



COMMENTARIES

ON

EQUITY JURISPRUDENCE,

AS ADMINISTERED

IN

ENGLAND AND AMERICA.

BY JOSEPH STORY, LL. D.,

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

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

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TO THE HONORABLE

WILLIAM PRESCOTT, LL. D.

SIR,

IT affords me sincere gratification to be allowed to dedicate this work to you, upon your retirement from the Bar, of which you have been so long a distinguished ornament. More than one third of a century has elapsed, since, upon my first admission to practice, I had the honor of forming an acquaintance with you, which has ripened into a degree of friendship, of which I may be truly proud. It has been my good fortune through the whole intermediate period to have been a witness of your professional labors;—labors equally remarkable for the eminent ability, untiring research, profound learning, and unsullied dignity, with which they were accompanied. They have brought with them the just reward due to a life of consistent principles, and public spirit, and private virtue, in the universal confidence and respect, which have followed you in your retreat from the active scenes of business. This is a silent but expressive praise, whose true value is not easily overestimated. I trust, that you may live many years to enjoy it; for the reason so finely touched by one of the great Jurists of Antiquity; *Quia Conscientia bene actæ vitæ, multorumque benefactorum Recordatio jucundissima est.*

JOSEPH STORY.

Cambridge, December, 1835.

P R E F A C E .

THE present work embraces another portion of the labors, devolved upon me by the Founder of the Dane Professorship of Law in Harvard University. In submitting it to the Profession, it is impossible for me not to feel great diffidence and solicitude, as to its merits, as well as to its reception by the public. The subject is one of such vast variety and extent, that it would seem to require a long life of labor to do more than to bring together some of the more general elements of the System of Equity Jurisprudence, as administered in England and America. In many branches of this most complicated System, composed (as it is) partly of the principles of natural law, and partly of artificial modifications of those principles, the ramifications are almost infinitely diversified; and the Sources, as well as the Extent, of these branches, are often obscure and ill defined, and sometimes incapable of any exact development. I have endeavoured to collect together, as far as my own imperfect studies would admit, the more general principles belonging to the System in those branches, which are of daily use and practical importance. My main object has been to trace out and define the various sources and limits of Equity Jurisdiction, as far as they may be ascertained by a careful examination of the Authorities, and a close Analysis of each distinct ground of that Jurisdiction, as it has been practically expounded and applied in different ages. Another object has been to incorporate into the text some of the leading doctrines, which guide and govern Courts of Equity in the exercise of their jurisdiction; and

especially in those cases, where the doctrines are peculiar to those Courts, or are applied in a manner unknown to the Courts of Common Law. In many cases I have endeavoured to show the reasons, upon which these doctrines are founded; and to illustrate them by principles drawn from foreign jurisprudence, as well as from the Roman Civil Law. Of course the Reader will not expect to find in these Commentaries a minute, or even a general, survey of all the doctrines belonging to any one branch of Equity Jurisprudence; but such expositions only, as may most fully explain the Nature and Limits of Equity Jurisdiction. In order to accomplish even this task in any suitable manner, it has become necessary to bestow a degree of labor in the examination and comparison of authorities, from which many jurists would shrink, and which will scarcely be suspected by those, who may consult the work only for occasional exigencies. It will be readily seen, that the same train of remark, and sometimes the same illustrations are repeated in different places. As the work is designed for elementary instruction, this course seemed indispensable to escape from the inconvenience of perpetual references to other passages, where the same subject is treated under other aspects.

The work is divided into three great heads. First, The Concurrent Jurisdiction of Courts of Equity; secondly, the Exclusive Jurisdiction; and thirdly, the Auxiliary or Assistant Jurisdiction. The Concurrent Jurisdiction is again subdivided into two branches; the one, where the subject matter constitutes the principal (though rarely the sole) ground of the Jurisdiction; the other, where the peculiar remedies administered in Equity, constitute the principal (though not always the sole) ground of jurisdiction. The present volume embraces the first only of these branches of Concurrent Jurisdiction. The remaining subjects will be fully discussed in the succeeding volume. I hope also to find leisure to present, as a fit conclusion of these Commentaries, a general review of the Doctrines of

Equity Pleading, and of the Course of Practice in Equity Proceedings.

In dismissing the work to the indulgent consideration of the Profession, I venture to hope, that it will not be found, that more has been promised than is performed; and that, if much has been omitted, something will yet be found to lighten the labors of the inquisitive, if not to supply the wants of the learned.

Cambridge, Mass., December, 1835.

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Page	22, line	3, for	Lombard	read	Lambard.
"	73, note	2, "	2 Fearn	"	2 Freem.
"	76, "	2, "	Mr. Balt	"	Mr. Belt.
"	80, "	2, "	Lect. 56, page 482, 483	read	Lect. 58, page 466, 467.
"	84, "	4, "	Lord Eldon	read	Lord Erskine.
"	111, line	15, "	against	"	against.
"	126, "	21, "	entering	"	are entering.
"	128, "	16, "	that	"	a.
"	200, "	3, "	but deduces	"	but each deduces.
"	223, "	23, "	parts	"	facts.
"	248, note	3, "	Dalbrai	"	Dalbiac.
"	266, line	8, "	purposes	"	purpose.
"	307, "	14, "	former	"	latter.
"	307, "	16, "	latter	"	former.
"	338, note	1, line 26, for	conduct	read	contract.
"	364, line	14, "	is	read,	are.
"	424, note	1, for	four	"	few.
"	424, line	18, "	accounts	"	account.
"	450, "	6, "	their	"	its.
"	439, note	1, after	Winchester	insert	v. Knight.
"	495, line	26, for	that	read	it.
"	553, "	5, "	view	"	review.
"	588, "	"	CHAP. XII.	"	CHAP. XIII.
"	592, "	19, "	§ 637	"	§ 638.
"	608, "	11, "	owelty	"	equality.
"	608, note	3, "	"	"	"
"	623, line	1, "	capable	"	incapable.

COMMENTARIES

ON

EQUITY JURISPRUDENCE.

CHAPTER I.

THE TRUE NATURE AND CHARACTER OF EQUITY JURISPRUDENCE.

§ 1. IN treating of the subject of Equity, it is material to distinguish the various senses, in which that word is used. For it cannot be disguised, that an imperfect notion of what, in England, constitutes Equity Jurisprudence, is not only common among those, who are not bred to the profession ; but that it has often led to mistakes and confusion in professional treatises on the subject. In the most general sense, we are accustomed to call that Equity, which, in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex æquo et bono*. In this sense it answers precisely to the definitions of justice, or natural law, as given by Justinian in the Pandects. *Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Jus pluribus modis dicitur ; uno modo, cum id quod semper æquum et bonum, jus dicitur, ut est jus naturale. Juris precepta sunt hæc ; honeste vivere, alterum non lædere, Eq.*

suum cuique tribuere.¹ And the word *jus* is used in the same sense in the Roman law, when it is declared, that *jus est ars boni et æqui*,² where it means, what we are accustomed to call, jurisprudence.³

§ 2. Now, it would be a great mistake to suppose, that Equity, as administered in England or America, embraced a jurisdiction so wide and extensive, as that, which arises from the principles of natural justice, above stated. Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Even the Roman law, which has been justly thought to deal to a vast extent in matters *ex æquo et bono*, never affected so bold a design.⁴ On the contrary, it left many matters of natural justice wholly unprovided for, from the difficulty of framing any general rule to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness, or even to positive engagements of parties, where they are not founded in

¹ Dig. Lib. 1, tit. 1, l. 10, 11.

² Dig. Lib. 1, tit. 1, l. 1.

³ Grotius, after referring to the Greek word, used to signify Equity, says, *Latinis autem æqui prudentia vertitur, quæ se ita ad æquitatem habet, ut jurisprudentia ad justitiam*. Grotius de *Æquitate*, ch. 1, § 4. This distinction is more refined, than solid, as the citation in the text shows. See also Taylor's *Elements of the Civil Law*, p. 90 to 98; Cicero. *Topic*. § 2; II. ad *Heren*. 13; III. ad *Heren*. 2. Bracton has referred to the various senses, in which *jus* is used. Item, (says he,) *jus quandoque ponitur pro jure naturali, quod semper bonum et æquum est; quandoque pro jure civili tantum; quandoque pro jure prætorio tantum; quandoque pro eo tantum, quod competit ex sententiâ*. Bracton, Lib. 1. ch. 4. p. 3. See Dr. Taylor's *Definition of lex and jus*. *Elem. Civ. Law*. p. 147, 148; Id. 178; Id. 40 to 43; Id. 55, 56; Id. 91.

⁴ See Heinecc. *Hist. Edit.* L. 1. ch. 6; De *Edictis Prætorum*, § 7, 8, 9, 10, 11, 12; Id. § 18, 21 to 30; De *Lolme on Eng. Const.* B. 1, ch. 11.

what constitutes a meritorious consideration.¹ Thus, it is well known, that in the Roman law, as well as in the common law, there are many pacts, or promises of parties, (*nude pacts*,) which produce no legal obligation, capable of enforcement *in foro externo*; but which are left to be disposed of *in foro conscientie* only.² *Cum nulla subest causa propter conventionem, hic constat non posse constitui obligationem. Igitur nuda pactio obligationem non parit.*³ And again. *Qui autem promisit sine causa, condicere quantitatem non potest, quam non dedit, sed ipsam obligationem.*⁴ And hence the settled distinction, in that law, between natural obligations, upon which no action lay, but they were merely binding in conscience, and civil obligations, which gave origin to actions.⁵ The latter were sometimes called just, because of perfect obligation in a civil sense; the former merely equitable, because of imperfect obligation. *Et justum appellatur*, (says Wolfius,) *quicquid fit secundum jus perfectum alterius; æquum vero, quod secundum imperfectum.*⁶ Cicero has alluded to the double sense of the word *Equity*, in this very connexion. *Æquitatis*, (says he,) *autem vis est duplex; cujus altera directi, et veri, et justi, ut dicitur, æqui et boni ratione dependitur; altera ad vicissitudinem referendæ gratiæ pertinet; quod in beneficio gratiæ, in injuria ultio nominatur.*⁷ It is scarcely necessary to add, that it is not in this latter sense,

¹ Ayliffe, Pand. B. 4, tit. 1. p. 420, &c.; 1 Kaims, Equity, Introd. p. 3; Francis, Maxims, Introd. p. 5, 6, 7.

² Ayliffe, Pand. B. 4, tit. 2. p. 424, 425; 1 Domat, Civ. Law, B. 1, tit. 1, § 5, art. 1, 6, 9, 13.

³ Dig. Lib. 2, tit. 14, l. 7, § 4.

⁴ Dig. Lib. 12, tit. 7, l. 1.

⁵ Ayliffe, Pand. B. 4, tit. 1, p. 420, 421.

⁶ Wolff. Instit. Jur. Nat. et Gent. P. 1, ch. 3, § 83.

⁷ Cic. Orat. Part. § 37.

any more than in the broad and general sense above stated, which Ayliffe has, with great propriety, denominated *Natural Equity*, because it depends on and is supported by natural reason, that Equity is spoken of, as a branch of English Jurisprudence. The latter falls appropriately under the head of *Civil Equity*, as defined by the same author, being deduced from and governed by such civil maxims, as are adopted by any particular state or community.¹

§ 3. But there is a more limited sense, in which the term is often used, and which has the sanction of jurists in ancient, as well as in modern times, and belongs to the language of common life, as well as to that of juridical discussions. The sense, here alluded to, is that, in which it is used in contradistinction to strict law, or *strictum et summum jus*. Thus, Aristotle has defined the very nature of Equity to be the correction of the law, wherein it is defective by reason of its universality.² The same sense is repeatedly recognised in the Pandects. *In omnibus quidem, maxime tamen in jure, æquitas spectanda sit. Quotiens æquitate desiderii naturalis ratio, aut dubitatio juris moratur, justis decretis res temperanda. Placuit in omnibus rebus præcipuam esse justitiæ æquitatisque, quam stricti juris rationem.*³ Grotius and Puffendorf

¹ Ayliffe, Pand. B. 1, tit. 7, p. 37.

² Arist. Ethic. Nicom. L. 5, ch. 14, cited 1 Woodes. Lect. (Lect. 7.) p. 193; Taylor, Elem. of Civ. Law. p. 91, 92, 93; Francis, Maxims, 3; 1 Fonbl. Eq. B. 1, § 2, p. 5, note (e). — Cicero, speaking of Galba, says, that he was accustomed, *Multa pro æquitate contra jus dicere*. Cic. de Oratore, Lib. 1, § 57. See also other passages, cited in Taylor's Elem. of the Civ. Law, 90, 91. Bracton defines *equity*, as contradistinguished from law, (*jus*,) thus; *Æquitas autem est rerum convenientia, quæ in paribus causis paria desiderat jura, et omnia bene cœquiparat; et dicitur æquitas quasi æqualitas*. Bracton, Lib 1, ch. 4, § 5, p. 3.

³ Dig. Lib. 50, tit. 17, l. 85, 90; Cod. Lib. 3, tit. 1, l. 8.

have both adopted the definition of Aristotle; and it has found its way, with approbation, into the treatises of most of the modern authors, who have discussed the subject.¹

§ 4. In the Roman jurisprudence we may see many traces of this doctrine, applied to the purposes of supplying the defects of the customary law, as well as to correct and measure the interpretation of the written and positive code. Domat, accordingly, lays it down, as a general principle of the civil law, that, if any case should happen, which is not regulated by some express or written law, it should have for a law the natural principles of Equity, which is the universal law, extending to every thing.² And for this he founds himself upon certain texts in the Pandects, which present the formulary in a very im-

¹ Grotius de *Æquitate*, ch. 1, § 3; Puffend. *Law of Nature and Nat.* B. 5, ch. 12, § 21, and Barbeyrac's note (1); 1 Black. *Comm.* 61; 1 Woodes. *Lect.* 7, p. 193; Bac. *De Aug. Scient. Lib.* 8, ch. 3, Aphor. 32, 35, 45. — Grotius says, *Proprie vero et singulariter æquitas est virtus voluntatis, correctrix ejus, quo lex propter universalitatem deficit.* Grotius de *Æquitate*, ch. 1, § 2. *Æquum est id ipsum, quo lex corrigitur.* Id. Dr. Taylor has with great force paraphrased the language of Aristotle. That part of unwritten law, says he, which is called *Equity*, or *τὸ Ἐπίαιον*, is a species of justice distinct from what is written. It must happen either against the design and inclination of the lawgiver, or with his consent. In the former case, for instance, when several particular facts must escape his knowledge; in the other, when he may be apprized of them, indeed, but by reason of their variety is not willing to recite them. For, if a case admits of an infinite variety of circumstances, and a law must be made, that law must be conceived in general terms. Taylor, *Elem. Civ. Law*, 92. And of this infirmity in all laws, the Pandects give open testimony. *Non possunt omnes articuli singillatim aut legibus, aut senatusconsultis comprehendere; sed cum in aliqua causa sententia eorum manifesta est, is, qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet.* Dig. L. 1, tit. 3, l. 12; Id. l. 10.

² 1 Domat. *Prel. Book.* tit. 1, § 1, art. 23. See also Ayliffe, *Pand.* B. 1, tit. 7, p. 38.

posing generality. *Hæc æquitas suggerit, etsi jure deficiamur*, is the reason given for allowing one person to restore a bank or dam in the lands of another, which may be useful to him, and not injurious to the other.¹

§ 5. The jurisdiction of the Prætor doubtless had its origin in this application of Equity, as contradistinguished from mere law. *Jus civile*, (say the Pandects,) *est, quod ex legibus, plebiscitis, senatus consultis, decretis principum, auctoritate prudentium venit. Jus prætorium est, quod Prætores introduxerunt, adjuvandi, vel supplendi, vel corrigendi juris civilis gratiâ, propter utilitatem publicam; quod et honorarium dicitur, ad honorem prætorum sic nominatum.*² But, broad and general as this language is, we should be greatly deceived, if it were to be supposed, that even the Prætor's power extended to the direct overthrow or disregard of the positive law. He was bound to stand by that law in all cases, to which it was justly applicable, according to the maxim of the Pandects, *Quod quidem perquam durum est; sed ita lex scripta est.*³

¹ Dig. Lib. 39, tit. 3, l. 2, § 5. — He cites other texts not perhaps quite so stringent; such as Dig. Lib. 27, tit. 1, l. 13, § 7; Id. Lib. 47, tit. 20, l. 7. Dr. Taylor has given many texts to the same purpose. Elem. Civ. Law, p. 90, 91. There was a known distinction in the Roman law on this subject. Where a right was founded in the express words of the law, the actions grounded on it were denominated *Actiones Directæ*; where they arose upon a benignant extension of the words of the law to other cases, not within the terms, but within what we should call the equity of the law, they were denominated *Actiones Utiles*. Taylor, Elem. Civ. Law, 93.

² Dig. Lib. 1, tit. 1, l. 7; Id. tit. 3, l. 10. — *Sed et eas actiones, quæ legibus proditæ sunt*, (say the Pandects,) *si lex justa ac necessaria sit, supplet Prætor in eo, quod legi deest.* Dig. Lib. 19, tit. 5, l. 11. Heineccius, speaking of the Prætor's authority, says, *His Edictis multa innovata, adjuvandi, supplendi, corrigendi juris civilis gratia, obtentuque utilitatis publicæ.* 1 Heinec. Elem. Pand. P. 1, Lib. 1, § 42.

³ Dig. Lib. 40, tit. 9, l. 12, § 1. See also 3 Black. Comm. 430,

§ 6. But a more general way, in which this sense of Equity, as contradistinguished from mere law, or *strictum jus*, is applied, is, to the interpretation and limitation of the words of positive or written laws; by construing them, not according to the letter, but to the reason and spirit of them.¹ Mr Justice Blackstone has alluded to this sense in his Commentaries, where he says, “from this method of interpreting laws, by the reason of them, arises, what we call Equity;”² and more fully in another place, where he says, “Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made by it. In this, Equity is synonymous with justice; in that, to the true and sound interpretation of the rule.”³

431; 1 Woodes. Lect. 7, p. 192 to 200. — Dr. Taylor, (Elem. of the Civil Law, p. 214,) has therefore observed, that, for this reason, this branch of the Roman law was not reckoned as part of the *jus civile scriptum* by Papinian, but stands in opposition to it. And thus, as we distinguish between common law and equity, there were with that people *actiones civiles et prætorie, et obligationes civiles, et prætorie*. The Prætor was therefore called *Custos, non conditor juris*; *judicia exercere potuit*; *jus facere non potuit*; *dicendi non condendi juris potestatem habuit*; *juvare, supplere, interpretari, mitigare jus civile potuit*; *mutare vel tollere non potest*. The prætorian edicts are not properly law, though they may operate like law. And Cicero, speaking of contracts *bonæ fidei*, says, in allusion to the same jurisdiction, In his *magni esse judicis statuere, (præsertim cum in plerisque essent judicia contraria,) quid quemque cuique præstare oporteret*, that is, should decide according to equity and conscience. Cic. de Officiis, Lib. 3, cap. 17. Dr. Taylor has, in another part of his work, gone at large into equity and its various meanings in the civil law. Taylor, Elem. of Civil Law, 90 to 98.

¹ Plowden, Comm. p. 465, 466.

² 1 Black. Comm. p. 61, 62.

³ 3 Black. Comm. p. 429. See also Taylor, Elem. Civ. Law. p. 96, 97; Plowd. Comm. p. 465, Reporter's note. — Dr. Taylor has observed, that the great difficulty is, to distinguish between that Equity, which is required in all law whatsoever, and which makes a

§ 7. In this sense Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance.¹ It is impossible, that any code, however minute and particular, should embrace, or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them. *Neque leges, neque senatusconsulta ita scribi possunt*, (says the Digest,) *ut omnes casus, qui quandoque inciderint, comprehendantur; sed sufficit ea, quæ plerumque accidunt, contineri.*² Every system of laws must necessarily be defective; and cases must occur, to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all. It is the office, therefore, of a judge to consider, whether the antecedent rule does apply, or ought, according to the intention of the lawgiver, to apply to a given case; and if there are two rules, nearly approaching to it, but of opposite tendency, which of them ought to govern it; and if there exists no rule, applicable to all the circumstances, whether the party should be remediless, or whether the rule furnishing the closest analogy ought to be followed. The general words of a law may embrace all cases;

very important and a very necessary branch of the *jus scriptum*; and that Equity, which is opposed to written and positive law, and stands in contradistinction to it. 'Taylor, *Elem. Civ. Law*, p. 90.

¹ See 1 *Fonbl. Equity*, B. 1, § 3, p. 24, note (h); Plowden, *Com.* p. 465, 466. — Lord Bacon said, in his *Argument on the jurisdiction of the Marches*; There is no law under heaven, which is not supplied with equity; for *Summum jus summa injuria*; or, as some have it, *Summa lex summa crux*. And, therefore, all nations have Equity. 4 *Bac. Works*, p. 274. Plowden, in his note to his *Reports*, dwells much (p. 465, 466,) on the nature of equity in the interpretation of statutes, saying, *Ratio legis est anima legis*. And it is a common maxim in the law of England, that *Apices juris non sunt jura*. Taylor, *Maxims*, *Max.* 16, p. 21; *Id.* *Max.* 49, p. 38; *Id.* *Max.* 105, p. 74.

² *Dig. Lib.* 1, tit. 3, l. 10.

and yet it may be clear, that all could not have been intentionally embraced; for if they were, the obvious objects of the legislation might or would be defeated. So, words of a doubtful import may be used in a law, or words susceptible of a more enlarged, or a more restricted meaning, or of two meanings equally appropriate.¹ The question, in all such cases, must be, in what sense the words are designed to be used; and it is the part of a judge to look to the objects of the Legislature, and to give such a construction to the words, as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of Equity, as contradistinguished from a strict adherence to the mere letter of the law. Hence arises a variety of rules of interpretation of laws, according to their nature and operation, whether they are remedial or penal laws, whether restrictive of general right, or in advancement of public justice or policy; whether they are of universal application, or of a private and circumscribed intent. But this is not

¹ It is very easy to see from what sources Mr. Charles Butler drew his own statement (manifestly, as a description of English Equity Jurisprudence, incorrect, as Professor Park has shown) "That Equity, as distinguished from law, arises from the inability of human foresight to establish any rule, which, however salutary in general, is not, in some particular cases, evidently unjust and oppressive, and operates beyond, or in opposition to, its intent, &c. The grand reason for the interference of a Court of Equity is, that the imperfection of the legal remedy, in consequence of the universality of legislative provisions, may be redressed." 1 Butler's Reminisc. 37, 38, 39; Park's Introd. Lect. 5, 6. Now Aristotle, or Cicero, or a Roman Prætor, or a Continental Jurist, or Publicist of modern Europe, might have used these expressions, as a description of general Equity; but it would have given no just idea of Equity, as administered under the municipal jurisprudence of England.

the place to consider the nature or application of those rules.¹

§ 8. It is of this Equity, as correcting, mitigating, or interpreting the law, that, not only civilians, but common law writers, are most accustomed to speak;² and thus many persons are misled into the false notion, that this is the real and peculiar duty of Courts of Equity, in England and America. St. German, after alluding to the general subject of Equity, says, "In some cases it is necessary to leave the words of the law, and to follow that reason and justice

¹ See Grotius de Jure. Belli ac Pacis. Lib. 3, ch. 20, § 47, p. 1, 2; Grotius de Æquitate, ch. 1. — This paragraph is copied very closely from the article *Equity*, in Dr. Lieber's *Encyclopedia Americana*, a license, which has not appropriated another person's labors. There will be found many excellent rules of interpretation of Laws in Ruthenforth's *Institutes of Natural Law*, B. 2, ch. 7; in Bacon's *Abridgment*, title *Statute*; in Domat on the Civil Law, (Prelim. Book, tit. 1, § 2;) and in 1 Black. Comm. Introduction, p. 58 to 62.

There are yet other senses, in which Equity is used, which might be brought before the reader. The various senses are elaborately collected by Oldendorpius, in his work *de Jure et Æquitate Disputatio*; and he finally offers, what he deems a very exact definition of Equity in its general sense. Æquitas est judicium animi, ex vera ratione petitum, de circumstantiis rerum, ad honestatem vitæ pertinentium, cum incidunt, recte discernens, quid fieri aut non fieri oporteat. This seems but another name for a system of ethics. Grotius has in one short paragraph, (*De Æquitate*, c. 1, § 2,) brought together the different senses in a clear and exact manner. Et ut de Æquitate primum loquamur, scire oportet, æquitatem aut æquum de omni interdum jure dici, ut cum jurisprudentia ars boni et æqui dicitur; interdum de jure naturali absolute, ut cum Cicero ait, jus legibus, moribus, et Æquitate constare; alias vero de hisce rebus, quas lex non exacte definit, sed arbitrio viri boni permittit. Sæpe etiam de jure aliquo civili proprius ad jus naturale accedente, idque respectu alterius juris, quod paulo longius recedere videtur, ut jus Prætorium, et quædam jurisprudentiæ interpretationes. Proprie vero et singulariter Æquitas est virtus voluntatis, correctrix ejus, in quo lex propter universalitatem deficit.

² See Merlin *Répertoire*, *Équité*. Francis, *Maxims*, 3, 5; 1 Fonbl. *Equity*, B. 1, ch. 1, § 2, note (e); 1 Woodes. *Lect.* vii, p. 192 to 200; Pothier, *Pand.* Lib. 1, tit. 3, art. 4, § 11 to 27.

requireth, and to that intent Equity is ordained, that is to say, to temper and mitigate the rigor of the law, &c. And so it appeareth, that Equity taketh not away the very right, but only that, that seemeth to be right, by the general words of the law.”¹ And, then, he goes on to suggest the other kind of Equity, as administered in Chancery, to ascertain “whether the plaintiff hath title in conscience to recover or not.”² And, in another place, he states, “Equity is a righteousness, that considereth all the particular circumstances of the deed, which is also tempered with the sweetness of mercy.”³ Francis, in his Maxims, lays down doctrines equally broad. As *summum jus* (says he) *summa est injuria*, as it cannot consider circumstances; and as this (Equity) takes in all the circumstances of the case, and judges of the whole matter, according to good conscience, this shows both the use and excellency of Equity above any prescribed law. Again; Equity is that, which is commonly called equal, just, and good; and is a mitigation or moderation of the common law, in some circumstances, either of the matter, person, or time; and often it dispensates with the law itself.⁴ The matters, of which Equity holdeth cognizance in its absolute power, are such as are not remediable at law, and of them the sorts may be said to be as infinite almost, as the different affairs conversant in human life.⁵ And, he adds, that Equity is so extensive and various, that every particular case in Equity may be truly said to stand upon its own particular circumstances; and, therefore, under favor, I apprehend precedents not of that great

¹ Dialogue, 1, ch. 16.² Id. ch. 17.³ Id. ch. 16.⁴ Francis, Max. p. 5, 6.⁵ Id. p. 6.

use in Equity, as some would contend ; but that Equity thereby may possibly be made too much a science for good conscience.”¹

§ 9. This description of Equity differs in nothing essential from that given by Grotius and Puffendorf,² as a definition of general Equity, as contradistinguished from the Equity, which is recognized by the mere municipal code of a particular nation. — And, indeed, it goes the full extent of embracing all things, which the law has not exactly defined, but leaves to the arbitrary discretion of a judge ; or, in the language of Grotius, *de hisce rebus, quas lex non exacte definit, sed arbitrio viri boni permittit*.³ So that, in this view of the matter, an English Court of Equity would seem to be possessed of exactly the same prerogatives and powers, as belonged to the Prætor’s forum in the Roman Law.⁴

§ 10. Nor is this description of the Equity Jurisprudence of England confined to a few text writers. It pervades a large class, and possesses the sanction of many high authorities. Lord Bacon more than once hints at it. In his Aphorisms he lays it down,

¹ Francis, Max. p. 5, 6. — Yet Francis is compelled to admit, that there are many cases, in which there is no relief to be had, either at law or in Equity itself ; but the same is left to the conscience of the party, as a greater inconvenience would thence follow to the people in general. Francis, Max. p. 5.

² Grotius de Æquitate, ch. 1, § 3, 12 ; Puffend. Elem. Juris. Univ. L. 1. § 22, 23, cited 1 Fonbl. Eq. B. 1, ch. 1 § 2, note (e) p. 5.

³ Grotius de Æquitate, ch. 1, § 2.

⁴ Dig. Lib. 1, tit. 1, l. 7. — See also Heinecc. De Edict. Prætorum, Lib. 1, ch. 6, § 8 to 13 ; Id. § 18 to 30 ; Dr. Taylor’s Elem. Civ. Law, 213 to 216 ; Id. 92, 93 ; De Lolme on Eng. Const. B. 1, ch. 11. — Lord Kaimes does not hesitate to say, that the powers assumed by our Courts of Equity are in effect the same, that were assumed by the Roman Prætor from necessity, without any express authority. 1 Kaimes, Eq. Introd. 19.

*Habeant similiter Curia Pratoria potestatem tam subvnicendi contra rigorem legis, quam supplendi defectum legis.*¹ And, on the solemn occasion of accepting the office of Chancellor, he said, Chancery is ordained to supply the law, and not to subvert the law.² Finch, in his Treatise on the Law, says, that the nature of Equity is to amplify, enlarge, and add to the letter of the law.³ In the Treatise of Equity, attributed to Mr. Ballow, and deservedly held in high estimation, language exceedingly broad is held on this subject. After remarking, that there will be a necessity of having recourse to the natural principles, that what is wanting to the finite may be supplied out of that which is infinite; and that this is properly what is called Equity, in opposition to strict law; he proceeds to state; “And thus, in Chancery, every particular case stands upon its own circumstances; and, although the common law will not decree against the general rule of law, yet Chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here. For no man can be obliged to any thing contrary to the law of nature; and indeed no man in his senses can be presumed willing to oblige another to it.”⁴

§ 11. The Author has, indeed, qualified these propositions with the suggestion; “But if the law

¹ Bac. De Aug. Scient. Lib. 3, ch. 3, Aphor. 35, 45.

² Bac. Speech, 4 Bac. Works, 488.

³ Finch's Law, p. 20.

⁴ 1 Fonbl. Eq. B. 1, ch. 1, § 3. — The author of Eynomus describes the original jurisdiction of the Court of Chancery, as a Court of Equity, to be “the power of moderating the *summum jus*.” Eynomus, Dial. III. § 60.

has determined a matter with all its circumstances, Equity cannot intermeddle." But, even with this qualification, the propositions are not maintainable, in the Equity Jurisprudence of England, in the general sense, in which they are stated. For example, the first proposition, that Equity will relieve against a general rule of law, is (as has been justly observed) neither sanctioned by principle, nor by authority.¹ For, though it may be true, that Equity has, in many cases, decided differently from Courts of Law; yet it will be found, that these cases involved circumstances, to which a Court of Law could not advert; but which, in point of substantial justice, were deserving of particular consideration; and which a Court of Equity, proceeding on principles of substantial justice, felt itself bound to respect.²

§ 12. Mr. Justice Blackstone has taken considerable pains to refute this doctrine. "It is said," he remarks, "that it is the business of a Court of Equity, in England, to abate the rigor of the common law."³ But no such power is contended for. Hard was the case of bond creditors, whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir; yet a Court of Equity had no power to interfere. Hard is the common law still subsisting, that land devised, or descending to the heir, should not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land; and that the father shall

¹ Com. Dig. Chancery, 3, F. 8.

² 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (g); 1 Dane's Abridg. ch. 9, art. 1, § 2, 3; *Kemp v. Pryer*, 7 Ves. 249, 250.

³ Francis, Max. p. 74, (Max. 105.)

never immediately succeed as heir to the real estate of the son. But a Court of Equity can give no relief; though, in both these instances, the artificial reason of the law, arising from feudal principles, has long since ceased.”¹ And illustrations of the same character may be found in every state of the Union. In some states, bond debts have a privilege of priority of payment over simple contract debts, in cases of insolvent intestate estates. In others, judgments are a privileged lien on lands. In many, if not in all, a debtor may prefer one creditor to another, in discharging his debts, whose assets are wholly insufficient to pay all the debts. And, (not to multiply instances,) what can be more harsh, or indefensible, than the rule of the common law, by which a husband may receive an ample fortune in personal estate, through his wife, and by his own act, or will, strip her of every farthing, and leave her a beggar ?

