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Equity Jurisprudence
Trusts
Equity Pleading

EXAMINATION QUESTIONS

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TWENTIETH SUBJECT.

Equity Jurisprudence.

CHAPTER I.

NATURE AND SCOPE OF EQUITY.

SECTION 1. DEFINITION OF EQUITY.

On account of the peculiar nature of equity jurisprudence, it has always been very difficult to give a definition of this subject which is at the same time accurate and explanatory.

Perhaps the best definition which it is possible to give, is as follows: Equity is that system of jurisprudence which was originally administered by the High Court of Chancery in England, and is now administered by courts having equity jurisdiction in this country.[1]

This definition is accurate, but must be supplemented by a historical account of the origin and development of equity jurisprudence. Such an historical account is given in Chapter VIII of Legal History in the first volume of this series, and this chapter should be re-read at this time.

In general, it must always be remembered that equity is a supplemental system, created to grant relief in cases beyond the jurisdiction of the common law courts.

[1] Similar definitions are as follows: "As the term is used in American cases and texts, equity is that portion of remedial justice which was formerly administered in England by the high court of chancery, by virtue of its extraordinary jurisdiction as extended, limited and modified by statute and adapted to our conditions by judicial construction." 16 Cyc., 23.

"Equity jurisprudence may therefore properly be said to be that portion of remedial justice which is exclusively administered by a court of equity as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law." 1 Story on Equity Jurisprudence, 20.

"Equity is therefore now a separate but incomplete system of jurisprudence, administered side by side with the common law, supplementing the latter where it is deficient, in places overlapping and there usually prevailing as against the law. It has its own fixed precedents and principles, now scarcely more elastic than those of the law. The relief it affords is usually different, and the procedure in some jurisdictions entirely distinct; in all it varies more or less from that of law." [2]

SECTION 2. CONCURRENT JURISDICTION OF LAW AND EQUITY.

Applying the general principle that equity will only take jurisdiction where there is no relief possible at law, it follows that, in general, the fields of the jurisdiction of the equity courts and of the common law courts will be distinct from each other, and that whenever one set of courts have jurisdiction, the other will not.

In some cases, however, we find concurrent jurisdiction of the two courts. Such concurrent jurisdiction may arise in four different ways:

(a) Equity may take jurisdiction on account of the fact that there is no remedy at law, and later a common law remedy may be given.

(b) Equity may take jurisdiction in cases where there is a common law remedy, which is, however, not certain, complete, and adequate.

(c) In cases where jurisdiction is given to equity by statute, over cases where the common law courts already have jurisdiction.

(d) Where an equity court properly acquires jurisdiction on account of some peculiar equitable

[2] 16 Cyc., pp. 23–4.

principle or remedy involved in the suit, such court may also, in the same case, grant other relief which could have been obtained at common law.

Illustrations of these different classes of cases will be given in the appropriate places in this book.

Section 3. Equity Jurisprudence Under the Codes.

Codes do not abolish the essential distinctions between legal and equitable rights and relief, but merely assimilate the processes by which such rights are asserted and such relief obtained.[3]

"The American jurisdictions may be grouped with respect to their systems of equity administration with practical accuracy into three classes: In the first class equity is administered by courts distinct from those administering the common law. In these the procedure is based upon that of the English high court of chancery, modified to a greater or less extent by statutes and rules of court. In the second class jurisdiction of cases at law and in equity is vested in the same courts, but the procedure is kept distinct and is in general the same as in the first class. This general system of procedure in force in the first and second classes of jurisdiction is that specially treated in this article. In the third class fall those states where law and equity are administered by the same court, and where codes or practice acts abolish the distinctions in procedure." [4]

[3] 16 Cyc., 24.

[4] 16 Cyc., 24, where the existing state of the law on this subject in each State is given

CHAPTER II.

THE EQUITABLE MAXIMS.

SECTION 4. NATURE AND IMPORTANCE.

Equitable maxims are certain broad, general principles generally accepted, and of fundamental importance. Maxims are found both in law and in equity. Legal maxims were at one time very highly regarded, but recently have been largely disregarded. Equitable maxims are at the present time of much greater importance than the legal ones.

"The maxims of equity possess a peculiar value not attaching to those of law, because the former are 'the fruitful germs from which these doctrines and rules (of equity) have grown, by a process of natural evolution.' Around these maxims, too, there have accumulated a vast number of decisions which construe them; and to collect and interpret these cases in connection with the maxims which they interpret is one of the chief purposes of this article." [1]

There are thirteen principal equitable maxims, which will be considered in order.

SECTION 5. EQUITY FOLLOWS THE LAW.

In this maxim is found one of the most fundamental characteristics of equity jurisprudence. Equity was created to supplement the common law, and for this purpose only. The result is that equity is bound by the established principles of law. It might be said that equity is addition and not subtraction. Equity

[1] Amer. & Eng. Ency. of Law, Vol. XI, p. 157.

was permitted to add to the law, to recognize new rights and titles, and to create new remedies, but not to disregard or destroy existing legal principles.

The accuracy of this maxim has recently been generally criticised,[2] but viewed from the proper standpoint it will be seen to be correct.

Under this maxim equity is bound by the rules of evidence fixed by the law, and by the statutes of limitations.[3]

Section 6. Equity Will Not Suffer a Wrong to be Without a Remedy.

This maxim gives the principle upon which equity jurisprudence was originally founded. During what may be called the formulative period in the history of equity, this maxim was true, and equity judges would create new remedies to meet new conditions.[4] At the present time the general scope of equity jurisdiction has been fixed, and cannot be enlarged by any act of the judges. There are at the present time, many wrongs for which there is no relief, either at law or in equity.[5]

[2] "The language of this maxim is so broad and its proper application so narrow that its utility is doubtful and its tendency misleading. It is true only in certain special senses. Where no countervailing equity requires different treatment a court of equity in dealing with legal estates and rights will follow the rules of law in respect thereto." 16 Cyc., 137. "The Latin form of this maxim is *equitas sequitur legem*, and though frequently stated as a general principle, it is really quite restricted in scope. There are, however, two classes of cases in which equity may be said to follow the law: (1) in determining purely legal rights, and (2) in determining analogous equitable rights." Am. & Eng. Ency. of Law, Vol. XI, pages 174–5.

[3] Castner vs. Walrod, 83 Ill., 171; Phillips vs. Sinclair, 20 Me., 269; Upham vs. Wyman, 7 Allen (Mass.), 503; Carrol vs. Green, 92 U. S., 509.

[4] See subject of Legal History, Vol. I, Sub. 2, Chapter VIII.

[5] The attempt to explain this maxim by saying that the word "wrong" here means "legal wrong," reduces the maxim to a mere meaningless arguing in a circle. Furthermore the larger meaning of the term was the one undoubtedly meant when the maxim was originally used.

This maxim, however, is still applicable, in certain cases. For example, where a statute creates a new right which cannot be enforced at law, equity will create new remedies to enforce it.[6]

Section 7. Equity Looks at the Intent Rather than the Form.

This maxim is characteristic of the greater freedom of action of the equity courts, as compared with the common law courts, and of their efforts to do substantial justice rather than enforce technical rules.

The effects of the application of this doctrine are well illustrated in the case of equitable mortgages.[7]

This maxim has also been applied by the courts in the construction of trusts,[8] and of contracts of suretyship.[9] This maxim was applied in the case of equitable liens in the case of Badgerow vs. Manhattan Trust Co.,[10] where the court said: "It must be remembered that the form of the agreement which creates a lien is not as material as the ultimate intent of the parties. Equity looks through form to substance. If the intent to charge designated property is established the lien follows."

Section 8. Equality is Equity.

Under this maxim equity will treat alike all members of a class. Those under a liability will be compelled to share such liability either equally or proportionally, according to the circumstances of the particular case; while the members of a class possessed

[6] Rhaten vs. Baker, 104 Ill. App., 653.

[7] Flagg vs. Mann, 2 Samn. (U. S.), 533. See Chapter on Mortgages.

[8] Texas vs. Hardenberg, 10 Wall., 68.

[9] Dood vs. Wilson, 4 Del. Ch., 108.

[10] 64 Fed. Rep., 931.

of a common right will be given the benefits accruing therefrom either equally or proportionally.

The most important product of this maxim is the doctrine of contribution. The maxim is also applied in the settlement of the estates of insolvent debtors.[11]

SECTION 9. EQUITY AIDS THE VIGILANT AND NOT THOSE WHO SLUMBER ON THEIR RIGHTS.

This maxim has a close resemblance to the statute of limitations, but goes further. Both common law and equity courts are alike bound by statutes of limitations, in that after the period provided by the statute has run neither class of courts can grant any relief. Before the expiration of such period, however, the fact of the delay of the plaintiff in bringing his action will not be considered by a common law court (except perhaps as affecting the credibility of the plaintiff's claim), while equity courts on the other hand may, and frequently do, refuse to grant relief on account of delay for a period less than that provided for by the statute. This is particularly true in those cases where one of two innocent parties must suffer a loss.

This question is discussed by the Supreme Court of the United States in the case of Wagner vs. Baird,[12] the decision in which is in part as follows:

"The important question is, whether the complainants are barred by the length of time.

"In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases; and this rather in obedience to the statutes, than by

[11] International Bank vs. Sherman, 101 U. S., 403.

[12] 7 Howard, 232.

analogy. In many other cases they act upon the analogy of the limitations at law; as where a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the limitation, and apply it to all cases of relief sought upon equitable titles, or claims touching real estate.

"But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rigths. (2 Story Eq., Sec. 1520.)

"A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights. 'Nothing,' says Lord Camden (4 Bro. Chr. R., 640), 'can call forth this court into activity but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive and does nothing. Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor. The party guilty of such laches cannot screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability.

"This doctrine has been so often asserted by this court, that it is unnecessary to vindicate it by argument. It will be sufficient to refer to Piatt vs. Vattier (9 Peters, 405), a case much resembling the present, and Bowman vs. Wathen (1 Howard, 189).

"Can the complainant's case stand the test of this reasonable and well established rule of equity?

"The bill does not assert that either the trustees or the cestuis que trust were ignorant of the transaction between Lawson and O'Bannon, or of the fraud practiced on Lawson, if any there was. Yet, with the exception of the caveat filed in Washington, in 1799, they show no assertion of claim under this voluntary post-nuptial settlement, from its date (June, 1794), till the filing of this bill in 1840. John O'Bannon lived till 1812; yet in all this time (sixteen years), no bill is filed to set aside his assignment from Lawson for the fraud now alleged, while the circumstances were fresh and capable of proof or explanation.

"In 1813 (perhaps in 1811), the defendants, or those under whom they claim, entered upon these lands; they paid large and valuable considerations for their respective portions, without any knowledge of this lost deed of family settlement, or reason to suspect fraud in the transfer to O'Bannon. And whether the patent obtained by Cotton, and his warranty, had the effect of conferring on them the legal title, or not, they reposed in confidence on it. By their industry and expenditure of their capital upon the land for a space of twenty-seven years, they have made it valuable; and what was a wilderness scarce worth fifty cents an acre, is now enhanced by their labor a hundred fold.

"No bad faith, concealment or fraud can be imputed

to them. If the trustees or cestuis que trust chose to reside in Kentucky and not look after these lands for near half a century, they can have no equity from a disability that was voluntary and self-imposed. The residence of the trustees in Kentucky was not considered as an obstacle or objection, in the minds of those who executed the deed, to their assuming the trust and care of lands in Ohio. There was no greater impediment to the prosecution of their claim in a court of equity at any time within forty years than there is now. They have shown nothing to mitigate the effect of their laches and long acquiescence, or which can entitle them to call upon a court of equity to investigate the fairness of transactions after all the parties to them have been so long in their graves, or grope after the truth of facts involved in the mist and obscurity consequent on the lapse of nearly half a century.

"We are all of opinion, therefore, that the lapse of time in the present case is a complete bar to the relief sought, and that the decree of the Circuit Court dismissing the bill should be affirmed with costs."

Section 10. Equity Acts Specifically and not by Way of Compensation.

This maxim has relation to the character of the relief which a court of equity gives. Where nothing is sought from the court except pecuniary damages, there is no reason for going into equity, as there is a plain and adequate remedy at common law. Such forms of relief, however, as specific performance, injunction, and reformation of instruments can only be obtained in equity. Equity will only give judgment for the payment of a sum of money, where it is given in connection with some peculiarly equitable form

of relief. For example, in the case of the infringement of a patent or copyright, an equity court in the same action may give a judgment in damages for the past infringement and an injunction against any future infringement. Here equity obtains jurisdiction through the prayer for the injunction.

SECTION 11. EQUITY ACTS IN PERSONAM AND NOT IN REM.

This maxim relates to the method of enforcing the judgment or decree of an equity court.

"This maxim embodies the principle distinguishing the process and decrees of the court of chancery and originally limiting their sanctions. It was originally the pride of the chancellors and the terror of the law judges that chancery acted directly upon the person or, as the phrase went, upon his conscience. It dealt with property but indirectly, by compelling the parties to act with relation to it." [13]

One effect of this maxim, in many cases, is to render the location of the property immaterial, where the court can acquire jurisdiction over the person of the defendant. Equity has the power to decree the conveyance of land outside of the territorial jurisdiction of the court.[14]

Extracts are here inserted from two of the most important of the decisions relative to this question:

"First, the point of jurisdiction ought in order to be considered; and though it comes late, I am not unwilling to consider it. To be sure a plea to the jurisdiction must be offered in the first instance, and put *in primo die;* and answering submits to the

[13] 16 Cyc., 134.
[14] Vaughan vs. Barclay, 6 Whart. (Pa.), 392; Gardner vs. Ogden, 22 N. Y., 335.

jurisdiction much more when there is a proceeding to hearing on the merits, which would be conclusive at common law; yet a court of equity, which can exercise a more liberal discretion than common-law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears. It is certain that the original jurisdiction in cases of this kind relating to boundaries between the provinces, the dominion, and proprietary government, is in the King and council; and it is rightly compared to the cases of the ancient Commotes and Lordships' Marches in Wales; in which if a dispute is between private parties it must be tried in the Commotes or Lordships; but in those disputes, where neither had jurisdiction over the other it must be tried by the King and council, and the King is to judge, though he might be a party, this question often arising between the crown and one Lord-Proprietor of a province in America; so in the case of the Marches it must be determined in the King's court, who is never considered as partial in these cases; it being the judgment of his judges in B. R. and Chancery. So, where before the King and council the King is to judge, and is no more to be presumed partial in one case than the other. This court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries; and this bill does not stand in need of that. It is founded on articles executed in England under seal for mutual consideration, which gives jurisdiction to the King's court, both in law and in equity; whatever be the subject matter. An action of covenant could be brought in B. R. or C. B., if either side committed a breach; so might there be for the £5,000

penalty without going to council. There are several cases, wherein collaterally, and by reason of the contract of the parties, matter out of the jurisdiction of the court originally will be brought within it. Suppose an order by the King and council in a cause, wherein the King and council had original jurisdiction, and the parties enter into an agreement under hand and seal for performance thereof. A bill must be in court for a specific performance, and perhaps, it will appear, this is almost literally that case. The reason is, because none but a court of equity can decree that. The King in council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the King in council might look on that, and allow it as evidence of the original right; but if that agreement is disputed, it is impossible for the King in council to decree it as an agreement. That court cannot decree in personam in England, unless in certain criminal matters, being restrained therefrom by Stat. 16, Car., and therefore the Lords of council have remitted this matter very properly to be determined in another place on the foot of the contract. The conscience of the party was bound by this agreement; and being within the jurisdiction of this court, which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it. To go a step farther, as this court collaterally and in consequence of the agreement judges concerning matters not originally in its jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the Ecclesiastical court, just as a court of law would maintain an action for damages in breach of covenant." [15]

[15] Penn vs. Lord Baltimore, 1 Vesey Sr., 444.

"I have directed a search to be made for precedents in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of Campbell vs. Houlditch, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the court of session in Scotland. From the note which his Lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore is of very high authority.

"In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if, for instance, as in Penn vs. Lord Baltimore, it can decree the performance of an agreement touching the boundary of a province in North America; or as in the case of Toller vs. Carteret, can forclose a mortgage in the Isle of Sark, one of the channel islands; in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign court.

"It is upon these grounds, I must add, and these

precedents, that I choose to rest the jurisdiction, and not upon certain others of a very doubtful nature, such as the power assumed in the year 1682, in Arglasse vs. Muschamp, and against Lord Macclesfield, in the year 1724, in Fryer vs. Bernard, of granting a sequestration against the estate of a defendant situated in Ireland. The reasons given by that great Judge in the latter case plainly show that he went upon a ground which would now be untenable, viz., what he terms the superintendent power of the courts in this country over those in Ireland; and indeed he supports his order by expressly referring to the right then claimed by the King's Bench in England, to reverse the judgments of the King's Bench in Ireland. This pretension, however, has long ago been abandoned, and has indeed been discontinued by parliamentary interposition; and the power of enforcing in Ireland, judgments pronounced here, and vice versa, is at the present time the subject of legislative consideration.

"As to the argument that the Courts of Equity in Ireland can, if applied to, restrain the action, the same consideration would prevent an injunction from ever issuing to stay proceedings in this country; for it might be said that the court of Exchequer has the power of restraining, and therefore there needs no interposition of the Court of Chancery. It suffices to say that the court in which the action is brought is a court of common law, and has no jurisdiction as such to stop the proceeding upon the ground now set forth.

"I am, therefore, of opinion that this injunction was well issued and that it must be continued, and that this motion must be refused with costs." [16]

[16] Lord Partarlington vs. Soulby, 3 Mylne and Kern, 104. The decisions in these two cases may be found in full in Keener's Cases of Equity Jurisdiction, Vol. I, pp. 12–18.

Equity jurisdiction has now been extended so as to allow an equity court, in some cases, to act strictly *in rem*. This happens when a mortgage is foreclosed and sold in a proceeding before this court and a master's deed given to the purchaser.

The right of equity to act *in personam*, however, has been in no way abridged.

SECTION 12. BETWEEN EQUAL EQUITIES, THE LAW WILL PREVAIL.

Where the equities are equal there is no reason for equity to favor one over the other, and the one with the legal title will therefore prevail.

Thus "where a debtor promised to secure two creditors holding equal claims, one of them, who obtained a conveyance, was held to have thereby acquired a legal advantage over the other which gave him the priority.[17] As between two tax purchasers having equal equities one who had obtained the legal title through a sheriff's deed was awarded priority." [18] [19]

SECTION 13. BETWEEN EQUAL EQUITIES PRIORITY OF TIME WILL PREVAIL.

This maxim is closely connected with the preceding one, and also with the maxim that equity "aids the vigilant and not those that slumber on their rights." This is a very old maxim but will only be applied where there is nothing else to enable equity to decide between the parties.

SECTION 14. HE WHO COMES INTO EQUITY, MUST COME WITH CLEAN HANDS.

Under this maxim equity will refuse to grant any relief to anyone who has been guilty of any unlawful

[17] Phillips vs. Crammond, 2 Wash. (U. S.), 441.
[18] Maina vs. Elliott, 51 Cal., 8.
[19] Am. & Eng. Ency. of Law, Vol. XI, p. 189.

or inequitable conduct in the matter relative to which he seeks relief. Equity will neither aid in the consummation of inequitable acts, nor relieve against the consequences of misconduct.

This maxim will be applied in divorce cases where the complainant has either been guilty of improper actions, or has used improper methods for obtaining evidence.[20] A party is never entitled to equitable relief when he has been guilty of practices in the matter similar to those against which he seeks protection or redress.[21]

SECTION 15. HE WHO SEEKS EQUITY MUST DO EQUITY.

This maxim means that all persons seeking equitable relief must accord to the other parties concerned all the equitable rights in the subject matter to which they are entitled. Under this principle one who has failed to perform his own obligations under a contract, cannot compel the other to perform.[22]

In cases where this maxim applies the bill should contain an offer to do equity. In bills for specific performance, and for some other purposes, such an offer is implied.

"The principal applications of the maxim are in suits to rescind contracts or to avoid other transactions, where plaintiff is required to restore benefits received and place other parties *in statu quo*,[23] election,[24] marshalling,[25] in bills for relief against usury,[26] and

[20] Van Voorhies vs. Van Voorhies, 94 Mich., 761; Woodward vs. Woodward, 41 N. J. Eq., 224.

[21] Sincheimer vs. United Garment Workers of America, 77 Hun. (N. Y.), 215.

[22] Wood vs. Perry, 1 Barb., 114; Baltimore vs. Chesapeake, etc., Telephone Co., 92 Md., 692; 48 Atl., 465.

[23] Stewart vs. Ludwick, 29 Ind., 230.

[24] See Descent and Distribution, 14 Cyc., 1, Wills.

[25] See Marshal of Assets and Securities.

[26] Corby vs. Bean, 44 Mo., 379.

before the married women's acts in enforcing the wife's equity to a settlement.[27] The adverse equity which must be satisfied is sometimes raised by estoppel."[28] [29]

The application of this maxim is not limited to the complainant; it is available against a cross-defendant,[30] and sometimes even against a defendant. The Supreme Court of the United States said on this last point in the case of Brown vs. Lake Superior Iron Co.:[31]

"The maxim 'He who seeks equity must do equity,' is as appropriate to the conduct of the defendant as to that of the complainant; and it would be strange if a debtor, to destroy equality and accomplish partiality, could ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive, and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant."

Section 16. Equity Considers That as Done Which Ought to be Done.

This maxim will only be applied in favor of the person for whose benefit the act should have been done. A person who should have done any act but fails to do so, can never have the benefit of the principle contained in this maxim. The most important application of this maxim is found in equitable conversion.

[27] See Husband and Wife.
[28] Powell vs. Thomas, 6 Hare, 300; 31 Eng. Ch., 300.
[29] 16 Cyc., 143.
[30] Brighton vs. Doyle, 64 Vt., 616.
[31] 134 U. S., 530.

SECTION 17. EQUITY IMPUTES AN INTENTION TO FULFILL AN OBLIGATION.

Under this maxim where a person, owing a certain obligation, does an act which may, or may not, have been intended as a fulfillment of such obligation, equity will presume that it was so intended. The application of this doctrine is almost entirely confined to the case of resulting trusts.

SECTION 18. OTHER MAXIMS.

The eight following additional equitable maxims are sometimes found:

Equity will not permit a trust to fail for the want of a trustee.

It is equity, that should make satisfaction, which received the benefit.

It is equity, that should have satisfaction, which received the loss.

Equity relieves against accidents.

Equity prevents mischief.

Equity prevents multiplicity of suits.

Equity regards length of time.

Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made.

CHAPTER III.

DIVISIONS OF EQUITY.

SECTION 19. IN GENERAL.

Equity jurisdiction may be divided into four great divisions as follows:

(a) Equitable titles.

(b) Equitable rights.

(c) Those cases where equity takes jurisdiction on account of the character or number of the parties.

(d) Equitable remedies.

SECTION 20. EQUITABLE TITLES.

In some cases the legal title is in one party, while the beneficial right of ownership belongs to another. In such cases the law courts only recognize the legal title, and the protection of the beneficial right of ownership is left to the courts of equity. Titles recognized by courts of equity but not by courts of law are called equitable titles.

Equitable titles include the following:

"Trusts; married women's separate property; equitable interests arising from the operation of the doctrine of conversion; equitable estates or interests arising from mortgages of real or of personal property, and from pledges of chattels or securities; equitable liens on real and on personal property; equitable interests of assignees arising from assignments of things in action, possibilities, and the like, not assignable at law, or arising from transactions which do not at law operate as assignments." [1]

[1] Pomeroy on Equity Jurisprudence, Sec. 150.

SECTION 21. EQUITABLE RIGHTS.

The second class of cases where equity takes jurisdiction arise where the title is recognized by law but some particular right in relation thereto can only be enforced in equity. Under this head will be treated, mistake, accident, fraud, contribution, exoneration, subrogation, marshaling, accounting, election, and conversion.

SECTION 22. WHERE EQUITY TAKES JURISDICTION ON ACCOUNT OF THE CHARACTER OR NUMBER OF THE PARTIES.

The third principal division of equity jurisprudence includes all cases where equity takes jurisdiction on account of the character or number of the party. Under this general division are included suits by or against married women, suits between husband and wife, suits between partners, and cases where, on account of the number of diverse interests, equity takes jurisdiction to prevent a multiplicity of suits.

SECTION 23. EQUITABLE REMEDIES.

The last great division of equity jurisprudence is that of equitable remedies. Under this head are gathered those cases where the complainant is compelled to go into equity in order to secure some particular method of granting relief given only by the equity courts. Among the various forms of equitable remedies are specific performance, injunctions, discovery, correction, and cancellation of written instruments, and various remedies applicable to real property.

CHAPTER IV.

EQUITABLE TITLES.

SECTION 24. USES OR TRUSTS.

Almost the entire field of equitable titles is taken up by the subject of uses or trusts. While strictly a branch of equity jurisprudence, trusts are generally studied separately, and are made a separate subject in this work.[1]

SECTION 25. EQUITABLE LIENS.

"An equitable lien is not an estate or property in the thing itself, nor a right to recover the thing, that is, a right which may be the basis of a possessory action; it is neither a jus ad rem nor a jus in re. It is simply a right of a special nature over the thing, which constitutes a charge or encumbrance upon the thing, so that the very thing itself may be proceeded against in an equitable action, and either sold or sequestered under a judicial decree, and its proceeds in the one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists. It is the very essence of this condition that while the lien continues the possession of the thing remains with the debtor or the person who holds the proprietary interest, subject to the encumbrance. The equitable lien differs essentially from the common law lien, which is simply a right to retain possession of the chattel until some debt or demand due to the person thus retaining is satisfied; and possession is such an inseparable element, that if it be voluntarily

[1] See Subject 21, in this Volume.

surrendered by the creditor, the lien is at once extinguished."[2]

The most important classes of equitable liens are vendor's and vendee's liens.

A vendor's lien arises where property is sold and transferred, but a part or the whole of the purchase price left unpaid. Here the vendor will have a lien on the property for the amount due him. The taking of other security destroys this lien, and as this is almost invariably done (on account of the insecurity of the vendor's lien), this lien is at present of little importance.

The vendee's lien arises where the vendee, under a contract for the purchase of land, pays a part, or the whole of the purchase price before conveyance.

Section 26. Other Equitable Titles.

The separate estate of a married woman has already been treated.[3] Mortgages will be the subject of the next chapter.

[2] Pomeroy on Equity Jurisprudence, Sec. 1233.

[3] Under Domestic Relations, Vol. IV, Sub. 10.

CHAPTER V.

MORTGAGES.

SECTION 27. MORTGAGES AND SIMILAR FORMS OF SECURITY.

A mortgage is a conveyance of either real or personal property, as security for the payment of a debt, or the performance of some act. The Supreme Court of the United States,[1] has defined a mortgage to be "an estate upon condition defeasible upon the performance of the condition according to its legal effect."

The following quotation gives an admirable brief account of the origin and history of mortgages:

"The idea of a mortgage and its characteristics have been by some writers ascribed to the Jews; by others it is said that the civil law, which distinguished between pledges and thing hypothecated, is responsible for the mortgage; while yet others look upon it as a corollary of the common law doctrine of estates upon condition.[2] However that may be, it is certain that a mortgage, or transaction in the nature thereof, was known to English law at a period anterior to the Norman conquest.[3] After that date, owing to the severity of the feudal system with respect to alienation of land, a tenant in chivalry being unable to alienate in the absence of a license therefor, mortgages were not in common use until the restrictions upon alienation were removed by a statute permitting all persons except the King's tenants in capite to alien all or any part of their lands at their discretion.[4] The result of

[1] United States vs. Fisher, 2 Cranch, 358.
[2] Kyger vs. Ryley, 2 Neb., 20.
[3] 1 Jones on Mortg. (4th ed.), Sec. 1.
[4] Powell on Mortg., 3; 1 Steph. Com., 327.

this statute was that two methods of securing payment of money by means of a conditional alienation of land became popular, which are distinguished by Littleton as vivum vadium, and mortuum vadium, the latter being the modern common law mortgage."[5]

The distinction between a mortgage or *mortuum vadium* and a *vivum vadium* is thus explained by Coke:

"'Mortgage' is derived of two French words, viz., *mort*, that is *mortuum*, and *gage*, that is *vadium* or *pignus*. And it is called in Latin mortuum vadium or *morgagium*. Now it is called here mortgage or *mortuum vadium*, both for the reason here expressed by Littleton, as also to distinguish it from that which is called *vivum vadium*. *Vivum autem dicitur vadium, quia nunquam moritur ex aliquad parte quod ex suis proventibus acquiratur*. As if a man borrow a hundred pounds of another, and maketh an estate of lands upon him, until he hath received the said sum of the issues and profits of the land, so as in this case neither money nor land dieth, or is lost (whereof Littleton speaketh in this chapter), and therefore it is called *vivum vadium*."[6]

The Welsh mortgage was intermediary in its character between the mortgage and the *vivum vadium*. In the Welsh mortgage the mortgagee took possession of the land, and the use of the land was set off against the use of the money; the mortgagor paying no interest, and the mortgagee not being compelled to account for the rents and profits of the land.

Section 28. Common Law Theory of Mortgage.

Under the common law, a mortgage was considered merely what it purports to be, namely, a deed of

[5] Am. & Eng. Ency. of Law, Vol. XX, pp. 899-900.

[6] Coke on Littleton, 205a.

the land with a condition subsequent. The condition subsequent which might defeat the estate of the grantee, and re-invest the estate in the grantor, was the repayment of the money by the grantor. If such payment was not made strictly according to the terms of the deed, the estate in the mortgagee became absolute. Upon the giving of the mortgage the mortgagee acquired the present legal estate, while the mortgagor only retained a possibility of revertor.

Possession passed to the grantee, unless reserved to the grantor by the terms of the deed.

Section 29. Equitable Theory of Mortgage.

Equity early took a different view of mortgage. Applying the doctrine that equity will look at the intent rather than the form, equity considered the debt as the principal thing and the mortgage merely as security therefor; with the result that a failure to pay the mortgage promptly on time was held not to work a forfeiture of the mortgagor's interest, but merely to render him liable for interest on the amount of the mortgage until its payment. In other words, the damage for the delay in the payment of the mortgage was considered the interest on the sum of money withheld for the time the same was withheld. At first equity only relieved against the forfeiture of the mortgagor's interest, when the act which worked such forfeiture was the result of an accident. Such relief, however, was soon extended to other cases.

Section 30. Modern Theory of Mortgages.

"Because of the fact that a mortgage is regarded as of a dual character—a conveyance of an estate in lands, and a security for a debt—bearing one character in a court of law and another in a court of equity, a

mortgage at the present day, in the absence of statutes providing otherwise, vests the legal title to the mortgaged property in the mortgagee,[7] at any rate, after condition broken and possession taken." [8]

The debt secured, however, is considered the real property right, and the mortgage merely as security therefor, and the interest of the mortgage is therefore considered personal property.

Section 31. Foreclosure of Mortgages.

After equity began to relieve against forfeiture in the case of mortgages, there was a period during which equity would relieve against such forfeitures after any period of time after breach. This, however, was soon seen to be going too far, as it worked a great hardship upon the mortgagee by preventing him from at any time acquiring a good title. To remedy this injustice, and to produce an equilibrium between the rights of mortgagor and mortgagee, the system of foreclosure of mortgages was introduced.

"A foreclosure is any proceeding by which the mortgagor's equity of redemption in the property is cut off beyond possibility of recall." [10]

"The term 'foreclosure' has undergone a marked change in signification since it was first employed in legal nomenclature. It was formerly applied only to a proceeding whose direct and immediate result was to cut off or 'foreclose' the equity of redemption allowed a mortgagor by the courts of chancery. Owing, however, to a change in the legal theory of the mortgage and in the methods employed for its enforcement, the term 'foreclosure' has acquired a broader meaning,

[7] Stelle vs. Carroll, 12 Pet. (U. S.), 205.
[8] Buck vs. Payne, 52 Miss., 271.
[9] American & Eng. Ency. of Law, Vol. XX, 900.
[10] Ansonia Nat. Bank's Appeal, 58 Conn., 260.

and now includes not merely a proceeding which extinguishes *ipso facto* the interests of the mortgagor in the premises, but also a proceeding which results in a sale thereof. Thus, the Connecticut statute, confining actions for a deficiency to parties who were made defendants to foreclosure applies to proceedings for the sale of the property. Foreclosure also includes the exercise of a power of sale conferred by a mortgage and by which the mortgagor's rights are extinguished. But the publication of the notice of sale in pursuance of the exercise of such a power does not constitute foreclosure, and under a statute limiting the right to foreclosure by advertisement to a period of ten years after the maturity of the mortgage, the entire proceeding must have been completed within that period. The term 'foreclosure' includes the sale of the property and the execution of the sheriff's deed as well as the decree, and under a statute which permits actions to foreclose mortgages covering land in different counties to be brought in either, the sale may take place in one of such counties, though the decree was rendered in the other." [11]

At least eight different methods of foreclosure are in force in different states in this country, as follows:

(a) Strict foreclosure.
(b) Equitable foreclosure.
(c) Scire facias.
(d) Rule nisi.
(e) Writ of entry.
(f) Ejectment.
(g) Advertisement and sale under a power.
(h) Entry and possession.

[11] Ency. of Pleading and Practice, Vol. IX, pp. 95–6.

Methods of foreclosure are regulated by statute, and the statutes of the different states should be consulted.[12]

Section 32. Redemption of Mortgages.

Upon a strict foreclosure of a mortgage the property becomes absolutely vested in the mortgagee and the right of the mortgagor to redeem is gone. In the case of an equitable foreclosure, where the property is sold to satisfy the mortgage, the mortgagor is allowed to redeem the property from the purchaser, within a certain specified time.

Section 33. Mortgage Trust Deeds.

A mortgage trust deed is a conveyance, usually by deed, of either real or personal property, by a debtor to a trustee, who is to hold such property as security for the payment of creditors or the indemnifying of sureties. Such a deed generally lodges in the trustee the power to sell such property upon the breach of the conditions contained in the deed, but in some states, *e. g.*, Illinois, the security can only be reached by foreclosure proceeding. Mortgage trust deeds are most frequently used in cases where there are a large number of creditors to be secured by the one conveyance, such as the bondholders of a railway. In some places (most notably Cook County, Illinois) a mortgage trust deed is the ordinarily used form of real estate mortgage.

Section 34. Sale With Right to Redeem.

A deed, or contract of sale, absolute in form, may be construed by the courts of equity as a mortgage.

[12] A synopsis of the laws of the various states on this subject are to be found collected in the Ency. of Pleading and Practice, Vol. IX, pp. 98–118.

A deed reserving the power to repurchase may be upheld or may be construed as a mortgage. The most important tests in such a case are the intentions of the parties, and the absence or presence of personal liability by the vendor to the vendee.

Section 35. Chattel Mortgages.

A chattel mortgage is a conditional transfer or conveyance of the property, and if the conditions are not duly performed the whole title vests absolutely at law in the mortgagee.[12]

The protections given to the mortgagor of real property are, in general, wanting to mortgagors of personal property. This difference is mainly due to the less degree of importance attached by the law to personal than to real property. It is sometimes provided by statute, however, that certain mortgages of property must be foreclosed in court. For example, the law of Illinois makes this provision in the case of mortgages of household furniture, except in the case of purchase money mortgages.

A bill of sale absolute on its face may be shown by parol to have been intended as a mortgage.

[12] Wright vs. Ross, 36 Cal., 414.

CHAPTER VI.

MISTAKE.

SECTION 36. DEFINITIONS.

"Mistake is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence."[1]

Another definition of mistake which has been given is as follows:

"Mistake may be said to exist, in a legal sense, where a person, acting upon some erroneous conviction, either of law or of fact, executes an instrument, or does an act, which, but for that erroneous conviction, he would not have executed or done."[2]

SECTION 37. CLASSIFICATION OF MISTAKE.

Mistake is divided into

(a) Mistake of law, and

(b) Mistake of fact.

Equity will, under proper conditions, relieve against mistakes of the latter class, but not against those of the former.

SECTION 38. MISTAKES OF FACT.

Mistakes of fact may consist either of mistakes by the parties to the contract as to some matter which goes to the essence of the contract, or it may be the mistake of a third person who reduces the contract to writing.

A mistake of the parties to the contract, to be

[1] Story's Equity Jurisprudence. [2] Eaton on Equity Jurisprudence.

relievable, must be mutual. An exception is found in cases where there is mistake on one side and fraud on the other. This exception, perhaps, would rather come under the head of fraud.

The necessity for the mutuality of the mistake was asserted by the Court in the case of Dinian vs. The Providence W. & B. R. R. Co.,[8] as follows:

"A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express what the parties actually agreed to. It follows that the mistake which it may correct in such a writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the draughting of the writing as makes it convey the intent or meaning of neither party to the contract. If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it, as it was written, by mistake, when it exactly expressed the agreement as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before; and the court would have been engaged in the singular office, for a court of equity, of doing right to one party at the expense of a precisely equal wrong to the other."

Section 39. Mistake as to Existence of Subject Matter of Contract.

When the subject matter of the contract was not in existence at the time of the making of the

[8] 5 R. I., 130.

contract, there is a mutual mistake against which equity will relieve. This rule also applies in the case of contracts for services, where, on account of facts unknown to either party at the time of the making of the contract, the performance of the services was unnecessary or impossible. This doctrine was laid down by the Supreme Court of the United States in the case of Allen vs. Hammond,[4] where a contract had been made by which Allen was to be allowed a large commission upon the allowance in favor of Hammond of a certain claim by the Portuguese government, which claim, unknown to the parties, had been allowed eight days prior to the making of the contract. The decision in this case was in part as follows:

"No one can read the contract without being struck with the large sum that Hammond is willing to pay on the contingency of recovering his claim. Allen was to receive as a compensation for his services, a sum little below the one-third of the amount recovered. This shows, in the strongest point of view, that Hammond could have entertained but a remote prospect of realizing his claim; and, indeed, it would seem, when the circumstances of the case are considered, that he could have had little or no ground to hope for success.

"His vessel and cargo had been condemned; the Portuguese Government was in an unsettled state, and its finances in the greatest confusion and embarrassment.

"In his vessel and cargo Hammond appears to have lost his entire property; and this very naturally threw him into despondence, and induced him to agree to pay nearly one-third of his demand to an

[4] 11 Peters, 63.

agent who might, by possibility, recover it. He, no doubt, supposed that by interesting his agent so deeply in the claim, he would secure his sympathies and his utmost exertions. And the prospect was, if the claim or any part of it should be obtained, it would be the work of time, and of great effort.

"Allen is not chargeable with fraud in entering into the contract, or in using the most persevering efforts to get possession of the installment paid.

"That the contract was entered into by both parties under a mistake is unquestionable. Neither of them knew that the Portuguese Government had allowed the claim. Can a court of equity enforce such a contract? Can it refuse to cancel it? That the agreement was without consideration is clear. Services long and arduous were contemplated as probable, by both parties, at the time the contract was executed. But the object of pursuit was already attained. No services were required under the contract, and for those which Allen had rendered to Hammond prior to it regular charges seem to have been made.

"It is true the amount of services required by the agent was uncertain. He took upon himself this contingency, and had not the claim been allowed by the Portuguese Government until after the contract, he would have been entitled to his commissions, however small his agency might have been in producing the result. This, it may be supposed, was a contingency within the contemplation of the parties at the time of the contract; so that, unconnected with other circumstances, the smallness of the service rendered could have constituted no ground on which to set aside the contract.

"But no one can for a moment believe that Ham-

mond intended to give to his agent nearly ten thousand dollars, on the contingency of his claim having been allowed at the time of the contract. And it is equally clear, that his agent, under such a circumstance, had no expectation of receiving that, or any other amount of compensation. The contract does not provide for such a case, and it could not have been within the contemplation of either party. Services were made the basis of the compensation agreed to be paid, but the allowance of the claim superseded all services in the case.

"The equity of the complainant is so obvious that it is difficult to make it more clear by illustration. No case, perhaps, has occurred, or can be supposed, where the principle on which the courts of equity give relief, is more strongly presented than in this case. The contract was entered into through the mistake of both parties; it imposes great hardship and injustice on the appellee, and it is without consideration. These grounds, either of which in ordinary cases is held sufficient for relief in equity, unite in favor of the appellee.

"Suppose a life estate in land be sold, and at the time of the sale the estate has terminated by the death of the person in whom the right vested, would not a court of equity relieve the purchaser? If the vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake. In either case would it not be gross injustice to enforce the payment of the consideration?

