffus *v.* Maw, 3 Giff. 592.

(*b*) Beckford *v.* Wade, 17 Ves. 99.

(*c*) Edsell *v.* Buchanan, 2 Ves. 83; Smith *v* Clay, 3 Bro. C. C. 640, note; Cholmondeley, *v.* Clinton, 2 J. & W. 156; Crooks *v.* Watkins, 8 Gr. 340.

(*d*) Stahlschmidt *v.* Lett, 1 Sm. & G. 415; Hill *v.* Walker, 4 K. & J. 166; Clinch *v.* Brophy, 10 Ir. Eq. 325; Crooks *v.* Crooks, 4 Gr. 615; Blaikie *v.* Staples, 13 Gr. 67; but see St. Vincent *v.* Grier, 13 Gr. 473. And see Irwin *v.* Freeman, 13 Gr. 465; Moffat *v.* Walker, 15 Gr. 155; Walmsley *v.* Bull, 15 Gr. 210; Stevenson *v.* Hodder, 15 Gr. 570; Carroll *v.* Eccles, 17 Gr. 529; Holmes *v.* Holmes, 17 Gr. 610.

(*e*) Story, s. 64 a; and see Pickering *v.* Lord Stamford, 2 Ves. 279, 582; Stackhouse *v.* Barnston, 10 Ves. 466; Bond *v.* Hopkins, 1 S. & L. 413; Cowper *v.* Cowper, 2 P. W 753.

(*f*) Kempt *v.* Pryor, 7 Ves. 249; Story, s. 64 b.

37. Another maxim is, that "Where there is equal equity, the law must prevail." This is generally true, for, in such a case, the defendant has an equal claim to the protection of a court of equity for his title; as the plaintiff has to the assistance of the court to assert his title; and the court will not interpose on either side(*a*); for the rule then applies, "*In æquali jure melior est conditio possidentis*"(*b*). It is upon this ground, that a court of equity refuses to interfere, either for relief or discovery, against a *bona fide* purchaser of the legal estate for a valuable consideration, without notice of the adverse title, if he chooses to avail himself of the defence at the proper time and in the proper mode(*c*). And it extends its protection equally, if the purchase is originally of an equitable title without notice, and afterwards with notice, the party obtains or buys in a prior legal title, in order to support his equitable title(*d*). This doctrine applies strictly in all cases, where the title of the plaintiff, seeking relief, is equitable. It was at one time, a matter of some doubt, whether it was applicable to the case of a plaintiff, seeking relief upon a legal title(*e*); but it seems now settled after much conflict of opinion, that the plea will prevail against a legal as well as an equitable claim (*f*). But the purchaser must have paid his purchase money before notice, for otherwise he will not be protected(*g*).

38. But, even when the title of each party is purely equitable, it does not always follow that the maxim admits of no

(*a*) Peto *v.* Hammond, 30 Beav. 495.

(*b*) Jerrard *v.* Saunders, 2 Ves. 454.

(*c*) See Sug. V. &. P. ch. 25; Story, Eq. Pl. ss. 603, 604, 805, 806. A plea of purchase for value, without notice, cannot be set up against the crown, Att.-Gen. *v.* McNulty, 11 Gr. 281, 581.

(*d*) Saunders *v.* Dehew, 2 Vern. 271; Goleborn *v.* Alcock, 2 Sim. 552; Phillips *v.* Phillips, 7 Jur. N. S. 1094; 8 Jur. N. S. 145.

(*e*) Bassett *v.* Nosworthy, Finch, 102; Burlace *v.* Cook, 2 Freem. 24; Williams *v.* Lambe. 3 Bro. C. C. 264; Jerrard *v.* Saunders, 2 Ves. 454, 458; Strode *v.* Blackburn, 3 Ves. 221; Collins *v.* Archer, 1 R & M. 284, 292.

(*f*) Sug. V. & P. 791; Walwyn *v.* Lee, 9 Ves. 24; Payne *v.* Compton, 2 Y. & C. *Ex.* 457; Bowen *v.* Evans, 1 J. & L. 263; Joyce *v.* DeMoleyns, 2 J. & L. 374; Att.-Gen. *v.* Williams, 17 Beav. 235. And see Frazer *v.* Jones, 5 Ha. 475; on app. 12 Jur. 443, Stackhouse *v.* Lady Jersey, 1 J. & H. 721; Hope *v.* Liddell, 21 Beav. 183; Penny *v.* Watts, 1 Mac. & G. 150; 2 D. & Sm. 501; Lane *v.* Jackson, 20 Beav. 539. But see Finch *v.* Shaw, Colyer *v.* Finch, 19 Beav. 500; 5 H. L. 905.

(*g*) Tildesley *v.* Lodge, 2 Sm. & G. 543.

preference of the one over the other, for another maxim, "*Qui prior est in tempore, potior est in jure*," may prevail. Precedency in time will, under many circumstances, give an advantage, or priority in right(*a*).

39. The rule is sometimes expressed in this form; "As between persons having only equitable interests, *Qui prior est in tempore, potior est in jure*." This is an incorrect statement of the rule, for that proposition is far from being universally true. In fact not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal; as is the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the name of trustees, where the second assignee has given notice, and the first has neglected to do so(*b*).

40. Another form of stating the rule is this, "As between persons having only equitable interests, if other equities are equal, *Qui prior est in tempore, potior est in jure*." This is not so obviously incorrect as the former, and yet even this enunciation of the rule, when accurately considered, seems to involve a contradiction. For when two persons are spoken of as having equal or unequal equities, in what sense is the word equity used? It is impossible strictly speaking that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. The rule should perhaps be stated thus, "as between persons having only equitable interests, if these equities are in all other respects equal, priority of time gives the better equity, or *Qui prior est in tempore, potior est in jure*." The real meaning of the rule is this, that, in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; that is, a court of equity will not prefer the one

(*a*) Becket *v.* Cordley, 1 Bro C. C. 358; Mackreth *v.* Symons, 15 Ves. 329.
(*b*) Dearle *v.* Hall, 3 Russ. 1; Loveridge *v.* Cooper, 3 Russ. 30.

to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or in other words that their equities are in all other respects equal; and that if the one has on other grounds a better equity than the other, priority of time is immaterial. In examining into the relative merits, or equities, of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these, the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points it must apply the test, not of any technical rule, or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights(*a*).

41. Another maxim of no small extent is, that "He who seeks equity must do equity"(*b*). This maxim principally applies to the party seeking relief in the character of a plaintiff in the court. Thus, for instance, before the repeal of the usury laws, if a borrower of money upon usurious interest sought the aid of a court of equity in cancelling, or procuring the instrument to be delivered up, the court would not interfere in his favour, unless upon the terms of his paying the lender what was really and *bona fide* due to him(*c*). But if the lender came into equity, to assert and enforce his own claim under the instrument, the borrower might show the invalidity of the instrument, and have a decree in his favour and a dismissal of the bill, without paying the lender anything, for the court will never assist a wrong-doer in effectuating his wrongful and illegal purpose(*d*). So, where a party seeks the benefit of a purchase made for him in the name of a

(*a*) Rice *v.* Rice, 2 Drew. 73.

(*b*) McDonald *v.* Neilson, 2 Cowp. 139; Farr *v.* Sheriffe, 4 Ha. 521; Hanson *v.* Keating, 4 Ha. 4; Bowser *v.* Colby, 1 Ha. 143; Williams *v.* Fowkes, 9 Ha. 595; Oxford *v.* Provand, L. R. 2 P. C. 125. And see Wiggins *v.* Meldrum, 15 Gr. 377.

(*c*) And see Drake *v.* Bank of Toronto, 9 Gr. 116.

(*d*) Mason *v.* Gardiner, 4 Bro. C. C. 437; Peacock *v.* Evans, 16 Ves. 512.

trustee, who has paid the purchase-money, but to whom he is indebted for other advances, he shall not be relieved but upon payment of all the money due to the trustee(*a*).

42. Other illustrations of the maxim, of a different nature, may be given. For instance, if a person having a title to an estate stands by and suffers a person ignorant of it to expend money upon the estate, either in buildings or other improvements, and afterwards asserts his title at law, upon proving his title, judgment would be given for him, without any compensation for improvements being given to the party evicted(*b*). In equity, however, a person who has expended money under such circumstances on the estate of another would be entitled to be indemnified for his expenditure, either by pecuniary compensation, or in some cases, if he were a lessee under a defective lease, by a confirmation of his title(*c*). This maxim is also frequently illustrated in that class of cases where, in consequence of some misdescription in the property sold, a court of equity will not enforce specific performance at the suit of the vendor, unless he makes compensation for the injury the defendant has sustained from the misdescription(*d*).

43. Another maxim is, "He who comes into equity must come with clean hands." So that if a person seeks to cancel, set aside, or obtain the delivery up of an instrument on account of fraud, and he himself has been guilty of participation in the fraud, equity will not interpose in his behalf, unless the fraud is against public policy, and public policy would be defeated by allowing it to stand. Thus where an infant, fraudulently concealing his age, obtained from trustees part of stock to which he was entitled on coming of age; and, when of age a few months after, he applied for and received the residue of such stock, it was held a fraud on the part of

(*a*) Sturgis *v.* Champneys, 5 M. & C. 97.

(*b*) But see now, Ont. Stat. 36 Vic. c. 22.

(*c*) Thornton *v.* Ramsden, 4 Giff. 519; Powell *v.* Thomas, 6 Ha. 300. And see Paul *v.* Johnston 12 Gr. 474; Carroll *v.* Robertson, 15 Gr. 173; McLaren *v.* Fraser, 17 Gr. 567; Gummerson *v.* Banting, 18 Gr. 516.

(*d*) Knatchbull *v.* Grueber, 1 Madd. 153; Hughes *v.* Jones, 3 D. F. & J. 307. And see Osborne *v.* Farmers and Mechanics' Building Society, 5 Gr. 326.

the infant, and neither he nor his assignees were allowed to enforce repayment by the trustees of the stock paid during his minority(*a*). The rule must be understood to refer to wilful misconduct in regard to the matter in litigation, and not to any misconduct however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern.

44. It is also a maxim that, "*Vigilantibus non dormientibus æquitas subvenit*," the meaning of which is, that equity discountenances laches, and, independently of any statute of limitation, has always refused to interfere where there has been gross delay in prosecuting rights, or long acquiescence in the assertion of adverse rights(*b*). Under such circumstances it would, in many cases, be impossible to interfere without doing injustice to third persons who had acquired interests in the property during the intervening period. In general, nothing can call forth a court of equity into activity but conscience, good faith, and personal diligence. But where acquiescence is relied on, it must be shown that the person acquiescing was aware of the thing in which he acquiesced, and of the effect of such acquiescence(*c*).

45. Another maxim of general use is, "Equality is equity"; or, as it is sometimes expressed, equity delighteth in equality(*d*); and this equality, according to Bracton, constitutes equity itself. This maxim is variously applied; as, for example, to cases of contribution between co-contractors, sureties, and others; to cases of abatement of legacies, where there is a deficiency of assets; and to cases of apportionment of moneys

(*a*) Overton *v.* Bannister, 3 Ha. 503; Savage *v.* Foster, 9 Mod, 35; Nelson *v.* Stocker, 4 D. & J. 458. And see Leary *v* Rose, 10 Gr. 346; Hope *v.* Beard, 8 Gr. 380; Blain *v.* Terryberry, 11 Gr. 286.

(*b*) See Hook *v.* McQueen, 4 Gr. 231; Clarke *v.* Hawke, 11 Gr. 118; Smith *v.* Bonnisteel, 13 Gr. 29; Forsyth *v.* Johnson, 14 Gr. 639; Walker *v.* Brown 14 Gr., 237; Brady *v.* Keenan, 14 Gr. 214; Larkin, *v.* Good, 17 Gr. 585; Smallcombe's case, L. R. 3 Eq., 769.

(*c*) Strange *v.* Fooks, 4 Giff. 408.

(*d*) Petit *v.* Smith, 1 P. W. 9; Hulme *v.* Chitty, 9 Beav. 437.

due on encumbrances among different purchasers and claimants of different parcels of the land(*a*).

46. Another maxim is, that "Equity looks upon that as done, which ought to have been done." The true meaning of this maxim is, that equity will treat the subject-matter, as to collateral consequences, and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been; not as the parties might have executed them. But equity will not thus consider things in favor of all persons; but only in favor of such as have a right to pray that the acts might be done(*b*). And the rule itself is not, in other respects, of universal application. The most common cases of the application of the rule are under agreements. All agreements are considered as performed, which are made, for a valuable consideration, in favor of persons entitled to insist upon their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed. They are, also, deemed to have the same consequences attached to them; so that one party, or his privies, shall not derive benefit by his laches or neglect, and the other party, for whose profit the contract was designed, or his privies, shall not suffer thereby. Thus, money covenanted or devised, to be laid out in land, is treated as real estate in equity(*c*). And, on the other hand, where land is contracted or devised to be sold, the land is considered and treated as money. There are exceptions to the doctrine, where other equitable considerations intervene, or where the intent of the parties leads the other way; but these demonstrate, rather than shake, the potency of the general rule(*d*).

47. There are, also, one or two rules, as to the extent of maintaining jurisdiction, which deserve notice, as they apply to various descriptions of cases, and pervade whole branches

(*a*) Story s. 64 f; Martin *v.* Martin, 1 Ves. 211; Lewin *v.* Okeley, 2 Atk. 50; Newton *v.* Bennet, 1 Bro. C. C. 185; Silk *v.* Prime, 1 Bro. C. C. 138, note; Hazlewood *v.* Pope, 3 P. W. 322.

(*b*) Burgess *v.* Wheate, 1 W. Black. 123, 129; Crabtree *v.* Bramble, 3 Atk. 987.

(*c*) Fletcher *v.* Ashburner, 1 Bro. C. C. 497.

(*d*) Story, s. 64g; and see Craig *v.* Leslie, 3 Wheaton, 563.

of equity jurisprudence, and cannot therefore, with propriety, be exclusively arranged under any one head.

48. One rule is that, if originally the jurisdiction has properly attached in equity in any case, on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the courts of law now entertaining jurisdiction in such cases, when they formerly rejected it. The jurisdiction of equity, like that of law, must be of a permanent and fixed character, and being once vested legitimately in the court, it must remain there, until the legislature shall abolish, or limit it; for without some positive Act, the just inference is, that the legislative pleasure is, that the jurisdiction shall remain upon its old foundations(*a*).

49. Another rule respects the exercise of jurisdiction, when the title is at law, and the party comes into equity for a discovery, and for relief, as consequent on that discovery. In many cases, it has been held, that where a party has a just title to come into equity for a discovery, and obtains it, the court will go on, and give him the proper relief; and not turn him round to the expenses and inconveniences of a double suit at law. The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief. The ground is stated to be the propriety of preventing a multiplicity of suits(*b*), a ground of itself quite reasonable, and sufficient to justify the relief, and one upon which courts of equity act, as a distinct ground of original jurisdiction(*c*).

50. In cases of account, there seems a distinct ground upon which the jurisdiction for discovery should incidentally carry the jurisdiction for relief. The remedy at law, in most cases of this sort, is imperfect or inadequate, and where this objection does not occur, the discovery sought must often be

(*a*) See Atkinson *v.* Leonard, 3 Bro. C. C. 218; *Ex. parte* Greenway, 6 Ves. 812; Kemp *v.* Pryor, 7 Ves. 249; Bromley *v.* Holland, 7 Ves. 19; East India Co. *v.* Boddam, 9 Ves. 468; Re Stannard, 1 Chan. Cham. R. 16.

(*b*) 1 Fonbl. Eq. B. 1, ch. 1, s. 3, note [*f*]; and see Parker *v.* Dee, 2 Ch. Ca. 200.

(*c*) Story s. 64 k. See Jesus College *v.* Bloom. 3 Atk. 262; Pearce *v.* Creswick, 2 Ha. 293; Adley *v.* The Whitstable Company, 17 Ves. 329; Ryle *v.* Haggie, 1 J. & W. 236; McKenzie *v.* Johnston, 4 Mad. 373.

obtained through the instrumentality of a master, or of some interlocutory order of the court; in which case it would seem strange, that the court should grant some, and not proceed to full relief(*a*). Even in cases not falling under either of these predicaments, the compelling of the production of vouchers and documents would seem to belong peculiarly to a court of equity, and to be a species of relief(*b*).

51. Similar reasons for extending the jurisdiction to relief, where it attaches for discovery, occur in cases of accident and mistake. In such cases the remedy at law is neither complete nor appropriate. And cases of fraud are least of all those in which the complete exercise of the jurisdiction of a court of equity in granting relief ought to be questioned or controlled. Indeed in many cases of fraud, what should be the nature and extent of the redress, whether wholly legal or wholly equitable, or a mixture of both, can scarcely be decided but upon a full hearing of the cause.

52. When we depart from matters of fraud, accident, mistake, and accounts, as the foundation of a suit in equity, it is more difficult to ascertain where the right of a court of equity to entertain a bill for relief, as consequent upon the jurisdiction for discovery, begins and where it ends(*c*). The difficulty is increased by the rule adopted in the courts of equity in England, that if the party seeks relief as well as discovery, and he is entitled to discovery only, a general demurrer will lie to the whole bill(*d*). The effect of this rule is, that the plaintiff may be compelled, in a doubtful case, to frame his bill for a discovery in the first instance, and having obtained it, he may be compelled to ask leave to amend (which will not ordinarily be granted, unless it is clear that the proper relief is in equity,) and then he may try the question, whether he is entitled to relief or not(*e*).

(*a*) 3 Black Comm. 437; Corporation of Carlisle *v.* Wilson, 13 Ves. 278. And see Jesus College *v.* Bloom, 3 Atk., 262.

(*b*) Story, s. 67.

(*c*) See Ryle *v.* Haggie, 1 J. & W. 234; Pearce *v.* Creswick, 2 Ha. 286.

(*d*) Story, Eq. Pl. ss. 312, 545.

(*e*) Story, s. 70; Mitford Eq. Pl. by Jeremy, p. 183, note (*n*); Cooper, Eq. Pl. ch. 1, s. 3, 58; ch. 2, s. 3, 188; Story, Eq. Pl., s, 312 and note [1]; Lousada *v.* Templer, 2 Russ. 564; Frietas *v.* Don Santos, 1 Y. & Jerv. 577; Severn *v.* Fletcher, 5 Sim. 457.

53. In ascertaining the true boundaries of the jurisdiction at present exercised by courts of equity, the subject naturally divides itself into three heads: the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction(*a*).

54. The concurrent jurisdiction of equity has its true origin in one of two sources; either the courts of law, although they have general jurisdiction in the matter, cannot give adequate, specific, and perfect relief; or, under the actual circumstances of the case, cannot give any relief at all. The former occurs when a simple judgment for the plaintiff, or for the defendant, does not meet the full merits and exigencies of the case; but a variety of adjustments, limitations, and cross claims are to be introduced, and finally acted on; and a decree meeting all the circumstances of the particular case between the very parties, is indispensable to complete distributive justice. The latter occurs, when the object sought cannot be accomplished by the courts of law; as, for instance, a perpetual injunction, or a preventive process, to restrain trespasses, nuisances, or waste. The concurrent jurisdiction of equity, therefore, extends to all cases of legal rights, where there is not a plain, adequate, and complete remedy at law(*b*).

55. The subject may be divided into two branches: (1.) that, in which the subject-matter constitutes the principal (for it rarely constitutes the sole) ground of the jurisdiction; and (2.) that, in which the peculiar remedies afforded by courts of equity constitute the principal (although not always the sole) ground of the jurisdiction(*c*).

(*a*) 1 Fonbl. Eq. B. 1, ch. 1, s. 3, note (*f*).
(*b*) Story s. 76; Com. Dig. Chancery, 3 F.
(*c*) Story s. 77.

CHAPTER IV.

ACCIDENT.

56. ACCIDENT is not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party. The jurisdiction of the court arising from accident in the general sense is probably coeval with its existence(*a*).

57. But equity will not interfere in every case of accident(*b*). The jurisdiction, being concurrent, it will do so only, when a court of law cannot grant suitable relief, and when the party has a conscientious title to relief. Both grounds must concur, for otherwise a court of equity not only may, but is bound to withhold its aid.

58. The first question is, whether there is an adequate remedy at law, not merely, whether there is some remedy. And here a most material distinction must be attended to. Courts of law now frequently interfere, and grant relief under circumstances in which it would certainly have been at one time denied. The legislature, by express enactments, has conferred on courts of law in some cases, the same remedial faculty which belongs to courts of equity. Now if the courts of equity originally obtained and exercised jurisdiction, that jurisdiction is not overturned or impaired by this change of the authority at law, for unless there are prohibitory or restrictive words used, the uniform interpretation is, that they confer concurrent and not exclusive remedial authority. And a court of law cannot by its own act, oust or repeal a jurisdiction which has rightfully attached in equity(*c*).

(*a*) Story, ss. 78, 79. See East India Co. *v.* Boddam, 9 Ves. 466; Armitage *v.* Wadsworth, 1 Madd. 189.

(*b*) Whitfield *v.* Fausset, 1 Ves. Sen. 392.

(*c*) Atkinson *v.* Leonard, 3 Bro. C. C. 218; *Ex parte* Greenway, 6 Ves. 812; Bromley *v.* Holland, 7 Ves. 19, 20; East India Company, *v.* Boddam, 9 Ves. 466; Walmsley *v.* Child, 1 Ves. Sen. 341; Kemp *v.* Pryor, 7 Ves. 248; British Empire Shipping Co. *v.* Somes, 3 K. & J. 437.

59. One of the most common interpositions of equity under this head is, in the case of lost bonds, or other instruments under seal. Until recently there could be no remedy at law on a lost bond, because there could be no *profert*, without which the declaration would have been fatally defective(*a*). Now, however, courts of law entertain the jurisdiction, and dispense with the *profert*, but this circumstance is not permitted in the slightest degree to change the course in equity(*b*).

60. The original ground, therefore, of granting the relief, was the inadequacy of a court of law, to afford it in a suitable manner from the impossibility of making a *profert*, but independently of this ground, for the original interference of equity, there is another satisfactory ground for the continuance of that interference. No other court can furnish the same remedy with all the fit limitations which justice may require, by granting *relief* only upon the terms of the party's giving a suitable bond of indemnity. Now, a court of law is incompetent to require such a bond of indemnity as a part of its judgment, although it has sometimes attempted an analagous relief by requiring the previous offer of such an indemnity(*c*). But such an offer may, in many cases, fall far short of the just relief; for, in the intermediate time, there may be a great change of the circumstances of the parties to the bond of indemnity(*d*). In joint bonds, there are still stronger reasons, for the equities may be different between the different defendants. And besides, a court of equity, before it will grant *relief*, insists that the defendant shall have the protection of the oath and affidavit of the plaintiff to the fact of the loss(*e*).

(*a*) Whitfield *v.* Fausset, 1 Ves. Sen. 392, 393; Co. Lit. 35 (*b*); Rex *v.* Arundel, Hob. 109; Atkinson *v.* Leonard, 3 Bro. C. C. 218; *Ex parte* Greenway, 6 Ves. 812; Bromley *v.* Holland, 7 Ves. 19, 20; East India Company *v.* Boddam, 9 Ves. 466; Toulman *v.* Price, 5 Ves. 238.

(*b*) Con. Stat. U. C. c. 22, s. 78; And see Read *v.* Brokman, 3 T. R. 151; Totty *v.* Nesbit, 3 T. R. 153, note. The jurisdiction of equity extends to destroyed bonds, County of Frontenac *v.* Bredin, 17 Gr. 645.

(*c*) *Ex parte* Greenway, 6 Ves. 312; Pierson *v.* Hutchinson, 2 Camp. 211; s. c. 6 Esp. 126; Hansard *v.* Robinson, 7 B. & C. 90.

(*d*) East India Company *v.* Boddam, 9 Ves. 466; *Ex parte* Greenway, 6 Ves. 812.

(*e*) Story, s. 82; Bromley *v.* Holland, 7 Ves. 19, 20; *Ex parte* Greenway, 6 Ves. 812; Whitchurch *v.* Golding, 2 P. W. 541; Anon. 3 Atk. 17; Walmsley *v.* Child, 1 Ves. Sen. 344, 345.

61. Where discovery only, and not relief, is the object of the bill, equity grants the discovery without any affidavit of loss, or offer of indemnity, and, in a variety of cases, this is all that the plaintiff desires(*a*). The ground of this distinction is, that, when relief is prayed, the proper forum of jurisdiction is sought to be changed from law to equity; and in all such cases an affidavit ought to be required to prevent abuse of the process of the court. When discovery only is sought, the original jurisdiction remains at law, and equity is merely auxiliary. In all cases where relief is sought, there must be an affidavit of the loss, and when proper, an offer of indemnity also in the bill(*b*).

62. But the loss of a deed is not always a ground to come into a court of equity for relief. If there is no more in the case, although the party may be entitled to a discovery of the original existence and validity of the deed, courts of law may afford just relief, since they will admit evidence of the loss and contents of a deed, just as a court of equity will do(*c*). To enable the party, therefore, in case of a lost deed, to come into equity for relief, he must establish, that there is no remedy at all at law, or no remedy which is adequate, and adapted to the circumstances of the case. The bill must always lay some ground, besides the mere loss of a title-deed or other sealed instrument, to justify a prayer for relief; as, that the loss obstructs the right of the plaintiff at law, or leaves him exposed to undue perils in the future assertion of such right (*d*).

63. With reference to lost bills of exchange and other negotiable instruments, it has after some conflict of authority been decided that if a bill, note, or cheque, negotiable either by endorsement or by delivery only, be lost, no action will lie at

(*a*) Dormer *v.* Fortescue, 3 Atk. 132: Whitchurch *v.* Golding, 2 P.W. 541; Walmsley *v.* Child, 1 Ves. Sen. 344, 345.

(*b*) Story, s. 83; Walmsley *v.* Child, 1 Ves. Sen. 344.

(*c*) Whitfield *v.* Faussat, 1 Ves. Sen. 392.

(*d*) Story, s. 84; See 1 Fonbl. Eq. B. 1, ch. 1, s. 3, note (*f*); ch. 3, s. 3. See Mitf. Eq. Pl. by Jeremy, 113, 114. And see Walmsley, *v.* Child, 1 Ves. Sen. 344; Dalston *v.* Coatsworth, 1 P. W. 731; Dormer *v.* Fortescue, 3 Atk. 132.

the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration(*a*); and the law is the same though the bill has never been endorsed(*b*). In this case, therefore, the proper remedy is in equity, not only on the ground of there being no remedy at law, but also on account of the power equity possesses of compelling the plaintiff to give a proper indemnity to the defendant. And the jurisdiction of equity over lost bills is not taken away by the Con. Stat. U. C. c. 42, s. 33, which provides that in an action founded upon a bill of exchange or other negotiable instrument, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity against the claims of any other person upon such instrument is given to the satisfaction of the court or judge.

64. But if a bill or note, not negotiable, be lost, an action, it would seem, will lie either on the bill or on the consideration, for no indemnity would be necessary, and, consequently no relief can be had in equity(*c*).

65. As to destroyed negotiable instruments, the law seems unsettled. The weight of authority seems in favour of the conclusion that at common law, by the custom of merchants, the holder on payment must deliver up the bill, and cannot recover unless he do so, which he cannot when the instrument is destroyed. But it has been held in equity, that courts of equity never acquired jurisdiction to give relief on account of the destruction of a bill of exchange, because there was a complete remedy in such a case at law(*d*).

66. Upon grounds somewhat similar, courts of equity often interfere, where the party, from the long possession or exercise of a right over property, may fairly be presumed to have had a legal title to it, and yet has lost the legal evidence of it, or is now unable to produce it. Equity, under such circum-

(*a*) Hansard *v.* Robinson, 7 B. & C. 90; Crowe *v.* Clay, 9 Ex. 604.
(*b*) Ramuz *v.* Crowe, 1 Ex. 167.
(*c*) Byles on Bills, 351; Hansard *v.* Robinson, 7 B. & C. 95.
(*d*) Wright *v.* Maidstone, 1 K. & J. 708.

stances, acts upon the presumption, arising from such possession, as equivalent to complete proof of the legal right. Thus, where a rent has been received and paid for a long time, equity will enforce the payment, although no deed can be produced to sustain the claim, or the precise lands, out of which it is payable, cannot, from confusion of boundaries, or other accident, be now ascertained(*a*).

67. There are many other cases of accident, where courts of equity grant both discovery and relief. One of the earliest cases in which they were accustomed to interfere, was, where by accident a bond had not been paid at the appointed day, and it was subsequently sued; or where a part only had been paid at the day(*b*). This jurisdiction was afterwards greatly enlarged in its operation, and applied to all cases, where relief is sought against the penalty of a bond, upon the ground that it is unjust for the party to avail himself of the penalty, when an offer of full indemnity is tendered. The same principle governs in the case of mortgages, where courts of equity constantly allow a redemption, although there is a forfeiture at law(*c*).

68. Executors and administrators often pay debts and legacies upon the entire confidence that the assets are sufficient for all purposes. Yet from unexpected occurrences, or from debts and claims, made known at a subsequent time, it may turn out that there is a deficiency of assets. Under such circumstances they may be entitled to no relief at law. But in a court of equity, if they have acted with good faith, and with due caution, they will be clearly entitled to it, upon the ground, that, otherwise, they will be innocently subject to an unjust loss, from what the law itself deems an accident(*d*).

(*a*) Story s. 87; Steward *v.* Bridger, 2 Vern. 516; Collet *v.* Jaques, 1 Ch. Cas. 120; Cox *v.* Foley, 1 Vern. 359; Eton College *v.* Beauchamp, 1 Ch. Cas. 121; Holder *v.* Chambury, 3 P. W. 256; Duke of Leeds *v.* Powell, 1 Ves. Sen. 171; Duke of Bridgewater *v.* Edwards, 6 Bro. P. C. 368; Duke of Leeds *v.* New Radnor, 2 Bro. C. C. 338, 518; Benson *v.* Baldwin, 1 Atk. 598.

(*b*) Cary's Rep. 1, 2; Seton *v.* Slade, 7 Ves. 273.

(*c*) Story s. 89; Seton *v.* Slade, 7 Ves. 273, 274; Lennon *v.* Napper, 2 S. & L. 684, 685.

(*d*) Edwards *v.* Freeman, 2 P. W. 447 Johnson *v.* Johnson, 3 Bos. & Pull. 162,

69. An executor or administrator once become fully responsible, by an actual receipt of a part of his testator's property, for the administration thereof, cannot at law found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, or destruction by fire, or loss by robbery or the like, or of reasonable confidence disappointed, or of loss by any of the other various means, which afford an excuse to ordinary agents and bailees in cases of loss without any negligence on their part; and courts of law are disinclined to make such a precedent(*a*).

70. In equity, however, an executor or administrator stands in the position of a gratuitous bailee; with respect to whom the law is, that he is not to be charged without some default in him(*b*). Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not, in equity, be charged with them as assets(*c*). Again, if the goods be perishable goods, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself*(d)*.

71. Other cases, in which an executor or administrator would be entitled to relief in equity, may be put. Thus, if he should receive money, supposed to be due from a debtor to the estate, and it should turn out that the debt had been previously paid, and, before the discovery, he had paid away the money to creditors of the estate; in such a case the supposed debtor may recover back the money in equity from the executor; and the

169; Hawkins *v.* Day, Ambl. 160; Chamberlain *v.* Chamberlain, 2 Freem. 141. But see Coppin *v.* Coppin, 2 P. W. 296, 297; Orr *v.* Kaines, 2 Ves. Sen. 194; Underwood *v.* Hatton, 5 Beav. 36. As to what amounts to an admission of assets, see Coleman *v.* Whitehead, 3 Gr. 227.

(*a*) Crosse *v.* Smith, 7 East, 246; Johnson *v.* Johnson, 3 Bos. & Pull. 162, 169.

(*b*) Wentw. Off. Ex. 235; Com. Dig. Assets, D. But see Wightwick *v.* Lord, 6 H. L. 217.

(*c*) Jones *v.* Lewis, 2 Ves. Sen. 240.

(*d*) Clough *v.* Bond, 3 M. & C. 496; Wms. on Exors. 1541.

latter may, in the same manner, recover it back from the creditors to whom he paid it. In like manner, if an executor should recover a judgment, and receive the amount, and apply it in discharge of debts, and then the judgment should be reversed, he is compellable to refund the money, and may recover it back from the creditors(*a*).

72. A court of equity will interfere on analagous grounds, in favour of an unpaid legatee, to compel the other legatees, who have been paid their legacies in full, to refund in proportion, if there was an original deficiency of assets to pay all the legacies, and the executor is insolvent. But equity will not interfere, if there was no such original deficiency, and there has been a waste by the executor(*b*). The reason of the distinction seems to be, that the other legatees in the first case have received more than their just proportion of the assets, but in the last case no more than their just proportion. There is, therefore, nothing inequitable in their availing themselves of their superior diligence(*c*). But as creditors have a prior right to satisfaction out of the assets, legatees are always compellable to refund in their favour(*d*).

73. Other instances of relief in equity, being given upon the ground of accident, may be referred to. Where a minor is bound apprentice to a person, and a premium is given for the apprenticeship to the master, who, during the apprenticeship becomes bankrupt, equity will interfere, and apportion the premium, upon the ground that the contract had failed from accident(*e*). So, if an annuity is directed by a will to be secured by public stock, and an investment is made accordingly, sufficient at the time for the purpose, but afterwards the stock is reduced by

(*a*) Story, s. 91; Pooley *v.* Ray, 1 P. W. 355; 2 Eq. Abridg. Ex'rs, 452, pl. 5; Pickering *v.* Stamford, 2 Ves. 583.

(*b*) Coppin *v.* Coppin, 2 P. W. 296; Orr *v.* Kaines, 2 Ves. Sen. 194; Moore *v.* Moore, 2 Ves. 600; Anon. 1 P. W. 495; Noel *v.* Robinson, 1 Vern. 94, note [1]; Edwards *v.* Freeman, 2 P. W. 447. And see Fenwick *v.* Clarke, 31 L. J. Ch. 728.

(*c*) Hodges *v.* Waddington, 2 Vent. 360; Newman *v.* Barton, 2 Vern. 205; Orr *v.* Kaines, 2 Ves. 194.

(*d*) Noel *v.* Robinson, 1 Vern. 90, 94, 460; Newman *v.* Barton, 2 Vern. 205; Nelthorp *v.* Hill, 1 Ch. Cas. 136; Anon. 1 Vern. 162; Hardwick *v.* Mynd, 1 Anst. 112.

(*e*) Hale *v.* Webb, 2 Bro. C. C. 78, and note; *Ex parte* Sandby, 1 Atk. 149.

act of parliament, so that the investment becomes insufficient, equity will decree the deficiency to be made up as an accident against the residuary legatees(*a*).

74. The non-execution of a mere power will never be aided in equity. But where there is a defective execution of a power, resulting either from accident or mistake, or both, and also in regard to agreements to execute powers, which may generally be deemed a species of defective execution(*b*), the rule is different. Equity will relieve in such a case, but only in favour of persons in a moral sense entitled to the same, and viewed with peculiar favour, and where there are no opposing equities on the other side(*c*). The aid of equity will be afforded in favour of a purchaser(*d*), which term includes a mortgagee and a lessee(*e*), creditors(*f*), a wife(*g*), a legitimate child(*h*), and a charity(*i*), but not in favour of the donee of the power, or a husband(*j*), or a natural child(*k*), or grandchildren(*l*), or remote relations, much less of volunteers(*m*), or strangers generally.

75. But in cases of defective execution of powers, a distinction must be drawn between powers created by private parties, and those which are specially created by statute. The latter are construed with more strictness, and whatever formalities are required by the statute must be punctually complied

(*a*) Davies *v.* Wattier, 1 S. & S. 463; May *v.* Bennet, 1 Russ. 370. And see Hatchett *v.* Pattle, 6 Madd. 4.

(*b*) 2 Chance on Powers, ch. 23; ss. 2824, 2825, 2897 to 2915.

(*c*) Sug. on Powers, 532; 2 Chance on Powers, ch. 23; ss. 2817 to 2932.

(*d*) Fothergill *v.* Fothergill, 2 Freem. 257.

(*e*) Barker *v.* Hill, 2 Chan. Rep. 113; Reid *v.* Shergold, 10 Ves. 370; Bradley *v.* Bradley, 2 Vern. 163; Taylor *v.* Wheeler, 2 Vern. 564; Jennings *v.* Moore, 2 Vern. 609; Marquis of Donegal *v.* Greg, 13 Ir. Eq. 12, 52.

(*f*) Pollard *v.* Greenvil, 1 Chan. R p. 10; Wilkes *v.* Holmes, 9 Mod. 485.

(*g*) Clifford *v.* Burlington, 2 Vern. 379; Coventry *v.* Coventry, 2 P. W. 222.

(*h*) Sneed *v.* Sneed, Ambl. 64; Hervey *v.* Hervey, 1 Atk, 561.

(*i*) Innes *v.* Sayer, 7 Ha. 377; 3 Mac. & G. 606; Att. Gen. *v.* Sibthorp, 2 R & M. 107.

(*j*) Watt *v.* Watt, 3 Ves. 244. And see Hughes *v.* Wells, 9 Ha. 749.

(*k*) Tudor *v.* Anson, 2 Ves. Sen. 582.

(*l*) Watts *v.* Bullas, 1 P. W. 60; Freestone *v.* Rant, 3 Bro. C. C. 231; Chapman *v.* Gibson, 3 Bro. C. C. 229; Hill *v.* Downton, 5 Ves. 564; Perry *v.* Whitehead, 6 Ves. 544.

(*m*) Smith *v.* Aston, 1 Freem. 309.

with, otherwise the defect cannot, or, at least, may not be helped in equity(*a*).

76. The defects which will be remedied, may generally be said to be any which are not of the very essence or substance of the power. Thus, a defect in executing the power by *will*, when it is required to be by a deed, or other instrument, *inter vivos*, will be aided(*b*). So, the want of a seal, or of witnesses, or of a signature, and defects in the limitations of the property, estate, or interest, will be aided(*c*). But equity will not aid defects which are of the very essence or substance of the power; as, for instance, if the power be executed without the consent of parties, who are required to consent to it(*d*). So, if it be required to be executed by *will*, and it is executed by an irrevocable and absolute *deed*(*e*).

77. A class of cases more common in their occurrence, and more extensive in their operation, will be found, where trusts, or powers in the nature of trusts, are required to be executed by the trustee in favour of particular persons, and they fail of being so executed by casualty or accident. In all such cases equity will interpose, and grant suitable relief, because it is not a mere power given to the trustee, but is a trust and duty which he ought to fulfil; and his omission so to do by accident, or design, ought not to disappoint the objects of the bounty(*f*). If the case were of a mere naked power, and not a power coupled with a trust, it would be very different(*g*).

78. What shall constitute an execution, or preparatory steps or attempts towards the execution of a power, entitling the

(*a*) Earl of Darlington *v.* Pultney, Cowp. 267. But see 2 Chance on Powers, ch. 23, art. 2985.

(*b*) Tollett *v.* Tollett, 2 P. W. 489. See Mills *v.* Mills, 8 Ir. Eq. 192; 29 Vic. c. 28, s. 11.

(*c*) Chance on Powers, ch. 23, ss. 2878, 2879, 2886, 2890.

(*d*) Mansell *v.* Mansell, cited, Scott *v.* Tyler, 2 Bro. C. C. 450.

(*e*) Story, s. 97; Sug. on Powers, 210; Reid *v.* Shergold, 10 Ves. 370; Adney *v.* Field, Ambl. 645; Anderson *v.* Dawson, 15 Ves. 532. And see Marjoribanks *v.* Hovendon, Dru. 11.

(*f*) Warneford *v.* Thompson, 3 Ves. 573; Brown, *v.* Higgs, 8 Ves. 574.

(*g*) Harding *v.* Glyn, 1 Atk. 469, and note; Brown *v.* Higgs, 4 Ves. 709; 5 Ves. 495; 8 Ves. 561; 2 Chance on Powers, ch. 23, s. 1.

party to relief in equity, on the ground of a defective execution, has been largely and liberally interpreted. But some steps must be taken, or acts done such as are properly referrable to the power, with the sole and definite intention of executing it. A mere loose and indefinite intention to execute the power, without some steps being taken to give it legal effect, is not sufficient(*a*).

79. Where by accident or mistake, upon a transfer of a bill of exchange, or a promissory note, there has been an omission by the party to indorse it according to the intention of the transfer, the party, or, in case of his death, his executor or administrator, may be compelled in equity to make the indorsement, and if the party has since become bankrupt, or his estate is insolvent, his assignees will be compelled to make it, for the transaction amounts to an equitable assignment, and a court of equity will clothe it with a legal effect and title(*b*).

80. Those cases of accident, in which no relief will be granted by courts of equity, may next be considered. In the first place, in matters of positive contract and obligation, created by the party (for it is different in obligations or duties created by law), it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident, or, that he has been in no default, or, that he has been prevented by accident, from deriving the full benefit of the contract on his own side(*c*). Thus, if a lessee covenants to pay rent, or to keep the demised estate in repair, he will be bound in equity as well as in law to do so, notwithstanding an inevitable accident or necessity by which the premises are destroyed or injured, as if they are burnt by lightning, or destroyed by public enemies, or by any other accident, or by overwhelming force. The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will

(*a*) See Shannon *v.* Bradstreet, 1 S. & L. 60; Gullan *v.* Grove, 26 Beav. 64; Pomfret *v.* Perring, 5 D. M. & G. 775; Carver *v.* Richards, 6 Jur. N. S. 410; Cooper *v.* Martin, 12 Jur. N. S. 887; Bambridge *v.* Smith, 8 Sim. 86.

(*b*) Story, s. 99 b; Watkins *v.* Maule 2 J. & W. 242. But see Edge *v.* Bumford, 31 Beav. 247.

(*c*) See Com. Dig. Chan. 3 F. 5; Berrisford *v.* Done, 1 Vern. 98.

presume an intentional general liability, where he has made no exception(*a*).

81. And the like doctrine applies to other cases of contract, where the parties stand equally innocent(*b*). Thus, if there is a contract for a sale at a price to be fixed by an award during the life of the parties, and one of them dies before the award is made, the contract fails, and equity will not enforce it upon the ground of accident; for the time of making the award is expressly fixed in the contract according to the pleasure of the parties; and there is no equity to substitute a different period(*c*). So, if an estate should be sold, for a certain sum of money and an annuity, and the agreement should be fair, equity will not grant relief, although the party should die before the payment of any annuity(*d*).

82. Courts of equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault, for in such a case the party has no claim to come into a court of justice to ask to be saved from his own culpable misconduct. And, on this account, in general, a party coming into a court of equity is bound to show that his title to relief is unmixed with any gross misconduct or negligence of himself or his agents(*e*).

83. Courts of equity will not interfere upon the ground of accident, where the party has not a clear vested right, but his claim rests in mere expectancy, and is a matter not of trust, but of volition. Thus, if a testator, intending to make a will in favour of particular persons, is prevented from doing so by accident, equity cannot grant relief, for a legatee or devisee

(*a*) Story, s. 101; Bullock *v.* Dommitt, 6 T. R. 650; Brecknock, &c. Canal Co. *v.* Pritchard, 6 T. R. 750; Paradine *v.* Jane, Aleyn, 27; Monk *v.* Cooper, 2 Str. 763; Belfour *v.* Weston, 1 T. R. 310; Pym *v.* Blackburn, 3 Ves. 34; Holtzapffell *v.* Baker, 18 Ves. 115; Harrison *v.* Lord North, 1 Ch. Cas. 83.

(*b*) Com. Dig. Chancery, 3 F. 5.

(*c*) Blundell *v.* Brettargh, 17 Ves. 232, 240. And see White *v.* Nutt, 1. P. W. 61.

(*d*) Story, ss. 103, 104; Mortimer *v.* Capper, 1 Bro. C. C. 156; Jackson *v.* Lever, 3 Bro. C. C. 605. See also 9 Ves. 246.

(*e*) Story, s. 105; *Ex parte* Greenway, 6 Ves. 812. See also Bromley *v.* Holland, 7 Ves. 19; East India Co. *v.* Boddam, 9 Ves. 467.

can take only by the bounty of the testator, and has no independent right, until there is a title consummated by law(*a*).

84. And no relief will be granted on account of accident, where the other party stands upon an equal equity, and is entitled to equal protection.

85. Against a *bona fide* purchaser, for a valuable consideration, without notice, a court of equity will not interfere on the ground of accident; for, in the view of a court of equity, such a purchaser has as high a claim to assistance and protection as any other person can have(*b*).

86. Upon a general survey of the grounds of equitable jurisdiction in cases of accident, it will be found that they resolve themselves into the following: that the party seeking relief has a clear right, which cannot otherwise be enforced in a suitable manner; or, that he will be subjected to an unjustifiable loss, without any blame or misconduct on his own part; or, that he has a superior equity to the party from whom he seeks the relief(*c*).

CHAPTER V.

MISTAKE.

87. MISTAKE as recognized and remedied in equity is sometimes the result of accident in its large sense, but, as distinguished from it, it is some unintentional act, omission, or error, arising from ignorance, surprise, imposition or misplaced confidence. Mistakes may be either in matter of law, or in matter of fact(*d*).

(*a*) Whitton *v.* Russell, 1 Atk. 448. And see Brown *v.* Higgs, 8 Ves. 561; Pierson *v.* Garnett, 2 Bro. C. C. 38, 226; Duke of Marlborough, *v.* Godolphin, 2 Ves. 61; Harding *v.* Glyn, 1 Atk. 469; Tollet *v.* Tollet, 2 P. W. 489.

(*b*) Story, s. 108.

(*c*) Story, s. 109.

(*d*) Story, s. 110.

88. The rule that ignorance of law is not an excuse, either for a breach or an omission of duty, is common to all systems of law. *Ignorantia juris haud excusat*, is the maxim of the common law(*a*), and this maxim is equally respected in equity (*b*). But this maxim applies only when the word "*jus*" is used in the sense of denoting general law, the ordinary law of the country, and not when it is used in the sense of denoting a private right(*c*).

89. One of the most common cases, put to illustrate the doctrine, is, where two are bound by a bond, and the obligee releases one, supposing, by a mistake of law, that the other will remain bound. In such a case the obligee will not be relieved in equity upon the mere ground of his mistake of the law(*d*). So, where a party having a power of appointment, executed it absolutely, without introducing a power of revocation, under a mistake of law, that being a voluntary deed it was revocable, relief was in like manner denied(*e*). And where a clause containing a power of redemption, in a deed granting an annuity, after it had been agreed to, was deliberately excluded by the parties, under the mistaken idea that it would render the contract usurious, the court refused to restore the clause, or to grant relief(*f*).

90. The maxim is not, however, of universal application in equity(*g*). No exception to its general application is admitted when the word *jus* is used in the sense of denoting general

(*a*) 1 Plowd. 342; see Manser's case, 2 Rep. 3 a, b; Cook *v.* Wotton, 4 Leon. 190; Stevens *v.* Lynch, 12 East 38; Teede *v.* Johnson, 11 Ex. 840; Pooley *v.* Brown, 11 C. B. N. S. 566.

(*b*) Malden *v.* Menill, 2 Atk. 8; Marshall *v.* Collett, 1 Y. & C. 232; Denys *v.* Shuckburg, 4 Y. & C. 42; Mellers *v*, Duke of Devonshire, 16 Beav. 257; Midland Great Western Co. of Ireland *v.* Johnson, 6 H. L. 798.

(*c*) Cooper *v.* Phibbs, L. R. 2 E. & I. App. 170.

(*d*) Com. Dig. Chancery, 3 F. 8; Cann *v.* Cann. 1 P. W. 723, 727. But see *Ex parte* Gifford, 6 Ves. 805; Nicholson *v.* Revell, 4 Ad. & E. 675.

(*e*) Worrall *v.* Jacob, 3 Mer. 195.

(*f*) Story, ss. 112, 113; Irnham *v.* Child, 1 Bro. C. C. 92. And see Pullen *v.* Ready, 2 Atk. 591; Frank *v.* Frank; 1 Ch. Ca. 84; Mildmay *v.* Hungerford, 2 Vern. 243; Stockley *v.* Stockley, 2 V. & B. 23, 30; Lord Portmore *v.* Morris, 2 Bro. C. C. 219; Marquis of Townshend *v.* Stangroom, 6 Ves. 332.

(*g*) Naylor *v.* Winch, 1 S. & S. 555; Watson *v.* Marsden, 4 D. M. & G. 230, 236; Stone *v.* Godfrey, 5 D. M. & G. 76, 90.

law, the ordinary law of the country; but it is otherwise when the word is used in the sense of denoting a private right(*a*). Accordingly, equity will grant relief where a party has acted under a misconception, or ignorance of his title to property respecting which some agreement has been made or conveyance executed(*b*).

91. It has been laid down as unquestionable doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, equity will relieve him from the effect of his mistake. But many, although not all of the cases, where the party knowing the facts has acted upon a mistake of the law, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise, which equity uniformly regards as a just foundation for relief(*c*).

92. Mistake in law, to be a ground for relief in equity, must be of a material nature, and the determining ground of the transaction(*d*). It may be a misapprehension of the law, or of their private rights to property, by both parties to a transaction, both making substantially the same mistake, or it mav be a misapprehension by one of the parties alone. If an agreement be entered into between two parties in mutual mistake as to their respective rights, either of them is entitled

(*a*) Kerr on Frauds, 330; Cooper *v.* Phibbs, L. R. 2 E. & I. App. 170.

(*b*) Cann *v.* Cann. 1 Ph. 727; Pusey *v.* Desbouverie, 3 P. W. 320; Farewell *v.* Coker, cit. 2 Mer. 269; Cocking *v.* Pratt, 1 Ves. 400; Ramsden *v.* Hylton, 2 Ves. 304; Macarthy *v.* Decaix, 2 R. & M. 614; Clifton *v.* Cockburn, 3 M. & K. 99; Sturge *v.* Sturge, 12 Beav. 229; Davies *v.* Morier, 2 Coll. 308; Reynell *v.* Sprye, 8 Ha. 222, 255; Cox *v.* Bruton, 5 W. R. 544.

(*c*) Naylor *v.* Winch, 1 S. & S. 555; Leonard *v.* Leonard, 2 B. & B. 180; Dunnage *v.* White, 1 Swanst. 137; Gordon *v.* Gordon, 3 Swanst. 400; Willan *v.* Willan, 16 Ves. 82; Evans *v.* Llewellyn, 1 Cox, 340; Twining *v.* Morrice, 2 Bro. C. C. 326. And see Ramsden *v.* Hylton, 2 Ves 304; Broughton *v.* Hutt, 3 D. & J. 501; Bingham *v.* Bingham, 1 Ves. 126; Stewart *v.* Stewart, 6 Cl. & Fin. 966.

(*d*) Stone *v.* Godfrey, 5 D. M. & G. 76; Re International Contract Co. L. R. 7 Chan. 485.

to have it set aside(*a*). If the mistake be that of one party only, equity may, under the peculiar circumstances of the case, grant relief. But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction, or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake(*b*).

93. Where a doubtful question arises, such as a question respecting the true construction of a will, a different rule prevails, and a compromise fairly entered into, with due deliberation, will be upheld in equity(*c*). It is enough to make a compromise valid, that there is a question to be decided between the parties(*d*). A compromise of doubtful rights will not be set aside on any other ground than fraud(*e*).

94. If compromises of doubtful rights are otherwise unobjectionable, they will be binding, and the right will not prevail against the agreement of the parties; for the right must always be on one side or the other, and there would be an end of compromises, if they could be overthrown upon any subsequent ascertainment of rights contrary thereto(*f*). If a compromise of a doubtful right is fairly entered into, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent

(*a*) Cooper *v.* Phibbs, L. R. 2 E. & I. App. 149.

(*b*) Pusey *v.* Desbouverie, 3 P. W. 315; Cocking *v.* Pratt, 1 Ves. 400; Macarthy *v.* Decaix. 2 R. & M. 614; Sturge *v.* Sturge, 12 Beav. 229; Schofield *v.* Temple, John. 166; Coward *v.* Hughes, 1 K. & J. 443; Broughton *v.* Hutt, 3 D. & J. 501; Re Saxon Life Assurance Co, 2 J. & H. 408; 1 D. J. & S. 29; Talbot *v.* Hamilton, 4 Gr. 200. See Worsley *v.* Frank, 11 L. T. 392.

(*c*) Stapilton *v.* Stapilton, 1 Atk.10; Gordon *v.* Gordon, 3 Swanst. 463; Leonard *v.* Leonard, 2 B. & B. 179; Naylor *v.* Winch, 1 S. & S. 555; Harvey *v.* Cooke, 4 Russ. 34; Stewart *v.* Stewart, 6 Cl. & Fin. 969; Pickering *v.* Pickering, 2 Beav, 56; Lawton *v.* Campion, 18 Beav. 87; Partridge *v.* Stevens, 9 Jur. N. S. 742; Bullock *v.* Downes, 9 H. L. 1; Brooke *v.* Lord Mostyn, 2 D. J. & S. 373; Lord Belhaven's case, 3 D. J. & S. 41.

(*d*) *Ex parte* Lucy, 4 D. M. & G. 356. And see Neale *v.* Neale, 1 Keen. 672.

(*e*) Brooke *v.* Lord Mostyn, 2 D. J. & S. 373.

(*f*) See Brown *v.* Pring, 1 Ves. Sen. 407, 408; Cann. *v.* Cann, 1 P. W. 727; Stapilton *v.* Stapilton, 1 Atk. 10; Stockley *v.* Stockley, 1 V. & B. 29, 31; Naylor *v.* Winch, 1 S. & S. 555; Goodman *v.* Sayers, 2 J. & W. 263; Pickering *v.* Pickering Beav. 31, 56; Underwood *v.* Lord Courtown, 2 S. & L. 67.

investigation, or future adjudication upon the right(*a*). But if the parties are not mutually ignorant, the case admits of a very different consideration. whether the ignorance be of a matter of fact or of law(*b*). The court of chancery will never hold parties, acting upon their rights, to be bound, unless they act with full knowledge of all the doubts and difficulties that arise. But if parties act, with full knowledge, if the agreement was fair and reasonable at the time, it will be binding, though it turns out that one gains an advantage from a mistake in point of law(*c*). And transactions are not, in equity, treated as binding even as family arrangements, where the doubts existing, as to the rights alleged to be compromised, were not presented to the mind of the party interested(*d*).

95. The compromise of contested claims is favoured in equity (*e*). But trustees are not justified in making doubtful compromises of the interests of their *cestuis que trust*(*f*). And where a compromise was made under a misapprehension of facts, and was of recent date, it was set aside, the matter being regarded as still *sub judice*(*g*).

96. The doctrine sustaining compromises, for the honour or peace of families, has been carried further, in cases of family compromises(*h*). But to render even such compromises binding, there must be an honest disclosure, by each party, of all material facts known to him, calculated to influence the judgment of the other in adopting the compromise; and any advantage taken by either party of the other's known ignor-

(*a*) Leonard *v.* Leonard, 2 B. & B. 179, 180; Dunnage *v.* White, 1 Swanst. 151, 152; Harvey *v.* Cooke, 4 Russ. 34; Stewart *v.* Stewart, 6 Cl. & Fin. 969. And see Gordon *v.* Gordon, 3 Swanst. 470: Pickering *v.* Pickering, 2 Beav. 31, 56; Goymour *v.* Pigge, 8 Jur. 526.

(*b*) Gordon *v.* Gordon, 3 Swanst. 400, 467, 470, 473, 476; Stewart *v.* Stewart, 6 Cl. & Fin. 969. See also Mortimer *v.* Capper, 1 Bro. C. C. 158.

(*c*) Gibbons *v.* Caunt, 4 Ves. 849. See also Dunnage *v.* White, 1 Swanst. 137.

(*d*) Story, s. 131; Henley *v.* Cooke, 4 Russ. 34.

(*e*) Att.-Gen. *v.* Boucherett, 25 Beav. 116, 121. And see Rowley *v.* Rowley, L. R. 1 H. L. Sc. 63; Dawson *v.* Newsome, 6 Jur. N. S. 625.

(*f*) Wiles *v.* Gresham, 5 D. M. & G. 770.

(*g*) Story, s. 131 a; Stainton *v.* The Carron Company, 6 Jur. N. S. 360; aff. 10 Jur. N. S. 783.

(*h*) Stockley *v.* Stockley, 1 V. & B. 29; Bellamy *v.* Sabine, 2 Ph. 425.

ance of such facts will render the compromise void(*a*). And especially if parties are not on equal terms, and one of them stands in such relation to the other, as renders it incumbent on him to give a full account of the matter in dispute, to the utmost of his knowledge, and he omits to do so, the court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties(*b*).

97. The disinclination of equity to set aside a family or other compromise entered into *bona fide*, and with a full disclosure of all facts known to either party, will be strengthened where subsequent arrangements have taken place on the footing of such compromise(*c*). But where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, there has been manifested a strong disinclination of courts of equity to sustain even family settlements(*d*).

98. The jurisdiction of equity over mistake is exercised much more liberally where the mistake is in matter of fact, than where it is in matter of law.

99. Mistake of fact, is a mistake not caused by the neglect of legal duty on the part of the person making the mistake, and consisting in an unconsciousness(*e*), ignorance(*f*), or forgetfulness(*g*), of a fact past(*h*), or present(*i*), material to the

(*a*) Greenwood *v.* Greenwood, 2 D. J. & S. 28 ; Smith *v.* Pincombe, 16 Jur. 205. And see Groves *v.* Perkins, 6 Sim. 576.

(*b*) Pusey *v.* Desbouverie, 3 P. W. 315 ; Sturge *v.* Sturge, 12 Beav 229. And see Langstaff *v.* Fenwick, 10 Ves. 405.

(*c*) Clifton *v.* Cockburn, 3 M. & K. 76 ; Bentley *v.* McKay, 31 Beav. 143 ; Cottle *v.* McHardy, 17 Gr. 342 ; Persse *v.* Persse, 7 Cl. & Fin. 279.

(*d*) Story, s. 132 ; Dunnage *v.* White, 1 Swanst. 137 ; Persse *v.* Persse, 7 Cl. & Fin. 279.

(*e*) Kelly *v.* Solari, 9 M. & W. 54.

(*f*) Cocking *v.* Pratt, 1 Ves. 400 ; East India Co. *v.* Neave, 5 Ves. 173 ; East India Co. *v.* McDonald, 6 Ves. 275 ; Hore *v.* Becher, 12 Sim. 465 ; Bell *v.* Gardner, 4 Man. & Gr. 11.

(*g*) Kelly *v.* Solari, 9 M. & W. 54 ; Lucas *v.* Worswick, 1 Moo. & R. 293.

(*h*) See East India Company *v.* Neave, 5 Ves. 173 ; East India Co. *v.* Donald, 9 Ves. 275 ; Willan *v.* Willan, 16 Ves. 72 ; Macarthy *v.* Decaix, 2 R. & W. 614.

(*i*) Cocking *v.* Pratt, 1 Ves. 400 ; Hore *v.* Becher, 12 Sim. 465 ; Colyer *v.* Clay, 7 Beav. 188 : Broughton *v.* Hutt, 3 D. & J. 501.

transaction; or in the belief in the present existence of a thing material to the transaction which does not exist(*a*), or in the past existence of a thing which has not existed.

100. The general rule as to mistakes of fact is, that an act done, or contract made, under a mistake or ignorance of a material fact, is relievable in equity(*b*). No person can be presumed to be acquainted with all matters of fact, and, therefore, ignorance of facts does not import culpable negligence(*c*). This rule applies not only to cases where there has been a studied suppression or concealment of the facts by the other side, which would amount to fraud; but also to many cases of innocent ignorance and mistake on both sides(*d*). So, if a party has *bonâ fide* entirely forgotten the facts, he will be entitled to relief, because, under such circumstances, he acts under the like mistake of the facts, as if he had never known them(*e*).

101. The rule, as to ignorance or mistake of facts, entitling the party to relief, has this important qualification, that the fact must be material to the act or contract, that is, essential to its character. For though there may be an accidental ignorance or mistake of a fact, yet, if the act or contract is not materially affected by it, relief will be denied(*f*).

102. It is not necessary that, in cases of mutual mistake going to the essence of the contract, there should be any presumption of fraud. Equity will often relieve, however inno-

(*a*) See Hitchcock *v.* Giddings, 4 Price, 135; Colyer *v.* Clay, 7 Beav. 188; Hastee *v.* Couturier, 9 Ex. 102; 5 H. L. 673; Strickland *v.* Turner, 7 Ex. 208; Cochrane *v.* Willis, L R 1 Chan. 58.

(*b*) Pooley *v.* Ray, 1 P. W. 355; Cocking *v.* Pratt, 1 Ves. 400; Hitchcock *v.* Giddings, 4 Price, 135; Leonard *v.* Leonard, 2 B. & B. 171.

(*c*) Ignorance of foreign law is deemed ignorance of fact, Leslie *v.* Bailie, 2 Y. & C. 91, 96; McCormick *v.* Garnett, 5 D. M. & G. 278.

(*d*) See Miles *v.* Stevens, 3 Burr. 21.

(*e*) Story, s. 140; Kelly *v.* Solari, 9 M. & W. 54, 58; East India Co. *v.* Neave, 5 Ves. 173; East India Co. *v.* Donald, 9 Ves. 275; Hore *v.* Becher, 12 Sim. 465; Colyer *v.* Clay, 7 Beav. 188; Hastie *v.* Couturier, 5 H. L. 673; Cochrane *v.* Willis, L. R. 1 Chan. 58.

(*f*) Story, s. 141; Stone *v.* Godfrey, 5 D. M. & G. 76; Carpmael *v.* Powis, 10 Beav. 39; Trigge *v.* Lavallee, 15 Moo. P. C. 276; O'Kill *v.* Whittaker, 1 D. & Sm. 83; Re International Contract Co. L. R. 7 Chan. 485.

cent the parties may be. Thus, if one person should sell a messuage to another, which was, at the time, swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party, a court of equity would relieve the purchaser, upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract(*a*).

103. In the application of the principle, it makes no difference that the subject-matter of the contract be known to both parties to be liable to a contingency, which may destroy it immediately; for if the contingency has, unknown to the parties, already happened, the contract will be void, as founded upon a mutual mistake of a matter, constituting the basis of the contract(*b*). That the fact is material is not, in all cases, sufficient to warrant relief being given; but it must be such as the party could not by reasonable diligence get knowledge of, when he was put upon inquiry(*c*). Though a court of equity will relieve against mistakes, it will not assist a man whose condition is attributable only to that want of due diligence which may be fairly expected from a reasonable person(*d*). Thus, a purchaser who is evicted by reason of a defect in title, which his legal adviser has overlooked, has no equity to recover his purchase-money(*e*). Nor can relief be had against a forfeiture, where a man who is charged with a legal obligation neglects to perform it(*f*).

104. Mistake of fact may be the mistake of one party only, or there may be a mistake of both parties respecting the same matter; and thus there arise two different conditions of the

(*a*) Hitchcock *v.* Giddings, 4 Price, 135, 141. But see Sug. V. & P. 247; Stent *v.* Bailis, 2 P. W. 220; Colyer *v.* Clay, 7 Beav. 188; Hore *v.* Becher, 12 Sim. 465; Cochrane *v.* Willis, L. R. 1 Chan. 58.

(*b*) Story, s. 143 a; Hitchcock *v.* Giddings, 4 Price, 135.

(*c*) Story, s. 146.

(*d*) Duke of Beaufort *v.* Neeld, 12 Cl & Fin. 248, 286; Leuty *v.* Hillas, 2 D. & J. 110; Wild *v.* Hillas, 18 L. J. Ch. 170; Wason *v.* Waring, 15 Beav. 151.

(*e*) Urmston *v.* Pate, 3 Ves. 235, n; See Cator *v.* Lord Pembroke, 1 Bro. C. C. 301, 2 Bro. C. C. 283; Thomas *v.* Powell, 2 Cox, 394.

(*f*) Gregory *v.* Wilson, 9 Ha. 683, 689.

question, which are governed by considerations of a different character(*a*).

105. The mistake of one party only is attended with different consequences, accordingly as the other party is or is not cognisant of the mistake; consequently an agreement cannot be affected by the mistake of either party in expressing his intention, or in his motives, of which the other party has no knowledge. And a party who has entered into an agreement under such a mistake, is bound by it and cannot assert his mistake in avoidance of the agreement(*b*). Upon this principle, it is not competent in the case of a written agreement for either of the parties to avoid its effect, by merely showing that he understood the terms in a different sense from that which they bear in their grammatical construction and legal effect. And when a party is mistaken in his motive for entering into a contract, or in his expectations respecting it, such mistake does not affect the validity of the contract(*c*).

106. In many cases, however, a court of equity refuses to grant a plaintiff specific performance of a contract, which the defendant has entered into under a mistake, even although the plaintiff was not privy to the mistake or implicated in its origin(*d*). A man, who seeks to take advantage of the plain mistake of another, cannot obtain the assistance of equity in doing so, but must rest satisfied with the remedy which a court of law will give him(*e*). The court of equity will not compel a man specifically to perform a contract which he never intended to enter into, or which he would not have entered into, had its true effect been understood. If the description of the property, the subject matter of the sale, or the terms of the contract are ambiguous, so that the one party

(*a*) Kerr on Fraud, 341.

(*b*) Stapylton *v.* Scott, 13 Ves. 427; Alvanley *v.* Kinnaird, 2 Mac. & G. 7; Cox *v.* Bruton, 5 W. R. 544. And see Cottingham *v.* Boulton, 6 Gr. 186.

(*c*) Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bayley, 5 Q. B. 288; Cumberlege v. Lawson, 1 C. B. N. S. 709; Shirley v. Davis, cited 6 Ves. 678. But see Evans v. Bremridge, 2 K. & J. 174; 3 D. M. & G. 100.

(*d*) See Harris v. Pepperell, L. R. 5 Eq. 1; Denny v. Hancock, L. R. 6 Chan. 1.

(*e*) Manser *v.* Back, 6 Ha. 448; Wood *v.* Scarth, 2 K. & J. 33; Needler *v.* Campbell, 17 Gr. 592.

may have reasonably made a mistake as to the subject matter or terms of the contract, or may have reasonably put a different construction on the contract from that which was contemplated by the other, the court will not assist either of them in enforcing the contract against the other(*a*).

107. Where the mistake is of one party alone to a contract, and it is known to the other at the time of making the contract, the fact that the latter knew of the mistake may have an important bearing on the validity of the contract. If the one party has by misrepresentation caused the mistake, his conduct may amount to fraud(*b*). If he knew of the mistake, but is not responsible for causing it, and merely remains silent, the question depends on the nature of the mistake and the general circumstances of the case. When the mistake is in the expression of the agreement, one of the parties cannot in equity hold the other bound to an expression of intention which he knew to be not in accordance with his real intention(*c*).

108. If the mistake is not in the expression of the agreement, but in some fact materially inducing it, the mere knowledge in the one party of a mistake in the other party does not, in the absence of a duty to disclose, or other special circumstances, constitute a sufficient ground in equity for avoiding the agreement. If the parties act fairly, and it is not a case where one is bound to communicate the facts to the other, upon the ground of confidence; or where the means of information are open to both parties, and each is presumed to exercise his own

(*a*) Harnett v. Yielding, 2 S. & L. 549; Watson *v.* Marston, 4 D. M. & G. 230; Wood *v.* Scarth 2 K. & J. 33; Baxendale *v.* Seale, 19 Beav. 601; Webster *v.* Cecil, 30 Beav. 64; Hood *v.* Oglander, 34 Beav. 518. And see Manser *v.* Back, 6 Ha. 443; Alvanley *v.* Kinnaird, 2 Mac. & G. 7; Falcke *v.* Gray, 4 Drew. 659; Shrewsbury & Birmingham Rail. Co. *v.* North Western Rail. Co., 6 H. L. 113; Calverly *v.* Williams, 1 Ves. 210; Jenkinson *v.* Pepys, cited 1 V. & B. 528; 15 Ves. 521; Clowes *v.* Higginson, 1 V. & B. 524; Neap *v.* Abbott, C. P. Coop, 333; Manser *v.* Back, 6 Ha. 447; Swaisland *v.* Dearsley, 29 Beav. 430; Moxey *v.* Bigwood, 8 Jur. N. S. 803; Parker *v.* Taswell, 2 D. & J. 559. See Wycombe Rail. Co. *v.* Donnington Hospital, L. R. 1 Chan. 268; McLaughlin *v.* Whiteside, 7 Gr. 573.

(*b*) See Worsley *v.* Frank, 11 L. T. 392; Shearman *v.* Macgregor 11 Ha. 106.

(*c*) Garrard *v.* Frankel, 30 Beav. 445. See also Harris *v.* Pepperell, L. R. 5 Eq. 1; Worsley *v.* Frank, 11 L. T. 392.

skill, diligence, and judgment with regard to a subject matter, where there is no confidence reposed, but each party is dealing with the other at armslength, equity will not relieve(*a*).

109. Money paid voluntarily, under mistake of fact, is recoverable both at law and in equity, unless it be clear that the party making the payment intended to waive all inquiry into the facts. It is not enough that he may have had the means of learning the truth, if he had chosen to make inquiry; the only limitation is that he must not waive all inquiry(*b*).

110. Sometimes by mistake, a written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent by expressing something different from the truth of that intent. In all such cases, equity will reform the contract, so as to make it conformable to the intent of the parties, if the mistake is clearly made out by satisfactory proofs(*c*).

111. The general rule of the common law is, that where a contract has been reduced to writing, verbal evidence cannot be given of what passed between the parties either before the written instrument was made, or during the time it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract(*d*). But courts of equity admit parol evidence to show that by accident, mistake or fraud, a written agreement does not contain the inten-

(*a*) Wright *v.* Goff, 22 Beav. 207; The Metropolitan Counties Society *v.* Brown, 26 Beav. 454; Pring *v.* Brown, 1 Ves. 408; Mortimer *v.* Capper, 1 Bro. C. C. 158; Anslie *v.* Medleycott, 9 Ves. 13; Crooks v. Davis, 6 Gr. 317; McRae *v.* Froom, 17 Gr. 357.

(*b*) Kelly *v.* Solari, 9 M. & W. 54; Townsend *v.* Crowdy, 8 C. B. N. S. 477. See Gregory *v.* Pilkington, 8 D. M. & G. 616; Shand *v.* Grant, 15 C. B. N. S. 324.

(*c*) Story, s. 152; Murray *v.* Parker, 19 Beav. 308. And see Allan *v.* Thorne, 3 Gr. 645; Russell *v.* Davy, 6 Gr. 165; White *v.* Haight, 11 Gr. 420; Chapin *v.* Clarke, 7 Gr. 75; Martin *v.* Reid, 8 U. C. L. J. 186; Arran *v.* Amabel, 15 Gr. 701; 17 Gr. 163.

(*d*) Goss *v.* Lord Nugent, 3 B. & Ad. 64, 65. But see Wilson *v.* Wilson, 5 H. L. 66. So by Scotch law "a writing cannot be cut down or taken away by the testimony of witnesses." Tait Ev. 326, 327.

tion and meaning of the parties(*a*). To enforce the performance of an agreement under such circumstances would be the highest injustice; it would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake or accident to resist the claims of justice under shelter of a rule framed to promote it(*b*). And such parol evidence is admitted whether the purpose of the suit be to rectify or rescind the agreement (*c*).

112. If parties enter into an agreement, but there is an error in the reduction of the agreement into writing, so that the written instrument fails through some mistake, either in matter of law(*d*) or of fact, to represent the real agreement of the parties, or omits or contains terms or stipulations contrary to the common intention of the parties, a court of equity will correct and reform the instrument; so as to make it conformable to the real intent of the parties(*e*). So, also, if a conveyance, executed for the purpose of giving effect to and executing an agreement, should by mistake give the purchaser less than the agreement entitled him to, he may call on the court to

(*a*) Marquis of Townshend *v.* Stangroom, 6 Ves. 332; Shelburne *v.* Inchiquin, 1 Bro. C. C. 338, 350; Simpson *v.* Vaughan, 2 Atk. 31; Langley *v.* Brown, 2 Atk. 203; Henkle *v.* Royal Assurance Co. 1 Ves. 314; Le Targe *v.* De Tuyle, 1 Gr. 227; Barnhart *v.* Patterson, 1 Gr. 459; Stewart *v.* Horton, 2 Gr. 45; Papineau *v.* Gurd, 2 Gr. 512; Willard *v.* McNab, 2 Gr. 601; Greenshields *v.* Barnhart, 3 Gr. 1; Holmes *v.* Matthews, 3 Gr. 379; Forrester *v.* Campbell, 17 Gr. 379; McDonald *v.* Ferguson, 17 Gr. 652. But see Howland *v.* Stewart, 2 Gr. 61; McAlpine *v.* How, 9 Gr. 372; McDonald *v.* Rose, 17 Gr. 657.

(*b*) South Sea Co. *v.* D'Oliffe, cited 1 Ves. 317; 2 Ves. 377; 5 Ves. 601; Pitcairne *v.* Ogbourne, 2 Ves. 375; Clowes *v.* Higginson, 1 V. & B. 524; Ball *v.* Stone, 1 S. & S. 210; Clinan *v.* Cooke, 1 S. & L. 32; Parsons *v.* Bignold, 13 Sim. 518; Murray *v.* Parker, 19 Beav. 308. The court will not correct an instrument made in consideration of marriage, except on the evidence of the mistake of both parties, Sells *v.* Sells, 1 Dr. & Sm. 45. And see Thompson *v.* Whitmore, 1 J. & H. 268; Bradford *v.* Romney, 30 Beav 431.

(*c*) Bentley *v.* Mackay, 31 L. J. Ch. 709; Garrard *v.* Frankell, 30 Beav. 451.

(*d*) Wake *v.* Harrop, 1 H. & C. 202.

(*e*) Beaumont *v.* Bramley, T. & R. 41; Cockerell *v.* Cholmeley, Taml. 435; Ashurst *v.* Mill, 7 Ha. 502; Barrow *v.* Barrow, 18 Beav. 529; Murray *v.* Parker, 19 Beav. 308; Malmesbury *v.* Malmesbury, 31 Beav. 407; Scholfield *v.* Lockwood, 32 Beav. 436; 33 L. J. Ch. 106; Reade *v.* Armstrong, 7 Ir. Ch. 375; Druiff *v.* Parker, L. R. 5 Eq. 137.

rectify the defective conveyance, and give him all that the agreement comprehended(*a*).

113. A person who seeks to reform an instrument on the ground of mistake, must be able to prove not only that there has been a mistake, but he must show exactly and precisely the form to which the deed ought to be brought, in order that it may be set right, according to what was really intended; and must be able to establish in the clearest and most satisfactory manner, that the alleged intention of the parties to which he desires to make it conformable, continued concurrently in the minds of all parties down to the time of its execution. The evidence must be such as to leave no fair and reasonable doubt that the deed does not embody the final intention of the parties(*b*).

114. Equity grants relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it may fairly be implied from the nature of the transaction. Thus, where there has been a joint loan of money to two or more obligors, and they are by the instrument made jointly liable, but not jointly and severally, the court has reformed the bond, and made it joint and several, upon the reasonable presumption, from the nature of the transaction, that it was so intended by the parties, and was omitted by want of skill or by mistake(*c*). The debt being

(*m*) Monro *v.* Taylor, 3 Mac. & G. 718; Leuty *v.* Hillas, 2 D. & J. 120; Walker *v.* Armstrong, 8 D. M. & G. 544. In most, if not all the cases where the court has reformed an instrument, there has been something beyond the parol evidence, such as a draft of the agreement, written instructions or the like, but the court will act where the mistake is already established by parol evidence, even where there is nothing to which the parol evidence may attach, Mortimer *v.* Shortall, 2 Dr. & War. 373; Lackersteen *v.* Lackersteen, 6 Jur. N. S. 1111; Tomlison *v.* Leigh, 11 Jur. N. S. 962.

(*b*) Marquis of Townsend *v.* Strangroom, 6 Ves. 334; Beaumont *v.* Bramley, T. & R. 41, 50; Marquis of Breadalbane *v.* Marquis of Chandos, 2 M. &. C. 740; Rooke *v.* Lord Kensington, 2 K. & J. 764; Fowler *v.* Fowler, 4 D. & J. 265; Earl of Bradford *v.* Earl of Romney, 30 Beav. 431; Bentley *v.* Mackay, 31 L. J., Ch. 709; Sell *v.* Sells, 1 Dr. & Sm. 42. See Lloyd *v* Cocker, 19 Beav. 144.

(*c*) Simpson *v.* Vaughan, 2 Atk. 31, 33; Bishop *v.* Church, 2 Ves. 100, 371; Thomas *v.* Frazer, 3 Ves. 399; Devaynes *v.* Noble, Sleech's case, 1 Mer. 538; Sumner v. Powell, 2 Mer. 30, 35; Hoare *v.* Contencin, 1 Bro, C.C. 27, 29; *Ex parte* Kendall, 17 Ves. 519; Underhill *v.* Horwood, 10 Ves. 209, 227; *Ex parte* Symonds, 1 Cox. 200; Burn *v.* Burn, 3 Ves. 573, 583; *Ex parte* Bates and Henckill, 3 Ves. 400, note; Gray *v.* Chiswell, 9 Ves. 118; Thorpe *v.* Jackson, 2 Y. & C. 553.

joint, the inference in such case is, that it is intended by all the parties, that in every event the responsibility should attach to each obligor, and to all equally. Formerly, in case of the death of one of the obligors, the survivor only was liable at law for the debt(*a*), but now the representatives of a deceased joint contractor are liable in the same manner as if the contract had been joint and several(*b*).

115. It seems now well established as a general principle, that every contract for a joint loan is in equity to be deemed, as to the parties borrowing, a joint and several contract, whether the transaction be of a mercantile nature or not. In every such case it may fairly be presumed to be intended that the creditor should have the several, as well as the joint, security of all the borrowers for the repayment of the debt(*c*). Hence, if one of the borrowers should die, the creditor has a right to proceed for immediate relief out of the assets of the deceased party without claiming any relief against the surviving joint contractors, and without showing that the latter are unable to pay by reason of their insolvency(*d*).

116. But where the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived, and equity will not interfere. A partnership debt is treated in equity as the several debt of each partner, although at law it is only the joint debt of all, because all the partners have had a benefit from the money advanced, or the credit given, and the obligation of all to pay exists, independently of any instrument, by which the debt may have been secured(*e*).

117. Upon the same ground, a court of equity will not reform a joint bond against a mere surety, so as to make it several against him, upon the presumption of a mistake from the na-

(*a*) Story, s. 162; Gray *v.* Chiswell, 9 Ves. 118; *Ex parte* Kendall, 17 Ves. 525.
(*b*) Con. Stat. U. C. c. 78, s. 6.
(*c*) Thorpe *v.* Jackson, 2 Y. & C. 553; Wilkinson *v.* Henderson, 1 M. & K. 582. But see Richardson *v.* Horton, 6 Beav. 185.
(*d*) Story, s. 162; Wilkinson *v.* Henderson, 1 M. & K. 582.
(*e*) Sumner *v.* Powell, 2 Mer. 35.

ture of the transaction, but will require positive proof of an express agreement by him, that it should be several as well as joint(*a*). And on proof of such an express agreement, relief will be given as fully against a surety or guarantee, as against the principal party(*b*).

118. Courts of equity will also decree the surrender of a bond to be cancelled, where it has not been executed by all who were expected to become jointly bound, as co-sureties (*c*). And the party complaining is not called upon to shew that he has sustained any substantial injury from the non-execution by the other(*d*).

119. Where an application is made to rectify a settlement, or to reform a contract, on the ground of mistake, the question to be considered is, not what the parties would have done, had they been able to anticipate subsequent developments; but what was their intention at the time the contract was executed(*e*).

120. Equity will not rectify a voluntary deed, unless all the parties consent. If any object, the deed must take its chance as it stands(*f*).

121. A deed will not be reformed on petition or motion, but only upon regular bill for that purpose, wherein the proposed alteration is distinctly set forth; and until the deed is reformed the court is bound to act upon it as it exists, although fully satisfied that it is at variance with the intention of the parties (*g*).

(*a*) Rawstone *v.* Parr, 3 Russ. 539.

(*b*) Story, s. 164; Crosby *v.* Middleton, 2 Eq. Ca. Abr. 188 F; Rawstone *v.* Parr, 3 Russ. 424, 539.

(*c*) Story, s. 164 a; Evans *v.* Brembridge, 2 K. & J. 174; 2 Jur. N. S. 311; Bonser *v.* Cox, 4 Beav. 379; Rice *v.* Gordon, 11 Beav. 265; Rastall *v.* Att.-Gen. 17 Gr. 1.

(*d*) Bonar *v.* McDonald, 3 H. L. 226; Rastall *v.* Att.-Gen. 17 Gr. 1.

(*e*) Wilkinson *v.* Nelson, 7 Jur. N. S. 480. And see Lackersteen *v.* Lackersteen, 6 Jur. N. S. 1111.

(*f*) Story, s. 164 e; Broun *v.* Kennedy, 33 Beav. 133. But see Philipson *v.* Kerry, 32 Beav. 628.

(*g*) Re Malet, 8 Jur. N. S., 226. But see De La Touche's Settlement, L. R. 10 Eq. 599. And see Bradford *v.* Romney, 30 Beav. 431; Walker *v.* Armstrong, 8 D. M. & G. 531

122. Sometimes conditions are annexed to a decree for reforming a contract, not in the contemplation of the parties when they entered into the contract. Thus where by mistake, in drawing up a lease of premises, the rent was stated at a lower rate than that stipulated by the parties, and the lessee had entered into possession, the court gave the lessee an election to continue the tenancy at the higher rate, or abandon and pay for use and occupation during his occupancy, at the higher rate, on being compensated for all repairs of a permanent character, but not for the expense of taking possession and establishing himself in business(*a*).

123. It is open to the crown to show itself misinformed in matters of fact, or mistaken in law in respect of its grant, in cases where it would not be open to a subject to avoid or reform his deed, upon the same grounds. But the fact of mistake must be established like other facts, and such evidence must be laid before the court as will convince the mind of the court to a reasonable degree of certainty that the patent was issued in mistake(*b*).

124. In like manner equity grants relief where an instrument has been delivered up, or cancelled under mistake, and in ignorance of the facts material to the rights derived under it, upon the ground that the party is conscientiously entitled to enforce such rights, and that he ought to have the same benefit as if the instrument were in his possession with its entire original validity(.)

125. In regard to mistakes in wills, courts of equity have jurisdiction to correct them, when they are apparent upon the face of the will, or may be made out by a due construction of its terms. But the mistake must be apparent on the face of the will, otherwise there can be no relief, for parol evidence, or evidence *dehors* the will, is not admissible to vary or control

(*a*) Story, s. 164 c; Garrard *v.* Frankel, 30 Beav. 445.

(*b*) Att.-Gen. *v.* Garbutt, 5 Gr. 184, 186. And see Saugeen *v.* Church Society, 6 Gr. 538.

(*c*) East India Co. *v.* Donald, 9 Ves. 275; East India Co. *v.* Neave, 5 Ves. 173; Scholefield *v.* Templer, Johns. 155.

the terms of the will, although it is admissible to remove a latent ambiguity(*a*).

126. A mistake cannot be corrected, or an omission supplied, unless it is clear by fair inference from the whole will, that there is such a mistake or omission(*b*). In all cases the first thing to be proved is that there is a mistake(*c*). It must be a clear mistake demonstrable from the structure and scope of the will(*d*). Thus if there is in a will, a mistake in the computation of a legacy, it will be rectified in equity(*e*). So, if there is a mistake in the name, description, or number of the legatees intended to take(*f*), or in the property intended to be bequeathed(*g*).

127. Relief will not be granted, unless the mistake be clearly made out(*h*). And so, if the words of the bequest are plain, evidence of a different intention is inadmissible to establish a mistake(*i*); nor will a mistake be rectified, if it does not appear clearly what the testator would have done in the case, if there had been no mistake(*j*).

128. It is clear that in point of law a mere mis-description of a legatee will not defeat the legacy. But it is equally clear that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can

(*a*) Story, s. 179; Milner *v.* Milner, 1 Ves. Sen. 106: Ulrich *v.* Litchfield, 2 Atk. 373; Hampshire *v.* Peirce, 2 Ves. 216; Bradwin *v.* Harper, Ambl. 374; Stebbing *v.* Walkey, 2 Bro. C. C. 85; Danvers *v.* Manning, 2 Bro. C. C. 18; Campbell *v.* French, 3 Ves. 321; Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109. But see Reffell *v.* Reffell, L. R. 1 P. & D. 139.

(*b*) Phillips *v.* Chamberlaine, 4 Ves. 57.

(*c*) Mellish *v.* Mellish, 4 Ves. 49.

(*d*) Phillips *v.* Chamberlaine, 4 Ves. 51; Holmes *v.* Custance, 12 Ves. 279; Purse *v.* Shaplin, 1 Atk. 415; DelMare *v.* Rebello, 3 Bro. C. C. 445.

(*e*) Milner *v.* Milner, 1 Ves. Sen. 106; Door *v.* Geary, 1 Ves. Sen. 255; Danvers *v.* Manning, 2 Bro. C. C. 18; Giles *v.* Giles, 1 Keen, 692.

(*f*) Stebbing *v.* Walkey, 2 Bro. C. C. 85; Rivers's case, 1 Atk. 410; Parsons *v.* Parsons, 1 Ves. 266; Beaumont *v.* Fell, 2 P. W. 141; Hampshire *v.* Pierce. 2 Ves. Sen. 216; Bradwin *v.* Harpur, Amb. 374.

(*g*) Door *v.* Geary, 1 Ves. Sen. 255; Selwood *v.* Mildmay, 3 Ves. 306.

(*h*) Holmes *v.* Custance, 12 Ves. 279.

(*i*) Chambers *v.* Minchin, 4 Ves. 675.

(*j*) See Smith *v.* Maitland, 1 Ves. 363. And see Taylor *v.* Richardson, 2 Drew. 16; Standen *v.* Standen, 2 Ves. 589.

be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy. Thus if a woman gives a legacy to a man describing him as her husband, and in point of fact the marriage is void, he having a former wife then living, this bequest will, in equity, be decreed void(*a*).

129. Where a legacy is revoked, or is given upon a manifest mistake of facts, equity will afford relief. Thus, if a testator revokes legacies to A. & B., giving as a reason, that they are dead, and they are in fact living, equity will hold the revocation invalid, and decree the legacies(*b*). But a false reason given for a legacy, or for the revocation of a legacy, is not always a sufficient ground to avoid the bequest or revocation in equity. To have such an effect, it must be clear that no other motive mingled in the legacy, and that it constituted the substantial ground of the act or bequest(*c*).

130. An election made by a party under a mistake of facts, or a misconception as to his rights, is not binding in equity. To constitute a valid election, the election must be made with full knowledge of the circumstances, and of the right to which the party put to the election was entitled(*d*). In order to presume an election from the acts of any person, he must be shown to have had a full knowledge of all the requisite circumstances, as to the amount of the different properties, and his own rights in respect of them(*e*). A person who has elected under a misconception is entitled to make a fresh election(*f*).

131. An application to the court for relief on the ground of

(*a*) Kennell *v.* Abbott, 4 Ves. 808. But see Giles *v.* Giles, 1 Keen, 685, 692; Rishton *v.* Cobb, 5 M. & C. 145. *Re* Petts, 27 Beav. 576; Schloss *v.* Stebel, 6 Sim. 1.

(*b*) Campbell *v.* French, 3 Ves. 321.

(*c*) Kennell *v.* Abbott, 4 Ves. 808. See also Wilkinson *v.* Joughin, 12 Jur. N. S. 330; *Re* Petts, 27 Beav. 576; 5 Jur. N. S. 1235.

(*d*) Wintour *v.* Clifton, 21 Beav. 468; 3 Jur. N. S. 74; Pusey *v.* Desbouverie, 3 P. W. 315.

(*e*) Wake *v.* Wake, 1 Ves. 335; Reynard *v.* Spence, 4 Beav. 103; Edwards *v.* Morgan, 13 Pri. 782; 1 Bligh. N S. 401; Westacott *v.* Cockerline, 13 Gr. 79.

(*f*) Kidney *v.* Cousmaker, 12 Ves. 136.

mistake, must be made with due diligence(*a*); and, as in case of fraud, time runs from the discovery(*b*).

132. The jurisdiction to relieve against mistake being an equitable one, is exercised upon equitable principles, and the court will not set aside a transaction without restoring the party against whom it interferes, as far as possible, to that which shall be a just situation with reference to the rights which he had antecedently to the transaction(*c*). If the court sees that the parties cannot be restored to that which shall be a just situation with reference to the rights which they had antecedently to the transaction, or that the mistake cannot be corrected without breaking in upon or affecting the rights of innocent parties, who were not aware of the existence of the mistake, when their right accrued, relief cannot be given(*d*).

CHAPTER VI.

ACTUAL FRAUD.

133. As a general rule, courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, other courts(*e*). In a great variety

(*a*) Beaumont *v.* Bramley, T. & R. 43; Denys *v.* Shuckburgh, 4 Y. & C. 53; Stone *v.* Godfrey, 5 D. M. & G. 76; Bentley *v.* Mackay, 31 Beav. 143; 31 L. J. Ch. 709.

(*b*) Brooksbank *v.* Smith, 2 Y. & C. 58.

(*c*) Bellamy *v.* Sabine, 2 Ph. 425; King *v.* Savery, 5 H. L. 627. And see McAlpine *v.* Swift, 1 B. & B. 293; Dacre *v.* Gorges, 2 S. & S. 454; Millar *v.* Craig, 6 Beav. 433; Meadows *v.* Meadows, 16 Beav. 404; Scholfield *v.* Templer, Johns. 155.

(*d*) Malden *v.* Merrill, 2 Atk., 8; Clifton *v.* Cockburn, 3 M. & K. 76; Blackie *v.* Clarke, 15 Beav. 595; *Re* Saxon Life Assurance Co. 2 J & H. 408; Bateman *v.* Boynton, L. R. 1 Chan. 359.

(*e*) Story, s. 184; Barker *v.* Ray, 2 Russ. 63. Mr. Fonblanque, in his note [B. 1, ch. 2, s. 3, note *u*], says: "Whether courts of equity could interpose, and relieve against fraud practised in the obtaining of a will, appears to have been formerly a point of considerable doubt." In some cases the jurisdiction was distinctly asserted; as in Maundy *v.* Maundy, 1 Ch. Rep. 66; Well *v.* Thornagh, Prec. Ch. 123; Goss *v.* Tracy, 1 P. W, 287; 2 Vern. 700; Morgan *v.* Annis, 3 D. & Sm. 461; in other cases such jurisdiction was disclaimed, though the fraud was gross and palpable; as in Roberts *v.* Wynne, 1 Ch. Rep. 125; Archer *v.* Moss, 2 Vern. 8; Herbert *v.* Lownes, 1 Ch. Rep. 13; Thynn *v.* Thynn. 1 Vern. 296; Devenish *v.* Barnes, Prec. Ch. 3; Barnesley *v.*

of cases there is a remedy, and an effectual remedy at law(*a*), and with reference to these, equity may be said to possess a general, and perhaps a universal, concurrent jurisdiction(*b*). But there are many cases of fraud entirely without remedy at law, and over these equity possesses an exclusive jurisdiction(*c*).

134. It is not easy to define fraud in the extensive signification in which courts of equity use that term(*d*); and these courts have never laid down, as a general proposition, what shall constitute fraud (*e*), or any general rule, beyond which they will not go upon the ground of fraud, lest other means of avoiding the equity of the courts should be found out(*f*).

135. Fraud, as that term is used in equity, includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, or by which an undue and unconscientious advantage is taken of another(*g*). And courts of equity interfere in cases of fraud, not only to set aside acts done, but they will also interfere, if acts have by fraud been prevented from being done by the parties, and treat the case exactly as if the acts had been done(*h*).

Powell, 1 Ves. 287; Marriott *v.* Marriott, Str. 666. See Dimes *v.* Steinberg, 2 Sm. & Giff. 75. By Con. Stat. U. C. c. 12, s. 28, the Court of Chancery in this Province has jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and to pronounce such wills and testaments to be void for fraud, or undue influence or otherwise, in the same manner and to the same extent, as the Court has jurisdiction to try the validity of deeds and other instruments. Menzies *v.* White, 9 Gr. 574; Waterhouse *v.* Lee, 10 Gr. 176; Martin *v.* Martin, 12 Gr. 500; 15 Gr. 586; Perrin *v.* Perrin, 19 Gr. 259.

(a) 3 Black, Comm. 431; 1 Fonbl. Eq. B. 1, ch. 2, s. 3, note *(r)*; 4 Inst. 84; Bright *v.* Enyon, 1 Burr, 396.

(b) See Ramshire *v.* Bolton, L. R. 8 Eq. 294; Hill *v.* Lane, L. R. 11 Eq. 215; Hoare *v.* Brembridge, L. R. 14 Eq. 532; 8 Chan. 22.

(c) Man *v.* Ward, 2 Atk. 229; Garth *v.* Cotton. 3 Atk. 755; Colt *v.* Wollaston, 2 P. W. 156; Stent *v.* Bailis, 2 P. W. 220; Chesterfield *v.* Jansen, 2 Ves. Sen. 155; Evans *v.* Bickwell, 6 Ves. 182; Clarke *v.* Manning, 7 Beav. 167; Trail *v.* Baring, 33 L. J. Ch. 521; Stewart *v.* Great Western Rail. Co. 2 Dr. & Sm. 438: 11 Jur. N. S. 627.

(d) Green *v.* Nixon, 23 Beav. 530; Reynell *v.* Sprye, 1 D. M. & G. 691.

(e) Mortlock *v.* Buller, 10 Ves. 306.

(f) Lawley *v.* Hooper, 3 Atk. 279; Anderson *v.* Fitzgerald, 4 H. L. 571; Webb *v.* Rorke, 2 S. & L. 666.

(g) 1 Fonbl. Eq, B. 1, ch. 2, s. 3, note (*r*); Chesterfield *v.* Jansen, 2 Ves. Sen. 155; Bromley *v.* Smith, 26 Beav. 671; Spackman's case, 3 L. J. Ch. 321.

(h) Story s. 187; Middleton *v.* Middleton, 1 J. & W. 96; Lord Waltham's case, cited 11 Ves. 638.

136. The following enumeration of the different kinds of frauds was given by Lord Hardwicke(*a*), First: Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. Secondly: It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the common law has taken notice(*b*). Thirdly: Fraud, which may be presumed from the circumstances and conditions of the parties contracting. Fourthly: Fraud, which may be collected and inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement. Fifthly: Fraud, in what are called catching bargains with heirs, reversioners, or expectants.

137. Fraud being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which courts of equity will grant relief under this head. It will be sufficient to collect some of the more marked classes of cases, in which the principles which regulate the action of courts of equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances(*c*).

138. Although it is equally a rule in courts of law and courts of equity that fraud is not to be presumed, but must be established by proof, courts of equity will act upon circumstances, as presumptions of fraud, which courts of law would not deem satisfactory proofs(*d*). In other words, equity will grant relief upon the ground of fraud, established by presumptive evidence,

(*a*) Chesterfield *v.* Jansen, 2 Ves. Sen. 155.
(*b*) See James *v.* Morgan, 1 Lev. 111.
(*c*) Story, s. 189.
(*d*) Trenchard *v.* Wanley, 2 P. W. 166; Townsend *v.* Lowfield, 1 Ves. 35; 3 Atk. 536 Walker *v.* Symonds, 3 Swanst. 61; Bath and Montague's case, 3 Ch. Cas. 85; Chesterfield *v.* Jansen, 2 Ves. Sen. 155; Fullager *v.* Clark, 18 Ves. 483.

which evidence courts of law would not always deem sufficient proof to justify a verdict at law.

139. One of the largest classes of cases, in which courts of equity are accustomed to grant relief, is where there has been a misrepresentation, or *suggestio falsi*(*a*). To justify, however, an interposition in such cases, it is not only necessary to establish the fact of misrepresentation; but that it is in a matter of substance, or important to the interests of the other party, and that it actually does mislead him(*b*). For, if the misrepresentation was of a trifling or immaterial thing, or if the other party did not trust to it, or was not misled by it; or if it was vague and inconclusive in its own nature; or if it was upon a matter of opinion or fact, equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other; in these and the like cases there is no reason for a court of equity to interfere to grant relief upon the ground of fraud(*c*).

140. Where a party misrepresents a material fact, or produces a false impression, intentionally or by design, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage over him, there is positive fraud in the truest sense of the term(*d*).

141. It is wholly immaterial whether the party misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false(*e*), for the

(*a*) Collins *v.* Cave, 6 H. & N. 131; Broderick *v.* Broderick, 1 P. W. 240; Jarvis *v.* Duke, 1 Vern. 20; Evans *v.* Bicknell, 6 Ves. 173, 182; Barry *v.* Croskey, 2 J. & H. 22; Fraser *v.* Sutherland, 2 Gr. 442; Blain *v.* Terryberry, 11 Gr. 286; Lindsay Petroleum Oil Co. *v.* Hurd, 16 Gr. 147; on App. 17 Gr. 115. And see Westbrooke *v.* Att.-Gen. 11 Gr. 330.

(*b*) Neville *v.* Wilkinson, 1 Bro. C. C. 546; Turner *v.* Harvey, Jac. 178; Small *v.* Atwood, 1 Younge, 407, 461; in App. 6 Cl. & Fin. 232, 395; Burnes *v.* Pennell, 2 H. L. 497, 529; Smith *v.* Kay, 7 H. L. 750, 775; Nicol's case, 3 D. & J. 387; Jameson *v.* Stein, 21 Beav. 5; Denne *v.* Light, 8 D. M. & G. 774; Barrett's case, 3 D. J. & S. 30; Kennedy *v.* Panama &c. Co. L. R. 2 Q. B. 580.

(*c*) Story s. 191; Trower *v.* Newcome, 3 Meriv. 704; Atwood *v.* Small, 6 Cl. & Fin. 232; 1 Younge, 407.

(*d*) Atwood *v.* Small, 6 Cl. & Fin. 232; 1 Younge, 407; Taylor *v.* Ashton, 11 M. & W. 401.

(*e*) See Wright *v.* Snowe, 2 D. & Sm. 321. And see Hutton *v.* Rossiter, 7 D. M. & G. 23; Pulsford *v.* Richards, 17 Beav. 94; Rawlins *v.* Wickham, 1 Giff. 355; 3 D. & J. 304.

affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false(*a*). And even if the party innocently misrepresents a material fact by mistake it is equally conclusive, for it operates as a surprise and imposition upon the other party(*b*). And the same general principles apply, whether the fraud was perpetrated by the party directly interested, or by an agent, if the principal adopts the act in which the fraud was committed. If the latter takes the benefit of his agent's fraud, it is immaterial whether the principal or the agent originally concocted the fraud, the principal, if he adopts his agent's act, will be held implicated to the fullest extent(*c*).

142. As a matter of conscience, any deviation from the most exact and scrupulous sincerity is contrary to the good faith that ought to prevail in contracts. But courts of justice are compelled to assign limits to the exercise of this jurisdiction far short of the principles deducible *ex æquo et bono*(*d*). Accordingly a misrepresentation, in order to justify a recission of a contract, must be something material, and which constituted an inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury(*e*).

143. In the next place, the mispresentation must not only be in something material, but it must be in something in

(*a*) Ainslie *v.* Medlycott, 9 V. . 21; Graves *v.* White, Freem. 57. See also Pearson *v.* Morgan, 2 Bro. C. C. 389; Foster *v.* Charles, 6 Bing. 396; 7 Bing. 104; Taylor *v.* Ashton, 11 M. & W. 401.

(*b*) See Pearson *v.* Morgan, 2 Bro. C. C. 389; Burrows *v.* Locke, 10 Ves. 475; De Manville *v.* Compton, 1 V. & B. 355; *Ex parte* Carr, 3 V. & B. 111; Smith *v.* Reese River Co. L. R. 2 Eq. 264; Denton *v.* McNeil, L. R. 2 Eq. 352; Henderson *v.* Lacan, L. R. 5 Eq. 249; Ship *v.* Crosskill, L. R. 10 Eq. 73.

(*c*) Cornfoot *v.* Fowke, 6 M. &. W. 358; Scholefield *v.* Templer, Johns. 155. And see Hartopp *v.* Hartopp, 21 Beav. 259; Wilde *v.* Gibson, 1 H. L. 605; Foy *v.* Merrick, 8 Gr. 323; Latham *v.* Crosby, 10 Gr. 308. But see Reynell *v.* Sprye, 1 D. M. & G. 684.

(*d*) See Mahon *v.* McLean, 13 Gr. 361.

(*e*) Jarvis *v.* Duke, 1 Vern. 19; Phillips *v.* Duke of Bucks, 1 Vern. 227; Lowndes *v.* Lane, 2 Cox. 363; Broderick *v.* Broderick, 1 P. W. 239; Pusey *v.* Desbouverie, 3 P. W. 318; Winch *v.* Winchester, 1 V. & B. 375; Geddes *v.* Pennington, 5 Dow, 159; Pillmore *v.* Hood, 6 Scott, 827; Jennings *v.* Broughton, 5 D. M. & G. 126; Goldicutt *v.* Townsend, 28 Beav. 445; Robson *v.* Earl of Devon, 4 Jur. N. S. 245.

regard to which the one party places a known trust and confidence in the other(*a*). It must not be a mere matter of opinion(*b*), equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment. Not but that misrepresentation, even in a matter of opinion, may be relieved against as a contrivance of fraud, in cases of peculiar relationship or confidence, or where the other party has justly reposed upon it, and has been misled by it. But if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations, for the rule is, *caveat emptor*(*c*).

144. To this ground of unreasonable indiscretion and confidence, may be referred the common language of puffing and commendation of commodities, which, however reprehensible in morals, as gross exaggerations or departures from truth, are nevertheless not treated as frauds which will avoid contracts. In such cases, if the matter is equally open to the observation, examination, and skill of both, the other party is bound, and indeed is understood, to exercise his own judgment(*d*). The maxim applies: *Simplex commendatio non obligat.*

145. In the next place, the party must be misled by the misrepresentation, for it cannot be said to influence his conduct, if he knows it to be false, and it is his own indiscretion, and not any fraud or surprise, of which he has reason to com-

(*a*) Lindsay Petroleum Oil Co. *v.* Hurd, 16 Gr. 147.

(*b*) Higgins *v.* Samels, 2 J. & H. 464; Leyland *v.* Illingworth, 2 D. F. & J. 248; L. R. 2 H. L. 99; Drysdale *v.* Mace, 5 D. M. & G. 107; Kisch *v.* Central Venezuela Rail. Co. 3 D. J. & S. 122; Denton *v.* McNeil, L. R. 2 Eq. 352; Dimmock *v.* Hallett, L. R. 2 Chan. 27; New Brunswick and Canada Rail. and Land Co. *v.* Conybeare, 9 H. L. 711.

(*c*) Story, ss. 197, 200 a.; Atwood *v.* Small, 6 Cl. & Fin. 232; McRae *v.* Froom, 17 Gr. 357; Lowndes *v.* Lane, 2 Cox, 363; Robson *v.* Earl of Devon, 4 Jur. N. S. 245. Where there is misrepresentation, the maxim *caveat emptor*, must be applied with great caution, Colby *v.* Gadden, 34 Beav. 416. A condition of sale, that misdescription or errors shall not annul the sale, does not cover a fraudulent misrepresentation, Shackleton *v.* Sutcliffe, 1 D. & Sm. 609; Leslie *v.* Thompson, 9 Ha. 273; and see Edwards *v.* Wickwar, L. R. 1 Eq. 68.

(*d*) Story, s. 201; Crooks *v.* Davis, 6 Gr. 317; McRae *v.* Froom, 17 Gr. 357.

plain under such circumstances(*a*). The party must also have been misled to his prejudice or injury; for courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage(*b*).

146. The defrauded party may, however, by his subsequent acts, with full knowledge of the fraud, deprive himself of all right to relief as well in equity as at law(*c*). Thus, if with full knowledge of the fraud, he should settle the matter in relation to which the fraud was committed, and give a release to the party who has defrauded him, he would lose all title to legal and equitable relief. The like rule would apply, if he knew all the facts, and with such full information he continued to deal with the party(*d*).

147. Where property is bought at an under price, through the mispresentation of an agent who derived no pecuniary advantage from the transaction, the principal is responsible. And where the same plaintiff had been induced to part with his property, at such undervalue, at two different times, through the misrepresentation of two different agents of the same principal, one bill may be brought to set aside both transactions, although in themselves wholly distinct, and the same will not be demurrable for multifariousness(*e*).

148. Brokers who sell their own property under the delusion upon the mind of the purchaser that they are selling on behalf of other parties, whereby the purchaser is induced either to make the purchase, which he otherwise would not have done, or to

(*a*) Story s. 202; Nelson *v.* Stocker, 4 D. & J. 458.

(*b*) Vernon *v.* Keys, 12 East, 637; Fellows *v.* Lord Gwydyr, 1 Sim. 63; Slim *v.* Croucher, 1 D. F. & J. 518.

(*c*) *Ex parte* Briggs, L. R. 1. Eq. 483. And see Smith's case, L. R. 2 Chan. 604; Bartlett *v.* Salmon, 6 D. M. & G. 33; Farebrother *v.* Gibson, 1 D. & J. 602.

(*d*) Story, s. 203 a; Vigers *v.* Pike, 8 Cl. & Fin. 545, 630; Galloway *v.* Holmes, 2 Dougl. 330.

(*e*) Story, s. 203 d; Walsham *v.* Stainton, 1 D. J. & S. 678; 9 Jur. N. S. 1261; 1 H. & M. 322, 8 L. T. N. S. 633. And see Ritchie *v.* Couper, 28 Beav. 344; Beck *v.* Kantorowicz, 3 K. & J. 230; Maxwell *v.* Port Tenant Patent Fuel Co., 24 Beav. 495; Tyrell *v.* Bank of London, 10 H. L. 26; Attwood *v.* Merewether, 37 L. J. Ch. 35.

give a higher price than he would otherwise have done, are guilty of such a fraud as will induce a court of equity to set the contract aside(*a*).

149. Another class of cases for relief in equity is, where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another(*b*). It is not every concealment, even of material facts, which will entitle a party to the interposition of a court of equity. The case must amount to the suppresion of facts, which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent(*c*).

150. The true definition of undue concealment, which amounts to a fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate to the other; and which the latter has a right not merely *in foro conscientiæ*, but *juris et de jure* to know(*d*).

151. The principle which treats non-disclosure as equivalent to fraud, when the circumstances impose a duty that disclosure should be made, obtains specially in respect to policies of

(*a*) Story, s. 203 a; Maturin *v.* Tredinnick, 9 L. T. N. S. 82; Driscoll *v.* Bromley, 1 Jur. 238; Gillett *v.* Peppercorne, 3 Beav. 78; Barker *v.* Harrison, 2 Coll. 546; Rentley *v* Craven, 18 Beav. 75; Hobday *v.* Peters, 28 Beav. 349; Lindsay Petroleum Oil Co. *v.* Hurd, 16 Gr. 147.

(*b*) Jarvis *v.* Duke, 1 Vern. 19; Evans *v.* Bicknell, 6 Ves. 173, 182; Central Rail. Co. of Venezuela *v.* Kisch, 3 D. J. & S. 122: L. R. 2 H. L. 99; Oakes *v.* Turquand, L. R. 2 Chan. 326. And see Broderick *v.* Broderick, 1 P. W. 239; Fricht *v.* Sheck 10 Gr. 254.

(*c*) Story, s. 204; Horsfall *v.* Thomas, 1 H. & C. 100; Archbold *v.* Lord Howth, L. R. Ir. 2 C. L. 629. And see Groves *v.* Perkins, 6 Sim. 576; Clarke *v.* Tipping, 9 Beav. 284; Stikeman *v.* Dawson, 1 D. & Sm. 90; Shackleton *v.* Sutcliffe, 1 D. & Sm. 609; Roddy *v.* Williams, 3 J. & L. 21; Abbott *v.* Sworder, 4 D. & Sm. 448; Pulsford *v.* Richards, 17 Beav. 87; Maclure *v.* Ripley, 2 Mac. & G. 274; Blake *v.* Mowatt, 21 Beav. 603; Haywood *v.* Cope, 25 Beav. 140; Evans *v.* Carrington, 1 J. & H. 598; 2 D. F. & J. 481; New Brunswick &c. Rail Co. *v.* Muggeridge, 1 Dr. & Sm. 363; Greenfield *v.* Edwards, 2 D. J. & S. 582; Hallows *v.* Fernie, L. R. 3 Eq. 536; Kent *v.* Freehold Land & Brick Making Co. L. R. 4 Eq. 598.

(*d*) Story, s. 207; Fox *v.* Mackreth, 2 Bro. C. C. 420; Turner *v.* Harvey, Jac. 178; Dolman *v.* Nokes, 22 Beav. 402, 407. But see Haywood *v.* Cope, 25 Beav. 140; Bartlett *v.* Salmon, 6 D. M. & G. 33; Drummond *v.* Tracey, 6 Jur. N. S. 369; Slim *v* Croucher, 6 Jur. N. S. 190.

insurance. In such cases the insurer necessarily reposes a trust and confidence in the insured, as to all facts and circumstances affecting the risk, which are peculiarly within his knowledge, and which are not of a public and general nature, or which the underwriter either knows, or is bound to know. Indeed, most of the facts and circumstances which may affect the risk, are generally within the knowledge of the insured only; and therefore, the underwriter may be said emphatically to place trust and confidence in him as to all such matters. And hence the general principle is, that in all cases of insurance the insured is bound to communicate to the underwriter all facts and circumstances, material to the risk, within his knowledge; and if they are withheld, whether the concealment be by design or by accident, it is equally fatal to the contract(*a*).

152. It was formerly considered that policies of assurance upon lives, like policies of insurance on ships, were made conditionally upon the truth or completeness of the representations respecting the risk, and that misrepresentation or concealment of a material fact, although not fraudulent, vitiated the policy. But it is now determined that such is not the case. The assured is always bound not only to make a true answer to the questions put to him, but to disclose spontaneously any fact exclusively within his knowledge, which it is material for the insurer to know. But it is not an implied condition of the validity of the policy that the insured should make a complete and true representation respecting the life proposed for insurance. Such condition, if intended, must be made a matter for express stipulation. It is however, an implied condition, that the person whose life is assured, is alive at the time of making the policy(*b*). If there is a proviso that the policy shall not be disputed on the ground of merely untrue state-

(*a*) Carter *v.* Boehm, 3 Burr. 1905; Bates *v.* Hewitt, L. R. 2 Q. B. 595, 605, 606, 610; Lindenau *v.* Desborough, 8 B. & C. 586, 592; Jones *v.* Provincial Insurance Co. 3 C. B. N. S. 86; McQuaig *v.* Unity Fire Insurance Association, 9 U. C. C. P. 85.

(*b*) Pritchard *v.* Merchant's Life Assurance Co. 3 C. B. N. S. 622; Wheelton *v.* Hardisty, 8 E. & B. 232.

ment, not fraudulently made, a mis-representation or concealment undesignedly made, does not avoid the policy(*a*).

153. Policies of insurance against fire are made upon the implied condition that the description of the property inserted in the policy is true at the time of making the policy(*b*); and there is an implied condition that the property shall not be altered during the term for which it is insured so as to increase the risk(*c*). In effecting an insurance against fire, it is the duty of the party proposing the insurance to communicate to the insurer all material facts within his knowledge touching the property(*d*).

154. The strict rule with respect to non-disclosure, which obtains in the case of policies of insurance does not extend to contracts of suretyship or guarantee. If the creditor be specially communicated with on the subject, he is bound to make a full, fair and honest disclosure of every circumstance within his knowledge, calculated in any way to influence(*e*) the discretion of the surety on entering into the required obligation(*f*). But he is not under any duty to disclose to the intended surety voluntarily and without being asked to do so, any circumstances unconnected with the particular transaction in which he is about to engage, which will render his position more hazardous, or to inform him of any matter affecting the general credit of the debtor, or to

(*a*) Fowkes *v.* Manchester & London Life Assurance Co. 3 B. & S. 917. See Wood *v.* Dwarris, 11 Ex. 493; Reis *v.* Scottish Equitable Life Assurance Co. 2 H. & N. 19.

(*b*) Sillem *v.* Thornton, 3 E. & B. 868.

(*c*) Stokes *v.* Cox, 1 H. & N. 533; Merrick *v.* Provincial Insurance Co., 14 U. C. Q. B. 439.

(*d*) Lindenau *v.* Desborough, 8 B. & C. 592; Bufe *v.* Turner, 6 Taunt. 338; Shaw *v.* St. Lawrence County Mutual Insurance Co., 11 U. C. Q. B. 73. But see Laidlaw *v.* Liverpool and London Insurance Co., 13 Grant, 377; Dickson *v.* Equitable Fire Assurance Co., 18 U. C. Q. B. 246; Rice *v.* Provincial Insurance Co., 7 U. C. C. P. 548; McDonell *v.* Beacon Fire & Life Assurance Co., 7 U. C. C. P. 308.

(*e*) Owen *v.* Homan, 3 Mac. & G. 378; Blist *v.* Brown, 8 Jur. N. S. 602. See Smith *v.* Bank of Scotland, 1 Dow, 272.

(*f*) North British Insurance Co. *v.* Lloyd, 10 Ex. 523; Wythes *v.* Labouchere, 3 D. & J. 609; Lee *v.* Jones, 17 C. B. N. S. 482. See Greenfield *v.* Edwards, 2 D. J. & S. 582.

call his attention to the transaction, unless there be something in it which might not naturally be expected to take place between the parties(*a*).

155. But if there be anything in the transaction that might not naturally be expected to take place between the parties concerned in it, the knowledge of which it is reasonable to infer would have prevented the surety from entering into the transaction, the creditor is under an obligation to make the disclosure(*b*). If, for instance, there be any private arrangement or secret understanding between the creditor and the debtor connected with the particular transaction, in which he is about to engage, whereby the risk of the surety is increased(*c*) or his position is so materially varied, that he is not in the position in which he might reasonably have contemplated to be(*d*); or if a party knowing or suspecting himself to be cheated by his clerk, and, concealing the fact, applies for security in such a manner, and under such circumstances, as holds the clerk out to others as one whom he considers as a trustworthy person(*e*); or if the creditor has notice that the circumstances under which the debtor has obtained the concurrence of the surety lead to the suspicion of fraud(*f*), concealment is fraudulent and will vitiate the transaction(*g*).

156. The same principle applies in all cases where the party is under an obligation to make a disclosure, and conceals material facts. Therefore, if a release is obtained from a party in ignorance of material facts, which it is the duty of the other

(*a*) Hamilton *v.* Watson, 12 Cl. & Fin. 109; Small *v.* Currie, 2 Drew. 102; Wythes *v.* Labouchere, 3 D. & J. 593, 609. And see Cunningham & Buchanan, 10 Gr. 521.

(*b*) Lee *v.* Jones, 17 C. B. N. S. 503; Burke *v.* Rogerson, 12 Jur. N. S. 635. See Squire *v.* Whitton, 1 H. L. 333; Greenfield *v.* Edwards, 2 D. J. & S. 582; Rhodes *v.* Bate, L. R. 1 Chan. 252; Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259.

(*c*) Pidcock *v.* Bishop, 3 B. & C. 605.

(*d*) Evans *v.* Brembridge, 2 K. & J. 174; 8 D. M. & G. 100; Spaight *v.* Cowne, 1 H. & M. 359.

(*e*) Smith *v.* Bank of Scotland, 1 Dow, 272.

(*f*) Squire *v.* Whitton, 1 H. L. 333.

(*g*) Owen *v.* Homan, 4 H. L. 997; Lee *v.* Jones, 17 C. B. N. S. 503; Rhodes *v.* Bate, L. R. 1 Chan. 252. And see Guardians of Stokesly Union *v.* Strother, 22 L. T. 84.

side to disclose, the release will be held invalid(*a*). So, in cases of family agreements and compromises, if there is any concealment of material facts, the compromise will be held invalid, upon the ground of mutual trust and confidence reposed between the parties(*b*). And in like manner, if a devisee, by concealing from the heir the fact that the will has not been duly executed, procures from the latter a release of his title, pretending that it will facilitate the raising of money to pay the testator's debts, the release will be void on account of the fraudulent concealment(*c*).

157. But by far the most comprehensive class of cases of undue concealment arises from some peculiar relation, or fiduciary character between the parties. Among this class of cases are to be found those which arise from the relation of client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que trust*, executors or administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part owners. In these, and the like cases, the law, in order to prevent undue advantage, from the unlimited confidence, affection, or sense of duty, which the relation naturally creates, requires the utmost degree of good faith (*uberrima fides*) in all transactions between the parties. If there is any misrepresentation, or any concealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose, and pronounce the transaction void, and, as far as possible, restore the parties to their original rights(*d*).

(*a*) Bowles *v.* Stewart, 1 S. & L. 209, 224; Broderick *v.* Broderick, 1 P. W. 240. See Roddy *v.* Williams, 3 J. & L. 1.

(*b*) Gordon *v.* Gordon, 3 Swanst. 399, 463, 467, 470, 473, 476, 477; Leonard *v.* Leonard, 2 B. & B. 171, 180, 181, 182.

(*c*) Story, s. 217; Broderick *v.* Broderick, 1 P. W. 239.

(*d*) Story s. 218. See Ormand *v.* Hutchinson, 13 Ves. 51; Beaumont *v.* Boultbee, 5 Ves. 485; Gartside *v.* Isherwood, 1 Bro. C. C. 558; Bulkley *v.* Wilford, 2 Cl. & Fin. 102, 177; Dalbiac *v.* Dalbiac, 16 Ves. 116; Clarke *v.* Hawke, 11 Gr. 527; Mason *v.* Seney, 12 Gr. 143; Fallon *v.* Keenan, 12 Gr. 388; Donaldson *v.* Donaldson, 12 Gr. 431; Elgie *v.* Campbell, 12 Gr. 132. And see Vallier *v.* Lee, 2 Gr. 606; Denison *v.* Denison, 13 Gr. 114, 596; Corrigan *v.* Corrigan, 15 Gr. 341; *Ex parte* Williams, L. R. 2 Eq. 216.

158. Having taken this general notice of cases of fraud, arising from the misrepresentation or concealment of material facts, some others, which, in a moral as well as in a legal view, seem to fall under the same predicament, being deemed cases of actual, intentional fraud, as contradistinguished from constructive or legal fraud, may be considered. In this class may properly be included all cases of unconscientious advantages in bargains, obtained by imposition, circumventions, surprise, and undue influence, over persons in general; and in an especial manner, all unconscientious advantages, or bargains obtained over persons disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of, or protecting their own rights and interests(*a*).

159. The general theory of the law, in regard to acts done and contracts made by parties, affecting their rights and interests is, that in all such cases there must be a free and full consent to bind the parties.

160. It is upon this general ground, that there is a want of rational and deliberate consent, that the contracts and other acts of idiots, lunatics, and other persons, *non compotes mentis*, are generally deemed to be invalid in courts of equity(*b*). Such persons being incapable in point of capacity to enter into any valid contract, or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights. Even courts of law now lend an indulgent ear to cases of defence against contracts of this nature, and, if the fraud is made out, will declare them invalid(*c*).

161. But courts of equity deal with the subject upon the most enlightened principles, and watch with the most jealous care

(*a*) Story s. 221. And see Gartside *v.* Isherwood, 1 Bro. C. C. 558; Skidmore *v.* Bradford, L. R. 8 Eq. 134.

(*b*) See Waring *v.* Waring, 12 Jur. 947; 6 Moore, P. C. 341. See also Creagh *v.* Blood, 2 J. & L. 509.

(*c*) Story ss. 223, 227; Yates *v.* Boen, 2 Str. 1104; Baxter *v.* Earl of Portsmouth, 5 B. & C. 170; Faulder *v.* Silk, 3 Camp. 126; Brown *v.* Joddrell, 1 Mood. & Malk, 105; Levy *v.* Baker, 1 Mood. & Malk, 106, and note *(b)*.

every attempt to deal with persons *non compotes mentis*. Wherever, from the nature of the transaction, there is not evidence of entire good faith (*uberrimæ fidei*), or the contract or other act is not seen to be just in itself, or for the benefit of these persons, courts of equity will set it aside, or make it subservient to their just rights and interests(*a*). Where, indeed, a contract is entered into with good faith, and is for the benefit of such persons, such as for necessaries, there courts of equity will uphold it, as well as courts of law(*b*). And, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase(*c*). But this rule is not applicable to a case where the question is, whether the deed of a lunatic altering the provisions of a settlement is valid(*d*).

162. Lord Coke has enumerated four different classes of persons who are deemed in law to be *non compotes mentis*. The first is an idiot, or fool natural; the second is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus qui gaudet lucidis intervallis*, and sometimes is of a good and sound memory, and sometimes *non compos mentis*; and the fourth is a *non compos mentis* by his own act, as a drunkard(*e*). In respect to the last class of persons, although it is regularly true, that drunkenness doth not extenuate any act or offence committed by any person against the laws; but it rather aggravates it, and he

(*a*) See Selby *v.* Jackson, 13 L. J. N. S. Ch. 249; Young *v.* Young, 10 Gr. 365.

(*b*) Baxter *v.* Earl of Portsmouth, 5 B. & Cr. 170. See also *Ex parte* Hall, 7 Ves. 264; Nelson *v.* Duncombe, 9 Beav. 211; Stedman *v.* Hart, Kay, 607.

(*c*) Story, s. 228; Neill *v.* Morley, 9 Ves. 478, 482; Sergeson *v.* Sealey, 2 Atk. 412; Price *v.* Berrington, 3 Mac. & G. 486; Williams *v.* Wentworth, 5 Beav. 325; Campbell *v.* Hooper, 3 Sm. & G. 153; Jacob *v.* Richards, 18 Beav. 300; 5 D. M. & G. 55; *Re* McSherry, 10 Gr. 390. See Molton *v.* Camroux, 2 Ex. 487; 4 Ex. 17.

(*d*) Elliott *v.* Ince, 7 D. M. & G. 475. And see Manning *v.* Gill, L. R. 13 Eq. 485.

(*e*) Beverley's case, 4 Co. 124; Co. Litt. 247 *a*.

shall gain no privilege thereby(*a*); and although, in strictness of law, the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*(*b*); yet courts of equity will relieve against acts done, and contracts made by him, while under this temporary insanity, where they are procured by the fraud or imposition of the other party(*c*). For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of courts of equity against his own grossly immoral and fraudulent conduct(*d*).

163. To set aside any act or contract on account of drunkenness, it is not sufficient, that the party is under undue excitement from liquor(*e*). It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding(*f*). If there be not that degree of excessive drunkenness, equity will not interfere, unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him(*g*).

164. Closely allied to the foregoing are cases where a person, although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness

(*a*) 4 Black. Comm. 25; 3 Bac. Abridg. *Idiots and Lunatics*, A.

(*b*) 3 Bac. Abridg. *Idiots and Lunatics*, A.

(*c*) Johnson *v.* Medlicott, cited 3 P. W. 130, note (A).

(*d*) See Cook *v.* Clayworth, 18 Ves. 12; Cole *v.* Robins, Bull. N. P. 172; Gore *v.* Gibson, 13 M. & W. 623.

(*e*) See Crippen *v.* Ogilvy, 15 Gr. 490; in app. 18 Gr. 253; Corrigan *v.* Corrigan, 15 Gr. 341.

(*f*) Cook *v.* Clayworth, 18 Ves. 12.

(*g*) Story, s. 231; Cook *v.* Clayworth, 18 Ves. 12; Say *v.* Barwick, 1 V. & B. 195; Butler *v.* Mulvihill, 1 Bli. 137; Lightfoot, *v.* Heron, 3 Y. & C. 586; Nagle *v.* Baylor, 3 Dr. & War. 60; Shaw *v.* Thackeray, 1 Sm. & G. 539; Wiltshire *v.* Marshall, 14 W. R. 602; Addis *v.* Campbell, 4 Beav. 401; Martin *v.* Pycroft, 2 D. M. & G. 800. And see Clarkson *v.* Kitson, 4 Gr. 244; McGregor *v.* Boulton, 12 Gr. 288; Nevills *v.* Nevills, 6 Gr. 121; Edinburgh Life Assce. Co. *v.* Allen, 18 Gr. 425.

arises; whether it arises from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear, or constitutional despondency, or overwhelming calamities(*a*).

165. It may be laid down as generally true, that the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice, or undue influence. But the simple fact that the intellectual capacity of one party to a contract is below that of the average of mankind, does not alone furnish sufficient ground for setting aside the contract(*b*). The rule of the common law seems to have gone further in cases of wills (for, it is said, that, perhaps it can hardly be extended to deeds without circumstances of fraud or imposition); since the common law requires that a person, to dispose of his property by will, should be of sound and disposing memory, which imports that the testator should have understanding to dispose of his estate with judgment and discretion; and this is to be collected from his words, actions and behaviour at the time, and not merely from his being able to give a plain answer to a common question(*c*).

166. Where any fiduciary relation has once subsisted between the parties, the law will always impose the burden upon the purchaser of an estate, of showing that all due protection had been afforded to the vendor, but not otherwise(*d*).

(*a*) Story, s. 234; Osmond *v.* Fitzroy, 3 P. W. 129; Willis *v.* Jernegan, 2 Atk. 251; McLaurin *v.* McDonald, 12 Gr. 82; Edinburgh Life Assce. Co. *v.* Allen, 18 Gr. 425. And see Livingstone *v.* Acre, 15 Gr. 610.

(*b*) See Blachford *v.* Christian, 1 Knapp, 73; Ball *v.* Mannin, 3 Bli. N R. 1.

(*c*) Story, s. 238; Donegal's case, 2 Ves. Sen. 407; Att.-Gen. *v.* Parnther, 3 Bro. C. C. 441. And see Martin *v.* Martin, 12 Gr. 500; Swinfen *v.* Swinfen, 27 Beav. 159; Ross *v.* Chester, 1 Hagg. 227; Constable *v.* Tuffnell, 4 Hagg. 489. And see *Re* Field, 3 Curt. 752; Wilson *v.* Bedard, 12 Sim. 28.

(*d*) Harrison *v.* Guest, 6 D. M. & G. 424. See also Denton *v.* Donner, 23 Beav. 291; Longmate *v.* Ledger, 2 Giff. 163.

167. Analogous cases may be put, where the party is subjected to undue influence, although in other respects of competent understanding(*a*). As, where he does not act, or makes a contract when under duress, or the influence of extreme terror, or of threats, or of apprehensions short of duress. For, in cases of this sort, he has no free will, but stands *in vinculis*. And the constant rule in equity is, that where a party is not a free agent, and is not equal to protecting himself, the court will protect him(*b*). On this account equity watches with extreme jealousy all contracts made by a party while under imprisonment; and, if there is the slightest ground to suspect oppression or imposition, they will set the contract aside(*c*). Circumstances, also, of extreme necessity and distress of the party, although not accompanied by direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the court in setting aside a contract which he has made on account of some oppression, or fraudulent advantage, or imposition, attendant upon it(*d*).

168. The acts and contracts of infants, that is, of all persons under twenty-one years of age, are *à fortiori* treated as falling within the like predicament. There are, indeed, certain excepted cases, in which infants are permitted by law to bind themselves by their acts and contracts. But these are all of a special nature; as, for instance, infants may bind themselves

(*a*) See Debenham *v.* Ox, 1 Ves. Sen. 276; Cory *v.* Cory, 1 Ves. Sen. 19; Young *v.* Peachy, 2 Atk. 254. See also Price *v.* Price, 1 D. M. & G. 308; Wilkinson *v.* Fawkes, 9 Ha. 592.

(*b*) Evans *v.* Llewellyn, 1 Cox, 340; Crowe *v.* Ballard, 1 Ves. 215, 220; Hawes *v.* Wyatt, 3 Bro. C. C. 158; 3 P. W. 294; note (*e*); Att.-Gen. *v.* Sothon, 2 Vern. 497.

(*c*) Roy *v.* Duke of Beaufort, 2 Atk. 190; Nichols *v.* Nichols, 1 Atk. 409; Hinton *v.* Hinton, 2 Ves. Sen. 634, 635; Falkner *v.* O'Brien, 2 B. & B. 214; Griffith *v.* Spratley, 1 Cox, 383; Underhill *v.* Horwood, 10 Ves. 219; Att.-Gen. *v.* Sothon, 2 Vern. 497; Wilkinson *v.* Stafford, 1 Ves. 32; Knight *v.* Marjoribanks, 11 Beav. 322; 2 Mac. & G. 10; Scott *v.* Scott, 11 Ir. Eq. 74.

(*d*) Story, s. 239. See Gould *v.* Okeden, 4 Bro. P. C. 198; Bosanquet *v.* Dashwood, Cas. t. Talbot, 37; Proof *v.* Hines, Cas. t. Talb. 111; Hawes *v.* Wyatt, 3 Bro. C. C. 156; Pichett *v.* Loggon, 14 Ves. 215; Beasley *v.* Magrath, 2 S. & L. 31; Farmer *v.* Farmer, 1 H. L. 724; Wood *v.* Abrey, 3 Mad. 417; Ramsbottom *v.* Parker, 6 Mad. 6; Fitzgerald *v.* Rainsford, 1 B. & B. 37, note (*a*); Huguenin *v.* Basely, 14 Ves. 273. And see Nottidge *v.* Prince, 2 Giff. 246, 6 Jur. N. S. 1066. An agreement executed under threat of prosecuting the plaintiff's son for forgery, was set aside, Bayley *v.* Williams, 4 Giff. 638.

by a contract for necessaries, suitable to their degree and quality(*a*); or by a contract of hiring and services for wages (*b*); or by some act which the law requires them to do(*c*).

169. Some acts of infants are voidable and some are void; and the same is true as to their contracts. Where they are utterly void, they are from the beginning mere nullities, and incapable of any operation. But where they are voidable, the infant may, when he arrives at full age, elect to avoid them or not. In this respect, he is by law differently placed from idiots and lunatics; for the latter, may not, at least at law, be allowed to stultify themselves. But an infant at his coming of age, may avoid or confirm any voidable act or contract at his pleasure. In general, where a contract may be for the benefit or to the prejudice of an infant, he may avoid it as well at law as in equity, where it can never be for his benefit, it is utterly void(*d*).

170. But if an infant, by a false and fraudulent representation that he is of full age, induces a man to enter into a contract with him, he is bound in equity(*e*).

171. Generally speaking, at law, *femes covert* have no capacity to do any acts, or to enter into any contracts; and such acts and contracts are treated as mere nullities. And in this respect equity generally follows the law. Courts of equity indeed, broke in upon this doctrine, and in many respects treated the wife as capable of disposing of her own separate property, and of doing other acts, as if she were a *feme sole*. In cases of this sort, the same principles applied to the acts and contracts of a *feme covert*, as would apply to her as a *feme sole*,

(*a*) Zouch *v.* Parsons, 3 Burr, 1801, Co. Litt. 172 *a*.
(*b*) Wood *v.* Fenwick, 10 M. & W. 195. And see Regina *v.* Lord, 12 Q. B. 757.
(*c*) Delesdernier *v.* Burton, 12 Gr. 569.
(*d*) Story, s. 241; Zouch *v.* Parsons, 3 Burr. 1801, 1807. And see Miller *v.* Ostrander, 12 Gr. 349.
(*e*) Cory *v.* Gertchen, 2 Mad. 40; Wright *v.* Snowe, 2 D. & Sm. 321; *Ex parte* Unity Bank, 3 D. & J. 63; Hannah *v.* Hodgson, 30 Beav. 23; Compare *Ex parte* Taylor, 8 D. M. & G. 254; Nelson *v.* Stocker, 4 D. & J. 458. And see Bartlett *v.* Wells, 1 B. & S. 836.

unless the circumstances gave rise to the presumption of fraud, imposition, unconscionable advantage, or undue influence(*a*).

172. The property of a married woman is not by the Act relating to the separate property of married women(*b*), made her separate property in the sense in which property settled to her own use with the right to dispose of it, is treated in equity, and therefore it has been held that her contracts do not bind it(*c*). The general scope and tenor of that Act is to protect and free from liability the property of married women, not to subject it to past liabilities, except in the case of her torts, and of her debts and contracts before marriage. The Act gives to what has been called the ordinary equitable estate of a *feme covert* certain qualities for its better protection, which it did not possess before, such qualities being incident to a separate estate, and sufficient probably, if found in a private instrument, to constitute a separate estate; but certain qualities incident to a separate estate are withheld, and among them that quality upon which all the decisions making separate property liable for the married woman's contracts is founded, namely, the *jus disponendi*(*d*).

173. By recent legislation married women may insure their own, or their husband's lives(*e*), may become stockholders or members of any bank, insurance company, or other incorporated company, as fully and effectually, as if *femes sole*, may make deposits in any bank and draw cheques thereon. They may also carry on any occupation or trade separately from their husbands, and for their own benefit; and they may sue and be sued separately from their husbands. A married

(*a*) Story, s. 243; Dalbiac *v.* Dalbiac, 16 Ves. 116. See Comyns, Dig. *Baron and Feme*, D. 1, E. 1 to 3, H. N. O. P. Q.; id. Chancery, 2 M. 1 to 16.

(*b*) Con. Stat. U. C. c. 73.

(*c*) Chamberlain *v.* McDonald, 14 Gr. 447.

(*d*) Royal Canadian Bank *v.* Mitchell, 14 Gr. 419, 421; Emrick *v.* Sullivan, 25 U. C. Q. B. 105. But see Lett *v.* The Commercial Bank. 24 U. C. Q. B. 555, and the language of V. C. Mowat, in Chamberlain *v.* McDonald, 14 Gr. 449.

(*e*) O. S. 35 Vic. c. 16.

woman is also made liable on any contract made by her respecting her real estate, as if she were a *feme sole*(*a*).

174. Of a kindred nature to the cases already considered, are cases of bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence. This is the sort of fraud alluded to by Lord Hardwicke when he said, that they were such bargains that no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other, being inequitable and unconscientious bargains(*b*). Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity(*c*). For courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations, not for courts of justice, but for the party himself to deliberate upon(*d*).

175. There may, however, be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud(*e*). But then such unconscionableness or such inade-

(*a*) The first section of this Act applies to women married since the passing of the Act; Dingman *v.* Austin, 33 U. C. Q. B. 190. But see Merrick *v.* Sherwood, 22 U. C. C. P 467,

(*b*) Chesterfield *v.* Jansen, 2 Ves. Sen. 155; Harvey *v.* Mount, 8 Beav. 439; Crippen *v.* Ogilvy, 15 Gr. 490.