§ 13. A very learned Judge in Equity, in one of his ablest judgments, has put this matter in a very strong light.² “The Law is clear,” said he, “and Courts of Equity, ought to follow it in their judgments concerning titles to equitable estates ; otherwise great uncertainty and confusion would ensue. And, though proceedings in Equity are said to be *secundum discretionem boni viri* ; yet when it is asked, *Vir bonus est quis ?* the answer is, *Qui consulta patrum, qui leges juraque servat*. And, as it is said in Rook’s case, (5 Rep: 99. 6.) that discretion is a science, not to act arbitrarily, according to men’s wills and private affections ; so the discretion, which is executed here, is to be governed by the rules of law and

¹ 3 Black. Comm. 430. See Com. Dig. Chancery 3, F. 8.

² Sir Joseph Jekyll, in *Cowper v. Cowper*, 2 P. Will. 753.

equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it. But, in no case, does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to the Court. That is a discretionary power, which neither this, nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with.”¹

§ 14. The next proposition, that every matter, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief in Equity, is equally untenable. There are many cases against natural justice, which are left wholly to the conscience of the party, and are without any redress, equitable or legal. And so far from a Court of Equity supplying universally the defects of positive legislation, or peculiarly carrying into effect the intent, as contradistinguished from the text of the Legislature, it is governed by the same rules of interpretation, as a Court of Law; and is often compelled to stop, where the letter of the law stops. It is the duty of every court of justice, whether of Law or of Equity, to consult the intention of the Legislature. And, in the discharge of this duty, a Court of Equity is not invested with a larger, or a more liberal, discretion than a Court of Law.²

¹ Sir Thomas Clarke in pronouncing his judgment in the case of *Burgess v. Wheate*, (1 W. Black. R. 123,) has adopted this very language, and given it his full approbation. See also, 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (g). See also *Fry v. Porter*, 1 Mod. R. 300.—*Francis, Max.* p. 65, (*Max.* 92.)

² 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (h).

§ 15. Mr. Justice Blackstone has here again met the objection in a forcible manner. “It is said, that a Court of Equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a Court of Law. Both, for instance, are equally bound, and equally profess to interpret statutes, according to the true intent of the Legislature. In general all cases cannot be foreseen; or, if foreseen, cannot be expressed. Some will arise, which will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the Equity of an Act of Parliament; and so cases within the letter are frequently out of the Equity. Here, by Equity, we mean nothing but the sound interpretation of the law, &c. &c. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the Judges in the Courts both of Law and Equity. The construction must in both be the same; or, if they differ, it is only as one Court of Law may happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question. Neither can enlarge, diminish, or alter that sense in a single tittle.”¹

§ 16. Yet it is by no means uncommon to represent, that the peculiar duty of a Court of Equity is, to supply the defects of the Common Law, and next, to correct its rigor or injustice.² Lord Kaimes avows this doctrine in various places; and in language singularly bold. “It appears now clearly,” says he, “that

¹ 3 Black. Comm. 431; 1 Dane Abr. ch. 9, art. 3, § 3.

² 1 Kaimes on Equity, B. 1, p. 40.

a Court of Equity commences at the limits of the Common Law, and enforces benevolence, where the law of nature makes it our duty. And thus a Court of Equity, accompanying the law of nature, in its general refinements, enforces every natural duty, that is not provided for at Common Law ;”¹ and in another place he adds, a Court of Equity boldly undertakes “to correct or mitigate the rigor, and what, in a proper sense, may be termed the injustice of the Common Law.”² And Mr. Woodeson, without attempting to distinguish accurately between general or natural, and municipal or civil, Equity, asserts, that “Equity is a judicial interpretation of laws, which, presupposing the legislator to have intended what is just and right, pursues and effectuates that intention.”³

§ 17. The language of Judges has often been relied on for the same purpose; and from the unqualified manner, in which it is laid down, too often justifies the conclusion. Thus Sir John Trevor, (the Master of Rolls) in his able judgment in *Dudley v. Dudley*,⁴ says, “Now Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigor, hardness, and edge of the law, and is a universal truth. It does also assist the law, where it is defective and weak in the constitution, (which is the life of the law) and defends the law

¹ 1 Kaimes on Equity, Introd. p. 12.

² Id. Introd. p. 15. — Lord Kaimes’s remarks are entitled to the more consideration, because they seem to have received, in some measure, at least, the approbation of Lord Hardwicke, (Parke’s Hist. of Chan. Appx. 501, 502; Id. 333, 334); and also from Mr. Justice Blackstone’s having thought them worthy of a formal refutation in his Commentaries; (3 Black. Comm. 436.)

³ 1 Woodeson, Lect. vii. p. 192.

⁴ Preced. in Ch. 241, 244; 1 Woodes. Lect. vii. p. 192.

from crafty evasions, delusions, and mere subtilties, invented and contrived to evade and elude the Common Law, whereby such as have undoubted right, are made remediless. And thus is the office of Equity to protect and support the Common Law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it." Now, however true this doctrine may be *sub modo*, to suppose it true in its full extent would be a grievous error.

§ 18. There is another suggestion, which has been often repeated ; and that is, that Courts of Equity are not, and ought not, to be bound by precedents ; and that precedents therefore are of little or no use there ; but that every case is to be decided upon circumstances, according to the arbitration or discretion of the Judge, acting according to his own notions *ex æquo et bono*.¹ Mr. Justice Blackstone, addressing himself to this erroneous statement, has truly said, " The system of our Courts of Equity is a labored connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection, &c. &c. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule."² And he afterwards adds, " the systems of jurisprudence in our Courts of Law and Equity are now equally artificial systems, founded on the same principles of justice and positive law, but varied by different usages

¹ See Francis, Max. p. 5, 6 ; Selden, cited in 3 Black. Comm. 432, 433, 435 ; 1 Kaims, Eq. Intro. p. 19, 20.

² 3 Black. Comm. 432, 433.

in the forms and mode of their proceedings.”¹ The value of precedents and the importance of adhering to them were deeply felt in ancient times, and nowhere more than in the Prætor’s forum. *Jus esse putatur* (says Cicero) *id, quod, voluntate omnium, sine lege, vetustas comprobârit. In eâ autem jura sunt, quædam ipsa jam certa propter vetustatem; quo in genere et alia sunt multa, et eorum multo maxima pars, quæ Prætores edicere consuêrunt.*² And the Pandects directly recognize the same doctrine. *Est enim juris civilis species, CONSUETUDO; enimvero diuturna*

¹ 3 Black. Comm. 434; Id. 440, 441; 1 Kent, Comm. Lect. 21, p. 489, 490 (2d edition). — The value and importance of precedents in Chancery was much insisted upon by Lord Keeper Bridgman, in *Fry v. Porter* (1 Mod. R. 300, 307). See also 1 Woodes. Lect. vii. p. 200, 201, 202. Lord Hardwicke in his letter to Lord Kaimes, on the subject of Equity, in answer to the question, whether a Court of Equity ought to be governed by any general rules, said; “Some general rules there ought to be, for otherwise the great inconvenience of *jus vagum et incertum* will follow. And yet the Prætor must not be so absolutely and invariably bound by them, as the Judges are by the rules of the Common Law. For if they were so bound, the consequence would follow, which you very judiciously state, that he must sometimes pronounce decrees, which would be materially unjust; since no rule can be equally just, in the application to a whole class of cases, that are far from being the same in every circumstance.” (Parke’s Hist. of Chancery, p. 501, 506.) This is very loosely said; and the reason given equally applies to every general rule; for there can be none, which will be found equally just in its application to all cases. If every change of circumstances is to change the rule in Equity, there can be no general rule. Every case must stand upon its own grounds. Yet Courts of Equity now adhere as closely to general rules, as Courts of Law. Each expounds its rules to meet new cases; but each is equally reluctant to depart from them, upon slight inconveniences and mischiefs. See Mitford, Plead. in Eq. p. 4, note (b); 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (k). The late Professor Park of King’s College (London) has made some very acute remarks on this whole subject, in his Introductory Lecture on Equity. (1832.)

² Cicero de Invent. Lib. 2, cap. 22. — My attention was first called to these passages by a note of Lord Redesdale. Mitford, Plead. Eq. p. 4, note (b.) See Heineccius De Edictis Prætorum, Lib. 1, cap. 6, § 13, 30.

*consuetudo pro jure et lege, in his quæ non ex scripto descendunt observari solet, &c. Maxime autem probatur consuetudo ex rebus judicatis.*¹

§ 19. If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superceding the law, and of enforcing all the rights, as well as charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni judicis*, and it may be, *ex æquo et bono*, according to his own notions and conscience; but still acting with a despotic and sovereign authority. A Court of Chancery might then well deserve the spirited rebuke of Selden; "For law we have a measure, and know what to trust to—Equity is according to the conscience of him, that is Chancellor; and as that is larger, or narrower, so is Equity. 'T is all one, as if they should make the standard for the measure the Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot; another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience."² And notions of this sort were, in former ages, when the Chancery Jurisdiction was opposed with vehement disapprobation by common

¹ Pothier, Pand. Lib. 1, tit. 3, art. 6, n. 28, 29.

² Selden's Table Talk, title *Equity*; 3 Black. Comm. 432, note (y.)

lawyers, very industriously propagated by the most learned of English antiquarians, such as Spelman, Coke, Lambard, and Selden.¹ We might, indeed, under such circumstances, adopt the language of Mr. Justice Blackstone, and say; "In short, if a Court of Equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case."² So far, however, is this from being true, that one of the most common maxims, upon which a Court of Equity daily acts, is, that Equity follows the law; and seeks out and guides itself by the analogies of the law.³

§ 20. What has been already said upon this subject, cannot be more fitly concluded, than in the words of one of the ablest judges, that ever sat in Equity. "There are," said Lord Redesdale, "certain principles, on which Courts of Equity act, which are very well settled. The cases, which occur, are various; but they are decided on fixed principles. Courts of Equity have, in this respect, no more discretionary power, than Courts of Law. They decide new cases, as they arise, by the principles, on which former cases have been decided; and may thus illustrate, or enlarge, the operation of those principles. But the principles are as fixed and certain, as the principles, on which the Courts of Common Law

¹ See citations, 3 Black. Comm. 433; Id. 54, 55; Id. 440, 441.

² 3 Black. Comm. 433; Id. 440, 441, 442. — De Lolme, in his work on the Constitution of England, has presented a view of English Equity Jurisprudence, far more exact and comprehensive, than many of the English text writers on the same subject. The whole chapter (B. 1, ch. 11,) is well worthy of perusal.

³ *Cowper v. Cowper*, 2 P. Will. 753.

proceed.”¹ In confirmation of these remarks, it may be added, that the Courts of Common Law are, in like manner, perpetually adding to the doctrines of the old jurisprudence ; and enlarging, illustrating, and applying the maxims, which are derived from very narrow and often obscure sources. For instance, the whole law of Insurance is scarcely a century old ; and more than half of its most important principles and distinctions have been created, within the last fifty years.

§ 21. In the early history of English Equity Jurisprudence, there might have been, and probably was, much to justify the suggestion, that Equity was bounded by no certain limits or rules ; but acted upon principles of conscience and natural justice, without much restraint of any sort.² And as the Chancellors were, for many ages, almost universally either ecclesiastics or statesmen, neither of whom are supposed to be very scrupulous in the exercise of power ; and as they exercised a delegated authority from the Crown, as the fountain of administrative justice, whose rights, prerogatives, and duties on this subject were not defined, and whose decrees were not capable of being resisted ; it would not be unnatural, that they should arrogate to themselves the general attributes of royalty, and interpose in many cases, which seemed to them to justify a remedy, more wide or more summary, than was exercised by the common Courts of Law.

§ 22. This is the view, which Mr. Justice Blackstone seems to have taken of the matter ; who has

¹ *Bond v. Hopkins*, 1 Sh. & Lefr. R. 428, 429. See also *Mitford on Plead. Eq.* p. 4, note (b.)

² 1 *Kent, Comm. Lect.* 21, p. 490, 491, 492, (2d edit.)

observed, that, in the infancy of our Courts of Equity, before their jurisdiction was settled, the Chancellors themselves, “partly from their ignorance of the law, (being frequently bishops or statesmen); partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in); but principally from the narrow and unjust decisions of the Courts of Law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors, for now (1765) above a century past. The decrees of the Court of Equity were then rather in the nature of awards, formed on the sudden, *pro re natâ*, with more probity of intention, than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used as precedents.”¹

§ 23. It was fortunate, indeed, that, even in those early times, the knowledge, which the ecclesiastical Chancellors had acquired of general equity and justice, from the civil law, enabled them to administer them with a more sound discretion, than could otherwise have been done. And from the moment, when principles of decision came to be acted upon and established in Chancery, the Roman law furnished abundant materials to erect a superstructure, at once solid, convenient, and lofty, adapted to human wants, and enriched by all the aids of human wisdom, experience, and learning. To say, that later Chancellors have borrowed much from these materials, is to bestow the highest praise upon their judgment, their industry, and their reverential regard to their duty. It would have been little to the commendation of

¹ 3 Black. Comm. 433 ; Id. 440, 441.

such learned minds, that they had studiously disregarded the maxims of ancient wisdom, or had neglected to use them, from ignorance, from pride, or from indifference.¹

§ 24. Having dwelt thus far upon the inaccurate, or inadequate notions, which are frequently circulated, as to Equity Jurisprudence in England and America, it may be thought proper to give some more exact and clear statement of it. This may be better done by explanatory observations, than by direct definitions, which are often said in the law to be perilous and unsatisfactory.

§ 25. In England, and in the American States, which have derived their jurisprudence from that parental source, Equity has a restrained and qualified meaning. The remedies for the redress of wrongs, and for the enforcement of rights, are distinguished into two classes ; first, those, which are administered in Courts of Common Law ; and secondly, those, which are administered in Courts of Equity. Rights, which are recognized and protected, and wrongs, which are redressed, by the former Courts, are called legal rights and legal injuries. Rights, which are recognized and protected, and wrongs,

¹ The whole of the late Professor Park's Lecture upon Equity Jurisprudence, delivered in King's College in Nov. 1831, on this subject, is well deserving of a perusal by every student. There is much freedom and force in his observations ; and, if his life had been longer spared, he would probably have been a leader in a more masculine and extensive course of law studies by the English Bar. There are also two excellent articles on the same subject in the American Jurist, one of which, published in 1829, contains a most elaborate review and vindication of the Jurisdiction of Courts of Equity ; and the other, in 1833, a forcible exposition of the prevalent errors on the subject, (2 Amer. Jurist, 314 ; 10 Amer. Jurist, 227.) I know not where to refer the reader to pages more full of useful comment and research.

which are redressed by the latter Courts only, are called equitable rights and equitable injuries. The former are said to be rights and wrongs at Common Law, and the remedies therefore are remedies at Common Law; the latter are said to be rights and wrongs in Equity, and the remedies, therefore, are remedies in Equity. 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.

§ 26. The distinction between the former and the latter Courts may be farther illustrated, by considering the different natures of the rights, they are designed to recognize and protect, the different natures of the remedies, which they apply, and the different natures of the forms and modes of proceeding, which they adopt, to accomplish their respective ends. In the Courts of Common Law, both of England and America, there are certain prescribed forms of action, to which the party must resort to furnish him a remedy; and, if there be no prescribed form to reach such a case, he is remediless; for they entertain jurisdiction only of certain actions, and give relief according to the particular exigency of such actions, and not otherwise. In those actions a general and unqualified judgment only can be given, for the plaintiff or for the defendant, without any adaptation of it to particular circumstances.

§ 27. But there are many cases, in which a simple judgment for either party, without qualifications, or conditions, or peculiar arrangements, will not do

entire justice *ex æquo et bono* to either party. Some modifications of the rights of both parties may be required ; some restraints on one side or the other, or perhaps on both sides ; some adjustments involving reciprocal obligations, or duties ; some compensatory or preliminary, or concurrent proceedings to fix, control, or equalize rights ; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or the redress of injuries. In all these cases, Courts of Common Law cannot give the desired relief. They have no forms of remedy adapted to the objects. They can entertain suits only in a prescribed form, and they can give a general judgment only in the prescribed form.¹ From their very character and organization they are incapable of the remedy, which the mutual rights and relative situations of the parties, under the circumstances, positively require.

§ 28. But Courts of Equity are not so restrained. Although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees, so as to meet most, if not all, of these exigencies ; and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay, more ; they can bring before them all parties interested in the subject matter, and adjust the rights of all, however numerous ; whereas Courts of Common Law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons

¹ Mitford on Plead. p. 3, 4 ; 1 Woodes. Lect. vii, p. 203 to 206.

may have the deepest interest in the event of the suit. So that one of the most striking and distinctive features of Courts of Equity is, that they can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas Courts of Common Law, (as we have already seen,) are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff or for the defendant.¹

§ 29. Another peculiarity of Courts of Equity is, that they can administer remedies for rights, which rights Courts of Common Law do not recognize at all, or, if they do recognize them, they leave them wholly to the conscience and good will of the parties. Thus, what are technically called Trusts, that is, estates vested in persons upon particular trusts and confidences, are wholly without any cognizance at the Common Law; and the abuses of such trusts and confidences are beyond the reach of any legal process. But they are cognizable in Courts of Equity; and hence they are called equitable estates; and an ample remedy is there given in favor of the *cestuis que trust*, (the parties beneficially interested,) for all wrongs and injuries, whether arising from negligence, or positive misconduct.² There are also many cases

¹ 1 Woodes. Lect. vii, p. 203 to 206; 3 Black. Comm. 438. — Much of this paragraph has been abstracted from Dr. Lieber's *Encyclopedia Americana*, article *Equity*. The late Professor Park, of King's College, London, in his *Introductory Lecture on Equity*, (1831, p. 15,) has said, "The Editors of the *Encyclopedia Americana* have stated the real case, with regard to what we call Courts of Equity, much more accurately than I can find it stated in any English Law Books;" and thus admits the propriety of the exposition contained in the text.

² 3 Black. Comm. 439; 1 Woodes. Lect. vii, p. 209 to 213; 2 Fonbl. Equity B. 2, ch. 1, § 1; Id. ch. 7; Id. ch. 8.

(as we shall presently see) of losses and injuries by mistake, accident, and fraud ; many cases of penalties and forfeitures ; many cases of impending irreparable injuries, or meditated mischiefs ; and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains ; in all of which Courts of Equity will interfere and grant redress ; but which the Common Law takes no notice of, or silently disregards.

§ 30. Again ; the remedies in Courts of Equity are often very different, in their nature, mode, and degree, from those of Courts of Common Law, even when each has a jurisdiction over the same subject matter. Thus, a Court of Equity, if a contract is broken, will often compel the party specifically to perform the contract ; whereas Courts of Law can only give damages for the breach of it. So, Courts of Equity will interfere by way of injunction to prevent wrongs ; whereas Courts of Common Law can grant redress only, when the wrong is done.²

§ 31. The modes of seeking and granting relief in Equity are also different from those of Courts of Common Law. The latter proceed to trial of contested facts by means of a jury ; and the evidence is generally to be drawn, not from the parties, but from third persons, who are disinterested witnesses. But Courts of Equity try causes without a jury ; and they address themselves to the conscience of the defendant, and require him to answer upon his oath the matters of fact stated in the bill, if they are within his knowledge ; and he is compellable to give a full account of all such facts, with all their circumstances,

¹ 1 Woodes. Lect. vii, p. 203, 204 ; 3 Black. Comm. 434, 435, 438, 439 ; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f.)

² 1 Woodes. Lect. vii. p. 206, 207.

without evasion, or equivocation ; and the testimony of other witnesses also may be taken to confirm, or to refute, the facts so alleged.¹ Indeed, every bill in Equity may be said to be, in some sense, a bill of discovery, since it asks for the personal oath of the defendant, to purge himself in regard to the transactions stated in the bill. It may readily be perceived, how very important this process of discovery may be, when we consider, how great the mass of human transactions is, in which there are no other witnesses, or persons, having knowledge thereof, except the parties themselves.

§ 32. Mr. Justice Blackstone has, in a few words, given an outline of some of the more important powers, and peculiar duties, of Courts of Equity. He says, they are established “to detect latent frauds, and concealments, which the process of Courts of Law is not adapted to reach ; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a Court of Law ; to deliver from such dangers as are owing to misfortune or oversight ; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law.”² But the general account of Lord Redesdale (which he admits, however, to be imperfect, and in some respects inaccurate) is far more satisfactory, as a definite enumeration. “The jurisdiction of a Court of Equity,” says he,³ “when it assumes a power of decision, is to be exercised, (1.) where the principles

¹ 3 Black. Comm. 437, 438 ; 1 Woodes. Lect. vii, p. 207.

² 1 Black. Comm. 92.

³ Mitford, Pl. Eq. by Jeremy, p. 111, 112.

of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose ; (2.) where the courts of ordinary jurisdiction are made instruments of injustice ; (3.) where the principles of law, by which the ordinary courts are guided, give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent : and it may also be collected, that Courts of Equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction ; (4.) to remove impediments to the fair decision of a question in other courts ; (5.) to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated, or destroyed, by those, to whose care it is by law intrusted, or by persons having immediate but partial interests ; (6.) to restrain the assertion of doubtful rights in a manner productive of irreparable damage ; (7.) to prevent injury to a third person by the doubtful title of others ; and (8.) to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits. And further, that Courts of Equity, without pronouncing any judgment, which may affect the rights of parties, extend their jurisdiction, (9.) to compel a discovery, or obtain evidence, which may assist the decision of other courts ; and (10.) to preserve testimony, when in danger of being lost, before the matter, to which it relates, can be made the subject of judicial investigation.”¹

¹ Dr. Dane, in his *Abridgment and Digest*, ch. 1, art. 7, § 33 to 51, (1 *Dane Abrid.* 101 to 107,) has given a summary of the differences

§ 33. Perhaps the most general, if not the most precise, description of a Court of Equity, in the English and American sense, is, that it has jurisdiction in cases of rights recognised and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.¹ The remedy must be plain ; for, if it be doubtful and obscure at law, equity will assert a jurisdiction.² It must be adequate ; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in Equity. And it must be complete ; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in future ; otherwise Equity will interfere, and give such relief and aid, as the exigency of the particular case may require.³ The jurisdiction of a Court of Equity is

between Equity Jurisdiction and Legal Jurisdiction, in regard to contracts, which may be read with utility. — See also Mitford, *Equity* Pl. 4, 5.

¹ Cooper, *Eq. Pl.* 128, 129 ; Mitford, *Pl. Eq.* 112, 123 ; 1 Woodes. *Lect.* vii, p. 214, 215.

² *Rathbone v. Warren*, 10 John. R. 587 ; *King v. Baldwin*, 17 John. R. 384.

³ See Dr. Lieber's *Ency. Americana*, art. *Equity* ; Mitford, *Eq. Plead.* 111, 112, 117, 123 ; 1 Woodes. *Lect.* vii, p. 214, 215 ; *Hinde's Pract.* 153 ; Cooper, *Eq. Pl.* — Sir James Mackintosh, in his life of Sir Thomas More, says, "Equity, in the acceptation, in which the word is used in English jurisprudence, is no longer to be confounded with that moral equity, which generally corrects the unjust operation of law, and with which it seems to have been synonymous in the days of Selden and Bacon. It is a part of laws formed from usages and determinations, which sometimes differ from what is called Common Law in its subjects ; but chiefly varies from it in its modes of proof, of trial, and of relief. It is a jurisdiction so irregularly formed, and often so little dependent upon general principles, that it can hardly be defined or made intelligible, otherwise than by a minute enumeration of the matters cognizable by it." There is much of

sometimes concurrent with the jurisdiction of a Court of law ; it is sometimes exclusive of it ; and it is sometimes auxiliary to it.¹

§ 34. Many persons, and especially foreigners, have often expressed surprise, that distinct Courts should, in England and America, be established for the administration of Equity, instead of the whole administration of municipal justice being confided to one and the same class of Courts, without any discrimination between Law and Equity.² But this surprise is founded almost wholly upon an erroneous view of the nature of Equity Jurisprudence. It arises from confounding the general sense of equity, which is equivalent to universal or natural justice, *ex æquo et bono*, with its technical sense, which is descriptive of the exercise of jurisdiction over peculiar rights and remedies. Such persons seem to labor under the false notion, that Courts of law can never administer justice with reference to principles of universal or natural justice, but are confined to rigid, severe,

general truth in this statement ; but it is, perhaps, a little too broad and undistinguishing for an accurate equity lawyer. Equity, as a science, and part of jurisprudence, built upon precedents, as well as upon principles, must occasionally fail in the mere theoretical and philosophical accuracy and completeness of all its rules and governing principles. But it is quite as regular and exact in its principles and rules, as the Common Law ; and, probably, as any other system of jurisprudence, established generally by positive enactments, or usages, or practical expositions, in any country, ancient or modern. There must be many principles and exceptions in every system, in a theoretical sense arbitrary, if not irrational ; but which are yet sustained by the accidental institutions, or modifications of society, in the particular country, where they exist. There are wide differences between the philosophy of law, as actually administered in any country, and that abstract doctrine, which may, in matters of government, constitute, in many minds, the law of philosophy.

¹ Fonbl. Eq. B. 1, ch. 1, § 3, note (f).

² 3 Black. Comm. 441, 442.

and uncompromising rules, which admit of no equitable considerations. Now, such a notion is founded in the grossest mistake of our systems of jurisprudence. Courts of Common Law, in a great variety of cases, adopt the most enlarged and liberal principles of decision ; and, indeed, often proceed, as far as the nature of the rights and remedies, which they are called to administer, will permit, upon the same doctrine, as Courts of Equity. This is especially true, in regard to cases involving the application of the law of nations, and commercial and maritime law and usages, and even of foreign municipal law. And Mr. Justice Blackstone has correctly said, that “ where the subject matter is such, as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of the Courts of Law are guided by the most liberal equity.”¹

§ 35. Whether it would, or would not, be best to administer the whole of remedial justice in one Court, or in one class of Courts, without any separation or distinctions of suits, or of the form or modes of proceeding and granting relief, is a matter, upon which different minds in the same country, and certainly in different countries, would probably arrive at opposite conclusions. And, whether, if distinctions in rights and remedies, and forms of proceeding, are admitted in the municipal jurisprudence, it would be best to confide the whole jurisdiction to the same Court or Courts, is also a matter, upon which an equal diversity of judgment might be found to exist. Lord Bacon, upon more than one occasion, expressed his decided opinion, that a separation of the adminis-

¹ 3 Black. Comm. 436. See Eunomus, Dial. 3, § 60.

tration of Equity from that of the Common Law was wise and convenient. "All nations," says he, "have equity. But some have law and equity mixed in the same Court, which is worse ; and some have it distinguished in several Courts, which is better."¹ And again, among his aphorisms, he says, *Apud nonnullos receptum est, ut jurisdictio, quæ decernit secundum æquum et bonum, atque illa altera, quæ procedit secundum jus strictum iisdem curiis deputentur ; apud alios autem et diversis. Omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum ; sed arbitrium legem tandem trahet.*² Lord Hardwicke held the same opinion ;³ and it is certainly a common opinion in countries, governed by the Common Law. In Civil Law countries, the general, if not the universal, practice is the other way,⁴ whether more for the advancement of public justice, is a matter of doubt with many learned minds.

§ 36. But, whether the one opinion, or the other, be most correct in theory, it is most probable, that the practical system, adopted by every nation, has been mainly influenced by the peculiarities of its own institutions, habits, and circumstances ; and especially by the nature of its own jurisprudence, and the forms of its own remedial justice. The union of Equity and Law in the same Court, which might be well adapted to one country, or even to one age, might be wholly unfit for another country, or another age. The question, in all such cases, must be a mixed question of public policy and private convenience ; and never

¹ Bac. Jurisd. of the Marches ; 4 Bac. Works, 274.

² Bac. De Aug. Scient. Lib. 8, cap. 3, Aph. 45 ; 7 Bac. Works, 448.

³ Parkes, Hist. Chan. App. p. 504, 505.

⁴ 1 Kaimes on Eq. Introd. p. 27 to 30.

can be susceptible of any universal solution, applicable to all times, and all nations, and all changes in jurisprudence.

§ 37. Accordingly we find, that, in the nations of antiquity, different systems existed. And in Rome, with whose juridical institutions we are best acquainted, not only were different jurisdictions entrusted to different magistrates; but the very distinction between Law and Equity was clearly recognized.¹ Thus, civil jurisdiction and criminal jurisdiction were confided to different magistrates.² The Roman Prætors generally exercised the former only. In the exercise of this authority, a broad distinction was taken between Actions at Law, and Actions in Equity, the former having the name of *Actiones Civiles*, and the latter of *Actiones Prætoriae*. And, in the same way, a like distinction was taken between *Obligaciones Civiles* and *Obligaciones Prætoriae*, between *Actiones Directæ* and *Actiones Utiles*.³ And, in modern nations, it is not uncommon for different portions of judicial jurisdiction to be vested in different magistrates or tribunals. Thus, questions of State or Public Law, such as prize causes, and causes touching sovereignty, are generally confided to special tribunals; and maritime and commercial questions often belong to

¹ 3 Black. Comm. 50; Parkes, Hist. Chan. 28; Butler's *Horæ Subsecivæ*, [43] p. 66; 1 Collect. Jurid. 25; Pothier, Pand. Lib. 1, tit. 2, § 2 to 24; Id. tit. 10, § 1, 2, 3; Id. tit. 11, § 1 to 9; Id. tit. 14, § 1, 2; Id. tit. 20.

² Taylor's Elem. Civil Law, 211, 213, 215 216; Pothier, Pand. Lib. 2, tit. 1, art. 2, § 5 to 8; Id. § 10.

³ Taylor's Elem. Civil Law, 213, 214; Id. 93, 94, 95; Pothier, Pand. Lib. 50, tit. 16; De Verb. Signif. Actio; Inst. Lib. 4, tit. 6, § 3, 8; Inst. Lib. 3, tit. 14, § 1; Heinecc. De Edict. Prætor. Lib. 1, cap. 6; 3 Black. Comm. 50; Parkes, Hist. ch. 28. — See 1 Collect. Jurid. 33; De Lolme on Eng. Const. B. 1, ch. 11.

Courts of Admiralty, or other Courts, constituted for commercial purposes. There is, then, nothing incongruous, much less absurd, in separating different portions of municipal jurisprudence from each other, in the administration of justice; and in denying powers to one Court, to dispose of all the merits of a cause, when its forms of proceeding are ill adapted to afford complete relief, and the same may more properly be exercised by another Court, of larger and more expansive authority.

CHAPTER II.

THE ORIGIN AND HISTORY OF EQUITY JURISPRUDENCE.

§ 38. HAVING thus ascertained, what is the true nature and character of Equity Jurisprudence, as it is administered in countries, governed by the Common Law, it seems proper, before proceeding to the consideration of the particulars of that jurisdiction, to take a brief review of its Origin and Progress in England, from which country America has derived its own principles and practice on the same subject. It is not intended here to speak of the Common Law Jurisdiction of the Court of Chancery, or of any of its specially delegated jurisdiction, in exercising the prerogatives of the Crown, as in cases of infancy and lunacy ; or of its statutable jurisdiction, in cases of bankruptcy.¹ The inquiry will mainly relate to its equitable, or, as it is sometimes called, its extraordinary jurisdiction.²

§ 39. The Origin of the Court of Chancery is involved in the same obscurity, which attends the investigation of many other questions, of high antiquity, relative to the Common Law.³ The administration of justice in England was originally confided to the *Aula Regis*, or great Court or Council

¹ See Com. Dig. Chancery, C. 1 ; 1 Madd. Ch. Pr. 262 ; 2 Madd. Ch. Pr. 447 ; Id. 565 ; 3 Black. Comm. 426, 427, 428.

² 3 Black. Comm. 50 ; Com. Dig. Chancery, C. 2 ; 4 Inst. 79 ; 2 Inst. 552.

³ Mitford, Pl. Equity, 1 ; Com. Dig. Chancery, A. 1 ; 4 Inst. 79 ; 1 Woodes. Lect. vi.

of the King, as the Supreme Court of Judicature, which, in those early times, undoubtedly administered equal justice, according to the rules of both Law and Equity, or of either, as the case might chance to require.¹ When that Court was broken into pieces, and its principal jurisdiction distributed among various Courts, the Common Pleas, the King's Bench, and the Exchequer, each received a certain portion, and the Court of Chancery also obtained a portion.² But, at that period, the idea of a Court of Equity, as contradistinguished from a Court of Law, does not seem to have subsisted in the original plan of partition, or to have been in the contemplation of the sages of the day.³ Certain it is, that, among the earliest writers of the Common Law, such as Bracton, Glanvill, Britton, and Fleta, there is not a syllable to be found, relating to the equitable jurisdiction of the Court of Chancery.⁴ Fleta, indeed, mentions the existence of a certain office, called the Chancery, and that to the office "it belongs to hear and examine the petitions and complaints of Plaintiffs, and to give them, according to the nature of the injuries shown by them, due remedy by *the writs of the King*."⁵

§ 40. That the Court of Chancery, in the exercise of its ordinary jurisdiction, is a Court of very high

¹ 3 Black. Comm. 50; 1 Reeves, Hist. 62, 63.