"If a horse be sold, which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration?

"There are cases in which the parties enter into the contract under a material mistake as to the subject matter of it.

"In the first case the vendor intended to sell, and the vendee to purchase a subsisting title, but which, in fact, did not exist; and in the second, a horse was believed to be living but which was, in fact, dead.

"If in either of these cases the payment of the purchase money should be required, it would be the payment without the shadow of consideration, and no court of equity is believed ever to have sanctioned such a principle. And so in the case under consideration; if Hammond should be held liable to pay the demand of the appellant, it would be without consideration.

"There may be some cases of wager, respecting certain events, where one of the contingencies had happened at the time of the wager, which was unknown to both parties, and which was held not to invalidate the contract. Of this character is the case of Earl of March vs. Pigot (5 Burr., 2802). But the question in that case, arose upon the verdict of a jury on a rule to show cause, etc.; and Lord Mansfield says, 'the nature of the contract, and the manifest intention of the parties, support the verdict of the jury (to whom it was left without objection) that he who succeeded to his estate first, by the death of his father, should pay to the other without distinction, whether the event had or not, at that time, actually happened.'

"In 1 Fonblanque's Equity, 114, it is laid down that where there is an error in the thing for which an individual bargains, by the general rules of contracting, the contract is null, as in such a case the parties are supposed not to give their assent. And

the same doctrine is laid down in Puffendorff's Law of Nature and Nations (Bk. 1, Ch. 3, Sec. 12).

"The law on this subject is clearly stated in the case of Hitchcock vs. Giddings (Daniel's Reports, 1), where it is said that a vendor is bound to know that he actually has that which he professes to sell. And even though the subject matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately, yet if the contingency has already happened, the contract will be void.

"By the decree of the Circuit Court, on the payment of the amount, including interest, which is due from the appellee to the appellant, he is required to deliver up to be cancelled the agreement entered into on the 27th of January, 1832, which leaves the parties as they were before the contract; and as we consider the decree just and sustained by principle, it is affirmed."

Section 40. Mistakes as to Identity or Quantity of Subject Matter.

Mistakes as to fundamental nature or character of the subject matter of the contract also furnish a basis for equitable relief. In Barth vs. Devel,[5] both parties to a deed believed that the land conveyed included the land upon which a certain building was located, which proved not to be the case. The decision in this was in part as follows:

"The question presented for determination is whether the mutual mistake of the parties with reference to the location of the building occupied by the plaintiff at the time of the making of the deed by defendant to her, is, under the circumstances

[5] 11 Colo., 494; 19 Pac., 471.

of this case, a ground for relief in equity. One of the circumstances to be considered is that the mistake related to a material fact, which constituted the only basis for the payment by plaintiff to defendant of the money sought to be recovered back. The premises conveyed to plaintiff by defendant were materially different from the premises the plaintiff intended to purchase, and from the premises defendant supposed he was selling to her. In Daniel vs. Mitchell, 1 Story, 172–190: 'Nothing is more clear in equity than the doctrine that a bargain founded in a mutual mistake of the facts, constituting the very basis or essence of the contract, or founded upon the representations of the sellers, material to the bargain, and constituting the essence thereof, although made by innocent mistake, will avoid it.' In Marvin vs. Bennett, 8 Paige, 312–321, it is held that equity will give relief in cases of mutual mistake, 'where the subject-matter of the sale and purchase is so materially variant from what the parties supposed it to be that the substantial object of the sale and purchase entirely fails.' By reason of the failure of the defendant to convey, not only almost the entire building intended to be conveyed, but also a failure to convey anything of material value to the plaintiff, there is a failure of the basis of the contract between the parties, without their assent, and to enforce such an agreement is inequitable. Miles vs. Stevens, 3 Pa. St., 21–37. Equitable relief will be granted in cases of mistake when the fact concerning which the mistake is made, is material to the transaction, affecting its substance and not merely its incidents, and the mistake itself is so important that it determines the conduct of the mistaken parties. 2 Pom., Eq. Jur., 856. Counsel for appellant

contend that under the evidence in this case the plaintiff is not entitled to the relief she demands, by reason of the application of the following claimed legal principles, as stated in the argument for appellant: *First.* Where the means of information are alike open to both parties, and when each is presumed to exercise his own judgment in regard to extrinsic matters, equity will not relieve. *Second.* When the facts are unknown to both parties, or when each has equal and adequate means of information, in such cases, if the party has acted with good faith, equity will not interfere. *Third.* When each party is equally innocent, and there is no concealment of facts, mistake or ignorance is no foundation for equitable interference The case of Crowder vs. Langdon, 3 Ired. Eq., 476, is cited in support of the foregoing proposition. An examination of that case will show that but little weight should be given to the case as an authority in support of the propositions contained in the head-notes. It appears that one of three partners in the mercantile business negotiated with another partner for the purchase of that partner's interest in the partnership; that during said negotiation, the partner having the interest for sale produced the books of the firm, and also a paper called the "blue paper," purporting to be a statement of the assets and liabilities of the firm, the figures of which statement were taken from the firm books, and that after adding the sum of $1500.00 to the sum of the liabilities, as they appeared from said statement, and deducting the sum of $600.00 from the assets on account of bad debts, which addition and deduction were made at the instance of the disinterested partner, the statement, as so changed, was taken as the basis of the contract

of sale and purchase made by the parties. It turned out that the liabilities of the firm were underestimated in nearly the sum of $2,500, and the purchaser brought an action to rescind the contract and recover back the purchase money paid. The foregoing statement contains all the facts relating to a mistake in the case, and shows that there was no question of mistake to which the principles announced could be applied. Mistake is not ground for relief, unless the mistake is acted upon and forms the basis of the contract, and when it is not acted upon the principles announced have no application, as is shown by the case cited, from which we quote: 'If, however, we were satisfied that the plaintiff acted upon the statement contained in the blue paper, as the known and declared basis on which he contracted, we should be inclined to grant him relief.' The case of Grymes vs. Sanders, 93 U. S., 55, cited by counsel, turned upon the fact that the mistake with reference to the location of the shaft had not animated and controlled the conduct of the party complaining, as appears from the following statement in the opinion: 'The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.' This fact, so stated, brings the case within the principle, that, to warrant relief in equity, 'the court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved,' announced by the court in that case. The case of Weber vs. Stark, 10 Lea, 406, cited by counsel for appellant, was determined upon a question of fact relating to the intention of the parties. It was found

by the court that the contract of sale made by the defendant to the plaintiff expressed the intention of the parties, and this finding clearly appears from the review of the evidence by the court on pages 412 and 413, of the opinion, which review also shows that there was no mistake as to the lots plaintiff intended to buy, but a mistake made by him as to an extrinsic fact. The case of White vs. Williams, 48 Barb., 222, was also determined upon a question of fact as to the intention of the parties. The mistake in this case was not in relation to ground intended to be purchased and sold, but in relation to an extrinsic fact relating to said ground.

"From this review of the cases cited, it will be seen that they have no application to the case at bar. In the case under consideration there is no question but that it was the intention of the plaintiff to purchase the identical 22 feet of ground on which the building she occupied stood. The defendant so understood the intention of the plaintiff, and he supposed that the conveyance made by him covered the premises the plaintiff intended to buy. The mutual mistake made by the plaintiff and defendant was in relation to a material fact, and but for the fact of the mistake the plaintiff, certainly, would not have entered into the contract from which she seeks to be relieved, and it is but just to the defendant to presume that he would not have taken the plaintiff's money without intending to give her value therefor. It does not appear that there are intervening rights to prevent the parties from being placed in the same position they were before the contract was made. In 1 Story, Eq. Jur., 138, it is said to be the clearly defined and well established rule, both in England and America,

that under such facts as are established by the evidence in this case equity will interfere, in its discretion, in order to prevent intolerable injustice. In illustration of the doctrine that equity will relieve in such cases, the learned author states the following supposed case: 'If one person should sell a messuage to another, which was at the same time swept away by a flood, or destroyed by an earthquake without any knowledge of the fact by either party, a court of equity would relieve the purchaser, upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. It constituted, therefore, the very essence and condition of the obligation of their contract.' 1 Story, Eq. Jur., 142. Under the facts of this case we do not conceive that the question of negligence arises; but, if it is in the case, the evidence does not show such a state of facts as should prevent the plaintiff from obtaining the relief demanded. At the time of making the contract the plaintiff was paying rent to the defendant for the premises she desired to purchase, and the defendant was receiving such rent as the owner of the premises. The plaintiff had the right to assume that defendant was the owner of the premises, and to act upon such assumption. 1 Story, Eq. Jur., 140; 2 Pm., Eq. Jur., 856; Quick vs. Stuyvesant, 2 Paige, 84–92. We therefore conclude that the plaintiff made a case which entitled her to the relief demanded."

It was held in Lawrence vs. Staigg,[6] that a mistake as to the quantity of the land conveyed by a deed is a mistake relievable in equity.

"The facts stated and proved in this case are

[6] 8 R. I., 256.

that the plaintiff arranged for sale and sold, through the agency of Alfred Smith, a well-known real estate agent in Newport, a portion of a certain farm belonging to the plaintiff, called the Ochre Point Farm, in said Newport. That Smith, who had the sole direction and control of said sale, in the summer of 1862 employed a surveyor by the name of Samuel S. Minot, reputed for his skill, to survey the portion of said farm to be sold into lots, and measure and plot the same, to be sold by one Swinburn, by auction. That among the lots so measured and plotted was lot No. 1 on the plot of said lots, set down as containing 45,918 feet to high water, by mistake of said surveyor, when, in truth, and in fact, said lot contained, in its true area to high water, 55,680 feet. That said lot was sold by auction, through mistake, to the defendant, and by him bought, as containing said area of 45,918 feet, instead of its true area of 55,680 feet, at five and one-quarter cents per square foot, and upon receiving a conveyance from the plaintiff of said lot, the defendant paid his said agent, Smith, the sum of $755.69 and delivered to him a mortgage for the payment of a note of $1,550, in three years, with interest, the area and price of said lot being adjusted by and according to said mistake. The bill prays that the sale, made as above, by mutual mistake as to area, may be rescinded, the consideration being returned to the defendant, and the land reconveyed by him to the plaintiff.

"We are clearly of opinion that this equity demanded of the defendant is due, under the facts, to the plaintiff, there being no doubt that the sale and conveyance were made under a mutual mistake, as to the area sold, and the price justly to be computed as the price of the lot. No fault or neglect in the

matter is fairly imputable to the plaintiff, who employed an agent to arrange the sale of his farm, of skill and good repute. This agent, for the purpose of surveying, measuring and plotting the lots to be sold, including lot No. 1, sold under the above mistake to the defendant, employed a skillful civil engineer, who, in performing his duty, fell into the mistake as above mentioned, which has caused the parties to contract and execute their contract of sale, contrary to the design and against right, as due to and from both parties. The sale, like that in Leslie vs. Thompson, was made according to the report of a surveyor, which was incorrect, and the contract was, as in that case, entered into under a mistaken conception of the amount of the property comprised in the particulars embraced in the report. There is no pretense, under the fact proved, that the plaintiff designed or expected to sell lot No. 1 in the mass or lump, or that the defendant designed or expected to buy it in that mode. The designation of the number of feet in the tract, with the price per foot at which it was sold, negatives any such presumption. In the exercise of its jurisdiction over the subject of such a mistake, the court will require, what it finds in this case, full and satisfactory proof of the mistake, and will be of little value, if it can suppress only positive frauds, and leave a material mistake, like the one in this case, innocently made, to work on intolerable mischief, contrary to the intention of the parties. As we have already had occasion to repeat, in the language of Judge Story: 'It would be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice, under the shelter of a rule framed to promote it.'

"According to the well-settled principles of equity jurisprudence applicable to such a subject, we must rescind the contract and sale entered into and arranged by mistake in a substantial particular, and which, if suffered to remain, will work a fraud upon the plaintiff, unless the same be confronted to the truth and fact in the particular complained of."

Section 41. Mistakes of Third Persons.

Where the parties to a contract come to an agreement which is reduced to writing by a third person, who makes a mistake in so doing, relief may be obtained in equity. Mutuality of mistake is necessary here as elsewhere; that is, the contract as written must fail to express the intention of either party to the contract.[7] If, however, the written instrument failed to express the agreement of the parties, the right to relief will not be defeated because one party discovered the mistake before signing, and failed to disclose it to the other.[8]

Section 42. Mistakes of Law.

Equity will not relieve against mistakes of law. There are probably no real exceptions to this rule.[9] There are, however, three apparent exceptions, as follows:

(a) Mistakes as to private statutes.

[7] Dinian vs. Railroad Co., 5 R. I., 137.

[8] Rassell vs. Rassell, 109 Ind., 354; 10 N. E., 114.

[9] "But there is a long line of specific authorities, most of them undoubtedly correct, in which relief for mistake of law has either been granted or admitted to be a proper head of equity jurisdiction. All of these cases will, upon examination, be found to rest, 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, abuse of confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief." Eaton on Equity, Sec. 112.

(b) Mistakes as to foreign laws.

(Both of these mistakes are considered as being mistakes of fact, it being necessary to prove both private statutes and foreign laws as facts.)

(c) Where a mistake of law occasions a mistake of fact, and the action from which relief is sought is induced by such mistake of fact. The most common illustrations of this last class are fond in mistakes as to ownership which are occasioned by mistakes of law. A mistake as to ownership, however occasioned, is a mistake of fact.

Mistake by a party as to the legal effect of an agreement which he executes, or as to the legal results of an act which he performs, is no ground for either defensive or affirmative relief.[10] Thus, a deed conveying land to the grantee for life, "and upon his death unto his heirs and their assigns forever," has been held to pass a fee to the grantee, even though it also recites an intention to convey the land to the grantee "to hold only during his natural life, and upon (his death) to be held in fee simple by his heirs." The fact that the word "heirs" was inserted in such deed instead of "children," by mistake as to the legal effect

[10] "If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew, or had an opportunity to know, the contents of an agreement or other instrument cannot defeat its performance or obtain its cancellation or reformation because he mistook the legal meaning and effect of the whole or of any portion of its provisions. Where the parties, with knowledge of the facts, and without any equitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense, or grant a reformation or rescission, although one of the parties—and as many cases hold, both of them—may have mistaken or misconceived its legal meaning, scope and effect." Pomeroy on Equity Jurisprudence, Sec. 843.

of the word, being held no ground for reforming the deed.[11]

SECTION 43. FORMS OF RELIEF GRANTED BY EQUITY IN CASES OF MISTAKE.

The two great equitable remedies in the case of mistake are the concellation and the correction of the contract, deed or other instrument. Which will be granted in each particular case will depend upon the circumstances of the case and the prayer in the bill of complaint. Mistake can also be set up as a defense to a bill for the specific performance of the contract, or other equitable suit.

[11] Fowler vs. Black, 136 Ill., 363; 26 N. E., 596.

CHAPTER VII.

ACCIDENT.

SECTION 44. DEFINITION.

Of all the definitions of accident, as the term is used in equity, the best and most accurate, is undoubtedly that of Pomeroy,[1] which is as follows: "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby contrary to his own intention and wish, he loses some legal right or becomes subject to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, in the circumstances, to retain."

SECTION 45. DISTINCTION BETWEEN ACCIDENT AND MISTAKE.

Two great distinctions are to be noticed between accident and mistake. In the first place mistake is subjective, while accident is objective. Mistake is in the minds of the parties, while accident is external thereto. Secondly, mistakes take place at the time the contract is entered into, while accident happens after the contract has been made or the right acquired which suffers injury by the accident.

SECTION 46. LOST INSTRUMENTS.

One of the most important class of accidents against which equity will grant relief is found in the

[1] Equity Jurisprudence, Sec. 79.

case of lost instruments. Relief in such cases can in some instances now be obtained at law, but the relief in equity is older and more complete.

Equitable relief of this character extends both to the case of deeds,[2] and to unsealed instruments, as bills and notes.[3]

This species of accident is thus discussed by the court in the case of City of Bloomington vs. Smith:[4]

"It is an old and familar rule that although the holder of a bill payable to bearer could not recover in a court of law without showing the presentation of the identical paper, a court of chancery, upon proof that the bill had been lost or stolen, would often order it paid upon equitable terms. Thus it is said by a learned author: 'A court of equity, however, may, where the bill is asserted to be lost, give relief to the holder; but then it is always upon the terms that he shows satisfactory proofs to establish the loss, and gives good security for the repayment of the money, if the acceptor shall be compelled to pay again the same to another holder.' Story, Bills, Sec. 445–447; Depew vs. Wheelan, 6 Blackf., 485. The rule which requires indemnity is not applicable in case the loss occurs after maturity. Elliott vs. Woodward, 18 Ind., 183; Bank vs. Ringel, 51 Ind., 393; Gregg vs. Bank, 87 Ind., 238. The agreement of an acceptor or payor of a bill of exchange is that upon a date fixed he will pay upon presentment of the identical bill. He has the right to insist upon the condition, but the power of a court of equity to compel payment upon suitable indemnity is thoroughly established. Bank vs. Haskins, 101 Mass., 370. When an accident

[2] Ex parte Greenway, 6 Ves., 812; Patton vs. Campbell, 70 Ill., 72.

Hansard vs. Robinson, 7 Barn & C., 90; 1 Scott, 412.

123 Ind., 41; 23 N. E., 972.

occurs which was not anticipated and provided for when the contract was made, and which leaves one of the parties remediless in a court of law, the jurisdiction of a court of equity may then be invoked to give relief against the accident. Daniel, Neg. Inst., Sec. 1477, 1478; Rand., Com. Paper, Sec. 1696; Adams vs. Edmunds, 55 Vt., 353. It would be against conscience that the maker should escape payment of an honest debt, notwithstanding satisfactory proof that the bill had been lost or stolen, and hence could not be presented, and notwithstanding the holder had tendered adequate indemnity. Fales vs. Russell, 16 Pick., 315; Thayer vs. King, 15 Ohio, 242; Smith vs. Rockwell, 2 Hill, 482; Snyder vs. Wolfley, 8 Serg. & R., 328. There was no error."

Section 47. Defective Execution of Powers.

Where there has been a total failure to execute a power there can be no relief in equity.[5] Equity, however, will relieve where there has been a defective execution of powers on account of accident.[6] Such a defect, however, must be merely a formal one and not one going to the essence of the power.

Section 48. Judgments at Law.

One of the last rights acquired by courts of equity, and the right most strenuously resisted by the common law courts, was that of interfering by injunctions in common law cases. Where a defendant is prevented by accident from setting up what would have been a good defense, equity will enjoin further pro-

[5] Tollett vs. Tollett, 2 P. Wms., 489; Mitchell vs. Denson, 29 Ala., 327; 65 Am. Dec., 403.

[6] Chapman vs. Gibson, 3 Brown Ch., 229.

ceedings to collect such judgment or set it aside and grant a new trial.[7]

The importance of this power has been diminished by the adoption by the common law courts of the custom of granting new trials, and in some states this equitable right has been abolished by statutes.

[7] Gibbs vs. Marsh, 2 Met., 243.

CHAPTER VIII.

PENALTIES AND FORFEITURES.

SECTION 49. PENALTIES.

Equity looks with the greatest disfavor upon penalties. Not only will equity courts never assist in the enforcement of a penalty, but also, in proper cases, equity will grant affirmative relief against them. Such relief was originally limited to cases where the penalty was intended to secure the payment of money.[1] Later the relief was extended to cases where the penalty was for the purpose of securing the performance of some act or the enjoyment of any collateral object.[2] The same relief which equity gives against penalties can now, in this country, be secured at common law, but equity still retains concurrent jurisdiction.

Alternative stipulations,[3] agreements for the reduction of an existing debt upon prompt payment,[4] and liquidated damages are not considered as creating penalties.

SECTION 50. LIQUIDATED DAMAGES.

Liquidated damages are damages whose amount is determined in advance of the breach, by the terms of the contract. Whether the sum stipulated in a contract is a penalty or liquidated damages, will be determined by the real intention of the parties and the nature of the transaction, rather than by the name

[1] Peachy vs. Duke of Somerset, 1 Strange, 447.
[2] Sloman vs. Walter, 1 Brown Ch., 418.
[3] Smith vs. Bergengren, 153 Mass., 690.
[4] Walsh vs. Curtis, 76 N. W., 52.

given to the sum to be paid, by the wording of the contract.

The securing by a larger sum of money of the payment of a smaller one will always be considered a penalty.[5] Although a note may be made to pay a higher rate of interest after maturity, a provision that in case of failure to pay when due the maker shall pay a higher rate from the date of the note, creates a penalty. In Krutz vs. Robbins,[6] the Court said:

"The plaintiff in the action sought to recover interest on the note from its date at the rate of 12 per cent per annum, compounded semi-annually, in accordance with the stipulation in the mortgage above set forth. The court, however, awarded him but 7 per cent. interest on the note, computed semi-annually from date to maturity, and thereafter at the rate of 12 per cent. per annum. Interest was also allowed on each coupon at the rate of 12 per cent. per annum from maturity, as therein specified. The amount recovered is $866.33 less than plaintiff conceives himself entitled to, and hence this appeal. The trial court, it will be seen, based its decision as to the rate of interest on the stipulation in the note itself in regard thereto; but appellant contends that the ruling was erroneous, for the reason that it gave no effect whatever to the stipulation in the mortgage providing for interest on the principal note, at the rate of 12 per cent. per annum from its date in case of default. He claims that that provision was part of the contract between the parties, and that inasmuch as it is not contrary to law or public policy, and is not immoral, it should be enforced as made. On the other hand the respondents insist that the provision in the mortgage

[5] Morrill vs. Weeks, 70 N. H., 178; Gay Mfg. Co. vs. Camp, 65 Fed., 794.

[6] 12 Wash 7; 40 Pac., 415.

for a higher rate of interest in case of default of payment of the principal or interest specified in the note is in the nature of a penalty, and unenforceable in equity. If this provision is a penalty, there can be no doubt that it is unenforceable, for it is a universal rule in equity never to enforce either a penalty or a foreclosure. 2 Story, Eq. Jur., Sec. 1319. But what is a penalty, and what is liquidated damages in a given case, it is not always easy to determine. As the question is one of intention, no single rule can be laid down which will furnish a certain and satisfactory criterion for all cases. In most cases many circumstances must be considered in order to ascertain the real intention of the parties. The courts, however, have deduced from the authorities certain general rules, 'each having more or less weight, according to the peculiar circumstances of each case.' Among these rules is one which is almost universally recognized and acted on, and which is that, where the payment of a smaller sum is secured by an agreement to pay a larger sum, the larger sum will be held a penalty, and not liquidated damages. Keeble vs. Keeble, 85 Ala., 552; 5 South, 149, and cases cited; 1 Pom., Eq. Jur., Sec. 441; Adams, Eq., page 108; 2 Pars., Notes and B., pages 413–414; Seton vs. Slade, 7 Ves., 265; 3 Bl. Comm., 432; Holles vs. Wyse, 2 Ver., 289; Strode vs. Parker, Id., 316; Orr vs. Churchill, 1 H. Bl., 227; Bonafous vs. Rybot, 3 Burrows, 1370; Parker vs. Butcher, L. R., 3 Eq., 762; Tiernan vs. Hinman, 16 Ill., 400; Watts vs. Watts, 11 Mo., 547; Mason vs. Callendar, 2 Minn., 350 (Gil., 302); Richardson vs. Campbell, 34 Neb., 181; 51 N. W., 753; Waller vs. Long, 6 Munf., 71.

"In Alexander vs. Troutman, 1 Kelly, 469, this is said to be the settled doctrine. If this case, therefore,

falls within the rule stated, the provision in the mortgage for an increased rate of interest in case of default in the payment of principal or specified interest is in the nature of a penalty, and the trial court was right in refusing to enforce it. While, in construing contracts, due weight will be given to the language used, still courts of equity will not be absolutely controlled by the words employed, when the enforcement of such contract will cause an unconscionable hardship or otherwise work an injustice. Keeble vs. Keeble, supra. A penalty has been defined to be an agreement to pay a greater sum to secure the payment of a less sum (Henry vs. Thompson, Minor, Ala., 209), and it seems to us that this case clearly falls within that definition and the rule above stated. The additional rate of interest is essentially a penalty, although not designated as such. It could not have been intended as compensation for the use of the principal before maturity, for the reason that 7 per cent. interest was agreed on as the rate of compensation. It could not have been intended as compensation for failure to pay the interest when due, because it is neither porportioned to the amount of interest nor to the length of time the debtor is in default. The provision for 5 per cent. extra interest may therefore be considered as a provision to secure the prompt payment of 7 per cent. interest on the principal debt, and also taxes, insurance, and principal when due."

If the sum to be paid is the same in case of any breach of the contract, whether great or small, it will be construed as a penalty.[7]

"Where an agreement is for the performance or non-performance of only one act, and there is no

[7] East Moline Plow Co. vs. Weir Plow Co., 95 Fed., 250; Kemble vs. Farren, 6 Bing., 141.

adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose will be treated as one for 'liquidated damages,' unless the intent be clear that it was designed to be only a penalty." [8]

In the case of a penalty the party bound has not the right to elect to pay the penalty and not to perform the contract; [9] but the rule is the opposite in the case of liquidated damages.[10]

Section 51. Forfeitures.

Equity will never enforce forfeitures. On the other hand, where the agreement secured is simply one for the payment of money, equity will set aside forfeitures either of land, chattels, securities or money, or otherwise relieve against them on payment of debt, interest and costs (if any) unless on account of the misconduct of the party seeking such relief, or other circumstances in the case, such relief would be inequitable.

The doctrine upon which such relief is based was stated by the court of Appeals of New York, in the case of Noyes vs. Anderson,[11] as follows:

"The power of a court of equity, in cases properly requiring it, will be exercised to relieve a party against forfeitures and from penalties, and this is upon the principle of equity jurisprudence that a party having

[8] Pomeroy on Equity Jurisprudence, Sec. 342; Keeble vs. Keeble, 85 Ala., 552.

[9] Hardy vs. Martin, 1 Cox., 26.

[10] Amanda Consol. G. M. Co. vs. People's M. & M. Co., 28 Colo., 251; 64 Pac., 218.

[11] 124 N. Y., 175; 26 N. E. 316; 21 Am. St. Rep., 657.

a legal right shall not be permitted to avail himself of it for the purposes of injustice or oppression. The doctrine was applied to relieve a mortgagor from the forfeiture to which he was subjected, and an obligor from the penalty with which he was chargeable, by the common law on default. It is also not only available to cases of leases where forfeiture of the term and entry are provided for as the consequences of non-payment of rent on the day it becomes due, but is extended to other cases, and more especially to those (although not necessarily confined to them) where the default resulting in forfeiture is in the payment of money, as in such case adequate compensation can be made. 1 Pom., Eq. Jr., Secs. 433, 450, 451. This relief will not be afforded in cases where the default and forfeiture have been occasioned by the willful neglect of the party seeking it. Nor will it ordinarily be given where the breach is of a condition precedent, although that rule may not be without exception. In the present case the default was in the performance of a condition subsequent, because the right of the plaintiff under the contract vested on its delivery subject to the provision that it should be avoided or rendered insufficient by a subsequent breach of the conditions, or any of them, upon the observance of which the defendant's right given by the contract depended. And the defeat of such right by her default, which the plaintiff by this action seeks to make available for the foreclosure of the mortgage, would result in a forfeiture from which, or the consequences of it, the court, upon the principle before mentioned, may have relieved the defendant, if in other respects she was entitled to the interposition of its equitable powers for that purpose. The stipulation of the

plaintiff's agreement essentially differs in its nature and object from a provision in a mortgage to the effect that the principal sum shall become due on a specified default in the payment of interest as provided by it. In the latter case provision is so made for the time when the principal sum may become due and that time is regulated by an event which may or may not occur, so far as it is dependent upon the default of the mortgagor. The consequence so produced is not deemed a forfeiture. The result is maturity of the principal debt at the time, not definitely fixed, when the mortgage is made, but specifically stipulated for in that instrument. And in such case the court, as a rule, will not grant relief to the mortgagor from the effect of his default when nothing is done on the part of the mortgagee to render it unconscionable for him to avail himself of it. Noyes vs. Clark, 7 Paige, 179; Malcom vs. Allen, 49 N. Y., 448; Bennett vs. Stevenson, 53 N. Y., 508. But the case at bar must be considered and determined in the light of the undisputed facts and circumstances under which the agreement was made, and in reference to the purpose represented by it. The money secured by the mortgage was due at that time. The parties made no stipulation modifying the terms of the bond and mortgage, nor in terms extending the term of payment, although the right to pay it would exist while foreclosure was suspended. Payment evidently was not contemplated. Nor was the mere extension of the time of payment of the mortgage debt the object or purpose of the agreement. And the conditions which the defendant was required to perform were independent of such debt, and did not embrace the payment of any part of it. The purpose was to obtain

and give protection to the defendant's estate, consisting of her equity of redemption, that she might have the beneficial enjoyment of it during her life, subject only to certain conditions to be by her performed. The primary purpose of the arrangement represented by the agreement was to secure to Mrs. Anderson for such time, so far as it would have that effect, the estate she then had in the premises, which could not be retained by her without the suspension of the foreclosure of the mortgage. The effect, therefore, given to her default by foreclosure of the mortgage would be the forfeiture of her estate in the premises, and no less so under the circumstances than would be that of a tenant of his term, by entry of his landlord for nonpayment of rent pursuant to a provision in the lease. In Giles vs. Austin, 62 N. Y., 486, which was a case of that character, Judge Rapallo, in delivering the opinion of the court, said: 'The cases in which relief has been denied are either where the lessee has willfully committed some affirmative act in violation of his covenant, or been guilty of some default, the precise damages for which cannot be ascertained by any rule. But, where the covenant is simply for the payment of money, the forfeiture is regarded as security merely for such payment, and equity will not allow it to be enforced after the party has obtained all that it was intended to secure to him.' So in the present case the purpose of the condition, subject to which the right of the defendant was taken and to be held under the agreement, was not to permit the increase of the amount of the prior mortgages by the accumulation of interest upon them, or to allow charges for taxes or assessments to remain on the premises. This was the extent of the requirement,

and it may necessarily be supposed that the consequences which the contract permitted to result to her from default were intended to secure the accomplishment of such purpose. The case, so far as relates to the nature of the agreement and its object, comes within those to which the equitable doctrine before mentioned may properly be applicable. De Forest vs. Bates, 1 Edw. Ch., 393; Atkins vs. Chilson, 11 Metc. (Mass.), 112; Hagar vs. Buck, 44 Vt., 285."

CHAPTER IX.

FRAUD.

SECTION 52. CLASSIFICATION OF FRAUD.

The best classification of fraud is probably that given by Lord Hardwicke, in the famous case of Earl of Chesterfield vs. Janssen.[1] The four classes of fraud as outlined in this classification are as follows:

1. Frauds arising from facts and circumstances of imposition.

2. Frauds apparent from the intrinsic nature and subject matter of the bargain.

3. Frauds presumed from the circumstances and condition of the parties.

4. Frauds which are an imposition and deceit on third persons not parties to the transaction.

The first class comes under the head of actual fraud, the last three under the head of constructive fraud.

SECTION 53. ACTUAL FRAUD.

A complete definition of actual fraud is impossible. The ingenuity of man in devising methods of obtaining an unfair advantage over his fellow man is so resourceful and varied as to defeat any attempt to cover the whole field by a single definition. In general, in every case of actual fraud, there must be present those elements required in the tort action for deceit.[2]

[1] 2 Ves. Sr., 1 Atlk., 301.

[2] See subject of Tort, Vol. IX, Sub. 8, Sec. 55.

SECTION 54. JURISDICTION OF EQUITY IN CASES OF ACTUAL FRAUD.

Under the English doctrine the jurisdiction of equity extends over every case of fraud, either actual or constructive. Under the American rule, equity only has jurisdiction where there is no adequate remedy at law. The application of the American rule is not free from difficulties, and the cases on the subject are not in harmony.

SECTION 55. FRAUDS APPARENT FROM THE INTRINSIC NATURE AND SUBJECT MATTER OF THE BARGAIN.

Under this head are to be considered inadequacy of consideration, illegal contracts, and contracts against public policy.

Inadequacy of consideration is never ground in itself for equitable relief, unless it is so gross as to shock the conscience. Or, unless, in the words of Lord Thurlow,[3] it is "an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

Inadequacy of consideration, however, will be taken into consideration, with other inequitable incidents, such as undue influence, concealment, etc.[4]

Equitable relief will be granted in those illegal contracts, where the parties are not considered as standing *in pari delicto*. Equity will never aid a person to obtain advantage of his own wrongful conduct, and where the parties are equally guilty, equity, like the common law, will leave the parties as she finds them.

[3] In Gwynne vs. Heaton, 1 Brown Ch., 159.

[4] Fish vs. Leser, 69 Ill., 394; Graffon vs. Burgess, 117 U. S., 184.

The various classes of illegal contracts, and contracts against public policy, have been discussed under the subject of contracts.[5]

Section 56. Frauds Presumed from the Circumstances and Condition of the Parties.

"This division embraces those cases in which a transaction, although it may be perfectly regular in its external form, is valid perhaps by the original rules of the common law, is impeachable in equity because it lacks that absolute consent which is regarded as essential by courts of equity. The equitable conception of true consent assumes a physical power of the party, an intellectual and moral power, and that he exercised these powers freely and deliberately."[6]

This division is subdivided into transactions void or voidable with persons totally or partially incapacitated, and transactions presumptively invalid between persons in fiduciary relations.

The various classes of persons whose contracts are void or voidable have already been discussed under the subject of contracts.[7]

In such cases equity will grant relief by ordering the cancellation of the contracts, which is in many cases a much more effective remedy than any which can be obtained at law.

Section 57. Frauds on Third Persons.

Contracts under this class are not fraudulent as between the immediate parties to the contract, or at least equity will not grant one relief as against the other.

[5] Vol. III, Sub. 6, Secs. 42–57.
[6] Pomeroy on Equity Jurisprudence, Sec. 943.
[7] Vol. III, Sub. 6, Secs. 6–11.

The most numerous species of this class of fraudulent contracts are conveyances of property for the purpose of defrauding creditors. Such conveyances were declared to be void as against the parties defrauded by the statute of 13 Eliz., C. 5. Similar legislation is to be found in each of the states of this country. Such conveyances may be set aside not only when the transferor was in debt at the time the transfer was made, but also when the transfer was made in anticipation of debts about to be contracted, or a risk or liability about to be incurred.

Another illustration of frauds of this class is found in secret bargains in fraud of compositions with creditors. The basis of compositions with creditors is that each creditor should share alike, and a secret bargain favoring one is a fraud upon the other creditors and voidable.[8]

[8] Solinger vs. Earle, 82 N. Y., 393; Miller vs. Sauenbier, N. J. Eq. 71.

CHAPTER X.

PECUNIARY RELIEF IN EQUITY.

SECTION 58. CONTRIBUTION.

The doctrine of contribution is thus stated by Mr. Pomeroy in his work on Equity Jurisprudence:[1]

"Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. The same doctrine applies, and the same remedy is given, between all those who are jointly, or jointly and severally, liable on contract or obligation in the nature of contract. The right, however, may be controlled or modified by express agreement among the co-sureties or debtors."

This doctrine grows out of the equitable maxim that "Equality is Equity," of which it is the chief application.

The right of contribution is now recognized in the courts of law, but the equitable relief, in this country, is more complete. Thus if one of the co-sureties is insolvent, the co-surety who has paid the debt can at law only recover from the other co-sureties their proportional share, reckoned on the basis of the whole number of co-sureties, while in equity he

[1] Section 1418.

can recover an amount determined by the number of solvent co-sureties.

The right of contribution does not exist between sureties who are bound by separate instruments,[2] nor does it ordinarily exist between joint tort fessors,[3] but it has been enforced in a few cases of this character where the act was done without wrongful intent.[4]

Section 59. Exoneration.

Exoneration is the right which a person who has paid a debt for which he is secondarily liable, has to be re-imbursed by the person primarily liable. This right exists either in the case of a surety who has paid the debt of his principal, or in the case of a person who has been obliged to pay some claim which is a lien or incumbrance on his property but which is primarily due by a third person.

Section 60. Subrogation.

Subrogation arises in the same cases as exoneration. This right is in the nature of additional security for the enforcement of the right of exoneration, and gives to any person (except the primary debtor) who has paid the debt, or who may lose through such debt, the benefit of any securities which the principal debtor may have given to any other party connected with the transaction. Thus a surety may be subrogated to securities given to the surety. Where securities are given to one co-surety by the principal (to secure such surety against loss) the other co-sureties have a combined right of contribution and subrogation.

[2] Moore vs. Isley, 22 N. C., 372.
[3] Johnson vs. Torpy, 35 Neb., 604.
[4] Farwell vs. Becker, 129 Ill., 261; 21 N. E., 762; 6 L. R. A., 400.

"The doctrine of subrogation is of wide extent and operation in various departments of equity jurisprudence. Persons entitled to the remedy may be classified as follows: first, those who made the payment in performance of a legal duty, arising either by express agreement or by operation of law, including sureties;[5] a fire insurance company that has paid a loss caused by the negligence of a third party, and is therefore subrogated to the claim of the insured against such party;[6] a surety who has paid more than his fair share is entitled to subrogation against his co-surety.[7] Second, those who, while not legally bound to pay, yet might suffer loss if the obligation is not discharged, and so pay the debt in self-protection, including subsequent encumbrances, and other owners of equities or partial interests who have paid off prior incumbrances. Third, those who have paid at the request of the debtor to some other party to the obligation. A person who attempts in good faith to purchase property at a void judicial sale, and whose purchase-money is used to satisfy valid claims against the property, acts on an invitation from the public favored by public necessity and policy, and is therefore subrogated to the rights of the parties receiving the money."[8,9]

"Subrogation is an equitable right, and not a legal one, and can be enforced only in equity. It will not be enforced when it would be inequitable to do so, or where it would work injustice to others having equal equities. To permit subrogation in this case

[5] Darrow vs. Summerhill, 93 Tex., 92; 77 Am. St. Rep., 833.
[6] Hart vs. Western R. R. Co., 13 Met. (Mass.,) 99.
[7] Pace vs. Pace's Admr., 95 Va., 792.
[8] Bond vs. Montgomery, 56 Ark., 563.
[9] Note to Sec. 1419, Pomeroy on Equity Jurisprudence.

would not only work injustice to appellee, who succeeded to the title of Hotchkiss, which appellant admitted to be the superior one, but would permit appellant to violate his own contract with Hotchkiss. This, equity will not allow. 24 Am. & Eng. Enc. Law, 191." [10]

The subject of subrogation is discussed by the Supreme Court of Ohio in the case of Henderson Achert Lithographic Co. vs. John Shilhto Co.,[11] as as follows:

"The creditor is undoubtedly entitled to subject to the payment of a judgment recovered on the debt any securities placed by the principal in the hands of the surety for its payment, or for his indemnity against its payment. If the securities consist of tangible property that can be reached by execution, process of that nature is the appropriate remedy for their subjection to the satisfaction of the judgment; for the property, though in the hands of the surety, being the property of the principal debtor, is subject to seizure and sale, like other property belonging to him, and its application to the payment of the debt, and the subsequent discharge of the surety's liability, is in accomplishment of the purpose for which it was placed in his custody. Where the securities are choses in action, counter bonds, or mortgages given by the principal, for the collection of which, and their application to the debt, an action becomes necessary, the surety may resort to that remedy; and the creditor may oftentimes reach property of that nature in the possession of the surety without the aid of subrogation, through a creditor's bill or proceedings in aid of

[10] Makell vs. Hotchkiss, 190 Ill., 311; 60 N. E., 524.