(*c*) Griffith *v.* Spratley, 1 Cox, 383; Copis *v.* Middleton, 2 Mad. 409; Collier *v.* Brown, 1 Cox, 428; Low *v.* Barchard, 8 Ves. 133; Western *v.* Russel, 3 V. & B. 187; Naylor *v.* Winch, 1 S. & S. 565; Borell *v.* Dann, 2 Ha. 440, 450; Callaghan *v.* Callaghan, 8 Cl. & Fin. 401; Bower *v.* Cooper, 2 Ha. 408; Abbott *v.* Sworder, 4 D. & Sm. 456; Falcke *v.* Gray, 4 Drew. 651.

(*d*) Story, s. 244; Harrison *v.* Guest, 8 H. L. 481.

(*e*) Gwynne *v.* Heaton, 1 Bro. C. C. 9; Gartside *v.* Isherwood, 1 Bro. C. C. 558, 560; Evans *v.* Llewellin, 1 Cox, 333.

quacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud(*a*). And where there are other ingredients in the case, of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud(*b*).

176. But courts of equity will not relieve in all cases, even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed *in statu quo*; as, for instance, in cases of marriage settlements, for the court cannot unmarry the parties(*c*).

177. Cases of surprise, and sudden action without due deliberation, may properly be referred to the same head of fraud or imposition(*d*). An undue advantage is taken of the party under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning. The surprise here intended must be accompanied with fraud and circumvention, or at least by such circumstances as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him. If proper time is not allowed to the party and he acts improvidently, if he is importunately pressed, if those in whom he places confidence make use of strong persuasions, if he is not fully aware of the consequences, but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel before he is called upon to act, in circumstances of sudden emergency, or unexpected right or acquisition; in these and many like cases, if there has been great inequality

(*a*) Coles *v.* Trecothick, 9 Ves. 246; Underhill *v.* Harwood, 10 Ves. 219; Morse *v.* Royal, 12 Ves. 373; Copis *v.* Middleton, 2 Mad. 409; Stillwell *v.* Wilkinson, Jac. 280; Peacock *v.* Evans, 16 Ves. 512; Wood *v.* Abrey, 3 Mad. 417; Blakeney *v.* Baggott, 1 Dow & Cl. 405; Rice *v.* Gordon, 11 Beav. 265; Cockell *v.* Taylor, 15 Beav. 103, 115; Falcke *v.* Gray, 4 Drew. 651; Summers *v.* Griffiths, 35 Beav. 27; Butler *v.* Miller, Ir. L. R. 1 Eq. 40.

(*b*) Story, s. 246; How *v.* Weldon, 2 Ves. Sen. 516; Com. Dig. Chancery, 3 M. 1; Huguenin *v.* Baseley, 14 Ves. 273.

(*c*) Story s. 250; North *v.* Ansell, 2 P. W. 619.

(*d*) How *v.* Weldon, 2 Ves. Sen. 516.

in the bargain, courts of equity will assist the party upon the ground of fraud, imposition, or unconscionable advantage(*a*).

178. Among other cases illustrative of what is denominated actual or positive fraud, are the fraudulent suppression or destruction of deeds and other instruments, in violation of, or injury to, the rights of others(*b*); fraudulent awards, with an intention to do injustice(*c*); fraudulent and illusory appointments and revocations, under powers; fraudulent prevention of acts to be done for the benefit of others, under false statements or false promises(*d*); frauds in relation to trusts of a secret or special nature(*e*); frauds in verdicts, judgments, decrees, and other judicial proceedings(*f*); frauds in the confusion of boundaries of estates and matters of partition and dower; frauds in the administration of charities; and frauds upon creditors, and other persons, standing upon a like equity (*g*).

179. In the first place, as to the suppression and destruction of deeds and wills, and other instruments. If an heir should suppress them, in order to prevent another party, as a grantee or devisee, from obtaining the estate vested in him thereby, courts of equity, upon due proof by other evidence, would grant relief, and perpetuate the possession and enjoyment of the estate in such grantee or devisee(*h*). For cases for relief

(*a*) Story s. 251; Evans *v.* Llewellyn, 1 Cox, 339; 2 Bro. C. C. 150; Irnham *v.* Child, 1 Bro. C. C. 92; Townshend *v.* Stangroom, 6 Ves. 338; Pickett *v.* Loggon, 14 Ves. 215.

(*b*) Bowles *v.* Stewart, 1 S. & L. 222, 225; Dormer *v.* Fortescue, 3 Atk. 124; Eyton *v.* Eyton, 2 Vern. 380; Dalston *v.* Coatsworth, 1 P. W. 733.

(*c*) Brown *v.* Brown, 1 Vern. 157, and note (1), 159; Com. Dig. Chancery, 2 K. 6; Champion *v.* Wenham, Ambl. 245.

(*d*) Luttrell *v.* Lord Waltham, cited 14 Ves. 290; Jones *v.* Martin, 6 Bro. P. C. 437; 5 Ves. 266; note, 2 Chance on Powers, ch. 23, art. 3015 to 3025.

(*e*) Dalbaic *v.* Dalbaic, 16 Ves. 124.

(*f*) Com. Dig. Chancery, 3 M. 1, 3 N. 1, 3 W.; Davenport *v.* Stafford, 8 Beav. 503; Langley *v.* Fisher, 9 Beav. 90.

(*g*) Story, s. 252; 1 Fonbl. Eq. B. 1 ch. 4, ss. 12, 13, 14, and notes; Com. Dig. Chancery, 3 M. 4; Jones *v.* Martin, 6 Bro. P. C. 437; 5 Ves. 266, note. And see Patch *v.* Ward, L. R. 3 Chan. 203.

(*h*) Hunt *v.* Matthews, 1 Vern. 408; Wardour *v.* Berisford, 1 Vern. 452; 2 P. W. 748, 749; Dalston *v.* Coatsworth, 1 P. W. 731; Finch *v.* Newnham, 2 Vern. 216; Hampden *v.* Hampden, 3 Bro. P. C. 551; Barnsley *v.* Powell, 1 Ves. Sen. 119, 284, 289; Tucker *v.* Phipps, 3 Atk. 360; Hornby *v.* Matcham, 16 Sim. 325.

against spoliation come in a favourable light before courts of equity, *in odium spoliatoris*; and where the contents of a suppressed or destroyed instrument are proved, the party will receive the same benefit as if the instrument were produced(*a*).

180. In the next place, frauds in regard to powers of appointment. A person, having a power of appointment for the benefit of others, shall not, by any contrivance, use it for his own benefit. Thus, if a parent has a power to appoint to such of his children as he may choose, he shall not, by exercising it in favour of a child in a consumption, gain the benefit of it himself, or by a secret agreement with a child, in whose favour he makes it, derive a beneficial interest from the execution of it(*b*). The same rule applies to cases where a parent, having a power to appoint among his children, makes an illusory appointment, by giving to one child a nominal and not a substantial share; for, in such a case, courts of equity will treat the execution as a fraud upon the power(*c*).

181. In the next place, the fraudulent prevention of acts to be done for the benefit of third persons. Courts of equity hold themselves entirely competent to take from third persons, and *à fortiori*, from the party himself, the benefit which he may have derived from his own fraud, imposition, or undue influence, in procuring the suppression of such acts(*d*). Thus, where a person had fraudulently prevented another, upon his death-bed, from suffering a recovery at law, with a view that the estate might devolve upon another person, with whom he was connected, it was adjudged, that the estate ought to be

(*a*) Story s. 254; Saltern *v.* Melhuish, Ambl. 247; Cowper *v.* Cowper, 2 P. W. 722; Rex *v.* Arundel, Hob. 109; Hampden *v.* Hampden, cited 1 P. W. 733; 3 Bro. P. C. 550; Bowles *v.* Stewart, 1 S. & L. 225.

(*b*) McQueen *v.* Farquahar, 11 Ves. 479; Aleyn *v.* Belcher, 1 Ed. 138; Palmer *v.* Wheeler, 2 B. & B. 18; Morris *v.* Clarkson, 1 J. & W. 111; Rowley *v.* Rowley, 18 Jur. 306; Agassiz *v.* Squire, 1 Jur. N. S. 50; Wellesley *v.* Mornington, 2 K. & J. 143; Daubney *v.* Cockburn, 1 Mer. 626; Farmer *v.* Martin, 2 Sim. 502; Thompson *v.* Simpson, 1 Dr. & War. 549; Askham *v.* Barker, 12 Beav. 499; Jackson *v.* Jackson, Dru. 91; 7 Cl. & Fin. 977; Salmon *v.* Gibbs, 3 D. & Sm. 343.

(*c*) Story 255; Butcher *v.* Butcher, 9 Ves. 382; Campbell *v.* Horne, 1 Y. & C. 664; Stolworthy *v.* Sancroft, 10 Jur. N. S. 762; Ward *v.* Tyrrell, 25 Beav. 563.

(*d*) Bridgman *v.* Green, 2 Ves. Sen. 627; Huguenin *v.* Baseley, 14 Ves. 289

held as if the recovery had been perfected, though even in favour of a volunteer, and against one not a party to the fraud(*a*). So, if a testator should communicate his intention to a devisee, of charging a legacy on his estate, and the devisee should tell him that it is unnecessary, and he will pay it, the legacy being thus prevented, the devisee will be charged with the payment(*b*). And, where a party procures a testator to make a new will, appointing him as executor, and agrees to hold the property in trust for the use of an intended legatee, he will be held a trustee for the latter, upon the like ground of fraud(*c*).

182. This head of positive or actual fraud, may be closed by referring to another class of frauds, of a very peculiar and distinct character. Gifts and legacies are often bestowed upon persons, upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. Where such consent is fraudulently withheld by the proper party, for the express purpose of defeating the gift or legacy, or of insisting upon some private and selfish advantage, or from motives of a corrupt, unreasonable, or vicious nature, courts of equity will not suffer the manifest object of the condition to be defeated by the fraud or dishonest, corrupt, or unreasonable refusal of the party whose consent is required to the marriage(*d*).

183. In general, a contract which contemplates a fraud upon third parties is regarded as so far illegal between the immediate parties, that neither will be entitled to claim the aid of a court of equity in its enforcement(*e*).

(*a*) Luttrell *v.* Lord Waltham, cited 14 Ves. 290; s. c. 11 Ves. 638; 1 J. & W. 96.

(*b*) Cited in Mestaer *v.* Gillespie, 11 Ves. 638. See Goss *v.* Tracey, 1 P. W. 288; 2 Vern. 700; Thynn *v.* Thynn, 1 Vern. 296; Reech *v.* Kennigate, Ambl. 67; Chamberlain *v.* Agar, 2 V. & B. 259; Drakeford *v.* Wilks, 3 Atk. 539; Blair *v.* Bromley, 2 Ph. 354; Podmore *v.* Gunning, 7 Sim. 660; Russell *v.* Jackson, 10 Ha. 213.

(*c*) Story s. 256; Thynn *v.* Thynn, 1 Vern. 296; Reech *v.* Kenningate, Ambl. 67; Bevenish *v.* Barnes, Prec. Ch. 3; Oldham *v.* Litchford, 2 Vern. 506; Barrow *v.* Greenough, 3 Ves. 152; Chamberlain *v.* Agar, 2 V. & B. 262; Whitton *v.* Russell, 1 Atk. 448.

(*d*) Story s. 257; Peyton *v.* Bury, 2 P. W. 626, 628; Eastland *v.* Reynolds, 1 Dick. 317; Goldsmid *v.* Goldsmid, 19 Ves. 368; Strange *v.* Smith, Ambl. 263; Clarke *v.* Parker, 19 Ves. 1, 12; Mesgrett *v.* Mesgrett, 2 Vern. 580; Merry *v.* Ryves, 1 Ed. 1, 4.

(*e*) But see Shaw *v.* Jeffery, 13 Moo. P. C. C. 432.

CHAPTER VII.

CONSTRUCTIVE FRAUD.

184. By CONSTRUCTIVE FRAUDS are meant such acts or contracts, as, although not originating in any actual evil design, or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief, as acts and contracts done *malo animo*(*a*).

185. The cases under this head may be divided into three classes: (1) Cases of constructive frauds, so called, because they are contrary to some general public policy, or to some fixed artificial policy of the law. (2) Constructive frauds which arise from some special confidential or fiduciary relation between all the parties, or between some of them. (3) Constructive frauds prohibited, chiefly because they unconscientiously compromit, or injuriously affect, the private interests, rights, or duties of the parties themselves, or operate substantially as a fraud upon the private rights, interests, duties, or intentions of third persons.

186. Among the cases of constructive fraud, which are so denominated on account of their being contrary to some general public policy, or fixed artificial policy of the law, are contracts and agreements respecting marriage, by which a party engages to give another a reward or compensation, if he will negotiate an advantageous marriage for him(*b*)

(*a*) Story, s. 258.

(*b*) See Hall and Kean *v.* Potter, 3 Lev. 411; Show. P. C. 76; Grisley *v.* Lother, Hob. 10; Law *v.* Law, Cas. t. Talb. 140, 142; Vauxhall Bridge Co. *v.* Spencer, Jac. 67.

All such marriage brokage contracts are utterly void, as against public policy(*a*); so much so that they are deemed incapable of confirmation(*b*); and even money paid under them may be recovered back in equity(*c*). Nor does it make any difference, that the marriage is between persons of equal rank, and fortune, and age(*d*).

187. Upon the same principle, secret contracts made with a parent or guardian, whereby a compensation or security, or benefit is to be received for promoting the marriage of his child or ward, or giving consent to it, are held void(*e*).

188. The same principle pervades the class of cases where persons, upon a treaty of marriage, by any concealment, or misrepresentation, mislead other parties, or do acts, which are by other secret agreements reduced to mere forms, or become inoperative(*f*). Thus, where a brother, on the marriage of his sister, let her have a sum of money privately, that her fortune might appear to be as much as was insisted on by the other side, and the sister gave a bond to the brother to repay it, the bond was set aside(*g*).

189. Of a kindred nature, and governed by the same rules,

(*a*) Arundel *v.* Trevillian, 1 Ch. Rep. 37 [87]; Drury *v.* Hooke, 1 Vern. 412; Hall *v.* Potter, 3 Lev. 411; Shower, P. C. 76; Cole *v.* Gibson, 1 Ves. Sen. 507: Debenham *v.* Ox, 1 Ves. Sen. 276; Smith *v.* Aykwell, 3 Atk. 566; Hylton *v.* Hylton, 2 Ves. Sen. 548; Scribblehill *v.* Brett, 2 Vern. 445; s. c. Prec. Ch. 165; 4 Bro. P C. 144; Roberts *v.* Roberts, 3 P. W. 74, note (1); 75, 76; Law *v.* Law, 3 P. W. 391, 394; Williamson *v.* Gihon, 2 S. & L. 357; Vauxhall Bridge Co. *v.* Spencer, Jac. 67.

(*b*) Cole *v.* Gibson, 1 Ves. Sen. 503, 506, 507; Roberts *v.* Roberts, 3 P. W. 74, note (1); Roche *v.* O'Brien, 1 B & B 358.

(*c*) Smith *v.* Bruning, 2 Vern. 392; Goldsmith *v.* Bruning, 1 Eq. A. B. 89 F.

(*d*) Story, ss. 260, 263; Williamson *v.* Gihon, 2 S. & L. 356, 362.

(*e*) Keat *v.* Allen, 2 Vern. 588; Roberts *v.* Roberts, 3 P. W. 74, and note (1); Peyton *v.* Bladwell, 1 Vern. 240; Redman *v.* Redman, 1 Vern. 348; Gale *v.* Lindo, 1 Vern. 475; Cole *v.* Gibson, 1 Ves. Sen. 503; Morrison *v.* Arbuthnot, 1 Bro. C. C. 547, note; 8 Bro P. C. 247.

(*f*) Lamlee *v.* Hanman, 2 Vern. 499, 500; Pitcairne *v.* Ogbourne, 2 Ves. Sen. 375; Neville *v.* Wilkinson, 1 Bro. C. C. 543, 547; Thompson *v.* Harrison, 1 Cox, 344; Estabrook *v.* Scott; 3 Ves. 461; Scott *v.* Scott, 1 Cox, 366; Hunsden *v.* Cheney, 2 Vern. 150; Beverley *v.* Beverley, 2 Vern. 133.

(*g*) Gale *v.* Lindo, 1 Vern. 475; Lamlee *v.* Hanman, 2 Vern. 499; Neville *v.* Wilkinson, 1 Bro. C. C. 543; 3 P. W. 74; Palmer *v.* Neave, 11 Ves. 165; Redman *v.* Redman, 1 Vern. 348; Morrison *v.* Arbuthnot, 8 Bro. P. C. 247; England *v.* Downs, 2 Beav. 522. See Hammersley *v.* De Biel, 12 Cl. & Fin. 45.

are cases where bonds are given, or other agreements made, as a reward for using influence and power over another person, to induce him to make a will in favour of the obligor, and for his benefit; for all such contracts tend to the deceit and injury of third persons, and encourage artifices and improper attempts to control the exercise of their free judgment(*a*). But such cases are carefully to be distinguished from those in which there is an agreement among heirs, or other near relatives, to share the estate equally between them, whatever may be the will made by the testator; for such an agreement is generally made to suppress fraud and undue influence, and cannot truly be said to disappoint the testator's intention, if he does not impose any restriction upon his devisee(*b*).

190. In all these cases, and those of a like nature, the distinct ground of relief is a meditated fraud or imposition practised by one of the parties upon third persons, by intentional concealment or misrepresentation. But the concealment or misrepresentation of a material fact will not induce the court to interfere where the parties acted with entire good faith and under mutual innocent mistake(*c*). There must be some ingredient of fraud, or some wilful misstatement or concealment by which the other side has been misled.

191. Upon a similar ground, a settlement, secretly made by a woman, in contemplation of marriage, of her own property to her own separate use, without her intended husband's privity, will be held void, as it is in derogation of the marital rights of the husband(*d*), and a fraud upon his just expecta-

(*a*) Debenham *v.* Ox, 1 Ves. Sen. 276.

(*b*) Story, s. 265; Beckley *v.* Newland, 2 P. W. 182; Harwood *v.* Tooke, 2 Sim. 192; Wethered *v.* Wethered, 2 Sim. 183.

(*c*) Merewether *v.* Shaw, 2 Cox, 124; Scott *v.* Scott, 1 Cox, 366; Pitcairne *v.* Ogbourne, 2 Ves. Sen. 375.

(*d*) Jones *v.* Martin, 3 Anst. 882; 5 Ves. 266, note; Fortescue *v.* Hennah, 19 Ves. 66; Bowes *v.* Strathmore, 2 Bro. C. C. 345; 2 Cox, 28; 1 Ves. 22; 6 Bro. P. C. 427; Ball *v.* Montgomery, 2 Ves. 194; Carlton *v.* Earl of Dorset, 2 Vern. 17; Gregor *v.* Kemp, 3 Swanst. 404, note; Goddard *v.* Snow, 1 Russ. 485; England *v* Downs, 2 Beav. 522.

tions(*a*). And a secret conveyance made by a woman, under like circumstances, in favour of a person for whom she is under no moral obligation to provide, would be treated in the like manner. But if she should only reasonably provide for her children by a former marriage, under circumstances of good faith, it would be otherwise(*b*). However, circumstances may occur which may deprive a husband of any remedy, as if before the marriage he acquires a knowledge of the prior settlement(*c*), or if he has so conducted himself after the settlement, that the wife cannot, without dishonour to herself, live with him, or cannot, without disgrace, retire from the marriage as when the intended husband induced her to cohabit with him before marriage(*d*).

192. Upon the same ground of public policy, contracts in restraint of marriage are held void(*e*). A contract which restrains a person from marrying at all, or a contract to marry a particular person, when that person is not bound by a corresponding reciprocal obligation, is treated as mischievous to the general interests of society, and will be cancelled(*f*). Courts of equity have in this respect followed, although not to an unlimited extent, the doctrine of the civil law, that marriage ought to be free(*g*).

193. Where the obligation to marry is reciprocal, the contract is valid, and even although the marriage is to be deferred

(*a*) And see Lance *v.* Norman, 2 Ch. Rep. 41; Blanchet *v.* Foster, 2 Ves. Sen. 264; England *v.* Downs, 2 Beav. 522. See also Lewellin *v.* Cobbold, 1 Sm. & Gif. 376; Wrigley *v.* Swainson, 3 D. & Sm. 458; Chambers *v.* Crabbe, 34 Beav. 457; Blenkinsopp *v.* Blenkinsopp, 1 D. M. & G. 495.

(*b*) Cotton *v.* King, 2 P. W. 357, 674; St. George *v.* Wake, 1 M. & K. 610; England *v.* Downs, 2 Beav. 522; De Manneville *v.* Crompton, 1 V. & B. 354; Taylor *v.* Pugh, 1 Ha. 608, 613, 616.

(*c*) Ashton *v.* McDougall, 5 Beav. 56; Griggs *v.* Staples, 13 Jur. 32; Maber *v.* Hobbs, 2 Y. & C. Ex. 317.

(*d*) Story, s. 273; Taylor *v.* Pugh, 1 Ha. 608.

(*e*) Baker *v.* White, 2 Vern. 215.

(*f*) Key *v.* Bradshaw, 2 Vern. 102; Baker *v.* White, 2 Vern. 215; Woodhouse *v.* Shepley, 2 Atk. 535; Lowe *v.* Peers, 4 Burr. 2225; Cock *v.* Richards, 10 Ves. 429; Atkins *v.* Farr, 1 Atk. 287; Hartley *v.* Rice, 10 East, 22.

(*g*) Story, s. 274; Dig. Lib. 35, tit. 1, l. 62, 63, 64; Key *v.* Bradshaw, 2 Vern. 102; 1 Fonbl. Eq. B. 1, ch. 4, s. 10. Lord Mansfield in Long *v.* Dennis, 4 Burr. 2055, said "Conditions in restraint of marriage are odious, and are therefore to be held to the utmost rigour and strictness." This generality of expression seems to have been disapproved of by Lord Eldon, in Clarke *v.* Parker, 19 Ves. 13.

to some future period, there may not be, as between the parties, any objection to the contract in itself, if in all other respects it is entered into in good faith, and there is no reason to suspect fraud, imposition or undue influence(*a*). But, even in these cases, equity will relieve against the contract, if it be a fraud upon third persons, as upon parents, or friends standing *in loco parentis*, from whom expectations are entertained (*b*).

194. Conditions annexed to gifts, legacies, and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. But a contract or condition in restraint of marriage generally is void as against public policy, and the due economy and morality of domestic life(*c*). And so, if a condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate, is unreasonably restrained in the choice of marriage, it will fall under the like consideration(*d*). But a general condition that the testator's widow shall not marry is not an unlawful one(*e*).

195. On the other hand, provisions against improvident matches, especially during infancy, or until a certain age of discretion, are not deemed an unreasonable precaution for parents and other persons to affix to their bounty(*f*). Thus a legacy given to a daughter to be paid to her at twenty-one years of age, if she does not marry until that period, would be held good(*g*). So is a condition not to marry

(*a*) Lowe *v.* Peers, 4 Burr. 2229, 2230; Key *v.* Bradshaw, 2 Vern. 102.

(*b*) Story, s. 275; Woodhouse *v.* Shepley, 2 Atk. 535, 539; Cock *v.* Richards, 10 Ves. 436, 438.

(*c*) Keily *v.* Monck, 3 Ridg. 205, 244, 247, 261; Rishton *v.* Cobb, 9 Sim. 615; Scott *v.* Tyler, 2 Bro. C. C. 488; Harvey *v.* Aston, 1 Atk. 361.

(*d* Keily *v.* Monck, 3 Ridg. 205, 244, 247, 261; Morley *v.* Rennoldson, 2 Ha. 570.

(*e*) Barton *v.* Barton, 2 Vern. 308; Lloyd *v.* Lloyd, 2 Sim. N. S. 255. Whether a condition defeating a gift to a man on his second marriage is good or bad, does not appear to be decided. See Evans *v.* Rosser, 2 H. & M. 190.

(*f*) Scott *v.* Tyler, 2 Dick. 719.

(*g*) See Stackpole *v.* Beaumont, 3 Ves. 96, 97; Scott *v.* Tyler, 2 Dick. 721, 722, 724; Beaumont *v.* Squire, 21 L. J. Q. B. 123; Desbody *v.* Boyville, 2 P. W. 547; Clarke *v.* Parker, 19 Ves. 1; Lloyd *v.* Branton, 3 Meriv. 108; Dashwood *v.* Bulkley, 10 Ves. 230; and see Younge *v.* Furse, 8 D. M. & G. 756.

without the consent of parents or trustees, or other specified persons.

196. A distinction is drawn between cases where, in default of a compliance with the condition, there is a bequest over, and cases where there is not a bequest over, upon a like default of the party to comply with the condition. In the former case, the bequest over becomes operative upon such default, and defeats the prior legacy(*a*). In the latter case (that is, where there is no bequest over,) the condition is treated as ineffectual, upon the ground that the condition is *in terrorem* only, and does not impose a forfeiture(*b*).

197. Another distinction is taken between conditions annexed to a bequest of personal estate, and the like conditions, annexed to a devise of real estate, or to a charge on real estate, or to things savoring of the reality. In the latter cases (touching real estate) the doctrine of the common law, as to conditions, is strictly applied. If the condition be precedent, it must be strictly complied with, in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent, its validity will depend upon its being such as the law will allow to devest an estate. For, if the law deems the condition void as against its own policy, then the estate will be absolute and free from the condition. If, on the other hand, the condition is good, then a non-compliance with it will defeat the estate, in the same manner as any other condition subsequent will defeat it(*c*.)

(*a*) Clarke *v.* Parker, 19 Ves. 13; Lloyd *v.* Branton, 3 Mer. 108, 119; Chauncy *v.* Graydon, 2 Atk. 616; Wheeler *v.* Bingham, 3 Atk. 367; Malcolm *v.* O'Callaghan, 2 Mad. 350; Gardiner *v.* Slater, 25 Beav. 509. And see Creagh *v.* Wilson, 2 Vern. 572; Gillett *v.* Wray, 1 P. W. 284. But where the condition of a devise was the giving of a bond not to marry or cohabit with certain persons, with a devise over, the court refused to enforce the condition, Poole *v.* Bott, 11 Ha. 33.

(*b*) Story, s. 286; Harvey *v.* Ashton, 1 Atk. 361, 375, 377; Reynish *v.* Martin, 3 Atk. 330; Pendarvis *v.* Hicks; 2 Freem. 41; Pullen *v.* Ready, 2 Atk. 587; Long *v.* Dennis, 4 Burr. 2055; Eastland *v.* Reynolds, 1 Dick. 317. But see *Re* Dickson, 1 Sim. N. S. 37, as to a bequest over.

(*c*) Story, s. 288; Co. Litt. 206 *a* and *b*; 217 *a*; Bertie *v.* Faulkland, 3 Ch. Cas. 130; 2 Vern. 333; Harvey *v.* Aston, 1 Atk. 361; Reynish *v.* Martin, 3 Atk. 330, 332, 333; Fry *v.* Porter, 1 Mod. 300; Long *v.* Rickets, 2 S. & S. 179; Popham *v.* Bamfield, 1 Vern. 3 Graydon *v.* Hicks, 2 Atk. 16; Peyton *v.* Bury, 2 P. W. 626.

198. But, if the bequest be of personal estate, a different rule seems to have prevailed, founded, in all probability, upon the doctrines maintained in the ecclesiastical courts, and derived from the canon and civil law(*a*). If the condition be subsequent and general, then the condition is altogether void, and the party retains the interest given, discharged of the condition(*b*). If it be only a limited restraint (such as to marriage with the consent of parents, or not until the age of twenty-one,) and there is no bequest over upon default, the condition subsequent is treated as merely *in terrorem*; and the legacy becomes pure and absolute(*c*). But if the restraint be a condition precedent, then it admits of a very different application from the rule of the common law in similar cases as to real estate. For, if the condition regard real estate, although it may be void, yet if there is not a compliance with it, the estate will never arise in the devisee. But if it be a legacy of personal estate, under like circumstances, the legacy will be held good and absolute, as if no condition whatsoever had been annexed to it(*d*).

199. Whether the same rule is to be applied to legacies of personal estate upon a condition precedent, of a limited, and qualified, and legal character, where there is no bequest over, and there has been a default in complying with the condition, has been a question much vexed and discussed in courts of equity, and upon which some diversity of judgment has been expressed. There are, certainly, authorities which go directly to establish the doctrine, that there is no distinction in cases of this sort between conditions precedent and conditions subsequent. In each of them, if there is no bequest over, the legacy is treated as pure and absolute, and the condition is made *in terrorem* only. The civil law and ecclesiastical law

(*a*) 1 Roper on Legacies, by White, 650; Scott *v.* Tyler, 2 Bro. C. C. 487; 2 Dick. 712; Stackpole *v.* Beaumont, 3 Ves. 96.

(*b*) See Morley *v.* Rennoldson, 2 Ha. 570.

(*c*) Lloyd *v.* Branton, 3 Mer. 119; Marples *v.* Bainbridge, 1 Mad. 590; Garret *v.* Pritty, 2 Vern. 293; Wheeler *v.* Bingham, 3 Atk. 364. And see W *v.* B., 11 Beav. 621; Poole *v.* Bott, 11 Ha. 33.

(*d*) Story, s. 289.

recognize no distinction between conditions precedent and conditions subsequent, as to this particular subject(*a*). On the other hand, there are authorities which seem to inculcate a different doctrine, and to treat conditions precedent, as to legacies of this sort, upon the same footing as any other bequests or devises at the common law; that is to say, that they are to to take effect only upon the condition precedent being complied with, whether there be a bequest over or not(*b*).

200. But, whichever of these opinions shall be deemed to maintain the correct doctrine, there is a modification of the strictness of the common law, as to conditions precedent in regard to personal legacies, which is at once rational and convenient, and promotive of the real intention of the testator. It is, that where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any default of the party, it is sufficient that it is complied with, as nearly as it practically can be, or (as it is technically called) *Cy pres.* This modification is derived from the civil law, and stands upon the presumption, that the donor could not intend to require impossibilities, but only a substantial compliance with his directions, as far as they should admit of being fairly carried into execution. It is upon this ground that courts of equity constantly hold, in cases of personal legacies, that a substantial compliance with the condition satisfies it, although not literally fulfilled. Thus, if a legacy upon a condition precedent should require the consent of three persons to a marriage, and one or more of them should die, the consent of the survivor or survivors would be deemed a suffi-

(*a*) See Harvey *v.* Aston, 1 Atk. 375; Reynish *v.* Martin, 3 Atk. 332.

(*b*) Story, s. 290. That there is no difference between conditions precedent and conditions subsequent, as to this point, was maintained by Lord Hardwicke, in Reynish *v.* Martin, 3 Atk. 330; and recognized by Lord Clare, in Keily *v.* Monck, 3 Ridgw. 263; and by Sir Thomas Plumer, in Malcolm *v.* O'Callaghan, 2 Mad. 349, 353. See also Garbut *v.* Hilton, 1 Atk. 381; Gardiner *v.* Slater, 25 Beav. 509. But the contrary doctrine is indicated in Hemmings *v.* Munckley, 1 Bro. C. C. 303; Scott *v.* Tyler, 2 Bro. C. C. 488; 2 Dick. 723, 724; Stackpole v. Beaumont, 3 Ves. 89. See also Knight *v.* Cameron, 14 Ves. 389; Clarke *v.* Parker, 19 Ves. 13; Elton *v.* Elton, 1 Ves. Sen. 4; Clifford *v.* Beaumont, 4 Russ. 325. The weight of authority is, in Mr. Roper's opinion, with the latter doctrine, Roper on Legacies, 654, 715; and see note to 3 Ves. 89, and note 1 Atk. 361.

cient compliance with the condition(*a*). And, *à fortiori*, this doctrine would be applied to conditions subsequent(*b*).

201. Conditions annexed to a gift, the tendency of which is to induce husband and wife to live separate, or be divorced, are, upon grounds of public policy and public morals, held void(*c*). This principle is not applicable where the bequest is of such a nature as not to influence the conduct of the husband and wife, and the bequest to the husband or wife living apart from each other is to take effect immediately upon the death of the testator(*d*).

202. Conditions annexed to devises, both of real and personal estate, to a widow, that they shall become inoperative in the event of the marriage of the devisee, are valid(*e*). The law recognizes in the husband that species of interest in the widowhood of his wife which makes it lawful for him to restrain a second marriage(*f*).

203. There is a difference, it has been said, even in equity, between a *condition* and *limitation*, in a gift to one not married, and that one may give an estate to any woman, to continue so long as she shall remain single; but if he give a life, or other estate, and then append a condition to defeat that estate, if she marries, the condition is not good(*g*). Such a distinction may be valid, perhaps, in regard to the creation of estates in the realty, but it may be doubted if it could fairly be maintained in regard to testamentary gifts of real estate, and especially of

(*a*) Swinburne on Wills, Pt. 4, 262; 1 Roper on Legacies, 601. See Clarke *v.* Parker, 19 Ves, 1, 16, 19.

(*b*) Story, s. 291. See 1 Roper on Legacies, 691; Peyton *v.* Bury, 2 P. W. 626; Graydon *v.* Hicks 2 Atk. 16, 18; Aislabie *v.* Rice, 3 Mad. 256; Worthington *v* Evans, 1 S. & S. 165.

(*c*) Tenant *v.* Braie, Tothil, 141; Brown *v.* Peck, 1 Eden, 140; Wren *v.* Bradley, 2 D. & Sm. 49.

(*d*) Shewell *v.* Dwarris, Johns. 172.

(*e*) Barton *v.* Barton, 2 Vern. 308; Jordan *v.* Holkam, Ambl. 209; Lloyd *v.* Lloyd, 2 Sim. N.S. 255, 263; Marples *v.* Bambridge, 1 Mad. 590.

(*f*) Lloyd *v.* Lloyd, 2 Sim. N. S. 255. And see Grace *v.* Webb, 15 Sim. 384; Tricker *v.* Kingsbury, 7 W. R. 652; Charlton *v.* Coombes, 11 W. R. 1038; Newton *v.* Marsden, 2 J. & H. 356; Craven *v.* Brady, L. R. 4 Eq. 209.

(*g*) Lloyd *v.* Lloyd, 2 Sim. N. S. 255.

personalty, where the general intent of the donor is more to be regarded than the precise technical form of the gift(*a*).

204. The question as to what conditions, affecting marriage, are valid, must depend upon the circumstances of each particular case, and will be very materially affected, by the consideration, how far the condition was one fairly applicable to the relation of the parties, and the peculiar views and situation of the donor and donee. It has been decided, that a condition, in a devise, that if the devisee "shall marry, contrary to the order and established rules of the people called Quakers, such devise should cease, as to him and his issue, and be void," is valid and legal(*b*). So it is a legal condition which avoids the gift, provided the donee marry a Scotchman(*c*), or a papist(*d*). And where a father revoked the provision in his will, on condition that his daughter became a nun, it was held a legal condition, and that the provision ceased on her becoming a nun, although there was no bequest over(*e*).

205. Bargains and contracts in general restraint of trade, are universally prohibited because they have a tendency to promote monopolies and to discourage industry, enterprise, and just competition(*f*). But such as are in restraint of it only as to particular places or persons, or for a limited time, if founded upon a good and valuable consideration, are valid(*g*). And combinations among workmen and employers to demand or to pay only certain prices for labour, with a penalty to each other upon breach of the agreement so made, are void as

(*a*) See Evans *v.* Rosser, 2 H. & M. 190; Heath *v.* Lewis, 3 D. M. & G. 954; West *v.* Kerr, 6 Ir. Jur. 141; Potter *v.* Richards, 1 Jur. N. S. 462.

(*b*) Haughton *v.* Haughton, 1 Moll. 612.

(*c*) Perrin *v.* Lyon, 9 East, 170.

(*d*) Duggan *v.* Kelly, 10 Ir. Eq. 295. And see 1 Eq. Ca. Ab. 110, pl. 2.

(*e*) Re Dickson's Trust, 1 Sim. N. S. 37. And see Clavering *v.* Ellison, 8 D. M. & G, 662; 7 H. L. 707.

(*f*) Mitchel *v.* Reynolds, 1 P. W. 181; Morris *v.* Colman, 18 Ves. 437.

(*g*) Whittaker *v.* Howe, 3 Beav. 383; Avery *v.* Langford, Kay. 666; Benwell *v.* Inns, 24 Beav. 307; Harms *v.* Parsons, 32 Beav. 328; Chesman *v.* Nainby, 1 Bro. P. C. 224; Shackle *v.* Baker, 14 Ves. 468; Cruttwell *v.* Lye, 17 Ves. 336; Harrison *v.* Gardner, 2 Mad. 198. And see Mossop *v.* Mason, 16 Gr. 302: in App. 17 Gr. 360; Catt *v.* Tourle, L. R. 4 Chan. 654; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345; Ontario Salt Co. *v.* Merchants' Salt Co. 18 Gr. 540. But see Allsopp *v.* Wheatcroft, L. R. 15 Eq. 59.

tending to restrain trade(*a*). But a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret(*b*).

206. Agreements whereby parties engage not to bid against each other at a public auction, have been held in the United States to be void, as a fraud upon third parties(*c*). But a mere agreement between two persons, each desirous of effecting the purchase of an estate, that they will not bid against each other, but that one shall retire and leave the field open to the other, has been held not inequitable(*d*). Where, however, at a tax sale, a considerable portion of the audience combined not to bid against each other, in order that whole lots should be knocked down for the taxes in arrear, and the combination extended even to driving others from the field of competition by so bidding against them as to make a profitable purchase hopeless, the sale was set aside(*e*).

207. In equity a vendor could lawfully without any express stipulation, or without making the fact publicly known, fix a reserved price and employ a person to bid for him, so as to prevent the property going under that price; but if more than one person be employed to bid, or if the object of the employment of a bidder be to run up and enhance the price, or if the sale profess to be without reserve, and a bidder be nevertheless employed, there is a fraud in equity as well as at law(*f*).

208. It has been lately enacted(*g*), that unless in the particu-

(*a*) Hilton *v.* Eckersley, 6 El. & Bl. 47.

(*b*) Bryson *v.* Whitehead, 1 S. & S. 74. See also Benwell *v.* Inns, 24 Beav. 307; Edmonds *v.* Plews, 6 Jur. N. S. 1091.

(*c*) Jones *v.* Caswell, 3 Johns. Cas. 29; Doolin *v.* Ward, 6 Johns. 194; Wilbur *v.* Howe, 8 Johns. 444; Gardiner *v.* Morse, 25 Maine, 140; Brisbane *v.* Adams, 3 Comst. 130; Hamilton *v.* Hamilton, 2 Rich. Eq. 355; Atcheson *v.* Mallon, 43 N. Y. 147.

(*d*) Re Carew's Estate, 26 Beav. 187; Galton *v.* Emuss, 1 Coll. 243.

(*e*) Henry *v.* Burness, 8 Gr. 345; Davis *v.* Clark, 8 Gr. 358; Massingberd *v.* Montague, 9 Gr. 92.

(*f*) Smith *v.* Clarke, 12 Ves. 477; Woodward *v.* Miller, 2 Coll. 279; Robinson *v.* Wall, 2 Ph. 372; Flint *v.* Woodin, 9 Ha. 618. See Mortimer *v.* Bell, L. R. 1 Chan. 10; Dimmock *v.* Hallett, L. R. 2 Chan. 21; Green *v.* Baverstock, 14 C. B. N. S. 204.

(*g*) Ont. Stat. 31 Vic. c. 28.

lars or conditions of sale by auction of any land, it is stated that such land will be sold subject to a reserved price, or to the right of the seller to bid, the sale shall be deemed and taken to be without reserve, and where a sale is without reserve, it shall not be lawful for the seller or for a puffer to bid at such sale, or for the auctioneer to take knowingly any bidding from the seller or from a puffer. Upon any such sale, subject to a right for the seller to bid, it shall be lawful for the seller, or any one puffer to bid, in such manner as the seller may think proper. But nothing contained in the Act shall be taken to authorize any seller to become the purchaser at the sale.

209. If an intending purchaser, in order to obtain property at a reduced price, or for any like object, employs to negotiate the purchase as principal, a person to whom he knows the owner from feelings of personal regard will sell the property for less than to others, and the court is satisfied that the deception has operated to the prejudice of the seller, specific performance of the contract will not be enforced(*a*).

210. Where a contract is entered into between parties pending a bill in parliament for the charter of a corporation for a private purpose, (as for example, a railway,) and the agreement is to be concealed from parliament, in order to procure the bill to be passed without the knowledge thereof, the contract will be held void as a constructive fraud upon parliament, as well as upon the public at large.*(b)* But, it has been said, there is

(*a*) Popham *v.* Eyre, Lofft, 786; Philips *v.* Duke of Bucks. 1 Vern. 227; Bonnett *v.* Sadler, 14 Ves. 527; Fellows *v.* Lord Gwydyr, 1 Sim. 63; Sug. V. & P. (14th Ed.) 219. And see Rodgers *v.* Rodgers, 13 Gr. 143, where the same principle was applied in the case of a sale under a decree. Also Twining *v.* Morrice, 2 Bro. C. C. 331; Townsend *v.* Stangroom, 6 Ves. 328.

(*b*) Story, s. 293; Lord Howden *v.* Simpson, 10 Ad. & Ell. 793; Simpson *v.* Lord Howden, 1 Keen, 583; 3 M. & C. 97; The Vauxhall Bridge Co. *v.* Earl Spencer, 2 Mad. 356; Jac. 64; and see Mangles *v.* Grand Dock Colliery Co. 10 Sim. 519; Taylor *v.* Chichester Co. Rail Co. L. R. 2 Ex. 356. But see Lord Howden *v.* Simpson, 9 Cl. & Fin. 61; Lord Petre *v.* Eastern Counties R., 1 Railw. Cas. 462; Earl of Shrewsbury *v.* North Staffordshire R. Co., L. R. 1 Eq. 593; Edwards *v.* Grand Junction Rail. Co. 1 M. & C. 650; Caledonian & Dumbartonshire Rail Co. *v* Helensburgh Harbour Trustees, 2 Macq. 391. A contract to abandon the prosecution of a petition presented against the return of a member of Parliament accused of bribery is illegal, Coppoch *v.* Bower, 4 M. & W. 361.

no fraud upon the Legislature unless the agreement is one which the parties are bound to communicate(*a*).

211. Agreements, which are founded upon violations of public trust or confidence, or of the rules adopted by courts in furtherance of the administration of public justice, are held void(*b*). Thus, an agreement by a party to a suit to pay a witness a certain sum for his attendance, and more if the party promising, succeeded in the suit, is void(*c*). Wager contracts, which are contrary to sound morals, or injurious to the feelings or interest of third persons, or against the principles of public policy or duty, are void(*d*). So are contracts to enable a person to violate the license laws(*e*), and contracts which have a tendency to encourage champerty(*f*).

212. Another extensive class of cases, falling under this head of constructive fraud, respects contracts for the buying, selling, or procuring of public offices(*g*). All such contracts must have a material influence to diminish the respectability, responsibility, and purity of public officers. They are justly deemed contracts of moral turpitude(*h*), and are held utterly void, as contrary to the soundest public policy ; and, indeed, as a constructive fraud upon the government(*i*).

213. Another class of agreements, held void on account of

(*a*) Ker on Frauds, 325.

(*b*) See Bowes *v.* City of Toronto, 6 Gr. 1 ;11 Moo. P. C. 463 ; Cooth *v.* Jackson, 6 Ves. 12; Johnson *v.* Ogilby, 3 P. W. 276.

(*c*) And see Williams *v.* Bayley, L. R. 1 H. L. 200 ; 35 L. J. Ch. 717 ; Collins *v.* Blantern, 2 Wils. 347 ; Keir *v.* Leeman, 6 Q. B. 308.

(*d*) De Costa *v.* Jones, Cowp. 729 ; Atherfold *v.* Beard, 2 T. R. 610 ; Gilbert *v.* Sykes, 16 East, 150 ; Hartley *v.* Rice, 10 East, 22 ; Allen *v.* Hearn, 1 T. R. 56 ; Shirley *v.* Sankey, 2 Bos. & Pull. 130. See Ramloll *v.* Soojumnull, 6 Moore, P. C. 300.

(*e*) Ritchie *v.* Smith, 6 C. B. 462.

(*f*) Powell *v.* Knowler, 2 Atk. 224 ; Reynell *v.* Sprye, 1 D. M. & G. 660.

(*g*) 1 Fonbl. Eq. B. 1, ch. 4, s. 4, note (*u*) ; Chesterfield *v.* Jansen, 1 Atk. 352 ; 2 Ves. Sen. 124, 156 ; Hartwell *v.* Hartwell, 4 Ves. 811, 815.

(*h*) Morris *v.* McCulloch, 2 Ed. 190 ; Ambl. 435 ; Law *v.* Law, 3 P. W. 391 ; Cas. t. Talb. 140 ; Hanington *v.* Du Chastel, 1 Bro. C. C. 124.

(*i*) Bellamy *v.* Burrow, Cas. t. Talb. 97 ; Hanington *v.* Du Chastel, 1 Bro. C. C. 124; 167, note; Garforth *v.* Fearon, 1 H. Bl. 327, 329; Palmer *v.* Bate, 2 Bro. & Bing. 673 ; Waldo *v.* Martin, 4 B. & Cr. 319 ; Parsons *v.* Thompson, 1 H. Bl. 223, 326 Ive *v.* Ash, Prec. Ch. 199 ; East India Co. *v.* Neave, 5 Ves. 173, 181, 184; Osborne, *v.* Williams, 18 Ves. 379.

their being against public policy, are such as are founded upon corrupt considerations, or moral turpitude, whether they stand prohibited by statute or not; for these are treated as frauds upon the public or moral law(*a*). Hence, all agreements, bonds, and securities, given as a price for future, and all agreements not under seal to pay for past(*b*) illicit intercourse(*c*) *(præmium pudoris)*, or for the commission of a public crime, or for the violation of a public law, or for the omission of a public duty, are deemed incapable of confirmation or enforcement(*d*).

214. A party is not estopped from avoiding his deed by proving that it was executed for a fraudulent, illegal or immoral purpose(*e*). But where a party comes to be relieved from an illegal or immoral contract or its obligations, he must distinctly and exclusively state such grounds of relief as the court can legally attend to, and must not accompany his claim to relief, which may be legitimate, with other claims and complaints, which are contaminated with the original immoral purpose. If he sets up as a ground of relief the non-fulfilment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies upon the immoral contract and its terms for relief, and therefore the court will refuse it(*f*).

215. Other cases might be put to illustrate the doctrine of

(*a*) Beaumont *v.* Reeve, 8 Q. B. 483.

(*b*) Evans *v.* Carrington, 30 L. J, Ch. 370; Robinson *v.* Cox, 9 Mod. 263; Friend *v* Harrison, 2 C. & P. 584.

(*c*) Story, s. 296; Walker *v.* Perkins, 3 Burr. 1568; Franco *v.* Bolton, 3 Ves. 370; Benyon *v.* Nettlefold, 17 Sim. 56; Clarke *v.* Periam, 2 Atk. 333, 337; Whaley *v.* Norton, 1 Vern. 483; Robinson *v.* Gee, 1 Ves. Sen. 251, 254; Gray *v.* Mathias, 5 Ves. 286; Ottley *v.* Browne, 1 B. & B. 360; Battersby *v.* Smith, 3 Mad. 110; Thompson *v.* Thompson, 7 Ves. 470; St. John *v.* St. John, 11 Ves. 535, 536. But see Spear *v.* Hayward, Prec. Ch. 114.

(*d*) Collins *v.* Blantern, 2 Wils. 341; Paxton *v.* Popham, 9 East, 421; Gas Light and Coke Co. *v.* Turner, 5 Bing. N. C. 666; 6 Bing. N. C. 324; Stratford & Moreton Rail Co. *v.* Stratton, 2 B. & Ad. 518; Benyon *v.* Nettlefold, 17 Sim. 56; 3 Mac. & G. 94; Horton *v.* Westminster Improvement Commissioners, 7 Ex. 780.

(*e*) Story, s. 296; Batty *v.* Chester, 5 Beav. 103.

(*f*) Stickland *v.* Aldridge, 9 Ves. 516; Muckleston *v.* Brown, 6 Ves. 52; Paine *v.* Hall, 18 Ves. 475; Edwards *v.* Pike, 1 Cox, 17. And see Adlington *v.* Cann. 3 Atk. 141; cited 9 Ves. 519; Wallgrave *v.* Tebbs, 2 K. & J., 313; Lomax *v.* Ripley, 3 Sm. & G. 48.

courts of equity, in setting aside agreements and acts in fraud of the policy of the law. Thus, if a devise is made upon a secret trust for charity, in evasion of the statutes of mortmain, it will be set aside(*a*). So, if a parent grant an annuity to his son to qualify him to kill game, he will not be permitted, by tearing off the seal, to avoid the conveyance(*b*). So if a person convey an estate to another to qualify him to sit in parliament, or to become a voter, he will not be permitted to avoid it, upon the ground of its having been done by him in fraud of the law, and upon a secret agreement that it shall be given up(*c*). Contracts affecting public elections are held void; so are assignments of rights of property, *pendente lite*, when they amount to or partake of, the character of maintenance or champerty, and are reprehended by the law.

216. There is a distinction often, but not universally, acted on in courts of equity as to the nature and extent of the relief, which will be granted to persons who are parties to agreements or other transactions against public policy, and who are, therefore, to be deemed *participes criminis*. In general (for it is not universally true) where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law, as to participators in a common crime, will not at present interpose to grant any relief; acting upon the known maxim, *In pari delicto potior est conditio defendentis, et possidentis*(*d*).

217. But where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance, that the relief is asked by a party who is *particeps criminis*, is not in equity material. The reason is, that

(*a*) Curtis *v.* Perry, 6 Ves. 747; Birch *v.* Blagrave, Ambl. 264, 265.

(*b*) See the Duke of Bedford *v.* Coke, 2 Ves. Sen. 116, 117. And see Langlois *v.* Baby, 10 Gr. 358; 11 Gr. 21; Emes *v.* Barber, 15 Gr. 679.

(*c*) Wallis *v.* Duke of Portland, 3 Ves. 494; Stevens *v.* Bagwell, 15 Ves. 139; Strachan *v.* Brandon, 1 Ed. 303; cited 18 Ves. 127.

(*d*) See Bromley *v.* Smith, Doug. 697, 698; Vandyck *v.* Hewitt, 1 East, 96; Howson *v.* Hancock, 8 T. R. 575; Browning *v.* Morris, Cowp. 790; Osborne *v.* Williams, 18 Ves. 379; Bosanquet *v.* Dashwood, Cas. t. Talbot 37, 40.

the public interest requires that relief should be given, and it is given to the public through the party(*a*). And in these cases relief will be granted not only by setting aside the agreement or other transaction, but, also, in many cases, by ordering a repayment of any money paid under it(*b*).

218. Where both parties are *in delicto*, concurring in an illegal act, it does not always follow, that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt(*c*). One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offence(*d*). And, besides, there may be, on the part of the court itself, a necessity of supporting the public interests or public policy, in many cases, however reprehensible the acts of the parties may be(*e*).

219. Questions have been raised as to how far contracts, which are illegal by some positive law, or which are declared so upon principles of public policy, are capable, as between the parties, of a substantial confirmation. The general rule is, that wherever any contract or conveyance is void, either by a positive law, or upon principles of public policy, it is deemed incapable of confirmation upon the maxim, *Quod ab initio non valet, in tractu temporis non convalescet*(*f*). But where

(*a*) St. John *v.* St. John, 11 Ves. 535, 536; Bromley *v.* Smith, Doug. 695, 697, 698; Hatch *v.* Hatch, 9 Ves. 292, 298; Rider *v.* Kidder, 10 Ves. 360; Roberts *v.* Roberts, 3 P. W. 66, 74, and note (1); Browning *v.* Morris, Cowp. 790; Morris *v.* McCullooh, 2 Ed. 190, and note id. 193; Reynell *v.* Sprye, 1 D. M. & G. 660. And see Sharp *v.* Taylor, 2 Ph. 801.

(*b*) Story, s. 298. See Goldsmith *v.* Bruning, 1 Eq. Abr. Bonds, &c. F. 4; Smith *v.* Bruning, 2 Vern. 392; Morris *v.* McCulloch, 2 Ed. 190. And see Symes *v.* Hughes, L. R. 9 Eq. 475; Lincoln *v.* Wright, 4 D. & J. 16; Haigh *v.* Kaye, L. R. 7. Chan. 469.

(*c*) Smith *v.* Bromley, Doug. 696; Browning *v.* Morris, Cowp. 790; Osborne *v.* Williams, 18 Ves. 379.

(*d*) Bosanquet *v.* Dashwood, Cas. t. Talb. 37, 40, 41; Chesterfield *v.* Jansen, 2 Ves. Sen. 156, 157; Osborne *v.* Williams, 18 Ves. 379; Bayley *v.* Williams, 4 Giff. 638.

(*e*) Story s. 300. See Woodhouse *v.* Meredith, 1 J. & W. 224, 225; Bosanquet *v.* Dashwood, Cas. t. Talb. 37, 40, 41; Smith *v.* Bromley, Doug. 696, note; Browning *v.* Morris, Cowp. 790; Morris *v.* McCulloch, 2 Ed. 190, and note, 193; W—— *v.* B——, 32 Beav. 574; and see Davies *v.* Otty, 12 L. T. N. S. 789; 13 W. R. 484.

(*f*) Vernon's case, 4 Co. 2 b.

it is merely voidable, or turns upon circumstances of undue advantage, surprise, or imposition, there, if it is deliberately, and upon full examination, confirmed by the parties, such confirmation will avail to give it an *ex post facto* validity(*a*).

220. In the class of cases embraced under the second head of constructive fraud, or those which arise from some peculiar confidential or fiduciary relation between the parties, there is often to be found some intermixture of deceit, imposition overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which courts of equity act in regard thereto, stands, independent of any such ingredient, upon a motive of general public policy. The general principle, which governs in all cases of this sort, is that if a confidence is reposed, and that confidence is abused, courts of equity will grant relief(*b*).

221. All contracts and conveyances, whereby benefits are secured by children to their parents, or to persons standing *in loco parentis*, are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances they will be set aside, unless third persons have acquired an interest under them(*c*); especially where the original purposes for which they have been obtained are perverted or used as a mere cover(*d*).

222. While parental influence lasts, it lies on the parent

(*a*) Story, s. 306; Chesterfield *v.* Jansen, 2 Ves. Sen. 125, 1 Atk. 301; Roberts *v.* Roberts, 3 P. W. 74, note; Cole *v.* Gibson, 1 Ves. Sen. 507; Crowe *v.* Ballard, 3 Bro. C. C. 120; Curwyn *v.* Milner, 3 P. W. 292, note c; Cole *v.* Gibbons, 3 P. W. 289.

(*b*) Story ss. 307, 308; Gartside *v.* Isherwood, 1 Bro. C. C. 560, 562; Osmond *v.* Fitzroy, 3 P.W, 129, 131, note; Fox *v.* Mackreth, 2 Bro. C. C. 407, 420; Huguenin *v.* Basley, 14 Ves. 290. See also Blandy *v.* Kimber, 24 Beav. 148.

(*c*) Baker *v.* Bradley, 7 D. M. & G. 597; Wright *v.* Vanderplank, 2 K. & J. 1; 8 D. M. & G. 133; McConnell *v.* McConnell, 15 Gr. 20; McGregor *v.* Rapelje, 17 Gr. 41; 18 Gr. 446: Archer *v.* Hudson, 7 Beav. 551; Maitland *v.* Irving, 15 Sim. 437; Maitland *v.* Backhouse, 16 Sim 68; Johnston *v.* Johnston, 17 Gr. 493. But see Denison *v.* Denison, 13 Gr, 114, 596.

(*d*) Story, s. 308; Young *v.* Peachey, 2 Atk. 254; Glissen *v.* Ogden, cited ibid. 258; Cocking *v.* Pratt, 1 Ves. Sen, 400; Hawes *v.* Wyatt, 3 Bro. C. C. 156; Carpenter *v.* Herriot, 1 Ed. 338; Blackborn *v.* Edgely, 1 P. W. 607; Blunden *v.* Barker, 1 P. W. 639; Morris *v.* Burroughs, 1 Atk. 402; Tendril *v.* Smith, 2 Atk. 85; Heron *v.* Heron, 2 Atk. 160.

upholding the transaction or maintaining the gift, to disprove the exercise of that influence by showing that the child was really a free agent, and had competent independent advice, or had at least competent means of forming an independent judgment, and fully understood what he was doing, and was desirous of doing it(*a*). The principle applies for at least a year after the coming of age of the child, and will extend beyond the year if the dominion lasts(*b*).

223. Although transactions between parent and child are regarded with jealousy, yet arrangements between father and son, for the settlement of family estates, if the settlement be not obtained by misrepresentation or the suppression of the truth, if the father acquires no personal benefit, and the settlement is a reasonable one, will be supported even though the father did exert parental authority and influence over the son to procure the execution of it(*c*). Transactions between parent and child, in the nature of a settlement of property or rights, are regarded with favour, and not with minute regard to the consideration(*d*); but if in the nature of bounty from the child soon after he obtains his majority, they are to be viewed with jealousy, and as the subject of interposition of the court, to guard against undue influence(*e*).

224. The same general principles apply to other family relations besides those of parent and child(*f*), and to persons standing in the situation of quasi guardians, or confidential

(*a*) Heron *v.* Heron, 2 Atk. 160; Young *v.* Peachey, 2 Atk. 254; Rhodes *v.* Cook, 4 L. J. Ch. 149; Casborne *v.* Barsham, 2 Beav. 76; Hoghton *v.* Hoghton, 15 Beav. 278; Hartopp *v.* Hartopp, 21 Beav. 259; Baker *v.* Bradley, 7 D. M. & G. 597; Wright *v.* Vanderplank, 8 D. M. & G. 135, 146; Bury *v.* Oppenheim, 26 Beav. 594; Savery *v.* King, 5 H. L. 627, 655; Jenner *v.* Jenner, 2 D. F. & J. 359; Davies *v.* Davies, 4 Giff. 417; Berdoe *v.* Dawson, 34 Beav. 603; Chambers *v.* Crabbe, 34 Beav. 457; Pott *v.* Surr, 34 Beav. 543; Beale *v.* Billing, 13 Ir. Ch. 250.

(*b*) Walker *v.* Symonds, 3 Swanst. 1, 72; Warde *v.* Dickson, 5 Jur. N. S. 699; Hannah *v.* Hodgson, 30 Beav. 19. But see Thornber *v.* Sheard, 12 Beav. 589.

(*c*) Hartopp *v.* Hartopp, 21 Beav. 259. See Head *v.* Godlee, Johns. 536; Jenner *v.* Jenner, 2 D. F. & J. 359.

(*d*) But see Douglas *v.* Ward, 11 Gr. 39.

(*e*) Story s. 309 a; Baker *v.* Bradley, 7 D. M. & G. 597; Field *v.* Evans, 15 Sim. 375; Turner *v.* Collins, L. R. 7 Chan. 329.

(*f*) Clarke *v.* Hawke, 11 Gr. 527.

advisers, as medical advisers(*a*), or ministers of religion(*b*), and to every case where influence is acquired and abused, where confidence is reposed and betrayed(*c*).

225. The relation of client and attorney or solicitor, must give rise to great confidence between the parties, and to very strong influence over the actions, and rights, and interests of the client(*d*). Hence, the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which, between other persons, would be held unobjectionable(*e*).

226. A solicitor is not allowed to bring his own personal interest in any way into conflict with that which his duty requires him to do(*f*), or make a gain for himself in any manner whatever at the expense of his client in respect of the subject of any transactions, connected with or arising out of the re-

(*a*) Dent *v.* Bennett, 4 M. & C. 269.

(*b*) Nottidge *v.* Prince, 2 Giff. 246.

(*c*) Smith *v.* Kay, 7 H. L. 751; Brown *v.* Kennedy, 33 Beav. 133.

(*d*) Walmesley *v.* Booth, 2 Atk. 25. See also Barnesley *v.* Powell, 1 Ves. Sen. 284; Bulkley *v.* Wilford, 1 Cl. & Fin. 102, 177 183; Edwards *v.* Meyrick, 2 Ha. 60, 68; Corley *v.* Lord Stafford, 1 D. & J. 238. See as to dealings between solicitors and clients, McCann *v.* Dempsey, 6 Gr. 192; Graves *v.* Smith, 6 Gr. 306; Rees *v.* Wittrock, 6 Gr. 418; Graves *v.* Henderson, 8 Gr. 1; 2 Er. & Ap. 9; Fleming *v.* Duncan, 17 Gr. 76; Oakes *v.* Smith, 17 Gr. 660.

(*e*) Welles *v.* Middleton, 1 Cox, 112, 125; 3 P. W. 131, note (1); Wright *v.* Proud, 13 Ves. 136; Wood *v.* Downes, 18 Ves. 126; Savery *v.* King, 5 H. L. 627; De Montmorency *v.* Devereux, 7 Cl. & Fin. 188; Jones *v.* Tripp, Jac. 322; Goddard *v.* Carlisle, 9 Price, 169; Edwards *v.* Meyrick, 2 Ha. 68. See Tomson *v.* Judge, 3 Drew. 306; Re Holmes's Estate, 3 Giff. 337; O'Brien *v.* Lewis, 4 Giff. 221; Walker *v.* Smith, 29 Beav. 394; Gardener *v.* Ennor, 35 Beav. 549. The principles which apply in the case of dealings between solicitor and client, are also applicable to the case of a counsel employed by a man as his confidential adviser; Purcell *v.* Macnamara, 14 Ves. 91; McCabe *v.* Hussey, 2 Dow & Cl. 440; 5 Bligh. N. R. 715; Carter *v.* Palmer, 8 Cl. & Fin. 657, 707, Brown *v.* Kennedy, 33 Beav. 133; Corley *v.* Lord Stafford, 1 D. & J. 238; or the case of a man who has constituted himself the legal adviser of another, Tate *v.* Williamson, L. R. 1 Eq. 528; L. R. 2 Chan. 65; or has offered him legal advice in the matter, Davis *v.* Abraham, 5 W. R. 465; and to the case of the clerk of a solicitor who has acquired the confidence of a client of his master, Hobday *v.* Peters, 28 Beav. 349; Cowdry *v.* Day, 5 Jur. N. S. 1199; Nesbitt *v.* Berridge, 32 Beav. 286.

(*f*) Lawless *v.* Mansfield, 1 Dr. & War. 557, 631.

lation of solicitor and client, beyond the amount of just and fair professional remuneration to which he is entitled(*a*).

227. A solicitor is not under any incapacity to purchase from or sell to a client. He may deal with a client or purchase a client's property even during the continuance of the relation, but the burthen of the proof lies on him to show that the transaction has been perfectly fair(*b*). He must however be prepared to show that he gave his client the same protection as he would have given him, if dealing with a stranger, and must satisfy the court that he has taken no advantage of his professional position, but has duly and honestly advised his client as an independent and disinterested adviser would have done, and has brought to his knowledge everything which he himself knew, necessary to enable him to form a judgment in the matter, and he must in particular be able to show that a just and fair price has been given(*c*).

228. The rule that a solicitor who deals with a client is bound to prove the fairness of the transaction applies with

(*a*) Wood *v.* Downes, 18 Ves. 120; Rhodes *v.* Beauvoir, 6 Bligh, N. R. 195; Champion *v.* Rigby 9 L. J. N. S. Ch. 211; Lyddon *v.* Moss, 4 D. & J. 104; Proctor *v.* Robinson, 35 Beav. 335; Tyrell *v.* Bank of London, 10 H. L. 26, 44. And see Strange *v.* Brennan, 15 L. J. Ch. 389; Pince *v.* Beattie, 32 L. J. Ch. 734; Galloway *v.* Corporation of London, L. R. 4 Eq. 90.

(*b*) Jones *v.* Roberts, 9 Beav. 419; Blagrave *v.* Routh, 8 D. M. & G. 621. And see Cooke *v.* Setree, 1 V. & B. 126; Plenderleath *v.* Frazer, 3 V. & B. 174; Gibson *v.* Jeyes, 6 Ves. 278; Harris *v.* Tremenhere, 15 Ves. 34; Montesquieu *v.* Sandys, 18 Ves. 313; Bellew *v.* Russell, 1 B. & B. 104, 107; Edwards *v.* Meyrick, 2 Ha. 60; Lawless *v.* Mansfield, 1 Dr. & War. 557; Stedman *v.* Collett, 17 Beav. 608; Moss *v.* Bainbrigge, 6 D. M. & G. 292; Carter *v.* Palmer, 8 Cl. & Fin. 657; Comp. Lyddon *v.* Moss, 4 D. & J. 104.

(*c*) Gibson *v.* Jeyes, 6 Ves. 277; Montesquieu *v.* Sandys, 18 Ves. 302; Cane *v.* Lord Allen, 2 Dow, 294; Morgan *v.* Lewis, 4 Dow. 29, 47; Molony *v.* Lestrange, Beat. 406, Champion *v.* Rigby, 9 L. J. N. S. Ch. 211; Uppington *v.* Bullen, 2 Dr. & War. 185; Edwards *v.* Meyrick, 2 Hare, 60; Higgins *v.* Joyce, 2 J. & L. 282; Spencer *v.* Topham, 22 Beav. 573; Holman *v.* Loynes, 4 D. M. & G. 270; Hesse *v.* Briant, 6 D. M. & G. 623; Savery *v.* King, 5 H. L. 627; Tomson *v.* Judge, 3 Drew. 306; Barnard *v.* Hunter, 2 Jur. N. S. 1213; Knight *v.* Bowyer, 2 D. & J. 421, 445; Gresley, *v.* Mouseley, 4 D. & J. 78; 3 D. F. & J. 433; Lyddon *v.* Moss, 4 D. & J. 104; Morgan *v.* Higgins, 1 Giff. 270; Cowdry *v.* Day, 1 Giff. 316; Pearson *v.* Benson, 28 Beav. 599; Marquis of Clanricarde *v.* Heming, 30 Beav. 175; Gibbs *v.* Daniell, 4 Giff. 1; Adams *v.* Sworder, 2 D. J. & S. 44; Rhodes *v.* Bate, L. R. 1 Chan. 252. A prudent man would not deal with a client without the intervention of another solicitor, but there is no rule that a solicitor may not take such a course, per Lord St. Leonards, Cults *v.* Salmon, 21 L. J. N. S. Ch. 750; J *v.* Price, 20 L. T. 492.

peculiar force where the client is placed at a disadvantage from his being indebted to the solicitor, and gives him a security for the debt(*a*). If, however, the court is satisfied that the transaction has been on the whole fair and reasonable, and that no undue advantage has been taken, it will be supported, although there may have been some irregularities attending it(*b*), and a solicitor who advances money to, or has dealings with a client, must be able to prove the advance of the money by some other evidence than the instrument creating the security(*c*).

229. The rule which throws on the solicitor dealing with his client, the burthen of proving the fairness of the transaction, is not confined to cases where the solicitor is actually employed at the time, but may extend to cases where a solicitor has in the course of his employment on a previous occasion acquired or had the means of acquiring any peculiar knowledge as to the property(*d*). As a general rule, however, it no longer applies after there has been an entire cessation of the relation(*e*); nor will it apply in cases where the transaction is entirely unconnected with the duty of the attorney(*f*).

(*a*) Proof *v.* Hines, Ca. t. Talb. 115; Walmesley *v.* Booth, 2 Atk. 29; Drapers Co. *v.* Davis, 2 Atk. 295; Ward *v.* Hartpole, 3 Bligh, 470; Newman *v.* Payne, 2 Ves. 200; Cook *v.* Setree, 1 V. & B. 136; Daly *v.* Kelly, 4 Dow. 417, 430; Casborne *v.* Barsham, 2 Beav. 76; Bellamy *v.* Sabine, 2 Ph. 425; Lawless *v.* Mansfield, 1 Dr. & War. 557; Uppington *v.* Bullen, 2 Dr. & War. 185; Edwards *v.* Meyrick, 2 Hare, 60; Shaw *v.* Neale, 20 Beav. 157; Coleman *v.* Mellersh, 2 Mac. & G. 309. See Jones *v.* Thomas, 2 Y. & C. Ex. 498; Morgan *v.* Higgins, 1 Giff. 270; Re Foster, 2 D. F. & J. 110; Re Pugh, 1 D. J. & S. 673. And see Davis *v.* Hawke, 4 Gr. 394; Grantham *v.* Hawke, 4 Gr. 582; McElroy *v.* Hawke, 5 Gr. 516.

(*b*) Jones *v.* Roberts, 9 Beav. 419; Blagrave *v.* Routh, 8 D. M. & G. 621; See Cooke *v.* Setrie, 1 V. & B. 126; Plenderleath, *v.* Frazer, 3 V. & B. 174; Lawless *v.* Mansfield, 1 Dr. & War. 557; Stedman *v.* Collett, 17 Beav. 608; Moss *v.* Bainbrigge, 6 D. M. & G. 292; Cheslyn *v.* Dalby, 2 Y. & C. Ex. 170; Comp. Lyddon *v.* Moss, 4 D. & J. 104. And see Shaw *v.* Drummond, 13 Gr. 662.

(*c*) Morgan *v.* Lewis, 4 Dow. 46; Morgan *v.* Evans, 3 Cl. & Fin. 195; Gresley *v.* Mousley, 3 D. F. & J. 433; Stainton *v.* Carron Co. 24 Beav. 352.

(*d*) Holman *v.* Loynes, 4 D. M. & G. 270; Gibbs *v.* Daniel, 4 Giff. 1. See Carter *v.* Palmer, 8 Cl. & Fin. 657, 707.

(*e*) Gibson *v.* Jeyes, 6 Ves. 277; Wood *v.* Downes, 18 Ves. 120; Montesquieu *v.* Sandys, 18 Ves. 313; Cane *v.* Lord Allen, 2 Dow, 289; Moss *v.* Bainbrigge, 6 D. M. & G. 292; See Dent *v.* Bennett, 4 M. & C. 269, 277; Carter *v.* Palmer, 8 Cl. & Fin. 657; Blagrave *v.* Routh, 8 D. M. & G. 620.

(*f*) See Jones *v.* Thomas, 2 Y. & C. Ex. 519.

230. The rule with regard to gifts by a client to his solicitor is much stricter than the rule with regard to other dealings between them. Gifts from a client to a solicitor during the existence of the relation, appear to be absolutely invalid, upon grounds of public policy; nor can a gift by a client to a solicitor after the cessation of the relation be supported, unless the influence arising from the relation may be rationally supposed to have ceased also(*a*).

231. The relation of principal and agent, is affected by the same considerations as the preceding, founded upon the same enlightened public policy(*b*). There is no rule to prevent an agent from dealing with his principal in respect of the matter in which he is employed as agent(*c*). But agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals(*d*); or, by abusing their confidence, to acquire unreasonable gifts or advantages(*e*); or, indeed, to deal validly with their principals in any case, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition(*f*).

(*a*) Welles *v.* Middleton, 1 Cox, 112; 4 Bro. P. C. 245; Newman *v.* Payne, 2 Ves. 200; Wright *v.* Proud, 13 Ves. 137; Hatch *v.* Hatch, 9 Ves. 292; Wood *v.* Downes, 18 Ves. 120; Goddard *v.* Carlisle, 9 Price, 169; Walsh *v.* Studdert, 2 Con. & L. 423; Tomson *v.* Judge, 3 Drew. 306; Spencer *v.* Topham, 22 Beav. 573; Holman *v.* Loynes, 4 D M. & G. 270, 283; *Re* Holmes' Estate, 3 Giff. 337; Gibbs *v.* Daniel, 4 Giff. 1; O'Brien *v.* Lewis, 4 Giff. 221; Lewis *v.* Hillman, 3 H. L. 630. But see Oldham *v.* Hand, 2 Ves. Sen. 259; Harris *v.* Tremenheere, 15 Ves. 34; Hunter *v.* Atkins, 3 M. & K. 113; Walker *v.* Smith, 29 Beav. 394. The same rule will not always apply to a testamentary gift, in favour of a solicitor by his client, which might be applicable to such a gift *inter* vivos. Hindson *v.* Weatherill, 5 D. M. & G. 301.

(*b*) Benson *v.* Heathorn, 1 Y. & C. 326; Huguenin *v.* Baseley, 14 Ves. 284.

(*c*) But see Dunbar *v.* Tredennick, 2 B. & B. 319; Norris *v.* Le Neve, 3 Atk. 38.

(*d*) See Kimber *v.* Barber, L. R. 8 Chan. 56; (reversing s. c. 20 W. R. 602); Lewis *v.* Hillman, 3 H. L. 607.

(*e*) Woodhouse *v.* Meredith, 1 J. & W. 204, 222; Massey *v.* Davies, 2 Ves. 318; Crowe *v.* Ballard, 3 Bro. C. C. 120; Lees *v.* Nuttall, 1 R. & M. 53; East India Co. *v.* Henchman, 1 Ves. 289; Driscoll *v.* Bromley, 1 Jur. 238; Bentley *v.* Craven, 18 Beav. 75; Maturin *v.* Tredennick. 9 L. T. N. S. 82. And see Washburne *v.* Ferris, 14 Gr. 516.

(*f*) Story, s. 315. See Crowe *v.* Ballard, 3 Bro. C. C. 117; Purcell *v.* Macnamara, 14 Ves. 91; Huguenin *v.* Basely, 14 Ves. 273; Watt *v.* Grove, 2 S. & L. 492; Fox *v.* Mackreth, 2 Bro. C. C. 400; Coles *v.* Trecothick, 9 Ves. 246; Lowther *v.* Lowther, 13 Ves. 102, 103; Selsey *v.* Rhoades, 2 S. & S. 41; Morret *v.* Paske, 2 Atk. 53; Rothschild *v.* Brookman, 2 Dow & 8; Barker *v.* Harrison, 2 Co : 546; Malony *v.*

232. Upon these principles, if an agent sells to his principal his own property, as the property of another, without disclosing the fact, the bargain however fair and reasonable it may be in other respects, may be impeached at the election of the principal. So if an agent, employed to purchase for another, purchases for himself, he will be considered as the trustee of his employer(*a*). And a person employed as an agent, to purchase up a debt of his employer, cannot purchase the debt upon his own account. The same rule applies to a surety, who purchases up the debt of his principal. And, therefore, if a purchase is made of the debt, the agent or surety can entitle himself, as against his principal, to no more than he has actually paid for the debt(*b*).

233. If the relation of principal and agent has wholly ceased, the parties are restored to their competency to deal with each other(*c*). But an agent who has in the course of his employment, acquired some peculiar knowledge as to the property, cannot after the cessation of the relation use the knowledge so acquired for his own benefit, and to the prejudice of his former employer(*d*).

234. A gift to an agent is valid, unless the party who seeks to set it aside, can show that some advantage was taken by the agent of the relation in which he stood to the donor (*e*). The rule with respect to the capacity of an agent to accept a gift from his principal, is not so strict as it is in the case of solicitor and client, trustee and *cestui que trust*, and guardian

Kerman, 2 Dr. & War. 31; Trevelyan *v.* Charter, 11 Cl. & Fin. 714, 732; Mulhallen *v.* Marum, 3 Dr. & War. 317; Bloyes Trust, 1 Mac & G. 488; Rhodes *v.* Bate, L. R. 1 Chan. 252; Gillett *v.* Peppercorne, 3 Beav. 78; Murphy *v.* O'Shea, 2 J. & L. 422; Clarke *v.* Tipping, 9 Beav. 284; Wilson *v.* Short, 6 Ha. 383; Hobday *v.* Peters, 28 Beav. 349; Tyrell *v.* Bank of London, 10 H. L. 26; Wentworth *v.* Lloyd, 32 Beav. 467.

(*a*) Lees *v.* Nuttall, 1 R. & M. 53; Taylor *v.* Salmon, 4 M. & C. 134; Beck *v.* Kantorowicz, 3 K. & J. 230; Hobday *v.* Peters, 28 Beav. 349.

(*b*) Reed *v.* Norris, 2 M. & C. 361, 374; Cane *v.* Lord Allen, 2 Dow, 294.

(*c*) Charter *v.* Trevelyan, 4 L. J. N. S. Ch. 209. See York Buildings Co. *v.* Mackenzie, 3 Pat. Sc. Ap. 379

(*d*) Carter *v.* Palmer, 8 Cl. & Fin. 657; Holman *v.* Loynes, 4 D. M. & G. 270.

(*e*) Hunter *v.* Atkins, 3 M. & K. 113; Nicol *v.* Vaughan, 1 Cl. & Fin. 495. See Wyse *v.* Lambert, 16 Ir. Ch. 379.

and ward. The relation in which the parties stand to each other being of a sort less known and definite than in those other cases, the jealousy is diminished(*a*).

235. The rule of equity as to dealings between guardian and ward is extremely strict, and imposes a general inability on the parties to deal with each other. Courts of equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian(*b*). For, in all such cases, the relation is still considered as having an undue influence upon the mind of the ward; and as virtually subsisting, especially if all the duties attached to the situation have not ceased; as, if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian(*c*). The same principles are applied to persons standing in the position of *quasi* guardians or confidential advisers(*d*).

236. After the relation has entirely ceased, not merely in name but in fact, and a full and fair settlement of all transactions growing out of the relation has been made, and sufficient time has elapsed to put the parties in a position of complete independence to each other, there is no objection to any bounty or grant conferred by the ward upon his former guar-

(*a*) Hunter *v.* Atkins, 3 M. & K. 113. But see Hobday *v.* Peters, 28 Beav. 349.

(*b*) Everitt *v.* Everitt, L. R. 10 Eq. 405; Ellis *v.* Barker, 20 W. R. 160.

(*c*) Story, s. 317; Hylton *v.* Hylton, 2 Ves. Sen. 547; Hatch *v.* Hatch, 9 Ves. 297; Aylward *v.* Kearney, 2 B. & B. 478; Dawson *v.* Massey, 1 B. & B. 229; Wright *v.* Pruoud, 13 Ves. 136; Wedderburn *v.* Wedderburn, 4 M. & C. 41; Cary *v.* Cary, 2 S. & L. 173; Wood *v.* Downes, 18 Ves. 126; Revett *v.* Harvey, 1 S. & S. 502; O'Neil *v.* Hamill, Beatt. 618; Maitland *v.* Irving, 15 Sim. 437; Archer *v.* Hudson, 15 L. J. Ch. 211; Maitland *v.* Backhouse, 17 L. J. Ch. 121; Espey *v.* Lake, 10 Ha. 260; Davies *v.* Davies, 4 Giff. 417; Matthew *v.* Brise, 14 Beav. 345. And see Rhodes *v.* Bate, L. R. 1 Chan. 252.

(*d*) Revett *v.* Harvey, 1 S. & S.502; Beasley *v.* Magrath, 2 S. & L. 31; Mulhallen *v.* Marum, 3 Dr. & War. 317: Allfrey *v.* Allfrey, 1 Mac. & G. 98; Llewellin *v.* Cobbold, 1 Sm. & G. 376; Prideaux *v.* Lonsdale, 1 D. J. & S. 433.

dian(*a*). But influence will be presumed to exist unless there is distinct evidence of its termination(*b*).

237. The same principles govern the relation of trustee and *cestui que trust*. It is the duty of a trustee to use his best exertions for the benefit of the *cestui que trust*, and he must not place himself in a situation in which his interests conflict with that which his duty requires him to do(*c*). Any personal benefit which he may gain by availing himself of his fiduciary character must be acquired by a dereliction of duty, and will enure for the benefit of the trust estate(*d*). And this restraint on any personal benefit to the trustee is not confined to his dealings with the estate, but extends to remuneration for services, and prevents him from receiving anything beyond the payment of his expenses, unless there be an express stipulation to the contrary(*e*). The court looks upon trusts as honorary, and a burden on the honour and conscience of the party, and not as taken with mercenary motives(*f*).

238. There is no rule which incapacitates a trustee from dealing with the *cestui que trust* in respect of the trust estate. Thus a trustee for sale may purchase the trust estate if the *cestui que trust* fully and clearly understands with whom he is

(*a*) Hylton *v.* Hylton, 2 Ves. Sen. 547, 549. See Beasley *v.* Magrath, 2 S. & L. 35; Ross *v.* Steele, 1 Ir. Eq. 171.

(*b*) Rhodes *v.* Bate, L. R. 1 Chan. 252. And see Archer *v.* Hudson, 15 L. J. Ch. 211.

(*c*) City of Toronto *v.* Bowes, 4 Gr. 489; 6 Gr. 1.

(*d*) Holt *v.* Holt, 1 Ch. Ca. 190; *Ex parte* Lacey, 6 Ves. 625; *Ex parte* James, 8 Ves. 337, 344; Dalbiac *v.* Dalbiac, 16 Ves. 123; Forbes *v.* Ross, 2 Cox, 116; Hamilton *v.* Wright, 9 Cl. & Fin. 111; Broughton *v.* Broughton, 5 D M. & G. 164; Vaughton *v.* Noble, 30 Beav. 34; Crosskill *v.* Bower, 32 Beav. 86; Graham *v.* Yeomans, 18 Gr. 238; Hewson *v.* Smith, 17 Gr. 407; Foster *v.* McKinnon, 5 Gr. 510; Lamont *v.* Lamont, 7 Gr. 258; and see Keech v. Sandford, 1 W. & T. L. C. 40.

(*e*) Robinson *v.* Pett, 3 P. W. 249; Moore *v.* Frowd, 3 M & C. 46; Bainbrigge *v.* Blair, 8 Beav. 588; Broughton *v.* Broughton, 5 D. M. & G. 160; Harbin *v.* Darby, 28 Beav. 325; Crosskill *v.* Bower, 32 Beav. 86; Barrett *v.* Hartley, L. R. 2 Eq. 789. The Con. Stat. U. C. c. 16, s. 66, has varied the rule as to compensation to trustees only so far as it applies to trustees under wills, Wilson *v.* Proudfoot, 15 Gr. 109; Deedes *v.* Graham, 20 Gr. 258. By an Act of the Ontario Legislature, passed in 1874, the term "trustee" is to include any trustee under a deed, settlement or will, and executors and administrators, and any guardian appointed by any court, and a testamentary guardian, or any other trustee, howsoever the trust is created.

(*f*) Ayliffe *v.* Murray, 2 Atk. 59.

dealing, and does not object to the transaction, and the trustee fairly and honestly discloses all that he knows respecting the property, and gives a just and fair price, and does not seek to secure surreptiously any advantage for himself(*a*). If there be any secret or underhand dealing on the part of the trustee the transaction becomes impeachable, and the transaction cannot be supported, however fair it may be in other respects, if the *cestui que trust* does not clearly and distinctly understand that he is dealing with the trustee. Where a trustee deals with his *cestui que trust* for the conveyance to himself of any portion of the trust property, it rests with the trustee to show that everything in connection with the transfer was fair and just(*b*).

239. A trustee cannot under any circumstances, deal with himself on behalf of the *cestui que trust* surreptitiously and without his knowledge and assent. That the terms on which he attempts to deal with the estate are as good as can be obtained from any other quarter, and that he himself takes no advantage from the bargain is immaterial(*c*). The terms may even be better, but the rule is so inflexible, that no enquiry can be made as to the fairness or unfairness of the transaction. It is enough that the act tends to interfere with the duty of protecting the trust estate, which he has undertaken to perform.

240. This principle applies alike, whether the transaction relates to real estate or personalty, or mercantile matters, for the disability arises, not from the subject matter, but from the obligation lying on the trustee to do his uttermost for the *cestui*

(*a*) Ayliffe *v.* Murray, 2 Atk. 59; Clarke *v.* Swaile, 2 Ed. 134; *Ex parte* Lacey, 6 Ves. 626; *Ex parte* James, 8 Ves. 337; Coles *v.* Trecothick, 9 Ves. 246; *Ex parte* Bennett, 10 Ves. 381; Randall *v.* Errington, 10 Ves. 422; Morse *v.* Royal, 12 Ves. 355; Downes *v.* Glazebrook, 3 Mer. 208; Knight *v.* Marjoribanks, 2 Mac. & G. 10; *Re* McKenna, 13 Ir. Ch. 329; Luff *v.* Lord, 11 Jur. N. S. 50; Dover *v.* Buck, 11 Jur. N. S. 580. And see King *v.* Keating, 12 Gr. 29; Baldwin *v.* Thomas, 15 Gr. 119; Gilpin *v.* West, 18 Gr. 228.

(*b*) Blain *v.* Terryberry, 11 Gr. 286.

(*c*) Patterson *v.* Holland, 7 Gr. 1.

que trust(c). And it makes no difference that the sale was by public auction(d), or that the purchase was made through another person(e), or from a co-trustee(f), or that the trustee purchased as agent for another person(g).

241. The application of the principle is, however, limited to dealings with the trust estate(h), and it does not operate after the relation of trustee and *cestui que trust* is clearly dissolved. But a trustee cannot, after the determination of the relation, be allowed to avail himself for his own benefit, and to the prejudice of the party for whom he had been trustee, of any information which he may have acquired during the existence of the relation(i).

242. Where the *cestuis que trust*, after they come of age, or in any other mode competent to release the previous defaults of the trustees, do any act which would ordinarily have that effect, between other parties, it will not be so regarded, unless the trustees had fully informed the *cestuis que trust* of their rights, or they acted under full knowledge of the liability of the trustees(j). But where the *cestui que trust*, knowing all

(a) Fox *v.* Mackreth, 2 Bro. C. C. 400; 4 Bro. P. C. 258; Randall *v.* Errington, 10 Ves. 423; Attorney-General *v.* Earl of Clarendon, 17 Ves. 500; Gregory *v.* Gregory, Coop. t. Eldon, 201; Woodhouse *v.* Meredith, 1 J. & W. 222; Baker *v.* Carter, 1 Y. & C. Ex. 250; Grover *v.* Hugell, 3 Russ. 428; Bailey *v.* Watkins, cit. 6 Bligh, N. R. 275; Re Bloye's Trust, 1 Mac. & G. 490; Lewis *v.* Hillman, 3 H. L. 607; Knight *v.* Marjoribanks, 2 Mac. & G. 12; Hamilton *v.* Wright, 9 Cl. & Fin. 111; Ingle *v.* Richards, 6 Jur. N. S. 1178; Popham *v.* Exham, 10 Ir. Ch. 440; Aberdeen Rail Co. *v.* Blakie, 1 Macq, 461; Parkinson *v.* Hanbury, 2 D. J. & S. 450; Ridley *v.* Ridley, 34 L. J. Ch. 462; Franks *v.* Bollans, 37 L. J. Ch. 155.

(b) Campbell *v.* Walker, 5 Ves. 678; *Ex parte* James, 8 Ves. 348; *Ex parte* Bennett, 10 Ves. 393; Sanderson *v.* Walker, 13 Ves. 602; York Building Co. *v.* McKenzie, 8 Bro. P. C. 42; Downes *v.* Glazebrook, 3 Mer. 207; Grover *v.* Hugell, 3 Russ. 428; Lawrence *v.* Galsworthy, 3 Jur. N. S. 1049; Adams *v.* Sworder, 2 D. J. & S. 44.

(c) Sanderson *v.* Walker, 13 Ves. 602; Adams *v.* Sworder, 2 D. J. & S. 44.

(d) Hall *v.* Noyes, cit. 3 Ves. 748; 3 Bro. C. C. 483; Whichcote *v.* Lawrence, 3 Ves. 740.

(e) *Ex parte* Bennet, 10 Ves. 381, 400; Gregory *v.* Gregory, Coop. t. Eldon, 201; *Ex parte* Gryls, 2 Dea. & Ch. 290.

(f) Knight *v.* Marjoribanks, 2 Mac. & G. 12.

(g) *Ex pavte* Lacey, 6 Ves. 627; Coles *v.* Trecothick, 9 Ves. 246; *Ex parte* Bennett, 10 Ves. 394; Morse *v.* Royal, 12 Ves. 373. See Hamilton *v.* Wright; 9 Cl. & Fin. 111; Holman *v.* Loynes, 4 D. M. & G. 270.

(h) Burrows *v.* Walls, 5 D. M. & G. 233. See also Lloyd *v.* Atwood, 3 D. & J. 614. And see Edinburgh Life Assurance Co. *v.* Allen, 18 Gr. 425.

the facts, has for a long time acquiesced in an improper investment of the fund, the trustees will not be made chargeable with any unexpected loss subsequently occurring(*a*).

243. The principles affecting dealings between a trustee and his *cestui que trust* extend to other persons invested with a like fiduciary character(*b*), such as executors and administrators(*c*), assignees of a bankrupt or insolvent(*d*), receivers(*e*), committees of lunatics(*f*), directors of a railway or other company(*g*), arbitrators(*h*), a member of a corporation taking a lease of corporate property(*i*), and many other cases(*j*). In general the disability extends to all persons who, being employed or concerned in the affairs of another, acquire a knowledge of his property(*k*).

244. The principle does not, however, apply to the case of a mortgagee dealing with the mortgagor(*l*), nor to the case of

(*a*) Story, s. 322 a; Griffiths *v.* Porter, 25 Beav. 236; Liddell *v.* Norton, 21 Beav. 185.

(*b*) Kerr on Frauds, 112.

(*c*) Hall v. Hallett, 1 Cox 134; Killick *v.* Flexney, 4 Bro. C. C. 161; Watson v. Toone, 6 Mad. 153; Baker *v.* Carter, 1. Y & C. Ex. 250; Groves *v.* Perkins, 6 Sim. 576; Pickering *v.* Pickering, 2 Beav. 31; Wedderburn *v.* Wedderburn, 4 M. & C. 41; Barton *v.* Hassard, 3 Dr. & War. 461; Allfrey *v.* Allfrey, 1 Mac. & G. 87; Smedley *v.* Varley, 23 Beav, 359; Prideaux v. Londsale, 1 D. J. & S. 433.

(*d*) *Ex parte* Reynolds, 5 Ves. 707; *Ex parte* Hughes, 6 Ves. 617; *Ex parte* Lacey, 6 Ves. 625; *Ex parte* James, 8 Ves. 337; *Ex parte* Bennett, 10 Ves. 381; *Re* Browne, 7 Ir. Ch. 274; Pooley *v.* Quilter, 2 D. & J. 327. And see Adams *v.* Sworder, 2 D. J. & S. 44.

(*e*) Alven *v.* Bond, 1 Fl. & K. 196; Eyre *v.* McDonnell, 15 Ir. Ch. 534; Boddington *v.* Langford, 15 Ir. Ch. 558.

(*f*) Wright *v.* Proud, 13 Ves. 136.

(*g*) Benson *v.* Heathorn, 1 Y. & C. 326; York and North Midland Rail. Co. *v.* Hudson, 16 Beav. 485; Great Luxemberg Rail. Co. *v.* Magnay, 25 Beav. 587; Gaskell *v.* Chambers, 26 Beav. 360; Aberdeen Rail. Co. *v.* Blakie, 1 Macq. 461; *Ex parte* Hill, 32 L. J. Ch. 154; Spackman's case, 34 L. J. Ch. 321; Patterson *v.* Holland, 7 Gr. 1; City of Toronto *v.* Bowes, 4 Gr. 489; 6 Gr. 1.

(*h*) Blennerhasset *v.* Day, 2 B & B. 116.

(*i*) Att.-Gen. *v.* Corporation of Cashel, 3 Dr. & War. 294.

(*j*) See *Ex parte* Morgan, 12 Ves. 6; Grover *v.* Hugell, 3 Russ. 428; Greenlaw *v.* King, 3 Beav. 49; Beaden *v.* King, 9 Hare. 499; Dimes *v.* Proprietor of Grand Junction Rail. Co., 3 H. L. 759; Denton *v.* Donner, 23 Beav. 285.

(*k*) Sug. V. & P. (14th ed.) 687.

(*l*) Knight v. Marjoribanks, 2 Mac. & G. 10; Dobson *v.* Land, 8 Ha. 220; but comp. Hickes *v.* Cooke, 4 Dow, 16; Downes *v.* Glazebrook, 3 Mer. 200; *Re* Bloye's Trust, 1 Mac. & G. 490; Robertson *v.* Norris, 1 Giff. 421; Ford *v.* Olden, L. R. 3 Eq. 461.

a puisne mortgagee buying the mortgaged property from a prior mortgagee under the exercise of his power of sale(*a*); nor to the case of a tenant for life purchasing from trustees for sale under a power to be exercised with his consent(*b*), nor to the case of a mortgagor with power to sell or lease, selling or leasing, to a trustee for himself(*c*); nor does it apply to the case of merely nominal trustees, such as trustees who have disclaimed(*d*).

245. The case of principal and surety may be briefly referred to as a striking illustration of this doctrine. The contract of surety imports entire good faith and confidence between the parties in regard to the whole transaction. If the creditor be specially communicated with, any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract(*e*). Upon the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety(*f*). If any stipulations, therefore, are made between the creditor and the debtor, which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from the obligation of his contract(*g*). And, on the other hand, if any stipulations for additional security, or other advantages, are

(*a*) Shaw *v.* Bunny, 2 D. J. & S. 468; Kirkwood *v.* Thompson, 2 D. J. & S. 613. The solicitor of the mortgagee cannot purchase, Howard *v.* Harding, 18 Gr. 181; and see Ellis *v.* Dellabough, 15 Gr. 583, where the purchase was made by the solicitor's clerk, who conveyed to the mortgagee.

(*b*) Howard *v.* Ducane, T. & R. 81.

(*c*) Beavan *v.* Habgood, 1 J. & H. 222.

(*d*) Stacey *v.* Elph, 1 M. & K. 195; Chambers *v.* Waters, 3 Sim. 42. And see Parkes *v.* White, 11 Ves. 209, 226.

(*e*) Owen *v.* Homan, 3 Mac. & G. 378; Blest *v.* Brown, 8 Jur. N. S. 602; Greenfield *v.* Edwards, 2 D. J. & S. 582, 598. But see Cunningham *v.* Buchanan, 10 Gr. 523.

(*f*) See Cecil *v.* Plaistow, 1 Anstr. 202; Leicester *v.* Rose, 4 East 372; Pidcock *v.* Bishop, 3 B. & C. 605; Smith *v.* Bank of Scotland, 1 Dow, 272.

(*g*) Bonar *v.* Macdonald, 3 H. L. 226; Nisbet *v.* Smith, 2 Bro. C. C. 583.

obtained between the creditor and the debtor, the surety is entitled to the fullest benefit of them(*a*).

246. But where an official bond is given for faithful administration, nominally to one of the officers of court, but in fact for the security of parties interested in the discharge of the official duty thereby insured, it was held that the surety on such bond is not discharged by the neglect of those interested to exercise that supervision over the official conduct of the principal which it was, by statute, made their duty to do. In order to have that effect, it would seem that the negligence must amount to a virtual connivance at the official delinquency; or must be so gross as to be equivalent to a wilful shutting of the eyes to the fraud about to be committed(*b*).

247. It may now be regarded as settled that there must be something which amounts to fraud to enable the surety to say that he is released from his contract on account of misrepresentation or concealment(*f*). But in regard to his being released by the surrender of securities held by the creditor, there is no difference whether they existed at the date of the suretyship or not(*d*).

248. It is upon this ground, that if a creditor, without any communication with the surety, and assent on his part, should afterwards enter into any new contract with the principal, inconsistent with the former contract, or should stipulate, in a binding manner, upon a sufficient consideration, for further delay and postponement of the day of payment of the debt, that will operate in equity as a discharge of the surety(*e*).

(*a*) Story, s. 324; Mayhew *v.* Crickett, 2 Swanst. 186, 191, note (*a*); Boultbee *v.* Stubbs, 18 Ves. 23; *Ex parte* Rushforth, 10 Ves. 409, 421. And see Clarke *v.* Ritchey, 11 Gr. 499.

(*b*) Story, s. 325 a. And see Corporation of East Zorra, *v.* Douglas, 17 Gr. 462; Peers *v.* Oxford, 17 Gr. 472; County of Frontenac *v.* Breden, 17 Gr. 645.

(*c*) North British Insurance Co. *v.* Lloyd, 10 Ex. 529; Wythes *v.* Labouchere, 3 D. & J. 593; Corporation of East Zorra *v.* Douglas, 17 Gr. 466; Peers *v.* Oxford, 17 Gr. 472.

(*d*) Story s. 325 a; Pledge *v.* Buss, 6 Jur. N. S. 696. The case of Newton *v.* Chorlton, 10 Ha. 646, is treated as overruled.

(*e*) Skip. *v.* Huey, 3 Atk. 91: Boultbee *v.* Stubbs, 18 Ves. 20; *Ex parte* Gifford, 6 Ves. 805; Rees *v.* Berrington, 2 Ves. 540; Blake *v.* White, 1 Y. & C. Ex. 420. See Gordon *v.* Calvert, 2 Sim. 253; 4 Russ. 581; Bonser *v.* Cox, 6 Beav. 110.

But it is not every alteration of his position by the act of the creditor, which will discharge the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor(*a*).

249. A surety cannot take proceedings to compel the creditor to proceed against the debtor, for at any moment after the debt becomes payable, he may himself pay it off, and proceed against the debtor for the money so paid(*b*). But on the other hand a surety has a right to compel the debtor to pay the debt when due, whether the surety has actually been sued on it or not(*c*). But this right arises only where the creditor has a right to sue his debtor, and refuses to exercise that right(*d*). Where the surety pays the debt on behalf of the principal debtor, the rule whether at law(*e*) or in equity is, that he has a right to call upon such debtor for reimbursement(*f*).

250. On payment of the debt a surety is entitled to all the securities which the creditor has against the principal; whether such collateral securities were given at the time of the contract of suretyship, with or without the knowledge of the surety(*g*); or whether they were given after that contract, with or without the knowledge of the principal(*h*). If a creditor therefore, who has had, or ought to have had, such collateral securities, loses them, or suffers them to get back into the possession of the debtor, or does not make them effectual by giving proper notice(*i*), the surety to the extent of such security will be discharged(*j*). This general rule did not

(*a*) Story s. 326; Tucker *v.* Laing, 2 K. & J. 745. And see Duff *v.* Barrett, 15 Gr. 632; 17 Gr. 187.

(*b*) Wright *v.* Simpson, 6 Ves. 733. But see Bailey *v.* Edwards, 12 W. R. 337.

(*c*) Ranelaugh *v.* Hayes, 1 Vern. 189; Antrobus *v.* Davidson, 3 Mer. 569.

(*d*) Padwick *v.* Stanley, 9 Hare, 627. But see Cunningham *v.* Lyster, 13 Gr. 575.

(*e*) Toussaint *v.* Martinnant, 2 T. R. 105.

(*f*) Craythorne *v.* Swinbourne, 14 Ves. 162. But see Geary *v.* Gore Bank, 5 Gr. 536. As to costs of proceedings against the surety, see Whitehouse *v.* Glass, 7 Gr. 45.

(*g*) Mayhew *v.* Crickett, 2 Swanst. 185.

(*h*) Pearl *v.* Deacon, 24 Beav. 186; 1 D. & J. 461; Lake *v.* Bruton, 18 Beav. 34; 8 D. M. & G. 440; Pledge *v.* Buss, John. 663, 668.

(*i*) Strange *v.* Fooks, 4 Giff. 408.

(*j*) Capel *v.* Butler, 2 S. & S. 457; Law *v.* East India Co. 4 Ves. 824; Watson *v.* Allcock, 1 Sm. & Giff. 319; 4 D. M. & G. 242.

apply to securities which upon payment got back to the principal debtor, and were in fact, extinguished by the payment (*a*). But a surety is now, by statute, entitled to have assigned to him every judgment, specialty, or security which shall be held by the creditor in respect of such debt; whether such judgment or debt shall or shall not at law be deemed to have been satisfied by the payment of the debt(*b*).

251. If a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and principal debtor, not where the creditor is merely inactive(*c*). It seems, however, that a surety will not be discharged by giving time, if his remedies against the principal are not diminished or affected, and especially if they are accelerated(*d*). And where the creditor, on making the arrangement with the debtor to give time, or otherwise vary the strict enforcement of the contract, reserves his right against the surety, although without communicating this fact to him, it will not operate as a release of the surety(*e*).

252. Contracts of suretyship limited by time are usually construed strictly, and not extended beyond the period fixed, even when the creditors and the principal extend the same relation. Thus, where two bankers carried on business under articles of partnership, providing that if, at the end of five years, the term fixed, either partner should wish to carry on the business, and should not take the share of the other at a valuation, the assets should be realized and debts paid, and the surplus divided; and one of the parties had procured a

(*a*) Copis *v.* Middleton, 1 T. & R. 229; Hodgson *v.* Shaw, 3 M. & K. 190.

(*b*) 26 Vic. c. 45, s. 2.

(*c*) Samuell *v.* Howarth, 3 Mer. 279; Wright *v.* Simpson, 6 Ves. 732; Rees *v.* Berrington, 2 Ves. 540; Bailey *v.* Edwards, 4 B. & S. 771; Davies *v.* Stainbank, 6 D. M. & G. 679; Vankoughnet *v.* Mills, 5 Gr. 653.

(*d*) Hulme *v.* Coles, 2 Sim. 12; Prendergast *v.* Devey, 6 Mad. 124; Price *v.* Edmunds, 10 B. & C. 578.

(*e*) Boultbee *v.* Stubbs, 18 Ves. 26; Webb *v.* Hewitt, 3 K. & J. 442; Wyke *v.* Rogers, 1 D. M. & G. 408; Green *v.* Wynn, L. R. 7 Eq. 28; Wood *v.* Brett, 9 Gr. 452; Bell *v.* Manning, 11 Gr. 142. And see Bank of Montreal, *v.* McFaul, 17 Gr. 234; Cumming *v.* Bank of Montreal, 15 Gr. 686.

surety to indemnify the other against all loss in respect of the partnership, the business of the bank having been continued by the firm more than a year after the expiration of the five years, it was held that surety was thereby discharged; and that, whether these facts would constitute a defence at law or not, a court of equity would restrain the obligee from proceeding in such an action(*a*).

253. Much that has been already stated as to unconscionable advantages, overreaching, imposition, undue influence, and fiduciary situations, may well be applied to the third class of constructive frauds, combining, in some degree, the ingredients of the others, but prohibited mainly, because they unconscientiously compromit, or injuriously affect, the private rights, interests, or duties of the parties themselves, or operate substantially as frauds upon the private rights, interests, duties, or intentions of third persons.

254. To this class may be referred many of the cases arising under the Statute of Frauds(*b*), which requires certain contracts to be in writing, in order to give them validity. In the construction of that statute, a general principle has been adopted, that, as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases, where from fraud, imposition, or mistake, a contract of this sort has not been reduced to writing, but has been suffered to rest in confidence or in parol communications between the parties, courts of equity will enforce it against the party, guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute(*c*).

255. The proper jurisdiction of courts of equity is to take every one's act according to conscience, and not to suffer un-

(*a*) Story, s. 327 a; Small *v.* Currie, 5 D. M. & G. 141. See also Watson *v.* Allcock, 4 D. M. & G. 242; Bonar *v.* Macdonald, 3 H. L. 226; Railton *v.* Mathews, 10 Cl. & Fin. 934.

(*b*) 29 Charles II. ch. 3, s. 1, 4.

(*c*) Story, s. 330; Montacute *v.* Maxwell, 1 P. W. 619; Att.-Gen. *v.* Sitwell, 1 Y & C. Ex. 559; Lincoln *v.* Wright, 4 D. & J. 16.

due advantage to be taken of the strict forms of law, or of positive rules(*a*). Hence it is, that, even if there be no proof of fraud or imposition, yet, if upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, courts of equity will sometimes interfere and grant relief(*b*); although they certainly are very cautious of interfering, unless upon very strong circumstances. But the mere fact that the bargain is a very hard or unreasonable one, is not, generally, sufficient, *per se*, to induce these courts to interfere(*c*).

256. Common sailors being a class of men who seem to have mixed up in their character qualities of very opposite natures, having at the same time great generosity, credulity, extravagance, heedlessness, and bravery, and who seem, from their habits, to require guardianship during the whole course of their lives, courts of equity take an indulgent consideration of their interests. Their contracts respecting wages and prize-money are watched with great jealousy, and are generally relievable whenever any inequality appears in the bargain, or any undue advantage has been taken(*d*).

257. But the great class of cases, in which relief is granted, under this head, is where the contract or other act is substantially a fraud upon the rights, interests, duties, or intentions of third persons. And, here, the general rule is, that particular persons, in contracts, and other acts, shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect to other persons, who stand in such a relation to either, as to be affected by the contract or the consequences of

(*a*) Chesterfield *v.* Jansen, 2 Ves. Sen. 137.

(*b*) Nott *v.* Hill, 1 Vern. 167, ; 2 Vern. 26; Berny *v.* Pitt, 2 Vern. 14; Chesterfield *v.* Jansen, 2 Ves. Sen. 145, 148, 154, 155, 158; Twistleton *v.* Griffith, 1 P. W. 310; Cole *v.* Gibbons, 3 P. W. 290; Bowes *v.* Heaps, 3 V. & B. 117; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Collins *v.* Hare, 2 Bligh N. R. 106; Goodhue *v.* Widdifield, 8 Gr. 531; Teeter *v.* St. John, 10 Gr. 85. But see Ormes *v.* Beadel, 2 Giff. 166.

(*c*) Story, s. 331; Willis *v.* Jernegan, 2 Atk. 251, 252; Proof *v.* Hines, Cas. t. Talb. 111; Ramsbottom *v.* Parker, 6 Mad. 5; Freeman *v.* Bishop, 2 Atk. 39.

(*d*) Sir Thomas Clarke, in How *v.* Weldon, 2 Ves. Sen. 516, 518; Taylour *v.* Rochford, 2 Ves. Sen. 281; Baldwin *v.* Rochfort, 1 Wills. 229; The Juliana, 2 Dod. Adm. 504. But see Chesterfield *v.* Jansen, 2 Ves. Sen. 137; Griffith *v.* Spratley, 1 Cox 383.

it(*a*). And, as the rest of mankind, besides the parties contracting, are concerned, the rule is properly said to be governed by public utility(*b*).

258. Bargains with heirs, reversioners, and expectants, during the life of their parents or other ancestors are not regarded favourably in equity.

259. In all cases of this sort, it was formerly incumbent upon the party dealing with the heir, or expectant, or reversioner, to establish, not merely that there was no fraud, but that a fair and adequate consideration had been paid(*c*). Inadequacy of price was sufficient to set aside the contract(*d*). But since the Ont. Stat. 31 Vic. c. 27, where the purchase made before the passing of the Act of any reversionary interest in real or personal estate is impeached on the ground of under value, the onus of proving such under value is to rest on the plaintiff, and no purchase made after the passing of the Act, *bona fide*, and without fraud, of any such interest is to be opened or set aside on the ground of under value(*e*).

260. In some instances the sale of reversionary interests has been supported on the ground of being part of a family arrangement, but it must clearly appear to be of that character to justify such a result, and knowledge by the father or other person standing *in loco parentis* of the transaction, does not

(*a*) Per Lord Hardwicke, in Chesterfield *v.* Jansen, 2 Ves. Sen. 156.

(*b*) Story, s. 333; Chesterfield *v.* Jansen, 2 Ves. Sen. 156; 1 Eq. Abr. 90.

(*c*) Earl of Aldborough *v.* Frye, 7 Cl. & Fin. 436; Gwynne *v.* Heaton, 1 Bro. C. C. 1; Bowes *v.* Heaps, 3 V. & B. 117; Peacock *v.* Evans, 16 Ves. 512. See Davis *v.* Duke of Marlborough, 2 Swanst. 147, 148, note; Twistleton *v.* Griffith, 1 P. W. 310; Cole *v.* Gibbons, 3 P. W. 293; Baugh *v.* Price, 1 Wils. 320; Barnardiston *v.* Lingood, 2 Atk. 135, 136; Walmesley *v.* Booth, 2 A tk. 27, 2.

(*d*) Peacock *v.* Evans, 16 Ves. 512, 514; Gowland *v.* De Faria, 17 Ves. 20; Bernal *v.* Donegal, 1 Bligh, N.R. 594; Hincksman, *v.* Smith, 3 Russ. 433; Earl of Aldborough *v.* Frye, 7 Cl. & Fin. 436; Edwards *v.* Browne, 2 Coll. 100; Boothby *v.* Boothby, 15 Beav. 212; St. Albyn *v.* Harding, 27 Beav. 11; Salter *v.* Bradshaw, 5 Jur. N.S. 831; Bromley *v.* Smith, 5 Jur. N.S. 833; Foster *v.* Roberts, 29 Beav. 467; Jones *v.* Rickett, 31 Beav. 130: Perfect *v.* Lane, 30 Beav. 197; Nesbitt *v.* Berridge, 32 Beav. 282; Clark *v.* Malpas, 31 Beav. 80; Baker *v.* Monk, 33 Beav. 419; Douglas *v.* Culverwell, 3 Giff. 251; Morey *v.* Totten, 6 Gr. 176.

(*e*) See Imp. Act, 31 Vic. c. 4.

necessarily make that valid, which would be otherwise invalid(*a*).

261. The principle that courts of equity will discourage dealings with expectant heirs, and others entitled to estates in expectancy, either by way of the purchase or mortgage of such estates, has nothing to do with family settlements made by persons in such circumstances, for the support of the wife or children of such persons. But a contract of the latter character, or any other reasonable and commendable family arrangement as to the settlement of property, is rather favoured by courts of equity(*b*

262. It is upon similar principles that *post obit* bonds and other securities of a like nature, are set aside, when made by heirs and expectants. A *post obit* bond is an agreement, on the receipt of money by the obligor, to pay a sum, exceeding the sums received and the ordinary rate of interest(*c*), upon the death of the person from whom the obligor has some expectations, if he should survive him(*d*). If in other respects these contracts are perfectly fair, courts of equity will permit them to have effect, as securities for the sum to which *ex æquo et bono* the lender is entitled; for he who seeks equity, must do equity(*e*).

263. Where tradesmen and others have sold goods to young

(a) Talbot *v.* Staniforth, 1 J. & H. 484; 8 Jur. N. S. 757; Jenner *v.* Jenner, 2 D. F. & J. 359. See Firmin *v.* Pulham, 2 D. & Sm. 99; Willoughby *v.* Brideoke, 13 W. R. 515.

(b) Story, s. 337 c; Shafto *v.* Adams, 4 Giff. 492. But see Greenwood *v.* Greenwood 2 D. J. & S. 28; Bolitho *v.* Hillyar, 11 Jur N S. 556; Godfray *v.* Godfray, 12 Jur. N. S. 397.

(c) Miller *v.* Cook, L. R. 10 Eq. 641; Tyler *v.* Yates, L. R. 11 Eq. 265; 6 Chan. 665.

(d) Chesterfield *v.* Jansen, 2 Ves. Sen. 157; 1 Atk. 352; Fox *v.* Wright, 6 Mad. 111; Wharton *v.* May, 5 Ves. 27; Curling *v.* Townshend, 19 Ves. 628; Earl of Aldborough *v.* Frye, 7 Cl. & Fin. 436. And see Beckley *v.* Newland, 2 P. W. 182; Wethered *v.* Wethered, 2 Sim. 183; Harwood *v.* Tooke, 2 Sim. 192; Hyde *v.* White, 5 Sim. 524.

(e) Story, ss. 342, 344; Curling *v.* Townsend, 19 Ves. 628; Bernal *v.* Donegal, 3 Dow, 133; Wharton *v.* May, 5 Ves. 27; Crowe *v.* Ballard, 3 Bro. C. C. 120; Gwynne *v.* Heaton, 1 Bro. C. C. 1. 9; Davis *v.* Duke of Marlborough, 2 Swanst. 174; Earl of Aldborough *v.* Frye, 7 Cl. & Fin. 436, 462, 464.

and expectant heirs at extravagant prices, and under circumstances demonstrating imposition or undue advantage, or an intention to connive at secret extravagance, and profuse expenditure, unknown to their parents or guardians, courts of equity have reduced the securities, and cut down the claims to their reasonable and just amount(*a*).

264. Another class of constructive frauds upon the rights, interests, or duties of third persons, embraces all those agreements and other acts of parties, which operate directly or virtually to delay, defraud, or deceive creditors. Even at common law such transactions are void(*b*), and the legislature, for the purpose of carrying the principles of the common law into effect more fully, declared by the 50 Edw. 3, c. 6, & 3 Hen. 7. c. 4, all fraudulent gifts of goods and chattels in trust for the donor and to defraud creditors to be void, and by 13 Eliz. c. 5, all gifts, grants and conveyances of goods and chattels, or land, made with an intent to hinder, delay, or defraud creditors were rendered void as against the person to whom such frauds would be prejudicial(*c*).

265. This statute does not declare voluntary conveyances to be void, but only declares all fraudulent conveyances to be so (*d*). Whether a conveyance is fraudulent or not, depends upon its being made "upon good consideration and *bona fide*." It is not sufficient that it be upon good consideration or *bona fide*. It must be both; even though made upon good consideration within the meaning of the statute, unless it is *bona*

(*a*) Story, s. 348; Bill *v.* Price, 1 Vern. 467, and note [1]; Lamplugh *v.* Smith, 2 Vern. 77; Whitley *v.* Price, 2 Vern. 78; Brooke *v.* Gally, 2 Atk. 34, 35, 36; Freeman *v.* Bishop, 2 Atk. 39. But see Barney *v.* Beak, 2 Ch. Cas. 136; Gwynne *v.* Heaton, 1 Bro. C. C. 9, 10.

(*b*) Cadogan *v.* Kennett, Cowp. 432; Copis *v.* Middleton, 2 Mad. 428; Barton *v* Vanheythusen, 11 Ha. 132.

(*c*) Tarleton *v.* Liddell, 17 Q. B. 391. For relief against judgments obtained by fraud see Douglass *v.* Ward, 11 Gr. 39; McDonald *v.* Boice, 12 Gr. 48; Bank of Montreal *v.* Baker, 6 Gr. 346.

(*d*) Russell *v.* Hammond, 1 Atk. 13; Doe *v.* Routledge, Cowp. 708; Cadogan *v.* Kennett, Cowp. 432, 434; Holloway *v.* Millard, 1 Mad. 414; Gale *v.* Williamson, 8 M. & W. 405.

fide also, it is void against creditors(*a*). The expression "good consideration" in the statute, means valuable consideration. Meritorious consideration, such as love, affection, &c., though good as between the parties themselves is not considered by the law *bona fide*, if inconsistent with that good faith which is due to creditors(*b*). Voluntary conveyances are binding as between the parties themselves, and all persons claiming under them, in privity of estate(*c*), but in so far as they have the effect of delaying, defrauding, or deceiving creditors, they are not *bona fide*, and are void as against creditors to the extent to which it may be necessary to deal with the property for their satisfaction. To this extent, and to this extent only, they will be treated as if they had not been made; for every other purpose they are good(*d*).

266. To support a settlement against creditors, it is not enough that it be made for valuable consideration; it must also be *bona fide* There may be in the strictest sense a valuable or even an adequate consideration, and it may be made *bona fide* to pass the property, yet if the settlement or conveyance be made with intent to delay, hinder, or defraud creditors, it is void as against them(*e*).

(*a*) Twynne's case, 3 Rep. 81; Bott *v.* Smith, 21 Beav. 516; Harman *v.* Rickards, 18 Hare, 81; Thompson *v.* Webster, 4 Drew. 628; 7 Jur. N. S. 531; Lloyd *v.* Attwood, 3 D. & J. 655; Fraser *v.* Thompson, 4 D. & J. 600; Corbett *v.* Padcliffe, 14 Moo. P. C. 547: Wood *v.* Irwin, 16 Gr. 398. And see Totten *v.* Douglass, 15 Gr. 126.

(*b*) Copis *v.* Middleton, 2 Mad. 430; Taylor *v.* Jones, 2 Atk. 600; Strong *v.* Strong, 18 Beav. 408; Goldsmith *v.* Russell, 5 D. M. & G. 547. And see Irwin *v.* Freeman, 13 Gr. 465; Goodwin *v.* Williams, 5 Gr. 539.

(*c*) Petre *v.* Epinasse, 2 M. & K. 496; Bill *v.* Cureton, 2 M. & K. 503; French *v.* French, 6 D. M. & G. 65; Longeway *v.* Mitchell, 17 Gr. 194.

(*d*) Curtis *v.* Price, 13 Ves. 103; Worsley *v.* De Mattos, 1 Burr. 474; Bott *v.* Smith 21 Beav. 516; Croker *v.* Martin, 1 Bligh, N. S. 573; French *v.* French, 6 D. M. & G. 95; Neale *v.* Day. 28 L. J. Ch. 45. And see Wakefield *v.* Gibson, 1 Giff. 401 Murphy *v.* Abraham, 15 Ir. Ch. 137; Shaw *v.* Jeffrey, 13 Moo. P. C. 432. A deed which, appears to be voluntary may be shown by any evidence, consistent with its terms, to have been made for valuable consideration. Post *v.* Todhunter, 2 Coll. 76; Gale *v.* Williamson, 8 M. & W. 405; Kelson *v.* Kelson, 10 Hare, 385; Townend *v.* Toker, L. R. 1 Chan. 446.

(*e*) Twynne's case, 3 Rep. 81; Holmes *v.* Penney, 3 K. & J. 99; Worsley *v.* De Mattos, 1 Burr. 474; Cadogan *v.* Kennett, Cowp. 434; Harman *v.* Richards, 10 Hare, 81. And see Mulholland *v.* Williamson, 12 Gr. 91; Merchant's Bank *v.* Clark, 18 Gr. 594; Wood *v.* Irwin, 16 Gr. 398: Gotwalls *v.* Mulholland, 3 E. & A. 101; Ont. Stat. 35 Vic., cap. 11.

267. A post nuptial settlement made in pursuance of a prior written agreement is valid against creditors, but a parol ante-nuptial agreement does not prevent a post-nuptial settlement from being voluntary(*a*). Post nuptial settlements are, as a general rule, voluntary deeds and therefore void as against creditors, and the fact that such a settlement is founded on a moral duty will not deprive it of the voluntary character(*b*). In certain cases, a post nuptial settlement if made in performance of a duty which a court of equity would enforce, is not to be treated as wholly voluntary(*c*).

268. The decided cases on the subject of conveyances in fraud of creditors are not entirely consistent with one another. In some cases the rule seems laid down that a deed is not invalid, unless the grantor was at the time indebted to the extent of insolvency; but the rule as so laid down is not correct(*d*). According to other cases a voluntary settlement is not invalid, although the settler may have been at the time considerably indebted, provided he was not indebted beyond his means of payment remaining after the settlement(*e*). The correct conclusion to be drawn from the cases seems to be, that if the debt of the creditor who impeaches the settlement existed at the date of the settlement, and the necessary consequence of

(*a*) Spurgeon *v.* Collier, 1 Ed. 61; Randall *v.* Morgan, 12 Ves. 67; Lassence *v.* Tierney, 1 Mac. & G. 551; *Ex parte* McBurnie, 1 D. M. & G. 44; Warden *v.* Jones, 2 D. & J. 76; Goldicutt *v.* Townsend, 28 Beav. 445; Totten *v.* Douglass, 16 Gr. 243. The consideration of marriage will not support a settlement by a man in insolvent or embarrassed circumstances, if there be evidence that the wife was implicated in any design to delay or defraud the creditors of the intended husband, or that the marriage was part of a scheme or contrivance between them to protect his property against his creditors. Colombine *v.* Penhall, 1 Sm. & G. 228; Fraser *v.* Thompson, 4 D. & J. 600.

(*b*) Holloway *v.* Headington, 8 Sim. 324; Jefferys *v.* Jefferys, Cr. & Ph. 133, 141. A post nuptial settlement made on the receipt of an additional portion, is a settlement for valuable consideration. Sug. V. & P. [14th ed.] 718.

(*c*) 1 Fonbl. Eq. B. K. 1, c. 4, s. 12, note [*b*]; Ib. c. 2, s. 6; Jones *v.* Marsh, Ca. t. Talb. 64; Wheeler *v.* Caryl. Amb. 121; Jewson *v.* Moulson, 2 Atk. 417; Middlecombe *v.* Marlow, 2 Atk. 519; Ward *v.* Shallett, 2 Ves. 16; Arundell *v.* Phipps, 10 Ves. 139.

(*d*) Per. V. C. Kindersley in Thompson *v.* Webster, 4 Drew. 632. And see Townsend *v.* Westacott, 2 Beav. 340, 345.

(*e*) See Townsend *v.* Westacott, 2 Beav. 340; Skarf *v.* Soulby, 1 M. & G. 364; French *v.* French, 6 D. M. & G. 95. And see Bank of Upper Canada *v.* Shickluna, 10 Gr. 157.

the settlement is, that creditors are defrauded or delayed, it is immaterial whether the debtor was or was not solvent after making the settlement(*a*). "The fact" said Lord Westbury, in Spirrett *v.* Willows, "of a voluntary settler retaining money enough to pay the debts which he owed at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of creditors are delayed, hindered or defrauded."

269. The provisions of the 13 Eliz. c. 5, are not confined to existing creditors at the date of the settlement, but extend to subsequent creditors also(*b*). Subsequent creditors cannot, however, set aside a settlement, unless the settlement was made with the express intent to "delay, hinder, or defraud," persons who might become creditors(*c*); or the settlor had not, after the settlement, sufficient means or reasonable expectation of being able to pay, his then existing debts, in which case the law infers that the settlement was made with intent to delay hinder or defraud creditors(*d*); or debts due at the date of the settlement remain unsatisfied(*e*). If at the time of filing the bill no debt due at the date of the settlement remains unpaid, and there is no evidence that the object of it was to delay hinder or defraud subsequent creditors, the settlement will prevail against them(*f*), but if any debt due at the execution of the settlement remains unsatisfied(*g*), or if, though the set-

(*a*) Spirrett *v.* Willows, 34 L. J. Ch, 365. And see French *v.* French, 6 D. M. & G. 95; Thompson *v.* Webster, 7 Jur. N. S. 531; Smith *v.* Cherrill, L. R. 4 Eq. 395; Corbett *v.* Radcliffe, 14 Moo. P. C. 135. And see 2 Kent's Com. 442.

(*b*) Tarback *v.* Marbury, 2 Vern. 509.

(*c*) Stileman *v.* Ashdown, 2 Atk. 481; Stephens *v.* Olive, 2 Bro. C. C. 91; Holloway *v.* Millard, 1 Mad. 414; Holmes *v.* Penney, 3 K. & J. 99; Barling *v.* Bishopp, 29 Beav. 417; Murphy *v.* Abraham, 15 Ir. Ch. 371.

(*d*) Spirrett *v.* Willows, 34 L. J. Ch. 367; Thompson *v.* Webster, 7 Jur. N.S. 531; Waddle *v.* McGinty, 15 Gr. 262. But see Freeman *v.* Pope, L. R. 5 Chan. 543.

(*e*) Jenkyn *v.* Vaughan, 3 Drew. 419; Barton *v.* Vanheythuysen, 11 Ha. 132.

(*f*) Jenkyn *v.* Vaughan, 3 Drew. 419. See Russell *v.* Hammond, 1 Atk. 13; Holmes *v.* Penney, 3 K. & J. 96; Barling *v.* Bishop, 29 Beav. 417; Thompson *v.* Webster, 7 Jur. N.S. 531.

(*g*) Jenkyn *v.* Vaughan, 3 Drew. 419, Comp. Holmes *v.* Penney, 3 K. & J. 90; and see Graham *v.* O'Keefe, 16 Ir. Ch. 1.

tlor was not indebted at the time, the settlement was made in contemplation of future debts, or in furtherance of a meditated design of fraud, the deed will be set aside(*a*).

270. To make a voluntary settlement or conveyance void as against creditors, whether existing or subsequent, it is indispensable that it should transfer property liable to be taken in execution for the payment of debts(*b*).

271. When after a bill of sale of chattel property, purporting on its face to take effect immediately it is executed, the vendor is permitted to remain in possession of the property, a strong presumption of fraud against creditors arises(*c*). But such possession is only a prima facie presumption of fraud which may be rebutted by explanation, showing the transaction to be fair and honest, and giving a reasonable ground for the retention of possession(*d*).

272. Before a creditor can file a bill impeaching a conveyance as fraudulent, he must establish his right at law by recovering judgment, and issuing execution thereon(*e*). But where the bill prayed only a declaration that the conveyance was fraudulent, and that the grantee might be restrained from alienating, a demurrer for want of equity, the plaintiff being only a simple contract creditor, was overruled(*f*).

(*a*) Stileman *v.* Ashdown, 2 Atk. 481; Richardson *v.* Smallwood, Jac. 552; Holloway *v.* Millard, 1 Mad. 414; Barling *v.* Bishop, 29 Beav. 417; Murphy *v.* Abraham, 15 Ir. Ch. 371; Graham *v.* O'Keefe, 16 Ir. Ch. 1. And see Whittington *v.* Jennings, 6 Sim. 496; Bank of British North America *v.* Rattenbury, 7 Gr. [illegible] Buckland *v.* Rose, 7 Gr. 440; Goodwin *v.* Williams, [illegible] Gr. 539.

(*b*) See Dundas *v.* Dutens, 1 Ves. 196; Cartland *v.* Estwick, Anst. [illegible]; Noyes *v.* Corrock, 9 Ves. 188, 189; Rider *v.* Kidder, 10 Ves. 368; Guy *v.* Pearkes, 18 Ves. 196; McCarthy, *v.* Gould, 1 B. & B. 389; Grogan *v.* Cook, 2 B. & B. [illegible]

(*c*) Twynne's case, 3 Rep. 81; Edwards *v.* Harben, 2 T. R. 587.

(*d*) Cadogan *v.* Kenneth, Cowp. 434; Martindale *v.* Booth 3 B. & Ad. 498, 505; Latimer *v.* Batson, 4 B. & C. 652; Minshall *v.* Lloyd, 2 M. & W. 450; Lindon *v.* Sharp, 6 Man. & Gr. 895, 898; Cook *v.* Walker, 3 W. R. 357.

(*e*) M'Master *v.* Clare, 7 Gr. 550; Whiting *v.* Lawrason, 7 Gr. 603; Ferguson *v.* Kilty, 10 Gr. 166; Duffy *v.* Graham, 15 Gr. 547; Colman *v.* Croker, 1 Ves. 161; Neate *v.* Duke of Marlborough, 3 M. & C. 407; Smith *v.* Hurst, 10 Ha. 30. But see Lister *v.* Turner, 5 Ha. 281.

(*f*) Longeway *v.* Mitchell, 17 Gr. 190; Reese River Mining Co. *v.* Atwell, L. R. 7 Eq. 347.

273. Formerly the law tolerated assignments by debtors, which gave one creditor a preference over another; and the fact that an assignment was made expressly to defeat the claim of a particular creditor was of no consequence, if the consideration was adequate(*a*). Now, however, all such preferences by a person in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, when made voluntarily or by collusion with a creditor or creditors, are forbidden(*b*). But a mortgage made to a creditor without any fraudulent intent, and under the influence of pressure on the part of the creditor, is not void, though the effect of the transaction may ultimately be to give a preference to the other creditors(*c*).

274. Under the Insolvent Act, gratuitous contracts or conveyances respecting either real or personal estate, made by a debtor within three months preceding his insolvency, are presumed to be made with intent to defraud his creditors(*d*). And all contracts made with intent to impede, obstruct, or delay creditors, with the knowledge of the party contracting with the debtor, are also void(*e*). Contracts or conveyances for consideration, by which creditors are injured or obstructed, made by a debtor with a person ignorant of the debtor's inability to meet his engagements, are voidable, and may be set aside by any court of competent jurisdiction upon such terms

(*a*) Holbird *v.* Anderson, 5 T. R. 235; Estwick *v.* Caillaud, 5 T. R. 420; Grogan *v.* Cooke, 2 B. & B. 235; Pickstock *v.* Lyster, 3 M. & S. 371; Wood *v.* Dixie, 7 Q. B. 892; Hale *v.* Saloon Omnibus Co., 4 Drew. 492; Wolverhampton and Staffordshire Banking Co. *v.* Marston, 7 H. & N. 148. But see Bott *v.* Smith, 21 Beav. 511.

(*b*) Con. Stat. U. C. c. 26, ss. 17 & 18; Coates *v.* Joslin, 12 Gr. 524.

(*c*) Gordon *v.* Young, 12 Gr. 319; Tuer *v.* Harrison, 14 U. C. C. P. 449; Gottwalls *v.* Mulholland, 15 U. C. C. P. 63; Bank of Toronto *v.* McDougall, 15 U. C. C. P. 475; Bank of Australia *v.* Harris, 8 Jur. N. S. 181; Bills *v.* Smith, 11 Jur. N. S. 155. A debtor defending one action brought against him by a creditor, and allowing judgment by default to be entered in an action by another creditor, will not render the latter judgment void, under Con. Stat. U. C. c. 26 s. 17, Young *v.* Christie, 7 Gr. 312.

(*d*) 32 & 33 Vic. c. 16, s. 86. See Newton *v.* Ontario Bank, 13 Gr. 652: on appeal 15 Gr. 285; a decision under the former Insolvent Act, 27 & 28 Vic. c. 17.

(*e*) 32 & 33 Vic. c. 13, s. 88; and see *Re* Colmere, L. R. 1 Chan. 128; Wood *v.* Barker, L. R. 1 Eq. 139; Ford *v.* Olden, L. R. 3 Eq. 461; Mercer *v.* Petersen, L. R. 2 Ex. 304; affirmed, L. R. 3 Ex. 105. But see Jackson *v.* Bowman, 14 Gr. 156.

as the court may order(*a*). Any sale, deposit, pledge, or transfer, by any person, in contemplation of insolvency, by way of security to any creditor, or any gift of property, real or personal, by way of payment to any creditor, whereby such creditor obtains an unjust preference over other creditors, is null and void, and the subject thereof may be recovered back, and if made within thirty days preceding the execution of an assignment, or the issuing of a writ of attachment, is presumed to have been made in contemplation of insolvency(*b*).

275. Every payment made by a debtor within thirty days before his insolvency to a person knowing his inability to meet his engagements in full, is void(*c*). And the transfer of any debt due by the insolvent to one of his debtors for the purpose of enabling him to set up such debt by way of compensation or set off, if made within thirty days preceding the insolvency, is null and void as regards the insolvent's estate(*d*).

276. It has been held in England, that, if a man makes a conveyance of lands in order to defraud his creditors, and dies, his creditors have no right to set aside the conveyance, for the statute 3 & 4 W. & M., c. 14, respecting devises in fraud of creditors was only designed to secure creditors against any imposition, which might be supposed in a man's last sickness(*e*). But in this Province, where lands and other hereditaments are made assets for the payment of debts, as auxiliary to the personal property of the deceased, if the debtor in his life time, has fraudulently conveyed his estate, with a view to defeat his creditors upon his decease, the real assets

(*a*) 32 & 33 Vic. c. 16, s. 87; Bank of Montreal *v.* McWhirter, 17 U. C. C. P. 506.

(*b*) 32 & 33 Vic. c. 16, s. 89; Adams *v.* McCall, 25 U. C. Q. B. 219; McWhirter *v.* Thorne, 19 U. C. C. P. 302; *Re* Owens, 12 Gr. 560. See Gordon *v.* Young, 12 Gr. 318; Roe *v.* Smith, 15 Gr. 344; Royal Canadian Bank *v.* Kerr, 17 Gr. 47; Mathers *v.* Lynch, 27 U. C. Q. B. 244.

(*c*) 32 & 33 Vic. c. 16, s. 90; Marshall *v.* Lamb, 7 Jur. 850.

(*d*) 32 & 33 Vic. c. 16, s. 91.

(*e*) Parslow *v.* Weaden, 1 Eq. Abr. 14, Pl. 7; 1 Fonbl. Eq. B. 1, ch. 4, s. 12, 14, and note (*l*); Jones *v.* Marsh, Cas. t. Talb. 64; Colman *v.* Croker, 1 Ves. 160. But see Lister *v.* Turner, 5 Ha. 281.

are subject to the same disposition as if no such conveyance had been made(*a*).

277. Another case of fraud upon creditors is where upon a composition by a debtor with his creditors, an undue advantage is secured to particular creditors, by a secret bargain with the debtor. Accordingly, any secret arrangement between the debtor and a particular creditor, whereby he is placed in a more favoured position than the other creditors, is a fraud upon them(*c*), and such an agreement is void even against the assenting debtor, or his sureties, or friends(*b*).

278. This relief is granted not for the sake of the debtor, for no deceit or oppression may have been practised upon him; but for the sake of honest, and humane, and unsuspecting creditors. And, hence, the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favoured creditors, or whether he has been a mere volunteer, offering his services, and aiding in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed, but even money paid under them is recoverable back, as it has been obtained against the clear principles of public policy(*d*). And it is wholly immaterial, whether such secret bargains give to the favoured creditors a larger sum, or an additional security or advantage, or only misrepresent some important fact; for the effect upon other creditors is precisely the same in each of these cases. They are misled into an act, to which they might not otherwise have assented(*e*).

(*a*) Story, ss. 375, 376.

(*b*) Jackman *v.* Mitchell, 13 Ves. 581; *Ex parte* Sadler and Jackson, 15 Ves. 52; Coleman *v.* Waller, 3 Y. & J. 215; Cullingworth *v.* Lloyd, 2 Beav. 385; Pendlebury *v.* Walker, 4 Y. & C. 434; *Ex parte* Oliver, 4 D. & Sm. 362; Mare *v.* Sandford, 1 Giff. 288; Mare *v.* Warner, 3 Giff. 100; Wood *v.* Barker, L. R. 1 Eq. 139.

(*c*) Spurrett *v.* Spiller, 1 Atk. 105; Jackman *v.* Mitchell, 13 Ves. 581; Jones *v.* Barkly, Doug. 695, note; Cockshott *v.* Bennett, 2 T. R. 763; Jackson *v.* Lomas, 4 T. R. 166.

(*d*) Smith *v.* Bromley, Doug. 696, note; Jones *v.* Barkley, Doug. 695, note; Jackman *v.* Mitchell, 13 Ves. 581; *Ex parte* Sadler and Jackson, 15 Ves. 55; Mawson *v.* Stock, 6 Ves. 300.

(*e*) Story, s. 379; Eastabrook *v.* Scott, 3 Ves. 456; Constantein *v.* Blache, 1 Cox, 287; Cullingworth *v.* Lloyd, 2 Beav. 385, and note 390; Leicester *v.* Rose, 4 East, 372; See Furlong *v.* Fottrell, Ir. R. 3 Eq. 432; Mare *v.* Sandford, 1 Giff. 288.

279. Any agreement, made by an insolvent debtor with his assignee, by which the estate of the insolvent is to be held in trust by the assignee, to secure certain benefits for himself and his family, such as to pay certain annuities to himself and his wife, out of the rents or proceeds of the property assigned, and to apply the surplus to the extinction of debt due to the assignee, will be held void, and will be rescinded, upon the ground of public policy, even at the instance of the insolvent himself (*a*).