² 3 Black. Comm. 50; Com. Dig. Chancery, A. 1, 2, 3; 1 Collect. Jurid. 27 to 30; Parkes, Hist. Chan. 16, 17, 28, 56; 1 Eq. Abridg. 129; Courts, B. note (a); 1 Woodes. Lect. vi, p. 174, 175; Gilb. For. Roman. 14; 1 Reeves, Hist. 59, 60, 63; Bac. Abridg. Court of Chancery, C.

³ 3 Black. Comm. 50. — The Legal Judic. in Chanc. stated, (1727,) ch. 2, p. 24.

⁴ Id. 50; Parkes, Hist. Chan. 25; 4 Inst. 82; 1 Reeves, Hist. 61; 2 Reeves, Hist. 250, 251.

⁵ Parkes, Hist. Chan. 25; Fleta, Lib. 2, cap. 13; 4 Inst. 78.

antiquity, cannot be doubted. It was said by Lord Hobart, that it is an original and fundamental Court, as ancient as the kingdom itself.¹ The name of the Court, Chancery, (*Cancellaria*,) is derived from that of the presiding officer, Chancellor, (*Cancellarius*,) an officer of great distinction, whose office may be clearly traced back, before the Conquest, to the times of the Saxon kings, many of whom had their Chancellors.² Lord Coke supposes, that the title, *Cancellarius*, arose from his cancelling (*a cancellando*) the king's letters patent, when granted contrary to law, which is the highest point of jurisdiction.³ But the office and name of Chancellor, (Mr. Justice Blackstone has observed,) was certainly known to the courts of the Roman Emperors; where it originally seems to have signified a chief scribe, or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince.⁴ From the Roman Emperor it passed to the Roman Church, ever emulous of imperial state; and hence every Bishop has to this day his Chancellor, the principal judge of his Consistory. And when the modern kingdoms of Europe were established upon the ruins of the Empire, almost every state preserved its Chancellor, with different jurisdictions and dignities, according to their different constitution. But in all of them, he seems to

¹ Hobart, R. 63; Com. Dig. Chancery, A. 1, 2; 2 Inst. 551, 552; 4 Inst. 78, 79.

² Com. Dig. Chancery, A. 1; 4 Inst. 78; 1 Woodes. Lect. vi, p. 161 to 165; Prynne's Animadv. 48; 1 Coll. Jurid. 26; 1 Rep. in Chan. App. 5, 7.

³ 4 Inst. 88; Eunomus, Dial. 3, § 60.

⁴ See Parkes, Hist. Chan. 14; 1 Woodes. Lect. vi, p. 160; Hist. of Chancery (1726), 3, 4.

have had the supervision of all charters, letters, and such other public instruments of the Crown, as were authenticated in the most solemn manner; and therefore, when seals came in use, he had always the custody of the king's great seal.¹

§ 41. It is not so easy to ascertain the origin of the equitable, or extraordinary jurisdiction of the Court of Chancery. By some persons it has been held to

¹ 3 Black. Comm. 46, 47; 1 Woodes. Lect. vi. p. 159, 160; 1 Coll. Jurid. 25; Parkes, Hist. Chan. 14; 1 Reeves. Hist. 61; 2 Reeves, Hist. 250, 251. — Camden, in his Britannia, p. 180, states the matter in this manner. "The Chancery drew that name from a Chancellor, which name, under the ancient Roman Emperors, was not of so great esteem and dignity, as we learn out of Vopiscus. But now-a-days a name it is of the highest honor, and Chancellors are advanced to the highest pitch of civil dignity; whose name Cassiodorus fetcheth from cross grates, or lattices, because they examined matters within places (*secretum*) severed apart, enclosed with partitions of such cross bars, which the Latins called *Cancelli*, — Regard, (saith he to a Chancellor) what name you bear. It cannot be hidden, which you do within lattices. For you keep your gates lightsome, your bars open, and your doors transparent as windows. Whereby it is very evident, that he sat within grates, where he was to be seen on every side; and thereof it may be thought he took his name. But minding it was his part, being, as it were, the Prince's mouth, eye, and ear, to strike and slash out with cross lines, lattice like, those letters, commissions, warrants, and decrees, passed against law and right, or prejudicial to the Commonwealth, which, not improperly, they called to cancel, some think the name of Chancellor came from this cancelling. And in a glossary of a later time this we read. A Chancellor is he, whose office it is to look into and peruse the writings of the Emperor; to cancel what is written amiss, and to sign that, which is well." However, Antiquaries differ much upon the origin of the word Chancellor. Some derive it a *cancellis*, or latticed doors, and hold that it was a denomination of those Ushers, who had the care of the *cancelli*, or latticed doors, leading to the presence chamber of the Emperors, and other great men. — See 1 Woodes. Lect. vi. p. 159, 160; Bythewoods' Eunomus, Dial. 3, § 60, note (a), p. 564; Brissonius, Voce, Cancellarius. Vicat, Vocab. Voce, Cancellarius; 1 Savigny's Hist. of Roman Law, translated by Cathcart.

be as ancient, as the kingdom itself.¹ Others are of a different opinion. Lambard, (according to Lord Coke,) who was a keeper of the Records of the Tower, and a Master in Chancery, says, that he could not find, that the Chancellor held any Court of Equity, nor that any causes were drawn before the Chancellor for help in Equity, before the time of Henry IV.; in whose days, by reason of intestine troubles, feoffments to uses did first begin, as some think.² Lord Coke says, it has been thought, that this Court of Equity began in the reign of Henry V., and increased in the reign of Henry VI.; but that its principal growth was during the Chancellorship of Cardinal Wolsey, in the reign of Henry VIII.³ And he adds, in another place, that we find no cases in our books, reported before the reign of Henry VI.⁴ Lord Coke's known hostility to the

¹ Com. Dig. Chancery, A. 2; Jurisd. of Chancery Vind.; 1 Rep. in Chan. App. 9, 10; 1 Coll. Jurid. 28, 29, 30, 62; Discourse on Judicial Authority of the Master of Rolls, 2; Id. Edit. of 1728, Preface, cxi. to cxix. (ascribed to Lord Hardwicke); Barton, Equity Introd. 2 to 13. — This was Lord Hobart's opinion, (as we have seen,) who added, "That part of Equity being opposite to regular law, and, in a manner, an arbitrary discretion, is still administered by the King himself, and his Chancellor, in his name, *ab initio*, as a special trust, committed to the King, and not by him to be committed to another." Hob. Rep. 63. Camden (Britannia, p. 181) says, "It is plain and manifest, that Chancellors were in England before the Normans' Conquest." In the Vindication of the Judgment, given by King James, in the case of the Court of Chancery, (1 Collectanea Juridica, p. 23, 61, 62,) it is said, "It cannot be denied, but that the Chancery, as it judgeth in equity, is a part of the law of the land, and of the ancient Common Law;" "for Equity is, and always hath been, a part of the law of the land."

² 2 Inst. 552. But see 1 Woodes. Lect. vi. p. 176, note (b); Parkes, Hist. Chan. 27; Id. 34; Jurisdiction of Chan. Vind.; 1 Rep. in Chan. App. 7, 8; 1 Coll. Jurid. 27; Legal Judic. in Chan. stated, (1727,) p. 29, 29.

³ 2 Inst. 553.

⁴ 4 Inst. 82.

jurisdiction of the Court of Chancery would very much abate our confidence in his researches, if they were not opposed by other pressing authorities.¹

§ 42. Lord Hale's account of the matter is, as follows. "There were many petitions referred to the Council, (meaning either the *Privatum Concilium*, or *Legale Concilium Regis*,) from the Parliament, sometimes by the answers to particular petitions, and sometimes whole bundles of Petitions in Parliament, which, by reason of a dissolution, could not be there determined, were referred, in the close of the Parliament, sometimes to the Council in general, and sometimes to the Chancellor. And this, I take to be the true original of the Chancery Jurisdiction in matters of Equity, and gave rise to the multitude of equitable causes, to be there arbitrarily deter-

¹ 3 Black. Comm. 54; 1 Collect. Jurid, 23, &c.; Com. Dig. Chancery, A. 2; 1 Woodes. Lect. vi. p. 176, 177. — Camden (Britannica, p. 191) says, "To this Chancellor's office, in process of time, much authority and dignity hath been adjoined by authority of Parliament; especially, ever since that Lawyers stand so precisely upon the strict points of law, and caught men with the traps and snares of their law terms; that of necessity there was a Court of Equity to be erected, and the same committed to the Chancellor, who might give judgment according to equity and reason, and moderate the extremity of law, which was wont to be thought extreme wrong."

Mr. Cooper, in his *Lettres de la Cour de la Chancellerie*, (Lett. 25, p. 182,) says, that there is not a doubt, that the jurisdiction now exercised by the Chancellor, to mitigate the severity of the Common Law, has always been a part of the law of England. And he cites in proof of it, the remark, stated in Burnet's Life of Lord Hale, p. 106, that he (Lord Hale) did look upon Equity as a part of the Common Law, and one of the grounds of it. There is no doubt, that this remark is well founded; but it may well be doubted, whether Lord Hale meant any thing more than a general assertion, that, in the administration of the Common Law, there often mingled equitable considerations and constructions, and not merely a strict and rigid summum jus.

mined." And he afterwards adds, "Touching the equitable jurisdiction, (in Chancery,) though, in ancient time, no such thing was known; yet it hath now so long obtained, and is so fitted to the disposal of lands and goods, that it must not be shaken, though, in many things, fit to be bounded or reformed. Two things might possibly give original, or at least, much contribute to its enlargement. (1.) The usual committing of particular petitions in Parliament, not there determined, unto the determination of the Chancellor, which was as frequent, as to the Council; and such a foundation being laid for a jurisdiction, it was not difficult for it to acquire more. (2.) By the invention of *uses*, (that is, *trusts*,) which were frequent and necessary, especially in the times of dissension, touching the Crown. In these proceedings, the Chancellor took himself to be the only dispenser of the King's conscience; and possibly the Council was not called either as assistants, or co-judges."¹ We shall presently see, how far these suggestions have been established.

§ 43. Lord Hardwicke seems to have accounted for the jurisdiction in another manner. The Chancery is the grand *Officina Justitiæ*, out of which all original writs issue under the great seal, returnable into the Courts of Common Law, to found proceedings in actions competent to the Common Law Jurisdiction. The Chancellor, therefore, (according to Lord Hardwicke,) was the most proper Judge, whether, upon any petition so referred, such a writ could not be framed and issued by him, as might fur-

¹ Parkes, Hist. Chan. App. p. 502, 503. See also Hist. Chan. (1726,) 11, 12, 13, 14; Parkes, Hist. Chan. 56.

nish an adequate relief to the party ; and, if he found the Common Law remedies deficient, he might proceed according to the extraordinary power committed to him by the reference, *Ne Curia Regis deficeret in justitiâ exercendâ*.¹ Thus, the exercise of the equitable jurisdiction took its rise from his being the proper officer, to whom all applications were made for writs, to ground actions at the Common Law ; and, from many cases being brought before him, in which that law would not afford a remedy, and thereby being induced, through necessity or compassion, to extend a discretionary remedy.² If (Lord Hardwicke added) this account of the original of the jurisdiction in Equity in England be historically true, it will, at least, hint one answer to the question, how the forum of Common Law, and the forum of Equity, came to be separated with us. It was stopped at its source, and in the first instance ; for if the case appeared to the Chancellor to be merely of Equity, he issued no original writ, without which the Court of Common Law could not proceed in the cause, but he retained the cognizance to himself.³ The jurisdiction, then, may be deemed, in some sort, a resulting jurisdiction, in cases not submitted to the decision of other courts by the Crown, or Parliament, as the great fountain of justice.⁴

¹ An account, nearly similar, of the Court of Chancery, is given in Bacon's Abridg. Court of Chancery, A. C.

² Parkes, Hist. Chan. App. p. 503, 504.

³ Id. *Rex v. Hare*, 1 Str. Rep. 150, 151. Per *Yorke* arguendo.

⁴ Id. 502 ; Hist. of Chan. (1726,) p. 9, 10, 12, 13 ; Parkes, Hist. of Chan. 56. — Sir James Mackintosh, in his elegant Life of Sir Thomas More, has sketched out a history of Chancery Jurisdiction, not materially different from that given by Lord Hardwicke, aided, as he was, by the later discoveries of the Commissioners of the Public

§ 44. Lord King, (or whoever else was the author of the Treatise, entitled, *The Legal Judicature in Chancery* stated,)¹ deduced the Jurisdiction of the Court of Chancery from the prerogative of the King to administer Justice in his realm, being sworn by his coronation oath to deliver his subjects *aquam et rectam justitiam*. This it was impossible for him to do in person ; and therefore, of necessity, he delegated it, by several portions, to ministers and officers deputed under him. But inasmuch as positive laws must, in their nature, consist of general institutions, there were, of necessity, a variety of particular cases still happening, where no proper, or adequate, remedy could be given by the ordinary Courts of Justice. Therefore, to supply this want, and correct the rigor of the positive law, recourse was had to the King, as the fountain of justice, to obtain relief in such cases. The method of application was by bills or petitions to the King, sometimes in Parliament, and sometimes out of Parliament, commonly directed to him and his Council ; and the granting of them was esteemed, not a matter of right, but of grace and favor. When Parliament met, there were

Records, as stated in their printed reports. I would gladly transcribe the whole passage, if it might not be thought to occupy too large a space for a work, like the present.

¹ Mr. Cooper, in his *Lettres sur la Cour de la Chancellerie*, 85, note (1.) expresses a doubt, whether Lord King was the author of this pamphlet, and stating, that it was written by the same person, who wrote the *History of the Chancery*, relating to the judicial power of that Court, and the rights of the Masters, (1726.) Bishop Hurd, in his *Life of Warburton*, says, that they were both written by Mr. Burrough, with the aid of Bishop Warburton. The *Discourse of the Judicial Authority of the Master of the Rolls*, is said to have been written by Lord Hardwicke alone, or in conjunction with Sir Joseph Jekyll. Cooper, *Lettres*, &c., p. 334, App. C. ; Id. p. 85, note.

usually petitions of all sorts, preferred to the King ; and the distinguishing of these petitions, and giving proper answers to them, occasioned a weight and load of business, especially when Parliament sat but a few days.¹ Accordingly, in the eighth of the reign of Edward I., an ordinance passed, by which petitions of this sort were to be referred, according to their nature, to the Chancellor, and the Justices ; and, in matters of Grace, to the Chancellor. And if the Chancellor and others could not do without the King, then they were to bring the matter, with their own hands, before the King, to know his pleasure ; so that no petitions should come before the King and his Council, but by the hands of the Chancellor and other chief ministers.² And hence the Writer deduces the conclusion, that, at this time, all matters of Grace were determinable only by the King. And he added, that he did not find any traces of a Court

¹ Parkes, Hist. Chan. 56.

² Legal Judic. in Chan. (1727,) p. 27, 28, 29. — The Ordinance, (8 Edw. I.) is cited at large in the work, 'The Legal Judicature, &c. p. 27, and is, as follows. It recites, that the People, who came to Parliament, were often "delayed and disturbed, to the great grievance of them, and of the Court, by the multitude of Petitions laid before the King, the greatest part whereof might be dispatched by the Chancellor, and by the Justices ; therefore it is provided, that all the petitions, which concern the seal, shall come first to the Chancellor ; and those, which touch the Exchequer, to the Exchequer ; and those, which concern the Justices, and the law of the land, to the Justices ; and those, which concern the Jews, to the Justices of the Jews ; and if the affairs are so great, or if they are of Grace, that the Chancellor and others cannot do it without the King, then they shall bring them with their own hands before the King, to know his pleasure ; so that no Petitions shall come before the King and his Council, but by the hands of his said Chancellor, and other chief ministers ; so that the King and his Council may, without the load of other business, attend to the great business of his Realm, and of other foreign countries." The same Ordinance will be found in Ryley, Placit. Parliam. p. 442, and Parkes, Hist. Chan. 29, 30.

of Equity in Chancery, in the time of Edward II.; and that it seemed to him, that the Equity side of the Court began in the reign of Edward III.,¹ when, by Proclamation, he referred matters of Grace to the cognizance of the Chancellor.² And the jurisdiction was clearly established, and acted on in the reign of Richard II.³

¹ Legal Judic. in Chan. (1727,) p. 28.

² Id. 30, 31, (22 Edw. III.) See Parkes, Hist. Chan. 35; 1 Equity Abr. Courts, B. note (u.) — The Proclamation is given in the Legal Judicature, &c., p. 30, 31, and in Parkes, History of Chancery, p. 35. It is as follows. "The King to the sheriffs of London greeting — Forasmuch as we are greatly and daily busied in various affairs, concerning us and the state of our realm of England: We will, That whatsoever business, relating as well to the common law of our kingdom, as our special grace, cognizable before us, from henceforth be prosecuted as followeth, viz. 'The common law business, before the Archbishop of Canterbury elect, our Chancellor, by him to be dispatched; and the other matters, grantable by our special grace, be prosecuted before our said Chancellor, or our well beloved Clerk, the Keeper of the Privy Seal, so that they, or one of them, transmit to us such petitions of business, which, without consulting us, they cannot determine, together with their advice thereupon, without any further prosecution to be had before us for the same; that upon inspection thereof, we may further signify to the aforesaid Chancellor or Keeper, our will and pleasure therein; and, that none other do for the future pursue such kind of business before us, we command you immediately, upon sight hereof, to make proclamation of the premises,' &c. Mr. Lambard, in his work on the Jurisdiction of Courts, says of the Court of Chancery, that "the King did at first determine causes in Equity in person; and about the 20th of Edward III., the King going beyond sea, delegated this power to the Chancellor;" and then, he says, "several statutes were made to enlarge the jurisdiction of this Court, 17 Rich. II. ch. 6," &c. Bigland, arguendo, in *Rex v. Standish*. (1 Mod. R. 59.) And Bigland then adds, "But the Chancellor took not upon him, *ex officio*, to determine matters in Equity, till Edward the Fourth's time; for, till then, it was done by the King in person, who delegated, to whom he pleased." This last remark seems, from the recent publication of the Record Commissioners, to be founded in error. 1 Cooper, Public Rec. p. 354, ch. 18.

³ Id. 29, 32, 33; Parkes, Hist. Chan. 39 to 44, 54; *Rex v. Standish*, 1 Mod. R. 59; Bigland's Argument.

§ 45. Mr. Justice Blackstone seems to rely on the same general origin of the Jurisdiction of Chancery, as arising from the reference of petitions from the Privy Council to the Chancellor; and also to the introduction of uses of land, about the end of the reign of Edward III.¹ Mr. Woodeson deduces the jurisdiction from the same source, and lays great stress on the proclamation of 22 Edw. III.; and also on the statute of 36 Edw. III. (stat. 1, ch. 9,) which he, as well as Spelman, considers as referring many things to the sole and exclusive cognizance of the Chancellor.² And he adds, that it seems incontrovertible, that the Chancery exercised an equitable jurisdiction, though its practice, perhaps, was not very flourishing; or frequent, through the reign of Edward III.³

§ 46. But all our juridical Antiquaries admit, that the jurisdiction of Chancery was established, and in full operation, during the reign of Richard II.; and their opinions are supported by the incontrovertible

¹ 3 Black. Comm. 50 to 52; Parkes, Hist. Chan. 56.

² 1 Woodes. Lect. vi. p. 176, and note (*f*); 2 Inst. 553; Parkes, Hist. Chan. 35; 1 Eq. Abr. Courts, B. note (*a*).

³ 1 Woodes. Lect. vi. p. 178, 179 to 183; see also 7 Dane's Abrid. ch. 225, art. 4, § 1. — Mr. Reeves, in his History of the English Law, traces the origin of the Court of Chancery to the reign of Richard II.; and refers the probable origin of its jurisdiction to the reference of petitions to the Chancellor by Parliament, or by the King's Council; and conjectures, that he soon afterwards, as the King's adviser, began to grant redress, without any such reference, by the mere authority of the King. 3 Reeves, Hist. of English Law, p. 188 to 191. Mr. Jeremy, in the Introduction to his Treatise on Equity Jurisdiction, (p. i. to xxi.), has given a sketch of the origin and progress of that jurisdiction in England. It is certainly a valuable, though concise, review of it. But it does not seem to contain any remarks, important to be taken notice of, beyond what are furnished by other authors already cited. See also Barton on Eq. Pract. Introd. p. 2 to 13.

facts, contained in the remonstrances, and other acts of Parliament. At this period, the extensive use, or abuse, of the powers of Chancery had become an object of jealousy with Parliament; and various efforts were made to restrain and limit its authority. But the Crown steadily supported it.¹ And the invention of the writ of subpœna by John Waltham, Bishop of Salisbury, who was keeper of the Rolls, about the 5th of Richard II., gave great efficiency, if not expansion, to the jurisdiction.² In the 13th of Richard II., the Commons prayed, that no party might be required to answer before the Chancellor, or the Council of the King, for any matter, where a remedy is given by the Common Law, unless it be by writ of *scire facias* in the County, where it is found, by the Common Law. To which the King answered, that he would preserve his royalty, as his progenitors had done before him.³ And the only redress granted was by Stat. 17 Richard, ch. 6., by which it was enacted, that the Chancellor should have power to award damages to the Defendant, in case the suggestions of the bill were untrue, according to his discretion.⁴ The struggles upon this subject

¹ Parkes, Hist. Chanc. 39 to 44.

² 3 Reeves, Hist. 192 to 194; Id. 274, 379, 380, 381; 3 Black. Comm. 52; Bac. Abr. Court of Chancery, C. — In the third year of the reign of Henry V., the Commons, in a petition to the king, declared themselves aggrieved by writs of subpœna, sued out of Chancery, for matters determinable at the Common Law, "which were never granted, or used, before the time of the late King Richard, when John Waltham, heretofore Bishop of Salisbury, of his craft, made, formed, and commenced such innovations." Parkes, Hist. Chan. 47, 48; 1 Woodes. Lect. vi. p. 183, 184. See also Gilb. Forum. Roman. 17.

³ Parkes, Hist. Chan. 41; 4 Inst. 82.

⁴ Parkes, Hist. Chan. 41, 42; 3 Black. Comm. 52; 4 Inst. 82, 83; 1 Woodes. Lect. vi. p. 183; 3 Reeves, Hist. 194.

were maintained in the subsequent reigns of Henry IV. and V. ; but the Crown resolutely resisted all appeals against the jurisdiction ; and finally, in the time of Edward IV., the process by bill and subpœna was become the daily practice of the Court.¹

§ 47. Considerable new light has been thrown upon the subject of the origin and antiquity of the equitable jurisdiction of the Court of Chancery, by the recent publication of the labors of the Commissioners on the Public Records. Until that period, the notion was very common, (which was promulgated by Lord Ellesmere,) that there were no petitions of the Chancery, remaining in the office of record, before the 15th year of the reign of Henry VI. But it now appears, that many hundreds have been lately found among the records of the Tower for nearly fifty years antecedent to the period, mentioned by Lord Ellesmere, and commencing about the time of the passage of the statute of 17 Rich. II. ch. 6.² But there is much reason to believe, that, upon suitable researches, many petitions, or bills, addressed

¹ 3 Black. Comm. 53 ; Parkes, Hist. Chan. 45 to 57 ; 1 Woodes. Lect. vi. p. 183 to 186 ; 3 Reeves, Hist. 193, 194, 274, 379, 390.

² 1 Cooper, Pub. Rec. 355. — I extract this statement from the Preface to the Calendars of the Proceedings in Chancery, &c., published by the Record Commissioners in 1827, and now before me. That Preface is signed by John Bayley, Sub Commissioner. But it would seem, that it was in fact drawn up by Mr. Lysons, more than ten years before. Mr. Cooper, in his very valuable account of the Public Records, has published this preface verbatim ; and has also extracted a Letter of Mr. Lysons, written on the same subject in 1816. The preface and letter seem almost identical in language. 1 Cooper, Pub. Rec. ch. 18, p. 354 ; Id. 384, note (b) ; Id. 455 to 458. — In the English Jurist, for January, 1828, there will be found, in a review of these Calendars, a very succinct, but interesting, account of the contents of the early Chancery Cases, printed by the Record Commissioners.

to the Chancellor, will be found of a similar character during the reigns of Edward I., Edward II., and Edward III.¹

§ 48. From the proceedings, (which have been published by the Record Commissioners,) it appears, that the chief business of the Court of Chancery in those early times did not arise from the introduction of uses of land, according to the opinion of most writers on the subject. Very few instances of applications to the Chancellor, on such grounds, occur among the proceedings of the Chancery during the first four or five reigns after the equitable jurisdiction of the Court seems to have been fully established. Most of these ancient petitions appear to have been presented in consequence of assaults, and trespasses, and a variety of outrages, which were cognizable at Common Law; but for which the party complaining was unable to obtain redress, in consequence of the maintenance and protection, afforded to his adversary, by some powerful baron, or by the sheriff, or by some officer of the County, in which they occurred.²

¹ Mr. Cooper says, that he "has made some inquiries, which induce him to think, that there still exist among the records at the Tower many petitions, or bills, addressed to the Chancellor, during the reigns of Edw. I., Edw. II., and Edw. III., similar to those addressed to that Judge, during the reign of Richard II., selections from which have been printed. Upon a very slight research, several documents of this description are stated to have been discovered; but only one of them has been seen by the compiler. It is dated the 38th year of Edward III." 1 Cooper, Publ. Rec. Addenda, p. 454, 455. — Mr. Barton says, that, so early as the reign of Edward I., the Chancellor began to exercise an original and independent jurisdiction, as a Court of Equity, in contradistinction to a Court of Law. Barton on Eq. Pr. Intro. p. 7.

² This passage is a literal transcript from the Preface to the Calendars in Chancery; and it is fully borne out by the examples of

§ 49. If this be a true account of the earliest known exercises of equitable jurisdiction, it establishes, that it was principally applied to remedy defects in the Common Law proceedings; and therefore, that Equity Jurisdiction was entertained upon the same ground, which now constitutes the principal reason of its interference, that a wrong is done, for which there is no plain, adequate, and complete remedy in the Courts of Common Law.¹ And in this way great strength is added to the opinions of Lord Hale and Lord Hardwicke, that its jurisdiction is, in reality, the residuum of that of the *Commune Concilium*, or *Aula Regis*, not conferred on other Courts, and necessarily exercisable by the Crown, as a part of its duty and prerogative, to administer Justice and Equity.² The introduction of Uses or Trusts at a later period may have given new activity and extended operation to the jurisdiction of the Court; but it did not found it. The redress, given by the Chancellor in such cases, was merely a new application of the old principles of the Court; since there was no remedy at law to enforce the observance of such uses, or trusts.³

those bills and petitions, given at large in the same work. Mr. Cooper, in his own work on the Public Records, has given an abstract, or marginal note, of all the examples thus given, from the reign of Richard II., to the reign of Richard III., amounting in number to more than one hundred. 1 Cooper. Pub. Rec. 359, 373; Id. 377 to 385.—As we recede from the reign of Richard II., and advance to modern times, the cases become of a more mixed character, and approach to those now entertained in Chancery.

¹ See Treatise on Subpœna, ch. 2; Harg. Law Tracts, p. 333, 334.

² See Eunomus, Dial. 3, § 60; 1 Eq. Abrid. Courts, B. note (a).

³ See 3 Black. Comm. 52; 3 Reeves, Hist. 379, 381; 1 Woodes. Lect. vi. p. 174, 176, 178, 182; Eunomus, Dial. 3, § 60; Parkes, Hist. Chan. 28 to 31.—The view, which is here taken of the sub-

§ 50. From this slight review of the origin and progress of equitable jurisdiction in England, it cannot escape observation, how naturally it grew up, in the same manner, and under the same circumstances, as the equitable jurisdiction of the Prætor at Rome. Each of them arose from the necessity

ject, is confirmed by the remarks of the Commissioners, under the Chancery Commission, in the 50th Geo. III., whose Report was afterwards published by Parliament in 1826. The passage, to which allusion is made, is as follows. "The proceedings in the Courts of Common Law are simple, and generally founded on certain writs of great antiquity, conceived in prescribed forms. This adherence to prescribed forms has been considered, as important to the due administration of justice, in common cases; but, in progress of time, cases arose, in which full justice could not be done, in the Courts of Common Law, according to the practice then prevailing; and, for the purpose of obtaining an adequate remedy, in such cases, resort was had to the extraordinary jurisdiction of the Courts of Equity, which alone had the power of examining the party on oath, and thereby acting through the medium of his conscience, and of procuring the evidence of persons, not amenable to the jurisdiction of the Courts of Common Law, and whose evidence therefore it was, in many cases, impossible to obtain, without the assistance of a Court of Equity. The application to this extraordinary jurisdiction, instead of being in the form of a Writ, prescribed by settled law, seems always to have been in the form of a Petition of the party or parties aggrieved, stating the grievance, the defect of remedy by proceedings in the Courts of Common Law, and the remedy, which, it was conceived, ought to be administered. This mode of proceeding unavoidably left every complaining party to state his case, according to the particular circumstances, always asserting, that the party was without adequate remedy at the Common Law." The Reviewer of the Early Proceedings in Chancery in the *English Jurist*, for January, 1828, concludes his observations in the following manner. "It is, we think, established to demonstration, that the general jurisdiction of the Court was derived from that extensive judicial power, which, in early times, the King's ordinary Council had exercised; but that it arose gradually and insensibly, as circumstances occurred, and occasions seemed to demand it; and that, having so arisen, it afterwards settled down by equally slow degrees, and, in consequence of occasional resistance, excited to its encroaching and despotic spirit, appears to us to be equally as demonstrable." 1 *English Jurist*, p. 350.

of the thing in the actual administration of justice, and from the deficiencies of the positive law, (the *lex scripta*,) or from the inadequacy of the remedies, in the prescribed form, to meet the full exigency of the particular case. It was not an usurpation, for the purpose of acquiring and exercising power ; but a beneficial interposition, to correct gross injustice, and redress aggravated and intolerable grievances.¹

§ 51. But, be the origin of the Court of Equity what it may, from the time of the reign of Henry VI., it constantly grew in importance ;² and, in the reign of Henry VIII., it expanded into a broad and almost boundless jurisdiction under the fostering care, and ambitious wisdom, and love of power of Cardinal Wolsey.³ Yet, (Mr. Reeves observes,) after all,

¹ 1 Kaims on Equity, Introd. p. 19 ; Butler's *Horæ Jurid.* § v. 3, p. 43 to 46 ; Id. App. note 3, p. 130. — Those, who have a curiosity to trace the origin and history of the Prætor's authority in Rome, and the gradual development, or assumption of jurisdiction by him, will find ample means for this purpose in Taylor's *Elements of the Civil Law*, p. 210 to 216, and in Heineccius *De Edictis Prætorum*, Lib. 1, cap. 6, per tot. The same complaints were made at Rome, as in England, of the excess and abuse of authority by the Prætors ; and the complaints commonly ended in the same way. The jurisdiction was occasionally restricted ; but it was generally confirmed. See Butler's *Horæ Jurid.* § v. 3, p. 43 to 46.

² Parkes, *Hist. Chan.* 55, 56 ; 3 Reeves, *Hist.* 379 to 382.

³ 4 Reeves, *Hist.* 368, 369 ; Parkes, *Hist. Chan.* 61, 62 ; 4 Inst. 91, 92. — It seems, that the first delegation of the Powers of the Lord Chancellor to Commissioners was in the time of Cardinal Wolsey. It will be found in Rymer's *Fœdera*, tom. 14, p. 299 ; Parkes, *Hist. of Chan.* 60, 61. It was in the same reign, that the Master of the Rolls, (it is said,) under a like appointment, first sat apart, and used to hear causes at the Rolls in the afternoon. The Master, who thus first heard causes, was Cuthbert Tunstall. 4 Reeves, *Hist. of the Law*, 368, 369 ; 5 Reeves, *Hist.* 160. But see *Discourse on the Judicial Authority of the Master of the Rolls*, (1728,) § 3, p. 33, &c. ; Id. § 4, p. 110, &c., ascribed to Sir Joseph Jekyll.

notwithstanding the complaints of the Cardinal's administration of justice, he has the reputation of having acted with great ability in the office of Chancellor, which lay heavier upon him, than it had upon any of his predecessors, owing to the too great care, with which he entertained suits, and the extraordinary influx of business, which might be attributed to other causes.¹ Sir Thomas More, the successor of the Cardinal, took a more sober and limited view of Equity Jurisprudence, and gave public favor, as well as dignity, to the decrees of the Court. But still there were clamors from those, who were hostile to Equity, during his time; and especially to the power of issuing injunctions to judgments and other proceedings, in order to prevent irreparable injustice.² This controversy was renewed, with much greater heat and violence, in the reign of James I., upon the point, whether a Court of Equity could give relief for, or against, a judgment at Common Law; and it was mainly conducted by Lord Coke against, and by Lord Ellesmere in favor of, the Chancery jurisdiction. At last, the matter came directly before the King, and, upon the advice and opinion of very learned Lawyers, to whom he referred it, his Majesty gave judgment in favor of the equitable jurisdiction in such cases.³ Lord Bacon

¹ 4 Reeves, Hist. 370.