[11] 64 Ohio St., 236; 60 N. E., 295.

execution. But as the money arising from such securities, however reached, properly belongs to the creditor for the security of whose debt they were intended, equity will aid him, through subrogation, to the remedies of the surety, which may prove the more effectual, because the creditor in that way becomes entitled to whatever priority of right exists in favor of the surety. This doctrine is sometimes said to rest upon the principle that a trust for the benefit of the creditor attaches to the property *eo instanti* it is placed in the possession of the surety, the execution of which may be enforced at the suit of the creditor, the cestui que trust. This was held in Pendery vs. Allen, 50 Ohio St., 121; 33 N. E., 716, and has been in many cases, some of which are cited in the brief of counsel for the plaintiff. In other cases the doctrine is said to arise from that principle of natural equity which requires that his property, in whatever form it may be, who is ultimately liable for the payment of the debt, should be primarily applied to that purpose, in exoneration of the one who is only secondarily liable. Either view presupposes that the securities are placed with the surety, and are the property of the principal debtor. The doctrine has been applied, however, where a stranger to the debt, for a sufficient consideration, has agreed to assume and discharge the obligation of the surety. The creditor may adopt and enforce the promise; for it is the property of his debtor, and its performance includes the payment of the debt. Such being its purpose, a court of chancery will see that its design is fulfilled. Champion vs. Brown, 6 Johns, Ch., 406. A distinction has been made between cases of that kind and those where the agreement is personal to the surety, for his individual indemnity only, and

not for the discharge of his liability; courts in cases of the latter class holding that the creditor acquires no equity to enforce the covenant. Homer vs. Bank, 7 Conn., 478; Taylor vs. Bank, 87 Ky., 398; 9 S. W., 240; Bank vs. Hastings, 1 Doug. (Mich.), 225; Jones vs. Bank, 29 Conn., 25. There are many other authorities to the same point, some of which are cited in the brief for the defendant. An attempt to define the precise scope of this distinction is a task that need not be assumed here further than to remark that it must depend, in each case, upon the terms and conditions of the covenant or contract of indemnity; for, while the right of subrogation is not founded on contract, it is well settled that it may be qualified and controlled by express agreement of the parties, and in that respect their rights and obligations may be whatever, by their contract, they choose to make them. Contracts of that nature, like all others, are to be construed and enforced according to the intention of the parties, as derived from the language they have employed."

Section 61. Marshaling of Assets.

"Where one person has a clear right to resort to two funds, and another person has a right to resort to but one of them, the latter may compel the former, as double creditor, to exhaust the fund on which the latter, as a simple creditor, has no claim." [12]

In the case of Webb vs. Smith,[12] the court explained this doctrine as follows:

"If A has a charge upon Whiteacre and Blackacre, and if B also has a charge upon Blackacre, only,

[12] Eaton, Equity, Sec. 252, giving definition of Lord Westbuty in Dolphis vs. Aylward, L. R., 4 H. L., 486.

[12] 30 Cho., Dev. 192

A must take payment of his charge out of Wniteacre, and must leave Blackacre so that B, the other creditor, may follow it, and obtain payment of his debt out of it. In other words, if two estates (Whiteacre and Blackacre) are mortgaged to one person, and subsequently one of them (Blackacre) is mortgaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave Blackacre to the second mortgagee upon which alone he can go."

Section 62. Accounting.

One of the earliest of all common law actions *ex contractu* was that of account. The common law action, however, was very narrow in its application, with the result that equity soon began to enter this field. The jurisdiction of equity in accounting, however, has always been limited to those cases where there is no complete and adequate remedy at law.

An action for accounting will lie at equity in the following classes of cases:

(a) In the case of mutual accounts between the parties. There must be true mutuality of accounts; that is, receipts and expenditures on both sides, not merely charges on one side and set-offs on the other.[14] Mutual accounts are thus discussed by the court in the case of Garner vs. Reis:[15]

"The case disclosed by the pleadings is one of mutual accounts, arising out of the dealings of the parties plaintiff and defendant with each other, under a contract between them, by which they engaged and became interested in a common business enterprise,

[14] Dinwiddie vs. Barley, 6 Ves., 136; Haywood vs. Hutchins, 65 N. C., 574.

[15] 25 Minn., 475.

which was undertaken and carried on in pursuance of its provisions. The accounts comprise various items on each side, all of which refer to and form parts of the one single transaction, which originated in the contract. No separate claim or suit can be maintained upon any one of such items disconnected with the rest, and hence they cannot, strictly speaking, he made mere matters of set-off, one against the other, as would be the case with independent cross demands or causes of action, having their origin in separate and distinct contracts or independent stipulations of the same contract. Being thus connected together as separate parts of one continuous transaction, the only right either party has in respect thereto, as against the other, is that of having the accounts fairly and fully adjusted and settled according to the provisions found due upon such final accounting and settlement. The subject matter of the action and controversy, therefore, is one of equitable cognizance and jurisdiction, and neither party can claim, in respect thereto, the right of a trial by jury, under that provision of the constitution which preserves such right in all cases at law as it existed when that instrument was adopted."

(b) Where the accounts although not mutual are very complex.[16] The mere fact that the items in the account are very numerous will not be sufficient to give equity jurisdiction.[17]

(c) Where a fiduciary relation exists between the parties, and the defendant owes the duty of rendering an account to the complainant.

[16] Taff Vale Ry. vs. Nixon, 1 H. L. Cas., 110, where the rule was laid down that in order to give jurisdiction solely on account of the complexity of the accounts it is necessary that the account should be so complicated that a court of law would be incompetent to examine it.

[17] Barry vs. Stevens, 31 Beav., 258; 3 Keener's Cases 910.

'The principal difficulty is as to when equity will take jurisdiction of an accounting between principal and agent. The mere relation of principal and agent, without more—the relation not being really fiduciary in its nature, and no obstacle intervening to a recovery at law—is insufficient to enable a principal to maintain the action against his agent.[18] But where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an accounting is sought are peculiarly within the knowledge of the latter, equity will assume jurisdiction.[19] While the rules are thus settled in favor of a principal, it does not follow that the reverse is true, and that an agent may come into equity for an accounting against his principal, since generally there is no trust or confidence reposed in the latter, and no duty on his part to account.'' [20] [21]

(d) Where the facts relative to the transaction are peculiarly within the knowledge of the defendant. This class is very closely connected with the preceding one.

(e) Where discovery is sought. Here the jurisdiction is really obtained by the necessity for the discovery.

[18] King vs. Rossett, 2 Young & J., 33.
[19] Marvin vs. Brooks, 94 N. J., 71.
[20] Padwick vs. Stanley, 9 Hare, 627.
[21] Pomeroy on Equity Jurisprudence, note to Sec. 1421.

CHAPTER XI.

SATISFACTION AND PERFORMANCE.

SECTION 63. SATISFACTION.

Satisfaction is the equitable doctrine by which the donation of a thing is taken as extinguishing some prior claim in favor of the donee. This doctrine will only apply when it is in accordance with the intention of the donor. The following are the principal applications of this doctrine.

(a) Satisfaction of debts by legacies. When a debtor leaves money by will to a creditor of his, this will ordinarily be presumed to be in satisfaction of the debt if the amount of the legacy is equal to or greater than the amount of the debt. If the amount of the legacy is less than the amount of the debt, it will be presumed to be a satisfaction *pro tanto*. This presumption may be rebutted by evidence showing that the testator intended the legatee to receive both the amount of the legacy and of the debt.[1] When a creditor leaves a legacy to his debtor, the one will be set-off against the other and it will not be presumed (in the absence of evidence to that effect) that the creditor intended the debtor to take the legacy and in addition to be free of the debt.[2]

(b) Satisfaction of legacies by subsequent legacies. Two legacies of the same specific article can, of course, only transfer the article once. Legacies of different amounts by the same instruments,[3] or of the

[1] Strong vs. Williams, 12 Mass., 389.
[2] Sharp vs. Wightmans, 205 Pa. St., 285; 54 Atl., 888.
[3] Edwards vs. Rainier's Ex's., 17 Ohio St., 597.

same amount by different instruments, are considered as cumulative;[4] but where there are two legacies of the same amount, given to the same party, by the same instrument, the second legacy is presumed to be in satisfaction of the first.[5] Each of these presumptions may be rebutted by evidence of a contrary intention on the part of the testator.

(c) Satisfaction of legacies by portions and advancements. In a majority of the states it is held that when a father makes a will leaving a certain legacy to a child, and afterwards pays to the child a sum of money, the presumption is that such payment will be considered (in the absence of evidence of a contrary intention) as being in the nature of an advancement, and as working satisfaction *pro tanto* of the legacy to such child. This doctrine is mainly upheld on the ground of fairness to the other children of the testator.

(d) Satisfaction of portions by subsequent legacies. Where the parent of one of the parties to a marriage agrees to settle a certain amount of money, or property, upon the parties to said marriage, or either of them or their children, and afterwards makes such a provision by will, such legacy will be presumed to be in satisfaction of the promised portion or settlement.

Section 64. Performance.

The doctrine of performance is an application of the equitable maxim that "Equity imputes an intention to fulfill an obligation." Where a person is under obligation to do a certain act, and does an act which may or may not have been intended as a fulfillment

[4] De Witt vs. Yates, 10 Johns, 156.

[5] Thompson vs. Betts, 74 Conn. 576.

thereof, or accomplishes the same result in a different manner than the manner specified, equity will consider the act done as a performance of the act which the party was under an obligation to do.

The two important classes of cases under this doctrine are as follows:

"Where a person covenants to purchase and settle, or to purchase and convey lands, and he afterwards purchases such lands, without expressing any purpose for which the purpose is made, and does not convey or settle them in pursuance of his covenant. 2. Where a person covenants to leave property by will, and he does not make the bequest, but on his death the covenantee receives the same kind of property by succession." *

* Pomeroy on Equity Jurisprudence, Sec. 579.

CHAPTER XII.

OTHER EQUITABLE RIGHTS.

SECTION 65. EQUITABLE ESTOPPEL.

The doctrine of equitable estoppel is based upon the equitable maxim that "He who seeks equity must do equity." This doctrine may be stated as follows:

"When one, by his words or conduct, wilfully, causes another to believe the existence of a certain state of things, and induces him to act in that belief, so as to alter his own previous position, the former is precluded from asserting, as against the latter, a different state of things as existing at the same time." [1]

Mr. Merwin states it as follows:

"Equitable estoppel consists in this: whenever, by his conduct or declarations, one has induced another to act upon the belief in certain facts, he shall not thereafter deny the truth of such facts, to the prejudice of the other." [2]

The doctrine of equitable estoppel was discussed at some length by the Supreme Court of Illinois in the case of Gillet vs. Wiley,[3] the decision in which case was in part as follows:

"The doctrine of estoppel in pais is never applied except where it would be contrary to equity to allow the assertion of the right, or proof of the fact, to avail. It is never applied to one who is without fault, or who has not, by some act or declaration, or by silence when he should speak, induced another to alter his

[1] Picard vs. Shears, 6 Adol. & E., 469.

[2] Merwin on Equity, Sec. 910.

[3] 126 Ill., 310; 19 N. E., 287.

condition on the faith of such acts or the truth of such declarations. The facts which give rise to an estoppel must be such as to make it unjust and inequitable to allow the party estopped to assert what would otherwise be his right, or make proof of matters tending to establish such right. Its effect is the forfeiture of pre-existing right, or the exclusion of evidence of such right. At the time of the execution of this receipt by Wiley, it is apparant that he had no knowledge that appellant was security on the guardian's bond, or that the security of such bond, whoever he might be, had taken a mortgage or other security from Day. Wiley so testifies, and is uncontradicted by any credible testimony. It is therefore evident that he could have had no purpose, in executing said receipt, of aiding said Day in perpetrating a fraud upon the security of such bond, even if he had known that he was executing a receipt. The ward owed no duty to appellant; made no statement or declaration to appellant to influence his conduct. Instead of giving the receipt to deceive appellant, and induce him to believe that the guardian had paid him, he was himself the victim of fraud and deception.

"It was said by this court in People vs. Brown, 67 Ill., 436, that 'the doctrine on this subject we understand to be, that when a person, by his words or conduct, voluntarily causes another to believe in the existence of a state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things.' It is clearly apparent in this case that there was no voluntary act of Wiley which could have misled appellant, or induced him to part with his security. The act of Wiley was pro-

cured by fraud and misrepresentation of his guardian, for the faithful performance of whose duty appellant was surety. The mind of Wiley never assented to the execution of the receipt as an acknowledgment of having received the money therein mentioned. What he voluntarily did was to execute what he supposed to be a promissory note. It is not essential to the creation of estoppel that there should be an actual fraudulent intent at the time of making the declarations or performing the act upon which the other party has relied, but it is essential that there should be voluntary acts or declarations by which another is made to believe in the existence of certain facts, and which induce him to act upon that belief. Picard vs. Sears, 6 A. & E., 469; Freeman vs. Cook, 2 Ex., 654; Cornish vs. Abbingdon, 4 Hurl. & N., 549; People vs. Brown, supra; Powell vs. Rogers, 105 Ill., 318.

"The cases and text writers seem to use interchangeably the words 'willfully,' 'intentionally,' 'means,' and 'voluntarily' as synonymous terms in discussing the question of the making of declarations or performing acts from which it is alleged an estoppel arises. The rule, as gathered from the various cases in respect of this element of estoppel, perhaps is, that where one voluntarily, by acts or declarations, represents a certain state of facts to exist, and thereby procures a change of conduct in another, he can not afterwards be heard to assert a contrary state of facts, if injury results to or fraud is perpetrated thereby upon the party who had acted relying upon the truth of his representations. It is, however, claimed 'that an equitable estoppel will arise by the negligent act and conduct of a party, even though ignorant of the truth of his declarations.'

"It is said in Bigelow on Estoppel, page 540: 'It seems to be settled that a party's ignorance of the truth of the representation will not remove the estoppel if his ignorance is the result of gross negligence.' It is urged that it was gross negligence for Wiley to sign the paper produced as a receipt, without informing himself of the contents thereof. We have seen that he was ignorant of the fact that he was making any representation or acknowledgment of payment by the guardian. His negligence, if any is attributable to him, was in relying upon the statement of Day as to the contents of said paper. It, however, appears that appellee's father died in 1856; that appellee was then about eight years old; that on March 23, 1859, Day was appointed guardian, and took appellee to his (Day's) home, where the ward continued to reside as a member of the guardian's family until after he became of age, and until the spring of 1881. When the signature was procured to the receipt, the ward was still an inmate of his guardian's family, and had just arrived at his majority. He would not be expected to distrust his guardian or question the truthfulness of his representations. Appellee says he had every confidence in his guardian, and the facts and circumstances shown tend to corroborate his statement. He was assured that the paper he was asked to sign was a note, and having been just awakened from sleep, did not read the paper before affixing his mark to it. That we can now see how utterly unworthy of confidence this guardian was, and how recreant to every trust and confidence reposed in him, furnishes no criterion for determining the condition of appellee's mind in this respect. Considering, as we must, the confidential and intimate relations existing between

appellee and his guardian, with whom he had had no settlement or talk of settlement of the ward's affairs, it can not be said that there was anything to apprise appellee that he might be acknowledging payment by the guardian, or that would put him upon inquiry in that regard. It is to be remembered that this boy, while having a considerable patrimony, had been reared in ignorance, and allowed to fall into vicious habits, and, in addition, had, several years prior to his arriving at majority, become afflicted with a nervous disease, that, to some degree, impaired his mental faculties. If it be conceded that appellee knew that Day was his guardian, or that Day had money in his hands belonging to appellee, what was there to induce appellee to believe that the signing of this particular paper had anything to do with the matter of his estate? Manifestly, nothing whatever.

"Ordinarily, one having the means of information as to the contents of a paper executed by him, will, as against third persons, be held to have known the contents, and will not be permitted to assert his ignorance of its contents to avoid responsibility according to its real import. Here, however, the signing of this receipt was the will and act of the guardian, rather than that of the appellee. Courts will watch settlements of guardians with their wards, or any act or transaction between them affecting the estate of the ward, with great jealousy. From the confidential relations between the parties, it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them, prejudicially affecting the interests of the ward, will be held to be constructively fraudulent. (Carter vs. Tice et al., 120 Ill., 277.) The doctrine is thus stated in 1 Story's

Eq. Jur., Sec. 217: Where the guardianship has, in fact, ceased, by the majority of the ward, the courts 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 term, the fullest deliberation on the part of the ward and the most abundant good faith on the part of the guardian, 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."

Section 66. Notice.

The question of notice is often of importance in equity, as one who takes with notice of equities takes subject to such equities.

"Notice is of two kinds—actual and constructive. Actual notice embraces all degrees and grades of evidence from the most direct and positive proof to the slightest circumstances from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts; and like other legal presumptions, does not admit of dispute."[4]

[4] Williamson vs. Brawn, 15 N. Y., 354.

Constructive notice covers a very broad field; the best classification of this species of notice which has been given is the following:[5]

(a) Extraneous facts, generally acts of fraud, negligence or mistake.

(b) The possession or tenancy of the party claiming the equity or title.

(c) Recital or reference in instruments of title.

(d) Lis pendens, i.e. pending suits relative to the particular piece of real property.

(e) Judgments, when properly docketed.

(f) Registration or recording of instruments.

A thorough treatment of the subject of construction notice is given by the Supreme Court of the United States in the case of Simmons Creek Coal Co. vs. Doran,[6] the decision in which case was in part as follows:

"Apart from this, we hold appellant chargeable with notice. The rule is thus stated by the Virginia Court of Appeals, in Burwell vs. Fauber, 21 Grant, 446, 463: 'Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his ears or his eyes to the

[5] Pomeroy on Equity Jurisprudence, Sec. 610 et seq.

[6] 142 U. S., 417.

inlet of information, and then say he is a bona fide purchaser without notice.' Jones vs. Smith, 1 Hare, 43, 55; LeNeve vs. LeNeve, 2 L. C. Eq., 127. And Brush vs. Ware, 40 U. S., 15; Pet., 93, 114 (10, 672, 680), are cited.

"In Mundy vs. Vawter, 3 Gratt, 518, relied on by appellant, the registry of a deed of 'all the estate both real and personal, to which the said James was in any manner entitled in law or in equity,' was held not to be notice in point of law to a subsequent purchaser of the existence of the deed, nor would notice in point of fact of such existence and contents affect such purchase, unless he had further notice that the land purchased by him was embraced by the provision of the deed; 'and the proof of such notice, whether direct or positive, or circumstantial and presumptive, must be such as to affect the conscience of the purchaser, and is not sufficient if it merely puts him upon inquiry, but must be so strong and clear as to fix on him the imputation of mala fides.' But the latter branch of this ruling was disapproved of in Warren vs. Syme, 7 W. Va., 474; and in Fidelity Ins. T. & S. D. Co. vs. Shenandoah Valley R. Co., 32 W. Va., 244, 259, it is said that 'whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is encumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice.

"Lord Hardwicke observed in LeNeve vs. LeNeve,

Amb., 436; 3 Atk., 646; 1 Ves., 140: 'That the taking of a legal estate, after notice of a prior right, makes a person a mala fide purchaser;' and the notes to that case in 2 L. C. Eq., 109, discuss at length the doctrine of knowledge, actual notice, express or implied, and constructive notice, with abundant citation of authority. The conclusion of the American editor is that actual notice embraces all degrees and grades of evidence, from the most direct and positive proof, to the slightest circumstances from which a jury would be warranted in referring notice, while constructive notice is a legal inference from established facts, and, like other legal presumptions, does not admit of dispute.

"Mr. Justice Story in his work on Equity Jurisprudence, Sec. 399, adopts the language of Chief Baron Eyer, in Plumb vs. Fluitt, 2 Anstr., 432, 438, that constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent, that the court will not allow even of its being controverted.

"In later editions of that work Judge Redfield (11th Ed., Sec. 410a) says that the term constructive notice 'is applied, indiscriminately, to such notice as is not susceptible of being explained or rebutted, and to that which may be. It seems more appropriate to the former kind of notices. It will then include notice by the registry, and notice by lis pendens. But such notice as depends upon possession, upon knowledge of an agent, upon facts to put one upon inquiry, and some other similar matters, although often called constructive notice, is rather implied notice, subject to be rebutted or explained. Constructive notice is thus a conclusive presumption or a presumption of law, while implied notice is a mere presumption of fact.

"Vice-Chancellor Wigram in Jones vs. Smith, supra, laid it down that cases in which constructive notice had been established, resolved themselves into two classes, first, those in which the party charged had actual notice that the property in dispute was in some way affected, and the court has thereupon bound him with consecutive notice of facts to a knowledge of which he would have been led by an inquiry into the matters affecting the property, of which he had actual notice; and, secondly, those where the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. If there is not actual notice that the property is in some way affected so that the case does not fall within the first class, and no fraudulent turning away from a knowledge of facts which the *res gestae* would suggest to a prudent mind or gross and culpable negligence, so as to bring it within the second, then the doctrine of constructive notice would not supply.

"Each case must be governed by its own peculiar circumstances, and in that in hand we think appellant either had actual knowledge, or actual notice of such facts and circumstances, as by the exercise of due diligence would have led it to knowledge of complainant's rights, and that if this were not so, then its ignorance was the result of such gross and culpable negligence that it would be equally bound.

"The deed of George W. Belcher to N. L. Reynolds conveyed the undivided five-eighths of seventy-five acres by a description reading as follows: 'Beginning at two birches on the bank of Simmons Creek in a line of a survey of twenty-five hundred acres conveyed by James Hector to Obediah Belcher, and a corner to the William H. Witten land, and with a line of the

said Witten land N. 50° 40′ W. 85, 40 chains up Simmons Creek, topping a bridge at 23 chains and crossing hollows and points of said ridge, to six dead chestnuts on said ridge, a corner to A. G. Belcher's land.' The deed of George W. Belcher to P. H. Rorer purported to convey 'three-eights (3-8) of a certain tract or parcel of land lying on Simmons Creek, a branch of Bluestone River, in the County of Mercer, the State of West Virginia, it being the same tract, five-eights (5-8), undivided, of which has heretofore been conveyed by the said parties of the first part to N. L. Reynolds, and containing, by recent survey, by horizontal measurement, one hundred and seventy and five-tenths acres, and bounded as follows: Beginning at two birches on the bank of Simmons Creek, N. 50° 26′ W., 8033 chains up Simmons Creek, crossing ridges and spurs, to six dead chestnuts on ridge, corner to A. G. Belcher.' The other conveyances refer to these descriptions.

"When Obediah and Robert D. Belcher bought the four thousand acres of James Hector they agreed to a division whereby Robert D. Belcher took fifteen hundred and Obediah twenty-five hundred acres. The deed of Hector to Robert D. Belcher for the fifteen hundred acres is in the record. The north line of this tract ran from the Wilson Cary Nicholas line N. 60° E. to the mouth of the Spruce Pine Branch on Flipping Creek, and Obediah Belcher's twenty-five hundred acres lay immediately north of that line and extended across from the Nicholas line to Flipping Creek. The two birches spoken of in George W. Belcher's deed to Reynolds as being in a line of a survey of twenty-five hundred acres conveyed by Hector to Belcher were not corner trees in that line, but were corner trees to the

Witten tract of two hundred acres. As the description in the deed to Reynolds puts the two birches as a corner to the William H. Witten land, it is plain that resort must have been actually had to R. D. Belcher's deed to Witten of the two hundred acres, and that deed described Witten's line as running from the two birches up Simmons Creek 'with Miller's line.' That deed could not be read without discovering that something had been omitted therefrom. And this is the more apparent since it is shown by the evidence that the distance by a straight line from the two birches to the six chestnuts was 328 poles, while it is also clear that a line running S. 55 W. from the two birches would not reach the six chestnuts, but would run away from them, so that both by distance and by course it was evident that an error had been committed, and what that error was seems to us to be obvious to any candid mind. Having actual notice to this extent, appellant was put upon inquiry, and inquiry would have conducted at once to the unrecorded deed.

"Again, actual and unequivocal possession is notice, because it is incumbent on one who is about to purchase real estate to ascertain by whom and in what right it is held or occupied; and the neglect of this duty is one of the defaults which, unexplained, is equivalent to notice. 2 L. C. in Eq., 180; Landes vs. Brant, 51 U. S., 10; How. 348 (13, 449); McLean vs. Clapp, 141 U. S., 429, 436 (35, 802); French vs. Royal Co., 5 Leigh, 641; Western Min. & Mfg. Co. vs. Peytona Coal Co., 8 W. Va., 406, 441; Core vs. Fraupel, 24 W. Va., 238; Morrison vs. Kelly, 22 Ill., 610. 'Possession,' said Walker, J., in the case last cited, 'may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its

adaptation to use; constructive, as when a person has the paramount title, which, in contemplation of law, draws to and connects it with the possession. But to be adverse it must be a pedis possessio, or an actual possession.' In Ewing vs. Burnet, 36 U. S., 11; Pet. 53 (9, 629), it was held that neither actual occupancy nor cultivation nor residence was necessary to constitute actual possession; that where the property is so situated as not to admit of any permanent useful improvements, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim, such possession would create a bar under the statute of limitations; that what acts may or may not constitute a possession are necessarily varied, and depend to some extent upon the nature, locality, and use to which the property may be applied, the situation of the parties, and a variety of circumstances which have necessarily to be taken into consideration in determining the question. And so possession of an improved portion of a tract of land, under a conveyance in fee of the whole, is construed to be coextensive with the grant. And where a party purchases land adjoining a tract of which he is already in the occupancy, he will be considered as at once, in point of law, in the possession of the newly acquired tract, when the latter is vacant, or at least not held under an adverse possession."

Section 67. Bona Fide Holder for Value.

The equitable doctrine of bona fide holder for value is very similar to that existing in the case of negotiable instruments, and is to the effect that a person

who, in good faith, purchases property for a valuable consideration, without notice of existing equities, takes the property free from such equities. After property has once come into the possession of a bona fide holder for value, it can be transferred to a person who has notice of the previously existing equities, but who has the other requisites of a bona fide holder for value, without re-establishing such equities or rights.

SECTION 68. ELECTION.

"Election in the sense used in equity jurisprudence arises where the obligation is imposed on a party to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both."

The most familiar illustration of election is where a party by will gives certain property to a second party, and by the same instrument gives certain property, or a certain right, belonging to such second party to a third party.[1] An example of this is where a husband leaves property to his wife and by the will deprives her of her right of dower.

In cases where the doctrine of equitable election is applicable the donee must elect either to take under the instrument or against the instrument. If the donee elects to take under the instrument he must carry out all its provisions and transfer his own property, transferred by such instrument to the person designated therein. If the donee elects to take against the instrument and to keep his own property, the person to whom the donee's property was given by the instru-

[1] Streatfield vs. Streatfield, 1 White & Tudor's Leading Cas. Equ., Pt. I, p. 406.

ment will be recompensed out of the property, given by the instrument to the party obliged to make the election.[8]

SECTION 69. EQUITABLE CONVERSION.

The equitable doctrine of conversion grows out of the maxim that "Equity considers that as done which ought to be done." Equitable conversion is defined as that change in the nature of property by which, for certain purposes, real property is considered as personal and personal property as real, and transmissible as such.

"For illustration, if money had been given by will or deed to trustees upon trust to purchase land therewith and convey same to A in fee, and A died before the trustees had made the purchase, and while the money was in their hands, the important question as to A's interest would for the first time practically arise: was that interest real estate, so that it descended to A's heirs if he died intestate, or was it personal estate, so that it devolved upon his administrators? Would it pass by a general bequest of personal property, or by general devise of lands? If A was a married man, was his widow entitled to dower in it? If A was a married woman, was her husband entitled to curtesy? Where the parties to a contract for the sale of land die before execution, are the vendee's heirs or his personal representatives entitled to the benefit of the agreement? Does the purchase-money, when paid, belong to the heirs or to the administrators of the vendor? These are the kinds of questions which

[8] Codington vs. Lindsay, 8 Ch. App., 578; Brown vs. Ward, 103 N. C., 178; 9 S. E., 300. This is the rule now generally followed; some cases, however, hold that where the donee elects against the instrument he forfeits all rights thereunder. See Hibbs vs. Insurance Co., 40 Ohio St., 545; Thellusson vs. Woodford, 13 Ves., 220.

are determined by the doctrine of conversion; and their solution depends upon the nature of the estates resulting from the operation of that doctrine upon the interests of the original parties to the will, deed, or contract. No other doctrine is perhaps more important in the equity jurisprudence of England, both because such trusts by wills, deeds, and family settlements are there very frequent, and because the common-law difference between the descent of land and the succession of personal property is still preserved in all of its integrity. The applications of the doctrine to settlements often gives rise to questions of great difficulty. In our own country the doctrine is theoretically adopted in all the states; but its applications are much less frequent and more simple than in England. With us, trust estates and family settlements are comparatively very few, and the tendency of modern legislation in many of the states is towards a uniformity in the rules of law which regulate the descent of lands and the devolution of personal property. In a few of the states the difference has been completely abolished, and both real and personal estate devolve in the same proportions to the same parties. It necessarily follows that many of the questions connected with conversion of the most frequent occurrence and of the highest importance in England are practically unknown in this county."[9]

The nature of this doctrine was discussed by the court in the case of Keller vs. Harper,[10] the decision in which case was in part as follows:

"In the Circuit Court for Frederick County, sitting in equity, a bill of complaint was filed by Charles V. S. Levy, administrator *de bonis non cum testamento*

[9] Pomeroy on Equity Jurisprudence, note to Sec. 1159, Student's Edition.

[10] 64 Maryland, 74.

annexo, of Jacob Keller, deceased, for the purpose of obtaining a judicial construction of the will of said decedent, who departed this life in the year eighteen hundred and fifty, after having made a testamentary disposition of his property by will and codicil, which were duly admitted to probate by the Orphans' Court of said county. During his life the testator had contracted two marriages. He had two children by the first marriage, and six by the second. The children of the first marriage were both daughters, one of whom, Ann E., married James Harkey, and the other Richard Harper. The testator's second wife survived him. His daughter, Mrs. Harkey, died intestate and without issue in the year 1852 or 1853, and her husband died a few years afterwards, prior to the decease of the widow of the testator. Mrs. Harper died, leaving two children, Richard K. Harper, and Charlotte Snook, who are her heirs at law. The husband of Mrs. Harper is now deceased.

"As Mrs. Harkey died intestate and without issue, her sister of the whole blood would inherit any real estate belonging to her which she had acquired by purchase and would transmit it by descent, to her heirs at law, by dying intestate. The proceeds from the sale of the real estate of Jacob Keller, whether sold during the lifetime of his widow or since her death, have been distributed in the Orphans' Court of Frederick County, and paid out, except that portion assigned by such distribution to the heirs of Mrs. Harkey. The question now to be determined is, who are the heirs of Mrs. Harkey? If by the operation of the terms of the testator's will, his real estate, although not sold until many years after his death, underwent a transmutation and was converted into personalty, there

could be no distinction between the whole and the half blood, who would be entitled to share equally in the distribution. If, on the other hand, the real estate was not, in conformity with the principles of equitable conversion, transformed into personalty anterior to an actual sale, then the heirs at law of Mrs. Harper, the sister of the whole blood, would be entitled to the distributive share of Mrs. Harkey, who had died intestate and without issue.

"The appellees, as the descendants of a sister of the whole blood, claim to the exclusion of the children or descendants of the children of the testator's second wife, on the ground that the will did not so operate as to cause a transmutation or conversion of the realty into personalty prior to the period when the property was sold.

"By a fundamental principle in equity, long established and universally recognized, land is considered as converted into money even anterior to a sale when a sale has been directed; and courts of equity will deal with such real estate as personalty in anticipation of the consummation of the testator's intention when such intention has been unequivocally declared. There must, however, be an imperative and unequivocal direction to sell the real estate, and when the power to sell requires the consent of the parties interested, there is no conversion until such consent is given. And when the sale is dependent upon a contingency, there is no transmutation until the contingency has happened. As said by Lord Cranworth, Chancellor, 'We must consider the property as converted from the time when it ought to have been converted.' And another important rule is that as courts are averse to sanctioning a change in the quality of an

estate, if there is any doubt as to the intention of the testator, the original character of the property will be retained. 'The basis of all the decisions is that the intent of the testator is the great guide in determining the question whether there has been an equitable conversion of the realty into personalty.'

"The learned judges in the Circuit Court, in a very able and lucid application of the principles established by the authorities cited, say:

" 'The order or direction in this will, for the conversion of the land into money, cannot be said to be "absolute and imperative" in the sense in which those terms are used by the courts and by the text writers on the subject. First, the executors must sell if the widow marries; next, they may sell with the widow's consent; then they shall sell all the estate, if the specific devisees refuse to take; and at her death the executors must sell all that had not been previously sold. And the different provisions of the will are put together in such a confused manner, and the time when, and the conditions or contingencies upon which the sale or sales may or must be made, are so uncertain that the court must have great doubt that the conversion operated from the death of the testator, and must therefore conclude that as to the property which was sold prior to the decease of the life tenant, the conversion took place at the time of sale, and as to the property sold after the death of the widow, the conversion was at the time of her decease. In other words, the intention to turn the land into money prior to the sale or decease of the widow, not so clearly appearing as is required in Lynn vs. Gephardt, the property retained its original character as just stated, there having been no equity between the heirs and

next of kin. Mrs. Harkey having died shortly after her father, and before the death of her stepmother, and before the time within which she could elect to take the house and lot devised to her, and before any of the property was sold, and as it still retained its character as land, her share in the estate vested in her as realty. And, as she took an interest different in quality and quantity under her father's will, from what she would have taken by descent, she took by purchase.'

"The language of the Circuit Court has been transcribed and adopted because it is apparently impossible to furnish a clearer exposition and application of the principles governing and controlling this controversy. And the final conclusion of the court is equally correct when it says:

" 'Upon the facts alleged in these proceedings and admitted by the parties who have appeared, that Mrs. Harkey died intestate and without issue, and her husband is now dead, her interest under the Code, Art. 47, Sec. 19, passed as real estate to her heirs at law, who are Richard K. Harper and Charlotte Snook, the only descendants of Sophia Harper, her only sister of the whole blood.' "

SECTION 70. RE-CONVERSION.

"Re-conversion is that imaginary process by which a prior constructive conversion is annulled and taken away, and the constructively converted property is restored, in contemplation of a court of equity, to its original actual quality." [11]

Re-conversion may take place either by the

[11] Ford vs. Ford, 80 Mich., 42; 44 N. W., 1057; Eaton on Equity, Sec. 105.

election of the party interested, or by operation of law. Where the property to be converted is to be for the use of a party absolutely he may elect to take the property in its original form, and if in such a case the party so interested dies before conversion has been effected, reconversion will take place by operation of law.

Chapter XIII.

CASES WHERE EQUITY TAKES JURISDICTION ON ACCOUNT OF THE CHARACTER OR NUMBER OF THE PARTIES.

Section 71. In General.

In addition to the equitable titles and interests already considered and the equitable remedies to be considered beginning with the next chapter, there remain a class of cases where equity courts take jurisdiction on account of the character or number of the parties. Under this general head are included:

(a) Suits by or against married women;

(b) Suits between husband and wife;

(c) Suits between partners;

(d) Cases where equity takes jurisdiction on account of the number or diverse interests of the parties interested.

Section 72. Suits by or Against Married Women and Suits Between Husband and Wife.

The jurisdiction of equity courts over suits by or against married women, and in cases of suits between husband and wife, has already been treated under the subject of Domestic Relations.[1]

Section 73. Suits Between Partners.

No action can be brought at common law by one partner against another in any controversy relative to partnership affairs. Equity takes jurisdiction in

[1] Vol. IV Subj. IX, Chap. III.

such cases, entertaining bills for accounting, dissolution of partnership, and other purposes.

SECTION 74. CASES WHERE EQUITY TAKES JURISDICTION ON ACCOUNT OF THE NUMBER OR DIVERSE INTERESTS OF THE PARTIES INTERESTED.

At common law, while there may be any number of either plaintiffs or defendants, provided the interests of all such plaintiffs or all such defendants are either joint or common, there is no method by which three or more mutually adverse interests may be adjudicated in the same suit. In equity any number of mutually adverse interests, relating to the same subject matter, may be adjudicated in the same suit. Thus in a suit to foreclose a first mortgage, the mortgagor, his assignee, a second mortgagee, a judgment creditor of the mortgagor and all others holding any interest in the property may be joined as defendants.

Equity will also compel a plaintiff in proper cases to consolidate his various claims against the defendant, in order to prevent the latter from being barred by a multiplicity of suits, and will ever in extrinsic cases compel different plaintiffs with common interests to consolidate the claims, or enjoin the prosecutions of other suits until the first and test suit is determined.

Equity will also prevent a multiplicity of suits by taking complete jurisdiction where both an equitable and legal remedy is required.

Bills of interpleader, another method of preventing multiplicity of suits, will be considered in a later chapter.

CHAPTER XIV.

SPECIFIC PERFORMANCE.

SECTION 75. IN GENERAL.

The first of the special equitable remedies to be considered is that of specific performance.

Specific performance is an order by a court of equity that a legal contract be carried into effect according to its terms.

The injured party may resort to a court of equity for specific performance, when the legal remedy of pecuniary damages is not a complete and adequate relief.

SECTION 76. SPECIFIC PERFORMANCE OF VARIOUS CLASSES OF CONTRACTS.

This form of equitable relief is limited to contracts for the sale of property, and contracts for insurance. There can be no specific performance of contracts for personal services, partnership contracts, contracts to marry, or contracts for the payment of a sum of money.

The specific performance of a contract for the payment of money, would be identical in its effect with that of a judgment at law for damages. The compelling by judicial decree of the specific performance of a contract to marry would be in violation of the ideas and principles of modern society.

SECTION 77. CONTRACTS OF PARTNERSHIP AND FOR PERSONAL SERVICES.

It was held in England that there could be specific performance of a contract of partnership for a definite period, but not of a contract of partnership for an

indefinite period. In this country specific performance is never decreed in the case of a contract of partnership no matter what its character may be.

Specific performance of a contract for personal services is never decreed. The reason for this rule is very manifest. If the contract has not been made on account of the peculiar skill of the person who is to perform the services, another person can be hired and any financial loss recompensed by a judgment at law for damages.

If the contract was made on account of the personal skill of the party employed, still there can be no ground for interference by a court of equity. Even if equity should decree the specific performance, they would be utterly unable to compel the defendant to exercise the peculiar abilities which were relied upon at the time of the making of the contract.[1] In some cases, however, equity will enjoin a person who has contracted to work for one person, from entering the employ of one of his business rivals.

Section 78. Contracts for the Sale of Real Property.

When the necessary elements are present equity will always enforce the specific performance of a contract for the sale of land.

"One who has contracted to purchase a particular tract of land cannot get its exact counterpart anywhere, with all its surroundings and conveniences. It is a unique thing, not capable of being duplicated."[2]

The purchaser of land under a contract of which he seeks specific performance must either prove a

[1] Lindsay vs. Glass, 119 Ind., 301; 21 N. E., 897; Wakeham vs. Barker, 82 Cal., 46; 22 Pac., 1131; Iron Age Pub. Co. vs. Telegraphic Co., 83 Ala., 498; 3 South, 449.

[2] Eaton on Equity, Sec. 259.

legal tender of the purchase price or allege in his petition that he is ready and willing to pay, and show a sufficient excuse for not having made a formal tender.[3]

The purchaser in a contract for the sale of land is not precluded from maintaining a suit for its specific performance by the mere fact that the land has increased in value, where such increase has taken place after the payment of part of the purchase price, and the delay in the payment of the balance is neither unreasonable nor due to bad faith.[4]

Section 79. Contracts for the Sale of Personal Property.

More difficulty is experienced in determining in what cases equity will decree specific performance of a contract for the sale of personal property.

Instead of granting relief in all such cases, as it does when real property is concerned, equity will only decree specific performance of contracts for the sale of personal property, when the special circumstances render such relief proper. The Supreme Court of Illinois, discussing this question in the case of Cohn vs. Mitchell,[5] said:

"It is to be remarked, in the first place, courts of chancery have a large discretion in this class of cases. It is true it is a judicial discretion, and is therefore subject to review where relief is denied in a case clearly brought within the general principles which control courts of equity in the exercise of this branch of their jurisdiction. A court of review, however, before interposing in any case must be able to say there has been an abuse of this discretion. It results from this general principle, that every case

[3] Harris vs. Greenleaf, 117 Ky., 817.
[4] Id.
[5] 115 Ill., 124.

of specific performance must necessarily depend in a large degree upon its own special circumstances. (Andrews vs. Sullivan, 2 Gilm., 327.) Again, the general rule clearly is, that a court of equity will not decree the specific performance of a contract relating to personal property unless there is some element or feature in it to show that the relief at law might not be adequate,—as, where the measure of damages resulting from the non-performance of the agreement is uncertain or difficult to ascertain, or where the thing contracted for has to the complainant some intrinsic or special value, and the like. The contract sought to be specifically enforced in this case is one relating solely to personal property. No special feature in the case has been suggested as authorizing the relief sought, and the only authority cited as supporting the theory of the bill is McMullen et ux. vs. Vanzant, 73 Ill., 192. The statement cited by counsel from that case, to the effect 'that the fact that an action at law would lie on the agreement sought to be enforced was no reason why it might not be enforced in equity,' is certainly true, and would hardly be denied by any one. The case, however, has but slight bearing, if any, on the one before us. There are two elements of equity jurisdiction that enter into that case that we do not find in this—fraud and an express trust—the latter alone being sufficient to warrant the decree."