280. Although voluntary and other conveyances, in fraud of creditors, are void, as against them, yet, they are so, only so far as the original parties and their privies, and others claiming under them, who have notice of the fraud, are concerned. *Bona fide* purchasers for a valuable consideration, without notice of the fraudulent or voluntary grant, are of such high consideration, that they will be protected, as well at law as in equity, in their purchases. It would be plainly inequitable, that a party who has, *bona fide*, paid his money upon the faith of a good title, should be defeated by any creditor of the original grantor, who has no superior equity, since it would be impossible for him to guard himself against such latent frauds(*b*).

281. What circumstances connected with voluntary or valuable conveyances, are badges of fraud, or raise presumptions of intentional bad faith, though very important ingredients in the exercise of equitable jurisdiction, fall rather within the scope of treatises on evidence, than of discussions touching jurisdiction(*c*). It may, however, be said generally, that whatever would at law be deemed badges of fraud, or presumptions of ill faith, will be fully acted upon in courts of equity. But, on the other hand, it is by no means to be deemed a logical conclusion, that, because a transaction could not be reached at law as fraudulent, therefore it would be equally safe against

(*a*) McNeill *v.* Cahill, 2 Bligh, 228.
(*b*) Story, s. 381.
(*c*) See 1 Eq. Abr. 148, E.; Twynne's case, 3 Co. 80, and see as to badges of fraud under English Bankrupt Law, Allen *v.* Bonnett, L. R. 5 Chan. 577.

the scrutiny of a court of equity; for a court of equity requires a scrupulous good faith in transactions which the law might not repudiate. As has been said by V. C. Page Wood, "The view taken by this court as to morality of conduct among all parties * * * * is one of the highest morality. The standard by which parties are tried here is a standard, I am thankful to say, far higher than the standard of the world "(*a*).

282. Other underhand agreements, which operate as a fraud upon third persons, and to which the same remedial justice has been applied, may be suggested. Where a father, upon the marriage of his daughter, had entered into a covenant, that upon his death he would leave her certain tenements, and he would also by his will, give and leave her a full and equal share, with her brothers and sisters, of all his personal estate, and afterwards, transferred to his son a very large portion of his personal property, consisting of public stock, but retained the dividends for his own life; the transfer was held void, as a fraud upon the marriage articles(*b*). Covenants of this nature do not prohibit a man from making, during his lifetime, any dispositions of his personal property among his children, more favourable to one than another. But they do prohibit him from doing any acts which are designed to defeat and defraud the covenant. A parent may, if he pleases, make an absolute gift to a child; but it must be an absolute and unqualified one, and not a mere reversionary gift, which saves the income to himself during his own life(*c*).

283. So if money to purchase goods for another, or to relieve him from pressure of his necessities, is advanced by any one, and the other parties interested should enter into a private agreement over and beyond that with which the party advancing the money is made acquainted, the agreement will be void at law, as well as in equity; for he is drawn in to make the advance by false colours held out to him, and under a suppo-

(*a*) Blissett *v.* Daniel, 10 Ha. 536.

(*b*) Jones *v.* Martin, 3 Anst. 882; 5 Ves. 265, n. See also Randall *v.* Willis, 5 Ves. 261; McNeill *v.* Cahill, 2 Bligh, 228. See Stocken *v.* Stocken, 4 M. & C. 95.

(*c*) Story, s. 382; Jones *v.* Martin, 3 Anst. 882.

sition that he is acquainted with all the facts(*a*). So the guaranty of the payment of a debt, procured from a friend upon the suppression by the parties of material circumstances, is a virtual fraud upon him, and avoids the contract(*b*).

284. Another class of constructive frauds consists of those where a man designedly or knowingly produces a false impression upon another, who is thereby drawn into some act or contract, injurious to his own rights or interests(*c*). And there is no real difference between an express representation, and one that is naturally or necessarily implied from the circumstances(*d*).

285. In many cases, a man may innocently be silent, but in other cases, he is bound to speak out, and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction(*e*). Thus, if a man, having a title to an estate, which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase under the supposition that the title is good, the former, so standing by and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase. So, if a man should stand by, and see another person, as grantor, execute a deed of conveyance of land belonging to himself, and knowing the facts, should sign his name as a witness, he would in equity be bound by the conveyance(*f*). So, if a party having a title to an estate, should stand by, and allow an innocent purchaser to

(*a*) Jackson *v.* Duchaire, 3 T. R. 551.

(*b*) Story, s. 383; Pidcock *v.* Bishop, 3 B. & C. 605; Smith *v.* Bank of Scotland, 1 Dow, 272. See Owen *v.* Homan, 3 Mac. & G. 378; Squire *v.* Whitton, 1 H. L. 333.

(*c*) Com. Dig. Chancery, 4 W.

(*d*) Dart, (4th Ed.) 84, 85, 590

(*e*) Savage *v.* Foster, 9 Mod. 35; Com. Dig. Chancery, 4 I. 3, 4 W.; Hanning *v.* Ferrers, 1 Eq. Abr. 356, pl. 10.

(*f*) Davies *v.* Davies, 6 Jur. N.S. 1320; Savage *v.* Foster, 9 Mod. 35; Hobbs *v* Norton, 1 Vern. 136; Boyd *v.* Belton, 1 J. & L. 730; Thompson *v.* Simpson, 2 J. & L. 110; Leary *v.* Rose, 10 Gr. 346; *Re* Shaver, 3 Chan. Cham. R. 385; Teasdale *v.* Teasdale, Sel. Ch. Rep. 59.

expend money upon the estate, without giving him notice, he would not be permitted by a court of equity to assert that title against such purchaser, at least not without fully indemnifying him for all his expenditure(*a*). And neither infancy nor coverture constitute any excuse for the party guilty of the concealment or misrepresentation(*b*).

286. To justify the application of this principle, it is indispensable that the party standing by and concealing his rights should be fully apprised of them, and should by his conduct or gross negligence, encourage or influence the purchase, for if he is wholly ignorant of his rights, or the purchaser knows them, or, if his acts, or silence or negligence, do not mislead, or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part. A right can be lost or forfeited only by such conduct as would make it fraudulent and against conscience to assert it(*c*).

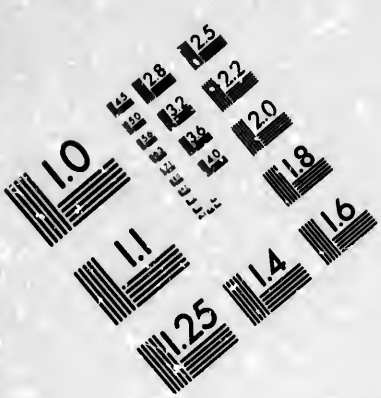
287. Another case, illustrative of the same doctrine, is, where through inadvertence, or a mistake of title, a man expends money improving the estate of another, with the knowledge of the real owner, who stands by and suffers him to proceed, without giving notice of his own claim. In such a case the real owner would not be permitted to avail himself of such improvements, without paying full compensation, for, in conscience, he was bound to disclose the defect of title(*d*).

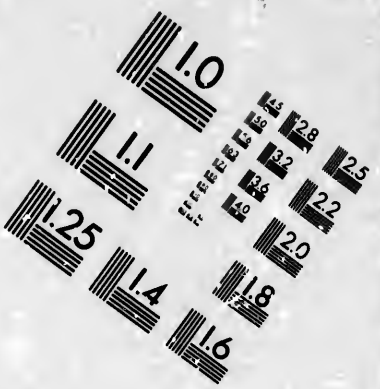
(*a*) Story, s. 385. See Cawdor *v.* Lewis, 1 Y. & C. Ex. 427; *Re* Shaver, 3 Chan. Cham. R. 386.

(*b*) Savage *v.* Foster, 9 Mod. 35; Evroy, *v.* Nichols, 2 Eq. Abr. 489; Clare *v.* Earl of Bedford, cited 2 Vern. 150, 151; Beckett *v.* Cordley, 1 Bro. C. C. 357; Watts *v.* Creswell, 2 Eq. Abr. 515; Cory *v.* Gertcken, 2 Mad. 40; *Re* Shaver, 3 Chan. Cham. R. 388. And see Barrow *v.* Barrow, 4 K. & J. 409; Nelson *v.* Stocker, 5 Jur. N.S. 262.

(*c*) Story, s. 386. See Neville *v.* Wilkinson, 1 Bro. C. C. 546; 3 P. W. 74, note; Scott *v.* Scott, 1 Cox, 378, 379, 380; Evans *v.* Bicknell, 6 Ves. 173, 182, 183, 184; Pearson *v.* Morgan, 2 Bro. C. C. 388. And see Brown *v.* Thrope, 11 L. J. Ch. 73; Davies *v.* Davies, 6 Jur. N.S. 1322; Marker *v.* Marker, 9 Ha. 16; Hooper *v.* Cooke, 25 L. J. Ch. 467; Ramsden *v.* Dyson, L. R. 1 H. L. 129.

(*d*) Pilling *v.* Armitage, 12 Ves. 84, 85. And see Bright *v.* Boyd, 1 Story, 478; Thornton *v.* Ramsden, 4 Giff. 519; Powell *v.* Thomas, 6 Ha. 300; East India Company *v.* Vincent, 2 Atk. 83; Dann *v.* Spurrier, 7 Ves. 231, 235; Jackson *v.* Cator, 5 Ves. 688; Shannon *v.* Bradstreet, 1 S. & L. 73. See also Ont. Stat. 36 Vic. c. 22.





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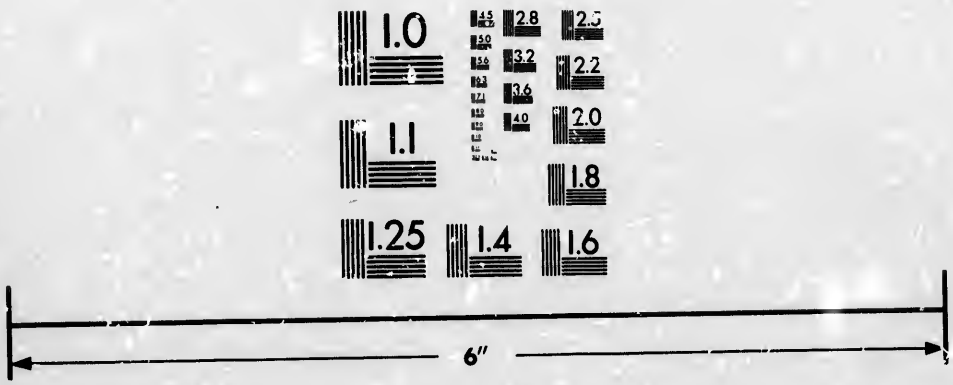

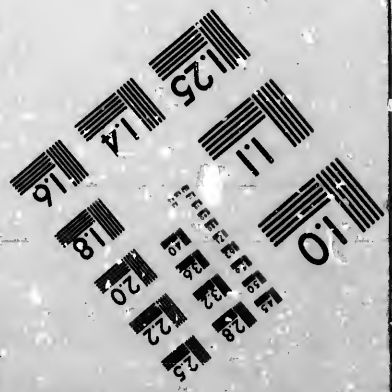

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288. The principle does not apply in the case of a man who builds on land knowing it to be the property of another, nor in favour of a lessee who expends money with the knowledge of his landlord on the improvement of the estate. If a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from claiming the land, with the benefit of all the expenditure upon it. So, if a tenant lays out money in the hope or expectation of an extended term, or an allowance for it, unless such hope or expectation has been created or encouraged by the landlord, the tenant has no equity to prevent the landlord from taking possession of the land and improvements when the tenancy is determined(*a*). Nor does the principle apply in favour of a man who is conscious of a defect in his title, and with such conviction on his mind, expends money in improving the property(*b*).

289. Another case, illustrating the same doctrine, is, where a person, having an incumbrance upon an estate, and knowing that another person is about to lend money on the mortgaged property, denies that he has an incumbrance, or asserts that it is satisfied, or is a witness to a subsequent mortgage or conveyance of the same property, knowing the contents of the deed, and does not disclose his prior incumbrance, he would be postponed to the second mortgagee, who lends his money on the faith of the representations so made(*c*).

290. So, where one puts the evidence of his lien into the debtor's hands, so as to enable him to represent it as extinguished, and thereby gain further credit upon the same pro-

(*a*) Pilling *v.* Armitage, 12 Ves. 78; Clare Hall *v.* Harding, 6 Hare, 273; Duke of Beaufort *v.* Patrick, 17 Beav. 60; Hamer *v.* Tilsley, John. 486; O'Fay *v.* Burke, 8 Ir. Ch. 226; Ramsden *v.* Dyson, L. R., 1 H. L. 129. See Rennie *v.* Young, 2 D. & J. 142.

(*b*) Kenney *v.* Brown, 3 Ridg. 518.

(*c*) Draper *v.* Borlace, 2 Vern. 369; Clare *v.* Earl of Bedford, cited 2 Vern. 150. 151; Mocatta *v.* Murgatroyd, 1 P. W. 393, 394; Berrisford *v.* Milward, 2 Atk. 49; Becket *v.* Cordley, 1 Bro. C. C. 353, 357; Evans *v.* Bicknell, 6 Ves. 173, 182, 183; Pearson *v.* Morgan, 2 Bro. C. C. 385, 388; Plumb *v.* Fluitt, 2 Anst. 432; West *v.* Reid, 2 Ha. 249, 259.

perty, the first lien will be postponed to the subsequent one(*a*).

291. And if a trustee should permit the title-deeds of the estate to go out of his possession for the purpose of fraud, and intending to defraud one person, should defraud another, equity will grant relief against him(*b*). So, if a bond should be given upon an intended marriage, and to aid it, and the marriage with that person should afterwards go off, and another marriage should take place upon the credit of that bond, the bond would bind the party in the same way as it would if the original marriage had taken effect(*c*).

292. The same principle applies to cases of a contract to sell lands, or to grant leases thereof. If a subsequent purchaser has notice of the contract, he is liable to the same equity, and stands in the same place, and is bound to do the same acts, which the person who contracted, and whom he represents, would be bound to do(*d*).

293. In all this class of cases, the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief(*e*). It has, accordingly, been laid down by a very learned judge, that the cases on this subject go to this extent only, that there must be positive fraud, or concealment, or negligence, so gross as to amount to constructive fraud(*f*). And, if the intention be fraudulent, although not exactly point-

(*a*) Perry-Herrick *v.* Atwood, 2 D. & J. 21. But see Tayler *v.* Great Indian Peninsula Railw. Co., 5 Jur. N. S. 1087.

(*b*) Evans *v.* Bicknell, 6 Ves. 174, 191; Clifford *v.* Brooke, 13 Ves. 132.

(*c*) Story, s. 392. See Evans *v.* Bicknell, 6 Ves. 191.

(*d*) Story, s. 396; Taylor *v.* Stibbert, 2 Ves. 438; Davis *v.* Earl of Strathmore, 16 Ves. 419, 428, 429; Underwood *v.* Courtown, 2 S. & L. 64; Mackreth *v.* Symmons, 15 Ves. 350; Scott *v.* Dunbar, 1 Moll. 442; Field *v.* Bolland, 1 Dr. & Wal. 37. See Dowell *v.* Dew, 1 Y. & C. 345.

(*e*) Tourle *v.* Rand, 2 Bro. C. C. 652.

(*f*) Evans *v.* Bicknell, 6 Ves. 190, 191, 192; Merewether *v.* Shaw, 2 Cox, 124 See Hewitt *v.* Loosemore, 9 Ha. 449.

ing to the object accomplished; yet the party will be bound to the same extent as if it had been exactly so pointed(*a*).

294. The Stat. 27, Eliz. c. 4, made perpetual by 39 Eliz. c. 18, s. 31, was enacted for the protection of purchasers, as the 13 Eliz. c. 5, was for that of creditors. It enacted that every conveyance, grant, charge, lease, limitation of use, of in, or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, &c., as shall purchase the said lands, or any rent or profit out of the same, shall be deemed only against such persons, their heirs, &c., who shall so purchase for money, or any good consideration, the said lands, to be wholly void, frustrate, and of none effect. Chattels personal, in which respect they differ from chattels real, are not within the statute, and therefore, a voluntary settlement of chattels personal would not be defeated by a subsequent sale(*b*). A mortgagee is a purchaser within the meaning of the act(*c*), but a judgment creditor is not(*d*).

295. A voluntary conveyance, is, by the statute, void as against a subsequent purchaser, although it may have been *bona fide* and for good consideration, and although the purchaser may have had full notice of it(*e*). Pre-nuptial marriage settlements and post-nuptial settlements made in pursuance of pre-nuptial articles are settlements for valuable consideration, and therefore good against subsequent purchasers(*f*). But as a general rule a post-nuptial settlement is voluntary(*g*).

(*a*) Story, s. 391; Evans *v.* Bicknell, 6 Bes. 191, 192; Beckett *v.* Cordley, 1 Bro. C. C. 357.

(*b*) Saunders *v.* Dehew, 2 Vern. 272; Bill *v.* Cureton, 2 M. & K. 503; McDonell *v.* Hesilrige, 16 Beav. 346.

(*c*) Chapman *v.* Emery, Cowp. 279.

(*d*) Bevan *v.* Earl of Oxford, 6 D. M. & G. 507.

(*e*) See Evelyn *v.* Templar, 2 Bro. C. C. 148; Doe *v.* Manning, 9 East, 59; Pulverloft *v.* Pulverloft, 18 Ves. 84, 86; Buckle *v.* Mitchell, 18 Ves. 100; Kelson *v.* Kelson, 10 Hare, 385; Daking *v.* Whimper, 26 Beav. 568; Clarke *v.* Wright, 6 H. & N. 49.

(*f*) Sug. V. & P. 718; Dart, 576.

(*g*) Sug. V. & P. 715.

296. A purchaser cannot avail himself of the Statute, unless he purchased *bona fide* and for a valuable consideration (*a*). And in order that a subsequent conveyance for value should defeat a prior voluntary conveyance, it is essential that both should be made by the same person. An heir or devisee cannot by a conveyance for value, defeat a voluntary settlement made by his ancestor or testator(*b*). Where a voluntary settlement is avoided by a subsequent sale, the volunteers have no equity against the purchase money payable to the settlor(*c*).

297. As between the parties themselves, and as against other voluntary grantees of the same estate, voluntary conveyances are binding(*d*). A voluntary settlement will be defeated by a conveyance or settlement for value, only to the extent necessary to give effect to the conveyance or settlement for value(*e*). A purchaser for value cannot come into court to have a prior voluntary deed void under the statute delivered up to be cancelled. In such a case, the court leaves both parties to their legal rights and remedies(*f*).

298. Questions under the 27 Eliz. c. 4, have never been frequent in this Province, and are still less likely to arise in future, in consequence of Ont. Stat. 31 Vic. c. 9. By that Act it is provided that notwithstanding the 27 Eliz. c. 4, no voluntary conveyance shall be void, merely from absence of valuable consideration, if executed in good faith and duly registered

(*a*) Humphreys *v.* Pensam, 1 M. & C. 580 ; Roberts *v.* Williams, 4 Hare, 130. In the case of deeds alleged to be voluntary, the court does not enter into the quantum of consideration, but only enquires whether the transaction was one of bargain, or one of gift merely. Kelson *v.* Kelson, 10 Hare, 385 ; Townend *v.* Tolker, L. R. 1 Chan, 459.

(*b*) Parker *v.* Carter, 4 Hare, 409 ; Doe *v.* Rusham, 17 Q. B. 723 ; Lewis *v.* Rees, 3 K. & J. 132.

(*c*) Daking *v.* Whimper, 26 Beav. 568.

(*d*) Bill *v.* Cureton, 2 M. & K. 503 ; Doe *v.* Rusham. 17 Q. B. 723 ; Lewis *v.* Rees, 3 K. & J. 132.

(*e*) Croker *v.* Martin, 1 Bligh, N. R. 573

(*f*) De Hoghton *v.* Money, 35 Beav. 98.

"before the execution of the conveyance to, and before the creation of any binding contract for the conveyance to, any subsequent purchaser from the same grantor of the same lands." A subsequent clause provides that the Act shall not operate so as to render valid, instruments void for any other reason or in addition to the absence of a valuable consideration.

299. Having now gone through most of the cases generally classed under the head of constructive fraud, it is proper to treat shortly of the position in which purchasers *bona fide* for valuable consideration, and purchasers entitled to rely for protection on the Registry laws stand; and also of the doctrine of notice.

300. The right to impeach a transaction on the ground of fraud, has no place as against a purchaser for valuable consideration without notice. If a man has paid his money in ignorance of the fact that another party has an equitable claim to the property, a court of equity will not deprive him of the benefit of his legal title even although his equitable claim be of later date than that of the other party(*a*). This rule, that a purchaser *bona fide* without notice will be protected, applies equally to real estate, chattels, and personal property(*b*), and is subject to no exception, even in favour of charities(*c*).

301. A purchaser for valuable consideration without notice of any defect in his title, may buy in or obtain any outstanding legal estate not held upon express trust for an adverse claimant; or any other legal advantage, the possession of which may be a protection to himself or an embarassment to other

(*a*) Lloyd *v.* Passingham, Coop. t. Eldon, 152; Attorney-General *v.* Flint, 4 Hare, 156; Blackie *v.* Clark, 15 Beav. 595; Cobbett *v.* Brock, 20 Beav. 528; Dawson *v.* Prince, 2 D. & J. 41; Dodds *v.* Hills, 2 H. & M. 424. Compare Vorley *v.* Cooke, 1 Giff. 230; Ogilvie *v.* Jeaffreson, 2 Giff. 379; Cottam *v.* Eastern Counties Railway Co. 1 J. & H. 243.

(*b*) Joyce *v.* De Moleyns, 2 J. & L. 377; Dawson *v.* Prince, 2 D. & J. 49; Dodds *v.* Hills, 2 H. & M. 424. See Thorndike *v.* Hunt, 3 D. & J. 563; Case *v.* James, 29 Beav. 512.

(*c*) Att.-Gen. *v.* Wilkins, 17 Beav. 293.

claimants(*a*). And a person affected by notice has the benefit of want of notice by intermediate purchasers(*b*). Thus, a purchaser will not be affected by notice if he purchase from one who himself bought *bona fide* without notice(*c*).

302. The protection from getting in the legal estate extends even to cases where the apparent or asserted equitable title is deduced through a forged instrument(*d*): provided the apparent title of the party from whom it was derived was clothed with possession(*e*). If, however, an instrument, which purports to convey a legal estate or interest, be forged, no title can be acquired under it. A man who takes under such an instrument has no title at all, and cannot claim as a purchaser without notice(*f*).

303. Though at one time doubted, it seems to be now settled that the defence of a purchase for value without notice will prevail as well against a legal title as an equitable title, in other words, it applies as well when the right sought to be enforced is a legal right as when it is an equitable one(*g*). But as between persons claiming merely equitable interests, the defence has no place. A party who purchases an equity takes

(*a*) Saunders *v.* Dehew, 2 Vern. 271; Willoughby *v.* Willoughby, 1 T. R. 763; Jerrard *v.* Saunders, 2 Ves. 458; Maundrell *v.* Maundrell, 10 Ves. 246; Hughes *v.* Garner, 2 Y. & C. Ex. 328; Carter *v.* Carter, 3 K. & J. 617; Bates *v.* Johnson, John. 304; Sharples *v.* Adams, 32 Beav. 213; Fagg *v.* James, 8 L. T. N. S. 7.

(*b*) McQueen *v.* Farquhar, 11 Ves. 467; Rogers *v.* Shortis, 10 Gr. 243.

(*c*) Harrison *v.* Firth, 1 Eq. Ca. Abr. 331; Lowther *v.* Carlton, 2 Atk. 242; Brandlyn *v.* Ord, 1 Atk. 571; Sweet *v.* Southcote, 2 Bro. C. C. 66; Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(*d*) Jones *v.* Powles, 3 M. & K. 581; Dawson *v.* Prince, 2 D. & J. 41. See Lloyd *v.* Passingham, Coop. t. Eldon, 152; Bowen *v.* Evans, 1 J. & L. 264; Lloyd *v.* Attwood, 3 D. & J. 655.

(*e*) Jones *v.* Powles, 3 M. & K. 596; Ogilvie *v.* Jeaffreson, 2 Giff. 380. See Cottam *v.* Eastern Counties Rail. Co. 1 J. & H. 248.

(*f*) Esdaile *v.* La Nauze, 1 Y. & C. Ex. 399. See Cottam *v.* Eastern Counties Rail. Co. 18 J. & H. 248.

(*g*) Bowen *v.* Evans, 1 J. & L. 264; Payne *v.* Compton, 2 Y. & C. Ex. 457; Att-Gen. *v.* Wilkins, 17 Beav. 285; Lane *v.* Jackson, 20 Beav. 535; Hope *v.* Liddel, 21 Beav. 183; Penny *v.* Watts, 1 Mac. & G. 150; Gomm *v.* Parrott, 3 Jur. N. S. 1150.

it subject to all the equities which affect it in the hands of the assignee(*a*).

304. The rule that a *bona fide* purchaser without notice may buy in, or obtain for his protection an outstanding legal estate or other legal advantage, was the foundation of the equitable doctrine of tacking, that is, uniting securities given at different times, so as to prevent an intermediate purchaser from claiming a title to redeem, or otherwise to discharge one lien which is prior in date without discharging or redeeming the other liens also which were subsequent to his own title. Thus, if a third mortgagee, without notice of a second mortgage at the time when he lent his money, purchased in the first mortgage, and thereby acquired the legal title, the second mortgagee could not redeem the first mortgage without redeeming the third also. And it was no matter, that the third mortgagee had notice of the second mortgage at the time he purchased in the first, provided he had no notice at the time he advanced his money(*b*). The absence of notice at the time of the advance was the ground of the equity(*c*). The doctrine of tacking was never favoured in this Province, and was only adopted under the weight of English authorities, until abolished by the Registry Act, in 1850(*d*).

305. Statutory provision for the registration of deeds was made at a very early period in the history of this Province(*e*). The object of the Legislature in establishing a system of registration, was to enable any one dealing with property from

(*a*) Frazer *v.* Jones, 17 L. J. Ch. 353, 356; Manningford *v.* Toleman, 1 Coll. 670; Rooper *v.* Harrison, 2 K. & J. 108; Ford *v.* White, 16 Beav. 120; Stackhouse *v.* Countess of Jersey, 1 J. & H. 721; Cox *v.* James, 3 D. F. & J. 264; Parker *v.* Clarke, 30 Beav. 54; Cory *v.* Eyre, 1 D. J. & S. 167; Phillips *v.* Phillips, 31 L. J. Ch. 321, 326. And see Macpherson *v.* Dougan, 9 Gr. 258.

(*b*) Marsh *v.* Lee, 1 Ch. Ca. 162; Morrett *v.* Parke, 2 Atk. 52; Wortley *v.* Birkhead, 2 Ves. 571; Lacey *v.* Ingle, 2 Ph. 419; Rooper *v.* Harrison, 2 K. & J. 86; Bates *v.* Johnson, John. 304; Street *v.* The Commercial Bank, 1 Gr. 169. And see Gordon *v.* Lothian, 2 Gr. 293; McMurray *v.* Burnham, 2 Gr. 289.

(*c*) Brace *v.* Duchess of Marlborough, 2 P. W. 491; Hopkinson *v.* Rolt, 9 H. L. 574.

(*d*) 13 & 14 Vic. c. 63, s. 4. See also Con. Stat. U. C. C. 89, s. 56. See since the Act of 1850; Hyman *v.* Root, 10 Gr. 340; Buckler *v.* Bowman, 12 Gr. 457.

(*e*) 35 Geo. 3, c. 5.

time to time, to know whether it was affected by any existing deed or conveyance, and to compel the registration of so much of such deed or conveyance as would afford this knowledge, on the penalty in default thereof of its being held void(*a*).

306. By the original act(*b*) registration was not made imperative, and it was only after a title became a registered one by some owner registering his deed, that deeds and wills were to be deemed fraudulent and void as against a subsequent purchaser or mortgagee for valuable consideration, unless registered before the registering of the deed or will under which such subsequent purchaser claimed title. In 1850 a new registry act(*c*) was passed, which made it necessary after patent from the Crown issued, to register every deed or will, under the penalty of its being held void as against subsequent purchasers(*d*). By the 8th section of the same act, registration was for the first time declared to constitute in equity notice to all persons claiming any interest subsequent to such registry(*e*).

307. Notwithstanding the stringent provisions of the registry laws, courts of equity have long held that if a subsequent purchaser has notice, at the time of his purchase, of a prior unregistered conveyance, he shall not be permitted to avail himself of his title against that prior conveyance(*f*).

(*a*) Reid *v.* Whitehead, 10 Gr. 446.

(*b*) 35 Geo. 3, c. 5.

(*c*) 13 & 14 Vic. c. 63.

(*d*) In the case of a registered title, a vendor cannot make out a good title unless all the deeds are registered, Brady *v.* Walls, 17 Gr. 703, 704; Kitchen *v.* Murray, 16 U. C. C. P. 69.

(*e*) A person who relies for his defence on the register must be taken to have notice of the whole register, and of whatever the register would put him on enquiry respecting, Ford *v.* White, 16 Beav. 120. See Stephen *v.* Simpson, 15 Gr. 594.

(*f*) Le Neve *v.* Le Neve, 3 Atk. 646; Sheldon *v.* Coxe, 2 Eden, 224; Forbes *v.* Deniston, 4 Bro. P. C. 189; Worsely *v.* De Mattos, 1 Burr. 474, 475; Eyre *v.* Dolphin, 2 B. & B. 302; Bushell *v.* Bushell, 1 S. & L. 99; Drew *v.* Lord Norbury, 9 Ir. Eq. 171; Chandos *v.* Brownlow, 2 Ridg. 428; Coppin *v.* Fernyhough, 2 Bro. C. C. 291; Toulmin *v.* Steere, 3 Mer. 209, 224. Express notice of an unregistered assignment of unpatented land has the same effect as like notice of an unregistered conveyance after patent, Goff *v.* Lister, 13 Gr. 406; 14 Gr. 451. Registration is notice of all instruments registered before, as well as since registration was made notice, Vance *v.* Cummings, 13 Gr. 25.

308. This doctrine, as to postponing registered to unregistered conveyances upon the ground of notice, has broken in upon the policy of the registration acts in no small degree; for a registered conveyance stands upon a different footing from an ordinary conveyance. It has, indeed, been greatly doubted, whether the courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance. But they have said that fraud shall not be permitted to prevail. There is however this qualification upon the doctrine, that it shall be available only in cases where the evidence of notice is quite satisfactory and distinct upon the point(*a*).

309. Constructive notice of an unregistered deed, capable of registration, will not prevail against a registered title. This was the settled doctrine of the Court of Chancery in this Province(*b*), and the recent Registry Acts have adopted the same rule by enacting that "priority of registration shall in all cases prevail, unless before such prior registration there shall have been actual notice of the prior instrument by the party claiming under this prior registration(*c*).

310. Registration of any instrument is in equity, notice to all persons claiming any interest in the land subsequent to such registry. Prior to the 13th & 14th Vic. c. 63, s. 8, regis-

(*a*) Story, s. 398; Hollywood *v.* Waters, 6 Gr. 329; Foster *v.* Beall, 15 Gr. 245; Hine *v.* Dodd, 2 Atk. 275; Jolland *v.* Stainbridge, 3 Ves. 485; Wallace *v.* Marquis of Donegal, 1 Dr. & Wal. 488; Wyatt *v.* Barwell, 19 Ves. 439. See Chadwick *v.* Turner, L. R. 1 Chan. 310; Rolland *v.* Hart, L. R. 6 Chan. 678. But see Skeeles *v.* Shearly, 8 Sim. 156; 3 M. & C. 112; Timson *v.* Ramsbottom, 2 Keen, 35; Foster *v.* Blackstone, 1 M. & K. 297.

(*b*) Ferrass *v.* McDonald, 5 Gr. 312; Baldwin *v.* Duignan, 6 Gr. 598; Graham *v.* Chalmers, 7 Gr. 597; 9 Gr. 241; McCrumm *v.* Crawford, 9 Gr. 340; Moore *v.* Bank of British North America, 15 Gr. 310. And see Rice *v.* O'Connor, 11 Ir. Ch. 510: approved on appeal, 12 Ir. Ch. 424. In Wormald *v.* Maitland, 35 L. J. Ch. 69, it was laid down broadly by Vice-Chancellor Stuart that constructive notice has the same effect as against a registered title as in other cases. This decision was afterwards followed in *Re* Allen's estate, Ir. R. 1 Eq. 455. But these cases will not be followed in this Province unless adopted by the Court of Error and Appeal, or the broad doctrine laid down by V.-C. Stuart receives the express sanction of a higher court in England, Moore *v.* Bank of British North America, 15 Gr. 319.

(*c*) 29 Vic. c. 24, s. 75; Ont. Stat. 31 Vic. c. 20, s. 67.

tration was not notice(*a*), but by the 29 Vic. c. 24, s. 64, it was provided that registration under that Act or any former Act shall, in equity constitute notice(*b*). While registration is notice of the thing registered for the purpose of giving effect to any equity accruing from it, it can be notice of any given instrument only to those who are reasonably led by the nature of the transaction in which they are engaged to examine the register with respect to it(*c*). Registration of an instrument not required to be registered, does not create notice(*d*). To a perfect registration it is necessary that all the requirements of the Registry Acts should be complied with, and defective registration is not notice(*e*).

311. Prior to the Registry Act of 1865(*f*), it was held that the Registry Act did not affect any equitable rights or interests which could not be registered(*g*). By the recent Act 29 Vic. c. 24, however, no equitable lien, charge, or interest affecting land is to be deemed valid in any court after the Act came into operation, as against a registered instrument executed by the same party, his heirs or assigns(*h*). But this Act does not affect any lien or equitable interest created before the passing of the Act(*i*).

312. Notice may be either actual and positive, or it may be implied and constructive. Actual notice requires no definition, for in that case knowledge of the fact is brought directly

(*a*) Street *v.* Commercial Bank, 1 Gr. 169.

(*b*) See Ont. Stat. 31 Vic. c. 20.

(*c*) Boucher *v.* Smith, 9 Gr. 347.

(*d*) Malcolm *v.* Charlesworth, 1 Keen, 63; Doe *v.* Rainsford, 10 U. C. Q. B. 236. But see Latch *v.* Bright, 16 Gr. 653.

(*e*) Boucher *v.* Smith, 9 Gr. 355; Reid *v.* Whitehead, 10 Gr. 446; Essex *v.* Baugh, 1 Y. & C. 620.

(*f*) 29 Vic. c. 24; Ont. Stat. 31 Vic. c. 20.

(*g*) Sumpter *v.* Cooper, 2 B. & Ad. 226; Neve *v.* Pennell, 2 H. & M. 187; Holmes *v.* Powell, 8 D. M. & G. 572; Buckley *v.* Lanauze, L. & G. t. Plunkett, 341; *Re* Driscoll, Ir. R. 1 Eq. 288; McMaster *v.* Phipps, 5 Gr. 258; Burgess *v.* Howell, 8 Gr. 37; McQuesten *v.* Campbell, 8 Gr. 244; Cherry *v.* Morton, 8 Gr. 407; McCrumm *v.* Crawford, 9 Gr. 340; Robson *v.* Carpenter, 11 Gr. 293; Harrison *v.* Armour, 11 Gr. 303; Bank of Montreal, *v.* Baker, 9 Gr. 298; Moore *v.* Bank of British North America, 15 Gr. 312.

(*h*) And see Ont. Stat. 31 Vic. c. 20, s. 68.

(*i*) McDonald *v.* McDonald, 14 Gr. 133.

home to the party. Constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent, that the court will not even allow of its being controverted(a). Or, as has been elsewhere defined, constructive notice is knowledge imputed by the court on presumption, too strong to be rebutted, that the knowledge must have been communicated(b).

313. An illustration of this doctrine of constructive notice is where the party has possession or knowledge of a deed, under which he claims his title, and it recites another deed, there the court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it(c). And generally it may be stated, as a rule on this subject, that where a purchaser cannot make out a title, but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact(d). Indeed, whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons,) is, in equity, held to be good notice to bind him(e). Thus, notice of a lease will be notice of its contents(f). So, if a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate which these tenants have, and, therefore, he is affected with notice of all the facts as to their estates(g).

(a) Plumb *v.* Fluitt, 2 Anst. 438, per Eyre, C.B.; Kennedy *v.* Green, 3 M. & K. 719; Wilde *v.* Gibson, 1 H. L. 605. See also Jones *v.* Smith, 1 Ha. 43; Meux *v.* Bell, 1 Ha. 73; West *v.* Reid, 2 Ha. 257.

(b) Story, s. 399; Hewitt *v.* Loosemore, 9 Ha. 449.

(c) Eyre *v.* Dolphin, 2 B. & B. 301.

(d) 2 Fonbl. Eq. B. 3, ch. 3, s. 1, note (b) Mertins *v.* Joliffe, Ambl. 311; Marr *v.* Bennett, 2 Ch. Cas. 246. But see Hamilton *v.* Royse, 2 S. & L., 327; Pilcher *v.* Rawlins, L. R. 11 Eq. 53; L. R. 7 Chan. 259.

(e) Smith *v.* Low, 1 Atk. 490; Ferrars *v.* Cherry, 2 Vern. 384; Daniels *v.* Davison, 16 Ves. 250; Howorth *v.* Deem, 1 Ed. 351; Surman *v.* Barlow, 2 Ed. 167; Parker *v.* Brooke, 9 Ves. 583; Eyre *v.* Dolphin, 2 B. & B. 301.

(f) Hall *v.* Smith, 14 Ves. 426. See James *v.* Lichfield, L. R. 9 Eq. 51.

(g) Story, s. 400; Taylor *v.* Stibbert, 2 Ves. 440; Spunner *v.* Walsh, 10 Ir. Eq. 386; Daniels *v.* Davison, 16 Ves. 249, 252; Smith *v.* Low, 1 Atk. 489; Allen *v.* Anthony, 1 Meriv. 282; Meux *v.* Maltby, 2 Swanst. 281; Hanbury *v.* Litchfield, 2 M. & K. 629, 632. And see Coles *v.* Sims, 5 D. M. & G. 1; Feilden *v.* Slater, L. R. 7 Eq. 523; Carter *v.* Williams, L. R. 9 Eq. 678.

314. Possession of property is not notice as against a registered title, it being constructive notice only(*a*); and it has been decided that it is not notice under the Registry Act of 1868(*b*).

315. As to the time at which one must receive notice to affect him in equity, it is in general sufficient if it be received before he has parted with his money, or placed himself in a position where he cannot resist the payment, as would be the case where the rights of third parties had attached(*c*.) And it is not indispensable to the validity of notice of an equitable interest, that it should come from the party, or his agent. It is sufficient if it be derived *aliunde;* provided it be of a character likely to gain credence(*d*). In regard to the inquiry required of a party, it should be such as a prudent and careful man would exercise in his own business of equal importance(*e*).

316. In a great variety of cases, it must necessarily be matter of no inconsiderable doubt and difficulty to decide what circumstances are sufficient to put a party upon inquiry. Vague and indeterminate rumour or suspicion is quite too loose and inconvenient in practice to be admitted to be sufficient(*f*). But there will be found almost infinite gradations of presumption between such rumour, or suspicion, and that certainty as to facts, which no mind could hesitate to pronounce enough to call for further inquiry, and to put the party upon his diligence. No general rule can, therefore, be laid

(*a*) Waters *v.* Shade, 2 Gr. 464; Ferrass *v.* McDonald, 6 Gr. 310; McCrumm *v.* Crawford, 9 Gr. 340. And see Gray *v.* Coucher, 15 Gr. 419.

(*b*) Sherboneau *v.* Jeffs, 15 Gr. 574.

(*c*) Collinson *v.* Lister, 20 Beav. 356; 7 D. M. & G. 634.

(*d*) Rawbone's Bequest, 3 K. & J. 300; Smith *v.* Smith, 2 Cr. & M. 231; Lloyd *v.* Banks, L. R. 3 Chan. 488; 4 Eq. 222; *In re* Tichener, 35 Beav. 317. But see *In re* Brown's Trusts, L. R. 5 Eq. 88.

(*e*) Story, s. 400 l.; Jones *v.* Williams, 24 Beav. 47; Ware *v.* Lord Egmont, 4 D. M. & G. 460; *Ex parte* Briggs, L. R. 1 Eq. 483; Smith *v.* Reese River Mining Co. L. R. 2 Eq. 264; Central Railway of Venezuela *v.* Kisch, L. R. 2 H. L. 99; and see Wormald *v.* Maitland, 35 L. J. N. S. Ch. 69; Agra Bank *v.* Barry, I. R. 6 Eq. 128.

(*f*) Sug. V. & P. [14th ed.] 755; Jolland *v.* Stainbridge, 3 Ves. 478.

down to govern such cases. Each must depend upon its own circumstances(*a*).

317. Formerly a purchase of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affected the purchaser in the same manner as if he had such notice; and he was accordingly bound by the judgment or decree in the suit(*b*). The litigating parties were exempted from taking any notice of the title so acquired; and it was not necessary to make the purchaser a party to the suit(*c*). A *lis pendens*, however, being only a general notice of an equity to all the world, it did not affect any particular person with a fraud, unless such person had also special notice of the title in dispute in the suit(*d*).

318. Now, however, the filing of a bill, or the taking of a proceeding, in which bill or proceeding any title or interest in land is brought in question, shall not be deemed notice of the bill or proceeding to any person not a party thereto, until a certificate by the Registrar or a Deputy Registrar of the court has been registered in the Registry Office of the county in which the land is situated, but no certificate is required to be registered of a similar proceeding for the foreclosure of a registered mortgage(*e*). A decree may also be registered upon the certificate of the proper officer(*f*).

(*k*) Story, s. 400 d Eyre *v.* Dolphin, 2 B. & B. 301; Hine *v.* Dodd, 2 Atk. 275. And see Hewitt *v.* Loosemore, 9 Ha. 449; Worthington *v.* Morgan, 16 Sim. 547.

(*l*) Com. Dig. Chancery, 5 C. 3 and 4; Preston *v.* Tubbin, 1 Vern. 286; Sorrell *v.* Carpenter, 2 P. W. 482; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Bishop of Winchester *v.* Paine, 11 Ves. 194; Garth *v.* Ward, 2 Atk. 175; Mead *v.* Lord Orrery, 3 Atk. 242; Gaskell *v.* Durdin, 2 B. & B. 169; Moore *v.* Macnamara, 2 B. & B. 186; Kinsman *v.* Kinsman, 9 L. J. Ch. 276; Bellamy *v.* Sabine, 1 D. F. J. 566.

(*m*) Bishop of Winchester *v.* Paine, 11 Ves. 197; Metcalf *v.* Pulvertoft, 2 V. & B. 205; Sorrell *v.* Carpenter, 2 P. W. 483; Story Eq. Pl. 156, 351.

(*n*) Mead *v.* Lord Orrery, 3 Atk. 242, 243; Wyatt *v.* Barwell, 19 Ves. 439; 2 Fonbl. Eq. B. 2, ch. 6, s. 3, note [*n*]; id. B. 3, c. 1, note [*b*].

(*o*) 18 Vic. c. 127, s. 3; 20 Vic. c. 56, s. 9; Con. Stat. U. C. c. 12, s. 64; 29 Vic. c. 24, s. 55; Ont. Stat. 31 Vic. c. 20, s. 57.

(*p*) 18 Vic. c. 127, s. 4; Con. Stat. U. C. c. 12, s. 65. As to decrees for alimony, see 23 Vic. c. 17, s. 4. But see 24 Vic. c. 41, s. 10.

319. In general, a decree is not constructive notice to any persons who are not parties or privies to it; and, therefore, other persons are not presumed to have notice of its contents. But a person who is not a party to a decree, if he has actual notice of it, will be bound by it; and if he pays money in opposition to it, he will be compelled to pay it again(*a*.)

320. To constitute constructive notice, it is not indispensable that it should be brought home to the party himself. It is sufficient, if it is brought home to the agent, attorney, or counsel of the party; for, in such cases, the law presumes notice in the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter(*b*). But, notice to bind the principal should be notice in the same transaction, or negotiation; for, if the agent, attorney, or counsel was employed in the same thing by another person, or in another business or affair, and at another time, since which he may have forgotten the facts, it would be unjust to charge his present principal on account of such a defect of memory(*c*).

321. The principal grounds upon which courts of equity grant relief in matters of accident, mistake, and fraud, have now been gone over. In all these cases it may be truly asserted, that the remedy and relief administered in courts of equity are, in general, more complete, adequate, and perfect, than they can be at common law. The remedy is more com-

(*a*) Story, s. 407; Harvey *v.* Mountague, 1 Vern. 57. And see Davis *v.* Earl of Strathmore, 16 Ves. 419.

(*b*) Com. Dig. Chancery, 4 C. 5 and 6; Sheldon *v.* Cox, 2 Ed. 224, 228; Jennings *v.* Moore, 2 Vern. 609. And see Rolland *v.* Hart, L. R. 6 Chan. 678.

(*c*) Warrick *v.* Warrick, 3 Atk. 294; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Lowther *v.* Carlton, 2 Atk. 242; Hargreaves *v.* Rothwell, 1 Keen, 154, 159; Ogilvie *v.* Jeaffreson, 6 Jur. N. S. 970. But see Wythes *v.* Labouchere, 3 D. & J. 593; Terry *v.* Holl, 2 D. F. & J. 53, where it was held that a solicitor acting in a transaction does not constitute him the solicitor of both parties so as to affect one with notice of facts known to the other. In that case, a solicitor holding a power of attorney from a client borrowed money, ostensibly for him from another client, but really fraudulently taking securities of the former client to obtain money for himself. The Lord Chancellor remarked: "To say that when Parkinson (the solicitor) was *ipse doli fabricator*, and knew the iniquity which he contemplated, his knowledge of that should be the knowledge of Holl, (the lender) would really be almost exposing the doctrine of notice to ridicule. And see Espin *v.* Pemberton, 4 Drew. 333; Cameron *v.* Hutchison, 16 Gr. 526.

plete, adequate, and perfect, because equity uses instruments and proofs not accessible at law; such as an injunction, operating to prevent future injustice, and a bill of discovery, addressing itself to the conscience of the party in matters of proof. The relief, also, is more complete, adequate, and perfect, inasmuch as it adapts itself to the special circumstances of each particular case; adjusting all cross equities; and bringing all the parties in interest before the court, so as to prevent multiplicity of suits and interminable litigation(*a*).

322. The flexibility of courts of equity, too, in adapting their decrees to the actual relief required by the parties, in which their proceedings form so marked a contrast to the proceedings at the common law, is illustrated in a striking manner, in cases of accident, mistake, and fraud. If a decree were in all cases required to be given in a prescribed form, the remedial justice would necessarily be very imperfect, and often wholly beside the real merits of the case. Accident, mistake, and fraud are of an infinite variety in form, character, and circumstances, and are incapable of being adjusted by any single and uniform rule. The beautiful character, pervading excellence, if one may so say, of equity jurisprudence is, that it varies its adjustments and proportions, so as to meet the very form and pressure of each particular case in all its complex habitudes(*b*).

CHAPTER VIII.

ACCOUNT.

323. ACCOUNT was one of the most ancient forms of action at the common law. But the modes of proceeding in that action, although aided from time to time by statutory provisions, were found so very dilatory, inconvenient, and unsatisfactory, that as soon as courts of equity began to assume jurisdiction in matters of account, as they did at a very early period,

(*a*) Story, s. 437. See Mitf. Eq. Pl. 111, 112, 113.
(*b*) Story, s. 439.

the remedy at law began to decline, and has fallen into almost total disuse(*a*).

324. At the common law, an action of account lay only in cases where there was either a privity in deed, by the consent of the party, as against a bailiff or receiver appointed by the party, or a privity in law, *ex provisione legis*, as against a guardian in socage(*b*). An exception, indeed, or rather an extension of the rule, was, for the benefit of trade and the advancement of commerce, allowed in favour of and between merchants; and therefore, by the law-merchant, one naming himself a merchant might have an account against another, naming him a merchant, and charge him as receiver(*c*). But, in truth, in almost every supposable case of this sort, there was an established privity of contract. With this exception, however, (if such it be,) the action was strictly confined to bailiffs, receivers, and guardians in socage(*d*.) So strictly was this privity of contract construed, that the action did not lie by or against executors and administrators. The statute of 13th Edward III. ch. 23, gave it to the executors of a merchant; the statute of the 25th Edward III. ch. 5, gave it to the executors of executors; and the statute of 31st Edward III. ch. 11, to administrators(*e*). But it was not until the statute of 3d & 4th Anne, ch. 16, that it lay against executors and administrators of guardians, bailiffs, and receivers(*f*).

325. The reasons for the disuse of the action of account at common law, and its progress in equity are easily found. One ground was, that courts of common law could not compel a discovery from the defendant on his oath; and another was,

(*a*) Story, s. 442. And see Godfrey *v.* Saunders, 3 Wilson, 73, 113, 117. See also, Buller, N. P. 217; 2 Reeves, Hist. of the Law, 73, 178, 337; 3 Reeves, Hist. L. 388; 4 Reeves, Hist. L. 378; 3 Black. Comm. 164.

(*b*) 1 Co. Litt. 90 *b*; id. 172 *a*; 2 Ponbl. Eq. B. 2. ch. 7, s. 6 and note; Bac. Abridg. *Accompt*, A.; Com. Dig. *Accompt*, A. 1; 2 Inst. 379.

(*c*) Co. Litt. 172 *a*; Earl of Devonshire's case, 11 Co. 89.

(*d*) Buller, N. P. 127; 1 Eq. Abr. 5, note (*a*); 2 Fonbl. Eq. B. 2, ch. 7, s. 6, and note (*n*); Co. Litt. 172 *a*; 2 Inst. 379.

(*e*) Co. Litt. 90 *b*; 2 Fonbl. Eq. B. 2, ch. 7, s. 6, and note (*n*).

(*f*) Story, s. 445; Buller, N. P. 127; Earl of Devonshire's case, 11 Co. 89.

that the machinery and administrative powers of the courts of common law were not so well adapted for the purposes of an account as those of courts of equity.

326. The common law action of account having then fallen into disuse, and suitors compelled to come into equity, it is necessary to examine in what cases equity will interfere to afford relief.

327. A bill for an account will lie where the claim is of so complicated a nature that the account cannot possibly be taken justly and fairly in a court of law(*a*). The language of Lord Redesdale is in point, as to what is the amount of complication necessary to give jurisdiction to a court of equity independently of any other circumstances. "The ground on which, I think, that this(*b*) is a proper case for equity is, that the account has become so complicated, that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all necessary accuracy. This is a principle on which courts of equity constantly act, by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law"(*c*).

328. Equity assumes jurisdiction where there exists a fiduciary relation between the parties, as in favour of a principal against his agent(*d*), though not in favour of the agent against the principal(*e*).

329. The most important agencies which fall under the cognizance of courts of equity, are those of attorneys, factors, bailiffs, consignees, receivers, and stewards. In most agencies

(*a*) Frietas *v.* Don Santos, 1 Y. & J. 574.

(*b*) O'Connor *v.* Spaight, 1 S. & L. 305.

(*c*) And see Foley *v.* Hill, 2 H. L. 28. But this principle is not quite settled. See Taff Vale Rail Co *v.* Nixon, 1 H. L. 111; North Eastern Rail Co. *v.* Martin, 2 Ph. 758. And see Falls *v.* Powell, 20 Gr. 454.

(*d*) McKenzie *v.* Johnston, 4 Mad. 375; Ridley *v.* Sexton, 19 Gr. 146; Smith *v.* Redford, 19 Gr. 274. But see Navulshaw *v.* Brownrigg, 1 Sim. N. S. 573; 2 D. M. & G. 441.

(*e*) James *v.* Snarr, 15 Gr. 229. And see Dinwiddie *v.* Bailey, 6 Ves. 136.

of this sort, there are mutual accounts between the parties; or, if the account is on one side, as the relation naturally gives rise to great personal confidence between the parties, it rarely happens that the principal is able, in cases of controversy, to establish his rights, or to ascertain the true state of the accounts, without resorting to a discovery from the agent(*a*).

330. The bare relation of principal and agent does not entitle the principal to come into a court of equity for an account, if the matter can be fairly tried at law(*b*). And where the principal brought a bill for an account against one employed as commercial traveller, he was held entitled to an account only from the time of giving notice to the agent to keep and render a special account(*c*). And an agent cannot maintain a bill for an account upon the ground alone that he was entitled to a commission for his services(*d*). But if the defendant as agent has received sums of money for the plaintiff, the particulars and amount of which are unknown to him, a bill praying for discovery and an account will be maintained(*e*). Where the accounts are too complicated to be dealt with in a court of law, a court of equity will entertain jurisdiction(*f*).

331. Courts of equity adopt very enlarged views in regard to the rights and duties of agents; and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them, they will take care that the omission to do so shall not be used as a means of escaping responsibility, or of obtaining undue recompense. If, therefore, an agent does not, under

(*a*) Story, s. 462. And see Pearse *v.* Green, 1 J. & W. 135; Ormond *v.* Hutchinson, 13 Ves. 53; Clarke *v.* Tipping, 9 Beav. 284; Frietas *v.* Don Santos, 1 Y. & J. 574; East India Company *v.* Henchman, 1 Ves. 289; Massey *v.* Davies, 2 Ves. 318: Borr *v.* Vandall, 1 Ch. Cas. 30; Earl of Hardwicke *v.* Vernon, 14 Ves. 510; Smith *v.* Leveaux, 1 H. & M. 123; 2 D. J. & S. 1. And see Douglas *v.* Woodside, 11 Gr. 375.

(*b*) Barry *v.* Stevens, 31 Beav. 258. But see Makepeace *v.* Rogers, 11 Jur. N. S. 314; 34 L. J. N. S. Ch. 396.

(*c*) Hunter *v.* Belcher, 9 L. T. N. S. 501.

(*d*) Smith *v.* Leveaux, 1 H & M. 123; 2 D. J. & S. 1; Phillips *v.* Phillips, 9 Ha. 471; Fluker *v.* Taylor, 3 Drew. 183; James *v.* Snarr, 15 Gr. 230; Moxon *v.* Bright, L. R. 4 Chan. 292.

(*e*) Hemings *v.* Pugh, 4 Giff 456.

(*f*) Hill *v.* South Staffordshire Railway, 11 Jur. N. S. 192; Turner *v.* Burkinshaw, L. R. 2 Chan. 488.

such circumstances, keep regular accounts and vouchers, he will not be allowed the compensation, which otherwise would belong to his agency(*a*). Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own, if he mixes it up with his own, the whole will be taken, both at law and in equity, to be the property of the principal until the agent puts the subject-matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part(*b*). In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of his principal(*c*). Courts of equity do not in these cases proceed upon the notion, that strict justice is done between the parties; but upon the ground that it is the only justice that can be done; and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal(*d*).

332. Cases of account between trustees and *cestuis que trust* may properly be deemed confidential agencies, and are peculiarly within the appropriate jurisdiction of courts of equity; the same general rule applies, as in other cases of agency(*e*). And the same doctrine is applicable to cases of guardians and wards, and other relations of a similar nature(*f*).

333. Cases of account between tenants in common, between joint-tenants, between partners, between part owners of ships, and between owners of ships and the masters, fall under the like considerations. They all involve peculiar agencies like those of bailiffs, or managers of property, and require the same

(*a*) White *v.* Lady Lincoln, 8 Ves. 363; Lupton *v.* White, 15 Ves. 441. But see Maclennan *v.* Heward, 9 Gr. 279.

(*b*) Lupton *v.* White, 15 Ves. 436, 440.

(c) Panton *v.* Panton, cited 15 Ves. 440; Chedworth *v.* Edwards, 8 Ves. 46.

(*d*) Story, s. 468; Lupton *v.* White, 15 Ves. 441.

(*e*) Docker *v.* Somes, 2 M. & K. 664.

(*f*) Story, s. 465.

operative power of discovery, and the same interposition of equity(*a*).

334. Equity assumes jurisdiction when the case is one of mutual accounts. V. C. Turner said(*b*): "I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of the two parties has received and paid on the other's account. At law, where each of two parties has received and paid on the account of the other, what would be to be re-recovered, would be the balance of the two accounts, and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments—a position of the case, which to say the least, would be difficult to be dealt with at law."

335. SET OFF. "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"(*c*). The courts of common law, however, refused to carry out the principle of justice, and held that where there were mutual debts unconnected they should not be set off but each must sue. The natural sense of mankind was first shocked at this in the case of bankrupts, and accordingly, the Legislature interfered, and allowed a set off at common law in this and a few other cases(*d*).

336. As to connected accounts of debt and credit, both at law and in equity, and without any reference to the statutes, or the tribunal in which the cause is depending, the same general rule prevails, that the balance of the accounts only is

(*a*) Story, s. 466. See Abbott on Shipp. B. 1, ch. 3, ss. 4, 10, 11, 12; Doddington *v.* Hallett, 1 Ves. Sen. 497; *Ex parte* Young, 2 V. & B. 242; Com. Dig. Chan. 3 V. 6, 2 A. 1; Drury *v.* Drury, 1 Ch. Rep. 49; Strelly *v.* Winson, 1 Vern. 297; Horn *v.* Gilpin, Ambl. 255; Pulteney *v.* Warren, 6 Ves. 73, 78.

(*b*) Phillips *v.* Phillips, 9 Hare, 473. See also Padwick *v.* Hurst, 18 Beav. 575; North Eastern Rail Co. *v.* Martin, 2 Ph. 758; Darthez *v.* Clemens, 6 Beav. 165; Kennington *v.* Houghton, 2 Y. & C. 620.

(*c*) Green *v.* Farmer, 4 Burr. 2220. And see Lundy *v.* McCulla, 11 Gr. 368.

(*d*) Snell's Eq. 415.

recoverable: which is, therefore, a virtual adjustment and set off between the parties(*a*). Where there are unconnected cross demands, equity does not, in general, interfere to set off one against the other in the absence of any special circumstance or agreement express or implied(*b*). But in the view of equity, the setting off one demand against another between the same parties is extremely just, and where there is any technical difficulty in the way of its being done without an agreement, the court accepts slighter evidence of such an agreement than is usually required, in order to establish disputed facts(*c*).

337. 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 debts 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(*d*). Thus, for example, if A. should be 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

(*a*) Dale *v.* Sollett. 4 Burr. 2133. See Berry *v.* Columbian Insurance Co. 12 Gr. 418; Cameron *v.* McDonald, 7 Gr. 402.

(*b*) Smith *v.* Muirhead, 3 Gr. 610.

(*c*) Lundy *v.* McCulla, 11 Gr. 368.

(*d*) See *Ex parte* Prescott, 1 Atk. 231. And see Hankey *v.* Smith, 3 T. R. 507, note; French *v.* Fenn, 3 Dougl. 257; Olive *v.* Smith, 5 Taunt, 60; Atkinson *v.* Elliot, 7 T. R. 378; Rose *v.* Hart, 8 Taunt, 499, 506.

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(*a*). If, in such a case, there should be an express 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(*b*).

338. 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(*c*). But the mere existence of cross demands will not be sufficient to justify a set off in equity(*d*). 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 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

(*a*) Lord Lanesborough *v.* Jones, 1 P. W. 326; *Ex parte* Flint, 1 Swanst. 33, 34; Dowman *v.* Matthews, Prec. Ch. 580, 582. See also a decision of Lord Hale, cited in Chapman *v.* Derby, 2 Vern. 117; Jeffs *v.* Wood, 2 P. W. 128, 129; Meliorucchi *v* Royal Exchange Ass. Co. 1 Eq. Abr. 8, pl. 8; s. c. Ambl. 408; James *v.* Kynnier, 5 Ves. 110; Hawkins *v.* Freeman, 2 Eq. Abr. 10, pl. 10.

(*b*) Story, s. 1435; Jeffs *v.* Wood, 2 P. W. 128, 129; Whitaker *v.* Rush, Ambl. 408; Hawkins *v.* Freeman, 2 Eq. Abr. 10, pl. 10.

(*c*) See Lord Lanesborough *v.* Jones, 1 P. W. 323; Curson *v.* African Company, 1 Vern. 122; Jeffs *v.* Wood, 2 P. W. 128, 129; Ryall *v.* Rolle, 1 Ves. Sen. 375, 376; s. c. 1 Atk. 185; James *v.* Kynnier, 5 Ves. 110; Gale *v.* Luttrell, 1 Y. & Jerv. 180; Cheetham *v.* Crook, 1 McClell & Y. 307; Piggott *v.* Williams, 6 Mad. 95; Taylor *v.* Okey, 13 Ves. 180.

(*d*) Rawson *v.* Samuel, 1 Cr. & Ph. 161, 178, 179; Whyte *v.* O'Brien, 1 S. & S. 551. And see Williams *v.* Davies, 2 Sim. 461; Beasley *v.* Darcy, 2 S. & L. 403 n.; *Ex parte* Stephens, 11 Ves. 24.

account between him and the other party, in respect to dealings arising out of the same contract(*a*).

339. 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(*b*). 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~~ defendant, 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(*c*).

340. 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(*d*). Thus, for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies 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(*e*). 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

(*a*) Story, s. 1436; Rawson *v.* Samuel, 1 Cr. & Ph. 172, 177.
(*b*) Clarke *v.* Cort, 1 Cr. & Ph. 154, 160.
(*c*) Williams *v.* Davies, 2 Sim. 461; Story, s. 1436 a.
(*d*) *Ex parte* Twogood, 11 Ves. 517; Addis *v.* Knight, 2 Mer. 191; Harvey *v.* Wood, 5 Mad. 460; Vulliamy *v.* Noble, 3 Mer. 617; Whitaker *v.* Rush, Ambl. 408; Bishop *v.* Church, 3 Atk. 691; Medlicot *v.* Bowes, 1 Ves. 208; Freeman *v.* Lomas, 9 Ha. 109; Cherry *v.* Boultbee, 4 M. & C. 442.
(*e*) *Ex parte* Stephens, 11 Ves. 24: *Ex parte* Blagden, 19 Ves. 466, 467; *Ex parte* Hanson, 12 Ves. 348; Vulliamy *v.* Noble, 3 Mer. 621.

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(*a*). 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(*b*).

341. Questions as to the APPROPRIATION, or as it was called in the Roman law, the imputation of payments, arise chiefly in cases of running accounts between debtor and creditor, where various payments have been made and various credits have been given at different times.

342. In the first place, the debtor has a right to appropriate any payments which he makes to whatever debt due to his creditor, he may choose to apply it, but he must exercise this option at the time of making the payment. And the intention of the person paying may not only be manifested by him in express terms(*c*), but it may be inferred from his conduct at the time of payment, or from the nature of the transaction(*d*.) In the next place, where the debtor himself makes no special appropriation of a payment the creditor is at liberty to apply that payment to any one or more of the debts which the debtor owes him(*e*), and it seems that the creditor need not make an immediate appropriation of it, but may do so at any time before the action(*f*). But a creditor has no right to

(*a*) *Ex parte* Hanson, 12 Ves. 346; s. c. 18 Ves. 232; Cheetham *v.* Crook, 1 McClell. & Y. 307.

(*b*) Story, s. 1437; Vulliamy *v.* Noble, 3 Meriv, 617, 618.

(*c*) *Ex parte* Imbert, 1 D. & J. 152.

(*d*) Young *v.* English, 7 Beav. 10; Att.-Gen. of Jamaica *v.* Manderson, 6 Moo. P. C. 239, 255.

(*e*) Lysaght *v.* Walker, 5 Bligh. N. R. 1, 28; Bosanquet *v.* Wray, 6 Taunt. 597; Brook *v.* Enderby, 2 Bro. & Bing. 70. But see Moore *v.* Riddell, 11 Gr. 69. A surety has no right to complain of the appropriation of payments by his creditor, when the principal makes no appropriation of them, Cunningham *v.* Buchanan, 10 Gr. 523.

(*f*) Philpot *v.* Jones, 2 Ad. & El. 44; Simpson *v.* Ingham, 2 B. & C. 65. But see Fraser *v.* Locie, 10 Gr. 207.

apply a general payment to any item of account which is itself illegal and contrary to law(*a*). If no special appropriation is made by either party, then the law applies the successive payments or credits to the discharge of the item of debit, antecedently due, in the order of time in which they stand in the account(*b*).

343. In the application of the doctrine to cases of partnership, where a change of the firm has occurred by a dissolution by death or otherwise, the rule is, that the estate of the deceased or retiring partner is liable only to the extent of the balance due to any creditor at the time of the dissolution; and that if the creditor continues to keep a running account with the survivors, or the new firm, and sums are paid to them by the creditor, and sums are drawn on their firm, and paid by them, and are charged and credited to the general account, and blended together as a common fund, without any distinction between the sums due to the creditor by the old firm and the new; in such a case, the sums paid to the creditor are deemed to be paid upon the general blended account, and go to extinguish, *pro tanto*, the balance of the old firm, in the order of the earliest items thereof(*c*).

344. On the other hand, if, under the like circumstances, moneys have been received by the new firm, and drawn out by the creditor from time to time, and upon the whole the original balance due to the creditor has been increased, but never at any time been diminished, in the hands of the firm;

(*a*) Wright *v.* Laing, 3 B. & C. 165; Ribbans *v.* Crickett, 1 B. & P. 264. But see Fraser *v.* Locie. 10 Gr. 207.

(*b*) Clayton's case, 1 Meriv. 572, 604, 608; Devaynes *v.* Noble, 1 Meriv. 585; Bodenham *v.* Purchas, 2 Barn. & Ald. 39; Simson *v.* Cooke, 1 Bing. 452; Simson *v.* Ingham, 2 B. & C. 65; Pemberton *v.* Oakes, 4 Russ. 154; Bank of Scotland *v.* Christie, 8 Cl. & Fin. 214, 229. As to what circumstances will amount to an appropriation or not, see Taylor *v.* Kymer, 3 Barn. & Adolph. 320, 333, 334; Marryatts *v.* White, 2 Starkie, 101; Goddard *v.* Hodges, 1 Cromp. & Mees. 33; Wright *v.* Laing, 3 B. & C. 165, Birch *v.* Tebbutt, 2 Starkie, 74. And see *Re* Brown, 2 Gr. 111; 590; Buchanan *v.* Kerby, 5 Gr. 332.

(*c*) Story, s. 459. And see judgment of Sir William Grant in Clayton's case, 1 Mer. 608, 609; Johnes's case, 1 Mer. 619; Smith *v.* Wigley, 3 Moo. & So. 174; Sterndale *v.* Hankinson, 1 Sim. 393; Bodenham *v.* Purchas, 2 Barn. & Ald. 39; Pemberton *v.* Oakes, 4 Russ. 154; Bank of Scotland *v.* Christie, 8 Cl. & Fin. 214, 227, 228.

in such a case, the items of payment made by the new firm are still to be applied to the extinguishment of the balance of the old firm, and will discharge the share of the deceased or retiring partner to that extent, but no further; for, in such a case, the general rule as to running accounts is applied with its full force(*a*). *A fortiori*, where payments have been made, and no new sums have been deposited by the creditor with the new firm, the payments will be applied in extinguishment, *pro tanto*, of the balance due by the old firm, in the order of the items thereof(*b*).

345. APPORTIONMENT, CONTRIBUTION, and GENERAL AVERAGE are in some measure blended together, and require, and terminate in accounts. In most of these cases, a discovery is indispensable for the purposes of justice; and where this does not occur, there are other distinct grounds for the exercise of equity jurisdiction, in order to avoid circuity and multiplicity of actions. Some cases of this nature spring from contract; others, again from a legal duty, independent of contract; and others, again, from the principles of natural justice, confirming the known maxim of the law, *qui sentit commodum, sentire debit et onus*. The two latter may, therefore, properly be classed among obligations resulting *quasi ex contractu*(*c*).

346. APPORTIONMENT and CONTRIBUTION, may conveniently be treated together. The word apportionment is sometimes used to denote the distribution of a common fund, or entire subject among all those who have a title to a portion of it(*d*). Sometimes, indeed, in a more loose but an analogous sense, it is used to denote the contribution which is to be made by different persons, having distinct rights, towards the discharge of a common burden or charge to be borne by all of them. In respect, then, to apportionment in its application to

(*a*) Palmer's case, 1 Mer. 623, 624; Sleech's case, 1 Mer. 538; Bodenham *v.* Purchas, 2 Barn. & Ald. 39. See *In re* Mason, 3 Mont. Deac. & De Gex, 490.

(*b*) Story, s. 459 *g*; Sleech's case, 1 Mer. 538, &c.

(*c*) Story, s. 469; Dering *v.* Earl of Winchelsea, 1 Cox, 318; s. c. 2 Bos. & Pul. 270.

(*d*) Co. Litt. 147 *b*; Story, s. 470; *Ex parte* Smyth, 1 Sw. 338, 339, note.

contracts in general, it is the known and familiar principle of the common law, that an entire contract is not apportionable (*a*). And in the application of this doctrine of the common law, courts of equity have generally, but not universally, adopted the maxim, *æquitas sequitur legem*. There are, however, some exceptions to the rule both at law and in equity, and some in which courts of equity have granted relief, where it would at least be denied at law.

347. At the common law, the cases are few in which an apportionment under contracts is allowed, the general doctrine being against it, unless specially stipulated by the parties. Thus, for instance, where a person was appointed collector of rents for another, and was to receive £100 per annum for his services; and he died at the end of three-quarters of the year, while in the service; it was held, that his executor could not recover £75 for the three-quarters' service, upon the ground that the contract was entire, and there could be no apportionment; for the maxim of the law is, *Annua nec debitum judex non separat ipsum*(*b*). So, where the mate of a ship engaged for a voyage at 30 guineas for the voyage, and died during the voyage, it was held that at law there could be no apportionment of the wages(*c*).

348. Courts of equity, to a considerable extent, act upon this maxim of the common law in regard to contracts, but, where equitable circumstances intervene, they grant redress. Thus, if an apprentice-fee of a specific sum be given, and the master

(*a*) Story, s. 470; P. dine *v.* Jane, Aleyn, 26, 27; *Ex parte* Smyth, 1 Sw. 338, 339, note and cases cited. And see Countess of Plymouth *v.* Throgmorton, 1 Salk. 65; Tyrie *v.* Fletcher, Cowp. 666; Robinson *v.* Bland, 2 Burr. 1077; 1 Bl. 234; Loraine *v.* Thomlinson, Doug. 585; Bermon *v.* Woodbridge, Doug. 781; Rothwell *v.* Cook, 1 B. & P. 172; Meyer *v.* Gregson, Marsh on Insurance, 658; Chater *v.* Beckett, 7 T. R. 201; Cook *v.* Jennings, 7 T. R. 381; Cutter *v.* Powell, 6 T. R. 320; Wiggins *v.* Ingleton, Lord Raym. 1211; Cook *v.* Tombs, 2 Anst. 420; Lea *v.* Barber, 2 Anst. 425 *n*; Mulloy *v.* Backer, 5 East, 316; Liddard *v.* Lopes, 10 East, 526; How *v.* Synge, 15 East, 440; Fuller *v.* Abbott, 4 Taunt. 105; Stevenson *v.* Snow, 3 Burr. 1237; Ritchie *v.* Atkinson, 10 East, 295; Waddington *v.* Oliver, 2 N. R. 61.

(*b*) Co. Litt. 150 *a*; Countess of Plymouth *v.* Throgmorton, 1 Salk. 65; 3 Mod. 153.

(*c*) Story, s. 471; Cutter *v.* Powell, 6 T. R. 320. See also Appleby *v.* Dods, 8 East, 300; Jesse *v.* Roy, 1 C. M. & R. 316, 329, 339.

afterwards becomes bankrupt, equity will decree an apportionment(*a*). And where an apprentice had been discharged from service, in consequence of the misconduct of the master, it was decreed that the indentures of apprenticeship should be delivered up, and a part of the apprentice-fee paid back(*b*). So, where the master undertook in consideration of the apprentice-fee, to do certain acts during the apprenticeship, which by his death were left undone and could not be performed, an apportionment of the apprentice-fee was decreed (*c*). But the mere refusal of the master to allow his apprentice to work, although improper and without excuse, is not sufficient ground for a court of equity to degree the cancellation of the articles of apprenticeship and a return of the premium. The appropriate remedy in such case is by an action at law for damages(*d*).

349. In regard to rents, the general rule at the common law leaned strongly against any apportionment thereof. Hence it was well established, that, in case of the death of a tenant for life, in the interval between two periods, at each of which a portion of rent becomes due from the lessee, no rent could be recovered for the occupation since the first of these periods(*e*). Hence it followed, that, on the determination of a lease by the death of the lessor before the day appointed for the payment of the rent, the event, on the completion of which the payment was stipulated, namely, occupation of the lands during the period stipulated, never occuring, no rent became payable, and in respect of time, apportionment was not in any case permitted(*f*). And this severe doctrine of the common law, artificial and unjust as it seems to be, was scrupulously followed in equity. It was to cure this manifest defect, that the

(*a*) Hale *v.* Webb, 2 Bro. C. C. 78; *Ex parte* Sandby, 1 Atk. 149; Hirst *v.* Tolson, 13 Jur. 596. And see Newton *v.* Rowse, 1 Vern. 460.

(*b*) Lockley *v.* Eldridge, Rep. t. Finch, 124. See Therman *v.* Abell, 2 Vern. 64.

(*c*) Soam *v.* Bowden, Rep. t. Finch, 396.

(*d*) Story, ss. 472, 473, 473 a; Webb *v.* England, 7 Jur. N. S. 153. In this case it was held that Therman *v.* Abell, 2 Vern. 64, is not sound law, but that the case of Argles *v.* Heasemen, 1 Atk. 518, should be followed.

(*e*) *Ex parte* Smyth, 1 Swanst. 338, and note.

(*f*) Clun's case, 10 Co. 127.

Imp. statute 11 Geo. II. ch. 19, s. 15, was passed, and the like remedial justice has been still more amply provided for by the statute 4 & 5 Wm. IV. ch. 22.

350. Some exceptions and some qualifications were, however, in certain cases and under certain circumstances, incorporated into the common law at an early period, in respect to rent growing out of real estate, where there was a division or severance of the land from which the rent issued. In other cases, the rent was held to be wholly extinguished. Thus, for instance, if a man had a rent-charge, and purchased a part of the land out of which it issued, the whole rent-charge was extinguished(*a*). But, if a part of the land came to him by operation of law, as by descent, then the rent-charge was apportionable; that is, the tenant, and the heir were to pay according to the value of the lands respectively held by them, and, of course, the part apportionable on the heir was extinguished(*b*). But a rent-service was in both cases apportionable (*c*). So, if a lessor granted part of a reversion to a stranger, the rent was to be apportioned(*d*). On the other hand, if part of the land out of which a rent-charge issued, was evicted by a title paramount, the rent was apportioned(*e*). So, although a rent-charge is in its nature entire and against common right, yet if it descended to coparceners by this rule of law, the rent was apportioned between them, and the tenant was subject to several distresses for the rent, and partition might be made before seisin of the rent(*f*). So, a rent-service incident to the reversion might be apportionable by a grant of a part of the reversion(*g*).

(*a*) Co. Litt. 147 *b*, 148 *a*, 148 *b*; Bac. Abr. *Rent*, M.: Com. Dig. *Suspension*, C. See also Averall *v.* Wade, Ll. & G. t. Sugden, 252, 264, 265.

(*b*) Co. Litt. 149 *b*; Bac. Abr. *Rent*, M.; Com. Dig. *Suspension*, C.

(*c*) Ibid.; Com. Dig. *Suspension*, E.

(*d*) Co. Litt. 148 *a*; Com. Dig. *Suspension*, E.; Ewer *v.* Moyle, Cro. Eliz. 771; Bac. Abr. *Rent*, M. 1.

(*e*) Com. Dig. *Suspension*, E.; Co. Litt. 147 *b*; Bac. Abr. *Rent*, M. 1, 2.

(*f*) Co. Litt. 164 *b*.

(*g*) Story s. 475 *a*; Bac. Abr. *Rent*, M. 1.

351. By a recent statute(*a*) it is provided that, "where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him, as incident to his part of the reservation, in respect of the apportioned rent or other reservation allotted or belonging to him.

352. But the ground of equity jurisdiction, in cases of apportionment of rent and other charges and claims, does not arise solely from the defective nature of the remedy at common law, where such a remedy exists. It extends to a great variety of cases where no remedy at all exists in law, and yet the party is entitled to relief. Thus, for instance, where a plaintiff was lessee of divers lands, upon which an entire rent was reserved, and afterwards the inhabitants of the town, where part of the lands lay, claimed a right of common in part of the lands so let, and upon a trial, succeeded in establishing their right; in this case there could be no apportionment of the rent at law, because, although a right of common was recovered, there was no eviction of the land. But it was not doubted that in equity a bill was maintainable for an apportionment, if a suitable case for relief were made out(*b*.) So, where money is to be laid out in land, if the party who is entitled to the land in fee, when purchased, dies before it is purchased, the money being in the mean time secured on a mortgage, and the interest made payable half-yearly, the interest will be apportioned in equity between the heir and the administrator of the party so entitled, if he dies before the

(*a*) 29 Vic. c. 28, s. 5. This section does away with the second resolution in Knight's case, 5 Rep. 55. See Roberts *v.* Snell, 1 Man. & Gr. 577; Bliss *v.* Collins, 4 Mad. 229; 5 Barn. & Ald. 876.

(*b*) Com. Dig. Chan. 2 E. 4 N. 9; Jew *v.* Thirkwell, 1 Ch. Cas. 31. See Aynsley *v.* Wordsworth, 2 V. & B. 331.

half-yearly payment is due(*a*). So, where portions are payable to daughters at eighteen or marriage, and, until the portions are due, maintenance is to be allowed, payable half-yearly at specific times, if one of the daughters should come of age in an intermediate period, the maintenance will be apportioned in equity(*b*).

353. But a far more important and beneficial exercise of equity jurisdiction, in cases of apportionment and contribution, is, when incumbrances, fines, and other charges on real estate are required to be paid off, or are actually paid off by some of the parties in interest(*c*). In most cases of this sort, there is no remedy at law, from the extreme uncertainty of ascertaining the relative proportions, which different persons, having interests of a very different nature, quality, and duration, in the subject matter, ought to pay. And, when there is a remedy, it is inconvenient and imperfect, because it involves multiplicity of suits, and opens the whole matter for contestation anew in every successive litigation(*d*).

354. Where different parcels of land are included in the same mortgage, and these different parcels are afterwards sold to different purchasers, each holding in fee and severalty the parcel sold to himself, each purchaser is bound to contribute to the discharge of the common burden or charge, in proportion to the value which his parcel bears to the whole included in the mortgage(*e*). But to ascertain the relative values of each, is a matter of great nicety and difficulty; and unless all the different purchasers are joined in a single suit, as they can be in equity, although not at law, the most serious embarrassments may arise in fixing the proportion of each purchaser, and making it conclusive upon all the others(*f*).

(*a*) Edwards *v.* Countess of Warwick, 2 P. W. 176. And see Sherrard *v.* Sherrard, 3 Atk. 502; Rashleigh *v.* Master, 3 Bro. C. C. 99, 101; Webb *v.* Shaftsbury, 11 Ves. 361; Wilson *v.* Harman, 2 Ves. Sen. 672.

(*b*) Story, s. 479; Hay *v.* Palmer, 2 P. W. 501; Sheppard *v.* Wilson, 4 Ha. 395.

(*c*) Com. Dig. Chan. 2 J. 2 S.; 1 Fonbl. Eq. B. 1, ch. 5, s. 9. and notes; Averall *v.* Wade, L. & G. t. Sugden, 252.

(*d*) Story, s. 483.

(*e*) Harris *v.* Ingledew, 3 P. W. 98, 99; Harbert's case, 3 Co. 14.

(*f*) Story, s. 484.

355. Intricate questions often arise in the adjustment of the rights and duties of the different parties interested in the inheritance, in regard to the paying off incumbrances. If a tenant in tail in possession pays off an incumbrance, it will ordinarily be treated as extinguished; the remainderman cannot be called upon for contribution, unless the tenant in tail has kept alive the incumbrance, or preserved the benefit of it to himself by some suitable assignment, or has done some other act or thing, which imports a positive intention to hold himself out as a creditor of the estate, in lieu of the mortgagee. The reason for this doctrine is, that a tenant in tail can, if he pleases, become the absolute owner of the estate; and, therefore, his discharge of incumbrances is treated, as made in the character of owner, unless he clearly shows that he intends to discharge them and become a creditor thereby(*a*).

356. The like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated by the birth of issue of another person; for it must be inferred that such a tenant in tail, in paying off an incumbrance without an assignment, means to keep the charge alive(*b*). *A fortiori*, the doctrine would not apply to the case of a tenant for life paying off an incumbrance; for, if he should pay it off without taking an assignment, he would be deemed to be a creditor to the amount paid, upon the ground that there can be no presumption that, with his limited interest, he could intend to exonerate the estate(*c*). But, in both cases, the presumption may be rebutted by circumstances, which demonstrate a contrary intention(*d*).

357. In respect to the discharge of incumbrances, it was

(*a*) Wigsell *v.* Wigsell, 2 S. &. S. 364; Jones *v.* Morgan, 1 Bro. C. C. 206; Kirkham *v.* Smith, 1 Ves. Sen. 258; Amesbury *v.* Brown, 1 Ves. Sen. 477; Shrewsbury *v.* Shrewsbury, 3 Bro. C. C. 120; St. Paul *v.* Viscount Dudley & Ward, 15 Ves. 173; Faulkner *v.* Daniel, 3 Ha., 199, 217.

(*b*) Wigsell *v.* Wigsell, 2 S. & S. 364.

(*c*) Saville *v.* Saville, 2 Atk. 463, 464; Jones *v.* Morgan, 1 Bro. C. C. 218; Shrewsbury *v.* Shrewsbury, 1 Ves. 233; 3 Bro. C. C. 120; *Ex parte* Digby, Jac. 235.

(*d*) Story, s. 486; Jones *v.* Morgan, 1 Bro. C. C. 218, 219; St. Paul *v.* Viscount Dudley & Ward, 15 Ves. 173; Redington *v.* Redington, 1 B. & B. 141, 142.

formerly a rule in equity, that the tenant for life and the reversioner, or remainder-man, were bound to contribute towards the payment of incumbrances, in a positive proportion, fixed by the court; so that they paid a gross sum, in proportion to their interests in the estate. The usual proportion was, for the tenant for life to pay one-third, and the remainder-man or reversioner, to pay two-thirds of the charge(*a*). A similar rule was applied to cases of fines paid upon the renewal of leases(*b*).

358. This rule is now, in both cases, entirely exploded, and a far more reasonable rule is adopted. It is this: that the tenant shall contribute beyond the interest, in proportion to the benefit he derives from the liquidation of the debt, and the consequent cessation of annual payments of interest during his life (which of course will depend much upon his age and the computation of the value of his life); and it will be referred to a Master, to ascertain and report what proportion of the capital sum due, the tenant for life ought, upon this basis, to pay, and what ought to be borne by the remainder-man or reversioner(*c*). If the estate is sold to discharge incumbrances, (as the incumbrancer may insist that it shall be,) in such a case, the surplus, beyond what is necessary to discharge the incumbrances, is to be applied as follows: the income thereof is to go to the tenant for life, during his life; and then the whole capital is to be paid over to the remainder-man or reversioner(*d*).

359. In regard to the interest due upon mortgages and other incumbrances, the question often arises, by whom and

(*a*) Powell on Mort. ch. 11, p. 311; Ballet *v.* Sprainger, Prec. Ch. 62; Shrewsbury *v.* Shrewsbury, 1 Ves. 233; Rives *v.* Rives, Prec. Ch. 21; 1 Fonbl. Eq. B. 1, ch. 5, s. 9, note (*a*); Faulkner *v.* Daniel, 3 Ha, 199, 217.

(*b*) White *v.* White, Ves. 33; Verney *v.* Verney, 1 Ves. Sen. 428; Nightingale *v.* Lawson, 1 Bro. C. C. 440.

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

(*d*) Penrhyn *v.* Hughes, 5 Ves. 107; White *v.* White, 4 Ves. 33; 3 Powell on Mortg. ch. 19, p. 922, Mr. Coventry's note, H.; id. 1043, note O; Lloyd *v.* Johnes, 9 Ves. 37.

in what manner it is to be paid. And here the general rule is, that a tenant for life of an equity of redemption is bound and may be compelled by the remainder-man, as far as the rents will extend, to keep down and pay the interest(*a*), and the assets of a tenant for life will be liable for his arrears(*b*). But a tenant in tail is not bound to keep down the interest; and yet, if he does, his personal representative has no right to be allowed the sums so paid, as a charge on the estate(*c*). The reason of this distinction is, that a tenant in tail, discharging the interest, is supposed to do it, as owner, for the benefit of the estate. He is not compellable to pay the interest; because he has the power, at any time, to make himself absolute owner against the remainder-man, and reversioner. The latter have no equity to compel him in their favour to keep down the interest, inasmuch, as if they take any thing, it is solely by his forbearance, and, of course, they must take it *cum onere*(*d*).

360. Similar questions may arise, as to the apportionment of the money between a tenant for life and a remainder-man in fee, who have united in a sale of the estate, without providing for the manner of apportioning the purchase-money between them, and one of them has died before any apportionment has been made. In such a case the value of the estate of each party must be ascertained, calculating that of the tenant for life according to the common tables respecting the probabilities of life, and the principal of the fund apportioned between them accordingly, upon the ground that it must be presumed, in such cases of a joint sale, that the parties mean to share the purchase-money according to their respective interests in the

(*a*) Makings *v.* Makings, 1 D. F. & J. 358; Faulkner *v.* Daniel, 3 Ha. 206; Simpson *v.* O'Sullivan, 7 Cl. & Fin. 550. And see Biscoe *v.* Van Bearle, 6 Gr. 438.

(*b*) Baldwin *v.* Baldwin, 4 Ir. Ch. 501; 6 Ir. Ch. 156.

(*c*) Amesbury *v.* Brown, 1 Ves. Sen. 480, 481; Redington *v.* Redington, 1 B. & B. 143; Chaplin *v.* Chaplin, 3 P. W. 234, 235.

(*d*) Story, s. 488. If the tenant in tail is an infant, his guardian or trustee will be required to keep down the interest, because the infant cannot bar the remainder, and make himself absolute owner. See Jeremy Eq. Jur. B. 1, c. 2, s. 1. Sergison *v.* Sealey, 2 Atk. 416; Bertie *v.* Lord Abingdon, 3 Mer. 560.

estate at the time of the sale, and not merely to substitute one fund for another(*a*).

361. GENERAL AVERAGE, a subject of daily occurrence in maritime and commercial operations still more fully illustrates the importance and value of this branch of equity jurisdiction. In the sense of the maritime law, general average means a general contribution that is to be made by all parties in interest, towards a loss or expense, which is voluntarily sustained or incurred for the benefit of all(*b*). The principle upon which this contribution is founded, is not the result of contract, but has its origin in the plain dictates of natural law (*c*). The principle is applied to all sacrifices of property, sums paid, and expenses voluntarily incurred in the course of maritime voyages, for the common benefit of all persons concerned in the adventure. The principle has, indeed, been confined to a sacrifice of property, and the contribution confined to the property saved thereby, although it certainly might have gone farther, and have required a corresponding apportionment of the loss or sacrifice of property upon all persons, whose lives have been preserved thereby(*d*).

362. General average then, extending to all losses and expenditures for the common benefit, it may readily be perceived, how difficult it would be for a court of law to apportion and adjust the amount, which is to be paid by each distinct interest, which is involved in the common calamity and expenditure.

363. By the general rule of the maritime law, in all cases of general average, the ship, the freight for the voyage, and the cargo on board, are to contribute to such reimbursement,

(*a*) See Brent *v.* Best, 1 Vern. 69; Truelock *v.* Robey, 11 Jur. 999; Thynn *v.* Duvall, 2 Vern. 117. But see Penrhyn *v.* Hughes, 5 Ves. 99, 107. And see Edmunds *v.* Waugh, L. R. 1 Eq. 413.

(*b*) Abbott on Shipp. Pt. 3, ch. 8, s. 1, p. 342; Moore, 297; Viner's Abridg. Contribution and Average, A. pl, 1, 2, 26.

(*c*) Dering *v.* Earl of Winchelsea, 1 Cox, 318, 323; 2 Bos. & Pul. 270, 274; Stirling *v.* Forrester, 3 Bligh, 590, 596.

(*d*) Story, s. 490.

according to their relative values. The first step in the process of general average, is to ascertain the amount of the loss for which contribution is to be made, as, for instance, in the case of jettison, the value of the property thrown overboard, or sacrificed for the common preservation. The value is generally indefinite and unascertained, and, from its very nature, rarely admits of an exact and fixed computation. The same remark applies to the case of ascertainment of the value of the contributory interest, the ship, the freight, and the cargo. These are generally differently estimated by different persons, and rarely admit of a positive and indisputable estimation in price or value. Now, as the owners of the ship, and the freight, and the cargo, may be, and generally are, in the supposed case, different persons, having a separate interest, and often an adverse interest to each other, it is obvious, that unless all the persons in interest can be made parties in one common suit, so as to have the whole adjustment made at once, and made binding upon all of them, infinite embarrassments must arise, in ascertaining and apportioning the general average(*a*).

364. In a proceeding at the common law, every party, having a sole and distinct interest, must be separately sued, and as the verdict and judgment in one case will not only not be conclusive, but not even be admissible evidence in another suit, as it is *res inter alios acta;* and as the amount to be recovered must in each case depend upon the value of all the interests to be affected, which, of course, might be differently estimated by different juries, it is manifest that the grossest injustice, or the most oppressive litigation might take place in all cases of general average on board of general ships. A court of equity, having authority to bring all the parties before it, and to refer the whole matter to a Master, to take an account, and to adjust the whole apportionment at once, affords a safe, convenient, and expeditious remedy. And it is accordingly the customary mode of remedy in all cases, where a controversy arises,

(*a*) Story, s. 491.

and a court of equity exists capable of administering the remedy(*a*).

365. Another class of cases, to illustrate the beneficial effects of equity jurisdiction over matters of account, is that of CONTRIBUTION BETWEEN SURETIES, who are bound for the same principal, and upon his default, one of them is compelled to pay the money, or to perform any other obligation, for which they all became bound(*b*). In cases of this sort, the surety who has paid the whole, is entitled to receive contribution from all the others, for what he has done in relieving them from a common burden(*c*), and this doctrine of contribution, does not stand upon any notion of mutual contract, expressed or implied, between the sureties to indemnify each other; but arises from principles of equity, independent of contract, though contract may qualify it(*d*).

366. This doctrine of contribution applies whether the parties are bound in the same or different instruments, provided they are co-sureties for the same principal and in the same engagement, even though they are ignorant of the mutual relation of suretyship; and there is no difference if they are bound in different sums, except that the contribution could not be required beyond the sum in which they have become bound(*e*). Under the same circumstances there can be no right to contribution at law, for there that right is founded on a contract, express or implied.

367. In other respects also, the relief given in equity is more

(*a*) Story, s. 491; Abbott on Shipp. Pt. 3, ch. 8, s. 17; Shepherd *v.* Wright, Shower, P. C. 18; Hallett *v.* Bousfield, 18 Ves. 190, 196. And see Cope *v.* Doherty, 4 K. & J. 367.

(*b*) Com. Dig. Chan. 4 D. 6.

(*c*) Layer *v.* Nelson, 1 Vern. 456. On the subject of contribution, there is a valuable note to the case of Averall *v.* Wade, Ll. & G. t. Sugden, 264; Spencer *v.* Parry, 3 Ad. & Ell. 331; Davies *v.* Humphries, 3 M. & S. 153; Cowell *v.* Edwards, 2 Bos. & Pull. 268; Brown *v.* Lee, 6 B. & C. 689; Kemp *v.* Finden, 12 M. & W. 421.

(*d*) Dering *v.* Earl of Winchelsea, 1 Cox, 318; 2 Bos. & Pull. 270; *Ex parte* Gifford, 6 Ves. 806; Craythorne *v.* Swinburne, 14 Ves. 160; Stirling *v.* Forrester, 3 Bligh, 590, 596; Onge *v.* Truelock, 2 Moll. 31, 42; Copis *v.* Middleton, T. & R. 224; Hodgson *v.* Shaw, 3 M. & K. 191; Mitchell *v.* English, 17 Gr. 304.

(*e*) Dering *v.* Winchelsea, 1 Cox, 318; Craythorne *v.* Swinburne, 14 Ves. 163, 169.

complete and effectual than it is at law; as for instance, where an account and discovery are wanted; or where there are numerous parties in interest, which would occasion a multiplicity of suits(*a*). So, also, if there are several sureties, one of whom becomes insolvent, and another pays the debt, the latter can, at law, recover from the other solvent sureties only the same share as he could if all were solvent. Thus, if there are four sureties, and one is insolvent, a solvent surety, who pays the whole debt, can recover only one-fourth part thereof (and not a third part) against the other two solvent sureties(*b*). But in a court of equity, he will be entitled to recover one-third part of the debt against each of them; for, in equity, the insolvent's share is apportioned among all the other solvent sureties(*c*). And if one of the sureties dies, the remedy at law lies only against the surviving parties; whereas, in equity, it may be enforced against the representative of the deceased party, and he may be compelled to contribute his share to the surviving surety, who shall pay the whole debt(*d*).

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

369. In cases of suretyship, questions of a very complicated nature may arise, from counter equities between some or all

(*a*) Craythorne *v.* Swinburne, 14 Ves. 160; Cowell *v.* Edwards, 2 B. & P. 268; Wright *v.* Hunter, 5 Ves. 792.

(*b*) Cowell *v.* Edwards, 2 B. & P. 268; Brown *v.* Lee, 6 B. & C. 697. See also Rogers *v.* Mackenzie, 4 Ves. 752; Wright *v.* Hunter, 5 Ves. 792.

(*c*) Story, s. 496; Pr ter *v.* Rich, 1 Ch. Rep. 34; Cowell *v.* Edwards, 2 B. & P. 268; Hale *v.* Harrison, 1 Ch. Cas. 246; Dering *v.* Earl of Winchelsea, 2 B. & P 270; 1 Cox, 318. But see Swain *v.* Wall, 1 Ch. Rep. 149.

(*d*) Primrose *v.* Bromley, 1 Atk. 89; Batard *v.* Hawes, 2 Ell. & B. 287.

(*e*) See Dering *v.* Earl of Winchelsea, 1 Cox, 318; 2 Bos. & Pull. 270. It may be questioned whether the more recent decisions in courts of equity justify any such discrimination between sureties for the same debt, by different bonds, with different sums as penalties, unless where the purpose of the different sums in which the sureties are bound is to show that the obligor incurs the hazard of only a portion of the debt, or a portion of what the other sureties assume. See Coope *v.* Twynam, T. & R. 426.

of the parties, resulting from contract, or from equities between themselves, or from peculiar transactions regarding third persons. Thus, for instance, although the general rule is, that there shall be a contribution between sureties, by the rule of equality, that may be modified by express contract between them; and, in such a case, courts of equity will be governed by the terms of such contract, in giving or refusing contribution(*a*). In like manner, there may arise by implication, from the very nature of the transaction, an exemption of one surety from becoming liable to contribution in favour of another. Thus, if one surety should not upon his own mere motion, but at the express solicitation of his co-surety, become a party to the instrument; and such co-surety should afterwards be compelled to pay the whole debt; in such a case, he would not be entitled to contribution, unless it clearly appeared that there was no intention to vary the general right of contribution, in the understanding of the parties(*b*).

370. If different sureties should be bound by different instruments, for equal portions of the debt of the same principal, and it clearly appeared that the suretyship of each was a separate and distinct transaction, there would be no right of contribution of one against the other(*c*). So, if there should be separate bonds, given with different sureties, and one bond is intended to be subsidiary to, and a security for the other, in case of a default in payment of the latter, and not to be a primary concurrent security; in such a case, the sureties in the second bond would not be compellable to aid those in the first bond by any contribution(*d*).

371. Accommodation endorsers of a negotiable security are considered as co-sureties, irrespective of the order of their

(*a*) Swain *v.* Wall, 1 Ch. 149; Craythorne *v.* Swinburne, 14 Ves. 160, 169; Dering *v.* Earl of Winchelsea, 1 Cox, 318; 2 B. & P. 270; Mitchell *v.* English, 17 Gr. 304.

(*b*) Turner *v.* Davies, 2 Esp. 478; Mayhew *v.* Crickett, 2 Swanst. 193.

(*c*) Coope *v.* Twynam, T. & R. 426.

(*d*) Craythorne *v.* Swinburne, 14 Ves. 160. See Cooke *v.* ——, 2 Freem. 97; Story, s. 498.

liability on the instrument itself (*a*). But where a firm endorse in the partnership name, the liability as sureties is not the several liability of each partner but a joint liability (*b*).

372. It is a general principle that where a creditor varies the contract between himself and the principal debtor without the privity of the surety, the surety will be released (*c*). But a surety will not be discharged by the creditor giving time, if his remedies against the principal are not diminished or affected, and especially if they are accelerated (*d*). A surety is not discharged when the creditor is merely inactive, but only when the time is given by some positive contract between the creditor and the principal debtor (*e*). And the surety will not be discharged if the creditor on giving further time to the principal debtor, reserve his right to proceed against the surety (*f*.)

373. A surety is entitled on payment of the debt to all the securities which the creditor has against the principal debtor; whether such collateral securities were given at the time of the contract of suretyship, with or without the knowledge of surety (*g*), or it seems whether they were given after that contract with or without the knowledge of the principal (*h*). Formerly a surety who paid off the debt of the principal, could not require the creditor, upon such payment, to assign the debt, on the ground that by payment the debt became extinguished

(*a*) Mitchell *v.* English, 17 Gr. 304; Clipperton *v.* Spettigue, 15 Gr. 269; Cockburn *v.* Johnston, 15 Gr. 577.

(*b*) Clipperton *v.* Spettigue, 15 Gr. 271.

(*c*) Bonser *v.* Cox, 6 Beav. 110; Calvert *v.* London Dock Co. 2 Keen, 638; Evans *v.* Bremridge, 2 K. & J. 174; 8 D. M. & G. 101.

(*d*) Hulme *v.* Coles, 2 Sim. 12; Prendergast *v.* Devey, 6 Mad. 124; Price *v.* Edmunds, 10 B. & C. 578.

(*e*) Samuell *v.* Howarth, 3 Mer. 272; Wright *v.* Simpson, 6 Ves. 734; Roe *v.* Berrington, 2 W. & T. L. C. 887; Bailey *v.* Edwards, 4 B. & S. 771; Davis *v.* Stainbank, 6 D. M. & G. 679.

(*f*) Webb *v.* Hewitt, 3 K. & J. 442; Boultbee *v.* Stubbs, 18 Ves. 26; Wyke *v.* Rogers, 1 D. M. & G. 408. And see Bank of Montreal *v.* McFaul, 17 Gr. 234; Cumming *v.* Bank of Montreal, 15 Gr. 686.

(*g*) Mayhew *v.* Crickett, 2 Sw. 185.

(*h*) Pearl *v.* Deacon, 24 Beav. 186; 1 D. & J. 461; [illegible] *v.* Brutton, 18 Beav. 34; 8 D. M. & G. 440; Pledge *v.* Buss, Johns. 663, 668.

(*a*). But now by Statute(*b*) "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty."

374. There are many other cases of contribution, in which the jurisdiction of courts of equity is required to be exercised, in order to accomplish the purposes of justice. Thus, for instance, in cases of a deficiency of assets to pay all debts and legacies, if any of the legatees have been paid more than their proportion, before all the debts are ascertained, they may be compelled to refund and contribute, in favour of the unpaid debts, at the instance of creditors, at the instance of other legatees, and in many cases, although not universally, at the instance of the executor himself(*c*).

375. In like manner, contribution lies between partners for any excess, which has been paid by one partner beyond his share, against the other partners, if upon a winding up of the partnership affairs, a balance appears in his favour; or, if, upon a dissolution, he has been compelled to pay any sum, for which he ought to be indemnified(*d*).

376. Contribution also lies between joint-tenants, tenants in common, and part-owners, of ships and other chattels, for all charges and expenditures incurred for the common benefit(*e*).

(*a*) Copis *v.* Middleton, T. & R. 229; Hodgson *v.* Shaw, 3 M. & K. 190.

(*b*) 26 Vic. c 45, s. 2.

(*c*) Story, s. 503; Noel *v.* Robinson, 1 Vern. 94, and notes; Walcott *v.* Hall, 2 Bro. C. C. 305; Anon. 1 P. W. 495; Newman *v.* Barton, 2 Vern. 205; Edwards *v.* Freeman, 2 P. W. 447; Hardwick *v.* Wind, 1 Anst. 112; Davis *v.* Davis, 1 Dick. 32; Jewson *v.* Grant, 3 Sw. 659. See also note to Averall *v.* Wade, Ll. & G. t. Sugden, 264. And see as to creditors who have received payment, being compelled where the assets are deficient to refund, Bank of British North America *v.* Mallory, 17 Gr. 102.

(*d*) Story s. 504. See Wright *v.* Hunter, 1 East, 20; Wright *v.* Hunter, 5 Ves. 792.

(*e*) Com. Dig. Chan. 3 V. 6; Rogers *v.* Mackenzie, 4 Ves. 752; Lingard *v.* Bromley, 1 V. & B. 114. And see Gage *v.* Mulholland, 16 Gr. 145.

377. LIENS also give rise to matters of account; and although this is not the sole, or indeed the necessary, ground of the interference of courts of equity, yet, directly or incidentally, it becomes a most important ingredient in the remedial justice administered by them in cases of this sort. A lien is not in strictness either a *jus in re*, or a *jus ad rem*; but it is simply a right to possess and retain property, until some charge attaching to it is paid or discharged(*a*). It has an existence, in many cases, by the usages of trade(*b*); and in maritime transactions, as in cases of salvage and general average(*c*).

378. A lien is often created and sustained in equity, where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money(*d*). Now, it is obvious, that most of these cases must give rise to matters of account, and as the nature and amount of the lien are often involved in great uncertainty, a resort to a court of equity, to ascertain and adjust the account, seems, in many cases, absolutely indispensable for the purposes of justice.

379. A great variety of cases in regard to rents and profits resolve themselves into matters of account, not only when they arise from privity of contract, but also when they arise from adverse claims and titles, asserted by different persons(*e*) Between landlord and tenant, accounts often extend over a number of years, where there are any special terms or stipulations in the lease, requiring expenditures on one side and allowances on the other. In such cases, where there are any controverted claims, a resort to courts of equity is often necessary to a due adjustment of the respective rights of each party(*f*).

(*a*) Brace *v.* Duchess of Marlborough, 2 P. W. 491; *Ex parte* Heywood, 2 Rose, 355, 357.

(*b*) Kruzer *v.* Wilcocks, Ambl. 252; Green *v.* Farmer, 4 Burr. 2218; Myers *v.* United Guarantee & Life Assurance Co. 7 D. M. & G. 112; Bock *v.* Gorrissen, 6 Jur. N. S. 47; 7 Jur. N. S. 81.

(*c*) Abbott on Shipping, Pt. 2, ch. 3, s. 1, 17; Pt. 3, ch. 3, s. 11; id. ch. 10, ss. 1, 2.

(*d*) Sugden on Vendors, ch. 12, s. 1; id. ch. 12, s. 1, Vol. 2, p. 57 [9th edit.]

(*e*) See Fonbl. Eq. B. 1, ch. 3, s. 3, and note (*k*); id. B. 1, ch. 1; id. B. 1, ch. 1, s. 3, note (*f*), Bac. Abridg. *Accompt*, B.

(*f*) Story, s. 508; O'Connor *v.* Spaight, 1 S. & L. 305. See The King *v.* The Free Fishers of Whitstable, 7 East, 353, 356. And see Townsend *v.* Ash, 3 Atk. 336; Pulteney *v.* Warren, 6 Ves. 91, 92; Norton *v.* Frecker, 1 Atk. 524, 528; Adley *v.* Whitstable Co. 17 Ves. 324; Lorimer *v.* Lorimer, 5 Mad. 363.

380. But another class of cases is still more frequent, arising from tortious or adverse claims and titles(*a*). Thus, for instance, if a man intrudes upon an infant's lands, and takes the profits, he is compellable to account for them, and will be treated as a guardian or trustee for the infant(*b*). And this is but following out the rule of law in the like case; for so greatly does the law favour infants, that if a stranger enters into and occupies an infant's lands, he is compellable, at law, to render an account of the rents and profits, and will be chargeable as guardian or bailiff (*c*). And a person who enters into wrongful possession of property under an unjust bargain will be dealt with more severely than a mortgagee in possession(*d*).

381. Cases of WASTE by tenants and other persons afford another illustration of the same doctrine(*e*). Thus, where one held customary lands of a manor, and opened a copper mine in the lands, and dug the ore, and sold great quantities of it in his lifetime, and then died, and his heir continued digging and disposing of the ore in like manner; upon a bill brought against the executor for an account, and against the heir also for an account, it was decided, that the bill was maintainable, against both the executor and the heir(*f*).

382. In some of the cases upon the subject of waste it seems to have been maintained, that, although the remedy for waste

(*a*) Bac. Abridg. *Accompt*, B; Yates *v.* Hambly, 2 Atk. 362, 363; Owen *v.* Griffith, Ambl. 520; 1 Ves. Sen. 250.

(*b*) Newburgh *v.* Bickerstaffe, 1 Vern. 295; Cary *v.* Bertie, 2 Vern. 342; Hutton *v.* Simpson, 2 Vern. 724; Lockey *v.* Lockey, Prec. Ch. 518; 1 Eq. Abridg. 7 Pl. 10, 11; id. 280, A.; Bennett *v.* Whitehead, 2 P. W. 644; 1 Fonbl. Eq. B. 1, ch. 3, s. 3, and note (*k*); Dormer *v.* Fortescue, 3 Atk. 129, 130.

(*c*) Story, ss. 510, 511; Littleton, s. 124; Co. Litt. 89 *b*, 90 *a*; Pulteney *v.* Warren, 6 Ves. 88, 89; Com. Dig. *Accompt*, A. 2; Dormer *v.* Fortescue, 3 Atk. 129, 130; Curtis *v.* Curtis, 2 Bro. C. C. 628, 632; Townsend *v.* Ash. 3 Atk. 337.

(*d*) Robertson *v.* Norris, 5 Jur. N. S. 1238.

(*e*) Lansdowne *v.* Lansdowne, 1 Mad. 116; Marquis of Ormond *v.* Kynersley, 5 Mad. 369. In Kingham *v.* Lee, 15 Sim. 396, the case of Marquis of Ormond *v.* Kynersley, was disapproved.

(*f*) Bishop of Winchester *v.* Knight, 1 P. W. 407; Bell *v.* Wilson, 11 Jur. N. S. 427, 2 Dr. & S. 395; 12 Jur. N. S. 263.

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

383. It is ordinarily a good bar to a suit for an account, that the parties have already in writing stated and adjusted the items of the account, and struck the balance(*d*). In such a case a court of equity will not interfere; for under such circumstances, an *indebitatus assumpsit* lies at law, and there is no ground for resorting to equity. If, therefore, there has been an account stated, that may be set up as a bar to all discovery and relief, unless some matter is shown, which calls for the interposition of a court of equity(*e*). But if there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties; but will allow it to be opened and re-examined(*f*). In some cases, as of gross fraud, or gross

(*a*) Whitfield *v.* Bewit, 2 P. W. 240; Garth *v.* Cotton, 3 Atk. 751; 1 Ves. Sen. 524, 546; Lee *v.* Alston, 1 Bro. C. C. 194; Eden on Injunc. 206, &c.

(*b*) See Barker *v.* Dacie, 6 Ves. 688.

(*c*) Story, s. 517. See Pulteney *v.* Warren, 6 Ves. 89, 90; Grierson *v.* Eyre, 9 Ves. 341; Richards *v.* Noble, 3 Meriv. 673. But see Lansdowne *v.* Lansdowne, 1 Mad. 116; Eden on Injunct. 206, &c., and Garth *v.* Cotton, 3 Atk. 756; 1 Ves. Sen. 524, 546. And see as to waste, Morris *v.* Morris, 2 D. & J. 323; Duke of Leeds *v.* Lord Amherst, 2 Ph. 117; Wellesley *v.* Wellesley, 6 Sim. 497; Micklethwait *v.* Micklethwait, 1 D. & J. 504; Gent *v.* Harrison, John. 517; Turner *v.* Wright, John. 740; Harcourt *v.* White, 6 Jur. N. S. 1087; Seagram *v.* Knight, L. R. 3 Eq. 398; L. R. 2 Chan. 628.

(*d*) Dawson *v.* Dawson, 1 Atk. 1; Taylor *v.* Haylin, 2 Bro. C. C. 310; Burk *v.* Brown, 2 Atk. 397, 399; Sumner *v.* Thorpe, 2 Atk. 1. See Neil *v.* Neil, 15 Gr. 110.

(*e*) Dawson *v.* Dawson, 1 Atk. 1; Anon., 2 Freeman, 62; Chambers *v.* Goldwin, 9 Ves. 265, 266; Taylor *v.* Haylin, 1 Cox, 435; 2 Bro. C. C. 310.

(*f*) Matthews *v.* Walwyn, 4 Ves. 125; Newman *v.* Payne, 2 Ves. 199. See also Beaumont *v.* Boultbee, 5 Ves. 485; Todd *v.* Wilson, 9 Beav. 486.

mistake, or undue advantage or imposition, made palpable to the court, it will direct the whole account to be opened, and taken *de novo*(*a*).

384. Where the mistake, or omission, or inaccuracy, or fraud, or imposition, is not shown to affect or stain all the items of the transaction, the court will allow the account to stand, with liberty to the plaintiff to surcharge and falsify it; the effect of which is, to leave the account in full force and vigor, as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes(*b*). Sometimes a still more moderate course is adopted; and the account is simply opened to contestation, as to one or more items, which are specially set forth in the bill of the plaintiff, as being erroneous or unjustifiable; and, in all other respects, it is treated as conclusive(*c*).

385. The showing an omission for which credit ought to be given, is a surcharge; the proving an item to be wrongly inserted is a falsification, and this liberty to surcharge and falsify includes not only an examination of errors of fact, but of errors of law(*d*).

386. What shall constitute, in the sense of a court of equity, a stated account, is in some measure dependent upon the particular circumstances of the case. An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause that errors are excepted(*e*). But in order to make an account a stated account, it is not necessary that it should be signed by the parties. It is sufficient if it has been examined and accepted by both parties; and this acceptance need not be express, but may be implied from circumstances(*f*).

(*a*) Vernon *v.* Vawdry, 2 Atk. 119; Piddock *v.* Brown, 3 P. W. 288; Wharton *v.* May, 5 Ves. 27, 48, 49; Clarke *v.* Tipping, 9 Beav. 284.

(*b*) Johnson *v.* Curtis, 3 Bro. C. C. 266; Pit *v.* Cholmondeley, 2 Ves. Sen. 565, 566.

(*c*) Story, s. 523; Brownell *v.* Brownell, 2 Bro. C. C. 62, 63; Twogood *v.* Swanston, 6 Ves. 484, 486.

(*d*) Roberts *v.* Kuffin, 2 Atk. 112.

(*e*) See Johnson *v.* Curtis, 3 Bro. C. C. 266.

(*f*) Willis *v.* Jernegan, 2 Atk. 251, 252; Sherman *v.* Sherman, 2 Vern. 276; 1 Eq. Abr. 12 Pl. 10, 11; Irvine *v.* Young, 1 S. & S. 333.

387. Acquiescence in stated accounts, even for a long time, although it amounts to an admission, or presumption of their correctness, does not of itself establish the fact of their having been settled(*a*).

388. The court is generally unwilling to open a settled account, especially after a long time has elapsed, except in cases of apparent fraud. But in cases of settled accounts between trustee and *cestui que trust*, and other persons standing in confidential relation to one another, where *mala fides* is alleged, there is scarcely any length of time that will prevent the court from opening the account altogether(*b*).

CHAPTER IX.

ADMINISTRATION.

389. The jurisdiction of courts of equity to superintend the administration of assets, and decree a distribution of the residue, after payment of all debts and charges among the parties entitled, either as legatees or as distributees, does not seem to have been thoroughly established until near the close of the reign of Charles II(*c*).

390. It has been said, that the jurisdiction in the administration of assets, is founded on the principle, that it is the duty of the court to enforce the execution of trusts; and that the executor or administrator, who has the property in his hands, is bound to apply that property to the payment of debts and legacies; and to apply the surplus according to the will of the testator, or, in case of intestacy, according to the statute of distributions. So that the sole ground, on which courts of

(*a*) Lord Clancarty *v.* Latouche, 1 B. & B. 428; Irvine *v.* Young, 1 S. & S. 333; Hunter *v.* Belcher, 2 D. J. & S. 202.

(*b*) Matthews *v.* Wallwyn, 4 Ves. 125; Todd *v.* Wilson, 9 Beav. 486.

(*c*) Matthews *v.* Newby, 1 Vern. 133; Howard *v.* Howard, 1 Vern. 134; Bucole *v.* Atleo, 2 Vern. 37; Gibbons *v.* Dawley, 2 Ch. Cas. 198; Pamplin *v.* Green, 2 Ch. Cas. 95; Lord Winchelsea *v.* Duke of Norfolk, 2 Ch. Rep. 165; Digby *v.* Cornwallis, 3 Ch. Rep. 40; Petit *v.* Smith, 1 P. W. 7.

equity proceed in cases of this kind, is to be deemed the execution of a trust(*a*).

391. The application for aid and relief in the administration of estates is sometimes made by the executor or administrator himself, when he finds the affairs of his testator or intestate so much involved, that he cannot safely administer the estate, except under the direction of a court of equity. In such a case, it is competent for him to institute a suit for the purpose of having all the claims of creditors and others adjusted, and a final decree, settling the order and payment of the assets(*b*). But, upon such a bill, brought by an executor or administrator, the court will not interpose, by way of injunction, to prohibit creditors proceeding at law, until there has been a decree against the executor or administrator to account; for, otherwise, the latter might without reason make it a ground of undue delay of the creditors(*c*).

392. An executor or administrator has no right to institute a suit merely to obtain an indemnity by passing his account under the decree of the court; there must be some real question to submit to the court, or some dispute requiring its interposition(*d*).

393. The more ordinary case of relief, sought in equity in cases of administration, is by creditors. A creditor may insti-

(*a*) Story, s. 532; Adair *v.* Shaw, 1 S. & L. 262. See also Farrington *v.* Knightly, 1 P. W. 548, 549, Rachfield *v.* Careless, 2 P. W. 161; Duke of Rutland *v.* Duchess of Rutland, 2 P. W. 210, 211; Elliott *v.* Collier, 1 Ves. 16; Anon., 1 Atk. 491; Wind *v.* Jekyll, 1 P. W. 575; Nicholson *v.* Sherman, 1 Ch. Cas. 57; Bac. Abridg. *Legacy*, M. 1 Mad. Pr. Ch. 466, 467. See also Thorndike *v.* Hunt, 3 D. & J. 563; Hopper *v.* Conyers, 12 Jur. N. S. 328; Sheriff *v* Butler, 12 Jur. N. S. 329; Hill *v.* Curtis, L. R. 1 Eq. 90; Rayner *v.* Koehler, L. R. 14 Eq. 262.

(*b*) Com. Dig. Chan. 3 G. 6; Buccle *v.* Atleo, 2 Vern. 37. See Rush *v.* Higgs, 4 Ves. 638, 643; Jackson *v.* Leaf, 1 J. & W. 231; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 4, s. 4 note (*u*). Morrice *v.* Bank of England, Cas. t. Talb. 224; Backwell's case, 1 Vern. 153, 155.

(*c*) Rush *v.* Higgs, 4 Ves. 638, 643; Perry *v.* Phillips, 10 Ves. 40; Largan *v.* Bowen, 1 S. & L. 296; Rankin *v.* Harwood, 2 Ph. 22; Arnold *v.* Bainbrigge, 2 D. F. & J. 92. But after a decree is made under which a debtor may come in and prove his debt, he will not be permitted to institute proceedings at law, Clark *v.* Lord Ormond, Jac. 122; Pennell *v.* Roy, 3 D. M. & G. 138.

(*d*) White *v.* Cummins, 3 Gr. 605; Smith *v.* Roe, 11 Gr. 322; Springer *v.* Clarke, 15 Gr. 666.

tute a suit for payment of his own debt, and seek a discovery of assets for this purpose only(*a*). The usual course, however, pursued in the case of creditors, is for one or more creditors to proceed for an account of the assets generally, and a due settlement of the estate(*b*). And this applies as well when the party suing is a creditor whose debt is payable *in presenti*, as when his debt is due *in futuro*, if it be *debitum in presenti solvendum in futuro*(*c*); and whether he has a mortgage or not(*d*).

394. The usual decree, in the case of creditors' suits against the executor or administrator, directs the accounts between the deceased and all his creditors to be taken; also an account of all the personal estate of the deceased in the hands of the executor or administrator, and that the same be applied in payment of the debts and other charges, in a due course of administration(*e*). In all cases of this sort, each creditor is entitled to appear before the Master, and may there, if he chooses, contest the claim of any other creditor, in the same manner as if it were an adverse suit(*f*).

395. But although the usual decree is, as above stated, where the executor or administrator admits assets, he thereby admits himself liable for the payment of the debt; and, in such a case, the plaintiff may have a decree for the payment of his

(*a*) Att.-Gen. *v.* Cornthwaite, 2 Cox, 44; Morrice *v.* Bank of England, Cas. t. Talb. 217; Anon., 3 Atk. 572; Perry *v.* Phelips, 10 Ves. 38. Martin *v.* Martin, 1 Ves. 213, 214; Sheppard *v.* Kent, 2 Vern. 435; Rush *v.* Higgs, 4 Ves. 638.

(*b*) See the case of The Creditors of Sir Charles Cox, 3 P. W. 343.

(*c* Whitmore *v.* Oxborrow 2 Y. & C. 13, 17.

(*d*) Greenwood *v.* Firth, 2 Hare, 241, note; Aldridge *v.* Westbrook, 5 Beav. 188; Skey *v.* Bennet, 2 Y. & C. 405; White *v.* Hillacre, 3 Y. & C. 597, 609, 610.

(*e*) Van Heythuysen, Eq. Draft. title, *Decrees*, p. 647; The Creditors of Sir Charles Cox, 3 P. W. 343; Sheppard *v.* Kent, Prec. Ch. 190; s. c. 2 Vern. 435; Kenyon *v.* Worthington, 2 Dick. 668. To obtain an enquiry as to real estate and an account of rents and profits, some of the persons interested in the real estate must be parties, Con. Gen. Ord. 472.

(*f*) Owens *v.* Dickenson, Cr. & Ph. 48, 56. See as to the form of a decree in an administration suit, in case all the parties interested should not be parties at the hearing, Fisk *v.* Norton, 2 Ha. 381. Where the executor or administrator does not resist a claim by setting up the Statute of Limitations, any party interested in the estate may raise that defence, Shewen *v.* Vanderhorst, 1 R. & M. 347; 2 R. & M. 75; Moodie *v.* Bannister, 4 Drew. 432; Fuller *v.* Redman, 26 Beav. 614.

own debt only, without any decree for a general account; for the other creditors are not prejudiced by such a decree for the payment of the plaintiff's debt(*a*).

396. Assets are usually treated of as divided into legal and equitable. Legal assets are such as come into the hands and power of an executor or administrator, or such as he is entrusted with by law, *virtute officie*, to dispose of in the course of administration(*b*) Equitable assets are, on the other hand, all property which would not have vested in the executor or administrator by law, but vests in him for payment of debts generally, by virtue of an express disposition of the property, which must be carried into effect by a court of equity(*c*). The distinction refers to the remedies of the creditor, and not to the nature of the property. The question is, not whether the testator's or intestate's interest was legal or equitable, but, whether a creditor, seeking to get paid out of such assets, can obtain payment thereout from a court of law, or can only obtain it through a court of equity(*d*).

397. In the administration of assets, equity follows the same rules in regard to legal assets, which are adopted by courts of law; and gives the same priority to the different classes of creditors, which is enjoyed at law(*e*). In the like manner, courts of equity recognize and enforce all antecedent liens, claims, and charges *in rem*, existing upon the property according to their priorities; whether these charges are of a legal or of an equitable nature, and whether the assets are legal or equitable(*f*).

(*a*) Woodgate *v.* Field, 2 Ha. 211.

(*b*) 2 Fonbl. Eq. B. 4, pt. 2, c. 2, s. 1; Bacon's Abr. Executors and Administrations, H.; Story, s. 551.

(*c*) 2 Fonbl. Eq. B. 4, pt. 2, c. 2, s. 1, and notes (*c*, *f*, and *g*); Wilson *v.* Fielding, 2 Vern. 763. And see Goodchild *v.* Ferrett, 5 Beav. 398; Charlton *v.* Wright, 12 Sim. 274.

(*d*) Cook *v.* Gregson, 3 Drew. 549. But see Att.-Gen. *v.* Murray, 6 Jur. N. S. 1083.

(*e*) See 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, s. 1, 2; Wride *v.* Clarke, 1 Dick. 382; Morrice *v.* Bank of England, Cas. t. Talb. 220, 221.

(*f*) Fremoult *v.* Dedire, 1 P. W. 429; Finch *v.* Earl of Winchelsea, 1 P. W. 277, 278; Burgh *v.* Francis, 1 Eq. Abr. 320, Pl. 1; Girling *v.* Lee, 1 Vern. 63, and Raithby's notes; Plunket *v.* Penson, 2 Atk. 290; Pope *v.* Gwinn, 8 Ves. 28, note; Morgan *v.* Sherrard, 1 Vern. 293; Cole *v.* Warden, 1 Vern. 410, and note; Wilson *v.* Fielding, 2 Vern. 763, 764; Foly's case, 2 Freem. 49; Wride *v.* Clark, 1 Dick. 382; Sharpe *v.* Earl of Scarborough, 4 Ves. 538.

398. In regard to equitable assets, courts of equity adopt very different rules from those adopted in courts of law in the administration of legal assets. Thus, in equity, it is a general rule that equitable assets shall be distributed equally, and *pari passu*, among all the creditors, without any reference to the priority or dignity of the debts(*a*). But if the fund falls short, all the creditors are required to abate in proportion(*b*).

399. Although as between themselves, in regard to equitable assets, the creditors are all equal, and are to share in proportion, *pari passu*; yet, as between them and legatees, the creditors are entitled to a priority and preference; and legatees take nothing until the debts are all paid(*c*). The ground of this decision is, that it is the duty of every man to be just, before he is generous; and no one can well doubt the moral obligation of any man to provide for the payment of all his debts(*d*).

400. By the Property and Trust Act of 1865(*e*), any claim to priority on the part of any creditor, where there is a deficiency of assets, is done away with. The 28th section of that Act provides that "on the administration of the estate of any "person dying after the passing of this Act, in case of a defi- "ciency of assets, debts due to the Crown, and to the executor "or administrator of the deceased person, and debts to others, "including therein respectively debts by judgment, decree, "or order, and other debts of record, debts by specialty, simple "contract debts, and such claims for damages as by statute,

(*a*) Co. Litt. 24; Hixam *v.* Witham, 1 Ch. Cas. 248; Gott *v.* Atkinson, Willes, 521; Turner *v.* Turner, 1 J. & W. 45; Creditors of Sir Charles Cox, 3 P. W. 343, 344; Deg *v.* Deg, 2 P. W. 412, 416; Wride *v.* Clark, 1 Dick. 382; Morrice *v.* Bank of England, Cas. t. Talb. 220; Wilson *v.* Paul, 8 Sim. 63. And see Pardo *v.* Bingham, L. R. 6 Eq. 485.

(*b*) Hixham *v.* Witham, 1 Freem. 301; 1 Ch. Cas. 248; Deg *v.* Deg, 2 P. W. 412; Wride *v.* Clark, 1 Dick. 382; Foly's case, 2 Freem. 49; Woolstonecroft *v.* Long, 2 Freem. 175; 2 Eq. Abridg. 459; 1 Ch. Cas. 32; 3 Ch. 12.

(*c*) See Anon. 2 Vern. 133; Hixam *v.* Witham, 1 Ch. Cas. 248; 1 Freem. 395; Anon. 2 Vern. 405; Walker *v.* Meagher, 2 P. W. 550.

(*d*) Hixam *v.* Witham, 1 Ch. Cas. 258; 1 Freem. 305; Walker *v.* Meagher, 2 P. W. 551, 552; Greaves *v.* Powell, 2 Vern. 248, and note [2]; Kidney *v.* Coussmaker, 12 Ves. 154.

(*e*) 29 Vic. c. 28.

"are payable in like order of administration as simple contract "debts, shall be paid *pari passu* and without any preference, "or priority of debts of one rank or nature over those of ano- "ther; but nothing herein contained shall prejudice any lien "existing during the lifetime of the debtor on any of his real "or personal estate(*a*)."

401. The order of administration in which assets are applied is as follows: (1) The general personal estate, not expressly or by plain implication exempted (2) Lands devised for the payment of debts(*b*). (3) Real estate descended to the heir, but not charged with debts(*c*). (4) Real estate devised, but charged with payment of debts(*d*). (5) Real estate comprised in a residuary devise(*e*). (6) General pecuniary legacies *pro rata*(*f*). (7) Specific legacies and real estate specifically devised, not charged with the payment of debts(*g*). (8) Real estate over which the testator had a general power of appointment, and over which he has actually exercised that power by deed or will in favour of volunteers(*h*).

402. If a testator has appropriated any specific part of his personal estate for the payment of his debts, and has also dis-

(*a*) See Bank of British North America *v.* Mallory, 17 Gr. 102, where certain creditors of a deceased insolvent, who having sued his executor and recovered judgment, sold his real estate, and got paid in full, were held bound to account, in order that the other creditors might have the whole estate distributed *pro rata*. See also Hutchinson *v.* Edmison, 11 Gr, 477.

(*b*) Harwood *v.* Oglander, 8 Ves. 125; Phillips *v.* Parry, 22 Beav. 279.

(*c*) Davies *v.* Topp, 1 Bro. C. C. 527; Manning *v.* Spooner, 3 Ves. 119. It must be remembered that since Con. Stat. U. C. c. 82, s. 5, when land is devised to the heir, he takes not as heir but purchaser, and as such is placed in the same position in all respects as any other devisee. And see Biederman *v.* Seymour, 3 Beav. 368; Strickland *v.* Strickland, 10 Sim. 374.

(*d*) Barnewell *v.* Lord Cawdor, 3 Mad. 453; Irvin *v.* Ironmonger, 2 R. & M. 531. If the heir takes, by reason of a devise, or otherwise, lapsed lands simply charged with debts, the land so charged is applicable for payment of debts in the same order as deeded estates, and not till after the real estates which have descended. Wood *v.* Ordish, 3 Sm. & G. 125.

(*e*) Hewson *v.* Fryer, L. R. 2 Eq. 632.

(*f*) Clifton *v.* Burt, 1 P. W. 680; Headley *v.* Readhead, Coop. t. Eldon, 50.

(*g*) Fielding *v.* Preston, 1 D. & J 438; Evans *v.* Wyatt, 31 Beav. 217; Wirehouse *v.* Scaife, 2 M. & Gr. 695; Milnes *v.* Slater, 8 Ves. 303; Tombs *v.* Roch, 2 Coll. 490; Gervis *v.* Gervis, 14 Sim. 655; Collis *v.* Robins, 1 D. & Sm. 131.

(*h*) Fleming *v.* Buchanan, 3 D. M. & G. 976; Hawthorn *v.* Shedden, 3 Sm. & Giff. 305; Holmes *v.* Coghill, 7 Ves. 499, 12 Ves. 206; Vaughan *v.* Vanderstegen, 2 Drew. 165.

posed of his general residuary personal estate, the part so appropriated will be primarily liable to the payment of the debts. If, however, he has made no disposition of his general residuary personal estate, then, notwithstanding such an appropriation, the general residuary personal estate, thus remaining undisposed of, will still remain subject to its primary liability to pay the debts(*a*). Very strong language on the part of a testator, is required to exonerate his general personal estate from its primary liability to the payment of his debts. Of course, nothing that he can say, can deprive his creditors of their legal right to resort primarily to his personal estate; but as between the several persons to whom his property may be bequeathed or devised, who therefore take as volunteers under him, he may, if he pleases, vary the priorities; but to do this he must have an intention not only to charge his real estate with his debts, but also to exonerate his personal estate therefrom(*b*).

403. Neither a general charge of debts upon the real estate, nor an express trust created by the testator for the payment of his debts out of his real estate, or any part thereof(*c*), will be sufficient to exonerate the personal estate from its primary liability to pay them. Nor will it alter the case that the charge or trust for payment out of the real estate comprises also the testator's general and testamentary expenses(*d*), though this circumstance is not without its weight, if there be in the will other indications of an intention to exonerate the personalty. If, therefore, the personal estate be simply given to some legatee, and more particularly if the articles given be specifically mentioned, the indication thus afforded of the testator's wish that the personalty shall come clear to the legatee, will, if coupled with an express trust for payment of the personal and testamentary expenses out of the real estate, be sufficient to exonerate the personalty(*e*). But if the per-

(*a*) Bootle *v.* Blundell, 1 Mer. 220.
(*b*) See Harold *v.* Wallis, 10 Gr. 197; Davidson *v.* Boomer, 17 Gr. 509.
(*c*) Tower *v.* Rous, 18 Ves. 132; Collis *v.* Robins, 1 D. & Sm. 131.
(*d*) Brydges *v.* Phillips, 6 Ves. 570.
(*e*) Greene *v.* Greene, 4 Mad. 148; Lance *v.* Aglionby, 27 Beav. 65.

sonalty be simply given to the executor, or if the gift be merely of the residue of the personal estate, the personal estate will not be exempt(*a*). An intention must appear to give the personal estate as a specific legacy to the legatee, and if this be the case, it will be exempt.

404. The rule that the personal estate is the primary fund for payment of debts has recently been broken in upon with respect to devises of mortgaged lands. The 32nd section of The Property and Trust Act(*b*), enacts that, "when any person shall, after the 31st of December, 1865, die seised of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the lands or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments, to obtain full payment or satisfaction of his mortgage debts, either out of the personal estate of the person so dying as aforesaid, or otherwise: Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made, before the 1st day of January, 1866."

405. The words used in the Act, "Sums by way of mort-

(*a*) Aldridge *v.* Walscourt, 1 B. & B. 312.

(*b*) 29 Vic. c. 28.

gage," have been held to apply only to a defined or specified charge on a specified estate(*a*). They are also applicable to an equitable mortgage of freeholds by deposit of title deeds and memorandum(*b*); but were held not to apply to a vendor's lien for unpaid purchase money(*c*). Now, however, by the Ont. Stat. 36 Vic. c. 20, s. 4, the term "mortgage" includes any lien for unpaid purchase money, and any charge, incumbrance, or obligation of any nature whatever upon any lands or tenements of a testator or intestate.

406. The cases were conflicting as to what is a "contrary or other intention," within the meaning of the Act. Lord Chancellor Campbell considered that the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was formerly observed, with respect to exempting the personal estate, the mortgaged land being now primarily liable(*d*). Lord Justice Turner, commenting upon the language used by Lord Campbell, said, nothing more was probably meant by it than that the intention should be clearly proved. If Lord Campbell intended to say that as before the Act it had been necessary to show an intention, not only to charge the mortgaged estate, but also to discharge the personalty, so now it is necessary to show an intention, not only that another fund should be charged, but also that the mortgaged estate should be discharged, he (the Lord Justice) was not prepared to follow him. In order to take a case out of the Act it was sufficient to show a contrary or other intention; this destroyed the analogy between the two cases. In the one case, the intention to be proved was contrary to a settled rule of law; in the other case, it was contrary only to a statutory rule, expressly made dependent upon intention * * * His opinion coincided with those cases in which it had been held that the mortgaged

(*a*) Hepworth *v.* Hill, 30 Beav. 476.

(*b*) Pembrooke *v.* Friend, 1 J. & H. 132,

(*c*) Hood *v.* Hood, 5 W. R. 747; Barnwell *v.* Iremonger, 1 Dr. & Sm. 255, 260.

(*d*) Woolstencroft *v.* Woolstencroft, 2 D. F. & J. 347.

estates were not liable where there was a direction that the debt should be paid out of some other fund(*a*).

407. A mere direction by the testator that the debts "shall be paid as soon as may be"(*b*), or that debts should be paid by "his executors out of his estate,"(*c*) the source from which payment is to be made not being mentioned, will not show a contrary or other intention sufficient to exonerate the mortgaged estate from its primary liability. A bequest, however, of the personal estate in trust to pay(*d*), or subject to the payment of debts(*e*), is sufficient to show a contrary intention within the meaning of the Act, so as to charge the personalty primarily with the payment of the mortgage debt on the lands devised. By the Ont. Stat. 36 Vic., c. 20, s. 32, it is enacted that, a general direction that the debt or all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to, or other than the rule established by the Property and Trust Act, unless such contrary or other intention shall be further declared by words expressly, or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

408. The order in which the several funds liable to debts are to be applied, regulates the administration of the assets only among the testator's own representatives, devisees, and legatees, and does not affect the right of the creditors themselves to resort, in the first instance, to all or any of the funds to which their claims extend. It may, therefore, happen, that a creditor having a claim on two or more funds, proceeds against them in a different order from that which the testator intended, or proceeds against one fund which is the only resource of some other creditor. Equity will then hold that the creditor having two funds shall not, by resorting to that

(*a*) Eno *v.* Tatham, 11 W. R. 475.
(*b*) Pembrooke *v.* Friend, 1 J. & H. 132.
(*c*) Woolstencroft *v.* Woolstencroft, 2 D. F. & J. 347.
(*d*) Moore *v.* Moore, 1 D. J. & S. 602.
(*e*) Mellish *v.* Vallins, 2 J. & H. 194.

fund, which is the only resource of another creditor, disappoint that other; but that other creditor shall stand in his place for so much, against that fund, to which otherwise he could not have access, the object of the court being that every claimant shall be satisfied, so far as by any arrangement consistent with the nature of the several claims, the property which they seek to affect can be applied in satisfaction of such claims(*a*).

409. Unless founded on some equity, marshalling will not be enforced between persons, unless they are creditors of the same person, and have demands against funds the property of the same person. "It was never said," observed Lord Eldon, "that, if I have a demand against A. and B., a creditor of B. shall compel me to go against A. without more, as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all the obligations arising out of these complicated relations may be satisfied; but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A. if not founded on some equity giving B. the right for his own sake to compel me to seek payment from A(*b*).