² Sir James Mackintosh's *Life of Sir Thomas More*; 4 Reeves, Hist. 370 to 376; Parkes, Hist. Chan. 63 to 65.

³ 1 Collect. Jurid. 23, &c.; 1 Woodes. Lect. vi. p. 186; 3 Black. Comm. 54; Parkes, Hist. Chan. 80. — The controversy gave rise to many pamphlets, not only at the time, but in later periods. The learned reader, who is inclined to enter upon the discussion of these points, now of no importance, except as a part of the juridical history of England, may consult advantageously the following works. *Observations concerning the office of Lord Chancellor*, published

succeeded Lord Ellesmere; but few of his decrees, which have reached us, are of any importance to posterity.¹ But his celebrated Ordinances, for the regulation of Chancery, gave a systematical character to the business of the Court; and some of the most important of them (especially as to Bills of Review) still constitute the fundamental principles of its present practice.²

§ 52. From this period, down to the time when Sir Heneage Finch (afterwards Earl of Nottingham) was elevated to the Bench, (1673,) little improvement was made, either in the principles or practice of Chancery;³ and none of the persons, who held the seal, were distinguished for uncommon attainments, or learning, in their profession.⁴ With Lord Nottingham, a new era commenced. He was a person of eminent abilities, and the most incorruptible integrity. He possessed a fine genius, and

in 1651, and ascribed (though it is said incorrectly) to Lord Ellesmere. (Discourse concerning the Judicial Authority of the Master of Rolls, 1728, p. 51.) A Vindication of the Judgment of King James, &c., printed in an Appendix to the first volume of Reports in Chancery, and in 1 Collect. Jurid. 23, &c.; the several Treatises on the Writ of Subpœna in Chancery, and the Abuses and Remedies in Chancery, in Hargrave's Law Tracts, p. 321, 425; and 4 Reeves, Hist. of the Law, p. 370 to 377; 2 Swanst. 24, note. — There is a curious anecdote related of Sir Thomas More, who invited the Judges to dine with him, and after dinner, showed them the number and nature of the causes, in which he had granted injunctions to judgments of the Courts of Common Law; and the Judges, upon full debate of the matters, confessed, that they could have done no otherwise themselves. The anecdote is given at large in Mr. Cooper's *Lettres sur la Cour de la Chancellerie*, Lett. 25, p. 185, note 1, from Roper's Life of Sir Thomas More.

¹ 3 Black. Comm. 55.

² See Bacon's Ord. in Chancery, by Beames.

³ 3 Black. Comm. 55.

⁴ See Parkes, Hist. Chan. 92 to 210.

great liberality of views, and a thorough comprehension of the true principles of Equity ; so that he was enabled to disentangle the doctrines from any narrow and technical notions, and to expand the remedial justice of the Court far beyond the aims of his predecessors. In the course of nine years, during which he presided in the Court, he built up a system of Jurisprudence and Jurisdiction, upon wide and rational foundations, which served as a model for succeeding Judges, and gave a new character to the Court ;¹ so that he has been emphatically called "The father of Equity."² His immediate successors availed themselves very greatly of his profound learning and judgment. But a successor was still wanted, who, with equal genius, abilities, and liberality, should hold the seals for a period long enough to enable him to widen the foundation, and complete the structure, begun and planned by that illustrious man. Such a successor at length appeared, in the person of Lord Hardwicke. This great Judge presided in the Court of Chancery during the period of twenty years ; and his numerous decisions evince the most thorough learning, the most exquisite skill, and the most elegant juridical analysis. There reigns, throughout all of them, a spirit of conscientious and discriminating Equity, a sound and enlightened judgment, as rare, as it is persuasive, and a power of illustration from analogous topics of the law, as copious, as it is exact and edifying. Few Judges have left

¹ Mr. Justice Blackstone has pronounced a beautiful Eulogy on him, in 3 Black. Comm. 56, from which the text is, with slight alterations, borrowed. See also 4 Black. Comm. 442.

² 1 Madd. Ch. Pr. Preface, 13. See Parkes, Hist. Chan. 211, 212, 213, 214 ; 1 Kent, Comm. Lect. 21, p. 492, (2d edition.)

behind them a reputation more bright and enduring ; few have had so favorable an opportunity of conferring lasting benefits upon the jurisprudence of their country ; and still fewer have improved it by so large, so various, and important contributions. Lord Hardwicke, like Lord Mansfield, combined with his judicial character, the still more embarrassing character of a statesman, and in some sort of a Minister of State. Both of them, of course, encountered great political opposition, (whether rightly or wrongly, it is beside the purpose of this work to inquire ;) and it is fortunate for them, that their judicial labors are embodied in solid volumes, so that, when the prejudices and the passions of the times are past away, they may remain open to the severest scrutiny, and claim from posterity a just and unimpeachable award.¹

§ 53. This short and imperfect sketch of the origin and history of Equity Jurisdiction, in England, will be here concluded. It has not been inserted in this place from the mere desire to gratify those, whose curiosity may lead them to indulge in antiquarian inquiries, laudable, and interesting, as it may be. But it seemed, if not indispensable, at least impor-

¹ See 1 Kent, Comm. Lect. 21, p. 494, (2d edit.) and Lord Kenyon's opinion in *Goodtitle v. Otway*, 7 T. R. 411. — Mr. Charles Butler, in his *Reminiscences*, has given a sketch of Lord Hardwicke and Lord Mansfield, which no Lawyer can read without high gratification. Few men were better qualified to judge of their attainments. 1 Butler's *Reminis.* § 11, n. 1, 2, p. 105 to 116. Those, who wish to form just notions of the great Chancellors of succeeding times, down to our own, may well consult the same interesting pages, in which Lord Camden, Lord Thurlow, Lord Rosslyn, Sir William Grant, and, though last, not least, the venerable Lord Eldon are spoken of in terms of high, but discriminating praise. See 4 Kent's Comm. Lect. 21, p. 494, 495, (2d edit.)

tant, as an introduction to a more minute and exact survey of that jurisdiction, as administered in the present times. In the first place, without some knowledge of the origin and history of Equity Jurisdiction, it will be difficult to ascertain the nature and limits of that jurisdiction; and how it can, or ought to be applied to new cases, as they arise. If it be a mere arbitrary, or usurped jurisdiction, standing upon authority and practice, it should be confined within the very limits of its present range; and the *terra incognita*, and the *terra prohibita*, ought to be the same, as to its boundaries. If, on the other hand, its jurisdiction be legitimate, and founded in the very nature of remedial justice, and a delegation of authority in all cases, where a plain, adequate, and complete remedy does not exist in any other Court, to protect acknowledged rights, and to prevent acknowledged wrongs, (that is, acknowledged in the Municipal Jurisprudence,) then it is obvious, that it has an expansive power, to meet new exigencies; and the sole question, applicable to the point of jurisdiction, must, from time to time, be, whether such rights and wrongs do exist, and whether the remedies therefor in other Courts, and especially in the Courts of Common Law, are full, and adequate to redress them. If the present examination (however imperfect) has tended to any result, it is to establish, that the latter is the true and constitutional predicament and character of the Court of Chancery.

§ 54. In the next place, a knowledge of the origin and history of Equity Jurisdiction will help us to understand, and, in some measure, to explain, as well as to limit, the anomalies, which do confessedly exist

in the system. We may trace them back to their sources, and ascertain, how far they were the result of accidental, political, or other circumstances ; of ignorance, or perversity, or mistake in the Judges ; of imperfect development of principles ; of narrow views of public policy, or the seductive influence of prerogative ; or, finally, of a spirit of accommodation to the institutions, habits, laws, or tenures of the age, which have long since been abolished, but have left the scattered fragments of their former existence behind them. We shall thus be enabled to see more clearly, how far the operation of these anomalies should be strengthened or widened ; when they may be safely disregarded, in application to new causes and new circumstances ; and when, though a deformity in the general system, they cannot be removed, without endangering the existence of other portions of the fabric, or interfering with the proportions of other principles, which have been moulded and adjusted with reference to them.

§ 55. In the next place, such a knowledge will enable us to prepare the way for the gradual improvement, as well of the science itself, as of the system of its operations. Changes in law, to be safe, must be slowly and cautiously introduced, and thoroughly examined. He, who is ill read in the history of any law, must be ill prepared to know its reasons, as well as its effects. The causes, or occasions of laws, are sometimes as important to be traced out, as their consequences. The new remedy, to be applied, may otherwise be as mischievous, as the wrong to be redressed. History has been said to be philosophy, teaching by examples ; and to no subject is this remark more applicable than to law,

which is emphatically the science of human experience. A sketch, however general, of the origin and sources of any portion of jurisprudence, may at least serve the purpose of pointing out the paths to be explored; and, by guiding the inquirer to the very places he seeks, may save him from the labor of wandering in devious tracks, and of bewildering himself in mazes of errors, as fruitless, as they may be intricate.

§ 56. In America, the origin of Equity Jurisprudence is far later than that of the jurisdiction, properly appertaining to the Common Law. In many of the Colonies, during their connexion with Great Britain, it had either no existence at all, or a very imperfect and irregular administration.¹ Even since

¹ Equity Jurisprudence scarcely had an existence, in any large and appropriate sense of the terms, in any part of New England, during its Colonial state. (1 Dane, Abridg. ch. 1, art. 7, § 51; 7 Dane, Abridg. ch. 225, art. 1, 2.) In Massachusetts and Rhode Island, it still has but a very limited extent. In Maine and New Hampshire, general Equity powers have been, within a few years, given to their highest Courts of Law. In Vermont and Connecticut, they have had an earlier establishment; in the former, since the Revolution; and in the latter, a short time before the Revolution. 2 Swift, Dig. p. 15, edit. 1823. In Virginia, there does not seem to have been any Court, having Chancery powers, earlier than the Act of 1700, ch. 4, (§ Tucker's Black. App. 7.) In New York, the first Court of Chancery was established in 1701; but it was so unpopular, from its powers being vested in the Governor and Council, that it had very little business, until it was reorganized in 1798. (1 John. Ch. Rep. Preface; Campb. and Camb. American Chancery Digest, Preface, 6; Blake's Chan. Introduct. viii.) In New Jersey, it was established in 1705, (1 Fonbl. Eq. by Laussat, edit. 1831, p. 14, note.) Mr. Laussat, in his Essay on Equity, in Pennsylvania, (1826,) has given an account of its origin, and progress, and present state, in that Commonwealth, (p. 16 to 31.) From this account we learn, that the permanent establishment of a Court of Equity was successfully resisted by the people, during the whole of its Colonial existence; and that the year 1790 is the true point, at which we must fix the

the revolution, which severed the ties, which bound us to the parent country, it has been of slow growth and cultivation; and several states still exist, in whose municipal jurisprudence it has no place at all, or no place as a separate and distinct science. Even in those states, in which it has been cultivated with the most success, and for the greatest length of time, it can scarcely be said to have been generally studied, or administered, as a system of enlightened and exact principles, until about the close of the eighteenth century.¹ Indeed, until a much later period, when Reports were regularly published, it scarcely obtained the general regard of the profession, beyond the purlieu of its immediate officers and ministers. Even in the great State of New York, whose rank in jurisprudence has never been second to that of any state in the Union, if it has not been the first among its peers, Equity was scarcely felt in the general administration of justice, until about the period of the Reports of Caines and of Johnson. And, perhaps, it is not too much to say, that it did not attain its full maturity, and masculine vigor, until Mr. Chancellor Kent brought to it the fulness of his own extraordinary learning, unconquerable diligence, and brilliant talents. If this tardy progress has somewhat checked the study of the beautiful and varied principles of Equity in America, it has, on the other hand, enabled us to escape from the embarrassing effects of decisions, made at an earlier period, when the

establishment of Equity in the Jurisprudence of Pennsylvania. See also, 7 Dane, Abridg. ch. 225, art. 1, 2.

¹ 1 Dane, Abridg. ch. 1, art. 7, § 51; 7 Dane, Abridg. ch. 225, art. 1, 2.

studies of the profession were far more limited, and the Benches of America were occasionally, like that of the English Chancery, occupied by men, who, whatever judgment or integrity they possessed, were inadequate for the duties of their stations, by their want of learning, or their general pursuits, or the disqualifying motives and circumstances, under which their choice originated, the want of Executive or popular favor, or the discouragement of a narrow and incompetent salary.

§ 57. The Equity Jurisprudence, at present exercised in America, is founded upon, coextensive with, and, in most respects, conformable to, that of England. It approaches even nearer to the latter, than the jurisdiction, exercised by the Courts of Common Law in America, does to the Common Law, as administered in England; because the Common Law was not, in many particulars, applicable to the situation of our country, when it was first introduced. But Equity Jurisprudence, in its main streams, flows from the same sources here, that it does in England, and admits of an almost universal application in its principles. The Constitution of the United States has, in one clause, conferred on the National Judiciary cognizance of cases in Equity, as well as in Law; and the uniform interpretation of the clause has been, that by cases in Equity, are meant cases, which, in the Jurisprudence of England, (the parent country,) are so called, as contradistinguished from cases at the Common Law;¹ so that, in the Courts of

¹ Robinson v. Campbell, 3 Wheaton, R. 212, 221, 223; Parsons v. Bradford, 3 Peters, Sup. Ct. R. 433, 447; 3 Story, Comm. on Const. 506, 507; Id. 644, 645; U. S. v. Howland, 4 Wheaton R. 115; 7 Dane, Abridg. ch. 225, art. 1.

the United States, Equity Jurisprudence embraces the same matters of jurisdiction and modes of remedy, as exist in England.

§ 58. In all the states, in which Equity Jurisprudence is recognised, except Pennsylvania, it is administered in the modes, and according to the forms, which appertain to it in England; that is, as a branch of jurisprudence, separate and distinct from the remedial justice of Courts of Common Law.¹ In Pennsylvania, it is administered through the forms, remedies, and proceedings of the Common Law; and is thus mixed up with legal rights and titles, in a manner not easily comprehensible elsewhere.² In some of the states in the Union, distinct Courts of Equity are established; in others, the powers are exercised concurrently with Common Law Jurisdiction by the same tribunal, being at once a Court of Law and a Court of Equity, somewhat analogous to the case of the Court of Exchequer in England. In others, again, no general Equity powers exist; but a few specified heads of Equity are confided to the ordinary Courts of Law, and constitute a limited statutable jurisdiction.³

¹ Fonblanq. on Eq. by Laussat, (edit. 1831,) p. 13 to 20; 7 Dane's Abridg. ch. 225, art. 1, 2.

² Id. 18 to 20.

³ Mr. Chancellor Kent, in a note to his Commentaries, has given a brief statement of the actual organization of Equity Jurisdiction in all the states; to which I gladly refer the learned reader. (4 Kent, Comm. Lect. 58, p. 163, note (d). A fuller account may be found in the Preface to Campbell & Cambreleng's American Chancery Digest, (edit. 1828,) and in Mr. Laussat's Edition of Fonblanque on Equity, vol. 1, p. 11 to 20, (edit. 1831); and in Mr. Laussat's Essay on Equity in Pennsylvania. App. (1826.) As the systems of the different states are, in many cases, subject to Legislative author-

ity, which is frequently engaged in introducing modifications, a more minute detail would scarcely be of any permanent importance to the profession. The article on Chancery Jurisdiction, in the first volume of the *American Jurist*, p. 314, contains many very valuable suggestions on this subject; and exhibits, in a striking manner, the importance of Equity Jurisprudence. See also, 7 *Dane's Abridg.* ch. 225, art. 1, 2.

CHAPTER III.

GENERAL VIEW OF EQUITY JURISDICTION.

§ 59. HAVING traced out the nature and history of Equity Jurisprudence, we are naturally led to the consideration of the various subjects, which it embraces, and the measure and extent of its jurisdiction. Courts of Equity, in the exercise of their jurisdiction, may, in a general sense, be said to differ from Courts of Common Law, in the modes of trial, in the modes of proof, and in the modes of relief. One or more of these elements will be found essentially to enter, as an ingredient, into every subject, over which they exert their authority. Lord Coke has, in his summary manner, stated, that three things are to be judged of in the Court of Conscience, or Equity, covin, accident, and breach of confidence;¹ or, as we should now say, matters of fraud, accident, and trust. Mr. Justice Blackstone has also said, that Courts of Equity are established, “to detect latent frauds and concealments, which the process of the Courts of Law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a Court of Law; to deliver from such dangers, as are owing to misfortune, or

¹ 4 Inst. 84; Com. Dig. Chancery, Z.; 3 Black. Comm. 431; 1 Eq. Abr. Courts, B. § 4, p. 130; 1 Dane's Abridg. ch. 9, art. 1, § 3; Earl of Bath v. Sherwin, Prec. Ch. 261; S. C. 1 Bro. Parl. Cas. 266; Rex v. Hare & Mann, 1 Str. 149, 150; Yorke, arguendo; 1 Woodes. Lect. vii. p. 208, 209; Bac. Abridg. Court of Chancery, C.

oversight ; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or Common Law.”¹

§ 60. These, as general descriptions, are well enough ; but they are far too loose and inexact, to subserve the purposes of those, who seek an accurate knowledge of the actual, or supposed, boundaries of Equity Jurisdiction. Thus, for example, although fraud, accident, and trust are proper objects of Courts of Equity, it is by no means true, that they are exclusively cognizable therein. On the contrary, fraud is, in many cases, cognizable in a Court of Law ; and sometimes, as fraud in obtaining a will, or devise of lands, is exclusively cognizable there.² Many cases of accident are remediable at law, such as loss of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions, and other like cases. And even trusts, though in general of a peculiar and exclusive jurisdiction in Equity, are sometimes cognizable at law ; as, for instance, cases of bailments, and that larger class of cases, where the action for money had and received for another’s use, is maintained *ex æquo et bono*.³

§ 61. On the other hand, there are cases of fraud, of accident, and of trust, which neither Courts of Law, nor of Equity, presume to relieve, or mitigate.⁴ Thus, a man may most unconscientiously

¹ 1 Black. Comm 92 ; and see 3 Black. Comm. 429 to 432.

² 1 Hovenden on Frauds, Introd. p. 16 ; Id. ch. 10, p. 252 ; 1 Dane, Abridg. ch. 9, art. 1, § 3 ; 3 Woodes. Lect. 56, p. 477.

³ 3 Black. Comm. 431, 432 ; 1 Woodes. Lect. vij. p. 208, 209.

⁴ 1 Fonbl. Eq. B. 1, ch. 1, § 3, p. 16.

wage his law in an action of debt; and yet, the aggrieved party will not be relieved in any Court of Law or Equity.¹ And, where the law has determined a matter, with all its circumstances, Equity cannot (as we have seen) intermeddle, against the positive rules of law.² And, therefore, Equity will not interfere in such cases, notwithstanding accident, or unavoidable necessity.³ This was long ago remarked by Lord Talbot, who, after saying, "There are instances, indeed, in which a Court of Equity gives remedy, where the law gives none," added; "But where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this Court to take it up, where the law leaves it, and extend it further than the law allows."⁴ And upon this ground, relief was refused to a creditor of the wife against her husband after her death, though he had received a large fortune with her on his marriage.⁵ So, a man may by accident omit to make a will, appointment, or gift, in favor of some friend or relative, or he may leave his will unfinished; and yet there can be no relief.⁶ And many cases of nonperformance of conditions precedent are equally without redress.⁷ So, cases of trust may exist, in

¹ Francis, Max. Introd. 6, 7.

² 1 Fonbl. Eq. B. 1, ch. 1, § 3; 1 Hovend. on Frauds, Introd. p. 12, 13.

³ Ibid. 1 Dane's Abridg. ch. 9, art. 1, § 2.

⁴ Heard v. Stanford, Cas. Temp. Talb. 174.

⁵ Ibid.

⁶ See Whitten v. Russell, 1 Atk. 448, 449; 1 Madd. Ch. Pr. 39; Id. 45, 46; 1 Woodes. Lect. vii. p. 214; Com. Dig. Chancery, 3 F. 8; 1 Fonbl. B. 1, ch. 3, § 7, and note (x); Francis, Max. M. 9, § 4.

⁷ 1 Madd. Ch. Pr. 35; Popham v. Bamfield, 1 Vern. R. 83; Lord Falkland v. Bertie, 2 Vern. 333; 7 Dane's Abridg. ch. 225, art. 4, § 6.

which the parties must abide by their own false confidence in others; without any aid from Courts of Justice. Thus, in cases of illegal contracts, or those, in which one party has placed property in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the former must abide by his loss; for, *in pari delicto melior est conditio possidentis, aut defendantis*, is a maxim of public policy, equally respected in Courts of Law and Courts of Equity.¹ And, on the other hand, where the fraud is perpetrated by one party only, still, if it involves a public crime, and redress cannot be obtained, except by a discovery from him personally of the facts, the law will not compel him to accuse himself of a crime; and therefore the case is one of irremediable injury.²

§ 62. These are but a few among many instances, which might be selected, to establish the justice of the remark, that, even in cases professedly within the scope of Equity Jurisdiction, such as fraud, accident, and trust, there are many exceptions; and that all, that can be ascribed to such general allegations, is general truth.³ The true nature and extent of Equity Jurisdiction, as at present administered,

¹ *Holman v. Johnson*, Cowper, R. 341; *Armstrong v. Toler*, 11 Wheaton, R. 258; *Hannay v. Eve*, 3 Cranch, R. 242; Francis, Maxims, M. 347, p. 260; 7 Dane's Abridg. ch. 226, art. 18; *Smith v. Bromley*, Doug. R. 696, note. — The civil law has a like Maxim; — *Paria delicta mutuâ compensatione tolluntur*. Breviar. Advocat. title Delictum. *Paria sunt non esse aliquid, vel non esse legitime*. Id. Paria.

² Francis, Maxims, Introd. 6, 7; Id. M. 306, p. 225; 2 Fonbl. Eq. B. 6, ch. 3, § 5.

³ See Com. Dig. Chancery, 3 F. 1 to 9; 7 Dane's Abridg. ch. 225, § 6; 1 Woodes, Lect. vii. p. 200 to 215.

must be ascertained by a specific enumeration of its actual limits in each particular class of cases, falling within its remedial justice.¹ This will accordingly be done in the subsequent pages.

§ 63. Before proceeding, however, to this distribution of the subject, it may be well to take notice of some few maxims and rules of a general nature, which are of constant and tacit, and sometimes of express, reference in most of the discussions arising in Equity, in order that we may understand the true nature and extent of the meaning attached to them.

§ 64. In the first place, it is a common maxim, that Equity follows the law, *æquitas sequitur legem*.² This maxim is susceptible of various interpretations. It may mean, that Equity adopts and follows the rules of law in all cases, to which those rules may, in terms, be applicable ; or it may mean, that Equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law.³ Now, the maxim is true in both of these senses, as applied to different cases and different circumstances. It is universally true in neither sense ; or rather, it is not of universal application.⁴

¹ Dr. Dane, in his Abridgment and Digest, has devoted two large chapters to the consideration of the System and Practice of Equity, especially in the Courts of the United States. The diligent student will not fail to avail himself of this ample source of information. 7 Dane's Abridg. ch. 225, 226, from p. 516 to 639.

² 1 Dane's Abridg. ch. 9, art. 1, § 2 ; Francis, Maxims, M. 9, (edit. 1751.) See *Earl of Bath v. Sherwin*, 10 Mod. R. 1, 3 ; *Cowper v. Cowper*, 2 P. Will. 753.

³ 3 Woodes. Lect. lvi. p. 479 to 482.

⁴ Sir Thomas Clarke, (Master of the Rolls,) in one of his elaborate opinions, has remarked, in regard to uses and trusts, that, at law, the legal operation controls the intent ; but, in Equity, the intent controls the legal operation of the deed. *Burgess v. Wheate*, 1 W. Black. R. 137.

Where a rule, either of the Common or Statute Law, is direct, and governs the case, with all its circumstances, or the particular point, a Court of Equity is as much bound by it, as a Court of Law, and can as little justify a departure from it.¹ If the law commands, or prohibits a thing to be done, Equity cannot enjoin the contrary, or dispense with the obligation. Thus, since the law has declared in England, that the eldest son shall take, by descent, the whole undevise estate of his parent, a Court of Equity cannot disregard this canon of descent; but must give full effect and vigor to it in all controversies, in which the title is asserted.² And yet, there are cases, in which Equity will control the legal title of an heir, general or special, when it would be deemed absolute at law; and in which, therefore, so far from following the law, it openly abandons it. Thus, if a tenant in tail, not knowing the fact, should, upon his marriage, make a settlement on his wife, and the heir in tail should engross the settlement, and conceal the fact, although at law his title would be absolute, a Court of Equity would award a perpetual injunction against asserting it to the prejudice of the settlement.³ So, if a son should by parol promise his father to pay his sisters' portions, if he would not direct timber to be felled to raise them; although discharged at law, he would in Equity be deemed liable, in the same

¹ *Kemp v. Pryor*, 7 Ves. 249 to 251; *Bac. Abridg. Court of Chancery*, C.

² *Francis, Maxims*, M. 9, p. 16, (edit. 1751); *Doct. & Stud. Dial.* 1, ch. 20.

³ *Raw v. Potts*, *Prec. Ch.* 35; *S. C.* 2 *Vern. R.* 239.

way, as if they had been charged on the land.¹ And many cases of a like nature may be put.²

§ 55. So, in many cases, Equity acts by analogy to the rules of law, in relation to equitable titles and estates. Thus, though the Statutes of Limitations are in their terms applicable to Courts of Law only; yet Equity, by analogy, acts upon them, and refuses relief under like circumstances. Equity always discountenances laches; and holds, that laches is presumable in Equity, where it is positively declared at law. Thus, in cases of equitable titles in land, Equity requires relief to be sought within the same period, in which an ejectment would lie; and, in cases of personal claims, within the period prescribed for personal suits of a like nature.³ And yet there are cases, in which the Statutes would be a bar at law, and Equity would, notwithstanding, grant relief; and on the other hand, there are cases, where the Statutes would not be a bar at law, and Equity, notwithstanding, would refuse relief.⁴ But

¹ *Dalton v. Poole*, 1 Vent. R. 318.

² 1 Fonbl. Eq. B. 1, ch. 3, § 4; *Hobbs v. Norton*, 1 Vern. R. 135; *Neville v. Robinson*, 1 Bro. Ch. C. 543; *Devenish v. Baines*, Pre. Ch. 3; *Oldham v. Litchfield*, 2 Fearn. R. 294; *Thynn v. Thynn*, 1 Vern. R. 296; 11 Ves. 638, 639; *Gilb. Lex. Prætor.* 336; *Sugden, Vendors*, (7th edit.) p. 717, 718; 3 *Woodes. Lect.* lvi. p. 479 to 482; *Id.* 486, 490, 491.

³ *Blanshard on Limit.* ch. 4, p. 61; *Edsell v. Buchanan*, 1 Ves. R. 83; *Com. Dig. Chanc. I.*; *Mitford, Pl. Eq.* 269 to 274; 1 *Madd. Ch. Pr.* 79, 80; 2 *Madd. Ch. Pr.* 244; *Smith v. Clay*, 3 Bro. Ch. C. 640, note; *Cholmondeley v. Clinton*, 2 Jack. & Walk. 156.

⁴ See *Pickering v. Lord Stamford*, 2 Ves. jr. 389; *Id.* 582; 2 *Madd. Ch. Pr.* 244 to 247; *Mitford, Pl. Eq.* 269 to 274; *Blanshard on Limit.* ch. 4, p. 61, 81, 82, 83; 1 Fonbl. Eq. B. 1, ch. 4, § 27, note (q); *Stackhouse v. Barnstoun*, 10 Ves. 466; *Bond v. Hopkins*, 1 Sch. & Lef. 413; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (g); *Cowper v. Cowper*, 2 P. Will. 753.

all these cases stand on special circumstances, which Courts of Equity can take notice of, when Courts of Law may be bound by the positive bar of the Statutes. And there are many other cases, where the rules of Law and Equity, on similar subjects, are not exactly coextensive, as to the recognition of rights, or of remedy.¹ Thus, a person may be tenant by the courtesy of his wife's trust estate; but she is not entitled to dower in his trust estate.² So, where a power is defectively executed, Equity will often aid it; whereas, at law the act is wholly nugatory.³

§ 56. Other illustrations of the same maxim may be drawn from the known analogies of legal and trust estates. In general, in Courts of Equity, the same construction and effect are given to perfect, or executed trust estates, as are given by Courts of Law to legal estates. The incidents, properties, and consequences of the estate are the same. The same restrictions are applied, as to creating estates, and bounding perpetuities, and giving absolute dominion over property. The same modes of construing the language and limitations of the trusts are adopted.⁴ But there are exceptions, as well known as the rule itself. Thus, executory trusts are treated, as susceptible of various modifications and constructions, not applicable to executed trusts.⁵ And,

¹ See *Earl Bath v. Sherwin*, 10 Mod. R. 1, 3; S. C. 1 Bro. Parl. C. 270; Doct. and Stud. Dial. 1, ch. 20.

² Cruise, Dig. tit. 12, ch. 2, § 15; 1 Fonbl. Eq. B. 1, ch. 6, § 9, note (t).

³ 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note *ibid*; *Id.* B. 1, ch. 4, § 25, note (h).

⁴ 3 Woodes. Lect. lvi. p. 479 to 482; 1 Fonbl. Eq. B. 1, ch. 3, § 1, p. 147, note (b); *Cowper v. Cowper*, 2 P. Will. 753.

⁵ 3 Woodes. Lect. lvi. p. 490 to 492; 1 Fonbl. Eq. B. 1, ch. 3, § 1, p. 147, note (b).

even at law, the words in a Will, are, or may be differently construed, when applied to personal estate, from what they are, when applied to real estate. In short, it may be correctly said, that the maxim, that Equity follows the law, is a maxim liable to many exceptions ; and that it cannot be generally affirmed, that, where there is no remedy at law in the given case, there is none in Equity ; or, on the other hand, that Equity, in the administration of its own principles, is utterly regardless of the rules of law.¹

§ 57. Another maxim is, that where there is equal Equity, the law must prevail.² And this is generally true ; for, in such a case, the Defendant has an equal claim to the protection of a Court of Equity for his title, as the Plaintiff has to the assistance of the Court to assert his title ; and, then, the Court will not interpose on either side ; for the rule there is, *In æquali jure melior est conditio possidentis*.³ And the Equity is equal between persons, who have been equally innocent, and equally diligent. It is upon this account, that a Court of Equity constantly refuses to interfere, either for relief or discovery, against a bona fide purchaser of the legal estate for a valuable consideration, without notice of the adverse title.⁴ And it extends its protection equally,

¹ *Kemp v. Pryor*, 7 Ves. 249, 250.

² 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note ; Id. ch. 5, § 3 ; 2 Fonbl. Eq. B. 6, ch. 3, § 3, and note (c) ; Id. B. 3, ch. 3, § 1 ; Mitford, Pl. Eq. 274 ; Jeremy, Eq. Jurisd. 285 ; Fitzsimmons v. Guestier, 7 Cranch 2, 18 ; Caldwell v. Ball, 1 T. R. 214.

³ Mitf. Pl. Eq. [215] 274 ; 1 Fonbl. Eq. B. 1, ch. 4, § 25 ; Id. ch. 5, § 3 ; 1 Madd. Ch. Pr. 170, 171 ; Jeremy on Equity Jurisd. 283 ; Jerrard v. Sanders, 2 Ves. jr. 454 ; 2 Fonbl. Eq. B. 3, ch. 3, § 1.