The most general rule which can be laid down is that specific performance will never be decreed for the sale of articles such as wheat, or corn, which can be readily purchased in the open market at any time.[6]

[6] Scott vs. Billgerry, 40 Miss., 119; Gloucester Isinglass, etc., Co. vs. Russian Cement Co., 154 Mass., 92.

"Where the corporate stock to which the contract relates is not procurable in the market, and its pecuniary value is not readily ascertainable, specific performance will, as a rule, be decreed,[7] especially where the court acquires jurisdiction of the action on the ground that it is an action to enforce a trust.[8] Also where the stock with reference to which the contract is made is of peculiar value to the plaintiff in order that he may obtain a proper and legitimate control over the management of a private corporation, specific performance will, as a rule, be decreed."[9 10]

SECTION 80. SPECIFIC PERFORMANCE WITH A VARIANCE.

Where the contract is separable, a court of equity may decree specific performance of one part of the contract, and disregard the other part.[11]

Even a party who is unable to fully carry out a contract into which he has entered, may secure a decree for the specific performance of the contract, with compensation made for the part of the contract which he is unable to perform.[12] This is one of the highest forms of the discretionary powers of equity courts.

SECTION 81. DEFENSES.

The principal defenses which can be set up against the granting of specific performance are the following:

Want of mutuality.

Want of, or inadequacy of, consideration.

The statute of frauds.

[7] Moses vs. Scott, 84 Ala., 608.
[8] Krohn vs. Williamson, 62 Fed. Rep., 869.
[9] Bumgartner vs. Leavitt, 35 W. Va., 194.
[10] Amer. & Eng. Ency. of Law, Vol. XXVI, page 122.
[11] Lawrence vs. Saratoga Lake R. Co., 36 Hun. (N. Y.), 475.
[12] Woodbury vs. Luddy, 14 Allen (Mass.), 1; Bostwick vs. Beach 103 N. Y., 422.

Concealment.
Fraud.
Mistake.
Hardship.
Plaintiff in default.
Lapse of time.
Impossibility of performance.
Penal or liquidated sum named in contract.

SECTION 82. MUTUALITY.

An important pre-requisite to the granting of the specific performance of a contract is the mutuality of the right to seek such relief. In general, equity will only grant specific performance for one party to a contract, when the other party would have had the right to obtain specific performance against the one bringing the suit. The principal exception to this rule arises in the case of contracts which are required by the statute of frauds, to be in writing. In such cases, the complainant, who has not signed the contract, may enforce a specific performance, although no relief could be obtained against him in respect of the promises made therein on his part.

This question of the necessity for mutuality in a contract was considered by the Supreme Court of Alabama in the case of Iron Age Publishing Co. vs. Western Union Telegraph Co.,[12] the decision in which case was as follows:

"Somerville, J. The bill is one in the nature of specific performance, seeking, by the auxiliary force of an injunction, to prevent the breach of an alleged contract by the New York Associated Press selling, as is insisted, to the complainant, the Iron Age Pub-

[12] 83 Ala., 498.

lishing Company, an exclusive right to receive and publish at Birmingham, Alabama, all of the Associated Press dispatches gathered and prepared for the press by the New York company, and transmitted over the telegraph lines of the Western Union Telegraph Company, which body corporate is also made a party defendant to the bill. The breach complained of is averred to be the delivery of these dispatches, for publication, to the Morning Herald Publishing Company, and the News Publishing Company, which companies publish a daily paper in the city of Birmingham, and are also made parties defendant to the present suit.

"The Chancellor sustained a demurrer to the bill, and the complainant brings this appeal. Some of these grounds of demurrer we proceed to discuss.

"There seems to be one feature about the present contract, however, which renders it impracticable to be specifically enforced, with justice to both parties. This is its want of mutuality, both of the obligation, and of the remedy as to one of its features. From the averments of the bill it is made to appear that the contract in question is to remain in force only so long as the complainant shall continue to act as agent and correspondent of the Associated Press at Birmingham. It is not shown whether this duty was assumed forever, for any definite period, or might terminate at will. In either contingency, we are unable to see how the court is to compel performance on the part of the complainant.

"The general rule, to which, it is true, there are many exceptions, seems to be, that contracts, in order to be enforced by specific performance, must be mutual in obligation, as well as in remedy. Mr.

Pomeroy says, and such we think is the general rule, that 'it is a familiar doctrine, that if the right to the specific performance of a contract exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement.' With some established exceptions, it may be stated that equity will decline to enforce a contract against a defendant, where the case is of such nature that the court has no power to compel the complainant to perform his part of it. There are many unilateral contracts, which constitute an exception to this rule, including the right to exercise certain options, and cases affected by the Statute of Frauds, to say nothing of others, which stand on peculiar principles. This case is not of that class.

"How, it may be asked, is it practicable for the court to compel the complainant to perform personal services, as agent and correspondent of the Associated Press at Birmingham, which it has contracted to perform from year to year, under this agreement? We have seen that the duty involves the exercise of special skill, judgment and discretion, being intellectual as well as mechanical in its character. These duties are also continuous in their nature, and of indefinite duration. There can be, as we have shown, no specific performance affirmatively of such duties by a court of equity. The most that can be done is to negatively enforce them by injunction prohibiting their breach, and this only on bill filed praying such particular relief.

"It is clear that but one of two decrees can be rendered in this case: (1) We can tie the hands of the Associated Press, and the other defendants by injunction, forbidding the delivery of the press dis-

patches to any one else than the complainant, as prayed for, and leave the complainant free to terminate the contract at its will without limitation of time or circumstance, or to perform its duties as correspondent as negligently or diligently as discretion may dictate; or (2) to keep the injunction in force so long as the duties imposed by the contract shall be faithfully performed by complainant, which may be for all time to come, in view of the possible perpetuity of complainant's corporate existence. The first decree suggested would be entirely opposed to all equity precedent and practice; the settled rule being that the courts will not interfere by injunction in cases of this kind, if indeed in any case, where defendant cannot be made secure in his rights and remedies for violation of the duties imposed on the complainant by the contract sought to be enforced.

"The second decree above suggested would also be impracticable, not only for the reason that the court cannot compel the performance of the personal services assumed to be undertaken by the complainant, involving as they do the exercise of special skill, judgment and discretion, but it would be out of the question for the court to keep this case open for all time, or even for an indefinite term of years, to superintend the continuous performance of these duties by the complainant. This might involve the frequent necessity on the part of the court of hearing complaints from the defendant, charging the complainant with a breach of its duties, or from the complainant, arraigning the defendant for contempt for a violation of the injunction. There would be thus no end to the number of occasions when the court might be called on, from year to year, to say whether the complainant has per-

formed the duties in question faithfully and efficiently, so as to have kept the injunction in force, or negligently or unskillfully, so as to justify its breach. For these reasons, the rule is that 'equity will not enforce the performance of continuous duties involving personal labor and care of a particular kind which the court cannot superintend.'

"The contract being one which cannot be specifically enforced in a court of equity against the complainant, we deem it inequitable to enforce it against the defendants.

"The demurrer of the bill was properly sustained, and the decree is affirmed."

Section 83. The Statute of Frauds.

As a general rule, equity will not enforce specific performance of an oral contract, which, under the statute of frauds should have been in writing.[14] There are, however, a number of exceptions to this rule. Part performance will take a case out of the operation of the statute,[15] and the statute of frauds will never be allowed to be invoked as a cover for fraud.[16]

Section 84. Want or Inadequacy of Consideration.

Equity will never decree the specific performance of a contract where there is a lack of consideration, or a gross inadequacy of consideration. Under this heading would be included cases where the vendor of property is unable to give a good title.

Inadequacy of consideration is not a sufficient

[14] Moote vs. Scriven, 33 Mich., 500; Russell vs. Russell, 60 N. J. Eq., 282.

[15] Townsend vs. Vanderwerker, 160 U. S., 171; Owens vs. McNally, 113 Cal., 444; Wilke vs. Miller, 171 Ill., 556.

[16] Teaque vs. Fowler, 56 Ind., 563.

defense to a bill seeking specific performance, unless the inadequacy be gross. In Abbott vs. Sworder,[17] the Lord Chancellor said:

"As to the question of inadequacy of consideration, the Lord Chancellor said: Undervalue there was, but the court could not estimate that undervalue in property of this sort. It was property which some people would look at only as a farm. Other persons who wanted a residence might not object to a house on the top of a hill, but might prefer such a situation. However that might be, Mr. Sworder bought the land, and had undoubtedly bought it dear. But the court could not interfere in such a case on the ground of undervalue; for that purpose the undervalue would be such as to shock the conscience. The defendant personally tested the character of the land by actual diggings, and then thought the property worth £5,000. It was a bad bargain, but the court had no power to relieve the defendant from it."

Section 85. Plaintiff in Default.

If the plaintiff is in default, he cannot have specific performance of the contract, unless (a) he is prevented from performing by the acts of the defendant, or (b) the extent of his default is small and suitable compensation can be made therefor. In Benedict vs. Lynch,[18] the court said:

"It may, then, be laid down as an acknowledged rule in courts of equity (and so the rule is considered in the elementary treaties on this subject), that where the party who applied for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able

[17] 4 De Gex. & Sne., 460. [18] 1 Johnson (N. Y.), 370.

to assign any sufficient justification or excuse for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. This rule appears to me to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems too much to prevail (and of which the facts in the present case furnish an example), that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court. It would be against all of my impressions of the principles of equity to help those who show no equitable title to relief.

"It may be useful, however, before we come to apply the rules of the court to the facts in this case, to look more particularly into the cases on the subject of relieving parties from delays in the performance of contracts for the sale of land.

"It was formerly supposed that the time fixed on for the completion of the contract was quite immaterial, and there are some cases which have given countenance to this idea. The case of Vernon vs. Stephens was a bill brought by a vendee for a specific performance after repeated defaults; but in that case different payments had been made and accepted, and further time had been given after each default, by agreement in writing; and the final default, after the last agreement, arose from the death of the original vendor and a neglect for some time to take out letters

of administration, so that the last default was reasonably accounted for; and the case, therefore, proves nothing in favor of a party in default, without excuse and without waiver from the opposite party. The case of Gibson vs. Patterson, in which Lord Hardwicke is supposed to have held that non-performance at the time was very immaterial, is proved to be most inaccurately reported, and that Lord Hardwicke made no such decision in that case, and the facts admitted of no such deduction. And, indeed, in another case, Lord Hardwicke lays down the true rule on this subject when he says that it is the business of this court to relieve against lapse of time in the performance of an agreement, and especially where the non-performance has not arisen by default of the party seeking to have a specific performance. So it was also held, in the case of Hayes vs. Caryll, as early as 1702, that where one person has trifled or shown a backwardness in performing his part of the agreement, equity will not decree a specific performance in his favor, especially if circumstances are altered.

"I do not perceive, therefore, that in the more ancient cases there is real ground for the opinion that the time stipulated for the performance of a contract is of no moment in this court, and I am at a loss to conceive how such an extravagant proposition should ever have gained currency. It is certainly, and very justly, exploded in the modern decisions."

Section 86. Fraud, Concealment, Etc.

Equity, even more than the common law, is opposed to granting relief to a person guilty of fraud, and no person who has secured the making of a contract by fraud can secure specific performance thereof.

"He who comes into equity must come with clean hands."

Section 87. Laches.

Equity will never enforce the specific performance of a contract, where the party seeking such relief has been guilty of laches. It is impossible to lay down any general rule as to just when this principle will be applied. It must depend upon all the circumstances of the case. It is not necessary to sustain this defense that the full period of the statute of limitations should have run.

Section 88. Hardship.

Equity will refuse to enforce the specific performance of a contract, when by doing so it would inflict a great hardship upon the defendant. This matter was fully discussed by the Supreme Court of the United States, in the case of Willard vs. Taylor,[19] the decision in which case was in part as follows:

"When a contract of this character, it is the usual practice of the courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. This jurisdiction, said Lord Erskine, 'is not compulsory upon the court, but the subject of discretion. The question is not what the court must

[19] 8 Wallace, 557.

do under the circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it.'

"And long previous to him Lord Hardwicke and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In Joynes vs. Statham, Lord Hardwicke said: 'The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law.' And in Underwood vs. Hitchcox, the same great judge said, in refusing to enforce a contract: 'The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances.'

"Later jurists, both in England and in the United States, have reiterated the same doctrine. Chancellor Kent, in Seymour vs. Delaney, upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances; and Chancellor Bates, of Delaware, in Godwin vs. Collins, recently decided, upon a very full consideration of the adjudged cases, says that a patient examination of the whole course of decisions on this subject has left with him 'no doubt that, as a matter of judicial history, such a discretion has always been exercised in administering this branch of equity jurisprudence.'

"It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which

there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties.

"In the case of the City of London vs. Nash, the defendant, a lessee, had covenanted to rebuild some houses, but instead of this he rebuilt only two of them, and repaired the others. On a bill by the city for a specific performance, Lord Hardwicke held that the covenant was one which the court could specifically enforce; but said, 'the most material objection for the defendant, and which has weight with me, is that the court is not obliged to decree a specific performance, and will not when it would be a hardship, as it would be here upon the defendant to oblige him, after having very largely repaired the houses, to pull them down and rebuild them.' In Faine vs. Brown, similar hardship, flowing from the specific execution of a contract, was made the ground for refusing the decree prayed. In that case the defendant was the owner of a small estate, devised to him on condition that if he sold it within twenty-five years, one-half of the purchase-money should go to his brother. Having contracted to sell the property, and refusing to carry out the contract under the pretence that he was intoxicated at the time, a bill was filed to enforce its specific execution, but Lord Hardwicke is reported to have said that, without regard to the other circumstances, the hardship alone of losing half the purchase money, if the contract was carried into execution, was sufficient to determine the discretion of the court not to interfere, but to leave the parties to the law.

"The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general, it may be said, that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if the result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate the result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in Davis vs. Hone, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree, unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party."

SECTION 89. MISTAKE.

There can be no specific performance of contracts entered into, under a mutual mistake of fact.[20]

[20] See Chapter VI, On Mistake.

CHAPTER XV.

REFORMATION AND CANCELLATION OF WRITTEN INSTRUMENTS.

SECTION 90. IN GENERAL.

The proper forms of equitable relief in the case of written instruments entered into under the influence of fraud or mistake are the reformation or the cancellation of such written instrument.

SECTION 91. CANCELLATION.

Equity will decree the cancellation of a written instrument in two classes of cases: (a) where the instrument, although absolutely void, is valid on its face; and (b) where it is voidable on the ground of fraud or mistake.

If an instrument is void on its face equity will not interfere, as any legal action is unnecessary. This point was discussed by Chief Justice Marshall in the case of Peirsoll vs. Elliot,[1] as follows:

"The court is well satisfied that this would be a proper case for a decree according to the prayer of the bill, if the defectiveness of the conveyance was not apparent on its face, but was to be proved by extrinsic testimony. The doubt respecting the propriety of the interference of a court of equity, is produced by the facts that the deed is void upon its face, and has been declared to be void by this court. It is therefore an unimportant paper, which cannot avail its possessor. The question whether a court

[1] 6 Peters, 95.

of equity ought, in any case, to decree the possessor of such a paper to surrender it, is involved in considerable doubt; and is one on which the chancellors of England seem to have entertained different opinions. Lord Thurlow was rather opposed to the exercise of this jurisdiction (3 Bro., Ch. Rep., 15, 18), and Lord Loughborough appears to have concurred with him (3 Ves., 368), and in Gray vs. Matthias (5 Ves., 286), the court of Exchequer refused to decree that a bond which was void upon its face should be delivered up principally on account of the expense of such a remedy in equity, when the defense at law was unquestionable. In this case Chief Baron M'Donald said that the defendant should have demurred to the action upon that bond. Instead of that, he comes here professing that it is a piece of waste paper. He goes through a whole course of equitable litigation at the expense of two or three hundred pounds. In such a case, though equity may have concurrent jurisdiction, it is not fit in the particular case that equity should entertain the bill.

"Lord Eldon inclined to favor the jurisdiction. (7 Ves., 3; 13 Ves., 581.) He thought the power to make vexatious demands upon an instrument as often as the purpose of vexation may urge the party to make them, furnished a reason for decreeing its surrender.

"In 1 Johnson's Ch. Reports, 517, Chancellor Kent concludes a very able review of the cases on this subject with observing: 'I am inclined to think that the weight of authority and the reason of the thing, are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing

on its face, or from proof taken in the cause, and that these assumed distinctions are not well founded.'

"The opinion of this learned chancellor is greatly respected by this court. He modifies it in some degree by afterwards saying: 'But while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion as the circumstances of the individual case may dictate and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense not arising on its face may be difficult or uncertain at law or from some other special circumstance peculiar to the case, rendering a resort here highly proper, and clear of all suspicion of any design to promote expense or litigation. If, however, the defect appears on the bond itself, the interference of this court will still depend on a question of expediency, and not on a question of jurisdiction.'

"The court forbears to analyze and compare the various decisions which have been made on this subject in England; because after considering them, much contrariety of opinion still prevails both on the general question of jurisdiction, where the instrument is void at law on its face, and on the expediency in this particular case of granting a perpetual injunction, or decreeing the deed to be delivered up and cancelled; and because we think that, although the prayer of the bill is rejected, the decree of dismission ought to be modified."

A forged instrument may be ordered cancelled.[3]

Bills to remove clouds from title will be taken up in the following chapter.

SECTION 92. REFORMATION.

Deeds, contracts or other written instruments, *inter-vivos*, will be reformed by equity, when on account of mutual mistake, or mistake on one side and fraud on the other, such instruments do not represent the true intention of the parties.

This form of equitable relief is much more effective than any which can be obtained at common law in such cases. A common law court can declare a contract either valid or invalid, but cannot enforce it according to the terms intended by the parties.

A contract or other instrument may be reformed at the suit of any of the parties to the original contract, or anyone claiming under them.[3]

A contract or other instrument may be reformed as against any of the original parties, or anyone claiming under them, except bona fide holders for value without notice.[4]

Parol evidence is admitted to prove mistake even although the instrument is one which the statute of frauds requires to be in writing.[5]

[3] Sharon vs. Terry, 36 Fed., 337.
[3] East vs. Peden, 108 Ind., 92; 8 N. E., 722.
[4] Hyland vs. Hyland, 19 Or., 51; 23 Pac., 811.
[5] Beardsley vs. Duntley, 69 N. Y., 577; 3 Keener Eq. Cas., 344. Some cases hold that parol evidence can only be admitted for the purpose of taking away from the contract, not for the purpose of adding to it. See Glass vs. Hulbert, 102 Mass., 24; 3 Keener Eq. Cas., 327.

CHAPTER XVI.

FORMS OF EQUITABLE RELIEF AFFECTING REAL PROPERTY.

SECTION 93. PARTITION.

Partition is the division of property,[1] owned in undivided shares so as to give to each co-owner an exclusive title to a specific part, instead of his former undivided interest in the whole.

Partition was recognized at common law, but the operation of the writ of partition was limited to cases where the joint ownership arose by operation of law.[2]

Equity early acquired jurisdiction in this class of cases on account of the inadequacy of the remedy at common law.

The partition of real property is now regulated by statute in the different states.

SECTION 94. ASSIGNMENT OF DOWER.

The assignment of dower was another subject over which equity formerly exercised jurisdiction, but which is now generally regulated by statutes.

SECTION 95. ESTABLISHMENT OF BOUNDARIES.

Equity will take jurisdiction in cases of disputed boundaries where there is no adequate remedy at law.

To give equity jurisdiction, there must be such particular reason, as for example, that it was necessary to prevent a multiplicity of suits.

[1] The term is generally but not exclusively applied to real estate.

[2] Perry vs. Pratt, 31 Conn. 433.

SECTION 96. BILLS TO REMOVE CLOUDS FROM TITLE.

Courts of equity have always had jurisdiction to remove clouds from title. A cloud on a title has been thus defined:

"Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the party may require."[3]

The subject as to what constitutes a cloud on title was discussed by the Court of Appeals in the case of King vs. Townsend,[4] the decision in which case was as follows:

"The release sought in this action is the cancellation of a lease executed and delivered by the comptroller of the City of New Orleans upon a sale of unpaid taxes. It is admitted by the defendant, who is the assignee of the lease, that it is void because the sale included an illegal charge for interest. It would seem that such an admission should at once end the controversy and the lease be promptly cancelled, but some ulterior purpose appears to lie behind the apparent litigation, and serves to prolong it. For, notwithstanding the defendant's concession, he resists the relief sought upon the double ground that there is no cloud on the one hand and no title to be clouded on the other.

"The claim that the lease constitutes no cloud is

[3] Eaton on Equity, Sec. 313. [4] 141 N. Y., 358.

founded upon the provisions of the statute which make the lease inchoate; ineffective to produce a right of possession or establish a title; until a specified notice to redeem has been given to occupant or owner, and a certificate of which signed by the comptroller, must accompany the record of the lease. It is undoubtedly true, that, until that certificate is given, the right of the lessee is imperfect and no title passes by the conveyance. But if we concede that the imperfect and inoperative lease does not constitute an actual cloud, it is nevertheless a decisive step towards the creation of a cloud, and a threat and menace to create one in the future. Equity may interfere to prevent a threatened cloud as well as to remove an existing one. It is true that in such a case, there must appear to be a determination to create a cloud, and the danger must be more than merely speculative or potential. That was said of tax proceedings in which no lease had been given and there was no proof that the purchaser claimed it or the city threatened it. Here it has been given. Its very existence is a threat. It was not given for amusement or as an idle ceremony. It meant and could only mean a purpose to subvert the title and possession of the owner. The further steps necessary to make the result effective lay wholly in the option of the lessee. If he actually served the necessary notice and filed the prescribed affidavit and satisfied the comptroller of these facts, the certificate followed as a matter of course if not barred by a redemption. The lessee, therefore, in the present case stands with an effective weapon in his hands and may strike his blow when he pleases. It is in that respect that the situation differs from that in Clark vs. Davenport. There the State comptroller had not given a

deed and was not bound to give it. He might instead cancel the sale, and could not be compelled to do so. Here the city comptroller has given the lease and has no discretion left. If the grantee gives the notice and proves it, the comptroller must make the certificate. Nor is it an answer to say for many years the lessee has omitted to give the notice. That only intensifies the injury and the danger. In Hodges vs. Griggs, a creditor's execution against land following an attachment had been allowed to sleep for seven or eight years, and equity required him to enforce his right or remove the threatened cloud. And so the defendant here has no right to maintain a threat of title as lessee, when he confesses that it is founded on no legal right. The lease is something more than a certificate of sale. It is in form and terms a conveyance, effective at the option of the lessee if there be no redemption. The statute provides that 'all such leases executed by the said comptroller and witnessed by the clerk of arrears, shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessments on said lands and tenements for taxes or assessments, or Croton water rents, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular and according to the provisions of the statute.' Such a lease armed with such presumptions, effective at the option of the lessee, and sufficient to prevent any sale of the property and cloud the owner's right, cannot be said to be a mere speculative danger.

"Nor is it true that the invalidity of the lease appears upon its face. It shows no details of the amounts for which the sale was made, and the pre-

sumptions attending it make proof of such details unessential to the right of the lessee. It is only by evidence outside of the lease itself that its invalidity can be made to appear.

"I think, therefore, that enough was shown to justify the intervention of equity to cancel the lease even if considered only as a threat to create a cloud, and if the action be regarded as one not to remove but to prevent a cloud."

CHAPTER XVII.

INJUNCTIONS.

SECTION 97. DEFINITION.

An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.[1]

Another definition declares an injunction to be "a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigencies of the writ."[2]

SECTION 98. CLASSIFICATION OF INJUNCTIONS.

Every injunction is either,

(a) interlocutory (or preliminary), or
(b) final (or perpetual);

and also either

(a) mandatory, or
(b) prohibitory.

SECTION 99. INTERLOCUTORY OR PRELIMINARY INJUNCTIONS.

An interlocutory or preliminary injunction is one issued during the pendency of the suit, prior to the final hearing. Such an injunction continues in force until the final hearing of the case, unless sooner rescinded by a subsequent order of the court. The

[1] Jeremy, Eq. Ju., 307. Quoted in Parsons vs. Marye, 23 Fed. Rep., 113, and followed in 22 Cyc., 740.

[2] Rogers Locomotive, etc., Works vs. Erie R. Co., 20 N. J. Eq. 379.

object of interlocutory injunctions is to keep things *in statu quo*, not to determine the right itself.[3]

When there is necessity for prompt action an interlocutory injunction may be issued without notice to the defendant. Such an injunction is called an *ex parte* injunction. As soon as he has notice of its issuance the defendant may come in and move to dissolve such injunction. In the Federal courts no *ex parte* injunctions are issued, but the same results are obtained by what are known as restraining orders.

Section 100. Perpetual Injunctions.

A perpetual or final injunction is one granted at the final hearing of the case. No perpetual injunction can be granted by an order upon affidavits.[4]

Section 101. Mandatory Injunctions.

A mandatory injunction is one which commands the performance of some act. Mandatory injunctions are quite rare in practice. When used it is mainly for the purpose of ordering an unlawful act, already done, to be redressed.[5]

Section 102. Prohibitory Injunctions.

The great mass of injunctions are prohibitory injunctions. A prohibitory injunction prohibits the doing of a certain act, and is used for the purpose of preventing a threatened but non-existing injury.[6]

The various acts against which an injunction may be issued are almost unlimited in number. The

[3] 22 Cyc., 740; Butler vs. Useful Manufactures Co., 7 Ohio Dec., 249; Harriman vs. Northern Securities Co., 132 Fed., 464.

[4] Jackson vs. Bunnell, 113 N. Y., 216; 21 N. E., 79.

[5] See Vane vs. Lord Barnard, 2 Vernon, 738.

[6] Schubach vs. McDonald, 179 Mo., 168.

most important classes will be taken up in the following sections.

Section 103. Injunction Against Waste.

Injunctions will be issued against the commission of waste by the party in possession. Even if the tenant holds "without impeachment of waste," he may be enjoined from the commission of voluntary waste.

The leading case on this branch of the law is that of Vane vs. Lord Barnard, generally known as Lord Barnard's case, and reported in Precedents in Chancery,[1] as follows:

"Lord Barnard was tenant for life without impeachment of waste; and this bill was brought against him by those in remainder for an injunction to stay his committing of waste; and by the proofs in the cause it appeared, that he had almost totally defaced the mansion house, by pulling down a great part and also going on entirely to ruin it; whereupon the court not only granted an injunction against him to stay his committing further waste, but also ordered a commission to issue six commissioners, whereof he to have notice and to appoint three on his part; or in default thereof, the six commissioners to be named *ex parte*, to take a view and make a report of the waste committed; and that he should be obliged to rebuild, and put it in the same plight and condition it was at the time of his entry thereon, and it was said that the like injunctions had frequently been granted in this court; and that the clauses of *without impeachment of waste* never were extended to allow the very destruc-

[1] Precedents in Chancery, 454; also reported in 2 Vernon, 738.

tion of the estate itself; but only to excuse from permissive waste, and therefore such a clause would not give leave to sell and cut down the trees which were the ornament or shelter of his houses, much less to destroy or demolish his house; and so it was ruled in my Lord Nottingham's time. 2 Chan. Cases, 32."

SECTION 104. INJUNCTIONS AGAINST TRESPASS.

The power of equity courts to grant injunctions against trespass to real property, long denied, is now acknowledged. The exercise of this power, however, is generally confined to the following classes of cases:

(a) Where the trespass would inflict irreparable damage.

(b) Repeated trespasses.[8]

(c) Where the trespasser is financially irresponsible.

An injunction will generally be refused where the plaintiff is out of possession, and the defendant in possession under a claim of right.[9]

SECTION 105. INJUNCTIONS AGAINST NUISANCE.

Equity is more liberal in granting injunctions against nuisances than against trespasses. Still not every act which constitutes a nuisance will be restrained by an injunction. The injury must be a real one,[10] and one for which there can be no adequate relief by a money judgment for damages.[11]

SECTION 106. INJUNCTIONS AGAINST PERSONAL TORTS.

Equity courts have ordinarily no power to issue injunctions against torts against the person.[12] Neither

[8] Hamilton vs. Ely, 4 Gill (Md.), 34.
[9] Gildersleeve vs. Overstolz, 97 Mo. App., 303; 71 S. W., 371; Taylor vs. Clark, 89 Fed., 7.
[10] General vs. Sheffield, etc., Co., 3 De Gex, M. & G., 304.
[11] Dwight vs. Hayes, 150 Ill., 273; 37 N. E., 218.
[12] Montgomery, etc., R. Co. vs. Walton, 14 Ala., 207.

will an injunction be issued against the publication of slander or libel.[13] In a few cases an injunction has been granted against slander of title.[14]

SECTION 107. INJUNCTIONS AGAINST THE COMMISSION OF CRIMINAL ACTS.

It was formerly held that an injunction would never issue against the commission of a criminal act. This doctrine has been considerably modified during the past few years, and the recognized rule now seems to be that where the issuing of an injunction is warranted by the necessity of protection to property interests, the fact that a crime or statutory offense must be enjoined as incidental thereto will not operate to deprive the court of its jurisdiction.[15]

SECTION 108. INJUNCTIONS AGAINST BREACH OF CONTRACT.

The general rule may be stated to be that the breach of an affirmative promise in a contract cannot be prevented by injunction (the proper remedy being specific performance), but that the breach of a negative promise may be. For example, injunctions have been issued against the violation of such agreements as not to disclose information,[16] or not to manufacture and sell a certain article.[17]

A contract affirmative in form often involves a negative in substance, and in such cases an injunction may be granted, the test being in the quality of the

[13] Chicago City R. Co. vs. General Elec. Co., 74 Ill. App., 465.

[14] Shoemaker vs. South Bend Spark Arrester Co., 135 Ind., 471; 35 N. E., 28.

[15] In re Debs, 158 U. S., 564; United States vs. Elliott, 64 Fed., 27; Crawford vs. Tyrell, 128 N. Y., 341; 28 N. E., 514.

[16] Exchange Tel. Co. vs. Central News, 2 Ch., 48; 66 L. J. Ch., 672.

[17] Kinsman vs. Parkhurst, 18 How. 289.

acts required, and not in the form of the language used.[18]

SECTION 109. INJUNCTIONS FOR THE PROTECTION OF PATENTS AND COPYRIGHTS.

A common class of injunctions are those for the protection of patents and copyrights.

"When the existence of a patent right or of a copyright is conceded, or has been established by an action at law, the jurisdiction of equity to restrain an infringement is too well settled and familiar to require the citation of authorities in its support. From the nature of the right and of the wrong—the violation being a continuous act—the legal remedy is necessarily inadequate. The ordinary form of relief is an accounting of profits and an injunction in equity; indeed, the action at law is seldom resorted to, except for the purpose of establishing the validity of the patent or copyright by the verdict of a jury when it is really contested. Under the Constitution of the United States, the cognizance of suits for the infringement of these rights belongs exclusively to the Federal courts." [19]

A temporary injunction will only issue in patent cases where the rights of the patentee are clear.[20] There must have been either an adjudication of the rights of the patentee, or a long continued public acquiescence in such rights.[21]

SECTION 110. INJUNCTIONS FOR THE PROTECTION OF TRADE-MARKS.

The exclusive right to the use of a proper trade-

[18] 22 Cyc., 846; Dwight vs. Hamilton, 113 Mass., 175.

[19] Pomeroy on Equity Jurisprudence, Sec. 1352.

[20] Parker vs. Sears, 1 Fish Pat. Cases, 93; Fed. Cas. No. 10,748

[21] Standard Elevator Co. vs. Crane El. Co., 56 Fed., 718; 6 C. C A., 100.

mark will be protected by injunction. Words descriptive of quality do not constitute a valid trade-mark and cannot be thus protected.[22] A person's name may be a proper trade-mark and will be protected against everyone except another person of the same name, and a person may be even enjoined from intentionally using his own name in such a manner as to deceive the public.[23] A person may also have the right to use his name by the assignment of it with the good will of the business.[24]

The principles governing the use of geographical names as trade marks are substantially the same as those governing the use of proper names.

Section 111. Injunctions Against Public Officials.

Where public officials are acting illegally or without authority and in breach of trust, and are causing irreparable injury or a multiplicity of actions at law, they may be enjoined by a court of equity.[25] Equity will not interfere, in general, with the discretionary powers of public officials, nor will an injunction be granted where the injury is slight or doubtful.[26]

[22] Vacuum Oil Co. vs. Climax Refining Co., 120 Fed., 254.
[23] Royal Baking Powder vs. Royal, 122 Fed., 337.
[24] Chas. S. Higgins Co. vs. Higgins Soap Co., 144 N. Y., 462.
[25] 22 Cyc., 879; Smith vs. Bangs, 15 Ill., 399.
[26] Brown vs. Reding, 50 N. H., 336.

CHAPTER XVIII.

OTHER FORMS OF EQUITABLE RELIEF.

SECTION 112. DISCOVERY.

Another basis of equitable jurisdiction, which was formerly of great importance, was the necessity of obtaining discovery from the opposite party. The relief in such cases is so closely connected with the form of relief, that the whole subject can be more conveniently treated under the subject of Equity Pleading.[1]

SECTION 113. NE EXEAT.

The writ of ne exeat is a writ issued by a court of equity prohibiting a defendant in a suit before such court from going outside of the territorial jurisdiction of the court during the pendency of the suit.

SECTION 114. INTERPLEADER.

A bill of interpleader may be filed by a person who has in his possession property of which he does not claim ownership, but which is claimed by two or more persons. To sustain this action it is necessary that the claimants should derive their titles from the same common source, and that neither of them should derive his title from the person who holds the property. Upon proper showing the court will relieve the holder of the property of any personal liability upon his surrender of the property, and will order the parties to interplead to settle their respective rights.

[1] Vol. 7, Sub. 22.

Section 115. Receivers.

The character and position of receivers have been thus described by a recent writer:

"A receiver is a person standing indifferent between the parties, appointed by the court as a quasi-officer or representative of the court, to hold, manage, control, and deal with the property which is the subject-matter of or involved in the controversy, under the direction of the court, during the continuance of the litigation, either where there is no person entitled competent to thus hold it, as for example, in the case of an infant, or in the interval before an executor or administrator of a deceased owner is appointed; or where two or more litigants are equally entitled, but it is not just and proper that either of them should retain it under his control,—as, for example, in some suits between partners; or where a person is legally entitled, but there is danger of his misapplying or misusing it, as for example, in some suits against an executor or administrator, or, under some particular circumstances, in suits for the enforcement of a mortgage; or he is appointed in like manner and under like circumstances for the purpose of carrying into effect a decree of the court concerning the property,—as, for example, a decree for winding up and settlement of a corporation, or the decree in a creditor's suit." [1]

[1] Pomeroy on Equity Jurisprudence, Sec. 1330.

TWENTY-FIRST SUBJECT.

Trusts.

CHAPTER I.

NATURE AND HISTORY OF TRUSTS.

SECTION 1. DEFINITION.

Chief Justice defined a trust as "a confidence reposed in some other, 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, for which the *cestui que trust* has no remedy but by subpoena in chancery." [1]

A later definition is as follows: "A trust may be defined as an obligation arising out of a confidence reposed in one who has the legal title conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed." [2]

Story's definition is as follows: "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." [3]

The essential characteristic of a trust is the separation of the legal title and the beneficial use; in every trust the former must be in one person and the latter in another.

Trusts were originally known as uses, and this latter name is still sometimes used.

SECTION 2. HISTORY OF USES.

An account of the introduction of uses into England, and their development prior to the passage of

[1] Coke on Littleton, 272 b.
[2] American & English Ency. of Law, Vol. XXVIII, page 858; 1 Perry on Trusts, Sec. 2.
[3] 2 Story's Equity, Sec. 964.

the statute of uses has been treated in Section 78 of Legal History. This section should be re-read at this time.

Section 3. The Statute of Uses.

The Statute of Uses was passed for the purpose of doing away with passive uses altogether. An indirect method of accomplishing this was adopted. Instead of prohibiting the creation of uses it was provided that where a use had been created that the legal title should be re-united in the person of the *cestui que use* or, in other words, that the legal title should pass from the trustee to the *cestui que use.* The text of the operative clause of the statute was as follows:

"That where any person or persons stand or be seized or at any time hereafter shall happen to be seized of, and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any other person or persons, or of a body politick, by reason of any bargain, sale feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner, means, whatsoever it be; that in every such case, all and every such person or persons and bodies politick, that have or shall hereafter have any such use, confidence or trust, in fee-simple, fee-tail, for terms of life or for years or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seisin estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, construction and purposes in the law of and in such

like estates as they had or shall have in use, trust, or confidence of, or in the same, and that the estate, title, right and possession that was in such person or persons that were or hereafter shall be seized of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politick be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust after such quality, manner, form and condition as they had before in or to the use, confidence or trust that was in them."

SECTION 4. EFFECT OF THE STATUTE OF USES.

The Statute of Uses was not intended to apply to the following classes of uses:

(a) Active uses;

(b) Contingent uses;

(c) Uses in personal property, including estates in real property less than freeholds;

(d) Uses for the use of married women.

Furthermore by a decision of the common law judges the purpose of the statute to abolish passive uses was entirely frustrated, and the final effect of the statute was to increase, rather than diminish the scope of the use. This decision of the common law judges was to the effect that a use could not be limited upon a use. This rule can be explained as follows:

If A grants land to B for the use of C, for the use of D, the statute operates and transfers the title from B to C; then under this decision, the statute has exhausted its force so far as this transaction is concerned, and cannot operate once more to transfer the legal title from C to D. Equity, however, steps in

and carries out the intention of the grantor by compelling C to hold the property for the use of D. The only result, therefore, accomplished by the Statute of Uses, in this respect, was the necessity for the addition of three words to the instrument creating the use.[4]

After the time of the Statute of Uses, uses came to be generally known as trusts.

[4] Tyrrel's Case, 2 Dyer, 155 a; Hopkins vs. Hopkins, 1 Ark., 591; Croxall vs. Shererd, 5 Wall, 268; Hutchins vs. Heywood, 50 N. H., 491.

CHAPTER II.

PARTIES AND SUBJECT-MATTER IN A TRUST.

SECTION 5. IN GENERAL.

There are three different parties in the case of every trust, the settlor, the trustee and the *cestui que trust*. The settlor creates the trust, the trustee holds the legal title and the *cestui que trust* holds the beneficial use.

SECTION 6. THE SETTLOR.

"As the creation of a trust is a modification of property in a particular form, it may be laid down as a general rule that whoever is competent to deal with the legal estate, may, if he be so disposed, vest it in a trustee for the purpose of executing the settlor's intention." [1]

Probably nothing more needs to be said on this point; if a person has the capacity to transfer both the legal title and the beneficial use in certain property to the same party, it is evident that he should have the right to transfer the legal title to one party and the beneficial use to another.

SECTION 7. THE TRUSTEE.

The question as to who may be a trustee is thus discussed in the leading work on the subject of Trusts:[2]

"The question who may be a trustee involves a variety of considerations. Thus, a person to be a trustee must be capable of taking and holding the property in which the trust is declared. Again, the

[1] Lewin on Trusts, Vol. I, Chapter III, Section 1.

[2] Id., Vol. I, Chapter III, Section 2.

trustee should be competent to deal with the estate as required by the trust, or as directed by the beneficiaries, whereas certain classes are by nature or by the rules of law under disability. Again, the execution of the trust may call for the application of judgment and a knowledge of business. And again, the trustee ought to be amenable to the jurisdiction of the court which administers trusts. In general terms, therefore, a trustee should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust."

A trust will never be allowed to fail for want of a trustee, and anyone who can hold the legal title may be a trustee.[3]

Corporations may act as trustee, if not inconsistent with their purposes or contrary to their charters.[4] Municipal corporations may be trustees.[5]

An infant of any age may be a trustee, at least temporarily. In cases where the infant is too young to perform the necessary duties, the court may remove him and appoint a competent party to the position.

Section 8. The Cestui Que Trust.

Any person, natural or artificial, may be a *cestui que trust* in the absence of statutory provisions to the contrary. Such restrictions at the present time are almost entirely confined to the cases of corporations and non-resident aliens.

Section 9. Trust Property.