410. Where the heir at law has paid debts, which ought to have been paid, first, out of the general personal estate, secondly, out of lands subject to a trust for their payment, he will be entitled to have the assets marshalled in his favour, as against the two funds, but not to the prejudice of pecuniary legatees; still less to the disappointment of specific gifts, for the heir is not a devisee, while the general or specific legatees take by the special bounty of the testator(*c*).

411. A devisee of land charged with the payment of debts, paying debts whilst any of the previously liable property remains unexhausted, will have a right to have the

(*a*) See Aldrich *v.* Cooper, 8 Ves. 382; Hanby *v.* Roberts, Ambl. 127; Tomb *v.* Roch, 2 Coll 497; Tidd *v.* Lister, 10 Hare, 157; Patterson *v.* Scott, 1 D. M. & G. 531.

(*b*) *Ex parte* Kendall, 17 Ves. 520.

(*c*) Hanby *v.* Roberts, Ambl. 128; Hensman *v.* Fryer, L. R. 2 Eq. 631.

assets marshalled in his favour, and to stand in the place of the creditor so far as regards, 1st. the general personal estate; 2nd. lands subject to a trust or power for raising the debts; 3rd. lands descended to the heir(*a*).

412. The principle of marshalling is also applicable between legatees. Thus, where a testator has charged one or more legacies upon the real estate, and other legacies are not so charged, if the personal estate prove insufficient to pay them all, the legacies charged upon the real estate shall be paid out of that; or if they have been paid out of the personal estate, the other legacies, as to so much shall stand in their place as a charge upon the land(*b*). But where the charge of a legacy upon real estate fails to affect it in consequence of an event happening subsequent to the death of the testator, or the death of the legatee before payment, the court will not marshall assets so as to throw such legacy upon the personal estate, in which case it would be vested and transmissible, whereas, as against the real estate, it would sink by the death of the legatee(*c*).

413. Pecuniary legatees, if the personal estate out of which they are to be paid has been exhausted by creditors, are entitled to be paid (1) out of lands which descend to the heir(*d*), (2) out of lands devised simply subject to debts(*e*), (3) out of lands subject to a mortgage to the extent to which the mortgagee may have disappointed them by resorting first to the personal estate(*f*), (4) out of lands comprised in a residuary devise(*g*). But they will not be entitled to marshall as against specific legatees or devisees(*h*).

(*a*) Harwood *v.* Oglander, 8 Ves. 106.

(*b*) Hanby *v.* Roberts, Ambl. 127; Masters *v.* Masters, 1 P. W. 421; Bligh *v.* Earl of Darnley, 2 P. W. 619; Bonner *v.* Bonner, 13 Ves. 379; Scales *v.* Collins, 9 Hare, 656.

(*c*) Prouse *v.* Abingdon, 1 Atk. 482; Pearce *v.* Loman, 3 Ves. 135. And see Tombs *v.* Roch, 2 Coll. 504.

(*d*) Hanby *v.* Roberts, Ambl. 128; Sproule *v.* Prior, 8 Sim. 189.

(*e*) Richard *v.* Barrett, 3 K. & J. 289.

(*f*) Johnson *v.* Child, 4 Hare, 87.

(*g*) Hensam *v.* Fryer, L. R. 2 Eq. 631.

(*h*) Herne *v.* Meyrick, 1 P. W. 201; Wythe *v.* Hennicker, 2 M. & K. 635.

414. Specific legatees and devisees have a right, if called on to pay any debts of their testator, to have the whole of his other property real and personal marshalled in their favour, so as to throw the debts as far as possible on the other assets, which are antecedently liable. It is now settled that a devisee and a specific legatee shall contribute *pro rata* to satisfy debts which the property antecedently liable has failed to satisfy(*a*).

415. If, however, the subject of any specific devise or bequest is liable to any burden of its own, the legatee must bear it alone, and cannot call the others to his aid. Thus the devisee of land bought by the testator, but not paid for, cannot call on the other specific devisees or legatees to pay a proportion of the purchase money to which his land is subject by reason of the vendor's lien, although he may claim to have his land exonerated at the expense of every one else taking property antecedently liable(*b*).

416. Assets are never marshal'ed in favour of legacies given to charities, upon the ground that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court, merely to support a bequest which is contrary to law. If, therefore, a testator should bequeath to a charity a legacy payable out of the produce of his real and personal estate(*c*), or a simple legacy without expressly charging it on that part of his personal estate which he may lawfully bequeath to charitable uses, the legacy will fail by law in the proportion which the real estate and personalty in the one case, or such personalty in the other may bear to the whole fund out of which the legacy was made payable(*d*). The rule of the court adopted in all such cases is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding

(*a*) Tombs *v.* Roch, 2 Coll. 490.
(*b*) Emuss *v.* Smith, 2 D. & Sm. 722.
(*c*) Currie *v.* Pye, 17 Ves. 462.
(*d*) Robinson *v.* Geldard, 3 Mac. & G. 735; Fourdrin *v.* Gowdey, 3 M. & K. 397; Johnson *v.* Lord Harrowby, Johns. 425; Hobson *v.* Blackburn, 1 Keen. 273.

so much of the charity legacies to fail as would in that way be to be paid out of the prohibited fund(*a*).

417. It may be useful to take notice of the interposition of courts of equity, in regard to the administration of assets, in cases where there is any alienation or waste of them on the part of the personal representative of the deceased. At common law, the executor or administrator is treated, for many purposes, as the owner of the assets, and has a power to dispose of and aliene them(*b*). There is no such thing known as the assets in the hands of an executor being the debtor, or as a creditor's having a lien on them; but the person of the executor, in respect to the assets which he has in his hands, is treated as the debtor(*c*). At law, the assets of the testator may, perhaps, at least under special circumstances, be taken in execution for the personal debt of the executor, unless, indeed, there be some fraud or collusion between the execution creditor and the executor(*d*); as they certainly may also be taken in execution for the debts of the testator(*e*). But in courts of equity, the assets are treated as the debtor, or, in other words, as a trust fund, to be administered by the executor for the benefit of all persons who are interested in it, whether they are creditors or legatees, or distributees, or otherwise interested, according to their relative priorities, privileges, and equities(*f*).

418. The executor, being a creditor of the estate, sustains virtually the double relation of debtor and creditor. Hence the legal remedy is suspended, and equity will compel the

(*a*) Williams *v.* Kershaw, 1 Keen. 275. n.

(*b*) Hill *v.* Simpson, 7 Ves. 166; McLeod *v.* Drummond, 14 Ves. 353; s. c. 17 Ves. 154, 168.

(*c*) Farr *v.* Newnham, 4 T. R. 621, 634; Whale *v.* Booth, 4 T. R. 625, note; s. c. 4 Doug. 36; Nugent *v.* Gifford, 1 West, 496, 497; s. c. 1 Atk. 463; s. c. 2 Ves. 269. But see Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 14 Ves. 361; s. c. 17 Ves. 154, 168.

(*d*) Whale *v.* Booth, 4 T. R. 623, note; s. c. 4 Doug. 36; Farr *v.* Newnham, 4 T. R. 621; McLeod *v.* Drummond, 17 Ves. 154; Ray *v.* Ray, Cooper, t. Eldon, 264.

(*e*) But see McLeod *v.* Drummond, 17 Ves. 154 168.

(*f*) Story, s. 579; Farr *v.* Newnham, 4 T. R. 636, per Buller, J.; Whale *v.* Booth, T. R. 625, note; 4 Doug. 39.

other creditors to allow the executor to retain the sum due to him, upon an equitable distribution of assets, according to his order of priority, and will liquidate the claim, and determine all questions respecting it. Where the assets are sufficient, the executor will be allowed to retain the amount of a debt barred by the statute of limitations(*a*). But where there is a deficiency of assets, the executor has no longer any right of retainer(*b*).

419. A sale made *bona fide* by the executor, for a valuable consideration, even with notice of their being assets, will be held valid, so that they cannot be followed by creditors or others, into the hands of the purchaser(*c*). In this respect there is a manifest difference between the case of an ordinary trust, where notice takes away the protection of a *bona fide* purchase from the party, and this peculiar sort of trust, mixed up in some measure with general ownership(*d*). To affect a sale or other transaction of an executor, attempting to bind the assets, so as let in the claims of creditors and others, who are principally interested, there must be some fraud, or collusion, or misconduct, between the parties(*e*).

420. A mere secret intention of the executor to misapply the funds, unknown to the other party dealing with him, or a subsequent unconnected misapplication of them, will not affect the purchaser. He must be cognizant of such intention, and designedly aid or assist in its execution(*f*). But, in the view of courts of equity, there is a broad distinction between cases of a sale or pledge of the testator's assets for a present advance,

(*a*) Story, s. 579 a; Hill *v.* Walker, 4 K. & J. 166; Crooks *v.* Crooks, 4 Gr. 615; Stahlschmidt *v.* Lett, 1 Sm. & G. 415. And see Re Coombs L. R. 1 P. & D. 288.

(*b*) 29 Vic. c. 28, s. 28; Bank of British North America *v.* Mallory, 17 Gr. 106; Doner *v.* Ross, 19 Gr. 231.

(*c*) McLeod *v.* Drummond, 17 Ves. 154, 155, 168; Keane *v.* Roberts, 4 Mad. 357.

(*d*) Mead *v.* Lord Orrery, 3 Atk. 238, 239, 240.

(*e*) Hill *v.* Simpson, 7 Ves. 152; Nugent *v.* Gifford, 1 Atk, 463, cited 4 Bro. Ch. 136, and 17 Ves. 160, 163; Andrews *v.* Wrigley, 4 Bro. C. C. 125; Mead *v.* Lord Orrery, 3 Atk. 235, 238, 239; McLeod *v.* Drummond, 14 Ves. 355; 17 Ves. 154, 168, 169, 170, 171.

(*f*) McLeod *v.* Drummond, 14 Ves. 355; s. c. 17 Ves. 154, 158, 169, 170, 171; Andrews *v.* Wrigley, 4 Bro. C. C. 125; Scott *v.* Tyler, 2 Bro. C. C. 431; 2 Dick. 724; Keane *v.* Roberts, 4 Mad. 357.

and cases of such a sale or pledge for an antecedent debt of the executor(*a*); for, in the latter case, the parties must be generally understood to co-operate in a misapplication of the assets from their proper purpose, unless that inference is repelled by the circumstances(*b*).

421. The general doctrine now maintained by courts of equity, upon this subject, was thus stated in an important case(*c*):—"Every person who acquires personal assets by a breach of trust or a *devastavit* by the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying, or receiving as a pledge for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will or otherwise; because this sale or pledge is held to be *primâ facie* consistent with the duties of an executor. Generally speaking, he does become a party to the breach of trust, by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledge is *primâ facie* inconsistent with the duty of an executor. I preface both of these propositions with the term 'generally speaking,' because they both seem to admit of exceptions." And it may be added, that, whenever there is a misapplication of the personal assets, and the assets or their proceeds can be traced into the hands of any persons affected with notice of such misapplication, there the trust will attach upon the property or proceeds in the hands of such persons, whatever may have been the extent of such misapplication or conversion(*d*).

(*a*) McLeod *v.* Drummond, 14 Ves. 361, 362; s. c. 17 Ves. 154, 155, 158 to 171; Hill *v.* Simpson, 7 Ves. 152.

(*b*) See note to Whale *v.* Booth, 4 Doug. 47, note (66).

(*c*) Keane *v.* Roberts, 4 Mad. 357, 358. See also Ram. on Assets, ch. 37, s. 4, p. 484; Watkins *v.* Cheek, 2 S. & S. 205.

(*d*) Story, s. 581. See Ram on Assets, ch. 37, s. 4, p. 491, 492; Adair *v.* Shaw, 1 S. & L. 261, 262; Holland *v.* Prior, 1 M. & K. 240; Newland v. Champion, 1 Ves. 106; Doran *v.* Simpson, 4 Ves. 651; Alsager *v.* Rowley, 6 Ves. 748; Bickley *v.* Dorrington, West, 169; White *v.* Parnther, 1 Knapp, 179, 226; Troughton *v.* Binkes, 6 Ves. 73.

422. Where a domestic executor or administrator collects assets of the deceased in a foreign country, without any letters of administration taken out, or any actual administration accounted for in such foreign country, and brings them home, they will be treated as personal assets of the deceased, to be administered here under the domestic administration(*a*). But where such assets have been collected abroad, under a foreign administration, and such administration is still open, there seems much difficulty in holding, that the executor or administrator can be called upon to account for such assets under the domestic administration, unless, perhaps, under very peculiar circumstances; since it would constitute no just bar to proceeding under the foreign administration in the courts of the foreign country. And, indeed, probates of wills and letters of administration are not granted in any country in respect to assets generally, but only in respect to such assets as are within the jurisdiction of the country, by which the probate is established, or the administration granted(*b*).

423. Where there are different administrations granted in different countries, those which are in their nature ancillary, are generally held subordinate to the original administration. But each administration is deemed so far independent of the other, that property received under one cannot be sued for under another, although it may, at the moment, be locally situate within the jurisdiction of the latter. Thus, if property is received by a foreign executor or administrator abroad, and afterwards remitted here, an executor or administrator appointed here could not assert a claim to it here, either against the person in whose hands it might happen to be, or against the foreign executor or administrator. The only mode of reaching it, if necessary for the purposes of due administration

(*a*) Dowdale's case, 6 Co. 47, 48; s. c. Cro. Jac. 55; Att.-Gen. *v.* Diamond, 1 Cr. & Jerv. 370; Erving's case, 1 Cr. & J. 151.

(*b*) Story, s. 583; See Story, Con. of Laws, ch. 13, ss. 512 to 519. But see Atty.-Gen. *v.* Diamond, 1 Cr. & Jerv. 370; Erving's case, 1 Cr. & Jerv. 151; 1 Tyrw. 191. As to the powers and obligations of foreign administrators dealing in Canada with foreign assets, and settling claims of Canadian creditors, see Grant *v.* McDonald, 8 Gr. 468.

here, would be to require its transmission or distribution, after all claims against the foreign administration had been ascertained and settled abroad(*a*).

424. In relation to the mode of administering assets by executors and administrators, there are in different countries very different regulations. The priority of debts, the order of payment, the marshalling of assets for this purpose, and, in cases of insolvency, the modes of proof, as well as of distribution, differ in different countries. What rule then is to govern in the marshalling of the assets? The law of the domicile or the law of the *situs*? The established rule now is, that, in regard to creditors, the administration of the assets of deceased persons is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derives his authority to collect them; and not by that of the domicile of the deceased(*b*).

425. Questions often arise also as to particular debts, whether they are properly and ultimately payable out of the personal estate or whether they are chargeable upon the real estate of the deceased. In all such cases, the settled rule now is, that the law of the domicile of the deceased will govern in cases of intestacy; and, in cases of testacy, the intention of the testator(*c*).

426. Every ancillary administration is, upon principles of international law, made subservient to the rights of creditors, legatees, and distributees, in the country where such administration is taken out, although the distribution, as to legatees and distributees or heirs, is governed by the law of the place of the testator's or intestate's domicile. But a most important question often arises: What is to be done as to the residue of the assets, after discharging all the debts and other claims of the deceased, due to persons resident in the country where

(*a*) Story, Con. of Laws, s. 518.
(*b*) Story, Con. of Laws, s. 524.
(*c*) Story, Con. of Laws, s. 528.

the ancillary administration is taken out? Is it to be remitted to the forum of the testator's or intestate's domicile, to be there finally settled, adjusted, and distributed among all the claimants, according to the law of the country of the domicile of the testator or intestate? Or, may creditors, legatees, and distributees of any foreign country come into the courts of equity, or other courts of the country, granting such ancillary administration, and there have all their respective claims adjusted and satisfied, according to the law of the testator's or intestate's domicile, or to any other law? And in cases of insolvency, or other deficiency of assets, what rules are to govern in regard to the rights, preferences, and priorities of different classes of claimants under the laws of different countries, seeking such distribution of the residue?

427. These are questions which have given rise to very ample discussions in various courts in the present age, and they have been thought to be not unattended with difficulty. It seems now, however, to be understood as the general result of the authorities, that courts of equity of the country where the ancillary administration is granted (and other courts, exercising a like jurisdiction in cases of administrations), are not incompetent to act upon such matters, and to decree a final distribution of the assets to and among the various claimants having equities or rights in the funds, whatever may be their domicile, whether it be that of the testator or intestate, or be in some other foreign country. The question, whether the court, entertaining the suit for such a purpose, ought to decree such a distribution, or to remit the property to the forum of the domicile of the party deceased, is treated, not so much as a matter of jurisdiction, as of judicial discretion, dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals, for the purpose of enforcing the rights of all persons, having a title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities,

which may call upon such tribunals for abstinence in the exercise of the jurisdiction(*a*).

428. The courts of equity maintain bills to compel the refunding of legacies paid where there arises a deficiency in the general personalty for the payment of debts. And the courts of equity, in administration suits, will compel the residuary legatee to refund for the purpose of meeting unpaid legacies, even where the legatees are not parties to the suit, they having petitioned to come in(*b*). But where the funds were paid to the residuary legatee, while there remained in the hands of the executor ample funds to meet all prior claims, but which were subsequently wasted, it was held no decree could be made against the residuary legatee. But if the goods had been wasted before the payment made to the residuary legatee, he will be compelled to refund, and in such cases the burden of proof is upon those who call upon the residuary legatee or next of kin to refund money paid to them, to show that the deficiency existed at the time the payment was made(*c*).

CHAPTER X.

MARSHALLING OF SECURITIES.

429. The doctrine of MARSHALLING is not confined to the administration of assets, but it is applied to other cases where the parties are living. Thus it has been laid down, that "if a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the court, in order to relieve the second mortgagee, has directed the first to take his satisfaction out of that estate only which is not in the mortgage

(*a*) Story's Con. of Laws, ch. 13, s. 513, and the cases in note [2], ibid. And see Bent *v.* Young, 9 Sim. 180; The Transatlantic Co. *v.* Pietroni, 6 Jur. N. S. 532; *Re* Blithman, 12 Jur. N. S. 84; L. R. 2 Eq. 23; Hope *v.* Carnegie, L. R. 1 Chan. 320.

(*b*) Prowse *v.* Spurgin, L. R. 5 Eq. 99.

(*c*) Peterson *v.* Peterson, L. R. 3 Eq. 111.

of the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons"(*a*). This seems to be a correct exposition of the law, with this exception, that it is immaterial whether the second mortgagee has notice of the first mortgage or not(*b*).

430. If one of two estates in mortgage is subject to a portion, the person entitled to the portion may, if it be necessary, compel the mortgagee to resort to the other estate, so that the payment of the portion as well as the mortgage may be worked out(*c*). So, where a man, having executed a voluntary settlement of real estate to uses in favor of his children, and covenanted that the estate should remain to those uses and for quiet enjoyment, afterwards mortgaged the settled estate with his own unsettled estate, and died, the children were held entitled to throw the mortgage on the unsettled estate, and as against the legatees, to prove under the covenants against the settlor for the damage they had sustained by the mortgage(*d*).

431. The right to marshall securities is applicable as against a surety to whom, on payment of the debt, they have been assigned. Thus, where there was a mortgage of two funds to A., with a covenant by a surety, followed by a second mortgage of one of the funds to B., B's fund having been exhausted in part payment of A's debt, and his mortgage having been transferred to the surety on payment by him of the balance, it was held that B. had a right to marshall the securities against the surety(*e*). And this doctrine will also be applied in favour of sureties, where the creditor has collateral securities or pledges for his debt(*f*). In such cases, the court will

(*a*) Per Lord Chancellor Hardwicke in Lanoy *v.* Duke of Athol, 2 Atk. 446.
(*b*) Baldwin *v.* Belcher, 3 Dr. & War. 176; Hughes *v.* Williams, 3 Mac. & G. 690; *Re* Cornwall, 2 C. & L. 131; Tidd *v.* Lister, 10 Hare, 157; 3 D. M. & G. 857; *Re* Fox, 5 Ir. Ch. 541; Gibson *v.* Seagrim, 20 Beav. 614. And see also, *Re* Jones, 2 Ir. Ch. 544.
(*c*) Lord Rancliffe *v.* Parkyns, 6 Dow, 216.
(*d*) Hale *v.* Cox, 32 Beav. 118.
(*e*) South *v.* Bloxam, 2 H. & M. 457.
(*f*) Com. Dig. Chan. 4 D. 6; Stirling *v.* Forrester, 3 Bligh, 590, 591.

place the surety exactly in the situation of the creditor, as to such securities or pledges, whenever he is called upon to pay the debt; for it would be against conscience, that the creditor should use the securities or pledges to the prejudice of the sureties, or refuse to them the benefit thereof, in aid of their own responsibility(*a*.)

432. Even where the surety had effected an insurance upon the life of the principal, with his consent, and the principal had died, making the surety his executor, who had received the money upon the policy, to the full amount of the debt; it was held, that so far as it was not required to indemnify the surety, it ought to be applied in payment of the debt(*b*.)

433. Where a policy of life assurance contained a provission that if the assured should die by his own hand, the policy should be void, except to the extent of interest acquired therein by actual assignment by deed for valuable consideration, or as security or indemnity, or by virtue of any legal or equitable lien as security for money, the assured assigned the policy by deed, by way of mortgage, to secure an amount far exceeding the sum assured, the security, including also real estates of considerable value. The assured afterwards died by his own hand. The office paid to the mortgagee the sum assured, and then filed a bill claiming to have the mortgage debt thrown primarily on the real estate comprised in the security, or at least, to have it apportioned between the policy money and the estates according to their value, and to have the whole or the apportioned part of the policy money raised out of these estates and repaid. But it was held that, apart from the question as to the effect of the payment by the office, the

(*a*) Aldrich *v.* Cooper, 8 Ves. 388, 389. See Gammon *v.* Stone, 1 Ves. Sen. 339; Robinson *v.* Wilson, 2 Mad. 569; *Ex parte* Rushforth, 10 Ves. 410, 414; Wright *v.* Morley, 11 Ves. 23; Parsons *v.* Briddock, 2 Vern. 608; *Ex parte* Kendall, 17 Ves. 520; Wright *v.* Simson, 6 Ves. 734; 2 Fonbl. Eq. B. 3, ch. 2, s. 6, note (*i*); Stirling *v.* Forrester, 3 Bligh, 590, 591.

(*b*) Lea *v.* Hinton, 5 D. M. & G. 823. See also Drysdale *v.* Piggott, 22 Beav. 238.

office had no equity against the real estates comprised in the mortgage(*a*).

434. But marshalling will not be enforced to the prejudice of a third party. Thus, where a person, being seised of several estates, and indebted by judgments, settled one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledged other judgments, the subsequent judgment creditors have no equity to compel the prior judgment creditors to resort to the settled estates(*b*).

CHAPTER XI.

LEGACIES.

435. No suit will lie at the common law to recover LEGACIES, unless the executor has assented thereto(*c*). But, in equity, the executor is treated as a trustee for the benefit of the legatees, and, therefore, as a matter of trust, legacies are within the cognizance of courts of equity, whether the executor has assented or not(*d*). The jurisdiction is also maintainable in all cases where an account or discovery, or distribution of the assets is sought, upon general principles. Indeed, Lord Mansfield seems to have thought that the jurisdiction arose as an incident to discovery and account(*e*). In the next place, there is,

(*a*) The Solicitor's General Life Assurance Society *v.* Lamb, 1 H. & M. 716; affirmed on appeal, 2 D. J. & S. 251.

(*b*) Averall *v.* Wade, Ll. & G. t. Sugden 252. And see Barnes *v.* Racster, 1 Y. & C. 401; Bugden *v.* Bignold, 2 Y. & C., 377; Gibson *v.* Seagrim, 20 Beav. 619.

(*c*) Deeks *v.* Strutt, 5 T. R. 690. And see Doe *v.* Gay, 3 East, 120; Paramore *v.* Yardley, Plowd. 539; Young *v.* Holmes, 1 Str: 70; 4 Co. 28 *b.*; Atkins *v.* Hill, Cowp: 284; Hawkes *v.* Saunders, Cowp. 289; Mayor of Southampton *v.* Greaves, 8 T. R. 583.

(*d*) Franco *v.* Alvares, 3 Atk: 346; Farrington *v.* Knightly, 1 P. W. 549, 554; Wind *v.* Jekyl, 1 P. W. 575; Hurst *v.* Beach, 5 Mad. 360; 2 Mad. Pr. Ch: 1, 2.

(*e*) Atkins *v.* Hill, Cowper, 287 2 Mad. Pr. Ch. 1, 2.

in many cases, the want of any adequate or complete remedy in any other court(*a*).

436. In many cases, courts of equity exercise an exclusive jurisdiction in regard to legacies; as, for instance, where the bequest of the legacy involves the execution of trusts, either express or implied; or where the trusts, ingrafted on the bequest, are themselves to be pointed out by the court(*b*).

437. But the beneficial operation of the jurisdiction of courts of equity, in cases of legacies, is even more apparent in some other cases, where the remedies are peculiar to such courts, and are protective of the rights and interests of legatees. Thus, for instance in cases of pecuniary legacies, due and payable at a future day (whether contingent or otherwise)(*c*), courts of equity will compel the executor to give security for the due payment thereof(*d*); or, what is the modern, and perhaps generally the more approved practice, will order the fund to be paid into court, even if there be not any actual waste, or danger of waste, of the estate(*e*).

(*a*) 2 Mad. Pr. Ch. 1, 2, 3; Franco *v.* Alvares, 3 Atk. 346.

(*b*) Farrington *v.* Knightly, 1 P. W. 549; Anon., 1 Atk. 491; Hill *v.* Turner, 1 Atk. 516; Att. Gen. *v.* Pyle, 1 Atk. 435; Story, s. 595. At law, the appointment of an executor is deemed to be a virtual gift to him of all the surplus of the personal estate, after payment of all debts and legacies. But in equity he is considered a mere trustee of such surplus, for the benefit of the next of kin, if, from the nature and circumstances of the will, a presumption arises that the testator did not intend that the executor should take such surplus to his own use. The effect of the doctrine, therefore, is, that the legal right of the executor will prevail, unless there are circumstances which repel that conclusion, Wilson *v.* Ivat, 2 Ves. 165; Bennett *v.* Bachelor, 1 Ves. 67; Dawson *v.* Clarke, 18 Ves. 254; Haynes *v.* Littlefear, 1 S. & S. 496. And see White *v.* Williams, 3 V. & B. 72, 73; Langham *v.* Sandford, 2 Mer. 17; Hurst *v.* Beach, 5 Mad. 360.

(*c*) See Palmer *v.* Mason, 1 Atk. 505; Heath *v.* Perry, 3 Atk. 101, 105. See Ferrand *v.* Prentice, Ambl. 273, note (1); Johnson *v.* De la Ceuze, cited 1 Bro. C. C. 105; Green *v.* Pigott, 1 Bro. C. C. 103, 105; Flight *v.* Cook, 2 Ves. Sen. 619; Gawler *v.* Standerwick, 2 Cox, 15, 18; Carey *v.* Askew, 2 Bro. C. C. 58; Studholme *v.* Hodgson, 3 P. W. 300, 303; Johnson *v.* Mills, 1 Ves. Sen. 282, 283.

(*d*) Rous *v.* Noble, 2 Vern. 249; 1 Eq. Abr. 238, Pl. 22; Duncumban *v.* Stint, 1 Ch. Cas. 121.

(*e*) Story s. 603; Johnson *v.* Mills, 1 Ves. Sen. 282; Ferrand *v.* Prentice, Ambl. 273; s. c. 2 Dick. 568; Phipps *v.* Annesley, 2 Atk. 56; Green *v.* Pigott, 1 Bro. C. C. 104; Webber *v.* Webber, 1 S. & S. 311; Johnson *v.* De la Creuze, 1 Bro. C. C. 105; Strange *v.* Harris, 3 Bro. C. C. 365; Yare *v.* Harrison 2 Cox, 377; Slanning *v.* Style, 3 P. W. 336; Batten *v.* Earnley, 2 P. W. 163; Blake *v.* Blake, 2 S. & L. 26.

438. Another class of cases of the same nature is, where a specific legacy is given to one for life, and after his death to another; there the legatee in remainder was formerly entitled, in all cases, to come into a court of equity, and to have a decree for security from the tenant for life, for the due delivery over of the legacy to the remainder-man. But the modern rule is, not to entertain such a bill, unless there be some allegation and proof of waste; or of danger of waste of the property. Without such ingredients, the remainder-man is only entitled to have an inventory of the property bequeathed to him, so that he may be enabled to identify it; and, when his absolute right accrues, to enforce a due delivery of it(*a*).

439. The question how far a legacy, depending upon intervening estates in the same property, is to be regarded as vested, and when it is to be treated as a mere expectancy, or contingent interest, is one of frequent occurrence in the courts of equity, and one not free from difficulty(*b*). A distinction obtains between a legacy to one for life, and then to such of the children of the *cestui que vie* as shall attain a certain age; and a gift over to the children generally. In the former case, the class is to be determined only when the contingency happens; and in the latter it must be determined at the death of the testator, from which date the will speaks. And all the children then living take a vested interest, not liable to be defeated, even by the death of the child, during the continuance of the intervening estate(*c*). And where the actual division

(*a*) Story s. 604; Bracken *v.* Bentley, 1 Ch. 110; Anon., 2 Freem. 206; Foley *v.* Burnell, 1 Bro. C. C. 279; Slanning *v.* Style, 3 P. W. 335, 336; Hyde *v.* Parrat, 1 P. W. 1; Batten *v.* Earnley, 2 P. W. 163; Leeke *v.* Bennett, 1 Atk. 471; Bill *v.* Kinaston, 2 Atk. 82. See Howe *v.* Earl of Dartmouth, 7 Ves. 137; Randall *v.* Russell, 3 Mer. 193; Mills *v.* Mills, 7 Sim. 501; Fryer *v.* Buttar, 8 Sim. 442; Benn *v.* Dixon, 10 Sim. 636; Cafe *v.* Bent, 5 Hare, 36; Hunt *v.* Scott, 1 D. & Sm. 219; Horne *v.* Horne, 14 Jur. 395; Neville *v.* Fortescue, 16 Sim. 333; Morgan *v.* Morgan, 14 Beav. 27.

(*b*) Smith *v.* Colman, 25 Beav. 216; Edwards *v.* Edwards, 15 Beav. 357; Home *v.* Pillans, 2 M. &. K. 15.

(*c*) Adams *v.* Roharts, 25 Beav. 658, and see Remnant *v.* Hood, 6 Jur, N.S. 1173; White *v.* Baker, 6 Jur. N. S. 591; Pinder *v.* Pinder, 6 Jur. N. S. 489; Chalmers *v.* North, 6 Jur. N. S. 490; Lees *v.* Massey, 6 Jur. N. S. 2. The case of Beck *v.* Burn, 7 Beav. 492, is here doubted, or denied to be law.

is postponed till the termination of the life-estate, for the convenience of the estate, and not to determine who shall be entitled, it does not hinder the estate, given over, from vesting in those entitled, at the death of the testator(*a*).

440. But, where a sum of money is given, to be divided among a class, when the eldest attains twenty-one, whether the gift be vested or contingent, all the children who are born before the period of division are entitled to shares(*b*). The construction is generally in favour of vesting(*c*). If a bequest be made to one, or his heirs, and he die before the testator, the legacy will not lapse, but go to the heir(*d*). But if it be to one, or his personal representative, the legacy will lapse, if he die before the testator. A gift over is allowed to operate notwithstanding the intervening estate may fail, for a reason not named in the will, or probably in the contemplation of the testator(*e*).

441. Legacies are generally said to be of two different kinds, general or specific; a third, however, may be added, in some degree partaking of the properties of the two former—a demonstrative legacy. A legacy is general where it does not amount to a bequest of any particular thing or money, distinguished from all others of the same kind. Thus, if a testator gives A. a diamond ring, or a horse, or $1,000 stock, or $1,000, not referring to any particular diamond ring, horse, stock, or moneys,

(*a*) Leeming *v.* Sherratt, 2 Hare, 14; Leake *v.* Robinson, 2 Mer. 363; Packham *v.* Gregory, 4 Hare, 396; Neatherway *v.* Fry, Kay, 172; Hearn *v.* Baker, 2 K. & J. 383.

(*b*) Mann *v.* Thompson, Kay, 638.

(*c*) Day *v.* Day, Kay, 703. But see Lloyd *v.* Lloyd, 3 K. & J. 20; Gilman *v.* Daunt, 3 K. & J. 48; Bennett's Will, 3 K. & J. 280; Wharton *v.* Barker, 4 K. & J. 483; Maddison *v.* Chapman, 4 K. & J. 709. And see *Re* Arrowsmith, 6 Jur. N. S. 1231; McLachlan *v.* Tait, 6 Jur. N. S. 1269; Whyte *v.* Collins, 6 Jur. N. S. 1281. And see *Re* Davies's Will, 7 Jur. N. S. 118.

(*d*) *Re* Porter's Trust, 4 K. & J. 188: *Re* Wildman's Trust, 7 Jur. N. S 121.

(*e*) Warren *v.* Rudall, 4 K. & J. 603. The cases upon the subject, and especially, Att.-Gen. *v.* Hodgson, 15 Sim. 146, and Philpott *v.* St. George's Hospital, 21 Beav. 134, are thoroughly reviewed. See also Corbett's Trusts, Johns. 591; Penny *v.* Clarke, Johns. 619; Randfield *v.* Randfield, 2 D. & J. 57; 4 Drew. 147; Webster *v.* Parr, 26 Beav. 236.

as distinguished from others, these legacies will be general(*a*). A legacy is specific when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. Thus, if a testator give B. "my diamond ring," "my white horse," "my $1,000 stock," or "$1,000 contained in a particular bag," or "owing to me by C.," in these and like instances the legacies are specific(*b*). A legacy is demonstrative when it is in its nature a general legacy, but there is a particular fund pointed out to satisfy it(*c*). Thus, if a testator gives $1,000 out of his Dominion Stock, the legacy will not be specific, but demonstrative(*d*).

442. Though often a matter of much difficulty, it is of much importance accurately to distinguish these legacies one from the other, because, if after paying debts there is a deficiency of assets for payment of all the legacies, a general legacy will be liable to abate, but a specific legacy will not. On the other hand, a specific legatee is liable to this disadvantage, that if the thing specifically given be adeemed by the testator either aliening or changing it into a different species of property, he will not be entitled to claim anything by way of compensation out of the general personal estate(*e*). But with regard to a demonstrative legacy, it is so far of the nature of a specific legacy, that it will not abate with the general legacies until after the fund out of which it is payable is exhausted, and so far of the nature of a general legacy that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the primary means of paying it(*f*).

(*a*) Hawthorn *v.* Shedden, 3 Sm. & G. 293; Fielding *v.* Preston, 1 D. & J. 438; and see Spooner's Trust, 2 Sim. N. S. 129. As to what would be held general legacies, see Lawson *v.* Stitch, 1 Atk. 507; Hume *v.* Edwards, 3 Atk. 693; Gibbons *v.* Hills, 1 Dick. 324; Hinton *v.* Pinke, 1 P. W. 539; Richards *v.* Richards, 9 Price 226; Apreece *v.* Apreece, 1 V. & B., 364; Edwards *v.* Hall, 11 Hare, 23; Creed *v.* Creed, 11 Cl. & Fin. 508.

(*b*) Lawson *v.* Stitch, 1 Atk. 507; Hinton *v.* Pinke, 1 P. W. 540; Crockat *v.* Crockat, 2 P. W., 164; Pulsford *v.* Hunter, 3 Bro. C. C. 416; Maning *v.* Purcell, 2 D. M. & G. 284; 7 D. M. & G. 55; Larner *v.* Larner, 26 L. J. N. S. Ch. 668; Stephenson *v.* Dowson, 3 Beav. 342; Chester *v.* Urwick, 23 Beav. 402.

(*c*) Ashburner *v.* Macguire, 2 Bro. C. C. 108.

(*d*) Robinson *v.* Geldard, 3 Mac. & G. 735; Sparrow *v.* Josselyn, 16 Beav. 135.

(*e*) 1 Rop. Leg. by White, 191. And see Oliver *v.* Oliver, L. R. 11 Eq. 506.

(*f*) Mullins *v.* Smith, 1 Dr. & Sm. 210; Vickers *v.* Pound, 6 H. L. 885.

443. As a general rule, interest is payable on legacies from the time when they become actually due. With regard to specific legacies, they are considered as severed from the bulk of the testator's property from his death, so that interest is computed on them from the death of the testator; and it is immaterial whether the enjoyment of the principal is postponed by the testator or not(*a*). General legacies, where the testator has fixed no time for their payment, are not payable until a year after his death(*b*). They will, therefore, as a general rule, carry interest only from that time (*c*). But where a testator directs a legacy to be paid before the expiration of twelve months from his death, interest will be due from the time when payment is directed to be made(*d*). And when a legacy is charged upon real property, and no time is fixed for its payment, interest will be due from the testator's death(*e*).

444. In the case of a legacy by a father or mother, or other person *in loco parentis*, to a child, if it is given generally, the court will give interest from the death, to create a provision for its maintenance(*f*). But the exception has not been extended to an adult child(*g*), nor to the case of a child, though not an adult, for whom the parent has provided maintenance out of another fund(*h*). Nor has the exception been extended to a wife(*i*), nor to a natural child(*j*). This exception to the general rule will not be extended to other relatives than chil-

(*a*) Barrington *v.* Tristram, 6 Ves. 345; Clive *v.* Clive, Kay, 600; Bristow *v.* Bristow, 5 Beav. 289.

(*b*) Child *v.* Elsworth, 2 D. M. & G. 679.

(*c*) And see Wood *v.* Penoyre, 13 Ves. 333; Gibson *v.* Bott, 7 Ves. 96; Pearson *v.* Pearson, 1 S. & L. 10; Collyer *v.* Ashburner, 2 D. & Sm. 404; Varley *v.* Winn, 2 K. & J. 700.

(*d*) Lord Londesborough *v.* Somerville, 19 Beav. 295.

(*e*) Maxwell *v.* Wetenall, 2 P. W. 26; Stonehouse *v.* Evelyn, 3 P. W. 254; Spurway *v.* Glynn, 9 Ves. 483.

(*f*) Beckford *v.* Tobin, 1 Ves. Sen. 310; Wilson *v.* Maddison, 2 Y. & C. 372.

(*g*) Raven *v.* Waite, 1 Swan. 553.

(*h*) *Re* Rouse's Estate, 2 Hare, 649; Donovan *v.* Needham, 9 Beav. 164.

(*i*) Lowndes *v.* Lowndes, 15 Ves. 301; Freeman *v.* Simpson, 6 Sim. 75; Milltown *v.* Trench, 4 Cl. & Fin. 276; 11 Bligh, N. R. 1.

(*j*) Beckford *v.* Tobin, 1 Ves. Sen. 310; Lowndes *v.* Lowndes, 15 Ves. 301. But see Newman *v.* Bateson, 3 Swanst. 689; Dowling *v.* Tyrrell, 2 R. & M. 343.

dren, such as grandchildren, or nephews, or nieces, unless the testator has put himself *in loco parentis*(*a*).

445. In the absence of the intention of the testator appearing upon the will, it is presumed that a testator intended legacies to be paid in the currency of the country in which he resided, even though he may charge lands in another country with their payment, in which the currency is different(*b*).

446 A donation *mortis causa*, is a gift of personal property made by the donor in contemplation of the conceived approach of death(*c*), and the gift must be intended to take complete effect only after the donor's decease(*d*). There must be a delivery of the subject of the gift to the donee for his own use (*e*), or upon trust for another person(*f*), or for a particular purpose(*g*). And the donor must not only part with the possession, but also with the dominion over the subject of the gift(*h*).

447. A *donatio mortis causa* differs from a legacy in these respects: (1) It cannot be proved as a testamentary act, for it takes effect as a gift from the delivery by the donor to the donee in his lifetime(*i*). (2) It requires no assent, or other act, on the part of the executor or administrator, to perfect the

(*a*) Houghlin *v.* Harrison, 2 Atk. 330; Butler *v.* Freeman, 3 Atk. 58; Descrambes *v.* Tomkins, 4 Bro. C. C. 149 n; Festing *v.* Allen, 5 Hare, 573; Crickett *v.* Dolby, 3 Ves. 10.

(*b*) Saunders *v.* Drake, 2 Atk. 466; Peirson *v.* Garnett, 2 Bro. C. C. 38; Malcolm *v.* Martin, 3 Bro. C. C. 50; Phipps *v.* Lord Anglesea, 1 P. W. 696; Wallis *v.* Brightwell, 2 P. W. 88, 89; Lansdowne *v.* Lansdowne, 2 Bligh. 92; Noel *v.* Rochefort, 10 Bligh. N. R. 483; 4 Cl. & Fin. 158.

(*c*) Duffield *v.* Elwes, 1 Bligh. N. R. 530; Edwards *v.* Jones, 1 M. & C. 233, 236; Hodges *v.* Hodges, Prec. Ch. 269; Walter *v.* Hodge, 2 Sw. 92, 100. And see Miller *v.* Miller, 3 P. W. 356; Lawson *v.* Lawson, 1 P. W. 441; Blount *v.* Burrow, 1 Ves. 546.

(*d*) Edwards *v.* Jones, 1 M. & C. 233; Tate *v.* Hilbert, 2 Ves. 111. See Gardner *v.* Parker, 3 Mad. 184; Tate *v.* Leithead, Kay, 658, 662; Staniland *v.* Willott, 3 Mac. & G. 694.

(*e*) Tate *v.* Hilbert, 2 Ves. 120. See Blain *v.* Terryberry, 9 Gr. 286.

(*f*) Drury *v.* Smith, 1 P. W. 405; Farquharson *v.* Cave, 2 Coll. 367; Moore *v.* Darton, 4 D. & Sm. 517.

(*g*) Blount *v.* Burrow, 4 Bro. C. C. 71.

(*h*) Reddell *v.* Dobree, 10 Sim. 244; Hawkins *v.* Blewitt, 2 Esp. 664. See Powell *v.* Hillicar, 26 Beav. 261.

(*i*) Thompson *v.* Hodgson, 2 Sw. 777.

title of the donee. It differs from a gift *inter vivos*, in several respects, in which it resembles a legacy. (1) It is ambulatory, incomplete, and revocable, during the donor's lifetime(*a*). (2) It may be made to the wife of the donor(*b*). (3) It is liable to the debts of the donor upon a deficiency of assets(*c*).

448. The question was formerly mooted whether choses in action, bonds, and other incorporeal rights, could pass by a donation *mortis causa*. The doctrine now established is, that not only negotiable notes and bills of exchange, payable to bearer, or indorsed in blank, bank cheques(*d*), and bank-notes, may be the subjects of a *donatio mortis causa*, because they may and do in the ordinary course of business pass by delivery; but that bonds and mortgages may also be the subjects of a *donatio mortis causa*, and pass by the delivery of the deeds and instruments by which they are created(*e*).

449. On the other hand, as there must be a delivery of the thing, or of the instrument which represents it, in order to make a good *donatio mortis causa*, if the thing is incapable of delivery it cannot be the subject of such donation, for there must be a parting with the legal power and dominion over the thing, which is evidenced only by the delivery. Thus, a mere chose in action, not subsisting in any specific instrument, cannot pass by a *donatio mortis causa*. So it has been ruled, that a promissory note or bill of exchange, not payable to bearer, or indorsed in blank, cannot so take effect, inasmuch as no property therein can pass by the delivery of the instrument(*f*), but more recently the gift of an unindorsed promissory note payable to the donor or order was held valid(*g*).

(*a*) Smith *v.* Casen, 1 P. W. 406.

(*b*) Jones *v.* Selby, Prec. Ch. 300; Johnson *v.* Smith, 1 Ves. Sen. 314; Tate *v.* Leithead, Kay, 658.

(*c*) Smith *v.* Casen, 1 P. W. 406; Ward *v.* Turner, 2 Ves. Sen. 434.

(*d*) Bouts *v.* Ellis, 17 Jur. 405.

(*e*) Drury *v.* Smith, 1 P. W. 405; Miller *v.* Miller, 3 P. W. 356. See also Hill *v.* Chapman, 2 Bro. C. C. 612; Jones *v.* Selby, Prec. Ch. 300; Gardner *v.* Parker, 3 Mad. 184; Snelgrove *v.* Bailey, 3 Atk. 214; Duffield *v.* Elwes, 1 Bligh, N. R. 542; Staniland *v.* Willott, 3 Mac. & G. 676; Ward *v.* Turner, 2 Ves. Sen. 441, 442.

(*f*) Miller *v.* Miller, 3 P. W. 356, 358; Ward *v.* Turner, 2 Ves. Sen. 442, 443.

(*g*) Veal *v.* Veal, 6 Jur. N S. 527.

CHAPTER XII.

CONFUSION OF BOUNDARIES.

450 Another head of concurrent jurisdiction arises from the confusion of the boundaries of land, and the confusion or entanglement, of other rights and claims of an analogous nature, calling for the interposition of courts of equity, in order to restore, and ascertain, and fix them.

451. Although the jurisdiction of the court to issue a commission to ascertain boundaries is certainly very ancient(*a*), its origin is by no means free from doubt(*b*). It has been supposed that consent was the ground upon which it was originally exercised(*c*).

452. There are two writs in the register, concerning the adjustment of controverted boundaries, from one of which (in the opinion of Sir William Grant) it is probable that the exercise of this jurisdiction in the Court of Chancery took its commencement. The one is the writ *De Rationabilibus divisis*(*d*), the other is *De Perambulatione faciendâ*(*e*).

453. Sir William Grant further supposes that, the jurisdiction having originated in consent, the next step would probably be, to grant the commission on the application of one party, who showed an equitable ground for obtaining it, such as that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And to its exercise, on such an equitable ground,

(*a*) Mullineux *v.* Mullineux; Pickering *v.* Kempton, Toth. 39; Boteler *v.* Spelman, Rep. t. Finch, 96; Wintle *v.* Carpenter, Rep. t. Finch, 462; Glynn *v.* Scarven, Rep. t. Finch, 239. The Court of Chancery in England has jurisdiction to issue a commission to ascertain boundaries in the Colonies, Tulloch *v.* Hartley, 1 Y. & C. 114. See Penn. *v.* Lord Baltimore, 1 Ves. Sen. 444; Pike *v.* Hoare, 2 Ed. 182; Bayley *v.* Edwards, 3 Swanst. 703.

(*b*) Wake *v.* Conyers, 1 Eden, 337, note; Marquis of Bute *v.* The Glamorganshire Co., 1 Ph. 681; Speer *v.* Crawter, 2 Mer. 418. See Co. Litt. 169 *a*; Hargrave's note 23, vii.

(*c*) Speer *v.* Crawter, 2 Mer. 417.

(*d*) Fitzherb. Nat. Brev. 300 [128]; Regis. Brevium, 157 *b*.

(*e*) Fitzherb. Nat. Brev. 309 [133]; Regis. Brev. 157, and Regula.

no objection has ever been made(*a*), and, it may be added, no just objection can be made(*b*).

454. This account of the origin of the chancery jurisdiction seems highly probable, but however satisfactory it may seem, it can scarcely be said to afford more than a reasonable conjecture, and is not a conclusive proof that such was the actual origin(*c*). It is very certain, that in some cases the Court of Chancery has granted commissions, or directed issues, on no other apparent ground, than that the boundaries of manors were in controversy(*d*). And Lord Northington seems to have assigned a different origin to the jurisdiction from that already suggested, upon one important occasion, at least; namely, that parties originally came into the court for relief, in cases of confusion of boundaries, under the equity of preventing multiplicity of suits(*e*).

455. Whatever may have been the origin of this branch of jurisdiction, it is one which has been watched with a good deal of jealousy by courts of equity of late years; and there seems no inclination to favour it, unless special grounds are laid to sustain it(*f*). The general rule now adopted is, not to entertain jurisdiction, in cases of confusion of boundaries, upon the mere ground that the boundaries are in controversy; unless some equity is superinduced by the act of the parties, as some particular circumstances of fraud, or confusion, where one person has ploughed too near another; or some gross negligence, omission, or misconduct, on the part of persons whose special duty it is to preserve or perpetuate the boundaries(*g*).

(*a*) Speer *v.* Crawter, 2 Meriv. 417.

(*b*) Story, s. 612.

(*c*) It is not improbable that equity which has borrowed so largely from the civil law, may have assumed jurisdiction to settle boundaries from the proceeding in that law, known as *actio finium regundorum*.

(*d*) See Lethulier *v.* Castlemain, 1 Dick. 46; Metcalf *v.* Beckwith, 2 P. W. 376.

(*e*) Wake *v.* Conyers, 1 Ed. 334; 2 Cox, 360.

(*f*) Wake *v.* Conyers, 1 Ed. 331.

(*g*) Wake *v.* Conyers, 1 Ed. 331; 2 Cox, 360; Speer *v.* Crawter, 2 Mer. 418; O'Hara *v.* Strange, 11 Ir. Eq. 262; Ireland *v.* Wilson, 1 Ir. Chan. 623. See Miller *v.* Warmington, 1 J. & W. 484.

456. Where there is an ordinary legal remedy, there is certainly no ground for the interference of courts of equity, unless some peculiar equity supervenes, which a court of common law cannot take notice of or protect. It has been said by Lord Northington, that where there is no legal remedy, it does not therefore follow, that there must be an equitable remedy, unless there is also an equitable right. Where there is a legal right, there must be a legal remedy; and if there is no legal right, in many cases there can be no equitable one(*a*). On this account he dismissed a bill to settle the boundaries between manors, it appearing, that there was no dispute as to the right of soil and freehold, on both sides the boundary marks, (which right was admitted by the bill to be in the defendant,) and that the right of seignory alone, (an incorporeal hereditament,) and not that of the soil, was in dispute(*b*).

457. If the confusion of boundaries has been occasioned not by the negligence of both, but by the fraud of one of the parties, that alone will constitute a sufficient ground for the interference of the court(*c*). And if the fraud is established, the court will by commission ascertain the boundaries if practicable; and, if not practicable, will do justice between the parties by assigning reasonable boundaries, or setting out lands of equal value(*d*). And where a relation exists between the parties, which makes it the duty of one of them to preserve and protect the boundaries, if he permits them to be destroyed, he will, even in the absence of fraud on his part, be compelled to substitute land of equal value, the land and its value being ascertained by commission(*e*). But, even in such

(*a*) Wake *v.* Conyers, 1 Ed. 331.

(*b*) Story, s. 616. And see St. Luke's *v.* St. Leonard's, 1 Bro. C. C. 41.

(*c*) This was according to the opinion of Lord Chief Baron Macdonald, the ground of the decision of the House of Lords in Rouse *v.* Barker, 4 Bro. P. C. 660. See Atkins *v.* Hatton, 2 Anstr. 396.

(*d*) Speer *v.* Crawter, 2 Meriv. 418; Duke of Leeds *v.* Earl of Strafford, 4 Ves. 181; Grierson *v.* Eyre, 9 Ves. 345; Att.-Gen. *v.* Fullerton, 2 V. & B. 263; Willis *v.* Parkinson, 2 Meriv. 507. For form of decree for a commission, in a case of this nature, see Willis *v.* Parkinson, 2 Meriv. 509; Duke of Leeds *v.* Strafford, 4 Ves. 186.

(*e*) Att.-Gen. *v.* Fullerton, 2 V. & B. 264. And see Glynn *v.* Seawar, Rep. t. Finch, 239; Aston *v.* Lord Exeter, 6 Ves. 293; Miller *v.* Warmington, 1 J. & W. 484 Speer *v.* Crawter, 17 Ves. 216; Godfrey *v.* Littel, 1 R. & M. 59; 2 R. & M. 630; Att.-Gen. *v.* Stephens, 6 D. M. & G. 133.

cases, it is further indispensable to aver, and to establish by suitable proofs, that the boundaries, without such assistance, cannot be found(*a*), and that some part of the lands, the boundaries of which are alleged to have been confused, is in the possession of the defendant(*b*). And the relation of the parties, entitling them to the redress, must also be clearly stated(*c*).

458. A bill in equity will lie to ascertain and fix boundaries, when it will prevent a multiplicity of suits. This is an old head of equity jurisdiction; and it has been very properly applied to cases of boundaries(*d*).

459. There are cases of an analagous nature (which constitute the second class of cases, arising from confusion or entanglement of other rights and claims than to lands) where a mischief, otherwise irremediable, arising from confusion of boundaries, has been redressed in courts of equity. Thus, where a rent is chargeable on lands, and the remedy by distress is, by confusion of boundaries or otherwise, become impracticable, the jurisdiction of equity has been most beneficially exerted to adjust the rights and settle the claims of the parties(*e*).

460. One other instance may be mentioned, in which courts of equity administer the most wholesome moral justice, following out the principles of law, and that is, where an agent, by fraud or gross negligence, has confounded his own property with that of his principal, so that they are not distinguishable. In such a case, the whole will be treated in equity as belonging to the principal, so far as it is incapable of being distinguished(*f*).

(*a*) Miller *v.* Warmington, 1 J. & W. 484.

(*b*) Att.-Gen. *v.* Stephens, 6 D. M. & G. 111, 149, overruling s. c. 1 K. & J. 724.

(*c*) Miller *v.* Warmington, 1 J. & W. 472.

(*d*) Wake *v.* Conyers, 1 Ed. 331; 2 Cox, 360; Waring *v.* Hotham, 1 Bro. C. C. 40; Bouverie *v.* Prentice, 1 Bro. C. C. 200; Mayor of York *v.* Pilkington, 1 Atk. 282, 284. See Whaley *v.* Dawson, 2 S. & L. 370.

(*e*) Story, s. 622; Bowman *v.* Yeat, cited 1 Ch. Cas. 145, 146; Duke of Leeds *v.* Powell, 1 Ves. 171, and Belt's Supp. 98; Bouverie *v.* Prentice, 1 Bro. C. C. 200; North *v.* Earl of Strafford, 3 P. W. 148, 149; Duke of Leeds *v.* New Radnor, 2 Bro. C. C. 338, 518; Att.-Gen. *v.* Stephens, 6 D. M. & G. 111.

(*f*) Lupton *v.* White, 15 Ves. 432; Chedworth *v.* Edwards, 8 Ves. 46; Colbourn *v.* Simms, 2 Ha. 554.

CHAPTER XIII.

DOWER.

461. Another head of concurrent equitable jurisdiction is in matters of DOWER. Dower is an estate for life to which a widow is entitled, in the third part of the lands of which her husband was seised, either in deed or in law, at any time during the coverture. Widows are also entitled to dower out of equitable estates, and where the husband had a right of entry(*a*). The jurisdiction of courts of equity, in matters of dower, for the purpose of assisting the widow by a discovery of lands or title-deeds, or for the removing of impediments to her rendering her legal title available at law, has never been doubted(*b*). But the question has been made, how far courts of equity should entertain general jurisdiction to give general relief in those cases where there appears to be no obstacle to her legal remedy(*c*).

462. The result of the various decisions is, that courts of equity now entertain a general concurrent jurisdiction with courts of law in the assignment of dower in all cases(*d*). The ground most commonly suggested for this result is, that the widow is often much embarrassed, in proceeding upon a writ of dower at the common law, to discover the titles of her deceased husband to the estates out of which she claims her dower (the title-deeds being in the hands of heirs, devisees, or trustees); to ascertain the comparative value of different estates; and to obtain a fair assignment of her third part(*e*).

(*a*) Con. Stat. U. C. c. 84, ss. 1, 2; Craig *v.* Templeton, 8 Gr. 483; Leach *v.* Shaw, 8 Gr. 494; McIntosh *v.* Wood, 15 Gr. 92; Thorpe *v.* Richards, 15 Gr. 403. But a widow is not entitled to dower out of unimproved lands, *Re* Tate, 5 U. C. L. J. N. S. 260; Ont. Stat. 32 Vic. c. 7, s. 23.

(*b*) 1 Fonbl. Eq. B. 1, c. 1, s. 3, note [*f*].

(*c*) Huddlestone *v.* Huddlestone, 1 Ch. 38: Park on Dower, 317.

(*d*) Curtis *v.* Curtis, 2 Bro. C. C. 620; Mundy *v.* Mundy, 2 Ves. 122; 4 Bro. C. C. 294. See Park on Dower, 317, 320, 325, 326, 329, 330; Strickland *v.* Strickland, 6 Beav. 77, 81.

(*e*) Story, s. 624.

463. In some cases the remedy for dower in equity seems indispensable. At law, if the tenant dies after judgment, and before damages are assessed, the widow loses her damages. And so, if the widow herself dies before the damages are assessed, her personal representative cannot claim any. But a court of equity will, in such cases, entertain a bill for relief; and decree an account of rents and profits, against the respective representatives of the several persons who may have been in possession of the estate since the death of the husband; provided, at the time of filing the bill, the legal right to damages is not gone(*a*).

464. Dower is highly favoured in equity. And, as has been said, the right that a doweress has to her dower, is not only a legal right, and so adjudged at law, but a doweress has, also, a moral right to be provided for, and have a maintenance and sustenance out of her husband's estate to live upon. She is, therefore, in the care of the law, and a favourite of the law(*b*).

465. So highly favoured is dower, that a bill for a discovery and relief has been maintained, even against a purchaser, for a valuable consideration without notice, who is, perhaps, generally as much favoured as any one in courts of equity(*c*). This decision has been often found fault with, and, in some cases, the doctrine of it denied.

466. A sale of land for taxes under the Assessment Act, destroys the right of the owner's widow to dower(*d*). But her right is not affected by a sale under execution against the

(*a*) Story, s. 625; Park on Dower, 330, 309; Curtis *v.* Curtis, 2 Bro. C. C. 632; Dormer *v.* Fortescue, 3 Atk. 130; Mordaunt *v.* Thorold, 3 Lev. 275; 1 Salk. 255.

(*b*) Dudley *v.* Dudley, Prec. Ch. 244; Banks *v.* Sutton, 2 P. W. 703; Radnor *v.* Vandebendy, 1 Vern. 356; D'Arcy *v.* Blake, 2 S. & L. 389; Mole *v.* Smith, 1 Jac. 496, 497. See Anderson *v.* Pignet, L. R. 8 Chan. 180; 11 Eq. 329. Where property was conveyed to a man under an agreement with the grantee, that the grantor should remain in possession of a portion of the land for life, the widow of the grantee was held not entitled to dower out of his portion during the life of the grantor, Slater *v.* Slater, 17 Gr. 45. And see Hoig *v.* Gordon, 17 Gr. 599; Sills *v.* Lang, 17 Gr. 691.

(*c*) Williams *v.* Lambe, 3 Bro. C. C. 264.

(*d*) Tomlinson *v.* Hill, 5 Gr. 231.

husband(*a*). And as it seems now settled that a plea of purchase for a valuable consideration without notice, is a good plea in all cases against a legal, as well as against an equitable claim, dower cannot constitute a just exception to the rule.

467. In this Province, fewer cases occur in regard to dower, in which the aid of a court of equity is wanted, than in England, from the greater simplicity of titles, the rareness of family settlements, and the general distribution of property among all the descendants, in equal or in nearly equal proportions. Still, cases do occur, in which a resort to equity is found to be highly convenient, and sometimes indispensable. Thus, for instance, if the lands, of which dower is sought, are undivided, the husband being a tenant in common, and a partition, or an account, or a discovery, is necessary, the remedy in equity is peculiarly appropriate and easy. So, where the lands are in the hands of various purchasers; or their relative values are not easily ascertainable; as, for instance, if they have become the site of a flourishing manufacturing establishment; or if the right is affected with numerous or conflicting equities [as where mortgages exist, in which the widow has released dower]; in such cases, the jurisdiction of a court of equity is, perhaps, the only adequate remedy(*b*).

468. A widow is entitled to dower in lands purchased from the crown by her deceased husband, although no patent has issued, and the purchase money has not been all paid(*c*). But she can have dower out of equitable estates only when her husband died seised(*d*). And a widow cannot, unless the husband died seised, recover arrears of dower in equity, any more than she can at law(*e*). And where the annual value of a widow's dower was small, and she resided on the property with her son, the heir, during his life, making no demand of

(*a*) Draper on Dower, 45.
(*b*) Story, s. 632.
(*c*) Craig *v.* Templeton, 8 Gr. 483.
(*d*) Con. Stat. U. C. c. 84, s. 1; Smith *v.* Smith, 3 Gr, 451.
(*e*) Losee *v.* Armstrong, 11 Gr. 517. And as a general rule, a widow is not entitled to costs in equity, unless she made a demand of her dower in writing as required at law.

her dower, a claim for arrears against his estate, after his death was refused(*a*).

469. If timber be cut down upon an estate of which a widow is dowable, before her dower is set out by metes and bounds, she is entitled during her estate to the income arising from one-third of the fund produced by the sale of the severed timber(*b*).

470. A right to dower is not saleable under execution against the lands of a doweress till dower is assigned; she has not either an estate in the land, or even a right of entry, nor does her interest come within the meaning of the words in Con. Stat. U. C. c. 90, s. 5: "A contingent or executory, or a future interest, or a possibility coupled with an interest"(*c*). And, *à fortiori*, the inchoate right of a married woman to dower, is not saleable under an execution against her(*d*). But a widow's title to dower before assignment, may be the subject of sale and conveyance in equity(*e*).

471. Where by a will, provision is made for the testator's widow, which is expressly declared to be in lieu of dower, she cannot claim both her dower and the provision made for her by the will, but must elect which she will take(*f*). And where a testator devised to his wife all his real and personal estate during widowhood, under which she entered upon the real estate and applied to her own use the personal property, she was held bound by the election to take under the will, and having married again, an action for dower brought by her and her second husband was restrained(*g*); the right to dower not being revived on her second marriage(*h*). But the elec-

(*a*) Phillips *v.* Zimmerman, 18 Gr. 224.

(*b*) Bishop *v.* Bishop, 10 L. J. Ch. 302; Dickin *v.* Hamer, 1 Dr. & Sm. 284; Farley *v.* Starling, 18 Gr. 380; Tooke *v.* Annesley, 5 Sim. 235.

(*c*) McAnnany, *v.* Turnbull, 10 Gr. 298.

(*d*) Allen *v.* Edinburgh Life Ass. Co. 19 Gr. 248.

(*e*) Rose *v.* Zimmerman, 3 Gr. 598.

(*f*) Kerr *v.* Leishman, 8 Gr. 435; Becker *v.* Hammond, 12 Gr. 485; Coleman *v.* Glanville, 18 Gr. 42. But see Wetherell *v.* Wetherell, 8 Jur. N. S. 814.

(*g*) Westacot *v.* Cockerline, 13 Gr. 79. And see Walton *v.* Hill, 8 U. C. Q. B., 562.

(*h*) Coleman *v.* Glanville, 18 Gr. 42.

tion must be made, or the acts from which an election is implied done, in the exercise of that deliberate and well considered choice, made with a knowledge of rights and in full view of consequences which is requisite to constitute an election(*a*). And where a widow had enjoyed the provision under the will in ignorance of her right to dower, she was held entitled to elect sixteen years after the testator's death(*b*).

472. Where a party enters into a contract to convey property, although at law his wife's right to dower, is during the life of the vendor, a nominal incumbrance only, the purchaser has a right in equity to compel its removal, or to have specific performance of his contract, with an abatement in the amount of the purchase money, in respect of such incumbrance(*c*).

473. Where a wife joins in a mortgage, and on the death of her husband there are not sufficient assets for the payment of his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors(*d*). And when the husband, after marriage, makes a mortgage, in which the wife joins, she is not entitled, even as against the heir at law, to dower, out of the whole freehold lands of her husband before provision is made for payment of the mortgage debt(*e*). Her right is to have dower to the extent of one-third of the value of the land beyond the incumbrance upon it(*f*).

CHAPTER XIV.

PARTITION.

474. The jurisdiction of courts of equity in cases of PARTI-

(*a*) Coleman *v.* Glanville, 18 Gr. 42. And see Wake *v.* Wake, 1 Ves. 3[illegible]; Reynard *v.* Spence, 4 Beav. 103.

(*b*) Sopwith *v.* Maughan, 30 Beav. 235.

(*c*) Kendrew *v.* Shewan, 4 Gr. 578; Van Norman *v.* Beaupre, 5 Gr. 599.

(*d*) Thorpe *v.* Richards, 15 Gr. 403; White *v.* Bastedo, 15 Gr. 546; Baker *v.* Dawbarn, 19 Gr. 113. Shepard *v.* Shepard, 14 Gr. 176, is now overruled.

(*e*) Jones *v.* Jones, 4 K & J. 361. But see Spyer *v.* Hyatt, 20 Beav. 621.

(*f*) Campbell *v.* Royal Canadian Bank 19 Gr. 343.

TION is, beyond question, very ancient(*a*). Mr. Hargrave has spoken of this jurisdiction, as if it were not only new, but a clear usurpation; yet he admits its existence and practical exercise, as early as the reign of Queen Elizabeth(*b*), a period so remote, that at least one-half of the law, which is at present, by way of distinction, called the common law, and regulates the rights of property, and the operation of contracts, and especially of commercial contracts, has had its origin since that time(*c*).

475. A decree of partition is ordinarily a matter of right, so no difficulty in making partition is allowed to prevail in equity, whatever may be the case at law, as the powers of the court are adequate to a full and just compensatory adjustment(*d*). Nor does it constitute any objection that the partition does not or may not finally conclude the interests of all persons; as, where the partition is asked only by or against a tenant for life, or where there are contingent interests to vest in persons not *in esse*(*e*).

476. In suits for partition, various other equitable rights and claims and adjustments will be made, which are beyond the reach of courts of law. Thus, if improvements have been made by one tenant in common, a suitable compensation will be made him upon the partition, or the property on which the improvements have been made, assigned to him. So courts of equity will assign to the parties respectively such parts of the estate as will best accommodate them, and be of most value

(*a*) 1 Fonbl. Eq. B. 1, ch. 1, s. 3, note (*f*); Miller *v.* Warmington, 1 J. & W. 484. And see Horncastle *v.* Charlesworth, 11 Sim. 315; Jope *v.* Morshead, 6 Beav. 217; Burrell *v.* Dodd, 3 B & P. 378; Bolton *v.* Ward, 4 Ha. 530; Hanbury *v.* Hussey, 14 Beav. 152.

(*b*) Co. Litt. 169 *b*, note.

(*c*) Story, s. 646.

(*d*) Baring *v.* Nash, 1 V. & B. 554; Parker *v.* Gerrard, Ambl. 236; Warner *v.* Baynes, Ambl. 589; Turner *v.* Morgan, 8 Ves. 143; Fitzpatrick *v.* Wilson, 12 Gr. 440. And see Otway-Cave *v.* Otway, L. R. 2 Eq. 725; Bailey *v.* Hobson, L. R. 5 Chan. 180.

(*e*) Story, s. 656; Baring *v.* Nash, 1 V. & B. 551; Wills *v.* Slade, 6 Ves. 498; Gaskell *v.* Gaskell, 6 Sim. 643; Hobson *v.* Sherwood, 4 Beav. 184; Heaton *v.* Dearden, 16 Beav. 147; and see Evans *v.* Bagshaw, L. R. 5 Chan. 340; Fall *v.* Elkins, 9 W R. 861; Watkins *v.* Williams, 3 Mac. & G. 622.

to them with reference to their respective situations, in relation to the property before the partition(*a*). For in all cases of partition, a court of equity does not act merely in a ministerial character, and in obedience to the call of the parties, who have a right to the partition; but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex æquo et bono*, according to its own notions of general justice and equity between the parties. It will, therefore, adjust all the equitable rights of the parties interested in the estate(*b*).

477. And courts of equity, in making these adjustments, do not confine themselves to the mere legal rights of the original tenants in common, but have regard to the legal and equitable rights of all other parties interested in the estate, which have been derived from any of the original tenants in common; and will, if necessary for this purpose, direct a distinct partition of each of several portions of the estate, in which the derivative alienees have a distinct interest, in order to protect that interest(*c*).

478. In equity, too, where there are divers parcels of lands, messuages, and houses, partition need not be made of each estate separately, so as to give to each party his moiety or other portion in every estate. But the whole of one estate may be allotted to one, and the whole of another estate to the other, provided that his equal share is allotted to each(*d*). But it is obvious, that, at law, such a partition can rarely be conveniently made, because the court cannot decree compen-

(*a*) Story *v.* Johnson, 1 Y. & C. Ex. 538; 2 Y. & C. Ex. 586.

(*b*) Story, s. 656 b. Where one tenant in common seeks an account against his co-tenant, it is necessary to show exclusion by the tenant in possession; Henderson *v.* Eason, 17 Q. B. 701; Griffies *v.* Griffies, 8 L. T. N. S. 758; and see Tyson *v.* Fairclough, 2 S. & S. 142; Sandford *v.* Ballard, 33 Beav. 401. But where the one who has been in occupation makes a claim for repairs and improvements, he must account for his occupation; Teasdale *v.* Sanderson, 33 Beav. 534; Rice *v.* George, 20 Gr. 221.

(*c*) Story, s. 656 c.; Story *v.* Johnson, 1 Y. & C. Ex. 538; 2 Y. & C. Ex. 586. And see *arguendo* in Earl of Clarendon *v.* Hornby, 1 P. W. 446, 447.

(*d*) Earl of Clarendon *v.* Hornby, 1 P. W. 445, 447; Peers *v.* Needham, 19 Beav. 316; Watson *v.* Duke of Northumberland, 11 Ves. 162; Lister *v.* Lister, 3 Y. & C. 540.

sation, so as to make up for any inequality, which must ordinarily occur in the allotment of different estates to each party. And where the estate is of such a nature that it cannot be divided without prejudice to the owners, the court may order it to be sold(*a*).

479. Formerly it was the practice where an infant was interested, to give him a day to show cause against the decree, on attaining twenty-one(*b*). This, however, is not now necessary in this Province, as the Statute(*c*) provides that any partition or sale made by the court shall be as effectual for the apportioning or conveying away of the estate or interest of any married woman, infant or lunatic, party to the proceedings by which the sale or partition is made or declared, as of any person competent to act for himself.

480. In suits between joint owners for partition or sale, the costs are borne by the parties in proportion to their respective interests in the property, except that in the case of partition, the court, if it sees fit, may give no costs to either party up to the hearing(*d*). The costs in such suits are as in other suits, party and party costs; and where any of the parties are not *sui juris*, costs as between solicitor and client are not decreed even by consent(*e*).

CHAPTER XV.

MATTERS OF RENT.

481. ANOTHER head of concurrent jurisdiction resulting from the imperfection of the remedy at law is in the case of

(*a*) Bennett *v.* Bennett, 8 Gr. 446.

(*b*) Brook *v.* Hertford, 2 P. W. 518; Tuckfield *v.* Buller, 1 Dick. 240; Thomas *v.* Gyles, 2 Vern. 232; Att.-Gen *v.* Hamilton, 1 Mad. 214. And see Bowra *v.* Wright, 4 D. & Sm. 265.

(*c*) Con. Stat. U. C. c. 12 s. 47.

(*d*) Cartwright *v.* Diehl, 13 Gr. 339; Leonard *v.* Jarvis, 1 Ch. Cham. R. 24.

(*e*) Harkness *v.* Conway, 12 Gr. 449. And see as to costs, Landell *v.* Baker, L. R. 6 Eq. 268; Osborn *v.* Osborn, L. R. 6 Eq. 338.

RENTS. If the deeds are lost, by which a rent is created, so that it is uncertain what kind of rent it was(*a*); or if, by reason of a confusion of boundaries, or otherwise, the lands out of which it issues cannot be exactly ascertained, courts of equity will interfere(*b*). So, if the remedy for the rent has become difficult or doubtful at law; or if there is an apparent perplexity and uncertainty as to the title, or as to the extent of the responsibility of the party, from whom it is sought; in all such cases, courts of equity will maintain jurisdiction, and upon a due ascertainment of the right, will decree the rent(*c*).

482. If a lease of an incorporeal thing is assigned, and the assignee enjoys it, he will be decreed, in equity, to pay the rent, although not bound at law(*d*). So, if an assignee of a term, rendering rent, assigns over, the lessor will be entitled to relief in equity for the rent against the first assignee, so long as he held the land, although he may have no remedy at law for these arrears(*e*).

483. Although a grantee of a rent has not a remedy in equity merely for the want of a distress, yet, if the want of such distress be caused by the fraud or other default of the tenant, he will be relieved in equity(*f*). So, if a rent is settled upon a woman by way of jointure, but she has no power of distress or other remedy at law, payment of the rent will be decreed, in equity, according to the intent of the conveyance(*g*).

(*a*) Collet *v.* Jacques, 1 Ch. Cas. 120; Cocks *v.* Foley, 1 Vern. 359; Duke of Leeds, *v.* New Radnor, 2 Bro. C. C. 338, 518, 519; Holder *v.* Chambury, 3 P. W. 256.

(*b*) Davy *v.* Davy, 1 Ch. Cas. 146, 147; Cocks *v.* Foley, 1 Vern. 359; North *v.* Earl of Strafford, 3 P. W 148; Heider *v.* Chambury, 3 P. W. 256; Duke of Bridgewater *v.* Edwards, 6 Bro. P. C. 368.

(*c*) Story, s. 684; Benson *v.* Baldwyn, 1 Atk. 598. See also Collet *v.* Jacques, 1 Ch. Cas. 120; Thorndike *v.* Collington, 1 Ch. Cas. 79.

(*d*) Com. Dig. Chan. 4 N. 1, *Rent*, City of London, *v.* Richmond, 2 Vern. 423; 1 Bro. P. C. 516.

(*e*) Treackle *v.* Coke, 1 Vern. 165; Valliant *v.* Dodemede, 2 Atk. 546, 548; Eaton College *v.* Beauchamp, 1 Ch. Cas. 121; Clavering *v.* Westley, 3 P. W. 402. But see Walters *v.* Northern Coal Mining Company, 5 D. M. & G. 629, 646. See also Cox *v.* Bishop, 8 D. M. & G. 815; Wright *v.* Pitt, L. R. 12 Eq. 408.

(*f*) Davy *v.* Davy, 1 Ch. Cas. 144, 147; Ferris *v.* Newby, cited 1 Ch. Cas. 147; Ferrers *v.* Tanner, cited 3 Ch. Cas. 91.

(*g*) Plunket *v.* Brereton, 1 Rep. Chan. 5; Champernoon *v.* Gubbs, 1 Vern, 359.

484. This jurisdiction, in matters of rent, is asserted upon the general principle, that where there is a right, there ought to be a remedy, and, if the law gives none, it ought to be administered in equity. This principle is of frequent application in equity, still it is not to be understood as of universal application, for there are limitations upon it. An obvious exception is, where a man becomes remediless at law from his own negligence. So, if he should destroy his own remedy to distrain for rent, and debt would not lie for the arrears of rent, he would not be relievable in equity(*a*).

485. Courts of equity have, in some cases, carried their remedial justice farther in aid of parties entitled to rent. It is plain enough, that they may well give relief where a bill for discovery and relief is filed, and the discovery is essential to the plaintiff's case, and the defendant admits the right of the plaintiff to the rent, for, in such a case the relief may well be held to be consequent upon the discovery. But, where no special ground of this sort has been stated in the bill, and where, upon the circumstances, there might well have been a remedy at law, courts of equity have in some cases gone on to decree the rent, when the defendant has by his answer admitted the plaintiff's right, and no exception has been taken to the jurisdiction by demurrer or by answer, but simply at the hearing(*b*).

486. These latter cases seem to stand upon grounds, which, if not questionable, may at least be deemed anomalous. The general doctrine of courts of equity certainly is, that, where the party entitled to rent, has a complete remedy at law, either by an action or by distress, no suit will be entertained in equity for his relief(*c*); and the cases, in which a suit in equity is commonly entertained, are of the kind above mentioned,

(*a*) Story, s. 684 a; 1 Fonbl. Eq. B. 1, ch. 3, s. 3, note (*f*); Vincent *v.* Beverlye, Noy, 82; 1 Roll. Abridg. 375, Pl. 3.

(*b*) Story, s. 684 b; Duke of Leeds *v.* New Radnor, 2 Bro. C. C. 338, 518; North *v.* Earl of Strafford, 3 P. W. 148; Holder *v.* Chambury, 3 P. W. 256.

(*c*) Palmer *v.* Wettenhal, 1 Ch. Cas. 184; Champernoon *v.* Gubbs, 2 Vern. 359; Fairfax *v.* Derby, 2 Vern. 613; Holder *v.* Chambury, 3 P. W. 256; Bouverie *v* Prentice. 1 Bro. C. C. 200.

namely, such as stand upon some peculiar equity between the parties; or where the remedy at law is gone without laches; or where it is inadequate or doubtful. It is not enough to show that the remedy in equity may be more beneficial, if the remedy at law is complete and adequate(*a*); or, even to show, that the remedy at law by distress is gone, if there be no fraud or default in the tenant(*b*).

487. But, in cases of rent, where courts of equity do interfere, they do not grant a remedy beyond what, by analogy to the law, ought to be granted. As, for instance, if an annuity be granted out of a rectory, and charged thereon, and the glebe be worth less per annum than the annuity, courts of equity will make the whole rectory, and not merely the glebe, liable for the annuity. But they will not extend the remedy to the tithes, they not being by law liable to a distress(*c*). So, if a rent be charged on land only, the party, who comes into possession of it will not be personally charged with the payment of it, unless there be some fraud on his part to remove the stock, or he do some other thing to evade the right of distress(*d*).

488. The beneficial effect of this jurisdiction in equity may be further illustrated by reference to the doctrine at law in cases of derivative titles under leases. It is well known, that although a derivative lessee, or under-tenant, is liable to be distrained for rent, during his possession; yet, he is not liable to be sued for rent on the covenants of the lease; there being no privity of contract between him and the lessor(*e*). But suppose the case to be, that the original lessee is insolvent, and unable to pay the rent; the question would then arise, whether the under lessee should be permitted to enjoy the profits and possession of the estate, without accounting for the rent

(*a*) Com. Dig. Chan. 4 N, 3, *Rent;* Att.-Gen. *v.* Mayor of Coventry, 2 Vern. 713.

(*b*) Story, s. 684 c; Davy *v.* Davy, 1 Ch. Cas. 144, 147; Champernoon *v.* Gubbs, 2 Vern. 359; Duke of Bolton *v.* Deane, Prec. Ch. 516.

(*c*) Thorndike *v.* Collington, 1 Ch. Cas. 79.

(*d*) Story, s. 685; Palmer *v.* Wettenhal, 1 Ch. Cas. 184; Davy *v.* Davy, 1 Ch. Cas. 144.

(*e*) Halford *v.* Hetch, 1 Doug. 183.

to the original lessor. Undoubtedly there would be no remedy at law. But it is understood, that, in such a case, courts of equity would relieve the lessor; and would direct a payment of the rent to the lessor, upon a bill making the original lessee, and the under-tenant parties. For, if the original lessee were compelled to pay the rent, he would have a remedy over against the under-tenant. And besides, in the eyes of a court of equity, the rent seems properly to be a trust or charge upon the estate; and the lessor is bound, at least, in conscience, not to take the profits without a due discharge of the rent out of them(*a*).

CHAPTER XVI.

PARTNERSHIP.

489. In cases of partnership, where a remedy at law actually exists, it is often found to be very imperfect, inconvenient, and circuitous. But in a very great variety of cases, there is, in fact, no remedy at all at law, to meet the exigency of the case. Where a discovery, an account, a contribution, an injunction, or a dissolution is sought in cases of partnership, or even where a due enforcement of partnership rights, duties, and credits is required, the remedial justice administered by courts of equity is far more complete, extensive, and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner, where no redress whatsoever, or very imperfect redress, could be obtained at law.

490. Courts of equity will decree a specific performance of a contract to enter into a partnership for a fixed and definite period of time, and to furnish a share of the capital stock, which a court of law is incapable of doing(*b*). But it will not

(*a*) Story, s. 687. See Goddard *v.* Keate, 1 Vern. 87.

(*b*) Anon. 2 Ves. Sen. 629, 630; Hercy *v.* Birch, 9 Ves. 357; Buxton *v.* Lister, 3 Atk. 383, Hibbert *v.* Hibbert, cited in Coll. on Part. B. 2, ch. 2, s. 2, p. 197; Crawshay *v.* Maule, 1 Swanst. 511, 512, note; Peacock *v.* Peacock, 16 Ves. 49. But see Sichel *v.* Mosenthal, 30 Beav. 371.

do so where no term has been fixed, for such decree would be useless, when either of the partners might dissolve the partnership immediately afterwards(*a*).

491. After the commencement, and during the continuance of the partnership, courts of equity will, in many cases, interpose to decree a specific performance of other agreements in the articles of partnership. If, for instance, there be an agreement to insert the name of a partner in the firm name, so as to clothe him publicly with all the rights of acting for the partnership, and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name, courts of equity will grant a specific relief, by an injunction against the use of any other firm name, not including his.

492. In such cases, the remedy is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental, or trivial omission(*b*). So, where there is an agreement not to raise money in the name, or on the credit of the firm, for the private use of any one partner, courts of equity will, from the manifest danger of injury to the firm, interpose by injunction to stop such an abuse of the credit of the firm. So, where there is an agreement by the partners, not to engage in any other business, courts of equity will act by injunction to enforce it; and, if profits have been made by any partner, in violation of such an agreement, in any other business, the profits will be decreed to belong to the partnership(*c*). So, if it is agreed that upon the

(*a*) Hercy *v.* Birch, 9 Ves. 357. And see Featherstonhaugh *v.* Turner, 25 Beav. 382; Astle *v.* Wright, 23 Beav. 77. As to specific performance of contracts in their nature revocable, see Wheeler *v.* Trotter, 3 Swanst. 174, note; Sheffield Gas Co. *v.* Harrison, 17 Beav. 294; Stocker *v.* Wedderburn, 3 K. &. J. 393; Scott *v.* Rayment, L. R. 7 Eq. 112.

(*b*) Marshall *v.* Colman, 2 J. & W. 266, 269. See Smith *v.* Jeyes, 4 Beav. 503 Cofton *v.* Horner, 5 Price, 537; Anderson *v.* Anderson, 25 Beav. 190. And see Warder, *v.* Stilwell, 3 Jur. N. S. 9.

(*c*) See Somerville *v.* Mackay, 16 Ves. 382, 387, 389. See Lock *v.* Lynam, 4 Ir. Ch. 188.

dissolution of a partnership, a certain partnership book shall belong to one of the partners, and the other shall have a copy of it, courts of equity will decree a specific performance(*a*).

493. Courts of equity even go farther, and, in case of a partnership existing during the pleasure of the parties, with no time fixed for its renunciation, will interfere (as it should seem) to qualify or restrain that renunciation, unless it is done under fair and reasonable circumstances; for, if a sudden dissolution is about to be made, in ill faith, and will work irreparable injury, courts of equity will, upon their ordinary jurisdiction to prevent irreparable mischief, grant an injunction against such a dissolution(*b*).

494. Courts of equity will also interfere, by way of injunction, to prevent a partner, during the continuation of the partnership, from doing any acts injurious thereto, as by signing or endorsing notes to the injury of the partnership, or by driving away customers, or by violating the rights of the other parties, or his duty to them, even when no dissolution is contemplated(*c*).

495. But it is not to be inferred, that equity will, in all cases, interfere to enforce a specific performance of partnership articles. Where the remedy at law is entirely adequate, no relief will be granted in equity; and where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of any disputes, to refer the same to arbitrators, courts of equity will not, any more than courts of law, interfere to enforce that agreement, but

(*a*) Story, s. 667; Lingen *v.* Simpson, 1 S. & S. 600; Richardson *v.* Bank of England, 4 M. & C. 165, 172, 173; Taylor *v.* Davis, 3 Beav. 388 note; Greatrex *v.* Greatrex, 1 D. & Sm. 692; Morison *v.* Moat, 9 Ha. 241; Marshall *v.* Watson, 25 Beav. 501.

(*b*) Story, s. 661. See Chavany *v.* Van Sommer, cited 1 Swanst. 511, 512, in a note. See Blisset *v.* Daniel, 10 Hare, 493.

(*c*) Story, s. 669. See Charlton *v.* Poulter, 19 Ves. 148 *n*; Goodman *v.* Whitcomb, 1 J. & W. 589; England *v.* Curling, 8 Beav. 129; Hall *v.* Hall, 12 Beav. 414; Miles *v.* Thomas, 9 Sim. 606; Marshall *v.* Watson, 25 Beav. 501.

will leave the parties to their own good pleasure in regard to such agreements(*a*).

496. A partnership may be dissolved by operation of law. The principal events on which the partnership is determined by operation of law seem to be, the death of one of the partners, unless there be an express stipulation to the contrary(*b*); by the bankruptcy of all or one of the partners(*c*); by the conviction of any one of them for felony(*d*); or by a general assignment by one or more of the partners, whether the partnership be determinable at will, or, it seems, even where it is for a definite period(*e*). To this may be added, any event which makes either the partnership itself, or the object for which it was formed, illegal(*f*).

497. By mutual agreement of all the partners, the partnership, though for an unexpired term, may be put an end to(*g*). Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it any moment he pleases, and the partnership will then be deemed to continue only so far as it may be necessary for the purpose of winding up its then pending affairs(*h*).

498. A partnership may also expire by the efflux of the time fixed upon by the partners for the limit of its duration(*i*). But in the case of a partnership for a term, if after the term, the

(*a*) Street *v.* Rigby, 6 Ves. 815, 818; Thompson *v.* Charnock, 8 T. R. 139; Waters *v.* Taylor, 15 Ves. 10; Wellington *v.* Mackintosh, 2 Atk. 569. See Agar *v.* Macklew, 2 S. & S. 418; Darbey *v.* Whitaker, 4 Drew. 134; Jackson *v.* Jackson, 1 Sm. & G. 184; Dinham *v.* Bradford, L. R. 5 Chan. 519; Scott *v.* Avery, 8 Exch. 487; 5 H. L. 811; Livingston *v.* Ralli, 5 E. & B. 132; Russell *v.* Pelligrini, 6 E. & B. 1020; Cooke *v.* Cooke, L. R. 4 Eq. 77; Horton *v.* Sayer, 4 H. & N. 643; Wallis *v.* Hirsch, 1 C. B. N. S. 316; Scott *v.* Corporation of Liverpool, 3 D. & J. 334; Elliott *v.* Royal Exch. Ass. Co., L. R. 2 Ex. 237; Lee *v.* Page, 30 L. J. N. S. Ch. 857.

(*b*) Gilespie *v.* Hamilton, 3 Mad. 251; Crawshay *v.* Maule, 1 Sw. 495; and see Crosbie *v.* Guion, 23 Beav. 518.

(*c*) Barker *v.* Goodair, 11 Ves. 83, 86; Crawshay *v.* Collins, 15 Ves. 228.

(*d*) 2 Black. Com. 409.

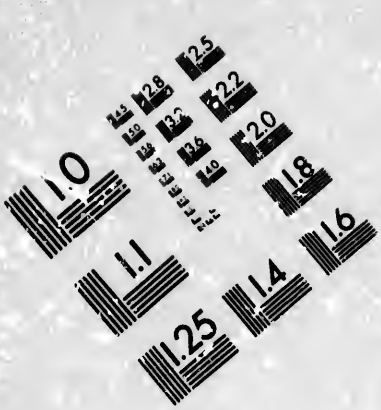
(*e*) Heath *v.* Sansom, 4 B & Ad. 172; Nerot *v.* Burnand, 4 Russ. 247.

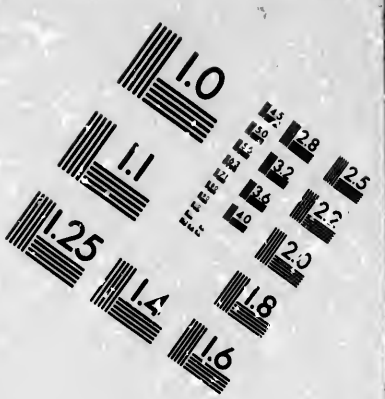
(*f*) Esposito *v.* Bowden, 7 El. & Bl. 763, 785.

(*g*) Hall *v.* Hall, 12 Beav. 414.

(*h*) Peacock *v.* Peacock, 16 Ves. 50.

(*i*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298.





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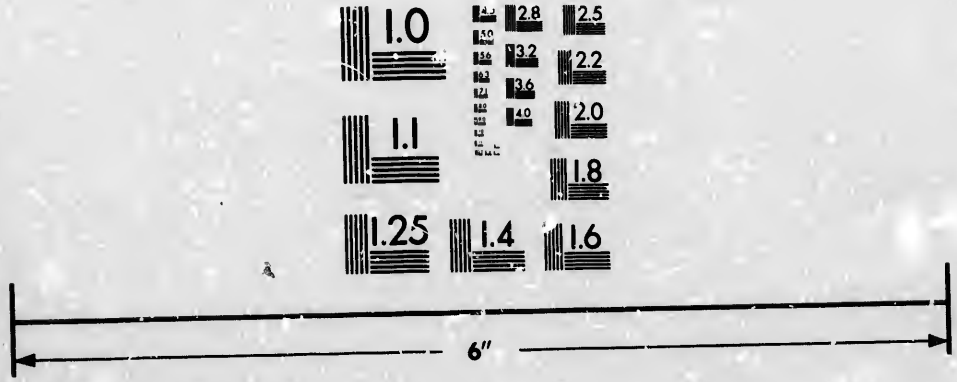

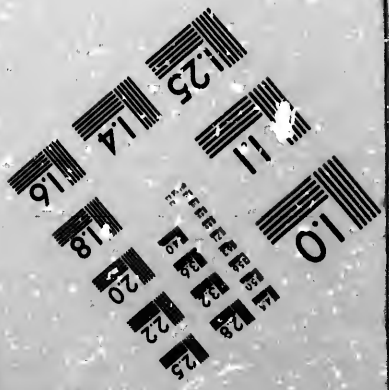

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business be carried on as before, instead of being wound up according to the terms of the articles, or by sale as required by law in the absence of special provision, the partnership will continue, and will be deemed a partnership at will upon the terms of the original partnership, so far as those terms are applicable(*a*).

499. A court of equity will in many cases decree a dissolution at the instance of a partner, even when he cannot by his own act dissolve the partnership; and where a partnership originated in fraud, misrepresentation, or oppression, it may be dissolved from its commencement(*b*). If one partner misconducts himself in reference to partnership matters, acting in breach of the trust and confidence between the partners, this will be a ground for dissolution(*c*). So the court will decree a dissolution if there have been continual breaches of the partnership contract by one of the parties, as if he has persisted in carrying on the business in a manner totally different from that agreed on(*d*). But trifling faults and misbehaviour, which do not go to the substance of the contract, do not constitute a sufficient ground to justify a decree for a dissolution; there must be a substantial failure in the performance of the agreement(*e*).

500. If a partner who ought to attend to the business of the partnership wilfully and permanently absents himself from it, or becomes so engrossed in his private affairs as to be unable to attend to it, this would seem, independently of agreement, to be a ground for dissolution(*f*). But the court will not dissolve a partnership on account of the disagreement, or incompatibility of temper of the partners, where there has been no

(*a*) Parsons *v.* Hayward, 31 Beav. 199.

(*b*) Rawlins *v.* Wickham, 1 Giff. 355; Hue *v.* Richards, 2 Beav. 305.

(*c*) Smith *v.* Jeyes, 4 Beav. 503; Harrison *v.* Tennant, 21 Beav. 482. And see Marshall *v.* Colman, 2 J. & W. 300; Goodman *v.* Whitcomb, 1 J. & W. 594; Norway Rowe, 19 Ves. 148; Master *v.* Kirton, 3 Ves. 74; Waters *v.* Taylor, 2 V. & B. 304; Loscombe *v.* Russell, 4 Sim. 8; Essell *v.* Hayward, 6 Jur. N. S. 690.

(*d*) Waters *v.* Taylor, 2 V. & B. 299; and see Newton *v.* Doran, 1 Gr. 590.

(*e*) Goodman *v.* Whitcomb, 1 J. & W. 592; Wray *v.* Hutchinson, 2 M. & K. 235; Anderson *v.* Anderson, 25 Beav. 190; Marshall *v.* Watson, 25 Beav. 501.

(*f*) Harrison *v.* Tennant, 21 Beav. 482; Smith *v.* Mules, 9 Hare, 556.

breach of the contract(*a*). If, however, the disagreements are so great as to render it impossible to carry on the business, all mutual confidence being destroyed, there cannot be a doubt that the court will dissolve the partnership(*b*).

501. A dissolution will also be decreed whenever a partner, who is to contribute his skill and industry in carrying on the business, or who has a right to a voice in the partnership, becomes permanently insane(*c*). Insanity of a partner is not, however, in the absence of agreement, *ipso facto*, a dissolution, but is only a ground for dissolution by decree of the court (*d*).

502. Where a dissolution has taken place, an account will not only be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business, and make sale of the partnership property, so that a final distribution may be made of the partnership effects(*e*); and if it is deemed expedient and proper, the court will restrain the partners from collecting the debts, or disposing of the property of the concern, and will direct the moneys of the firm received by any of them, to be paid into court(*f*).

(*a*) Goodman *v.* Whitcomb, 1 J. & W. 589, 592; Jauncey *v.* Knowles, 29 L. J. Ch. 95.

(*b*) Baxter *v.* West, 1 Dr. & Sm. 173; Watney *v.* Wells, 30 Beav. 56; Leary *v.* Shout, 33 Beav. 582.

(*c*) Waters v. Taylor, 2 V. & B. 303; Patey *v.* Patey, 5 L. J. N. S. Ch. 198; Rowlands *v.* Evans, 30 Beav. 302.

(*d*) Jones *v.* Noy, 2 M. & K. 125. In a late case (Anon. 2 K. & J. 441), the following propositions were established:—1. That actual insanity of a partner is not in itself a dissolution of the partnership, but there must be a decree of the dissolution. 2. That such a decree notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made in a disputed case, without further inquiry, whether, at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members according to the articles of partnership. And it would seem that when the party is shown to have once been in the state above detailed, the affirmative of the issue is properly thrown upon him. 3. That insanity existing when the relief is sought, with the apparent probability of its continuance, is good ground to decree a dissolution. See also Kirby *v.* Carr, 3 Y. & C. 184; Sadler *v.* Lee, 6 Beav. 324; Besch *v.* Frolich, 1 Ph. 172; Leaf *v.* Coles, 1 D. M. & G. 174; Bagshaw *v.* Parker, 10 Beav. 532.

(*e*) Crawshay *v.* Maule, 1 Sw. 506, 523; Peacock *v.* Peacock, 16 Ves. 57; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 308; Crawshay *v.* Collins, 15 Ves. 218; Wilson *v.* Greenwood, 1 Sw. 471. As to the method of taking partnership accounts, see Davidson *v.* Thirkell, 3 Gr. 330.

(*f*) Foster *v.* Donald, 1 J. & W. 252.

503. But the court will not appoint a receiver, or manager, at the instance of one of the partners, in a suit which does not seek to dissolve the partnership; nor in one which does, upon an interlocutory application, and merely upon evidence that the partners do not co-operate in the management of the business. To justify such an appointment, it must be shown, that one partner has interfered so as to prevent the business being carried on(*a*).

504. The old rule, that a decree for an account between partners will not be made, save with a view to the final determination of all questions and cross claims between them, and to a dissolution of the partnership, must be regarded as no longer in force(*b*). There are three classes of cases in which suits for an account, without a dissolution, are more particularly common. First, where one partner has sought to withhold from his co-partner the profit arising from some secret transaction(*c*). Second, where one partner has sought to exclude or expel his co-partner, or to drive him to a dissolution(*d*). Third, where the partnership has proved a failure, and a limited account will result in justice to all parties(*e*).

505. A partnership, though in a certain sense expiring on any of the events that have been mentioned, such as death, or effluxion of time, does not expire for all purposes, for all the partners are interested in the business until all the affairs of the partnership have been finally settled by all(*f*). Hence, the partners thus continuing a business are accountable to the rest, not merely for the ordinary profits, but for all the advan-

(*a*) Loscombe *v.* Russell, 4 Sim. 8; Fairthorne *v.* Weston, 3 Hare, 387; Roberts *v.* Eberhardt, Kay, 148; Sheppard *v.* Oxenford, 1 K. & J. 491.

(*b*) Lindley on Partnership, 806.

(*c*) Hic' ens *v.* Congreve, 1 R. & M. 150; Fawcett *v.* Whitehouse, 1 R. & M. 132; The Society of Practical Knowledge *v.* Abbott; 2 Beav. 559; Beck *v.* Kantorowicz, 3 K. & J. 230.

(*d*) Chapple *v.* Cadell, Jac. 537; Richards *v.* Davies, 2 R. & M. 347. But see Forman *v.* Homfray, 2 V. & B. 329; Loscombe *v.* Russell, 4 Sim. 8.

(*e*) Wallworth *v.* Holt, 4 M. & C. 619; Apperly *v.* Page, 1 Ph. 779; Wilson *v.* Stanhope, 2 Coll. 629; Cooper *v.* Webb, 15 Sim. 454; Clements *v.* Bowes, 17 Sim. 167; Shephard *v.* Oxenford, 1 K. & J. 491.

(*f*) Crawshay *v.* Collins, 2 Russ. 344.

tages which they have obtained in the course of the business(a).

506. There are other considerations, which make a resort to a court of equity, instead of a court of law, not only a more convenient, but even an indispensable instrument for the purposes of justice. Thus, real estate may be bought and held for the purposes of the partnership, and really be a part of the stock in trade. The conveyance in such a case may be in the name of one, for the benefit of all the partners; or in the name of all, as tenants in common, or as joint tenants. In case of the death of a partner, by which a dissolution takes place, the real estate may thus become severed at law from the partnership funds, and vest in the surviving partner exclusively, or in the heirs of the deceased partner, in common with the survivor, according to the particular circumstances of the case.

507. But in a court of equity, in such a case, although not at law, the real estate is treated as personalty, to all intents and purposes, whatever may be the form of the conveyance (b), and subject to all the equitable rights and liens of the partners, and their creditors, which would apply to it if it were personal estate, and so to pass to the personal representatives of a deceased partner, unless there be a clear and determinate expression of the deceased partner, that it shall go to his heir-at-law beneficially(c).

508. The lien, also, of partners upon the whole funds of the partnership, for the balance finally due to them respectively, seems incapable of being enforced in any other manner than by a court of equity, through the instrumentality of a sale. Besides, the creditors of the partnership have the preference

(a) Clements v. Hall, 2 D. & J. 173; Willett v. Blandford, 1 Hare, 253; Wedderburn v. Wedderburn, 22 Beav. 84.

(b) Ripley v. Waterworth, 7 Ves. 425; Phillips v. Phillips, 1 M. & K. 649; Broom v. Broom, 3 M. & K. 443; Morris v Kearsley, 2 Y. & C. Ex. 139; Houghton v. Houghton, 11 Sim 491; Essex v. Essex, 20 Beav. 442; Wylie v. Wylie, 4 Gr. 278; Sanborn v. Sanborn, 11 Gr 359.

(c) Darby v. Darby, 3 Drew. 495; Bone v. Pollard, 24 Beav. 283.

to have their debts paid out of the partnership funds, before the private creditors of either of the partners. But this preference is, at law, generally disregarded; in equity, it is worked out through the equity of the partners over the whole funds(*a*). On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything(*b*); which also can be accomplished only by the aid of a court of equity; for at law a joint creditor may proceed directly against the separate estate(*c*).

509. On the death of one partner, the creditors of the partnership may, at their option, pursue their legal remedies against the survivor, or resort in equity to the estate of the deceased, and this altogether without regard to the state of the accounts between the partners themselves, or to the ability of the survivor to pay(*d*).

510. It often happens, either on account of the form of the articles of partnership, or the manner in which the surviving partners treat the effects of the concern, after the decease of one of their number, that they are liable to account for a share of the profits to the personal representatives of the deceased partner or the legal *cestui que trust*. The cases, where a liability of this kind occurs, have been divided into three classes (*e*). 1. Where the surviving partners continue the trade with the capital, composed wholly or in part of the estate of the deceased partner. The rule applicable to such a case is the same, whatever be the cause of the dissolution. The liability to account proceeds wholly on the ground that the profits are the product of the capital in part, and therefore to that extent,

(*a*) Twiss *v.* Massey, 1 Atk. 67; *Ex parte* Cook, 2 P. W. 500; *Ex parte* Elton, 3 Ves. 240; *Ex parte* Clay, 6 Ves. 813; Campbell *v.* Mullett, 2 Swanst. 574, 575; *Ex parte* Ruffin, 6 Ves. 125, 126; Gray *v.* Chiswell, 9 Ves. 118.

(*b*) Lindley on Partner. 1173; Ridgway *v.* Clare, 19 Beav. 111; *Ex parte* Wilson, 3 M. D. & D. 57.

(*c*) Story, s. 675; Dutton *v.* Morrison, 17 Ves. 205, 210.

(*d*) Baring *v.* Noble, 2 R. & M. 495.

(*e*) Wedderburn *v.* Wedderburn, 22 Beav 84. A testator's direction to his executors to carry on the business with his surviving partners, does not authorize his executors to embark any new capital in the business, Smith *v.* Smith, 13 Gr. 81.

belong to the owner of the capital. 2. Where the legal personal representatives of the deceased partner employ the assets in carrying on trade for themselves. The liability to account, in this class of cases, proceeds from misconduct and breach of trust in the executors. In this class of cases the *cestuis que trust* are entitled, at their option, to legal interest on the amount, or a share of the profits. 3. Where the surviving partners are also the personal representatives of the deceased partner. The liability to account here may involve an inquiry into the misconduct of the executors, but is affected more or less by the articles of partnership. That is true also of the first class. But in the second, no contract is supposed to exist. It is therefore a mere breach of trust. The third class will be governed by the rules which apply generally to the case of surviving partners, carrying on the trade of a deceased partner, and these rules are regulated by contract, and may vary in each case(*a*).

511. Where a partnership was entered into for a term of years, subject to a power in one of the partners to determine the same by giving three months' notice, and it was provided that in case of the death of this partner before the partnership was wholly wound up, his executors should settle its affairs. This partner during the term gave notice to dissolve, and died before the expiration of the three months. It was held that the partnership determined on the death of the partner(*b*).

512. At law, an execution for the separate debt of one of the partners may be levied upon the joint property of the partnership. In such a case, however, the judgment creditor can levy, not the moiety or undivided share of the judgment debtor in the property, as if there were no debts of the partnership, or lien on the same for the balance due to the other partner, but the interest only of the judgment debtor, if any, in the property, after the payment of all debts and other charges thereon

(*a*) Story, s. 676 b. See Crawshay *v.* Collins, 2 Russ. 325. And also Vyse *v.* Foster, L. R. 8 Chan. 309; Bilton *v.* Blakely, 6 Gr. 575.

(*b*) Bell *v.* Nevin, 12 Jur. N. S. 935.

(*a*). When, therefore, the sheriff seizes such property upon an execution, he seizes only such undivided and unascertained interest; and if he sells under the execution, the sale conveys nothing more to the vendee, who thereby becomes a tenant in common, substituted to the rights and interests of the judgment debtor in the property seized (*b*). In such a case therefore, the proper remedy for the other partners, if nothing is due to the judgment debtor out of the partnership funds, is to file a bill in equity against the vendee of the sheriff, to have the proper accounts taken (*c*).

513. Another illustration of the beneficial results of equity jurisdiction, in cases of partnership, may be found in the not uncommon case of two firms dealing with each other, where some or all of the partners in one firm are partners with other persons in the other firm. Upon the technical principles of the common law, in such cases, no suit can be maintained at law in regard to any transactions or debts between the two firms (*d*).

514. In equity there is no difficulty in proceeding to a final adjustment of all the concerns of both firms in regard to each other; for, it is sufficient, that all parties in interest are before the court as plaintiffs, or as defendants; and they need not as at law, in such a case, be on the opposite sides of the record. In equity, all contracts and dealings between such firms of a moral and legal nature are deemed obligatory, though void at law (*e*). Courts of equity, in all such cases, look behind the form of the transactions to their substance; and treat the dif-

(*a*) West *v.* Skip, 1 Ves. Sen. 239; 2 Swanst, 526; Barker *v.* Goodair, 11 Ves. 85; Dutton *v.* Morrison, 17 Ves. 205.

(*b*) West *v.* Skip, 1 Ves. Sen. 239; Chapman *v.* Koops, 3 Bos. & Pull. 289; Skip. *v.* Harwood, 2 Swanst. 586; cit. Cowp. 451; Dutton *v.* Morrison, 17 Ves. 205, 206; Heydon *v.* Heydon, 1 Salk. 392; Taylor *v.* Fields, 4 Ves. 396; Fox *v.* Hanbury, Cowp. 445; *Re* Wait, 1 J. & W. 605; Habershon *v.* Blurton, 1 D. & Sm. 121. And see Partridge *v.* McIntosh, 1 Gr. 50.

(*c*) Story, s. 677; Chapman *v.* Koops, 3 B. & P. 290; Waters *v.* Taylor, 2 V. & B. 300; Taylor *v.* Fields, 4 Ves. 396; Dutton *v.* Morrison, 17 Ves. 205; *Re* Wait, 1 J. & W. 605.

(*d*) Bosanquet *v.* Wray, 6 Taunt. 597; Mainwaring *v.* Newman, 2 B. & P. 120.

(*e*) Bosanquet *v.* Wray, 6 Taunt. 597.

ferent firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies(*a*).

515. Upon similar grounds, one partner cannot, at law, maintain a suit against his copartners, to recover money which he has paid for the partnership, since he cannot sue them without suing himself also, as one of the partnership(*b*), but he may do so in equity.

516. It is sometimes a question of considerable difficulty, how far a court of equity will interfere, in one country, in regard to partnership transactions occurring in foreign jurisdictions. In a suit, therefore, where the subject-matter was immovable property situate in a foreign jurisdiction, being mining property, and where the contract sought to be enforced was entered into and to be performed in that country, and the defendants were domiciled there, it was held that the courts of equity had no jurisdiction to entertain a suit(*c*).

CHAPTER XVII.

CANCELLATION AND DELIVERY OF INSTRUMENTS.

517. Another head of equity jurisdiction embraces that large class of cases, where the RESCISSION, CANCELLATION, or DELIVERY UP of agreements, securities, or deeds is sought. It is obvious that courts of law are utterly incompetent to make a specific decree for any relief of this sort(*d*); and, without it,

(*a*) Story, s. 680; Mainwaring *v.* Newman, 2 B. & P. 120; De Tastet *v.* Shaw, 1 B. & Ald. 664.

(*b*) Wright *v.* Hunter, 5 Ves. 792; Bovill *v.* Hammond, 6 B. & C. 149; Sedgwick *v.* Daniell, 2 H. & N. 319; Holmes *v.* Higgins, 1 B. & C. 74. And see McGregor *v.* Anderson, 6 Gr. 354; Kintrea *v.* Charles, 12 Gr. 117.

(*c*) Story, s. 683 a; Cookney *v.* Anderson, 31 Beav. 452; on Appeal, 9 Jur. N. S. 736. See also Norris *v.* Chambres, 29 Beav. 246; Hawarden *v.* Dunlop, 7 L. T. N. S. 237; Hendrick *v.* Wood, 9 Jur. N. S. 117; Maunder *v.* Lloyd, 2 J. & H. 718; Steele *v.* Stuart, 12 W. R. 247; Wood *v.* Scoles, 12 Jur. N. S. 555.

(*d*) Bromley *v.* Holland, 7 Ves.

the most serious mischiefs may often arise to the parties interested.

518. The application to a court of equity for this purpose, is not a matter of absolute right, upon which the court is bound to pass a final decree, but it is a matter of sound discretion, to be exercised by the court, either in granting or in refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case(*a*). Thus, a court of equity will sometimes refuse to decree a specific performance of an agreement, which it will yet decline to order to be delivered up, cancelled, or rescinded(*b*), and an agreement may be rescinded or cancelled upon the application of one party, when the court would decline any interference at the instance of the other(*c*). And in all cases of this sort, where the interposition of a court of equity is sought, the court will, in granting relief, impose such terms upon the party as it deems the real justice of the case to require; and, if the plaintiff refuses to comply with such terms, his bill will be dismissed(*d*).

519. It is obvious that, the jurisdiction exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, *quia timet*; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest(*e*). *A fortiori*, the party will have a right to come into equity to have such agreements, securities,

(*a*) Mortlock *v.* Buller, 10 Ves. 293; 2 Dow, 518. And see Bentley *v.* McKay 31 Beav. 143; affirmed 8 Jur. N. S. 1001; Ormes *v.* Beadel, 2 D. F. & J. 333; Croft *v.* Graham, 9 Jur. N. S. 1032; Tottenham *v.* Green, 32 L. J. N. S. Ch. 201.

(*b*) See M'Leod *v.* Drummond, 17 Ves. 167; Savage *v.* Brocksopp, 18 Ves. 335; Mortlock *v.* Buller, 10 Ves. 305, 308; Turner *v.* Harvey, Jac. 178.

(*c*) Cooke *v.* Clayworth, 18 Ves. 12.

(*d*) Story, s. 693; Goring *v.* Nash, 3 Atk. 188, Buckle *v.* Mitchell, 18 Ves. 111; Revell *v.* Hussey, 2 B. & B. 288; Holbrook *v.* Sharpey, 19 Ves 131; Byne *v.* Vivian, 5 Ves. 606; Byne *v.* Potter, 5 Ves. 609.

(*e*) Cooper *v.* Joel, 27 Beav. 313; W. *v.* B. 32 Beav. 574; Onions *v.* Cohen, 2 H. & M. 354.

deeds, or other instruments delivered up and cancelled, where he has a defence against them, which is good in equity, but not capable of being made available at law(*a*).

520. Courts of equity will generally set aside, cancel, and direct to be delivered up, agreements and other instruments, however solemn in their form of operation, where they are voidable, and not merely void, under the following circumstances: First, where there is actual fraud in the party defendant, in which the party plaintiff has not participated. Secondly, where there is a constructive fraud against public policy, and the party plaintiff has not participated therein. Thirdly, where there is a fraud against public policy and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand. And lastly, where there is a constructive fraud by both parties, but they are not *In pari delicto*(*b*).

521. The first two classes of cases do not require any illustration, since it is manifestly a result of natural justice, that a party ought not to be permitted to avail himself of any agreement, deed, or instrument procured by his own actual or constructive fraud, or by his own violation of legal duty or public policy, to the prejudice of an innocent party.

522. The third class may be illustrated by the case of a gaming security, which will be decreed to be given up, notwithstanding both parties have participated in the violation of the law; because public policy will be best subserved by such a course(*c*).

523. The fourth class may also be illustrated by cases, where,

(*a*) Story, s. 694. And see as to ordering cancellation, Martyn *v.* Westbrook, 7 L. T. N. S. 449; Clark *v.* Malpas, 31 Beav. 80; Sharp *v.* Leach, 31 Beav. 491.

(*b*) Story, s. 695; Hanington *v.* Du Chatel, 1 Bro. C. C. 124; St. John *v.* St. John, 11 Ves. 535, 536; Wynne *v.* Callander, 1 Russ. 293; Jackman *v.* Mitchell, 13 Ves. 581, 583; Earl of Milltown *v.* Stewart, 3 M. & C. 18, 24; MacCabe *v.* Hussey, 2 Dow & Cl. 440; S. C. 5 Bligh, N. R. 715.

(*c*) Earl of Milltown *v.* Stewart, 3 M. & C. 18, 24; Wynne *v.* Callander, 1 Russ. 293; W. *v.* B. 32 Beav. 574. See as to gaming securities given in a foreign country, Quarrier *v.* Colston, 1 Ph. 147.

although both parties have participated in the guilty transaction, yet, the party who seeks relief has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age or condition; so that in a moral as well as in a legal point of view, his guilt may well be deemed far less dark in its character and degree than that of his associate(*a*).

524. On the other hand, where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement, which he seeks to set aside, is founded on illegality, immorality, or base and unconscionable conduct on his own part; in such cases, courts of equity will leave him to the consequences of his own iniquity; and will decline to assist him to escape from the toils which he has studiously prepared to entangle others, or whereby he has sought to violate with impunity the best interests and morals of social life(*b*).

525. A question has often occurred, how far courts of equity would or ought to interfere to direct deeds and other solemn instruments to be delivered up and cancelled, which are utterly void, and not merely voidable(*c*). The doubt has been, in the first place, whether, as an instrument utterly void is incapable of being enforced at law, it is not a case where the remedial justice to protect the party may not be deemed adequate and complete at law, and therefore where the necessity for the interposition of courts of equity is obviated(*d*). And, in the next place, whether, if the instrument be void, and ought not to be enforced, the more appropriate remedy in a court of equity would not be, to order a perpetual injunc-

(*a*) Story, s. 695 a.

(*b*) See Franco *v.* Bolton, 3 Ves, 368; St. John *v.* St. John, 11 Ves. 535, 536; Brackenbury *v.* Brackenbury, 2 J. & W. 391; Gray *v.* Mathias, 5 Ves. 286; Benyon *v.* Nettlefold, 3 Mac. & G. 94.

(*c*) See Bromley *v.* Holland, 5 Ves 618; 7 Ves. 18; Simpson *v.* Lord Howden, 3 M. & C. 102; Colman *v.* Sarrel, 1 Ves. 50.

(*d*) Hilton *v* Barrow, 1 Ves. 284; Ryan *v.* Mackmath, 3 Bro. C. C. 15, 16, and Pierce *v.* Webb, cited, note (2); Jervis *v.* White, 7 Ves. 413; Gray *v.* Mathias, 5 Ves. 293; Bromley *v.* Holland, 5 Ves. 618.

tion to restrain the use of the instrument, rather than to compel a delivery up and cancellation of the instrument(*a*).

526. But whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest; and the jurisdiction is now maintained in the fullest extent(*b*). And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person(*c*). If it is a deed purporting to convey lands or other hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title(*d*). If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes; and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost, or obscured(*e*).

527. But where the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of

(*a*) Story, s. 698; Jervis *v.* White, 7 Ves. 414; Hanington *v.* Du Chatel, 1 Bro. C. C. 124; 2 Dick. 581; 2 Sw. 159, note.

(*b*) Note to Davis *v.* Duke of Marlborough, 2 Sw. 157, note (*b*); St. John *v.* St. John, 11 Ves. 526; Simpson *v.* Lord Howden, 3 M. & C. 104, 105; Mayor of Colchester *v.* Lowten, 1 V. & B. 244; Bromley *v.* Holland, 7 Ves. 16, 19, 20, 21; Hayward *v.* Dimsdale, 17 Ves. 112; Williams *v.* Flight, 5 Beav. 41. See also Sismey *v.* Eli, 13 Jur. 480.

(*c*) Bromley *v.* Holland, 7 Ves. 20, 21: Jervis *v.* White, 7 Ves. 414; Bishop of Winchester *v.* Fournier, 2 Ves. Sen. 445, 446; Wynne *v.* Callandar, 1 Russ. 293.

(*d*) Pierce *v.* Webb, 3 Bro. C. C. 16, note; Hayward *v.* Dimsdale, 17 Ves. 111; Byne *v.* Vivian, 5 Ves. 606, 607; Mayor of Colchester *v.* Lowten, 1 V. & B. 244; Att.-Gen. *v.* Morgan, 2 Russ. 306; Duncan *v.* Worrall, 10 Price, 31; Jackman *v.* Mitchell, 13 Ves. 581: Shaw *v.* Ledyard, 12 Gr. 382; Ross *v.* Harvey, 3 Gr. 649. But see Hurd *v.* Billinton, 6 Gr. 145; Buchanan *v.* Campbell, 14 Gr. 168.

(*e*) Story, s. 700; Bromley *v.* Holland, 7 Ves. 20, 21; Kemp *v.* Pryor, 7 Ves. 248, 249; St. John *v.* St. John, 11 Ves. 535; Peake *v.* Highfield, 1 Russ. 559; Duncan *v.* Worrall, 10 Price, 31.

courts of equity, to direct it to be cancelled or delivered up would not seem to apply; for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it, in a just sense, be said, that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury. And, accordingly, it is now fully established, that, in such cases, courts of equity will not interpose their authority to order a cancellation or delivery up of such instruments(*a*).

528. The whole doctrine of courts of equity on this subject is referable to the general jurisdiction, which it exercises in favor of a party, *quia timet*. It is not confined to cases, where the instrument, having been executed, is void upon grounds of law or equity. But it is applied, even in cases of forged instruments, which may be decreed to be given up without any prior trial at law on the point of forgery(*b*).

529. The powers of courts of equity are by no means limited to cases of the delivery up or cancellation of deeds on account of some inherent defect which renders them either voidable or void. On the contrary, its remedial justice is often and most beneficially applied, by affording specific relief, in cases of unexceptionable deeds and other instruments, in favor of persons who are legally entitled to them(*c*). Thus, heirs-at-law, devisees, and other persons, properly entitled to the custody and possession of the title-deeds of their respective estates, may, if they are wrongfully detained or withheld from them, obtain a decree for a specific delivery of them(*d*). The same doctrine applies to other instruments and securities, such as bonds, negotiable instruments, and other evidences of pro-

(*a*) Story, s. 700; Gray *v.* Mathias, 5 Ves. 286; Simpson *v.* Lord Howden, 3 M. & C. 97, 102, 103, 108; Bromley *v.* Holland, 7 Ves. 16, 20, 22; Threlfall *v.* Lunt, 7 Sim. 627.

(*b*) Peake *v.* Uttenfield, 1 Russ. 559.

(*c*) Mitford, Eq. Pl. by Jeremy, 117, 118; Brown *v.* Brown, 1 Dick. 62; Gibson *v.* Ingo, 6 Hare, 112.

(*d*) Reeves *v.* Reeves, 9 Mod. 128; Tanner *v.* Wise, 3 P. W. 296; Harrison *v.* Southcote, 1 Atk. 539; Ford *v.* Peering, 1 Ves. 72; Papillon *v.* Voice, 2 P. W. 478; Duncombe *v.* Mayer, 8 Ves. 320.

perty, which are improperly withheld from the persons, who have an equitable or legal interest in them(*a*); or who have a right to have them preserved.

530. Upon similar principles, persons having rights and interests in real estate are entitled to come into equity for the purpose of having an inspection and copies of the deeds under which they claim title(*b*). And in like manner, remaindermen, and reversioners, and other persons, having limited or ulterior interests in real estate, have a right in many cases to come into equity, to have the title-deeds secured for their benefit, or their interests otherwise secured.(*c*) But in all such cases, the court will exercise a sound discretion as to making the decree; for it is by no means an absolute right of the party to have the title-deeds in all cases secured, or brought into chancery for preservation. To entitle the party, therefore, to seek relief, it must clearly appear that there is danger of a loss or destruction of the title-deeds in the custody of the persons possessing them; and, also, that the interest of the plaintiff is not too contingent, or too remote, to warrant the proceeding(*d*).

531 Cases also may occur, where a deed, or other instrument, originally valid, has, by subsequent events, such as by a satisfaction, or payment, or other extinguishment of it, legal or equitable, become *functus officio*; and yet, its existence may be either a cloud upon the title of the other party, or subject him to the danger of some future litigation, when the facts are no longer capable of complete proof, or have become involved in the obscurities of time(*e*). Under such circum-

(*a*) See Knye *v.* Moore, 1 S. & S. 61; Freeman *v.* Fairlie, 3 Meriv. 30.

(*b*) Banbury *v.* Briscoe, 2 Ch. Cas. 42; Reeves *v.* Reeves, 9 Mod. 128; Davis *v.* Earl of Dysart, 20 Beav. 405; Pennell *v.* Earl of Dysart, 27 Beav. 542.

(*c*) Smith *v.* Cooke, 3 Atk. 382; Banbury *v.* Briscoe, 2 Ch. Cas. 42; Ivie *v.* Ivie, 1 Atk. 431; Lempster *v.* Pomfret, Ambl. 154; Freeman *v.* Fairlie, 3 Meriv. 30; Ford *v.* Peering, 1 Ves. 72; Southby *v.* Stonehouse, 2 Ves. Sen. 610; Papillon *v.* Voice, 2 P. W. 471; Senhouse *v.* Earl, 2 Ves. Sen. 450; Leech *v.* Trollop, 2 Ves. 662.

(*d*) Story, s. 704; Ivie *v.* Ivie, 1 Atk. 431; Ford *v.* Peering, 1 Ves. 76, 78; Noel *v.* Ward, 1 Mad. 322; Lempster *v.* Pomfret, Ambl, 154; Pyncent *v.* Pyncent, 3 Atk 571; Joy *v.* Joy, 2 Eq. Ab. 284; Webb *v.* Lymington, 1 Ed. 8.

(*e*) See Anon., Gilb. Eq. 1; Flower *v.* Marten, 2 M. & C. 459.

stances, although the deed or other instrument has become a nullity, yet courts of equity will interpose upon the like principles, to prevent injustice, and will decree a delivery and cancellation of the instrument(*a*).

532. The doctrine has also been applied to cases where it has been fairly inferable from the acts or conduct of the party entitled to the benefit of the deed or other instrument, that he has treated it as released, or otherwise dead in point of effect(*b*). Thus, where a son-in-law was indebted to his father-in-law on several bonds, and by his will the latter left him a legacy, and from some memorandums of the testator it was satisfactorily shown, that the testator did not intend that these bonds should be enforced by the executors; it was decreed that they should not be the subject of any demand by the executors against the son-in-law(*c*).

533. Where a father, upon payment of the debts of his son took a bond from the latter, and it was apparent from all the circumstances, that the father did not intend it as an absolute security against his son, but in some sort as a check upon his future conduct, and that he did not intend, after his death, that it should be treated as a debt due from his son to his estate, or to be put in force against him, it was decreed that the bond should be delivered up by the executors to be cancelled(*d*). So, where a testatrix, by her will, forgave a debt due to her on bond by her son-in-law, and he died in her lifetime; it was held, that it was a release in equity, and that the bond ought to be delivered up by her executor(*e*).

(*a*) Story, s. 705; Cary, 17.

(*b*) Aston *v.* Pye, 5 Ves. 350, note.

(*c*) Eden *v.* Smith, 5 Ves. 341, 351.

(*d*) Flower *v.* Marten, 2 M. & C. 459, 474. 475.

(*e*) Story, s. 705; Sibthorp *v.* Moxon, 3 Atk. 579; Elliott *v.* Davenport, 2 Vern. 521; 1 P. W. 83. See also Toplis *v.* Baker, cited in note, 1 P. W. 86; Duffield *v.* Elwes, 1 Bligh. N. R. 529, 530, 531, 538, 539; Richards *v.* Symes, 2 Atk. 319; 1 Bligh, N. S. 537; Wekett *v.* Raby, 2 Bro. P. C. 386; Flower *v.* Marten, 2 M. & C. 459, 474. See also Sibthorp *v.* Moxon, 3 Atk. 580, 581. But see Tuffnell *v.* Constable, 8 Sim. 69.

CHAPTER XVIII.

SPECIFIC PERFORMANCE OF AGREEMENTS AND OTHER DUTIES.

534. By the common law every executory contract to sell or transfer a thing, is treated as a mere personal contract, and, if it is unperformed by the party, no redress can be had, except in damages; this is, in effect, allowing the party the election either to pay damages, or to perform the contract at his sole pleasure. But courts of equity have deemed such a course wholly inadequate for the purposes of justice, and they have not hesitated to interpose, and require from the conscience of the offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse(*a*).

535. The jurisdiction of courts of equity, to decree a specific performance of contracts, is not dependent upon, or affected by, the form or character of the instrument. What these courts seek to be satisfied of is, that the transaction in substance amounts to, and is intended to be, a binding agreement for a specific object, whatever may be the form or character of the instrument. Thus, if a bond with a penalty is made upon condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events and not to be discharged by the payment of the penalty, although it has assumed the form of a condition only(*b*). Courts of equity, in all cases of this sort, look to the substance of the transaction, and the primary object of the parties; and where that requires a specific performance, they will treat the penalty as a mere security for its due performance and attainment(*c*).

(*a*) See Alley *v.* Deschamps, 13 Ves. 228, 229; Gilb. For. Rom. 220; Harnett *v.* Yielding, 2 S. & L. 553. But see Greenaway *v.* Adams, 12 Ves. 395, 400; Davis *v.* Snyder, 1 Gr. 134.

(*b*) Logan *v.* Wienholt, 7 Bligh, N. R. 1, 49, 50; Chilliner *v.* Chilliner, 2 Ves. Sen. 528; Long *v.* Bowring, 33 Beav. 585.

(*c*) Story, s. 715.

536. The ground of the jurisdiction being the inadequacy of the remedy at law, it follows as a general principle that where damages at law will give the party the full compensation to which he is entitled, and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere(*a*).

537. There are, however, certain cases where equity refuses to compel specific performance without taking into consideration the question whether adequate relief can be obtained at law, or not. Thus the court will not decree specific performance of an agreement to do an act immoral or contrary to the law(*b*). So again, the court will not enforce specific performance of an agreement without consideration(*c*). The incapacity of the court to compel the complete execution of a contract in certain cases, also limits its jurisdiction to compel specific performance. The principle is most frequently illustrated in cases of agreements to do acts involving personal skill, knowledge, or inclination(*d*). On the same principle

(*a*) Harnett *v.* Yielding, 2 S. & L. 553.

(*b*) Thomson *v.* Thomson, 7 Ves. 470; Ewing *v.* Osbaldiston, 2M. & Co. 53.

(*c*) Jefferys *v.* Jefferys, Cr. & Ph. 141; Barr *v.* Hatch, 9 Gr. 312. And see Osborne *v.* Osborne, 5 Gr. 619. In a late case, (Donaldson *v.* Donaldson, Kay, 711), the subject of voluntary assignments is examined with considerable carefulness, by a very eminent equity judge, Vice-Chancellor Wood, and the conclusion arrived at, that a voluntary assignment, by deed, of the assignor's interest in stocks standing in the names of trustees, upon trust for him, is a complete transfer of such interest, as between the donee and the representatives of the donor, although no notice of the deed was given to the trustees, in the donor's lifetime; because no further act, on the part of the donor, was requisite to complete the gift. And it was said the donee could compel the trustees to transfer the stock to him, without making the donor or his representatives parties to the suit. But if the trustees, before notice of the deed, transferred the stock to another person, the donee would have no remedy against them. The case is put upon the ground that the title to the property had passed, by the deed, so far as the donor, or his representatives, were concerned. And it is conceded, that where there is a contract only, or an imperfect gift, which requires some other act on the part of the assignor or donor, the court will not interfere to compel the performance of such act. The cases upon this subject are very thoroughly and ably reviewed in the case of Kekewich *v.* Manning, 1 D. M. & G. 176; and Beatson *v.* Beatson, 12 Sim. 281; and Dillon *v.* Coppin, 4 M. & C. 647; are there considered as not in accordance with the general course of the decisions on the subject. And see Wheatley *v.* Purr, 1 Keen, 551; Blakely *v.* Brady, 2 Dr. & Wal. 316. But contra, see Godsal *v.* Webb, 2 Keen, 99; James *v.* Bydder, 4 Beav. 600.

(*d*) See Lumley *v.* Wagner, 5 D. & Sm. 485; 1 D. M. & G. 604; Martin *v.* Nutkin, 2 P.W. 266; Dietrichsen *v.* Cabburn, 2 Ph. 52. The court cannot enforce specific performance of an order in Council, Simpson *v.* Grant, 5 Gr. 267.

the court refuses specific performance of an agreement for the sale of the good-will of a business unconnected with the business premises, by reason of the uncertainty of the subject matter, and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it(*a*).

538. The question of what contracts courts of equity will decree the specific performance, may be considered most conveniently under three general heads. (1) Where the contract relates to personal acts. (2) Where the contract relates to personal property; and (3) Where the contract relates to real estate.

539. As a general rule the court will not exercise its jurisdiction by attempting to enforce a specific performance of acts involving personal skill, knowledge or inclination. Thus, where a lady agreed with a theatrical manager to sing at his theatre for a definite period, and by a subsequent agreement engaged not to use her talent at any other theatre or concert room without the authority of the manager, the court refused to compel her to sing at the plaintiff's theatre according to her agreement, although it enjoined her against singing at any other theatre(*b*).

540. As contracts of hiring and service are of a confidential character, and cannot therefore be enforced against an unwilling party with any hope of ultimate success, courts of equity, although a different opinion was formerly entertained(*c*), now refuse to decree specific performance of them(*d*). So the specific performance of a contract of agency will not be enforced in equity(*e*).

(*a*) Baxter *v.* Conolly, 1 J. & W. 576; Darbey *v.* Whittaker, 4 Drew. 134, 139, 140.

(*b*) Lumley *v.* Wagner, 5 D. & Sm. 485; 1 D. M. & G. 604; Martin *v.* Nutkin, 2 P. W. 266; Dietrichsen *v.* Cabburn, 2 Ph. 52.

(*c*) Ball *v.* Coggs, 1 Bro. P. C. 140; East India Co. *v.* Vincent, 2 Atk. 83.

(*d*) Johnson *v.* Shrewsbury & Birmingham Rail Co. 3 D. M. & G. 914; Horne *v.* London & North Western Rail Co. 10 W. R. 170; Pickering *v.* Bishop of Ely, 2 Y. & C. 249; Stocker *v.* Brocklebank, 3 Mac. & G. 250; Brett *v.* The East India & London Shipping Co. 2 H. & M. 404; Mair *v.* Himalaya Tea Co. L. R. 1Eq. 411.

(*e*) Chinnock *v.* Sainsbury, 30 L. J. N. S. ch. 409. And see Brett *v.* East India & London Shipping Co. 2 H. & M. 404.

541. Notwithstanding some early decisions to the contrary, it is now settled that with a few exceptions, the court will not decree specific performance of contracts to build or repair(*a*), or to make a branch railway(*b*). When, however, the performance of certain acts, such as making certain buildings or repairs, is merely incidental to a contract of which the specific performance would ordinarily be decreed, such as a contract to grant a lease, the court will now direct the contract for the lease to be specifically performed, and direct an enquiry as to damages(*c*).

542. The court will, however, decree specific performance of a contract by a defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. Thus, a railway company were ordered to construct and forever thereafter to maintain one neat archway sufficient to permit a loaded carriage of hay to pass under the railway(*d*). And where there have been acts amounting to a part performance of the contract the court will compel specific performance, which without such acts it might not do(*e*).

543. A court of equity will decree specific performance of an agreement to enter into partnership for a fixed and

(*a*) Errington *v.* Aymesley, 2 Bro. C. C. 341; Paxton *v.* Newton, 2 Sm. & G. 437; Lucas *v.* Commerford, 3 Bro. C. C. 166. But see Moore *v.* Greg, 12 Jur. 952. The earlier cases are Buxton *v.* Lister, 3 Atk. 385; City of London *v.* Nash, 3 Atk. 512.

(*b*) South Wales Railway Co. *v.* Wythes, 1 K. & J. 186; 5 D. M. & G. 880. And see Booth *v.* Pollard, 4 Y. & C. 61; Pollard *v.* Clayton. 1. K. & J. 462; Flint *v.* Brandon, 8 Ves. 159. And see, Colton *v.* Rookledge, 19 Gr. 121.

(*c*) Middleton *v.* Greenwood, 2 D. J. & S. 142. See Kay *v.* Johnson, 2 H. & M. 118; and also Blackett *v.* Bates, 2 H. & M. 270; reversed on appeal, L. R. 1 Chan. 117. In Mosely *v.* Virgin, 3 Ves. 185, Lord Rosslyn said, that if an agreement for building were in its nature defined, there could be no great difficulty in decreeing specific performance. See also Cubitt *v.* Smith, 10 Jur. N. S. 1123. But see Brace *v.* Welment, 25 Beav. 348; Norris *v.* Jackson, 1 J. & H. 319.

(*d*) Storer *v.* Great Western Railway Company, 2 Y. & C. 48. And see Sanderson *v.* The Cockermouth & Workington Railway, 11 Beav. 497; Franklyn *v.* Tuton, 5 Mad. 469; Lane *v.* Newdigate, 10 Ves. 192; Price *v.* Corporation of Penzance, 4 Hare, 506; South Western Railway Co. *v.* Wythes, 1 K. & J. 200; Soames *v.* Edge, John. 669.

(*e*) Price *v.* Corporation of Penzance, 4 Hare, 506, 509; Pembroke *v.* Thorpe, 3 Sw. 437 n; Sanderson *v.* Cockermouth, & Workington Rail Co. 11 Beav. 497.

definite term(*a*), but will not do so when the amount of capital and the mode by which it is to be provided is undefined(*b*), nor will it do so when no term has been fixed for the duration of the partnership, for such a decree would be useless when either of the parties might dissolve the partnership immediately afterwards(*c*).

544. The court will compel specific performance of agreements for separation between husband and wife, by decreeing the execution of proper deeds of separation, provided there be a good consideration to support the contract, as for instance, a covenant by trustees to idemnify the husband against the wife's debts(*d*).

545. A court of equity will not decree specific performance of an agreement to refer disputes to arbitration(*e*), and a plea of an agreement to refer to arbitration would not constitute a valid objection to a bill, either for discovery only or for discovery and relief(*f*). But an inequitable refusal of a plaintiff to submit to arbitration according to contract, may disentitle him to relief in equity(*g*).

546. The right of a person to have specific performance of an award is the same as if the award had been an agreement between the parties, and the court will not decree specific performance of an award in a case where, if the award had been an agreement, specific performance would have been refused(*h*).

(*a*) Anon, 2 Ves. 629; England *v.* Curling, 8 Beav. 129.
(*b*) Downs *v.* Collins, 5 Hare, 418, 437.
(*c*) Hercy *v.* Birch, 9 Ves. 357; Sheffield Gas Consumers' Co. *v.* Harrison, 17 Beav. 294. But see note to Crawshay *v.* Maule, 1 Sw. 513.
(*d*) Stephens *v.* Olive, 2 Bro. C. C. 90; Westmeath *v.* Westmeath, Jac. 126, 141; Elworthy *v.* Bird, 2 S. & S. 372. And see Wellesley *v.* Wellesley, 10 Sim. 256; Wilson *v.* Wilson, 1 H. L. 538.
(*e*) Price *v.* Williams, cited 6 Ves. 818; Street *v.* Rigby, 6 Ves. 815; Wilkes *v.* Davis, 3 Mer. 507; Gervais *v.* Edwards, 2 Dr. & War. 80.
(*f*) Wellington *v.* McIntosh, 2 Atk. 569; Street *v.* Rigby, 6 Ves. 815, overruling Halfhide *v.* Fenning, 2 Bro. C. C. 336. But see the British Empire Shipping Co. Somes, 3 K. & J. 433.
(*g*) Cheslyn *v.* Dalby, 2 Y. & C. Ex. 170.
(*h*) Blackett *v.* Bates, L. R. 1 Chan. 117.