⁴ See Sugden on Vendors, (7th edit.) ch. 16, p. 713, &c. § 10 ; Id. ch. 18, p. 757, 762, 763 ; Francis, Maxims, M. 236, (edit. 1751.)

if the purchase is originally of an equitable title, without notice, and afterwards, with notice, the party obtains, or buys in a prior legal title, in order to support his equitable title.¹ This doctrine applies strictly in the case, where the title of the Defendant seeking relief is equitable. But it yet remains a matter of some doubt, whether it is applicable to the case of a Plaintiff, seeking relief upon a legal title.² The purchaser, however, in all cases, must hold a legal title, or be entitled to call for it, in order to give him full protection ; for, if his title be merely equitable, then he must yield to a legal and equitable title in the adverse party.³

§ 58. But, even when the title of each party is purely equitable, it does not always follow, that the maxim admits of no preference of the one over the other. For, where the equities are in other respects equal ; still another maxim may prevail, which is, *qui prior est in tempore potior est in jure* ; for precedence in time will, under such circumstances,

¹ See Sugden on Vendors, (7th edit.) ch. 16, p. 713, 728 ; 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (e).

² Sugden on Vendors, ch. 18, (7th edit.) p. 762, 763 ; Jeremy, Eq. Juris. 285. — It is an apparent anomaly in the general doctrine, that it should be inapplicable to a bill for relief, founded on a legal title. Against such a bill, Lord Thurlow decided, that a plea of a bona fide purchase, without notice, was no protection ; *Williams v. Lambe*, 3 Bro. Ch. C. 264. Lord Loughborough seems to have entertained a different opinion ; and the point has been contested by some elementary writers, and supported by others. Mr. Balt, in his note to the case, 3 Bro. Ch. Cas. 264, insists on Lord Thurlow's doctrine being right ; so do Mr. Roper, and Mr. Beames. But Mr. Sugden treats it as incorrect. See *Jerrard v. Saunders*, 2 Ves. jr. 454, 458 ; Sugden, Vendors (7th edit.) 762, 763 ; Roper, Husband and Wife, 446, 447.

³ Sugden, ch. 18, p. 757 to 763 ; Francis, Maxims, M. 236, (edit. 1751) ; Com. Dig. Chancery, 4 W. 12 ; *Davies v. Austen*, 1 Ves. jr. 247 ; *Skirras v. Craig*, 7 Cranch R. 34 ; *Whitfield v. Faussat*, 1 Ves. 397 ; Jeremy on Equity Jurisd. 236.

give the advantage, or priority in right.¹ Hence, when the legal estate is outstanding, equitable incumbrances must be paid according to priority of time.² And whenever the equities are unequal, there the preference is constantly given to the superior Equity.³

§ 59. Another maxim of no small extent is, that he, who seeks Equity, must do Equity.⁴ This maxim principally applies to the party, who is seeking relief, in the character of Plaintiff, in the Court. Thus, for instance, if a borrower of money upon usurious interest seeks to have the aid of a Court of Equity, in cancelling, or procuring the instrument to be delivered up, the Court will not interfere in his favor, unless upon the terms, that he will pay the lender, what is really and bona fide due to him. But if the lender comes into Equity, to assert and enforce his own claim under the instrument, there the borrower may show the invalidity of the instrument, and have a decree in his favor, and dismissal of the bill, without paying the lender any thing; for the Court will never assist a wrong doer, in effectuating his wrongful and illegal purpose.⁵ And like principles will govern in other similar cases, where the transaction is not, as between the parties, grossly fraudulent, or otherwise liable to just excep-

¹ 1 Fonbl Equity, B. 1, ch. 4, § 25; *Fitzsimmons v. Guestier*, 7 Cranch 2; *Berry v. Mutual Ins. Co.* 2 John. Ch. R. 608; *Beckett v. Cordley*, 1 Brown, Ch. R. 358.

² Ibid. note (e). See *Blake v. Hungerford*, Prec. Ch. 158.

³ *Jeremy*, Eq. Jurisd. 285, 286.

⁴ *Francois*, Maxims, M. 175; Id. 179 (edit. 1751); *Com. Dig. Chan. 3 F. 3*; *McDonald v. Neilson*, 2 Cowp. R. 139.

⁵ 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (h); Id. B. 1, ch. 2, § 13; *Mason v. Gardiner*, 4 Bro. Ch. C. 495.

tion.¹ Many other illustrations of the maxim, of a different nature, may readily be put ; as where a second incumbrancer seeks relief against a prior incumbrancer, who has a claim to tack a subsequent security ; where a husband seeks to recover his wife's property, and he has made no settlement upon her ; where a jointress seeks relief against the heir, and has title deeds in her possession, material to the inheritance ; and where a party seeks the benefit of a purchase made for him in the name of a Trustee, who has paid the purchase money ; but to whom he is indebted for other advances.²

§ 60. Another maxim of general use is, that Equality is Equity ; or, as it is sometimes expressed, Equity delighteth in Equality.³ And this Equality, according to Bracton, constitutes Equity itself ; *æquitas est rerum convenientia, quæ paribus in causis paria jura desiderat, et omnia vere co-æquiparat, et dicitur æquitas, quasi æqualitas*.⁴ This maxim is variously applied ; as, for example, to cases of contribution between co-contractors, sureties, and others ; to cases of abatement of legacies, where there is a deficiency of assets ; to cases of apportionment of incumbrances among different purchasers and claimants ; and especially to cases of the marshalling and distribution of equitable assets.⁵ For, though out of legal assets payment must be made of debts, in the course of administration, according to their dignity

¹ Peacock v. Evans, 16 Ves. 511 ; Francis, Maxims, M. 175, 179, (edit. 1751.)

² Com. Dig. Chancery, 3 F. 3.

³ Francis, Maxims, M. 91, (edit. 1751) ; Petit v. Smith, 1 P. Will. 9.

⁴ Bracton, Lib. 1, cap. 3, § 20 ; Plowden, Comm. 467 ; Co. Litt. 24.

⁵ Francis, Maxims, M. 91 (edit. 1751) ; 1 Woodes. Lect. lvi. p. 486, 487, 488, 490.

and priority of right ; yet as to equitable assets, all debts stand generally in *pari jure*, and are to be paid proportionally, without reference to their dignity, or priority of right at law.¹ And, here, we have another illustration of the doctrine, that Equity does not always follow the law.²

§ 61. Another, and the last maxim, which it seems necessary to notice, is, that Equity looks upon that as done, which ought to be done. The true meaning of this maxim is, that Equity will treat the subject matter, as to collateral consequences, and incidents, in the same manner, as if the final acts, contemplated by the parties, had been executed, exactly as they ought to have been, not as the parties might have executed them.³ But Equity will not thus consider things in favor of all persons ; but only in favor of such, as have a right to pray, that the acts might be done.⁴ And the rule itself is not, in other respects, of universal application ; though Lord Hardwicke said, that it holds in every case, except in dower.⁵ The most common cases of the application of the rule are under agreements. All agreements are considered as performed, which are made for valuable consideration, in favor of persons entitled to insist upon

¹ 3 Woodes. Lect. lvi. p. 483, 486, 487, 489.

² 1 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and note ; 1 Madd. Ch. Pr. 466 ; Martin v. Martin, 1 Ves. 211 ; 2 Black. Comm. 511, 512 ; Lewin v. Oakley, 2 Atk. 50 ; Newton v. Bennet, 1 Brown, Ch. Cas. 185 ; Silk v. Prime, 1 Bro. Ch. Cas. 138, note ; Haslewood v. Pope, 3 P. Will. 322 ; Moses v. Murgatroyd, 1 John. Ch. R. 119 ; Livingston v. Newkirk, 3 John. Ch. R. 319.

³ 1 Fonbl. Eq. B. 1, ch. 6, § 9 ; Francis Maxims, M. 106, (edit. 1751) ; 1 W. Black. 129.

⁴ Burgess v. Wheate, 1 W. Black. 123, 129 ; Crabtree v. Bramble, 3 Atk. 687 ; 1 Fonbl. Equity, B. 1, ch. 6, § 9, note (s).

⁵ Crabtree v. Bramble, 3 Atk. 687.

their performance. They are to be considered, as done at the time, when, according to the tenor thereof, they ought to have been performed. They are, also, deemed to have the same consequences ; so that one party, or his privies, shall not derive benefit by his laches, or neglect, and the other party, for whose profit the contract was designed, or his privies, shall not suffer thereby.¹ Thus, money covenanted, or devised, to be laid out in land, is treated as real estate in Equity, and descends to the heir. And, on the other hand, where land is contracted, or devised to be sold, the land is considered and treated as money.² There are exceptions to the doctrine, where other equitable considerations intervene, or where the intent of the parties leads the other way ; but these demonstrate, rather than shake, the potency of the general rule.³

§ 62. There are, also, one or two rules, as to the extent of maintaining jurisdiction, which deserve notice in this place, as they apply to various descriptions of cases, and pervade whole branches of Equity Jurisprudence ; and cannot, therefore, with propriety be exclusively arranged under any one head.

§ 63. One rule is, that, if originally the jurisdiction has attached in Equity, on account of any supposed defect of remedy at law, the jurisdiction is not changed or obliterated by the Courts of Law now

¹ Francis Maxims, M. 106, (edit. 1751.)

² 1 Fonbl. Eq. B. 1, ch. 6, § 9, note (t) ; Gilbert, Lex. Prætor. 243, 244 ; Fletcher v. Ashburner, 1 Bro. Ch. C. 497 ; Craig v. Leslie, 3 Wheat. R. 563, 577 ; 3 Woodes. Lect. lvi. p. 482, 483.

³ Ibid. — The whole of this doctrine was very much considered by the Supreme Court, in the case of Craig v. Leslie, 3 Wheaton, R. 563, where a very elaborate opinion was delivered by Mr. Justice Washington.

entertaining suits in cases, when they formerly rejected them. This has been repeatedly asserted by Courts of Equity, and constitutes, in some sort, the pole-star of portions of its jurisdiction. The reason is, that it cannot be left to Courts of Law to enlarge, or restrain the powers of Courts of Equity, at their pleasure. The Jurisdiction of Equity, like that of Law, must be of a permanent and fixed character. There can be no ebb or flow of jurisdiction, dependent upon external changes. Being once vested legitimately in the Court, it must remain there, until the Legislature shall abolish, or limit it; for without some positive act, the just inference is, that the legislative pleasure is, that the jurisdiction shall remain upon its old foundation. This doctrine has been a good deal canvassed in modern times; and it has been especially the subject of commentary by some of the greatest Equity Judges, who have ever adorned the Bench.¹ Lord Eldon upon one occasion said; “Upon what principle can it be said, the ancient jurisdiction of this Court is destroyed, because Courts of Law now, very properly, perhaps, exercise that jurisdiction, which they did not exercise forty years ago? Demands have been frequently recovered in Equity, which now could be without difficulty recovered at law, &c. — I cannot hold, that the jurisdiction is gone, merely because the Courts of Law have exercised an equitable jurisdiction.”²

¹ See *Atkinson v. Leonard*, 3 Bro. Ch. R. 218; *Ex parte Greenway*, 6 Ves. 812; *East India Company v. Boddam*, 9 Ves. 468, 469; *Bromley v. Holland*, 7 Ves. 19 to 21; *Cooper*, Eq. Pl. ch. 3, p. 126, 129.

² *Kemp v. Pryor*, 7 Ves. 249, 250.

§ 64. Another rule respects the exercise of jurisdiction, when the title is at law, and the party comes into Equity for a discovery, and for relief, as consequent on that discovery. In many cases it has been held, that, where a party has a just title to come into Equity for a discovery, and obtains it, the Court will go on to give him the proper relief; and not turn him round to the expenses and inconveniences of a double suit at law. The jurisdiction, having once rightfully attached, shall be made effectual for the purposes of complete relief. And it has accordingly been laid down by elementary writers of high reputation, that "the Court, having acquired cognizance of the suit for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident, and mistake."¹ The ground is stated to be, the propriety of preventing a multiplicity of suits;² a ground of itself, quite reasonable, and sufficient to justify the relief, and one, upon which Courts of Equity act,

¹ 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f); Coop. Eq. Pl. Introd. p. xxxi; Middleton Bank v. Russ, 3 Connect. R. 135.

² The passage from Fonblanque on Equity deserves to be quoted at large. "The concurrence of jurisdiction may, in the greater number of cases, in which it is exercised, be justified by the propriety of preventing a multiplicity of suits; for, as the mode of proceeding in Courts of Law requires the plaintiff to establish his case, without enabling him to draw the necessary evidence from the examination of the defendant, justice could never be attained at law in those cases, where the principal facts, to be proved by one party, are confined to the knowledge of the other party. In such cases, therefore, it becomes necessary for the party, wanting such evidence, to resort to the extraordinary powers of a Court of Equity, which will compel the necessary discovery; and the Court, having acquired cognizance of the suit, for the purpose of discovery, will entertain it, for the purpose of relief, in most cases of fraud, account, accident, and mistake."

as we shall presently see, as a distinct ground of original jurisdiction.¹

§ 65. It is observable, that the guarded language used is, "in most cases," though it is certainly difficult to perceive any solid ground, why the jurisdiction should not extend to all cases, embraced by the general principle. But the qualification is made, with reference to the bearing of some of the authorities. The learned author of the *Treatise on Equity*,² has laid down the principle in the broadest terms. "And when," says he, "this Court can determine the matter, it shall not be a handmaid to the other Courts; nor beget a suit to be ended elsewhere."³ There are many authorities, which go to support this proposition. But there are many also, which are irreconcilable with it, or at least contain exceptions to it.

§ 66. Mr. Fonblanque has remarked, "There are some cases, in which, though the plaintiff might be relieved at law, a Court of Equity, having obtained jurisdiction for the purpose of discovery, will entertain the suit for the purpose of relief. But there certainly are other cases, when, though the plaintiff be entitled to discovery, he is not entitled to relief. To strike out the distinguishing principle, upon which Courts of Equity in such cases have proceeded, would be extremely useful. But, after having given considerable attention to the subject, I find myself incapable of reconciling the

¹ See *Jesus College v. Bloom*, 3 Atk. 262, 263.

² Mr. Ballow.

³ 2 Fonbl. Eq. B. 6, ch. 3, § 6. — This is the very language of the Lord Keeper, (afterwards Lord Chancellor Nottingham,) in *Parker v. Dee*, 2 Ch. Cas. 200, 201.

various decisions upon it.”¹ What the learned author desired, has been found equally embarrassing to subsequent inquirers; and there is a distressing uncertainty on this branch of Equity Jurisdiction in England.²

§ 67. In cases of account there seems a distinct ground, upon which the jurisdiction for discovery should incidentally carry the jurisdiction for relief. In the first place, the remedy at law, in most cases of this sort, is imperfect, or inadequate. In the next place, where this objection does not occur, the discovery sought must often be obtained through the instrumentality of a master, or some interlocutory order of the Court; in which case it would seem strange, that the Court should grant some, and not proceed to full, relief.³ In the next place, in cases not falling under either of these predicaments, the compelling of the production of vouchers, &c. would seem to belong peculiarly to a Court of Equity, and be a species of relief. And, in the last place, where neither of the foregoing principles applies, there is great force in the ground of suppressing multiplicity of suits, constituting, as it does, a peculiar ground for the interference of Equity.⁴

¹ 2 Fonbl. B. 6, ch. 3, § 6, note (r).

² Coop. Eq. Pl. ch. 3, § 3, p. 188, 189.

³ 3 Black. Comm. 437; Mitf. Eq. Pl. by Jeremy, p. 119, 120, 123; Corporation of Carlisle v. Wilson, 13 Ves. 278, 279.

⁴ See Jesus College v. Bloom, 3 Atk. 262; S. C. Ambler, R. 54. — The full concurrency of jurisdiction of Courts of Equity for relief, in all matters of account, whether there be a remedy at law or not, seems to have been largely insisted on by Lord Eldon, in The Corporation of Carlisle v. Wilson, (13 Ves. 278, 279.) And it was positively asserted by the Court of Errors in New York, in Ludlow v. Simond, (2 Caines, Cas. in Err. 38, 39, 53, 54.) In Ryle v. Haggie,

§ 68. Cases of accident and mistake furnish like reasons for extending the jurisdiction to relief, where it attaches for discovery. The remedy at law is not in such cases, (as we shall presently see,) either complete or appropriate. And cases of fraud are least of all those, in which the complete exercise of the jurisdiction of a Court of Equity, in granting relief, ought to be questioned or controlled; since, in addition to all other reasons, fraud constitutes the most ancient foundation of its power; and it sifts the conscience of the party, not only by his own answer under oath, but by subjecting it to the severe scrutiny of comparison with other competent testimony; thus narrowing the chances of successful evasion, and compelling the party to do equity, as it shall appear upon a full survey of the whole transaction. Indeed, in many cases of fraud, what should be the nature and extent of the redress, whether wholly legal or equitable, or a mixture of both, can scarcely be decided, but upon a full hearing upon final proceedings in the cause.

§ 69. But there are cases, or at least authorities, which it is not easy to reconcile with the principles already stated in matters of fraud, accident, mistake, and account.¹ Some of them may have been adjudged upon their own peculiar circumstances, and stand upon a ground, which leaves these principles untouched. Others are not susceptible of such a classification, and must either be rejected

(1 Jac. & Walk. 234,) the Master of the Rolls said; "When it is admitted, that a party comes here properly for a discovery, the Court is never disposed to occasion a multiplicity of suits, by making him go to a Court of Law for the relief."

¹ 2 Fonbl. Eq. B. 6, ch. 3, § 6, note (r).

altogether, or overrule the principles of these decisions.¹

§ 70. But when we depart from matters of fraud, accident, mistake, and account, as the foundations of the bill, it is far more difficult to ascertain the boun-

¹ In *Parker v. Dee*, (2 Chan. Cas. 200,) the bill was against an Executor for a *discovery* of assets, and payment; and relief was decreed by Lord Nottingham. In *Bishop of Winchester v. Knight*, (1 P. Will. 406,) the bill was for a discovery and an account of ore, dug by a tenant during his life, and by his heir, against the Executor and Heir; and the Court maintained the suit, directing a trial at law, and after the trial granted relief. In *Story v. Lord Windsor*, (2 Atk. 630,) the bill was for an account of the profits of a colliery, upon a legal title asserted by the Plaintiff; Lord Hardwicke sustained the bill for the account, because (he said) this is not a title of land, but of a colliery, which is a kind of trade; and therefore an account of the profits may be taken here. (See also *Jesus College v. Bloom*, 3 Atk. 262.) The same learned Chancellor, in *Sayer v. Pierce*, (1 Ves. 232,) seems to have proceeded on the same ground, holding, that the party, being out of possession of lands, generally was not entitled to maintain a bill for an account [of profits alone; but he retained the bill in that case, directing a trial at law, upon the ground, that it asked to ascertain boundaries. In *Lee v. Alston*, (1 Bro. Ch. R. 194,) a bill for an account of timber, cut by a tenant for life, impeachable for waste, was entertained by Lord Thurlow, and relief granted. In *Jesus College v. Bloom*, (3 Atk. 262; S. C. Ambler, R. 54,) which was a bill for an account and satisfaction for waste, in cutting down timber before the assignment, against an assignee of the lessee of the Plaintiffs; Lord Hardwicke said, "Upon the opening of the case, the bill seems improper, and an action of trover is the proper remedy. Where the bill is for an injunction, and waste has been already committed, the Court, to prevent a double suit, will decree an account and satisfaction for what is past." And because the bill sought an account only against the assignee for waste before the assignment, and without praying an injunction, his Lordship dismissed the bill. The same point was held in *Smith v. Cooke*, 3 Atk. R. 378, 381. In *Geast v. Barker*, (2 Bro. Ch. 61,) the bill was for a discovery of the quantity of coal and coke, sold from a mine let by Plaintiff to Defendant, upon a reservation of one shilling for every stack of coal sold, &c., and prayed an issue, to try, what quantity a stack should contain, and suggested a custom of the country. The Master of the Rolls (Lord Kenyon) said, if it were now necessary either to decree account,

dary, where the right of a Court of Equity to entertain a bill for relief, as consequent upon the jurisdiction for discovery, begins, and where it ends.¹ The difficulty is increased, by the recent rule adopted in Equity, in England, (of which we shall have occasion to speak more fully hereafter,) that, if the party seeks relief, as well as discovery, and he is entitled to discovery only, a general demurrer will lie to the whole bill. The effect of which is, that a plaintiff may be compelled, in a doubtful case, to frame his bill for a discovery in the first instance, and having obtained it, by amending his bill, try the question, whether he is entitled to relief or not.²

§ 71. In America, a strong disposition has been shown to follow out a convenient and uniform principle of jurisdiction, and to adhere to that, which seems formerly (as we have seen) to have received

or dismiss the bill, he would do the latter, as he was clear the remedy was at law. (S. C. cited in *Harwood v. Oglander*, 6 Ves. 225.) Why the remedy and account should not be given in Equity, is not stated; and it is difficult to see; since it is clear, that the bill was good for the discovery, and it was obtained. In *Sloane v. Heatfield*, (Bunb. R. 18,) the bill was for a discovery of treasure-trove, and relief; and the Court held it good for discovery; but that the Plaintiff could not have relief; because he might bring trover at law. In *Ryle v. Haggie*, (1 Jac. & Walk. 234,) an opposite course was adopted, upon the professed ground of avoiding a multiplicity of suits, the party having a good ground to seek a discovery, and there being a remedy at law. In *The Duke of Leeds v. New Radnor*, (2 Bro. Ch. R. 338, 519,) Lord Thurlow reversed the decree of the Master of the Rolls, denying relief, because there was a remedy at law, upon the ground, that the bill being retained for a year, the right to grant relief in Equity was thus far admitted, and it ought to give entire relief. See Mr. Fonblanque's Comment on this case, in 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (g), p. 156. See Mr. Blunt's note to the case of *Jesus College v. Bloom, Ambler*, 54; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (g).

¹ See *Ryle v. Haggie*, 1 Jac. & Walk. 234.

² Mitford, Eq. Pl. by Jeremy, p. 183, 184, note (n); Cooper, Eq. Pl. ch. 1, § 3, p. 58; Id. ch. 3, § 3, p. 188.

the approbation of Lord Nottingham.¹ The principle is, that, where the jurisdiction once attaches for discovery, and the discovery is actually obtained, the Court will farther entertain the bill for relief, if the plaintiff prays it. This has been broadly asserted in many cases, and certainly possesses the recommendation of simplicity and uniformity of application ; and escapes from what seems to be the capricious and unintelligible line of demarkation, pointed out in the English authorities. Thus, it has been laid down in the Courts of New York, upon more than one occasion, as a settled rule, that, when the Court of Chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief.² A similar doctrine has been laid down in other states ;³ and has been affirmed in the Supreme Court of the United States. On this latter occasion, it was said by the Chief Justice, in delivering the opinion of the Court, " It is true, that, if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party, against whom that claim is asserted, he may be required in a Court of Chancery to disclose those facts ; and the Court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy."⁴

¹ Ante, § 65, note (3).

² *Armstrong v. Gilchrist*, 2 John. Cas. 424 ; *Rathbone v. Warren*, 10 John. R. 587, 596 ; *King v. Baldwin*, 17 John. R. 384. See also *Leroy v. Veeder*, 1 John. Cas. 417 ; *S. C. 2 Cain. Cas. in Err.* 175 ; *Hepburn v. Dundas*, 1 Wheat. R. 197 ; *Ludlow v. Simond*, 2 Cain. Err. 1, 38, 51, 52.

³ *Chichester's Executor v. Vass's Administrator*, 1 Munf. R. 98 ; *Isham v. Gilbert*, 3 Connect. R. 166 ; *Ferguson v. Waters*, 3 Bibb. 303 ; *Middletown Bank v. Russ*, 3 Connect. R. 139.

⁴ *Russell v. Clarke's Executors*, 7 Cranch, 69.

§ 72. This doctrine, however, though generally true, is not to be deemed of universal application.¹ To justify a Court of Equity in granting relief in cases of discovery, it seems necessary, that the relief should be of such a nature, as a Court of Equity may properly grant in the ordinary exercise of its authority. If, therefore, the proper relief be by damages, which can alone be ascertained by a Jury, there is a strong reason for declining the exercise of the jurisdiction, since it is the appropriate function of a Court of Law to superintend such trials. And, in other cases, where a question of a purely legal nature arises, and should be tried by a Jury, and the relief is dependent upon that question, there is equal reason, that the jurisdiction for relief should be altogether declined; or, at all events, if the bill is retained, that a trial at law should be directed by the Court, and relief granted, or withheld, according to the final issue of the trial. Thus, if a bill seeks the discovery of a contract of sale of goods and chattels, or of a wrongful conversion of goods and chattels; and the breach of the contract, or the conversion of the goods and chattels, is properly remediable in damages, to be ascertained by a Jury, the relief seems, properly, to belong to a Court of Law. In like manner, questions of fraud in obtaining and executing a will of real estate, and many cases of title to real estate, dependent partly on matters of fact, and partly on matters of law, are properly triable in an ejectment, and should be left to the common tribunals.² And it has accordingly been

¹ *Middletown Bank v. Russ*, 3 Connect. R. 135, 140; *Id.* 166.

² *Jones v. Jones*, 3 Meriv. R. 161.

laid down in some of the American Courts, that, under such circumstances, where the verdict of a Jury is necessary to ascertain the extent of the relief, the parties should be left to their action at law, after the discovery is obtained.¹

§ 73. The distinction, here pointed out, furnishes a clear line for the exercise of Equity Jurisdiction in cases, where relief is sought upon bills of discovery; and, if it should receive a general sanction in the American Courts, it will greatly diminish the embarrassments, which have hitherto attended many investigations of the subject. In the present state of the authorities, however, little more can be absolutely affirmed than these propositions; first, that in bills of discovery, seeking relief, if any part of the relief sought be of an equitable nature, the Court will retain the bill for complete relief; secondly, that in matters of account, fraud, mistake, and accident, the jurisdiction for relief will, generally, but not universally, be retained and favored; and thirdly, that in cases, where the remedy at law is more appropriate than the remedy in Equity, or the verdict of a Jury is indispensable to the relief sought, the jurisdiction will be declined; or if retained, will be so, subject to a trial at law.

§ 74. From what has been already stated, it is manifest, that the jurisdiction, in cases of this sort, attaches in Equity, solely on the ground of discovery. If, then, the discovery is not obtained, or is used as a mere pretence to give jurisdiction, it would be a gross abuse to entertain the suit in Equity, when the whole foundation, on which it

¹ *Lynch v. Sumrall*, 1 Marsh. Kentuck. R. 469.

rests, is either disproved, or is shown to be a colorable disguise, for the purpose of changing the forum of litigation. Hence, to maintain the jurisdiction for relief, it is necessary, in the first place, to allege in the bill, that the facts are material to the plaintiff's case, and that the discovery of them by the defendant is indispensable, as proof; for if the facts lie within the knowledge of witnesses, who may be called in a Court of Law, that furnishes a sufficient reason for a Court of Equity's refusing its aid. The bill must therefore allege, (and if required it must be established,) that the plaintiff is unable to prove such facts by other testimony.¹ In the next place, if the answer denies the matters of fact, of which discovery is sought by the bill, the latter must be dismissed, for the jurisdiction substantially fails by the denial.²

¹ *Gelston v. Hoyt*, 1 John. Ch. R. 543; *Seymour v. Seymour*, 4 John. Ch. R. 409; *Pryor v. Adams*, 1 Call, R. 382; *Duvalls v. Ross*, 2 Munf. R. 290, 296; *Bass v. Bass*, 4 H. & Munf. 478.

² *Russell v. Clarke's Executors*, 7 Cranch, 69; *Ferguson v. Waters*, 3 Bibb, R. 303; *Nourse v. Gregory*, 3 Litt. R. 378; *Robinson v. Gilbraith*, 4 Bibb, R. 184.

CHAPTER IV.

CONCURRENT JURISDICTION OF EQUITY. — ACCIDENT.

§ 75. HAVING disposed of those matters, which may in some sort be deemed preliminary, the next inquiry, which will occupy our attention is, to ascertain the true boundaries of the jurisdiction at present exercised by Courts of Equity. The subject here naturally divides itself into three great heads, the concurrent, the exclusive, and the auxiliary, or supplemental jurisdiction.¹ As the concurrent jurisdiction is that, which is of the greatest extent, and most familiar occurrence in practice, I propose to begin with that.

§ 76. The concurrent jurisdiction of the Court of Equity may be truly said to embrace, if not all, at least a very large portion of the original jurisdiction inherent in the Court from its very nature, or first conferred upon it, upon the dissolution or partition of the powers of the Great Council, or, *Aula Regis*, of the King. We have already seen, that it did not take its rise from the introduction of technical uses or trusts, as has been erroneously supposed.² Its original foundation, then, may be more

¹ In this division I follow Mr. Fonblanque and Mr. Jeremy; and though a more philosophical division might be made, I am by no means certain, that it would be convenient. Mr. Maddock has made a different division; but, upon reflection, I have not been inclined to give it a preference. 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f); Jeremy on Eq. Jurisd. Introd. p. xxvii.

² Ante, § 42, 43; 1 Cooper's Public Records, 357.

fitly referred to what Lord Coke deemed the true one, fraud, accident, and confidence.¹ In many cases of this sort, Courts of Common Law are, and for a long time have been, accustomed to exercise jurisdiction, and to afford an adequate remedy. And in many other cases, in which anciently no such remedy was allowed, their jurisdiction is now expanded, so as effectually to reach them.² Still, however, there are many cases of fraud, accident, and confidence, which either Courts of Law do not attempt to redress at all ; or the redress, which they afford, is inadequate and defective.³ The concurrent jurisdiction, then, of Equity, has its true origin in one of two sources ; either the Courts of Law, though they have general jurisdiction in the matter, cannot give adequate, specific, and perfect relief ; or, under the actual circumstances of the case, they cannot give any relief at all. The former occurs in all cases, when a simple judgment for the plaintiff, or for the defendant, does not meet the full merits and exigencies of the case ; but a variety of adjustments, limitations, and cross claims, are to be introduced, and finally acted on ; and a decree, meeting all the circumstances of the particular case between the very parties is indispensable to distributive justice. The latter occurs, when the object sought is incapable of being accomplished by the Courts of Law ; as, for instance, a perpetual injunction, or a preventive process to restrain trespasses, nuisances,

¹ 4 Inst. 84 ; *Earl of Bath v. Sherwin*, 10 Mod. 1 ; 3 Black. Comm. 431.

² 3 Black. Comm. 431, 432.

³ See 7 Dane's Abridg. ch 225, art. 5, § 10 ; art. 6, § 1 ; Com. Dig. Chancery, 3 F. 8.

or waste.¹ It may, therefore, be truly said, that the concurrent jurisdiction of Equity extends to all cases of legal rights, where, under the circumstances, there is not a plain, adequate, and complete remedy at law.²

§ 77. The subject, for convenience, may be divided into two branches ; (1) that, in which the subject-matter constitutes the principal (for it rarely constitutes the sole) ground of the jurisdiction ; and (2) that, in which the peculiar remedies afforded by Courts of Equity, constitute the principal (though not always the sole) ground of the jurisdiction. Of these we shall endeavour to treat successively in their order, beginning with that of the subject-matter, where the relief is deemed more adequate, complete, and perfect in Equity than at Common Law ; but where the remedy is not, or, at least, may not be, of a peculiar and exclusive character.³ It is proper, however, to add, that, as the grounds of jurisdiction often run into each other, any attempt at a scientific method of distribution of the various heads would be impracticable and illusory.

§ 78. And, in the first place, let us consider cases, where the jurisdiction arises from accident. By the term *accident* is here intended, not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force ; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or

¹ See Jeremy on Eq. Jurisd. 292 ; Id. 307 ; 3 Woodes. Lect. lvi. p. 397, &c. ; Beames, Eq. Pl. ch. 3, p. 77, 78.

² Com. Dig. Chancery, 3 F. 9.

³ See Mitford, Pl. Eq. by Jeremy, 111 ; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), p. 12.

misconduct in the party.¹ Lord Cowper, speaking on the subject of accident, as cognizable in Equity, said, "By accident is meant, when a case is distinguished from others of the like nature by unusual circumstances ;"² a definition quite too loose and inaccurate, without some further qualifications ; for it is entirely consistent with the language, that the unusual circumstances may have resulted from the party's own gross negligence, folly, or rashness.

§ 79. The jurisdiction of the Court, arising from accident, in the general sense already suggested, is a very old head in Equity, and probably coeval with its existence.³ But it is not every case of accident, which will justify the interposition of a Court of Equity.⁴ The jurisdiction, being concurrent, will be maintained only ; first, when a Court of Law cannot grant suitable relief ; and secondly, when the party has a conscientious title to relief. Both must concur in the given case ; for otherwise a Court of Equity not only may, but is bound to withhold its aid. Mr. Justice Blackstone has very correctly ob-

¹ Francis, *Maxims*, M. 120, p. 87, (edit. 1781.) See Jeremy on Equity Jurisd. B. 3, pt. 2, Introd. p. 358. — Mr. Jeremy defines accident, in the sense used in a Court of Equity, to be "an occurrence in relation to a contract, which was not anticipated by the parties, when the same was entered into, and which gives an undue advantage to one of them over the other in a Court of Law." Jeremy on Eq. Jurisd. B. 3, Pt. 2, p. 358. Accidents, in the sense of a Court of Equity, may arise in relation to other things besides contracts, and therefore the confining of the definition to contracts is not entirely accurate. The definition is defective in another respect ; for it does not exclude cases of unanticipated occurrences, resulting from the negligence or misconduct of the party seeking relief.