"As a general rule, all property, whether real or personal, and whether legal or equitable, may be made

[3] Kerr vs. Day, 14 Pa. St., 114; Bundy vs. Bundy, 38 N. Y., 410; Dunbar vs. Soule, 129 Mass., 284; Adams vs. Adams, 21 Wall., 186.

[4] Trustees vs. King, 12 Mass., 546; In re Newark Sav. Inst., 28 N. J. Eq., 552.

[5] Sutton vs. Cole, 3 Pick. 232; Allen vs. Macy, 109 Ind., 550

the subject of a trust, provided the policy of the law, or any statutory enactment, does not prevent the settlor from parting with the beneficial interest in favor of the intended *cestui que trust.*" [6]

"Property not in existence as well as property not owned by the settlor may be the subject of a trust." [7]

[6] Lewin on Trusts, Vol. I, Chapter IV.

[7] Morton vs. Naylor, 1 Hill, 439.

Chapter III.

CLASSIFICATION OF TRUSTS.

Section 10. In General.

Trusts are classified in a number of different ways. The most important classification is that into express and implied trusts. Implied trusts are subdivided into resulting and constructive trusts.[1]

Other classifications are into active trusts and passive trusts; into executed and executory; and into private and charitable.

Section 11. Express Trusts.

An express trust is one created by the express words of the settlor. A trust in personal property can be created either orally or by writing, but an express trust in real property under the statute of frauds can only be created by writing.

Section 12. Express Trusts Created by Precatory Words.

A class of express trusts which give rise to no little difficulty are those arising from what are known as precatory words.

"Precatory words are words of expectation, hope, desire, or recommendation, used by a donor in qualifying an absolute gift."

The former tendency of the courts was to create

[1] Under the classification used by English writers on this subject, implied resulting and constructive trusts are three distinct classes. Under this classification, an implied trust is what, under the American system of classification, would be described as an express trust created growing out of precatory words. The American classification is both more convenient and more accurate.

a trust out of precatory words whenever it was possible to do so. This doctrine however, has been greatly modified. The law on this point has been greatly modified, the present rule being stated by Pomeroy[2] as follows:

"In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner. Unless a gift to A, with precatory words in favor of B, is in fact equivalent in its meaning, intention, and effect to a gift to A, 'in trust for B,' then certainly no trust should be inferred. The early decisions proceeded perhaps upon a more artificial rule, and saw an intention in the use of words of wish, desire, and the like, where no such intention really existed. The modern decisions have adopted a more just and reasonable rule, and require the intention to exist as a fact, and to be expressed in unequivocal language. No other conclusion can be reconciled with the general principles of construction, which are based upon reason and universal experience. It has sometimes been stated as a general rule that a *prima facie* presumption of an intention to create a trust arises from the use of precatory words. Whatever may have been true of the earlier cases, the modern authorities do not, in my opinion, sustain any such rule; it is contrary to their whole scope and tenor."

Section 13. Implied Trusts.

Implied trusts are those which are created by law

[2] Pomeroy on Equity Jurisprudence, Sec. 1016.

without any express words on the part of the settlor creating them. Implied trusts are subdivided into resulting trusts and constructive trusts. In the case of resulting trusts, the law presumes that the parties intended to create a trust, and that therefore it is merely carrying out the intention of the parties, which they failed to express. In the case of constructive trusts, the law creates the trust, against the intention of the parties, in order to prevent fraud or injustice.

SECTION 14. RESULTING TRUSTS.

The two general classes of resulting trusts arise as follows:

(a) Where property is purchased with the money of one person and title taken in the name of another; and

(b) Where there is a partial or complete failure of the purposes of the trust, or where the property granted to the trustee is greater than is necessary for carrying out the purposes of the trust and there is no evidence that the trustee was intended to take beneficially.

(a) Where one person purchases property and takes the title in the name of another, the second party will be held to hold as trustee for the person making the purchase, unless such second party is the wife or child of the person making the purchase, in which case the transaction will be presumed to be an advancement or gift.[8] In both cases it is only a presumption, and the true intention of the settlor may be shown; thus a stranger may take as a gift, or a wife or child may hold as a trustee.

A much stronger case of a resulting trust arises

[8] Dyer vs. Dyer, 2 Cox, 92; Smithsonian Inst. vs. Meech, 169 U. S., 398.

where a person purchases property in his own name with funds belonging to another.

"A trust also results in favor of one who pays only a part of the price. In other words, where two or more persons together advance the price, and the title is taken in the name of one of them, a trust will result in favor of the other with respect to an undivided share of the property proportioned to his share of the price."[4]

"Where property is given by will or deed, stated to be on trust, but no trust is declared; or upon trusts thereafter to be declared, but no such declaration is made; or is given upon some trust which has wholly failed and become inoperative,[5] or when property is given upon a trust which is too uncertain, indefinite, and vague in its declaration to be carried into effect,[6] or if property is given upon a trust which is illegal, and therefore void,[7] or upon a trust which fails by lapse, and the property is not otherwise disposed of,[8 9]" there will be a resulting trust back in favor of the settlor or his heirs.

Section 15. Constructive Trusts.

Constructive trusts always involve the question of fraud, either actually or potentially. A constructive trust is created by the courts, in order to do justice between the parties, either where there has been actual fraud in that particular transaction, or where the transaction is of a character that offers such temptation to fraud. Equity seeks to discover all transactions

[4] Pomeroy on Equity Jurisprudence, Sec. 1038; Bailey vs. Henenway, 147 Mass., 326.
[5] Morice vs. Bishop of Durham, 10 Ves., 537.
[6] Nichols vs. Allen, 130 Mass., 211.
[7] Pawson vs. Brown, L. R. 13 Ch. Div., 202.
[8] Ackroyd vs. Smithson, 1 Brown Ch., 503; 3 Keener, 977.
[9] Pomeroy on Equity Jurisprudence, Sec. 1032.

of the kind. Constructive trusts will arise in the following classes of cases (among others): where money is received by one person which rightfully belongs to another;[10] where a trustee (or other person in a fiduciary relation) purchases property with trust funds;[11] where a partner, or other person holding a fiduciary position, renews a lease for his own benefit;[12] where trust property is wrongfully acquired by a trustee or other person in a fiduciary position;[13] or where property subject to a trust or lien is purchased by a person with notice of such trust or lien or is transferred to a person without consideration.[14]

The right to follow trust funds which have been used by the trustee (or other person in a fiduciary relation), was discussed at some length by the Court of Appeals of New York, in the case of Holmes vs. Gilman,[15] the decision in which case was in part as follows:

"The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a cestui que trust to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced and identified, and provided the rights of bona fide purchasers for value without notice do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust

[10] Robinson vs. Pierce, 118 Ala., 273.
[11] Ferris vs. Van Vechten, 73 N. Y., 113.
[12] Trice vs. Comstock, 57 C. C. A., 646; 721 Fed., 620.
[13] McDonough vs. O'Neil, 113 Mass., 92.
[14] Union Pac. R. R. Co. vs. McAlpine, 129 U. S., 305.
[15] 138 N. Y., 376; 34 N. E., 205.

funds, and the *cestui que trust* has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title. Van Alen vs. Bank, 52 N. Y., 1; Newton vs. Porter, 69 N. Y., 133; Ferris vs. Van Vechten, 73 N. Y., 119; Cavin vs. Gleason, 105 N. Y., 256, 260; 11 N. E. Rep., 504; In re Hallett's Estate, 13 Ch. Div., 696. It is somewhat akin to the principle decided in Silsbury vs. McCoon, 3 N. Y., 379, where corn was wrongfully taken from its owner and converted into whisky. The court held the property was not changed in the hands of the wrongdoer, and the whisky belonged to the owner of the original material, no matter how much it had been increased in value. The case of Pennell vs. Deffell, 53 Eng. Ch., 372, 388, 389, discusses the principle as thus stated, and agrees to it. That a partner occupies a fiduciary position with regard to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds, is, I think, clearly established. 1 Lindl. Partn. (2nd Amer. Ed.), 303; Featherstonehaugh vs. Fenwick, 17 Ves., 298; Anderson vs. Lemon, 8 N. Y., 236; Mitchell vs. Reed, 61 N. Y., 123; Riddle vs. Whitehill, 135 U. S., 621; 10 Sup. Ct. Rep., 924. Although partners do not, in the strict sense of the term, occupy the position of trustees towards each other and toward the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called, on behalf of a cestui que trust. Per Jessel,

M. R., in re Hallett's Estate, 13 Ch. Div., 696, 712. While legally incorrect to describe the fraudulent abstractions made by Gilman of the funds of the firm as embezzlements, the description is harmless. It was a monstrous and gross breach of the duty he owed the firm, and the right of the firm to follow the funds is not affected because the act could not be regarded in law as an embezzlement. The right to follow the funds springs from the fiduciary nature of Gilman's position with regard to them. These general positions are not really denied by the defendant. It is claimed, however, that the tracing and identification of the funds have not been sufficiently proved in fact, and it is also urged that there has been an actual mingling of firm funds with the private funds of Gilman in the purchase and maintenance of the policies. I have looked carefully through the evidence upon these questions of fact, and I think the findings of the referee are fully sustained, and that no exception can prevail on such grounds. If these preliminary questions be decided against him the counsel for defendant then urges that the rule clearly is, if the trust fund has become mingled with money or property of the trustees or others, equity impresses the proceeds with a trust to an amount equal to the original trust fund and interest, and will go no further. He then claims that the firm funds which went to the purchase of the policies and the payment of the annual premiums were mingled with the property right of the wife, called her 'insurable interest' in her husband's life, and so the policies were not wholly the result of the use of those firm funds, and therefore the plaintiff can have only a lien on the policies or the moneys arising from their payment, to the amount of the

premiums paid with the firm funds, and the interest thereon. This is really the chief question in the case.

"Where moneys have been misapplied, and have been used as a portion of a larger amount, which has been invested in other property, the property thus acquired does not, as a whole, belong to the owner of the moneys misapplied. It does not belong to him, because it has not been purchased or acquired wholly with his money or funds, and hence it is that such property is held charged with a lien at least to the amount of the trust funds invested in it. It is not necessary to here decide it, because we take another view of the facts, but I am not at all prepared to admit that under no circumstances is the cestui que trust entitled to recover back anything more than the amount of his property and interest, where there has been a mingling of funds. In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property, which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee, and that only the original sum wrongfully taken, and interest, can be given to the cestui que trust, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value. If, in such case, the cestui que trust were not allowed to at least participate in this increased value, it would appear to be a violation of the principle that the trustee cannot ever be permitted to make a profit out of the use of the trust funds. It seems to me to be a case for the application of the doctrine that the parties became co-owners of the property at the option of the cestui que trust, in the proportion which their various contribu-

tions bore to the sum total invested. In this case, however, the defendant is enabled to claim a mingling of funds and property only by treating the right of a wife to insure the life of her husband for her benefit as a species of property which has been mingled with the funds of the firm, the result of the combination being the procurement of the policies.

"We do not regard this right as property in any such light as to bring the case within the principle of the authorities upon the subject of a mingling of funds in the purchase or acquisition of other property. The right of a wife to insure the life of her husband for her own benefit is not property. It is more in the nature of a power or privilege to make a valid contract. It is a status and not a property right. The common law upon motives of public policy held that there must be what was termed 'insurable interest' in the life which was insured, or else the policy was a dangerous kind of wager, and therefore void. To take a policy out of such a class it was necessary to show that the insured had some interest in the continuance of the life of the cestui que vie. Who had such an interest as to give a right of insurance was frequently a matter of some discussion and of possible doubt. It may not even now perhaps be said that the precise nature, character and extent of the interest in another's life, which shall render that life insurable, have been formally and plainly laid down. It is said by the Federal Supreme Court that one essential is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. Insurance Co. vs. Schaefer, 94 U. S., 457, 460. An interest which is insurable must be an interest in favor of the continu-

ance of the life, and not an interest in its loss or destruction. If any person could be thought to have an interest in the continuance of the life of another, it would be a wife in the life of her husband. Judge Allen, in Baker vs. Insurance Co., 43 N. Y., 283, regarded the question as decided that a wife had at common law an insurable interest in the life of her husband. Judge Andrews held to the same effect in Brummer vs. Cohn, 86 N. Y., 11, 14. These cases favor the view that the statutes upon the subject of the insurance of the husband's life in favor of his wife, while it regulates, does not create the right. I do not intimate that, if the statute created the right, it would in any way alter its nature. That such a policy was valid at common law simply makes it clearer that it is the nature of the relationship between man and wife that makes the policy valid, and relieves it from the objection that it is a wager policy. That relationship is not property in any fair sense of the term. It creates an insurable interest in the life of another, of a nature the same as a parent has in a child or the child in a parent; that is, an interest in the preservation of the life, and not in its destruction. Being so circumstanced, a policy of insurance upon such life is not a wager policy, and is therefore a valid policy. It is the same question, but it may perhaps appear a little clearer when it is asked whether the power or privilege of a parent or child or creditor to insure the life of his parent or child or debtor is property. A man has an insurable interest in his own life. If he take trust funds and procure such insurance, has he thereby mingled those funds with other property, *i. e.*, with his right to insure his own life? And can it be said that the policy is the product of such mingled funds

and property, so that nothing but the original amount of the trust funds and interest can be recovered back from the estate? The fact is apparent that a policy of insurance upon a life is not a policy of indemnity. The sum named in the policy is to be paid when the insured life has ceased, no matter how really valueless such life may have in the meantime become. The power of the wife to procure insurance is not in the least unfavorably affected by the fact that insurance in her favor has already been secured. As was said by Shaw, C. J., in Loomis vs. Insurance Co., 6 Gray, 396, the amount of the insurance is immaterial. The medium is computed, upon the law of averages, to be the exact equivalent for the risk. So, if insurance has been taken out by the husband on his life in the wife's name, she could herself take out more upon just as favorable terms, and just as expeditiously as if none had been taken. No one company might desire to go above a certain amount upon any one risk, but the ability to procure further insurance is practically unrestrained. The wife has, therefore, suffered no loss by the original procurement of this insurance, and its subsequent maintenance unknown to her, so long as the premiums have not been paid with her moneys or in any way from her estate. In other words, her property has not been used for any purpose. Her power to obtain valid insurance upon his life remained wholly unimpaired and unaffected by the insurance already obtained. The fact that she had what is termed an 'insurable interest' was only material for the purpose of upholding the validity of the insurance in question. I cannot see how it can be regarded as property in any event. That a life insurance policy has not the features of a contract of indemnity, and is

not such a contract, has been unquestioned for a number of years. Rawls vs. Insurance Co., 27 N. Y., 282; Olmstead vs. Keyes, 85 N. Y., 593.

"The case of these policies is very much like that in Baker vs. Insurance Co., supra, where Judge Allen said the insurance was effected by the husband for the benefit of his wife, and as a provision for her in case of his death. It was there stated that the case would not be changed if the policy were regarded as having been procured by the wife, because the husband was in truth the actor, and represented the wife, and she, in claiming the benefits of the policy, necessarily ratified and confirmed the compact as it was made, and with all its terms and conditions. Therefore this case is to be looked at with reference to the fact that every dollar of the moneys which procured and maintained these policies in existence belonged to the firm represented by the plaintiff, and that Gilman had no more right to invest or use these funds in the manner he did than would any third person who had procured them without any right or title. It has been said that the husband, when he procures an insurance for his wife's benefit, acts as her agent, or represents her, and that she has a vested interest in the policies the moment they are delivered by force of the statute permitting them to be made in this form. Whitehead vs. Insurance Co., 102 N. Y., 143; 6 N. E. Rep., 267. This is doubtless true in the case of the husband procuring the insurance with funds which belong to him or his wife, but where the premiums are paid with moneys which in truth do not belong to him, and which the husband misapplies in so paying, and by which he violates his obligations to the true owner of the moneys thus used, the wife in such case must claim the policy

subject to the means by which the husband procured, and she must adopt all his methods. The moneys in the hands of the company could not be recovered back by the cestui que trust if received by the company in good faith, because it would stand in the position of a bona fide purchaser, yet the policy itself would stand as the representative of these trust moneys, and the right of the wife would be to that extent subordinate. This principle has, in effect, been decided in New Jersey in the case of Shaler vs. Trowbridge, 28 N. J. Eq., 595. It was there held upon almost identical facts, that there was no public policy which favored the wife at the expense of the principle that trust funds could be followed, and that no profit could in any way arise in favor of the trustees who used them. It also held that the wife could not be permitted to avail herself of the proceeds of policies paid for by her husband with trust funds. It is true, in that case the policies were originally taken out in the name of the husband, and subsequently made payable to the wife, and it is urged that there is a difference in the two cases, because in the New Jersey case it was the husband's insurable interest which was insured, and then assigned, and that in this case it is the wife's interest which was originally insured; but we hold, upon the facts in this case, that the taking out of the policies in the name of the wife does not alter the principle as to trust funds. The cestui que trust is entitled to follow his funds, and to take the moneys or the policy at his option.

"The case of Bank vs. Hume, 128 U. S., 195; 9 Sup. Ct. Rep., 41, is not in point. The moneys there used were in truth the property of the husband, although he was insolvent, and he used some of his prop-

erty to purchase insurance for the benefit of his wife and children. The Supreme Court held that a policy of insurance taken out by the husband in the name and for the benefit of the wife made the contract a contract with the wife, and that even though the premiums were paid by the insolvent husband, with moneys which, or some part of which, ought to have been used for the payment of his debts, yet, if there were no fraud as between the wife and the company, the wife could hold the policy as against the creditors of the husband, except the amount which had been wrongfully used in the payment of premiums. If the amount of the husband's estate used to pay the premiums were no more than reasonable and moderate under the circumstances, it was further held that the creditors could not recover back the moneys so paid for them, although the husband was, at the time of their payment, insolvent. It was said the interest insured did not belong to the husband or his creditors; that the contracts were not payable to the husband, his representatives, or his creditors; that no fraud on the part of the wife, the children, or the insurance company was shown or pretended; and that there was no gift or transfer of the debtor's property, unless the amounts paid for premiums were to be held as excessive. That is a very different case from the one under consideration. It was no trust fund (within the meaning of that term when used to authorize the following thereof) which went to pay for the policy in that case. The moneys belonged to and were the property of the husband. They might, under certain circumstances, be reached in proceedings after judgment and return of execution, but the title was in the husband and he used his own property to procure the insurance. Hav-

ing done so, the policy thus procured became a contract with the wife, and her insurable interest in her husband's life was thus made effectual. The creditors could not follow the moneys into other property, and demand such property. No principle of following trust funds was involved.

"In this case, however, there is the fact which alters and colors the whole transaction, and is fundamental and controlling in its nature, and that fact is that the moneys which procured the insurance were trust moneys, and, although invested in the policies, they were subject at the very moment of such investment to the right of the owner of the funds to follow them into whatever change of form they might assume, and to claim the thing into which they were changed as if it were the original fund. In the case in the Federal court, the whole matter was discussed with reference to the violation of the Statute of Connecticut, based upon the statute of Elizabeth (13 Eliz., c. 5), prohibiting the transfer of the property of an individual in fraud of his creditors. We have a statute to the same effect, 2 Rev. St., p. 137, Sec. 1. The learned chief justice said, that the statute was passed to prevent debtors from dealing with their property to the prejudice of their creditors, but dealing with that which creditors irrespective of such dealing could not have touched was within neither the letter nor the spirit of the statute. This was spoken of the insurable interest of the wife, and it was spoken in regard to creditors as that term is generally used. In this case it is not in the simple character of a creditor of Mr. Gilman, or of the defendant, Mrs. Gilman, that the plaintiff asks relief. He seeks the aid of a court of equity to enable him, in the character of a cestui que

trust, to follow his property which was wrongfully converted by one bearing towards him the obligations of a trustee, and by such trustee invested in these policies, and such cestui que trust now asks, in substance, for his own property, or for the property into which his trust funds were wrongfully converted; and we think he has the right to recover the property which represents and stands in the place of the original trust fund. The case in the Federal court is not at all parallel, and is, therefore, no authority against our contention. Whether at common law or under the provisions of our statute the procurement of policies of insurance in the wife's name, under the facts developed in this case, does not prevent the cestui que trust from following and claiming the trust funds or their proceeds, if the proceeds of these policies had been greater than the whole amount of the indebtedness of the husband to the cestui que trust, arising out of the husband's breach of trust, we do not decide what might be in equity the different rights of the wife and cestui que trust in the balance, or whether any different rule could be logically applied. The husband in this case converted over $200,000 of what stood in the nature of a trust fund, and the plaintiff recovers only a little over one-fourth thereof in case the judgment on the referee's report be affirmed. We simply decide the case now before us. As to other questions discussed in the defendant's brief, we have carefully considered them, and we think there is no error in the result arrived at by the referee. The order of the general term is therefore reversed, and the judgment entered upon the report of the referee is affirmed, with costs to the plaintiff at general term and in this court. All concur. Judgment accordingly."

SECTION 16. PAROL EVIDENCE TO ESTABLISH RESULTING AND CONSTRUCTIVE TRUSTS.

Resulting and constructive trusts are not within the provisions of the statute of frauds and may be established by parol evidence.

SECTION 17. ACTIVE AND PASSIVE TRUSTS.

An active trust is one where there is anything to be done by the trustee, however slight. A passive trust is one where the trustee merely holds the legal title, and has no services to perform.

SECTION 18. EXECUTED AND EXECUTORY TRUSTS.

An executed trust is one where nothing remains to be done by the settlor; an executory trust is one where the settlor still has some act to perform to render the trust effective.

CHAPTER IV.

CHARITABLE USES.

SECTION 19. IN GENERAL.

Charitable uses or trusts have their origin in the Statutes of Charitable Uses,[1] which enumerated the purposes for which charitable uses might be created as follows:

"The relief of aged, impotent, and poor people; the maintenance of maimed and sick soldiers and mariners; the support of schools of learning, free schools, and scholars of universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; the relief, stock, and maintenance of houses of correction; marriage of poor maids; and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners and captives; aid of poor inhabitants concerning payments of fifteenths, setting out of soldiers, and other taxes."

This statute has served as the basis of the law on this subject in the various states of this country.

SECTION 20. CHARACTER AND CHARACTERISTICS OF CHARITABLE USES.

The character and characteristics of charitable uses have been thus summarized in a recent treatise on this subject:[2]

" 'Charitable' uses, in the language of English

[1] 43 Eliz., C. 4.

[2] "The True Principles of Legislation with Regard to Property Given for Charitable Uses or Other Public Uses," by Courtney S. Kenny, L.L.M. (Essay which won the Yorke Prize of the University of Cambridge.)

law, are simply a class of public uses. To be public—that is, to benefit indefinite individuals—is essential to the legal idea of charity. A gift of a shilling to a poor neighbor, or of a hundred pounds to set up a grandchild in business, may be beneficent, and beneficent in the fuller sense of exceeding those reasonable expectations of his which it would be an act of mere justice to satisfy. In every ordinary sense it may be an act of 'charity.' But such gifts, or even a gift of money for such ten poor curates as the Bishop of London may select, would not be called 'charitable' by English lawyers, since each recipient is an ascertained person, or readily can be rendered such.

"Now as it is this characteristic of indefiniteness that distinguishes public from private uses, it is upon it that whatever is necessarily peculiar and anomalous in the legal treatment of public gifts must depend. There is no definite person who can claim the due application of the gift. Then the law must supply peculiar and anomalous means for securing that due application. Some measure of supervision is needed in the case of property devoted to public uses, which is unnecessary for private property.

"Gifts to public uses, again, are almost always characterised by a real or apparent meritoriousness. Some rare instances may indeed be found—like gifts for diminishing the national debt, or for setting up a monument to the donor—in which the object is so futile or so personal that the gift will not inspire gratitude or admiration in even the most unreflecting observer. But in almost all cases a public gift has at least the semblance of a public benefit, and its donor is regarded by the majority of mankind with the reverence due to a 'pious founder.' This attribute

of meritoriousness, again, demands the attention of the jurist. The desire of public applause, the hope of divine favor, the impulse of benevolent zeal, may blind the founder to primary but commonplace obligations. As there is this special hazard of his being generous before he is just, the law may have to supply peculiar and anomalous means for limiting his generosity. Some measure of restriction is needed—at any rate in certain stages of a nation's spiritual development—in the case of property devoted to perpetual public uses, which is unnecessary for private property.

"But there is a third and still more remarkable attribute, which, though far from being an essential characteristic of gifts to public uses, is nevertheless attached to the great majority of them, and to all that are of any considerable value. It is that of perpetuity. A charitable foundation is usually intended to escape the fate of all other human institutions, and to continue its work of benficence forever."

"Some measure of revision is needed in the case of property devoted to perpetual public uses which is unnecessary for private property.

"Indefiniteness, meritoriousness, perpetuity—these, then, are the three peculiarities which make public endowments require a correspondingly peculiar treatment at the hands of the legislator."

Section 21. Purposes for which Charitable Uses May Be Created.

The purposes for which charitable uses may be created are, in general, those enumerated in the Statute of Charitable Uses. This list is not exclusive, however, and many important species of charity at the present time are not included. The three most

important classes of charitable uses are those for religious, educational, and benevolent purposes.

SECTION 22. USES FOR RELIGIOUS PURPOSES.

Formerly, in England, the only charitable uses which could be created were those in favor of the established church. A much more liberal rule prevails in America, and property may be left in trust for any religious sect. This question was discussed by the Supreme Court of Illinois in the case of Hoeffer vs. Clogan,[8] as follows:

"The doctrine of charitable uses has been repeatedly held to be a part of the law of this state. The equitable jurisdiction over such trusts was not derived from the statute of charitable uses (43 Eliz., Chap. 4), but prior to and independent of that statute charities were sustained irrespective of indefiniteness of the beneficiaries, or the lack of trustees, or the fact that the trustees appointed were not competent to take (Vidal vs. Girard, 2 How., 127; Heuser vs. Harris, 42 Ill., 425). The statute, however, became a part of the common law of this state. Heuser vs. Harris, supra; Andrews vs. Andrews, 110 Ill., 223; Hunt vs. Fowler, 121 Ill., 269, 12 N. E., 331, and 17 N. E., 491. The statute of charitable uses of Elizabeth has, since its passage, been considered as showing the general spirit and intent of the term 'charitable,' and the objects which come within such general spirit and intendment are to be so regarded. The definition given by Mr. Justice Gray in the case of Jackson vs. Phillips, 14 Allen, 539, was adopted and approved by this court in the case of Crerar vs. Williams, 145 Ill., 625; 34 N. E., 467. It is as follows: 'A charity in a legal sense, may be more fully defined as a gift, to

[8] 171 Ill., 462, 49 N. E., 527.

be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.' Any trust coming within this definition for the benefit of an indefinite class of persons sufficiently designated to indicate the intention of the donor, and constituting some portion or class of the public, is a charitable trust. Among such objects are the support and propagation of religion, and the maintenance of religious services (Andrews vs. Andrews, supra); to pay the expense of preaching and salary of rectors (Alden vs. St. Peter's Parish, 158 Ill., 631, 42 N. E., 392), or the preaching of an annual sermon in memory of the testator (Duror vs. Motteaux, 1 Ves. Sr., 320). The doctrine of superstitious uses arising from the statute (1 Edw. VI, Chap. 14), under which devises for procuring masses were held to be void, is of no force in this state, and has never obtained in the United States. In this country there is absolute religious equality, and no discrimination, in law, is made between different religious creeds or forms of worship. It cannot be denied that the bequests for the general advancement of the Roman Catholic religion, the support of its forms of worship, or the benefit of its clergy, are charitable, equally with those for the support or propagation of any other form of religious belief or worship. The nature of the mass,

like preaching, prayer, the communion, and other forms of worship, is well understood. It is intended as a repetition of the sacrifice on the cross, Christ offering Himself again through the hands of the priest, and asking pardon for sinners as He did on the cross; and it is the chief and central act of worship in the Roman Catholic Church. It is a public and external form of worship—a ceremonial which constitutes a visible action. It may be said, not for any special purpose, but from a liturgical point of view every mass is practically the same. The Roman Catholic Church believes that Christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other, and among the special purposes for which masses may be said is the remission of this penalty. A bequest for such special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service, and render it a mere private benefit. While the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person, or because special prayers should be included in the services for particular persons. Memorial services are often held in churches, but they are not less public acts of worship because of their memorial character; and in Duror vs. Motteaux, supra, the trust for the preaching of an annual sermon in memory of the testator was held to be a charitable use. The mere fact that the bequest was given with the intention of obtaining some benefit, or from some

personal motive, does not rob it of its character as charitable. The masses said in the Holy Family Church were public, and the presumption would be that the public would be admitted, the same as at any other act of worship, of any other Christian sect. The bequest is not only for an act of religious worship, but it is an aid to the support of the clergy. Although the money paid is not regarded as a purchase of the mass, yet it is retained by the clergy, and, of course, aids in the maintenance of the priesthood.

"In the case of Schouler, Petitioner, 134 Mass., 426, it was held that a bequest of money for masses was a good, charitable bequest of the testatrix, and the court said: 'Masses are religious ceremonials or observances of the church of which she was a member, and come within the religious or pious uses which are upheld as public charities.' So, in Pennsylvania, it has been held that a bequest to be expended in masses for the repose of souls is a religious or charitable bequest under the statute. Rhymer's Appeal, 93 Pa. St., 142; Seibert's Appeal, 18 Wkly. Notes Cas., 276. A recent case, decided in the Irish courts, January 24, 1897, is Attorney General vs. Hall. It was held unanimously, both in the exchequer and the courts of appeals, that a bequest for saying masses for the soul of a deceased person was a good, charitable bequest. In New York and Wisconsin it has been held that a trust of this character is void for the want of a definite beneficiary to enforce its execution. Holland vs. Alcock, 108 N. Y., 312, 16 N. E., 305; McHugh vs. McCole (Wis., decided October 22, 1897), 72 N. W., 631. But the decisions in those states are readily distinguishable from the rule in this state. In New York charitable uses were abolished by legislation,

and in all valid trusts there must be a definite and certain beneficiary to take the equitable title, unless the act of 1893, which is said to have resulted from the decision in Tilden vs. Green, 130 N. Y., 29, 28 N. E., 880, has enlarged or relaxed the rule as to a definite beneficiary. In Wisconsin all trusts are abolished by statute, except certain specific trusts, where there is certainty in the beneficiaries, and in that state bequests have been held to be void which have been uniformly sustained in this court as for charitable purposes. The decision in McHugh vs. McCole, supra, was upon the ground that the doctrine of charitable uses was not in force in that state, and that a trust, to be sustained, must be of a clear and definite nature, and the beneficiary interest to every person therein must be fully expressed and clearly defined upon the face of the instrument. The will in that case gave a certain sum of money to the Roman Catholic Bishop of the diocese of Green Bay, Wis., to be used and applied in specified amounts for masses for the repose of testator's soul and the souls of certain named persons. It was held invalid solely on the ground that the provision amounted to a trust which, under the statutes of that state, was invalid. It was said that, if the testator had made a direct bequest of the sum in question to Bishop Messmer, or to any bishop or priest, for masses for the repose of the souls of persons named in his will, it would be valid, and the court said: 'We know of no legal reason why any person of the Catholic faith, believing in the efficacy of masses, may not make a direct gift or bequest to any bishop or priest of any sum out of his property or estate for masses for the repose of his soul or the souls of others, as he may choose.' The court expressed regret that

the intention of the testator could not be given effect because he had put it in the form of a trust provision. So, also, in New York, it has been held in several cases that a bequest to a named priest for the saying of masses for the repose of the souls of specified persons is valid. Ruppel vs. Schlegel (Sup.), 7 N. Y. Supp., 936; In re Howard's Estate (Surr.), 25 N. Y. Supp., 1111; Vanderveer vs. McKane (Sup.), 11 N. Y. Supp., 808. The case of Festorazzi vs. Catholic Church, 104 Ala., 327, 18 South, 394, holds that a bequest to that church in the city of Mobile, to be used in solemn mass for the repose of testator's soul, could not be supported as a charitable bequest. The decision seems to be on the ground that the testator's own soul was the exclusive object and beneficiary of the trust, and that no public benefit was to be derived from it, and no living person was able to call the trustee to account. We are not able to agree with the conclusion that there is no benefit to the church or public in such case, and, as we have seen, the ceremonial of the mass is a public action, which can be seen and taken cognizance of, so that there is no more difficulty in procuring a mass to be said than there is in securing the public delivery of a sermon or lecture. A bequest for the erection of a public statue or monument to a distinguished person is a good charitable bequest, and yet such person, if deceased, could not enforce its execution, but the courts could and would do it. We think the devise and legacy charitable, and a rule applicable to trusts is that they will not be allowed to fail for want of a competent trustee. The court will appoint a trustee or trustees to take the gifts and apply them to the purposes of the trust. Heuser vs. Harris, supra. The decree of the circuit court is

reversed, and the cause is remanded, with directions to proceed in conformity with the views herein expressed. Reversed and remanded."

A trust for the propagation of a religious belief, however, which is in violation of the criminal laws of the State or country would be void; and the same is probably the law in the case of property left in trust for the purpose of promoting infidelity.[4]

Section 23. Uses for Educational Purposes.

Uses for educational purposes of every description are clearly valid.[5] The court, in passing upon the validity of educational gifts, is not concerned with the truth or falsity of the opinions sought to be taught, so long as they are not hostile to law or morals.[6] Thus a trust for the circulation of writings attacking the right of private property in land, has been upheld.[7]

Section 24. Peculiarities in the Law Governing Charitable Uses.

The most striking peculiarities in the laws governing charitable uses are found in the fact that the rules against perpetuities and accumulations do not apply and in the application of the special *cy pres* doctrine.

Section 25. The Cy Pres Doctrine.

"The word 'cy-pres,' means, 'near,' 'next to'; 'as near as may be.' Where the literal execution of the trusts of a charitable gift is inexpedient or impracticable, a court of equity will execute them, as nearly as it can, according to the original plan. The general principle upon which the court acts is that, if the

[4] Manners vs. Philadelphia Library Co., 93 Pa. St., 165.
[5] Clement vs. Hyde, 50 Vt., 716.
[6] In re Foveaux, 2 Ch., 201.
[7] George vs. Braddock, 45 N. J. Eq., 757.

testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be executed 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."[8]

SECTION 26. THE RULE AGAINST PERPETUITIES.

It is necessary here to explain the meaning of the rule against perpetuities. The purpose of this rule is to prevent any person from controlling the disposition of his property for longer than a certain period after his death. The rule is that all future estates must vest within a particular life or lives in being at the death of the testator and twenty-one years and a fraction (nine months, the period of gestation) thereafter. If the estate is created or limited by deed *inter vivos*, the lives in being must be those of persons who are living at the execution of the deed and not merely at the death of the grantor or settlor.[9]

This rule only applies to equitable estates and executory devises, it does not apply to contingent remainders.

SECTION 27. THE RULE AGAINST ACCUMULATIONS.

At first the testator or settlor was allowed to provide for the accumulation of his estate (*i. e.*, the continued adding of the interest to the principal) for the whole period allowed by the rule against perpetuities. This period was later found to be too long,[10]

[8] Eaton on Equity, Sec. 183, citing Lord Eldon in Moggridge vs. Thockwall, 7 Ves., 56.

[9] Merwin on Equity, Sec. 273.

[10] This result was mainly brought about by the agitation growing out of the will of one Thellusson which is described by Merwin as follows:

"Such being the common law, one Thellusson made a will leaving all his property to trustees, directing that it should be converted into one

to permit accumulations to be allowed, and by statute (40 Geo. III, c. 98), it was provided "that accumulations shall not be made except during one of three periods, as the testator or settlor may select, as follows: (1) The life of the settlor himself. (2) Twenty-one years from his own death. (3) During the minority of any particular person, living at the time of the settlor's death, who would be entitled to the rents and profits under the deed or will if of full age." [11]

fund, and that the rents and profits should accumulate during the lives of all his sons, and of all his grandsons living at the time of his own death, and then, upon the death of the last survivor, that the whole estate should go to the third generation in a certain specified manner. He died in 1797 leaving three sons, three daughters, and £50,000. Accumulations might go on under this will for seventy-five years more, and thus the whole fund might amount in the end to £100,000,000, or $500,000,000. However, the will followed the rule, and it was held valid."

[11] Merwin on Equity, Sec. 366.

CHAPTER V.

TRUSTEES.

SECTION 28. APPOINTMENT.

The trustee is ordinarily appointed by the settlor who creates the trust. Equity, however, will never suffer a trust to fail for want of a trustee, and where the settlor fails to appoint a trustee or where a vacancy arises by death, resignation or other cause, a court of equity may appoint a trustee. Under the laws of England and America no one can be compelled to accept an appointment as trustee, and there must be an acceptance of the trust either expressly or by implication.[1]

SECTION 29. ESTATE OF THE TRUSTEES.

The estate of the trustee is determined as to its extent by the extent of the interest of the *cestui que trust*. If the legal estate of the trustee is less in quantity than the equitable estate of the *cestui que trust*, it will be enlarged sufficiently to enable the trustee to perform the purposes of the trust. If the estate of the trustee is greater than is necessary for the purposes of the trust there will be a resulting trust back to the trustee as to the residue.

SECTION 30. DUTIES OF TRUSTEES.

The first duty of a trustee is to reduce all of the trust property to his possession. If there are notes, bonds, other choses in action, the parties in any way interested should be notified.[2] Any improper species

[1] This of course does not apply in the case or resulting or constructive trusts.

[2] Judson vs. Corcoran, 17 How., 614; Barney vs. Douglass, 19 Vt., 98.

of securities or property should be sold as quickly as practical.

Having reduced the trust property to his possession, the next duty of the trustee is to keep such property safely, and to invest all the trust funds.[8]

The income of the trust estate, of whatever character, must be carefully collected and preserved.

SECTION 31. DEGREE OF CARE, SKILL AND GOOD FAITH REQUIRED.

The trustee is only held liable for the exercise of a reasonable degree of skill, ability, and energy, but is required to exercise the highest possible degree of good faith.

Note to Lewin, Vol. I, on Trusts, Chapt. 14, Sec. 4, Am. Ed.: "Investment of trust funds.—The trustees are to conduct themselves faithfully and exercise sound discretion, not with a view to speculation, but to make a disposition of the trust funds, considering the probable income as well as the safety of the investment; Emery vs. Batchelder, 78 Me., 233; Miller vs. Congdon, 14 Gray, 116; Lovell vs. Briggs, 2 N. H., 219; Van Orden vs. Van Orden, 10 Johns., 31; Roper on Legacies, 411. If there are any directions in the instrument creating the trust they are to be explicitly followed, as are any rules of court or statute provisions existing in any state. In the absence of these, the trustees may exercise their best judgment in good faith. Trustees should not make investments which will take the trust property beyond the jurisdiction of the court, and ordinarily they will be held responsible for the amount, if they do it, without being especially authorized. Ormiston vs. Olcott, 22 Hun., 270; Ormiston vs. Olcott, 84 N. Y., 339; Burrill vs. Shiel, 2 Barb., 457; Rush's App., 12 Pa. St., 375; Amory vs. Green, 13 Allen, 413; Pet. Baptist Church, 51 N. H., 424; trustees should not invest funds in personal securities; Clark vs. Garfield, 8 Allen, 427; Barney vs. Saunders, 16 How., 545; Smith vs. Smith, 4 Johns., Ch. 281; Spear vs. Spear, 9 Rich. Eq., 184; but the rule is now modified in some states, and in Harvard Coll. vs. Amory, 9 Pick., 446, it was declared 'all that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested."

SECTION 32. DELEGATION OF AUTHORITY BY TRUSTEES.

A trustee is only authorized to delegate his authority where the act delegated is a mere ministerial one, on the one hand, or one requiring special technical skill not possessed by the trustee on the other.

SECTION 33. CO-TRUSTEES.

The respective power of co-trustees depends largely on the terms of the instrument creating it. A trustee is only liable for the default of a co-trustee, when he is himself personally concerned in the transaction or his negligence has permitted such act of the co-trustee.

SECTION 34. ACCOUNTS AND COMPENSATION OF TRUSTEE.

A trustee must render proper accounts at the termination of his trust, and at other times if required.

The English rule as to the compensation of trustees is thus stated in Lewin on Trusts:[4]

"It is an established rule in general, that a trustee shall have no allowance for his trouble and loss of time. One reason is, that on these pretences, if admitted, the trust estate might be loaded and rendered of little value; besides the great difficulty there would be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon the trustee, for it lies in his own option whether he will accept the trust or not. The true ground, however, is, that if the trustee were allowed to perform the duties of the office,

[4] Vol. II, Lewin on Trusts, Chapter XXIV.

and to claim compensation for his services, his interest would be opposed to his duty; and, as a matter of prudence, the court would not allow a trust or executor to place himself in such a false position."