547. The general rule now is, not to entertain jurisdiction in equity for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature(*a*); yet the rule is a qualified one, and subject to exceptions; or, rather, the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy(*b*). Thus, where there was a contract for the sale of 800 tons of iron, to be paid for in a certain number of years, by instalments, a specific performance was decreed; for such sort of contracts (it was said) differ from those which are to be immediately executed(*c*). But the true reason probably was, that under the particular circumstances of the case, there could be no adequate compensation in damages at law; for the profits upon the contract, being to depend upon future events, could not be correctly estimated by the jury in damages, inasmuch as the calculation must proceed upon mere conjecture(*d*).

548. On the same principle that damages would be an inadequate remedy, the court has decreed specific performance of agreements for the manufacture and delivery of saw logs, when they are shown to possess a peculiar value to the plaintiff, and can be identified as those claimed by the plaintiff(*e*).

549. Specific performance of a contract to convey shares in a railway, or other private corporation, will be decreed, upon the ground that such shares are of uncertain value, and not always readily obtainable in the market(*f*). But it has been decided that a specific performance of a contract to convey public stocks will not be decreed, unless under peculiar cir-

(*a*) See 1 Mad. Pr Ch. 320; Pooley *v.* Budd, 14 Beav. 34.

(*b*) See Kerr on Injunct. 593; Wood *v.* Rowcliffe, 3 Hare, 304.

(*c*) Taylor *v.* Neville, cited in 3 Atk. 384; Adderley *v.* Dixon, 1 S. & S. 610.

(*d*) Story, s. 718; Adderley *v.* Dixon, 1 S. & S. 607, 610.

(*e*) Farwell *v.* Wallbridge, 6 Gr. 634; Flint *v.* Corby, 4 Gr. 45; Fuller *v.* Richmond, 4 Gr. 657; Stevenson *v.* Clarke, 4 Gr. 540. And see Buxton *v.* Lister, 3 Atk. 384, 385.

(*f*) Duncuft *v.* Albrecht, 12 Sim. 189. And see Doloret *v.* Rothschild, 1. S. & S. 590; Jackson *v.* Cocker, 4 Beav. 59; Fyfe *v.* Swaby, 16 Jur. 49; Cheale *v.* Kenward, 3 D. & J. 27.

cumstances, because the value of such stocks is fixed, and they may always be procured in the market(*a*).

550. The court will not ordinarily compel specific performance of a contract to sell shares, where the assent of the directors is necessary in order that the purchaser's name be placed upon the register, and they refuse to give it(*b*). But if the directors wantonly, or for some idle and foolish reason refuse to admit a purchaser, the court may compel them to do so, and compel specific performance of the contract(*c*).

551. The court will neither decree specific performance of a contract to lend(*d*), nor of a contract to borrow(*e*) money.

552. Ordinarily, in cases of chattels, courts of equity will not interfere to decree a specific delivery, because by a suit at law a full compensation may be obtained in damages, although the thing itself cannot be specifically obtained(*f*). But there are cases of personal goods and chattels, in which the remedy at law by damages would be utterly inadequate, and leave the injured party in a state of irremediable loss. In all such cases, courts of equity will interfere, and grant full relief, by requiring a specific delivery of the thing which is wrongfully withheld. This may occur, where the thing is of a peculiar value and importance; and the loss of it cannot be fully compensated in damages, when withheld from the owner, and then relief will be granted in equity(*g*). Thus, where the lord of a manor was entitled to an old altar-piece, made of

(*a*) See Nutbrown *v.* Thornton, 10 Ves. 159, 161; Cudee *v.* Rutter, 1 P. W. 570; Doloret *v.* Rothschild, 1 S. & S. 590; Adderley *v.* Dixon, 1 S. & S. 607; Shaw *v.* Fisher, 5 D. M. & G. 596. See also Colt *v.* Netterville, 2 P. W. 305.

(*b*) Bermingham *v.* Sheridan, 33 Beav. 660.

(*c*) Bermingham *v.* Sheridan, 33 Beav. 665. And see Robinson *v.* The Chartered Bank, L. R. 1 Eq. 32.

(*d*) Sechel *v.* Mosenthal, 30 Beav. 371; Brough *v.* Oddy, 1 R. & M. 55; Flight *v.* Bolland, 4 Russ, 298, 301. But see Ross *v.* Clevely, Toml. 80.

(*e*) Rogers *v.* Challis, 27 Beav. 175.

(*f*) Buxton *v.* Lister, 3 Atk. 383; Mitford, Eq. Pl. by Jeremy, 118, 119; 1 Mad. Pr. Ch. 184, 295, 320.

(*g*) Jeremy, Eq. Jur. B. 3, Pt. 2, ch. 4, s. 2, p. 467; Mitf. Eq. Pl. by Jeremy, 117: Cooper, Eq. Pl. 132; Fells *v.* Read, 3 Ves. 70; Walwyn *v.* Lee, 9 Ves. 33. And see Wood *v.* Rowcliffe, 2 Ph. 382; s. c. 3 Hare, 304.

silver, and remarkable for a Greek inscription and dedication to Hercules, as treasure-trove within his manor, and it had been sold by a wrong-doer, it was decreed to be delivered up to the lord of the manor, as a matter of curious antiquity, which could not be replaced in value, and which might, by being defaced, become greatly depreciated(*a*). So, where an estate was held by the tenure of a horn, and a bill was brought by the owner to have it delivered up to him, it was held maintainable, for it constituted an essential muniment of his title(*b*). The same rule has been applied to a "box of jewels (*c*)," and to "mortgage-deeds(*d*)."

553. The same principle applies to any other chattel, whose principal value consists in its antiquity; or its being the production of some distinguished artist; or in its being a family relic, ornament, or heirloom; such, for instance, as ancient gems, medals, and coins; ancient statutes and busts; paintings of old and distinguished masters; and even those of a modern date, having a peculiar distinction and value, such as family pictures and portraits, and ornaments, and other things of a kindred nature(*e*).

554. There are other cases, where courts of equity have interfered to decree a specific delivery of chattels under an agreement of sale, or for an exclusive possession and enjoyment for a term of years. But all these cases stand upon very peculiar circumstances, where the nature of the remedy at law is inadequate to complete redress; or where some other ingredients of equity jurisdiction are mixed up in the transaction, such as the necessity of interference to prevent multi-

(*a*) Somerset *v.* Cookson, 3 P. W. 390.
(*b*) Pusey *v.* Pusey, 1 Vern. 273.
(*c*) Saville *v.* Tankred, 1 Ves. Sen. 101.
(*d*) Jackson *v.* Butler, 2 Atk. 306; Knye *v.* Moore, 1 S. & S. 61.
(*e*) Story, s 709; Fells *v.* Read, 3 Ves. 70; Lloyd *v.* Loaring, 6 Ves. 773, 779; Lowther *v.* Lowther, 13 Ves. 95; Pearne *v.* Lisle, Ambl. 77; Macclesfield *v.* Davis, 3 Ves. & B. 16, 17, 18; Nutbrown *v.* Thornton, 10 Ves. 163; Arundell *v.* Phipps, 10 Ves. 140, 148; Falcke *v.* Gray, 5 Jur. N. S. 645; Dowling *v.* Betjemann, 2 J. & H. 544, Reece *v.* Trye, 1 D. & Sm. 273; Beresford *v.* Driver, 14 Beav. 387; 16 Beav. 134.

plicity of suits, or irreparable mischief(*a*). Thus, for instance, where, on the dissolution of a partnership, an agreement was made, that a particular book used in the trade should be considered the exclusive property of one of the partners, and that a copy of it should be given to the other, a specific performance of the agreement was decreed as to the copy; for it is clear, that at law no adequate redress could be obtained(*b*). So a decree was made against a lessee of alum works, to prevent a breach of a covenant, to leave a certain amount of stock on the premises at the expiration of the term, there being ground of suspicion that he did not mean to perform the covenant(*c*).

555. Where a fiduciary relation subsists between the parties, whether it be that of an agent or a trustee, or a broker, or whether the subject matter be stock or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of the power, and will compel a specific delivery up of the articles(*d*).

556. Courts of equity are in the habit of interposing to grant relief, in cases of contracts respecting real property, to a far greater extent than in cases respecting personal property; not, indeed, upon the ground of any distinction, founded upon the mere nature of the property, as real or as personal, but at the same time, not wholly excluding the consideration of such a distinction. In regard to contracts respecting personal property, if the contract is not specifically performed, the purchaser may purchase other goods of a like description and quality, with the damages given him at law, and thus completely obtain his object.

557. But, in contracts respecting a specific messuage or par-

(*a*) See Nutbrown *v.* Thornton, 10 Ves. 159, 161, 163; Buxton *v.* Lister, 3 Atk. 383, 384, 385; Thompson *v.* Harcourt, 1 Bro. P. C. 193; Arundell *v.* Phipps, 10 Ves. 139, 148; Mitf. Eq. Pl. by Jeremy, 119, and notes; Lloyd *v.* Loaring, 6 Ves. 773.

(*b*) Lingen *v.* Simpson, 1 S. & S. 600.

(*c*) Story, s. 710; Ward *v.* Buckingham, cited 10 Ves. 161.

(*d*) Wood *v.* Rowcliffe, 3 Hare, 304; 2 Ph. 383; Pollard *v.* Clayton, 1 K. & J. 462; Edwards *v.* Clay, 28 Beav. 145.

cel of land, the same considerations do not ordinarily apply. The locality, character, vicinage, soil, easements or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser; so that it cannot be replaced by other land of the same precise value, but not having the same precise local conveniences or accommodations(*a*); and, therefore, a compensation in damages would not be adequate relief. It would not attain the object desired; and it would generally frustrate the plans of the purchaser. And hence it is, that the jurisdiction of courts of equity to decree specific performance, is, in cases of contracts respecting land, universally maintained, whereas, in cases respecting chattels, it is limited to special circumstances(*b*).

558. Courts of equity, too, in cases of contracts respecting real property, have been in the habit of granting this relief, not only to a greater extent, but also under circumstances far more various and indulgent than in cases of contracts respecting chattels. For they do not confine themselves to cases of a strict legal title to relief. Another principle, equally beneficial, is well known and established, that courts of equity will not permit the forms of law to be made the instruments of injustice; and they will, therefore, interpose against parties, attempting to avail themselves of the rigid rules of law for unconscientious purposes. When, therefore, advantage is taken of a circumstance that does not admit of a strict performance in the contract, if the failure is not in a matter of substance, courts of equity will interfere(*c*).

559. On these accounts, courts of equity have enforced contracts of this sort, where no action for damages could be maintained; for, at law, the party plaintiff must have strictly performed his part; and the inconvenience of insisting upon that in all cases is sufficient to require the interference of courts of equity. They dispense with that which would make a compliance with what the law requires oppressive; and, in various

(*a*) Adderley *v.* Dixon, 1 S. & S. 607.
(*b*) Story, s. 746.
(*c*) Halsey *v.* Grant, 13 Ves. 76, 77.

cases of such contracts, they are in the constant habit of relieving a party who has acted fairly, although negligently(*a*).

560. On the other hand, as the interference of courts of equity is discretionary, they will not enforce a specific performance of such contracts at the instance of the vendor, where his title is involved in difficulties which can be removed, although, perhaps, at law, an action might be maintainable against the defendant for damages for his not completing his purchase(*b*).

561. And it seems to be settled now that where the party against whom the decree is sought shows to the satisfaction of the court, that he entered into the contract under a *bona fide* misapprehension in a material point, the contract will not be carried into effect(*c*).

562. Courts of equity will also, in allowing or denying a specific performance, look not only to the nature of the transaction, but also to the character of the parties who have entered into the contract. Thus, if the purchase be made by trustees for the benefit of a *cestui que trust*, and there be a substantial misdescription of the premises, courts of equity will not enforce against them a specific performance with compensation, as being prejudicial to the *cestui que trust* and incapable of being ascertained(*d*).

563. The cases where a specific performance is sought, of contracts respecting land, may be subdivided into two heads. (1) Where relief is sought upon parol contracts within the statute of frauds and perjuries (as it is called); and (2) Where it is sought under written contracts, not falling within the scope of that statute.

(*a*) Story, s. 748. And see Lennon *v.* Napper, 2 S. & L. 684.

(*b*) Cooper *v.* Denne, 4 Bro. C. C. 80; 1 Ves. 565; Higgins *v.* Samels, 2 J. & H. 460.

(*c*) Webster *v.* Cecil, 30 Beav. 62; Butterworth *v.* Walker, 13 W. R. 168; Moxey *v.* Bigwood, 12 W. R. 811. See also Wycombe Railw. Co. *v.* Donnington Hospital, 12 Jur. N. S. 347; L. R. 1 Chan. 268; Howe *v.* Hunt, 8 Jur. N. S. 834; Samuda *v.* Lawford, 8 Jur. N. S. 739.

(*d*) White *v.* Cudden, 8 Cl. & Fin. 766.

564. The Statute of Frauds(*a*) declares, "That all interests in lands, tenements, and hereditaments, except leases for three years, not put in writing and signed by the parties or their agents authorized by writing, shall not have, nor be deemed in law or equity to have, any greater force or effect than leases on estates at will." It further enacts, "That no action shall be brought, whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, or upon any agreement, that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party or his lawful agent." By the same statute, declarations of trust, created by the parties, are to be in writing; but trusts resulting by implication of law are to remain as they stood before the passing of the Act.

565. Courts of equity are bound, as much as courts of law, by the provisions of this statute, and are not at liberty to disregard them. They do, however, interfere in some cases within the reach of the statute, but they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it, and independent of it(*b*).

566. In the first place, then, courts of equity will enforce a specific performance of a contract within the statute, not in writing, where it is fully set forth in the bill, and is confessed by the answer of the defendant(*c*). The reason given for this decision is, that the statute is designed to guard against fraud and perjury; and, in such a case, there can be no danger of that sort. The case, then, is taken entirely out of the mischief

(*a*) 29 Car. II. ch. 3.
(*b*) Story, s. 754; Bond *v.* Hopkins, 1 S. & L. 433.
(*c*) Att.-Gen. *v.* Sitwell, 1 Y. & C. Ex. 583; Gunter *v.* Halsey, Amb. 586; Att.-Gen. *v.* Day, 1 Ves. Sen. 221. And see Lacon *v.* Mertins, 3 Atk. 3.

intended to be guarded against by the statute(*a*). Perhaps another reason might fairly be added; and that is, that the agreement, although originally by parol, is now in part evidenced by writing under the signature of the party, which is a complete compliance with the terms of the statute. If such an agreement were originally by parol, but it was afterwards reduced to writing by the parties, no one would doubt its obligatory force(*b*). Indeed, if the defendant does not insist on the defence, he may fairly be deemed to waive it; and the rule is, *Quisque renunciare potest juri pro se introducto*(*c*).

567. Where the answer confesses the parol agreement, but insists upon the statute of frauds as a defence, the question arises, whether courts of equity will allow the statute, under such circumstances, as a bar; or, whether they will, notwithstanding the statute, decree a specific performance upon the ground of the confession. Upon this question, there has been no small conflict of judicial opinion(*d*). But the doctrine is now firmly established, that even where the answer confesses the parol agreement, if it insists, by way of defence, upon the protection of the statute, the defence must prevail as a competent bar(*e*).

568. In the next place, courts of equity will enforce a specific performance of a contract within the statute, where the parol agreement has been partly carried into execution, by the party

(*a*) Att.-Gen. *v.* Day, 1 Ves. Sen. 221; Croyston *v.* Baynes, 1 Eq. Abr. 19; Prec. Ch. 208; Symondson *v.* Tweed, Prec. Ch. 374; Lacon *v.* Mertins, 3 Atk. 3; Child *v.* Godolphin, 1 Dick. 39, cited 2 Bro. C. C. 566; Gunter *v.* Halsey, Amb. 586; Whitchurch *v.* Bevis, 2 Bro. C. C. 566, 567; Cottingham *v.* Fletcher, 2 Atk. 155; Spurrier *v.* Fitzgerald, 6 Ves. 548, 555; Att.-Gen. *v.* Sitwell, 1 Y. & C. Ex. 583.

(*b*) But See Eyre *v.* Popham, Lofft. 808, 809; The London and Birmingham Rail way Co. *v.* Winter, Cr. & Ph. 57. 62; Rondeau *v.* Wyatt, 2 H. Bl. 68.

(*c*) Rondeau *v.* Wyatt, 2 H. Bl. 68; Spurrier *v.* Fitzgerald, 6 Ves. 548.

(*d*) Child *v.* Godolphin, 1 Dick. 39; cited 2 Bro. C. C. 566; Child *v.* Comber, 3 Sw. 423, note; Cottington *v.* Fletcher, 2 Atk. 155, 156; Lacon *v.* Mertins, 3 Atk. 3; Moore *v.* Edwards, 4 Ves. 24; Evans *v.* Harris, 2 V. & B. 361; Morrison *v.* Turnour, 18 Ves. 175; Mitf. Eq. Pl. by Jeremy, 265 to 268.

(*e*) See Mitf. Eq. Pl. by Jeremy, 265 to 268; Sug. V. & P. (14th ed.) 149; Walters *v.* Morgan, 2 Cox, 369; Whitbread *v.* Brockhurst, 1 Bro. C. C. 416; Whitchurch *v.* Bevis, 2 Bro. C. C. 559, 568, 569; Cooth *v.* Jackson, 6 Ves. 17; Roe *v.* Teed, 15 Ves. 375; Blagden *v.* Bradbear, 12 Ves. 466, 471; Skinner *v.* McDouall 2 D. & Sm. 265.

praying relief *(a)*. The distinct ground, upon which courts of equity interfere in cases of this sort, is, that otherwise one party would be able to practise a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief *(b)*. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious, that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice *(c)*.

569. A more difficult question is to ascertain what, in the sense of courts of equity, is to be deemed a part-performance, so as to extract the case from the reach of the statute. It seems formerly to have been thought, that a deposit, or security, or payment of the purchase money, or a part of it, or at least, of a considerable part of it, was such a part-performance as took the case out of the statute *(d)*. But that doctrine

(a) Caton *v.* Caton, L. R. 1 Chan. 137; Farquharson *v.* Williamson. 1 Gr. 93; O'Neal *v.* McMahon, 2 Gr. 145; Jennings *v.* Robertson, 3 Gr. 513. And see Grant *v.* Brown, 12 Gr. 52, on app. 13 Gr. 256. Companies and corporations are bound equally with, individuals by acts of part performance, Wilson *v.* The West Hartlepool Rail Co. 34 Beav. 187; Steven's Hospital *v.* Dyas, 15 Ir. Ch. 405.

(b) See Att.-Gen. *v.* Day, 1 Ves. Sen. 221; Walker *v.* Walker, 2 Atk. 100; Taylor *v.* Beech, 1 Ves. Sen. 297; Buckmaster *v.* Harrop, 7 Ves. 346; Whitbread *v.* Brockhurst, 1 Bro. C. C. 417; 2 V. & B. 153, note; Hawkins *v.* Holmes, 1 P. W. 770; Wills *v.* Stradling, 3 Ves. 378; Morphet *v.* Jones, 1 Sw. 181; Hare *v.* Shearwood, 1 Ves. 242; Clinan *v.* Cooke, 1 S. & L. 41; Mr. Raithby's note to Hollis *v.* Edwards, 1 Vern. 159.

(c) Story, s. 759. It must be borne in mind, "that part performance, to take a case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement." See Lady Thynne *v.* Earl of Glengall, 2 H. L. 158.

(d) Hales *v.* Van Berchem, 2 Vern. 618; Owen *v.* Davies, 1 Ves. Sen. 82; Skett *v.* Whitmore, 2 Freem. Ch. 281; Lacon *v.* Mertins, 3 Atk. 4; Main *v.* Melbourn, 4 Ves. 720, 724; Clinan *v.* Cooke, 1 S. & L. 40, note (*a*).

was open to much controversy and is now finally overthrown(*a*).

570. One ground, why part-payment is not now deemed a part-performance, is, that the money can be recovered back again at law, and, therefore, the case admits of full and direct compensation. Another ground, which certainly has more strength in it, is, that the statute has said in another clause (that which respects contracts for goods), that part-payment, by way of earnest, shall operate as a part-performance. And hence, the courts have considered this clause as excluding agreements for lands, because it is to be inferred, that, when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands(*b*). But a more general ground and that which ought to be the governing rule in cases of this sort, is, that nothing is to be considered as a part-performance, which does not put the party in a situation, which is a fraud upon him, unless the agreement is fully performed(*c*).

571. In order to make the acts such as a court of equity will deem part-performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed. For, if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part-performance of the agreement(*d*). Acts, merely introductory or ancillary to an

(*a*) Clinan *v.* Cooke, 1 S. & L. 40, 41; O'Herlihy *v.* Hedges, 1 S. & L. 129. But see Rose *v.* Watson, 10 H. L. 672. And see Sug. V. & P. (14th ed.] 152. It would, however, be difficult to refuse specific performance where the purchaser has paid all the purchase money, although there is authority in stating that the contract cannot be enforced where all the purchase money has been paid, Hughes *v.* Morris, 2 D. M. & G. 356.

(*b*) Story, s. 760; Clinan *v.* Cooke, 1 S. & L. 40; Pengall *v.* Ross, 2 Eq. Abr. 46, pl. 12; Pain *v.* Coombs, 1 D. & J. 34.

(*c*) Savage *v.* Foster, 9 Mod. 37. See Sutherland *v.* Briggs, 1 Hare, 26.

(*d*) Gunter *v.* Halsey, Ambl. 586; West, 681; Lacon *v.* Mertins, 3 Atk. 4; *Ex parte* Hooper, 19 Ves. 479; Morphett *v.* Jones, 1 Sw. 131; Att.-Gen. *v.* Day, 1 Ves Sen. 221; Walker *v.* Walker, 2 Atk. 100; Buckmaster *v.* Harrop, 7 Ves. 346; Wills *v.* Stradling, 3 Ves. 78; Meynell *v.* Surtees, 3 Sm. & Giff. 101; Farrall *v.* Davenport, 3 Giff. 363. See Black *v.* Black, 2 Gr. E. & A. 419.

agreement, are not considered as a part-performance thereof, although they should be attended with expense. Therefore, delivering an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, admeasuring the lands, registering conveyances, and acts of the like nature, are not sufficient to take a case out of the statute(*a*). They are all preliminary proceedings, and are, besides, of an equivocal character, and capable of a double interpretation; whereas acts, to be deemed a part-performance, should be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part-execution(*b*).

572. The mere possession of the land contracted for, will not be deemed a part-performance, if it be obtained wrongfully by the vendee(*c*), or if it be wholly independent of the contract. So, if the vendee be a tenant in possession under the vendor; for his possession is properly referable to his tenancy, and not to the contract(*d*). But if the possession be delivered and retained solely under the contract; or if, in case of tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, referable solely and exclusively to the contract; there, the possession may take the case out of the statute. Especially will it be held to do so, where the party let into possession, has expended money in building or repairs or other improvements; for under such circumstances, if the parol contract were to be deemed a nullity, he would be liable to be treated as a trespasser; and the expend-

(*a*) Hawkins *v.* Holmes, 1 P. W. 770; Pembroke *v.* Thorpe, 3 Sw. 437; Clerk *v.* Wright, 1 Atk. 12; Whitbread *v.* Brockhurst, 1 Bro. C. C. 412; Whitchurch *v.* Bevis, 2 Bro. C. C. 559, 566; Redding *v.* Wilkes, 3 Bro. C. C. 400; Cooth *v.* Jackson, 6 Ves. 17; Stokes *v.* Moore, 1 Cox, 219; Frame *v.* Dawson, 14 Ves. 386; Sug. V. & P. [14th ed.] 151.

(*b*) Story, s. 762.

(*c*) Cole *v.* White, 1 Bro. C. C. 409.

(*d*) Wills *v.* Stradling, 3 Ves. 378; Smith *v.* Turner, Prec. Ch. 561; Savage *v.* Carroll, 1 B. & B. 282; Frame *v.* Dawson, 14 Ves. 386; Lindsay *v.* Lynch, 2 S. & L. 1; O'Reilly *v.* Thompson, 2 Cox, 271; Morphett *v.* Jones, 1 Sw. 181; Brennan *v.* Bolton, 2 Dr. & War. 349; Sudg. V. & P. [14th ed.] 152.

iture would not only operate to his prejudice, but be the direct result of a fraud practised upon him(*a*).

573. In order to take a case out of the statute, upon the ground of part-performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract; but the contract should also be established by competent proofs to be clear, definite, and unequivocal in all its terms. If the terms are uncertain, or ambiguous, or not made out by satisfactory proofs, a specific performance will not be decreed. Yet in former times, very able judges felt themselves at liberty to depart from such a reasonable course of adjudication, and granted relief, notwithstanding the uncertainty of the terms of the contract(*b*). Such a latitude of jurisdiction seems unwarrantable upon any sound principle; and, accordingly, it has been expressly renounced in more recent times(*c*).

574. Although it is clear that where a parol contract is made in consideration of marriage, the subsequent marriage will not be an act of part-performance, so as to take the case out of the statute (*d*), yet a parol contract may be taken out of the statute by acts of part-performance, independently of the

(*a*) Butcher *v.* Staples, 1 Vern. 363; Pike *v.* Williams, 2 Vern. 45b; Lockey *v.* Lockey, Prec. Ch. 518; Earl of Aylesford's case, 2 Str. 783; Binstead *v.* Colman, Bunb. 65; 'Lacon *v.* Mertins, 3 Atk. 1; Wills *v.* Stradling, 3 Ves. 78; Kine *v.* Balfe, 2 B. & B. 348; Denton *v.* Stewart, 1 Cox, 258; Gregory *v.* Mighell, 18 Ves. 328; Morphett *v.* Jones, 1 Sw. 172; Lester *v.* Foxcroft, 1 W. & T. 693, Mundy *v.* Joliffe, 5 M. & C. 167; Mortimer *v.* Orchard, 2 Ves. 243; Toole *v.* Medlicot, 1 B. & B. 393; Norris *v.* Jackson, 10 W. R. 228; Nunn *v.* Fabian, L. R. 1 Chan. 35. In Pain *v.* Coombs, 1 D. & J. 34, it is suggested, by way of query, whether possession, taken previously, but continued after a parol agreement, may not be such part-performance as so exclude a defence founded on the statute of frauds.

(*b*) Anon. 5, Vin. Abr. 523, Pl. 40; id. 522, Pl. 38; Anon., cited 6 Ves. 470; Allan *v.* Bower, 3 Bro. C. C. 149.

(*c*) See Clinan *v.* Cooke, 1 S. & L. 22, 40; Symondson *v.* Tweed, Prec. Ch. 374; Forster *v.* Hale, 3 Ves. 712, 713; Savage *v.* Carroll, 1 B. & B. 282, s. c. 2 B. & B. 451; Tools *v.* Medlicott, 1 B. & B. 404; Lindsay *v.* Lynch, 2 S. & L. 6.

(*d*) Dundas *v.* Dutens, 1 Ves. 196; Lassence *v.* Tierney, 1 Mac. & G. 551; Warden *v.* Jones, 23 Beav. 487; 2 D. & J. 76; Cooper *v.* Wormald, 7 W. R. 402; Caton *v.* Caton, L. R. 1 Chan. 137, reversing s. c. 13 W. R. 801; and see s. c. L. R. 2 H. L. 127.

marriage(*a*). And where a person marries upon the faith of representations or promises made to him for the purpose of influencing his conduct with reference to the marriage, the person making such representations or promises will be compelled in equity to make them good, not only at the instance of the person to whom they were made(*b*), but also at the instance of the issue(*c*). The representation or promise must, however, be clear and absolute(*d*).

575. A parol promise made prior to a marriage cannot be enforced if the marriage did not take place, by reason of any reliance on such promise, or if it was not acted on as a reason and consideration for the marriage(*e*).

576. A contract will be taken out of the statute, where the provisions of the statute have not been complied with, in consequence of the fraud of the person against whom a decree for specific performance is sought(*f*).

577. The rule that parol agreements, even with part-performance, will not be decreed to be specifically executed unless the whole terms of the contract are clear and definitely ascertained, applies equally to cases of written contracts. If they are not certain in themselves, so as to enable the court to arrive at the clear result of what all the terms are, they will not be specifically enforced. It would be inequitable to carry a contract into effect, where the court is left to ascertain the intentions of the parties, by mere conjecture or guess; for it

(*a*) Surcome *v.* Pinniger, 3 D. M. & G. 571; and see Taylor *v.* Beech, 1 Ves. Sen. 297; Lassence *v.* Tierney, 1 Mac. & G. 551.

(*b*) Hammersley *v.* De Biel, 12 Cl. & Fin. 45; s. c. as De Biel *v.* Thompson, 3 Beav. 469; Payne *v.* Mortimer, 1 Giff. 118; 4 D. & J. 447; Alt *v.* Alt, 4 Giff. 84. And see Loffus *v.* Maw, 3 Giff. 592.

(*c*) Walford *v.* Gray, 13 W. R. 335; on app. 761.

(*d*) Randall *v.* Morgan, 12 Ves. 67. And see Maunsell *v.* White, 1 J. & L. 567; Loxley *v.* Heath, 27 Beav. 523; 1 D. F. & J. 489; Kay *v.* Crook, 3 Sm. & Giff. 407 Jameson *v.* Stein, 21 Beav. 5; and see Jorden *v.* Money, 15 Beav. 372; 2 D. M. & G. 318; 5 H. L. 185; Black *v.* Black, 2 Gr. . & A. 419.

(*e*) Goldicutt *v.* Townsend, 28 Beav. 445; Jamieson *v.* Stein, 21 Beav. 5.

(*f*) Maxwell *v.* Montacute, Prec. Ch. 526; Walker *v.* Walker, 2 Atk. 98; Jones *v.* Statham, 3 Atk. 389; Whitchurch *v.* Bevis, 2 Bro. C. C. 565; Lincoln *v.* Wright, 4 D. & J. 16, 22.

might be guilty of the error of decreeing precisely what the parties never did intend or contemplate(*a*); and if any terms are to be supplied, it must be by parol evidence; and the admission of such evidence would be contrary to the general rule, that parol evidence is not admissable to vary, annul, or explain a written contract(*b*).

578. It is important to take notice of a distinction between the case of a plaintiff seeking a specific performance in equity, and the case of a defendant, resisting such a performance. The specific execution of a contract in equity is a matter, not of absolute right in the party, but of sound discretion in the court(*c*); hence, it requires a much less strength of case on the part of the defendant to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain a bill to enforce a specific performance(*d*). When the court simply refuses to enforce the specific performance of a contract, it leaves the party to his remedy at law(*e*). An agreement, to be entitled to be carried into specific performance, ought to be certain, fair, and just in all its parts(*f*). Courts of equity will not decree a specific performance in cases of fraud or mistake(*g*); or where it would compel the party to an illegal or immoral

(*a*) Lindsay *v.* Lynch, 2 S. & L. 7, 8; Harnett *v.* Yielding, 2 S. & L. 555; Holloway *v.* Headington, 8 Sim. 324; McLaughlin *v.* Whiteside, 7 Gr. 573; Hook *v.* M'Queen, 2 Gr. 490. See Moorhouse *v.* Colvin, 15 Beav. 341; Kelly *v.* Sweeten, 17 Gr. 372; 1 Fonbl. Eq. B. 1, ch. 3, s. 11, note (*o*).

(*b*) Story, s. 767; 3 Starkie on Evid. Pt. 4, p. 995 to 1015; Parteriche *v.* Powlet, 2 Atk. 383; Tinney *v.* Tinney, 3 Atk. 8; Lawson *v.* Laude, 1 Dick. 316; Townshend *v.* Stangroom, 6 Ves. 328; Rich *v.* Jackson in note, 6 Ves. 334, note; Woollam *v.* Hearn, 7 Ves. 211; Clinan *v.* Cooke, 1 S. & L. 33; Squire *v.* Campbell, 1 M. & C. 480. But see Gould *v.* Hamilton, 5 Gr. 192.

(*c*) Cooper *v.* Denne, 4 Bro. C. C. 87; Haywood *v.* Cope, 25 Beav. 140; Murrell *v.* Goodyear, 1 D. F. & J. 432; Sug. V. & P (14th ed.) 349. And see Langstaffe *v.* Mansfield, 4 Gr. 607; Modlen *v.* Snowball, 7 Jur. N. S. 1260.

(*d*) Vigers *v.* Pike, 8 Cl. & Fin. 562, 645.

(*e*) Vigers *v.* Pike, 8 Cl. & Fin. 562, 645.

(*f*) Buxton *v.* Lister, 3 Atk. 385; Harnett *v.* Yielding, 2 S. & L. 554; Ellard *v.* Landaff, 1 B. & B. 250. See also Drysdale *v.* Mace, 5 D. M. & G. 103; Pegler *v.* White, 33 Beav. 403.

(*g*) Harnett *v.* Yielding, 2 S. & L. 554; Reynell *v.* Sprye, 1 D. M. & G. 660; Edwards *v.* McLeay, Coop. t. Eld. 308; Brooke *v.* Rounthwaite, 5 Hare, 298; Higgins *v.* Samels, 2 J. & H. 460; Farebrother *v.* Gibson, 1 D & J. 602; Drysdale *v.* Mace, 5 D. M. & G. 103; Swaisland *v.* Dearsley, 29 Beav. 430; Day *v.* Wells, 30 Beav. 220.

act(a); or where it would be against public policy; or where it would involve a breach of trust(b).

579. But courts of equity will let in the defendant to defend himself, by evidence to resist a decree, where the plaintiff would not always be permitted to establish his case by like evidence. Thus, for instance, courts of equity will allow the defendant to show, that, by fraud, accident, or mistake, the thing bought is different from what he intended(c); or that material terms have been omitted in the written agreement; or that there has been a variation of it by parol; or that there has been a parol discharge of a written contract(d).

580. In the case of a plaintiff seeking the specific performance of a contract, if it is reduced to writing, courts of equity will not ordinarily entertain a bill, to decree a specific performance thereof with variations or additions, or new terms to be made and introduced into it by parol evidence(e). There are, however, certain exceptions to this doctrine, which have

(a) Howe *v.* Hunt, 31 Beav. 420. And the court will not decree specific performance of an agreement which will infringe the prior rights of others, Reed *v.* Don Pedro, &c., Gold Mining Co. 10 L. T. N. S. 836.

(b) Mortlock *v.* Buller, 10 Ves. 292; Rede *v.* Oakes, 13 W. R. 303; Sneesby *v.* Thorne, 7 D. M. & G. 399.

(c) Malins *v.* Freeman, 2 Keen, 25, 34. And see Cottingham *v.* Boulton, 6 Gr. 186; Crooks *v.* Davis, 6 Gr. 317.

(d) Jones *v.* Statham, 3 Atk. 388; Woollam *v.* Hearn, 7 Ves. 211; Townshend *v.* Stangroom, 6 Ves. 328; Clarke *v.* Grant, 14 Ves. 519; Winch *v.* Winchester, 1 V. & B. 375; Price *v.* Dyer, 17 Ves. 356; Rich *v.* Jackson, 4 Bro. C. C. 514; 6 Ves. 334, note; Robson *v.* Collins, 7 Ves. 130; Cgilvie *v.* Foljambe, 3 Meriv. 53; Squire *v.* Campbell, 1 M. & C. 180; The London and Birmingham Railway Co. *v.* Winter, Cr. & Ph. 60, 61, 63; Pope *v.* Garland, 4 Y & C. 394; Van *v.* Corpe, 3 M. & K. 277; and see Neodler *v.* Campbell, 17 Gr. 592. Lord St. Leonards (Sug. V. & P., 14th ed., 165), gives the result of the authorities, as to a parol variation, as follows:— "1. That evidence of it is totally inadmissable at law. 2. That in equity the most unequivocal proof of it will be expected. 3. That, if it be proved to the satisfaction of the court, and be such a variation as the court will act upon; yet, it can only be used as a *defence* to a bill demanding a specific performance, and is inadmissable, as a ground to *compel* a specific performance; unless, 4. There has been such a part-performance of the new parol agreement as would enable the court to grant its aid in the case of an original independent agreement; and then in the view of equity, it is tantamount to a written agreement."

(e) Jones *v.* Statham, 3 Atk. 388; Townshend *v.* Stangroom, 6 Ves. 328; Ramsbottom *v.* Gosden, 1 V. & B. 165; the London and Birmingham Railway Co. *v.* Winter, Cr. & Ph. 57, 62; and see Londonderry *v.* Baker, 3 L. T. N. S. 546.

been allowed to prevail; as, for example, where the omission has(*a*) been by fraud; and in cases not within the reach of the statute of frauds, where there has been a clear omission by mistake(*b*).

581. And where the defendant sets up, in his defence to a bill for the specific performance of a written contract, that there has been a parol variation, or addition thereto, by the parties; if the plaintiff assents thereto, he may amend his bill, and at his election have a specific performance of the written contract, with such variations or additions so set up; for, under such circumstances, there is a written admission of each party to the parol variation or addition, and there can be no danger of injury to the parties, or evasion of the rules of evidence, or of the statute of frauds(*c*). So, the court may decree a specific performance in favour of the plaintiff, notwithstanding he does not make out the case stated by his bill, if he offers to comply with the contract as set forth in the defendant's answer, and as the defendant states it(*d*).

582. In general, it may be stated that, to entitle a party to a specific performance, he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards the performance of his own part(*e*). If he has been guilty of gross laches, or if he applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed; for courts of equity

(*a*) Maxwell *v.* Montacute, Prec. ch. 526; Walker *v.* Walker, 2 Atk. 98; Jones *v.* Statham, 3 Atk. 389; Whitchurch *v.* Bevis, 2 Bro. C. C. 565; Lincoln *v.* Wright, 4 D. & J. 16, 22.

(*b*) Henkle *v.* Royal Exch. Assur. Co., 1 Ves. Sen. 317; Motteux *v.* London Assur. Co., 1 Atk. 545.

(*c*) The London and Birmingham Railway Co. *v.* Winter, Cr. & Ph. 57; Jones *v.* Statham, 3 Atk. 388; Townshead *v.* Stangroom, 6 Ves. 328, and Ramsbottom *v.* Gosden, 1 V. & B. 165.

(*d*) Story, s. 770 a; Lindsay *v.* Lynch, 2 S. & L. 9; Wollam *v.* Hearn, 7 Ves. 22; Deniston *v.* Little, 2 S. & L. 11, note. But in a very late case (Jeffery *v.* Stephens, 6 Jur. N. S. 947) before the Master of the Rolls, it was decided, that where the defendant set up in his answer a different agreement from that which the plaintiff sought to have enforced, and one which the plaintiff had always repudiated, he was not entitled to have the agreement set up by the defendant specifically performed.

(*e*) 1 Fonbl. Eq. B. 1, ch. 6, s. 2, and notes (*c*, *d*); Gilbert, Lex Prætor. 240.

do not, any more than courts of law, administer relief to the gross negligence of suitors(*a*).

583. Where the terms of an agreement have not been strictly complied with, or are incapable of being strictly complied with, still, if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed; and if compensation may be made for an injury occasioned by non-compliance with the strict terms; in all such cases courts of equity will interfere, and decree a specific performance. For the doctrine of courts of equity is, not forfeiture, but compensation(*b*); and nothing but such a decree will, in such cases, do entire justice between the parties(*c*).

584. One of the most frequent occasions on which courts of equity are asked to decree a specific performance of a contract, is, where the terms for the performance and completion of the contract have not, in point of time, been strictly complied with. Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and cir-

(*a*) Milward *v.* Earl of Thanet, 5 Ves. 720, note; Moore *v.* Blake, 1 B. & B. 68, 69; Watson *v.* Reid, 1 R. & M. 236; Page *v.* Broom, 4 Russ. 6; Walker *v.* Broom, 14 Gr. 237. Under the circumstances of this Country, a much less delay may prevent a party from obtaining specific performance, than would be sufficient to do so in England—Hook *v.* McQueen, 4 Gr. 231. And see as to laches, Paul *v.* Blackwood, 3 Gr. 394; on appeal, 4 Gr. 550; Haggart *v.* Allen, 4 Gr. 36; Young *v.* Bown, 6 Gr. 402; Crawford *v.* Birdsall, 8 Gr. 415. But see O'Keefe *v.* Taylor, 2 Gr. 95.

(*b*) Page *v.* Broom, 4 Russ. 6, 19. And see Hunt *v.* Spencer, 13 Gr. 225.

(*c*) Story, s. 775; Davis *v.* Hone, 2 S. & L. 347; Lennon *v.* Napper, 2 S. & L. 684; 1 Fonbl. Eq. B. 1, ch. 6, s. 2, note (*e*). It sometimes happens that a contract involving the sale and conveyance of land becomes impossible, by reason of the title proving defective, and at the same time the vendee may have taken possession, and insist upon strict performance on the part of the vendor and also declined to surrender possession on the ground of not being in fault. Such a contract must be treated the same as if never made, as to any act of possession under it or specific performance, leaving the party to any redress he might have for damages in an action at law. Mullins *v.* Hussey, 12 Jur. N. S. 636. As to taking possession being a waiver of title, see Morin *v.* Wilkinson, 2 Gr. 157; The Commercial Bank *v.* McConnell, 7 Gr. 323; Darby *v.* Greenlees, 11 Gr. 357; Mitcheltree *v.* Irwin, 13 Gr. 531.

cumstances of the contract(*a*). It is true that courts of equity have regard to time, so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance, or if he comes, *recenti facto*, to ask for a specific performance, the suit is treated with indulgence, and generally with favour by the court(*b*).

585. But then, in such cases, it should be clear that the remedies are mutual(*c*); that there has been no change of circumstances affecting the character or justice of the contract(*d*); that compensation for the delay can be fully and beneficially given; that he who asks a specific performance is in a condition to perform his own part of the contract; and that he has shown himself ready, desirous, prompt, and eager to perform the contract(*e*). Even where time is of the essence of the contract, it may be waived by proceeding in the purchase after the time has elapsed; and if time was not originally made by the parties of the essence of the contract, yet it may become so by notice, if the other party is afterwards guilty of improper delay in completing the purchase(*f*).

586. Courts of equity will also relieve the party vendor, by decreeing a specific performance, where he has been unable to comply with his contract according to the terms of it, from the state of his title at the time, if he comes within a reason-

(*a*) Sug. V. & P. [14th ed.] 260; Wynn *v.* Morgan, 7 Ves. 202; Gibson *v.* Patterson, 1 Atk. 12; Pincke *v.* Curteis, 4 Bro. C. C. 329; Lloyd *v.* Collett, 4 Bro. C. C. 469; 4 Ves. 689, note; Omerod *v.* Hardman, 5 Ves. 736; Seton *v.* Slade, 7 Ves. 265; Hall *v.* Smith, 14 Ves. [illegible] Savage *v.* Brocksopp, 18 Ves. 335; Hertford *v.* Boore, 5 Ves. 719; Reynolds *v.* N[illegible]on, 6 Mad. 19, 25, 26; Newman *v.* Rogers, 4 Bro. C. C. 391; Doloret *v.* Rothschild, 1 S. & S. 590; Heaphy *v.* Hill, 2 S. & S. 29. See also Coslake *v.* Till, 1 Russ. 376; King *v.* Wilson, 6 Beav. 124; Macbryde *v.* Weekes, 22 Beav. 533. As to time being made of the essence of the contract, see Parken *v.* Thorold, 16 Beav. 59. As to waiver of condition making time of the essence, see McDonald *v.* Garrett, 7 Gr. 606.

(*b*) Ibid.; Jeremy on Eq. Jur. B. 3, Pt. 2, ch. 4, s. 1, p. 461, 462. And see McSweeney *v.* Kay, 15 Gr. 432.

(*c*) 1 Fonbl. Eq. B. 1, ch. 6, s. 12, note (*c*), and the case there cited.

(*d*) Paine *v.* Meller, 6 Ves. 349.

(*e*) Millard *v.* Earl of Thanet, 5 Ves. 720, note; Alley *v.* Deschamps, 13 Ves. 228; Moore *v.* Blake, 1 B. & B. 68, 69.

(*f*) King *v.* Wilson, 6 Beav. 124.

able time, and the defect is cured(*a*). So, if there has been no unnecessary delay, courts of equity will sometimes decree a specific performance in favour of the vendor, although he is unable to make a good title at the time when the bill is brought, if he is in a condition to make such a title at or before the time of the decree(*b*). So, if the circumstances of the quality or quantity of land are not correctly described, and the misdescription is not very material, and admits of complete compensation, courts of equity will decree a specific performance. In all such cases, courts of equity look to the substance of the contract, and do not allow small matters of variance to interfere with the manifest intention of the parties, and especially where full compensation can be made to the party on account of any false or erroneous description(*c*).

587. But notwithstanding the rule is well established in courts of equity, that time will not be regarded as indispensable, in regard to decreeing specific performance of contracts for the actual sale of lands on one side and the actual purchase on the other, it is different where the contract gives a mere election to purchase upon certain conditions. Accordingly, where upon a lease, with the right of purchase within seven years, upon giving three months' notice, and paying a fixed sum at the expiration of such notice, and the lessee gave the requisite notice, but did not pay the money in time, a bill for specific performance was dismissed(*d*).

588. Thus far, cases of suits by the vendor against the purchaser for a specific performance, where the contract has not been, or cannot be strictly complied with, have been spoken of. But suits may also be brought by the purchaser for a

(*a*) See the cases cited in Sug. V. & P. [14th ed.] 260 et seq.; Guest *v.* Homfray, 5 Ves. 818; Esdaile *v.* Stephenson, 1 S. & S. 122; Wynn *v.* Morgan, 7 Ves. 202.

(*b*) Hoggart *v.* Scott, 1 R. & M. 293; s. c. Tamlyn, 500.

(*c*) Story, s. 777; Calcraft *v.* Roebuck, 1 Ves. 220; Calverley *v.* Williams, 1 Ves. 212; Dyer *v.* Hargrave, 10 Ves. 507; Guest *v.* Homfray, 5 Ves. 818; Drewe *v.* Hanson, 6 Ves. 675; Halsey *v.* Grant, 13 Ves. 76, 77; Hanbury *v.* Litchfield, 2 M. & K. 629; Horniblow *v.* Shirley, 13 Ves. 81. See Carver *v.* Richards, 6 Jur. N. S. 667.

(*d*) Story, s. 777 a; Lord Ranelagh *v.* Melton, 2 Dr. & Sm. 278; Weston *v.* Collins, 11 Jur. N. S. 190.

specific performance under similar circumstances, where the vendor is incapable of making a complete title to all the property sold, or where there has been a substantial misdescription of it in important particulars; or where the terms, as to the time and manner of execution, have not been punctually or reasonably complied with on the part of the vendor. In these and the like cases, as it would be unjust to allow the vendor to take advantage of his own wrong, or default, or misdescription, courts of equity allow the purchaser an election to proceed with the purchase *pro tanto*, or to abandon it altogether. The general rule (for it is not universal) in all such cases, is, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase-money or compensation, for any deficiency in the title, quantity, quality, description, or other matters touching the estate(*a*). But if the purchaser should insist upon such a performance, the court will grant the relief only upon his compliance with equitable terms(*b*).

589. Perhaps it may be truly said, that in some of the cases, in which, in former times, the strict terms of the contract, as to time, description, quantity, quality, and other circumstances of the estate sold, were dispensed with, courts of equity went beyond the true limits, to which every jurisdiction of this sort should be confined, as it amounted to a substitution *pro tanto*, of what the parties had not contracted for(*c*). But the tendency of the modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the prin-

(*a*) Paton *v.* Rogers, 1 V. & B. 351; Hill *v.* Buckley, 17 Ves. 394; Milligan *v.* Cooke, 16 Ves. 1; Todd *v.* Gee, 17 Ves. 278, 279; Wood *v.* Griffith, 1 Sw. 54; Mestaer *v.* Gillespie, 11 Ves. 640; Graham *v.* Oliver, 3 Beav. 124, 128; Barrett *v.* Ring, 2 Sm. & G. 43; Wilson *v.* Williams, 3 Jur. N. S. 810; Maw *v.* Topham, 19 Beav. 576; King *v.* Wilson, 6 Beav. 124; McCall *v.* Faithorne, 10 Gr. 324; Follis *v.* Porter, 1 Gr. 442. As to compensation for improvements made by purchaser when vendor cannot complete contract, Davis *v.* Snyder, 1 Gr. 134.

(*b*) Paton *v.* Rogers, 1 V. & B. 351; Thomas *v.* Dering, 1 Keen 729, 743, 747; Malden *v.* Fyson, 9 Beav. 347.

(*c*) See Halsey *v.* Grant, 13 Ves. 73; Drewe *v.* Hanson, 6 Ves. 678; Bowyer *v.* Bright, 13 Price, 702.

ciples of equity, and by a reasonable regard to the convenience of mankind, as well as to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions(*a*).

590. Cases within the reach of other clauses of the statute of frauds have occurred, and may again occur, in which, also, the remedial justice of courts of equity ought to be exerted by decreeing a specific performance of the contemplated act of trust. Thus, if a man, in confidence on the parol promise of another to perform the intended act, should omit to make certain provisions, gifts, or arrangements for other persons, by will or otherwise, such a promise would be specifically enforced in equity against such promisee; although founded on a parol declaration, creating a trust contrary to the statute of frauds; for it would be a fraud upon all the other parties to permit him to derive a benefit from his own breach of duty and obligation(*b*).

591. Where the specific execution of a contract respecting lands will be decreed between the parties, it will be decreed between all persons claiming under them in privity of estate, or of representation, or of title, unless other controlling equities are interposed(*c*). If a person purchases lands with knowledge of a prior contract to convey them, he is affected by all the equities which affected the lands in the hands of the vendor(*d*). On the other hand, if the vendee under such a contract conveys the same to a third person, the latter, upon paying the purchase-money, may compel the vendor, and any person claiming under him in privity, or as a purchaser

(*a*) Story, s. 780; Drewe *v.* Hanson, 6 Ves. 678.

(*b*) Story, s. 781; Oldham *v.* Litchfield, 2 Vern. 506; s. c. 2 Freem. 284; Dutton *v.* Pool, 2 Lev. 211; s. c. 1 Ventr. 318; s. c. cited 2 Freem. 285; Reech *v.* Kennigate, Ambl. 67; 1 Ves. Sen. 123; Barrow *v.* Greenough, 3 Ves. 152, 154; Mestaer *v.* Gillespie, 11 Ves. 638; Chamberlain *v.* Agar, 2 V. & B. 262; Devenish *v.* Baines, Prec. Ch. 3; Chamberlaine *v.* Chamberlaine, 2 Freem. 34.

(*c*) Smith *v.* Hibbard, 2 Dick. 730.

(*d*) Potter *v.* Sanders, 6 Ha. 1.

with notice, to complete the contract and convey the title to him(*a*).

592. The general principle upon which this doctrine proceeds, is, that from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities as the party would be from whom he purchased(*b*).

593. In the view of courts of law, contracts respecting lands, or other things, of which a specific execution will be decreed in equity, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident, or as a present or future charge. But courts of equity regard them in a very different light. They treat them, for most purposes, precisely as if they had been specifically executed(*c*).

594. If a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land, and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made, and it passes by descent to his heir as land(*d*). The vendor is deemed in equity to stand seized of it for the benefit of the purchaser; and the trust attaches to the land, so as to bind the heir of the vendor, and every one claiming under him as a purchaser, with notice of the trust. The heir of the purchaser may come into equity and insist upon a specific performance of the contract; but as he now takes the land subject to the charges he cannot re-

(*a*) Winged *v.* Lefebury, 2 Eq. Abridg. 32, pl. 43; Taylor *v.* Stibbert, 2 Ves. 437; Daniels *v.* Davison, 16 Ves. 249; 17 Ves. 433.

(*b*) Davie *v.* Beardsham, 1 Ch. Cas. 39; Green *v.* Smith, 1 Atk. 572, 573; Pollexfen *v.* Moore, 3 Atk. 273; Mackreth *v.* Symmons, 15 Ves. 329, 336; Walker *v.* Preswick, 2 Ves. Sen. 622; Trimmer *v.* Bayne, 9 Ves. 209.

(*c*) Story, s. 790.

(*d*) Seton *v.* Slade, 7 Ves. 264, 274. And see 2 W. & T. 513, and the cases there collected.

quire the purchase-money to be paid out of the personal estate of the purchaser, in the hands of his personal representative.

595. On the other hand, the vendor may come into equity for a specific performance of the contract on the other side, and to have the money paid, and in case of the vendor's death, the purchase money is treated as the personal estate of the vendor, and goes as such to his personal representatives. In like manner, land, articled or devised to be sold, and turned into money, is reputed as money, and money, articled or bequeathed to be invested in land, has, in equity, many of the qualities of real estate, and is discendible and devisable as such, according to the rules of inheritance in other cases(*a*).

596. Where a person has entered into a contract not to do a thing, specific performance of such negative contract will be enforced by an injunction restraining him from doing anything in contravention of it. Thus a court of equity has restrained parties from ringing a bell (*b*), carrying on a trade (*c*), acting on the stage(*d*), carrying on a particular trade in a certain place or district(*e*), erecting buildings(*f*), or making applications to parliament, contrary to an agreement not to do such acts(*g*).

597. The jurisdiction of the court with regard to specific performance has been enlarged by the 28 Victoria, c. 17, s. 3 which enacts that "In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the

(*a*) Story, s. 790; Fletcher *v.* Ashburner, 1 Bro. C. C. 496. Doughty *v.* Bull, 2 P. W. 320; Yates *v.* Compton, 2 P. W. 308; Trelawney *v.* Booth, 2 Atk. 307; Rose *v.* Cunynhame, 11 Ves. 554; Kirkman *v.* Miles, 13 Ves. 338.

(*b*) Martin *v.* Nutkin, 2 P. W. 266.

(*c*) Barrett *v.* Blagrave, 5 Ves. 555; Ves. 104; Williams *v.* Williams, 2 Sw. 253; 3 Mer. 157. And see Shackle *v.* Baker, 14 Ves. 468; Cruttwell *v.* Lye, 17 Ves. 335; Newbury *v.* James, 2 Mer. 446; Harrison *v.* Gardiner, 2 Mad. 198.

(*d*) Lumley *v.* Wagner, 1 D. M. & G. 604.

(*e*) Clements *v.* Welles, L. R. 1 Eq. 200; Clarkson *v.* Edge, 12 W. R. 518.

(*f*) Rankin *v.* Huskisson, 4 Sim. 13.

(*g*) Ware *v.* Grand Junction Water Works Company, 2 R. & M. 470, 483; Heathcote *v.* North Staffordshire Railway Company, 2 Mac. & G. 100; Lancaster and Carlisle Railway Company *v.* North Western Railway Company, 2 K. & J. 293.

commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the Court, if it thinks fit, may award damages to the party injured, either in addition to or in substitution for such injunction or specific performance."

598. This Act which is not retrospective, does not extend the jurisdiction of the court where there is a plain common law remedy, and where the court would not have interfered before the passing of the Act(*a*). The court, therefore, cannot award damages, save in those cases where it has jurisdiction to decree specific performance, and in addition to or substitution for that remedy. Hence it has been decided that as a court of equity has no jurisdiction to compel specific performance of an agreement to borrow a sum of money, it cannot award compensation or damages against the person who has refused to accept a loan of money for which he has contracted.(*b*) So, as the court would not compel specific performance of an agency contract, it cannot grant damages for the breach of such a contract.(*c*)

599. Where the court, however, has jurisdiction to grant specific performance, it may award damages for non-performance of part of the contract in respect to which it could not have compelled specific performance. Thus where the plaintiff agreed to grant a lease to the defendant, when, and so soon as he, the defendant, should have built a new house on the land, and the defendant agreed to accept such lease when required, and by a certain day to pull down an old house then standing on the land and build a new one on the site. The defendant, who was previously in the occupation of the premises, in pursuance and part performance of the agreement, caused the old house to be pulled down and sold the materials, and continued in possession, and paid part of the rent which accrued due, but did not proceed to build a new

(*a*) Wicks *v.* Hunt, Johns. 372, 380.
(*b*) Rogers *v.* Challis, 27 Beav. 175.
(*c*) Chinnock *v.* Sainsbury, 30 L. J. N. S. Ch. 409.

house on the old site. On demurrer to a bill praying specific performance and damages, it was held that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease(*a*).

CHAPTER XIX.

COMPENSATION AND DAMAGES.

600. As a general proposition, courts of equity do not entertain jurisdiction to give redress by way of COMPENSATION or DAMAGES, for breaches of contract, and other wrongs and injuries cognizable at law, where these constitute the sole objects of the bill(*b*). Wherever the suit is one merely for damages, and there is a perfect remedy at law, the foundation of equitable jurisdiction is wanting(*c*). Compensation or damages ought, therefore, ordinarily to be decreed in equity only when incidental to other relief(*d*), or where there is no adequate remedy at law(*e*); or where there is some peculiar equity(*f*).

601. The rule has been construed so strictly, that even in cases where no remedy exists at law, a court of equity has refused to award damages. Thus, where a trustee, by a breach of trust has injured the trust property, damages were

(*a*) Soames *v.* Edge, Johns. 669.

(*b*) Lewers *v.* Earl of Shaftesbury, L. R. 2 Eq. 270. And see Middleton *v.* Greenwood, 2 D. J. & S. 145; Durell *v.* Pritchard, L. R. 1 Chan. 244; Hindley *v.* Emery, L. R. 1 Eq. 52; Wedmore *v.* Mayor of Bristol, 11 W. R. 136; Swaine *v.* Great Northern Rail Co. 12 W. R. 391.

(*c*) Clifford *v.* Brooke, 13 Ves. 131, 134; Blore *v.* Sutton, 3 Meriv. 247, 248; Newham *v.* May, 13 Price, 749, 752.

(*d*) Newham *v.* May, 13 Price, 752,

(*e*) Ranelaugh *v.* Hayes, 1 Vern, 189; Newham *v.* May, 13 Price, 752.

(*f*) Nelson *v.* Bridges, 2 Beav. 239. The court may, and in some cases does, grant damages in substitution for other relief, as the more appropriate remedy. See Senior *v.* Pawson, L. R. 3 Eq. 330; Martin *v.* Headon, L. R. 2 Eq. 425; Durell *v.* Pritchard, L. R. 1 Chan. 244; Howe *v.* Hunt, 31 Beav. 420; Franklinski *v.* Ball, 33 Beav. 560; Catton *v.* Wyld, 32 Beav. 266.

refused, although, if the trustee had by the breach of trust, made profits, he would have been accountable for them(*a*).

602. The mode by which compensation or damages are ascertained, may be either by a reference to a master, or by directing an issue, to be tried by a jury. The latter was the most invariable course in former times, in all cases where the compensation was not extremely clear, as to its elements and amount, but the former method is now generally adopted(*b*).

603. Wherever compensation or damages are incidental to other relief, the jurisdiction properly attaches in equity; for it flows, and is inseparable from the proper relief(*c*). Thus, where a bill is brought by vendor against vendee for a specific performance, and payment of the purchase-money, equity will decree payment of the purchase-money, as incidental to the general relief, although the vendor may have a good remedy at law(*d*).

604. Where specific performance is refused there is more difficulty in establishing the propriety of exercising a general jurisdiction for compensation or damages. But on one occasion(*e*), where specific performance was refused, because the vendor had rendered himself incapable of performing the contract, a decree for compensation, and reference to a master(*f*), was made.

(*a*) The corporation of Ludlow *v.* Greenhouse, 1 Bligh, N. R. 18, 57, 58. And see Chapman *v.* Chapman, L. R. 9 Eq. 276.

(*b*) Denton *v.* Stewart, 1 Cox, 258; Greenaway *v.* Adams, 12 Ves 401, 402, Todd *v.* Gee, 17 Ves. 278, 279; Watt *v.* Grove, 2 S. & L. 513. The court may now try any question with a jury instead of directing an issue to a court of common law, Con. Stat. U. C. c. 12, s. 69. And see 28 Vic. c. 17, s, 3.

(*c*) See Todd *v.* Gee, 17 Ves. 278, 279; Grant *v.* Munt, Coop. t. Eld. 173; Newham *v.* May, 13 Price, 752; Mortlock *v.* Buller, 10 Ves. 306, 315; Dyer *v.* Hargrave, 10 Ves. 507; Howland *v.* Norris, 1 Cox, 59; Halsey *v.* Grant, 13 Ves. 77; Forrest *v.* Elwes, 4 Ves. 497; Hedges *v.* Everard, 1 Eq. Abr. 18, pl. 7. But damages will not be given if the injury be trivial, Clarke *v.* Clark, L. R. 1 Chan. 16; Curriers' Co. *v* Corbett, 13 W. R. 1056. But see Robson *v.* Whittingham, L. R. 1 Chan. 442.

(*d*) Withy *v.* Cottle, 1 S. & S. 174; Adderley *v.* Dixon, 1 S. & S. 607.

(*e*) Greenaway *v.* Adams, 12 Ves. 401.

(*f*) And see Denton *v.* Stewart, 1 Cox, 258; Sainsbury *v.* Jones, 5 M. & C. 1; Gwillim *v.* Stone, 14 Ves. 128. If the plaintiff does any act which disentitles him to specific performance he will not be entitled to damages, Collins *v.* Stuteley, 7 W. R. 710; Bauman *v.* Matthews, 4 L. T. N. S. 784.

605. Courts of equity ought not to entertain suits for compensation or damages, except as incidental to other relief, where the contract is such that there is an adequate remedy at law for compensation or damages. But where there is no such remedy at law, a peculiar ground exists for the interference of courts of equity to prevent irreparable mischief, or avoid fraudulent advantage being taken of the injured party. Thus, where there has been part performance of a parol contract, and the vendor has since sold the land to a *bona fide* purchaser, for value without notice, a decree for specific performance would be ineffectual and the contract being parol there would be no remedy at law for compensation or damages, there seems a just foundation for the exercise of equity jurisdiction(*a*).

606. As there is, in the present state of the authorities, some conflict of opinion, it is not possible to affirm more than that the jurisdiction for compensation or damages does not ordinarily attach in equity, except as ancillary to specific performance, or some other relief. If it attaches in other cases, it must be under very special circumstances, and upon peculiar equities, as in cases of fraud or where the party has disabled himself, by matters *ex post facto*, from a specific performance(*b*), or where there is no adequate remedy at law(*c*).

607. Where compensation is sought by a defendant, in resistance or modification of the plaintiff's claim, the maxim often prevails, that he who seeks equity shall do equity. Thus, if a plaintiff seeks the aid of the court to enforce his title against an innocent person, who has made improvements

(*a*) Story, s. 798; Denton *v.* Stewart, 1 Cox, 258; Deane *v.* Izard, 1 Vern. 159; Todd *v.* Gee, 17 Ves. 273; City of London *v.* Nash, 3 Atk. 512, 517; Cud *v.* Rutter, 1 P. W. 570.

(*b*) See Davenport *v.* Ryland, L. R. 1 Eq. 302; Eastwood *v.* Lever, 33 L. J. Ch. 355; Cory *v.* Thames Iron Co., 11 W. R. 589.

(*c*) Errington *v.* Aynesly, 2 Bro. C. C. 341; Deane *v.* Izard, 1 Vern. 159; Gwillim *v.* Stone, 14 Ves. 129; Todd *v.* Gee, 17 Ves. 273. And see Betts *v.* Neilson, L. R. 3 Chan. 429; Betts *v.* Gallais, L. R. 10 Eq. 392; Schotsmans *v.* Lancashire, &c. R. Co., L. R. 1 Eq. 349; Jegon *v.* Vivian, L. R. 6 Chan. 742; Hilton *v.* Woods, L. R. 4 Eq. 432; Corporation of Hythe *v.* East, L. R. 1 Eq. 620.

on lands, supposing himself the absolute owner, aid will be given to him only upon terms of making compensation to the extent of the benefit he will receive from the improvements(*a*). Independently of any fraud, if an account of rents and profits is sought from an innocent person who has made improvements, in ignorance of his title being defective, equity in decreeing an account, will allow him to deduct a due compensation for his improvements(*b*). So, in cases of partition between tenants in common, compensation is often allowed to one of them who has made valuable improvements(*c*).

608. The jurisdiction of the court with respect to compensation and damages has been extended by the 28 Vic., c. 17, s. 3, which provides, that in all cases in which the court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the court, if it thinks fit, may award damages to the party injured, either in addition to, or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the court may direct, or the court may grant such other relief as it may deem just.

609. With reference to the construction and application of the corresponding Act in England(*d*), the following points seem settled: The statute does not extend the jurisdiction of the court to cases where there is a plain common law remedy, and where before the statute the court would not have inter-

(*a*) Cawdor *v.* Lewis, 1 Y. & C., Ex. 427; Pilling *v.* Armitage, 12 Ves. 84; Thornton *v.* Ramsden, 4 Giff. 519; Ramsden *v.* Dyson, L. R. 1 H. L. 129; Powell *v.* Thomas, 6 Ha. 300; Jackson *v.* Cator, 5 Ves. 688; Dann *v.* Spurrier, 7 Ves. 231; Shannon *v.* Bradstreet, 1 S. & L. 73. And see Cooper *v.* Phibbs, L. R. 2 H. L. 166; Bevis *v.* Boulton, 7 Gr. 39.

(*b*) And see McLaren *v.* Fraser, 17 Gr. 567; Gummerson *v.* Banting, 18 Gr. 516. As to the mode of estimating the improvements, see Morley *v.* Matthews, 14 Gr. 555; Carrol *v.* Robertson, 15 Gr. 176; Smith *v.* Bonnisteel, 13 Gr. 35; Mill *v.* Hill, 3 H. L. 869.

(*c*) Story *v.* Johnson, 1 Y. & C. Ex. 538; 2 Y. & C. Ex. 586; Biehn *v.* Biehn, 18 Gr. 497.

(*d*) 21 & 22 Vic., c. 27.

fered(*a*). That where a plaintiff comes to the court for the specific performance of a contract which cannot be performed at all, damages cannot be given in lieu of specific performance(*b*). So, again, there can be no relief in equity where a bill is filed for damages and damages only(*c*). And where the court has jurisdiction to compel specific performance of a part of a contract, it has also power under the statute to award damages for the breach of another part of the contract in respect of which it could not have compelled specific performance(*d*).

CHAPTER XX.

INTERPLEADER.

610. The remedy by INTERPLEADER at law had a very narrow range, and existed only where there was a joint bailment by both claimants(*e*).

611. The jurisdiction in equity, to compel an interpleader is properly applied to cases where two or more persons whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, severally claim the same thing by different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties. He therefore applies to a court of equity to protect him, not only from being compelled to pay or deliver the thing

(*a*) Wicks *v.* Hunt, Johns. 380.
(*b*) Middleton *v.* Magnay, 2 H. & M. 236; Rogers *v.* Challis, 27 Beav. 175; Chinnock *v.* Sainsbury, 30 L. J. Ch. 409.
(*c*) Middleton *v.* Greenwood, 2 D. J. & S. 145.
(*d*) Snell's Eq. 475.
(*e*) Crawshay *v.* Thornton, 2 M. & C. 21.

claimed to both the claimants, but also from the vexation attending upon the suits, which are, or may be, instituted against him(*a*).

612. If an interpleader at law will lie, and would be effectual for the protection of the party, the jurisdiction in equity fails(*b*). So, if the party seeking the aid of the court claims an interest in the subject-matter, as well as the other parties, there is no foundation for the exercise of the jurisdiction, for he has other remedies(*c*).

613. The true ground upon which the plaintiff comes into equity, is, that, claiming no right in the subject-matter himself, he is, or may be, vexed by having two legal or other processes, by different persons, against him at the same time. He has, therefore, an obvious equity, to insist that those persons, should settle the contest among themselves, and not with him or at his expense(*d*). If their respective titles are doubtful, there is the more reason why he should not be harrassed by suits to ascertain and fix them.

614. It is not necessary, to entitle the party to come into equity, that the titles of the claimants should be both purely

(*a*) Moore *v.* Usher, 7 Sim. 383; Jones *v.* Thomas, 2 Sm. & Giff. 186; Reid *v.* Stearn, 6 Jur. N. S. 267; Hoggart *v.* Cults, Cr. & P. 197. And see Glyn *v.* Duesbury, 11 Sim. 147; Pearson *v.* Cardon, 2 R. & M. 613. Generally speaking, the bill should be filed before any judgment at law settling the rights of the respective parties to the property in question; the object of the bill being to protect the complainant from the vexation attendant upon defending all the suits that may be instituted against him for the same property. Cornish *v.* Tanner, 1 Y. & J. 333. But a bill of interpleader may be filed after a verdict at law, if the effect of the action at law was merely to ascertain the damages due the plaintiff at law who was a defendant in the equity suit, Hamilton *v.* Marks, 5 D. & Sm. 638. Where a person in good faith, but from wrong information, replevied property which did not belong to him, and after a verdict against him, a new claimant insisted that the property was his, and threatened an action, this was held not a case for interpleader, Fuller *v.* Patterson, 16 Gr. 91.

(*b*) Hamilton *v.* Marks, 5 D. & Sm. 638.

(*c*) Langston *v.* Boylston, 2 Ves. 103, 109; Angell *v.* Hadden, 15 Ves. 244; Mitchell *v.* Hayne, 2 S. & S. 63; Aldrich *v.* Thompson, 2 Bro. C. C. 149; Slingsby *v.* Boulton, 1 V. & B. 334; And where two claimants both demand the same property of the plaintiff, and he has done acts tending to the recognition of the claim of both, he cannot maintain a bill of interpleader against them, Sablicich *v.* Russell, L. R. 2 Eq. 441.

(*d*) Mitchell *v.* Hayne, 2 S. & S. 63; Moore *v.* Usher, 7 Sim. 383; Langston *v.* Boylston, 2 Ves. 109. And see Davidson *v.* Douglas, 12 Gr. 181.

legal. It is sufficient to found the jurisdiction that one title is legal and the other is equitable(*a*). Indeed where one of the claims is purely equitable, it seems indispensable to come into equity, for, in such a case, there can be no interpleader at law (*b*). Thus, if a debt or other claim has been assigned, and a controversy arises between the assignor and the assignee respecting the title, a bill of interpleader may be brought by the debtor, to have the point settled, to whom he shall pay(*c*).

615. Where the title of all the claimants is purely equitable, there is a still broader ground to entertain bills in the nature of a bill of interpleader. Nor is it necessary that a suit shall have been actually commenced by either or both of the conflicting claimants, against the party, either at law or in equity, it is sufficient that a claim is made against him, and that he is in danger of being molested by conflicting rights(*d*).

616. In cases of adverse independent titles, not derived from the same common source, the party holding the property must defend himself as well as he can at law ; and he is not entitled to the assistance of a court of equity ; for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person, who calls for an interpleader(*e*).

617. It is a settled rule of law, and of equity also, that an agent shall not be allowed to dispute the title of his principal to property which he has received from or for his principal, or to say that he will hold it for the benefit of a stranger(*f*). But this doc-

(*a*) Morgan *v.* Marsack, 2 Mer. 107; Smith *v.* Hammond, 6 Sim, 10; Crawford *v.* Fisher, 10 Sim. 479. See Hamilton *v.* Marks, 5 D. & Sm. 638.

(*b*) Duke of Bolton *v.* Williams, 4 Bro. C. C. 309 ; 2 Ves. 151, 152.

(*c*) See Wright *v.* Ward, 4 Russ. 215; Lowndes *v.* Cornford, 18 Ves. 299.

(*d*) Langston *v.* Boylston, 2 Ves. 107 ; Morgan *v.* Marsack, 2 Mer. 107 ; Alnete *v.* Bettam, Cary, 65, 66 ; Angell *v.* Hadden, 15 Ves. 244 ; s. c. 16 Ves. 202 ; Farebrother *v.* Prattent, 5 Price, 303. As to the affidavit of no collusion, which is required from the plaintiff, see Manby *v.* Robinson, L. R. 4 Chan. 347.

(*e*) Pearson *v.* Cardon, 2 R. & M. 606, 610 ; Crawshay *v.* Thornton, 2 M. & C. 1, 23 ;

(*f*) Dixon *v.* Hamond, 2 B. & Ald. 313, 314 ; Cooper *v.* Te Tastet, 1 Tamlyn, 177 ; Nickolson *v.* Knowles, 5 Mad. 47 ; Smith *v.* Hammond, 6 Sim. 10 ; Pearson *v.* Cardon, 2 R. & M. 606, 609, 610, 612 ; Crawshay *v.* Thornton, 7 Sim. 391 ; s. c. 2 M. & C. 1. And see Roberts *v.* Bell, 7 El. & Bl. 323.

trine is to be taken with its proper qualifications. For, if the principal has created an interest or a lien on the funds in the hands of the agent, in favor of a third person, and the nature and extent of that interest or lien is in controversy between the principal and such third person, there the agent may, for his own protection, file a bill of interpleader to compel them to litigate and adjust their respective titles to the fund(*a*).

618. A tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger under an adverse title to that of the landlord(*b*). But equity will, even in the case of a tenant, grant relief if the persons claiming the same rent claim in priority of contract or tenure, as in the case of a mortgagor and mortgagee; of a trustee and *cestui que trust*, or where an estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in receipt of the rent(*c*). In cases of this sort, the tenant does not dispute the title of his landlord, but he affirms that title, and the tenure and contract by which the rent is payable, and puts himself upon the mere uncertainty of the person to whom he is to pay the rent.

619. A bill of interpleader could not be filed by a sheriff who seized goods in execution, on account of the existence of adverse claims to the property. This arose from the principle involved in the definition of interpleader, "where two persons claim of a third the same debt, or the same duty;" and the sheriff, as to one of the defendants, admits himself a wrongdoer, and may be therefore liable to him for damages, as well as for the goods themselves(*d*). It seems, however, that courts of equity will allow a bill of interpleader to be filed by a

(*a*) Smith *v.* Hammond, 6 Sim. 10; Wright *v.* Ward, 4 Russ. 215, 220; Crawshay *v.* Thornton, 7 Sim. 391; 2 M. & C. 1, 21; Crawford *v.* Fisher, 1 Ha. 436, 440.

(*b*) Dungey *v.* Angove, 2 Ves. 310; Cook *v.* Rosslyn, 1 Giff, 167.

(*c*) Aldrich *v.* Thompson, 2 Bro. C. C. 149; Hodges *v.* Smith, 1 Cox, 357; Cowtan *v.* Williams, 9 Ves. 107; Clarke *v.* Byne, 13 Ves. 383; Johnson *v.* Atkinson, 3 Anstr. 798. And see Stephens *v.* Callanan, 12 Price, 158; Jew *v.* Wood, Cr. & P. 184.

(*d*) Slingsby *v.* Boulton, 1 V. & B. 335.

sheriff where there are conflicting equitable claims on the property which he has seized(*a*).

CHAPTER XXI.

BILLS QUIA TIMET.

620. Bills QUIA TIMET are in the nature of writs of prevention, to accomplish the ends of precautionary justice(*b*). They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a court of equity, because he fears (*Quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires compensation or other relief. The manner in which this aid is given by courts of equity is, of course, dependent upon circumstances. They interfere sometimes by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given, or money to be paid over, and sometimes by the mere issuing of an injunction or other remedial process, thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it(*c*).

621. In regard to equitable property, the jurisdiction is applicable equally where there is a present right of enjoyment, and where the right of enjoyment is future or contingent. The object in all cases is, to secure the preservation of the property to its appropriate uses and ends; and the interference

(*a*) Tufton *v.* Harding, 6 Jur. N. S. 116; Hale *v.* Saloon Omnibus Co. 4 Drew. 492; Dutton *v.* Furness, 12 Jur. N. S. 386. The rights and remedies of sheriffs in cases of conflicting claims to goods seized under execution are regulated by Con. Stat. U. C. c. 30, s. 8, et seq. And see as to executions issued from the Court of Chancery, Con. Stat. U. C. c. 24, s. 19.

(*b*) 1 Mad. Ch. Pr. 178, 179; Viner, Abr. *Quia timet*, A. and B.

(*c*) Story, s. 826; Jeremy Eq. Jurisd. B. 1, ch. 7, ss. 1, 2; B. 3, ch. 2, s. 2.

of a court of equity becomes indispensable wherever there is danger of its being converted to other purposes, or diminished, or lost by gross negligence. It will, accordingly, take the fund into its own hands, or secure its due management and appropriation, either by the agency of its own officers or otherwise. Thus, if property in the hands of a trustee for certain specific uses or trusts, either expressed or implied, is in danger of being diverted or squandered, to the injury of any claimant having a present or future fixed title thereto, the administration will be duly secured by the court, according to the original purposes, in such a manner as the court may deem best, as by the appointment of a receiver, or by payment of the fund, if pecuniary, into court, or by requiring security for its due preservation and appropriation(*a*).

622. The same principle is applied to the cases of executors and administrators, who are treated as trustees of the personal estate of the deceased. If there is danger of waste of the estate, or collusion between the debtors of the estate and the executors or administrators, whereby the assets may be subtracted, courts of equity will interfere and secure the fund; and, in the case of collusion with debtors, they will order the latter to pay the amount of their debts into court(*b*).

623. A receiver, when appointed, acts for the benefit and on behalf of all the parties, and not for the plaintiff, or one defendant only(*c*). A receiver may be granted in any case of equitable property. And where there are creditors, annuitants, and others, some of whom are creditors at law, claiming under judgments, and others are creditors claiming upon equitable debts; if the property be of such a nature, that if legal, it may be taken in execution, it may, if equitable, be put into the possession of a receiver, to hold the same, and apply the profits under the direction of the court, for the bene-

(*a*) Story, s. 827.

(*b*) Story, s. 828; Elmsley *v.* Macaulay, 3 Bro. C. C. 624; Taylor *v.* Allen, 2 Atk. 213; Utterson *v.* Mair, 4 Bro. C. C. 277.

(*c*) Davis *v.* Duke of Marlborough, 1 Swanst. 83; 2 Swanst. 125; Simpson *v.* Ottawa & Prescott Rail Co. 1 Chan. Cham. R. 99.

fit of all the parties, according to their respective rights and priorities(*a*).

624. The same rule applies to cases where the property is legal, and judgment creditors have taken possession of it under writs of *elegit;* for it is competent for the court to appoint a receiver in favour of annuitants and equitable creditors, not disturbing the just prior rights, if any, of the judgment creditors(*b*). Hence, the appointment of a receiver, in cases of this sort, is often called an equitable execution.

625. Upon the appointment of a receiver of the rents and profits of real estate, if tenants are in possession they may be compelled to attorn; and the court thus becomes virtually, *pro hac vice*, the landlord(*c*). The appointment of a receiver, generally entitles him to possession of the premises, but it does not, in all cases, amount to a turning of the other party out of possession. In some cases, as in the case of an infant's estate, the receiver's possession is that of the infant. But where the rights of the different parties in the suit are adverse, the possession of the receiver is treated as the possession of the party who ultimately establishes his right to it. The receiver, however, cannot, except by the authority of the court, proceed in ejectment against the tenants(*d*), nor will the possession of the tenants be ordinarily disturbed by the court, where a receiver is appointed. But, although not parties to the suit, they may, and in certain cases will be compelled to attorn to the receiver(*e*).

626. A receiver, when in possession, has very little discre-

(*a*) Davis *v.* Duke of Marlborough, 2 Swanst. 125, 135, 139, 145, 146, 173.

(*b*) Davis *v.* Duke of Marlborough, 1 Swanst. 83; 2 Swanst. 125, 135, 139, 140, 141, 145, 173; White *v.* Bishop of Peterborough, 3 Swanst. 117, 118. And see Munns *v.* Isle of Wight Rail Co. L. R. 5 Chan. 415; Sollory *v.* Leaver, L. R. 9 Eq. 22; Riches *v.* Owen, L. R. 3 Chan. 820; Eyton *v.* Denbigh &c. Rail Co. L. R. 6 Eq. 14, 488; Preston *v.* Corporation of Great Yarmouth, L. R. 7 Chan. 655.

(*c*) Sharp *v.* Carter, 3 P. W. 379. Similar rights and incidents belong to cases of sequestration, Angel *v.* Smith, 9 Ves. 338; Silver *v.* Bishop of Norwich, 3 Sw. 112, note.

(*d*) Wynn *v.* Lord Newborough, 3 Bro. C. C. 88; s. c. 1 Ves. 164.

(*e*) Simmonds *v.* Lord Kinnaird, 4 Ves. 747; Reid *v.* Middleton, T. & R. 455; Hobson *v.* Sherwood, 19 Beav. 575; Hobhouse *v.* Holcombe, 2 D. & Sm. 208.

tion allowed him, but must apply, from time to time, to the court for authority to do such acts as may be beneficial to the estate. Thus, he is not at liberty to bring or to defend actions, or to let the estate, or to lay out money, unless by the special leave of the court(*a*).

627. The possession of a receiver cannot be disturbed, even by an ejectment under an adverse title, without the leave of the court, for his possession is deemed the possession of the court, and the court will not permit itself to be made a suitor in a court of law(*b*).

628. The appointment of a receiver rests in the sound discretion of the court(*c*); and he is, when appointed, treated as virtually an officer and representative of the court, and subject to its orders(*d*). Lord Hardwicke considered this power of appointment to be of great importance and most beneficial tendency; and he significantly said: "It is a discretionary power, exercised by the court, with as great utility to the subject as any authority which belongs to it; and it is provisional only, for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled; and it does not at all affect the right(*e*)."

629. In cases of conflicting legal and equitable debts and charges, it is a common course to appoint a receiver, for the benefit of all concerned. And where an estate is held by a party, under a title obtained by fraud, actual or constructive, a receiver will be appointed(*f*).

(*a*) See *Re* Crmsby, 1 B. & B. 189; Malcolm *v.* O'Callaghan, 3 M. & C. 52; Bristowe *v.* Needham, 2 Ph. 190; Thomas *v.* Torrance, 1 Chan. Cham. R. 9; Simpson *v.* Ottawa & Prescott Rail Co. 1 Chan. Cham. R. 337; Baldwin *v.* Crawford, 2 Chan. Cham. R. 9.

(*b*) Angel *v.* Smith, 9 Ves. 335; Russell *v.* East Anglian Rail Co. 3 Mac. & G. 104; Bryan *v.* Cormick, 1 Cox, 422; Anon, 6 Ves. 287; Ames *v.* Birkenhead Dock Trustees, 20 Beav. 332; Bank of British North America, *v.* Heaton, 1 Chan. Cham. R. 175.

(*c*) Skip *v.* Harwood, 3 Atk. 564; Owen *v.* Homan, 3 Mac. & G. 378.

(*d*) Angel *v.* Smith, 9 Ves. 335; Hutchinson *v.* Massareene, 2 B. & B. 55.

(*e*) Skip *v.* Harwood, 3 Atk. 564.

(*f*) Story, s. 834; Huguenin *v.* Baseley, 13 Ves. 105; Stitwell *v.* Williams, 6 Mad. s. c. Stitwell *v.* Wilkins, Jac. 280.

630. But it is not infrequent to ask for the appointment of a receiver, against a party who is rightfully in possession, or who is entitled to the possession of the fund, or who has an interest in its due administration. In such cases, courts of equity pay a just respect to such legal and equitable rights and interests of the possessor of the fund, and do not withdraw it from him by the appointment of a receiver, unless the facts, averred and established in proof, show that there has been an abuse, or there is danger of abuse, on his part. For the rule of such courts is not to displace a *bona fide* possessor from any of the just rights attached to his title, unless there be some equitable ground for interference(*a*).

631. Thus executors and administrators are by law intrusted with authority to collect and administer the assets of the deceased, and courts of equity will not interfere with their management and administration of such assets upon slight grounds(*b*). When, therefore, the appointment of a receiver is sought against an executor or administrator, it is necessary to establish by suitable proofs, that there is some positive loss, or danger of loss, of the funds, as, for instance, some waste or misapplication, or some apprehended danger from the bankruptcy, insolvency, or personal fraud, misconduct or negligence of the executor or administrator(*c*).

632. Where there are several incumbrances on an estate, as the first incumbrancer is entitled to possession, and the receipt of the rents and profits, equity will not deprive him of such possession and profits unless upon sufficient cause shown (*d*). But if he is not in possession, and does not desire it, or if he has been paid off, or refuses to receive what is due him, a receiver may be appointed upon the application of a subsequent

(*a*) Story, s. 335. See Tyson *v.* Fairclough, 2 S. & S. 142.

(*b*) And see *In Re* Ferrior, L. R. 3 Chan. 175; Hitchen *v.* Birks, L. R. 10 Eq. 471.

(*c*) Poverty alone has been held not a sufficient ground, Howard *v.* Papera, 1 Mad. 142. But see Langley *v.* Hawk, 5 Mad. 46; Middleton *v.* Dodswell, 13 Ves. 266; Gladdon *v.* Stoneman, 1 Mad. 143, note; Scott *v.* Becher, 4 Price, 346; Mansfield *v.* Shaw, 3 Mad. 100; Harrold *v.* Wallis, 9 Gr. 443.

(*d*) Rowe *v.* Wood, 2 J. & W. 554, 557; Berney *v.* Sewell, 1 J. & W. 649; Quarrell *v.* Beckford, 13 Ves. 377; Codrington *v.* Parker, 16 Ves. 469.

incumbrancer(*a*). But where the court acts thus in favour of subsequent incumbrancers, it is cautious not to disturb prior rights or equities; and, therefore, before it acts finally, it will endeavour to ascertain the priorities and equities of all parties, and then it applies the funds, which are received, according to such priorities and equities(*b*).

633. So, where tenants for life, or in tail, neglect to keep down the interest due upon incumbrances upon the estates, equity will appoint a receiver to receive the rents and profits, in order to keep down the interest, for this is a mere act of justice to the incumbrancers, and also to those who may be otherwise interested in the estates(*c*).

634. Although equity will not appoint a receiver, except upon special grounds, yet there are cases in which it will interpose, and require money to be paid into court by a party who stands in the relation of a trustee to the property, without any ground being laid to show that there has been any abuse or any danger to the fund. Thus, in cases of suits by creditors, or legatees, or distributees, against executors or administrators for a settlement of the estate, if the executors or administrators, by their answers, admit assets in their hands, and the court takes upon itself a settlement of the estate, it will direct the assets to be paid into court(*d*).

635. The general rule, upon which courts of equity proceed in requiring money to be paid into court, is this, that the party, who is entitled to the fund, is also entitled to have it secured. And this rule is equally applicable where the plaintiffs, seeking the payment, are solely entitled to the whole fund, and where

(*a*) Bryan *v.* Cormick, 1 Cox, 422; Norway *v.* Rowe, 19 Ves. 153; White *v.* Bishop of Peterborough, 3 Swanst. 109. See Sollory *v.* Leaver, L. R. 9 Eq. 22; Hiles *v.* Moore, 15 Beav. 175; Rhodes *v.* Mostyn, 17 Jur. 1007; Aikins *v.* Blain, 13 Gr. 646.

(*b*) Davis *v.* Duke of Marlborough, 2 Swanst. 145, 149. 1 Swanst. 74; Metcalfe *v.* Archbishop of York, 1 M. & C. 547.

(*c*) Story, s. 838; Giffard *v.* Hart, 1 S. & L. 407, note; Bertie *v.* Lord Abingdon, 3 Meriv. 560. And see Gresley *v.* Adderley, 1 Swanst. 579, and note.

(*d*) Story, s. 839; Strange *v.* Harris, 3 Bro. C. C. 365; Blake *v.* Blake, 2 S. & L. 26; Yare *v.* Harrison, 2 Cox, 377. And see Leigh *v.* Macaulay, 1 Y. & C. Ex. 260; Bowsher *v.* Watkins, 1 R. & M. 277.

they have acquired such an interest in the whole fund, together with others, as entitles them, on their own behalf and the behalf of others, to have the sum secured in court(*a*).

636. The preceding remarks are principally (but not exclusively) applicable to cases of equitable property, whether the right of enjoyment thereof be present, future, or contingent. In regard to legal property, where the right of enjoyment is present, the legal remedies will be generally found sufficient for the protection and vindication of that right. But where the right of enjoyment is future or contingent, the party entitled is often without any adequate remedy at law for any injury which he may in the meantime sustain by the loss, destruction, or deterioration of the property, in the hands of the party entitled to the present possession of it(*b*).

637. By the ancient common law, there could in general be no future right of property, created in personal goods and chattels, to take place in expectancy, for they were considered of so transitory a nature, and so liable to be lost, destroyed, or otherwise impaired, that future interests in them were not treated as of any account(*c*). An exception was permitted, at an early period, as to goods and chattels given by will in remainder, after a bequest for life. But that was at first allowed only where the use of the goods or chattels, and not the goods or chattels themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the testator(*d*). That distinction has since been disregarded; and the limitation in remainder is now equally respected, whether the first legatee takes the use or the goods and chattels themselves for life(*e*).

(*a*) See Leigh *v.* Macaulay, 1 Y. & C. Ex. 260; Bowsher *v.* Watkins, 1 R. & M. 277; Gedge *v.* Trail, 1 R. & M. 281, note; Freeman *v.* Fairlie, 3 Meriv. 29, 30; Cruikshanks *v.* Roberts, 6 Mad. 104; Johnston *v.* Aston, 1 S. & S. 73; Rothwell *v.* Rothwell, 2 S. & S. 217; Orrok *v.* Binney, Jac. 523.

(*b*) Story, s. 843; 1 Eq. Abridg. 360, pl. 4.

(*c*) 2 Black. Comm. 398; 1 Eq. Abridg. pl. 4.

(*d*) Hyde *v.* Parrat, 1 P. W. 1; Tissen *v.* Tissen, 1 P. W. 502.

(*e*) Story, s. 844; Anon., 2. Freem. 145; id. 206; Hyde *v.* Parratt, 1 P. W. 1, 6; Upwell *v.* Halsey, 1 P. W. 651; Vachel *v.* Vachel, 1 Chan. Cas. 129, 130; Foley *v.* Burnell, 1 Bro. C. C. 274, 278; Co. Litt. 20 (*a*). See *Re* Smith's will, 20 Beav. 197.

638. In all cases of this sort, where there is a future right of enjoyment of personal property, courts of equity will now interpose and grant relief upon a bill *Quia timet*, where there is any danger of loss or deterioration, or injury to it in the hands of the party entitled to the present possession(*a*).

639. Indeed, the doctrine is now well established, that the bequest of the use of the residue of the personal estate of the testator to a legatee for life, or for a shorter period, with a bequest over to other legatees, does not give the legatee for life, or for a shorter period, the right to the possession of the fund in the meantime. The executor is entitled to retain the fund in his own hands, and to pay over the income to the legatee for life, or for a shorter period, as it accrues from time to time(*b*).

640. If personal chattels are bequeathed to A. for life, remainder to B., A. will be entitled to the possession of the goods, upon signing and delivering to the executor an inventory of them, admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder(*c*). The old practice was to require the tenant for life to give security for the protection of the remainder-man, but such security is not required unless a case of danger is shown(*d*).

641. Another instance of the application of the remedial justice of courts of equity by a bill *Quia timet* is in cases of sureties of debtors and others. Thus, if a surety, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he may file a bill of this sort to compel the debtor to discharge the debt or other obligation, for which the surety is responsible(*e*).

(*a*) Story, s. 845. And see Batten *v.* Earnley, 2 P. W. 163; Slanning *v.* Style, 3 P. W. 336, 337.

(*b*) Story, s. 845 a. And see Johnson *v.* Mills, 1 Ves. Sen. 282.

(*c*) Slanning *v.* Style, 3 P. W. 336; Leeke *v.* Bennett, 1 Atk. 471; Bill *v.* Kinaston, 2 Atk. 82.

(*d*) Foley *v.* Burnell, 1 Bro. C. C. 279; Conduitt *v.* Soane, 1 Coll. 285.

(*e*) Nisbet *v.* Smith, 2 Bro. C. C. 581; Ranelaugh *v.* Hayes, 1 Vern. 190; Antrobus *v.* Davidson, 3 Mer. 569.

CHAPTER XXII.

BILLS OF PEACE.

642. BILLS OF PEACE sometimes bear a resemblance to bills *Quia timet.* The latter are, however, distinguishable from the former in several respects, and are always used as a preventive process, before a suit is actually instituted, whereas bills of peace, although sometimes brought before any suit is instituted to try a right, are most generally brought after the right has been tried at law(*a*).

643. A bill of peace is a bill brought to establish and perpetuate a right, which, from its nature, may be controverted by different persons, at different times, and by different actions; or, where separate attempts have already been unsuccessfully made to overthrow the same right, and justice requires that the plaintiff should be quieted in the right, if it is already sufficiently established, or if it should be sufficiently established under the direction of the court(*b*). The obvious design of such a bill is to procure repose from perpetual litigation, and, therefore, it is justly called a bill of peace.

644. One class of cases, to which this remedial process is properly applied, is, where there is one general right to be established against a great number of persons. It may also be resorted to where one person claims or defends a right against many, or where many claim or defend a right against one(*c*). In such cases, courts of equity interpose to prevent multiplicity of suits(*d*); for, as each separate party may sue, or may be sued, in a separate action at law, and each suit would only decide the particular right in question between

(*a*) Mitf. Eq. Pl. 145, 148; Co. Litt. 100 *a*.

(*b*) See Teynham *v.* Herbert, 2 Atk. 483.

(*c*) Teynham *v.* Herbert, 2 Atk. 484; Corporation of Carlisle *v.* Wilson, 13 Ves. 276; Duke of Norfolk *v.* Meyers, 4 Mad. 83; Weale *v.* West Middlesex Waterworks Co. 1 J. & W. 369.

(*d*) Ewelme Hospital *v.* Andover, 1 Vern. 266; Hanson *v.* Gardner, 7 Ves. 309, 310; Ware *v.* Horwood, 14 Ves. 32, 33; Dilly *v.* Doig, 2 Ves. 486.

the plaintiff and defendant in that action, litigation might become interminable(*a*).

645. Bills of this nature may be brought by a lord against tenants for an encroachment under colour of a common right; or by tenants against the lord for disturbance of a common right; by a party in interest to establish a toll due by a custom, or to establish the right to profits of a fair, there being several claimants(*b*).

646. So, a person who has possession, and claims a right of fishery for a considerable distance on the river, to which the riparian proprietors set up several adverse rights, may have a bill of peace against all of them to establish his right, and quiet his possession(*c*). So, it will lie to establish a duty, claimed by a municipal corporation against many persons, although there is no privity between them(*d*).

647. But to entitle a party to maintain a bill of peace, it must be clear that there is a right claimed, which affects many persons, and that a suitable number of parties in interest are brought before the court; for, if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed; for it cannot then conclude any persons, but the very defendants(*e*).

648. Courts of equity will not, upon a bill of this nature, decree a perpetual injunction for the establishment or the en-

(*a*) Story, s. 854.

(*b*) How *v.* Tenants of Bromsgrove, 1 Vern. 22; Ewelme Hospital *v.* Andover, 1 Vern. 266; Pawlet *v.* Ingres, 1 Vern. 308; Brown *v.* Vermuden, 1 Ch. Cas. 272; Rudge *v.* Hopkins, 2 Eq. Abridg. 170, pl. 27; Conyers *v.* Abergavenny, 1 Atk. 284, 285; Poore *v.* Clark, 2 Atk. 515; Weeks *v.* Staker, 2 Vern. 301; Arthington *v.* Fawkes, 2 Vern. 356; Corporation of Carlisle *v.* Wilson, 13 Ves. 279, 280; Hanson *v.* Gardiner, 7 Ves. 305, 309, 310; Duke of Norfolk *v.* Meyers, 4 Mad. 117.

(*c*) Mayor of York *v.* Pilkington, 1 Atk. 282; Teynham *v.* Herbert, 2 Atk. 483. See New River Company *v.* Graves, 2 Vern. 431.

(*d*) City of London *v.* Perkins, 3 Bro. P. C. 602; 1 Mad. Pr. Ch. 138, 139; Mayor of York *v.* Pilkington, 1 Atk. 284; Teynham *v.* Herbert, 2 Atk. 483; Middleton *v.* Jackson, 1 Ch. Rep. 18; Popham *v.* Lancaster, 1 Ch. Rep. 51; Cowper *v.* Clerk, 3 P. W. 157; Powell *v.* Powis, 1 Y. & J. 159.

(*e*) Story, s. 857; Disney *v.* Robertson, Bunb. 41; Cowper *v.* Clerk, 3 P. W. 157; Welby *v.* Duke of Rutland, 2 Bro. P. C. 39; Weller *v.* Smeaton, 1 Bro. C. C. 572.

joyment of the right of a party, who claims in contradiction to a public right, as if he claims an exclusive right to a highway, or to a common navigable river, or an exclusive right to a rope-ferry across a river, for it is said, that this would be to enjoin all the people of the country(*a*).

649. Bills of peace are also ordinarily applied to cases where the plaintiff has, after repeated and satisfactory trials, established his right at law, and yet is in danger of further litigation and obstruction to his right from new attempts to controvert it. Under such circumstances, courts of equity interfere, and grant a perpetual injunction to quiet the possession of the plaintiff, and to suppress future litigation of the right. This exercise of jurisdiction was formerly much questioned. Lord Cowper, in a celebrated case, where the title to land had been five several times tried in an ejectment, and five verdicts given in favour of the plaintiff, refused to sustain the jurisdiction for a perpetual injunction. But his decision was overruled by the House of Lords, and a perpetual injunction was decreed upon the ground that it was the only adequate means of suppressing oppressive litigation and irrepar able mischief(*b*. And this doctrine has ever since been adhered to.

CHAPTER XXIII.

INJUNCTIONS.

650. A WRIT OF INJUNCTION may be described to be a judicial process, whereby a party is required to do or to refrain from doing a particular thing, according to the exigency of

(*a*) Story, s. 858; Hilton *v.* Lord Scarborough, 2 Eq. Abridg. 171, pl. 2; Letton *v.* Goodden, L. R. 2 Eq. 123.

(*b*) Story, s. 859; Earl of Bath *v.* Sherwin, Prec. Ch. 261; 10 Mod. 1; 4 Bro. P. C. 373; Leighton *v.* Leighton, 1 P. W. 671, 672; and see Devonsher *v.* Newenham, 2 S. & L. 208, 209; Teynham *v.* Herbert, 2 Atk. 483; Earl of Darlington *v.* Bowes, 1 Ed. 270; Weller *v.* Smeaton, 1 Cox, 102; 1 Bro. C. C. 573.

the writ (*a*). The process, however, is rather preventive than restorative, although it is by no means confined to the former object(*b*). It seeks to prevent a meditated wrong more often than to redress an injury already done. It is not confined to cases falling within the concurrent jurisdiction of the court; but it applies equally to cases belonging to its exclusive and auxiliary jurisdiction(*c*).

651. The writ of injunction is peculiar to courts of equity, although there are some cases where courts of law may exercise analogous powers(*d*). The cases, however, to which these legal processes are applicable are so few, and so inadequate for the purposes of justice, that the processes themselves have fallen into disuse, and almost all the remedial justice of this sort is now administered through the instrumentality of courts of equity. The jurisdiction in these courts, then, has its true origin in the fact, that there is either no remedy at all at law, or the remedy is imperfect and inadequate. The exercise of the jurisdiction is, however, a matter resting on the sound discretion of the court(*e*).

652. In treating of the jurisdiction, cases of injunctions to stay proceedings at law, to restrain vexatious suits, to restrain the alienation of property, to restrain waste, to restrain nuisances, to restrain trespasses, and to prevent other irreparable mischiefs will chiefly occupy attention. Those, however, are far from being all the cases in which this species of equitable interposition is obtained.

653. Injunctions to stay proceedings at law, are sometimes

(*a*) Bradbury *v.* Manchester Sheffield &c. Rail Co. 15 Jur. 1167.

(*b*) Com. Dig. Chan. D. 11, 13; Gilb. Forum Roman ch. 11, [p. 192, 194. As to enforcing covenants by injunction, see Catt *v.* Tourle, L. R. 4 Chan. 654.

(*c*) Stribley *v.* Hawkie, 3 Atk. 275; Hugenin *v.* Basley, 15 Ves. 180; Gray *v.* Stanford, 8 Ir. Eq. 678.

(*d*) Jefferson *v.* The Bishop of Durham, 1 B. & P. 105, 120. And see Con. Stat. U. C. c. 23, s. 9, et seq.

(*e*) Story, s. 864. And see Lumley *v.* Wagner, 1 D. M. & G. 616; Slim *v.* Croucher, 1 D. F. & J. 523; Hunt *v.* Hunt, 8 Jur. N. S. 86; Emperor of Austria *v.* Day, 3 D. F. & J. 217, 253; Southampton Dock Co. *v.* Southampton Harbour & Pier Co. L. R. 11 Eq. 254.

granted to stay trial(*a*), or, after verdict, to stay judgment(*b*), or, after judgment, to stay execution, or proceedings under executions(*c*), pending an appeal(*d*), or, if the execution has been issued, to stay the money in the hands of the sheriff (*e*); or, to stay the issuing of a writ of possession after verdict in an ejectment(*f*), or to stay the delivery of possession after a writ has been issued.

654. Relief will not be given in equity after judgment, unless some special equitable ground for the interference of the court can be shown(*g*). A defence which has been fully and fairly tried at law cannot be set up as a ground for relief in equity after judgment(*h*), even although it may be the opinion of the court that the defence ought to have been sustained at law(*i*). Nor can a man who, having a good defence at law, neglects to avail himself of it there(*j*), or who suffers judgment to go against him by neglect(*k*), come to a court of equity for relief. The mere fact of the discovery of fresh evidence since the verdict is not a sufficient ground for the interference of the court(*l*). Still less can an equity arise if the evidence might have been procured before the trial with ordinary care

(*a*) See Dalglish *v.* Jarvie, 2 Mac. & G. 231; Treadwell *v.* Morris, 15 Gr. 165; McFadden, *v.* Jenkins, 1 Ha. 458; 1 Ph. 157.

(*b*) Turner *v.* Wright, 1 J. & W. 290; Jones *v.* Hughes, 1 Ha. 383.

(*c*) Codd *v.* Woden, 3 Bro. C. C 72; Lady Arundel *v.* Phippe, 10 Ves. 144; Jones *v.* Bassett, 2 Russ. 405; Newland *v.* Painter, 4 M. & C. 408; Algar *v.* Murrell, 6 Jur. 775; Espey *v.* Lake, 10 Ha. 260; Fisher *v.* Baldwin, 22 L. J. Ch. 966. See Williams *v.* Roberts, 8 Ha. 315.

(*d*) Earl of Shrewsbury *v.* Trappes, 2 D. F. & J. 172; Neil *v.* Bank of Upper Canada, 2 Gr. 386. But see Smith *v.* Wooten, 12 Gr. 200.

(*e*) Whittingham *v.* Burgoyne, 3 Aust. 900; Franklyn *v.* Thomas, 3 Mer. 234; Farquharson *v.* Pitcher, 2 Russ. 81.

(*f*) Drummond *v.* Pigou, 2 M. & K. 168.

(*g*) Rowe *v.* Wood, cited 2 Sw. 234, n; Protheroe *v.* Forman, 2 Sw. 229; O'Mahony *v.* Dickson, 2 S. & L. 400. See Countess of Gainsborough *v.* Giffard, 2 P. W. 424; Hankey *v.* Vernon, 2 Cox, 12; Bateman *v.* Willoe, 1 S. & L. 205.

(*h*) Harrison *v.* Nettleship, 2 M. & K. 423. See Larabrie *v.* Brown, 1 D. & J. 205.

(*i*) Bateman *v.* Willoe, 1 S. & L. 205. See Simpson *v.* Lord Howden, 3 M. & C. 97; Terrell *v.* Higgs, 1 D. & J. 388.

(*j*) Protheroe *v.* Forman, 2 Sw. 229; Bateman *v.* Willoe, 1 S. & L. 205; Morrison *v.* McLean, 7 Gr. 167.

(*k*) Williams *v.* Lee, 3 Atk. 223. Comp. Griffith *v.* Edwards, 2 Jur. N. S. 584.

(*l*) Sewell *v.* Freestun, 1 Chan. Ca. 65; Ware *v.* Horwood, 14 Ves. 31; Taylor *v.* Shepherd, 1 Y. & C. Ex. 271; Bullock *v.* Chapman, 2 D. & Sm. 211.

and diligence, or if the grievance complained of has been caused by a mistake in pleading, or the conduct of a cause, or by surprise(*a*).

655. A writ of injunction is in no just sense a prohibition to the courts of common law in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is directed only to the parties. It neither assumes any superiority over the court in which those proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that from certain equitable circumstances, of which the court of equity, granting the process, has cognizance, it is against conscience, that the party inhibited should proceed in the cause. The object, therefore, really is, to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights, or to subject him to some unjust vexation or injury, which is wholly irremediable by a court of law(*b*).

656. Without a jurisdiction of this sort, to control or enjoin proceedings at law, equity jurisprudence, as a system of remedial justice, would be grossly inadequate to the ends of its institution. In a great variety of cases, courts of law cannot afford any redress to the party sued, although it is most manifest that he has in conscience and justice, but not at law, a perfect defence(*c*).

657. Relief will be given where material facts have been discovered since the trial which were fraudulently concealed, or

(*a*) Curtis *v.* Smallrige, 2 Freem. 178; Stephenson *v.* Wilson, 2 Vern. 325; Blackhall *v.* Combs, 2 P. W. 70; Richards *v.* Symes, 2 Atk. 319; Kemp *v.* Mackrell, 2 Ves. 579; Holworthy *v.* Mortlock, 1 Cox, 141; Bateman *v.* Willoe, 1 S. & L. 201; Field *v.* Beaumont, 3 Mad. 102; Griffith *v.* Edwards, 2 Jur. N. S. 584; Prince of Wales Assurance Co. *v.* Trulock, 4 W. R. 788, 820; 5 W. R. 14; Larabrie *v.* Brown, 1 D. & J. 205. Comp. O'Neill *v.* Browne, 9 Ir. Eq. 131.

(*b*) Story, s. 875; Hill *v.* Turner, 1 Atk. 516; Harrison *v.* Gurney, 2 J. & W. 563; Lord Portarlington *v.* Soulby, 3 M. & K. 104; Bunbury *v.* Bunbury, 3 Jur. 644; Heathcote *v.* North Staffordshire Railway Co. 2 Mac. & G. 109; Hunt *v.* Hunt, 8 Jur. N. S. 88.

(*c*) Story, s. 877.

could not by ordinary care and diligence have been discovered before the trial(*a*). So also relief will be given against a judgment which has been obtained by fraud or collusion(*b*). In general it may be stated, that in all cases, where, by accident or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is, therefore, against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained.

658. Suppose again, an executor or administrator should be in possession of abundant assets to pay all the debts of the deceased, and by an accidental fire, or by a robbery, without any default on his part, a great portion of them should be destroyed, so that the estate should be insolvent, he might be sued at law by a creditor, and the loss of the assets by accident would afford no defence. When he once becomes chargeable with the assets at law, he is for ever chargeable, notwithstanding any intervening casualties. But courts of equity will enjoin proceedings at law, in cases of this sort, upon the purest principles of justice(*c*).

659. But an injunction is ordinarily applied for, to stay proceedings at law, where the rights of the party are wholly equitable in their own nature, or are incapable under the circumstances of being asserted in a court of law(*d*). An illustration of the former class may be found in the attempt of a trustee, in violation of his trust, to oust the possession of the *cestui que trust* of an estate, to the beneficial enjoyment of which he is entitled; or of a landlord to oust the possession of a tenant, with whom he has contracted for a lease, by an

(*a*) Countess of Gainsborough *v.* Gifford, 2 P. W. 424; Wilmot *v.* Lennard, 3 Sw. 682; Williams *v.* Lee, 3 Atk. 223; Jarvis *v.* Chandler, T. & R. 319; Cunningham *v.* Buchanan, 10 Gr. 523. See Ayre's case, 25 Beav. 513.

(*b*) Isaac *v.* Humpage; 3 Bro. C. C. 463; Rowe *v.* Wood, 2 Sw. 234, n; Annesley *v.* Rookes, 3 Mer. 226 n; O'Neill *v.* Browne, 9 Ir. Eq. 131; Taylor *v.* Hughes, 2 J. & L. 24; Bargate *v.* Shortridge, 5 H. L. 297.

(*c*) Story, s. 878; Crosse *v.* Smith, 7 East, 246; Croft *v.* Lyndsey, 2 Freem. 1.

(*d*) See Waterlow *v.* Bacon, L. R. 2 Eq. 514.

ejectment in violation of that contract. Illustrations of the latter class may be found in the common cases of bonds and mortgages, and other penal securities and covenants, where, by the strict rules of law, the party after forfeiture can obtain no relief(*a*); in cases of set-off in equity, which are not recognized at all at law as such; and in cases of partnership property seized in execution by a creditor of one of the partners, where an injunction will be awarded to stay proceedings, until an account of the partnership funds and rights is taken(*b*).

660. Another class of cases, in which injunctions are granted against proceedings at law, is where there has already been a decree upon a creditor's bill for the administration of assets. Such a decree is considered in equity to be in the nature of a judgment for all the creditors, and therefore, if subsequently to it, a creditor should sue at law, the court of equity, in which the decree is made, will, in the assertion of its jurisdiction, restrain him from proceeding in his suit(*c*).

661. Courts of equity will not only award an injunction to stay proceedings at law, but they will also, where the party is proceeding at law and in equity for the same matter at the same time, compel him to make an election of the suit, in which he will proceed, and will stay the proceedings in the other court(*d*).

662. Courts of equity will also interpose to prevent their

(*a*) Walker *v.* Jones, L. R. 1 P. C. 50.

(*b*) Story, s. 654.

(*c*) Story, s. 890; Morrice *v.* Bank of England, Cas. t. Talb. 217; 2 Bro. P. C. 465; Paxton *v.* Douglas, 8 Ves. 520; Martin *v.* Martin, 1 Ves. Sen. 212; Perry *v.* Phelips, 10 Ves. 34; Clarke *v.* Ormond, Jac. 122; Hope *v.* Carnegie, L. R. 1 Chan. 320; Bailie *v.* Bailie, L. R. 5 Eq. 175; Burles *v.* Popplewell, 10 Sim. 383. And see Bank of British North America *v.* Mallory, 17 Gr. 102. As to restraining a creditor who has proved as a subsequent incumbrancer in a suit for foreclosure, Cahuac *v.* Durie, 9 Gr. 485; Goodwin *v.* Williams, 5 Gr. 178.

(*d*) Story, s. 889; Vaughan *v.* Welsh, Moseley, 210; Mocher *v.* Reed, 1 B. & B. 318 Gedye *v.* Montrose, 5 W. R. 537. There are some exceptions to this doctrine. One is, that a mortgagee may proceed in equity, and at law the same time. But this right is not unqualified; for the mortgagor will not be compelled to pay upon his bond, unless secure of his title-deeds being delivered up, Schoole *v.* Sall, 1 S. & L. 176; Royle *v.* Wynne, Cr. & Ph. 252. And see Rees *v.* Beckett, 2 Gr. 650. And also as to costs in such a case, Weir *v.* Taylor, 1 Chan. Cham. R. 371.

own officers, or persons employed under the authority of the court, from proceeding at law. Thus, commissioners for the examination of witnesses have been restrained from proceeding at law to recover their fees(*a*); and the same principle has been applied to an auctioneer who has sold property under an order of court(*b*).

663. Courts of equity will grant an injunction to protect their officers, who execute their process, against suits brought against them for acts done under or in virtue of such process(*c*). The ground of this jurisdiction is, that courts of equity will not suffer their process to be examined by any other courts; and courts of law cannot know anything of their nature and effect. If they are irregularly issued or executed, it is the duty of courts of equity themselves to apply the proper remedy(*d*). The same principle is applied to protect sequestrators and receivers(*e*).

664. Although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country, are resident within the jurisdiction of the court of equity, it will restrain either party from proceeding in a suit out of its jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree *in personam* ac-

(*a*) See Blundell *v.* Gladstone, 9 Sim. 455; Ambrose *v.* Dunmow Union, 8 Beav. 43.

(*b*) *In re* Weaver, 2 M. & C. 441.

(*c*) Turner *v.* Turner, 15 Jur. 218; Fisher *v.* Glass, 9 Gr. 46.

(*d*) Story, s. 891; Bailey *v.* Devereux, 1 Vern. 269; Frowd *v.* Lawrence, 1 J. & W. 655; May *v.* Hook, 2 Dick. 619; Aston *v.* Heron, 2 M. & K. 390; Arrowsmith *v.* Hill, 2 Ph. 609; Walker *v.* Micklethwait, 1 Dr. & Sm. 51; *Re* James Campbell, 3 D. M. & G. 585. But see as to the case of a sheriff, where he has seized goods under a writ issued out of chancery, Onyon *v.* Washbourne, 14 Jur. 497; Tufton *v.* Harding, 6 Jur. N. S. 116.

(*e*) Angel *v.* Smith, 9 Ves. 338; Chalie *v.* Pickering, 1 Keen, 749; Evelyn *v.* Lewis, 3 Ha. 472; Defries *v.* Creed, 34 L. J. Ch. 607; Ames *v.* Birkenhead Docks, 20 Beav. 353.

cording to those equities and enforce obedience to their decrees by process *in personam*(a).

665. The process of injunction is also most beneficially applied to suppress undue and vexatious litigation. Thus, where a party is guilty of continual and repeated breaches of covenants, a court of equity will interpose, and enjoin the party from further violations of such covenants, even although such breaches may be capable of compensation by repeated actions of covenant. For, without such interposition, the party can do nothing but repeatedly resort to law; and when suits have proceeded to such an extent as to become vexatious, for that very reason the jurisdiction of a court of equity attaches(b).

666. With a view to the same beneficial purpose, and to suppress undue and mischievous litigation, courts of equity will prevent a party from setting up an unconscientious defence at law, or from interposing impediments to the just rights of the other party(c). In such cases, courts of equity act by injunction, and by that process prohibit the party from asserting such an unconscientious defence, or from setting up such an impediment to the obstruction of justice. Thus, for instance, if an ejectment is brought to try a right to land in a court of common law, a court of equity will, under proper circumstances, restrain the party in possession from setting up any title, which may prevent the fair trial of the right(d). But this will not be done in every case; for if there is any counter equity in the circumstances of the case, the court will not interfere. Thus, it will not interfere against the possessor, who

(a) Lord Cranston *v.* Johnston, 3 Ves. 170, 182; Beckford *v.* Kemble, 1 S. & S. 7; Harrison *v.* Gurney, 2 J. & W. 563; Portarlington *v.* Soulby, 3 M. & K. 104; Bowles *v.* Orr, 1 Y. & C. Ex. 464. See also Wharton *v.* May, 5 Ves. 27; Kennedy *v.* Earl of Cassillis, 2 Swanst. 313; Bushby *v.* Munday, 5 Mad. 297; Beauchamp *v.* Marquis of Huntley, Jac. 546; Hope *v.* Carnegie, L. R. 1 Chan. 320; Carron Iron Co. *v.* MacLaren, 5 H. L. 416, 437.

(b) Story, s. 901; Waters *v.* Taylor, 2 V. & B. 302. See also Ware *v.* Horwood, 14 Ves. 33.

(c) See Martin *v.* Nicolls, 3 Sim. 458; Bowles *v.* Orr, 1 Y. & C. Ex. 464.

(d) Pultney *v.* Warren, 6 Ves. 89; Crow *v.* Tyrell, 3 Mad. 181. See Jones *v.* Jones, 3 Mer. 172.

is a *bona fide* purchaser for a valuable consideration, without notice of the adverse claim at the time of his purchase(*a*).

667. Cases often arise, in which a party may be entitled to proceed in a suit at law for damages, when a complete equitable defence exists, which is yet incapable of being asserted at law. In such cases the suit at law is treated as vexatious, and will be stayed by an injunction. Thus, if a decree has been made against a vendor for the specific performance of a contract for the sale of land, notwithstanding the vendee has not strictly complied with the terms of the contract, and subsequently a suit is brought by the vendor against the vendee for the breach of the contract, a court of equity will restrain the suit as being unjustifiable and vexatious(*b*). And if a creditor should give time to his debtor, and should thereby release the surety in equity, and he should afterwards proceed at law against the surety, the suit would be stopped by injunction upon a similar ground(*c*).

668. Injunctions are also granted to restrain the alienation of property in the largest sense of the word.

669. In regard to negotiable securities, if there is danger of their getting into the hands of a *bona fide* holder without notice, who may be entitled to recover upon them, notwithstanding any fraud in their original concoction, or the loss of them by the real owner, the court will grant an injunction prohibiting their negotiation, assignment, or endorsation(*d*).

670. The same principle is applied to restrain the transfer of stocks. Thus, for instance, where there is a controversy respecting the title to stock under different wills, an injunc-

(*a*) Story, s. 903; Bond *v.* Hopkins, 1 S. & L. 429; Baker *v.* Mellish, 10 Ves. 549.

(*b*) Reynolds *v.* Nelson, 6 Mad. 290. And see Prothero *v.* Phelps, 7 D. M. & G. 722.

(*c*) Bank of Ireland *v.* Beresford, 6 Dow, 233; Bowmaker, *v.* Moore, 3 Price, 219. See Clarke *v.* Henty, 3 Y. & C. 187.

(*d*) Smith *v.* Haytwell, Amb. 66; Lloyd *v.* Gurdon, 2 Swanst. 180; King *v.* Hamlet, 4 Sim. 223; Patrick *v.* Harrison, 3 Bro. C. C. 476; Hood *v.* Aston, 1 Russ. 412; Sharp *v.* Arbuthnot, 13 Jur. 219; Green *v.* Pledger, 3 Ha. 165; Simons *v.* Cridland, 5 L. T. N. S. 523. See Hodgson *v.* Murray, 2 Sim. 515.

tion will be granted to restrain any transfer *pendente lite*(*a*). So an injunction will be granted where the title to stock is controverted between principal and agent(*b*); or where a trustee or agent attempts to transfer it for his own benefit, and to the injury of the party beneficially entitled to it(*c*).

671. An injunction will also be granted to restrain a party from suing at law upon the debentures for interest, or dividends, declared upon the shares of a joint-stock company, where the shares held by the defendant were fraudulently issued, in the first instance, but *bona fide* purchased in the market, in the due course of business(*d*). So, also, to restrain the payment of money, where it is injurious to the party to whom it belongs; or where it is in violation of the trust to which it should be devoted(*e*). So, too, to restrain the transfer of diamonds or other valuables, where the rightful owner may be in danger of losing them(*f*).

672. In like manner an injunction will be granted to restrain a party from making vexatious alienations of real property, *pendente lite*(*g*). So, also, to restrain a vendor from conveying the legal title to real estate pending a suit for the specific performance of a contract for the sale of that estate(*h*). Although the maxim is, *pendente lite nil innovetur*, that maxim is not to be understood as warranting the conclusion, that the conveyance so made is absolutely null and void at all times, and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit; and they are not bound to take notice of the title acquired under it; but with regard to them the title is to be

(*a*) King *v.* King, 6 Ves. 172.
(*b*) Chedworth *v.* Edwards, 8 Ves. 46.
(*c*) Stead *v.* Clay, 1 Sim. 294; Rogers *v.* Rogers, 1 Anst. 174; Malcolm *v.* Scott, 3 Ha. 39.
(*d*) Athenæum Life Ass. Co. *v.* Pooley, 3 D. & J. 294.
(*e*) See Reeve *v.* Parkins, 2 J. & W. 390; Whittingham *v.* Burgoyne, 3 Anst. 900; Green *v.* Lowes, 3 Bro. C. C. 217.
(*f*) Ximènes *v.* Franco, 1 Dick. 149; Tonnins *v.* Prout, 1 Dick. 387.
(*g*) Daly *v.* Kelly, 4 Dow, 440. And see Att.-Gen. *v.* McLaughlin, 1 Gr. 34.
(*h*) Echliff *v.* Baldwin, 16 Ves. 267; Daly *v.* Kelly, 4 Dow, 435.

taken as if it had never existed. Otherwise, suits would be indeterminable, if one party, pending the suit, could, by conveying to others, create a necessity for introducing new parties(*a*).

673. Waste may be defined as the destructive or material alteration of things forming an essential part of the inheritance(*b*). The jurisdiction of equity to restrain waste arose, as in most other cases, from the incompetency of the common law to give adequate relief. The jurisdiction at common law with regard to waste may be thus stated:—By the statutes of Gloucester, 6 Edw. 1, c. 5; of Marlebridge, 52 Hen. 3, c. 24; and of Westminster, 13 Edw. 1, c. 22, a writ of waste may be brought by him who hath the immediate estate of inheritance in reversion or remainder against the tenant for life, tenant in dower, tenant by the courtesy, or tenant for years; it may also be brought by one tenant in common, or joint tenant against another who wastes the estate held in common or joint tenancy. But it does not lie between *co-parceners*(*c*).

674. But courts of equity have, by no means, limited themselves to an interference in cases of this sort. They have extended this salutary relief to cases where the remedies provided in the courts of common law cannot be made to apply; and, where the titles of the parties are purely of an equitable nature(*d*); and, where the waste is, what is commonly, although with no great propriety of language, called equitable waste(*e*); meaning acts which are deemed waste only in courts of equity; and where no waste has been actually committed, but is only meditated or apprehended, equity will interfere by a bill *quia timet*(*f*).

(*a*) Story, s. 908; Metcalfe *v.* Pulvertoft, 2 V. & B. 205; Bishop of Winchester *v.* Paine, 11 Ves. 197; Gaskell *v.* Durdin, 2 B. & B. 169; Bishop *v.* Beavor, 3 Ves. 314; Moore *v.* Macnamara, 2 B. & B. 186.

(*b*) Tomlin's Law Dict., Waste.

(*c*) 3 Black Com. 227, 228; Jefferson *v.* Bishop of Durham, 1 Bos. & Pull. 120; Snell Eq. 463.

(*d*) Mitf. Eq. Pl. by Jeremy, 114, 115, and cases cited in note (*u*); 1 Mad. Pr. Ch. 114 to 121.

(*e*) Marquis of Downshire *v.* Lady Sandys, 6 Ves, 109, 110, 115; Chamberlyne *v.* Dummer, 1 Bro. C C. 166.

(*f*) Story, s. 912.

675. There are many cases where a person is dispunishable at law for committing waste, and yet a court of equity will enjoin him. As, where there is a tenant for life, remainder for life, remainder in fee, the tenant for life will be restrained, by injunction, from committing waste(*a*); although, if he did commit waste, no action of waste would lie against him by the remainder- man for life, for he has not the inheritance, or by the remainder-man in fee, by reason of the interposed remainder for life(*b*). So, a ground landlord may have an injunction to stay waste against an under-lessee(*c*). And an injunction may be obtained against a tenant from year to year, after a notice to quit, to restrain him from removing the crops, manure, &c., according to the usual course of husbandry(*d*).

676. Courts of equity will grant an injunction in cases where the aggrieved party has equitable rights only; and, indeed, it has been said, that these courts will grant it more strongly where there is a trust estate(*e*). Thus, for instance, in cases of mortgages, if the mortgagor or mortgagee in possession commits waste, or threatens to commit it, an injunction will be granted, although there is no remedy at law(*f*). And where a purchaser, having entered into possession, failed to perform his agreement and meet his payments, he was restrained from cutting timber, or removing timber already cut(*g*).

(*a*) See Robinson *v.* Litton, 3 Atk. 210. But equity will not interfere to make a tenant for life liable for *permissive* waste; for such a tenant is not bound to repair, Powys *v.* Blagrave, Kay, 495; 4 D. M. & G. 448; Zimmerman *v.* O'Reilly, 14 Gr. 646. And see Wood *v.* Gaynon, Amb. 395.

(*b*) Com. Dig. *Waste*, C. 3; Abraham *v.* Bubb, 2 Freem. Ch. 53; Garth *v.* Cotton, 1 Dick, 183, 205, 208; 1 Ves. sen. 555; Perrot *v.* Perrot, 3 Atk. 94; Robinson *v.* Litton, 3 Atk. 210; Davis *v.* Leo, 6 Ves. 787.

(*c*) Farrant *v.* Lovell, 3 Atk. 723; Ambl. 105.

(*d*) Onslow *v.* ——, 16 Ves. 173; Pratt *v.* Brett, 2 Mad. 62.

(*e*) Robinson *v.* Litton, 3 Atk. 210; Garth *v.* Cotton, 1 Dick, 183; 1 Ves. Sen. 555; Stansfield *v.* Habergham, 10 Ves. 277, 278.

(*f*) Farrant *v.* Lovell, 3 Atk. 723: Usborne *v.* Usborne, 1 Dick. 75; Humphreys *v.* Harrison, 1 J. & W. 581; Wason *v.* Carpenter, 13 Gr. 329; Cawthra *v.* McGuire, 5 U. C. L. J. 142; Russ *v.* Mills, 7 Gr. 145. But a mortgagor will not be restrained unless the land would be a scanty security without the timber, Hippesley *v.* Spencer, 5 Mad. 422; King *v.* Smith, 2 Ha. 239.

(*g*) Ferrier *v.* Kerr, 2 Gr. 668; Lawrence *v.* Judge, 2 Gr. 301. But see Smith *v.* Bell, 11 Gr. 519.

677. Equitable waste may be defined to be such acts as at law would not be esteemed waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed, from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. As if the mortgagor in possession should fell timber on the estate, and thereby the security would become insufficient (but not otherwise), a court of equity will restrain the mortgagor by injunction(*a*). So, if there be a tenant for life without impeachment for waste, and he should pull down houses, or do other waste wantonly and maliciously, a court of equity would restrain him(*b*).

678. Upon the same ground, tenants for life without impeachment for waste, and their assignees, and tenants in tail, after possibility of issue extinct, have been restrained from cutting down trees planted for the ornament or shelter of the premises(*c*). So, a tenant for life, without impeachment of waste, has been restrained from cutting timber where certain trustees had powers inconsistent with his right, and to which it was expressly made subject(*d*).

679. Upon similar grounds, although courts of equity will not interfere by injunction to prevent waste in cases of tenants in common, or coparceners, or joint-tenants, because they have a right to enjoy the estate as they please; yet they will interfere in special cases; as, where the party committing the waste is insolvent; or, where the waste is destructive of the estate,

(*a*) King *v.* Smith, 2 Ha. 239. And see Thompson *v.* Croker, 3 Gr. 653, where the attaching creditors of an absconding mortgagor were restrained from selling timber improperly cut on the mortgaged premises.

(*b*) Abraham *v.* Bubb, 2 Freem. Ch. 53; Lord Barnard's case, Prec. Ch. 454, 2 Vern. 738; Aston *v.* Aston, 1 Ves. Sen. 265.

(*c*) Rolt *v.* Lord Somerville, 2 Eq. Ca. Ab. 759; Packington's case, 3 Atk. 215; Strathmore *v.* Bowes, 2 Bro. C. C. 88; Coffin *v.* Coffin, Jac. 71; Burges *v.* Lamb, 16 Ves 185, 186; Marquis of Downshire, *v.* Sandys, 6 Ves. 107; Lord Tamworth *v.* Lord Ferrers, 6 Ves. 419; Day *v.* Merry, 16 Ves. 375; Attorney-General *v.* Duke of Marlborough, 3 Mad. 539, 540; Wellesley *v.* Wellesley, 6 Sim. 497. See Sowerby *v.* Fryer, L. R. 8 Eq. 417; Birch-Wolfe *v.* Birch, L. R. 9 Eq. 683; Bubb *v.* Yelverton, L. R. 10 Eq. 465.

(*d*) Story, s. 915; Briggs *v.* Earl of Oxford, 5 D. & Sm. 156. See Kekewich *v.* Marker, 3 Mac. & G. 311.

and not within the usual legitimate exercise of the right of enjoyment of the estate(*a*).

680. The jurisdiction of the court is frequently exercised in granting injunctions in cases of nuisances. Nuisances may be of two sorts: (1) such as are injurious to the public at large, or to public rights; (2) such as are injurious to the rights and interests of private persons.

681. In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth(*b*). The jurisdiction is applicable, not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. Purpresture, according to Lord Coke, signifies a close, or enclosure, that is, when one encroaches, or makes that several to himself which ought to be common to many(*c*). The term was, in the old law writers, applied to cases of encroachment, not only upon the king, but upon subjects. But in its common acceptation, it is now understood to mean an encroachment upon the king, either upon part of his demesne lands, or upon rights and easements held by the crown for the public, such as upon highways, public rivers, forts, streets, squares, bridges, quays, and other public accommodations(*d*).

682. In cases of purpresture, the remedy for the crown is either by an information of intrusion at the common law, or by an information at the suit of the attorney-general in equity. In the case of a judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appear to be a mere purpresture, without being at the same time a nuisance, the

(*a*) Story, s. 916; Twort *v.* Twort, 16 Ves. 128, 131; Hole *v.* Thomas, 7 Ves. 589, 500; Christie *v.* Saunders, 2 Gr. 670; Dougal *v.* Foster, 4 Gr. 319. An injunction was refused against a tenant in common in possession, selling hay, &c., contrary to the custom of the country, Bailey *v.* Hobson, L. R. 5 Chan. 180.

(*b*) Eden on Injunct. 224, 225.

(*c*) 2 Inst. 38, 272.

(*d*) Att.-Gen. *v.* Forbes, 2 M. & C. 123; Earl of Ripon *v.* Hobart, 3 M. & K. 169, 179, 180.

court may direct an inquiry to be made, whether it is most beneficial to the crown, to abate the purpresture, or to suffer the erections to remain and be arrested. But if the purpresture be also a public nuisance, this cannot be done; for the crown cannot sanction a public nuisance(*a*).

683. In cases of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction. Thus, informations in equity have been maintained against a public nuisance by stopping a highway. But the court has no jurisdiction on the ground of public nuisance to enforce by injunction the ordinary repair of a highway, or to restrain an incorporated road company from suffering a road to continue out of repair(*b*).

684. The ground of this jurisdiction of courts of equity is, their ability to give a more complete and perfect remedy than is attainable at law. They can interpose, where the courts of law cannot, to restrain and prevent such nuisances, which are threatened, or are in progress, as well as to abate those already existing. And by a perpetual injunction, the remedy is made complete through all future time; whereas, an information or indictment at the common law can only dispose of the present nuisance, and for future acts new prosecutions must be brought. Besides, the remedial justice in equity may be prompt and immediate, before irreparable mischief is done, while, at law, nothing can be done, except after a trial, and upon the award of judgment. In the next place, a court of equity will not only interfere upon the information of the attorney-general, but also upon the application of private parties, directly affected by the nuisance(*c*). At law, in many

(*a*) Story, s. 922; Att.-Gen. *v.* Richards, 2 Anstr. 603, 606.

(*b*) Att.-Gen. *v.* Weston Plank Road Co. 4 Gr. 211; Paxton *v.* Newton, 2 Sm. & G. 440. But see Att.-Gen. *v.* Toronto Street Rail Co. 14 Gr. 673,; 15 Gr. 187; Att.-Gen. *v.* Great Northern Rail Co. 1 Dr. & Sm. 154; Att.-Gen. *v.* Metropolitan Board of Works, 1 H. & M. 298; Att.-Gen. *v.* Mid Kent Rail Co. L. R. 3 Chan. 100.

(*c*) See Soltau *v.* De Held, 2 Sim. N. s. 150.

cases, the remedy is, or may be, solely through the instrumentality of the attorney-general(*a*).

685. In regard to private nuisances, the interference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. It is not every nuisance which will justify the interposition of courts of equity to redress the injury or to remove the annoyance. There must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction(*b*).

686. Every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary. But if it is continued so long as to become a nuisance, in such a case an injunction ought to be granted, to restrain the person from committing it(*c*). So, a mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief(*d*).

687. On the other hand, where the injury is irreparable, as where loss of health(*e*), loss of trade(*f*), destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act or erection, in every such

(*a*) Story, s. 424; Crowder *v.* Tinkler, 19 Ves. 617, 623; Att.-Gen. *v.* Forbes, 2 M. & C. 129. See also Spencer *v.* London & Birmingham Rail Co. 8 Sim. 193; Sampson *v.* Smith, 8 Sim. 272.

(*b*) Fishmongers' Company *v.* East India Company, 1 Dick. 163; Att.-Gen. *v.* Nichol, 16 Ves. 342. And see Broadbent *v.* Imperial Gas Co. 7 D. M. & G. 436; Att.-Gen. *v.* Birmingham, 4 K. & J. 528; The Manchester Sheffield &c. Rail Co. *v.* Works of Board of Health, 23 Beav. 198. But see as to acquiescence, Radenhurst *v.* Coate, 6 Gr. 139; Heenan *v.* Dewar, 17 Gr. 638; 18 Gr. 438.

(*c*) Coulson *v.* White, 3 Atk. 21, See Inchbald *v.* Robinson, L. R. 4 Chan. 388.

(*d*) Story, s. 925; Att.-Gen. *v.* Nichol, 16 Ves. 342; Wynstanley *v.* Lee, 2 Swanst. 336; Earl of Ripon *v.* Hobart, 3 M. & K. 169; Harrison *v.* Good, L. R. 11 Eq. 338. And see Magee *v.* London & Port Stanley Rail Co. 6 Gr. 170.

(*e*) Walter *v.* Selfe, 4 D. & Sm. 322.

(*f*) As to restraining the publication of advertisements injurious to the reputation and mercantile credit of another, Dixon *v.* Holden, L. R. 7 Eq. 488.

case courts of equity will interfere by injunction, in furtherance of justice and the violated rights of the party(*a*). Thus, for example, where a party builds so near the house of another, as to darken his windows, against the clear rights of the latter either by contract, or by ancient possession, courts of equity will interfere by injunction to prevent the nuisance, as well as to remedy it, if already done, although an action for damages would lie at law; for the latter can in no just sense be deemed an adequate relief in such a case(*b*). The injury is material, and operates daily to destroy or diminish the comfort and use of the neighbouring house; and the remedy by a multiplicity of actions, for the continuance of it, would furnish no substantial compensation(*c*).

688. Cases of a nature calling for the like remedial interposition of courts of equity, are, the obstruction or pollution(*d*) of watercourses, the diversion of streams from mills(*e*), the back flowage on mills, and the pulling down of the banks of rivers, and thereby exposing adjacent lands to inundation, or adjacent mills to destruction(*f*). So, an injunction will be granted against a corporation, to prevent an abuse of the powers granted to them to the injury of other persons(*g*). So,

(*a*) Wynstanley *v.* Lee, 2 Swanst. 335; Att.-Gen. *v.* Nichol, 16 Ves. 342; Cherrington *v.* Abney, 2 Vern. 646; Earl Bathurst *v.* Burden, 2 Bro. C. C. 64; Nutbrown *v.* Thornton, 10 Ves. 163.

(*b*) Brummell *v.* Wharin, 12 Gr. 283; Back *v.* Stacy, 2 Russ. 121; Sutton *v.* Montfort, 4 Sim. 559. See Stone *v.* Real Property Company, 12 Jur. N. S. 558; Arcedeckne *v.* Kelk, 5 Jur. N. S. 114; Bononi *v.* Backhouse, 5 Jur. N. S. 1345; Wilson *v.* Townend, 6 Jur. N. S. 1109; Tapling *v.* Jones, 11 H. L. 290; Staight *v.* Burn, L. R. 5 Chan 163.