² *Earl of Bath v. Sherwin*, 10 Mod. R. 1, 3 ; Com. Dig. Chancery, 4 D. 10.

³ See *East India Company v. Boddam*, 9 Ves. 466 ; *Armitage v. Wadsworth*, 1 Madd. R. 189 to 193.

⁴ *Whitfield v. Faussat*, 1 Ves. 392, 393.

served, that "many accidents are supplied in a Court of Law ; as loss of deeds, mistakes in receipts and accounts, wrong payments, death, which made it impossible to perform a condition literally, and a multitude of other contingencies. And many cannot be redressed even in a Court of Equity ; as if by accident a recovery is ill suffered, a contingent remainder destroyed, or a power of leasing omitted in a family settlement."¹

§ 80. The first consideration then is, whether there is an adequate remedy, not merely, whether there is some remedy at law.² And here a most material distinction is to be attended to. In modern times, Courts of Law frequently interfere, and grant a remedy, under circumstances, in which it would certainly have been denied in earlier periods. And, sometimes, the Legislature by express enactments has conferred on Courts of Law the same remedial faculty, which belongs to Courts of Equity. Now, (as we have seen,) in neither case, if the Courts of Equity originally obtained and exercised jurisdiction, is that jurisdiction overturned, or impaired by this

¹ 3 Black. Comm. 431 ; Com. Dig. Chancery, 3 F. 8. — Even this language is true in a general sense only ; for, (as we shall presently see,) omissions in a family settlement, and many other defects in private and legal proceedings, may be redressed, or rather supplied in Equity. 1 Fonbl. Eq. B. 1, ch. 1, § 7 ; Mitford, Pl. Eq. 127, 128, (4th edit.) by Jeremy. In *Whitfield v. Faussat*, (1 Ves. 392,) Lord Hardwicke is reported to have said, "The loss of a deed is not always assumed to come into Courts of Equity for relief ; for, if there was no more in the case, although he (the plaintiff) is entitled to have a discovery of that, whether lost or not, Courts of Law [sometimes] admit evidence of the loss of a deed, proving the existence of it, and the contracts, just as a Court of Equity does." The other parts of his Lordship's opinion, show, that the word "sometimes" should be inserted, as a qualification of the language.

² Cooper, Eq. Pl. 129.

change of the authority at law. In regard to Legislative enactments, unless there are prohibitory or restrictive words used, the uniform interpretation is, that they confer concurrent and not exclusive remedial authority. And it would be still more difficult to maintain, that a Court of Law, by its own act, could oust or repeal a jurisdiction already rightfully attached in Equity.¹

§ 81. One of the most common interpositions of Equity under this head is, in the case of lost bonds, or other instruments under seal.² Until a very recent period, the doctrine prevailed, that there could be no remedy on a lost bond, in a Court of Common Law, because there could be no *profert* of the instrument, without which the declaration would be fatally defective.³ At present, however, the Courts of Law do entertain the jurisdiction, and dispense with the *profert*, if an allegation of loss by

¹ Mitf. Pl. Eq. 113, 114; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), p. 15, 16, 17. *Atkinson v. Leonard*, 3 Bro. Ch. R. 219; *Ex parte Greenway*, 6 Ves. 812; *Bromley v. Holland*, 7 Ves. 19, 20; *East India Company v. Boddam*, 9 Ves. 466; *Walmsley v. Child*, 1 Ves. 341; *Kemp v. Pryor*, 7 Ves. 248 to 250; *Cooper*, Eq. Pl. ch. 3, p. 129; *Ludlow v. Simond*, 2 Caines, Cas. in Err. 1; *King v. Baldwin*, 17 John. R. 394; *Post v. Kimberly*, 9 John. R. 470.

² Mr. Reeves (*Hist. of English Law*, Vol. 3, p. 189) has remarked, that by the old Common Law, "When a person was to found a claim by virtue of a deed, which was detained in the hands of another, so that he was prevented from making a *profert* of it, he was utterly deprived of the means of obtaining justice according to the forms of law. If a deed of grant of rent, common, or annuity were lost, as these claims could only be substantiated by the evidence of a deed, they vanished together with it."

³ *Whitfield v. Faussat*, 1 Ves. 392, 393; *Co. Lit.* 35, (b); *Rex v. Arundel*, Hob. R. 109; *Atkins v. Leonard*, 3 Bro. Ch. R. 219; *Ex parte Greenway*, 6 Ves. 812; *Bromley v. Holland*, 7 Ves. 19, 20; *East India Company v. Boddam*, 9 Ves. 466; *Toulman v. Price*, 5 Ves. 238.

time and accident is stated in the declaration.¹ But this circumstance is not permitted in the slightest degree to change the course in Equity.²

§ 82. Independent of this general ground of the inability to make a proper proof of the deed at law, there is another satisfactory ground for the interference of a Court of Equity. It is, that no other court can furnish the same remedy with all the limitations, which may be demanded for the purposes of justice, by granting *relief* only upon the terms of the party's giving (when proper) a suitable bond of indemnity. Now, a Court of Law is incompetent to require such a bond of indemnity, as a part of its judgments, though it has, sometimes, attempted an analogous relief, (it is difficult to understand upon what ground) by requiring the previous offer of such an indemnity.³ But such an offer may, in many cases, fall far short of the just relief; for, in the intermediate time, there may be a great change of circumstances of the parties to the bond of indemnity.⁴ In joint bonds, there are still stronger reasons; for the equities may be different between the different defendants.⁵ And besides; a Court of Equity, before it will grant *relief*, (it is otherwise, where *discovery* only is sought,) will insist, that the defendant shall have the protection of the oath and affidavit of the plaintiff to the fact of the loss; thus requiring,

¹ Read v. Brokman, 3 T. R. 151; Totty v. Nesbitt, 3 T. R. 153, note.

² Ibid. Walmsley v. Child, 1 Ves. 341; Kemp v. Pryor, 7 Ves. 249, 250; Cooper, Eq. Pl. 129, 130; Evans v. Bicknell, 6 Ves. R. 192.

³ Ex parte Greenway, 6 Ves. 812; Pierson v. Hutchinson, 2 Camp. 211; S. C. 6 Esp. 126; Hansard v. Robinson, 7 B. & Cresw. 90.

⁴ East India Company v. Boddam, 9 Ves. 466; Ex parte Greenway, 6 Ves. 812.

⁵ Ibid.

what is most essential to the interests of justice, that the party should pledge his conscience by his oath, that the instrument is lost.¹

§ 83. We have seen, that, in cases of the loss of sealed instruments, Equity will entertain a suit for relief, as well as for discovery, upon the party's making an affidavit of the loss of the instrument, and offering indemnity. The original ground of granting the relief was the supposed inadequacy of a Court of Law, to afford it in a suitable manner, from the impossibility of making a profert.² But, where discovery only, and not relief, is the object of the bill, there Equity will grant the discovery without any affidavit of loss, or offer of indemnity; and, in a variety of cases, this is all, that the plaintiff may desire.³ The ground of this distinction is, that, when relief is prayed, the proper forum of jurisdiction is sought to be changed from Law to Equity; and in all such cases an affidavit ought to be required, to prevent abuse of the process of the Court. But when discovery only is sought, the original jurisdiction remains at Law, and Equity is merely auxiliary. The jurisdiction for discovery alone would, therefore, seem upon principle to be universal. But the jurisdiction for relief is special, and limited to peculiar cases; and in all these cases,

¹ *Bromley v. Holland*, 7 Ves. 19, 20; *Ex parte Greenway*, 6 Ves. 812; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 16, 17; *Whitchurch v. Golding*, 2 P. Will. 541; *Anon.* 3 Atk. 17; *Mitf. Pl. by Jeremy*, 29, 54, 123, 124; *Walmsley v. Child*, 1 Ves. 344, 345; *Cooper, Eq. Pl. ch. 3*, p. 126, 129, 130; *Id.* *Intro.* p. xxviii, xxix; *Leroy v. Veeder*, 1 John. Cas. 417.

² *Ibid.* *Anon.* 2 Atk. 61.

³ *Dormer v. Fortescue*, 3 Atk. 132; *Whitchurch v. Golding*, 2 P. Will. 541; *Walmsley v. Child*, 1 Ves. 344, 345.

there must be an affidavit of the loss, and, when proper, an offer of indemnity also in the bill.¹

§ 84. It has been remarked by Lord Hardwicke, "that the loss of a deed is not always a ground to come into a Court of Equity for, relief;" for, if there is no more in the case, although the party may be

¹ In *Walmsley v. Child*, (1 Ves. R. 344,) Lord Hardwicke is reported to have said, that there are but three cases, in which a bill for discovery and relief on lost instruments can be maintained in Equity. The passage, however, is singularly obscure, and of difficult interpretation; and I have not been able entirely to satisfy my mind, what Lord Hardwicke's real doctrine was, or what were the three cases, to which he alluded. Two of them are easily made out; but the perplexity is in ascertaining the third, as contradistinguished from the other two. The passage is as follows. "But there are cases, upon which you may come into Equity on a loss, though remedy may be at law; and one is clear upon a bill for discovery. But if you come into Equity, not only for discovery, but have relief, on the foundation of loss, that changes the jurisdiction. And there are but three cases, in which you are entitled to that; in every one of which you are obliged to annex an affidavit to the bill, to prove the loss. If the deed or instrument, upon which the demand arises, is lost, and you only come for discovery, you are entitled thereto, without affidavit: but if relief is prayed beyond that discovery, to have payment of the debt, affidavit of the loss must be annexed; for that changes the jurisdiction. If the deed lost concerned the title of lands, and possession prayed to be established, such affidavit must be annexed. Another case is of a personal demand, where loss of a bond, a bill in Equity on that loss, to be paid the demand: there a bill for discovery will not be sufficient, but it must be to be paid the money thereon; but an affidavit must be annexed. The reason of the difference between a bond and a note is, that in an action at law, a *profert in Curiam* of the bond must itself be made; otherwise *oyer* cannot be demanded by the defendant; and if *oyer* is not given, the plaintiff cannot proceed. But that is not necessary in the case of notes; no *oyer* is demanded upon them, and proving the contents being sufficient; and nothing standing in the plaintiff's way. Another case, in which you may come into this Court on a loss is, to pray satisfaction and payment of it upon terms of given security. In an action at law, the plaintiff might offer, but the defendant could not be compelled to take, but in Equity, that would be consideration, whether they were reasonable. That was the case of *Teresy v.*

entitled to a discovery of the original existence and validity of the deed, Courts of Law may afford just relief, since they will admit evidence of the loss and contents of a deed, just as a Court of Equity will do.¹ To enable the party, therefore, in case of a lost deed, to come into Equity for relief, he must establish, that there is no remedy at all at law, or no remedy, which is adequate, and adapted to the circumstances of the case. In the first place, he may come into Equity for payment of a lost bond; for in such a case his bill should not be for a discovery only, but for relief; since the jurisdiction attached, when there was no remedy at law, for want of a due profert.² In the next place, when a deed of land has been destroyed, or is concealed by the defendant; for then, as the party cannot know, which alternative is correct, a Court of Equity will

Gorey, as Lord Nottingham has taken the name in an authentic record I have of it; which was Easter, 28 C. 2, where a bill of exchange was drawn on the defendant, and indorsed, in the third place, to the plaintiff, by whom the bill was either lost or mislaid, as appeared by the affidavit annexed. And the bill prayed, that the defendant might be decreed to pay the plaintiff the money, as last indorsee, according to the acceptance; the plaintiff first giving security to save the defendant harmless against all former assignments; which was so decreed, but without damages and costs. In a book called Finch's Reports, 301, the decree is somewhat larger, and the acceptance of the defendant was after the third indorsement, and it is in that book, though not so in the manuscript report; and, indeed, I do take it to be as in the book; and then there is no doubt of the plaintiff's right: but, if that be material, it shall be inquired into: in that case, if the plaintiff could at law prove the contents of his bill, and the indorsement, and the loss of it, he might have brought his action at law, upon that bill, without coming into this Court; but he was apprehensive, the course of trade might stand in his way at law, and therefore came into this Court upon terms, submitting it to the judgment of the Court, whether they were not reasonable."

¹ Whitfield v. Faussat, 1 Ves. 392, 393.

² Id. Walmsley v. Child, 1 Ves. 344, 345.

make a decree, (which a Court of Law cannot,) that the plaintiff shall hold and enjoy the land, until the defendant shall produce the deed, or admit its destruction.¹ So if a deed concerning land is lost, and the party in possession prays discovery, and to be established in his possession under it, Equity will relieve; for no remedy, in such case, lies at law.² And, where the plaintiff is out of possession, there are cases, in which Equity will interfere upon lost or suppressed title deeds, and decree possession to the plaintiff; but, in all such cases, there must be other equities, calling for the action of the court.³ Indeed, the bill must always lay some ground, besides the mere loss of a title deed, or other sealed instrument, to justify a prayer for relief; as that the loss obstructs the right of the plaintiff at law, or leaves him exposed to undue perils in the future assertion of these rights.⁴

§ 85. Although upon a lost bond Equity will decree payment for the reason already stated; yet it will not entertain jurisdiction for relief upon a lost negotiable note, or other unsealed security, so as to decree payment upon the mere fact of loss; for no such supposed inability to recover at law exists in the case of such a note or unsealed contract, which is lost, as exists for want of a profert of a bond at law. No profert is necessary, and no *oyer* allowed at law of such note or security;⁵ and a recovery can

¹ *Rex v. Arundel*, Hob. R. 108 b; 1 Ves. 392.

² *Walmsley v. Child*, 1 Ves. 434, 435. See also, *Dalton v. Coatsworth*, 1 P. Will. 731; *Dormer v. Fortescue*, 3 Atk. 132.

³ *Dormer v. Fortescue*, 3 Atk. 132.

⁴ See 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f); *Id.* ch. 3, § 3.

⁵ *Walmsley v. Child*, 1 Ves. 345; *Glynn v. Bank of England*, 2 Ves. 38, 41.

be had at law, upon mere proof of the loss.¹ But, then, a Court of Law cannot (as we have seen) insist upon an indemnity, or at least cannot insist upon it in such a form, as may operate a perfect indemnity.² In such a case, therefore, a Court of Equity will entertain a bill for relief and payment, upon an offer in the bill to give a proper indemnity under the direction of the Court, and not without. And such an offer entitles the Court to require an indemnity, not strictly attainable at law, and founds a just jurisdiction.³

§ 86. In the cases, which we have been considering, the lost note, or other security, was negotiable. And, according to the authorities, this circumstance is most material, for otherwise it would seem, that no indemnity would be necessary,⁴ and consequently no relief could be had in Equity. The propriety of this exception has been somewhat doubted ; for the party is entitled, upon payment of such a note or security, to have it delivered up to him, as a voucher of its payment and extinguishment ; and it may have been assigned, in Equity, to a third person. And although, in such a case, the assignee would be affected by all the equities, as between the original parties ; yet the promisor may not always, after a great length of

¹ *Walmsley v. Child*, 1 Ves. 345 ; *Glynn v. Bank of England*, 2 Ves. 38, 41.

² *Ante*, § 82 ; 2 Camp. 211 ; 7 B. & Cresw. 90.

³ *Walmsley v. Child*, 1 Ves. 344, 345 ; *Teresy v. Gorey*, Finch, R. 301 ; *S. C.* 1 Ves. 345 ; *Glynn v. Bank of England*, 1 Ves. 346 ; 2 Ves. 38 ; *Mossop v. Eadon*, 16 Ves. 430, 434 ; *Chitty on Bills*, (8th edit. 1833,) p. 290 ; *Bromley v. Holland*, 7 Ves. 19 to 21 ; *Davies v. Bodd*, 4 Price, 176.

⁴ *Mossop v. Eadon*, 16 Ves. 430, 434 ; see *Chitty on Bills*, (8th edit. 1833,) p. 291, note.

time, be able to establish those equities by competent proof; and, at all events, he may be put to serious expense and trouble, to establish his exoneration from the charge. The course in Equity, under such circumstances, seems perfectly within the principles, on which such Courts ordinarily proceed to grant relief, not only in cases of absolute loss, but of impending or probable mischief or inconvenience. And a bond of indemnity, under such circumstances, is but a just security to the promisor, against the vexation, and the accumulated expenses of a suit.¹

§ 87. It is upon grounds somewhat similar, that Courts of Equity often interfere; where the party, from long possession, or exercise of right, may fairly be presumed to have had a legal title to it, and yet has lost the legal evidence of it, or is now unable to produce it. Under such circumstances, Equity acts upon the presumption from such possession, as equivalent to complete proof of the legal right. Thus, where a rent has been received and paid for a long time, Equity will enforce the payment, although no deed can be produced to sustain the claim, or the precise lands, out of which it is payable, cannot, from confusion of boundaries or other accident, be now ascertained.²

§ 88. In the cases of supposed lost instruments, where relief is sought, it has been seen, that, as a

¹ See *Hansard v. Robinson*, 7 B. & Cresw. 90; *East India Company v. Boddam*, 9 Ves. 468, 469; *Davies v. Dodd*, 4 Price R. 176.

² 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (g); *Steward v. Bridger*, 2 Vern. 516; *Collet v. Jaques*, 1 Ch. Cas. 120; *Cocks v. Foley*, 1 Vern. 359; *Eton College v. Beauchamp*, 1 Cas. Ch. 121; *Holder v. Chambury*, 3 P. Will. 255; *Duke of Leeds v. Powell*, 1 Ves. 171; *Duke of Bridgewater v. Edwards*, 4 Bro. Parl. C. 139; *Duke of Leeds v. New Rodner*, 2 Bro. Ch. C. 338, 518; *Benson v. Baldwin*, 1 Atk. 598; *Cooper*, Eq. Pl. 130.

guard upon the preliminary exercise of jurisdiction, an affidavit of the loss of the instrument, and that it is not in the possession or power of the plaintiff, is indispensable to sustain the bill.¹ And, in order to maintain the suit, it is further indispensable, that the loss, if not admitted by the answer of the defendant, should, at the hearing of the cause, be established by competent and satisfactory proofs.² For the very foundation of the suit in Equity rests upon this most material fact. If, therefore, the plaintiff should fail to establish at the hearing the loss of the instrument, or the defendant should overcome the plaintiff's proofs by countervailing testimony of its existence, the suit will be dismissed, and the plaintiff remitted to the legal forum.³ But if the loss is sufficiently established, when it is denied by the defendant's answer, the plaintiff will be entitled to relief, although he may have other evidence, competent and sufficient to establish the existence and contents of the instrument, of which he might have availed himself in a Court of Law.⁴ For the jurisdiction attaches by the loss of the instrument; and a Court of Equity will not drive the party to the hazard of a trial at law, when the case is fit for its own interposition, and final action upon a claim to sift the conscience of the party by a discovery.

¹ *East India Co. v. Boddam*, 9 Ves. 466; *Cooper*, Eq. Pl. 125, 126.

² *Stokoe v. Robson*, 3 Ves. & B. 50; *Smith v. Bicknell*, Id. note; *Cookes v. Hellier*, 1 Ves. 234, 235; *Walmsley v. Child*, 1 Ves. 344, 345; *Cooper*, Eq. Pl. 239; *Clavering v. Clavering*, 2 Ves. 292; *East India Company v. Boddam*, 9 Ves. 466.

³ See *Jeremy on Eq. Jurisd.* 359, 360, 361; *Cooper*, Eq. Pl. 238, 239; *Mitf. Eq. Pl. by Jeremy*, 222; *Armitage v. Wadsworth*, 1 Madd. R. 192 to 194; 1 *Fonbl. Eq. B. 1*, ch. 3, § 3, note (h).

⁴ 1 *Fonbl. Eq. B. 1*, ch. 1, § 3, note (f), p. 17.

§ 89. We have thus far been considering the cases of accident, founded upon lost instruments. But there are many other cases of accident, where a Court of Equity will grant both discovery and relief. One of the earliest cases, in which it was accustomed to interfere, was, where a bond had not by accident been paid at the appointed day, and it was subsequently sued, or where a part only had been paid at the day.¹ This jurisdiction was afterwards greatly enlarged in its operation, and applied to all cases, where relief is sought against the penalty of a bond, upon the ground, that it is unjust for the party to avail himself of the penalty, when an offer of full indemnity is tendered. The same principle governs in the case of mortgages, where Courts of Equity constantly allow a redemption, although there is a forfeiture at law.² And it may now be stated generally, that, where an inequitable loss or injury will otherwise fall upon a party from circumstances beyond his own control, or from his

¹ Cary's Rep. 1, 2; 7 Ves. 273. See also Harg. Law Tracts, p. 431, 432, Norburie on Chancery Abuses.

² Seton v. Slade, 7 Ves. 273, 274; Lenon v. Napper, 2 Sch. & Lefr. 684, 685; Com. Dig. Chancery, 4 A. 5; Mitf. Pl. Ch. by Jeremy, 117, 130; Cooper, Eq. Pl. 130, 131; 2 Fonbl. Eq. B. 3, ch. 3, § 4, and notes. — Mr. Mitford puts the relief in cases of this sort upon the ground of accident. His language is, "In many cases of accidents, as lapse of time, the Courts of Equity will also relieve against the consequences of the accident in a Court of Law. Upon this ground they proceed in the common case of a mortgage, where the title of the mortgagee has become absolute at law, upon default of payment of the mortgage money at the time stipulated for payment." Mitf. Eq. Pl. by Jeremy, 130. I apprehend, that this is not the true ground, but that it turns upon the construction of the contract, being a mere security; and time not being of the essence of the contract; and the unconscionableness of insisting upon taking the land for the money. Seton v. Slade, 7 Ves. 273, 274; Lenon v. Napper, 2 Sch. & Lefr. 684, 685.

own acts done in entire good faith, and in the performance of a supposed duty, without negligence, a Court of Equity will incline to grant him relief.

§ 90. Cases, illustrative of this doctrine, may easily be put. In the course of the administration of estates, executors and administrators often pay debts and legacies upon the entire confidence, that the assets are sufficient for all purposes. It may turn out, from unexpected occurrences, or from debts and claims made known at a subsequent time, that there is a deficiency of assets. Under such circumstances, they may be entitled to no relief at law; but in a Court of Equity they would, if they have acted with good faith, and with due caution, be clearly entitled to it, upon the ground, that otherwise they would be innocently subjected to an unjust loss, from what the law itself deems an accident.¹ Indeed, it has been said, that in England no case at Law has yet decided, that an executor or administrator, once become fully responsible, by an actual receipt of a part of his testator's property, for the administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, or destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means, which afford an excuse to ordinary agents and bailees, in cases of loss without any negligence on their part; and that Courts of Law are disinclined to make such a pre-

¹ *Edwards v. Freeman*, 2 P. Will. 447; *Johnson v. Johnson*, 3 Bos. & Pull. 162, 169; *Hawkins v. Day*, Ambler, R. 160; *Chamberlain v. Chamberlain*, 2 Freem. 141. But see *Coppin v. Coppin*, 2 P. Will. 296, 297; *Orr v. Kaines*, 2 Ves. 194.

cedent.¹ If this be a true description of the actual state of the law on this subject, it would become an intolerable grievance, if a Court of Equity should not, under any circumstances, be able to interfere in favor of executors and administrators, in order to prevent such gross injustice. And, in cases of this sort, relief has accordingly been often granted by Courts of Equity, in mitigation and melioration of the hardship of the Common Law.² But to found a good title to such relief, it seems indispensable, that there should have been no negligence or misconduct on the part of such executors or administrators, in the payment of the assets ; for if there has been any, that, perhaps, may induce a Court of Equity to withhold its assistance.³

§ 91. Other cases may be easily put, in which an executor or administrator would be entitled to relief. Thus, if he should receive money, supposed to be

¹ *Crosse v. Smith*, 7 East, R. 246 ; *Johnson v. Johnson*, 3 Bos. & Pull. 162, 169. But see *Orr v. Kaines*, 2 Ves. 194 ; *Hawkins v. Day, Ambler*, R. 160. — But even at law, the payment of a simple contract debt, without notice of a specialty debt, would, in case of a deficiency of assets, protect the executor or administrator. *Davis v. Monkhouse*, Fitzgib. R. 76 ; *Brooks v. Jennings*, 1 Mod. R. 174 ; *Britton v. Batthurst*, 3 Lev. 115 ; *Hawkins v. Day, Ambler*, R. 160, 162.

In *Brisbane v. Dacres*, (5 Taunt. R. 143, 159,) Mr. Justice Chambre seems to have thought, that an administrator paying money *per capita*, in misapplication of the effects of the intestate, might recover it back at law. But Lord Chief Justice Mansfield, in the same case, doubted it ; and said, if he could, it would be only under the principle of *æquum et bonum*.

² *Croft's Executors v. Lyndsey*, 2 Freem. R. 1 ; S. C. 2 Eq. Abridg. 452 ; *Holt v. Holt*, 1 Cas. Ch. 190 ; 2 P. Will. 447 ; *Orr v. Kaines*, 2 Ves. R. 194 ; *Moore v. Moore*, 2 Ves. 600 ; *Nalthorp v. Hill*, 1 Cas. Ch. 135 ; *Noel v. Robinson*, 1 Vern. 90, 94 ; 2 Eq. Abridg. F. Ex'rs. K. p. 452.

³ See Hovenden's note to 2 Freem. R. 1, (n. 3.) ; 1 Cas. Ch. 136 ; 1 Fonbl. Eq. B. 1, ch. 3, § 3.

due from a debtor to the estate ; and it should turn out, that the debt had been previously paid ; and before the discovery he had paid away the money to creditors of the estate ; in such case, the supposed debtor may recover back the money in Equity from the executor ; and the latter may in the same manner recover it from the creditors, to whom he paid it.¹ In like manner, if an executor should recover a judgment, and receive the amount, and apply it in discharge of debts, and then the judgment should be reversed, he is compellable to refund the money, and may recover it back from the creditors.²

§ 92. Upon analogous grounds a Court of Equity will interpose, in favor of an unpaid legatee, to compel the other legatees, who have been paid their full legacies, to refund in proportion, if there was an original deficiency of assets to pay all the legacies, and the executor is insolvent ; but not, as it should seem, if there was no such original deficiency, and there has been a waste by the executor.³ The reason of the distinction seems to be, that the other legatees in the first case have received more than their just proportion of the assets ; but in the last case no more than their just proportion. And therefore there is nothing inequitable on their part in availing themselves of their superior diligence.⁴

¹ Poole v. Ray, 1 P. Will. 355 ; 2 Eq. Abridg. 452, pl. 5.

² Ibid.

³ Orr v. Kaines, 2 Ves. 194 ; Moore v. Moore, 2 Ves. 600 ; Anon. 1 P. Will. 495 ; Walcot v. Hall, Id. Cox's note ; S. C. 1 Bro. Ch. R. 305, and Belt's notes ; Noel v. Robinson, 1 Vern. 94 ; Raithby's note (1) ; Edwards v. Freeman, 2 P. Will. 447.

⁴ Id. ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (p) ; Lupton v. Lupton, 2 John. Ch. R. 614, 626. — But it seems, that the executor himself cannot, in a case of deficiency of assets, compel the legatees to refund in favor of another legatee, who is unpaid, where the ex-

But legatees are always compellable to refund in favor of creditors ; because the latter have a priority of right to satisfaction out of the assets.¹

§ 93. Other illustrations of the doctrine of relief in Equity, upon the ground of accident, may be stated. Suppose a minor is bound as apprentice to a person, subject to the Bankrupt laws, and a large premium is given for the apprenticeship to the master, and he becomes bankrupt during the apprenticeship ; in such a case, Equity will interfere, and apportion the premium, upon the ground of the failure of the contract from accident.² So, if stock of a Government is held for the benefit of A during life, and afterwards the growing payments, as well as the arrears, are to be for the benefit of B ; and then a revolution should occur, by which the pay-

ecutor has made a voluntary payment ; but only where the payment has been compulsive. 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (p) ; *Hodges v. Waddington*, 2 Vent. 360 ; *Newman v. Barton*, 2 Vern. R. 205 ; *Orr v. Kaines*, 2 Ves. 194. — And in cases of creditors he cannot compel legatees to refund, if he knew of the debts at the time of the payment ; but only when the debts were then unknown to him. *Nalthorp v. Hill*, 1 Ch. Cas. 136 ; *Jewon v. Grant*, 3 Swanst. 659 ; *Hodges v. Waddington*. 2 Vent. 360 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (p). So that the rights of the executor himself, and of legatees and creditors, are not precisely the same, in all cases of a deficiency of assets. See 2 Eq. Abridg. Legacies, B. 13, p. 554 ; 17 Mass. R. 384, 385. In Massachusetts, an executor, who has voluntarily paid a legatee, can, on the subsequent discovery of a deficiency of assets, recover back the money at law ; and so, if he has paid some creditors in full, and there is afterwards a deficiency of assets, he may recover back from the creditors so paid, in proportion to the deficiency. *Walker v. Hill*, 17 Mass. R. 380 ; *Walker v. Bradley*, 3 Pick. R. 261.

¹ *Noel v. Robinson*, 1 Vern. 90, 94 ; *Id.* 460 ; *Newman v. Barton*, 2 Vern. 205 ; *Nelthorp v. Hill*, 1 Ch. Cas. 136 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (p) ; *Lupton v. Lupton*, 2 John. Ch. R. 614, 626 ; *Anon.* 1 Vern. 162 ; *Hardwick v. Mynd*. 1 Anst. R. 112.

² *Hale v. Webb*, 2 Bro. Ch. R. 78, and *Belt's* note. See 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (g) ; *Ex parte Sandby*, 1 Atk. 149.

ments should be suspended for several years ; and A should die, before the arrears are paid ; there, such revolution would be treated as an accident ; and the representatives of A would be entitled to the arrears, and not B, notwithstanding the language of the contract. For the arrears supposed in the contract could mean only such, as might ordinarily occur, and not such, as should arise from extraordinary events.¹ So, if an annuity is directed by a will to be secured by public stock ; and an investment is made accordingly, sufficient at the time for the purpose ; but afterwards the stock is reduced by an act of Parliament, so that the stock becomes insufficient, Equity will decree the deficiency to be made up against the residuary legatees, as an accident.²

§ 94. In the execution of mere powers, it has been said, that a Court of Equity will interpose, and grant relief on account of accident, as well as mistake. And this seems regularly true, where, by accident, there is a defective execution of the power. But where there is a non-execution of the power by accident, there seems more reason to question the doctrine. It is true, that it was said by two Judges in a celebrated case, that, if the party appear to have intended to execute his power, and is prevented by death, Equity will interpose to effectuate his intent ; for it is an impediment by the act of God.³ But it is doubtful, whether this doctrine

¹ *Haslett v. Pattie*, 6 Madd. R. 4.

² *Davies v. Wottier*, 1 Sim. & Stu. 463 ; *May v. Bennett*, 1 Russell, R. 370.

³ *Earl of Bath & Montague's Case*, 3 Ch. Cas. 69, 93 ; 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (*k*) ; *Id.* B. 1, ch. 1, § 7, note (*v*) ; *Sugden on Powers*, ch. 6, § 2, p. 378, (3d edit.)

can be maintained, unless when the party has taken some preparatory steps for the execution ; so that it may be deemed a case, not of non-execution, but of defective execution.¹ And it has been said, that Equity will also relieve in case of a defective execution of a power, where it is impossible, by circumstances, over which the party has no control, for him to execute it ; as if he is sent abroad by the Government, and the prescribed witnesses cannot be obtained ; or if the remainder man refuses to the party a sight of the deeds creating the power ; so that the party cannot ascertain the form of executing it.²

§ 95. In regard to the defective execution of powers, resulting either from accident, or mistake, or both, and also in regard to agreements to execute powers, (which may generally be deemed a species of defective execution,)³ Courts of Equity do not in all cases interfere and grant relief ; but grant it only in favor of persons, in a moral sense, entitled to and viewed with peculiar favor ; and where there are on the other side no opposing equities.⁴ Without undertaking to enumerate all the qualifications of doctrine, belonging to this intricate subject, it may be stated, that Courts of Equity, in cases of defective execution of powers, will (unless there be some countervailing equity) interpose, and grant relief in

¹ See 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (*h*), note (*k*) ; Smith v. Ashton, 1 Ch. Cas. 264 ; 2 Chance on Powers, ch. 23, § 3, art. 2999 to 3004 ; Id. § 1, art. 2817 to 2923 ; Sugden on Powers, ch. 6, § 2, p. 378, (3d edit.)