The American rule is more liberal towards the trustee, who, in most cases, will be allowed a reasonable compensation for his services. In either country a trustee will be allowed credit for all his necessary and proper expenses.

The American rule on this subject was discussed at length by the Supreme Court of Illinois in the case of Cook vs. Gilmore,[5] the decision in which case was as follows:

"The question presented by this record is, whether a trustee who accepts and performs the trust, without any contract or stipulation of the parties, or any provision in the order of court appointing him, for compensation for his services, is entitled to compensation for care bestowed and for time expended in executing the trust.

"The rule laid down in the text-books is, 'that a trustee is not entitled to compensation for personal trouble and loss of time.' (Perry on Trusts, 904–906; Hill on Trustees, 889; 2 Lewin on Trusts, 627.) And such seems to be the rule established by the English courts of equity, although in the later cases exceptions to that general rule have been more frequent in cases where the court can find from the attending circumstances, that both parties expected that compensation would be made. (2 Story's Eq. Jur., 1268, and cases cited; authorities supra.) The rule applied, not only to trustees so called, but also to all who held a fiduciary relation, as executors and administrators, mortgagees

[5] 133 Ill., 139.

in possession, receivers and guardians, and to officers, directors and trustees of corporations. The rule is based upon the well recognized principle, upon which courts of equity invariably act, that the trustee should execute the trust for the benefit of the cestui que trust alone, and that he shall derive no profit by reason of the trust. And the rule was adopted and enforced for the reason that while, in a particular case, the allowance of compensation might be justly made, and the estate not to be charged with more than it might otherwise have to bear, yet the adoption of the contrary rule would have the tendency to tempt the trustee to disregard the interest of the beneficiaries, and lead, in general, to the consequence of loading the estate for the benefit of the trustee, by pretenses of care, trouble and loss of time—thus placing the trustee in a position which equity forbids, where his personal interests would conflict with the performance of his duty—and it is held that in this there was no hardship upon the trustee, for he might choose whether he will accept the trust or not. So a trustee might refuse to accept appointment by a court, unless provision was made for proper compensation, and if he undertook the trust with the understanding that upon subsequent application compensation would be allowed, the court may, at the proper time, ascertain and allow the same.

"By this well settled rule, the services of a trustee in the absence of a provision for compensation in advance, are to be performed as a gratuity, without regard to the advantage that may result from his superior care, skill and diligence in the management of the trust estate.

"We are aware that in many of the states of

the Union, and in the Federal Courts, a different rule prevails; but the law, as established by the courts of equity in England, in respect of compensation of conventional trustees, has been so long and firmly established in the jurisprudence of this State that it ought not to be changed by judicial determination. As said by the Appellate Court, the rule has been applied in all its strictness in this State, whenever the question has arisen. (See Constant vs. Matteson, 22 Ill., 546.) In some of the states the right of mere conventional trustees to compensation has been fixed by statute, while perhaps in all, as in this State, laws have been passed allowing compensation of trustees required by law to be appointed, such as executors and administrators, guardians, conservators, and assignees of insolvent estates; and it is now universally held in this country that receivers, being the arm of the court to execute its orders in respect of the property of which the court has taken control, may be allowed compensation out of the funds in his hand. In some, and perhaps a majority, of the states, where renumeration has been provided by statute to those to whom the law entrusts the care and management of the estates of lunatics, infants, deceased persons, insolvents, and the like, the courts, by an equitable construction, have extended the right to voluntary or conventional trustees, when the agreement, deed, will or order of appointment is silent. (See American note to Robinson vs. Pett, supra.) And this view is pressed upon us in this case with great force. But it must be answered regardless of what our views might be, if the question was an open one in this State, that the same statutes now in force, or others in every respect identical in effect, were in force when each of the

decisions of this court referred to upon this question was rendered, and manifestly were not regarded by the court as controlling. Notwithstanding these statutes this court adopted, and has since adhered to, the common law rule.

"Appellant's trusteeship falls clearly within the rule, and while he would be entitled to have allowed him all money actually expended, in good faith, for the preservation of the trust fund, if any, he can recover nothing for his personal or professional services in respect of his trusteeship. His claim for compensation as trustee, as well as for attorney's fee for professional services rendered during the continuance of the trust, were properly disallowed by the court. (Hill on Trustees, 890; Perry on Trusts, 907, and cases supra.)"

SECTION 35. RESIGNATION AND REMOVAL OF TRUSTEES.

A trustee will be permitted to resign his position at any time in the absence of any special circumstances which would render such resignation inequitable.

A court of equity always has the power to remove a trustee for proper cause, such as incompetency, dishonesty, etc.

TWENTY-SECOND SUBJECT.

Equity Pleading.

CHAPTER I.

INTRODUCTORY.

SECTION 1. NATURE AND OBJECT OF EQUITY PLEADING.

The subject of equity pleading is concerned with those rules by which the procedure in equity cases is determined. The object of equity pleading, is to inform the court of the nature of the claim, and of the defense, and to bring the parties to an issue to be decided by the court.

SECTION 2. COMPARISON BETWEEN EQUITY PLEADING AND PRACTICE AND COMMON LAW PLEADING AND PRACTICE.

The greatest difference between the method of procedure in equity and in common law cases is found in the fact that in an equity suit there are (with a few exceptions which will be noted elsewhere) no juries, and questions of fact, as well as of law, are determined by the judge.

The system of equity pleading is much more simple and less technical than the system of common law pleading.

CHAPTER II.

PARTIES TO A SUIT IN EQUITY.

SECTION 3. IN GENERAL.

Parties to a suit in equity are, in general, more numerous than in a suit at law. At common law only two adverse interests can be adjudicated in the same case. While there may be an indefinite number of plaintiffs or of defendants, all the plaintiffs and all the defendants must have a joint or common interest. In a suit in equity any number of mutually adverse interests may be adjudicated in the same suit.

The result of this is, that in a suit in equity the complainant must often join as defendants, not only those parties against whom he seeks relief but also other persons having an interest in the subject matter of the suit.

SECTION 4. CLASSIFICATION OF PARTIES.

Parties to a suit in equity are classified as indispensable, necessary and formal parties.

"Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation. They may be parties or not at the option of the complainant. Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full

justice between them. Such persons may be made parties, if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation. Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." [1]

This classification originated with the Supreme Court of the United States and has become the generally recognized system of classification. The Supreme Court of the United States in discussing this subject in the case of Shields vs. Barrow,[2] said:

"Such being the scope of this bill and its parties, it is perfectly clear that the Circuit Court of the United States for Louisiana could not make any decree thereon. The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others. Thomas R. Shields, the principal, and four out of six, of his indorsers, being citizens of Louisiana, could not be made defendants in this suit; yet each of them was an indispensable party to a bill for rescission of the contract. Neither the Act of Congress of February 28, 1839 (5 Stat. at L., 321, Sec. 1), nor the 47th rule for the equity practice of the circuit courts of the United States enables a

[1] See Fletcher on Equity Pleading, Sec. 40.

[2] 17 Howard, 139; see, also, Minnesota vs. Northern Securities Co., 184 U. S., 199; Ribon vs. Chicago, R. I. & P. R. Co., 16 Wall., 563; Kendig vs. Dean, 97 U. S., 423.

circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such a decree.

"In Russell vs. Clarke's Executors, 7 Cranch, 98, this court said: 'The incapacity imposed on the Circuit Court to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interests of absent persons, it may be the duty of the court to decree, as between the parties before them. But, in this case, the assignees of Robert Murray & Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause till they are parties.'

"The court here points out three classes of parties to a bill in equity. They are: (1) Formal parties; (2) persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and to complete justice by adjusting all the rights involved in it. These persons are commonly termed necessary parties, but if their interests are separable from those of the parties before the court so that the court may proceed to a decree and do complete and final justice without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons, who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or

leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

"A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them, while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.

"Now it will be perceived that in Russell vs. Clarke's Executors, this court, after considering the embarrassments which attend the exercise of the equity jurisdiction of the circuit courts of the United States, advanced as far as this. They declared that formal parties may be dispensed with when they cannot be reached; that persons having rights which must be affected by a decree cannot be dispensed with; and they express a doubt concerning the other class of parties. This doubt is solved in favor of the jurisdiction in subsequent cases, but without infringing upon what was held in Russell vs. Clarke's Executors concerning the incapacity of the court to give relief when that relief necessarily involves the rights of absent persons. As to formal or unnecessary parties, see Wormley vs. Wormley, 8 Wh., 451; Carneal vs. Banks, 10 Wh., 188; Vattier vs. Hinde, 7 Pet., 266. As to the parties having a substantial interest, but not so connected with the controversy that their

joinder is indispensable, see Cameron vs. M'Roberts, 3 Wh., 591; Osborn vs. Bank of U. S., 9 Wh., 738; Harding vs. Handy, 11 Wh., 132. As to the parties having an interest which is inseparable from the interest of those before the court, and who are therefore, indispensable parties, see Cameron vs. M'Roberts, 2 Wh., 571; Mallow vs. Hinde, 12 Wh., 197.

"In Cameron vs. M'Roberts, where the citizenship of the other defendants than Cameron did not appear on the record, this court certified: 'If a joint interest vested in Cameron and the other defendants the court had no jurisdiction over the cause. If a distinct interest vested in Cameron so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone.' And the grounds of this distinction are explained in Mallow vs. Hinde, 12 Wh., 196–198.

"Such was the state of the laws on this subject when the Act of Congress of February 28th, 1839 (5 Stat. at L., 321), was passed and the 47th rule, for the equity practice of the Circuit Court of the United States, was made by this court.

"The first section of that statute enacts: 'That when, in any suit at law, or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not

regularly served with process, or not voluntarily appearing to answer, and the non-joinder of parties who are so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit.'

"This Act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the case of Cameron vs. M'Roberts, 3 Wh., 591; Osborn vs. Bank of U. S., 9 Wh., 738, and Harding vs. Handy, 11 Wh., 132. For this court had already there decided that the nonjoinder of a party, who could not be served with process, would not defeat the jurisdiction. The Act says it shall be lawful for the court to entertain jurisdiction; but as is observed by this court in Mallow vs. Hinde,12 Wh., 198, when speaking of a case where indispensable parties were not before the court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'

"So that, while this Act removed any difficulty as to jurisdiction between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court

rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this Act of Congress, and of the previous decisions of the court, on the subject of that rule. Hagan vs. Walker, 14 How., 36. It remains true, notwithstanding the Act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court in Elendorf vs. Taylor, 10 Wh., 167: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach—as if such party be a resident of another state—ought not to prevent a decree upon its merits.' But if the case cannot be thus completely decided, the court should make no decree.

"We have thought it proper to make these observations upon the effect of the Act of Congress and of the 47th rule of this court, because they seem to have been misunderstood and misapplied in this case; it being clear that the Circuit Court could make no decree, as between the parties originally before it, so as to do complete and final justice between them, without affecting the rights of absent persons, and that the original bill ought to have been dismissed."

The difference between necessary and proper parties was discussed in the recent case of Sioux City Terminal Railroad and Warehouse Co. vs. Trust Co. of North America,[8] as follows:

[8] 49 U. S. App., 523; 82 Fed., 126.

"The general rule in chancery is that all those whose presence is necessary to a determination of the entire controversy must be, and all those who have no interest in the litigation between the immediate parties, but who have an interest in the subject-matter of the litigation which may be conveniently settled therein, may be made parties to it. The former are termed 'necessary' and the latter the 'proper' parties to the suit. The limitation of the jurisdiction of the federal courts by the citizenship of the parties and the inability of those courts to bring in parties beyond their jurisdiction by publication, have resulted in a modification of this rule, and a practical division of the possible parties to suits in equity in those courts into indispensable parties and proper parties. An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court, or the suit will be dismissed. The complainant may join every proper party, and he must join every proper party who would have been a necessary party under the old chancery rule, unless his joinder would oust the jurisdiction of the court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the court, or

otherwise. If, however, such a party is incapable of being made a party, or if his joinder would oust the jurisdiction of the court as to the parties before it, the suit may proceed without him, and the decree will not affect his interests."

"The following persons are not necessary parties unless their presence is required for the protection of others who have been made defendants:

(a) Persons whose interest is very small.

(b) Persons whose interest has been created to deprive the court of jurisdiction.

(c) Persons who consent to the decree sought.

(d) Persons against whom the complainants waive their rights.

(e) Persons who are legally represented."

"Persons who are interested in the controversy, but whose interest is such that the controversy can be satisfactorily determined as to those made parties without prejudicing the rights of those not made parties, are necessary parties if they can be reached, but otherwise the court will proceed without them." [4]

SECTION 5. PARTIES COMPLAINANT AND DEFENDANT.

There is not the same hard and fast division between parties complainant and defendant in equity as between plaintiffs and defendants at common law. In equity if a person who would properly be a complainant refuses to join with the other parties having a common interest with him he may be made a defendant. We thus see that in equity parties with the same interest may be (in form) on opposite sides of the case, while one defendant may be seeking relief from another defendant. A party made a defendant in a bill may file a cross bill asking relief against another defendant.

[4] Shipman on Equity Pleading, Sec. 14.

SECTION 6. MISJOINDER AND NONJOINDER.

Either the misjoinder or the nonjoinder of defendants will be ground for the dismissal of the bill.

CHAPTER III.

OUTLINE OF PROCEEDINGS IN EQUITY.

SECTION 7. THE PROCEEDINGS.

The order of the proceedings to be considered (other than the pleadings which are taken up in the following chapters) in a suit in equity, is as follows:

Process for appearance.
Appearance.
Proceedings on default.
Interlocutory proceedings.
Taking of evidence.
Reference to master.
The hearing.
The decree.
Correction or reversal of decrees.
Enforcements of decrees.

SECTION 8. PROCESS FOR APPEARANCE.

The regular process for appearance in equity, is the writ of subpoena, directed to the defendant, commanding him, under a penalty, personally to appear in court at a prescribed time, and answer the allegations of the bill. It issues in all original proceedings in equity immediately upon the filing of the bill.

Obedience to the subpoena may be enforced by attachment for contempt of court in cases where discovery is necessary from the defendant.

SECTION 9. APPEARANCE.

As in proceedings in common law cases, appearance may be either voluntary or involuntary; and, also,

either general or special. A special appearance is one where the defendant appears for some special object, which does not involve any contest as to the merits of the complainant's case. The most common object in appearing specially is to contest the jurisdiction of the court.

Section 10. Proceedings on Default.

If a defendant fails to appear, or after appearance fails to answer the bill, the bill may be taken *pro confesso*. In some jurisdictions there must be a rule upon the defendant to answer before a bill can thus be taken *pro confesso*.[1] The allegations of a bill taken *pro confesso* are to be strictly construed,[2] and although "It is held that the bill, when taken as confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or matters which, from their nature, and the course of the court, require an examination of details, the obligation to furnish proof rests on the complainant.[3] It is purely a matter of discretion with the court whether it will require the complainant to make proof against defendants who fail to answer.[4] A party against whom a bill has been taken for confessed cannot complain and assign for error that the proof does not sustain the allegations of the bill."[5,6]

Section 11. Interlocutory Proceedings.

By interlocutory proceedings are meant the various steps between the commencement and termination

[1] United States Equity, Rule 18; Nesbit vs. St. Patrick's Church, 9 N. J. Eq., 76; Pendleton vs. Evans, 4 Wash. C. C., 336; Fed. Cas. No. 10,920.

[2] Breckenridge vs. Water's Heirs, 4 Dana (Ky.), 620.

[3] Henry vs. Seager, 80 Ill. App., 172.

[4] Manchester vs. McKee, 9 Ill., 511; Ferguson vs. Sutphen, 8 Ill., 547.

[5] Johnson vs. Donnell, 15 Ill., 97. Shipman, 145 a.

[6] Fletcher on Equity Pleading and Practice, Sec. 146.

of a suit, such as the amending of the pleadings, the appointment of a receiver, etc.,[7] interlocutory decrees, etc.

SECTION 12. REFERENCE TO A MASTER.

A master in chancery is a quasi judicial officer whose duty it is to aid the equity judge to make investigations as to the facts in the case, in order to aid the judge in the determination of the case before him, and to perform special ministerial acts, such as selling property. The investigations of the master are pursued by hearings held before him, which hearings are conducted very much as regular court proceedings.

The character and duties of this office were thus discussed by the Supreme Court of the United States, in the case of Kimberly vs. Arms.[8]

"A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and is usually employed to take and state accounts, to take and report testimony, and to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property involved, and similar services. The information which he may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence. Basey vs. Gallagher, 87 U. S., 20; Wall., 670, 680 (22; 452; 453); Quinby vs. Conlon, 104 U. S., 420, 424 (26; 800; 801).

"In practice it is not usual for the court to reject the report of a master, with his findings upon the

[7] For discussion of Receivers, see subject of Equity Jurisprudence, Vol. VII, Subject 20, Section 115.

129 U. S., 512

matter referred to him, unless exceptions are taken to them, and brought to its attention, and upon examination the findings are found unsupported or defective in some essential particular. Medsker vs. Bonebrake, 108 U. S., 66 (27; 654); Tilghman vs. Proctor, 125 U. S., 136, 149 (31; 664; 669); Callaghan vs. Myers, 128 U. S., 617, 666 (ante 547; 562). It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference, by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration —a proceeding which is governed by special rules— is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.

"The reference of the whole case to a master, as here, has become in late years a matter of more common occurrence than formerly, though it has always been within the power of a court of chancery, with the consent of parties, to order such a reference. Haggett vs. Welsh, 1 Sim., 134; Dowse vs. Coxe, 3 Bing., 20; Prior vs. Hembrow, 8 Mees & W., 773. The power is incident to all courts of superior jurisdiction. Newcomb vs. Wood, 97 U. S., 581, 583 (24; 1085; 1086). By statute, in nearly every State, provision has been made for such references of controversies at law. And there is nothing in the nature of the proceeding, or in the organization of a court of equity, which should preclude a resort to it in controversies involving equitable considerations."

Section 13. Taking of Evidence.

The method of taking evidence in equity suits differs very greatly from that followed in common law cases. Evidence in equity suits is almost invariably taken outside of court, either in hearings of court, before masters in chancery, or in the form of depositions, and is presented to the court in writing. Witnesses, however, may be heard at the regular hearing of the case. The force of the answer as evidence will be considered in a later chapter.

Section 14. The Hearing.

In general, the hearing in equity does not take place until not only the pleading but also the taking of the evidence has been completed. At the hearing the case is presented to the court, on its merits, the master's report and the depositions are read, and the case is signed by the counsel on each side.

SECTION 15. THE DECREE.

"The decree of a court of chancery is its order or sentence determining and adjusting the rights and interests of the parties to the suit upon the issues submitted and heard."

Decrees are divided into interlocutory and final decrees. Interlocutory decrees are those given during the progress of the case, and settling some preliminary matter.

A final decree is one which disposes of the suit on its merits, leaving nothing further for the court to do.

SECTION 16. CORRECTION OR REVERSAL OF DECREES.

A final decree, if erroneous or unjust, may be corrected or reversed as follows:

(a) Upon a hearing, or by a new or supplemental bill in the nature of a bill of review, if the decree has not been enrolled.

(b) By bill of review for defects in substance; and, if the decree has been enrolled, formal or technical errors or defects by petition.

(c) If obtained through fraudulent means, by a bill to impeach such decree on that ground.

(d) By appeal.

The granting of a rehearing is discretionary with the trial court. Bills of review and bills to impeach a decree on the grounds of fraud will be considered in the following chapter.

SECTION 17. APPEALS.

"An appeal is a process of civil law origin, and is the appropriate mode of review for causes originating in a court of chancery.[9] Unless statutes otherwise

[9] Pennington vs. Coxe, 2 Cranch, U. S., 61; Lyles vs. Barnes, 40 Miss., 609.

provide, it removes the whole cause, subjecting the facts as well as the law to review and retrial.[10] A technical appeal is the exclusive appellate remedy for review of cases in equity." [11] [12]

Section 18. Enforcements of Decrees.

Originally, equity acted only *in personam* not *in rem*. A court of equity could only order a defendant to do a certain thing, and their attempt to coerce him into doing so by imprisoning him for contempt of court, or by the sequestration of his property. At the present time an execution against the property of the defendant may issue in equity suits as well as in common law cases. Bills to enforce decrees will be considered in the following chapter.

[10] Goodrich vs. Smith, 67 Mich., 1.
[11] Jarvis vs. Blanchard, 6 Mass., 4; Cook vs. Hoyt, 13 Ill., 144.
[12] Ency. of Pleading and Practice, Vol. II, p. 31.

CHAPTER IV.

THE BILL OF COMPLAINANT.

SECTION 19. DEFINITION.

The bill in equity is the first step in the case, being filed even before the issuance of process upon the defendant.

A bill in equity performs a two-fold office:

(a) As a pleading, it is a statement of the complainant's case and prays relief.

(b) As an examination of defendant, it seeks a discovery of facts upon which to base a decree.

A bill in equity must contain a statement of all the facts upon which the claim for the relief sought is based. Much greater freedom in the methods of stating the facts is allowed in a bill in equity than in a common law declaration.

SECTION 20. CLASSIFICATION OF BILLS.

Bills in equity are primarily divided into original bills, and bills not original.

Original bills are in turn subdivided into bills praying relief, and bills not praying relief.

Original bills praying for relief may be divided into three classes:

Bills praying the decree or order of the court, touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of

the complainant's right, bills of interpleader, and bills of certiorari.

Original bills not praying relief are in turn subdivided into:

Bills to perpetuate testimony.
Bills to examine witnesses *de bene esse.*
Bills of discovery.

Bills not original are divided into:

Interlocutory bills, and
Bills in the nature of original bills.

Interlocutory bills include:

Supplemental bills and original bills in the nature of supplemental bills.
Bills of revivor and original bills in the nature of bills of revivor, and
Bills of revivor and supplement.

The five classes of bills in the nature of original bills are:

Cross bills.
Bills of review and bills in the nature of bills of review.
Bills to impeach a decree on the ground of fraud.
Bills to suspend or avoid the operation of decrees, and
Bills to carry decrees into execution.

Section 21. Original Bills.

Original bills are those which relate to some matter not before litigated in the court by the same persons, standing in the same interests. Such a bill begins the suit or controversy.

The classification of original bills has been given in the previous section.

SECTION 22. ORIGINAL BILLS PRAYING THE DECREE OR ORDER OF THE COURT TOUCHING SOME RIGHT CLAIMED BY THE COMPLAINANT IN OPPOSITION TO THE DEFENDANT.

The bills falling under this division of the classification adopted are the usual forms of bills in equity. The various forms of such bills are very numerous, being varied to give relief in the various cases falling under equity jurisdiction, and already considered under the first subject of this volume.

Among the more important forms of this species of bills are:

Bills to foreclose mortgages,
Bills to redeem,
Bills for partition,
Bills to quiet title,
Bills to reform or cancel instruments,
Bills for specific performance,
Bills to set aside fraudulent conveyances,
Bills for infringement of patents,
Creditors' bills,
Bills for injunctions.

The nine parts of a bill in equity of this character will be taken up in the following chapter.

SECTION 23. BILLS OF INTERPLEADER.

Bills of interpleader have been already discussed under the subject of Equity Jurisprudence.

"The essential requirements of a good bill of interpleader are: (1) that the same thing, debt, or duty is claimed by both or all of the parties against whom relief is demanded; (2) that all the adverse title or claim is dependent on or is derived from a common

source; (3) that the person asking the relief does not have or claim any interest in the subject-matter; (4) that he stands perfectly indifferent between those claiming the thing, debt, or duty, being in the position merely of stakeholder. To maintain this bill, the complainant must be in possession of some specific chattel or definite sum of money to which different parties make claim. Such a bill will not lie if the complainant himself claims any interest in the property in dispute. He must stand neutral between the parties."[1]

In Cogswell vs. Armstrong,[2] the Supreme Court of Illinois said:

"A bill of interpleader is ordinarily exhibited where two or more persons claim the same debt, or separate interest, and he, not knowing to which of the claimants he ought, of right, to render the same debt, duty or other thing, fears that he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead and state their several claims, so that the court may adjudge to whom the same debt, duty or other thing belongs. Story's Equity Pleading, sec. 291.

"In Haggart vs. Cutts, 1 Craig & Phillips, 204, Lord Cottenham said: 'The definition of 'interpleader, is not and cannot now be disputed. It is where the plaintiff says, 'I have a find in my possession, in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into Court, and you shall contest it between yourselves.'

"In this case, one of the defendants did not

[1] Fletcher on Equity Pleading, Sec. 773.

[2] 77 Ill., 139, 141

contest the right to the money. The other defendants appeared and insisted upon the payment of the money to them. The complainant, however, who could only file his bill and have it determined which of the defendants claiming the fund was entitled to it, is urging that a portion of the fund should go to him. We are aware of no authority which would sanction the right of appellant to enter into the contest for a portion of the fund."

Section 24. Bills of Certiorari.

A bill of certiorari is used for the purpose of removing a suit from an inferior to a superior court, for the purpose of further proceedings in the later court. This form of bill is very rare in America and perhaps obsolete.

Section 25. Original Bills Not Praying Relief.

There are in equity a class of bills utterly unlike any form of action at common law, which do not ask relief against the defendant, the object of such bills being the securing of evidence for use in other cases. The three forms of this class of bills will be taken up in the three following sections.

Section 26. Bills to Perpetuate Testimony.

Bills to perpetuate testimony can only be used in cases when there is no present pending action in which the facts can be investigated but where the party seeking the perpetuation of such testimony is in danger of having an action brought against him, in which such testimony will be necessary for his defense. Bills of this character have gradually fallen into disuse through the development of more convenient methods of securing the same result.

SECTION 27. BILLS TO TAKE TESTIMONY DE BENE ESSE.

A bill to take testimony de bene esse is for the purpose of obtaining testimony in a pending suit, and may be brought by either complainant or defendant. Bills of this character were discussed in the case of Richter vs. Jerome,[8] the decision in which case was in part as follows:

"To entitle the party to maintain a bill of this description the plaintiff must aver: (1) That there is a suit depending in which the testimony of the witnesses named will be material. Story, Eq., Sec. 307. (2) That the suit is in such condition that the depositions cannot be taken in the ordinary methods prescribed by law, and that the aid of the court of equity is necessary to perpetuate testimony. (3) The facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined, that the court may see that they are material to the controversy. (4) The necessity for taking the testimony, and the danger that it may be lost by delay.

"A failure to make the proper averment in any of these particulars is good ground for a demurrer, but we do not understand that as a rule the allegations of the bill can be put in issue by an answer. In cases of bills strictly to perpetuate testimony (which will only lie when suit has been commenced) the defendant may allege by way of plea any fact that may tend to show that there is no occasion to perpetuate the testimony; as for instance, that there exists no such dispute or controversy as that alleged in the bill, or that the plaintiff has no such interest in it as will justify his application to perpetuate the testimony. Story, Eq. Pl., 306a. But in bills to take testimony

[8] 25 Fed. Rep., 679.

de bene esse there must be a suit depending in some court, and this of itself is evidence of a controversy between the parties. In Ellice vs. Roupell, Story, Eq. Pl., 306a note, Sir J. Romilly stated the rule to be in regard to bills for perpetuating testimony that defendant, by consenting to answer the plaintiff's bill, admitted his right to examine witnesses in the case, and that implies all that is demandable. 'For if there is really any *bona fide* controversy between the parties, the right to perpetuate the testimony follows as a matter of course.' In a case of the kind under consideration, where a hearing cannot be had in the supreme court in less than two or three years, and the witnesses are some of them old and infirm, it is obvious that the plaintiff ought in some way or another to be able to secure their testimony against the contingency of death, absence, or mental alienation. At the same time resort ought not to be had to the extraordinary power of a court of equity, if the usual methods of procedure prescribed by statute are competent to afford relief. The case is no longer 'depending,' in the circuit court, and hence is removed from the operation of the act of Congress permitting depositions to be taken *de bene esse*. Rev. St., Sec. 863. From the time the appeal was perfected, the jurisdiction of the circuit court was suspended, and so remains until the cause is remanded from the appellate court. Slaughter-house Cases, 10 Wall., 273. It has also been expressly held that this act has no application to cases pending in the Supreme Court. The Argo, 2 Wheat., 287."

Section 28. Bills of Discovery.

A bill of discovery is one brought against the

opposite party in an action at law, for the purpose of obtaining evidence as to facts within the knowledge of the defendant, (i. e., in the bill of discovery, who may be the plaintiff in the original action) or to secure the production of deeds or other written instruments in his presence.

"Under the existing practice in courts of law in this State, a plaintiff can obtain the evidence of a defendant upon the trial by examining him as a witness, and can obtain a production of books and papers both before and upon the trial. He can also compel a sworn answer to his complaint and thus require the defendant to admit or deny under oath all the material allegations of fact in his complaint. The practice which thus prevails is the practice of the federal courts also, by force of sections 724, 858, 914, Rev. St. He cannot obtain the testimony of the defendant before the trial in an action pending in this court, although he can do so in the state courts, because Section 861 of the Revised Statutes, as construed in Beardsley vs. Little, 14 Blacthf., 102, requires such testimony, unless taken *de bene esse* or by commission to be taken in the presence of the court and jury at the trial. See also Easton vs. Hodges, 7 Biss., 324.

"The jurisdiction in equity for discovery originated in the absence of power in courts of law to compel a discovery by their own process, either by means of the oath of a party or by the production of deeds, books and writings in his possession or control. But it does not follow, because courts of law now have power to extend such relief, that a court of equity should forego the exercise of an ancient and well-settled jurisdiction. No principle is more vigorously

asserted by courts of equity than that they will not yield a jurisdiction once legitimately exercised, because an enlargement of the ordinary powers of courts of law has rendered a resort to equity no longer necessary. There can be no ebb and flow of jurisdiction dependent upon external changes. Being once legitimately vested 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. Story, Eq., Sec. 64. Accordingly, it has been frequently held that a court of equity should not refuse to entertain a bill for discovery, although, by the enlargement of the jurisdiction and remedies exercised by courts of law, similar relief could be obtained by the complainant in his action at law. Lovell vs. Galloway, 17 Beav., 1; British Empire Shipping Co. vs. Somes, 3 Kay & J., 433; Shotwell's Admr. vs. Smith, 20 N. J. Ch., 79; Cannon vs. McNab, 48 Ala., 99; Millsaps vs. Pfeiffer, 44 Miss., 805.

"It is obviously desirable to ascertain the merits of a case at its outset, so far as may be practicable, when this can be done, with the formalities and safeguards of regular procedure, rather than to await the result of an elaborate trial. The saving of time and expense which may thus be effected is beneficial, not only to the immediate litigants but to the public also. There are, therefore, persuasive considerations why a party should be permitted to resort to a bill of discovery when the facts alleged in the bill reasonably indicate that such a remedy will conduce to the safe and convenient prosecution of his action or defense at law. It is the rule of the English courts that a party may maintain a bill of discovery in equity, not only when he is destitute of other evidence than the

oath of the adverse party to establish his case, but also to aid such evidence or to render it unnecessary. Montague vs. Dudman, 2 Ves. Sr., 398; Finch vs. Finch, Id., 491; Brereton vs. Gamul, 2 W. Atk., 241. In Earl of Glengall vs. Fraser, 2 Hare, 99, it was said by Vice-Chancellor Wygram: 'The plaintiff is, in this court, entitled to an answer from the defendant, not only in respect to facts which he cannot otherwise prove, but also as to facts, the admission of which will relieve him from the necessity of adducing proof from other sources.' There are many American authorities to the same effect, among which may be cited Marsh vs. Davison, 9 Paige, 580; Peck vs. Ashley, 12 Metc., 381; Stacy vs. Pierson, 3 Rich., Eq., 152; Williams vs. Wann, 8 Blackf., 477.

"Other authorities hold that in order to maintain such a bill it must appear affirmatively that the case of the party at law cannot be established by the testimony of other witnesses, or without the aid of the discovery he seeks. Such is the rule declared in Brown vs. Swann, 10 Pet., 497, where it is held that the complainant must show by his bill that he is unable to prove the facts sought to be discovered by other testimony than that of the defendant. That was a case, however, in which the complainant sought general relief as well as discovery, thus seeking to withdraw the whole jurisdiction from the court of law of a cause of action properly triable there and transfer it to a court of equity, and the decision is not applicable where the bill is for discovery merely. Story's Eq. Pl., Sec. 324. The same observation applies to the case of Drexel vs. Berney, 14 Fed. Rep., 268, decided in this court." [4]

[4] Colgate vs. Compagnie Francaise du Telegraphe de Paris a New York, 23 Fed. Rep., 82.

In many of the states a somewhat different view is taken, and bills for discovery alone will be no longer maintained under any circumstance.

Section 29. Bills Not Original.

"Bills not original are those which relate to some matter already litigated in court between the same parties, and are divided into

Interlocutory bills, and

Bills in the nature of original bills."

Section 30. Interlocutory Bills.

Interlocutory bills are bills brought during the progress of the suit on the original suit, and whose object is to add to an original bill by correcting defects or supplying matters necessary to the suit; or to continue the suit if abated; and obtain the benefit of proceedings already had; or for both purposes.

Interlocutory bills include

Supplemental bills and original bills in the nature of supplemental bills;

Bills of revivor and original bills in the nature of bills of revivor, and

Bills of revivor and supplement.

Section 31. Supplemental Bills and Bills in the Nature of a Supplemental Bill.

Mr. Fletcher in his work on Equity Pleading, thus states the nature and object of a supplemental bill:

"A supplemental bill lies when there is a defect in the proceedings occurring too late to be remediable by amendment, or where, by an event subsequent to the commencement of the suit, a new interest in the matter in litigation is claimed by an existing party to the suit, or a new party claims, but not by mere

operation of law, the interest which was claimed by an existing party. It is merely an addition to the original bill. It is a well settled rule that nothing can be inserted in an original bill by way of amendment, which has arisen subsequent to the commencement of the suit, but that the same must be stated in the supplemental bill. It may be filed to supply defects in the frame of the original bill, and this may be done either before or after decree, and to aid or impeach the decree, or to put new matter in issue, as a new interest vested in an old party, or an interest devolving upon a new party."[5]

Where it is desired to bring in new parties as defendants to the bills, this must be done by a bill in the nature of a supplemental bill.[6]

Section 32. Bills of Revivor and Bills in the Nature of a Bill of Revivor.

A bill of revivor, or a bill in the nature of a bill of revivor, is one brought to revive a bill which has abated on account of the death of one of the parties, or the marriage of a female complainant.

The distinction between the two above mentioned forms of bills has been thus stated:

"The bill is an available remedy whenever the interest of the former party survives, and is transmitted to one whose title as his representative cannot be disputed; and the only question to be determined is the fact of the existence of such representative. If the title of the latter is open to contest, the remedy is by an original bill in the nature of a bill of revivor."[7]

[5] Fletcher on Equity Pleading, Sec. 825.

[6] Bowie vs. Muiter, 2 Ala., 406; Sedgwick vs. Cleveland, 7 Paige (N. Y.), 287.

[7] Shipman on Equity Pleading, Sec. 201.

SECTION 33. BILLS OF SUPPLEMENT AND REVIVOR.

A bill of supplement and revivor, as is readily seen from the name of the bill, is one which seeks both to revive the bill and to introduce new matter.

SECTION 34. BILLS IN THE NATURE OF ORIGINAL BILLS.

Bills in the nature of original bills are those for the purpose of cross litigation or for the purpose of controverting or suspending or reversing some decree of court or for carrying it into execution. The various classes of bills in this division are as follows:

Cross bills;

Bills of review and bills in the nature of bills of review;

Bills to impeach a decree on the ground of fraud.

Bills to suspend or avoid the operation of decrees;

Bills to carry decrees into execution.

SECTION 35. CROSS BILLS.

A cross bill is a bill brought by a defendant in a suit in equity, who seeks some affirmative relief against some other party to the suit. It may be brought either against the complainant, or against some other defendant. Thus if a bill is brought for the specific performance of a contract the defendant may file a cross bill asking for the cancellation of the contract; or if in a bill to foreclose on a first mortgage, a second mortgagee is made a defendant, he may file a cross bill against the mortgagor.

A cross bill may be brought for the purpose merely of obtaining discovery.

Cross bills are thus discussed by the Supreme

Court of the United States [8] in the case of Morton's Louisiana & Texas R. & S. Co. vs. Texas Central R. Co.:

"A cross-bill,' says Mr. Justice Story (Eq. Pl., No. 389), 'ex *vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill.' And as illustrative of cross-bills for relief, he says (No. 392): 'It also frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill, or cross-bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties, and upon the proper proofs.'

"It seems to us that in order that a decree might be made upon the whole matter in dispute, brought completely before the court, the bill in question was necessary and was correctly styled a cross-bill. In no proper sense were new and distinct matters introduced by it, which were not embraced in the original and amended and supplemental bills, and while it sought equitable relief, it was such as, in point of jurisdiction over the subject matter, the court was competent to administer. It may be that, so far as it sought the further aid of the court beyond the purposes of defense to the original bill, it was not a pure cross-bill, but that is immaterial. The subject matter was the same, although the complainant in the cross-bill as-

[8] 137 U. S., 171.

serted rights to the property different from those allowed to it in the original bill, and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained except through a cross-bill, and different relief from that prayed in the original bill would necessarily be sought. This bill was filed, on leave, before the testimony was taken, and though there should be as little delay as possible in filing bills of this kind, yet that was a matter entirely within the discretion of the court, which could have directed it to be filed even at the hearing. And whether this bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill, there is no error in calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the Circuit Court did not depend upon the citizenship of the parties, but on the subject matter of the litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims as to its ultimate possession and control.

"Milwaukee & M. R. Co. vs. Soutter, 69 U. S., 2 Wall., 609 (17, 886); People's Bank vs. Calhoun, 102 U. S., 256 (26, 101); Krippendorf vs. Hyde, 110 U. S., 276 (28, 145)."

SECTION 36. BILLS OF REVIEW AND BILLS IN THE NATURE OF REVIEW.

Bills of review and bills in the nature of a bill of review, are bills filed to obtain a modification or reversal of a decree made upon a former bill. If the decree has been signed and enrolled a bill of review

is used; if the decree has not been enrolled a bill in the nature of a bill of review is the proper remedy. Bills of review and bills in the nature of a bill of review may be brought either on the ground of error apparent on the face of the record, or newly discovered evidence. In the first case the bill of review may be filed as a matter of right, but in the latter case, the consent of the court is first required.

Section 37. Other Bills in the Nature of Original Bills.

The other species of bills in equity are not of very great importance.

A bill may be brought, as a matter of right, to set aside a decree which has been obtained by fraud.

The use of bills to suspend or avoid the operation of decrees, which were formerly common in England, especially in times of great political disturbance, have become obsolete in this country.

"Bills to effectuate or carry out decrees are filed to carry a decree into execution when, by reason of neglect of the parties or from some other cause, it has become impossible to do so without the further decree of the court to that end."

CHAPTER V.

PARTS OF A BILL.

SECTION 38. THE PARTS OF A BILL IN EQUITY.

The nine parts of an ordinary bill in equity are as follows:

(a) The address.
(b) The introduction.
(c) The premises or stating part.
(d) The confederating part.
(e) The charging part.
(f) The averment of jurisdiction.
(g) The interrogating part.
(h) The prayer for relief.
(i) The prayer for process.

Of these the first three and the last two are essentials, while the fourth, fifth, and sixth and seventh, may be dispensed with.

SECTION 39. THE ADDRESS.

The address is a purely formal, though necessary part of the bill, and should contain the appropriate and technical description of the court in which the complainant seeks relief.

SECTION 40. THE INTRODUCTION.

The introduction contains the names and domiciles of the complainants and of the character in which they sue. In the Federal courts the names and descriptions of the defendants are also inserted in the introduction, but in the state courts this is left to the premises.

Section 41. The Premises or Stating Part.

Perhaps the most important of all the parts of a bill in equity is the premises or stating part. Here the complainant must set out the statement of the facts upon which his cause of action depends.

"The statement must allege the existence of every fact necessary to entitle the complainant to equitable relief. It must be complete in itself, and cannot be aided or enlarged by reference to other parts of the bill."