(*c*) Story, s. 926.

(*d*) Wood *v.* Sutcliffe, 2 Sim. N. S. 165; Goldsmid *v.* Tunbridge Wells Co. 12 Jur. N. S. 308; Att.-Gen. *v.* Colney Hatch Lunatic Asylum, L. R. 4 Chan. 146; Lingwood *v.* Stowmarket Co. L. R. 1 Eq. 77, 336; Att.-Gen. *v.* Richmond, L. R. 2 Eq. 306; Att.-Gen. *v.* Leeds Corporation, L. R. 5 Chan. 583; Holt *v.* Corporation of Rochdale, L. R. 10 Eq. 354; Clowes *v.* Staffordshire P. W. Co. L. R. 8 Chan. 125. As to pollution of the air, see Cartwright *v.* Gray, 12 Gr. 399. As to the circumstances under which the court will interfere, Att.-Gen. *v.* Gee, L. R. 10 Eq. 131.

(*e*) But see Graham *v.* Northern Rail Co. 10 Gr. 259.

(*f*) Robinson *v.* Byron, 1 Bro. C. C. 588; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 706; Lane *v.* Newdigate, 10 Ves. 194; Chalk *v.* Wyatt, 3 Meriv. 688. And see Gamble *v.* Howland, 3 Gr. 281; Burr *v.* Graham, 5 Gr. 491.

(*g*) Coats *v.* The Clarence Railway Company, 1 R. & M. 181. And see Brewster *v.* The Canada Co. 4 Gr. 443.

to restrain the ringing of bells by a Roman Catholic community, although the same was done only on Sundays(*a*).

689. An injunction will be granted to prevent a party from making erections on an adjacent lot in violation of his covenant or other contract(*b*). And to prevent a tenant from removing mineral and other deposits from the bed of a stream running through a farm which he occupies(*c*).

690. Upon the same principle, a land-owner has a right, independent of prescription, to the lateral support of his neighbours' land, so far as that is necessary to sustain his soil in its natural state, and also to compensation for damages caused, either to the land or buildings upon it, by the withdrawal of such support, it being established that the additional weight of the buildings had nothing to do with the subsidence of the soil(*d*). And it would seem that he may acquire, by twenty years' enjoyment, the right to lateral support for the additional weight of buildings erected on the land. And where houses of the plaintiff were injured by mining operations of the defendant, in adjoining land, which would have caused the soil to subside without the additional weight of the houses, a decree for perpetual injunction, and for compensation, was granted(*e*).

691. Upon similar grounds, courts of equity interfere in cases of trespasses, that is to say, to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive liti-

(*a*) Soltau *v.* De Held, 2 Sim. N. S. 150.

(*b*) Ranken *v.* Huskisson, 4 Sim. 13; Squire *v.* Campbell, 1 M. & C. 480, 481; Roper *v.* Williams, T. & R. 18. See also Peek *v.* Matthews, L. R. 3 Eq. 515; Western *v.* McDermott, L. R. 2 Chan. 72; Mitchell *v.* Steward, L. R. 1 Eq. 541; Wilson *v.* Hart, L. R. 1 Chan. 463; Feilden *v.* Slater, L. R. 7 Eq. 523; Clements *v.* Welles, L. R. 1 Eq. 200.

(*c*) Thomas *v.* Jones, 1 Y. & C. 510.

(*d*) Hunt *v.* Peake, Johns. 705.

(*e*) Story, s. 927 a; Caledonian Railway Co. *v.* Sprot, 2 McQueen, 449; Humphries *v.* Brogden, 12 Q. B. 739; Rowbotham *v.* Wilson. 6 El. & Bl. 593; Arkwright *v.* Gell, 5 M. & W. 203; Acton *v.* Blundell, 12 M. & W. 324; Dickinson *v.* Grand J. Canal Co. 7 Exch. 282; Chasemore *v.* Richards, 7 W. R. 685; Solomon *v.* Vintners' Company, 7 W. R. 613; Metropolitan Board of Works *v.* Metropolitan R. R. Co., L. R. 4 C. P. 192; Popplewell *v.* Hodkinson, L. R. 4 Ex. 248.

gation(*a*). But if the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity(*b*). Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses, but now, there is not the slightest hesitation, if the acts done, or threatened to be done, to the property, would be ruinous or irreparable, or would impair the just enjoyment of the property in future(*c*).

692. Relief is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited rights with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property(*d*).

693. Thus, for instance, an injunction will be granted, where timber is attempted to be cut down by a trespasser, in collusion with the tenant of the land(*e*), or where there is a dispute respecting the boundaries of estates, and one of the claimants is about to cut down ornamental or timber trees in the disputed territory(*f*). So, where lessees are taking away from a manor, bordering on the sea, stones of a peculiar value (*g*).

694. Upon similar principles, for preventing irreparable mischief, or suppressing multiplicity of suits and vexatious litigation, courts of equity interfere in cases of patents for inventions, and in cases of copyrights, to secure the rights of the inventor, or author, and his assignees and representatives(*h*).

(*a*) Hanson *v.* Gardiner, 7 Ves. 308, 309, 310; Norway *v.* Rowe, 19 Ves. 147, 148, 149.

(*b*) But see London, &c. R. Co. *v.* Lancashire, &c. R. Co. L. R. 4 Eq. 174.

(*c*) Story, s. 928; Hanson *v.* Gardiner, 7 Ves. 306; Courthope *v.* Mapplesden, 10 Ves. 291; Field *v.* Beaumont, 1 Swanst. 207, 208; Crockford *v.* Alexander, 15 Ves. 138; Thomas *v.* Oakley, 18 Ves. 184. See Att.-Gen. *v.* McLaughlin, 1 Gr. 34.

(*d*) Story, s. 929; Thomas *v.* Oakley, 18 Ves. 184; Field *v.* Beaumont, 1 Swanst. 208; Norway *v.* Rowe, 19 Ves. 147, 154.

(*e*) Courthorpe *v.* Mapplesden, 10 Ves. 290. And see Chisholm *v.* Sheldon, 1 Gr. 318.

(*f*) Kinder *v.* Jones, 17 Ves. 110. See Christie *v.* Long, 3 Gr. 630.

(*g*) Earl Cowper *v.* Baker, 17 Ves. 128; Thomas *v.* Jones, 1 Y. & C. 510.

(*h*) Sheriff *v.* Coates, 1 R. & M. 159.

695. If no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights(*a*). Besides, in cases of this nature, mere damages would give no adequate relief. For example, in the case of a copyright, the sale of copies by the defendant is not only in each instance taking from the author the profit upon the individual book, which he might otherwise have sold; but it may also be injuring him, to an incalculable extent, in regard to the value and disposition of his copyright, which no inquiry for the purpose of damages could fully ascertain(*b*).

696. In cases, however, where a patent has been granted for an invention, it is not a matter of course for courts of equity to interpose by way of injunction. If the patent has been but recently granted, and its validity has not been ascertained by a trial at law, the court will not generally act upon its own notions of the validity of the patent, and grant an immediate injunction; but it will require it to be ascertained by a trial in a court of law, if the defendant denies its validity, or puts the matter in doubt(*c*). But, if the patent has been granted for some length of time, and the patentee has put the invention into public use, and has had an exclusive possession of it under his patent for a period of time, which may fairly create the presumption of an exclusive right, the court will ordinarily interfere by way of injunction(*d*).

(*a*) Harmer *v.* Plane, 14 Ves. 132; Hogg *v.* Kirby, 8 Ves. 223, 224; Lawrence *v.* Smith, Jac. 472; Sturz *v.* De la Rue, 5 Russ. 322.

(*b*) Story, ss. 931, 932; Hogg *v.* Kirby, 8 Ves. 223, 224, 255; Wilkins *v.* Aikin, 17 Ves. 424; Lawrence *v.* Smith, Jac. 472. And see Geary *v.* Norton, 1 D. & Sm. 9; Colbourne *v.* Simms, 2 Ha. 543, 553.

(*c*) Martin *v.* Wright, 6 Sim. 297; Bramwell *v.* Halcomb, 3 M. & C. 737; Spottiswoode *v.* Clarke, 2 Ph. 156; Stevens *v.* Keating, 2 Ph. 333; Caldwell *v.* Van Vlissengen, 9 Ha. 415; Rollins *v.* Hinks, L. R. 13 Eq. 361. As to disputing the validity of a patent, see Whiting *v.* Tuttle, 17 Gr. 454. And see also as to novelty of invention, Abell *v.* McPherson, 17 Gr. 23; North *v.* Williams, 17 Gr. 179; Summers *v.* Abell, 15 Gr. 532.

(*d*) Hill *v.* Thompson, 3 Mer. 622, 628; Bacon *v.* Jones, 4 M. & C. 433, 436. And see Powell *v.* Begley, 13 Gr. 381; Crosley *v.* Derby Gaslight Co. 1 R. & M. 166 n.

697. There are some peculiar principles, applicable to cases of copyright, which are not generally applicable to patents for inventions. In the first place, no copyright can exist, consistently with principles of public policy, in any work of a clearly irreligious, immoral, libellous, or obscene description. In the case of an asserted piracy of any such work, if it be a matter of any real doubt, whether it falls within such a predicament or not, courts of equity will not interfere by injunction to prevent or to restrain the piracy, but will leave the party to his remedy at law(*a*).

698. In cases of copyright, difficulties often arise, in ascertaining whether there has been an actual infringement thereof (*b*), which are not strictly applicable to cases of patents. It is, for instance, clearly settled, not to be any infringement of the copyright of a book, to make *bona fide* quotations or extracts from it, or a *bona fide* abridgment of it; or to make a *bona fide* use of the same common materials in the composition of another work(*c*). But what constitutes a *bona fide* case of extracts, or a *bona fide* abridgment, or a *bona fide* use of common materials, is often a matter of most embarrassing inquiry. The true question, in all cases of this sort is, whether there has been a legitimate use of the copyright publication, in the fair exercise of a mental operation, deserving the character of a new work. If there has been, although it may be prejudicial to the original author, it is not an invasion of his legal rights. If there has not been, then it is treated as a mere colourable curtailment of the original work, and a fraudulent evasion of the copyright(*d*).

(*a*) Story, s. 936; Walcot *v.* Walker, 7 Ves. 1; Southey *v.* Sherwood, 2 Meriv. 435; Lawrence *v.* Smith, Jac. 471.

(*b*) Hereford *v.* Griffin, 16 Sim. 190; Kelly *v.* Morris, L. R. 1 Eq. 697; Morris *v.* Ashbee, L. R. 7 Eq. 34; Morris *v.* Wright, L. R. 5 Chan. 279.

(*c*) Lewis *v.* Fullarton, 2 Beav. 6; Campbell *v.* Scott, 11 Sim. 31. And see Mack *v.* Petter, L. R. 14 Eq. 431; McCrea *v.* Holdsworth, L. R. 6 Chan. 418; Holdsworth *v.* McCrea, L. R. 2 H. L. 380; Pike *v.* Nicholas, L. R. 5 Chan. 251; Levy *v.* Rutley, L. R. 6 C. P. 523; Wood *v.* Chart, L. R. 10 Eq. 193.

(*d*) Wilkins *v.* Aikin, 17 Ves. 425; Longman *v.* Winchester, 16 Ves. 269; Matthewson *v.* Stockdale, 12 Ves. 270; Cary *v.* Fadden, 5 Ves. 24; Jarrold *v.* Houston, 3 K. & J. 708; Stevens *v.* Benning, 6 D. M. & G. 223; Reade *v.* Bentley, 3 K. & J. 278; 4 K. & J. 656. And see Bogue *v.* Houlston, 5 D. & Sm. 267; Bradbury *v.* Hotten, L. R. 8 Ex. 1; Gambart *v.* Ball, 14 C. B. N. S. 306; Murray *v.* Bogue, 1 Drew. 353; Leader *v.* Purday, 18 L. J. N. S. C. P. 97; Wood *v.* Boosey, L. R. 3 Q. B. 223.

699. The general doctrine on copyright in publications of the class of maps, charts, road-books, calendars, chronological and other tables, is not easily reducible to any accurate definition. The materials being equally open to all, there must be a close identity or similitude in the very form and use of the common materials. The difficulty here, is, to distinguish what belongs to the exclusive labours of a single mind from what are the common sources of the materials [of the knowledge used by all. Suppose for instance, the case of maps; one man may publish the map of a country; another man, with the same design, if he has equal skill and opportunity, may by his own labour produce almost a *fac-simile*. He has certainly a right so to do; he is not at liberty to copy that map, and claim it as his own. He may work on the same original materials, but he cannot exclusively and evasively use those already collected and embodied by the skill, industry, and expenditure of another. The fact of copy or no copy, is generally ascertained in the absence of direct evidence, by the appearance in the alleged copy of the same inaccuracies or blunders, that are to be found in the first published work. But this is a mode of inference which must be applied with caution(*a*).

700. As to private letters, whether on literary subjects, or on matters of private business, personal friendships, or family concerns, it is not easy to lay down any definite rule as to how far equity will interfere to restrain their publication. It may, however, be safe to assume that the cases on this subject establish the following proposition(*b*). (1) That the writer of private letters has such a qualified property in them, as will entitle him to an injunction to restrain their publication by th party written to, or his assignees(*c*). (2) That the party written to has such a qualified right of property in the letters written to him, as will entitle him or his personal representa-

(*a*) Story, s. 939; Wilkins *v.* Aikin, 17 Ves. 424; Longman *v.* Winchester, 16 Ves. 269, 271; Matthewson *v.* Stockdale, 12 Ves. 270; Cary *v.* Fadden, 5 Ves. 24. And see Campbell *v.* Scott, 11 Sim. 31.

(*b*) Drew. on Inj. 208.

(*c*) Pope *v.* Curl, 2 Atk. 342; Gee *v.* Pritchard, 2 Sw. 402.

tives to restrain the publication of them by a stranger(*a*). (3) That such qualified right may be displaced by reasons of public policy, or by some personal equity(*b*).

701. A court of equity will interfere to restrain the publication of unpublished manuscripts. In cases of literary, scientific, and professional treatises in manuscript, it is obvious that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership, by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication to which the receiver may choose to devote them. The property, then, in such manuscripts not having been parted with in cases of this sort, if any attempt is made to publish them without the consent of the author or proprietor, it is obvious that he ought to be entitled to protection in equity(*c*).

702 Questions sometimes arise in regard to the equitable interest of publishers in copyrights by virtue of contracts with the authors, for successive editions. Where publishers agreed with an author to print, reprint, and publish a work at their own risk, upon certain specified terms, and that, if other editions should be required, the author should make the necessary alterations and additions, and the publishers should publish all subsequent editions upon the same terms, and after several changes in the partners of the house and the bankruptcy of the last survivor of the original contractors, the assignees, with

(*a*) Earl of Granard *v.* Dunkin, 1 B. & B. 207; Thompson *v.* Stanhope, Amb. 739.

(*b*) Lord Perceval *v.* Phipps. 2 V. & B. 19.

(*c*) Story, s. 943. See Prince Albert *v.* Strange, 1 Mac. & G. 25; Duke of Queensberry *v.* Shebbeare, 2 Ed. 329; Southey *v.* Sherwood, 2 Meriv. 435, 436; Macklin *v.* Richardson, Amb. 694; Pope *v.* Curl, 2 Atk. 343. And where a person delivers scientific or literary oral lectures, it is not competent for any person who is privileged to hear them, to publish the substance of them from his own notes, Abernethy *v.* Hutchinson, 3 L. J. Ch. 209.

the solvent partners of the new firm, to whom the work had been assigned by their predecessors, assigned to other law publishers all the interest of the firm in the work and all the unsold copies, it was held that the purchasers had no share in the copyright of the work, and were not entitled to an injunction to restrain the publication of a new edition by another publisher with the author's concurrence. The agreement was held to be of a personal nature on both sides, and the benefit of it not assignable, except by mutual consent of the parties(*a*).

703. In cases of the invasion of a copyright by using the same materials in another work, of which a large proportion is original, it constitutes no objection that an injunction will in effect stop the sale and circulation of the work which so infringes upon the copyright. If the parts which are original cannot be separated from those which are not original, without destroying the use and value of the original matter, he who has made the improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to another, and the mixture is forbidden by the law, he must again separate them, and bear all the mischief and loss which the separation may occasion(*b*).

704. Where a dramatic performance has been allowed by the author to be acted at a theatre, no person has a right to pirate such a performance, and to publish copies of it surreptitiously, or to act it at another theatre without the consent of the author or proprietor; for his permission to act it at a public theatre does not amount to an abandonment of his title to it, or to a dedication of it to the public at large(*c*).

705. An injunction will also be granted against publishing a magazine in a party's name who has ceased to authorize

(*a*) Story, s. 941 a; Stevens *v.* Benning, 6 D. M. & G. 223. See also Reade *v.* Bentley, 3 K. & J. 278; 4 K. & J. 656; Jarrold *v.* Heywood, 18 W. R. 279; Pike *v.* Nicholas, 13 W. R. 321. See also Morris *v.* Wright, 18 W. R. 327; Taylor *v.* Pillow, L. R. 7 Eq. 418.

(*b*) Story, s. 942; Mawman *v.* Tegg, 2 Russ. 390

(*c*) See Morris *v.* Kelley, 1 J. & W. 481.

it(*a*), or, from assuming the name of a newspaper, published by the plaintiff, for the fraudulent purpose of deceiving the public and supplanting the plaintiff in the good-will of his own newspaper.

706. On similar principles, an injunction will be granted to restrain the owner from running omnibuses, having on them such names and words, and devices, as to form a colorable imitation of the words, names, and devices on the omnibuses of the plaintiff; for this has a natural tendency to deprive the plaintiff of the fair profits of his business, by attracting custom under the false representation that the omnibuses of the defendant belong to and are under the management of the plaintiff(*b*).

707. So, also, an injunction will be granted to prevent the use of names, marks, letters, or other *indicia* of a tradesman, by which to pass off goods to purchasers as the manufacture of that tradesman, when they are not so(*c*).

708. With regard to the use of trade marks, and generally as to the enjoyment of a particular trade designation, the right to protection does not seem to depend upon a property in them, but on the principle that the court will not allow fraud to be practised on private individuals, or upon the public(*d*). The test of the infringement of a trade-mark is, whether the acts complained of on the part of the defendant are likely to mislead the public into the belief that in dealing with the defendant they are procuring a different article, and the one originally sold under the plaintiff's mark instead of the one they in fact obtain(*e*).

(*a*) Hogg *v.* Kirby, 8 Ves. 215.

(*b*) Knott *v.* Morgan, 2 Keen, 213, 219.

(*c*) Perry *v.* Truefitt, 6 Beav. 66; Gout *v.* Aiepioglu, 6 Beav. 69, note. And see Wotherspoon *v* Currie, L. R. 5 H. L. 508; Seixo *v.* Provezende, L. R. 1 Chan. 192; Hirst *v.* Denham, L. R. 14 Eq. 542; Cocks *v.* Chandler, L. R. 11 Eq. 446; Lippmann *v.* Elkan, L. R. 12 Eq. 140; 7 Chan. 130; James *v.* James, L. R. 13 Eq. 421; Marshall *v.* Ross, L. R. 8 Eq. 651.

(*d*) Farina *v.* Silverlock, 6 D. M. & G. 217; Burgess *v.* Burgess, 3 D. M. & G. 896. See Marshall *v.* Ross, 17 W. R. 1086; Hudson *v.* [illegible]nett, 12 Jur. N. S. 519; Brass *v.* Dawber, 19 L. T. N. S. 626.

(*e*) Williams *v.* Osborne, 13 L. T. N. S. 498; Lee *v.* Haley, L. R. 5 Chan. 155; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518; Radway *v.* Coleman, 15 Gr. 50.

709. Thus, an injunction will be granted against vending an article of trade under the name of a party, with false labels, to the injury of the same party, who has already acquired a reputation in trade by it(*a*). But it has been refused, when sought against a chemist for selling a quack medicine under a false and colorable representation that it was the medicine of the plaintiff, an eminent physician, who had not any such medicine of his own, with which the quack medicine could come in competition(*b*).

710. A foreign manufacturer may file his bill in equity in this Province, for an injunction and account of profits, against a manufacturer in this country, who has committed a fraud upon him by the use of his trade-mark, for the purpose of inducing the public to believe that the goods so marked were manufactured by such foreigner. This relief is founded upon the personal injury caused the plaintiff by the defendant's fraud, and the right to such relief exists, although the plaintiff resides and carries on his business in another country, and has no establishment in this Province, and does not sell his goods here(*c*).

711. And where one sells his share in a partnership business then in operation, it imports the sale of the good-will of the business. This comprehends every positive advantage which has been acquired by the firm in carrying on its business, whether connected with the place or the name of the firm; but it does not imply a prohibition against the retiring partner carrying on the same business in the same place, so that he do it under such a name as not to give the impression that he is the successor of the old firm. He will be restrained from doing this by injunction(*d*).

(*a*) Motley *v.* Downman, 3 M. & C. 14; Millington *v.* Fox, 3 M. & C. 338; Perry *v.* Truefitt, 6 Beav. 66; Franks *v.* Weaver, 10 Beav. 297; Barnett *v.* Lenchars, 13 L. T. N. S. 495.

(*b*) Clark *v.* Freeman, 12 Jur. 149.

(*c*) See The Collins Company *v.* Brown, 3 K. & J. 423; The Collins Co. *v.* Cowen, 3 K. & J. 428. See also Seixo *v.* Provezende, 12 Jur. N. S. 215; Leather Cloth Company *v.* American Leather Cloth Company, 11 Jur. N. S. 513; Emperor of Austria *v.* Day, 7 Jur. N. S. 483, 639.

(*d*) Churton *v.* Douglas 5 Jur. N. S. 887; Mossop *v.* Mason, 16 Gr. 302; 17 Gr. 360. And see Aikins *v.* Piper, 15 Gr. 561; Banks *v.* Gibson, 34 Beav. 566.

712. The vendor of a business and good-will may, in the absence of express stipulation, set up another business of the same kind, and may publicly advertise the fact, but must not privately, by letter, personally, or by a traveller, solicit customers of the old business to cease dealing with the purchaser and to give their custom to himself(*a*).

713. The good will of a business, which in general imports the tendency of business to a particular house, is held not to be applicable to solicitors, and a contract for the sale of such a good-will is not susceptible of specific performance in a court of equity(*b*). But the good-will of such a business may fairly be sold for a pecuniary consideration.

714. An injunction restraining a person from carrying on a business within a fixed distance from a certain spot, imports distance, not by the road, but by a straight line in a horizontal plane(*c*). In order to claim relief by way of injunction, it is not requisite to show a fraudulent purpose in the defendant. It is sufficient if the similarity of title has led, and is likely to lead, to mistakes(*d*).

715. If the defendant, in a suit for the protection of a trade-mark, offers the plaintiff, after an interim injunction has been granted, in order to avoid further litigation, to pay all costs and to give an undertaking not to use the trade-mark complained of, and the plaintiff notwithstanding persists in carrying the suit to a hearing, the injunction will be made perpetual, but no further costs after the offer will be allowed, inasmuch as the plaintiff has obtained nothing by the hearing which he could not have secured without(*e*).

716. Courts of equity will also restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment, And it matters not, in such cases,

(*a*) Labouchere *v.* Dawson, L. R. 13 Eq. 322.
(*b*) Austen *v.* Boys, 2 D. & J. 626; 24 Beav. 598.
(*c*) Duignan *v.* Walker, 5 Jur. N. S. 976.
(*d*) Story, s. 951 d; Clement *v.* Maddick, 5 Jur. N. S. 592.
(*e*) Story, s. 951 f; Hudson *v.* Bennett, 12 Jur. N. S. 519.

whether the secrets be secrets of trade or secrets of title, or any other secrets of the party, important to his interests(*a*). Thus, a party has been restrained from using the secret of compounding a medicine not protected by patent, when it appeared that the secret was imparted to him, to his own knowledge, in breach of faith or contract, on the part of the person so communicating it(*b*).

717. Other cases of special injunctions, granted to prevent a total failure of remedial justice, may be mentioned. Thus, courts of equity will interfere, to restrain a vendor from selling to the prejudice of the vendee, pending a bill for the specific performance of a contract respecting the estate; for it might put the latter to the expense of making the purchaser a party, in order to give perfect security to his title(*c*).

718. In like manner, sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons as in cases of trusts, and special authorities, where the party is abusing his trust or authority(*d*). And where sales have been made to satisfy certain trusts and purposes, and there is danger of a misapplication of the proceeds, courts of equity will also restrain the purchaser from paying over the purchase-money(*e*). And, generally, where the necessity of the case requires it, a court of equity will interfere to prevent a defendant from affecting property in litigation, by contracts, conveyances, or other acts (*f*).

719. Cases of injunctions against a transfer of stocks, of an-

(*a*) Cholmendeley *v.* Clinton, 19 Ves. 261, 267; Evitt *v.* Price, 1 Sim. 483; Yovatt *v.* Winyard, 1 J. & W. 394.

(*b*) Story, s. 952; Morrison *v.* Moat, 15 Jur. 787. And see Williams *v.* Williams, 3 Meriv. 159; Green *v.* Folgham, 1 S. & S. 398.

(*c*) Echliff *v.* Baldwin, 16 Ves. 267; Curtis *v.* Marquis of Buckingham, 3 V. & B. 168; Daly *v.* Kelly, 4 Dow, 440.

(*d*) Anon., 6 Mad. 10. See Parrott *v.* Congreve, 13 Jur. 398.

(*e*) Green *v.* Lowes, 3 Bro. C. C. 217; Matthews *v.* Jones, 2 Anstr. 506; Hawkshaw *v.* Parkins, 2 Swanst. 549.

(*f*) Story, s. 954; Shrewsbury &c. R. Co. *v.* Shrewsbury and B. R. Co. 1 Sim. N. S. 410; The Great W. R. Co. *v.* The Birmingham &c. R. Co., 12 Jur. 106; 2 Ph. 597.

nuities, of ships, and of negotiable instruments, furnish appropriate illustrations of the same principle(*a*).

720. The question has been made, how far a court of equity has jurisdiction to interfere in cases of public functionaries, who are exercising special public trusts or functions. As to this, the established doctrine now is, that so long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, the court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, the court no longer considers them as acting under authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority(*b*).

721. Where land is sold with a covenant from the grantee, or upon condition that the erections upon it shall be of a prescribed character. The performance of such stipulations will be enforced in equity by restraining any departure from them (*c*). The same principle is applied to cases of personal property, bequeathed as heirlooms, or settled in trust to go with particular estates. Thus, for example, household furniture, plate, pictures, statues, books, and libraries, are often bequeathed or settled in trust, to go with the title of certain family mansions and estates. In such cases courts of equity will enforce a due observance of the trust, and restrain the parties having a present possession from wasting the property, or doing any acts inconsistent with the trust(*d*).

(*a*) Terry *v.* Harrison, Bunb. 289; Chedworth *v.* Edwards, 8 Ves. 46; Stead *v.* Clay, 1 Sim. 294; Hood *v.* Aston, 1 Russ. 412; Thompson *v.* Smith, 1 Mad. 395; Rogers *v.* Rogers, 1 Anstr. 174.

(*b*) Story, s. 955; Frewin *v.* Lewis, 4 M. & C. 254. See Grenville-Murray *v.* Clarendon, L. R. 9 Eq. 11; Att.-Gen. *v.* Kirk; Kirk *v.* The Queen, L. R. 14 Eq. 558.

(*c*) Coles *v.* Sims, Kay, 56; Child *v.* Douglas, Kay, 560; Piggott *v.* Stratton, John. 341. See also Rowbotham *v.* Wilson, 6 Jur. N. S. 965; 3 Jur. N. S. 1297. Western *v.* Macdermot, 12 Jur. N. S. 366; Harrison *v.* Good, L. R. 11 Eq. 338.

(*d*) Cadogan *v.* Kennet, Cowp. 435, 436; Co. Litt. 20 a; Hargrave's note [5].

722. An injunction will also be granted to restrain the sailing of a ship, upon the application of a part owner, whose share is unascertained, in order to ascertain that share, and to obtain security for the due return of the ship(*a*).

723. Where a party had been induced, by fraudulent misrepresentations or misunderstanding, to accept a lease of coal mines at a certain rent, which he had covenanted to pay, and also to work the mines, it was held that the court of equity would not restrain an action for the rent, although the coal proved to be not worth the expense of working, but that, if a suit were to be brought upon the covenant to work the mine, the court would interfere(*b*).

724. Injunctions will also be granted to compel the due observance of personal covenants, where there is no effectual remedy at law. Thus, in the old case of the parish bell, where certain persons owning a house in the neighbourhood of a church entered into an agreement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning to their disturbance, the agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour(*c*).

725. Upon the same ground a celebrated play writer, who had covenanted not to write any dramatic performances for another theatre, was, by injunction, restrained from violating the covenant(*d*). So, an author, who had sold his copyright in a work, and covenanted not to publish any other to its prejudice, was restrained by injunction from so doing(*e*).

(*a*) Haly *v.* Goodson, 2 Meriv. 77; Christie *v.* Craig, 2 Meriv. 137. But see Castelli *v.* Cook, 13 Jur. 675.

(*b*) Ridgway *v.* Sneyd, Kay 627.

(*c*) Story, s. 958; Martin *v.* Nutkin, 2 P. W. 266. See Soltau *v.* De Held, 2 Sim. N. S. 133.

(*d*) Morris *v.* Colman, 18 Ves. 437. And see Montague *v.* Flockton, L. R. 16 Eq. 189. But see Kemble *v.* Kean, 6 Sim. 333; Rolfe *v.* Rolfe, 15 Sim. 88; Hills *v.* Croll, 2 Ph. 60.

(*e*) Barfield *v.* Nicholson, 2 S. & S. 1; Kimberley *v.* Jennings, 6 Sim. 340.

726. Notwithstanding some apparent vacillation in the decisions of the English courts of equity, in regard to the propriety of enforcing the negative portion of a contract by injunction, where they cannot enforce the specific performance of the affirmative counter stipulations, which constitute the main basis of the contract, it seems now to be left to depend very much upon the character of such stipulations(*a*).

727. Courts of equity also interfere, and effectuate their own decrees in many cases by injunctions, in the nature of a judicial writ or execution for possession of the property in controversy; as, for example, by injunctions to yield up, deliver, quiet, or continue the possession, followed up by a writ of assistance(*b*).

728. The granting or refusing of injunctions is a matter resting in the sound discretion of a court of equity(*c*); and, consequently, no injunction will be granted whenever it will operate oppressively, or inequitably, or contrary to the real justice of the case; or, where it is not the fit and appropriate mode of redress under all the circumstances of the case; or, where it will or may work an immediate mischief, or fatal injury. Thus, for example, no injunction will be granted to restrain a nuisance, by the erection of a building, where the erection has been acquiesced in, or encouraged by the party seeking the relief(*d*).

729. An injunction will not be granted in cases of gross laches or delay by the party seeking the relief in enforcing his rights; as, for example, where, in case of a patent or a copyright, the patentee has lain by, and allowed the violation to go on for a long time, without objection, or seeking redress(*e*).

(*a*) Story, s. 958 a.

(*b*) Stribley *v.* Hawkie, 3 Atk. 275; Penn *v.* Lord Baltimore, 1 Ves. Sen. 454; Dove *v.* Dove, 1 Cox, 101; 1 Bro. C. C. 375; 2 Dick. 617; Huguenin *v.* Baseley, 15 Ves. 180; Roberdeau *v.* Rous, 1 Atk. 543.

(*c*) Bacon *v.* Jones, 4 M. & C. 433; Bramwell *v.* Halcomb, 3 M. & C. 737.

(*d*) Williams *v.* Earl of Jersey, Cr. & Ph. 91.

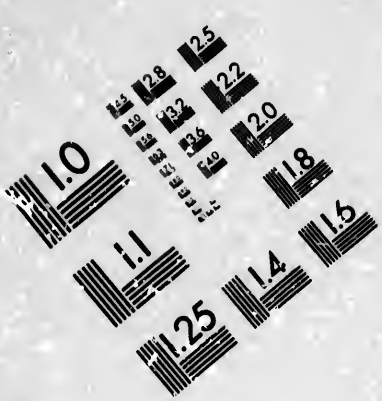
(*e*) Saunders *v.* Smith, 3 M. & C. 711; Lewis *v.* Chapman, 3 Beav. 133.

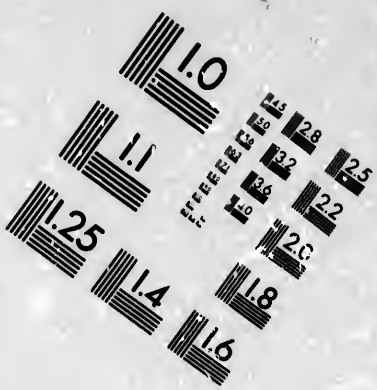
730. Covenants may also be of such a nature as ought not, in equity, to be specifically enforced by injunction, in consideration of the unreasonable and inconvenient consequences which may ensue therefrom. Thus, where it was covenanted by the lessee of an inn, that he would keep it open, and not discontinue it, the court refused to grant an injunction to enforce the specific performance of the covenant(*a*). It is obvious, that the granting of the injunction in such a case might be utterly useless, and moreover, be attended with ruinous consequences to the lessee.

731. Upon similar principles a court of equity will not by injunction compel a person to fulfil a contract to write dramatic performances for a particular theatre(*b*); or, to act a certain number of nights at a particular theatre(*c*), or to compel an employer to retain a servant, agent, or manager; or to restrain him from excluding such person(*d*), or to furnish maps, which the plaintiff is to have the sole privilege of engraving and publishing(*e*).

732. Courts of equity will not interfere by injunction to restrain corporators from applying to the legislature either of the country, or of a foreign country, where the grant was originally in another country, for an enlargement of the powers of the corporation(*f*). And those courts will not interfere with grants obtained by resident citizens of the country, in foreign countries, in order to determine how far such grants interfere with each other. But a foreign sovereign, having entered into a contract with British subjects, and subsequently made another grant, in derogation of the first concession, the English courts will not restrain the second grantee from doing in a foreign country, whatever they are authorized to do by the sovereign power there(*g*). But the court has jurisdiction

(*a*) Hooper *v.* Brodrick, 11 Sim. 47.
(*b*) Morris *v.* Colman, 18 Ves. 437.
(*c*) Kemble *v.* Kean, 6 Sim. 333. But see Lumley *v.* Wagner, 16 Jur. 871.
(*d*) Stocker *v.* Brockelbank, 3 Mac. & G. 250.
(*e*) Baldwin *v.* Society for Diffusing Useful Knowledge, 9 Sim. 393.
(*f*) Bill *v.* Sierra Nevada, L. W. & M. Company, 1 D. F. & J. 177.
(*g*) Gladstone *v.* Ottoman Bank, 9 Jur. N. S. 246; 1 H. & M. 505.





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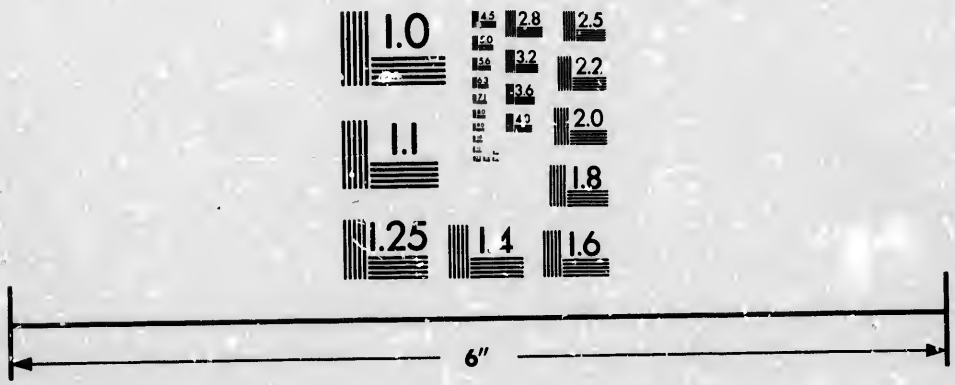

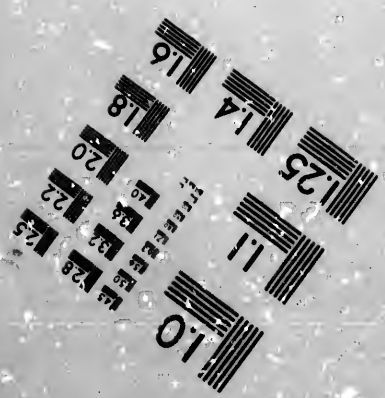

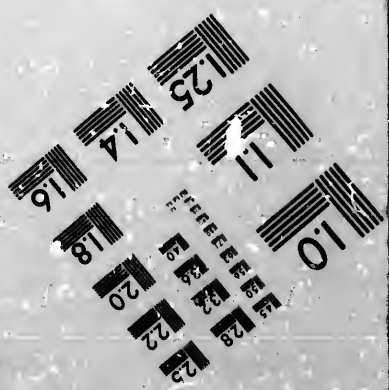

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at the suit of one citizen against another citizen, in whose hands a fund is placed, subject, at law, to the sole control of a foreign sovereign or ambassador, to restrain the defendant from parting with the fund upon the order of such foreign sovereign or ambassador(*a*).

733. It has recently been decided, that, where a court of one country is called upon to enforce a contract entered into in another, it is not enough that the contract is valid by the law of the country where it is entered into. For if any part of the contract be inconsistent with the law and policy of the country where it is sought to be enforced, it will not there be carried into effect, even as to particulars which are not obnoxious to the spirit of the law of that country(*b*).

734. Courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights, or redress wrongs. The jurisdiction of these courts, thus operating by way of special injunction, is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence. At the same time, it must be admitted that the exercise of it is attended with no small danger, both from its summary nature and its liability to abuse. It ought, therefore, to be guarded with extreme caution, and applied only in very clear cases; otherwise, instead of becoming an instrument to promote the public, as well as private welfare, it may become a means of extensive, and, perhaps, of irreparable injustice(*c*).

(*a*) Gladstone *v.* Mussurus Bey, 9 Jur. N. S. 71; 1 H. & M. 495.

(*b*) Hope *v.* Hope, 8 D. M. & G. 731.

(*c*) Story, s. 959 b. See the remarks of Lord Cottenham on this subject, in Brown *v.* Newall, 2 M. & C. 570, 571. Also, Lord Brougham's remarks in the case of the Earl of Ripon *v.* Hobart, 3 M. & K. 169. See also Barnard *v.* Willis, Cr. & Ph. 85; Durham and Sunderland Railway Company *v.* Wawn, 3 Beav. 119.

735. Where the granting of the injunction may be attended with damage to the defendant, the court will not grant it, in the first instance, without a bond or undertaking on the part of the plaintiff to pay such damages as the defendant may sustain by the order, should the injunction be dissolved, or the suit finally determined in favour of the defendant(*a*). And where the party, obtaining an injunction has given security, or has undertaken to abide by any order the court may make respecting damages to the adversary, and the question is finally decided against the application, the defendant is entitled to have the damages ascertained and paid; and a mere dismissal of the cause, with costs to defendant, is not a sufficient ascertainment of the damages(*b*).

736. Courts of equity will not interfere to stay proceedings in any criminal matters, or in cases not strictly of a civil nature, as for instance, on an indictment, or a mandamus, or an information(*c*). But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity; for if they are, the court possesses power to restrain them personally from proceeding at the same time, upon the same matter of right, for redress in the form of a civil suit and of a criminal prosecution(*d*).

CHAPTER XXIV.

TRUSTS.

737. A TRUST in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof(*e*). In other words,

(*a*) 28 Vic. c. 17, s. 3.

(*b*) See Newby *v.* Harrison, 7 Jur. N. S. 981; Novello *v.* James, 5 D. M. & G. 876.

(*c*) Holderstaffe *v.* Saunders, 6 Mod. 16; Montague *v.* Dudman, 2 Ves. Sen. 396.

(*d*) Mayor of York *v.* Pilkington, 2 Atk. 302.

(*e*) See the language of Lord Hardwicke, in Sturt *v.* Mellish, 2 Atk. 612; 2 Spence, 875. And see 2 Black. Comm. 327; Co. Litt. 272 *b*; Bacon Abr. Uses and Trusts, A. B.; Com. Dig. Chan. 4 W.

the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly or in part, to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favour of others; and these uses, benefits, or charges constitute the trusts, which courts of equity will compel the legal owner, as trustee, to perform in favour of the *cestui que trust*, or beneficiary. Three things are said to be indispensable to constitute a valid trust; first, sufficient words to raise it; secondly, a definite subject; and thirdly, a certain or ascertained object(*a*).

738. Lord Coke, describing the nature of a use or trust in land according to the common law, uses the following language: A use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use*, (the beneficiary) shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cestui que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust for which he had no remedy by the common law, but for breach of trust his remedy was by subpœna in chancery(*b*).

739. The introduction of uses and trusts into England has been generally attributed to the ingenuity of the clergy, in order to escape from the prohibitions of the Mortmain Acts. But, whether this be the true origin of them or not, it is very certain that the general convenience of them in subserving the common interests of society as well as in enabling parties to escape from forfeitures in times of civil commotion, soon gave them an extensive public approbation, and secured their permanent adoption into the system of English jurisprudence (*c*). And they have since been applied to a great variety of

(*a*) Story, s. 964; Cruwys *v.* Colman, 9 Ves. 323.

(*b*) Co. Litt, 272 *b*; Chudleigh's case, 1 Co. 121, *a b*; Bac. Abridg, *Uses and Trusts*, A. B.; Com. Dig. Chan. 4 W.

(*c*) 2 Black. Comm. 328, 329; Bac. Abridg. *Uses and Trusts*, A. B. See also Lloyd *v.* Spillet, 2 Atk. 149; Hopkins *v.* Hopkins, 1 Atk. 591.

cases, which never could have been in the contemplation of those who originally introduced them; but, which, nevertheless, are the natural attendants upon a refined and cultivated state of society, where wealth is widely diffused, and the necessities and conveniences of families, or commerce, and even of the ordinary business of human life, require that trusts should be established, temporary or permanent, limited or general, to meet the changes of past times, as well as to provide for the exigencies of times to come(*a*).

740. The inroads which uses had made, and were making on the ancient law of tenure, caused the enacting of the Statute of Uses(*b*), the general intent of which was to transfer the use into possession, and to make the *cestui que use* complete owner of the lands, as well at law as in equity(*c*). But as the statute did not in its terms apply to all sorts of uses, and was construed not to apply to uses ingrafted on uses, it failed in a great measure to accomplish the ends for which it was designed. Thus, for example, it was held not to apply to trusts or uses created upon term of years; or to trusts of a nature requiring the trustee still to hold out the estate, in order to perform the trusts; and generally not to trusts created in relation to mere personal property(*d*).

741. With regard to trusts of all those classes of property therefore, the rules applied after the statute, were the same that they were subject to before it was passed.

742. Before the Statute of Frauds(*e*), trusts of every species of property might have been created without any writing, but that statute requires all declarations or creations of trusts or confidences of any lands, tenements, and hereditaments to be manifested and proved by some writing, signed by the party,

(*a*) Story, s. 969.

(*b*) 27 Hen. 8, c. 10.

(*c*) 2 Black. Comm. 332, 333; Co. Litt, 271 *b*, Butler's note.

(*d*) 2 Black. Comm. 335 to 337; Sympson *v.* Turner, 1 Eq Abridg. 383; Co. Litt. 290 *b*, note; Co. Litt. 271 *b*; Bac. Abridg. *Uses and Trusts*, B. C. D. G. 2 H.; *Trusts*, A.

(*e*) 29 Car. 2. c. 3.

entitled to declare such trusts, or by his last will in writing(*a*). And all grants and assignments of any trust or confidence are likewise required to be in writing. Trusts arising, transferred, or extinguished by operation of law are excepted; and from the terms of the statute it is apparent that it does not extend to declarations of trusts of personalty(*b*). Neither does it prescribe any particular form or solemnity in writing; nor that the writing should be under seal.

743. Any writing sufficiently evincive of a trust, as a letter, or other writing of a trustee, stating the trust, or any language in writing, clearly expressive of a trust, intended by the party, although in the form of a desire or a request, or a recommendation, will create a trust by implication(*c*). And where a trust is created for the benefit of a third person, although without his knowledge, he may afterwards affirm it, and enforce the execution of it in his own favour at least, if it has not, in the intermediate time, been revoked by the person who has created the trust(*d*).

744. Uses or trusts, to be raised by any covenant or agreement of a party in equity, must be founded upon some meritorious or some valuable consideration; for courts of equity will not enforce a mere gratuitous gift, or a mere moral obligation(*e*). Hence it is, that, if there be a mere voluntary executory trust created, courts of equity will not enforce it (*f*). And, upon the same ground, if two persons for a valuable

(*a*) But where it would work a fraud to deny the trust, the defendant will not be allowed to set up the statute, Haigh *v.* Kaye, L. R. 7 Chan. 469.

(*b*) Nab *v.* Nab, 10 Mod. 404; Fordyce *v.* Willis, 3 Bro. C. C. 586; 2 Black. Comm. 637; Benbow *v.* Townsend, 1 M. & K. 506; McFadden *v.* Jenkins, 1 Ph. 157.

(*c*) Crooke *v.* Brookeing, 2 Vern. 106; Inchiquin *v.* French, 1 Cox 1; Smith *v.* Attersoll, 1 Russ. 266.

(*d*) Acton *v.* Woodgate, 2 M. & K. 492; Wallwyn *v.* Coutts, 3 Meriv. 707; 3 Sim. 14; Garrard *v.* Lord Lauderdale, 3 Sim. 1. See Simmonds *v.* Palles, 2 J. & L. 489, 495; Maber *v.* Hobbs, 2 Y. & C. Ex. 317; Lane *v.* Husband, 14 Sim. 656. But the assignee can sue for, and recover from third parties, the property covered by the assignment, Glegg *v.* Rees, L. R. 7 Chan. 71.

(*e*) Colman *v.* Sarrel, 1 Ves. 53, 54; Colyear *v.* Countess of Mulgrave, 2 Keen, 81, 97, 98; Ellis *v.* Nimmo, Ll. & G. t. Sug. 333; Holloway *v.* Headington, 8 Sim. 324; Gaskell *v.* Gaskell, 2 Y. & Jerv. 502. But see Moore *v.* Crofton, 3 J. & L, 438.

(*f*) Colyear *v.* Countess of Mulgrave, 2 Keen, 81; Collinson *v.* Pattrick, 2 Keen, 123, 134; Holloway *v.* Headington, 8 Sim. 329; Callagan *v.* Collagan, 8 Cl. & Fin, 374, 401. See Jones *v.* Lock, L. R. 1 Chan. 25; Scales *v.* Maude, 6 D. M. & G. 43.

consideration, as between themselves, covenant to do some act for the benefit of a third person, who is a mere stranger to the consideration, he cannot enforce the covenant against the two, although each one might enforce it against the other(*a*).

745. In cases where the use or trust is already created and vested, or otherwise fixed in the *cestui que trust*, it is otherwise (*b*), or where it is raised by a last will and testament(*c*). Thus, for example, if A. should direct his debtor to hold the debt in trust for B., and the debtor should accept the trust, and communicate the fact to both A. and B., the trust, although voluntary, would be enforced in favour of B., and binding on A., for nothing remains to be done to fix the trust. So, if A. had declared himself trustee for B. of the same debt, the same doctrine would apply(*d*).

746. Trusts in real property are, in many respects, governed by the same rules as the like estates at law, and afford an illustration of the maxim *æquitas sequitur legem*. Thus, they are descendible, devisable, and alienable; and heirs, devisees, and alienees may, and generally do, take therein the same interests in point of construction and duration, and they are affected by the same incidents, properties, and consequences, as would under like circumstances apply to similar estates at law(*e*).

747. There are, however, exceptions to the doctrine above stated. Thus, for example, the construction put upon executory trusts arising under agreements and wills, sometimes differs, in equity, from that in regard to executed trusts. And trusts in terms for years and personalty will be often recog-

(*a*) Sutton *v.* Chetwynd, 3 Meriv. 249; T. & R. 296.

(*b*) See Richardson *v.* Richardson, L. R. 3 Eq. 686; Morgan *v.* Malleson, L. R. 10 Eq. 475; *In re* Curteis' Trusts, L. R. 14 Eq. 217.

(*c*) Lechmere *v.* Earl of Carlisle, 3 P. W. 222; Austen *v.* Taylor, Ambl. 376; 1 Ed. 361; Petre *v.* Espinasse, 2 M. & K. 496; Collinson *v.* Pattrick, 2 Keen, 123, 134.

(*d*) Story, s. 973; McFadden *v.* Jenkins, 1 Ph, 152. See also Stapleton *v.* Stapleton, 14 Sim. 186.

(*e*) Story, s. 974.

nized and enforced in equity, which would be wholly disregarded at law(*a*).

748. Where a trust is created for the benefit of a party, it is not only alienable by him by his own proper act and conveyance, but it is also liable to be disposed of by operation of law *in invitum*, like any other property, although indirectly the very purposes of the trust may thereby be defeated. Thus, where certain estates were devised to trustees, in order, among other things, to pay an annuity to the testator's son for life, the annuity being declared to be for his personal maintenance and support during his life, and not on any account to be subject or liable to the debts, engagements, charges, and encumbrances of the son, but as the same became due, it was to be paid into the son's hands, and not to any other person whatsoever, it was held, that the annuity on the son becoming a bankrupt passed by the assignment under the bankruptcy to the assignees(*b*).

749. It is, however, in the power of the person creating the trust to prevent this. Thus, the testator might, if he had thought fit, have made the annuity determinable on the bankruptcy, or have made it to go over to another person in the event of the bankruptcy. But, while it was the property of the bankrupt, it must be subject to the ordinary incidents of property, and therefore, subject to his debts(*c*).

750. If a trust is created for a married woman for her separate use, and the trustees are to pay the money into her proper hands and for her use, her own receipt only being required, she may still assign it, and her assignee will take the full title to it(*d*). The same rule will apply to the case of a

(*a*) Story, s. 974; Co. Litt. 290 *b*, note; Austen *v.* Taylor, Ambl. 376; 1 Ed. 361; Massenburgh *v.* Ash, 1 Vern. 234, 304; Bac. Abridg. *Uses and Trusts*, G. s. 2, 109. See Stonor *v.* Curwen, 5 Sim. 264; Roberts *v.* Dixwell, West, 542; Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 227.

(*b*) Graves *v.* Dolphin, 1 Sim. 66; Piercy *v.* Roberts, 1 M. & K. 4. See *Re* Muggeridge's Trusts, John. 625; Sharpe *v.* Cosserat, 20 Beav. 470.

(*c*) Brandon *v.* Robinson, 18 Ves. 429, 433. See Rochford *v.* Hackman, 9 Ha. 475.

(*d*) Brandon *v.* Robinson, 18 Ves. 434. But an express prohibition of alienation or anticipation will, in the case of a married woman, be binding, and if the intent clearly appears, this seems to be enough, without express words, see Arnold *v.* Woodhams, L. R. 16 Eq. 29.

trust fund in rents and profits created by a will for the benefit of a particular person during his life, although there be a proviso that he shall not have any power to sell, or to mortgage, or to anticipate in any way the rents and profits(*a*).

751. The analogy to estates at the common law is not only followed, as to the rights and interests of the *cestui que trust*, but also as to the remedies to enforce, preserve, and extinguish those rights and interests. Thus, for instance, there cannot, strictly speaking, be a disseisin, abatement, or intrusion, as to a trust estate. But there may be such an adverse claim of a trust estate by an adverse claimant, taking the rents and profits, as may amount to an equitable ouster of the rightful claimant; and such, as if continued twenty years, would, by analogy to legal remedies, bar any assertion of his right in equity(*b*).

752. In general, a trustee can only be sued in equity in regard to any matters touching the trust(*c*. But if he chooses to bind himself by a personal covenant in any such matters, he will be liable at law for a breach thereof, although he may in the instrument containing the covenant, describe himself as covenanting as trustee; for the covenant is still operative as a personal covenant, and the superadded words are but a *descriptio personæ*(*d*).

753. It is a maxim of equity that, "a trust shall not fail for want of a trustee." Wherever the intention of the settlor can be clearly collected, and there is no want of consideration, the

(*a*) Green *v.* Spicer, 1 R. & M. 395.

(*b*) Cholmondeley *v.* Clinton, 2 J. & W. 1; Bond *v.* Hopkins, 1 S. & L. 428; Hovenden *v.* Annesley, 2 S. & L. 630, 636. And see Penny *v.* Allen, 7 D. M. & G. 422. As to statute barring claim for breach of trust, see Stone *v.* Stone, L. R. 5 Chan. 74. As to barring claim for account, see Burdick *v.* Garrick, L. R. 5 Chan. 233. As to barring claim under a trust term, Locking *v.* Parker, L. R. 8 Chan. 30.

(*c*) The right to sue for a breach of trust cannot, it seems, be assigned, Hill *v.* Boyle, L. R. 4 Eq. 260. Long acquiescence in the breach will bar relief—Sleeman *v.* Wilson, L. R. 13 Eq, 36. See Taylor *v.* Cartwright, L. R. 14 Eq. 167. As to right of *cestui que trust* to sue a debtor to the trust, see Sharp *v.* San Paulo R. Co., L. R. 8 Chan. 597.

(*d*) Chapman and Barker's case, L. R. 3 Eq. 361; *In Re* Great Whal. Busy Minin Co. L. R. 6 Chan. 196.

court will follow the estate into the hands of the legal owner, not being a purchaser for value without notice, and compel him to give effect to the trust by the execution of the proper assurance(*a*). Thus, if a devisor or settlor appoint a trustee, who either dies in the testator's lifetime(*b*), or disclaims, or is incapable of taking the estate(*c*), or if the trustee otherwise fail(*d*), the trust is not defeated, but fastens on the conscience of the person upon whom the legal estate has devolved. So, if a testator directs a sale of his lands for certain purposes, but omits to name a person to sell, the trust attaches upon the conscience of the heir, and he is strictly bound in equity to give effect to the intention(*e*).

754. The power of a trustee over the legal estate or property vested in him, properly speaking, exists only for the benefit of the *cestui que trust*(*f*). It is true, that he may as legal owner do acts to the prejudice of the rights of the *cestui que trust*, and he may even dispose of the estate or property, so as to bar the interests of the latter therein; as by a sale to a *bona fide* purchaser, for a valuable consideration without notice of the trust. But, when the alienation is purely voluntary, or where the estate devolves upon heirs, devisees, or other representatives of the trustee, or where the alienee has notice of the trust, the trust attaches to the estate, in the same manner as it did in the hands of the trustee himself, and it will be enforced accordingly in equity(*g*). And although the trustee may, by a mortgage, or other specific lien, without notice of the trust, bind the estate or the property; yet it is not bound by any judgments, or any other claims of creditors against him(*h*).

(*a*) Att.-Gen. *v.* Lady Downing, Ambl. 571.
(*b*) Moggridge *v.* Thackwell, 3 Bro. C. C. 528; 1 Ves. 475.
(*c*) Sonley *v.* Clockmakers' Co., 1 Bro. C. C. 81; White *v.* Baylor, 10 Ir. Eq. 53.
(*d*) Att.-Gen. *v.* Stephens, 3 M. & K. 347.
(*e*) Pitt *v.* Pilliam, Freem. 134. And see 29 Vic. c. 28, ss. 13, 14 & 15.
(*f*) See Lewis *v.* Matthews, L. R. 2 Eq. 177.
(*g*) Pye *v.* George, 1 P. W. 128; Saunders *v.* Dehew, 2 Vern. 271.
(*h*) Story, s. 977. As to a mortgage by an executor or trustee for the purposes of the trust, see Ewart *v.* Gordon, 13 Gr. 40, where the cases are collected and remarked on.

755. It seems to be considered, that where the trustee holds the legal title in trust property, with the power to convert the same into money and apply the money to the purposes of the trust, a *bona fide* purchaser will hold the property free from all trust. In order to enable the *cestui que trust* to follow the same into the hands of an assignee from the trustee, it must appear either that no consideration was paid or else that the assignee knew that the trustee was misapplying the trust estate and took the conveyance in aid of such misapplication. It is not enough that one who advances money, on the pledge of the trust estate, knew it was of that character, if he had no reason to doubt the right of the trustee so to use it(*a*).

756. What powers may be properly exercised over trust property, by a trustee, depends upon the nature of the trust, and sometimes upon the character and situation of the *cestui que trust*. Where the *cestui que trust* is of age, or *sui juris*, the trustee has no right (unless express power is given) to change the nature of the estate, as by converting land into money, or money into land, so as to bind the *cestui que txust*. But where the *cestui que trust* is not of age, it has been laid down that the trustee may change the nature of the estate, where the interests of the infant require the conversion(*b*). But no trustee could be advised to take upon himself the responsibility of thus dealing with the estate, without the express sanction of the court(*c*).

757. It has also been laid down, as a general rule, that the *cestui que trust* may call upon the trustee for a conveyance to execute the trust(*d*); and that, what the trustee may be compelled to do by a suit, he may voluntarily do without a suit. But this rule admits, if it does not require, many qualifications in its practical application; for, otherwise, a trustee may incur

(*a*) Story, s. 977 a. See Newton *v.* Newton, L. R. 6 Eq. 135; Boursot *v.* Savage, L. R. 2 Eq. 134.

(*b*) Inwood *v.* Twynne, Amb. 419.

(*c*) Hill on Trustees, 396; and see *Ex parte* Phillips, 19 Ves. 122; Witter *v.* Whitter, 3 P. W. 101.

(*d*) See Jervoise *v.* Duke of Northumberland, 1 J. & W. 559, 571.

many perils, the true nature and extent of which may not be ascertainable, until there has been a positive decision upon his acts by a court of equity, or a positive declaration by such a court of the acts, which he is at liberty to do(*a*).

758. Courts of equity carry trusts into effect only when they are of a certain and definite character. If, therefore, a trust be clearly created in a party, but the terms by which it is created are so vague and indefinite, that courts of equity cannot clearly ascertain either its objects or the persons who are to take, then the trust will be held entirely to fail, and the property will fall into the general funds of the author of the trust(*b*).

759. Trusts are usually divided into Express Trusts and Implied Trusts, the latter comprehending all those trusts, which are called constructive and resulting trusts. Express trusts are those which are created by the direct and positive acts of the parties by some writing, or deed, or will. Not that in those cases, the language of the instrument need point out the nature, character, and limitations of the trust in direct terms, *ipsissimis verbis*; for it is sufficient that the intention to create it can be fairly collected upon the face of the instrument from the terms used; and the trust can be drawn, as it were *ex visceribus verborum*. Implied trusts are those which are deducible from the nature of the transaction, as a matter of clear intention, although not found in the words of the parties; or which are superinduced upon the transaction by operation of law, as matter of equity, independent of the particular intention of the parties(*c*).

760. The most usual cases of express trusts are found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of lands; or in formal conveyances,

(*a*) Story, s. 979. See 2 Fonbl. Eq. B. 2, ch. 7, s. 2, note c; Moody *v.* Walters, 16 Ves. 302, 307.

(*b*) Stubbs *v.* Sargon, 2 Keen, 255; Ommanney *v.* Butcher, T. & R. 260, 270, 271; See Wood *v.* Cox, 2 M. & C. 684; 1 Keen, 317; Aston *v.* Wood, L. R. 6 Eq. 419; Lister *v.* Hodgson, L. R. 4 Eq. 30.

(*c*) Story s. 980.

such as marriage settlements, terms for years, mortgages, and other conveyances and assignments for the payment of debts, or for raising portions, or for other special purposes; or in last wills and testaments, in a variety of bequests and devises, involving fiduciary interests for private benefit or public charity. Many of these instruments, however, will also be found to contain implied, constructive, and resulting trusts(*a*).

761. The terms, implied trusts, trusts by operation of law, and constructive trusts, appear from the books to be almost synonymous, but the following distinctions may be mentioned: An implied trust is one declared by a party not directly, but only by implication; as, where a testator devises an estate to A. and his heirs, *not doubting* that he will thereout pay an annuity to B. for life, in which case, A. is to the extent of the annuity, a trustee for B. Trusts by operation of law, are such as are not declared by a party at all, either directly or indirectly, but result from the effect of a rule of equity. They are either resulting trusts, as where an estate is devised to A. and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; or, constructive trusts, which the court elicits by a construction put upon certain acts of parties, as when a tenant for life of leaseholds renews the leases on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease(*b*).

762. Though in general a trust created for an illegal purpose will not be enforced, it is otherwise where the illegal purpose has failed; as for example, where one conveyed property to a trustee to avoid creditors, and was afterwards declared bankrupt, and pursuant to terms of composition with creditors seeks to enforce the trust and recover the property (*c*).

(*a*) Story, s. 981.
(*b*) Lewin on Trusts, 86, note.
(*c*) Symes *v.* Hughes, L. R. 9 Eq. 475. See Haigh *v.* Kaye, L. R. 7 Chan. 469.

CHAPTER XXV.

CHARITIES.

763. THE term charity in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed by a court of equity, for there its signification is derived chiefly from the Statute of Charitable Uses(*a*). Those purposes are considered charitable which that statute enumerates, or which are by analogy deemed within its spirit and intendment(*b*).

764. Gifts to the poor either generally(*c*), or of a particular locality(*d*), bequests to the poor of a workhouse or hospital(*e*), or emigrating to particular colonies(*f*), to the masters and governors of an hospital(*g*), or to the widows and children of seamen belonging to a town(*h*), to "poor relations, poor kinsmen and kinswomen(*i*)," have all been held to come within the statute. So, also, gifts for the advancement and propagation of education and learning in any part of the world(*j*), or to build and erect a school or free grammar school(*k*), or to maintain a schoolmaster(*l*), for the foundation of scholarship, fellow-

(*a*) 43 Eliz. c. 4.

(*b*) Morice *v.* Bishop of Durham, 9 Ves. 405.

(*c*) Att.-Gen. *v.* Matthews, 2 Lev. 167.

(*d*) Att.-Gen. *v.* Clarke, Amb. 422; Bristow *v.* Bristow, 5 Beav. 289; Att.-Gen. *v.* Bovill, 1 Ph. 762; Att.-Gen. Wilkinson, 1 Beav. 370; *Re* Lambeth Charities, 22 L. J. Ch. 959; Hereford *v.* Adams, 7 Ves. 324; Att.-Gen. *v.* Corporation of Exeter, 2 Russ. 47; 3 Russ. 396; Att.-Gen. *v.* Brandreth, 1 Y. & C. 200; Att.-Gen. *v.* Blizard, 21 Beav. 233.

(*e*) Att.-Gen. *v.* Vint, 3 D. & Sm. 704.

(*f*) Barclay *v.* Maskelyne, 4 Jur. N. S. 1294.

(*g*) Mayor of London's case, Duke, 83, 111.

(*h*) Powell *v.* Att.-Gen. 3 Mer. 48. And see Att.-Gen. *v.* Combe, 2 S. & S. 93; Thompson *v.* Corby, 27 Beav. 649.

(*i*) Green *v.* Howard, 1 Bro. C. C. 31: Brunsden *v.* Woolredge, Amb. 507; Mahon *v.* Savage, 1 S. & L. 111. And see White *v.* White, 7 Ves. 423; Isaac *v.* De Friez, 17 Ves. 373 n; Att.-Gen. *v.* Price, 17 Ves. 371.

(*j*) Whicker *v.* Hume, 1 D. M. & G. 506; 7 H. L. 124.

(*k*) Case of Rugby School, Duke, 80, 112; Gibbons *v.* Maltyard, Duke 111; Poph. 6. And see Att.-Gen *v.* Earl of Lonsdale, 1 Sim. 109.

(*l*) Hyheshaw *v.* Corporation of Morpeth, Duke, 69.

ship, or lectureship in a college(*a*), have been held to be charitable within the intent of the statute(*b*).

765. With regard to cases not coming expressly within the terms, but which, by analogy, have been deemed within the spirit and intendment of the Statute of Elizabeth, may be mentioned: gifts for religious purposes, as for repairs, furniture or ornaments of a church(*c*), or to a minister for preaching(*d*), for a priest and his successors(*e*), for the augmentation of small livings(*f*), or for the advancement of Christianity among infidels(*g*), for the distribution of Bibles and other religious books and tracts(*h*), for the increase and encouragement of good servants(*i*), for letting out land to the poor at a low rate(*j*), or for deserving literary men who have not been successful(*k*).

766. It is not material that the particular public or general purpose is not expressed in the Statute of Elizabeth, all other legal, public, or general purposes being within the equity of the statute. Thus, gifts to bring spring water for the inhabitants of a town(*l*), to build a sessions house or house of correction(*m*), for the repair of highways(*n*), for a life-boat(*o*), for an

(*a*) Rex *v.* Newman, 1 Lev. 284; Case of Jesus College, Duke, 78, 111; Att.-Gen. *v.* The Margaret & Regius Professors in Cambridge, 1 Vern. 55.

(*b*) And see Att.-Gen. *v.* Tancred, 1 Eden, 10; Att.-Gen *v.* Whorwood, 1 Ves. 537; Porter's case, 1 Co. 25 *b*.

(*c*) Att.-Gen. *v.* Ruper, 2 P. W. 125; Att.-Gen. *v.* Vivian, 1 Russ. 226; Turner *v.* Ogden, 1 Cox, 316. As to what are religious purposes, see Cocks *v.* Manners, L. R. 12 Eq. 574.

(*d*) Gibbons *v.* Maltyard, Poph. 6; Pember *v.* Inhabitants of Knighton, Poph. 132; Persted *v.* Payer, 1 Eq. Ca. Abr. 95, pl. 3.

(*e*) Thornber *v.* Wilson, 3 Drew. 245. And see Att.-Gen. *v.* Parker, 1 Ves. Sen. 43; Att.-Gen. *v.* Newcombe, 14 Ves. 7; Pennington *v.* Buckley, 6 Hare, 453.

(*f*) Att.-Gen. *v.* Brereton, 2 Ves. Sen. 426; Widmore *v.* Woodroffe, Amb. 636; Middleton *v.* Clitherow, 3 Ves. 734.

(*g*) Att.-Gen. *v.* City of London, 1 Ves. 243.

(*h*) Att.-Gen. *v.* Stepney, 10 Ves. 22. And see Townsend *v.* Carus, 3 Hare, 257 Powerscourt *v.* Powerscourt, 1 Moll. 616; Thornton *v.* Howe, 8 Jur. N. S. 663.

(*i*) Loscombe *v.* Wintringham, 13 Beav. 87.

(*j*) Crafton *v.* Frith, 15 Jur. 737.

(*k*) Thompson *v.* Thompson, 1 Coll. 395.

(*l*) Jones *v.* Williams, Amb. 651.

(*m*) Duke, 109, 136.

(*n*) Eltham Parish *v.* Wareyn, Duke, 67; Collison's case, Hob. 136.

(*o*) Johnston *v.* Swann, 3 Mad. 457.

institution for studying and endeavouring to cure maladies of any quadrupeds or birds useful to man(*a*), for a botanical garden for the public benefit(*b*), or to charitable beneficial and public works, have been held to come within the meaning of the statute.

767. Devises or bequests for private charities(*c*), or to found a private museum(*d*), or to distribute rents and profits among certain families according to their circumstances(*e*), are not charitable within the meaning of the statute. Nor is a bequest for maintaining and keeping in repair family vaults and tombs *(f)*. But when the vault is to be used for the interment of the family of the donor, the gift may be charitable(*g*). And gifts of an indefinite and general character, for the purposes of benevolence or general liberality, without the mention of specific objects, are not charitable(*h*).

768. Other bequests, apparently charitable, have been held void if contrary to the policy of the law. Thus, although the Statute of Elizabeth mentions "relief or redemption of prisoners" as a charitable purpose, a bequest to be applied in purchasing the discharge of persons committed to prison for non-payment of fines under the Game Laws, was held void as contrary to public policy*(i)*. So, a bequest "towards the po-

(*a*) The University of London *v.* Yarrow, 23 Beav. 159; 1 D. & J. 72.

(*b*) Townley *v.* Bedwell, 6 Ves. 194. And see The Trustees of the British Museum *v.* White, 2 S. & S. 594.

(*c*) Ommanney *v.* Butcher, T. & R. 260; Kendall *v.* Granger, 5 Beav. 303.

(*d*) Thompson *v.* Shakespeare, Johns. 612; 1 D. F. & J. 399; Carne *v.* Long, 4 Jur. N. S. 474.

(*e*) Lilly *v.* Hay, 1 Hare, 580. And see Att.-Gen. *v.* Haberdashers' Co. 1 M. & K. 420.

(f) Masters *v.* Masters, 1 P. W. 422, 423. But the authorities are not clear on this subject. See Mitford *v.* Reynolds, 1 Ph. 185, 189; Mellick *v.* The President, &c., of the Asylum, Jac. 180; Adnam *v.* Cole, 6 Beav. 353; Lloyd *v.* Lloyd, 2 Sim. N. S. 255; Willis *v.* Brown, 2 Jur. 987; Rickard *v.* Robson, 8 Jur. N. S. 665.

(*g*) Gravenor *v.* Hallum, Amb. 653; Doe d. Thompson *v.* Pilcher, 3 Man. & Sel. 407; 6 Taunt. 359.

(*h*) Morice *v.* Bishop of Durham, 9 Ves. 399; Ommanney *v.* Butcher, T. & R. 260; James *v.* Allen, 3 Mer. 17; Ellis *v.* Selby, 1 M. & C. 286; Kendall *v.* Granger, 5 Beav. 300; Nash *v.* Morley, 5 Beav. 177; Vezey *v.* Jamson, 1 S. & S. 69.

(i) Thrupp *v.* Collett, 26 Beav. 125.

litical restoration of the Jews to Jerusalem and to their own land," was held void(*a*).

769. A charitable use must be carefully distinguished from what is termed a superstitious use. The latter has been defined "one which has for its object the propagation of the rites of a religion not tolerated by the law(*b*)." Formerly, gifts for the maintenance of Roman Catholic Monasteries, for masses for a person's soul, for maintaining a Roman Catholic priest, and many other similar purposes, were void(*c*). So were gifts in favour of the places of worship, ministers, or schools of Protestant Dissenters(*d*). And also, a bequest for the maintenance of an assembly for reading the Jewish law(*e*). The law in England is now, however, altered, and in this Province there is no doubt, such gifts would be held valid. By our law all bodies of Christians enjoy equal toleration(*f*). Thus, a bequest "for masses to be offered for the repose of the testator's soul" has been held free from any taint of illegality(*g*).

770. Where a gift made to charitable purposes is void as being superstitious, it becomes the duty of the Crown to appropriate it to valid charitable objects(*h*). But if a bequest, being void as superstitious, has no charitable object, the Crown cannot apply it for charitable purposes, but it will go to the residuary legatees, or in case of intestacy to the next of kin(*i*).

(*a*) Habershon *v.* Vardon, 4 D. & Sm. 467.

(*b*) Boyle, 242.

(*c*) DeGarcin *v.* Lawson, 4 Ves. 433 n; Gates *v.* Jones, cit, 2 Vern. 266; Smart *v.* Prujean, 6 Ves. 560; West *v.* Shuttleworth, 2 M. & K. 684; Att.-Gen. *v.* The Fishmongers Co. 2 Beav. 151; 5 M. & C. 11; Att.-Gen. *v.* Power, 1 B. & B. 145; Cary *v.* Abbot, 7 Ves. 490; Att.-Gen. *v.* Todd, 1 Keen, 803; De Themmines *v.* De Bonneval, 5 Russ. 288.

(*d*) Att.-Gen. *v.* Baxter, 1 Vern. 248, 1 Eq. Ca. Ab. 96, pl. 9.

(*e*) De Costa *v.* DePas, 1 Amb. 228. And see Isaac *v.* Gompertez, 1 Ves. 44.

(*f* Per V. C. Strong in Elmsley *v.* Madden, 18 Gr. 389, where it is suggested that perhaps the Roman Catholic Church enjoys peculiar rights and privileges under the capitulation of Quebec and Montreal, the Treaty of Paris and the Quebec Act, 14 Geo. 3, c. 83.

(*g*) Elmsley *v.* Madden, 18 Gr. 389.

(*h*) Cary *v.* Abbot, 7 Ves. 490; see De Costa *v.* De Pas, Amb. 228; De Garcin *v.* Lawson, 4 Ves. 433 n.

(*i*) West *v.* Shuttleworth, 2 M. & K. 684. And see Heath *v.* Chapman, 2 Drew. 417.

771. The statute of mortmain, 9th Geo. II. ch. 36, 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 "has 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 disherision of their lawful heirs."

772. Since the passing of that Act, all devises to charitable purposes made by wills, whether of freeholds or leaseholds, or of the rents and profits of, or of crops growing on, lands, are void(*a*). Any personalty savouring of realty has been held to come within the meaning of the Act. Thus, a legacy of money to arise from the sale of land, is void(*b*). And it is void even although the conversion may have been directed by a former instrument(*c*). Although a devise of rents of realty is clearly within the Act, arrears of rent are not(*d*). But a bequest of arrears of interest on a mortgage has been held within the Act, for the land might be sold to pay them(*e*).

773. A bequest to a charity, of money to be laid out in the purchase of land, is void, even although the trustees have power to invest upon personal securities until a suitable purchase can be made(*f*). And a recommendation to trustees to pur-

(*a*) Arnold *v.* Chapman, 1 Ves. Sen. 108; Att.-Gen. *v.* Tomkins, Amb. 216; Thornber *v.* Wilson, 3 Drew. 245; Cramp *v.* Playfoot, 4 K. & J. 479; Symonds *v.* Marine Society, 2 Giff. 325; Lewis *v.* Paterson, 13 Gr. 223; Anderson *v.* Kilborn, 13 Gr. 219. But see Anderson *v.* Dougall, 13 Gr. 164.

(*b*) Curtis *v.* Hutton, 14 Ves. 537; Page *v.* Leapingwell, 18 Ves. 463; Trustees of the British Museum *v.* White, 2 S. & S. 595; Att.-Gen. *v.* Lord Weymouth, Amb. 20; Paice *v.* Archbishop of Canterbury, 14 Ves. 364; Att.-Gen. *v.* Harley, 5 Mad. 321; Waite *v.* Webb, 6 Mad. 71; Thornber *v.* Wilson, 3 Drew. 245; 4 Drew. 350; The Incorporated Church Building Society *v.* Coles, 5 D. M. & G. 331; Robinson *v.* Robinson, 19 Beav. 494.

(*c*) Middleton *v.* Spicer, 1 Bro. C. C. 201; Att.-Gen. *v.* Harley, 5 Mad. 321; Aspinall *v.* Bourne, 29 Beav. 462. But see Shadbolt *v.* Thornton, 17 Sim. 49; 13 Jur. 597; Marsh *v.* Att.-Gen. 7 Jur. N. S. 184.

(*d*) Edwards *v.* Hall, 11 Hare. 6; 6 D. M. & G. 74.

(*e*) Alexander *v.* Brame, 7 Jur. N. S. 889. And a bequest of debts secured by an equitable mortgage of leaseholds has been held void, Chester *v.* Chester, L. R. 12 Eq. 444; and see Harbin *v.* Masterman, L. R. 12 Eq. 559.

(*f*) Att.-Gen. *v.* Heartwell, 2 Ed. 234; Grieves *v.* Case, 4 Bro. C. C. 67; Pritchard *v.* Arbouin, 3 Russ. 457; Mann *v.* Burlingham, 1 Keen 235. And see Dunn *v.* Bownas, 1 K. & J. 601.

chase has been held to be mandatory, and therefore void(*a*). Where a testator bequeaths money to be laid out in erecting or building a school, or other charitable institution, it will be implied that he intended a purchase of land to be made for that purpose, and the gift will consequently be void(*b*), unless he distinctly points to some land which is already in mortmain, or expressly exclude the application of the money for the purchase of land(*c*).

774. A bequest of money for the erection(*d*) or repairs and improvement(*e*) of buildings upon land already in mortmain is valid. A bequest, however, for paying off an incumbrance on real estate belonging to a charity is invalid(*f*), though the incumbrance be merely equitable(*g*). But a bequest for paying off debts contracted in respect of a meeting-house, but which do not constitute a charge upon it, is valid(*h*).

775. Charities are so highly favoured in the law, that they have always received a more liberal construction than the law will allow in gifts to individuals(*i*). Thus, 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 an estate is devised to such person as the executor shall name, and no executor is appointed; or, if an executor being appointed, he dies in the testator's lifetime, and no other is

(*a*) Att.-Gen. *v.* Davies, 9 Ves. 546; Kirkbank *v.* Hudson, 7 Price 212; Pilkington *v.* Boughey, 12 Sim. 114.

(*b*) Foy *v.* Foy, 1 Cox 163; Att.-Gen. *v.* Nash, 3 Bro. C. C. 588; Att.-Gen. *v.* Whitchurch, 3 Ves. 144; Chapman *v.* Brown, 6 Ves. 404; Att.-Gen. *v.* Parsons, 8 Ves. 186; Att.-Gen. *v.* Davies, 9 Ves. 535; Smith *v.* Oliver, 11 Beav. 481; Att.-Gen. *v.* Hodgson, 15 Sim. 146. But see Att.-Gen. *v.* Philpott, 6 H. L. 338, reversing S. C. 21 Beav. 134, and overruling Trye *v.* Corporation of Gloucester, 14 Beav. 173. And see Cawood *v.* Thompson, 1 Sm. & Giff. 409; Baldwin *v.* Baldwin, 22 Beav. 413.

(*c*) Pritchard *v.* Arbouin, 3 Russ. 457; *Re* Watmough's Trust, L. R. 8 Eq. 272; Pratt *v.* Harvey, L. R. 12 Eq. 544; Hawkins *v.* Allen, L. R. 10 Eq. 246.

(*d*) Brodie *v.* Duke of Chandos, 1 Bro. C. C. 444 n.; Att.-Gen. *v.* Bishop of Oxford, 1 Bro. C. C. 444; Glubb *v.* Att.-Gen., Amb. 373; Att.-Gen. *v.* Parsons, 8 Ves. 186; Att.-Gen. *v.* Munby, 1 Mer. 327; Fisher *v.* Brierly, 1 D. F. & J. 643.

(*e*) Harris *v.* Barnes, Amb. 652; Att.-Gen., Bishop of Chester, 1 Bro. C. C. 444.

(*f*) Corbyn *v.* French, 4 Ves. 418.

(*g*) Waterhouse *v.* Holmes, 2 Sim. 162. And see Davies *v.* Hopkins, 2 Beav. 276.

(*h*) Bunting *v.* Marriott, 19 Beav. 163.

(*i*) 2 Roper on legacies, by White, ch. 19, s. 5, p. 164 to 222.

appointed in his place, in all these cases if the bequest be in favour of a charity, the Court of Chancery will assume the office of an executor, and carry into effect the bequest, which in the case of individuals must have failed altogether(*a*).

776. Again, 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, then, the Court of Chancery, if no mode is pointed out, will of itself supply the defect, and enforce the charity(*b*).

777. Where the literal execution of the trusts of a charitable gift becomes inexpedient or impracticable, the court will execute them as nearly as it can, according to the original purpose, or (as the technical expression is) *cy pres*(*c*). The general principle upon which the court acts is, that if the testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be effectuated, shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished(*d*). 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 necessitous freemen of the company; there being no British slaves in Turkey or Barbary to redeem, the court directed a new scheme to be framed *cy pres*; and approved of a

(*a*) Mills *v.* Farmer, 1 Mer. 55, 96; Moggridge *v.* Thackwell, 7 Ves. 36.

(*b*) Mills *v.* Farmer, 1 Mer. 55, 95; Moggridge *v.* Thackwell, 7 Ves. 36; White *v.* White, 1 Bro. C. C. 12. And see Att.-Gen. *v.* Syderfen, 1 Vern. 224; s. c. 2 Freem. 261.

(*c*) Att.-Gen. *v.* Oglander, 3 Bro. C. C. 165; Att.-Gen. *v.* Green, 2 Bro. C. C. 492; Frier *v.* Peacock, Rep. t. Finch, 245; Att.-Gen. *v.* Boultbee, 2 Ves. 380; Att.-Gen. *v.* Wansay, 15 Ves. 232.

(*d*) Per Lord Eldon, Moggridge *v.* Thackwell, 7 Ves. 69.

scheme which gave the moiety thus undisposed of, to the donees of the other fourth parts(*a*).

778. The doctrine of *cy pres* is applicable only where the testator has manifested in his will a general intention of charity, and therefore, is not applicable when such general intention is not to be found. Thus, where a testator shews an intention of giving to some particular institution, and such intention cannot be carried out, and there is no intention in favour of charity generally, the bequest will fail, and the next of kin will take(*b*).

779. In further aid of charities, the court will supply all defects of conveyances, where the donor has a capacity, and a disposable estate, and his mode of donation does not contravene the provisions of any statute(*c*).

780. Lapse of time has been held in equity no bar in the case of charitable trusts, 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(*d*).

781. There is, however, one exception to the general rule that equity favours charities. Assets will not be marshalled by a court of equity in favour of a charity. Thus if a testator

(*a*) Att.-Gen. *v.* The Ironmongers' Company, 2 Beav. 313; Att.-Gen. *v.* Bishop of Llandaff, cit. 2 M. & K. 586. And see Att.-Gen. *v.* Oglander, 3 Bro. C. C. 165; Att.-Gen. *v.* City of London, 3 Bro. C. C. 171.

(*b*) Att.-Gen. *v.* Bishop of Oxford, cit. 4 Ves. 431; Att.-Gen. *v.* Goulding, 2 Bro. C. C. 428; Cherry *v.* Mott, 1 M. & C. 123; Smith *v.* Oliver, 11 Beav. 481; Loscombe *v.* Wintringham. 13 Beav. 87; Clarke *v.* Taylor, 1 Drew. 642; Russell *v.* Kellett, 3 Sm. & Giff. 264; Sinnett *v.* Herbert, L. R. 12 Eq. 201.

(*c*) Case of Christ College, 1 W. Bl. 90; Att.-Gen. *v.* Rye, 2 Vern. 453; Rivett's case, Moore, 890; Att.-Gen. *v.* Burdett, 2 Vern. 755; Att.-Gen. *v.* Bowyer, 3 Ves. 714; Damer's case, Moore, 882; Collison's case, Hob. 136; Mills *v.* Farmer, 1 Mer. 55; Incorporated Society *v.* Richards, 1 Dr. & War. 308; Sayer *v.* Sayer, 7 Hare, 377; Innes *v.* Sayer, 3 Mac. & G. 606.

(*d*) Att.-Gen. *v.* Christ's Hospital, 3 M. & K. 344; Att.-Gen. *v.* Corp. of Beverley, 6 D. M. & G. 268. Story, s. 1192.

give his real estate, and personal estate (consisting of personalty savouring of realty, as leasehold and mortgage securities, and also pure personalty), to trustees, upon trust to sell, and pay his debts and legacies, and bequeath the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate, and the personalty savouring of realty, in order to leave the pure personalty for the charity(*a*). The rule of the court in all such cases is to appropriate the fund, as if no legal objection existed, as to applying any part of it to the charity legacies; then holding so much of the charity legacies to fail as would in that way be payable out of the prohibited fund(*b*).

782. As to resulting trusts in gifts to charities, the following rules have been adopted by the court. (1) Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularises no objects(*c*), or such as do not exhaust the proceeds(*d*), the court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall be applied. (2) Where a person settles lands, or the rents and profits of lands to purposes which at the time exhaust the whole proceeds, but, in consequence of an increase in the value of the estate, an excess of income subsequently arises, the court will order the surplus instead of resulting, to be applied in he same or a similar manner with the original amount(*e*). (3) But even in the case of charity, if the settlor do not give the

(*a*) Mogg *v.* Hodges. 2 Ves. Sen. 52; Fourdrin *v.* Gowdey, 3 M. & K. 397; Johnson *v.* Woods, 2 Beav. 409; Waite *v.* Webb, 6 Madd. 71.

(*b*) Per Lord Cottenham in Williams *v.* Kershaw, 1 Keen. 274 n. And see Robinson *v.* Governors of the London Hospital, 10 Hare, 19; Johnson *v.* Lord Harrowby, Johns. 425.

(*c*) Att.-Gen. *v.* Herrick, Amb. 712.

(*d*) Att-Gen. *v.* Haberdasher's Co, 4 Bro. C. C. 102; Att.-Gen. *v.* Minshull, 4 Ves. 11; Att.-Gen. *v.* Arnold, Shower's P. C. 22. And see Att.-Gen. *v.* Sparks, Amb. 201; Att.-Gen. *v.* Mayor of Bristol, 2 J. & W. 316.

(*e*) Thetford school case, 8 Rep. 130 *b*; Att.-Gen. *v.* Beverley, 6 H. L. 310; Att.-Gen. *v.* Caius College, 2 Keen. 150; Att.-Gen. *v.* Jesus College, 29 Beav. 163; Merhant Taylor's Co. *v.* Att.-Gen. L. R. 11 Eq. 35; L. R. 6 Chan. 512.

land, or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir at law(*a*), or belong to the donee of the property subject to the charge, if the latter be (as in the case of a charitable corporation) itself an object of charity(*b*).

CHAPTER XXVI.

MARRIAGE SETTLEMENTS.

783. Where an instrument, designed as a MARRIAGE SETTLEMENT, is final in its character, and the nature and extent of the trust estates created thereby are clearly ascertained and accurately defined, so that nothing further remains to be done according to the intention of the parties, the trusts are treated as executed trusts, and courts of equity construe them in the same way as legal estates of the like nature would be construed at law upon the same language(*c*). Thus, if the language of the instrument would give a fee tail to the parents in a legal estate, they will be held entitled to a fee tail in the trust estate(*d*).

784. Where no marriage settlement has actually been executed, but only articles for a settlement, courts of equity, when called upon to execute them, indulge in a wider latitude of interpretation, and construe the words most beneficially for

(*a*) See Att.-Gen. *v.* Mayor of Bristol, 2 J. & W. 308.

(*b*) Att.-Gen. *v.* Beverley, 6 H. L. 310; Att.-Gen. *v.* Southmolton, 5 H. L. 1; Att.-Gen. *v.* Trinity College, 24 Beav. 383; Att.-Gen. *v.* Dean of Windsor, 24 Beav. 679; affirmed, 8 H. L. 369.

(*c*) Synge *v.* Hales, 2 B. & B. 507; Jervoise *v.* Duke of Northumberland, 1 J. & W. 559, 571; Wright *v.* Pearson, 1 Ed. 119; Jones *v.* Morgan, 1 Bro. C. C. 206. See also Boswell *v.* Dillon, 1 Dru. 291. For various cases decided on marriage settlements and their construction, see Place *v.* Spawn, 7 Gr. 406; Ridout *v.* Gwynne, 7 Gr. 505; Tripp *v.* Martin, 9 Gr. 20; Ryland *v.* Alnutt, 11 Gr. 135.

(*d*) See Cooper *v.* Kynock, L. R. 7 Chan. 398.

the issue of the marriage(*a*). Thus, if the terms of the articles would, if construed with legal strictness, give the parents an estate tail, and so enable them to defeat the provision for their issue, the court will decree a settlement to the parents for life only, with remainder to the issue in tail as purchasers(*b*); and if the articles are applicable to daughters, the like limitations will be made to them also(*c*).

785. In cases of executory trusts arising under wills, a similar favorable construction will be made in favor of the issue in carrying them into effect, if the court can clearly see from the terms of the will that the intention of the testator is to protect the interests of the issue in the same way(*d*).

786. A distinction is, however, recognized in equity between executory trusts under marriage articles, and those under wills. In the former, the intention of the parties may fairly be presumed *a priori*, from the nature of the transaction; in the latter, it must be gathered from the words of the will alone. When the object is to make a provision, by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to

(*a*) Young *v.* Smith, L. R. 1 Eq. 180; *Re* Mainwaring's Settlement, L. R. 2 Eq. 487; Carter *v.* Carter, L. R. 8 Eq. 551. And see Campbell *v.* Bainbridge, L. R. 6 Eq. 269; Dering *v.* Kynaston, L. R. 6 Eq. 210; *Re* Browne's Will. L. R. 7 Eq. 231; Dickinson *v.* Dillwyn, L. R. 8 Eq. 546; *Re* Pedder's Settlement, L. R. 10 Eq. 585; Bower *v.* Smith, L. R. 11 Eq. 279; *Re* Clinton's Trust, L. R. 13 Eq. 295; *Re* Bellasis' Trust, L. R. 12 Eq. 218; *Re* Brookman's Trust, L. R. 5 Chan. 182.

(*b*) Trevor *v.* Trevor, 1 P. W. 622; 5 Bro. P. C. 122; Griffith *v.* Buckle, 2 Vern. 13; Stonor *v.* Curwen, 5 Sim. 268; Davies *v.* Davies, 4 Beav. 54; Lambert *v.* Peyton, 8 H. L. 1.

(*c*) Nandick *v.* Wilkes, 1 Eq. Ca. Abr. 393; Hart *v.* Middlehurst, 3 Atk. 371; Burnaby *v.* Griffin, 3 Ves. 266; Horne *v.* Barton, 19 Ves. 398; Phillips *v.* James, 13 W. R. 543, 934; Shelton *v.* Watson, 16 Sim. 543; Coape *v.* Arnold, 2 Sm. & Giff. 311; 4 D. M. & G. 574.

(*d*) Story, s. 983; Leonard *v.* Earl of Sussex, 2 Vern. 526; Papillon *v.* Voice, 2 P. W. 478; Glenorchy *v.* Bosville, Cas. t. Talb. 3; Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 227, 230; Green *v.* Stephens, 17 Ves. 75, 76; Carter *v.* White, Ambl. 670; Sydney *v.* Shelley, 19 Ves. 366; Stonor *v.* Curwen, 5 Sim. 264; Thompson *v.* Fisher, L. R. 10 Eq. 207; Magrath *v.* Morehead, L. R. 12 Eq. 491. And see Loch *v.* Bagley, L. R. 4 Eq. 122; Stanley *v.* Coulthurst, L. R. 10 Eq. 259; Grier *v.* Grier, L. R. 5 H. L. 688; Turner *v.* Sergeant, 17 Beav. 515; Stanley *v.* Jackman, 23 Beav. 450.

himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the court will decree a strict settlement, in conformity to the presumed intention of the parties.

787. If the like words occur in executory trusts created by a will, there is no ground for the court decreeing a strict settlement, unless other words occur explanatory of the intent. The subject being a mere bounty, the intended extent of the bounty can be known only from the words in which it is conferred; but if it is to be clearly ascertained from any thing in the will, that the testator did not mean to use the expressions which he has employed, in their strict, proper, technical sense, the court, in decreeing such a settlement as he has directed, will depart from his words in order to execute his intention(*a*).

788. In furtherance of the same beneficial purpose in favor of issue, courts of equity will construe an instrument which might, under one aspect, be treated as susceptible of a complete operation at law, to contain merely executory marriage articles, if such an intent is apparent on the face of it; for this construction may be most important to the rights and interests of the issue(*b*). And an instrument, as to one part of the property comprised in it, may be taken as a final legal settlement; and as to another part as mere articles(*c*).

789. There is also a distinction in courts of equity as to the parties in whose favour the provisions of marriage articles will be specifically executed or not(*d*). The parties seeking a specific execution of such articles may be those who are strictly within the reach and influence of the consideration of the

(*a*) Blackburn *v.* Stables, 2 V. & B. 370; Jervoise *v.* Duke of Northumberland, 1 J. & W. 559, 571, 574; Lord Deerhurst *v.* Duke of St. Albans, 5 Mad. 260; Synge *v.* Hales, 2 B. & B. 507. See Sackville—West *v.* Holmesdale, L. R. 4 H. L. 543; Maguire *v.* Soulby, 2 Hog. 113; Stratford *v.* Powell, 1 B. & B. 25.

(*b*) Trevor *v.* Trevor, 1 P. W. 622; White *v.* Thornborough, 2 Ver. 702.

(*c*) Story, s. 985; and see *Re* De La Touche's Settlement, L. R. 10 Eq. 599; Countess of Lincoln *v.* Duke of Newcastle, 12 Ves. 218; Vaughan *v.* Burslem, 3 Bro. C. C. 101, 106.

(*d*) See Jeston *v.* Key, L. R. 6 Chan. 610.

marriage, or claiming through them; such as the wife and issue, and those claiming under them; or they may be mere volunteers, for whom the settlor is under no natural or moral obligation to provide, and yet who are included within the scope of the provisions in the marriage articles; such as his distant heirs or relatives, or mere strangers. The distinction is, that marriage articles will be specifically executed upon the application of any person within the scope of the consideration of the marriage, or claiming under such person; but not generally upon the application of mere volunteers(*a*).

790. Where the bill is brought by persons who are within the scope of the marriage consideration, or claiming under them, courts of equity will decree a specific execution throughout, as well in favour of the mere volunteers, as of the plaintiffs in the suit. So that, indirecly, mere volunteers may obtain the full benefit of the articles, in the cases where they could not directly insist upon such rights. The ground of this peculiarity is, that, when courts of equity execute such articles at all, they execute them *in toto*, and not partially(*b*).

791. But where the parent, or his agent, or the friends of the woman, hold out considerations of a pecuniary nature to induce the marriage and a settlement upon the lady, in faith of which the marriage and settlement take place, a court of equity will compel the party holding out such inducements to make them good(*c*).

792. A *post nuptial* settlement made in pursuance of a prior valid written agreement is valid against creditors, but a parol

(*a*) Wollaston *v.* Tribe, L. R. 9 Eq, 44; West *v.* Errissey, 2 P. W. 349; Kettleby *v.* Atwood, 1 Vern. 298, 471; Stephens *v.* Trueman, 1 Ves. Sen. 73; Pulvertoft *v.* Pulvertoft, 18 Ves. 84; Holloway *v.* Headington, 8 Sim. 325; Jefferys *v.* Jefferys, Cr. & Ph. 138, 141.

(*b*) Story, s. 986: Osgood *v.* Strode, 2 P. W. 255, 256; Trevor *v.* Trevor, 1 P. W. 622; Goring *v.* Nash, 3 Atk. 186, 190; Davies *v.* Davies, L. R. 9 Eq. 468. And see McGregor *v.* Rapelje, 17 Gr. 38; 18 Gr. 446.

(*c*) Hammersley *v.* Baron De Biel, 12 Cl. & Fin. 45; Coverdale *v.* Eastwood, L. R. 15 Eq. 121; Payne *v.* Mortimer, 1 Giff, 118; 4 D. & J. 447; Alt *v.* Alt, 4 Giff. 84; Walford *v.* Gray, 13 W. R. 335; 761. And see Maunsel *v.* White, 1 J. & L. 567; Loxley *v.* Heath, 27 Beav. 523; 1 D. F. & J. 489; Kay *v.* Crook, 3 Sm. & G. 407; Jameson *v.* Stein, 21 Beav. 5.

ante-nuptial agreement does not prevent a *post nuptial* settlement from being voluntary(*a*). Nor will the written recognition after marriage of a verbal promise made before marriage, support a *post nuptial* settlement against creditors(*b*). *Post nuptial* settlements are, as a general rule, voluntary deeds, and therefore void as against creditors(*c*). And the fact that such a settlement may be founded on a moral duty, will not deprive it of its voluntary character(*d*). But in certain cases, a *post nuptial* settlement, if made in pursuance of a duty which a court of equity would enforce, is not to be treated as wholly voluntary(*e*).

793. The consideration of marriage, although the most valuable of all considerations, if there be *bona fides*(*f*), will not support a settlement by a man in insolvent or embarrassed circumstances, if there be evidence to shew that the intended wife was implicated in any design to delay or defraud the creditors of the intended husband, or that the marriage was part of a scheme or contrivance between them to protect his property against the claims of his creditors(*g*).

794. Where the rectification of a marriage settlement was sought on the ground of mistake, the doctrine in the older cases was that where the articles and settlement were both before marriage, the court would not interfere, unless the settlement was expressed to be made in pursuance of the articles, for, without such a recital, the court supposed that the parties had altered their intentions as regarded the terms of the con-

(*a*) Spurgeon *v.* Collier, 1 Ed. 61; Randall *v.* Morgan, 12 Ves. 67; Lassence *v.* Tierney, 1 Mac. & G. 551; *Ex parte* McBurnie, 1 D. M. & G. 445; Warden *v.* Jones, 2 D. & J. 76; Goldicutt *v.* Townsend, 28 Beav. 445.

(*b*) Randall *v.* Morgan, 12 Ves. 67; Warden *v.* Jones, 2 D. & J. 76.

(*c*) Sug. V. & P. 715. But see Holmes *v.* Penny, 3 K. & J. 90.

(*d*) Holloway *v.* Headington, 8 Sim. 324; Jefferys *v.* Jefferys, Cr. & Ph. 138, 141.

(*e*) Jones *v.* Marsh, Ca. t. Talbot, 64; Wheeler *v.* Caryl, Amb. 121; Jewson *v.* Moulson, 2 Atk. 417; Middlecombe *v.* Marlow, 2 Atk. 519; Arundell *v.* Phipps, 10 Ves. 139; Ward *v.* Shallett, 2 Ves. Sen. 16.

(*f*) Campion *v.* Colton, 17 Ves. 264; *Ex parte* McBurnie, 1 D. M. & G. 441; Dilkes *v.* Broadmead, 2 D. F. & J. 566. And see Commercial Bank *v.* Cooke, 9 Gr. 524; Jackson *v.* Bowman, 14 Gr. 156.

(*g*) Colombine *v.* Penhall, 1 Sm. & G. 228; Fraser *v.* Thompson, 4 D. & J. 659. And see *Re* Mc Burnie, 1 D. M. & G. 445; Buckland *v.* Rose, 7 Gr. 440.

tract(*a*). The later authorities, however, dispense with the necessity of a reference to previous articles in the settlement (*b*). Where a settlement purposes to be in pursuance of articles entered into before marriage, and there is any variance, then no evidence is necessary to have the settlement corrected; and although the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence, showing that the discrepancy had arisen from a mistake, the court will enforce the settlement, and make it conformable to the real intention of the parties(*c*).

795. Estates *pour autre vie* may, at law, be devised or limited in strict settlement by way of remainder, like estates of inheritance; and the remainder-man will take as special occupant(*d*). But those who have an interest therein in the nature of estates tail, may bar their issue, and all remainders over, by the alienation of the estate *pour autre vie*, as those who are, strictly speaking, tenants in tail of legal estates, may(*e*).

796. The manner of settling estates in terms of years and personal chattels is different, for in them no remainder can at law be limited. But they may be entailed at law by an executory devise, or by a deed of trust in equity, as effectually

(*a*) See Legg *v.* Goldwire, Ca. t. Talb. 20. And also Honor *v.* Honor, 1 P. W. 123; Roberts *v.* Kingsley, 1 Ves. Sen. 238; Warwick *v.* Warwick, 3 Atk. 293.

(*b*) Bold *v.* Hutchinson, 5 D. M. & G. 566.

(*c*) Bold *v.* Hutchinson, 5 D. M. & G. 566. But see Mignan *v.* Parry, 31 Beav. 211. As to cases where the court has rectified settlements, see Hamil *v* White, 3 J. & L. 695. Wilson *v.* Wilson, 15 Sim. 487; 1 H. L. 538; Walsh *v.* Trevannion, 16 Sim. 178; Murray *v.* Parker, 19 Beav. 305; *Re* Morse's Settlement, 21 Beav. 174; Torre *v.* Torre, 1 Sm. & G. 518; Walker *v.* Armstrong, 21 Beav. 284; Naylor *v.* Wright, 5 W. R. 770; Wolterbeek *v.* Barron, 23 Beav. 423; Tomlinson *v.* Leigh, 14 W. R. 121; Earl of Malmesbury *v.* Earl of Malmesbury, 31 Beav. 407. Where it has refused to do so, see Howkins *v.* Jackson, 2 Mac. & G. 372; White *v.* Anderson, 1 Ir. Ch. 419; Brougham *v.* Squire, 1 Drew. 151; Lloyd *v.* Cocker, 19 Beav. 140; Fyfe *v.* Arbuthnot, 1 D. & J. 406; Elwes *v.* Elwes, 2 Giff. 545; 9 W. R. 820; Sells *v.* Sells, 1 Dr. & Sm. 42; Fowler *v.* Fowler, 4 D. & J. 250; Jenner *v.* Jenner, 6 Jur. N. S. 668.

(*d*) Low *v.* Burron, 3 P. W. 262, and notes; Doe d. Blake *v.* Luxton, 6 T. R. 291, 292; Finch *v.* Tucker, 2 Vern. 184; Baker *v.* Bayley, 2 Vern. 225.

(*e*) Story, s. 989; Co. Litt. 20 *a*, note (5); Wastneys *v.* Chappell, 1 Bro. P. C. 475; Norton *v.* Frecker, 1 Atk. 525; Low *v.* Burron, 3 P. W. 262; Grey *v.* Mannock, 2 Ed. 339; Blake *v.* Luxton, Cooper, t. Eld. 178, 184; Forster *v.* Forster, 2 Atk. 260.

as estates of inheritance, and with the same limitations as to perpetuity(*a*). However, the vesting of an interest in a term for years or in chattels in any person, equivalent to a tenancy in tail, confers upon him the absolute property in such term or chattels, and bars the issue, and all subsequent limitations (*b*). If, in the case of a term of years, or of chattels, the limitations over are too remote, the whole property vests in the first taker(*c*).

797. Marriage settlements for the benefit of the children of the marriage, after the decease of the wife, their shares to be vested at twenty-one or marriage, with a proviso that until the principal should become payable to the children, the trustees should apply the whole of the income, or so much of it as they should think fit, for the education and maintenance of the children, are construed as giving a discretionary trust to the trustees, and not a mere power, and the father has been held entitled to an allowance for the past and future maintenance of his child, without regard to his ability to maintain it(*d*).

CHAPTER XXVII.

TERMS FOR YEARS.

798. THE creation of long TERMS FOR YEARS, for the purpose of securing money lent on mortgage of the land, took its rise from the inconveniences of the ancient way of making mortgages in fee by way of feoffment and other solemn conveyances, with a condition of defeasance. For, by such mode,

(*a*) 1 Fonbl. Eq. B. 1, ch. 4, s. 2, and note (*f*); 2 Fonbl. Eq. B. 2, ch. 4, s. 2 note (*d*); Wright *v.* Cartwright, 1 Burr. 282.

(*b*) Co. Litt. 18 *b*, Hargrave's note (7); Co. Litt. 20 *a*, Hargrave's note (5); Matthew Manning's case, 8 Co. 94, 95; Lampet's case, 10 Co. 47; 1 Mad. Pr. Ch. 367; Goodright *v.* Parker, 1 M. & Selw. 692.

(*c*) Co. Litt. 20 *a*, Harg. note (5); 1 Co. 66.

(*d*) Ransome *v.* Burgess, L. R. 3 Eq. 773. And see Fussell *v.* Dowding, L. R. 14 Eq. 421.

if the condition was not punctually performed, the estate of the mortgagee at law became absolute. Hence it became, usual to create long terms of years upon the like condition; because, among other reasons, such terms on the death of the mortgagee became vested in his personal representatives, who were also entitled to the debt, and could properly discharge it(*a*). Terms for years were also often created for securing the payment of jointures and portions for children, and for other special trusts.

799. Such terms did not determine upon the mere performance of the trusts for which they were created, unless there was a special proviso to that effect in the deed. The legal interest continued in the trustee after the trusts were performed; although the owner of the fee was entitled to the equitable and beneficial interests therein.

800. At law the possession of the lessee for years is deemed to be the possession of the owner of the freehold. And, by analogy, courts of equity hold that where the tenant for the term of years is but a trustee for the owner of the inheritance he shall not oust his *cestui que trust*, or obstruct him in any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance. It follows the descent to the heir, and all the alienations made of the inheritance, or of any particular estate or interest carved out of it by deed, or by will, or by act of law (*b*). In short, a term, attendant upon the inheritance by express declaration, or by implication of law, may be said to be governed in equity by the same rules, generally, to which the inheritance is subject(*c*).

801. Although the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct

(*a*) Co. Litt. 290 *b*, Butler's note (1), s. 13; 208 *a*, note (1); Bac. Abridg. *Mortgage*, A. 1035.

(*b*) Co. Litt. 290 *b*, Butler's note (1), s. 13; Whitchurch *v.* Whitchurch, 2 P. W. 236; Charlton *v.* Low, 3 P. W. 330; Villers *v.* Villers, 2 Atk. 72; Willoughby *v.* Willoughby, 1 T. R. 765.

(*c*) Story, s. 998.

and separate from it at law, and the whole benefit and advantage to be made of the term arises from this separation. For, if two or more persons have claims upon the inheritance under different titles, a term of years attendant upon it is still so distinct from it, that, if any one of them obtains an assignment of it, then (unless he is affected by some of the circumstances which equity considers as fraudulent, or as otherwise controlling his rights) he will be entitled, both at law and in equity, to the estate for the whole continuance of the term, to the utter exclusion of all the other claimants. This, if the term is of long duration, absolutely deprives all the other claimants of every kind of benefit in the land(*a*).

802. At common law all terms for years are deemed to be terms in gross(*b*). And courts of equity, when they hold terms for years to be attendant upon the inheritance, always do so by affecting the person holding the term, with a trust for that purpose, either upon the express declaration of the parties, or by implication of law. If the term is made attendant upon the inheritance by express declaration, it is immaterial whether the term, if it were in the same hands with the inheritance, would or would not have merged; or whether it be subject to some ulterior limitation, to which the inheritance is not subject; for the express declaration will be sufficient to make it attendant upon the inheritance. But if the term is to be made attendant upon the inheritance by implication of law, then it is necessary that it should not be subject to any other limitation, and that the owner of the inheritance should be entitled to the whole trust in the term(*c*).

803. The general rule is, that where the same person has the inheritance and the term in himself, although he has in one the equitable interest, and in the other the legal interest, there the inheritance by implication draws to itself the term, and makes that attendant upon it. For, as at law, if the legal

(*a*) Story, s. 999; Co. Litt. 290 *b*, Butler's note s. (1), 13.

(*b*) Willoughby *v.* Willoughby, 1 T. R. 765; Scott *v.* Fenhoullet, 1 Bro. C. C. 69, 70.

(*c*) 2 Fonbl. Eq. B. 2, ch. 4, s. 3, note(*l*); Scott *v.* Fenhoullet, 1 Bro. C. C. 70.

estate in the term and in the inheritance come into the same hand, the term is merged, and the estate goes to the heir; so in equity, where the one estate is equitable, and the other legal, it is in the nature of a merger; and the trust of the term will follow the inheritance(*a*).

804. But although a term may be so attendant upon the inheritance, yet, as the legal estate in it remains distinct and separate from the inheritance at law, it may at any time be disannexed therefrom by the proper acts of the parties in interest, and be turned into a term in gross at law. And a term so attendant becomes a term in gross, when it fails of a freehold to support it, or it is divided from the inheritance by different limitations from those of the latter(*b*).

805. In many cases, the distinction between terms in gross and terms attendant upon the inheritance, is highly important; the former being generally treated as mere personalty; the latter, as partaking of the realty, and following the fate of the inheritance. Thus, for example, a term attendant upon the inheritance will not pass by a will not executed, so as to pass real estate under the statute of frauds. So, such a term is real assets in the hands of the heir; for the statute of frauds having made a trust in fee assets in the hands of the heir, the term, which follows the inheritance, and is subject to all the charges which would affect the inheritance, must also be real assets. On the contrary, a term in gross is personal assets only(*c*).

806. Where such terms are created to raise portions for children upon marriage settlements, and the settler also personally covenants to pay such portions, the real estate is considered as the primary fund, and the personal estate of the covenanter as auxiliary only(*d*). If there be no such personal

(*a*) Story, s. 1001; Capel *v.* Girdler, 9 Ves. 510; Best *v.* Stamford, 2 Freem. 288; Whitchurch *v.* Whitchurch, 2 P. W. 336; Sidney *v.* Shelly, 19 Ves. 352; Kelly *v.* Power, 2 B. & B. 253.

(*b*) Willoughby *v.* Willoughby, 1 T. R. 765, 770.

(*c*) Story, s. 1002.

(*d*) Lechmere *v.* Charlton, 15 Ves. 197.

covenant for the payment of the portions, but only a covenant to settle lands, and to raise a term of years out of the lands for securing the portions, in such a case, even although there be a bond to perform the covenant, the portions are not in any event payable out of his persona[illegible]te(*a*).

CHAPTER XXVIII.

MORTGAGES.

807. A MORTGAGE is a conveyance or assignment to the creditor of the whole or part of the debtor's interest in real or personal estate, implying the existence of a debt and conditional upon its non-payment on a certain day, but becoming absolute at law upon breach of the condition(*b*). It may be legal or equitable, the nature of the latter being, that no legal interest in the property mortgaged passes to the mortgagee.

808. Mortgages had no existence in English jurisprudence, while the system of feudal tenures prevailed in its full vigour, as they were incompatible with the leading objects of that system(*c*). But, as soon as the general right of alienation of real property was admitted, the necessities of the people led to the introduction of mortgages(*d*).

809. The ordinary mortgage was, at the common law, strictly an estate upon condition; that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment, or in a deed of defeasance executed at the same time, by which it was provided that on payment by the mortgagor, or feoffer, of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made,

(*a*) Story, s. 1603; Edwards *v.* Freeman, 2 P. W. 437.
(*b*) Fisher on Mortgages, ss. 8, 1321.
(*c*) Glanville, Lib. 10, 6. And see Bac. Abridg. *Mortgage* A.
(*d*) 2 Fonbl. Eq. B. 3, ch. 1, s. 1, and note (*a*); Bac. Abridg. *Mortgage* A.; Litt. s. 327, 332; Co. Litt. 202 *b*, 205 *a*; Coote on Mortgages, 4.

the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition. If the condition was performed, the feoffer re-entered and was in of his ld estate. If the condition was broken, the feoffee's estate became absolute and indefeasible, and all the legal consequences followed, as though he had been absolute owner from the time of his feoffment(*a*).

810. 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. He 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(*b*).

811. Courts of equity, however, soon arrived at the just conclusion, that mortgages ought to be treated as a mere security for the debt due to the mortgagee; and that although forfeited at law, the mortgagee held the estate as a trust(*c*); the mortgagor having an equity of redemption, which he might enforce against the mortgagee, as he could any other trust, if he applied within a reasonable time to redeem, and offered a full payment of the debt, and of all equitable charges(*d*).

812. 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(*e*).

813. The doctrine that the mortgage is only a pledge or security for the payment of the debt, or the discharge of the

(*a*) Coote, 6.

(*b*) Story, s. 1012.

(*c*) Seton *v.* Slade, 7 Ves. 273; Cholmondeley *v.* Clinton, 2 J. & W. 181. See also Casbourne *v.* Inglis, 2 J. & W. 194, note.

(*d*) Story, s. 1013; Langford *v.* Barnard, Tothill, 134; Emmanuel College *v.* Evans, 1 Chan. Rep. 18.

(*e*) 4 Kent, Comm. 158.

other engagements, for which it was originally given, having been established, 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.

814. At one time it was 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(*a*). 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(*b*), and, if entailed, may be barred by a fine or recovery in the usual way. It is also liable to tenancy by the courtesy, but was not liable to dower(*c*), until the passing of the 4 Wm. 4, c. 1(*d*).

815. The estate of the mortgagee 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(*e*). Upon the same ground, an assignment of the debt by the mortgagee carries with it, in equity, as an incident, the interest of the mortgagee in the mortgaged property; unless, indeed, the instrument of assignment contains a plain exception of the latter(*f*).

816. The mortgagee, by virtue of his mortgage becomes the legal owner of the land, and consequently entitled at law to immediate possession, or to the receipt of the rent, if the land be under lease(*g*). But where the mortgagee enters into pos-

(*a*) Roscarrick *v.* Barton, 1 Chan. Ca. 217.
(*b*) Pawlett *v.* Att.-Gen., Hardres, 469; Casborne *v.* Scarfe, 1 Atk. 605. As to further title acquired by the mortgagor, see Jones *v.* Bank of Upper Canada, 13 Gr. 74.
(*c*) Dixon *v.* Saville, 1 Bro. C. C. 327, 328.
(*d*) Con. Stat. U. C. c. 84, s. 1.
(*e*) Com. Dig. Chan., 4 A. 9; Casborne *v.* Scarfe, 1 Atk. 605. See Thornborough *v.* Baker, 1 Ch. Ca. 283.
(*f*) Story, s. 1016.
(*g*) Coote, 339.

session of the mortgaged property, he is of course accountable for the rents and profits(*a*). And he will be charged an occupation rent for any part of it held by himself(*b*). And if a mortgagee gives notice to the tenants not to pay rent to the mortgagor, he becomes entitled to take possession, and though he does not do so, he must be answerable to the mortgagor for any loss which may occur(*c*).

817. Courts of equity will not, however, ordinarily require annual rests to be made in settling the accounts as against a mortgagee in possession. Thus, they will not require annual rests to be made, where the interest of the mortgage is in arrear 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(*d*). But where special circumstances exist, as, for example, where no arrears of interest are due at the time when the mortgagee enters into possession, or an agreement exists between the parties, by which the interest in arrear is converted into principal, there, and in such cases, annual rests will be made(*e*).

818. A mortgagee in possession, will in equity be allowed for all repairs necessary for the support of the property(*f*), and also for doing that which is essential for the protection of the title of the mortgagor(*g*). But he will not be allowed for general improvements made without the acquiescence or consent of the mortgagor, which enhance the value of the estate-

(*a*) Sherwin *v.* Shakspear, 5 D. M. & G. 531, 536; Kensington *v.* Bouverie, 7 D. M. & G. 157. But see Soar *v.* Dalby, 15 Beav. 156; Parkinson *v.* Hanbury, L. R. 2 H. L. 1.

(*b*) Smart *v.* Hunt, 1 Vern. 418 n; Trulock *v.* Robey, 15 Sim. 265; 2 Ph. 396.

(*c*) Heales *v.* McMurray, 23 Beav. 401. And see Penn *v.* Lockwood, 1 Gr. 547;

(*d*) Finch *v.* Brown, 3 Beav. 70; Wilson *v.* Cluer, 3 Beav. 136; Moore *v.* Painter, 6 Jur. 903; Coldwell *v.* Hall, 9 Gr. 110. And see Gordon *v.* Eakins, 16 Gr. 363; Crippen *v.* Ogilvie, 15 Gr. 568; Scholefield *v.* Lockwood, 32 Beav. 439; Latter *v.* Dashwood, 6 Sim. 462. But see Thorneycroft *v.* Crockett, 2 H. L. 239.

(*e*) Shephard *v.* Elliott, 4 Madd. 254; Gould *v.* Tancred, 2 Atk. 533; Wilson *v.* Metcalfe, 1 Russ. 530; Crippen *v.* Ogilvie, 15 Gr. 568. And see Morris *v.* Islip, 20 Beav. 654; Thompson *v.* Hudson, L. R. 10 Eq. 497.

(*f*) Sandon *v.* Hooper, 6 Beav. 246; Neesom *v.* Clarkson, 4 Ha. 97.

(*g*) Sandon *v.* Hooper, 6 Beav. 246; Pelly *v.* Wathen, 7 Ha. 373; Parker *v.* Watkins, John. 133.

especially if they are of such a nature as may cripple the right or power of redemption(*a*). 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(*b*), or destroying(*c*), or losing the title deeds(*d*).

819. Where the mortgagor contracts to sell the fee-simple of the mortgaged estate, free from incumbrances, the purchaser, with the concurrence of the mortgagee, is entitled, on procuring a discharge of the vendor from all liability in respect of the mortgage debt, and bearing any extra expense occasioned by his demand, to require a conveyance of the equity of redemption, in such manner as to keep the mortgage on foot(*e*).

820. The mortgagor is not, unless there be some special agreement to that effect, entitled of right to the possession of the land mortgaged. 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 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(*f*). 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 therefor to the mortgagee(*g*). 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 res-

(*a*) Sandon *v.* Hooper, 6 Beav. 248; Hughes *v.* Williams, 12 Ves. 493; Thornneycroft *v.* Crockett, 16 Sim. 445; Rowe *v.* Wood, 2 J. & W. 553, 556; Kerby *v.* Kerby, 5 Gr. 587. But see Millett *v.* Davy, 31 Beav. 470. And see Carroll *v.* Robertson, 15 Gr. 173; Constable *v.* Guest, 6 Gr. 510.

(*b*) Sandon *v.* Hooper, 6 Beav. 246; Farrant *v.* Lovell, 3 Atk. 723.

(*c*) Hornby *v.* Matcham, 16 Sim. 325.

(*d*) Brown *v.* Sewell, 11 Ha. 49. And see Lord Middleton *v.* Elliot, 15 Sim. 531; Woodman *v.* Higgins, 14 Jur. 846. As to loss of title deeds, see McDonald *v.* Hime, 15 Gr 72; Bennett *v.* Foreman, 15 Gr. 117.

(*e*) Cooper *v.* Cartwright, John, 679; Clark *v.* May, 16 Beav. 273.

(*f*) Co. Litt. 204 *b*, note (1); Keech *v.* Hall, Doug. 21; Moss *v.* Gallimore, Doug. 279.

(*g*) Story, s. 1017; Colman *v.* Duke of St. Albans, 3 Ves. 25, 32; Mead *v.* Lord Orrery, 3 Atk. 244; *Ex parte* Wilson, 2 V. & B. 252; Hele *v.* Lord Bexley, 20 Beav. 127.

trained by injunction(*a*). But to restrain the felling of timber it would seem to be necessary to shew that without the timber, the security is a scanty one(*b*).

821. As to what constitutes a mortgage, there is no difficulty whatever in courts of equity, although there may be technical embarrassments in courts of law. The particular form or words of the conveyance are unimportant; 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(*c*), it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations thereof(*d*). Even parol evidence is admissible in some cases, as in cases of fraud, 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(*e*).

822. The question whether a conveyance of land and the contemporaneous execution of a bond to reconvey the land upon payment of the consideration of the conveyance create a mortgage or a mere contract for repurchase is one of fact, and, if really doubtful, upon the proof, should be decided in favour of its being a mortgage(*f*). The existence of a debt is the decisive test upon this point. And it is not requisite that

(*a*) Robinson *v.* Litton, 3 Atk. 210; Usborne *v.* Usborne, 1 Dick. 75; Humphreys *v.* Harrison, 1 J. & W. 581; As to removing machinery by a mortgagor, see Gordon *v.* Johnston, 14 Gr. 402; Crawford *v.* Findlay, 18 Gr. 51; Myers *v.* Smith, 15 Gr. 616.

(*b*) Hippesley *v.* Spencer, 5 Madd. 422; King *v.* Smith, 2 Ha. 239; Wason *v.* Carpenter, 13 Gr. 329; Cawthra *v.* Maguire, 5 U. C. L. J. 142. And see Russ *v.* Mills, 7 Gr. 145.

(*c*) See Waters *v.* Mynn, 14 Jur. 341; Hawke *v.* Milliken, 12 Gr. 236.

(*d*) Butler's note (1) to Co. Litt. 203 *b*; 2 Fonbl. Eq. B. 3, ch. 1, s. 4, and note (*e*); s. 5, note (*h*). See Monk *v.* Kyle, 17 Gr. 537; Healey *v.* Daniels, 14 Gr. 633.

(*e*) Story, s. 1018; Montacute *v.* Maxwell, 1 P. W. 618; Walker *v.* Walker, 2 Atk 98; Vernon *v.* Bethell, 2 Ed, 110; Le Targe *v.* De Tuyle, 1 Gr. 227; Bernard *v.* Walker, 2 Gr. E. & A. 121.

(*f*) Bostwick *v.* Phillips, 6 Gr. 427.

the bond for reconveyance should bear the same date as the deed in order to constitute a mortgage(*a*).

823. The assignee of a mortgage takes it subject not only to the state of the accounts between the mortgagor and mortgagee, but also to all the equities existing as against the mortgagee(*b*).

824. 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(*c*).

825. Courts of equity have established, as principles not to be departed from, that once a mortgage always a mortgage; that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; and that a mortgage can no more be irredeemable than a distress irrepleviable(*d*).

826. 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(*e*). Thus, 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 parti. and is not within the operation of the statute of

(*a*) Story, s. 1018 b.

(*b*) McPherson *v.* Dougan, 9 Gr. 258; Smart *v.* McEwan, 18 Gr, 623. And see Engerson *v.* Smith, 9 Gr. 16; Church Society *v.* McQueen, 15 Gr. 281; Henderson *v.* Brown, 18 Gr. 79.

(*c*) Co. Litt. 204 *b*, note (1); Bonham *v.* Newcomb, 1 Vern. 232; Seton *v.* Slade, 7 Ves. 273; Com, Dig. Chan. 4 A. 1, 2

(*d*) Coote, 11; and see Howard *v.* Harris, 1 Vern. 192; Jason *v.* Eyre, 2 Chan. Ca. 33; Newcomb *v.* Bonham, 1 Vern. 7; Goodman *v.* Grierson, 2 B. & B. 278; Spurgeon *v.* Collier, 1 Ed. 55; Rushbrook *v.* Lawrence, L. R. 8 Eq. 25; L. R. 5 Chan. 3.

(*e*) See Abbott *v.* Stratton, 3 J. & L. 609.

frauds(*a*). This doctrine has sometimes been thought difficult to be maintained either upon the ground of principle or public policy, and although it is firmly established, a disposition has been evinced not to enlarge its operation(*b*). It is not, therefore, 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(*c*).

827. Such an equitable mortgage will not, however, since the passing of the recent Registry Act, be valid as against a registered instrument executed by the same party, his heirs or assigns(*d*).

828. As to the kinds of property which may be mortgaged, it may be laid down as a general proposition, with few exceptions, that every species of property, real or personal, corporeal or incorporeal, movable or immovable, in possession remainder, expectancy, or even in action, is the subject of mortgage(*e*).

829. As to persons qualified to mortgage, a right to mortgage is *prima facie*, incident to the right to property, and coextensive with it(*f*). A trust to sell, if there be nothing to negative the settlor's intention to convert the estate absolutely, will not authorize the trustee to execute a mortgage(*g*). But

(*a*) Russel *v.* Russel, 1 Bro. C. C. 269; *Ex parte* Coming, 9 Ves. 116, 117; Birch *v.* Ellames, 2 Anst. 427, 438; *Ex parte* Mountfort, 14 Ves. 606; *Ex parte* Langston, 17 Ves. 228, 229; Pain *v.* Smith, 2 M. & K. 417; Keys *v.* Williams, 3 Y. & C. 55.

(*b*) *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. 9; *Ex parte* Whitbread, 19 Ves. 209. And see Chapman *v.* Chapman, 15 Jur. 265.

(*c*) Norris *v.* Wilkinson, 12 Ves. 197. And see as to equitable mortgages, *Ex parte* National Bank, L. R. 14 Eq. 507; Wilson's case, L. R. 12 Eq. 516; Newton *v.* Newton, L. R. 6 Eq. 135; L. R. 4 Chan. 143; *Re* Kerr's Policy, L. R. 8 Eq. 331; Chadwick *v.* Turner, L. R. 1 Chan. 310; Layard *v.* Maud, L. R. 4 Eq. 397; Thorpe *v.* Holdsworth, L. R. 7 Eq. 139.

(*d*) Ont. Stat. 31 Vic., c. 20, s. 68. And see McDonald *v.* McDonald, 14 Gr. 133.

(*e*) Coote, 104; and see *Re* Sankey, B. C. Co., L. R. 9 Eq. 721; L. R. 10 Eq. 381; Gibbs & West's case, L. R. 10 Eq. 312.

(*f*) Coote, 103; and see Mason *v.* Parker, 16 Gr. 230.

(*g*) Haldenby *v.* Spofforth, 1 Beav. 390; Stronghill *v.* Anstey, 1 D. M. & G. 635; Page *v.* Cooper, 16 Beav. 396; Devaynes *v.* Robinson, 24 Beav. 86.

where an estate is devised to trustees, charged with debts, and subject thereto, upon trust for certain parties, so that a sale, though it may be required, is not the testator's object, the trustees may, for the purpose of paying the debts, mortgage instead of selling(*a*).

830. As an executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets, and, accordingly, the power of an executor or administrator to mortgage the assets has been recognised by high authorities on several occasions(*b*).

831. An equity of redemption is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees, and representatives of the mortgagor, but also in the hands of other persons, who have acquired an interest in the lands mortgaged by operation of law, or otherwise, in privity of title(*c*). 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, remainder man or reversioner(*d*), a tenant by the courtesy(*e*), a jointress(*f*), a tenant in dower(*g*), a judgment creditor(*h*), 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

(*a*) Ball *v.* Harris, 4 M. & C. 264; Stronghill *v.* Anstey, 1 D. M. & G. 645; Page *v.* Cooper, 16 Beav. 400.

(*b*) Mead *v.* Orrerey, 3 Atk. 239; Scott *v.* Tyler, 2 Dick, 725; McLeod *v.* Drummond, 17 Ves. 154. But see Andrew *v.* Wrigley, 4 Bro. C. C. 138.

(*c*) Co. Litt. 208, note (1).

(*d*) Ranald *v.* Russell, 1 Younge, 9; Rafferty *v.* King, 1 Keen, 618; Aynsly *v.* Reed, 1 Dick. 249.

(*e*) Jones *v.* Meredith, Bunb. 347.

(*f*) Howard *v.* Harris, 1 Vern. 190.

(*g*) Co. Litt. 208 *a*, note (1); Swannoch *v.* Lifford, Ambler, 6; Kinnoul *v.* Money, 3 Swanst. 202.

(*h*) Stonehewer *v.* Thompson, 2 Atk. 440. And see Fawcett *v.* Fothergill, 1 Dick. 19.

enforcement of their claims and interests respectively in the land(*a*). When any such person does so redeem, 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 a further right of priority by tacking might formerly be acquired, but this right of tacking has now been abolished.

832. As a person who redeems is entitled, upon payment, to a reconveyance of the mortgage, the mortgagee cannot sue for the mortgage money where he has put it out of his power to reconvey the property or part of it(*b*). Thus, where a mortgagee and mortgagor sold and conveyed part of the mortgaged property, without the assent of a person to whom the mortgagor had, subsequently to the mortgage, sold the remainder of the property, it was held that the mortgagee could not call on the owner of such remaining portion for payment of the balance of the mortgage money(*c*).

833. Where default is made in payment of the mortgage money, the mortgagee is entitled to pursue all his remedies, both legal and equitable, at the same time. He may bring an action on the covenant for the money, and an action of ejectment to recover the possession, and at the same time file a bill in equity for foreclosure(*d*).

834. In England, a bill for foreclosure is deemed, in common cases, the exclusive and appropriate remedy, and the courts of equity in that country refused, until a recent period, to decree a compulsory sale against the will of the mortgagor

(*a*) See Anon. 3 Atk. 314; Fell *v.* Brown, 2 Bro. C. C. 279; Christian *v.* Field, 2 Ha. 177; Acton *v.* Pierce, 2 Vern. 480; Downe *v.* Morris, 3 Ha. 394; Janes *v.* Jackson, 16 Ves. 367.

(*b*) Palmer *v.* Hendrie, 27 Beav. 349; Lockhart *v.* Hardy, 9 Beav. 349. See Bald *v.* Thompson, 16 Gr. 177.

(*c*) Gowland *v.* Garbutt, 13 Gr. 578. And see Crawford *v.* Armour, 13 Gr. 576; Beck *v.* Moffatt, 17 Gr. 601; Burnham *v.* Galt, 16 Gr. 417.

(*d*) But by pursuing his legal remedies at the same time he may in equity be deprived of his costs, Con. Gen. Ord. 465.

(*a*). But in this Province, a mortgagee is entitled to file a bill for sale, and the court may order such sale without giving the usual or any time to redeem(*b*).

835. A person who has an assignment of the debt, with the right to retain a portion of it, the remainder belonging to the assignor, but no assignment of the mortgage deed, cannot maintain a bill to foreclose. That should be in the name of the party holding the deed, who will recover the portion of the debt assigned for the benefit of the assignee(*c*).

836. It is now a common practice to insert in mortgages a power of sale upon default of payment. And although an opinion was entertained unfavourable to such a power, as dangerous, it is now firmly established(*d*).

837. Powers of sale are construed liberally for the purpose of effecting their general object. Thus, a power to sell, either by public auction or private contract, and a sale by private contract, with an agreement that a portion of the money might remain on mortgage of the property sold, was held valid(*e*).

838. A power in a mortgage deed to the mortgagee to sell, is in the nature of a trust, but it may be exercised without

(*a*) This general rule is departed from in certain cases: (1) where the estate is deficient to pay the incumbrance, Dashwood *v.* Bithazey, Mosel. 196; (2) where the mortgagor is dead, and there is a deficiency of personal assets, Daniel *v.* Skipwith, 2 Bro. C. C. 155; (3) where the mortgage is of a dry reversion, How *v.* Vigures, 1 Ch. 32; (4) where the mortgagor dies, and the estate descends to an infant, Booth *v.* Rich, 1 Vern. 295; Mondey *v.* Mondey, 1 V. & B. 223. But see Goodier *v.* Ashton, 18 Ves. 83; Gore *v.* Stackpole, 1 Dow, 18; Davis *v.* Dowding, 2 Keen, 245; (5) where the mortgagor becomes bankrupt, and the mortgagee prays a sale; (6) or where the mortgagor is dead, and the mortgagee by his bill, brought against the executor or administrator and the heir, prays for the 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, King *v.* Smith, 2 Ha. 239.

(*b*) Con. Gen. Ord. 426, 427. But see Rigney *v.* Fuller, 4 Gr. 198.

(*c*) Story, s. 1023 a; Morley *v.* Morley, 25 Beav. 253.

(*d*) Croft *v.* Powell, Comyns, 603; Anon., 6 Mad. 10; Corder *v.* Morgan, 18 Ves. 344; *Re* Richardson, L. R. 12 Eq. 398. And see *Re* Chawner's Will, L. R. 8 Eq. 569; Cruikshank *v.* Duffin, L. R. 13 Eq. 555; Boyd *v.* Petrie, L. R. 7 Chan. 385, reversing S. C. 10 Eq. 482; Bridges Longman, 24 Beav. 27; Cook *v.* Dawson, 29 Beav. 128.

(*e*) Story, s. 1027 a. See Davey *v.* Durrant, 1 D. & J. 535.

the concurrence of the mortgagor(*a*). But the mortgagee, like every other trustee, is bound to use all the means in his power to get the fairest and best price for the property(*b*). The mortgagor cannot purchase under the power so as to relieve himself from subsequent charges made by him before the sale(*c*); and, perhaps, the rule would be the same if the estate was sold to a stranger and purchased from him by the mortgagor(*d*). So, the mortgagee cannot, by a pretended sale, acquire the property as his own; relief from such a sale would be afforded even at a considerable distance of time(*e*).

839. Where there are various persons claiming adverse rights and limited interests in the mortgaged estate, a court of equity will direct how the assets and securities are to be marshalled, so as to do justice between the different claimants, and 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(*f*).

840. The ordinary limitation of time within which a mortgage is redeemable, 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(*g*). If, therefore, the mortgagee enters into possession in his character of

(*a*) Sug. V. & P. 65. The insertion of a power of sale does not deprive the mortgagee of his right to a foreclosure, Slade *v.* Rigg, 3 Ha. 35; Wayne *v.* Hanham, 9 Ha. 62.

(*b*) Orme *v.* Wright, 3 Jur. 19; Richmond *v.* Evans, 8 Gr. 508; Latch *v.* Furlong, 12 Gr. 303. And see Bank of Upper Canada *v.* Wallace, 16 Gr. 280; Brown *v.* Woodhouse, 14 Gr. 682; Trust and Loan Co. *v.* Boulton, 18 Gr. 234.

(*c*) Otter *v.* Lord Vaux, 2 K. & J. 650; 6 D. M. & G. 638.

(*d*) Sug. V. & P. 66. And see McDonald *v.* Reynolds, 14 Gr. 691.

(*e*) Robertson *v.* Norris, 1 Giff. 421; Popham *v.* Exham, 10 Ir. Ch. 440. And see Ellis *v.* Dellabough, 15 Gr. 583; Spain *v.* Watt, 16 Gr. 260; Howard *v.* Harding, 18 Gr. 181.

(*f*) Story, s. 1028. And see Boucher *v.* Smith, 9 Gr. 347; Ricker *v.* Ricker, 14 Gr. 264; Barker *v.* Eccles, 17 Gr. 277; Jones *v.* Beck, 18 Gr. 671; *Re* Mower's Trusts, L. R. 8 Eq. 110.

(*g*) Raffety *v.* King, 1 Keen, 602, 609, 610, 616, 617; Cholmondeley *v.* Clinton, 2 J. & W. 1, 191; Corbett *v.* Barker, 1 Anst. 138; 3 Anst. 755; White *v.* Parnther, 1 Knapp, 228, 229.

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.

841. 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(*a*), it continues to run against all persons claiming under the mortgagor, whatever may be the disabilities to which they may be subjected(*b*).

842. 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(*c*).

843. Similar considerations apply, in many respects, to the right of foreclosure of a mortgage. If the mortgagee suffers 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

(*a*) An acknowledgment by one of two joint mortgagees and trustees is inoperative, Richardson *v.* Younge, L. R. 10 Eq. 275; 6 Chan. 478.

(*b*) Story, s. 1028 a.

(*c*) Raffety *v.* King, 1 Keen, 601, 609. 610, 616 to 618; Corbett *v.* Barker, 1 Anst. 1; 3 Anst. 755; Reeve *v.* Hicks, 2 S. & S. 403; Ravald *v.* Russell 1 Younge, 19.

bill for a foreclosure will generally be deemed to be barred and extinguished(*a*). However, in cases of this sort, as the bar is not positive, but founded upon a presumption of payment, it is open to be rebutted by circumstances(*b*).

844. A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time(*c*); and if he does not pay the debt at the appointed time, six months' notice to the mortgagee of his intention to do so is necessary, unless the mortgagee has demanded or taken steps to compel payment(*d*).

845. A mortgage to secure future advances, expressed in any form upon the face of the deed, which is intelligible and not calculated to mislead future incumbrancers, is valid; and the mortgagee may continue to make advances until he has express notice of some further incumbrance, or alienation of the title of the mortgagor. But where the mortgagee has notice of a subsequent mortgage, he cannot hold his security for advances made after such notice(*e*).