² 1 Fonbl. Eq. B. 1, ch. 5, § 2, note (*h*) ; Earl of Bath & Montague's Case, 3 Ch. Cas. 68 ; Gilb. Lex Pretoria, p. 305, 306.

³ 2 Chance on Powers, ch. 23, § 1, art. 2824, 2825, 2897 to 2915.

⁴ Ibid. ch. 23, § 1, art. 2817 to 2932.

favor of purchasers, creditors, a wife, a child, and a charity ; but not in favor of the donee of the power, or a husband, or grandchildren and remote relations, or strangers generally.¹

§ 96. But in cases of defective execution of powers, we are carefully to distinguish between those, which are created by parties, and those, which are specially created by statute, as, for instance, powers of tenants in tail to make leases. As to the latter, they are construed with more strictness ; and, whatever formalities are required by the statute must be punctually complied with, otherwise the defect cannot be helped, or, at least, may not, perhaps, in Equity ; for Courts of Equity cannot dispense with the regulations prescribed by a statute, at least, where they constitute the apparent policy and object of the statute.²

§ 97. As to the defects, which may be remedied, they may generally be said to be any, which are not of the very essence or substance of the power. Thus, a defect by executing the power by a *Will*, when it is required to be by a deed or an instrument *inter vivos*, will be aided. So the want of a seal, of witnesses, or of signature, or defects in the limitations of the property, estate, or interest will be aided ; and, perhaps, the same rule will apply to defective executions of powers by *femes covert*. But Equity will not aid defects, which are of the very essence or sub-

¹ 2 Chance on Powers, ch. 23, § 1, art 2330 to 2858 ; Id. 2859 to 2863 ; Id. 2864 to 2873 ; 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (v) ; Id. B. 1, ch. 4, § 25, notes (A) (i) ; Id. B. 1, ch. 5, § 2, and note (b).

² 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (t) ; Id. B. 1, ch. 4, § 25, note (e) ; Earl of Darlington v. Pultney, Cowp. R. 267. But see 2 Chance on Powers, ch 23, § 2, art. 2985 to 2997.

stance of the power ; as, for instance, if the power be executed without the consent of parties required to consent to it. So, if it be required to be executed by *Will*, and it is executed by a *Deed* ; for this is apparently contrary to the settler's intention.¹

§ 98. But a class of cases more common in their occurrence, as well as more extensive, in their operation, will be found, where trusts or powers in the nature of trusts, are required to be executed by the trustee in favor of particular persons, and fail of being so executed by casualty or accident. In all such cases Equity will interpose, and grant suitable relief. Thus, for instance, if a testator should, by his will, devise certain estates to A, with directions that A should at his death distribute the same among his children and relations, as he should choose ; and A should die without making such distribution ; a Court of Equity would interfere, and make a suitable distribution ; because it is not given to the devisee as a mere power, but as a trust and duty, which he ought to fulfil ; and his omission so to do by accident, or design, ought not to disappoint the objects of the bounty. It would be very different, if the case were of a mere power, and not a power coupled with a trust.²

¹ 2 Chance on Powers, ch. 23, § 1, art. 2874 to 2896 ; Id. art. 2930 ; Id. 2980 to 2984. — I have contented myself with these general statements on this confessedly involved topic, as a full investigation of all the doctrines concerning it more properly belongs to a treatise on Powers. The learned reader will find the whole subject fully examined, and all the leading authorities brought together, in 2 Chance on Powers, ch. 23, § 1, 2, 3, art. 2818 to 3024, and Sugden on Powers, ch. 6, p. 344 to 393, (3d edition,) and Powell on Powers, p. 54, 155, 243, 280.

² *Harding v. Glynn*, 1 Atk. 469, and note by Saunders ; *Brown v. Higgs*, 4 Ves. 709 ; 5 Ves. 495 ; 8 Ves. 561 ; 2 Chance on Powers, ch. 23, § 1.

§ 99. Another class of cases is, where a testator cancels a former will upon the presumption, that a later will made by him is duly executed, when it is not. In such a case it has been decided, that the former will shall be set up against the heir in a Court of Equity, and the devisee be relieved there, upon the ground of accident.¹ But this class seems more properly to belong to the head of mistake, or of conditional presumptive revocation, where the condition has failed.²

§ 100. These may suffice, as illustrations of the general doctrine of relief in Equity in cases of accident. They all proceed upon the same common foundation, that there is no adequate or complete remedy at law under all the circumstances; that the party has rights, which ought to be protected and enforced; or will sustain injury, loss, or detriment, which it would be unequitable to throw upon him.³

§ 101. And this leads us, naturally, to the consideration of those cases of accident, in which no relief will be granted by a Court of Equity. In the first place, in matters of positive contract and obligation, created by the party, (for it is different in obligations or duties created by law,)⁴ it is no ground for the interference of Equity, that the party has been prevented from fulfilling them by accident; or, that he has

¹ *Onions v. Tyrer*, 1 P. Will. 343, 345; S. C. 2 Vern. 751; Prec. Ch. 459.

² 1 P. Will. 345, Cox's note; *Burtenshaw v. Gilbert*, Cowp. R. 49.

³ Courts of Equity will also interfere and grant relief, where by accident there has been a confusion of boundaries of estates. Mitf. Eq. Pl. by Jeremy, 117. So, where, by reason of a confusion of boundaries, the remedy by distress is gone; *Duke of Leeds v. Powell*, 1 Ves. 171.

⁴ *Paradine v. Jane*, Aleyn. R. 27. See also Story on Bailments, § 25, 35, 36.

been in no default ; or, that he has been prevented by accident, from deriving the full benefit of the contract on his own side.¹ Thus, if a lessee on a demise covenants to keep the demised estate in repair, he will be bound in Equity, as well as in Law, to do so, notwithstanding any inevitable accident or necessity, by which the premises are destroyed or injured ; as if they are burnt by lightning, or destroyed by public enemies, or by any other accident or overwhelming force. The reason is, that he might have provided for such contingencies by his contract, if he had chosen ; and the law will presume an intentional general liability, where he has made no exception.²

§ 102. And the same rule applies in like cases, where there is an express covenant, (without any proper exceptions,) to pay rent during the term. It must be paid, notwithstanding the premises are accidentally burnt down during the term. And this is equally true as to the rent, although the tenant has covenanted to repair, except in cases of casualties by fire, and the premises are burnt down by such casualty ; for *expressio unius est exclusio alterius*.³ In all cases of this sort of accidental loss by fire, the rule

¹ 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (g). See Com. Dig. Chan. 3 F. 5 ; *Barrisford v. Done*, 1 Vern. 98.

² *Id.* *Dyer*, R. 33, (a) ; *Chesterfield v. Bolton*, Com. R. 627 ; *Bullock v. Dommitt*, 6 T. R. 650 ; *Brecknock, &c. Canal Company v. Pritchard*, 6 T. R. 750 ; *Paradine v. Jane*, Aleyn, R. 27 ; *Monk v. Cooper*, 2 Str. R. 763 ; 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (g), p. 374, &c. ; *Harrison v. Lord North*, 1 Ch. Cas. 83.

³ *Monk v. Cooper*, 2 Str. 763 ; S. C. 2 Lord Raymond, 1477 ; *Balfour v. Weston*, 1 T. Rep. 310 ; *Fowler v. Bott*, 6 Mass. R. 63 ; *Doe v. Sandham*, 1 T. R. 705, 710 ; *Hallet v. Wylie*, 3 John. R. 44 ; *Hare v. Groves*, 3 Anst. 687 ; *Holtsapfel v. Baker*, 18 Ves. 115 ; *Pym v. Blackburn*, 3 Ves. 34, 38 ; 1 Fonbl. Equity, B. 1, ch. 5, § 8, note (g) ; *Cooper Eq. Pl.* 131.

prevails, *res perit domino* ; and therefore the tenant and landlord suffer according to their proportions of interest in the property burnt ; the tenant during the term, and the landlord for the residue.

§ 103. And, the like doctrine applies to other cases of contract, where the parties stand equally innocent.¹ Thus, for instance, if there is a contract for a sale at a price to be fixed by an award, during the life of the parties, and one of them dies before the award is made, the contract falls ; and Equity will not enforce it upon the ground of accident ; for the time of making the award is expressly fixed in the contract according to the pleasure of the parties ; and there is no Equity to substitute a different period.²

§ 104. So, if A should covenant with B to convey an estate for two lives in a Church lease to B by a certain day, and one of the lives should afterwards drop before the day appointed for the conveyance ; B would be compelled to stand by his contract, and to accept the conveyance ; for neither party is in any fault ; and B by the contract took upon himself the risk, by not providing for the accident.³ So, if an estate should be sold by A to B for a certain sum of money and an annuity, and the agreement be fair, Equity will not grant relief, although the party dies before the payment of any annuity.⁴

§ 105. In the next place, Courts of Equity will not grant relief to a party upon the ground of accident,

¹ Com. Dig. Chancery, 3 F. 5.

² *Blundell v. Brettaugh*, 17 Ves. 232, 240.

³ *White v. Nutt*, 1 P. Will. 61.

⁴ *Mortimer v. Capper*, 1 Bro. Ch. R. 156 ; *Jackson v. Lever*, 3 Bro. Ch. R. 605 ; see also 9 Ves. 246.

where the accident has arisen from his own gross negligence or fault ; for in such a case the party has no claim to come into a Court of Justice, to ask to be saved from his own culpable misconduct. And, on this account, in general, a party coming into a Court of Equity is bound to show, that his title to relief is unmixed with any gross misconduct or negligence of himself or his agents.¹

§ 105. In the next place Courts of Equity will not interfere upon the ground of accident, where the party has not a clear vested right ; but his claim rests in mere expectancy, and is a matter, not of trust, but of volition. Thus, if a testator, intending to make a will in favor of particular persons, is prevented from doing so by accident, Equity cannot grant relief ; for it is not in the power of the Court to relieve against accidents, which prevent voluntary dispositions of estates ;² and a legatee or devisee can take only by the bounty of the testator, and has no independent right, until there is a title consummated by law. The same principle applies to a mere power, such as a power of appointment, uncoupled with any trust ; if it is unexecuted by accident or otherwise, a Court of Equity will not interfere and execute it, as the party should or might have done.³ But if there were a trust, it would be otherwise.

¹ *Marine Insurance Company v. Hodgson*, 7 Cranch, 336. See *Penny v. Martin*, 4 John. Ch. R. 569 ; 1 Fonbl. Eq. B. 1, ch. 3, § 3 ; *Ex parte Greenway*, 6 Ves. 812. See also 7 Ves. 19, 20 ; 9 Ves. 467, 468.

² *Whitton v. Russell*, 1 Atk. 448 ; 1 Madd. Ch. Pr. 46.

³ *Brown v. Higgs*, 8 Ves. 561, 559 ; *Pierson v. Garnet*, 2 Brown, Ch. C. 38, 226 ; *Duke of Marlborough v. Godolphin*, 2 Ves. 61, and *Belt's Supplement*, 277, 278 ; *Harding v. Glyn*, 1 Atk. 469, and *Saunders's note* ; *Tollet v. Tollet*, 2 P. Will. 489 ; 1 Fonbl. B. 1, ch. 4, § 25, note (h) ; *Id.* note (k) ; 1 Madd. Ch. Pr. 46.

§ 106. In the next place, no relief will be granted on account of accident, where the other party stands upon an equal Equity, and is entitled to equal protection. Upon this ground, also, Equity will not interfere to give effect to an imperfect will against an innocent heir at law ; for, as heir, he is entitled to protection, whatever might have been the intent of the testator, unless his title is taken away according to the rules of law.¹

§ 107. So, if a tenant for life, or in tail, have a power to raise money, and he raises money by mortgage, without any reference to the power, and not in conformity to it, the mortgage will not bind the heir in tail.² So, if a tenant in tail conveys the estate by bargain and sale, or enters into a contract of sale, and covenants to suffer a fine and recovery, and he dies before the fine or recovery, the heir in tail, or remainder man is not bound ; for he is deemed a purchaser under the donor, and entitled to protection, as such ; and a Court of Equity will not carry into effect against him any act of a former tenant in tail, further than a Court of Law.³

§ 108. And, generally, against a bona fide purchaser for a valuable consideration without notice, a Court of Equity will not interfere on the ground of accident ; for, in the view of a Court of Equity, such a purchaser has as high a claim to assistance

¹ See Com. Dig. Chancery, 3 F. 6, 7, 8 ; 1 Fonbl. Eq. B. 1, ch. 4, § 25, notes (k), (n) ; Francis, Maxims, M. 167, p. 128 (1751).

² Jenkins v. Kemis, 1 Cas. Ch. 103 ; S. C. cited 2 P. Will. 667 ; 1 Fonbl. Eq. B. 1, ch. 4, § 25, notes (l), (n).

³ 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note ; Id. ch. 4, § 19, and notes ; Weale v. Lower, 1 Eq. Abridg. 266 ; Powell v. Powell, Prec. Ch. 278.

and protection, as any other person can have.¹ Principles of an analogous nature seem to have governed in many of the cases, in which a surrender of copyholds has been supplied by Courts of Equity.²

§ 109. Perhaps, upon a general survey of the grounds of equitable jurisdiction in cases of accident, it will be found, that they resolve themselves into the following ; that the party seeking relief has a clear right, which cannot otherwise be enforced in a suitable manner ; or, that he will be subjected to an unjustifiable loss, without any blame or misconduct on his own part ; and that he has a superior equity to the party, from whom he seeks the relief.³

¹ Mitford, Eq. Pl. by Jeremy, 274, X. ; Cooper. Eq. Pl. 281 to 285 ; 2 Fonbl. Eq. B. 2, ch. 6, § 2, and notes ; *Malden v. Merrill*, 2 Atk. 8 ; Newl. on Contr. ch. 19, p. 342.

² 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (v).

³ Many of the cases on this subject will be found collected in 1 Madd. Ch. Pr. ch. 2, § 2, p. 41, &c. Jeremy on Equity Jurisd. ch. 1, p. 359, &c., and 2 Swift's Digest, ch. 6, p. 92, &c.

CHAPTER V.

MISTAKE.

§ 110. WE may next pass to the consideration of Equitable Jurisdiction, founded upon the ground of mistake. This is sometimes the result of accident, in its large sense ; but, as contradistinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence.¹ Mistakes are ordinarily divided into two sorts, mistakes in matter of law, and mistakes in matter of fact.

§ 111. And first, in regard to mistakes in matter of law. It is a well known maxim, that ignorance of law will not furnish an excuse for any person, either for a breach, or an omission of duty ; *ignorantia legis neminem excusat* ; and this maxim is equally as much respected in Equity as in law.² It

¹ Mr. Jeremy defines Mistake, in the sense of a Court of Equity, to be "that result of ignorance of law or of fact, which has misled a person to commit that, which, if he had not been in error, he would not have done." Jeremy, Eq. Jurisd. B. 3, Pt. 2, p. 358. This definition seems too narrow, and it does not comprehend cases of omission or neglect. May there not be a mistake from surprise, or imposition, as well as from ignorance of law or fact ?

² *Bilbie v. Lumley*, 2 East. R. 469; Doct. & Stud. Dial. 1 ch. 26, p. 92; Id. Dial. 2, ch. 46, p. 303 ; *Stevens v. Lynch*, 12 East. 38 ; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v) ; *Hunt v. Rousmaniere's Adm'rs*, 8 Wheaton, R. 174 ; S. C. 1 Peters, Sup. C. R. 1 ; *Frank v. Frank*, 1 Ch. Cas. 84. — How far money paid under a mistake of law, is, as the civil law phrases it, liable to *repetition*, that is, to a recovery back, has been a matter much discussed by Civilians, and upon which they are divided in opinion. Pothier and Heineccius maintain the negative ; Vinnius and D'Aguesseau the affirmative, the latter especially in a most masterly dissertation. Sir W. D. Evans, in the Appendix

probably belongs to some of the earliest rudiments of English jurisprudence ; and, is certainly so old, as

to his translation of Pothier on Obligations, (Vol. 2, p. 408 to 437,) has given a Translation of the Dissertations of D'Aguesseau and Vinnius ; and Sir W. D. Evans has prefixed to them a view of his own reasoning in support of the same doctrine. (Id. Vol. 2, 369.) The text of the Roman Law seems manifestly on the other side, although the force of the text has been attempted to be explained away, or at least limited. The Digest (Lib. 22, tit. 6, l. 9.) says, "*Ignorantia facti, non juris, prodesse ; nec stultis solere succurri, sed errantibus ;*" and still more explicitly the Code says, (Lib. 1, tit. 18, l. 10,) "*Cum quis jus ignorans indebitatam pecuniam solverit, cessat repetitio ; per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est.*" See also, 1 Pothier, Oblig. Pt. 4, ch. 3, § 1, n. 334. 1 Evans's Pothier on Oblig. 523, 524 ; Pothier, Pand. Lib. 22, tit. 6 ; Cujaccii Opera, Tom. 4, p. 502 ; Comm. ad Leg. vii. de Jur. et Fact. Ignor. Heinecc. ad Pand. Lib. 22, tit. 6, § 146 ; 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 13 to 17. But the question is a very different one, how far a promise to pay is a binding obligation ; for a party may not be bound by the latter to pay, although he may not, if he has paid the money, be entitled to recover it back. Heineccius (*ubi supra*) insists on this distinction ; founding himself on the Roman Law. Cujaccius also insists on the same distinction. (Cujac. Opera, Tom. 4, p. 506, 507. D'Aguesseau denies the distinction, as not founded in reason, and insists on the same rights in both cases. Sir W. D. Evans holds to the same opinion ; but insists, at all events, that a mere promise to pay, under a mistake of law, is not binding, 2 Evans, Pothier on Oblig. 395, &c. There is certainly great force in his reasoning. It has, however, been rejected by the English Courts ; and a promise to pay, upon a supposed liability, and in ignorance of the law, has been held to bind the party. *Stevens v. Lynch*, 12 East. R. 38 ; *Goodman v. Sayers*, 2 Jac. & Walk. 263 ; *Brisbane v. Dacres*, 5 Taunt. R. 143 ; *East India Company v. Tritton*, 3 B. & Cresw. 280. Mr. Chancellor Kent held a doctrine equally extensive, in *Shotwell v. Murray*, 1 John. Ch. R. 512, 516. See also *Storrs v. Barker*, 6 John. Ch. R. 166 ; *Clarke v. Dutcher*, 9 Cowen, R. 674. In Massachusetts it has been held, that money, paid under a mistake of law, may be recovered back ; and, at all events, that a promise to pay, under a mistake of law, cannot be enforced. *May v. Coffin*, 4 Mass. R. 342 ; *Warder v. Tucker*, 7 Mass. R. 452 ; *Freeman v. Boynton*, 7 Mass. R. 488. See also *Haven v. Foster*, 9 Pick. R. 112, in which there is a very learned argument by counsel on each side on the general doctrine, and the opinions of Civilians, as well as the Common Law decisions, are copiously cited.

to have been long laid up among its settled elements. We find it stated with great clearness and force in the Doctor and Student, where it is affirmed, that every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by Statute, as the Common Law.¹ The probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might not be carried.² Indeed, one of the remarkable tendencies of the English Common Law upon all subjects of a general nature, is to aim at practical good, rather than theoretical perfection; and to seek less to administer justice in all possible cases, than to furnish rules, which shall secure it in the common course of human business. And, if upon the mere ground of ignorance of the law, men were admitted to over-haul, or extinguish their most solemn contracts, and especially those, which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature and difficulty of the proper proofs.³ The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse, than to permit a person to reclaim his property upon the mere pretence, that at the time of parting with it he was ignorant of the law acting on his title.⁴ Mr.

¹ Doct. & Stud. Dial. 2, ch. 46.

² *Bilbie v. Lumley*, 2 East. 469, 472.

³ *Lyon v. Richmond*, 2 John. Ch. R. 51, 60; *Shotwell v. Murray*, 1 John. Ch. R. 512; *Storrs v. Barker*, 6 John. Ch. R. 169, 170.

⁴ See *Storrs v. Barker*, 6 John. Ch. R. 169.

Fonblanque has accordingly laid it down as a general proposition, that ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts, in Courts of Equity.¹ And he is fully borne out by authorities.²

a § 112. One of the most common cases put to illustrate the doctrine is, where two are bound by a bond, and the obligee releases one, supposing, by mistake of law, that the other will remain bound. In such a case the obligee will not be relieved in Equity upon the mere ground of his mistake of the law;³ for there is nothing inequitable in the co-obligor's availing himself of his legal rights; nor of the other obligor's insisting upon his release; if they have acted *bonâ fide*, and there has been no fraud or imposition on their side, to procure the release.

¹ 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v); 1 Madd. Ch. Pr. 60. But see *Moseley's Rep.* 364; 1 Ves. 127; *Storrs v. Barker*, 6 John. Ch. R. 169, 170; *Hunt v. Rousmaniere*, 1 Peters, R. 1, 15, 16.

² The doctrine was pushed to a great extent (as Mr. Fonblanque has remarked) in *Wibdey v. Cooper Company*, cited in a note to *East v. Thornbury*, 3 P. Will. 127, note B, and *Atwood v. Lamprey* (*ibid.*), in which a tenant, who had paid a rent or annuity charged on land, without deducting the land tax, was not allowed to recover back the amount by a bill in Equity. 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v). There is an appearance of hardship in this doctrine; but it has been fully recognised in a late case, where an executor paid interest on a legacy without deducting the property tax. *Currie v. Goold*, 2 Madd. R. 163; and in *Smith v. Alsop*, 1 Madd. R. 623; Lord Hardwicke also acted upon the same doctrine, in *Nicholls v. Leeson*, 3 Atk. 573. The cases resolve themselves into an overpayment by mistake of law, or fact; and probably of the former. But it does not appear in any of these, that the mistake was not mutual. It is a little difficult to reconcile these cases with the doctrine in *Bingham v. Bingham*, 1 Ves. 126, and *Belt's Suppt.* 79.

³ *Com. Dig. Chancery*, 3 F. 8; *Harman v. Cannon*, 4 Vin. Abridg. 387, pl. 3; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v). See also 1 Peters, Sup. C. R. 17; 1 P. Will. 723, 727; 2 Atk. 591; 2 John. Ch. R. 51; 4 Pick. R. 6, 17; *Cann v. Cann*, 1 P. Will. 723, 727.

So, where a party had a power of appointment, and executed it absolutely, without introducing a power of revocation, upon a mistake of law, that it, being a voluntary deed, it was revocable; relief was in like manner denied.¹ If the power of revocation had been intended to be put into the appointment, and omitted by a mistake in the draft, it would have been a very different matter.

§ 113. The same principle applies to agreements entered into in good faith; but under a mistake of the law. They are generally held valid, and obligatory upon the parties.² Thus, where a clause containing a power of redemption, in a deed granting an annuity, after it had been agreed to, was deliberately excluded by the parties upon a mistake of law, that it would render the contract usurious; the Court of Chancery refused to restore the clause, or, to grant

¹ *Worrall v. Jacob*, 3 Meric. R. 195. See also 1 Peters, R. 16.

² *Pullen v. Ready*, 1 Atk. 591; *Storkley v. Storkley*, 1 Ves. & B. 23, 30; *Frank v. Frank*, 1 Ch. Cas. 84; *Mildmay v. Hungerford*, 2 Vern. R. 243; *Shotwell v. Murray*, 1 John. Ch. R. 512; *Lyon v. Richmond*, 2 John. Ch. R. 51; *Hunt v. Rousmaniere*, 1 Peters, Sup. R. 1, 15; *Storrs v. Barker*, 6 John. Ch. R. 169, 170. — Some of the cases, commonly cited under this head, are cases of family agreements, to preserve family honor, or family peace; and some of them are compromises of rights, thought at the time to be doubtful by all the parties. The cases of *Stapleton v. Stapleton*, 1 Atk. 10; *Storkley v. Storkley*, 1 Ves. & B. 23; *Cory v. Cory*, 1 Ves. 19; *Gordon v. Gordon*, 3 Swanst. R. 463, 467, 471, 474, 477, and perhaps *Frank v. Frank*, 1 Ch. Cas. 84, are of the former sort. And it has been said by Lord Eldon, that in family arrangements an equity is administered in Equity, which is not applied to agreements generally. (1 Ves. & B. 30.) Compromises of doubtful rights stand upon a distinct ground; for in such cases the parties are equal, and it is for the public interest to suppress litigation. *Cann v. Cann*, 1 P. Will. 723; 1 Ves. & B. 30; 1 Atk. 10; *Naylor v. Wench*, 1 Sim. & Stu. 564, 565. But of these doctrines a more full discussion belongs to the text.

relief.¹ Lord Eldon, in commenting on this case, said, that it went upon an indisputably clear principle ; that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind, that it would be ruinous. And they desired the Court to do, not what they intended, for the insertion of that provision was directly contrary to their intention ; but they desired to be put in the same situation, as if they had been better informed, and consequently had a contrary intention.² So, where a devise was given upon condition, that a woman married with consent of her parents, and she married without such consent, whereby a forfeiture accrued to other parties, who afterwards executed an agreement respecting the estate, whereby the forfeiture was in effect waived, the Court refused any relief, although it was contended, that it was upon a mistake of law. Lord Hardwicke, on that occasion said, “ It is said, they (the parties) might know the fact, and yet not know the consequence of law. But if parties entering into an agreement, and the very will, out of which the forfeiture arose, is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point ; and shall not be relieved on a pretence of being surprised, with such strong circumstances, attending it.”³ So, where the plaintiff was tenant for life, with re-

¹ *Irnham v. Child*, 1 Bro. Ch. R. 92. See 6 Ves. 332, 333 ; 1 Peters, Sup. C. R. 16, 17.

² *Marquis of Townshend v. Stangroom*, 6 Ves. 332. See also *Lord Patmore v. Morris*, 2 Bro. Ch. R. 219 ; *Hunt v. Rousmaniere's Administrators*, 2 Mason, R. 366, 367.

³ *Pullen v. Ready*, 2 Atk. 537, 591.

mainder to his first and other sons in tail, remainder to the defendant in fee ; and his wife being then *privement ensient* of a son, he was advised, that, if he bought the reversion of the defendant, and took a surrender, that would merge his estate for life, and destroy the contingent remainder in his sons, and give him a fee ; and he accordingly bought the reversion, and gave security for the purchase money ; and upon discovery of his mistake of the law, he brought a bill to be relieved against the security, it was denied, unless upon payment of the full amount.¹

§ 114. Another illustration may be derived from a case, most vigorously contested and critically discussed, where upon the loan of money, for which security was to be given, the parties deliberately took, after consultation with counsel, a letter of attorney, with a power to sell the property (ships) in case of a nonpayment of the money, instead of a mortgage upon the property itself, upon the mistake of law, that the security by the former instrument would bind the property equally as strongly, as a mortgage, in case of death or other accident. The debtor died, and his estate being insolvent, a bill in Equity was brought by the creditor against the administrators, to reform the instrument, or to give it a priority by way of lien on the property, in exclusion of the general creditors. The Court, finally, after the most deliberate examination of the case at three successive stages of the cause, denied relief ; upon the ground, that the agreement was for a particular security selected by the parties, and not for security generally ; and that the Court were asked

¹ Mildmay v. Hungerford, 2 Vern. 243.

to substitute another security for that selected by the parties, not upon any mistake of fact, but of law, when it was not within the scope of their agreement.¹

§ 115. It is manifest, that the whole controversy in this case turned upon the point, whether a Court of Equity could grant relief, where a security becomes ineffectual, not by fraud or accident, or because it is not what the parties intended it to be ; but, because conforming to that intention, the parties in executing it innocently mistook the law. It was the very security the parties had deliberately selected ; but by unforeseen events, it was not as good a security, as they might have selected. It would have been most extraordinary and unprecedented for that Court of Equity, under such circumstances, to grant relief ; for it would be equivalent to decreeing a new agreement, not contemplated by the parties, instead of executing that actually made by them. If the party, who was to execute the power of attorney, had refused that, and offered a mortgage, could he have insisted on such a substitute ? If a mortgage had been agreed on, could he have compelled the other side to have accepted a letter of attorney ? Certainly not. Equity may compel parties to execute their agreements ; but it has no authority to make agreements for them, or to substitute one for another. If there had been any mistake in the instrument itself, so that it did not contain in it, what the parties had agreed on, that would have formed a very different case ; for where an instrument is drawn and executed, which professes, or is intended

¹ Hunt v. Rousmaniere, 8 Wheat. R. 174 ; 1 Peters, Sup. C. R. 1, 13, 14 ; S. C. 2 Mason, R. 244, 342.

to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil that intention, or violates it, Equity will correct the mistake, so as to produce a conformity to the instrument.¹

§ 116. In the preceding section it has been stated, that agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally held valid and obligatory. The doctrine is laid down in this guarded and qualified manner, because it is not to be disguised, that there are authorities, which are supposed to contradict it, or at least to form exceptions to it. Indeed, in one case, Lord King is reported to have said, that the maxim of law, *ignorantia juris non excusat*, was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes; but it did not hold in civil cases.² This broad statement is utterly irreconcilable with the well established doctrine, both of Courts of Law and Courts of Equity. The general rule certainly is, (as has been very clearly stated by the Supreme Court of the United States,) that a mistake of the law is not a ground for reforming a deed founded on such a mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision.³

¹ See the able opinion of Mr. Justice Washington in *Hunt v. Rousmaniere's Adm'rs*, 1 Peters, Sup. C. R. 13 to 17.

² *Lansdowne v. Lansdowne*, Moseley, R. 364; S. C. 2 Jac. & Walk. 205.

³ *Hunt v. Rousmaniere*, 1 Peters, Sup. C. R. 15; S. C. 8 Wheaton, R. 211, 212. See also *Hepburn v. Dunlop*, 1 Wheaton, R. 179, 195; *Shotwell v. Murray*, 1 John. Ch. R. 512, 515; *Lyon v. Richmond*, 2 John. Ch. R. 51, 60; *Storrs v. Barker*, 6 John. Ch. R. 169, 170. —

§ 117. In illustration of this remark, we may refer to a case, commonly cited as an exception to the general rule. In that case the daughter of a freeman of London accepted a legacy of £10,000, left by her father's will, upon condition, that she should release her orphanage share; and, after her father's death, she received the legacy, and executed the release. Upon a bill, afterwards filed by her against her brother, who was the executor, the release was set aside, and she was restored to her orphanage share, which amounted to £40,000. Lord Chancellor Talbot, in making the decree, admitted, that there was no fraud in her brother, who had told her, that she was entitled to her election, to take an account of her father's personal estate, and to claim her orphanage share; but she chose to accept the legacy. His Lordship said, "It is true, it appears, the son (the defendant) did inform the daughter, that she was bound either to waive the legacy given by the father, or release her right to the custom. And so far she might know, that it was in her power to accept either the legacy or orphanage part. But I hardly think she knew, she was entitled to have an account taken of the personal estate of her father; and first to know what her orphanage part did amount to; and that, when she should be fully apprized of this, then, and

Mr. Chancellor Kent has laid down the doctrine in equally strong terms. "It is rarely," says he, "that a mistake in point of law, with a full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the injurious consequences of deception practised upon mankind, &c. It would therefore seem to be a wise principle of policy, that ignorance of the law, with a knowledge of the facts, cannot generally be set up as a defence." *Storrs v. Barker*, 6 John. Ch. R. 169, 170.

not till then, she was to make her election ; which very much alters the case. For, probably, she would not have elected to accept her legacy, had she known, or been informed, what her orphanage part amounted unto, before she waived it and accepted the legacy.”¹

§ 118. It is apparent, from this language, that the decision of his Lordship rested upon mixed considerations, and not exclusively upon mere mistake or ignorance of the law by the daughter. There was no fraud in her brother ; but it is clear, that she relied upon her brother for a knowledge of her rights and duties in point of law ; and he, however innocently, omitted to state some most material legal considerations, affecting her rights and duty. She acted under this misplaced confidence, and was misled by it ; which of itself constituted no inconsiderable ground for relief. But a far more weighty reason is, that she acted under ignorance of facts ; for she neither knew, nor had any means of knowing, what her orphanage share was, when she made her election. It was, therefore, a clear case of surprise in matters of fact, as well as of law. No ultimate decision was made in the case, it being compromised by the parties.