In Smith vs. Wood, the court said: "No rule of equity pleading is better settled than that which declares that every material fact which is necessary for a complainant to prove to establish his right to the relief he asks must be alleged in the premises of his bill with reasonable fullness and particularity. A suitor who seeks relief on the ground of fraud must do something more than make a general charge of fraud. He must state the facts which constitute the fraud, so that the person against whom relief is sought may be afforded a full opportunity, not only to deny or explain the facts charged, but to disprove them. He has a right to know in advance just what he will be required to meet." [1]

Much less formality is required in stating a case in a bill in equity than in a common law declaration.

The bill should not contain arguments mingled with facts in the premises.[2]

Section 42. The Confederating Part.

The confederating part consists of a charge that the defendants and divers other persons unknown, but

[1] 42 N. J. Eq., 563; 7 Atl., 881.

[2] Weisman vs. Mining Co., 4 Jones Eq. (N. C.), 112.

whose names when discovered it is prayed may be inserted in the bill, have combined and confederated together to defraud complainant of his rights.

The reason for inserting this part is found in the fact that it was formerly considered necessary in order to permit the later addition of other parties who might be found necessary to the suit. This view has now been abandoned, and this part of the bill is absolutely unnecessary. It may be inserted or left out at the pleasure of the pleader.

SECTION 43. THE CHARGING PART.

The charging part of a bill consists of the statement of a defense which it is anticipated the defendant will set up and a denial thereof. The purpose of this part is to enable the complainant to file interrogatories relative to such anticipated defense. Under the Federal equity rules this part of the bill may be included in the premises.

SECTION 44. THE AVERMENT OF JURISDICTION.

The averment of jurisdiction consists of a statement that the acts of the defendant are contrary to equity and good conscience and that the complainant has no relief except in a court of equity. This averment is absolutely without value. If the premises make out a cause for equitable relief this averment is unnecessary, and if no cause for relief has been shown, this clause cannot give equity jurisdiction.

SECTION 45. THE INTERROGATING PART.

The interrogating part of a bill is in effect a bill for discovery inserted in the bill. Interrogations may be either general or special. A general interrogatory prays:

"That the defendant may full answer make to all and singular the premises as fully and completely as if the same were repeated and he specially interrogated thereto."

Special interrogatories begin with the form of a general interrogatory, and then continue as follows: "And that more especially said confederates may, in manner aforesaid, answer and set forth whether," etc.; then inserting the particular question to which an answer is sought.

Interrogatories must be confined to matters relative to the complainant's cause of action. The defendant cannot be questioned concerning matters which properly relate to his defense, and still less as to matters which have no connection with the suit.

Section 46. The Prayer for Relief.

The prayer for relief is a petition to the court for the relief of such. The prayer may be either for general or special relief. Generally the prayer is for both.

The prayer for special relief enumerates and asks for the particular relief to which the complainant considers himself entitled.

The prayer for general relief asks, in general terms, for such relief in the premises as shall be agreeable to equity.

Under a general prayer for relief the court can grant any form of relief which the facts of the case will justify, except special writs, such as injunctions, or ne exeat, or special orders during the continuance of the suit.[3]

[3] Haworth vs. Taylor, 108 Ill., 275; Franklin vs. Greene, 2 Allen, 519; African M. E. Church vs. Conover, 28 N. J. Eq., 157.

SECTION 47. THE PRAYER FOR PROCESS.

The last part of a bill in equity is the prayer for process, which is a request for the issuing of process to compel the defendant to appear to answer the bill and abide by the decree of the court. The ordinary process prayed for is the writ of subpoena.

The omission of the prayer for process renders the bill demurrable.[4] If the defendant answers in such cases, however, he waives the defect.[5]

[4] Wright vs. Wright, 8 N. J. Eq., 143.

[5] Segee vs. Thomas, 3 Blatch., 11; Fed. Cas., No. 12,633.

CHAPTER VI.

PLEADING BY DEFENDANT.

SECTION 48. THE VARIOUS METHODS OF DEFENSE OPEN TO DEFENDANT.

Upon the filing of the bill of complaint and the service of process upon the defendant, four methods of defense become available to the defendant, who can either:

(1) Disclaim,
(2) Demur,
(3) Plead, or
(4) Answer.

These four methods of defense will be the subject of the four succeeding chapters. A defendant may combine two or more of these defenses, as by disclaiming to part of the bill and demurring to the balance, or by demurring to one part and answering the remaining portion.

Chapter VII.

THE DISCLAIMER.

Section 49. The Disclaimer.

A disclaimer is a pleading by the defendant disclaiming and renouncing all interest in, or claim to, the subject-matter of the controversy.

This method of procedure is open to the defendant when he is merely made a party to the suit on account of some interest or claim in the subject matter which he is believed to possess. If affirmative relief is sought against a defendant, he cannot relieve himself of responsibility by disclaiming.

CHAPTER VIII.

THE DEMURRER.

SECTION 50. DEFINITION.

In a demurrer the defendant denies that the complainant has set forth a cause of action. The demurrer raises a question of law and is the proper method of defense when the ground of the defense is apparent upon the face of the bill itself, either from the matter contained in it, or from a defect in its frame.

SECTION 51. COMPARISON BETWEEN DEMURRERS AT COMMON LAW AND IN EQUITY.

A demurrer in equity can only be made to the bill, while in common law it can be made to any of the pleadings. A demurrer is the only way of raising a question of law at common law, while in equity such a question may be tried on an answer.

SECTION 52. CLASSIFICATION OF DEMURRERS.

The general classification of demurrers is into general and special demurrers.

A demurrer also may be to the whole bill or to a part of the bill. There may be a demurrer to discovery alone.

Other forms of demurrers to be considered are speaking demurrers, and demurrers *ore tenus*.

SECTION 53. GENERAL AND SPECIAL DEMURRERS.

A general demurrer is one which assigns no special ground of objection, save that the bill is without

equity. It is generally sufficient as to all defects in substance.

A special demurrer is one which specifies the particular defects objected to.

A special demurrer must always be used where the objection is to the form of the bill.

The form of demurrer generally used is both general and special.

Section 54. Demurrers to a Part of a Bill.

A demurrer may be filed to a part of the bill, which is separable from the remainder thereof. In such a case the defendant must disclaim, plead or answer to the remainder of the bill.

Section 55. Demurrers Ore Tenus.

Where there is a special demurrer to the whole of the bill, and the special causes of demurrer are overruled, the defendant will be allowed to set up other objections, which can be raised by demurrer, orally at the trial. The only effect of this is to give the defendant the same advantage as if his demurrer had been both special and general.

Section 56. Speaking Demurrers.

A demurrer which sets forth matters not appearing upon the face of the record is called a speaking demurrer, and is bad.

Section 57. Grounds for Demurrers.

The grounds for objections to the relief sought which may be taken by demurrer may be summarized as follows:

(1) To the jurisdiction of the court.
  (a) That the subject of the suit is not within the jurisdiction of a court of equity.
  (b) That some other court of equity is vested with the proper jurisdiction.
  (c) That some other court, than an equity court, is vested with the proper jurisdiction.
(2) To the person of the complainant.
  (a) That the complainant has not legal capacity to sue; or
  (b) That he has no title to the character in which he sues.
(3) To the substance of the bill.
  (a) That the complainant has no interest in the subject-matter of the suit.
  (b) That the defendant is not answerable to him respecting the same.
  (c) That the defendant is without interest in the same.
  (d) That the complainant shows no title or equity to the relief which he seeks.
  (e) That the bill does not embrace all that the controversy properly includes and leaves the defendant liable to future litigation.
  (f) That the complainant's right to sue has been barred by laches or by the statute of limitations.
  (g) That another suit is pending between the same parties, upon the same cause of action.
(4) To the form of the bill.
  (a) Such defects in uncertainty of allegations,

or omission of prescribed formularies or formal requisites.

(b) Multifariousness.

(c) Want of proper parties or misjoinder of parties.[1]

SECTION 58. DEMURRERS TO DISCOVERY ALONE.

In certain cases a demurrer will lie against discovery alone.

"There is also a class of cases in which the defendant may refuse to make a discovery as to particular charges contained in the bill, although a demurrer could not have been sustained as to the relief which the complainant intends to found upon those charges. Those, however, are cases in which the discovery asked for would tend to criminate the defendant, or subject him to a penalty or forfeiture, or would be a breach of confidence which some principle of public policy does not permit, and where the complainant may be entitled to the relief sought, upon the matters charged in the bill, although the defendant is not bound to make a discovery to aid in establishing the facts. But where the same principle upon which the demurrer of the truth of certain charges in the complainant's bill is attempted to be sustained is equally applicable, as a defense to the relief sought by the bill, the settled rule of the court is that the defendant cannot be permitted to demur as to the discovery only, and answer as to the relief. This general rule is equally applicable to the case of a plea; and the defendant cannot plead any matters in bar of the discovery merely, when the matters thus pleaded would be equally valid as a defense to the relief." [2]

[1] This classification is in the main that followed in Shipman on Equity Pleading.

[2] Brownell vs. Curtis, 10 Paige, (N. Y.) 210.

SECTION 59. ADMISSIONS BY DEMURRERS.

A demurrer (for the purpose of the argument on the demurrer only) admits all facts which are well pleaded;[3] it does not, however, admit legal conclusions,[4] nor arguments,[5] contained in the bill demurred to.

In Stow vs. Russel,[6] it was said by the Supreme Court of Illinois:

"The first question presented for consideration is, as to the operation and effect of the demurrer. The plaintiff insists, that as it admits the facts charged to be true, the relief prayed for should be granted, those facts presenting equities of the strongest character. We understand, in chancery, a demurrer is always to the merits, and in bar of the relief sought, and proceeds upon the ground that, admitting the facts stated in the bill to be true, the complainant is not entitled to the relief he seeks. It is always founded upon some strong point of law going to the absolute denial of the relief sought, but defects in substance are not supplied or aided by it, nor defective statements of title or claims to relief cured by it. The demurrer only admits that which is well stated or pleaded. Mills et al. vs. Brown et al., 2 Scam., 557; 1 Daniel's Ch. Pr., 601. It does not admit any matters of law which may be suggested in a bill, or inferred from the facts stated in it. It is not admitted, therefore, by this demurrer, that the contract of August 2, 1852, was an extension of any other previous contract, as contended for by the plaintiff, and on which inference of his own he bases his principal claim to relief. That

[3] Baker vs. Booker, 6 Price, 281; Baker vs. Atkins, 62 Me., 205.
[4] Pearson vs. Tower, 55 N. H., 36; Thompson vs. National Bank of Redemption, 106 Mass., 128.
[5] Johnson vs. Roberts, 102 Ill., 655.
[6] 36 Ill., 18.

it is but an extension of the old contract is a conclusion which the plaintiff has reached, but which is not admitted by the demurrer."

Section 60. Effect of Order Sustaining or Overruling Demurrer.

Formerly the sustaining of a demurrer resulted in a final determination of the suit in favor of the defendant. A more liberal rule is allowed to-day in such cases, and the plaintiff will be allowed to amend his bill unless it is evident that the demurrer went to the very basis of the suit, and that no good bill could be framed on the plaintiff's cause of action.

When a demurrer is overruled the correct practice is to enter an order for the defendant to answer, and upon his failure to do so to take the bill as confessed.

CHAPTER IX.

THE PLEA.

SECTION 61. DEFINITION AND NATURE.

The plea in equity is entirely different in its nature from any form of common law pleading.

The nature of a plea is thus described by Mr. Fletcher in his work on Equity Pleading:[1]

"Where an objection to the bill is not apparent on the bill itself, the defendant, if he wishes to take advantage of it, must show to the court the matter which creates the objection, by answer or plea. A plea is a special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred.[2] It has been said to differ from an answer in the common form, as it demands the judgment of the court, in the first instance, whether the special matter urged for it does not debar the complainant from his title to that answer which the bill requires.[3] A plea which sets forth nothing except what appears on the face of the bill is bad, and must be overruled, although the objection, if raised, by demurrer, would have been valid, as the proper office of a plea is to bring forth fresh matter not apparent in the bill.[4] Every defense which may be a full answer to the merits of the bill is not, as of course, to be considered as entitled to be brought forward by way of plea. Where a defense consists in a variety of circumstances, there is no use in a plea.

[1] Fletcher on Equity Pleading, Sec. 235.
[2] Cockburn vs. Thompson, 16 Ves., 321.
[3] Roche vs. Morgell, 2 Schoales & L. 725; Beame's Pleas in Eq., 1.
[4] Bicknell vs. Gough, 3 Atk., 558.

The examination must still be at large, and the effect of allowing such a plea will be that the court will give their judgment upon the circumstances of the case before they are made out by proof. The true end of a plea is to save the parties the expense of an examination of the witnesses at large.[5] The defense proper for a plea is such as reduces the cause, or some part of it, to a single point, or to the point to which the plea applies.[6] Hence, a plea, in order to be good, whether it be affirmative or negative, must be either an allegation or a denial of some leading fact, or of matters which, taken collectively, make out some general fact, which is a complete defense.[7] But although the defense offered by way of plea would consist of a great variety of circumstances, yet, if they all tend to a single point, the plea may be good."[8]

Section 62. Classification of Pleas.

Pleas are divided into,

(a) Pleas in abatement, and

(b) Please in bar.

And also into;

(a) Pure pleas.

(b) Negative pleas, and

(c) Anomalous pleas.

Section 63. Pleas in Abatement.

Pleas in abatement, or dilatory pleas, include pleas to the jurisdiction of the court, pleas to the person either of the complainant or defendant, and pleas to the bill. The latter class includes pleas to the following effect:

[5] National Hollow Brake Beam Co. vs. Interchangeable Brake Beam Co., 83 Fed., 26.

[6] Speery vs. Miller, 2 Barb. Ch. (N. Y.), 632.

[7] Story, Eq. Pl., Sec. 652; Saltur vs. Tobias, 7 Johns; Ch. (N. Y.), 214.

[8] Hazard vs. Durant, 25 Fed., 2? Cooper, Eq. Pl., 225.

(a) That there is another suit depending in a court of equity for the same matter and between substantially the same parties; or
(b) That there is a want of proper parties to the bill; or
(c) That to sustain the proceeding would cause a multiplicity of suits; or
(d) That the bill is multifarious, in joining or confounding distinct and separate matters in the same suit.

SECTION 64. PLEAS IN BAR.

A plea in bar is one which opposes a bill on its merits, and which, if true, will constitute a complete defense to the bill.

Pleas in bar are classified as follows:

(1) Pleas in bar resting on statute.
  (a) The statute of limitations.
  (b) The statute of frauds.
  (c) Any other statute creating a bar.
(2) Pleas in bar founded on matter of record:
  (a) A judgment at law in a court of record.
  (b) The judgment or decree of a foreign court.
  (c) A decree of a court of equity.
(3) Pleas in bar depending on some matters in pais.
  (a) A release.
  (b) A stated account.
  (c) A settled account.
  (d) An award.
  (e) That the defendant is a purchaser for a valuable consideration.
  (f) Title in the defendant.

Section 65. Pure Pleas.

A pure or affirmative plea is one in the nature of a pleading by the way of confession and avoidance. Such a bill admits the matter pleaded in the bill, and then sets up matters not apparent on the face of the bill, such as payment or release, as a defense.

Section 66. Negative Pleas.

A negative plea denies one or more matters contained in the complainant's bill. In order for a plea of this character to constitute a sufficient defense, the matter denied must be material to the complainant's cause.

Section 67. Anomalous Pleas.

An anomalous plea is one which contains both affirmative and negative matter. Anomalous pleas are of two kinds.

(a) Where the complainant in the charging part of his bill has anticipated a defense of the defendant and then proceeded to deny it, and the defendant sets up the anticipated defense and denies the denial of the complainant.

(b) Where the defendant in his plea alleges matter inconsistent with certain matter in the complainant's bill and denies such inconsistent matter.

Section 68. Plea Supported by Answer.

A defendant may plead to one part of a bill and answer the rest. In addition wherever the defendant files a plea, and the complainant's bill contains interrogatories relative to the matters put in issue by the plea, the defendant must support his plea with an answer to such interrogatories. This can only happen in the case of negative and anomalous pleas.

SECTION 69. PLEAS OVERRULED BY ANSWER.

Wherever the defendant both pleads and answers, and the plea and the answer both cover the same ground, the plea will be overruled by the answer.

SECTION 70. ADMISSION BY PLEAS.

A plea (for the purpose of the determination of the issue raised by the plea only) admits all facts well pleaded, and not denied by the plea.

SECTION 71. EFFECT OF ORDER SUSTAINING OR OVERRULING PLEA.

If a plea is sustained as to its sufficiency it is a full bar to so much of the bill as it covers if the facts therein be true, and a replication must be filed thereto. A decision in favor of the defendant on the facts contained in the plea, will be a final decision as to the part covered. Upon a plea being overruled the defendant will generally be allowed to answer.

Chapter X.

THE ANSWER.

Section 72. Definition and Answer.

The answer in equity is a reply to each of the allegations in the complainant's bill. There is no such thing as a general denial in a suit in equity. The answer may raise the question both as to the truth and as to the sufficiency of the facts alleged in the complainant's bill.

Section 73. Requisites of Answer.

An answer in equity serves two purposes. "First, that of answering the case as made by the bill; and secondly, that of stating to the court the nature of the defense of which the defendant means to rely."

The facts in the answer must be stated with certainty and must be responsive to the complainant's bill.

Section 74. Exceptions to Answer.

An answer cannot be demurred to, but the same result is obtained by the complainant taking exceptions to the answer.

Section 75. Scandal and Impertinence.

Scandal[1] and impertinent[2] matters are prohibited

[1] "Scandal on the answer is the same as in the bill; that is, allegations of matters neither proper for the court to hear nor for the defendant to state in a pleading, or which unnecessarily cast upon another the imputation of disgraceful or criminal conduct. Nothing relevant to the merits of the controversy can be so considered." Shipman, Sec. 341.

[2] "Impertinence is where the answer states matter outside of and irrelevant to the case made by the bill, and not material to the defendant's case. Scandalous matter is

in the answer as in the bill. Such matter may be struck out upon exceptions being taken thereto.

Section 76. The Answer as Evidence.

Unless answer under oath is expressly waived by the complainant in his bill, the defendant's answer will stand as evidence for both parties to the suit.

always impertinent, but the contrary is not true, and nothing will be deemed impertinent which can be of any influence in the decision of the suit, either as to subject-matter, the relief sought, or the costs." Shipman on Equity Pleading, Sec. 342.

CHAPTER XI.

THE REPLICATION.

SECTION 77. NATURE OF THE REPLICATION IN EQUITY.

The replication in equity is merely a joinder in issue. No new matter can be set up by this pleading and it is at present very generally disregarded. The place of the later pleadings at common law is supplied in equity by amendments to the bill or answer.

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APPENDIX A.

TO EQUITY PLEADING.

BILL TO FORECLOSE TRUST DEED.

TO THE HONORABLE JUDGES OF THE.....COURT OF COOK COUNTY,
IN THE STATE OF ILLINOIS,

IN CHANCERY SITTING:

THE COMPLAINANTS,.....
.....
show that on.....1.....,.....
.....for value received,
made.....promissory note.. of that date, and
thereby promised to pay to the order of.....
the sum of .....Dollars,
.....years after the date
thereof, with interest at the rate of.....per cent per annum,
payable .....annually .....
.....

THAT SAID PAYEE.....afterwards endorsed said
note.. in writing.....
.....
and delivered the same to the complainant.....
.....

THAT THE COMPLAINANT.....
has been the legal holder and owner of said note.. ever since.....

THAT TO SECURE THE PAYMENT OF SAID NOTE.., the said.....
.....
executed and delivered to the complainant,....., trustee,
a deed of trust of even date with said note.., thereby conveying.....
in fee simple, the following described real estate, with all the buildings and
improvements thereon, to-wit:.....
.....
which said deed of trust was, on.....1.....,
duly acknowledged, and afterwards, on.....1.....,recorded
in the Recorder's Office of said Cook County, in Book....., Page.....
.....

THAT IT IS PROVIDED in said trust deed that if default be made in the payment of the said note.., or the interest thereon, or any part thereof, or in case of waste or non-payment of taxes or assessments, or neglect to procure or renew insurance, or in case of the breach of any of the covenants therein contained, then the whole of the principal of said note.., shall, thereupon, at the option of the legal holder thereof, become immediately due.

THAT DEFAULT has been made in payment of.....
.....

THAT THERE IS NOW DUE the whole of the principal of said note.., being the sum of.....Dollars, with interest from.....
.....
.....

THAT in said trust deed it was agreed that the grantor.. should pay all costs and attorney's fees incurred or paid by said trustee, or the holder of said note.., in any suit in which either of them might be a plaintiff or defendant, by reason of being a party to said trust deed, or the holder of said note.., and that in case of foreclosure of said trust deed by proceedings in court, there should be paid out of the proceeds of sale of said premises under decree in such proceeding, reasonable.....
.....
solicitor's fees for complainant's solicitor.., and all moneys advanced for insurance, taxes, assessments or other liens on said property, and also cost of procuring or completing abstract showing the whole title to said premises down to and including such decree; such cost of abstract to be taxed as costs in said proceeding.

THAT, by the filing of this bill, there is due to complainant.....
for solicitor's fees incurred .....
dollars, and for insurance, taxes, assessments and other liens advanced under the provision of said trust deed, ...
..... dollars
.....

THAT. .....
.....
have or claim some interest in said premises subsequent to the lien of said trust deed.

THE COMPLAINANTS, therefore, make the said parties defendants to this bill, and pray that they may be required to answer the same, without oath, answer on oath being hereby waived;.....
.....
that a Receiver may be appointed to take charge of said premises, that an account may be taken in this behalf under the direction of the Court; that the defendants, or some of them, may be decreed to pay whatever sum shall appear to be due upon the taking of such account by a short day to be fixed by the Court; that in default of such payment said property may be sold to satisfy the amount due; that complainants may have execution against the said defendant. .....
for any balance that shall remain due, if the sale of said premises fail to produce sufficient to pay the whole of said debt, and that complainants may have such other and further relief as the nature of the case may require.

AND COMPLAINANTS pray that a chancery summons may issue against

the said defendants.....
.....
.....
to appear before this Court and answer this bill.

.....
.....
.....

.....
Complainant's Solicitors.

BILL FOR DIVORCE BY HUSBAND.

STATE OF.....
.....COUNTY. } ss.

IN THE.....COURT OF.....COUNTY.
TO THE.....TERM, A. D. 190..

.....
VS. } BILL FOR DIVORCE.
.....

TO THE HONORABLE....., JUDGE OF SAID COURT,
IN CHANCERY SITTING:

HUMBLY COMPLAINING Unto Your Honor.., your orator.....
.....of....., in the County of.....,
and State of.....respectfully shows that he is, and for more than a year last past, continuously, immediately preceding the filing of this bill of complaint, has been an actual resident of the State of.....

YOUR ORATOR Further shows unto Your Honor.., that on or about the.....day of.....A. D. 190...,
at.....in the State of.....he was lawfully joined in marriage with....., of.....
in the State of....., whom your orator prays may be made a party defendant hereto, and from thence hitherto, until on or about the .....day of.....A. D. 190.., your orator and the said defendant lived and cohabited together as husband and wife.

YOUR ORATOR Further shows unto Your Honor.., and charges that the said defendant, on or about the.....day of.....
....., A. D. 190.., wilfully, and without any reasonable or just cause therefor, deserted and abandoned your orator, and wholly refused to live and cohabit with him any longer as husband and wife, and from thence hitherto, up to the time of filing this Bill of Complaint, has continuously absented herself from him and refused to return and live with him as husband and wife, and still does, without any fault on the part of your orator.

YOUR ORATOR Further shows unto Your Honor.., and charges that ever since the said marriage, he has conducted and demeaned himself toward

the said defendant as a true, faithful, chaste and affectionate husband, but the said defendant, wholly regardless of her marriage vows, for a considerable time past, given herself over to adulterous practices; that on or about the .....day of.....A. D. 190.., at..... in the State of....., the said defendant committed adultery with one.....
.....
and at divers other times and places since said marriage the said defendant committed adultery with one....., and with divers other lewd men, whose names are to your orator unknown.....
.....

Forasmuch, therefore, as your orator is without remedy in the premises, except in a court of equity; your orator prays that the said.....
.....who is made party defendant to this bill, may be required to make full and direct answer to the same; that the said marriage between your orator and the defendant may be dissolved and declared null and void, by the decree of this court, according to the statute in such case made and provided; .....
and that your orator may have such other and further relief in the premises as equity may require and to your honor shall seem meet.

And May it Please Your Honor To grant unto your orator the writ of summons in chancery issuing out of and under the seal of this Honorable Court, to be directed to the said defendant.....,
therein and thereby commanding her by a certain day, and under a certain penalty, to be therein inserted, that she personally be and appear before this Honorable Court, then and there to stand to, abide and perform such order, direction and decree therein as to Your Honor... shall seem meet according to equity and good conscience.

And Your Orator, As in duty bound, will ever pray, etc.

.....
....

Solicitor.. for Complainant.

State of..... }
.....County. } ss.

.....being duly sworn, says that he is the Complainant whose name is subscribed to the foregoing Bill of Complaint; that he has heard the above Bill of Complaint read, and knows the contents thereof; that the said Bill of Complaint is true of his own knowledge, except as to the matters and things therein stated to be upon information and belief, and as to those matters and things he believes it to be true.

Subscribed and Sworn to by the said.....before..... me this.....day of..... .....A. D. 190 .....

.....

BILL TO FORECLOSE MORTGAGE.

STATE OF.....
COUNTY OF.....} ss. .....COURT OF.....COUNTY,
To the.....Term, A. D. 19...

TO THE JUDGE... OF SAID COURT, IN CHANCERY SITTING:

YOUR ORATOR .....
.....
respectfully represent... unto Your Honor..., that on or about the.....
day of ....., A. D. 19...., ...
.....
became and.....indebted to.....
in the sum of.....and being so indebted, in
consideration thereof, the said .....
on that day made and executed under.....hand..
.....certain.....
for the sum of.....
.....
.....
as will more fully appear by the said....., ready to be produced in court, and by the copy of the same herewith filed and marked "Exhibit A," and made part of this your Orator... Bill of Complaint.

YOUR ORATOR... further represent... unto Your Honor..., that, to secure the payment of the principal sum and interest above mentioned, the said.....
by.....deed, dated the.....day of.....
A. D. 19...., conveyed to.....
in fee simple, the following described parcel... of land, with its appurtenances, situated in the County of.....
and State of....., to-wit: .....
.....
.....
subject, however, to a condition of defeasance upon the payment of the principal sum and interest aforesaid, according to the tenor and effect of the said..... ; which said mortgage was, on the day of its date, duly acknowledged, and afterwards, on the.....day of .....A. D. 19..., recorded in the Recorder's office of the said County of ....., at..... o'clock in the .....noon of said day, in Book.....of.....on page ....., as by the said mortgage and its accompanying certificates of acknowledgment and recording, ready to be produced in court, and by a copy thereof herewith filed and marked "Exhibit B," and made a part of this Bill, will more fully appear,.....
.....
.....

YOUR ORATOR... further represent... unto Your Honor..., that the sum of.....
with interest from the .....day of.....

A. D. 19..., is now due and unpaid to your Orator..., on the said ..... and mortgage, and in said mortgage it was expressly agreed that in case of the foreclosure of said mortgage by proceedings in court, or in case of any suit or proceeding at law or in equity wherein said mortgagee ....., executors, administrators or assigns should be a party plaintiff or defendant by reason of ..... being a party to said mortgage, he or they should be allowed and paid their reasonable costs, charges, attorney's and solicitors' fees in such suit or proceeding by the said mortgagor..., and the same should be a further charge and lien upon said premises under said mortgage, to be paid out of the funds of the sale thereof, if not otherwise paid by said mortgagor...: and your Orator... claim.... that by the filing of this bill, under this clause in said mortgage, there is now due your Orator... for solicitors' fees.....
Dollars, in addition to the sum above mentioned, and that no proceedings at law have been had to recover the above-mentioned debt secured by the said .....and mortgage, or any part thereof.

YOUR ORATOR... futher represent... and charge... that the said premises described in said mortgage are meager and scant security for the said sum of.....
.....
and interest mentioned in said.....and mortgage, and now due your Orator.....
.....

AND YOUR ORATOR... further represent... unto Your Honor... and state... upon informatoin and belief, that.....
.....
ha... or claim to have some interest in the said mortgaged premises, or some part thereof, as purchaser..., mortgagee.. judgment creditors or otherwise, which interest, if any, ha... accrued subsequent to the lien of the said mortgage of your Orator... and.....subject thereto.

YOUR ORATOR..., THEREFORE, ask... the aid of this Honorable Court in the premises, and make... the said.....
.....
.....
parties defendant... to this bill, and to the end that they may be required to answer this, your Orator... bill, according to the rules and practice of this Honorable Court, without oath,.....answer on oath being hereby waived; that an account may be taken in this behalf by or under the direction of this Court; that the said defendant.....
.....
may be decreed to pay your Orator... whatever sum shall appear to be due .....upon the taking of such account, together with solicitor's fees and.....costs of this proceeding, by a short day to be fixed by the Court; that in default of such payment, the said mortgaged property may be sold, as may be directed by the Court, to satisfy the amount due your Orator... for principal and interest on the said.....
and mortgage and solicitors' fees and.....

costs of this proceeding; that in case of such sale and in failure to redeem therefrom, pursuant to the statute, the defendants, and all persons claiming through or under them subsequent to the commencement of this suit, may be forever barred and foreclosed of all right and equity of redemption in the said premises; that your Orator... may have execution against the said defendant .....
for any balance that shall remain due to your Orator... of the principal and interest of said.....and mortgage, if the sale of said mortgaged premises as aforesaid fails to produce sufficient to pay the whole of said mortgage debt and solicitors' fees and costs of this suit; and that your Orator... may have such other and further relief as the nature of..... case may require, and as to this Court shall seem agreeable to equity and good conscience.

MAY IT PLEASE YOUR HONOR... to grant unto your Orator... the writ of summons in chancery, issuing out of and under the seal of this Honorable Court, directed to the sheriff of the said County of....., commanding him that he summon the said defendants..... .....
to appear before the said Court, on the first day of the next..... term thereof, to be held at the Court House in the County of..... aforesaid, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as shall seem agreeable to equity and good conscience.

AND YOUR ORATOR... will ever pray, etc.

.....
.....
Solicitor... for Complainant...

STATE OF..... } ss.
COUNTY OF..... }

ON this ..... day of ..... in the year One Thousand Nine Hundred and ....., personally appeared before me.....
who, being duly sworn, saith that he.....
.....
.....
and that he has read the foregoing Bill of Complaint, and knows the contents thereof, and that the same is true of ..... own knowledge, except as to the matters and things therein stated to be upon ..... information and belief, and as to those matters he believes it to be true.

SUBSCRIBED AND SWORN TO before me this.....day of .....A. D. 19... .....
.....
CLERK.

CREDITOR'S BILL.

STATE OF..... } ss. .....COURT OF.....COUNTY,
.....COUNTY. } OF THE.....TERM, A. D. 190..

TO THE JUDGE.. OF SAID COURT, IN CHANCERY SITTING:

YOUR ORATOR.., ...
.....
Respectfully represent.. unto your Honor.. that at the.....term, A. D. 190..., of the.....Court of said..... County, to-wit: On the.....day of.....19..., the same being one of the regular days of said term, your Orator.. recovered a judgment against.....
.....
of the defendants hereinafter named, for the sum of..... Dollars and.....Cents, for the damages which..... had sustained, and the costs of suit and charges of your Orator, by..... about.....suit in that behalf expended, which were adjudged to your Orator.. in and by the said Court, whereof the said.....
.....
.....
convicted, as by the record of the said judgment in the office of the clerk of said court, reference being thereto had, and to which for greater certainty, your Orator.. pray.. leave to refer, will more fully and at large appear.

AND YOUR ORATOR.. FURTHER REPRESENT.. Unto your Honor that the said judgment so recovered in manner aforesaid, remaining in full force and effect, and the.....damages aforesaid unpaid and unsatisfied, your Orator.., on or about the.....day of....., in the year of our Lord One Thousand Nine Hundred and....., for the purpose of obtaining satisfaction of the said judgment, sued and prosecuted out of the said court a writ of fieri facias, directed to the Sheriff of.....County, that being the County in which said defendant.. resided at the time of the issuing of said writ, by which said writ the said Sheriff was commanded, that of the goods, chattels, lands and tenements of the defendant.. ..... in his County, he cause to be made the sum of..... Dollars and.....Cents, which your Orator.. in said .....Court recovered against the said defendant.., ...
and that he should have the money at the clerk's office of said Court, at..... ....., in said County, in ninety days from the date thereof, to satisfy the judgment so recovered by your Orator.. as aforesaid, and that he should have then and there that writ.

AND YOUR ORATOR.. FURTHER SHOW.. That the said writ of fieri facias, before the delivery thereof to the said Sheriff, was duly endorsed, and was afterward, and on or about the.....day of..... in the year of our Lord One Thousand Nine Hundred and....., delivered to the said Sheriff to be executed in due form of law.

AND YOUR ORATOR.. FURTHER SHOW.. That the said Sheriff of said County aforesaid, on the.....day of....., in the year of our Lord One Thousand Nine Hundred and..... returned on the said writ to him, in that behalf directed and delivered as aforesaid, that.....
.....
.....
as by the said writ of fieri facias, and the directions, and the return of the said Sheriff endorsed thereon, as aforesaid, now on file in the office of the clerk of the said Court, will more fully appear, and to which, or to a copy thereof, your Orator.. pray.. leave to refer.

AND YOUR ORATOR.. FURTHER SHOW.. That the said judgment still remains in full force and effect, not reversed or satisfied, or otherwise vacated; and that the said..... not paid the same to your Orator.., but ha.. hitherto wholly neglected and refused so to do.

AND YOUR ORATOR.. FURTHER SHOW.. That there is now actually and equitably due to your Orator.., upon the aforesaid judgment, the sum of.....Dollars and.....cents, together with the interest thereon from the..... day of....., One Thousand Nine Hundred and....., over and above all claims of said defendant.., by the way of set-off or otherwise.
.....
.....

AND YOUR ORATOR.. FURTHER SHOW.. Unto your Honor, that on or about the.....day of.....and before that time, in the year of our Lord, One Thousand Nine Hundred and ....., the said defendant.....
.....
engaged in the mercantile business at the.....
.....and that your Orator.....informed and believe.. that in the course of the said mercantile business of the said defendant.....
divers persons became indebted to..... to a large amount, and that the said defendant.. last named at the time of filing this, your Orator's Bill of Complaint, ha.. debts due to.....and for which.....hold divers securities and evidences to a large amount, and.....divers goods, wares and merchandise, and other articles of personal property which belong to....., or in which.....in some way or manner..... beneficially interested; and that..... ha.. equitable interests and things in action of some nature or kind, which might and ought to be applied to the payment of your Orator's said judgment, against.....the said defendant.....

AND YOUR ORATOR.. Also charge.. that the said defendant .....
.....
.....
owner.. of, or in some way or manner beneficially interested in some real

estate, in this or some other State; or some chattels real of some name or kind; or some contract or agreement relating to real estate; or the rents, issues and profits of some real estate; and also that the said defendant.....
.....
owner of, or in some way beneficially interested in the stock of some company, incorporated or unincorporated, or in the profits of some company or co-partnership; and also that.....ha.. in.....possession at the time of the filing of this, your Orator's Bill of Complaint, some money in coin or Bank bills; or that.....money deposited in some bank or elsewhere, to.....credit; or that..... ha.. money, or securities for the payment of money, held by some other person, in trust or otherwise, for.....benefit.

AND If the said defendant.....
.....
made any sale, assignment or transfer of.....property or effects, or any part thereof, your Orator.. expressly charge.. that.....believe such sale, assignment or transfer is merely colorable, and made with a view of protecting the property or effects of said defendant .....
.....
.....
so assigned, and placing the same beyond the reach of your Orator's said judgment, and enabling the said defendant.. .....
.....
to control and enjoy the same and the avails thereof, or to hinder or delay your Orator.. in the collection of.....debt now in judgment as aforesaid; and that so it would appear, if the said defendant.....
.....
would state and set forth when and to whom such sale, transfer or assignment was made, and what was the amount in value of the property or effects so sold, assigned or transferred, and what were the terms upon which said sale, transfer or assignment was made, and what disposition has been made of the property or effects so sold, assigned or transferred, and in whose possession the same now is or what has been done with the avails thereof. And your Orator.. claim.. a full and complete discovery of all such property, effects and things in action, belonging to the said defendant .....
.....
.....
and of all trusts whereby any property, debts or effects are held for the use or benefit of the said defendant.. last named, and of every sale, assignment or transfer which the said defendant.. last named ha.. made of..... property, debts or other effects, and of the person or persons to whom such sale, assignment or transfer has been made; the amount and value of the property, debts or other effects so sold, assigned or transferred; and the trusts and other conditions upon which such sale, assignment or transfer was made, and all the facts and circumstances relating thereto; and particularly what is the situation of the property, debts or other effects sold, assigned or transferred, at the time of filing this, your Orator's Bill of Complaint.

AND YOUR ORATOR.. FURTHER SHOW.. Unto your Honor, that.....

ha.. reason to believe, and do.. believe that the said defendant.. last named ..ha.. property and other equitable interests, things in action or effects, of the value of more than.....dollars, exclusive of all prior first claims thereon, and which your Orator.. ha.. been unable to reach by execution on said judgment, against the said defendant.. last named; and that this, your Orator's Bill of Complaint, is not exhibited by collusion with the said defendant.., or with any other person, or for the purpose of protecting the property or effects of said defendant.. .....
.....
.....
against the claims of other creditors; but for the sole purpose of compelling payment and satisfaction of the judgment so as aforesaid recovered by your Orator.. against the defendant..
.....
.....

AND YOUR ORATOR.. Well hoped that the said defendant.., ...
.....
.....
would have paid to your Orator.. the amount due.....on said judgment, or would have applied for that purpose any property, money, debts, or other equitable interests or things in action belonging to....., or in which.....in any way interested, as in equity and good conscience.....ought to have done.

BUT NOW, SO IT IS, That the said defendants combining and confederating together, and with divers other persons, to your Orator.. unknown, but whose names, when discovered,.....pray may be inserted herein, with proper and apt words to charge them, and contriving how to injure and defraud your Orator.. in the premises, neglect.. or refuse.. to pay the amount so due to your Orator.. on.....said judgment, or to apply for that purpose any property, money, debts or other equitable interests or things in action belonging to the said defendant.., ...
.....
and for reason whereof, the said defendant.. set.. up a variety of unfounded pretenses; all of which actings, doings, neglects and pretenses are contrary to equity and good conscience, and tend to the manifest wrong and injury of your Orator.. in the premises.

FORASMUCH, THEREFORE, As your Orator.....without remedy in the premises, save in a Court of Equity; and to the end, therefore, that the said defendant.. may, if.....can, show why your Orator.. should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and particularly to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written .....required to answer: .....
.....

that is to say, the said defendant.. may fully set forth and discover, according to the best of ..... knowledge, remembrance, information and belief, the nature and situation, amount and value of all the property, interest and effects of the said defendant.., ... including all things in action of whatever nature or kind, with all the particulars relating thereto, and that.....may answer and state whether, at the time of filing this, your Orator's Bill of Complaint, ..., the said defendant.., ...

.....

not debts due to.....to a considerable amount; and if so that..... may state particularly the amount of such debts respectively, and from whom the same are due, and what security is held therefor; and also that.....may state which and what amount of said debts are good and collectible, and what amount bad or doubtful; and whether or not at the time of filing this, your Orator's Bill of Complaint.....ha.. not some property, real or personal, in law or equity, belonging to.....or held in trust for....., or in which.....ha.. some beneficial interest of some kind or description, and, if so, that.....may state and set forth a full, true and particular account thereof, and the nature and value of.....interest therein; and that.....may also state whether.....ha.. not money of some kind in.....possession, or under.....control, or deposited to.....credit, or for.....use, or in some way or manner held for.....use and benefit; and, if so, that.....may state and set forth particularly the amount thereof, and how and by whom the same is held; and that.....may also state whether or not .....ha.... any other equitable interest or thing in action, or other means belonging to....., or in which.....in any way interested, whereby.....could pay any part of the amount so as aforesaid due to your Orator.. upon.....said judgment against....., to said defendant,

And If the said defendant.. last named.....made any sale, assignment or transfer of..... property and effects, or any part thereof, that then the said defendant.. may state and set forth.....for ....., jointly or separately, generally, but not in items, what property or effects have been so sold, assigned or transferred, and the value thereof, and particularly when and to whom, and for what purpose, and upon what terms and conditions such sale, assignment or transfer was made, and what has been done under such sale, assignment or transfer, and what has been done with the property or effects so sold, assigned or transferred, and the avails thereof. And that the said defendant.. may specially state or set forth, each for himself, jointly or separately.....