846. Where the contract binds the mortgagee to make the advances, absolutely, although the payment is future, the debt is present, and the binding force of the mortgage, and the extent of the incumbrance, is the same as if the advances were made at the date of the mortgage; but where the advances depend upon the continued consent of both the mortgagor and mortgagee, and it is in effect to secure a balance of running account, the force of the security is liable to be affected by

(*a*) Stewart *v.* Nicholls, 1 Tamlyn. 307; Christophers *v.* Sparke, 2 J. & W. 223; Trash *v.* White, 3 Bro. C. C. 289; Teplis *v.* Baker, 2 Cox, 119. See also White *v.* Parnther, 1 Knapp, 228, 229.

(*b*) Story, s. 1028 b.

(*c*) Brown *v.* Cole, 14 Sim. 427.

(*d*) Coote, 528. But see Green *v.* Adams, 2 Chan. Cham. R. 134.

(*e*) Shaw *v.* Neale, 20 Beav. 157; 6 H. L. 581; Rolt *v.* Hopkinson, 25 Beav. 461; 4 Jur. N. S. 919; Daun *v.* The City, &c., Brewery Co., L. R. 8 Eq. 155. See Brownlee *v.* Cunningham, 13 Gr. 586; Ross *v.* Perrault, 13 Gr. 206; Inglis *v.* Gilchrist, 10 Gr. 301. Gordon *v.* Graham, 2 Eq. Cas. Ab. 998 is now overruled.

subsequent incumbrances, which are legally brought home to the knowledge of the first mortgagee(*a*).

847. The doctrine of tacking which prevailed in England, has been abolished in this Province by statute(*b*). But the devisee of a mortgagor was held not entitled to redeem the mortgage without also paying a judgment held by the mortgagee against the mortgagor(*c*).

848. Where a mortgage contains no covenant by the mortgagor to insure, but he does insure, and a loss by fire occurs, the mortgagee is entitled to have the insurance money laid out in rebuilding(*d*). And a mortgagee insuring the mortgaged premises against fire, out of his own funds, is entitled to receive the amount of the policy in the event of loss, for his own benefit, without giving credit therefor upon the mortgage(*e*).

849. A mortgage upon 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. A pledge 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(*f*).

850. 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

(*a*) Story, s. 1023 c. See Hopkinson *v.* Rolt, 9 H L. 514; Daun *v.* City, &c., Brewery Co., L. R. 8 Eq. 155. But see McMaster *v.* Anderson, cited Taylor on Titles, 32.

(*b*) Con. Stat. U. C. c. 89, s. 56; 29 Vic. c. 24, s. 67; O. S. 31 Vic. c. 20, s. 68.

(*c*) McLaren *v.* Fraser, 17 Gr. 533. And see Keenan *v.* Anderson, 17 Gr. 636; Hyman *v.* Roots, 10 Gr. 340.

(*d*) Stinson *v.* Pennock, 14 Gr. 604.

(*e*) Dobson *v.* Land, 8 Ha. 216; Russell *v.* Robertson, 1 Chan. R. 72.

(*f*) Ryall *v.* Rolle, 1 Atk. 166, 167; Ratcliffe *v.* Davies, Cro. Jac. 244; Com. Dig. *Mortgage*, A; Jones *v.* Smith, 2 Ves. 378.

within a reasonable time(*a*). 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(*b*).

851. 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 demand, his personal representatives may redeem(*c*). Generally speaking, the remedy of the pledgor is at law, 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 in equity(*d*).

852. On the other hand, the pledgee may bring in a bill in equity to foreclose and sell the pledge(*e*). It seems also, 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(*f*).

853. Questions often arise as to 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(*g*).

(*a*) See Kemp *v.* Westbrook, 1 Ves. Sen. 278. And see Langton *v.* Waite, L. R. 6 Eq. 165; L. R. 4 Chan. 402.

(*b*) Story, s. 1031; Tucker *v.* Wilson, 1 P. W. 261; Lockwood *v.* Ewer, 9 Mod. 275; 2 Atk. 303.

(*c*) Story on Bailments, ss. 208, 345, 346, 348; Demandray *v.* Metcalf, 2 Vern. 691, 698; Vanderzee *v.* Willis, 3 Bro. C C. 21; Kemp *v.* Westbrook, 1 Ves. Sen. 278.

(*d*) Jones *v.* Smith, 2 Ves. 372.

(*e*) *Ex parte* Mountfort, 14 Ves. 606.

(*f*) Kemp *v.* Westbrook, 1 Ves. Sen. 278; Lockwood *v.* Ewer, 9 Mod. 278; Pothonier *v.* Dawson, Holt's N. P. 383.

(*g*) Chester *v.* Willis, Ambl. 246; Compton *v.* Oxendor., 2 Ves. 264. But see Withington *v.* Tate, L. R. 4 Chan. 288; Heyman *v.* DuBois, L. R. 13 Eq. 158.

854. 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. 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(*a*). 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(*b*).

CHAPTER XXIX.

ASSIGNMENTS.

855. Another class of trusts, embraces ASSIGNMENTS of real and personal property upon special trusts. The most important and extensive of this class is that which embraces general assignments by insolvents and other debtors for the discharge of their debts. 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(*c*). Priorities and preferences given by such assignments, were not at one time deemed fraudulent or inequitable; but all such preferences

(*a*) St. Paul *v.* Viscount Dudley & Ward, 15 Ves. 173; Forbes *v.* Moffat, 18 Ves. 390; Wilkes *v.* Collin, L. R. 8 Eq. 338. And see Beaty *v.* Gooderham, 13 Gr. 317; Finlayson *v.* Mills, 11 Gr. 218; Elliott *v.* Jayne, 11 Gr. 412.

(*b*) Story, s. 1035 c.

(*c*) And see Estwick *v.* Caillaud, 5 T. R. 420; Holbird *v.* Anderson, 5 T. R. 235; Meux *v.* Howell, 4 East 1; The King *v.* Watson, 3 Price, 6; Small *v.* Marwood, 9 B. & C. 300; Pickstock *v.* Lyster, 3 M. & Selw. 371.

are now forbidden by statute(*a*). 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(*b*).

856. 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(*c*). It will be sufficient, if they have notice of the trust in their favour and they assent to it(*d*). As it has been said, "If the creditor has assented to it, and if he has acquiesced in it, or has acted under its provisions, and complied with its terms, and the other side express no dissatisfaction, the settled law of the court is, that he is entitled to its benefits"(*e*). And even where the creditors are required to execute the deed, before they can take under its provisions, they may take the benefit of the trust, where they have acquiesced, and taken no proceedings against the debtor(*f*).

857. 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 revokable 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,

(*a*) 22 Vic. c. 96; Con. Stat. U. C. c. 26, s. 18.

(*b*) Bank of Toronto *v.* Eccles, 10 U. C. C. P. 282; 2 Gr. E. & A. 53; Mulholland *v.* Hamilton, 10 Gr. 45.

(*c*) Lane *v.* Husband, 14 Sim. 656; Field *v.* Lord Donoughmore, 1 Dru. & War. 227. See Simmonds *v.* Palles, 2 J. & L. 489; Acton *v.* Woodgate, 2 M. & K. 492.

(*d*) Acton *v.* Woodgate, 2 M. & K. 492; Biron *v.* Mount, 24 Beav. 649.

(*e*) Field *v.* Lord Donoughmore, 1 Dru. & War. 227; Pyper *v.* McDonald, 5 U. C. L. J. 162. See Kirwan *v.* Daniel, 5 Ha. 499; Griffith *v.* Ricketts, 7 Ha. 307; Cornthwaite *v.* Frith, 4 D. & Sm. 552. As to great delay, see Gould *v.* Robertson, 4 D. & Sm. 509.

(*f*) *Re* Baber's Trusts, L. R. 10 Eq. 555; Whitmore *v.* Turquand, 1 J. & H. 444; 3 D. F. & J. 107.

as merely directing the mode in which the assignee shall and may apply the debtor's property for his own benefit(*a*).

858. 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 (*b*).

859. 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. Thus, 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(*c*).

860. But courts of equity totally disregarded this, and thus 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*(*d*). Every such assignment is considered in equity,

(*a*) Story, s. 1036 b; Garrard *v.* Lord Lauderdale, 3 Sim. 1. See Simmonds *v.* Palles, 2 J. & L. 489; Wallwyn *v.* Coutts, 3 Meriv. 707; 3 Sim. 14; Page *v.* Broom, 4 Russ. 6; Acton *v.* Woodgate, 2 M. & K. 492; Glegg *v.* Rees, L. R. 7 Chan. 71. See Mackinnon *v.* Stewart, 1 Sim. N.S. 76; Le Touche *v.* Earl of Lucan, 7 Cl. & Fin. 772; Montefiore *v.* Brown, 7 H. L. 241.

(*b*) Story, s. 1038; Farrell *v.* Heelis, Ambl. 724. And see Brown *v.* Heathcote, 1 Atk. 160, 162; Mitford *v.* Mitford, 9 Ves. 99; Jewson *v.* Moulson, 2 Atk. 417, 420; Morrall *v.* Marlow, 1 P. W. 459; *Ex parte* Hanson, 12 Ves. 349; Grant *v.* Mills, 2 V. & B. 306; *Ex parte* Peake, 1 Madd. 346. It seems that notice is necessary to perfect title of a special assignee as against the assignee in bankruptcy. See Wragge's case, L. R. 5 Eq. 284; *Ex parte* Caldwell, L. R. 13 Eq. 188.

(*c*) Co. Litt, 232 *b*, note; Stafford *v.* Buckley, 2 Ves. 177, 181; Com. Dig. *Assignment*, D; Miles *v.* Williams, 1 P. W. 252. *Choses in action*, or made assignable by statute, Ont. Stat. 35 Vic. c. 12.

(*d*) Burn *v.* Carvalho, 4 M. & C. 690; Warmstrey *v.* Tanfield, 1 Ch. Rep. 29; Goring *v.* Bickerstaff, 1 Ch. Cas. 8; Wind *v.* Jekyll, 1 P. W. 573, 574; Kimpland *v.* Courtney, 2 Freem. 251; Thomas *v.* Freeman, 2 Vern. 593, and note (2); Wright *v.* Wright, 1 Ves. Sen. 411; Stokes *v.* Holden, 1 Keen. 145; Prosser *v.* Edmonds, 1 Y. & C. Ex. 481, 486. But see Duggan's Trusts, L. R. 8 Eq. 697.

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(*a*).

861. 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*. 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(*b*).

862. Contingent and future interests and possibilities, coupled with an interest in real estate, may now be granted or assigned at law(*c*). The statute, however, does not render assignments of contingent interests, or possibilities in chattels, or mere naked possibilities not coupled with an interest, valid at law; the exclusive jurisdiction, therefore, of courts of equity as to such assignments, is untouched by the Act(*d*).

863. 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(*e*). But until the event has happened, the party contracting to buy has nothing but the contingency,

(*a*) Story, s. 1040; Co. Litt. 232 *b* note; Lord Carteret *v.* Paschal, 3 P.W. 199; Duke of Chandos *v.* Talbot, 2 P. W. 603; Wright *v.* Wright, 1 Ves. Sen. 411. See Ross *v.* Monro, 6 Gr. 431.

(*b*) Story, 1040; Langton *v.* Horton, 1 Ha. 549, 556. And see Holroyd *v.* Marshall, 6 Jur. N. S. 931; Douglas *v.* Russell, 4 Sim. 524; Watson *v.* Duke of Wellington, 1 R. & M. 602, 605; *Re* Ship Warre, 8 Price, 269 note; Curtis *v.* Auber, 1 J. & W. 526.

(*c*) Con. Stat. U. C. c. 90, s. 5.

(*d*) Snell, 73.

(*e*) Stokes *v.* Holden, 1 Keen, 145, 152, 153; Stone *v.* Lidderdale, 2 Anst. 533; Tunstall *v.* Boothby, 10 Sim. 542, 549; Wells *v.* Foster, 8 M. & W. 149; Langton *v.* Horton, 1 Ha. 549, 556, 557.

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(*a*).

864. The same effect takes place 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(*b*). Therefore, a contingent legacy, which is to vest upon some future event, such as the legatee's coming of age, may become the subject of an assignment, or a contract of sale.

865. But, although such assignments are valid in equity, yet they will not generally be carried into effect in favour of mere volunteers, or even in favour 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 favour of persons claiming for a valuable consideration(*c*).

866. In certain cases, 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(*d*). 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(*e*).

(*a*) Story, s. 1040 c ; Stokes *v.* Holden, 1 Keen, 152, 153. See Yates *v.* Madden, 16 Jur. 45 ; Spooner *v.* Payne, 16 Jur. 367 ; Carleton *v.* Leighton, 3 Mer. 667, 672.

(*b*) See Purdew *v.* Jackson, 1 Russ. 1, 26, 44, 45, 47, 50.

(*c*) Story, s. 1040 d ; Wright *v.* Wright, 1 Ves. Sen. 412 ; Whitefield *v.* Faussett, 1 Ves. Sen. 391. See also Collyear *v.* Countess of Mulgrave, 2 Keen, 81, 98 ; Collinson *v.* Pattrick, 2 Keen, 123, 134 ; Stokes *v.* Holden, 1 Keen, 145, 152, 153 ; Doungsworth *v.* Blair, 1 Keen, 795, 801, 802 ; Ellis *v.* Nimmo, Ll. & G. t. Sug. .333 ; Holloway *v.* Headington, 8 Sim. 324 ; Jones *v.* Roe, 3 T. R. 63, 94 ; Jefferys *v.* Jefferys, Cr. & Ph. 138, 181 ; Callaghan *v.* Callaghan, 8 Cl. & Fin. 374. And see Gott *v.* Gott, 9 Gr. 165.

(*d*) Collyer *v.* Fallon, T. & R. 459. But see L'Estrange *v.* L'Estrange, 13 Beav. 281 ; Webster *v.* Webster, 31 Beav. 393 ; Somerset *v.* Cox, 33 Beav. 634 ; Buller *v.* Plunkett, 1 J. & H. 441.

(*e*) Davis *v.* Duke of Marlborough, 1 Sw. 79 ; McCarthy *v.* Goold, 1 B. & B. 387 ; Stone *v.* Lidderdale, 2 Anst. 533 ; Flarty *v.* Odlum, 3 T. R, 681 ; Tunstall *v.* Boothby, 10 Sim. 540 ; Grenfell *v.* Dean of Windsor, 2 Beav. 544, 549.

867. 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(*a*). In like manner, the profits of a public office would seem, upon grounds of public policy, not to be assignable(*b*), even for the benefit of creditors.

868. A different principle, it has been thought, is 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(*c*). But it may be fairly questioned, whether the public policy, in cases of pensions, is not thereby materially thwarted and overturned. The authorities, however, seem to support the right to assign a pension(*d*).

869. 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(*e*). So, a mere right of action for a tort is not, for the like reason, assignable. 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 local instrument, or to maintain a suit(*f*).

(*a*) Wells *v.* Foster, 8 M. & W. 149. See Spooner *v.* Payne, 16 Jur. 367.

(*b*) Hill *v.* Paul, 8 Cl. & Fin. 295, 307; Palmer *v.* Bate, 2 Brod. & Bing. 673; Davis *v.* Duke of Marlborough, 1 Sw. 79. But see Arbuthnot *v.* Norton, 5 Moore, P. C. 219; 10 Jur. 145.

(*c*) Story s. 1040 f; Stone *v.* Lidderdale, 2 Anst. 533; Wells *v.* Foster, 8 M. & W. 149; Tunstall *v.* Boothby, 10 Sim. 549; *Ex parte* Battine, 4 Barn. & Ad. 690. See Feistel *v.* King's College, 10 Beav. 491.

(*d*) Heald *v.* Hay, 3 Giff. 467; Carew *v* Cooper, 4 Giff. 619; 12 W. R. 586; Knight *v.* Bulkeley, 27 L. J. N. S. Ch. 592. But see Lloyd *v.* Cheatham, 3 Giff. 171, and Imp. Act, 47 Geo. 3, c. 25, s. 4.

(*e*) Prosser *v.* Edmonds, 1 Y. & C. Ex. 481.

(*f*) Story, s. 1040 h; Prosser *v.* Edmonds, 1 Y. & C. Ex. 481, 496.

870. The distinction between the operation of assignments at law, and the operation of them in equity, may be illustrated thus: 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, the mere receipt, and even the collecting of the bill, will not necessarily amount to such an appropriation of the money to the use of the creditors, as that they can maintain 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(*a*). 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 favour of the assignee(*b*).

871. 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(*c*).

872. 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(*d*). The same principle would apply to the case of an assignment of a part of such debt(*e*). In each case, a trust would be created in favour of the equitable

(*a*) Williams *v.* Everett, 14 East, 582; Yates *v.* Bell, 3 Barn. & Ald. 643; Grant *v.* Austen, 3 Price, 58.

(*b*) Story, s. 1042; De Bernales *v.* Fuller, 14 East, 590, note.

(*c*) Adams *v.* Claxton, 6 Ves. 231.

(*d*) *Ex parte* South, 3 Swanst. 393; Lett *v.* Morris, 4 Sim. 607; *Ex parte* Alderson, 1 Mad. 53; Farquhar *v.* City of Toronto, 12 Gr. 186; Diplock *v.* Hammond, 2 Sm. & G. 141; 5 D. M. & G. 320; Buntin *v.* Georgen, 19 Gr. 167. See Collyer *v.* Fallon, T. & R. 470, 475, 476; Adams *v.* Claxton, 6 Ves. 230; Row *v.* Dawson, 1 Ves. Sen. 331; Priddy *v.* Rose, 3 Meriv. 86, 102; Bell *v.* London & Northwestern Railway, 15 Beav. 548; Foote *v.* Matthews, 4 Gr. 366.

(*e*) Smith *v.* Everett, 4 Bro. C. C. 64; Lett *v.* Morris, 4 Sim. 607; Watson *v.* Duke of Wellington, 1 R. & M. 602, 603.

assignee on the fund, and would constitute an equitable lien upon it(*a*).

873. 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(*b*).

874. 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(*c*).

875. A mere mandate from a principal to his agent, not communicated to a third person, will give him no right or interest 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 mandatory with the third person, to execute it for his benefit(*d*).

876. 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 favour of C., for a valuable consideration, amounts to a valid assignment to C. of so much of the funds of A. in the hands of B(*e*). So, indorsing and delivering a bond to an assignee for a valuable consideration, amounts to an assignment of the bond. Indeed, any order, writing, or act, which makes an appropriation of a fund,

(*a*) Story, s. 1044.

(*b*) Scott *v.* Porcher, 3 Meriv. 662. See also Acton *v.* Woodgate, 2 M. & K. 462; Wallwyn *v.* Coutts, 3 Meriv. 707, 708; 3 Sim. 14; Gerrard *v.* Lord Lauderdale, 2 R. & M. 451; Gaskell *v.* Gaskell, 2 Y. & Jerv. 502; Maber *v.* Hobbs, 2 Y. & C. 317; Glegg *v.* Rees, L. R. 7 Chan. 71.

(*c*) Williams *v.* Everett, 14 East, 582.

(*d*) Morrell *v.* Wooten, 16 Beav. 197; Scott *v.* Porcher, 3 Meriv. 662; 664; Acton *v.* Woodgate, 2 M. & K. 492.

(*e*) Row *v.* Dawson, 1 Ves. Sen. 332; Crowfoot *v.* Gurney, 9 Bing. 372; Smith *v.* Everett, 4 Bro. C. C. 64.

amounts to an equitable assignment of that fund(*a*). An assignment of a debt may be by parol, as well as by deed(*b*).

877. 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(*c*). But though this rule generally holds good, it has been observed that length of time and circumstances may make the case of the assignor stronger (*d*). But in order to perfect his title against the debtor, it is indispensable for the assignee to do all that can be done to perfect the assignment, to do everything towards having possession, which the subject admits of, and for this purpose, he 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(*e*).

878. Courts of equity on principles of public policy, will not give effect to assignments which partake of the nature of champerty or maintenance, or buying of pretended titles(*f*). 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

(*a*) Row *v.* Dawson, 1 Ves. Sen. 332; Ryall *v.* Rolles, 1 Ves. 348, 375; Townsend *v.* Windham, 2 Ves. 6; *Ex parte* Alderson, 1 Mad. 53; Burn *v.* Carvalho, 4 M. & C. 690, 702; Yeates *v.* Groves, 1 Ves. 280, 281; *Ex parte* South, 3 Sw. 393.

(*b*) Story, s. 1047; Heath *v.* Hall, 4 Taunt. 326; s. c. 2 Rose, 271; Tibbits *v.* George, 5 Ad. & Ell. 107, 115, 116.

(*c*) Priddy *v.* Rose, 3 Meriv. 86; Coles *v.* Jones, 2 Vern. 692; Turton *v.* Benson, 1 P. W. 496. And see Barnett *v.* Sheffield, 1 D. M. & G. 371; Athenæum Life Assce. Soc. *v.* Pooley, 3 D. & J. 294. See *Ex parte* New Zealand Banking Co. L. R. 3 Chan. 154; *Ex parte* City Bank, L. R. 3 Chan. 758; *In re* Natal Investment Co. L. R. 3 Chan. 355; *Ex parte* Asiatic Banking Co., L. R. 2 Chan. 391. And see Dickson *v.* Swansea, &c. R. Co., L. R. 4 Q. 44; Graham *v* Johnson, L. R. 8 Eq. 36; Watson *v.* Mid-Wales. R. Co., L. R. 2 C. P. 593; Higgs *v.* Northern A. Tea Co., L. R. 4 Ex. 387.

(*d*) Hill *v.* Caillorel, 1 Ves. Sen. 123.

(*e*) Foster *v.* Blackstone, 1 M. & K. 297; Timson *v.* Ramsbottom, 2 Keen. 35; Meux *v.* Bell, 1 Ha. 73; Deane *v.* Hall, 3 Russ. 1; Buller *v.* Plunket, 1 J. & H. 441; Feltham *v.* Clarke, 1 D. & Sm. 307. See Green *v.* Ingham, L. R. 2 C. P. 525.

(*f*) Strachan *v.* Brander, 1 Ed. 303, 309; Skapholme *v.* Hart, Rep. t. Finch, 477; Burke *v.* Green, 2 B. & B. 517; Wood *v.* Downes, 18 Ves. 125, 126; Wood *v.* Griffith, 1 Swanst. 55, 56; Wallis *v.* Duke of Portland, 3 Ves. 493, 502; Stone *v.* Yea, Jac. 426; Reynell *v.* Sprye, 1 D. M. & G. 660.

former, so that they may share the profits resulting from the success of the suit(*a*). 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, it being the unlawful maintenance of a suit, in consideration of a bargain for part of a thing, or some profit out of it(*b*).

879. 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, for it amounts to maintenance, and is the buying of a pretended title(*c*). The only exceptions to the general rule are of certain peculiar relations recognized by the law; such as that of father and son(*d*); or of an heir apparent; of the husband of an heiress(*e*); or of master and servant(*f*); and the like.

880. But a party may purchase 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 savours of maintenance; that is, provided he does not undertake to pay any costs, or make any advances beyond the mere support of the exclusive interest, which he has so acquired(*g*). A purchase, however, by an attorney, *pendente lite*, of the subject matter of the suit is invalid(*h*).

(*a*) Hartley *v.* Russell, 2 S. & S. 244. But see Harrington *v.* Long, 2 M. & K. 590.

(*b*) Stevens *v.* Bagwell, 15 Ves. 156.

(*c*) Burke *v.* Green, 2 B. & B. 521, 522; Marquis of Cholmondeley *v.* Lord Clinton, 2 J. & W. 135, 136; Powell *v.* Knowler, 2 Atk. 224; Bayly *v.* Tyrell, 2 B. & B. 358. And see Muchall *v.* Banks, 10 Gr. 25.

(*d*) Burke *v.* Green, 2 B. & B. 521.

(*e*) Moore *v.* Usher, 7 Sim. 384.

(*f*) Wallis *v.* Duke of Portland, 3 Ves. 503: And see Elborough *v.* Ayres, L. R. 10 Eq. 367; Dickinson *v.* Burrell, 14 W. R. 412; Knight *v.* Bowyer, 2 D. & J. 421, 455; Cockell *v.* Taylor, 15 Beav. 103, 117; Hunter *v.* Daniell, 4 Ha. 420.

(*g*) Story, s. 1050. See Williams *v.* Protheroe, 5 Bing. 309; 3 Y. & Jerv. 129; Harrington *v.* Long, 2 M. & K. 592; Knight *v.* Bowyer, 2 D. & J, 455; Cockell *v.* Taylor, 15 Beav. 117. But see Prosser *v.* Edmonds. 1 Y & C. Ex. 485, 496; Hartley *v.* Russell, 2 S. & S. 244; Hunter *v.* Daniel, 4 Ha 420.

(*h*) Simpson *v.* Lamb, 7 El. & Bl. 84; Anderson *v.* Radcliffe, 6 Jur. N. S. 578.

CHAPTER XXX

WILLS AND TESTAMENTS.

881. The Court of Chancery in this Province has not only the same jurisdiction as was possessed by the court in England as to wills and testaments, but has also "jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the court has jurisdiction to try the validity of deeds and other instruments"(*a*).

882 The principles which govern the court in dealing with instruments impeached on the grounds of fraud or undue influence, have already been treated of. These principles are applicable to the case of wills(*b*).

883. Although the Court in this Province has such extensive jurisdiction in the matter of wills, a few remarks on the jurisdiction which the courts in England exercised as to establishing wills, may be useful.

884. Where a will respected personal estate, it belonged to the ecclesiastical courts; and where it respected real estate, it belonged to the courts of common law. But, although this was regularly true, yet, whenever a will came before a court of equity, as an incident in a cause, they necessarily entertained jurisdiction to some extent over the subject; and if the validity of the will was admitted by the parties, or if it was otherwise established by the proper modes of proof, they acted upon it to the fullest extent(*c*). And 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, which had

(*a*) Con. Stat. U. C. c. 12, s. 28.

(*b*) And see Martin *v.* Martin, 12 Gr. 500; Donaldson *v.* Donaldson, 12 Gr. 431, where undue influence in connection with wills is discussed.

(*c*) See Morrison *v.* Arnold, 19 Ves. 670.

so determined it, would certainly grant a perpetual injunction(*a*).

885. The usual manner in which courts of equity proceeded in such cases was, that if the parties admitted the due execution and validity of the will, it was deemed *ipso facto*, sufficiently proved. If the will was of personal estate, and a probate thereof was produced from the proper ecclesiastical court, that was ordinarily deemed sufficient. But if the parties were dissatisfied with the probate, and contested the validity of the will, the court of equity, in which the controversy was depending, suspended the determination of the cause, in order to enable the parties to try its validity before the proper ecclesiastical tribunal(*b*), and then governed itself by the result(*c*). If the will was of real estate, and its validity was contested in the cause, the court directed its validity to be ascertained, either by directing an issue to be tried, or an action of ejectment to be brought at law; and governed its own judgment by the final result(*d*). If the will was established in either case, a perpetual injunction might be decreed(*e*).

886. Often the primary, although not the sole, object of a suit in equity, brought by devisees and others, was 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(*f*). In such cases, the jurisdiction exercised by courts of equity was somewhat analogous to that exercised in cases of bills of peace; and was founded upon the like considerations in order to suppress interminable litigation, and to give security and repose to titles(*g*). In every case of this sort, courts

(*a*) Sheffield *v.* Duchess of Buckinghamshire, 1 Atk. 630.
(*b*) See Allen *v.* McPherson, 1 H. L. 191.
(*c*) Sheffield *v.* Duchess of Buckinghamshire, 1 Atk. 630.
(*d*) Att.-Gen. *v.* Turner, Ambl. 587.
(*e*) Leighton *v.* Leighton, 1 P. W. 671.
(*f*) Bootle *v.* Blundell, 19 Ves. 494, 509; Leighton *v.* Leighton, 1 P. W. 671; Colton *v.* Wilson, 3 P. W. 192; Devonsher *v.* Newenham, 2 S. & L. 199; Harris *v.* Cotterell, 3 Mer. 678, 679; Morrison *v.* Arnold, 19 Ves, 670.
(*g*) See Jones *v.* Jones, 3 Mer. 161, 170; Bates *v.* Graves, 2 Ves. 288.

of equity would, unless the heir waived it, direct an issue of *devisavit vel non*, to ascertain the validity of the will(*a*).

887. The court, however, did not feel itself bound by a single verdict either way, if it was not entirely satisfactory, but would direct new trials, until there was no longer any reasonable ground for doubt(*b*). But a new trial was not directed unless there was substantial ground for believing that, on a second trial, other evidence of a weighty nature bearing against the existing conclusion could and would be produced, which was not heard before(*c*). The general rule established in courts of equity was, 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(*d*). This rule was not absolutely inflexible, but yielded to peculiar circumstances(*e*).

888. When, by these means, upon a verdict, the validity of the will was fully established, the court, by its decree, declared it to be well proved, and that it ought to be established, and granted a perpetual injunction(*f*).

889. If, on the other hand, the heir did not dispute the will, but acted under it, merely denying that certain lands passed under the description in the will, a court of equity had full jurisdiction to determine this question, without granting an issue of *devisavit vel non*, or it might grant such issue at its discretion(*g*).

(*a*) Pemberton *v.* Pemberton, 11 Ves. 53; 13 Ves. 290; Dawson *v.* Chater, 9 Mod. 90; Levy *v.* Levy, 3 Mad. 245; Cooke *v.* Cholmondeley, 2 Mac. & G. 18; Cooke *v.* Turner, 15 Sim. 611; Bootle *v.* Blundell, 19 Ves. 501, 502. And see Grove *v.* Young, 15 Jur. 810.

(*b*) Att.-Gen. *v.* Turner, Ambl. 587; Pemberton *v.* Pemberton, 11 Ves. 50, 52; s. c. 13 Ves. 290; Bootle *v.* Blundell, 19 Ves. 499; Fowkes *v.* Chadd, 2 Dick. 576.

(*c*) Waters *v.* Waters, 2 D. & Sm. 591. And see McGregor *v.* Topham, 3 H. L. 132; Hitch *v.* Wells, 10 Beav. 84.

(*d*) Jeremy on Eq. Jurisd. B. 3, ch. 1, s. 2, p. 297, 298; Bootle *v.* Blundell, 19 Ves. 499, 502, 505, 509; Ogle *v.* Cooke, 1 Ves. Sen. 177; Tatham *v.* Wright, 2 R. & M. 1.

(*e*) See Tatham *v.* Wright, 2 R. & M. 1.

(*f*) Jeremy on Eq. Jurisd. B. 3, ch. 1, s. 2, p 297, 298.

(*g*) Rickets *v.* Turquand, 1 H. L. 472.

890. Courts of equity, in cases of this sort, where the original will was lodged in the custody of the Register of the Ecclesiastical Court, and it was necessary to produce it before witnesses resident abroad, whose testimony was to be taken under a commission to prove its due execution, would 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 was any dispute about the security for the safe custody and return of the will, it was referred to a master to settle and adjust the same(*a*). If the commission was to be executed within the realm, and the witnesses were therein, the court directed the original will to be brought into its own registry, to lie there, until the court had done with it(*b*); or to be delivered out on giving security(*c*).

891. Express trusts of real and personal property created by last wills and testaments, are various in their nature and objects. They are 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 of 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(*d*).

892. Trusts are often created by will, without the designation of any trustee, or leaving it doubtful upon the terms of the will, who is the proper party to execute them. In such cases, the benefit of the interposition of equity becomes apparent, as it is a settled principle in courts of equity, that a trust

(*a*) Frederick *v.* Aynscombe, 1 Atk. 627.
(*b*) Frederick *v.* Aynscombe, 1 Atk. 627, 628.
(*c*) Morse *v.* Roach, 2 Str. 961.
(*d*) Story, s. 1058; Lewin on Trusts, 16.

shall never fail for the want of a proper trustee, and if no other is designated, courts of equity will take upon themselves the due execution of the trust.

893. Thus, also, if a testator should order his real estate, or any part thereof, to be sold for the payment of his debts, without saying who shall sell, a clear trust would be created, but a court of law will not take cognizance of the trust. A court of equity will not, however, hesitate 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.

894. In the case 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(*a*).

895. In case of a will giving power to trustees to sell an estate upon some specified trust, if they should all refuse to execute the trust, or should all die before executing it, at law, the trustees, if living, could not be compelled to execute the trust, and by their death the power would be entirely extinguished (*b*.) But a court of equity 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(*c*). If the trustees should decline, or refuse to act at all, the court would appoint other trustees, if

(*a*) Wood *v.* White, 4 M. & C. 460, 481; Lockton *v.* Lockton, 1 Ch. Cas. 180; Carville *v.* Carville, 2 Ch. 301; Blatch *v.* Wilder, 1 Atk. 420; Forbes *v.* Peacock, 11 Sim. 152, 160.

(*b*) Co. Litt. 113 *a* note (2).

(*c*) Sugden on Powers, 588; Tollett *v.* Tollett, 2 P. W. 490.

necessary, to carry the trust into effect(*a*). If the trustees should die, without executing the power, it would hold the trust to survive, and would decree its due execution by a sale of the estate for the specified trust(*b*). 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(*c*).

896. Where a testator directed his trustees to sell his real estate, and instead of selling they mortgaged and retained the estate, it was held that they thereby committed a breach of trust; and the estate having become depreciated, they were held liable for the loss. It was also held, that as against a mortgagee with notice, the mortgage was void, but that he was entitled to stand as a creditor on the produce of the estate(*d*).

897. 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, where, in a will or other instrument, the donor of the power has a general intention in favour of a class, and a particular intention in favour 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 favour of the class(*e*). Thus, where the testator bequeathed a certain leasehold estate to A. upon trust, subject to certain

(*a*) Story, s. 1061.

(*b*) Brown *v.* Higgs, 8 Ves. 570, 574; Richardson *v.* Chapman, 7 Bro. P. C. 318.

(*c*) Davy *v.* Hooper, 2 Vern. 665; Harding *v.* Glyn, 1 Atk. 469; Maddison *v.* Andrew, 1 Ves. Sen. 57; Witts *v.* Boddington, 3 Bro. C. C. 95; Cole *v.* Wade, 16 Ves. 27; Birch *v.* Wade, 3 V. & B. 198; Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561, 569, 570; Stubbs *v.* Sargon, 2 Keen, 255.

(*d*) Devaynes *v.* Robinson, 24 Beav. 86. But see Ont. Stat. 36 Vic. c. 20, s. 33, as to mortgaging lands devised to trustees, charged with the payment of debts, legacies, or other specific sums of money, where no express provision is made for raising such debts, legacies, or sums of money.

(*e*) Burrough *v.* Philcox, 5 M. & C. 73, 92.

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 favour of all the children of B. and C(*a*).

898. And where a 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 estates, 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 favour of the testator's nephews and nieces, and their children, subject to a power of selection and distribution by the surviving child(*b*). So, where the testator devised to B. in tail, and for want of issue of her body, he empowered and 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 favour of the heir, who was held to be the nearest family in the sense of the will(*c*).

899. In regard to powers, too, some subtle distinctions have been taken at law, which often require the interposition of courts of equity. Thus 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, for, in each case, it is held to be a personal trust in all the persons, unless some other language is used to the

(*a*) Story, s. 1061 b; Brown *v.* Higgs, 8 Ves. 574; 4 Ves. 708; 5 Ves. 495.
(*b*) Burrough *v.* Philcox, 5 M. & C. 73, 92. See Prendergast *v.* Prendergast, 3 H L. 218.
(*c*) Griffiths *v.* Evan, 5 Beav. 241.

contrary. But, if the testator should give authority to his executors (*eo nomine*) to sell, and should make A. and B. his executors, then, if one should die, the survivor (it has been said) could sell(*a*). 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.

900. Where the power is coupled with an interest, the construction might be different, even at law. But, at all events, if the power is coupled with a trust, courts of equity will insist upon its execution(*b*).

901. It is a general rule, that, in the execution of a power, the donee 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(*c*).

902. 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. Thus, 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 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. The old cases generally inclined to hold, that the power should be restricted to the mere application of the annual rents and profits(*d*). The more recent

(*a*) Co. Litt. 112 *b*, 113 *a*, and see Co. Litt. 181 *b*.

(*b*) Co. Litt. 113 *a*, Hargrave's note (2); Lane *v.* Debenham, 17 Jur. 1005.

(*c*) Story, s. 1062 a; Owens *v.* Dickenson, Cr. & Ph. 53. And see Langham *v.* Nenny, 3 Ves. 467; Bennett *v.* Aburrow, 8 Ves. 609, 616; Doe *v.* Nowell *v.* Roake, 6 Bing. 475, in the House of Lords, reversing the decision of the Common Pleas in the same case, 2 Bing. 497, and affirming that of the King's Bench, 5 B. & C. 720.

(*d*) Ivy *v.* Gilbert, 2 P. W. 13, 19; Trafford *v.* Ashton 1 P. W. 418; Evelyn *v.* Evelyn, 2 P. W. 666, 672; Mills *v.* Banks, 3 P. W. 1; Okeden *v.* Okeden, 1 Atk. 550.

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(*a*).

903. According to the modern doctrine, where 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(*b*).

904. 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 payment of debts was to be satisfied; and whether the 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(*c*).

905. Embarrassing questions also often arise as to the persons entitled to take under words of general descriptions

(*a*) Story, s. 1063; Green *v.* Belchier, 1 Atk. 505; Baines *v.* Dixon, 1 Ves. Sen. 42; Countess of Shrewsbury *v.* Earl of Shrewsbury, 1 Ves. 233, 234; 3 Bro. C. C. 120; Trafford *v.* Ashton, 1 P. W. 415, 419; Allan *v.* Backhouse, 2 V. & B. 65, 76; Bootle *v.* Blundell, 1 Mer. 193, 233. And see Ont. Stat. 36 Vic. c. 20, s. 33.

(*b*) Story, s. 1064 a.

(*c*) Story, s. 1064 b; Ball *v.* Harris, 4 M. & C. 264.

(*a*); as, for example, under bequests to "children," to "grandchildren," to "younger children," to "issue," to "heirs," to "next of kin," to "nephews and nieces," to "first and second cousins," to "relations," to "poor relations," to the "family," to "personal representatives," and to "servants." For these words have not a uniform fixed sense and meaning in all cases, but 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(*b*).

906. The word "child" or "children" is sometimes construed to mean "issue," and "issue" to mean "children"(*c*); "heirs" is sometimes construed to mean "children"(*d*); "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(*e*); "relations" is sometimes construed to mean the "next of kin," in the strict sense of the words,

(*a*) Examples of the interpretation of various words referred to in this and the following sections will be found in Hall *v.* Luckup, 4 Sim. 5; Dalzell *v.* Welch, 2 Sim. 319; Horridge *v.* Ferguson, Jac. 583; Lees *v.* Mosley, 1 Y. & C. Ex. 589; Earl of Orford *v.* Churchill, 3 V. & B. 59; Lady Lincoln *v.* Pelham, 10 Ves. 166; Bowles *v.* Bowles, 10 Ves. 177; Gittings *v.* McDermott, 2 M. & K. 69; Mounsey *v.* Blamire, Russ. 384; Leigh *v.* Norbury, 13 Ves. 340; Sibley *v.* Perry, 7 Ves. 522; Grant *v.* Lynam, 4 Russ. 292; Brandon *v.* Brandon, 3 Sw. 319; Smith *v.* Campbell. 19 Ves. 400; Mahon *v.* Savage, 1 S. & L. 111; Pope *v.* Whitcombe, 3 Mer. 689; Cruwys *v.* Colman, 9 Ves. 319; Worseley *v.* Jonson, 3 Atk. 761; Elmsley *v.* Young, 2 M. & K. 82; Palin *v.* Hills, 1 M. & K. 470; Price *v.* Strange, 6 Mad. 159; Piggott *v.* Green, 6 Sim. 72; Barnes *v.* Patch, 8 Ves. 604; Crossly *v.* Clare, Ambl. 397; Chambers *v.* Brailsford, 18 Ves. 368; 19 Ves. 652; Mayott *v.* Mayott, 2 Bro. C. C. 125; Charge *v.* Goodyer, 3 Russ. 140; Silcox *v.* Bell, 1 S. & S. 301; Chilcot *v.* Bromley, 12 Ves. 114; Gill *v.* Shelley, 2 R. & M. 336; Langston *v.* Langston, 8 Bligh, N. R. 167; Clapton *v.* Bulmer, 10 Sim. 426; Head *v.* Randall, 2 Y. & C. 231; Liley *v.* Hey, 1 Hare, 580, 582; Wright *v.* Atkyns, T. & R. 156; Wood *v.* Wood, 3 Ha. 65. In Mayor of Hamilton *v.* Hodsdon, 11 Jur. 193, before the Privy Council, a mistake in the report of Barnes *v.* Patch is noticed.

(*b*) Story, s. 1065 b.

(*c*) See Pope *v.* Pope, 21 L. J. N. S. Ch. 276.

(*d*) Head *v.* Randall, 2 Y. & C. 231; Minter *v.* Wraith, 13 Sim. 52. And see *Re* Stevens' Trusts, L. R. 15 Eq. 110.

(*e*) Withy *v.* Mangles, 10 Cl. & Fin. 213; Cholmondeley *v.* Ashburton, 6 Beav. 86.

and sometimes to include persons more remote in consanguinity(*a*); "personal representatives" is sometimes construed to mean the "administrators or executors," and sometimes to mean the "next of kin"(*b*); "executors" sometimes includes the persons named as executors in the will, and sometimes only such as take upon themselves that office. Among "nephews and nieces" are not ordinarily included "great-nephews and great-nieces"(*c*), nor will the expression "grand-nephews and nieces" include the children of grand-nephews and nieces(*d*).

907. The word "family" admits of a still greater variety of applications. It may mean a man's household, consisting 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(*e*).

908. A bequest to "cousins" simpliciter, in the absence of any thing to explain the meaning of the testator, includes first cousins only(*f*). A similar construction was given to the word "niece"(*g*). And in order to enable illegitimate children to take under a bequest to "daughters," it would seem to be requisite to show that there were no other persons who could answer the description, and that their reputed character did answer it, and that this was understood by the testator, which last fact will not be inferred(*h*). A gift to "my other nephews

(*a*) And see Hibbert *v.* Hibbert, L. R. 15 Eq. 372.

(*b*) Daniel *v.* Dudley, 1 Ph. 1, 6. And see Holloway *v.* Clarkson, 2 Hare, 521, 523; Bulmer *v.* Jay, 4 Sim. 48; 3 M & K. 197; Ripley *v.* Waterworth, 7 Ves. 425; Wellman *v.* Bowring, 1 S. & S. 24; 2 Russ. 374; 3 Sim. 328; Price *v.* Strange, 6 Mad. 159; Palin *v.* Hill, 1 M. & K. 470; Hames *v.* Hames, 2 Keen. 646; Grafftey *v.* Humpage, 1 Beav. 46; Mackenzie *v.* Mackenzie, 15 Jur. 1091; Long *v.* Watkinson, 16 Jur. 235; Booth *v.* Vicars, 1 Coll. 6.

(*c*) Falkner *v.* Butler, Ambl. 514; Shelley *v.* Bryer, Jac. 207.

(*d*) Waring *v.* Lee, 8 Beav. 247. But see James *v.* Smith, 14 Sim. 214.

(*e*) Story s. 1065 b; Blackwell *v.* Bull, 1 Keen. 176, 181.

(*f*) Stoddart *v.* Nelson, 6 D. M. & G. 68.

(*g*) Crook *v.* Whitley, 7 D. M. & G. 490. See also Pride *v.* Fooks, 3 D. & J. 252; Jenkins *v.* Lord Clinton, 26 Beav. 108; Smith *v.* Lidiard, 3 K. & J. 252.

(*h*) *Re* Herbert, 6 Jur. N. S. 1027. And see Allen *v.* Webster, 6 Jur. N. S. 574; Medworth *v.* Pope, 5 Jur. N. S. 996; Edmunds *v.* Fessey, 7 Jur. N. S. 282.

and nieces on both sides," was held to include the children of the brothers and sisters of the testator's wife(*a*).

909. Difficulties may also arise, where there is a bequest or devise to the next of kin, whether they are to take *per stirpes* or *per capita*(*b*). 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(*c*). 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(*d*). 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(*e*).

910. Equally embarrassing questions sometimes 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

(*a*) Frogley *v.* Phillips, 6 Jur. N. S. 641. And see Sherratt *v.* Mountford, L. R. 15 Eq, 305; 21 W. R. 818.

(*b*) Mattison *v.* Tanfield, 3 Beav. 131; Paine *v.* Wagner, 12 Sim. 184.

(*c*) See on this point, 2 Jarman on Wills, p. 37; Elmsley *v.* Young, 2 M. & K. 786 Smith *v.* Campbell, 19 Ves. 403; Withy *v.* Mangles, 4 Beav. 366; 8 Jur. 69.

(*d*) Blackwell *v.* Bull, 1 Keen, 176, 181; Odell *v.* Crone, 3 Dow, 61.

(*e*) Story, s. 1065 d.

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(*a*).

911. In regard also to legacies and bequests of chattels and other personal property, courts of equity 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(*b*). 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, the courts of equity have followed them in such interpretation, rather than the rules of the common law where they differ(*c*).

912. 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, 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

(*a*) The Mayor of Gloucester *v.* Wood, 3 Ha. 131.

(*b*) 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, s. 2, note (*d*), 1; id. B. 2, ch. 5, s. 3, and note (*k*); 1 Mad. Pr. Ch. 466, 467.

(*c*) Story, s. 1067; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, s. 4, and notes (*h*), (*i*); ib. 5, and note (*l*); ib. s. 6, and note (*o*); ib. s. 7, and notes (*q*), (*r*), (*s*); ib. s. 9, and note (*y*); ib. s. 11, and note (*a*); Crooke *v.* De Vandes, 9 Ves. 197.

in the two different species of estates, as to the title of the devisee, and the validity of the limitation over(*a*).

913. 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 devise 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 devise 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(*b*).

914. 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(*c*); but the tendency of the later

(*a*) See Forth *v.* Chapman, 1 P. W. 664; Crooke *v.* De Vandes, 9 Ves. 197, 203, 204.

(*b*) Story, s. 1067 a; Forth *v.* Chapman, 1 P. W. 664; Crooke *v.* De Vandes, 9 Ves. 197, 203, 204; Porter *v.* Bradley, 3 T. R. 143; Pells *v.* Brown, Cro. Jac. 590. And see *Ex parte* Wynch, 5 D. M. & G. 188, where this subject is discussed by Lord-Chancellor Cranworth and the Lords Justices; and also Knight *v.* Ellis, 2 Bro. C. C. 570; Lyon *v.* Mitchell, 1 Mad. 486; Tothill *v.* Pitt, 1 Mad. 487; 7 Bro. P. C. 453; Elton *v.* Eason, 19 Ves. 73; Britton *v.* Twining, 3 Mer. 176; Chandless *v.* Price, 3 Ves. 99; Att.-Gen. *v.* Bright, 2 Keen, 57; Tate *v.* Clarke, 1 Beav. 100; Jordan *v.* Lowe, 6 Beav. 350; Bird *v.* Webster, 1 Drew. 338; Aubin *v.* Daly, 4 B. & Ald. 59; Oates *v.* Cooke, 3 Burr. 1684; Trent *v.* Hanning, 1 Bos. & Pull. N. R. 116; Doe *v.* Woodhouse, 4 T. R. 89; Mogg *v.* Mogg, 1 Mer. 654; Dunk *v.* Fenner, 2 R. & M. 557; Hockley *v.* Mawbey, 1 Ves. 143; Darley *v.* Martin, 17 Jur. 1125; Clare *v.* Clare, Ca. t. Talb. 21; Warman *v.* Seaman, Ca. t. Finch, 279; Stafford *v.* Buckley, 2 Ves. Sen. 170; Goldney *v.* Crabb, 19 Beav. 338; Parker *v.* Clarke, 6 D. M. & G. 104; Hedges *v.* Harper, 3 D. & J. 129; Stewart *v.* Jones, 3 D. & J. 532; *Re* Andrew's Will, 6 Jur. N. S. 114.

(*c*) Story, s. 1068.

decisions is against construing precatory or recommendatory words as trusts(*a*).

915. No particular form of expression is necessary to the creation of a trust, if, on the whole, it can be gathered that a trust was intended. It has been laid down, as a general rule, 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 favour of another, the recommendation, entreaty, or wish, shall be held to create a trust: (1) If the words are so used, that on the whole, they ought to be construed as imperative; (2) If the subject of the recommendation or wish be certain; (3) If the objects or persons intended to have the benefit of the recommendation or wish be also certain(*b*). These three requisites must co-exist(*c*).

916. The words of recommendation used must be such that, upon the whole, they ought to be construed as imperative. The application of this rule is often attended with considerable difficulty. No technical words are necessary, but the testator's intent is to take place, and his words, "willing and desiring," that the person upon whom he has conferred property should make a disposition of it in favour of certain objects, will be construed as imperative, and amount to a trust (*d*), as also, the words and phrases—"wish and request" (*e*) "have fullest confidence"(*f*), "heartily beseech"(*g*), "well know"(*h*), "of course he will give"(*i*), and the like.

(*a*) See Sale *v.* Moore, 1 Sim. 534.

(*b*) Knight *v.* Knight, 3 Beav. 172; 11 Cl. & Fin. 513.

(*c*) See Briggs *v.* Penny, 3 Mac. & G. 554; Moriarty *v.* Martin, 3 Ir. Ch. 31.

(*d*) Eeles *v.* England, 2 Vern. 466. And see Henry *v.* Simpson, 19 Gr. 526.

(*e*) Foley *v.* Parry, 5 Sim. 138; 2 M. & K. 138; Godfrey *v.* Godfrey, 11 W. R. 554; Liddard *v.* Liddard, 28 Beav. 266.

(*f*) Wright *v.* Atkyns, 17 Ves. 255; 19 Ves. 299; Palmer *v.* Simmonds, 2 Drew. 221; Gulby *v.* Cregoe, 24 Beav. 185; Shovelton *v.* Shovelton, 32 Beav. 143.

(*g*) Meredith *v.* Heneage, 1 Sim. 553.

(*h*) Bardswell *v.* Bardswell, 9 Sim. 323; Briggs *v.* Penny, 3 Mac. & G. 546, 554.

(*i*) Robinson *v.* Smith, 6 Mad. 194. For decisions on many other similar words, see "Last wish" Hinxman *v.* Poynder, 5 Sim. 546; "dying request" Pierson *v.* Garnet, 2 Bro. C. C. 38, 226; "recomended," Tibbits *v.* Tibbets, 19 Ves. 656; Horwood *v.*

917. The subject matter of the recommendation or wish, must be certain. Thus, where a testator, who, having devised real property to his wife, to be sold for payment of his debts and legacies, in aid of his personal estate, declared that he did not doubt but that his wife would be kind to his children, it was insisted that this constituted a trust of the personal estate; but the court was of opinion that these words gave a right to no child in particular, or a right to any particular part of the estate, and that the clause was void for uncertainty (*a*). So, in an absolute devise to a person, the words "well knowing that he will remember"(*b*), certain objects, or, "do justice to," or "deal justly and properly to or by them"(*c*), have not been construed as a trust, because no particular property is pointed out as the object of it(*d*). And where there is an absolute gift of property to a person, and a recommendation to give to a certain object "what shall be left" at his death, or "what he shall die seised or possessed of" (*e*), or what "he may have saved" out of an estate given for life(*f*), the subject will be considered as uncertain(*g*).

918. The objects or persons intended to have the benefit of the recommendation or wish must be certain. Thus, where a testator gave real and personal estates to his wife, in full con-

West, 1 S. & S. 387; Malim *v.* Keighley, 2 Ves. 333, 529; Ford *v.* Fowler, 3 Beav. 146; "entreat," Prevost *v.* Clarke, 2 Mad. 458; "not doubting," Parsons *v.* Baker, 18 Ves. 476; Taylor *v.* George, 2 V. & B. 378; "under the firm conviction," Barnes *v.* Grant, 26 L. J. N. S. Ch. 92; "authorise and empower," Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192; "hope," Harland *v.* Trigg, 1 Bro. C. C. 142; Paul *v.* Compton, 8 Ves. 375.

(*a*) Buggens *v.* Yates, 9 Mod. 122. And see Sale *v.* Moore, 1 Sim. 534; Curtis *v.* Ripon, 5 Mad. 434; Dawson *v.* Clark, 15 Ves. 409; Howarth *v.* Dewell, 6 Jur. N. S. 1360.

(*b*) Bardswell *v.* Bardswell, 9 Sim. 319.

(*c*) LeMaitre *v.* Bannister, Finch, Prec. 200 n; Pope *v.* Pope, 10 Sim. 1.

(*d*) And see Flint *v.* Hughes, 6 Beav. 342; Macnab *v.* Whitbread, 17 Beav. 299; Winch *v.* Brutton, 14 Sim. 379; Reeves *v.* Baker, 18 Beav. 372; Fox *v.* Fox, 27 Beav. 301.

(*e*) Wynne *v.* Hawkins, 1 Bro. C. C. 179; Sprange *v.* Barnard, 2 Bro. C. C. 585; Bland *v.* Bland, 2 Cox, 349; Pushman *v.* Filliter, 3 Ves. 7; Wilson *v.* Major, 11 Ves. 205; Lechmere *v.* Lavie, 2 M. & K. 197; Pope *v.* Pope, 10 Sim. 1; Green *v.* Marsden, 1 Drew. 646, 651.

(*f*) Cowman *v.* Harrison, 10 Hare, 234.

(*g*) See and consider Constable *v.* Bull, 3 D. & Sm. 411.

fidence she would distinguish the heirs of his late father by devising the whole of his estate, together and entire, to such of his father's heirs as she might think best deserved her preference, the objects were thought not certain, whether the testator had pointed out the heirs at law of his father to take the personal as well as the real estate, or the heirs and next of kin, or the next of kin only(*a*). Where, however, the power is to be exercised by the donee by will, or at his death, or at or before his death, the objects will be considered to be those who answer a particular description at the death of the donee, and there will be no uncertainty(*b*).

919. Even where these three requisites exist, 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, no trust will be created(*c*). Thus, the words "free and unfettered" accompanying the strongest expressions of request, were held to prevent the words of request from being imperative(*d*).

920. Where a trust has been created in favour of certain objects, by words of recommendation, such part of the property as is not wanted for the purposes of the trust will belong to the person upon whom the property has been conferred, subject to the trust, no resulting trust arising for the next of kin or heirs at law(*e*).

921. There is another class of cases of a similar nature, where powers are given to persons accompanied with such words of

(*a*) Meredith *v.* Heneage, 1 Sim. 542; Sale *v.* Moore, 1 Sim. 534; Benson *v.* Whittam, 5 Sim. 22; Wright *v.* Atkyns, T. & R. 157, 163.

(*b*) Pierson *v.* Garnett, 2 Bro. C. C. 38, 226; Atkyns *v.* Wright, 17 Ves. 255; 19 Ves. 299; Meredith *v.* Heneage, 1 Sim. 558; Knight *v.* Knight, 3 Beav. 173; 11 Cl. & Fin. 513.

(*c*) See Ball *v.* Vardy, 1 Ves. 270; Meggison *v.* Moore, 2 Ves. 630; Knight *v.* Knight, 3 Beav. 148; 11 Cl. & Fin. 513. And also, Bernard *v.* Minshull, Johns. 276; Williams *v.* Williams, 1 Sim. N. S. 358.

(*d*) Meredith *v.* Heneage, 1 Sim. 542; 10 Price, 230; Hoy *v.* Master, 6 Sim. 568. And see Finden *v.* Stephens, 2 Ph. 142; Knott *v.* Coltee, 2 Ph. 192; Johnston *v.* Rowlands, 2 D. & Sm. 356; Shaw *v.* Lawless, 5 Cl. & Fin. 129.

(*e*) See Wood *v.* Cox, 2 M. & C. 684, overruling judgment of Lord Langdale, 1 Keen, 317.

recommendation in favour of certain objects, as to render these powers in the nature of trusts, so that the failure of the donees to exercise such powers in favour of the objects, will not turn to their prejudice, since the court will, to a certain extent, take upon itself the duties of the donees(*a*).

922. It is perfectly clear, that where there is a mere power of disposing, and that power is not executed, the court cannot execute it(*b*). It is equally clear that, wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident, the court will execute the trust(*c*).

923. But there is not only a mere trust and a mere power, but there is also known to the court a power which the party to whom it is given is intrusted and required to execute. With regard to that sort of power, the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has the duty imposed upon him does not discharge it, the court will, to a certain extent, discharge the duty in his room and place(*d*).

924. 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.

925. The doctrine of *cy pres*, it was said by V.-C. Wigram, "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

(*a*) Gower *v.* Mainwaring, 2 Ves. Sen. 87; Gude *v.* Worthington, 3 D. & Sm. 389; Reid *v.* Reid, 25 Beav. 469; Izod *v.* Izod, 32 Beav. 242; *Re* Caplin's Will, 34 L. J. N. S. Ch. 578.

(*b*) Brown *v.* Higgs, 8 Ves. 570.

(*c*) Brown *v.* Higgs, 8 Ves, 570; Att.-Gen. *v.* Lady Downing, Amb. 550; Att.-Gen. *v.* Hickman, 2 Eq. Ca. Abr. 193; Wainwright *v.* Waterman, 1 Ves. 311; Gude *v.* Worthington, 3 D. & Sm. 389.

(*d*) Brown *v.* Higgs, 8 Ves. 570. And see Burrough *v.* Philcox, 5 M. & C. 72; Davy *v.* Hooper, 2 Vern. 665; Madoc *v.* Jackson, 2 Bro. C. C. 588; Hockley *v.* Mawbey, 1 Ves. 143; Jones *v.* Torin, 6 Sim. 255; Salusbury *v.* Denton, 3 K. & J. 29; Little *v.* Neil, 10 W. R. 592; Gough *v.* Bult, 16 Sim. 45.

person, it is given 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(*a*) would so far as respected the order of the succession, only be consistent with and included in an intention to give an estate tail."

926. "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 or 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*) Pitt *v.* Jackson, 2 Bro. C. C. 51; Vanderplank *v.* King, 3 Hare, 1. See Hannam *v.* Sims, 2 D. & J. 151.

a subordinate purpose; namely, the mode of carrying out that paramount intention"*(a)*.

927. The illustrations of the constructions which courts of equity have adopted, in the case of wills, in order to effect the obvious intention of the testator, by a departure more or less marked, from the strict literal and grammatical import of the words, are, of necessity, almost as various as the cases. Some general rules will be found to obtain in all cases which are regarded as reliable. 1. That the words must have their ordinary, popular signification, technical terms excepted, unless there is something in the context, or subject-matter, to indicate a different use; and this indication must be clear and unequivocal, in order to prevail. 2. Where the words can have a natural, and also a secondary and unusual interpretation, the former will be preferred*(b)*. Words will be supplied by obvious implication*(c)*. "Or," will be read "and"*(d)*. Where a residue is given directly to a class, and it consists partly of reversionary property, the class is to be ascertained at once, and not from time to time, as the reversions fall in and become distributable*(e)*. And in construing a will, plain and distinct words are only to be controlled by words equally plain and distinct *(f)*. The general presumption is, that the testator expects the words of his will to speak from his death. A different construction will not therefore be admitted unless very obviously intended*(g)*. If the language of a will admits of two constructions,—one, reasonable and natural in its direction of property, and the other capricious and inconvenient, courts of justice may reasonably lean towards the former, as being what was properly intended*(h)*.

(*a*) Story, s. 1074 a.

(*b*) See Pasmore *v.* Huggins, 21 Beav. 103; Abbott *v.* Middleton, 21 Beav. 143; Hildersdon *v.* Grove, 21 Beav. 518; Circuitt *v.* Perry, 23 Beav. 275; Birds *v.* Askey, 24 Beav. 615; Douglas *v.* Fellows, Kay, 114; Kennedy *v.* Sedgwick, 3 K. & J. 540; Browne *v.* Hammond, Johns. 210.

(*c*) Abbott *v.* Middleton, 21 Beav. 143.

(*d*) Maude *v.* Maude, 22 Beav. 290.

(*e*) Hagger *v.* Payne, 23 Beav. 474.

(*f*) Goodwin *v.* Finlayson, 25 Beav. 65.

(*g*) Goodlad *v.* Burnett, 1 K. & J. 341; Bullock *v.* Bennett, 1 K. & J. 315.

(*h*) Jenkins *v.* Hughes, 6 Jur. N. S. 1043; Story, s. 1074 b.

928. A marked change has occurred in the construction of wills, in regard to clauses connected conjunctively being construed disjunctively, and *vice versa*. From the time of Lord Hardwicke(*a*), until a comparatively recent date(*b*), the construction of taking such clauses rather according to the general purpose and scope of the instrument had prevailed, whereby a conjunctive particle was often read disjunctively, and sometimes the contrary. But Lord Ellenborough(*c*) thought it contrary to common sense to read "and" disjunctively. Since that time the decisions have fluctuated, until it was definitely settled in the House of Lords, that the strict literal construction should prevail(*d*).

929. As a general rule, the term "money," in a will, does not include stocks, either in the public funds or private corporations. But where there is nothing else upon which the gift can operate, public stocks will pass under a bequest of "all the money I may die possessed of"(*e*). But a bequest of "all my fortune now standing in the funds," will not pass bank-stock(*f*). But in many cases, and particularly, in cases of executory devises, the gift over is held to take effect where the contemplated intervening estate never attaches, as where the gift over is upon the death of settlor's children, leaving no issue, and the settlor in fact never had any children(*g*).

930. When discussing the question of construction of wills in a late case(*h*), the Lord Chancellor said: "Upon the construction of wills 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

(*a*) Brownsword *v.* Edwards, 2 Ves. Sen. 248; Bell *v.* Phyn, 7 Ves. 453.
(*b*) Doe *v.* Jessep, 12 East, 288.
(*c*) Doe *v.* Jessep, 12 East, 288.
(*d*) Grey *v.* Pearson, 6 H. L. 61; 3 Jur. N. S. 823. See also Pearson *v.* Rutter, 3 D. M. & G. 398; Seccombe *v.* Edwards, 6 Jur N. S. 642.
(*e*) Chapman *v.* Reynolds, 6 Jur. N. S. 440. See also Cowling *v.* Cowling, 26 Beav. 449; Lowe *v.* Thomas, 5 D. M. & G. 315; Wylie *v.* Wylie, 6 Jur. N. S. 259.
(*f*) Slingsby *v.* Grainger, 5 Jur. N. S. 1111; *Re* Powell, 5 Jur. N. S. 331.
(*g*) Osborn *v.* Bellman, 6 Jur. N. S. 1325.
(*h*) Stewart *v.* Jones, 5 Jur. N. S. 229; 3 D. & J. 532.

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. And first, what is the ordinary meaning of the expressions used by the testator? If the meaning of the words he has used is clear, they must be adopted, whatever the inclination of the court may be"(*a*).

931. The disposition of the courts of equity undoubtedly is, to construe general words, following a specific enumeration of articles in a will, as limited to matters *ejusdem generis*. It was accordingly held, that a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other goods, chattels, and effects, which shall be in, upon, and about my dwelling-house and premises, at the time of my decease," did not include a sum of money found in the house (*b*).

CHAPTER XXXI.

ELECTION.

932. ELECTION is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a 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, that one shall be a substitute for the rest. The second gift is designed to be effectual only in the event of the donee declining the first; and the substance of the gifts combined is an option(*c*).

(*a*) Story, s. 1074 f.

(*b*) Gibbs *v.* Lawrence, 7 Jur. N. S. 137. And see Byrom *v.* Brandreth, 21 W. R. 942.

(*c*) See Dillon *v.* Parker, 1 Swanst, 394, note b; Thellusson *v.* Woodford, 13 Ves. 220; Birmingham *v.* Kirwan, 2 S. & L. 449. And see Stephens *v.* Stephens, 1 D. & J. 62; Usticke *v.* Peters, 4 K. & J. 437; Wintour *v.* Clifton, 21 Beav. 447.

933. 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(*a*).

934. The ground upon which courts of equity interfere is, that the purposes of substantial justice may be obtained by carrying into full effect the whole intentions of the testator(*b*). The foundation of the doctrine in cases of implied election, 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 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 destitute of legal validity, not express, but implied, which is annexed to the benefit proposed to him. To accept the bene-

(*a*) Story. s. 1076.

(*b*) Crosbie *v.* Murray, 1 Ves, 557.

fit, while he declines the burden, is to defraud the design of the donor(*a*).

935. To illustrate the doctrine of election, suppose A., by will or deed gives to B., property belonging to C., and by the same instrument gives other property belonging to himself to C., equity will hold C. to be entitled to the gift made to him by A. only, upon the implied condition of his conforming with all the provisions of the instrument, by renouncing the right to his own property in favour of B. He must, consequently, make his choice, or as it is technically termed, he is put to his election, to take either under or against the instrument.

936. Where C., the donee, elects to take under, and consequently to conform to all the provisions of the instrument, no difficulty can arise, as B. will take C.'s property, and C. will take the property given to him by A. But if C. elects to take against the instrument, that is to say, retains his own property, and at the same time, sets up a claim to the property given to him by A., an important question arises whether he thereupon incurs a forfeiture of the whole benefit conferred upon him by the instrument, or is merely bound to make compensation out of it to the person who is disappointed by his election. There are many dicta in favour of the doctrine of forfeiture(*b*), but the leading authorities support the doctrine of compensation(*c*).

(*a*) Story, s. 1077; 1 Swanst. 394, 395, note (*b*); Noys *v.* Mordaunt, 2 Vern. 581 Frank *v.* Lady Standish, 15 Ves. 391, note; Streatfield *v.* Streatfield, Cas. t. Talb. 183; Boughton *v.* Boughton, 2 Ves. 12, 14; Broome *v.* Monck, 10 Ves. 616, 617; Walker *v.* Jackson, 2 Atk. 627, 629; Clarke *v.* Guise, 2 Ves. 617; Wilson *v.* Lord Townsend, 2 Ves. 696; Blake *v.* Banbury, 4 Bro. C. C. 21, 24; 1 Ves. 514; Thellusson *v.* Woodford, 13 Ves. 220; Warren *v.* Rudall, and Hall *v.* Warren, 6 Jur. N. S. 395.

(*b*) See Cowper *v.* Scott, 3 P. W. 124; Cookes *v.* Hellier, 1 Ves. 235; Morris *v.* Burroughs, 1 Atk. 404; Pugh *v.* Smith, 2 Atk. 43; Wilson *v.* Mount, 3 Ves. 194; Wilson *v.* Townshend, 2 Ves. 697; Broome *v.* Monck, 10 Ves. 609; Thellusson *v.* *v.* Woodford, 13 Ves. 220; Villareal *v.* Lord Galway, 1 Bro. C. C. 292; Green *v.* Green, 2 Mer. 86. And see Greenwood *v.* Penny, 12 Beav. 406.

(*c*) Streatfield *v.* Streatfield, Cas. t. Talb. 176; Bor *v.* Bor, 3 Bro. P. C. 167; Ardesoife *v.* Bennet, 2 Dick, 465; Lewis *v.* King, 2 Bro. C. C. 600; Freke *v.* Barrington, 3 Bro. C. C. 284; Whistler *v.* Webster, 2 Ves. 372; Ward *v.* Baugh, 4 Ves. 627; Dashwood *v.* Peyton, 18 Ves. 49; Tibbitts *v.* Tibbitts, Jac. 317; Lord Rancliffe *v.* Parkyns, 6 Dow, 179; Kerr *v.* Wauchope, 1 Bligh, 25.

937. The conclusion from all the authorities has been thus summed up: (1) That in the event of an election to take against the instrument, courts of equity assume jurisdiction to sequester the benefits intended for the refractory donee, in order to secure compensation to those whom his election disappoints; (2) That the surplus after compensation does not devolve, as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right(*a*).

938. As the doctrine of election depends upon compensation, it follows that it will not be applicable unless there be a fund from which compensation can be made. Thus, where under a power to appoint to children, the father made an appointment improperly, it was held that any child entitled in default of appointment, might set it aside, although a specific share was appointed to him. The doctrine of election, it was said, never can be applied, but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases there must be some free disposable property given to the person, which can be made a compensation for that the testator takes away(*b*).

939. The doctrine of election is applicable to deeds as well as to wills(*c*), although by the civil law, from which it appears to have been borrowed by courts of equity, it was confined to wills(*d*). And the doctrine is applicable to interests remote, contingent, or of small value, as well as to those which are immediate, or of great value(*e*).

(*a*) 1 Swanst. 433. And see Padbury *v.* Clark, 2 Mac. & G., 298; Greenwood *v.* Penny, 12 Beav. 403; Howells *v.* Jenkins, 1 D. J. & S. 617.

(*b*) Bristowe *v.* Ward, 2 Ves. 336. See Banks *v.* Banks, 17 Beav. 352; *Re* Fowler's Trust, 27 Beav. 362.

(*c*) Bigland *v.* Huddleston, 3 Bro. C. C. 286 n; Moore *v.* Butler, 2 S. & L. 266; Birmingham *v.* Kirwan, 2 S. & L. 450; Green *v.* Green, 2 Mer. 86; Bacon *v.* Cosby, 4 D. & Sm. 261; Cumming *v.* Forrester, 2 J. & W. 345; Anderson *v.* Abbott, 23 Beav. 457; Mosley *v.* Ward, 29 Beav. 407.

(*d*) See note to Dillon *v.* Parker, 1 Sw. 394.

(*e*) Webb *v.* Earl of Shaftesbury, 7 Ves. 480; Highway *v.* Banner, 1 Bro. C. C. 584; Wilson *v.* Townsend, 2 Ves. 697; Morgan *v.* Morgan, 4 Ir. Ch. 606. But see Bor *v.* Bor, 3 Bro. P. C. 178 n.

940. In order to raise a case of election, there must appear in the will or instrument itself, a clear intention on the part of the author of it to dispose of that which is not his own(*a*). And it is immaterial whether he knew the property not to be his own, or by mistake conceived it to be his own. In either case, if the intention to dispose of it appears clearly, his disposition will be sufficient to raise a case of election(*b*).

941. The difficulty of sustaining a case of election, is always much greater where the testator has a partial interest in the property dealt with, than where he purports to devise an estate in which he has no interest at all(*c*). Where the testator has some interest, the court will lean as far as possible to a construction which would make him deal only with that to which he is entitled(*d*). But where a testator, entitled only to part of an estate, uses words in devising it, which show clearly that he intended to pass the entirety, if the owner of the other part takes other benefits by the will, he will be put to his election (*e*).

942. 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(*f*). 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

(*a*) Forrester *v.* Colton, 1 Ed. 531; Judd *v.* Pratt, 13 Ves. 168; 15 Ves. 390; Dashwood *v.* Peyton, 18 Ves. 27; Blake *v.* Bunbury, 4 Bro. C. C. 21; 1 Ves. 514; Rancliffe *v.* Lady Parkyns, 6 Dow, 149, 179; Jervoise *v.* Jervoise, 17 Beav. 566; Padbury *v.* Clark, 2 Mac. & G. 298; Lee *v.* Egremont, 5 D. & Sm. 348; Wintour *v.* Clifton, 21 Beav. 447; 8 D. M. & G. 641; Stephens *v.* Stephens, 3 Drew. 697; 1 D. & J. 62; Poole *v.* Oldham, 10 W. R. 337, 591; Fox *v.* Charlton, 10 W. R. 506. And see Churchill *v.* Churchill, L. R. 5 Eq. 44.

(*b*) Whistler *v.* Webster, 2 Ves., 370; Thellusson *v.* Woodford, 13 Ves. 221; Welby *v.* Welby, 2 V. & B. 199; Whitley *v*, Whitley, 31 Beav. 173.

(*c*) Lord Rancliffe *v.* Lady Parkyns, 6 Dow, 185.

(*d*) Maddison *v.* Chapman, 1 J. & H. 470; *Re* Bidwell's settlement, 11 W. R. 161.

(*e*) Padbury *v.* Clark, 2 Mac. & G. 298; Wintour *v.* Clifton, 21 Beav. 447; 8 D. M. & G. 644; Grosvenor *v.* Durston, 25 Beav. 97; Usticke *v.* Peters, 4 K. & J. 437; Fitzsimmons *v.* Fitzsimmons, 28 Beav. 417; Howells *v.* Jenkins, 2 J. & H. 706; 1 D. J. & S. 617. But see Chave *v.* Chave, 2 J. & H. 713 n.

(*f*) Bigland *v.* Huddleston, 3 Bro. C. C. 285; Green *v.* Green, 9 Mer. 86; 19 Ves. 665.

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 enforce 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 the party to make an election, and not to leave it uncertain under what title he may take(*a*).

943. The question of the competency of persons under disabilities, to make valid elections affecting their title to real estate, is discussed very much at length, and the cases reviewed, by Vice-Chancellor Page Wood(*b*). The conclusion to which this eminent judge came is, that a married woman can elect so as to affect her interest in real estate, without deed(*c*), acknowledged according to the requisite formalities of the statute; and that where she has, in fact, made such election upon which other parties have acted, the court can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of benefits arising from a fraud(*d*).

944. 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(*e*). But such an intention must be clear and free from ambiguity. 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

(*a*) Lord Redesdale, in Birmingham *v.* Kirwan, 2 S. & L. 450.

(*b*) Barrow *v.* Barrow, 4 K. & J. 409.

(*c*) But see Griggs *v.* Gibson, L. R. 1 Eq. 685.

(*d*) See Savage *v.* Foster, 9 Mod. 35; Gretton *v.* Hayward, 1 Swanst. 413; Lassence *v.* Tierney, 1 Mac. & G. 551; Field *v.* Moore, 19 Beav. 179; Campbell *v.* Ingilby, 21 Beav. 567; 1 D. & J. 393; Willoughby *v.* Middleton, 2 J. & H. 344; Brown *v.* Brown, L. R. 2 Eq. 481; Codrington *v.* Lindsay, L. R. 8 Chan. 578.

(*e*) Arnold *v.* Kemstead, Ambler, 466; 2 Ed. 237, and note; Villareal *v.* Galway, 1 Bro. C. C. 292. And see Dyke *v.* Rendall, 2 D. M. & G. 269; Nottley *v.* Palmer, 2 Drew. 93.

in such a devise or bequest to her title to dower(*a*). 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(*b*).

945. The mere gift 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(*c*). So, the gift of a portion of his real estate to his widow, for life or during widowhood, is not sufficient to put her to an election as to the residue of his real estate(*d*).

946. The law of the Court of Chancery, at the present day, as to a wife's duty to elect between a provision in the will of the husband and her right to dower, is, that if you find any thing in the will which is inconsistent with the assertion on the widow's part of her right to have one-third of the land set out by metes and bounds, that raises a case of election(*e*).

947. 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

(*a*) French *v.* Davies, 2 Ves. 576, 577; Lawrence *v.* Lawrence, 2 Vern. 366; and Raithby's note; 1 Swanst. 398, note; Greatorex *v.* Cary, 6 Ves. 615; Kitson *v.* Kitson, Prec. Ch. 352; Foster *v.* Cook, 3 Bro. C. C. 347; Strachan *v.* Sutton, 3 Ves. 249; Brown *v.* Perry, 2 Dick. 685; Incledon *v.* Northcote, 3 Atk. 430; Gibson *v.* Gibson, 1 Drew. 42.

(*b*) Story, s. 1088; Birmingham *v.* Kirwan, 2 S. & L. 452, 453. See also Pearson *v.* Pearson, 1 Bro. C. C. 292, and Mr. Belt's note; Norcott *v.* Gordon, 14 Sim. 258; Lord Dorchester *v.* Earl of Effingham, Coop. t. Eld. 319; Harrison *v.* Harrison, 1 Keen, 767.

(*c*) Holdich *v.* Holdich, 2 Y. & C. 18, 21, 22. And see Pearson *v.* Pearson, 1 Bro. C. C. 291; Foster *v.* Cook, 3 Bro. C. C. 347; Dowson *v.* Bell, 1 Keen, 761; Norcott *v.* Gordon, 14 Sim. 258; Hall *v.* Hill, 1 Dr. & W. 103.

(*d*) Bending *v.* Bending, 3 K. & J. 257.

(*e*) Bending *v.* Bending, 3 K. & J. 257; Birmingham *v.* Kirwan, 2 S. & L. 449; Foster *v.* Cook, 3 Bro. C. C. 347; Strahan *v.* Sutton, 3 Ves. 249; Hall *v.* Hill, 1 Dr. & W. 107; Ellis *v.* Lewis, 3 Ha. 310; Chalmers *v.* Storil, 2 V. & B. 222; Dickson *v.* Robinson, Jac. 503; Roberts *v.* Smith, 1 S. & S. 513; Gibson *v.* Gibson, 1 Drew. 42.

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 (*a*).

948. 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 every thing else, when the testator has said it is in lieu of a particular thing(*b*).

949. 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(*c*). So, if a legatee cannot obtain a particular 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(*d*). 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(*e*).

(*a*) Story, s. 1089; Ranelyffe *v.* Parkyns, 6 Dow, 149, 185; Blake *v.* Bunbury, 1 Ves. 515, 523. See Grissell *v.* Swinhoe, L. R. 7 Eq. 291; Wilkinson *v.* Dent, L. R. 6 Chan. 339.

(*b*) Story, s. 1090; East *v.* Cook, 2 Ves. 23; Dillon *v.* Parker, 1 Swanst. 404, 405, note; Wilkinson *v.* Dent, L. R. 6 Chan. 339.

(*c*) Andrews *v.* Trinity Hall, 9 Ves. 534; 1 Swanst. 402, note.

(*d*) See East *v.* Cook, 2 Ves. 23; Bor *v.* Bor, 3 Bro. P. C. 167; Huggins *v.* Alexander, cited 2 Ves. 31; Wollaston *v.* King, L. R. 8 Eq. 165; Grissell *v.* Swinhoe, L. R. Eq. 291; Cooper *v.* Cooper, L. R. 6 Chan. 15.

(*e*) Story, s. 1091; Talbot *v.* Earl of Radnor, 3 M. & K. 252.

950. 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(*a*). Questions on this point are not likely to arise now, as real estates are liable for the payment of simple contract debts, as well as those by specialty.

951. Persons compelled to elect are entitled previously to ascertain the relative value of their own property and that conferred upon them(*b*). And an election made under a mistaken impression, will not be binding, for in all cases of election the court while it enforces the rule of equity, that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed, perhaps, in ignorance of the value of the funds(*c*). Therefore, a person compelled to elect may file a bill to have all necessary accounts taken(*d*).

952. Election is either express or implied, and considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election. This question must be determined more upon the circumstances of each particular case, than upon any general principle. It is, however, settled that, any acts to be binding upon a person, must be done with a knowledge of his rights, and with the intention of electing(*e*).

952. On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circum-

(*a*) Kidney *v.* Coussmaker, 12 Ves. 154. See also Clarke *v.* [illegible] 2 Ves. 617; Dey *v.* Dey, 2 P. W. 412.

(*b*) Newman *v.* Newman, 1 Bro. C. C. 186; Wake *v.* Wake, 1 Bro. C. C. 255; Chalmers *v.* Storil, 2 V. & B. 222; Hender *v.* Rose, 3 P. W. 19[illegible].

(*c*) Pusey *v.* Desbouverie, 3 P. W. 315; Wake *v.* Wake, 3 Bro. C. C. 255; Kidney *v.* Coussmaker, 12 Ves. 136; Boynton *v.* Boynton, 1 Bro. C. C. 445.

(*d*) Butricke *v.* Brodhurst, 3 Bro. C. C. 88; Pusey *v.* Desbouverie, 3 P. W. 315.

(*e*) Stratford *v.* Powell, 1 B. & B. 1; [illegible] *v.* Parker, 1 Sw. 389; Edwards *v.* Morgan, 13 Price, 782; 1 Bligh, N. S. 405; Worthington *v.* Wiginton, 20 Beav. 67; Wintour *v.* Clifton, 21 Beav. 447, 468; 5 De M. & G. 641; Campbell *v.* Ingilby, 21 Beav. 582.

stances of the property against which the election is supposed to have been made. For, if a party so situated, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other. In like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own, as for instance, by mortgaging it (particularly if this be done with the knowledge and concurrence of the party entitled to call for an election), such dealing will be unavailing to prove an actual election as against the receipt of the rent of the other property(*a*).

954. It is difficult to lay down any rule as to what length of time, after acts done by which election is usually implied, will be binding upon a party, and prevent him setting up the plea of ignorance of his rights. Thus, three years' receipt of a legacy and annuity, under a will by a widow in ignorance of her rights, did not preclude her from making her election (*b*). And where a widow had received an annuity for five years, it was held she had not elected(*c*). But where a testator having devised to his wife all his real and personal property during her widowhood, under which she immediately on her husband's death entered upon the real estate, and applied to her own use the personal estate, the court restrained an action of dower brought by her after her second marriage, holding that she had elected against her dower, and that she was bound by the election she had made(*d*).

955. Acts of implied election which will bind a party will also bind his representatives(*e*), and some acts which would not be binding upon him, if insisted upon in his lifetime, will

(*a*) Padbury *v.* Clark, 2 Mac. & G. 298. And see Morgan *v.* Morgan, 4 Ir. Ch. 606, 614.

(*b*) Wake *v.* Wake, 1 Ves. 335.

(*c*) Reynard *v.* Spence, 4 Beav. 103; Butricke *v.* Brodhurst, 3 Bro. C. C. 90. And see Sopwith *v.* Maugham, 30 Beav. 235.

(*d*) Westacott *v.* Cockerline, 13 Gr. 79.

(*e*) Earl of Northumberland *v.* Earl of Aylesford, Amb. 540, 657. See also Stratford *v.* Powell, 1 B. & B. 1; Ardesoife *v.* Bennett, 2 Dick. 463.

bind his representatives, upon that principle only, not to disturb things long acquiesced in in families, upon the foot of rights which those in whose place they stand, never called in question(*a*). But if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation, and place the other party in the same situation as if those benefits had not been accepted, they may renounce them, and determine for themselves(*b*).

956. Where an infant is bound to elect, the period of election has, sometimes, been deferred until after he came of age (*c*). In other cases, there has been a reference to inquire what would be most beneficial to the infant(*d*), but an order may be made for an infant to elect without any reference(*e*).

957. The practice as to election by married women in the Court of Chancery, varies, but in general there will be an inquiry what is most beneficial for them, and they will be required to elect within a limited time(*f*). A married woman may elect so as to effect her interest in real property; and where she has once so elected, though without deed acknowledged, the court can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of a fraud. Having elected she is bound(*g*).

(*a*) Tomkyns *v.* Ladbroke, 2 Ves. Sen. 593; Worthington *v.* Wiginton, 20 Beav. 67; Sopwith *v.* Maugham, 30 Beav. 235, 239; Whitley *v.* Whitley, 31 Beav. 173.

(*b*) Dillon *v.* Parker, 1 Sw. 385; Moore *v.* Butler, 2 S. & L. 268; Tyssen *v.* Benyon, 2 Bro. C. C. 5.

(*c*) Streatfield *v.* Streatfield, Cas. t. Talb. 176. And see Boughton *v.* Boughton, 2 Ves. 12; Bor *v.* Bor, 3 Bro. P. C. 173.

(*d*) Chetwynd *v.* Fleetwood, 1 Bro. P. C. 300; Goodwyn *v.* Goodwyn, 1 Ves. 228; Cretton *v.* Hayward, 1 Sw. 413 Ebrington *v.* Ebrington, 5 Mad. 117; Ashburnham *v.* Ashburnham, 13 Jur. 1111; Prole *v.* Soady, 8 W. R. 131.

(*e*) Blunt *v.* Lack, 26 L. J. Ch. 148, Lamb *v.* Lamb, 5 W. R. 772.

(*f*) Pultney *v.* Darlington, 7 Bro. P. C. 546; Vane *v.* Lord Dungannon, 2 S. & L. 133; Davis *v.* Page, 9 Ves. 350.

(*g*) Ardesoife *v.* Bennett, 2 Dick. 463; Barrow *v.* Barrow, 4 K. & J. 409; Willoughby *v.* Middleton, 2 J. & H. 344; Sisson *v.* Giles, 11 W. R. 558; Saville *v.* Saville, 2 Coll. 721; Anderson *v.* Abbott, 23 Beav. 457. But see Campbell *v.* Ingilby, 21 Beav. 467; Frank *v.* Frank, 3 M. & C. 171.

CHAPTER XXXII.

SATISFACTION.

958. 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, does that by will, which is capable of being considered as a performance 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(*a*).

959. 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 of 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(*b*). And 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(*c*).

960. In regard to cases where the thing given is *ejusdem generis* with that due to the donee, the presumption that it is given in satisfaction, does not necessarily arise, nor is it, as has

(*a*) Story, s. 1099.

(*b*) Powell on Devises, 433, note (4). And see Hardingham *v.* Thomas, 2 Drew. 353.

(*c*) Weall *v* Rice, 2 R. & M. 251, 263, 268. See Kirk *v.* Eddowes, 3 Ha. 509; Hall *v.* Hill, 1 Dru. & W. 118; Twining *v.* Powell, 2 Coll. 263.

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(*a*).

961. 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(*b*). 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 favour of it, in cases of portions and advancements(*c*).

962. A distinction must be made between cases of satisfaction and cases of performance. Satisfaction supposes intention. It is something different from 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 ?(*d*)

963. The rule, as to the satisfaction or ademption(*e*) of a legacy by a portion, has been thus laid down "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 a portion; and by a sort of artificial rule upon an arti-

(*a*) Blandy *v.* Widmore, 1 P. W. 354, Mr. Cox's note (1); Lechmere *v.* Earl of Carlisle, 3 P. W. 225, 226; Atkinson *v.* Webb, 2 Vern. 478.

(*b*) See Rickman *v.* Morgan, 2 Bro. C. C. 394; Bellasis *v.* Uthwatt, 1 Atk. 426; Weall *v.* Rice, 2 R. & M. 267, 268, 351. See also Earl of Glengall *v.* Barnard, 1 Keen, 769; s. c. nom. Lady Thynne *v.* Earl of Glengall, 2 H. L. 131.

(*c*) Story, s. 1105. And see Pym *v.* Lockyer, 5 M. & C. 29, 34, 45; Kirk *v.* Eddowes, 3 Ha. 509.

(*d*) Goldsmith *v.* Goldsmith, 1 Swanst. 211.

(*e*) As to distinction between satisfaction and ademption, see Coventry *v.* Chichester, 2 H. & M. 159.

ficial notion, and a sort of feeling 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"(*a*). It is now settled that the gift of a portion of less amount than the legacy, is not a total ademption of the legacy, but merely *pro tanto*(*b*).

964. The rule or presumption against double portions is equally applicable in cases where a person has placed himself in *loco parentis*(*c*).

965. So strong is the leaning or presumption against double portions, that it will not be repelled, though there may be slight circumstances of difference between the advance and the portion(*d*); nor by the portion or legacy being payable at different times(*e*); nor by the circumstance that the limitations of the portion under the will are very different from the limitations in the settlement(*f*).

966. A gift, however, of a sum of money to the husband of a daughter, by her father, *simpliciter* after the marriage, and not in consequence of any promise made previous to the marriage taking place, will not be an ademption of a legacy given by the father to his daughter(*g*).

967. A legacy which has been adeemed by a settlement or advancement, will not be revived by a codicil made after such settlement, or advancement, although it confirms the will and all the bequests contained in it. The codicil can only act

(*a*) *Ex parte* Pye, 18 Ves, 140.

(*b*) Pym *v.* Lockyer, 5 M. & C. 29. And see Kirk *v.* Eddowes, 3 Ha. 509; Montague *v.* Montague, 15 Beav. 565; Hopwood *v.* Hopwood, 7 H, L. 728.

(*c*) Booker *v.* Allen, 2 R. & M. 270; Powys *v.* Mansfield. 3 M. & C. 359; Watson *v.* Watson, 33 Beav. 574.

(*d*) *Ex parte* Pye, 18 Ves. 140.

(*e*) Hartopp *v.* Hartopp, 17 Ves. 184.

(*f*) See Trimmer *v.* Bayne, 7 Ves. 508; Monck *v.* Monck, 1 B. & B. 298; Sheffield *v.* Coventry, 2 R. & M. 317; Platt *v.* Platt, 3 Sim. 503; Day *v.* Boucher, 3 Y. & C. Ex. 411; Powys *v.* Mansfield, 3 M. & C. 359, 374; Lord Durham *v.* Wharton, 3 Cl. & Fin. 146, reversing S. C. 5 Sim. 297; 3 M. & K, 427.

(*g*) Ravenscroft *v.* Jones, 32 Beav. 669, 670; McClure *v.* Evans, 29 Beav. 422. But see Ferris *v.* Goodburn, 27 L. J. N. S. Ch. 574.

upon the will at the time, and at the time, the legacy revoked, adeemed, or satisfied, formed no part of it(*a*).

968. The presumption, however, of satisfaction being intended, may be repelled by the intrinsic evidence furnished by the different nature of the gifts, where, for instance, the testamentary portion and subsequent advancement are not *ejusdem generis*. Thus, a legacy to a son, of $500, was held not to be adeemed by a subsequent gift of one-half of the testator's stock in trade, valued at $1,500(*b*). And a legacy of a sum of money will not be adeemed by an allowance of an annuity(*c*). So, also, where the testamentary portion is certain, and the subsequent advancement depends upon a contingency, the presumption of satisfaction will be repelled(*d*).

969. It was formerly held, that where the bequest was of an uncertain amount, as a bequest of a residue, or part of a residue, the presumption would not arise, as the idea of a portion *ex vi termini* was a definite sum(*e*). But it has since been decided that a portion, by settlement or otherwise, will be a satisfaction, according to the amount, either in full or *pro tanto*, of a previous bequest of a residue(*f*).

970. An advancement may be made to a child, at other times than that of marriage, and the presumption against double portions will then arise. For instance, if a subsequent gift be described in a writing as a portion, or if an advancement be made, not evidenced by writing, evidence is admissible to show the nature of the transaction, But the court

(*a*) Powys *v.* Mansfield, 3 M. & C. 376.

(*b*) Holmes *v.* Holmes, 1 Bro. C. C. 555; Davys *v.* Boucher, 3 Y. & C. Ex. 411. But see remarks on Holmes *v.* Holmes, in Pym *v.* Lockyer, 5 M. & C. 48.

(*c*) Watson *v.* Watson, 33 Beav. 574. And see Pankhurst *v.* Howell, L. R. 6 Chan. 136.

(*d*) Spinks *v.* Robins, 2 Atk. 493; Crompton *v.* Sale, 2 P. W. 553. But see Powys *v.* Mansfield, 3 M. & C. 359, 374.

(*e*) Freemantle *v.* Banks, 5 Ves. 85. And see Farnham *v.* Phillips, 2 Atk. 215; Smith *v.* Strong, 4 Bro. C. C. 493; Davys *v.* Boucher, 3 Y. & C. Ex. 397.

(*f*) Scholfield *v.* Heap, 27 Beav. 93; Beckton *v.* Barton, 27 Beav. 99; Montefiore *v.* Guadalla, 1 D. F. & J. 93. And see Lady Thynne *v.* Earl of Glengall, 2 H. L. 131.

will not add up small sums which a parent may give to a child, to show they were intended as a portion(*a*).

971. A legacy by a parent, or person in *loco parentis*, is not satisfied by occasional small gifts in the testator's life time(*b*). And a sum of money given by a father to his daughter for a wedding outfit and a wedding trip, has been held not to be an ademption of a legacy(*c*).

972. With respect to the satisfaction of a portion by a legacy, the rule is, that wherever a legacy given by a parent, or a person standing in *loco parentis*, is as great as, or greater than, a portion or provision previously secured to the legatee upon marriage or otherwise, then, from the strong inclination of courts of equity against double portions, a presumption arises that the legacy was intended by the testator as a complete satisfaction(*d*). If the legacy is not so great as the portion or provision, a presumption arises that it was intended as a satisfaction *pro tanto*(*e*). And the bequest of the whole, or part of a residue, will, according to its amount, be presumed either a satisfaction of a portion in full or *pro tanto*(*f*).

973. Considerable differences only between the settlement and the will are considered sufficient to repel the presumption of satisfaction. Slight variations between the settlement and will, as for instance, as to the time of the payment of the portion or legacy, or between the limitations in the settlement and the will, are not sufficient for that purpose(*g*). The pre-

(*a*) Suisse *v.* Lowther, 2 Ha. 434; Scholfield *v.* Heap, 27 Beav. 93.

(*b*) Watson *v.* Watson, 33 Beav. 574. But see Ferris *v.* Goodburn, 27 L. J. N. S. Ch. 574.

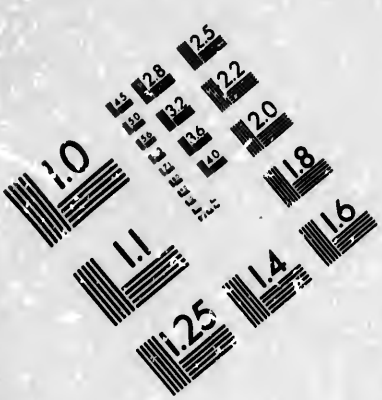
(*c*) Ravenscroft *v.* Jones, 32 Beav. 669.

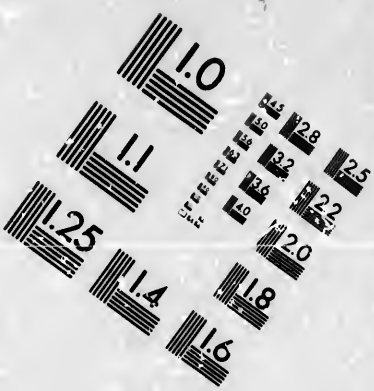
(*d*) Bruen *v.* Bruen, 2 Vern. 439; Moulson *v.* Moulson, 1 Bro. C. C. 82; Copley *v.* Copley, 1 P. W. 147; Ackworth *v.* Ackworth, 1 Bro. C. C. 307 n; Finch *v.* Finch, 1 Ves. 534; Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516; Sparks *v.* Cator, 3 Ves. 530; Pole *v.* Lord Somers, 6 Ves. 309; Bengough *v.* Walker, 15 Ves. 507. And see Lethbridge *v.* Thurlow, 15 Beav. 334; Ferris *v.* Goodburn, 27 L. J. N. S. Ch. 574.

(*e*) Warren *v.* Warren, 1 Bro. C. C. 305.

(*f*) See Lady Thynne *v.* Earl of Glengall, 2 H. L. 131; Richman *v.* Morgan, 1 Bro. C. C. 63; 2 Bro. C. C. 394; Bengough *v.* Walker, 15 Ves. 507; Coventry *v.* Chichester, 2 H. & M. 149; Campbell *v.* Campbell, L. R. 1 Eq. 383.

(*g*) Sparkes *v.* Cator, 3 Ves. 530; Weall *v.* Rice, 2 R. & M. 251; Earl of Glengall *v.* Barnard, 1 Keen, 769; S. C. nom. Lady Thynne *v.* Earl of Glengall, 2 H. L. 131; Coventry *v.* Chichester, 2 H. & M. 149.





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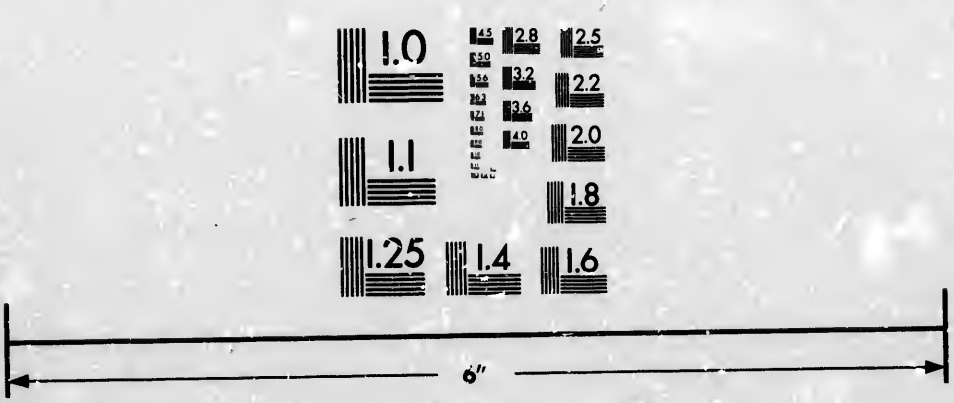

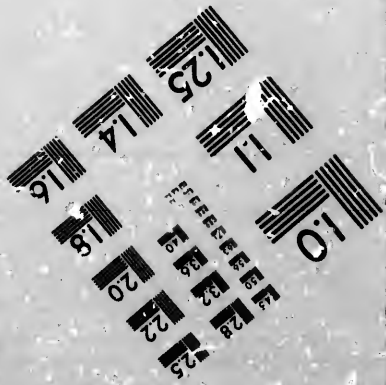

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sumption, however, of satisfaction being intended, may be repelled by intrinsic evidence, showing the intention of the parent in favour of double portions(*a*). Such intention may also be sufficiently indicated from the different nature of the gifts. Thus, where the portion is vested, and the legacy is contingent, the presumption will be repelled; for it would be hard to say that a mere contingency should take away a portion absolutely vested(*b*). So, also, where the gift by the will and the portion are not *ejusdem generis*, the presumption will be repelled. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land(*c*).

974. Where a parent, or person in *loco parentis*, makes a provision by a settlement for his children, equal to or greater than a provision contained in a former settlement, it may be considered as a satisfaction. As, for instance, where, by a will, executed contemporaneously with the second settlement, he declares that a provision contained in it is to be taken as a satisfaction(*d*). But no presumption will arise where there are those distinctions between the nature of the two gifts which the court has relied upon in cases of satisfaction upon wills, to show that the presumption does not arise(*e*).

975. Where the first provision is by a will, it being a voluntary irrevocable instrument, a subsequent advance will be a satisfaction, either wholly or in part, without reference to the wishes of the person advanced. If, however, the first provision is by settlement or other contract, a subsequent legacy, considered as an advancement, will raise a case of election, that is to say, the legatee may, at his option, take either the first or last provision(*f*).

(*a*) Lethbridge *v.* Thurlow, 15 Beav. 334.

(*b*) Bellasis *v.* Uthwatt, 1 Atk. 426; Hanbury *v.* Hanbury, 2 Bro. C. C. 352. And see Pierce *v.* Locke, 2 Ir. Ch. 205, 215.

(*c*) Goodfellow *v.* Burchett, 2 Vern. 298; Bellas's *v.* Uthwatt, 1 Atk. 428; Ray *v.* Stanhope, 2 Ch. Rep. 159; Saville *v.* Saville, 2 Atk. 458; Grave *v.* Earl of Salisbury, 1 Bro. C. C. 425. But see Bengough *v.* Walker, 15 Ves. 507.

(*d*) Davis *v.* Chambers, 7 D. M. & G. 386.

(*e*) Palmer *v.* Newell, 20 Beav. 32, 40; 8 D. M. & G. 74.

(*f*) Copley *v.* Copley, 1 P. W. 147; Finch *v.* Finch, 1 Ves. 534; Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516; Pole *v.* Somers, 6 Ves. 309.

976. Another point which courts of equity are sometimes called upon to determine is, whether a second legacy is to be taken as substitutional or accumulative. Where the same specific thing or corpus is given, either in the same or in different instruments, in the nature of the thing it can but be a ratification; where, for instance, there are two gifts of a ruby ring and there is no pretence that there are two ruby rings(*a*).

977. It is also clear that, where a testator by different testamentary instruments, has given legacies of quantity, *simpliciter*, to the same person, the court considering that he who has given more than once, must *prima facie* be intended to mean more than one gift, awards to the legatee all the legacies. And it is immaterial whether any subsequent legacy is of the same amount(*b*), or less(*c*), or larger than the first(*d*). The case is still stronger in favour of the legatee, where there is any variation as to the mode or times of payment, as when the legacy given by a will, and that given by a codicil are payable at different times, carry interest from different dates, or are given over to different persons(*e*). So, when the legacies are given upon or for different trusts and purposes(*f*).

978. But where the legacies, although given by different instruments, are not given *simpliciter*, but the motive of the gift is expressed, and the same motive is expressed, and the same sum given, by both instruments, the court considers

(*a*) See Duke of St. Albans *v.* Beauclerc, 2 Atk. 638; Ridges *v.* Brown, 1 Bro. C. C. 392; Suisse *v.* Lowther, 2 Ha. 432; Roxburgh *v.* Fuller, 13 W. R. 39.

(*b*) Wallop *v.* Hewett, 2 Ch. Rep. 70; Newport *v.* Kynaston, Rep. t. Finch. 294; Hooley *v.* Hatton, 1 Bro. C. C. 390 n; Baillee *v.* Butterfield, 1 Cox, 392; Forbes *v.* Lawrence, 1 Coll. 495; Radburn *v.* Jervis, 3 Beav. 450; Lee *v.* Pain, 4 Hare, 201, 216; Roch *v.* Callen, 6 Ha. 531; Russell *v.* Dickson, 4 H. L. 304; Wilson *v.* O'Leary, L. R. 12 Eq. 525.

(*c*) Pit *v.* Pidgeon, 1 Ch. Ca. 301; Hunt *v.* Beach, 5 Mad. 358; Townshend *v.* Mostyn, 26 Beav. 72.

(*d*) Suisse *v.* Lowther, 2 Hare, 424; Hertford *v.* Lowther, 7 Beav. 107; Lyon *v.* Colville, 1 Coll. 449; Brennan *v.* Moran, 6 Ir. Ch. 126.

(*e*) See Hodges *v.* Peacock, 3 Ves. 735; Mackenzie *v.* Mackenzie, 2 Russ. 262; Bartlett *v.* Gillard, 2 Russ. 149; Guy *v.* Sharp, 1 M. & K. 589; Wray *v.* Field, 6 Mad. 300; Watson *v.* Reid. 5 Sim. 431; Strong *v.* Ingram, 6 Sim. 197; Robley *v.* Robley, 2 Beav. 95; Att.-Gen. *v.* George, 8 Sim. 138.

(*f*) Saurey *v.* Rumney, 5 D. & Sm. 698. And see Spire *v.* Smith, 1 Beav. 419.

these two coincidences as raising a presumption that the testator did not by a subsequent instrument mean another gift, but meant only a repetition of the former gift(*a*). This presumption is raised, however, only where the double coincidence occurs, of the same motive, and the same sum in both instruments. It will not be raised, if in either instrument there be no motive, or a different or additional motive expressed, although the sums be the same(*b*). Nor will the presumption that repetition only, and not accumulation, was intended, arise, although the same motive be expressed in different instruments, if the sums are different(*c*).

979. Where a second instrument expressly refers to the first, although the legacies given in each to the same person may be of different amounts, it may appear, from intrinsic evidence, upon the true construction of the words in the second instrument, that the latter gift was intended to be substitutional (*d*). So, where a codicil furnishes intrinsic evidence that the testator is thereby revising, explaining, and qualifying his will, legacies may be construed to be substitutional(*e*), and a later instrument which appears, as to the legacies, to be a mere copy of the former, will so far be held as substitutional (*f*).

980. Where legacies of quantity are given by the same instrument, whether a will or a codicil, to the same person *simpliciter*, and are of equal amount, one only will be good, the repetition being considered to arise from forgetfulness. Nor

(*a*) Hurst *v.* Beach, 5 Mad. 358; Benyon *v.* Benyon, 17 Ves. 34.

(*b*) Roch *v.* Callen, 6 Ha. 531; Ridges *v.* Morrison, 1 Bro. C. C. 388. And see Mackinnon *v.* Peach, 2 Keen, 555; Moggridge *v.* Thackwell, 1 Ves. 473; Lobley *v.* Stocks, 19 Beav. 392.

(*c*) Hurst *v.* Beach, 5 Mad. 352; Lord *v.* Sutcliffe, 2 Sim. 273.

(*d*) Mayor of London *v.* Russell, Rep. t. Finch, 290; Martin *v.* Drinkwater, 2 Beav. 215; Bristow *v.* Bristow, 5 Beav. 289; Currie *v.* Pye, 17 Ves. 642.

(*e*) Moggridge *v.* Thackwell, 1 Ves. 464; 3 Bro. C. C. 517; Fraser *v.* Byng, 1 R. & M. 90.

(*f*) Coote *v.* Boyd, 2 Bro. C. C. 521. And see Barclay *v.* Wainwright, 3 Ves. 462; Att.-Gen. *v.* Harley, 4 Mad. 263; Hemming *v.* Gurney, 2 S. & S. 311; 1 Bligh, N. R. 479; Gillespie *v.* Alexander, 2 S. & S. 145; Campbell *v.* Lord Radnor, 1 Bro. C. C. 271; Tuckey *v.* Henderson, 33 Beav. 184; Hinchcliffe *v.* Hinchcliffe, 2 Dr. & Sm. 96; Roxburgh *v.* Fuller, 13 W. R. 39.

will small differences in the way in which the gifts are conferred, afford internal evidence that the testator intended that they should be cumulative. If, however, the legacies given by the same instrument are of unequal amount, and not merely as might be inferred from Hooley *v.* Hatton, where a large sum is given after a less, they will be considered cumulative(*a*).

931. The intention of the testator, when it can be collected from the instrument containing two legacies, will, of course, override any presumption which might be raised in the absence of such intention(*b*). And although legacies given by different instruments are equal, if they were intended by the testator to be cumulative(*c*), or if though differing in amount, the latter was intended to be substitutional(*d*), the intention will be carried into effect.

982. On the question of the admission of extrinsic evidence, the conclusion from the authorities seems to be, that where the court itself raises the presumption against double legacies, as where two legacies of equal amount are given by one instrument, parol evidence is admissible to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will. On the other hand, when the court does not raise the presumption, as where legacies of equal amount are given *simpliciter* by different instruments, parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will(*e*).

(*a*) Greenwood *v.* Greenwood, 1 Bro. C. C. 31 n; Garth *v.* Meyrick, 1 Bro. C. C. 30; Holford *v.* Wood, 4 Ves. 76; Manning *v.* Thesiger, 3 M. & K. 29. And see Brine *v.* Ferrier, 7 Sim. 549; Early *v.* Benbow, 2 Coll. 342; Early *v.* Middleton, 14 Beav. 453.

(*b*) Yockney *v.* Hansard, 3 Ha. 622; Curry *v.* Pile, 2 Bro. C. C. 225. See Baylee *v.* Quinn, 2 Dr. & War. 116; Adnam *v.* Cole, 6 Beav. 353; Hartley *v.* Ostler, 22 Beav. 449.

(*c*) Lobley *v.* Stocks, 19 Beav. 392.

(*d*) Russell *v.* Dickson, 4 H. L. 293. And see as to the effect of probate having been granted to two distinct writings, Baillie *v.* Butterfield, 1 Cox, 392; Campbell *v.* Lord Radnor, 1 Bro. C. C. 272; Walsh *v.* Gladstone, 1 Ph. 294; Heming *v.* Clutterbuck, 1 Bligh, N. R. 491, 492; Brine *v.* Ferrier, 7 Sim. 549.

(*e*) See Hurst *v.* Beach, 5 Mad. 351; Guy *v.* Sharp, 1 M. & K. 589; Hall *v.* Hill, 1 Dr. & War. 94, 116; Lee *v.* Pain, 4 Ha. 216; Martin *v.* Drinkwater, 2 Beav. 215; Coote *v.* Boyd, 2 Bro. C. C. 527.

983. The general rule with respect to the satisfaction of a debt by a legacy is, that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt; so that he shall not have both the debt and the legacy(*a*).

984. The rule as to this presumption has met with the censure of the most eminent judges, as founded upon reasoning alike artificial and unsatisfactory. They have, although not breaking through this rule, said they would not go further, and have always endeavoured to lay hold of trifling circumstances, in order to take cases out of it(*b*).

985. In this class of cases, there is a leaning against, as in the two first classes of cases, a leaning in favour of, the presumption of satisfaction. Thus, where the legacy is of less amount than the debt, the presumption is, that it was not intended to be given in lieu of it. It will not therefore be considered a satisfaction, even *pro tanto*(*c*). So also, the presumption of satisfaction being intended, will be repelled where the legacy, though in amount equal to, or greater than the debt, is payable at different times, so as not to be equally advantageous to the legatee as the payment of the debt(*d*).

986. The presumption will also be repelled, where the legacy and debt are of a different nature, either with reference to the subjects themselves, or with respect to the interest

(*a*) Talbot *v.* Duke of Shrewsbury, Prec. Ch. 394. See also Brown *v.* Dawson, Prec. Ch. 240; Fowler *v.* Fowler, 3 P. W. 353; Richardson *v.* Greese, 3 Atk. 68; Gaynon *v.* Wood, 1 Dick. 331; Bensusan *v.* Nehemias, 4 D. & Sm. 381; Shadbolt *v.* Vanderplank, 29 Beav. 405.

(*b*) Lady Thynne *v.* Earl of Glengall, 2 H. L. 153; Richardson *v.* Greese, 3 Atk. 65.

(*c*) Cranmer's Ca., 2 Salk. 508; Atkinson *v.* Webb, 2 Vern. 478; Eastwood *v.* Vinke, 2 P. W. 614, 617; Minuel *v.* Sarazine, Mos. 295; Graham *v.* Graham, 1 Ves. 263. But see Hammond *v.* Smith, 33 Beav. 452.

(*d*) Atkinson *v.* Webb, Prec. Ch. 236; Nicolls *v.* Judson, 2 Atk. 300; Hales *v.* Darrell, 3 Beav. 324, 332; Charlton *v.* West, 30 Beav. 124. And see Pinchin *v.* Simms, 30 Beav. 119; Matthews *v.* Matthews, 2 Ves. 635; Clarke *v.* Sewell, 3 Atk. 96 Haynes *v.* Mico, 1 Bro. C. C. 129; Jeacock *v.* Falkner, 1 Bro. C. C. 295.

given(*a*), or is not co-extensive with the debt(*b*). And where there is a particular motive assigned for the gift, it will not be presumed to be a satisfaction for a debt(*c*).

987. Where the legacy is contingent, or uncertain whether it be given upon the happening of a contingency(*d*), or is in itself of an uncertain or fluctuating nature, as a gift of the whole, or a part of the testator's residuary estate, even though it should prove greater in amount than the debt, it will not be held a satisfaction(*e*); and the result will be the same if the debt itself is contingent or uncertain, as a debt upon an open or running account; for it might not be known to the testator whether he owed any money to the legatee or not, and therefore, it could not reasonably be held that he intended all or any to be in satisfaction of a debt which he did not know that he owed(*f*) But the presumption will not be rebutted by the circumstance that the debt is liable to variation in amount(*g*).

988. The presumption will not be raised where the debt of the testator was contracted subsequently to the making of the will, for he could have had no intention of making any satisfaction for that which was not in existence(*h*), and where there is an express direction in the will for payment of debts and legacies, the court will infer that it was the intention of the testator, that both the debt and the legacy should be paid to the creditor(*i*).

989. A legacy given by the will of a parent to a child, is not upon any different footing from that of a legacy by any other person, as a satisfaction of a debt, not being a portion.

(*a*) Eastwood *v.* Vinke, 2 P. W. 614.
(*b*) Alleyn *v.* Alleyn, 2 Ves. 37.
(*c*) Matthews *v.* Matthews, 2 Ves. 635.
(*d*) Crompton *v.* Sale, 2 P. W. 553.
(*e*) Devese *v.* Pontet, 1 Cox, 188; Barret *v.* Beckford, 1 Ves. 519; Lady Thynne *v.* Earl of Glengall, 2 H. L. 154.
(*f*) Rawlins *v.* Powell, 1 P. W. 297; Carr *v.* Eastabrooke, 3 Ves. 561.
(*g*) Edmunds *v.* Low, 3 K. & J. 318.
(*h*) Cranmer's Ca. 2 Salk. 508; Thomas *v.* Bennet, 2 P. W. 343; Plunkett *v.* Lewis, 3 Hare, 330.
(*i*) Richardson *v.* Greese, 3 Atk. 65; Field *v.* Martin, Dick. 543; Hales *v.* Darrell, 3 Beav. 324, 332.

Therefore, where a father owes a mere debt to a child, a subsequent legacy, will not in the absence of intention, express or implied, be considered as a satisfaction of the debt, unless it be either equal to, or greater than, the debt, in amount, and the presumption of satisfaction be not repelled by any of those slight circumstances, which will take a bequest of such amount to a stranger, out of the general rule(*a*).

990. Where the presumption arises merely from the fact of a legacy to a creditor being equal to or greater than the amount of the debt, it would appear, upon principle, that evidence ought to be admitted to rebut the presumption, and if so, evidence may on the other hand be admitted to fortify it(*b*). However, Lord Talbot refused on one occasion to admit such evidence(*c*), and this decision appears to have been approved of by Lord Chancellor Sugden(*d*).

CHAPTER XXXIII.

CONVERSION.

991. Nothing is better established than the principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise. Whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties may make land money, or money land(*e*).

(*a*) Tolson *v.* Collins, 4 Ves. 483; Stocken *v.* Stocken, 4 Sim. 152.
(*b*) Plunkett *v.* Lewis, Ha. 316.
(*c*) Fowler *v.* Fowler, 3 P. W. 353.
(*d*) Hall *v.* Hill, 1 Dr. & War. 121.
(*e*) Fletcher *v.* Ashburner, 1 Bro. C. C. 499.

992. The direction to convert either money into land, or land into money, must be express and imperative, for if conversion be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found(*a*). But although the conversion is apparently optional, as, where trustees are directed to lay out personalty, "in lands or some other securities," as they shall think most fit and proper, yet if the limitation and trust of the money directed to be laid out are only adapted to real estate, so as to denote the testator's intention that land shall be purchased, this circumstance will outweigh the presumed option, and the money will be considered land(*b*). In any case, where it is clear that a testator, whatever may be the language he has used, intended that a conversion should take place at all events, equity holding the doctrine that the intent rather than the form is to be considered, will direct that the property should be converted in accordance with the testator's wishes (*c*).

993. Where absolute conversion is directed to be made by deed, if no time for it be pointed out, it will take place from the delivery of the deed(*d*). And in the case of a will it will take place from the death of the testator(*e*), even although there may be a direction that a sale should take place "whenever it should appear advantageous"(*f*).

994. Although it is true as a general rule, that in a deed conversion takes place from the date of its execution, caution is necessary in applying the rule to instruments, such as mortgage deeds, where the general intention of the author of the trust is neither to convert nor to alter the devolution of pro-

(*a*) Curling *v.* May, cit. 3 Atk. 255; Van *v.* Barnett, 19 Ves. 102; Amler *v.* Amler, 3 Ves. 583; Bourne *v.* Bourne, 2 Hare, 35; Polley *v.* Seymour, 2 Y. & C. Ex. 708.

(*b*) Earlom *v.* Saunders, Amb. 241; Johnson *v.* Arnold, 1 Ves. 169; Cookson *v.* Reay, 5 Beav. 22; 12 Cl. & Fin. 120; Cowley *v.* Hartstong, 1 Dow, 361.

(*c*) Thornton *v.* Hawley, 10 Ves. 129; Grieveson *v.* Kirsopp, 2 Keen, 653; Davis *v.* Goodhew, 6 Sim. 585; Burrell *v.* Baskerfield, 11 Beav. 525.

(*d*) Griffith *v.* Ricketts, 7 Hare, 299; Clarke *v.* Franklin, 4 K. & J. 257.

(*e*) Beauclerk *v.* Mead, 2 Atk. 167. See Ward *v.* Arch, 15 Sim. 389.

(*f*) Robinson *v.* Robinson, 19 Beav. 495.

perty, but merely to raise money. Thus, where default having been made in payment of a mortgage, the mortgagee after the death of the mortgagor intestate, exercised the power of sale, it was held that if the estate had been sold in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor, but the estate being unsold at his death, the equity of redemption descended to his heir, and he was entitled to the surplus(*a*).

995. The conversion may be made to depend upon the option to purchase at a future time(*b*). Until, however, the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate(*c*).

996. Where a conversion is directed, whether by will or by settlement, or other instrument *inter vivos*, whether of money into land, or of land into money, if the objects and purposes for which the conversion was directed, have totally failed before the instrument directing the conversion comes into operation, no conversion will take place, but the property so directed to be converted, will remain in its original state, or rather, will result to the testator or settlor with its original form unchanged(*d*).

997. With regard to partial failure of the purposes for which conversion is directed, there is a material distinction as to the application of the doctrine to cases where the conversion is directed by will, and to cases where it is directed by deed. In the case of conversion directed by will, if there has been any partial failure of the purposes for which the conversion has been directed, to that extent it will result to the testator's rep-

(*a*) Wright *v.* Rose, 2 S. & S. 323.

(*b*) Lawes *v.* Bennett, 1 Cox, 167.

(*c*) Townley *v.* Bedwell, 14 Ves. 591; *Ex parte* Hardy, 30 Beav. 206. See also Collingwood *v.* Row, 3 Jur. N. S. 785; Gold *v.* Teague, 7 W. R. 84; Weeding *v.* Weeding, 1 J. & W. 424; Woods *v.* Hyde, 10 W. R. 339. But see Drant *v.* Vanse, 1 Y. & C. 580; Emuss *v.* Smith, 2 D. & Sm. 722.

(*d*) See Clarke *v.* Franklin, 4 K. & J. 257; Ripley *v.* Waterworth, 7 Ves. 435; Smith *v.* Claxton, 4 Mad. 492.

resentatives, real or personal, who would have been entitled to take it, had no conversion been directed(*a*). Where by an instrument *inter vivos*, conversion is directed for certain specified purposes or objects, and a part of these purposes or objects fail, the property to that extent results to the settlor, not in its original form, but in the form into which he has directed it to be converted(*b*).

998. A wrongful conversion of property by trustees will not affect the interests of the *cestuis que trust*. Thus, if real property be wrongfully converted into personalty, or personalty into realty, each property so converted will be considered to retain its original character(*c*).

999. Although land absolutely directed or agreed to be converted into money, and money directed to be converted into land, will immediately be impressed with the character of the property into which each is respectively to be converted, still this notional conversion may be put an end to, by the absolute owner electing to take the property in its actual state. And the court will not direct a conversion against his election, because when converted, he might immediately reconvert it(*d*).

(*a*) See Ackroyd *v.* Smithson, 1 Bro. C. C. 503; Hill *v.* Cock, 1 V. & B. 175; Hodgson *v.* Bective, 1 H. & M. 376; s. c. nom. Bective *v.* Hodgson, 10 H. L. 656; Jessop *v.* Watson, 1 M. & K. 665; Robinson *v.* Taylor, 2 Bro. C. C. 589; Berry *v.* Usher, 11 Ves. 87; Wilson *v.* Major, 11 Ves. 205; Watson *v.* Hayes, 2 M. & C. 125; Fitch *v.* Weber, 6 Hare, 145; Shallcross *v.* Wright, 12 Beav. 505; Gordon *c.* Atkinson, 1 D. & Sm. 478; Taylor *v.* Taylor, 3 D. M. & G. 190; Ellis *v.* Bartrum, 25 Beav. 110.

(*b*) Hewitt *v.* Wright, 1 Bro. C. C. 86. See also Van *v.* Barnett, 19 Ves. 102; Biggs *v.* Andrews, 5 Sim. 424; Griffith *v.* Ricketts, 7 Hare, 299, 311; Clarke *v.* Franklin, 4 K. & J. 257; Pultney *v.* Darlington, 1 Bro. C. C. 223; Lechmere *v.* Lechmere, Ca. t. Talb. 80.

(*c*) Lewin on Trusts, 825.

(*d*) Seeley *v.* Jago, 1 P. W. 389. An infant cannot ordiarily elect, Carr *v.* Ellison, 2 Bro. C. C. 56; Van *v.* Barnett, 19 Ves. 102; Robinson *v.* Robinson, 19 Beav. 494. A lunatic cannot elect, Ashby *v.* Palmer, 1 Mer. 296; *Re* Wharton, 5 D. M. & G. 33. As to election by a married woman, see Oldham *v.* Hughes, 2 Atk. 452; Frank *v.* Frank, 3 M. & C. 171; May *v.* Roper, 4 Sim. 360; Briggs *v.* Chamberlain, 11 Hare, 69; Hobby *v.* Collins, 4 D. & Sm. 289; Tuer *v.* Turner, 20 Beav. 560. By a tenant in tail, Benson *v.* Benson, 1 P. W. 130; Short *v.* Wood, 1 P. W. 470; Edwards *v.* Countess of Warwick, 2 P. W. 173; Trafford *v.* Boehm, 3 Atk. 440; Colwell *v.* Shadwell, 1 P. W. 471; Cunningham *v.* Moody, 1 Ves. 176. And by a remainder-man, Lingen *v.* Sowray, 1 P. W. 173; Pultney *v.* Darlington, 1 Bro. C. C. 223; Crabtree *v.* Bramble, 3 Atk. 680; Triquet *v.* Thornton, 13 Ves. 345; Stead *v.* Newdigate, 2 Mer. 531; Gillies *v.* Longlands, 4 D. & Sm. 372, 379.

1000. Where an estate is directed to be sold, and the money arising from the sale to be divided among several persons, none of them have a right to say that any part shall not be sold, and elect to take his share in land; for to allow election in such a case, would be injurious to the sale of the entirety(*a*). But if money be directed to be laid out in land, to the use of several persons as tenants in common, any one of them may elect to take his share of the money, for the residue of the money may be quite as advantageously invested in the purchase of land as the whole(*b*).

1001. Where the parties are competent to elect, the election may be made either by express declaration or by acts from which an election will be presumed to have been made. An express declaration to elect may be made by parol(*c*). The presumption that a person has made an election, will arise from very slight circumstances(*d*). Thus, if a person keeps land unsold, a presumption will arise that he has elected to take it as land(*e*). And where the person absolutely entitled to money directed to be laid out in land, receives the money from the trustees, he elects to take it as money(*f*).

CHAPTER XXXIV.

APPLICATION OF PURCHASE MONEY.

1002. In cases of trusts, questions formerly often arose, as to

(*a*) Deeth *v.* Hale, 2 Moll. 317; Smith *v.* Claxton, 4 Mad. 484, 494; Chalmer *v.* Bradley, 1 J. & W. 59; Trower *v.* Knightley, 6 Mad. 134; Holloway *v.* Radcliffe, 23 Beav. 163, 171.

(*b*) Seeley *v.* Jago, 1 P. W. 389; Walker *v.* Denne, 2 Ves. 182.

(*c*) Edwards *v.* Countess of Warwick, 2 P. W. 174; Pultney *v.* Lord Darlington, 1 Bro. C. C. 237; Wheldale *v.* Partridge, 8 Ves. 236.

(*d*) Pultney *v.* Lord Darlington, 1 Bro. C. C. 238; Van *v.* Barnett, 19 Ves. 109; Cookson *v.* Cookson, 12 Cl. & Fin. 121; Dixon *v.* Gayfere, 17 Beav. 433.

(*e*) Ashby *v.* Palmer, 1 Mer. 301; Crabtree *v.* Bramble, 2 Atk. 688; Inwood *v.* Twyne, 2 Ed. 148; Davies *v.* Ashford, 15 Sim. 44; Kirkman *v.* Miles, 13 Ves. 338. See also Griesbach *v.* Freemantle, 17 Beav. 314.

(*f*) Pultney *v.* Lord Darlington, 1 Bro. C. C. 238; Trafford *v.* Boehm, 3 Atk. 440; Rook *v.* Worth, 1 Ves. 461.

the payment of purchase-money to the trustees, and as to the cases in which the purchaser was bound to look to the due APPLICATION OF PURCHASE-MONEY.

1003. The doctrine was not universally true, that a purchaser having notice of a trust, was bound to see that the trust was in all cases properly executed by the trustee. As applied to the cases of sales, authorized to be made by trustees for particular purposes, the doctrine was not absolute, that the purchaser was bound to see that the money raised by the sale was applied to the very purposes indicated by the trust. On the contrary, there were many qualifications and limitations of the doctrine in its actual application to sales both of personal and of real estate(*a*),

1004. 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(*b*). Thus, if a trust is created to 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(*c*).

(*a*) Story, s. 1125.

(*b*) 1 Mad. Pr. Ch. 352, 496; 2 Mad. Pr. Ch. 103; 1 Powell on Mortgages, ch. 9, p. 214. See Elliott *v.* Merryman, Barnard, Ch. 78; 2 Atk. 42; Shaw *v.* Borrer, 1 Keen, 574; Wood *v.* White, 4 M. & C. 490, 461, 482.

(*c*) Story, s. 1127; Elliott *v.* Merryman, Barnard, Ch. 78; 2 Atk. 42; Shaw *v.* Borrer, 1 Keen, 574; Walker *v.* Smallwood, Ambl. 676; Bonney *v.* Ridgard, 1 Cox, 145; Jenkins *v.* Hiles, 6 Ves. 654; Braithwaite *v.* Britain, 1 Keen, 206, 222; Ball *v.* Harris, 4 M. & C. 264; Eland *v.* Eland, 4 M. & C. 420.

1005. The personal estate being the primary fund for the payment of the debts of the testator, the purchaser of the whole, or any part of it, is not bound to see that the purchase-money is applied by the executor to the discharge of the debts (*a*). But it is necessary he should 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(*b*).

1006. It makes no difference in the application of the 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. 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, 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(*c*).

1007. Where there is a devise of real estate for the payment of debts generally, or debts and legacies generally, or if the testator merely charges his lands with such payments, and the money is raised by the trustee by sale or mortgage, the purchaser or mortgagee is not bound to look to the application of the purchase-money(*d*).

(*a*) Lonney *v.* Ridgard, 1 Cox, 145 ; Hill *v.* Simpson, 7 Ves. 152.

(*b*) Ewer *v.* Corbet, 2 P. W. 149; Keane *v.* Robarts, 4 Madd. 356; McLeod *v.* Drummond, 14 Ves. 353 ; 17 Ves. 153.

(*c*) Story, s. 1129 ; Ewer *v.* Corbet, 2 P. W. 148 ; Langley *v.* Earl of Oxford, 14 Ves. 17.

(*d*) Williamson *v.* Curtis, 3 Bro. C. C. 96 ; Powitt *v.* Guyon, 1 Bro. C. C. 186; Balfour *v.* Welland, 16 Ves. 151 ; Shaw *v.* Borrer, 1 Keen, 559, 573 ; Ball *v.* Harris, 4 M. & C. 269 ; Eland *v.* Eland, 4 M. & C. 420 ; Robinson *v.* Lowater, 5 D. M. & G. 272 ; Dowling *v.* Hudson, 17 Beav. 248 ; Story *v.* Walsh, 18 Beav. 559 ; Greetham *v.* Colton, 34 Beav. 615.

1008. 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(*a*).

1009. In all these cases, the rule 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. 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(*b*).

1010. But, where in cases of real estate the trust is for the payment of legacies, or annuities, or of specified or scheduled debts, the rule is different, for they are ascertained; and the purchaser is bound to see that the money is actually applied in discharge of them(*c*). 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(*d*).

1011. This rule has now a very limited application. By

(*a*) See Spaulding *v.* Shalmer, 1 Vern. 301; Coxeter, 2 Vern. 302; French *v.* Chichester, 2 Vern. 538; Elliott *v.* Merryman, Barnard, 78; Shaw *v.* Borrer, 1 Keen, 559, 574; Ball *v.* Harris, 4 M. & C. 264; Eland *v.* Eland, 4 M. & C. 420.

(*b*) Story, s. 1131 a; Eland *v.* Eland, 4 M. & C. 420, 427; Watkins *v.* Cheek, 2 S. & S. 199.

(*c*) Elliot *v.* Merryman, 2 Atk. 41; Horn *v.* Horn, 2 S. & S. 448; Colclough *v.* Sterum, 3 Bligh, 181.

(*d*) Story, s. 1132; Rogers *v.* Skillicome, Ambl. 188; Eland *v.* Eland, 4 M. & C. 420; Watkins *v.* Cheek, 2 S. & S. 199; Johnson *v.* Kennett, 6 Sim. 384; 3 M. & K. 624.

statute(*a*), the *bona fide* payment of any money to, and the receipt thereof by any person to whom the same is payable, upon any express or implied trust, or for any limited purpose, and such payment to, and receipt by, the survivors or survivor of two or more mortgagees or holders, or the executors or administrators of such survivor, or their or his assigns, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary be expressly declared by the instrument creating the trust or security(*b*).

CHAPTER XXXV.

IMPLIED TRUSTS.

1012. IMPLIED TRUSTS(*c*) 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; among the latter are cases of meditated fraud, imposition, notice of an adverse equity, and other cases

(*a*) Con. Stat. U. C. c. 90, s. 9.

(*b*) See Bennett *v.* Lytton, 2 J. & H. 158.

(*c*) See Cook *v.* Fountain, 3 Swanst. 585. Lord Nottingham's judgment in that case 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 *casu pro amico*."

of a similar nature. It has been said that the law never implies, and equity never presumes, a trust, except in case of absolute necessity(*a*). Perhaps a more correct exposition of the general rule would 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(*b*).

1013. 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 the party receiving the money, or other property, holds it upon a trust, necessarily implied from the nature of the transaction, in favour of such beneficiary, although no express agreement has been entered into, to that effect(*c*). 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; and if revoked, then the original trust is gone, and an implied trust results in favour of the party who originally created it(*d*).

1014. 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; or which are of such an indefinite nature that courts of equity will not carry them into 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(*e*).

(*a*) Cook *v.* Fountain, 3 Sw. 591, 592.

(*b*) Story, s. 1195.

(*c*) Com. Dig. Chan., 4 W. 5.

(*d*) Story, s. 1196; Linton *v.* Hyde, 2 Mad. 94; Priddy *v.* Rose, 3 Mer. 102; Dearle *v.* Hall, 3 Russ. 1; Loveridge *v.* Cooper, 3 Russ. 30; Page *v.* Broom, 4 Russ. 6; Walwyn *v.* Coutts, 3 Mer. 707; 3 Sim. 14; Garrard *v.* Lord Lauderdale, 3 Sim. 1; 2 R. & M. 451; Leman *v.* Whitely, 4 Russ. 427.

(*e*) Stubbs *v.* Sargon, 2 Keen, 255; Ommaney *v.* Butcher, 1 T. & R. 260, 270, Wood *v.* Cox, 2 M. & C. 684; 1 Keen, 317; Cook *v.* Hutchinson, 1 Keen, 42, 50. And see Aston *v.* Wood, L. R. 6 Eq. 419.

1015. Where the trusts have all failed, by the death of the *cestuis que trust*, and the grantor is also dead, without heirs, making a case for an escheat to the crown, or lord of the manor, if the legal title remained in the grantor, a court of equity has no power to compel the trustee to convey the estate to the crown, in order to perfect the right of escheat, but the trustee is entitled to hold the land(*a*).

1016. 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 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(*b*). 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, equity will immediately raise a use or trust correspondent to such consideration(*c*), in the absence of any controlling declaration or other circumstances.

1017. 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

(*a*) Burgess *v.* Wheate, 1 W. Black, 123; 1 Ed. 177; Fawcet *v.* Lowther, 2 Ves. 300; Middleton *v.* Spicer, 1 Bro. C. C. 201; Walker *v.* Denne, 2 Ves. 170; Williams *v.* Lord Lonsdale, 3 Ves. 752; Cox *v.* Parker, 22 Beav. 168. See also Smith *v.* Spencer, 6 D. M. & G. 631; Peacock *v.* Stockford, 7 D. M. & G. 129; Dunne *v.* Dunne, 7 D. M. & G. 207; Ware *v.* Watson, 7 D. M. & G. 348.

(*b*) 2 Bl. Com. 330; Bac. Abr. *Uses* and *Trusts* (I), id. *Trusts* (C.); Com. Dig. Chan. 4 W. 3. See also Burgess *v.* Wheate, 1 Ed. 206, 207.

(*c*) Dyer *v.* Dyer, 2 Cox, 92, 93. But see Haigh *v.* Kaye, L. R. 7 Chan. 469.

trust will arise, for the benefit of the grantor or devisor and his heirs(*a*).

1018. 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(*b*). 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(*c*).

1019. But this 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 that would be directly in the teeth of the statute of frauds *(d)*.

1020. There are also other exceptions to the doctrine of a resulting or implied trust, even where the principal has paid the purchase-money. Thus, where A. took a mortgage in the

(*a*) Story, s. 1200 : Cruse *v.* Barley, 3 P. W. 20; Ripley *v.* Waterworth, 7 Ves. 425, 435; Hobart *v.* Countess of Suffolk, 2 Vern. 644; Hill *v.* Bishop of London, 1 Atk. 618; Robinson *v.* Taylor, 1 Ves. 44; s. c. 2 Bro. C. C. 589; Stanfield *v.* Habergham, 10 Ves. 273; Tregonwell *v.* Sydenham, 3 Dow, 194; Chitty *v.* Parker, 2 Ves. 271. And see *Re* Sanderson, 3 K. & J. 497; Clarke *v.* Hilton, L. R. 2 Eq. 810; Longley *v.* Longley, L. R. 13 Eq. 133.

(*b*) Com. Dig. Chan. 3 W. 3; Co. Litt. 290 *b*; Butler's note (T), s. 8; Bac. Abr. *Uses* (1); id. *Trust* (C); Young *v.* Peachey, 2 Atk. 256; Lloyd *v.* Spillet, 2 Atk. 150; Scott *v.* Fenhoullet, 1 Bro. C. C. 69, 70; Lane *v.* Dighton, Ambl. 409, 411; Finch *v.* Finch, 15 Ves. 50; Mackreth *v.* Symmons, 15 Ves. 350; Wray *v.* Steele, 2 V. & B. 388.

(*c*) Ebrand *v.* Dancer, 2 Ch. Cas. 26; 1 Eq. Abr. 382, pl. 11; Lloyd *v.* Read, 1 P. W. 607; Rider *v.* Kidder, 10 Ves. 366.

(*d*) Story, s. 1201 a; Bartlett *v.* Pickersgill, 1 Ed. 515; 4 East, 577, note; Sug. V. & P. 703. See also Rastell *v.* Hutchinson, 1 Dick. 44; Rex *v.* Boston, 4 East, 572; Crop *v.* Norton, 2 Atk. 74; 9 Mod. 233; Fell *v.* Chamberlain, 2 Dick. 484; Braddock *v.* Derisley, 1 F. & F. 60; Lincoln *v.* Wright, 4 D. & J. 16; Inskip's case, 3 Giff. 359. And see Morley *v.* Davison, 20 Gr. 98.

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(*a*). So, if a parent should purchase in the name of a son, the purchase would be deemed, *prima facie*, intended as an advancement, so as to rebut the presumption of a resulting trust for the parent(*b*). 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(*c*).

1021. 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, purchasing in the name of a child, means a benefit for the latter, in discharge of his moral obligation, and also as a token of parental affection. This presumption in favour of the child, being thus founded in natural affection, and moral obligation, ought not to be frittered away by nice refinements(*d*). 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(*e*).

1022. 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 in evidence(*f*). And the like presumption exists in the case of a purchase by a husband in the name of his wife, and of securities taken in her name(*g*).

(*a*) Benbow *v.* Townsend, 1 M. & K. 506.

(*b*) Sidmouth *v.* Sidmouth, 2 Beav. 447.

(*c*) Sidmouth *v.* Sidmouth, 2 Beav. 447; Scawin *v.* Scawin, 1 Y. & C. 65.

(*d*) Finch *v.* Finch, 15 Ves. 50; Dyer *v.* Dyer, 2 Cox, 93, 94; Lord Gray *v.* Lady Gray, 1 Eq. Abr. 381.

(*e*) Story, s. 1203.

(*f*) Ebrand *v.* Dancer, 2 Ch. Cas. 26; s. c. 1 Eq. Abr. 382, pl. 11; Lloyd *v.* Read, 1 P. W. 607; Rider *v.* Kidder, 10 Ves. 366; 2 Mad. Pr. Ch. 101; Scawin *v.* Scawin, 1 Y. & C. 65.

(*g*) Story, 1204. And see Crabb *v.* Crabb, 1 M. & K. 511. But see Owen *v.* Kennedy, 20 Gr. 163.

1023. 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(*a*).

1024. 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 whosever 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, an office may be purchased, or a license obtained in the name of a partner out of the partnership funds (as a stockbroker's license) 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 stock-broker, or as the case may be, for the benefit of the other partners(*b*).

1025. 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

(*a*) Bell *v.* Phyn, 7 Ves. 453; Ripley *v.* Waterworth, 7 Ves. 425, 435; Balmain *v.* Shore, 9 Ves. 500; Lake *v.* Craddock, 3 P. W. 158; Jackson *v.* Jackson, 9 Ves. 591, 593, 594, 597; Selkrig *v.* Davies, 2 Dow, 231; Fawcett *v.* Whitehouse, 1 R. & M. 132.
(*b*) Story, s. 1207 a; Clarke *v.* Richards, 1 Y. & C. Ex. 351, 384, 385.

own benefit, unless it is otherwise disposed of by the testator (*a*). But courts of equity lay hold of any circumstances which may prevent the operation of the general rule. 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 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(*b*).

(*a*) 2 Mad. Pr. Ch. 83 to 85; 2 Fonbl. Eq. B. 2, ch. 2, s. 5, note (*k*); Jeremy on Eq. B. 1, ch. 1, s. 2, p. p. 122 to 129.

(*b*) 2 Fonbl. Eq. B. 2, ch. 5, s. 3, note (*k*); 2 Mad. Pr. Ch. 83, 84. (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 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. C. C. 634; Bennett *v.* Bachelor, 3 Bro. C. C. 28; 1 Ves. 63; 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 a direction to reimburse the executors their expenses is sufficient to exclude them, Dalton *v.* Dean, 2 Bro. C. C. 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. 78; Oldham *v.* Carleton, 2 Cox, 400. (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; Bennett *v.* Bachelor, 3 Bro. C. C. 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. W. 157; Cordell *v.* Noden, 2 Vern. 148; Newstead *v.* Johnstone, 2 Atk. 46. (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 the case of the personal estate falling short, yet it has been allowed to prevail; and it is 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 limitations, which will be hereafter considered, it will not exclude,) he shall be excluded from the residue, Cook *v.* Walker, cited 2 Vern. 676; Joslin *v.* Brewitt, Bunb. 112; Davers *v.* Dewes, 3 P. W. 40; Farrington *v.* Knightly, 1 P. W. 544; Vachell *v.* Jeffries, Prec. Ch. 170; Petit *v.* Smith, 1 P. W. 7. Nor will the circumstances 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. C. C. 154; Nesbit *v.* Murray, 5 Ves. 149. Nor will the testator's having bequeathed lega-

1026. In like manner, at law, a testator, by the appointment of his debtor to be 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, and the other is the act of the party(*a*). But in equity, a debt due by an executor is not extinguished; and it will go to the same party who would be

cies to his next of kin, vary the rule, Bayley *v.* Powell, 2 Vern. 361; Wheeler *v.* Sheers, Mos. 288; Andrew *v.* Clark, 2 Ves. 162, for the rule is founded rather on a presumption of intent to exclude the executor, than to create a trust for the next of kin; and, therefore, if there be no next of kin, a trust shall result for the crown; Middleton *v.* Spicer, 1 Bro. C. C. 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. W. 489; 1 Ves. 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-executors, 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. C. C. 328; Blinkhorn *v.* Feast, 2 Ves. Sen. 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. W. 7; Carey *v.* Goodinge, 3 Bro. C. C. 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.* Johnstone, 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. W. 114; Jones *v.* Westcombe, Prec. Ch. 316; Nourse *v.* Finch, 1 Ves. 356.

(*a*) Hudson *v.* Hudson, 1 Atk. 461.

entitled to the surplus estate, if the debt were due from a third person(*a*).

1027. Another illustration of the doctrine of implied trusts arises from acts done by trustees, apparently within the scope and objects of their duty. Thus, 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(*b*). 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, 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 of his covenant(*c*).

1028. 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 favour of the persons beneficially entitled to the money(*d*).

1029. Upon grounds of an analogous nature, the general doctrine proceeds, that, whatever acts are done by trustees in

(*a*) Hudson *v.* Hudson, 1 Atk. 461; Phillips *v.* Phillips, 1 Ch. Cas. 292; Brown *v.* Selwin, Cas. t. Talb. 240.

(*b*) Deg. *v.* Deg, 2 P. W. 414; Lane *v.* Dighton, Ambl. 409; Perry *v.* Phellips, 4 Ves. 107; 17 Ves. 173; Bennett *v.* Mayhew, cited 1 Bro. C. C. 232; 2 Bro. C. C. 287.

(*c*) Sowden *v.* Sowden, 1 Cox, 165; s. c. 1 Bro. C. C. 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. & B. 265; Waite *v.* Horwood, 2 Atk. 159.

(*d*) Story, s. 1210; Taylor *v.* Plumer, 3 M. & S. 562; Liebman *v.* Harcourt, 2 Mer. 513; Chedworth *v.* Edwards, 8 Ves. 46; Ryall *v.* Ryall, 1 Atk. 59; Ambl. 412, 413; Lane *v.* Dighton, Ambl. 409; Bennett *v.* Mayhew, cited 1 Bro. C. C. 232; 2 Bro. C. C. 287; Buckeridge *v.* Glasse, Cr. & Ph. 126.

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. 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, if a trustee should purchase a lien or mortgage on the trust estate, at a discount, he cannot avail himself of the difference, but the purchase will be held a trust for the benefit of the *cestui que trust*(*a*). 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(*b*). And, if a trustee misapplies the funds of the *cestui que trust*, the latter has 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(*c*).

1030. The same principle will apply to persons standing in other fiduciary relations to each other. Thus, 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. 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(*d*). Sureties who purchase up the securities of the principal on which they are sureties, are subject to the same rule, and the principal will be entitled to the benefit of every such purchase at the price given for them(*e*).

1031. By that class of implied trusts arising from what are properly called equitable liens, are to be understood such liens as exist in equity, and of which courts of equity alone take cog-

(*a*) Moret *v.* Paske, 2 Atk. 54; Forbes *v.* Ross, 2 Bro. C. C. 430.
(*b*) Griffin *v.* Griffin, 1 S. & L. 352; James *v.* Dean, 11 Ves. 392; Nesbitt *v.* Tredenick, 1 B. & B. 46, 47.
(*c*) Boyd's case, 1 D. & J. 223.
(*d*) Lees *v.* Nuttal, 1 R. & M. 53; s. c. Tamlyn, 382; Carter *v.* Palmer, 11 Bligh, 397, 418, 419.
(*e*) Story, s. 1211 a; Reed *v.* Norris, 2 M. & C. 361, 374.

nizance. A lien is not, strictly speaking, either a *jus in re*, or *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(*a*).

1032. 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(*b*). There are few liens which at 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(*c*).

1033. 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(*d*). Thus, for example, the lien on goods 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(*e*). 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 a mere operation of law(*f*).

1034. In enforcing liens at law, courts of equity are, in general, governed by the same rules of decision as courts of law,

(*a*) Brace *v.* Duchess of Marlborough, 2 P. W. 491; *Ex parte* Knott, 11 Ves. 617.

(*b*) *Ex parte* Haywood, 2 Rose, 355, 357.

(*c*) Averall *v.* Wade, Ll. & G. t. Sug. 252.

(*d*) Haywood *v.* Waring, 4 Camp. 291; Hollis *v.* Claridge, 4 Taunt. 807; Chase *v.* Westmore, 5 M. & S. 180; Hansom *v.* Meyer, 6 East, 614; Hartley *v.* Hitchcock, 1 Starkie, 408; Dodsley *v.* Varley, 12 Ad. & El. 632.

(*e*) *Ex parte* Deez, 1 Atk. 228; *Ex parte* Shank, 1 Atk. 234; Franklin *v.* Hosier, 4 Barn. & Ald. 341; *Ex parte* Bland, 2 Rose, 91.

(*f*) Story, s. 1216.

with reference to the nature, operation, and extent of such liens(*a*). 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(*b*). Thus, equity will 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. Thus, if he seeks relief in equity against the equitable freehold estate of his debtor, it is indispensable for him first to sue out execution at law. And not only must the suing out of process be proved, but it must also be averred in the bill, otherwise the latter will be demurrable(*c*).

1035. But there are liens recognized in equity, whose existence is not known nor obligation enforced at law, and in respect to which, courts of equity exercise a very large and salutary jurisdiction(*d*). In regard to these liens, it may be generally stated, that they arise from constructive trusts. They are, therefore, wholly independent of 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. The usual course of enforcing a lien in equity, if not discharged, is by a sale of the property to which it is attached(*e*). Thus the vendor of land has a lien on the land for the amount of the purchase-money, 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(*f*). To the extent of the lien the vendee be-

(*a*) Gladstone *v.* Birley, 2 Mer. 403; Oxenham *v.* Esdaile, 2 Y. & J. 500.

(*b*) See Robinson *v.* Tonge, 3 P. W. 398, 491; Stileman *v.* Ashdown, Ambl. 13; Tyndale *v.* Warre, Jac. 212; Moore *v.* Clarke, 11 Gr. 497.

(*c*) Neate *v.* Duke of Marlborough, 3 M. & C. 407, 415.

(*d*) Gladstone *v.* Birley, 2 Mer. 403.

(*e*) Neate *v.* Duke of Marlborough, 3 M. & C. 407, 415.

(*f*) Burgess *v.* Wheate, 1 W. Bl. 150; s. c. 1. Ed. 210; Mockreth *v.* Symmons, 15 Ves. 329, 337, 339, 342; Hughes *v.* Kearney, 1 S. & L. 132 Daniels *v.* Davidson 16 Ves. 249; s. c. 17 Ves. 433.

comes a trustee for the vendor; and his heirs, and all other persons claiming under them, with such notice, are treated as in the same predicament(*a*).

1036. 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(*b*). Although it has been objected, that the creation of such a trust by courts of equity is in contravention of the policy of the statute of frauds(*c*), the doctrine is now too firmly established to be shaken by any mere theoretical doubts(*d*). 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.

1037. 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 had 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 person into a predicament, better than his own, with full notice of all the facts(*e*).

1038. Generally speaking, where the purchase money is unpaid, the lien of the vendor exists, and the burden of proof is on the purchaser to establish that, in the particular case, it

(*a*) Story, s. 1217. But see now the Registry Act, Ont. Stat. 31 Vic. c. 20, s. 68.
(*b*) Smith *v.* Hubbard, 2 Dick. 730; Dodsley *v.* Varley, 12 Ad. & El. 332, 633.
(*c*) Stat. 29 Charles II. c. 3.
(*d*) Mackreth *v.* Symmons, 15 Ves. 339.
(*e*) Story, s. 1219. See Mackreth *v.* Symmons, 15 Ves. 340, 347, 349. And see Nairn *v.* Prowse, 6 Ves. 752; Chapman *v.* Tanner, 1 Vern. 267; Blackburne *v.* Gregson, 1 Bro. C. C. 424.

has been intentionally displaced, or waived by the consent of the parties(*a*).

1039 The taking of a security for the payment of the purchase-money, is not, in every case, a waiver or extinguishment of the lien. Thus, the taking a bond or note, or even bills of exchange, drawn on and accepted by a third person, or by the purchaser and a third person, has been deemed no waiver of the lien, but merely a mode of payment(*b*). But where a vendor takes a mortgage upon the land, or on part of it, or on another estate, it has been held that his lien is waived(*c*).

1040. The lien of the vendor exists against the vendee, and against volunteers, and purchasers under him with notice. 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(*d*). And by the recent Registry Act(*e*), no equitable lien, charge, or interest affecting land, is to be deemed valid as against a registered instrument executed by the same party, his heirs, or assigns(*f*).

1041. A solicitor who has recovered a trust estate on behalf of the trustee, has no lien on the deeds, or on the fund in court, as against the *cestuis que trust*, as the solicitor can have no

(*a*) Mackreth *v.* Symmons, 15 Ves. 342, 344, 348, 349; Hughes *v.* Kearney, 1 S. & L. 135, 136; Nairn *v.* Prowse, 6 Ves. 752. But see Boulton *v.* Gilespie, 8 Gr. 223.

(*b*) Hughes *v.* Kearney, 1 S. & L. 136, 138; Grant *v.* Mills, 2 V. & B. 306; *Ex parte* Peake, 1 Mad. 349; *Ex parte* Loring, 2 Rose, 79; Saunders *v.* Leslie, 2 B. & B. 514; Blackburne *v.* Gregson, 1 Cox, 90; 1 Bro. C. C. 420; Lynn *v.* Chaters, 2 Keen, 520; Teed *v.* Carruthers, 2 Y. & C. 40; Colborne *v.* Thomas, 4 Gr. 102; Rutherford *v.* Rutherford, 11 Gr. 565. And see Flint *v.* Smith, 8 Gr. 339.

(*c*) Bond *v.* Kent, 2 Vern. 281; 1 S. & L. 135; Capper *v.* Spotteswood, Taml. 21; DeGear *v.* Smith, 11 Gr. 570. And see Galt *v.* Bush, 8 Gr. 360.

(*d*) Sug. V. & P. 680; Cator *v.* Bolingbroke, 1 Bro. C. C. 302; Mackreth *v.* Symmons, 15 Ves. 336, 339 to 341, 347, 353, 354. And see Blackburne *v.* Gregson, 1 Bro. C. C. 420; Mitford *v.* Mitford, 9 Ves. 100; Grant *v.* Mills, 2 V. & B. 306; Chapman *v.* Tanner, 1 Vern. 267; *Ex parte* Peake, 1 Mad. 356; Fawell *v.* Heelis, Ambler, 726.

(*e*) Ont. Stat. 31 Vic. c. 20, s. 68.

(*f*) See as to this Act, McDonald *v.* McDonald, 14 Gr. 133.

higher claim against the deeds, or the fund, than that of his client the trustee(*a*).

1042. 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 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(*b*).

1043. 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(*c*).

1044. Courts of equity have not confined the doctrine of compensation, or lien, for repairs and improvements, to cases of agreement or of joint purchase. 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(*d*). 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*) See Francis *v.* Francis, 5 D. M. & G. 108; Groom *v.* Booth, 1 Drew. 548; Martindale *v.* Picquot, 3 K. & J. 317. And see as to set-off, *Ex parte* Cleland, L. R. 2 Chan. 125; *In re* Bank of Hindostan, L. R. 3 Chan. 125. But see Simmonds *v.* Great Eastern Railw., L. R. 3 Chan. 797.

(*b*) Story, s. 1234. And see Gage *v.* Mulholland, 16 Gr. 145.

(*c*) Lake *v.* Craddock, 1 Eq. Abr. 291; 3 P. W. 158. See also, Scott *v.* Nesbitt, 14 Ves. 444; Hamilton *v.* Denny, 1 B. & B. 199.

(*d*) See Sug. V. & P. 698.

a charge, for which the tenant is entitled to a lien(a). So, 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 asks for a partition(b).

1045. 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(c).

1046. In the case of partnership property, 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. A long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners(d); that is to say, 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(e).

(a) Hibbert *v.* Cooke, 1 S. & S, 552. But see Floyer *v.* Banks, L. R. 8 Eq. 115.
(b) Swan *v.* Swan 8 Price, 518.
(c) Collyer on Partn., 65; West *v.* Skip, 1 Ves. Sen. 239, 456.
(d) Campbell *v.* Mullett, 2 Sw. 574; West *v.* Skip, 1 Ves. Sen. 237, 455; *Ex parte* Ruffin, 6 Ves. 126; Taylor *v.* Fields, 4 Ves. 396; Young *v.* Keighley, 15 Ves. 557. And see Baker *v.* Dawbarn, 19 Gr. 113.
(e) *Ex parte* Ruffin, 6 Ves. 126; *Ex parte* Williams, 11 Ves. 3, 5, 6; *Ex parte* Kendall, 17 Ves. 521, 526.

1047. The extent of a banker's lien upon securities left with him for special purposes, but in some sense connected with his general business, is one not always easy of determination. Thus, where the customer kept exchequer bills locked up in a box in the bank, of which the officers had the key, he handed them over to the bankers from time to time, for the purpose of being exchanged merely, this being so understood by the bankers. This exchange of the bills was regarded as a special agency, and as giving no control over the bills, for any other purpose, after that was accomplished; so that in performing this agency the bankers stood in much the same relation to the owner as a messenger employed to procure the exchange; and it was held that no lien for the general balance of account attached(*a*). But where Dutch bonds were deposited with a broker to cover an advance, the broker having power to sell the bonds when the advance became payable, it was held that the broker had a general lien upon them for the balance of his account(*b*).

1048. Implied trusts, or perhaps, more properly speaking, constructive trusts, which are independent of any presumed intention of the parties, and are forced upon their conscience by the mere operation of law, may next be considered.

1049. 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(*c*). The receiving of money which cannot consistently with conscience be retained, is in equity sufficient to raise a trust in favour of the party, for whom, or on whose account it was received(*d*). This 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

(*a*) Brandao *v.* Barnett, 12 Cl. & Fin. 787. See also Davis *v.* Bowsher, 5 T. R. 488.

(*b*) Jones *v.* Peppercorne, 5 Jur. N. S. 140; 1 Johns. 430.

(*c*) Com. Dig. *Chancery*, 2 A. 1; 4 W. 5.

(*d*) 2 Fonbl. Eq. B. 2, ch. 1, s. 1, note (b).

have compelled the payment, but whether he can now, with a safe conscience, *ex æquo et bono*, retain it. Illustrations of this doctrine are familiar in cases of money paid by accident, or mistake, or fraud. 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(*a*).

1050. 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, knowing it to be such, from the trustee, in violation of the objects of the trust. In such a case equity forces the trust upon the conscience of the guilty party, and compels him to perform it, and to hold the property subject to it, in the same manner as the trustee himself held it(*b*).

1051. 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, either compellable to execute the trust, or to preserve the property for the persons entitled to it(*c*). It is upon this ground 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(*d*).

1052. Upon similar principles, wherever the property of a party has been wrongfully misapplied, or a trust fund has been

(*a*) Story, s. 1255. And see Farmer *v.* Arundel, 2 W. Bl. 824; Moses *v.* Macferland, 2 Burr. 1012; Bize *v.* Dickason, 1 T. R. 185; Bilbie *v.* Lumley, 2 East, 469.

(*b*) See 2 Fonbl. Eq. B. 2, ch. 6, s. 1, note (a); id. s. 2, note (h); Com. Dig. *Chancery*, 4 W. 28; 2 Mad. Pr. Ch. 103, 104; Jeremy on Eq. Jurisd. B. 2, ch. 3, pp. 281, 282; Adair *v.* Shaw, 1 S. & L. 243, 262.

(*c*) Lord Redesdale, in Adair *v.* Shaw, 1 S. & L. 262. See also Leigh *v.* Macaulay, 1 Y. & C. Ex. 265, 266.

(*d*) Story, s. 1257; Hill *v.* Simpson, 7 Ves. 166. And see Harford *v.* Lloyd, 20 Beav. 310; Ernest *v.* Croysdill, 6 Jur. N. S. 740.

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*(*a*). The general 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 favour 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 (*b*).

1053. 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 favour of the party entitled to the benefit(*c*). For the same reason a trustee, purchasing 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(*d*).

1054. There is no rule of equity law applicable to trusts which is more uniformly acted upon by the courts than that

(*a*) *Ex parte* Dumas, 1 Atk. 232, 233; Scott *v.* Surman, Willes, 400; Burdett *v.* Willett, 2 Vern. 638; Griggs *v.* Cocks, 4 Sim. 438; Wilkins *v.* Stevens, 1 Y. & C. 431. And as to equity aiding a purchaser who has to surrender his purchase in recovering his money, see Hope *v.* Liddell, 21 Beav. 183.

(*b*) Taylor *v.* Plumer, 3 M. & S. 574. See Ord *v.* Noel, 5 Mad. 408; Copeman *v.* Gallant, 1 P. W. 319, 320; Ryall *v.* Rolle, 1 Atk. 172; Leigh *v.* Macaulay, 1 Y. & C. Ex. 260, 265; Lench *v.* Lench, 10 Ves. 511, 517; Lewis *v.* Madocks, 17 Ves. 57; Phayre *v.* Peree, 3 Dow, 116: Liebman *v.* Harcourt, 2 Mer. 513.

(*c*) Fawcett *v.* Whitehouse, 1 R. & M. 132, 149; Com. Dig. *Chancery*, 4 W. 30.

(*d*) Bulkley *v.* Wilford, 2 Cl. & Fin. 177. But see Imperial Mercantile Credit Assn. *v.* Coleman, L. R. 6 Chan. 558; Whitney *v.* Smith, L. R. 4 Chan. 513.

one who assumes to act in relation to trust property, without just authority, however *bona fide* may be his conduct, shall be held responsible both for the capital and the income, to the same extent as if he had been *de jure* trustee. Thus, where the estate of tenant for life was liable to forfeiture upon his mortgaging the same, and he executed a mortgage to one without the knowledge of those taking under the forfeiture, it was held that such mortgagee was responsible to those entitled under the forfeiture, from the filing of the bill, at all events, and, beyond that, from the time he had notice of the trusts creating the forfeiture(*a*).

1055. And the principle of following trust funds in the hands of a defaulting trustee, applies against the assignees of such trustee as fully as against the trustee himself; and the evidence that the trust fund was acquired on the eve of the bankruptcy, and when the bankrupt was about to abscond with that and his other money, was held not to raise any equity in favour of the assignees or general creditors, as against the owners of the trust fund(*b*).

1056. In cases of this sort, the *cestui que trust* 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*(*c*). The substituted fund is only liable to his option(*d*). But he cannot insist upon opposite and repugnant rights. Thus, if a trustee has sold 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 it 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(*e*).

(*a*) Hennessey *v.* Bray, 33 Beav. 96. And see Rolfe *v.* Gregory, 11 Jur. N. S. 238.
(*b*) Story, s. 1261 d; Frith *v.* Cartland, 2 H. & M. 417; 11 Jur. N. S. 238.
(*c*) Docker *v.* Somes, 2 M. & K. 655.
(*d*) Watts *v.* Girdlestone, 6 Beav. 188, 190.
(*e*) Story, s. 1262.

1057. So, where an executor or trustee, instead of executing any trust, as he ought, as by laying out the property, either on 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 his 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. 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 dividend, as if it had remained stock(*a*).

1058. 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 is extinguished. But if afterwards he should re-purchase, or otherwise become entitled to the same property, the trust would revive, and re-attach to it in his hands. In equity, even more strongly than at law, the maxim prevails, that no man shall take advantage of his own wrong(*b*).

1059. Having now gone over most of the important heads of equity, falling under the denomination of express or implied trusts, 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, for enforcing a due performance of trusts, may be shortly considered.

1060. 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 under-

(*a*) Pocock *v.* Reddington, 5 Ves. 800; Harrison *v.* Harrison, 2 Atk. 121; Bostock *v.* Blakeney, 2 Bro. C. C. 653; Forrest *v.* Elwes, 4 Ves. 497; Earl Powlet *v.* Herbert, 1 Ves. 297; Byrchell *v.* Bradford, 6 Mad. 235. And see Long *v.* Stewart, 5 Ves. 800, note; Crackelt *v.* Bethune 1 J. & W. 586.

(*b*) Bovey *v.* Smith, 2 Ch. Cas. 124; 1 Vern. 84; Com. Dig. *Chancery*, 4 W. 25.

taken(*a*). But, as he is supposed merely to take upon himself the trust, as a matter of honour, 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(*b*); he would seem, upon the analogous principles applicable to bailments, bound only to good faith and reasonable diligence(*c*).

1061. The more recent decisions in regard to the extent of the responsibility of agents, bailees, and all similar trustees, seem to make the question turn more upon the nature of the trust than the fact of its being gratuitous or for compensation. And in view of these, the statement which has sometimes been made, that a trustee of an estate, either real or personal, who has the entire management intrusted to him, or even a general supervision, for the benefit of those interested, is only liable for gross negligence, can scarcely be considered correct. Whether the service be gratuitous or not, the duty of the trustee undoubtedly is to perform it, according to his best ability, with such care and diligence as men, fit to be intrusted with such matters, may fairly be expected to put forth in their own business, of equal importance(*d*).

1062. 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 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(*e*). 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

(*a*) Com. Dig. *Chancery*, 4 W. 25; Fyler *v.* Fyler, 3 Beav. 550.

(*b*) But see Con. Stat. U. C. c. 16, s. 66; Ont. Stat. 37 Vic. c. 9, as to compensation to executors and trustees under wills; and see, also, Newport *v.* Bury, 23 Beav. 30.

(*c*) See Bostock *v.* Floyer, L. R. 1 Eq. 26; Hopgood *v.* Parkin, L. R. 11 Eq. 74; Sutton *v.* Wilders, L. R. 12 Eq. 373.

(*d*) Chisholm *v.* Barnard, 10 Gr. 479.

(*e*) Morley *v.* Morley, 2 Ch. Cas. 2; Knight *v.* Lord Plymouth, 3 Atk. 480; 1 Dick. 120, 127; Jones *v.* Lewis, 2 Ves. 240.

due credit, and the banker or drawer of the bill should become bankrupt, he would not be responsible(*a*).

1063. In all cases, however, in which a trustee places money in the hands of a banker, he should take care to keep it separate, and not to 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(*b*). If, however, the investment is made with a banker in a manner not authorized by the will, the trustee will be held responsible(*c*). But, as a general thing, it is said there is no impropriety in the temporary investment of trust money on a deposit note(*d*).

1064. If a trustee invest trust money in mere personal securities, however unexceptionable they may 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(*e*). Nay, it will be at the peril of the trustee, if trust money comes to his hands, (such as a debt due 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(*f*).

1065. In relation to trust property, it is the duty of the trustee, whether it be real estate or personal estate, to defend the

(*a*) Knight *v.* Lord Plymouth, 3 Atk. 480; Jones *v.* Lewis, 2 Ves. 240, 241; Rowth *v.* Howell, 3 Ves. 564; Massey *v.* Banner, 4 Mad. 416, 417, *Ex parte* Belchier & Parsons, Ambl. 219; Adams *v.* Claxton, 6 Ves. 226. And see *Re* Colne Valley & Halstead Co. 1 D. F. & J. 53; Cockburn *v.* Peel, 7 Jur. N. S. 310; Harris *v.* Harris, 29 Beav. 107. But see Sculthorpe *v.* Tipper, L. R. 13 Eq. 232.

(*b*) Massey *v.* Banner, 4 Mad. 416, 417; Freeman *v.* Fairlie, 3 Mer. 29; Clarke *v.* Tipping, 9 Beav. 284; Cook *v.* Addison, L. R. 7 Eq. 466. And see Brown *v.* Adams, 21 L. T. N. S. 71; *Ex parte* Kingston, L. R. 6 Chan. 632.

(*c*) Rehden *v.* Wesley, 29 Beav. 213; Whitney *v.* Smith, L. R. 4 Chan. 513; Fisher *v.* Gilpin, 38 L. J. N. S. Ch. 230.

(*d*) Wilkins *v.* Hogg, 8 Jur. N. S. 25. And see Hume *v.* Richardson, 3 Jur. N. S. 686.

(*e*) Adye *v.* Feuilleteau, 1 Cox, 24; Ryder *v.* Bickerton, 3 Sw. 80; S. C. 1 Ed. 149, note; Holmes *v.* Dring, 2 Cox, 1.

(*f*) Story, s. 1274; Lowson *v.* Copeland, 2 Bro. C. C. 156; Powell *v.* Evans, 5 Ves. 844; Tebbs *v.* Carpenter, 1 Mad. 290.

title at law, in case of any suit being brought respecting it; to give notice, if it may be useful and practicable, of such suit, to his *cestui que trust*; to prevent any waste, or delay, or injury to the trust property; to keep regular accounts(*a*); 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(*b*). 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(*c*).

1066. 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, and they must always depend upon the peculiar objects and structure of the trust (*d*).

1067. The general rule as to interest upon trust funds 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(*e*). In some

(*a*) Freeman *v.* Fairlie, 3 Mer. 29, 41; Pearse *v.* Green, 1 J. & W. 135, 140; Adams *v.* Clifton, 1 Russ. 297; Randall *v.* Burrowes, 11 Gr. 364.

(*b*) Walker *v.* Symonds, 3 Swanst. 58, 73.

(*c*) Story, s. 1275; Oliver *v.* Court, 8 Price, 127. But see Payne *v.* Little, 26 Beav. 1; Raby *v.* Ridehalgh, 7 D. M. & G. 104; Bate *v.* Hooper, 5 D. M. & G. 338.

(*d*) Story, s. 1276.

(*e*) See Smith *v.* Roe, 11 Gr. 311.

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 (*a*).

1068. It seems now settled that, if the trustee himself put the trust money into his own business, by which he realizes a profit beyond the rate of interest on the public stocks or other proper securities for the investment of trust funds, or even beyond the legal rate of interest, the *cestui que trust* is entitled to such profit(*b*). But if the trustee loan the trust money to others, who know of the breach of trust thus committed, the *cestui que trust* may follow the money into their hands, but they cannot claim any profits which they may have made beyond legal interest, but are limited to the compensation stipulated by the borrowers, if that is not less than the trustee could have realized on a prudent investment(*c*).

1069. Payment to the agent of trustees is payment to the trustees(*d*). And if the agent pay the money, in good faith, to a party not entitled to hold it, whereby it is lost, such agent cannot be made responsible in a separate bill against him alone, without joining the trustees; since it is only through the trustees that such agents are liable at all. But co-trustees are not responsible for the fraud and forgery of one of their number to which they in no way contribute, either directly or remotely(*e*).

1070. Where there are several trustees, the question has often arisen, how far they are to be deemed responsible for

(*a*) Raphael *v.* Boehm, 11 Ves. 91; S. C. 13 Ves. 407, 590; Dornford *v.* Dornford, 12 Ves. 127; Foster *v.* Foster, 2 Bro. C. C. 616; Davis *v.* May, 19 Ves. 383; Sevier *v.* Greenway, 19 Ves. 413; Webber *v.* Hunt, 1 Mad. 13; Jeremy on Eq. Jurisd. B. 3, pt. 2, ch. 5, p. 545; 2 Mad. Pr. Ch. 114, 115; Wightman *v.* Helliwell, 13 Gr. 330. And see Nelson *v.* Booth, 5 Jur. N. S. 28.

(*b*) See Wightman *v.* Helliwell, 13 Gr. 330.

(*c*) Story, s. 1277 a; Stroud *v.* Gwyer, 6 Jur. N. S. 719. See also Dimes *v.* Scott, 4 Russ. 195; M'Donald *v.* Richardson, 5 Jur. N. S. 9; Palmer *v.* Mitchell, 2 M. & K. 672, note. Simpson *v.* Chapman, 4 D. M. & G. 154, is now overruled.

(*d*) Robertson *v.* Armstrong, 28 Beav. 123.

(*e*) Story, s. 1277 f; Barnard *v.* Bagshaw, 9 Jur. N. S. 220.

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(*a*). 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(*b*).

1071. But the rule that a trustee is only liable for his own receipts, does not apply where a trustee assists or enables another trustee to receive the money; as, for instance, by joining with him in a release for the money, although he alone obtain possession of the money and invest it in improper securities. And accordingly, on such a state of facts, both trustees will be held responsible for the consequent loss(*c*).

1072. It is otherwise with regard to executors, for where there are two executors, 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, and each is competent, by his own separate receipt, to discharge any debtor to the estate(*d*). If, then, they join in a receipt, it is their own voluntary act, and equivalent to an admission of their willingness to be jointly accountable for the money(*e*). 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(*f*).

(*a*) Leigh *v.* Barry, 3 Atk. 584; Anon. 12 Mod. 560.

(*b*) Brice *v.* Stokes, 11 Ves. 324; Harden *v.* Parsons, 1 Ed. 147; Gregory *v.* Gregory, 2 Y. & C. Ex. 316; Sadler *v.* Hobbs, 2 Bro. C. C. 117; Webb *v.* Ledsam, 1 K. & J. 388. And see Norton *v.* Steinkoff, Kay, 45.

(*c*) Thompson *v.* Finch, 22 Beav. 316. And see as to negligence in looking after the application of the trust fund by a co-trustee, Allan *v.* Scott, 12 L. T. N. S. 449; Ingle *v.* Partridge, 32 Beav. 661.

(*d*) See Charlton *v.* Earl of Durham, L. R. 4 Chan. 433; Lee *v.* Sankey, L. R. 15 Eq. 204.

(*e*) Murrell *v.* Cox, 2 Vern. 570; Aplyn *v.* Brewer, Prec. Ch. 173; Moses *v.* Levi, 3 Y & C. 359, 367; Hewitt *v.* Foster, 6 Beav. [illegible], Broadhurst *v.* Balguy, 1 Y. & C. 16.

(*f*) Townsend *v.* Barber, 1 Dick. 356.

1073. 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 a 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(*a*). It will be otherwise, however, if one executor has no knowledge of the receipt, or misapplication, or waste of the assets, by the other(*b*).

1074. But, although the general rule, in regard to trustees, is that they shall be liable only for their own acts and receipts, yet some distinctions have been indulged in by courts of equity. Thus, 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(*c*).

1075. 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 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. But, wherever either a trustee, or an executor, by his own negligence or laches, suffers his co-trustee or co-executor to receive and

(*a*) Williams *v.* Nixon, 2 Beav. 472.
(*b*) Story, s. 1280 a.
(*c*) Fellows *v.* Mitchell, 1 P. W. 83; 2 Vern. 415, 504.

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(*a*).

1076. The mere appointment by the trustees of one of them to be the agent or factor of the others for the property, is not of itself such a breach of trust as subjects the other trustees 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 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. 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(*b*).

1077. 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 both, there, each of them will be held chargeable for the whole (*c*). So, if one trustee should wrongfully suffer the other to retain 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

(*a*) Story, s. 1283. See also Harvey *v.* Blakeman, 4 Ves. 596; Crosse *v.* Smith, 7 244; Scurfield *v.* Howes, 3 Bro. C. C. 93; Westley *v.* Clarke, 1 Ed. 357; Joy *v.* Campbell, 1 S. & L. 341; Williams *v.* Nixon, 2 Beav. 472.

(*b*) Horne *v.* Pringle, 8 Cl. & Fin. 264.

(*c*) Gill *v.* Att.-Gen., Hardres, 314; Lord Shipbrook *v.* Lord Hinchinbrook, 16 Ves. 479, 480; Sadler *v.* Hobbs, 2 Bro. C. C. 116; Underwood *v.* Stevens, 1 Mer. 712; Adair *v.* Shaw, 1 S. & L. 272; Joy *v.* Campbell, 1 S. & L. 341.

liable for any loss(*a*). *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(*b*).

1078. But here it may be important to notice an illustration of the doctrine, that courts of equity administer their aid only in favour of persons who exercise due diligence to enforce their rights, and are guilty of no improper acquiescence or delay. Hence, if there be a clear breach of trust by a trustee, yet, if the *cestui que trust*, 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(*c*).

1079. Where there are numerous trustees, the personal responsibility of each, for the acts of the others, must depend much upon his ability to interpose and hinder the others from pursuing the course which resulted in the loss. This will depend upon the nature of the trust, and how far the duty and right to act is joint, and incapable of execution, except by the concurrence of all the trustees. In general, this concurrence is required in regard to trusts which are of a private and personal nature. But in regard to such trusts as are of a public nature, the trustees may act by the majority(*d*).

1080. Courts of equity 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 go farther, and in cases requiring such a remedy, remove the old trustees and substitute new ones. Indeed,

(*a*) Sadler *v.* Hobbs, 2 Bro. C. C. 114; Keble *v.* Thompson, 3 Bro. C. C. 112; Langston *v.* Ollivant, Coop. t. Eld. 33; Caffrey *v.* Darby, 6 Ves. 448; Bone *v.* Cooke, 1 McClel. 168; Brice *v.* Stokes, 11 Ves. 319; Chambers *v.* Minchin, 7 Ves. 197, 198.

(*b*) Story. s. 1284; Gill *v.* Att.-Gen., Hardres, 314; Boardman *v.* Mosman, 1 Bro. C. C. 68; Bate *v.* Scales, 14 Ves. 402; Oliver *v.* Court, 8 Price, 127.

(*c*) Broadhurst *v.* Balguy, 1 Y. & C. 16, 28. And see Sleight *v.* Lawson, 3 K. & J. 292; Cooper *v.* Carter, 2 D. M. & G. 297.

(*d*) Story, s. 1284 e; Perry *v.* Shipway, 5 Jur. N. S. 535.

the appointment of new trustees is an ordinary remedy, enforced by court 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(*a*).

1081. 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 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(*b*).

1082. In cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust(*c*). 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(*d*). 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 (*e*).

1083. The jurisdiction of courts of equity, in regard to trusts, as well as to other things, is not confined to cases where

(*a*) Ellison *v.* Ellison, 6 Ves. 663, 664; Lake *v.* De Lambert, 4 Ves. 592; Millard *v* Eyre, 2 Ves. 94; Buchanan *v.* Hamilton, 5 Ves. 722; Hibbard *v.* Lambe, Amb. 309; Com. Dig. *Chancery*, 4 W. 7. And see *Re* The Moravian Society, 26 Beav. 101; *Re* Bridgman's Trust, 6 Jur. N. S. 1065; *Re* Tempest L. R. 1 Chan. 485.

(*b*) Uvedale *v.* Ettrick, 2 Ch. Cas. 130. And see Lewin on Trusts, 712.

(*c*) Portsmouth *v.* Fellows, 5 Mad. 450; Mayor, &c., of Coventry, *v.* Att.-Gen. 7 Bro. P. C. 235.

(*d*) Att.-Gen. *v.* Cooper's Company, 19 Ves. 192.

(*e*) Story, s. 1289. And see Castle *v.* Castle, 1 D. & J. 352; Raikes *v.* Ward, 1 Ha. 448; Wetherell *v.* Wilson, 1 Keen, 80; Woods *v.* Woods, 1 M. & C. 401; Crockett *v.* Crockett, 2 Ph. 553; Brown *v.* Casamajor, 4 Ves. 498; Hammond *v.* Neame, 1 Sw. 35; Hadow *v.* Hadow, 9 Sim. 438; Browne *v.* Paull, 1 Sim. N. S. 92; Jodrell *v.* Jodrell, 14 Beav. 397; Longmore *v.* Elcum, 2 Y. & C. 363.

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(*a*).

CHAPTER XXXVI.

PENALTIES AND FORFEITURES.

1084. Originally, in all cases of PENALTIES and FORFEITURES, there was no remedy at law, but the only relief which could be obtained was exclusively sought in courts of equity Now, indeed, relief may be obtained at law, in a great variety of cases; although some cases are still cognizable in equity also. The original jurisdiction, however, in equity, still remains, notwithstanding the concurrent remedy at law.

1085. At law (and in general the same is equally true in equity), if a man undertake 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 in damages for the non-performance; if it be a condition, then his rights, dependent upon the performance of the condition, will be gone by 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(*b*).

1086. In regard to contracts, if they stipulate to do anything

(*a*) See Penn *v.* Lord Baltimore, 1 Ves. Sen. 444; Earl of Kildare *v.* Eustace, 1 Vern. 419, 422.

(*b*) Story, s. 1302. See Butler's note (1) to Co. Litt. 206 a, and 1 Fonbl. Eq. B. 1, ch. 4, s. 1, and notes (a), (b), (c).

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. 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(*a*). 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(*b*).

1087. Conditions 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(*c*).

1088. 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 act of G or of the law, or of the party who is entitled to the benefit of them, 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 im-

(*a*) 1 Fonbl. Eq. B. 1, ch. 4, s. 1, and note (a) ; id. s. 2 ; id. s. 3, note (r) ; id. s. 4, note (s) ; Pullerton *v.* Agnew, 1 Salk. 172 ; Com. Dig. *Condition*, D. 1.

(*b*) Story, s. 1303 : Thornborrow *v.* Whiteacre, 2 Ld. Raym. 1164 ; James *v.* Morgan, 1 Lev. 111.

(*c*) This is the classification by Mr. Butler, in his note (1) to Co. Litt. 206 a. See also Com. Dig. *Condition*, D. 1 to 8.

possible 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, under different circumstances of its application produce directly opposite results(*a*).

1089. 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(*b*). 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(*c*).

1090. 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 the obligor is not bound to pay it(*d*). So, if the 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

(*a*) See Co. Litt. 206 a. Also, Butler's note to Co. Litt. 206 b, 207 a.

(*b*) Black. Comm. 156, 157; Com. Dig. *Condition*, D. 1 to 4; Co. Litt. 206 a; 1 Fonbl. Eq. B. 1, ch. 4, s. 1, note (*c*).

(*c*) 2 Black. Comm. 157; Co. Litt. 206 a; Cary *v.* Bertie, 2 Vern. 339, 340.

(*d*) Com. Dig. *Condition*, 1; Thornborrow *v.* Whiteacre, 2 Ld. Raym. 1164; Gradon *v.* Hicks, 2 Atk. 18; Jones *v.* Earl of Suffolk, 1 Bro. C. C. 528; Co. Litt. 206 (*a*); 1 Roll. Abridg. 450, pl. 10. But see also, Barker *v.* Hodgson, 3 M. & S. 267; Edwin *v.* East India Company, 2 Vern. 210; Blight *v.* Page, 3 B. & Pul. 295, note, and other cases collected in Platt on Covenants.

saved. But if one part only was possible at the time, then the other part, if possible, ought to be performed(*a*).

1091. Thus, 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(*b*).

1092. 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(*c*).

1093. The origin of equity jurisdiction 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, is 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 default, the obligee would be placed in the same situation, as if the principal had been paid at the proper day. The consideration, that the failure of payment at that day might be

(*a*) Story, s. 1307; Com. Dig. *Condition*, D. 1; Laughter's case, 5 Co. 21; 1 Fonbl. Eq. B. 1, ch. 4, s. 3. and note (*q*). And see *Re* Conington's Will, 6 Jur. N. S. 992; *Re* Williams, 6 Jur. N. S. 1064.

(*b*) Story, s. 1311.

(*c*) Story, s. 1312.

attended with mischievous consequences to the obligee, which never could be cured by any subsequent payment thereof, with the addition of interest, seems to have been overlooked(*a*).

1094. The doctrine has, however, 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(*b*).

1095. In every such case, the true test (generally, if not universally) by which to ascertain whether relief can or cannot be had in equity is, to consider whether compensation 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 (*c*). 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(*d*).

(*a*) Reynolds *v.* Pitt, 19 Ves. 140. See Gregory *v.* Wilson, 16 Jur. 304; Story s. 1313. See Hill *v.* Barclay, 18 Ves. 58, 60.

(*b*) Sloman *v.* Walter, 1 Bro. C. C. 418; Sanders *v.* Pope, 12 Ves. 282; Davis *v.* West, 12 Ves. 475. And see Parker *v.* Butcher. L. R. 3 Eq. 762; Thompson *v.* Hudson, L. R. 2 Eq. 612; 2 Chan. 255; L. R. 4 H. L. 1; Herbert *v.* Salisbury, &c. Rail Co., L. R. 2 Eq. 221; Sterne *v.* Beck, 11 W. R. 791.

(*c*) See Carden *v.* Butler, 1 Hayes & Jones, 112; French *v.* Macale, 2 Dru. & War. 269; Elliott *v.* Turner, 13 Sim. 477. And see Bargent *v.* Thompson, 4 Giff, 473.

(*d*) Astley *v.* Weldon, 2 Bos. & Bull. 346, 350; Hardy *v.* Martin, 1 Cox, 26; Benson *v.* Gibson, 3 Atk. 395; Errington *v.* Aynesley, 2 Bro. C. C. 343; Com. Dig. *Chancery*, 4 D. 2.

1096. 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(*a*). 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(*b*).

1097. In cases of this sort, admitting 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(*c*).

1098. 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, he gets all that he expected, and all that, in justice, he is entitled to(*d*). And, notwithstanding the objections which have been sometimes urged against it, this seems a sufficient foundation for the jurisdiction.

(*a*) Hill *v.* Barclay, 18 Ves. 58. See Gregory *v.* Wilson, 16 Jur. 304; 9 Hare. 683, 689; Bowser *v.* Colby, 1 Hare, 109; Horne *v.* Thompson, 1 Sau. & Sc. 615. As to the power of the Common Law Courts now in such cases, see 22 Vic., c. 27, s. 56.

(*b*) Davis *v.* West, 12 Ves. 475; Sanders *v.* Pope, 12 Ves. 282; Peachy *v.* The Duke of Somerset, 1 Str. 453; Wadman *v.* Calcraft, 10 Ves. 67, 70; Hill *v.* Barclay, 18 Ves. 58, 59; 16 Ves. 403, 405.

(*c*) Story, s. 1315; Bertie *v.* Falkland, 2 Vern. 339, 344; s. c. 1 Salk. 479; Popham *v.* Bampfield, 1 Vern. 83, and note (1); Hayward *v.* Angell, 1 Vern. 223; Grimston *v.* Bruce, 1 Salk. 156; Taylor *v.* Popham, 1 Bro. C. C. 168; Hollinrake *v.* Lister, 1 Russ. 508; Rose *v.* Rose, Ambl. 332; Wyllie *v.* Wilkes, Doug. 522; Woodman *v.* Blake, 2 Vern. 221; Cage *v.* Russell, 2 Vent. 352; Wallis *v.* Crimes, 1 Ch. Cas. 89.

(*d*) Peachy *v.* The Duke of Somerset, 1 Str. 447, 453.

1099. The same principle of general justice is applied in favour of the party entitled to the security of the penalty, wherever the other party has unreasonably deprived him of his right to enforce it, until it is no longer adequate to secure his rights. 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.

1100. Courts of equity in such cases do no more than supply and adminster, 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(*a*). 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(*b*). And, in such a case, it will not make any difference, that the mortgage is given by a surety(*c*).

1101. But a distinction must be made 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

(*a*) The East India Company *v.* Campion, 11 Bligh, 159, 187, 188. See also Pulteney *v.* Warren, 6 Ves. 92; Grant *v.* Grant, 3 Russ. 598; 3 Sim. 340; Duval *v.* Terrey, Shower, P. C. 15; Hale *v.* Thomas, 1 Vern. 349, 350; Peers *v.* Baldwin, 2 Eq. Abridg. 611.

(*b*) Clark *v.* Lord Abingdon, 17 Ves. 106.

(*c*) Story, s. 1316 a; Clark *v.* Lord Abingdon, 17 Ves. 106.

entitled to fix their own measure of damages; 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.

1102. 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 endeavoured to cover up their objects under other disguises. 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(*a*).

1103. In regard to forfeitures, it is a universal rule in equity, never to enforce either a penalty or a forfeiture(*b*). Therefore, courts of equity will never aid in the divesting of an estate, for a breach of a covenant, on a condition subsequent; although they will often interfere to prevent the divesting of an estate, for a breach of covenant or condition(*c*).

1104. 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. 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(*d*).

(*a*) Story, s. 1318; Lowe *v.* Peers, 4 Burr. 22, 25; Astley *v.* Weldon, 2 Bos. & Pull. 346.

(*b*) Popham *v.* Bampfield, 1 Vern. 83; Cary *v.* Bertie, 2 Vern. 339.

(*c*) Story, s. 1319.

(*d*) Story, s. 1320; Popham *v.* Bampfield, 1 Vern. 33; Hayward *v.* Angell, 1 Vern. 222; Northcote *v.* Duke, Ambl. 513; Sanders *v.* Pope, 12 Ves. 289; Cage *v.* Russell, 2 Vent. 352; Wafer *v.* Mocato, 9 Mod. 112; Hack *v.* Leonard, 9 Mod. 91; Com. Dig. *Chancery*, 3 L. And see Taylor *v.* Popham, 1 Bro. C. C. 168; Hollinrake *v.* Lister, 1 Russ. 508; Com. Dig. *Chancery*, 2 Q. 4, 7, 8.

1105. 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(*a*). 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(*b*).

1106. The doctrine seems now to be asserted, that in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, or fraud, or surprise, although the breach is capable of a just compensation(*c*). 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(*d*).

1107. 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 renew a

(*a*) Hill *v.* Barclay, 16 Ves. 403, 405; 18 Ves. 58, 60; Wadman *v.* Calcraft, 10 Ves. 68, 69; Reynolds *v.* Pitt, 19 Ves. 140.

(*b*) Wadman *v.* Calcraft, 10 Ves. 68, 69; Hill *v.* Barclay, 16 Ves. 403, 405; 18 Ves. 59, 60, 61; Reynolds *v.* Pitt, 19 Ves. 140, 141; Bracebridge *v.* Buckley, 2 Price, 200; Green *v.* Bridges, 4 Sim. 96. The contrary doctrine was maintained in Hack *v.* Leonard, 9 Mod. 91; and Webber *v.* Smith, 2 Vern. 103. And see Gregory *v.* Wilson, 9 Hare, 683.

(*c*) Eaton *v.* Lyon, 3 Ves. 692, 693; Bracebridge *v.* Buckley, 2 Price, 200; Hill *v.* Barclay, 16 Ves. 403, 405; 18 Ves. 58; Rolfe *v.* Harris, 2 Price, 206, note; White *v.* Warner, 2 Mer. 459; Northcote *v.* Duke, 2 Ed. 322, note; Com. Dig. *Chancery*, 2 Q. 2 to 4.

(*d*) Bowser *v.* Colby, 1 Ha. 109, 130; Horne *v.* Thompson, 1 Sau. & Sc. 615.

lease within a given time, no relief will be given; for they admit of no just compensation or clear estimate of damages(*a*). The same rule formerly prevailed in cases of breach of covenant to insure, but now the court may in certain cases relieve where the breach has been by accident or mistake, or otherwise without fraud or gross negligence(*b*).

1108. 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, 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 (*c*).

1109. But where the party or his agent, who is entitled to the benefit of the forfeiture, has waived such benefit, and treated the contract as still subsisting for some purposes, he will not be allowed to insist upon the forfeiture for any purpose(*d*).

1110. Where any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act, 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(*e*).

(*a*) Grimstone *v.* Lord Bruce, 1 Salk. 156; 2 Vern. 594; Wafer *v.* Mocato, 9 Mod 112; Lovat *v.* Lord Ranelagh, 3 V. & B. 24; Rolfe *v.* Harris, 2 Price, 206, note; White *v.* Warner, 2 Meriv. 459; 1 Fonbl. Eq. B. 1 ch. 6, s. 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.

(*b*) 29 Vic. c. 28, s. 5. And see Page *v.* Bennett, 2 Giff. 117. And see before the statute, Reynolds *v.* Pitt, 19 Ves. 134; Haven *v.* Middleton, 10 Hare, 641; Green *v.* Bridges, 4 Sim. 96.

(*c*) Sparks *v.* Proprietors of Liverpool Water Works, 13 Ves. 433, 434; Prendergrast *v.* Turton, 1 Y. & C. 98, 110. And see Woollaston's case, 4 D. & J. 437; Richmond's case, 4 K. & J. 305.

(*d*) Wing *v.* Harvey, 5 D. M. & G. 265. And see Whitehead *v.* Bennett, 6 Jur. N. S. 419.

(*e*) Peachy *v.* Duke of Somerset, 1 Str. 447, 452; Keating *v.* Sparrow, 1 B. & B. 373, 374.

CHAPTER XXXVII

INFANTS.

1111. 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, is that which is exercised over the persons and property of infants, idiots, lunatics, and married women.

1112. The origin of the jurisdiction over the persons and property of infants in chancery is obscure, and has been a matter of much juridical discussion(*a*). But, whatever may be the true origin of the jurisdiction it is now conceded, on all sides, to be firmly established, and beyond the reach of controversy. 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(*b*). Some of the more important functions of the Court, connected with this authority, are, the appointment and removal of guardians; the maintenance of infants; the management and disposition of the property of infants; and lastly, the marriage of infants.

1113. 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(*c*) that it will not interfere in such a case, but from

(*a*) Story, s. 1328; Co. Litt. 89 a; 3 Black. Com. 426, 427; Duke of Beaufort *v.* Berty, 1 P. W. 705; Morgan *v.* Dillon, 9 Mod. 139; Hughes *v.* Science, 2 Eq. Abr. 756; De Manneville *v.* De Manneville, 10 Ves. 63; Eyre *v.* Countess of Shaftesbury, 2 P. W. 118, 123; Wellesley *v.* Duke of Beaufort, 2 Russ. 20; Wellesley *v.* Wellesley, 2 Bligh, N.R. 129, 136, 142.

(*b*) Wellesley *v.* Duke of Beaufort, 2 Russ. 19; Duke of Beaufort *v.* Berty, 1 P.W. 702, 706.

(*c*) *Re* Spence, 2 Ph 247.

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(*a*). Guardians appointed by the court are treated as officers of the court, and are held responsible accordingly to it(*b*).

1114. The question of who are to be appointed guardians, is one of discretion, merely; and the court ordinarily, especially if the guardianship be contested between two or more parties (*c*), directs a reference to appoint guardians(*d*), leaving the person in whose custody the infant actually is, to retain that custody until the coming in of the master's report(*e*). But if there are testamentary guardians, the court has no jurisdiction to interfere(*f*). If the testamentary appointment, however, be one, that contemplates the residence of the child in the country of its birth, and the child be removed to a residence within the jurisdiction of the court, it seems that the court 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(*g*). But at the same time, the court will look at all the circumstances, and not appoint the persons for whom the parent has

(*a*) Lord Eldon, in Wellesley *v.* Duke of Beaufort, 2 Russ. 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; 2 Swanst. 533; *Ex parte* Mountfort, 15 Ves. 445; *Ex parte* Salter, 2 Dick. 769; Wilcox *v.* Drake, 2 Dick. 631; cited Jac. 251, note (*c*); Curtis *v.* Rippon, 4 Mad. 462; *Ex parte* Myerscough, 1 J. & W. 151; *Ex parte* Richards, 3 Atk. 518; *Ex parte* Birchell, 3 Atk. 812; *Ex parte* Woolscombe, 1 Mad. 213; *Ex parte* Wheeler, 16 Ves. 256; *Re* Jones, 1 Russ. 478; Bradshaw *v.* Bradshaw, 1 Russ. 528.

(*b*) Story, s. 1338; Wellesley *v.* Duke of Beaufort, 2 Russ. 1, 20.

(*c*) See Knott *v.* Cottee, 2 Ph. 192.

(*d*) See *Re* Bond, 11 Jur. 114.

(*e*) Coham *v.* Coham, 13 Sim 639.

(*f*) But see Anon. 6 Gr. 632.

(*g*) See Miller *v.* Harris, 14 Sim. 540; *Re* Johnstone, 2 J. & L. 222.

expressed a preference, if they are resident in the country of the child's birth, unless the court is satisfied that it was his intention to appoint them guardians generally, and not guardians for that country merely(*a*).

1115 In the next place, as to the removal of guardians. 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 (*b*). In all such cases, the 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 will interpose, not only by way of remedial justice, but of preventive justice(*c*). 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(*d*); 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 (*e*). 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(*f*).

1116. The Court of Chancery will not only interfere to remove guardians for improper conduct, but it will also assist

(*a*) Beattie *v.* Johnson, 1 Ph. 17; 10 Cl. & Fin. 42.

(*b*) Duke of Beaufort *v.* Berty, 1 P. W. 703; Butler *v.* Freeman, Ambl. 302; Roach *v.* Garvan, 1 Ves. Sen. 160; Wellesley *v.* Duke of Beaufort, 2 Russ. 21, 22; Wellesley *v.* Wellesley, 2 Bligh, N. R. 128, 145, 145. See also Eyre *v.* Countess of Shaftesbury, 2 P. W. 107; O'Keefe *v.* Casey, 1 S. & L. 106; Tombes *v.* Elers, 1 Dick. 88; Smith *v.* Bate, 2 Dick. 631; Morgan *v.* Dillon, 9 Mod. 139. But see Ingham *v.* Bickerdike, 6 Mad. 276.

(*c*) Wellesley *v.* Duke of Beaufort, 2 Russ. 1, 20; Wellesley *v.* Wellesley, 2 Bligh, N. R. 128, 141; Duke of Beaufort *v.* Berty, 1 P W. 704, 705; Com. Dig. *Chancery*, 3 O. 4. 5.

(*d*) See *Re* McCulloch, 1 Dr. 276.

(*e*) Duke of Beaufort *v.* Berty, 1 P. W. 703, 704; De Manneville *v.* De Manneville, 10 Ves. 55; Lyons *v.* Blenkin, Jac. 245; Skinner *v.* Warner, 2 Dick. 779; Tombes *v.* Elers, 1 Dick. 88; Talbot *v.* Earl of Shrewsbury. 4 M. & C. 672.

(*f*) Foster *v.* Denny, 2 Ch. Cas. 237; Hanbury *v.* Walker, 3 Ch. Cas. 58; 1 Mad. Pr. Ch. 263, 264, 268, 269.

guardians in compelling their wards to go to the schools 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 a writ of *habeas corpus*, but it may also be done on a petition, without any bill being filed in the court(*a*). The jurisdiction of the court extends to the care of the person of the infant, so far as necessary for his protection and education; and as to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance(*b*). 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(*c*).

1117. Although, in general, parents are intrusted 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, this presumption may be removed; as when (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(*d*); 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(*e*).

1118. In every such case the court will interfere, and de-

(*a*) Eyre *v.* Countess of Shaftesbury, 2 P. W. 103, 118, 120; Goodall *v.* Harris, 2 P. W. 561, 562; *Ex parte* Hopkins, 3 P. W. 152; Hall *v.* Hall, 3 Atk. 721; Da Costa *v.* Mellish, West, 300; 2 Swanst. 533, 537, note; Reynolds *v.* Teynham, 9 Mod. 40; Wright *v.* Naylor, 5 Mad. 77; *Re* Gillrie, 3 Gr. 279.

(*b*) *Re* Spence, 2 Ph. 247.

(*c*) Co. Litt. 88 b, Hargrave's note. See 1 Black. Comm. 461, 462.

(*d*) *Re* Fynn, 2 D. & Sm. 457; Warde *v.* Warde, 2 Ph. 786; Thomas *v.* Roberts, 14 Jur. 639.

(*e*) See Anon., 2 Sim. N. S. 54. But see Ball *v.* Ball, 2 Sim. 35.

prive the father 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(*a*). But it is only in cases of gross misconduct that paternal rights are interfered with(*b*). As between husband and wife, the custody of the children generally belongs to the husband(*c*).

1119. 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 have the custody of his infant children; and it has been said that by the common law the courts have no power to take legitimate minor children from the custody of the father(*d*). But the courts have now jurisdiction by statute to confer the custody on the mother until the infant attains twelve years of age(*e*).

1120. 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(*f*).

1121. The court has no jurisdiction to remove a child from the custody of the father or mother, merely because it would

(*a*) Duke of Beaufort *v.* Berty, 1 P. W. 703; Whitfield *v.* Hales, 13 Ves. 482; De Manneville *v.* De Manneville, 10 Ves. 59; Shelley *v.* Westbroke, Jac. 266; Lyons *v.* Blenkin, Jac. 245; Roach *v.* Garvan, 1 Dick. 88; Lord Shipbrook *v.* Lord Hinchinbrook, 2 Dick. 547; Creuse *v.* Orby Hunter, 2 Cox, 242; Wellesley *v.* Duke of Beaufort, 2 Russ. 1, 20, 21; 2 Bligh, N. R. 128, 141; Com. Dig. *Chancery*, 3 O. 4, 5; Ball *v.* Ball, 2 Sim. 35; *Ex parte* Mountfort, 15 Ves. 445.

(*b*) *Re* Pulbrook, 11 Jur. 185.

(*c*) See *Re* North, 11 Jur. 7; Regina *v.* Smith, 17 Jur. 24.

(*d*) *Re* Hakewill, 12 C. B. 223. And see *Ex parte* Skinner, 9 J. B. Moore, 278; Rex *v.* Hopkins, 7 East, 579.

(*e*) Con. Stat. U. C. c. 74, ss. 8 to 11; *Re* Davis, 3 Chan. Cham. R. 277; Monro *v.* Monro, 15 Gr. 431. And see *Re* Fynn, 2 D & Sm. 457; *Re* Tomlinson, 3 D. & Sm. 371; *Re* Taylor, 11 Sim. 178; Shillito *v.* Collett, 8 W.R. 683; *Re* Winscom, 2 H. & M. 540.

(*f*) See the very able judgment of Lord Redesdale in Wellesley *v.* Wellesley, 2 Bligh, N. R., 124, for a discussion of the principles on which the jurisdictio is rested.

be for the benefit of the child. The peculiar religious opinions, or the poverty of the father, form no grounds for removing the child from his custody. Mere acts of harshness or severity, by a father, not such as would be injurious to the health, or the fact of a somewhat passionate temper, will not justify such removal(*a*.)

1122. 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 (*b*). 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 special cognizance and protection(*c*).

1123. The power of the Court of Chancery to appoint a guardian, and make an infant a ward of the court, is not 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(*d*).

1124. 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(*e*). Every act done without such direction is treated as

(*a*) Curtis *v.* Curtis, 5 Jur. N. S. 1147. See *Re* Newberry, L. R. 1 Eq. 451; L. R. 1 Chan. 263, where the subject of enforcing the provisions of the father's will in regard to the religious education of his children is discussed.

(*b*) See Goodall *v.* Harris, 2 P. W. 560, 562. See Hughes *v.* Science, Ambl. 302, note.

(*c*) Butler *v.* Freeman, Ambl. 301; Hughes *v.* Science, Ambl. 302, note; Eyre *v.* Countess of Shaftesbury, 2 P. W. 112; Wright *v.* Naylor, 5 Mad. 77; Wellesley *v.* Wellesley, 2 Bligh, N. R. 137.

(*d*) Johnstone *v.* Beattie, 10 Cl. & Fin. 42.

(*e*) See Goodall *v.* Harris, 2 P. W. 560, 562; Daniel *v.* Newton, 8 Beav. 485; Butler *v.* Freeman, Ambl. 302, 303; Hughes *v.* Science, Ambl. 302, note; Johnstone *v.* Beattie, 10 Cl. & Fin. 42, 84, 85.

a violation of the authority of the court, and the offending party will be arrested upon the 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; 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(*a*).

1125. Whenever 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(*b*). 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(*c*).

(*a*) 2 Fonbl. Eq. B. 2, Pt. 2, ch. 2, s. 1, and notes (*b*), (*c*); Hughes *v.* Science, Ambl. 302, note; Macpherson on Infants, Appendix I.

(*b*) See Wellesley *v.* Wellesley, 2 Bligh, N. R. 135.

(*c*) *Ex parte* Whitfield, 2 Atk. 315; *Ex parte* Thomas, Ambl. 146; *Ex parte* Kent, 3 Bro. C. C. 88; *Ex parte* Salter, 2 Dick. 769; 3 Bro. C. C. 500; *Ex parte* Mountfort, 15 Ves. 445; *Ex parte* Myerscough, 1 J. & W. 152; Corbett *v.* Tottenham, 1 B. & B. 59, 60. *Ex parte* Green, 1 J. & W. 253; *Ex parte* Starkie, 3 Sim. 339; *Ex parte* Lakin, 4 Russ. 307; *Ex parte* Molesworth, 4 Russ, 308, note; Clay *v.* Pennington, 8 Sim. 359; Bridge *v.* Brown, 2 Y. & C. 181.

1126. In regard to the maintenance of infants out of their own property, it is not allowed as a matter of course by a court of equity, either out 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(*a*). But if the father is unable to support the infant, he may be allowed out of his estate; and if special circumstances exist, the father may be allowed for expenses of past maintenance(*b*).

1127. 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(*c*).

1128. In allowing maintenance, the court has 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(*d*). Similar considerations will apply to a father or mother of the infant, who is in distress or narrow circumstances(*e*). On the other hand, in

(*a*) Thompson *v.* Griffin, Cr. & Ph. 317, 320. And see Stocken *v.* Stocken, 4 Sim. 152; 4 M. & C. 95; Mundy *v.* Lord Howe, 4 Bro. C. C. 223; Meacher *v.* Young. 2 M. & K. 490; Bruin *v.* Knott, 1 Ph. 572.

(*b*) See Carmichael *v.* Hughes, 20 L. J. Ch. 396. See also Stopford *v.* Lord Canterbury, 11 Sim. 82; Bruin *v.* Knott, 1 Ph. 572.

(*c*) Stephens *v.* James, 1 M. & K. 627; Logan *v.* Farlie, Jac. 193; and see note, Jac. 265. And see Sanborn *v.* Sanborn, 11 Gr. 361.

(*d*) Harvey *v.* Harvey, 2 P. W. 21, 22; Lanoy *v.* Duke of Athol, 2 Atk. 447; Petre *v.* Petre, 3 Atk. 511; Burnet *v.* Burnet, 1 Bro. C. C. 179; Mitchell *v.* Ritchey, 13 Gr. 453.

(*e*) Roach *v.* Garvan, 1 Ves. Sen. 160; Bradshaw *v.* Bradshaw, 1 J. & W. 647; Heysham *v.* Heysham, 1 Cox, 179; Allen *v.* Coster, 1 Beav. 201.

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(*a*). 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(*b*).

1129. The court also exercise, a vigilant care over guardians in their management of the property of the infant. It will carry its aid and protection in favour 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 (*c*).

1130. The marriage of infants 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; 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(*d*).

1131. In all cases where the Court of Chancery appoints a guardian, or committee in the nature of a guardian, to have

(*a*) Barlow *v.* Grant, 1 Vern. 255; Harvey *v.* Harvey, 2 P. W. 22; *Ex parte* Green, 1 J. & W. 253; Walker *v.* Wetherell, 6 Ves. 474; *Re* England, 1 R. & M. 499; *Ex parte* Swift, 1 R. & M, 575; Clay *v.* Pennington, 8 Sim. 359; Ashbough *v.* Ashbough, 10 Gr. 430. But see *Re* Coe's Trust, 4 K. & J. 199.

(*b*) Walker *v.* Wetherell, 6 Ves. 474.

(*c*) Wyllie *v.* Ellice, 6 Hare, 505.

(*d*) Eyre *v.* Countess of Shaftesbury, 2 P. W. 111; Butler *v.* Freeman, Ambl. 302 Edes *v.* Brereton, West, 348; More *v.* More, 2 Atk. 157; Herbert's case, 3 P. W. 116 Hughes *v.* Science, Ambl. 302, note; Nicholson *v.* Squire, 16 Ves. 259.

the care of an infant, it is accustomed to require the party to give security 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 security would in strictness be forfeited, whatever favour the court might, upon an application, think fit to extend to the party, when he should appear to have been in no fault(*a*).

1132. Where there is reason to suspect an intended and improper marriage without its sanction, the court will, by 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, will remove the infant from his care and custody, and place the infant under the care and custody of a committee(*b*).

1133. 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(*c*). 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 equitable and proper(*d*). It will not make any difference in the case, that the ward has since come 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(*e*).

(*a*) Eyre *v.* Countess of Shaftesbury, 2 P. W. 112; Dr. Davis's case, 1 P. W. 698.

(*b*) Smith *v.* Smith, 3 Atk. 304; Pearce *v.* Crutchfield, 14 Ves. 206; Beard *v.* Travers, 1 Ves. Sen. 313; Shipbrook *v.* Hinchinbrook, 2 Dick. 547, 548; Roach *v.* Garvan, 1 Ves. Sen. 160.

(*c*) Smith *v.* Smith, 3 Atk. 305.

(*d*) Stevens *v.* Savage, 1 Ves. 154; Winch *v.* James, 4 Ves. 386; Bathurst *v.* Murray, 8 Ves. 74, 78, Ball *v.* Coutts, 1 V. & B. 300, 301, 306.

(*e*) Stackpole *v.* Beaumont, 3 Ves. 98.

1134. The Court of Chancery refuses to interfere with the custody of foreign guardians and their control of their wards, upon mere grounds of expediency and advantage to the wards. If there is within the jurisdiction, property belonging to the wards, guardians will be appointed to supplement the office and duty of the foreign guardians, in case of neglect or abuse, and to bring the matter before the court for proper directions. But no interference with the control of the person of the wards by the foreign guardians will be allowed until some case of abuse is shown. The court will not in such case entertain any question of the preference of the wards and the greater advantage to them of English control or education(*a*).

1135. In this Province the court has by Statute,(*b*) jurisdiction to order a sale, lease, or other disposition of property of which an infant is seised or possessed, in fee or for a term of years or otherwise, wherever the court is of opinion that such sale or lease is necessary or proper for the maintenance or education of the infant; or that by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such disposition. But no sale, lease, or other disposition can be made against the provisions of any will or conveyance by which the estate has been devised or granted to the infant or for his use(*c*).

1136. In directing the sale of an infant's estate under the Statute, the court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit(*d*).

(*a*) Nugent *v.* Vetzera, L. R. 2 Eq. 704.
(*b*) Con. Stat. U. C. c. 12. s. 50.
(*c*) Con. Stat. U. C. c. 12, s. 51.
(*d*) *Re* McDonald, 1 Chan. Cham. R. 97.

CHAPTER XXXVIII.

IDIOTS AND LUNATICS.

1137. 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(*a*)

1138. The statutes of 17 Edward 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. The jurisdiction in England 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(*b*). From this circumstance 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. 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(*c*).

1139. The court in this Province has not only the same jurisdiction as the court in England over "lunatics, idiots and persons of unsound mind, and their property and estates," but the statute expressly provides that the jurisdiction shall

(*a*) Beverley's case, 4 Co. 126; 1 Black. Comm. 303; *Ex parte* Grimstone, Ambl. 707; s. c. cited 2 Ves. 235, note; *Ex parte* Degge, 4 Bro. C. C. 235, note; Oxenden *v.* Lord Compton, 2 Ves. 71; Eyre *v.* Countess of Shaftesbury, 2 P. W. 118, 119; Cary *v.* Bertie, 2 Vern. 342, 343; 2 Fonbl. Eq. B. 2, Pt. 2 ch. 2, s. 1, note (*a*).

(*b*) *Ex parte* Phillips, 19 Ves. 122; Oxenden *v.* Lord Compton, 2 Ves. 72.

(*c*) Story, s. 1363.

include that which in England is conferred upon the Lord Chancellor by a commission from the crown under the sign manual(*a*).

1140. 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(*b*). When a person is ascertained to be an idiot or lunatic(*c*), 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(*d*). After the custody is so granted, and maintenance is assigned, the chancellor acts in other matters, relative to lunatics, at least(*e*), 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. 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(*f*).

1141. In regard to the manner of ascertaining whether a person is an idiot or lunatic, or not, a few words will suffice. Upon a proper petition, a commission may issue, on which the inquiry is to be made, as to the asserted idiocy or lunacy of the party(*g*). The inquisition is always had, and the question

(*a*) Con. Stat. U. C. c. 12, s. 31.

(*b*) Lysaght *v.* Royse, 2 S. & L. 153. And see Gilbee *v.* Gilbee, 1 Ph. 121.

(*c*) As to the jurisdiction of chancery to interfere for the protection of a lunatic not found so by inquisition, see Nelson *v.* Duncombe, 9 Beav. 214.

(*d*) Dormer's case, 2 P. W. 263; Sheldon *v.* Fortescue Aland, 3 P. W. 110; Lysaght *v.* Royse, 2 S. & L. 153; *Ex parte* Chumley, 1 Ves. 296; *Ex parte* Baker, 6 Ves. 8; *Ex parte* Pickard, 3 V. & B. 127; *Ex parte* Webb, 2 Ph. 10.

(*e*) See Lysaght *v.* Royse, 2 S. & L. 153.

(*f*) *Ex parte* Grimstone, Ambl. 707; *Ex parte* Degge, 4 Bro. C. C. 235 note; *Ex parte* Fitzgerald, 2 S. & L. 432, 438; Oxenden *v.* Lord Compton, 2 Ves. 69; s. c. 4 Bro. C. C. 231; Nelson *v.* Duncombe, 9 Beav. 211.

(*g*) Lysaght *v.* Royse, 2 S. & L. 153; *Ex parte* Fitzgerald, 2 S. & L. 438; *Re* Webb, 2 Ph. 10; *Re* Gordon, 2 Ph. 242.

tried by a jury. The commission is not confined to idiots or lunatics, strictly so called; but in modern times it is extended to all persons, who, from age, infirmity, or other misfortune are incapable of managing their own affairs(*a*), and therefore are properly deemed of unsound mind, or *non compotes mentis* (*b*). In this Province, the Court may declare a person a lunatic without the delay or expense of issuing a commission(*c*).

1142. The Court itself may also make enquiries, and hear evidence and try the question of lunacy with or without the aid of a jury. The alleged lunatic can, however, demand a jury(*d*).

1143. 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 other property within the jurisdiction, although he is domiciled abroad(*e*).

1144. Where the personal estate of a lunatic is not sufficient for the discharge of his debts, the court may, on the petition of the committee, order the real estate or a sufficient portion of it to be mortgaged, leased, or sold. And where the personal estate, and the rents, profits and income of the real estate are insufficient for the maintenance of the lunatic, or that of his family, or for the education of his children, on the application of the committee, or any member of the lunatic's family, the committee may be authorized or directed to mortgage or sell the whole or part of the real estate as may be necessary(*f*).

(*a*) See *Re* Monaghan, 3 J. & L. 258.

(*b*) Gibson *v.* Jeyes, 6 Ves. 273; Ridgway *v.* Darwin, 8 Ves. 66; *Ex patre* Cranmer, 12 Ves. 446; Sherwood *v.* Sanderson, 19 Ves. 285.

(*c*) Con. Stat. U. C. c. 12, s. 33.

(*d*) 28 Vic. c. 17, s. 5.

(*e*) Southcot's case, 2 Ves. Sen. 402; *Re* Princess Bariantinski, 1 Ph. 375.

(*f*) Con. Stat. U. C. c. 12, ss. 38, 39. And see *Re* Frost, L. R. 5 Chan. 699; *Re* Strickland, L. R. 6 Chan. 226.

1145. In case any mortgage, lease, or sale has been made, the lunatic and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, have the like interest in the surplus of the money raised, as he or they would have in the estate, if no mortgage, lease, or sale had been made; and such money is to be treated and dealt with as of the same nature and character as the estate [mortgaged, leased, or sold(*a*).

1146. Suits are sometimes entertained in courts of equity on behalf of persons of weak mind, brought by their next friend, where no declaration of lunacy has been applied for or made, and a decree pronounced for the protection of the plaintiff's property, and liberty given to apply in lunacy as to its application(*b*).

CHAPTER XXXIX.

MARRIED WOMEN.

1147. A peculiar jurisdiction was always exercised by courts of equity, in regard to the persons and property of MARRIED WOMEN; and, principally, in regard to their property.

1148. Recent legislation has made great alterations in the position and rights of married women, in relation to property. The real estate of any married woman, owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof are now held and enjoyed by her for her separate use, free from any estate or claim of her husband during her life time, or as tenant by the courtesy, and her receipts alone are a sufficient discharge for any rents, issues and profits. A married woman

(*a*) Co. Stat. U. C. c. 12, s. 40. And see Campbell *v.* Campbell, 19 Gr. 25.

(*b*) Light *v.* Light, 25 Beav. 248. See also Conduit *v.* Soane, 5 M. & C. 111; *Re* Berry, 13 Beav. 455; *Re* Irby, 17 Beav. 334; Herring *v.* Clark, L. R. 4 Chan. 167.

is also liable upon any contract made by her, respecting her real estate, as if she were a *feme sole*(*a*).

1149. A married woman may also carry on any occupation or trade separately from her husband. All proceeds or profits from any such occupation or trade; all her wages and personal earnings; and all investments of such wages, earnings, moneys, or property are free from the debts or disposition of the husband, and may be held and enjoyed by her, and disposed of without her husband's consent, as freely as if she were a *feme sole* The possession, actual or constructive, of the husband, of any of his wife's personal property, does not render the same liable for his debts(*b*).

1150. A married woman may also, in her own name, or in that of a trustee for her, insure for her sole benefit, or for the use and benefit of her children, her own life, or with his consent, the life of her husband, and the amount payable under the insurance, shall be receivable for the sole and separate use of the married women, or her children, as the case may be, free from the claims of the husband's representatives, or of any of his creditors(*c*).

1151. A married woman may also become a stockholder or member of any bank, insurance company, or association, as if a *feme sole*, and may vote by proxy, or otherwise, and enjoy the same rights as other stockholders or members. She may also make deposits of money in her own name in any savings or other bank, and withdraw the same by her own cheque, and her receipt or acquittance is a sufficient legal discharge to the bank. But any deposit or investment by a married woman of her husband's moneys in fraud of his creditors is not protected(*d*).

1152. A married woman may also maintain an action in

(*a*) Ont. Stat. 35 Vic. c. 16, s. 1. This section applies only in the case of marriage since the passing of the Act, Dingman *v.* Austin, 33 U. C. Q. B. 190.
(*b*) Ont. Stat. 35 Vic. c. 16, s. 2.
(*c*) Ont. Stat. 35 Vic. c. 16, s. 3.
(*d*) Ont. Stat. 35 Vic. c. 16, ss. 5, 6.

her own name for the recovery of any wages, earnings, money and property, which is her separate property, and she has in her own name the same remedies, both civil and criminal, against all persons whomsoever, for the protection and security of such wages, earnings, money and property, and of any chattels or other her separate property for her own use, as if such wages, earnings, money chattels and property belonged to her as an unmarried woman. Any married woman may be sued or proceeded against separately from her husband, in respect of any of her separate debts, engagements, contracts, or torts, as if she were unmarried(*a*).

1153. A husband is not, by reason of any marriage since the 2nd of March, 1872, liable for the debts of his wife contracted before marriage; but the wife is liable to be sued therefor, and any property belonging to her for her separate use is liable to satisfy such debts as if she had continued unmarried. And a husband is not liable for any debts of his wife, in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her contracts(*b*).

1154. By an Act passed in 1859(*c*), every married woman might by devise, or bequest, executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, whether acquired before or after marriage, to or among her child or children, issue of any marriage, and failing there being any issue, then to her husband, or as she might see fit, in the same manner as if she were *sole* and unmarried. Her husband was not, however, by any such devise or bequest deprived of any right he might have acquired as tenant by the courtesy(*d*).

(*a*) Ont. Stat. 35 Vic. c. 16, s. 9. See Merrick *v.* Sherwood, 22 U. C. C. P. 467. It is not now necessary to make the husband of a married woman a co-defendant with her in a Suit in Chancery. Indeed, he is no longer a proper party, and may demur for want of equity, Per Chancellor Spragge, in Macfarlane *v.* Murphy.

(*b*) Ont. Stat. 35 Vic. c. 16, s. 8.

(*c*) Con. Stat. U. C. c. 73, s. 16.

(*d*) A devise by a married woman of real estate, which was her separate property, but of which her husband was in possession before the 4th of May, 1859, has been held good, *Re* Hilliker, 3 Chan. Cham. R. 72.

1155. That Act did not authorize a married woman, who had a child, or children, to devise or bequeath her property otherwise than to or among such child or children. Any disposition of her property in favour either of her husband or other parties was void, and as to the portion attempted to be so disposed of there was an intestacy(*a*).

1156. The clause of the Act in question has since been repealed, and now a married woman has the same power to dispose of her property by will that an unmarried woman has(*b*).

1157. The separate personal property of a married woman dying intestate is distributed in the same proportions between her husband and children as the personal property of a husband dying intestate is distributed between his wife and children. If there be no child or children living, at the death of the wife dying intestate, then the property is distributed as if the Act had not been passed(*c*).

1158. It has been held that the general scope and tenor of the Act was to protect and free from liability the property, real and personal, of married women; not to subject it to fresh liabilities except in the case of her torts, and of her debts and contracts before marriage. It conferred upon such property certain qualities incident to separate estate, but it withheld the *jus disponendi*(*d*).

1159. Notwithstanding these changes in the law, it is important to give some of the leading doctrines of courts of equity respecting married women and their property, as these obtained prior to the recent statutes.

(*a*) Mitchell *v.* Weir, 19 Gr. 568.

(*b*) Ont. Stat. 36 Vic. c. 20, s. 5. The words of that Act are "Every person may devise, bequeath, or dispose, &c." The interpretation clause (sec. 4) says: the term "person" shall include a married woman.

(*c*) Con. Stat. U. C. c. 73, s. 17.

(*d*) Royal Canadian Bank *v.* Mitchell, 14 Gr. 419, 420. And see Chamberlain *v.* McDonald, 14 Gr. 447.

1160. At common law, 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. 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(*a*).

1161. A man cannot, at law, 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. Upon the same ground it is, that, 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(*b*).

1162. It is also a settled rule of the common law, founded on 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. 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(*c*).

1163. 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

(*a*) 1 Black. Comm. 442.
(*b*) 1 Black. Comm. 443.
(*c*) Hare *v.* Beecher, 12 Sim. 465, 467; Story, s. 1367a.

the contrary, courts of equity, for many purposes, treat the husband and wife 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(*a*). And in cases respecting her separate estate, she may also be sued without him(*b*); although he is ordinarily required to be joined for the sake of conformity to the rule of the law, as a nominal party, whenever he is within the jurisdiction of the court, and can be made a party(*c*).

1164. By the general rules of law, contracts made between husband and wife before marriage become, by their matrimonial union, utterly extinguished(*d*). 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(*e*). 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(*f*).

1165. In regard to contracts made between husband and wife after marriage, *à 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. Here again, although courts of equity follow the law, they will, under particular circumstances, give full effect and validity to postnuptial contracts. Thus, for example, if a wife, having a separate estate, should, *bonâ fide*, enter into a contract with her husband, to make him a certain allowance

(*a*) Arundell *v.* Phipps, 10 Ves. 144, 149; Cannel *v.* Buckle, 2 P. W. 243, 244.

(*b*) Dubois *v.* Hole, 2 Vern. 613. See Travers *v.* Bulkeley, 1 Ves. Sen. 384; Brooks *v.* Brooks, Prec. Ch. 24; Kirk *v.* Clark, Prec. Ch, 275; Lampert *v.* Lampert, 1 Ves. 21; Griffith *v.* Hood, 2 Ves. Sen. 452.

(*c*) See Lilia *v.* Airey, 1 Ves. 278. But see now, Note to Sec. 1152.

(*d*) Co. Litt. 112 *a*, 187 *b*; Com. Dig. *Baron & Feme*, D. 1.

(*e*) Com. Dig. *Baron & Feme*, D. 1; Cro. Car. 551; Co. Litt, 264 *b*.

(*f*) Rippon *v.* Dowding, Ambl. 566.

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(*a*). 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(*b*).

1166. 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(*c*).

1167. But where a legacy to the wife was paid to her, and both she and her husband executed a release, and, immediately after, the money came into the hands of the husband, and he employed it, partly in his own business, and partly in the family expenditure, with the assent of the wife, there being no other evidence whether the wife expected it to be held in trust for her use, it was considered there was no such trust, and that she could not claim it out of her husband's estate(*d*).

1168. Upon similar grounds, 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, 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 reimburse-

(*a*) More *v.* Freeman, Bunb. 205.
(*b*) Harvey *v.* Harvey, 1 P. W. 125, 126; 2 Vern. 659, 760; Com. Dig. *Chancery*, 2 M. 11, 12, 14.
(*c*) Darley *v.* Darley, 3 Atk. 399; Rich *v.* Cockell, 9 Ves. 375.
(*d*) Gardner *v.* Gardner, 5 Jur. N. S. 975; 1 Giff. 126.

ment out of his estate, and to the like privileges as belong to other creditors(*a*).

1169. In respect 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 (*b*). If the nature and circumstances of the gift or grant, whether it be express or implied, 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(*c*).

1170. 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(*d*), 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(*e*). It is true that courts of equity 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(*f*). *A fortiori*, such allowances provided for by marriage articles, or by a settlement before marriage, even without the intervention of

(*a*) Tate *v.* Austin, 1 P. W. 264; 2 Vern. 689; Pawlet *v.* Delaval, 2 Ves. Sen. 663, 669; Clinton *v.* Hooper, 3 Bro. C. C. 201; Innes *v.* Jackson, 16 Ves. 356, 367; 1 Bligh, 104, 114, 115.

(*b*) Beard *v.* Beard, 3 Atk. 72.

(*c*) Walter *v.* Hodge, 2 Swanst. 106, 107; Lucas *v.* Lucas, 1 Atk, 270, 271.

(*d*) Slanning *v.* Style, 3 P. W. 337. 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, Jodrell *v.* Jodrell, 9 Beav. 45.

(*e*) 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. See Lloyd *v.* Pughe, L. R. 14 Eq. 241; 8 Chan. 88.

(*f*) McLean *v.* Longlands, 5 Ves. 78, 79; Walter *v.* Hodge, 2 Swanst. 103.

trustees, will be deemed valid in equity, to all intents and purposes, not only against the husband, but also against his creditors(*a*).

1171. The strict rules of the old common law would not permit the wife to take or enjoy any real or personal estate separate from or independent of her husband. Courts of equity have, however, 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.

1172. 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(*b*).

1173. 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 also(*c*). Although the agreement is made between husband and wife alone, the trust will attach upon him, and be enforced in the same manner, and under the same circum-

(*a*) Story, s. 1375.

(*b*) Story, s. 1379.

(*c*) Parker *v.* Brooke, 9 Ves. 583; Bennet *v.* Davis, 2 P. W. 316; Lucas *v.* Lucas, 1 Atk. 270; Pawlet *v.* Delaval, 2 Ves. Sen. 666, 667; Slanning *v.* Style, 3 P. W. 337; Rollfe *v.* Budder, Bunb. 187; Darley *v.* Darley, 3 Atk. 399; Rich *v.* Cockell, 9 Ves. 375; Davison *v.* Atkinson, 5 T. R. 434; Lee *v.* Prieaux, 3 Bro. C. C. 383; Woodmeston *v.* Walker, 2 R. & M. 197; Major *v.* Lansley, 2 R. & M. 355.

stances, that it would be if he were a mere stranger(*a*). It makes 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(*b*).

1174. 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 involves some nice distinctions. 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(*c*). But the question which most frequently arises is, what words are sufficiently expressive, for the purpose must clearly appear beyond any reasonable doubt(*d*).

1175. 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"(*e*); or, "to her sole use and benefit"(*f*); or, "for her own use, and at her own disposal"(*g*); or, "to her own use during her life, independent of her husband"(*h*); or, "that she shall enjoy and receive the issues and profits"(*i*); in all these cases the marital

(*a*) 2 Fonbl. Eq. B. 1, ch. 2, s. 6, note (*n*), &c.

(*b*) See Allen *v.* Walker, L. R. 5 Ex. 187. But see Ashton *v.* Blackshaw, L. R. 9 Eq. 510.

(*c*) Darley *v.* Darley, 3 Atk. 399; Tyrrell *v.* Hope, 2 Atk. 561; Stanton *v.* Hall, 2 R. & M. 175; Newlands *v.* Paynter, 10 Sim. 377; 4 M. & C. 408.

(*d*) Lumb *v.* Milnes, 5 Ves. 517; Brown *v.* Clark, 3 Ves. 166; *Ex parte* Ray, 1 Mad. 199; Rich *v.* Cockell, 9 Ves. 370, 377; Wills *v.* Sayers, 4 Mad. 409; Massey *v.* Parker, 2 M. & K. 174.

(*e*) Adamson *v.* Armitage, Coop. t. Eld. 283; 19 Ves. 416; Wills *v.* Sayers, 4 Mad. 409.

(*f*) —— *v.* Lynne, 1 Younge, 562.

(*g*) Prichard *v.* Ames, T. & R. 222; Stanton *v.* Hall, 2 R. & M. 175.

(*h*) Wagstaff *v.* Smith, 9 Ves. 520.

(*i*) Tyrrell *v.* Hope, 2 Atk. 561.

rights of her husband will be excluded, and the property will be for her exclusive use.

1176. 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(*a*). 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 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(*b*). 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(*c*). So, a bequest to a married woman, "for her benefit, independent of the control of her husband," will receive the like construction(*d*).

1177. But the woman's 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(*e*).

1178. A gift or bequest, after marriage, to a married woman, "for her own use and benefit(*f*);" or, "to pay the same into

(*a*) Lee *v.* Prieaux, 3 Bro. C. C. 381; Lumb *v.* Milnes, 6 Ves. 517; Tyler *v.* Lake, 2 R. & M. 183; —— *v.* Lyne, 1 Younge, 562; Stanton *v.* Hall, 2 R. & M. 180; Blacklow *v.* Laws, 2 Ha. 40, 49.

(*b*) Darley *v.* Darley, 3 Atk. 399; Wagstaff *v.* Smith, 9 Ves. 520, 524; Johnes *v.* Lockhart, 3 Bro. C. C. 383, note; Tyler *v.* Lake, 2 R & M. 183.

(*c*) Margetts *v.* Baringer, 7 Sim. 482.

(*d*) Simons *v.* Horwood, 1 Keen, 7.

(*e*) Baker *v.* Newton, 2 Beav. 112. See Arnold *v.* Woodhams, L. R. 16 Eq. 29.

(*f*) Kensington *v.* Dollond, 2 M. & K. 184; Wills *v.* Sayers, 4 Mad. 409; Roberts *v.* Spicer, 5 Mad. 491.

her own proper hands, to and for her own use and benefit(*a*);" or to pay an annuity "into her proper hands, for her own proper use and benefit(*b*);" 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. 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(*c*).

1179. 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. 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(*d*).

1180. At law a married woman is, during her coverture, generally incapable of entering into any valid contract to bind either her person or her estate(*e*). 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(*f*).

(*a*) Tyler *v.* Lake, 2 R. & M. 183.

(*b*) Blacklow *v.* Laws, 2 Ha. 49.

(*c*) Dakins *v.* Berisford, 1 Ch. Cas. 194. See also Lumb *v.* Milnes, 5 Ves. 517; Stanton *v.* Hall, 2 R. & M. 175. And see Appleton *v.* Rowley, L. R. 8 Eq. 139.

(*d*) Peacock *v.* Monk, 2 Ves. Sen. 191; Doe *v.* Staples, 2 T. R. 695; Wright *v.* Englefield, 2 Ed. 239; Oke *v.* Heath, 1 Ves. 135; Marlborough *v.* Godolphin, 2 Ves. Sen. 75; Southby *v.* Stonehouse, 2 Ves. Sen. 610; Dowell *v.* Dew, 1 Y. & C. 345. And see Wood *v.* Wood, L. R. 10 Eq. 220.

(*e*) Marshall *v.* Rutton, 8 T. R. 545.

(*f*) See note to Hulme *v.* Tenant, 1 Bro. C. C. 20; Sockett *v.* Wray, 4 Bro. C. C. 485; Nantes *v.* Corrock, 9 Ves. 189; Jones *v.* Harris, 9 Ves. 496, 497; Stuart *v.* Lord Kirkwall, 3 Mad. 387; Owens *v.* Dickenson, Cr. & Ph. 48; Francis *v.* Wigzell, 1 Mad. 285. See Shattock *v.* Shattock, 12 Jur. N. S. 405; Johnson *v.* Gallagher, 7 Jur. N. S. 273.

1181. The doctrines maintained by courts of equity, as to the nature and extent of the liability of the separate estate of a married woman for her debts and other charges created during her coverture, are somewhat artificial, and cannot all be resolved into the general proposition, that she is, as to such property, to be deemed a *feme sole*. In the first place, her separate property is not in equity liable for the payment of her general debts, or of her general personal engagements. 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(*a*).

1182. 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, *à fortiori*, dispose of a part thereof(*b*). Her agreement, however, creating the charge, is not, properly speaking, an obligatory contract, for, as a *feme covert*, she is incapable of contracting; but is rather an appointment 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(*c*).

1183. 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 suffi-

(*a*) Story, s. 1398; Duke of Bolton *v.* Williams, 2 Ves. 138, 150, 156; Jones *v.* Harris, 9 Ves. 498; Stuart *v.* Kirkwall, 3 Mad. 387; Greatley *v.* Noble, 3 Mad. 94; Aguilar *v.* Aguilar, 5 Mad. 418. But see Chubb *v.* Stretch, L. R. 9 Eq. 555.

(*b*) Hulme *v.* Tenant, 1 Bro. C. C. 16, 20; Browne *v.* Like, 14 Ves. 302; Peacock *v.* Monk, 2 Ves. Sen. 190; Grigby *v.* Cox, 1 Ves. Sen. 517; Greatley *v.* Noble, 3 Mad, 94.

(*c*) Story, s. 1399; Stuart *v.* Lord Kirkwall, 3 Mad. 387; Greatley *v.* Noble, 3 Mad. 94; Field *v.* Sowle, 4 Russ. 112. See also Aguilar *v.* Aguilar, 5 Mad. 418. But see Owens *v.* Dickenson, Cr. & Ph. 48, 52 to 54.

cient 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 estate, otherwise the debt will not affect it. 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(*a*).

1184. After a thorough revision of the leading cases upon this subject from the earliest period, Lord Justice Turner came to the conclusion, that a court of equity, having created for married women a separate estate, has enabled them to contract debts in respect of it; that their separate estate may be subjected to the payment of such debts; and that a court of equity will give execution against it; but it was held, that something more is necessary to bind the separate estate of a married woman than the mere existence of such facts as would create a debt against a single woman. It should appear that an engagement was made with reference to and upon the faith or credit of the estate. And where a married woman, living apart from her husband and having separate estate, contracts debts, the court will impute to her the intention of dealing with her separate estate, unless the contrary is shown (*b*).

1185. 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

(*a*) Hulme *v.* Tenant, 1 Bro. C. C. 16; Heatley *v.* Thomas, 15 Ves. 596; Bullpin *v.* Clarke, 17 Ves. 365; Stuart *v.* Lord Kirkwall, 3 Mad. 387. See Owens *v.* Dickenson, Cr. & Ph. 48, 52; Crosby *v.* Church, 3 Beav. 489. See Tullett *v.* Armstrong, 4 Beav. 319, 323.

(*b*) Johnson *v.* Gallagher, 3 D. F. & J. 494. The same principle is maintained in Dillon *v.* Grace, 2 S. & L. 456. See also Vaughan *v.* Vanderstegen, 2 Drew. 165, 363; Picard *v.* Hine, L. R. 5 Chan. 274; McHenry *v.* Davies, L. R. 10 Eq. 88; Butler *v.* Cumpston, L. R. 7 Eq. 16; Matthewman's case, L. R. 3 Eq. 781; London C. Bank of Australia *v.* Lampriere, L. R. 4 P. C. 572.

other goods, personal chattels, and personal estate as come to her during the marriage. 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 (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. 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, and this is called the wife's equity to a settlement(*a*).

1186. The precise origin of this right of the wife, or the precise grounds upon which it was first established are not easily ascertained. 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(*b*). This is not so much a statement of 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 a creature of a court of equity, and stands upon its own peculiar doctrine and practice(*c*).

(*a*) Story, ss. 1402, 1405; Langham *v.* Nenny, 3 Ves. 469; Bond *v.* Simmons, 3 Atk. 20, 21.

(*b*) Jewson *v.* Moulson, 2 Atk. 419.

(*c*) Story, s. 1407; Murray *v.* Elibank, 10 Ves. 90; 13 Ves. 6.

1187. 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(*a*). 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 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(*b*).

1188. 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(*c*), although it was not then generally extended, as against the husband personally, to equitable interests, in which she had a life-estate only(*d*). It seems now to 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 husband or his assignee is obliged to come into a court of equity to enforce his rights against the property(*e*).

1189. Where the husband has made an assignment of the wife's *choses in action*, or other equitable interests, it is 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 her out of her *choses in action* and equitable interests 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 pro-

(*a*) Jewson *v.* Moulson, 2 Atk. 419, 420; Sleech *v.* Thorington, 2 Ves. Sen. 561; Att-Gen. *v.* Whorwood, 1 Ves. Sen. 538, 539; Bosvil *v.* Brander, 1 P. W. 459, Mr. Cox's note.

(*b*) Story, s. 1408.

(*c*) Burdon *v.* Dean, 2 Ves. 607; Sturgis *v.* Champneys, 5 M. & C. 97, 101.

(*d*) Eliot *v.* Cordell, 5 Mad. 155. But see Stanton *v.* Hall, 2 R. & M. 175.

(*e*) Sturgis *v.* Champneys, 5 M. & C. 97, 105; Hanson *v.* Keating, 8 Jur. 949.

porty, subject to all the equities which affect the bankrupt, or insolvent, or general assignor(*a*). 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(*b*).

1190. The principal controversy which has arisen is, whether a special assignee or purchaser from the husband, for a 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 do so(*c*).

1191. The court in this Province has jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would, by the law of England, obtain a divorce and alimony as incident thereto, or to any wife whose husband lives apart from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for a restitution of conjugal rights(*d*).

1192. Although in England the mere fact of desertion by the husband will not entitle the wife to a decree for alimony, still, as in this country, the court cannot decree restitution of conjugal rights, desertion would be sufficient to warrant a decree for alimony, and desertion coupled with other acts of cruelty forms a material ingredient in determining a wife's right to relief(*e*).

(*a*) Jewson *v.* Moulson, 2 Atk. 420; Jacobson *v.* Williams, 1 P. W. 382; Bosvil *v.* Brander, 1 P. W. 458; Burdon *v.* Dean, 2 Ves. 607; Prior *v.* Hill, 4 Bro. C. C. 139; Oswell *v.* Probert, 2 Ves. 680; Mitford *v.* Mitford, 9 Ves. 87, 97, 100; Elliott *v.* Cordell, 5 Mad. 149; Eedes *v.* Eedes, 11 Sim. 569, 570; Sturgis *v.* Champneys, 5 M. & C. 97, 103, 104.

(*b*) Pierce *v.* Thornley, 2 Sim. 167; Honner *v.* Morton, 3 Russ. 64, 68, 69; Gayer *v.* Wilkinson, 1 Bro. C. C. 49; Mitford *v.* Mitford, 9 Ves. 87, 97, 99; Purdew *v.* Jackson, 1 Russ. 64.

(*c*) Mitford *v.* Mitford, 9 Ves. 87, 97, 99; Elliot *v.* Cordell, 5 Mad. 149; Macaulay *v.* Phillips, 4 Ves. 19; Like *v.* Beresford, 3 Ves. 506; Pryor *v.* Hill, 4 Bro. C. C. 139; Purdew *v.* Jackson, 1 Russ. 1, 70; Honner *v.* Morton, 3 Russ. 64, 68; Pope *v.* Crashaw, 4 Bro. C. C. 326; Harwood *v.* Fisher, 1 Y. & C. Ex. 112; Johnson *v.* Johnson, 1 J. & W. 472, 479. See *Re* Carr's Trusts, L. R. 12 Eq. 609.

(*d*) Con. Stat. U. C. c. 12, s. 29.

(*e*) Severn *v.* Severn, 3 Gr. 431. See Rodman *v.* Rodman, 20 Gr. 428; Edwards *v.* Edwards, 20 Gr. 392.

1193. The right of a wife is to reside with her husband in his home, or in the joint home of both; where, therefore, it appeared that the husband resided with his children (by a former wife) and compelled his wife to live in lodgings, although no violence or ill-treatment was shown on the part of the husband to the wife, a decree for alimony was made in her favour(*a*)

1194. In fixing the amount of alimony, regard is had to the station in life, and position of the parties, and also to the nature of the property of which the husband is possessed. A percentage upon the annual value of the husband's property will very rarely, in this country, form a just measure for the allowance of alimony(*b*). As the wife and family are in most cases supported, partly at least, by the labour and skill of the husband, if any proportion is taken as the scale of allowance, the annual value of that labour and skill should be added to the annual value of the husband's property(*c*).

1195. As the purpose of allotting alimony to a wife is to afford her the means of supporting herself, whilst living apart from her husband, and the court does not contemplate the parties living separate for life, but looks forward to a reconciliation between them, it will not sanction the payment by the husband of a sum in gross, in lieu of an annual sum by way of alimony(*d*).

1196. A deed of separation, entered into by the husband and wife alone, without the intervention of trustees, is utterly void(*e*). And 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

(*a*) Weir *v.* Weir, 10 Gr. 565.

(*b*) Severn *v.* Severn, 7 Gr. 109; McCulloch *v.* McCulloch, 10 Gr. 322; Wilcocks *v.* Wilcocks, 30 L. J. Prob. 205. See also, Whildon *v.* Whildon, 5 L. T. N. S. 138.

(*c*) McCulloch *v.* McCulloch, 10 Gr. 322.

(*d*) Hagarty *v.* Hagarty, 11 Gr. 562.

(*e*) Legard *v.* Johnson, 3 Ves. 352, 359, 361; Westmeath *v.* Salisbury, 5 Bligh, N. R. 375.

is covenanted for by the husband, and the trustees covenant to exonerate him from any debts contracted therefor(*a*).

1197. 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(*b*). And 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(*c*).

CHAPTER XL.

AWARDS.

1198. COURTS of equity also formerly exercised a large jurisdiction in matters of AWARDS, but in consequence of statutes which have been passed on this subject, the jurisdiction has become, in a practical sense, although not in a theoretical view, greatly narrowed, and is now of rare occurrence. It may, however, be of 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 interferes with its exercise.

1199. In cases of fraud, mistake, or accident, courts of equity may, in virtue of their general jurisdiction, interfere to set aside awards upon the same principles, and for the same reasons, which justify their interference in regard to other mat-

(*a*) Legard *v.* Johnson, 3 Ves. 352, 360; Westmeath *v.* Westmeath, Jac. 126; Worrall *v.* Jacob, 3 Meriv. 267; Jee *v.* Thurlow, 2 B. & C. 547; Elworthy *v.* Bird, 2 S. & S. 372; Rodney *v.* Chambers, 2 East, 283; Westmeath *v.* Salisbury, 5 Bligh, N. R. 339, 376; In Hamilton *v.* Hector, L. R. 6 Chan. 701; 12 Jur. 511; a stipulation as to where the children should pass their holidays was enforced.

(*b*) Durant *v.* Titley, 7 Price, 577; Hindley *v.* Westmeath, 6 B. & Cr. 200; Westmeath *v.* Salisbury, 5 Bligh, N. R. 367, 373, 375, 393, 395, 396, 400, 415; St. John *v.* St. John, 11 Ves. 526.

(*c*) Fletcher *v.* Fletcher, 2 Cox, 99; 3 Pro. C. C. 619; Bateman *v.* Countess of Ross, 1 Dow, 235; Westmeath *v.* Salisbury, 5 Bligh, N. R. 375, 395; St. John *v.* St. John, 11 Ves. 537. So where no separation has taken place, the parties having continued to live together, a separation deed is void, Bindley *v.* Mullonney, L. R. 7 Eq. 343.

ters, where there is no adequate remedy at law(*a*). And if there be no statute to the 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(*b*).

1200. Where, after the hearing was closed, one of the arbitrators requested, and they all received, a statement in writing from one of the parties containing new and different items of claim from any presented at the hearing, and this without the knowledge of the other party, a court of equity will enjoin a suit at law upon, and set aside, the award; notwithstanding the arbitrators swear the statement had no influence upon their award, and there is no imputation of fraud or corruption against them(*c*).

1201. Where at the commencement of a reference, the arbitrator for one side, conferred privately with the parties who nominated him, on the matters in question, and on the evidence to be offered; and continued this course to the end, it was held that the impropriety was not cured by showing that after the reference had made some progress, the other arbitrator acted with similar irregularity on the other side(*d*). And where two out of three arbitrators took the evidence of a witness in the absence of one of the parties and of the other arbitrator, and it appeared that they were influenced by the evidence then given in making their award, it was set aside (*e*).

1202. When an award was agreed upon between arbitra-

(*a*) See Champion *v.* Wenham, Ambl. 245; Knox *v.* Symmonds, 1 Ves. 369; South Sea Company *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; Att.-Gen. *v.* Jackson, 5 Ha. 366.

(*b*) See Nichols *v.* Chalie, 14 Ves. 264, 269; Nichols *v.* Rowe, 3 M. & K. 431; Street *v.* Rigby, 6 Ves. 815; Cheslyn *v.* Dalby, 2 Y. & C. 170.

(*c*) Story, s. 1452 a.

(*d*) *Re* Lawson & Hutchinson, 19 Gr. 84.

(*e*) Hickman *v.* Lawson, 8 Gr. 386.

tors, and afterwards one of them having taken a new view of the case, dissented, and the others, after discussing by letter the dissenting arbitrator's views, made and published the award as at first agreed upon, it was set aside, because the arbitrators should have met for the discussion. Correspondence on the subject was considered insufficient, even although the dissenting arbitrator did not object to that method(*a*).

1203. 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 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(*b*). 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 of 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(*c*).

1204. 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. 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. 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

(*a*) Jekyll *v.* Wade, 8 Gr. 363.

(*b*) Corneforth *v.* Greer, 2 Vern. 705; Ridout *v.* Payne, 1 Ves. Sen. 11; 3 Atk. 494.

(*c*) Story, s. 1453. In Chase *v.* Westmore, 13 East, 153, 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."

of equity and good conscience(*a*). 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 misbehaviour in the arbitrators(*b*).

1205. 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(*c*). 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 to set it aside(*d*). 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(*e*).

1206. In regard to matters of fact, the judgment of the arbitrators is ordinarily deemed conclusive(*f*). If, however, there is a mistake of a 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(*g*).

(*a*) Knox *v.* Symmonds, 1 Ves. 369; South Sea Company *v.* Bumstead, 3 Eq. Abr. 80, pl. 8; Delver *v.* Barnes, 1 Taunt. 48, 51.

(*b*) Morgan *v.* Mather, 2 Ves. 15, 22; Knox *v.* Symmonds, 1 Ves. 369; Chace *v.* Westmore, 13 East, 357, 358. See Nichols *v.* Roe, 3 M. & K. 438.

(*c*) Knox *v.* Symmonds, 1 Ves. 369; Ridout *v.* Payne, 3 Atk. 494; Kent *v.* Elstop, 3 East, 18.

(*d*) Young *v.* Walter, 9 Ves. 364, 366; Blennerhassett *v.* Day, 2 B. & B. 120; Richardson *v.* Nourse, 3 B. & Ald. 237.

(*e*) Ching *v.* Ching, 6 Ves. 282; Young *v.* Walter, 9 Ves. 364; Chace *v.* Westmore 13 East, 357; Campbell *v.* Twemlow, 1 Price, 81; Steff *v.* Andrews, 2 Mad. 6, 9; Wood *v.* Griffith, 1 Swanst. 55.

(*f*) See Price *v.* Williams, 1 Ves. 365; Morgan *v.* Mather, 2 Ves. 15; Dick *v.* Milligan, 2 Ves. 23; Goodman *v.* Sayers, 2 J. & W. 249, 259.

(*g*) Story, s. 1456; Knox *v.* Symmonds, 1 Ves. 369. See Rogers *v.* Dallimore, 6 Taunt. 111. See also Bac. Abr. *Arbitrament and Award*, ; K. ; Com. Dig. *Chancery* 2 K, 1 to 6; Att.-Gen. *v*, Jackson, 5 Ha. 366.

1207. The mistake in matter of law, to render the award voidable in equity, must appear by the question being stated on the face of the award, as a justification of the conclusion to which the arbitrators came; or else it must be shown that the arbitrators intending to follow the law, have misapprehended it, and were thus brought to a different result from what they would otherwise have reached. And in regard to mistake in matter of fact, which shall be sufficient to invalidate an award, it must be something more than the misjudgment of the arbitrator, in weighing evidence, or the construction of written admissions. The mistake must be one which shows that the arbitrator was misled, and thus failed to comprehend the true facts of the case; as by a mistake in computation, or in a date, material to the rights of the parties, or by the use of false measures, or false weights, or in some similar mode. A mere error in judgment is no mistake which a court of equity can correct, since the judgment of the chancellor is as fallible as that of the arbitrator(*a*).

1208. An arbitrator after making the award is *functus officio*, and cannot rectify even a clerical error(*b*). But equity will correct a mistake in an award where all the arbitrators agree in what it was, and where there was no fault in either of the parties in producing it. And the testimony of the arbitrator will be received in explanation of his award, and if it appears that he acted under a mistake, either of law, or fact in making the award, and but for such mistake would have made a different one, it will be set aside, or referred back to the arbitrator(*c*).

1209. 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 any persons who, in the ordinary course of things have a right to sue there

(*a*) Story, s. 1456a.
(*b*) Mordue *v.* Palmer, L. R. 6 Chan. 22.
(*c*) *Re* Dare Valley Rail Co. L. R. 6 Eq. 429. See Duke of Buccleuch *v.* Metropolitan Board of Works, L. R. 5 H. L. 418.

(*a*). Neither will they, for the same reason, compel arbitrators to make an award; nor, when they have made an award, will they compel them to disclose the grounds of their judgment(*b*).

1210. Under a contract to pay such damages, in a certain contingency, as a third person shall award, there is, in the absence of fraud, no cause of action, either at law or in equity, unless the award is made. Thus, where a contract for the performance of works contained a provision, that if the contractor should not, in the opinion of the employer's engineer, exercise such due diligence as would enable the works to be completed, according to the contract within the time limited, the employers might determine the contract, and the contractor should be paid such sum as the engineer should determine to have been reasonably earned for work actually done; and the contract being determined under the provision, the contractor filed a bill against the employers and their engineer, complaining of undue delay in awarding the amount earned by the contractor, and seeking payment of what was due upon the contract, but did not establish fraud or collusion against the engineer; it was held the bill could not be maintained(*c*).

1211. And where in such a case the award of the engineer has been made, and the contractor claims a larger sum in addition, it is incumbent, in order to maintain a bill in equity for that purpose, that he should establish fraud and collusion between the employers and their engineer, or else that essential and material mistakes should have intervened. And if such collusion were only for the purpose of obtaining tempo-

(*a*) Kill *v.* Hollister, 1 Wils. 129; Mitchell *v.* Harris, 4 Bro. C. C. 312, 315; 2 Ves. 131; Street *v.* Rigby, 6 Ves. 815, 818; Crawshay *v.* Collins, 1 Swanst. 40; Agar *v.* Macklew, 2 S. & S. 418; Gourlay *r.* Somerset, 19 Ves. 431. And see Smith *v.* Lloyd, 26 Beav. 507; Durham *v.* Bradford, L. R. 5 Chan. 519; Richardson *v.* Smith, L. R. 5 Chan. 648.

(*b*) Anon., 3 Atk. 644.

(*c*) Scott *v.* The Corporation of Liverpool, 3 D. & J. 334; Sharpe *v.* San Paulo R. Co., L. R. 8 Chan. 597; Elliott *v.* Royal Exch. Ass. Co., L. R. 2 Ex. 237; Jones *v* St. Johns College, L. R. 6 Q. B. 115.

rary indulgence, with the design of ultimately paying the full sum due the contractor, a court of equity will nevertheless have jurisdiction of the matter(*a*).

1212. When an award has actually been made, and it is unimpeached and unimpeachable, it constitutes a bar to any suit for the same subject-matter, both at law and in equity. 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 (*b*).

1213. As the specific performance of awards, as well as of contracts, rests in the sound discretion of the courts, 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(*c*). 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(*d*).

1214. Although the general principle is that an award may be good in part, and bad in part; still where arbitrators found a sum of money due to a creditor, and directed the debtor to pay, and the creditor to receive such amount in a certain specified manner, the creditor was not allowed to adopt the award in so far as it found the sum due, and reject that portion of it directing the mode of payment(*e*).

(*a*) Story, s. 1457 b. See Kimberley *v.* Dick, L. R. 13 Eq. 1.

(*b*) Hall *v.* Hardy, 3 P. W. 187; Thomson *v.* Noel, 1 Atk. 62; Norton *v.* Mascall, 2 Vern. 24; Wood *v.* Griffith, 1 Swanst. 54; Bell *v.* Miller, 9 Gr. 385, Com. Dig. *Chancery*, 2 K. See also Bishop *v.* Webster, 2 Vern. 444.

(*c*) Auriol *v.* Smith, 1 T. & R. 187, 189, 190; Wood *v.* Griffith, 1 Swanst. 54; Emery *v.* Wase, 5 Ves. 846; Com. Dig. *Chancery* 2 K. 2. So in case of unreasonableness of submission and want of finality and excess of authority in the award, Nickels *v.* Hancock, 7 D. M. & G. 300.

(*d*) Jones *v.* Bennett, 1 Bro. P. C. 528. See Bell *v.* Miller, 9 Gr. 385.

(*e*) Dalton *v.* McNider, 5 Gr. 501.

CHAPTER XLI.

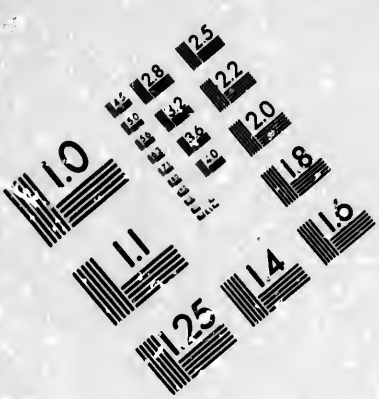
WRIT OF ARREST.

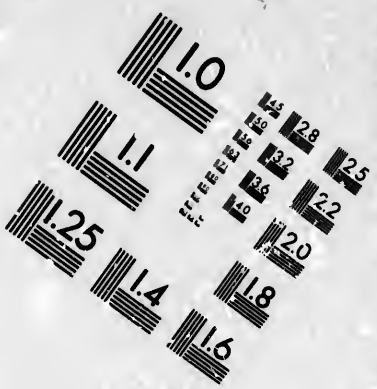
1215. THE writ of *Ne exeat regno*, or, as it is now termed in this Province, a WRIT OF ARREST, was a prerogative writ, issued to prevent a person from leaving the realm(*a*). It is said that it is a process unknown to the ancient common law, which, in the freedom of its spirit, allowed every man to depart the realm at his pleasure(*b*). 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. 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.

1216. The writ was originally applied only to great political objects and purposes of state, for the safety or benefit of the realm(*c*). 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(*d*).

1217. 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 cases within the usage. But it is applied to cases of private right with great caution and jealousy(*e*).

(*a*) Beames on Ne Exeat, 1; 1 Black. Comm. 137, 266.
(*b*) Beames on Ne Exeat, 1.
(*c*) *Ex parte* Brunker, 3 P. W. 312; Anon., 1 Atk. 521; Flack *v.* Holm, 1 J. & W. 405, 413, 414.
(*d*) Beames, Ord. of Chanc. 40; Beames on Ne Exeat, 16.
(*e*) Tomlinson *v.* Harrison, 8 Ves. 32; Whitehouse *v.* Partridge, 3 Swanst. 379.





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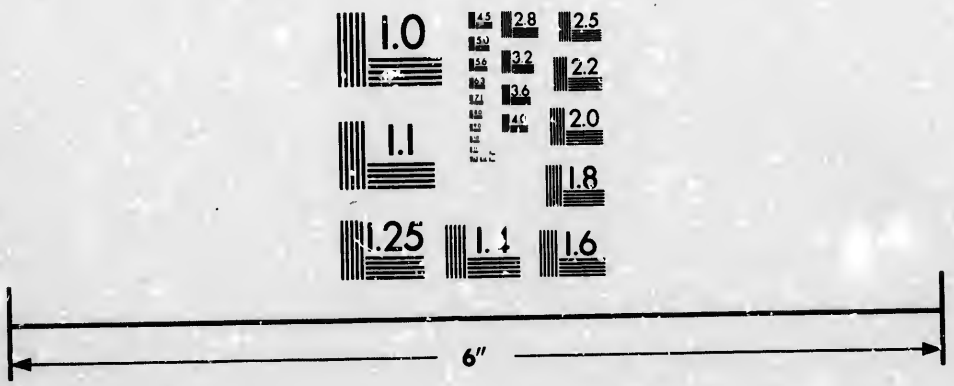

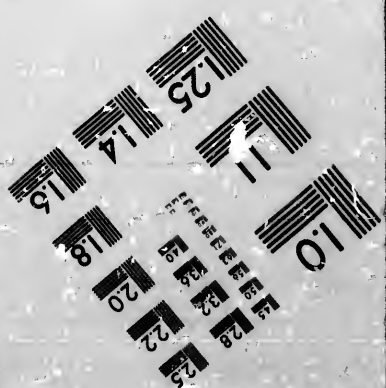

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1218. In general, it may be stated, that the writ of arrest will not be granted, unless in cases of equitable debts and claims; for, in regard to civil rights, it is treated as in the nature of equitable bail(*a*). If, therefore, the debt be such as that it is demandable in a suit at law, the writ will be refused; for, in such a case, the remedy at law is open to the party(*b*). 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(*c*).

1219. Although as has been said, that in general, the writ of arrest lies only upon equitable debts and claims, there are 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 arrest if he is about to quit the realm(*d*); 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(*e*).

1220. In regard to alimony, it has been said that it arose from compassion, and because the ecclesiastical courts could not take bail(*f*). 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,

(*a*) Beames on Ne Exeat, 30; *Ex parte* Brunker, 3 P. W. 312; Atkinson *v* Leonard. 3 Bro. C. C. 218; Jackson *v.* Petrie, 10 Ves. 163, 165; Whitehouse *v.* Partridge, 3 Swanst. 377; 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; Black *v.* Holm, 1 J. & W. 405, 413, 414; Jenkins *v.* Parkinson, 2 M. & K. 5. In Wyatt's Practical Register, 289, it is said: "It is now mostly used, where a suit is commenced in this court against a man, and he, designing to beat 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.

(*b*) Dawson *v.* Dawson, 7 Ves. 173; Russell *v.* Ashby, 5 Ves. 96; Blaydes *v.* Calvert, 2 J. & W. 211, 213.

(*c*) Crosly *v.* Marriot, 2 Dick. 609; Gardner *v.* ——, 15 Ves. 444.

(*d*) Con. Stat. U. C. c. 24, s. 9; Read *v.* Read, 1 Ch. Cas. 115; Shaftoe *v.* Shaftoe, 7 Ves. 71; Dawson *v.* Dawson, 7 Ves. 173; Anon. 2 Atk. 210.

(*e*) Beames on Ne Exeat, p. 30.

(*f*) Beames on Ne Exeat, p. 30; Anon., 2 Atk. 210; Vandergucht *v.* De Blaquiere, 8 Sim. 315.

although alimony is a fixed sum and not strictly an equitable debt, yet the ecclesiastical courts were 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(*a*).

1221. 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; for matters of account are properly cognizable therein(*b*). The writ 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(*c*).

1222. As to the nature of the equitable demand, for which a writ will be issued, it must be certain in its nature, and actually payable, and not contingent(*d*). It should also be for some debt or pecuniary demand. It will not lie, therefore, in a case where the demand is of a general unliquidated nature, or is in the nature of damages(*e*). The equitable debt need not, however, be directly created between the parties. It will be sufficient, if it be fixed and certain. Thus the *cestui que trust* or assignee of a bond, may have a writ of arrest against the obligor(*f*).

(*a*) In Read *v.* Read, 1 Ch. Cas. 115; *Ex parte* Whitmore, 1 Dick. 143; Shaftoe *v.* Shaftoe, 7 Ves. 171; and Dawson v. Dawson, 7 Ves. 173, no such compassion is suggested.

(*b*) Jones *v.* Sampson, 8 Ves. 593; Russell *v.* Ashby, 5 Ves. 96; Amsinck *v.* Barklay, 8 Ves. 597; Dick *v.* Swinton, 1 V. & B. 371; Stewart *v.* Graham, 19 Ves. 313; Flack *v.* Holm, 1 J. & W. 405, 413.

(*c*) Jones *v.* Alephsin, 16 Ves. 471; Howden *v.* Rodgers, 1 V. & B. 132; Atkinson *v.* Leonard, 3 Bro. C. C. 218; Blaydes *v.* Calvert, 2 J. & W. 213.

(*d*) Anon., 1 Atk. 521; Rico *v.* Gaultier, 3 Atk. 500; Shearman *v.* Shearman, 3 Bro. C. C. 370; Whitehouse *v.* Partridge, 3 Swanst. 377, 378; Morris *v.* McNeil, 2 Russ. 604.

(*e*) See Etches *v.* Lance, 7 Ves. 417; Cock *v.* Ravie, 6 Ves. 283. See also Bridge *v.* Hindall, Rep. t. Finch, 257; Beames on Ne Exeat, 36, 37, 53; Whitehouse *v.* Partridge, 3 Swanst. 377, 378; Blaydes *v.* Calvert, 2 J. & W. 212; Graves *v.* Griffith, 1 J. & W. 646, Flack *v.* Holm, 1 J. & W. 405, 407.

(*f*) Grant *v.* Grant, 3 Russ. 598; Leake *v.* Leake, 1 J. & W. 605.

1223. The writ will not be granted on a bill for an account in favour of a plaintiff, who is a foreigner out of the realm, because he cannot be compelled to appear and account. 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(*a*).

CHAPTER XLII.

BILLS OF DISCOVERY.

1224. 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. 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(*b*). In this Province no bill of discovery will be entertained except in aid of the prosecution or defence of an action at law.

1225. The sole object of such a bill being a particular discovery, when that discovery is obtained by the answer, there can be no further proceedings thereon(*c*). To 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

(*a*) Hyde *v.* Whitefield, 19 Ves. 343, 344. See Done's case, 1 P. W. 263; Flack *v.* Holm, 1 J. & W. 405, 411, 414, 415; Howden *v.* Rodgers, 1 V. & B. 129.

(*b*) Cooper, Eq. Pl. ch. 1, s. 4, p. 58, 60; Mitf. Eq. Pl. 8, 53, 148, 306, 307; 1 Mad. Ch. Pr. 160.

(*c*) Lady Shaftesbury *v.* Arrowsmith, 4 Ves. 71.

such a bill, either because he has no proof, or because he wants it in aid of other proof(*a*).

1226. The jurisdiction of courts of equity to compel discovery arose principally from the inability of courts of common law to compel a complete discovery of the material facts in controversy by the oaths of the parties in the suit, and from their want of power 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(*b*).

1227. The principal grounds upon which a bill of discovery may be resisted, have been enumerated 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 discovery called for would subject the defendant to a penalty, or forfeiture, or prosecution(*c*).

1228. It must clearly appear upon the face of the bill, that the plaintiff has a title to the discovery which he seeks(*d*). A

(*a*) Finch *v.* Finch, 2 Ves. Sen. 492; Montague *v.* Dudman, 2 Ves. Sen. 398.
(*b*) Story, ss. 1484, 1485; 2 Black. Comm. 382; Com. Dig. *Chancery* 3 B.
(*c*) Story, s. 1489.
(*d*) Brown *v.* Dudbridge, 2 Bro. C. C. 321, 322; Brownsword *v.* Edwards, 2 Ves. 243, 247. See Kettlewell *v.* Barstow, L. R. 6 Chan. 686; Commissioners, &c., of London *v.* Glasse, L. R. 15 Eq. 302; Girdlestone *v.* North British, &c., Co. L. R. 11 Eq. 197.

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 (*a*).

1229. 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, and the reason of this is that an heir-at-law has no interest in the title-deeds of an estate, unless it has descended to him; whilst 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 (*b*).

1230. In the next place, the party must not only show that he has an interest in the subject-matter of the bill, but he must also state a 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 answer to the action. 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(*c*). 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(*d*).

1231. 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 they will not compel a discovery in aid of a criminal prosecution, for it is against the

(*a*) Buden *v.* Dore, 2 Ves. Sen. 445. But see Metcalfe *v.* Hervey, 1 Ves. Sen. 248; Ivy *v.* Kekewick, 2 Ves. 679; Glegg *v.* Legh, 4 Mad. 193, 208.

(*b*) Story, ss. 1491, 1492, 1493.

(*c*) Wallis *v.* Duke of Portland, 3 Ves. 494; Lord Kensington *v.* Mansell, 13 Ves. 240; Macaulay *v.* Shackell, 1 Bligh, N. R. 120.

(*d*) Thomas *v.* Tyler, 3 Y & C. Ex. 255, 261, 262.

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(*a*).

1232. 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 exercise the same jurisdiction. But although the courts of common law can now compel production of documents and grant discovery, yet a plaintiff or defendant at law is still entitled to come to equity for discovery, and this is put upon the ground that equity having once acquired jurisdiction over the subject matter cannot lose that jurisdiction, by the mere fact of the common law court also being invested with the same powers(*b*).

1233. Courts of equity will not 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(*c*). But the court will grant a discovery in aid of a compulsory reference to arbitration ordered in an action(*d*).

1234. No discovery will be compelled where it is against the policy of the law from the particular relation of the parties(*e*). Thus no discovery will lie against a married woman, to compel her to disclose facts which may charge her husband. Upon the same ground, a person standing in the relation of professional confidence to another, will not be compelled to disclose the secrets of his client(*f*).

(*a*) Story, s. 1494. And see Montague *v.* Dudman, 2 Ves. Sen. 398; Thorpe *v.* Macaulay, 5 Mad. 229, 230; Shackell *v.* Macaulay, 2 S. & S. 79; 1 Bligh, N. R. 96; Claridge *v.* Hoare, 14 Ves. 64, 65; 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. 693; Finch *v.* Finch, 2 Ves. Sen. 492.

(*b*) Lovell *v.* Galloway, 17 Beav. 1; British Empire Shipping Co. *v.* Somes, 3 K. & J. 433.

(*c*) Street *v.* Rigby, 6 Ves. 821.

(*d*) British Empire Shipping Co. *v.* Somes, 3 K. & J. 433.

(*e*) See Wadeer *v.* East India Company, 7 Jur. N. S. 350.

(*f*) Story, s. 1496. See Minet *v.* Morgan, L. R. 8 Chan. 361; Wilson *v.* Northampton, &c., Rail Co., L. R. 14 Eq. 477.

1235. In general, arbitrators are not compellable by a bill of discovery to disclose the grounds on which they made their award, because arbitrators are not obliged by law to give any reason for their award. But if they are charged with corruption, fraud, or partiality, they must answer to that(*a*).

1236. 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(*b*).

1237. A defendant may object to a bill of discovery, that he is a *bona fide* purchaser for a valuable consideration, without notice of the plaintiff's claim. 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(*c*).

1238. 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 loss, if not utter ruin(*d*).

CHAPTER XLIII.

BILLS TO PERPETUATE TESTIMONY.

1239. THE object of bills to perpetuate testimony is to pre-

(*a*) Steward *v.* East India Company, 2 Vern. 380; Anon., 3 Atk. 644; Tittenson *v.* Peat, 3 Atk. 529; Ives *v.* Metcalfe, 1 Atk. 63.

(*b*) Story, s. 1499. Fenton *v.* Hughes, 7 Ves. 287; Neuman *v.* Godfrey, 2 Bro. C. C. 332; Cookson *v.* Ellison, 2 Bro. C. C. 252.

(*c*) Stanhope *v.* Earl Verney, 3 Eden, 81; Willoughby *v.* Willoughby, 1 T. R. 763, 767.

(*d*) Story, s. 1503.

serve and perpetuate evidence when it is in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation(*a*). 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 mean time, he may perpetuate the proofs of those rights, they may be lost without any default on his part(*b*).

1240. The jurisdiction, which courts of equity exercise to perpetuate testimony is open to one great objection. The depositions are not published until after the death of the witnesses. The testimony, therefore, has this infirmity, that it is not given under the sanction of those penalties which the law imposes upon the crime of perjury. It is for this reason that courts of equity do not generally entertain such bills, unless where it is absolutely necessary to prevent a failure of justice (*c*).

1241. 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 a 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 for giving him the advantage of deferring his proceedings to a future time, and to substitute thereby written depositions for *viva voce* evidence(*d*).

1242. 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 right which he seeks to secure, equity will enter-

(*a*) Com. Dig. *Chancery*.
(*b*) Story, s. 1505; Mason *v.* Goodburne, Rep. t. Finch, 391.
(*c*) Angell *v.* Angell, 1 S. & S. 83; Cann *v.* Cann, 1 P. W. 567.
(*d*) Story, s. 1508; Ellice *v.* Roupell, 32 Beav. 299.

tain 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(*a*).

CHAPTER XLIV.

ESTOPPELS IN EQUITY.

1243. THE subject of equitable estoppels, or estoppels in fact, has become one of great practical importance, and forms a very essential element in that fair dealing, and rebuke of all fraudulent misrepresentation, which it is the boast of courts of equity constantly to promote. It applies to all cases where rights, once valid, are lost by delay, and the implied acquiescence, resulting from such delay(*b*). Thus where a party has acquiesced in the violation of a covenant to a certain extent, this affords sufficient objection to granting of an interlocutory injunction against a greater violation of it(*c*).

1244. 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 favour 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, and which they had expended as their own in faith of such acquiescence.

(*a*) Duke of Dorset *v.* Girdler, Prec. ch. 531; Dew *v.* Clarke, 1 S. & S. 114. A bill to perpetuate testimony cannot be brought by a defendant in a pending suit, Earl Spencer *v.* Peck, L. R., 3 Eq., 415.

(*b*) Story, s. 1534.

(*c*) Child *v.* Douglas, 5 D. M. & G. 739. See Mitchell *v.* Steward, L. R. 1 Eq. 541; Western *v.* MacDermott, L. R. 1 Eq. 499; 2 Chan. 72.

Such acquiescence constituted an equitable estoppel upon any such claim, since it had been acted upon in good faith by the other party(*a*).

1245. But the equitable rule 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(*b*). But 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 a good title(*c*).

1246. This principle affects corporations and other joint-stock companies the same as it does individuals(*d*). But 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(*e*). But the principle of the 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 (*f*).

(*a*) Stafford *v.* Stafford, 1 D. & J. 193. See Bate *v.* Hooper, 5 D. M. & G. 338.
(*b*) Rennie *v.* Young, 2 D. & J. 136.
(*c*) Nunn *v.* Fabian, 11 Jur. N. S. 868; Crook *v.* Corporation of Seaford, L. R. 10 Eq. 678; 6 Chan. 551. And see Davies *v.* Sear, L. R. 7 Eq. 427; Bankart *v.* Tennant, L. R. 10 Eq. 141.
(*d*) *Re* Strand Music Hall Co. 14 W. R. 6; Hill *v.* So. Staffordshire Railway, 11 Jur. N. S. 192; Wilson *v.* West Hartlepool Railw. & Harb. Co., 11 Jur. N. S. 124; Steevens Hospital *v.* Dyas, 15 Ir. Ch. 405.
(*e*) Prendergast *v.* Turton, 1 Y. & C. 98.
(*f*) Clements *v.* Hall, 2 D. & J. 173.

1247. 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(*a*). Third parties who, by false representations, induce others to enter into contracts, are estopped from afterwards falsifying their statements, and if necessary may be compelled to make them good(*b*). 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(*c*).

1248. This principle has often been applied to the proceedings of joint-stock companies not strictly in accordance with the requirements of their charter. As 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(*d*).

1249. Lapse of time and acquiescence on the part of the party whose interests are alleged to have been injuriously

(*a*) Pulsford *v.* Richards, 17 Beav. 87.

(*b*) Bridger's case L. R. 9 Eq. 74; Mitchell's case, L. R. 9 Eq. 363. And see Ebbett's case, L. R. 5 Chan. 302.

(*c*) Story, s. 1538.

(*d*) *Re* The Magdalena Steam Nav. Co. 6 Jur. N. S. 975. See Laird *v.* Birkenhead Rail. Co., 6 Jur. N. S. 140; Bankart *v.* Houghton, 5 Jur. N. S. 282.

affected by irregular proceedings will be a complete bar, unless the transaction is tainted with fraud, meaning thereby, an act involving grave moral guilt(*a*). 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(*b*).

1250. An essential difference exists 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 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. 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

(*a*) Smallcomb's case, L. R. 3 Eq. 769; L. R. 3 H. L. 249. See also Brotherhood's case, 31 Beav. 365.

(*b*) Story, s. 1249; Perrett's case, L. R. 15 Eq. 205; Oakes *v.* Turquand, L. R. 2 H. L. 325; Kent *v.* Freehold, &c., Co., L. R. 3 Chan. 493; Peek *v.* Gurney, L. R. 13 Eq. 79.

abandon that right, except by acts which are equivalent to an agreement, or to a license(*a*).

1251. 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(*b*).

1252. This doctrine of estoppels *in pais*, or equitable estoppels, is based upon a fraudulent purpose, and a fraudulent result. If, therefore, the element of fraud 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. There must be deception, and change of conduct in consequence, in order to estop the party from showing the truth(*c*).

1253. 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. 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(*d*).

1254. In a late case, where a married woman executed a deed, *inter partes*, whereby she attempted to make her hus-

(*a*) Clarke *v.* Hart, 5 Jur. N. S. 447. And see Pickard *v.* Sears, 6 Ad. & El. 469; Freeman *v.* Cooke, 2 Ex. 654.

(*b*) Davies *v.* Davies, 6 Jur. N. S. 1320. And see Phillips *v.* Homfray, L. R. 6 Chan. 770.

(*c*) Story, s. 1543. 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.

(*d*) Guelph *v.* The Canada Co., 4 Gr. 632; Saugeen *v.* Church Society, 6 Gr. 538; Rossin *v.* Walker, 6 Gr. 619

band'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*(*a*).

1255. This question of estoppel in fact, or acquiescence in an adverse claim of right, was discussed somewhat in detail in the House of Lords(*b*). Lord Chancellor Campbell said: "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."

1256. 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 were believed by the company to be correct, at the time the prospectus issued, and a person agreed to accept shares upon the faith of them, and without making inquiries, the company cannot enforce the agreement, after the representa-

(*a*) Skottowe *v.* Williams, 7 Jur. N. S. 118. And see *Re* Fiddey, L. R. 7 Chan. 773; Jones *v.* Higgins, L. R. 2 Eq. 538.

(*b*) Cairncross *v.* Lorimer, 7 Jur. N. S. 149.

tions 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 advantages gained by them(*a*).

1257. It is sometimes attempted to be maintained that courts of equity require a more perfect good faith, and visit a severer 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 (*b*).

(*a*) New Brunswick & Canada Rail. & Land Co. *v.* Muggeridge, 7 Jur. N. S. 132.
(*b*) Story, s. 1548; Scott *v.* Corporation of Liverpool, 5 Jur. N. S. 105.

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