.....

.....

.....

And that the said defendant.., or some of them, may be decreed to pay your Orator.. the amount so as aforesaid due to..... for principal and interest on.....said judgment, together with your Orator's costs and charges

in this behalf sustained; and may be decreed to apply for that purpose any money or property, real or personal, in law or equity, debts, choses in action or equitable interests belonging to said defendant.....
.....
or held in trust for....., or in which.....in any way or manner .....beneficially interested; and that said defendant... may be enjoined and restrained from selling, assigning, transferring, delivering, negotiating, discharging, receiving, collecting, incumbering, or in any way or manner disposing of, or intermeddling with any debts or demands due to.... .....or any bills, bonds, notes, drafts, checks, book accounts, mortgages, judgments, or other debts due to..... .....whether in.....possession, or held by some other person in trust for.....or to.....use or benefit; and also from selling, assigning, transferring, or in any manner incumbering or disposing of, or intermeddling with any money in coin, bank bills, drafts or checks belonging to.....whether in.....possession, or held by any person in trust for..... use or benefit, or any stock or interest in any private or incorporated company, or any property, real or personal, things in action or chattels real held by.....or by any other person for....., or in which ..... ha.. any interest whatever, except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the said defendant.....
.....
.....
.....

And That the said defendant.. last named may also be in like manner prohibited from making any assignment of.....property, and from confessing any judgment for the purpose of giving preference to any other creditor over your Orator.., and from doing any other act to enable other creditors to obtain.....property. And that a receiver may be appointed, according to the course of practice in this Court, and with the usual powers of receivers in like cases, of all the property, equitable interests, things in action and effects of the said defendant.....
.....

And That your Orator.. may have such further or such other relief in the premises as the nature of.....case shall require, and as shall be agreeable to equity and good conscience.

May it Please Your Honor To grant unto your Orator.. the People's Writ of Injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said defendant.....
.....and to.....Counselors, Attorneys, Solicitors, Trustees and Agents, therein and thereby commanding and strictly enjoining the said defendant.. and the persons before mentioned, in manner aforesaid.

And may it Please Your Honor To grant unto your Orator.. the People's Writ of Summons, issuing out of and under the seal of this Honorable

Court, to be directed to the said defendant.....
.....
.....
therein and thereby commanding.....and each of.....
on a certain day and under a certain penalty, to be therein inserted, that .....personally be and appear before this Honorable Court, on the first day of the next..... term thereof, to be held at the Court House, in the County of ..... aforesaid..... then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as to your Honor... shall seem agreeable to equity and good conscience.

And Your Orator... will ever pray, etc.

.....
.....
Solicitor... for Complainant...

State of.....} ss.
.....County} On this.....day of
.....One Thousand Nine Hundred and .....
personally came before me.....
who, being duly sworn, saith that ...he.....
.....
.....
that he has read the foregoing Bill of Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief, and as to these matters he believes it to be true.

.....
.....
Subscribed and sworn to before me, this.....
day of..... A. D. 190...} .....
.....

BILL FOR MECHANIC'S LIEN ON BUILDING CONTRACT.—ACT OF 1895

STATE OF ILLINOIS, } ss. IN THE.....COURT OF.....COUNTY
.....COUNTY }

.....TERM, A. D. 190...

To the Honorable.....Judge.. of the.....Court of the County.....in the State of Illinois.—In Chancery Sitting:

YOUR ORATOR..,.....
of the..... of ....., County of .....,
and State of ....., respectfully represent.. unto your honor.. that ..he.. ..... by occupation,.....(1);
that on or about the ..... day of .....A. D. 190...
.....
of the ..... of ....., in the County of .....
and State of ....., (2) ..... of the defendants hereinafter named, applied to your orator... to build for ..... a (3).....
upon the premises hereinafter described; and thereupon your orator.. and the said .....
entered into a written contract, with drawings and specifications attached, a true copy of which contract is hereto attached, marked "Exhibit A," and made a part hereof, as will appear by the said contract, drawings and specifications, ready to be produced in Court, upon the hearing hereof.
.....
.....

YOUR ORATOR.. FURTHER REPRESENT.. That immediately after the making of said contract, and in compliance with the terms thereof, ..he.. commenced work under the same on the following described premises, to wit: (4).....
.....
the said.....
being at the time, and still is, the owner of the said premises.....
.....
.....

YOUR ORATOR.. FURTHER REPRESENT.. That ..he.. did in compliance with the said contract, within the time specified, build and finish (5).....
.....for the said..... on said premises a .....
.....and did furnish all the necessary materials and labor for that purpose, and did in all respects comply with the terms of the said contract and the specifications and drawings thereto attached, by ..h.. required to be performed, ...
.....

YOUR ORATOR.. FURTHER REPRESENT.. That in accordance with the

(1) Here state occupation of complainant.
(2) Insert here number of defendants who made the contract.
(3) Here state the kind of building.
(4) Here describe the premises.
(5) If for altering, repairing or ornamenting, then erase the words "build and finish," and insert the appropriate words.

conditions of the said contract, your orator..., on the .....day of .....A. D. 1....., procured from..... the architect and superintendent of the erection of the said building, a certificate in writing that your orator.. had completed ..h.. part of the said contract according to the terms and conditions thereof, which said certificate is now in the possession and control of your orator.. and ready to be produced on the hearing of this cause.....

.....

.....

YOUR ORATOR.. FURTHER REPRESENT.. That immediately after the completion of the said building, to wit: on the ..... day of .....A. D. 1....., the said.....

.....

accepted the same and took possession thereof, and has ever since occupied the same.....

.....

YOUR ORATOR.. FURTHER REPRESENT... That the said.....

.....

.....

ha... only paid your orator.. the sum of .....dollars on said contract and that there is now due to your orator.. the sum of..... .....dollars from the said..... together with interest thereon from the .....day of .....A. D. 1....., and your orator.. attach... hereto a schedule marked "Exhibit B," and made a part of this bill, showing the amount due your orator.. under said contract, and all payments, with the dates thereof, made by the said..... to your orator.. .....

.....

.....

YOUR ORATOR.. FURTHER REPRESENT.. That all notices required by statute to be given, served or filed in order to establish a lien upon said premises have been given, served and filed as required by law.

.....

.....

YOUR ORATOR.. FURTHER REPRESENT.. That ..he.. ha.. frequently requested the said..... to pay the said sum of ..... dollars, the balance due your orator.. from ..h.... as aforesaid, but the said

.....

.....ha... neglected and refused so to do; by means whereof your orator..... entitled to a mechanic's lien upon the said premises for the amount due your orator.. as aforesaid, under an act entitled "An act to revise the law in relation to Mechanics' Liens," approved and in force June 26, 1895.

.....

.....

YOUR ORATOR.. FURTHER REPRESENT.. Upon information and belief

that .....
.....
have or claim to have some interest in the said premises, as purchasers, mortgagees, judgment creditors, leesses, or otherwise, the precise nature whereof is unknown to your orator..; but such interests, if any there be, have accrued since and are subject to the lien of your orator... as aforesaid.

YOUR ORATOR.. FURTHER SHOW.. That within ten days after said contract was made with the said....., to-wit: On the .....day of .....190.., and before commencing work thereunder, ... gave the said..... the owner of said premises, a statement in writing, under oath, of the names and addresses of all parties having sub-contracts for specific portions of the work or for material, and of the amount to become due each, and when, and of all such sub-contracts as were not then let, the names and addresses of those who had made bids or proposals for the same or for material, and the respective amounts of such bids or proposals, and, within ten days after the same were accepted, the amount thereof.

(6)YOUR ORATOR.. FURTHER SHOW.. That on the ..... day of ..... 190.., ... filed with the Clerk of the Circuit Court of said County of ..... in which said premises and improvements are situated, a claim for lien for the amount so due your orator.. as aforesaid, consisting of a statement of your orator.. contract, the date the same was made, and when completed, the balance due after allowing all credits, a sufficiently correct description of the said real estate to pass the title thereof by deed of conveyance, and verified by the affidavit of .....
.....
.....

YOUR ORATOR.. FURTHER REPRESENT.. That the Clerk of the Circuit Court of said County, when such claim for lien for the amount so due your orator.., was filed for a lien indorsed thereon, the date of such filing, to-wit: the.....day of ..... A. D. 190.., and made an abstract thereof in a book kept for that purpose, properly indexed, containing the name.. of your orator.. as the person.. filing the lien, the amount of the lien, to-wit:.....dollars, the date of filing, to-wit, on the .....day of ..... A. D. 190.., the name of the person, to-wit: the said..... ....., against whom the lien was filed, and a description of the above described premises, charged with your orators' lien; as by the records of the office of the said Circuit Court in that behalf, or a certified copy of the same ready to be produced in Court on the hearing of this cause, as well as by a copy thereof hereto attached and made a part of this bill, marked "Exhibit C," will more fully appear.

FORASMUCH, THEREFORE, As your orator..... without remedy in the premises except in a court of equity; and to the end that the said
.....
.....

(6) If a statement has not been filed with the Clerk of the Circuit Court, this and the subsequent allegations may be erased.

who are made parties defendant to this bill, may be required to make full, direct and perfect answer to the same, but not under oath, the answer under oath being hereby expressly waived; that an account may be taken in this behalf under the direction of this Court; that your orator.. may be decreed to be entitled to a lien upon the said premises for the amount due your orator.. under the said contract, in pursuance of the statute in such case made and provided, and that the defendant.. .....
.....
.....
may be decreed to pay your orator.. the amount due on said contract, with interest thereon, by a short day to be fixed by the Court, and that in default of such payment the said premises may be sold as the Court may direct, to satisfy such amount, interest and costs; that in case of such sale, and a failure to redeem therefrom pursuant to law, the defendants and all persons claiming through or under them, after the commencement of this proceeding may be forever barred and foreclosed of all right or equity of redemption of the said premises; and that your orator.. may have such other and further relief in the premises as equity may require, and to your honor.. shall seem meet.

MAY IT PLEASE YOUR HONOR.. To grant the people's writ of summons in chancery, directed to the sheriff of said County of ..... commanding him that he summon the defendants.....
.....
.....
to appear before this Honorable Court on the first day of the next..... term thereof, to be held at the court house in..... in the County of ..... aforesaid, then and there to answer this bill, etc.

.....

Solicitor for Complainant..

.....
.....
.....

ANSWER IN CHANCERY—SKELETON FORM.

STATE OF ILLINOIS, } ss. IN THE ..... COURT OF.....COUNTY.
.....COUNTY. }

Of the .....Term, A. D. 1....

.....
.....
.....
VS. } ANSWER.
.....
.....
.....

The .....answer of .....
.....
defendant.. to the bill of complaint of .....
.....
complainant..

Th.... defendant.. now and at all times hereafter saving and reserving to .....all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much or such parts thereof as th... defendant.. ..... advised it is material or necessary for ..h.. to make answer to .....
answering say, ...
.....
.....

And th... defendant.. denies all and all manner of unlawful combination and confederacy wherewith ..h.. by said bill charged, without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained, material or necessary for th... defendant.. to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of th... defendant..; all which matters and things th... defendant.. ready and willing to aver, maintain and prove, as this honorable court shall direct; and humbly pray to be hence dismissed with ..... reasonable costs and charges in this behalf most wrongfully sustained.

.....
.....
....
Solicitor.. for defendant..

DECLARATION OF TRUST IN LAND CONVEYED.

To all to Whom These Presents Shall Come—Greeting:

Whereas, ...
of.....in the County of.....State of. .....
lately purchased of.....in the County of.....
State of.....a certain piece or parcel of land, with the appurtenances thereunto belonging, known and described as follows, to wit:
.....
.....
situate, lying and being in the County of.....State of.....,
which said piece or parcel of land was, by the direction and appointment of the said.....conveyed to
me the said.....as grantee thereof, as
by the said conveyance dated the.....day of.....
A. D. 190.., and recorded in the Recorder's office of.....County,
State of.....in Book.....of Records, on
page.....will fully appear.

And Whereas, I had no right, title nor interest in or to said place or parcel of land, but the same was conveyed to me as grantee to hold in trust for the benefit of the said.....and his heirs.

Now Therefore, Know Ye, That I, the said..... do hereby acknowledge and declare, that I am nominated and named as grantee in said conveyance upon and in behalf of the said..... and his heirs, as trustee, solely, and I do not claim to have any right, title or interest in said land or any portion thereof, by virtue of said conveyance, to my own use or benefit, but solely to the use and benefit of the said ....and his heirs, and I, the said..... .....do for myself and my heirs covenant with the said.....by these presents that I will at any time hereafter upon the proper written request of the said.....and at his cost and expense, by good assurance and conveyance at law, convey and assure the said piece or parcel of land, and all my interest as such trustee therein, to the said.....or to such other person or persons as he shall in writing nominate or appoint.

In Witness Whereof, I have hereunto set my hand and seal this .....day of....., A. D. 190 .. ..[seal.]

State of .....
County of. ..... } ss.

I, ...
Do Hereby Certify That,..... .....
personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act, for the purposes therein set forth.

Given under my hand and..... Seal this.....day of.....A. D. 190.... .....
Notary Public.

REPLICATION TO ANSWER.

STATE OF ILLINOIS, } ss.
COUNTY..... }

IN THE.....COURT
OF.....COUNTY.

.....Term, A. D. 190...

.....
.....
.....
.....
.....
.....

IN CHANCERY.

The Replication of.....
.....
.....
Complainant..., to the.....
Answer of.....
.....
.....

TH..... REPLIANT..., saving and reserving to..... now, and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant... for replication thereunto, say..., that ...he... will aver, maintain and prove.....Bill of Complaint to be true, certain, and sufficient in the law, to be answered unto; and, that the said answer of the said defendant... ..... uncertain, untrue, and insufficient to be replied unto by th.....repliant... without this: that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed, or denied, is true. All which matters and things th..... repliant... .....ready to aver, maintain, and prove, as this honorable court shall direct, and humbly pray..., as in and by ..... said Bill ..... ha..... already prayed.

.....

Solicitor... for Complainant...

APPENDIX B.

TO EQUITY PLEADING.

ORDINANCES MADE BY THE LORD CHANCELLOR BACON FOR THE BETTER AND MORE REGULAR ADMINISTRATION OF JUSTICE IN THE CHANCERY, TO BE DAILY OBSERVED, SAVING THE PREROGATIVE OF THE COURT.

(1) No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of reivew may be grounded by the special license of the court, and not otherwise.

(2) In case of miscasting (being a matter demonstrative), a decree may be explained and reconciled by an order without a bill of review; not understanding by miscasting any pretended misrating or misvaluing, but only error in the auditing or numbering.

(3) No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed,—as, if it be for land, that the possession be yielded; if it be for

money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone.

(4) But, if any act be decreed to be done which extinguisheth the party's right at the common law, as making of assurance or release, acknowledging satisfaction, canceling of bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court.

(5) No bill of review shall be put in except the party that prefers it enters into recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him.

(6) No decree shall be made upon pretense of equity against the express provision of an act of parliament. Nevertheless, if the construction of such act of parliament hath for a time gone away in general opinion and reputation, and after, by a later judgment, hath been controlled, then relief may be given upon matter of equity for cases arising before the said judgment, because the subject was in no default.

(7) Imprisonment for breach of a decree is in nature of an execution, and therefore the custody ought to be straight, and the party not to have any liberty to go abroad but by special license of the Lord Chancellor; but no close imprisonment is to be but by express order for willful and extraordinary contempts and disobedience as hath been used.

(8) In case of enormous and obstinate disobedience in breach of a decree, an injunction is to be granted *sub poena* of a sum; and upon affidavit or other sufficient proof of persisting in contempts, fines are to be pronounced by the Lord Chancellor in open court,

and the same estreated down into the Hanaper, if cause be, by a special order.

(9) In case of a decree made for the possession of land, a writ of execution goeth forth, and, if that be disobeyed, then process of contempt, according to the course of the court against the person to commission of rebellion, and then a sergeant at arms by special warrant, and, in case the sergeant at arms cannot find him, or be resisted, upon the coming in of the party and his commitment, if he persist in disobedience, an injunction is to be granted for the possession, and, in case that also be disobeyed, then a commission to put him in possession.

(10) Where the party is committed for breach of a decree, he is not to be enlarged until the decree be fully performed in all things which are to be done presently; but if there be other parts of the decree to be performed at days or times to come, then he may be enlarged by order of court upon recognizance, with sureties, to be put in for the performance *de futuro;* otherwise not.

(11) Where causes come to a hearing in court, no decree bindeth any person who was not served with process *ad audiendum judicium*, according to the course of the court, or did appear *gratis* in person in court.

(12) No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted

with the conveyance, the court is to give order upon the special matter according to justice.

(13) Where causes are dismissed upon full hearing, and the dismission signed by the lord chancellor, such causes shall not be retained again, nor new bill exhibited, except it be upon new matter, like to the case of the bill of review.

(14) In case of other dismissions which are not, upon hearing of the cause, if any new bill be brought, the dismission is to be pleaded; and after reference and report of the contents of both suits, and consideration taken of the causes of the former dismission, the court shall rule the retaining or dismissing of the new bill, according to justice and the nature of the case.

(15) All suits grounded upon wills nuncupative, leases parol, or upon long leases that tend to the defeating of the king's tenures, for the establishing of perpetuities, or grounded upon remainders put in to the crown to defeat purchasers, or for brokage or rewards to make marriages, or for bargains at play and wagers, or for bargains for offices contrary to the statute of 5 & 6 Edw. VI., or for contracts upon usury or simony, are regularly to be dismissed upon motion if they be the sole effect of the bill, and, if there be no special circumstances, to move the court to allow them a proceeding, and all suits under the value of ten pounds are regularly to be dismissed.

(16) Dismissions are properly to be prayed and had, either upon hearing or upon plea unto the bill, when the cause comes first into the court; but dismissions are not to be prayed after the parties have been at charges of examination, except it be upon special cause.

(17) If the plaintiff discontinue the prosecution, after all the defendants have answered above the space of one whole term, the cause is to be dismissed of course, without any motion, but, after replication put in, no cause is to be dismissed without motion and order of the court.

(18) Double vexation is not to be admitted; but if the party sue for the same cause at common law and in chancery, he is to have a day given to make his election where he will proceed, and, in default of such election, to be dismissed.

(19) Where causes are removed by special *certiorari* upon a bill containing matter of equity, the plaintiff is, upon receipt of his writ, to put in bond to prove his suggestion within fourteen days after the receipt, which, if he does not prove, then, upon certificate from either of the examiners presented to the lord chancellor, the cause shall be dismissed with costs, and a *procedendo* to be granted.

(20) No injunction of any nature shall be granted, revived, dissolved, or stayed upon any private petition.

(21) No injunction to stay suits at the law shall be granted upon priority of suit only, or upon surmise of the plaintiff's bill only, but upon matter confessed in the defendant's answer or matter of record, or writing plainly appearing, or when the defendant is in contempt for not answering, or that the debt desired to be stayed appeareth to be old, and hath slept long, or the creditor or the debtor hath been dead some good time before the suit brought.

(22) Where the defendant appears not, but sits an attachment; or when he doth appear, and departs without answer, and is under attachment for not answering; or when he takes oath he cannot answer

without sight of evidences in the country; or where, after answer, he sues at common law by attorney, and absents himself beyond sea,—in these cases an injunction is to be granted for the stay of all suits at the common law until the party answer or appear in person in court, and the court give further order; but nevertheless, upon answer put in, if there be no motion made the same term, or the next general seal after the term, to continue the injunction, in regard of the insufficiency of the answer put in, or in regard of the matter confessed in the answer, then the injunction to die and dissolve without any special order.

(23) In the case aforesaid, where an injunction is to be granted for stay of suits at the common law, if the like suit be in the chancery, either by *scire facias* or privilege or English bill, then the suit is to be stayed by order of the court, as it is in other courts by injunction, for that the court cannot enjoin itself.

(24) Where an injunction hath been obtained for stay of suits, and no prosecution is had for the space of three terms, the injunction is to fall of itself, without further motion.

(25) Where a bill comes in after an arrest at the common law for a debt, no injunction shall be granted without bringing the principal money into court, except there appear in the defendant's answer, or by sight of writings, plain matter tending to discharge the debt in equity; but if an injunction be awarded and disobeyed, in that case no money shall be brought in or deposited in regard of the contempt.

(26) Injunctions for possession are not to be granted before a decree, but where the possession hath continued by the space of three years before the bill exhibited, and upon the same title, and not upon any title by lease, or otherwise determined.

(27) In case where the defendant sits all the process of contempt and cannot be found by the sergeant at arms, or resists the sergeant, or makes rescue, a sequestration shall be granted of the land in question, and, if the defendant render not himself within the year, then an injunction for the possession.

(28) Injunctions against felling of timber, plowing up of ancient pastures, or for the maintaining of inclosures, or the like, shall be granted according to the circumstances of the case; but not in case where the defendant, upon his answer, claimeth an estate of inheritance, except it be where he claimeth the land in trust, or upon some other special ground.

(29) No sequestration shall be granted but of lands, leases, or goods in question, and not of any other lands or goods not contained in the suits.

(30) Where a decree is made for rent to be paid out of land, or a sum of money to be levied out of the profits of land, there a sequestration of the same lands, being in the defendant's hands, may be granted.

(31) Where the decrees of the provincial counsel, or of the court of requests, or the queen's court, are, by continuancy or other means, interrupted, there the court of chancery, upon a bill preferred for corroborations of the same jurisdictions, decrees, and sentences, shall give remedy.

(32) Where any cause comes to a hearing that hath been formerly decreed in any other of the king's courts of justice at Westminster, such decree shall be first read, and then to proceed to the rest of the evidence on both sides.

(33) Suits after judgment may be admitted according to the ancient custom of the chancery, and the late royal decision of his majesty of record after solemn

and great deliberation; but in such suits it is ordered that bond be put in with good sureties to prove the suggestions of the bill.

(34) Decrees upon suits brought after judgment shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution or perform other acts, according to the equity of the case.

(35) The registers are to be sworn, as hath been lately ordered.

(36) If any order shall be made, and the court not informed of the last material order formerly made, no benefit shall be taken by such order, as granted by abuse and surreptition, and to that end the registers ought duly to mention the former order in the latter.

(37) No order shall be explained upon any private petition, but in court as they are made; and the register is to set down the orders as they were pronounced by the court truly at his peril, without troubling the lord chancellor by any private attending of him to explain his meaning; and if any explanation be desired, it is to be done by public motion, where the other party may be heard.

(38) No draft of any order shall be delivered by the register to either party without keeping a copy by him, to the end that, if the order be not entered, nevertheless the court may be informed what was formerly done, and not put to new trouble and hearing, and to the end, also, that knowledge of orders be not kept back too long from either party, but may presently appear at the office.

(39) Where a lease[1] hath been debated, upon hearing of both parties, and opinion hath been delivered

[1] "This word ought to be 'cause,' and it is so stated in Toth. (Proceed.) 30." Beames, Order Ch., 20.

by the court, and, nevertheless, the cause referred to treaty, the registers are not to omit the opinion of the court in drawing of the order of reference, except the court doth specially declare that it be entered without any opinion either way; in which case, nevertheless, the registers, are out of their short note, to draw up some more full remembrance of that that passed in court, to inform the court if the cause come back and cannot be agreed.

(40) The registers, upon sending of their draft unto the counsel of the parties, are not to respect the interlineations or alterations of the said counsel (be the said counsel never so great), further than to put them in remembrance of that which was truly delivered in court, and so to conceive the order upon their oath and duty, without any further respect.

(41) The registers are to be careful in penning and drawing up of decrees, and special matters of difficulty and weight, and therefore, when they present the same to the lord chancellor, they ought to give him understanding which are those decrees of weight, that they may be read and reviewed before his lordship sign them.

(42) The decrees granted at the rolls are to be presented to his lordship, with the orders whereupon they are drawn, within two or three days after every term.

(43) Injunctions for possession, or for stay of suits after verdict, are to be presented to his lordship together with the orders whereupon they go forth, that his lordship may take consideration of the order before he sign them.

(44) Where any order upon the special nature of the case shall be made against any of these general

rules, there the register shall plainly and expressly set down the particulars, reasons, and grounds moving the court to vary from the general rule.

(45) No reference upon a demurrer or question touching the jurisdiction of the court shall be made to the masters of the chancery, but such demurrers shall be heard and ruled in court, or by the lord chancellor himself.

(46) No order shall be made for the confirming or ratifying of any report without day first given, by the space of a seven-night at the least, to speak to it in court.

(47) No reference shall be made to any masters of the court, or any other commissioners, to hear and determine, where the cause is gone so far as to examination of witnesses, except it be in special cases of parties near in blood, or of extreme poverty, or by consent, and, generally, reference of the state of the cause, except it be by consent of the parties, to be sparingly granted.

(48) No report shall be respected in court which exceedeth the warrant of reference.

(49) The masters of the court are required not to certify the state of any cause as if they would make breviates of the evidence on both sides, which doth little ease the court, but with some opinion, or otherwise, in case they think it too doubtful to give opinion, and therefore make such special certificate, the cause is to go on to a judicial hearing without respect had to the same.

(50) Matters of account, unless it be in very weighty causes, are not fit for the court, but to be prepared by reference, with this difference, nevertheless: that the cause comes first to a hearing, and, upon the entrance into a hearing, they may receive

some direction, and be turned over to have the accounts considered, except both parties, before a hearing, do consent to a reference of the examination of the accounts to make it more ready for a hearing.

(51) The like course to be taken for the examination of court rolls, upon customs and copies, which shall not be referred to any one master, but to two masters, at the least.

(52) No reference to be made of the insufficiency of an answer without showing of some particular point of the defect, and not upon surmise of the insufficiency in general.

(53) Where a trust is confessed by the defendant's answer, there needeth no farther hearing of the cause, but a reference presently to be made of the account, and so to go on to a hearing of the accounts.

(54) In all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*, he shall pay unto the defendant his utmost costs, to be assessed by the court.

(55) If any bill, answer, replication, or rejoinder shall be found of an immoderate length, both the party and the counsel under whose hand it passed shall be fined.

(56) If there be contained in any bill, answer, or other pleadings or interrogatory any matter libelous or slanderous against any that is not party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his majesty's courts, such bills, answers, pleadings, or interrogatories shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit for the abuse of the court, and the counselors at law who

have set their hands shall likewise receive reproof or punishment, if cause be.

(57) Demurrers and pleas which tend to discharge the suit shall be heard first upon every day of orders, that the subject may know whether he shall need farther attendance or not.

(58) A demurrer is properly upon matter defective contained in the bill itself, and no foreign matter, but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like; and such plea may be put in without oath in case where the matter of the plea appears upon record, but, if it be anything that doth not appear upon record, the plea must be upon oath.

(59) No plea of outlawry shall be allowed without pleading the record *sub pedi sigilli;* nor plea of excommunication without the seal of the ordinary.

(60) Where any suit appeareth upon the bill to be of the natures which are regularly to be dismissed, according to the 15th ordinance, such matter is to be set forth by way of demurrer.

(61) Where an answer shall be certified insufficient, the defendant is to pay costs; and if a second answer be returned insufficient in the points before certified insufficient, then double costs; and upon the third, treble costs; and upon the forth, quadruple costs; and then to be committed also until he hath made a perfect answer, and to be examined upon interrogatories touching the points defective in his answer; but if any answer be certified sufficient, the plaintiff is to pay costs.

(62) No insufficient answer can be taken hold of after replication put in, because it is admitted sufficient by the replication.

(63) An answer to a matter charged, as the defendant's own fact, must be direct, without saying it is to his remembrance, or as he believeth, if it be laid as done within seven years before. If the defendant deny the fact, he must traverse it directly, and not by way of negative pregnant; as, if a fact be laid to be done with diverse circumstances, the defendant may not traverse it literally as it is laid in the bill, but must traverse the point of substance. So, if he be charged with the receipt of £100, he must traverse that he hath not received £100, nor any part thereof, and, if he have received part, he must set forth what part.

(64) If a hearing be prayed upon bill and answer, the answer must be admitted to be true in all points, and a decree ought not to be made, but upon hearing the answer read in court.

(65) Where no counsel appears for the defendant at the hearing, and the process appears to have been served, the answer of such defendant is to be read in court.

(66) No new matter is to be contained in any replication, except it be to avoid matter set forth in the defendant's answer.

(67) All copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwastefully, unto which shall be subscribed the name of the principal clerk of the office where it is written, or his deputy, for whom he will answer, for which subscription only no fee at all shall be taken.

(68) All commissions for examinations of wit-

nesses shall be *super interr. inclusis* only, and no return of depositions into the court shall be received but such only as shall be either comprised in one roll, subscribed with the name of the commissioners, or else in divers rolls, whereof each one shall be so subscribed.

(69) If both parties join in commissions, and, upon warning given, the defendant bring his commissioners, but produceth no witnesses, nor ministereth interrogatories, but after seek a new commission, the same shall not be granted; but nevertheless, upon some extraordinary excuse of the defendant's default, he may have liberty granted by special order to examine his witnesses in court upon the former interrogatories, giving the plaintiff, or his attorney, notice that he may examine also if he will.

(70) The defendant is not to be examined upon interrogatories, except it be in very special cases, by express order of the court, to sift out some fraud, or practice pregnantly appearing to the court, or otherwise, upon offer of the plaintiff, to be concluded by the answer of the defendant, without any liberty to disprove such answer, or to impeach him after of perjury.

(71) Decrees in other courts may be read upon hearing, without the warrant of any special order, but no depositions taken in any other court are to be read but by special order; and, regularly, the court granteth no order for reading of deposition, except it be between the same parties, and upon the same title and cause of suit.

(72) No examination is to be had of the credit of any witness but by special order, which is sparingly to be granted.

(73) Witnesses shall not be examined *in perpetuam rei memoriam*, except it be upon the ground of a bill first put in, and answer thereunto made, and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined, and so publication to be of such witnesses, with this restraint nevertheless: that no benefit shall be taken of the depositions of such witnesses in case they may be brought *viva voce* upon the trial, but only to be used in case of death before the trial, or age, or impotency, or absence out of the realm at the trial.

(74) No witnesses shall be examined after publication, except it be by consent or by special order *ad informandum conscientiam judicis* and then to be brought close sealed up to the court, to peruse or publish, as the court shall think good.

(75) No affidavit shall be taken or admitted by any master of the chancery tending to the proof or disproof of the title or matter in question, or touching the merits of the cause; neither shall any such matter be colorably inserted in any affidavit for serving of process.

(76) No affidavit shall be taken against affidavit, as far as the masters of the chancery can have knowledge, and, if any such be taken, the latter affidavit shall not be used nor read in court.

(77) In case of contempts granted upon force, or ill words upon serving of process, or upon words of scandal of the court, proved by affidavit, the party is forthwith to stand committed. But for other contempts against the orders or decrees of the court, an attachment goes forth first upon affidavit made, and then the party is to be examined upon interroga-

tories, and his examination referred. And if, upon his examination, he confess matter of contempt, he is to be committed; if not, the adverse party may examine witnesses to prove the contempt. And therefore, if the contempt appear, the party is to be committed; but, if not, or if the party that pursues the contempt do fail in putting in interrogatories, or other prosecution, or fail in the proof of the contempt, then the party charged with the contempt is to be discharged with good costs.

(78) They that are in contempt, especially so far as proclamation of rebellion, are not to be here, neither in that suit nor any other, except the court of special grace suspend the contempt.

(79) Imprisonment upon contempt for matters passed may be discharged of grace after sufficient punishment, or otherwise dispensed with; but if the imprisonment be for not performance of any order of the court in force, they ought not to be discharged, except they first obey, but the contempt may be suspended for a time.

(80) Injunctions, sequestrations, dismissions, retainers upon dismissions, or final orders are not to be granted upon petitions.

(81) No former order made in court is to be altered, crossed, or explained upon any petition; but such orders may be stayed upon petition for a small stay, until the matter may be moved in court.

(82) No commission for examination of witnesses shall be discharged, nor no examinations or depositions shall be suppressed upon petition, except it be upon point of course of the court first referred to the clerks, and certificate thereupon.

(83) No demurrer shall be overruled upon petition.

(84) No *scire facias* shall be awarded upon recognizances not enrolled, nor upon recognizances enrolled, unless it be upon examination of the record with the writ; nor no recognizance shall be enrolled after the year, except it be upon special order from the Lord Chancellor.

(85) No writ of *ne exeat regnum*, prohibition, consultation, statute of Northampton, *certiorari* special, or *procedendo* special, or *certiorari* or *procedendo* general, more than one in the same cause; *habeas corpus*, or *corpus cum causa, vi laica removend*,—restitution thereupon, *de coronatore et viridario eligendo* in case of a moving *de homine repleg. assiz.*, or special patent, *inde ballivo amovend, certiorari super presentationibus* fact, *coram commissariis seward*, or *ad quod dampnum*, shall pass without warrant under the Lord Chancellor's hand, and signed by him, save such writs as (of) *ad quod dampnum* as shall be signed by master attorney.

(86) Writs of privilege are to be reduced to a better rule, both for the number of persons that shall be privileged, and for the case of the privilege; and as for the number, it shall be set down by schedule, for the case is to be understood that, besides parties privileged, as attendants upon the court, suitors and witnesses are only to have privilege *eundo, redeundo, et morando*, for their necessary attendance, and not otherwise, and that such writ of privilege dischargeth only an arrest upon the first process; but yet where, at such times of necessary attendance, the party is taken in execution, it is a contempt to the court, and accordingly to be punished.

(87) No *supplicavit* for the good behavior shall be granted but upon articles grounded upon the oath of two, at the least, or certificate of any one justice

of assize, or two justices of the peace, with affidavit that it is their hands, or by order of the star chamber or chancery or other of the king's courts.

(88) No recognizance of the good behavior and the peace taken in the country, and certified into the petty bag, shall be filed in the year, without warrant from the lord chancellor.

(89) Writs of *ne exeat regnum* are properly to be granted, according to the suggestion of the writ, in respect of attempts prejudicial to the King and State, in which case the lord chancellor will grant them, upon prayer of any of the principal secretaries, without cause showing, or upon such information as his lordship shall think of weight; but otherwise, also, they may be granted, according to the practice of long time used, in case of interlopers in trade, great bankrupts, in whose estate many subjects are interested, or other cases that concern multitudes of the king's subjects, also in case of duels and divers others.

(90) All writs, certificates, and whatsoever other process *ret. coram rege in Canc.* shall be brought into the chapel of the rolls within convenient time after the return thereof, and shall be there filed, upon their proper files and bundles, as they ought to be, except the depositions of witnesses, which may remain with any of the six clerks by the space of one year next after the cause shall be determined by decree, or otherwise be dismissed.

(91) All injunctions shall be enrolled, or the transcript filed, to the end that, if occasion be, the court may take order to award writs of *scire facias* thereupon, as in ancient time hath been used.

(92) All days given by the court to sheriffs to return their writs, or bring their prisoners upon writs

of privilege, or otherwise, between party and party, shall be filed either in the register's office or in the petty bag, respectively; and all recognizances taken to the king's use, or unto the court, shall be duly enrolled in convenient time with the clerks of the enrollment, and calendars made of them, and the calendars every Michaelmas term to be presentd to the lord chancellor.

(93) In case of suits upon the commissions for charitable uses, to avoid charge, there shall need no bill, but only exceptions to the decree and answer forthwith to be made thereunto; and thereupon, and upon sight of the inquisition, and the decree brought unto the lord chancellor by the clerk of the petty bag, his lordship, upon perusal thereof, will give order under his hand for an absolute decree to be drawn up.

(94) Upon suit for the commission of sewers, the names of those that are desired to be commissioners are to be preferred to the lord chancellor in writing; then his lordship will send the names of some privy counselor, lieutenant of the shire, justices of assize, being resident in the parts for which the commission is prayed, to consider of them, that they be not put in for private respects, and, upon the return of such opinion, his lordship will farther order for the commission to pass.

(95) No new commission of sewards shall be granted while the first is in force, except it be upon discovery of abuse or fault in the first commissioners, or otherwise upon some great and weighty ground.

(96) No petition of bankrupts shall be granted but upon petition first exhibited to the lord chancellor, together with names presented, of which his lordship will take consideration, and always single some learned

in the law with the rest, yet so as care be taken that the same parties be not too often used in commissions; and likewise care is to be taken that bond with good surety be entered into, in two hundred pounds at least, to prove him a bankrupt.

(97) No commission of delegates in any case of weight shall be awarded but upon petition preferred to the lord chancellor, who will name the commissioners himself, to the end that they may be persons of convenient quality, having regard to the weight of the cause, and the dignity of the court from whom the appeal is.

(98) Any man shall be admitted to defend *in forma pauperis* upon oath; but for plaintiffs, they are ordinarily to be referred to the court of requests, or to the provincial counsels, if the case arise in the jurisdictions, or to some gentlemen in the country, except it be in some special cases of commiseration or potency of the adverse party.

(99) Licenses to collect for losses by fire or water are not to be granted but upon good certificate, and not for decays of suretyship, or debt, or any other casualties whatsoever; and they are rarely to be renewed; and they are to be directed unto the county where the loss did arise, if it were by fire, and the counties that abut upon it, as the case shall require, and, if it were by sea, then unto the county where the port is from whence the ship went, and to some counties adjoining.

(100) No exemplification shall be made of letters patent (*inter alia*) with omission of the general words; nor of records made void or canceled; nor of the decrees of this court not enrolled; nor of depositions by parcel; nor of depositions in court, to which the hand of the examiner is not subscribed; nor of

records of the court, not being enrolled or filed; nor of records of any other courts, before the same be duly certified to this court, and orderly filed here; nor of any records upon the sight and examination of any copy in paper but upon sight and examination of the original.

(101) And, because time and experience may discover some of these rules to be inconvenient, and some other to be fit to be added, therefore his lordship intendeth, in any such case, from time to time to publish any such revocations or additions.

APPENDIX A.

TO TRUSTS.

DECL/ RATION CREATING A TRUST.

TO ALL TO WHOM THESE PRESENTS SHALL COME—Greeting:

WHEREAS, It is my intention and desire to create a trust for the purpose of.....
.....
and to that end, and that the above object and purpose may be effectually consummated as desired, I do hereby declare this the following trust:

NOW THEREFORE, KNOW YE, That in pursuance of such intention, I ..... of ..... in the County of ..... and State of ....., on this .....day of ....., in the year of our Lord one thousand eight hundred and ninety....., have nominated, appointed and declared, and by these presents do hereby nominate, appoint and declare .....of.....,.....in the County of ..... and State of ....., to be my Trustee, of the sum of .....DOLLARS, which said sum of money is this day paid and delivered by me to the said ..... in trust, nevertheless, for the purposes following, that is to say:.....
.....
.....
the said Trustee, ..., or his successor in trust, to have and to hold the said sum of money for the purposes above mentioned and for no other or different purpose or purposes, and to account to me in writing of all his actings and doings in respect of the said trust hereby created, and of the money so delivered to him, at such reasonable time or times as he shall be requested in writing so to do.

The said ....., Trustee, is hereby authorized and empowered to use the said money for the full execution of the trust, following out the purposes herein set forth, without let or hindrance from any one, exercising his own best judgment and discretion for the best advancement of the purposes herein set forth.

If for any cause, the said trust shall not be fully executed, or shall fail or become inoperative, then the balance of the aforesaid sum of money, if any remains after payment of all expenses and charges of said trust, shall be returned to me, the said .....

The said ....., Trustee, shall be allowed to retain, out of said sum of money, the sum of ..... DOLLARS, as pay for his services in this behalf for executing this trust, to be paid to him on the execution of this trust.

This trust shall become operative and binding immediately upon its acceptance by the said ....., Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ..... day of .....A. D. 190...

IN PRESENCE OF US,
.....
.....
} ..... [SEAL.]

ACCEPTANCE BY TRUSTEE.

I, ..., named as Trustee in the foregoing instrument, for myself, hereby acknowledge the receipt of the foregoing sum of money from the said ..... creating said trust, and I agree to accept the said trust, and enter upon its performance, and that I will faithfully perform the duties and obligations imposed upon me herein, to the best of my ability, and will faithfully account to the said .... for all moneys received by me for the purposes of said trust.

IN WITNESS WHEREOF, I have hereunto set my hand this ..... day of ..... A. D. 190...

IN PRESENCE OF US:
.....
.....
} .....

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