§ 119. The case of *Evans v. Llewellyn*² is expressly put in the decree upon the ground of surprise, “the conveyance having been obtained and executed by the plaintiffs improvidently.” It was admitted, that there was no sufficient proof of fraud or imposition practised upon the plaintiff, (though

¹ *Pusey v. Desbouvrie*, 3 P. Will. 315, 321 ; 2 Ball & Beatt. 182,

² 2 Bro. Ch. R. 150 ; S. C. 1 Cox, R. 333, more full.

the facts might well lead to some doubt on that point,) and the plaintiff was certainly not ignorant of any of the facts, which respected his rights. The Master of the Rolls (Sir Lloyd Kenyon, afterwards Lord Kenyon) said, "The party was taken by surprise. He had not sufficient time to act with caution; and therefore, though there was no actual fraud, it is something like fraud; for an undue advantage was taken of his situation. I am of opinion, that the party was not competent to protect himself, and therefore this Court is bound to afford him such protection, and therefore these deeds ought to be set aside, as *improvidently* obtained. If the plaintiff had in fact gone back, I should not have rescinded the transaction."¹

§ 120. The most general class of cases relied on, as exceptions to the rule, is that class, where the party has acted under a misconception, or ignorance of his title to the property, respecting which some agreement has been made, or conveyance executed. So far, as ignorance in point of fact of any title in the party is an ingredient in any of these cases, they fall under a very different consideration.² But so far, as the party, knowing all the facts, has acted upon a mistake of the law, applicable to his title, they are proper to be discussed in this place. Upon a close survey many, though not all, of the cases in the latter predicament, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresenta-

¹ 1 Cox, R. 340, 341.

² See *Ramsden v. Hylton*, 2 Ves. 304; *Cann v. Cann*. 1 P. Will. 727; *Farewell v. Coker*, cited 2 Meriv. 269.

tion, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise, which Equity uniformly regards as a just foundation for relief.¹

¹ See *Willan v. Willan*, 16 Ves. 82. — Mr. Jeremy (E1. Jurisd. P. 2, ch. 2, p. 366) seems to suppose, that there is something technical in the meaning of the word, *surprise*, as used in Courts of Equity; for, speaking upon what, he says, is technically called a case of surprise, he adds, "which [surprise] it seems is a term for the immediate result of a certain species of mistake, upon which this Court will relieve," a definition or description not very intelligible, and rather tending to obscure, than to clear up the subject. In another place (ch. 3, p. 383, note) he says, that surprise is often used as synonymous with fraud, but that "they may, perhaps, be distinguished by the circumstance, that in instances, to which the term *fraud* is applied, an unjust design is presupposed; but that in those, to which surprise is assigned, no fraudulent intention is to be presumed. In the former case one of the parties seeks to injure the other: in the latter both of them act under an actual misconception of the law." Whether this explanation makes the matter much clearer may be doubted. The truth is, that there does not seem any thing technical or peculiar in the word, *surprise*, as used in Courts of Equity. The common definition of Johnson sufficiently explains its sense. He defines it the act of taking unawares; the state of being taken unawares; sudden confusion or perplexity. When a Court of Equity relieves on the ground of surprise, it does so upon the ground, that the party has been taken unawares, that he has acted without due deliberation, and under confused and sudden impressions. The case of *Evans v. Llewellyn*, 2 Bro. Ch. R. 150, is a direct authority to this very view of the matter. There may be cases, where the word *surprise* is used in a more lax sense, and where it is deemed presumptive of, or approaching to, fraud. (1 Fonbl. Eq. B. 1, ch. 2, § 8, p. 125; *Earl of Bath and Montague's Case*, 3 Ch. Cas. 56, 74, 103, 114.) But it will always be found, that the true use of it is, where something has been done, which was unexpected, and operated to mislead or confuse the parties on the sudden, and on that account being deemed a fraud. See *Earl of Bath and Montague's Case*, 3 Ch. Ca. 56, 74, 114; *Irnham v. Child*, 1 Bro. Ch. 92; *Marquis of Townshend v. Strangrom*, 6 Ves. 327, 338; *Twining v. Morrice*, 2 Bro. Ch. R. 326; *Willan v. Willan*, 16 Ves. 81, 86, 87. In *Evans v. Llewellyn*, 1 Cox, R. 340, the Master of the Rolls, adverting to the cases of surprise, where an undue advantage is taken of the party's situation, said, "The cases of infants dealing with guardians, of sons with fathers, all proceed upon the same general principles, and establish this, that, if the party is in a

§ 121. It has been laid down as unquestionable doctrine, that, if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a Court of Equity will relieve him from the effect of his mistake.¹ But, that, where a doubtful question arises, such as a question respecting the true construction of a will, a different rule prevails; and a compromise, fairly entered into with due deliberation, will be upheld in a Court of Equity, as reasonable in itself, to terminate the differences by dividing the stake, and as supported by the principles of public policy.²

§ 122. In regard to the first proposition, the terms, in which it is expressed, have the material qualification, that the party has upon plain and settled principles of law a clear title, and yet is in gross ignorance, that he possesses any title whatsoever. Thus, in England, if the eldest son, who is heir at law of all the undisposed of fee simple estates of his ancestors, should, in gross ignorance of the law, knowing, however, that he was the eldest son, agree to divide the estates with a younger brother; such

situation, in which he is not a free agent, and is not equal to protecting himself, this Court will protect him. See 1 Fonb. Eq. B. 1, ch. 2, § 8. See post, a note on this point, under the head of Fraud.

¹ *Naylor v. Winch*, 1 Sim. & Stu. 555. See also 1 Ves. 126; *Moseley*, R. 364; 2 Jac. & Walk. 205; *Leonard v. Leonard*, 2 B. & Beatt. 180; *Dunnage v. White*, 1 Swanst. 137. See *Hunt v. Rousmaniere*, 8 Wheaton, R. 211 to 215; S. C. 1 Peters, Sup. C. R. 1, 15, 16; *Gudon v. Gudon*, 3 Swanst. 400. — In the very case, in which this doctrine is laid down in such general terms, relief was denied, because the claim was doubtful, and the compromise was after due deliberation. *Naylor v. Winch*, 1 Sim. & Stu. 555. Is there any distinction between ignorance of a principle of law, and mistake of a principle of law, as to this point? See 1 Madd. Ch. Pr. 61.

² *Ibid.*

an agreement, executed or unexecuted, would be held in a Court of Equity invalid, and relief accordingly granted. In a case thus strongly put, there may be ingredients, which would give a coloring to the case, independent of the mere ignorance of the law. If the younger son were not equally ignorant, there would be much ground to suspect fraud, imposition, misrepresentation, or undue influence on his part.¹ And if he were equally ignorant, the case would exhibit such a gross mistake of rights, as would lead to the conclusion of great mental imbecility, surprise, or blind and credulous confidence, on the part of the eldest son, as might fairly entitle him to the protection of a Court of Equity upon general principles.² Indeed, where the party acts upon the misapprehension, that he has no title at all in the property, it seems to involve in some measure a mistake of fact, that is, the fact of ownership, arising from a mistake of law. A party can hardly be said to intend to part with a right, or title, of whose existence he is wholly ignorant; and if he does not so intend, a Court of Equity will in ordinary cases relieve him from the legal effect of instruments, which surrender such unsuspected right, or title.³

¹ Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 366; *Leonard v. Leonard*, 2 B. & Beatt. 182.

² See *Hunt v. Rousmaniere*, 8 Wheaton, R. 211, 212, 214; S. C. 1 Peters, Sup. C. R. 15, 16. See Ayliffe's Pand. B. 2, tit. 15, p. 116.

³ See *Ramsden v. Hylton*, 2 Ves. 304; 2 Meriv. R. 269. — I am aware, that, generally, where the facts are known, the mistake of the title of heirship is treated as a mistake of law. Indeed in the civil law it is put, as the most prominent illustration of the distinction between ignorance of fact, and ignorance of law. *Si quis nesciat se cognatum esse, interdum in jure, interdum in facto errat.*

§ 123. One of the earliest cases on this subject is *Turner v. Turner*, in 31 Car. 2,¹ where the plaintiff's father had lent a sum on mortgage to A, who mortgaged lands to the father and his heirs, with a proviso, that, on payment of the money to the father, or his heirs, the premises were to be reconveyed to A. The plaintiff was executor of his father, and claimed the mortgage, as vesting in the executor, and not in the heirs. The defendant was the son and heir at law of the plaintiff's eldest brother, and set up a release of this mortgage, and an allotment of it to him, upon an agreement made among the heirs for a division of the personal estate, and a subsequent receipt of the mortgage by him. The plaintiff insisted, that at the time of the release, he looked on the mortgage as belonging to the defendant, as heir at law, and knew not his own title

Nam si et liberum se esse, et ex quibus natus sit, sciat, jura autem cognationis habere se nesciat, in jure errat. At si quis forte expositus, quorum parentum esset ignoret et serviat alicui, putans se servum esse fortasse; in facto magis quam in jure errat. Dig. Lib. 22, tit. 6, l. 1, § 2; Pothier, Pand. Lib. 22, tit. 6, § 1, n. 1; 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 4. Is ownership or heirship a conclusion of law, or of fact, or a mixed result of both? Is title to an estate a fact, or not? Is ignorance of the title, when all the facts, on which it legally depends, are known, ignorance of a fact, or of law? Mr. Powell puts the case of *Lansdowne v. Lansdowne*, (Moseley, R. 364,) as a case of misrepresentation of a fact, that is, that the party was not heir, when in fact he was heir. See 2 Powell on Contracts, 196. An error of law, in relation to heirship, is not, in the civil law, always fatal to the party. It will not deprive the party of a right resulting from his heirship; as if a nephew accounts with an uncle for the whole effects of a deceased brother, upon the mistake of law, that the uncle was sole heir, he shall be restored to his rights. 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 15. The rule of the Civil Law is, *Juris ignorantia non prodest adquirere volentibus; suum vero petentibus non nocet.* Dig. Lib. 22, tit. 6, l. 7.

¹ 2 Rep. in Ch. 81. [154.]

thereto ; and that the mortgage was worth £8,000, and the shares on the division only £250 a piece. The Lord Chancellor (Lord Nottingham) relieved the plaintiff, stating, that the plaintiff had an undoubted right to the mortgaged premises. This case is reported, without any statement of the grounds of the decision, so that it is impossible now to ascertain them. There may have been surprise, or imposition, or undue influence ; or the defendant might have well known the plaintiff's rights, and suppressed his knowledge of them. If it proceeded upon the naked ground of a mistake of law, it is not easily reconcilable with other cases. But, if it proceeded upon the ground, that the plaintiff had no knowledge of his title to the mortgage, and therefore did not intend to release any title to it, the release might well be relieved against, as going beyond the intentions of the parties, upon a mutual mistake of the law. It might, then, be deemed in some sort a mistake of fact, as well as of law. It was certainly a plain mistake of the settled law ; and, if both parties acted under a mutual misconception of their actual rights, they could not justly be said to have intended what they did. Mutual misapprehension of rights, as well as of the effect of agreements, may properly furnish, in some cases, a ground for relief.¹

§ 124. In *Bingham v. Bingham*,² there was a devise by A to his eldest son and heir B in fee tail, limiting the reversion to his own right heirs. B left no issue, and devised the estate to the plaintiff. The defendant had brought an ejectment for the

¹ *Willan v. Willan*, 16 Ves. 31, 82, 85.

² 1 Ves. 126 ; *Belt's Sup.* 79. See *Leonard v. Leonard*, 2 B. & Beatt. 183.

estate under the will ; and the plaintiff purchased the estate of the defendant for £80, under a mistake of law, that the devise to him by B could not convey the fee. Having paid the purchase money, he now brought his bill to have it refunded, alleging in the bill, that he was ignorant of the law, and persuaded by the defendant and his scrivener and conveyancer, that B had no power to make the devise. The Master of Rolls, sitting for Lord Hardwicke, granted the relief, saying, that, though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the Court was warranted to relieve against. It is certainly not very easy to reconcile this case with the general doctrine already stated. It is admitted by the report, that the defendant supposed he had a right ; and, indeed, it was probably a case of a family compromise upon a doubted, if not a doubtful right, and a mutual claim, and a mutual ignorance of the law. If so, it trenches upon that class of cases, and is inconsistent with them. If, on the other hand, the defendant's title was adverse, and not a family controversy, still, if the agreement was fairly entered into by the contending parties, it is difficult to perceive, why it should have been set aside, merely because in the event the title turned out to be in the plaintiff.¹ There were, probably, some circumstances in the case material to the decision, which have not reached us ; otherwise it would conflict with other cases already cited.²

¹ See *Leonard v. Leonard*, 2 B. & Beatt. 171, 180, 182.

² Mr. Belt, in his Supplement, (p. 79,) has given a more full account of the facts of the case, from the Register's Book, which I have followed. As a family compromise, or a compromise with a stranger, claiming an adverse right under a mutual mistake,

§ 125. The case of *Lansdowne v. Lansdowne*¹ was to the following effect. The plaintiff, who was heir at law, and son of the eldest brother, had a controversy with his uncle (who was the youngest brother) whether he or his uncle was heir to the estate of another deceased brother of his uncle ; and they consulted one Hughes, who was a school-master and their neighbour, and he gave it as his opinion, upon examining The Clerk's Remembrancer, that the uncle had the right, because lands could not ascend ; upon which the plaintiff and his uncle agreed to divide the lands between them, and in pursuance of this agreement they executed first a bond, and then conveyances of the shares fixed on for each. The plaintiff sought to be relieved against these instruments, alleging in his bill, that he had been surprised and imposed upon by Hughes and his uncle. The uncle being dead, his son and Hughes

but in good faith, it is difficult to find any support for it in other authorities. See *Storkley v. Storkley*, 1 V. & B. 23 ; *Cory v. Cory*, 1 Ves. 19. *Gordon v. Gordon*, 3 Swanston, R. 463, 467, 471, 474, 477 ; *Cann v. Cann*, 1 P. Will. 723 ; 1 Ves. & B. 30 ; *Naylor v. Wench*, 1 Sim. & Stu. 564, 565 ; *Leonard v. Leonard*, 2 B. & Beatt. 171, 180, 182. The case of *Corking v. Pratt*, (1 Ves. 400, and *Belt's Supplement*, 176,) seems to have turned upon a mistake, not of law, but of fact. But, then, it does not appear, that, at the time, either party knew what the personal estate would ultimately amount to, and it might have been a matter of great doubt, and a compromise accordingly made. If so, could it be afterwards set aside ? (See *Burt v. Barlow*, 3 Bro. Ch. R. 451 ; *Leonard v. Leonard*, 2 B. & Beatt. 171, 180.) If the case turned upon the ground of a suppression of facts, known to the mother, and not to the daughter, or upon undue influence or imposition, there could be little difficulty in supporting it. The case of *Ramsden v. Hylton*, (2 Ves. 304 ; *Belt's Supplement*, 350,) turned upon other considerations. How can the case of *Bingham v. Bingham*, as a case standing upon general principles, be reconciled with *Mildmay v. Hungerford*, (2 Vern. 243,) and *Pullen v. Ready*, (2 Atk. 587, 591.) See also *Evans v. Llewellyn*, 2 Bro. Ch. R. 150.

¹ *Moseley*, R. 364 ; S. C. 2 Jac. & Walk. 205.

were made defendants to the bill ; and Hughes, in his answer, admitted, that he had given the opinion, being misled by the book, and that he had recommended the parties to take farther advice ; but that the plaintiff had afterwards told him, that, if his uncle would, he would agree to share the land between them, let it be whose right it would, and thereby prevent all disputes and law suits. Upon which Hughes prepared the papers, and they were executed accordingly. Lord Chancellor King decreed, that it appeared, that the bond and conveyances “ were obtained by mistake, and misrepresentation of the law,” and ordered them to be given up to be cancelled. It was upon this occasion, that his Lordship is reported to have used the language already quoted, that the maxim, that ignorance of the law was no excuse, did not apply to civil cases ; and if his judgment proceeded upon that ground, it was (as has been already stated) manifestly erroneous. This case has been questioned on several occasions, and is certainly open to much criticism. It appears to have been a case of a family dispute and compromise, made by parties equally innocent, and upon a doubted question of title under a mutual mistake of the law. Under such circumstances, there is great difficulty in sustaining it in point of principle or authority. It was most probably decided by Lord King on the untenable ground already suggested. If indeed, it proceeded upon the ground of undue confidence in Hughes’s opinion, or was induced by his undue persuasions and influence, such a misrepresentation of the law by him might, under such circumstances, furnish a reason for relief.¹

¹ See *Fitzgerald v. Peck*, 4 *Littell*, 127.

But that does not appear in any report of the case.¹

§ 126. The distinction between cases of mistake of a plain and settled principle of law, and those of mistake of a principle of law, not plain to persons generally, but which is yet constructively certain, as a foundation of title, is not of itself very intelligible, or practically speaking, very easy of application, considered as an independent element of decision. In contemplation of law, all its rules and principles are deemed certain, although they have not, as yet, been recognised by public adjudications, upon the theoretical ground, that *id certum est, quod certum reddi potest*, and that decisions do not make the law, but only promulgate it. Besides ; what are to be deemed plain and settled principles ? Are they such, as have been long and uniformly established by

¹ The case of *Lansdowne v. Lansdowne* has been doubted on several occasions. The report in 2 Jac. & Walk. 205, is more full than that in *Moseley*, though to the same effect. The decree was, that the agreement "was obtained by a mistake and misrepresentation of the law," which, under certain circumstances, might furnish a ground for relief. The case was closely criticized and doubted by the Supreme Court of the United States, in *Hunt v. Rousmaniere*, 8 Wheaton, R. 214, 215, and 1 Peters, Sup. C. R. 15, 16. The Court seemed to think it might be explicable, upon the ground, that the plaintiff was ignorant of the fact, that he was the eldest son ; or, if he mistook his legal rights, that he was imposed upon by some unfair representations of his better informed opponent ; or that his ignorance of the law of primogeniture demonstrated such mental imbecility, as would entitle him to relief. There is an apparent error in the suggestion of the Supreme Court, that there was an award in the case. Hughes did not act as an arbitrator, but was merely consulted as a friend. If there had been a plain mistake of the law by an arbitrator, that would, of itself, in many cases, have been a ground of relief. *Corneforth v. Geer*, 2 Vern. 705 ; *Ridout v. Pain*, 3 Atk. 494. Mr. Powell (on Contracts, vol. 2, p. 196) puts the case of *Lansdowne v. Lansdowne* as an illustration of a mistake of a fact, that is, of heirship.

adjudications, only ? Or is a single decision sufficient ? What degree of clearness constitutes the line of demarkation ? If there have been decisions different ways at different times, which is to prevail ?¹ If a majority of the profession hold one doctrine and a minority another, is the rule to be deemed doubtful, or certain ?

§ 127. Take the case, commonly put on this head, of the construction of a will. Every person is presumed to know the law ; and, though opinions may differ, before an adjudication upon the construction of the will is made ; yet, when it is made, it is supposed always to have been certain. It may have been a question at the bar, whether a devise was an estate for life, or in tail, or in fee simple ; but when the Court has once decided it to be the one or the other, the title is always supposed to have been fixed and certain in the party from the beginning. It will furnish a sufficient title to maintain a bill for a specific performance of a contract of sale of that title.

§ 128. Where there is a plain and established doctrine on the subject, so generally known, and of such constant occurrence, as to be understood by the community at large as a rule of property, such as

¹ There is much masculine force in the reasoning of Mr. Chancellor Kent, on this subject, in *Lyon v. Richmond*, 2 John. Ch. R. 60. "The Courts (says he) do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of the law. Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle, which is safe and practicable in the common intercourse of mankind. And to furnish a subsequent judicial decision, in any one given case on a point of law, to open or annul every thing, that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences."

the common canons of descent, there a mistake in ignorance of the law, and of title founded on it, may well give rise to a presumption, that there has been undue influence, imposition, mental imbecility, surprise, or confidence abused. But in such cases the mistake of the law is not the foundation of the relief, but is the medium of proof to establish some other proper ground of relief.

§ 129. Lord Eldon, in a case of a family agreement, seems to have thought, that there might be a distinction between cases, where there is a doubt raised between the parties as to their rights, and a compromise is made upon the footing of that doubt, and cases where the parties act upon a supposition of right in one of the parties, without a doubt upon it, under a mistake of law. The former might be held obligatory, when the latter ought not to be.¹ But his Lordship admitted, that the doctrine attributed to Lord Macclesfield was otherwise, denying the distinction, and giving equal validity to agreements entered into upon a supposition of a right, and of a doubtful right.² It may be gathered, however, from these remarks, that Lord Eldon's own opinion was,

¹ *Storkley v. Storkley*, 1 V. & Beames, 31.

² *Ibid.* *Cann v. Cann*, 1 P. Will. 727 ; *Stapilton v. Stapilton*, 1 Atk. 10. — Lord Eldon was here speaking in the case of a family agreement, and not between strangers ; but it is by no means certain, that he meant to limit his observations to such cases. In *Dunnage v. White*, 1 Swanst. R. 137, 151, Sir Thomas Plumer said, " It is, then, insisted, that the deed may be supported as a family arrangement, according to the doctrine of *Stapilton v. Stapilton*, and *Cann v. Cann*. Undoubtedly parties entitled in different events, may, while the uncertainty exists, each taking his chance, effect a valid compromise. In *Stapilton v. Stapilton*, the legitimacy of the eldest son was doubtful. That was a question proper to be so settled ; and the settlement was a consideration, which gave effect to the deed.

that an agreement made, or act done, not upon a doubt of title, but upon ignorance of any title in the party, ought not to be obligatory upon him, though arising solely from a mistake of law.

§ 130. There may be a solid ground for a distinction between cases, where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases, where there is a doubt or controversy or litigation between parties, as to their respective rights.¹ In the former cases, (as has been already suggested,) the party seems to labor in some sort under a mistake of fact as well as of law.² He supposes, as matter of fact, that he has no title, and that the other party has a title to the property. He does not intend to release or surrender his title, but the act or agreement proceeds upon the supposition, that he has none. Lord Macclesfield, in the very case, in which the foregoing

¹ In *Evans v. Llewellyn*, (2 Bro. Ch. R. 150; S. C. 1 Cox, R. 333,) the Master of the Rolls (Lord Kenyon) did not seem to recognise any such distinction. The decree in that case seems to have been put upon the mere ground of surprise. But from Mr. Cox's Report, it would seem, that the party was not ignorant of the facts, or even of the law of his title. Mr. Brown represents the case a little differently. In *Lang v. The Bank of the United States*, Mr. Chief Justice Shippen, speaking of the effect of a mistake of right of a party, and that he was not barred by it, said, "The case of *Penn v. Lord Baltimore* is decisive to this point. I was present at the argument half a century ago, and heard Lord Hardwicke say, though it is not mentioned in the Report, that, if Lord Baltimore had made the agreement in question, under a mistake of his right to another degree of latitude, he ought to be relieved; but that he was not mistaken." The cases of *Ramsden v. Hylton*, 2 Ves. 304, and *Farewell v. Coker*, cited 2 Meriv. R. 269, were upon mistakes of fact, not of law; or rather attempts were there made to extend the releases to property never intended by the parties.

² § 129, — and see 2 Powell on Contracts, p. 196; *Dunnage v. White*, 1 Swanst. 137, 151; *Harvey v. Cooke*, 4 Russell, R. 34.

language already cited,¹ is attributed to him, is reported to have said, that, if the party releasing is ignorant of his right to the estate, or if his right is concealed from him by the person, to whom the release is made, there would be good reasons for setting aside the release.² But (he added) the mere fact, that the party making the release had the right, and was controverting it with the other party, can furnish no ground to set aside the release; for, by the same reason, there could be no such thing as compromising a suit, nor room for any accommodation. Every release supposes the party making it to have a right.³

§ 131. The whole doctrine of the validity of compromises of doubtful rights rests on this foundation.⁴ If they are otherwise unobjectionable, they will be binding, and the right will not prevail against the agreement of the parties; for the right must always be on one side or the other, and there would be an end of compromises, if they might be overthrown

¹ § 122.

² *Cann v. Cann*, 1 P. Will. 727; *Ramsden v. Hylton*, 2 Ves. 304.

³ 1 P. Will. 727. — In *Leonard v. Leonard*, (2 B. & Beatt. 180,) Lord Manners takes notice of a distinction between a mere release and a deed of compromise. The former supposes, that the parties know their rights, and the one surrenders his rights to the other; in the latter, both parties are ignorant of their rights, and the agreement is founded in that ignorance, and the party surrendering may in truth have nothing to surrender. But is it true, in all cases, that a release presupposes a right? Lord Redesdale has said, that the accepting of a release is in no case an acknowledgment, that a right existed in the releasor. It amounts only to this; I give you so much for not seeking to disturb me. *Underwood v. Lord Courtown*, 2 Sch. & Lefr. 67.

⁴ See the Dictum of Lord Hardwicke, in *Brown v. Pring*, 1 Ves. 407, 408, as to compositions made by parties, with their eyes open, and rightly informed.

upon any subsequent ascertainment of right contrary thereto.¹ If, therefore, a compromise of a doubtful right is fairly made between parties, its validity cannot depend upon any future adjudication of that right.² And where compromises of this sort are fairly entered into, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result.³ But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance be of fact or of law.⁴ It has been emphatically said, that

¹ *Cann v. Cann*, 1 P. Will. 727 ; *Stapilton v. Stapilton*, 1 Atk. 10 ; *Stockley v. Stockley*, 1 V. & B. 29, 31 ; *Naylor v. Winch*, 1 Sim. & Stu. 555 ; *Goodman v. Sayers*, 2 Jac. & Walk. 263.

² *Leonard v. Leonard*, 2 Ball. & Beatt. 179, 180 ; *Shotwell v. Murray*, 1 John. Ch. R. 516 ; *Lyon v. Lyon*, 2 John. Ch. R. 51 ; *Dunnage v. White*, 1 Swanst. 151, 152 ; *Harvey v. Cooke*, 4 Russell, 34.

³ *Leonard v. Leonard*, 2 Ball. & Beatt. 179, 180. See *Gordon v. Gordon*, 3 Swanst. 470.

⁴ *Id.* 180, 182 ; *Gordon v. Gordon*, 3 Swanst. R. 400, 467, 470, 473, 476. See also a case cited by Lord Thurlow, in *Mortimer v. Capper*, 1 Bro. Ch. R. 158. — In respect to compromises, it is often laid down, that they must be reasonable. (*Stapilton v. Stapilton*, 1 Atk. 10.) By this we are not to understand, that the consideration is adequate, and there is no great inequality ; but that the circumstances are such, as to demonstrate no undue advantage taken by either party of the other. Thus, in a case of compromise of doubtful rights, under a will, the Master of the Rolls, (Sir R. P. Arden,) said ; “ It (the agreement) must be reasonable. No man can doubt, that this Court will never hold parties acting upon their rights, doubts arising as to those rights, to be bound, unless they act with a full knowledge of all the doubts and difficulties, that arise. But, if parties will, with full knowledge of them, act upon them, though it turns out, that one gains a great advantage, if the agreement was fair and reasonable, at the time, it shall be binding. There was a case before the Lord Chancellor, who spoke to me upon it, in which it was held, that the Court will enforce such an agreement, though it

no man can doubt, that the Court of Chancery will never hold parties, acting upon their rights, to be bound, unless they act with full knowledge of all the doubts and difficulties, that do arise. But, if parties will, with full knowledge, act upon them, though it turns out, that one gains an advantage from a mistake in point of law, if the agreement was reasonable and fair at the time, it shall be binding.¹ And transactions are not, in the eye of a Court of Equity, to be treated as binding even as family arrangements, where the doubts existing, as to the rights alleged to be compromised, are not presented to the mind of the party interested.²

§ 132. There are cases of family compromises, where, upon principles of policy, for the honor or peace of families, the doctrine sustaining compromises has been carried farther. And it has been truly remarked, that in such family arrangements the Court of Chancery has administered an Equity, which is not applied to agreements generally.³ Such compromises, fairly and reasonably made, to save the honor of a family, as in cases of suspected illegitimacy, to prevent family disputes, and family forfeitures, are upheld with a strong hand; and are binding, when, in cases between strangers, the like agreements would not be enforced.⁴ Thus, it

turns out, that the parties were mistaken in point of law, *even supposing counsel's opinion was wrong.*" *Gibbons v. Caunt*, 4 Ves. 849. See *Stapilton v. Stapilton*, 2 Atk. 10; *Naylor v. Winch*, 1 Sim. & Stu. 555.

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

² *Henley v. Cooke*, 4 Russ. R. 34.

³ *Stockley v. Stockley*, 1 V. & Beames, 29.

⁴ *Stapilton v. Stapilton*, 1 Atk. 2, 10; *Cann v. Cann*, 1 P. Will. 727; *Stockley v. Stockley*, 1 V. & Beames, 30, 31; *Cory v. Cory*,

has been said, that, if on the death of a person seized in fee a dispute arises, who is heir, and there is room for rational doubt, as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all, that he knows, and is informed of; and at length they agree to distribute the property, under the notion, that the elder claimant is illegitimate, although it turns out afterwards, that he is legitimate; the Court will not disturb such an arrangement, merely because the fact of legitimacy is subsequently established.¹ Yet, in such a case, the party acts under a mistake of fact. In cases of ignorance of title, upon a plain mistake of the law, there seems little room to distinguish between family compromises and others.

§ 133. And where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, there has been manifested a strong disinclination by Courts of Equity to sustain even family settlements. It was upon this sort of mixed ground, that it was held in a recent case, that a deed executed by the members of a family, to determine their interests under the will and partial intestacy of an ancestor, was refused to be enforced; it appearing on

1 Ves. 19; *Leonard v. Leonard*, 2 B. & Beatt. 171, 180; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v); *Gordon v. Gordon*, 3 Swanst. 463, 470, 473, 476; *Dunnage v. White*, 1 Swanst. 137, 151; *Harvey v. Cooke*, 4 Russell, R. 34. — *Frank v. Frank*, (1 Ch. Cas. 84,) is generally supposed to have been decided upon this head. But it was apparently a case of misrepresentation; and Lord Manners has doubted its authority. *Leonard v. Leonard*, 2 B. & Beatt. R. 182, 183. *Cory v. Cory*, 1 Ves. 19, is very difficult to maintain; for the party was drunk at the time of the agreement.

¹ *Gordon v. Gordon*, 3 Swanst. R. 476; *Id.* 463.

the face of the deed, that the parties did not understand their rights, or the nature of the transaction ; and that the heir surrendered an unimpeachable title without consideration ; and evidence being given of his gross ignorance, habitual intoxication, and want of professional advice ; although there was no sufficient proof of fraud or undue influence, and there had been an acquiescence of five years.¹

§ 134. Cases of surprise, mixed up with a mistake of law, stand upon a ground peculiar to themselves, and independent of the general doctrine. In such cases, the agreements or acts are unadvised, and improvident, and without due deliberation ; and, therefore, they are held invalid, upon the common principle adopted by Courts of Equity, to protect those, who are unable to protect themselves, and of whom an undue advantage is taken.² Where the surprise is mutual, there is of course a still stronger ground to interfere ; for neither party has intended, what has been done. They have misunderstood the effect of their own agreements or acts ; or have presupposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist. Contracts made in mutual error, under circumstances material to their character and consequences, seem, upon general principles, invalid.³ *Non videntur, qui errant, consentire*, is a rule of the

¹ *Dunnage v. White*, 1 Swanst. R. 137.

² See *Evans v. Llewellyn*, 1 Cox, R. 333 ; S. C. 2 Bro. Ch. 150 ; *Marquis of Townshend v. Strangroom*, 6 Ves. 333, 338 ; *Chesterfield v. Janssen*, 2 Ves. 155, 156 ; *Ormond v. Hutchinson*, 13 Ves. 51.

³ *Willan v. Willan*, 16 Ves. 72, 81 ; *Clanes v. Higginson*, 1 Ves. & Beames, 524, 527 ; *Ramsden v. Hylton*, 2 Ves. 304 ; *Farewell v. Coker*, 2 Meriv. R. 269.

civil law; ¹ and it is founded in common sense and common justice. But in its application it is material to distinguish between error in circumstances, which do not influence the contract, and error in circumstances, which induce the contract.²

§ 135. There are also cases of peculiar trust, and confidence, and relation between the parties, which give rise to a qualification of the general doctrine. Thus, where a mortgagor had mortgaged an estate to a mortgagee, who was his attorney, and in settling an account with the latter, he had allowed him a poundage for having received the rents of the estate, in ignorance of the law, that a mortgagee was not entitled to such an allowance, which was professionally known to the attorney; it was held, that the allowance should be set aside. But the Master of the Rolls, upon that occasion, put the case upon the peculiar relation between the parties; and the duty of the attorney to have made known the law to his client, the mortgagor. He said, that he did not enter into the distinction between allowances in accounts from ignorance of law, and allowances from ignorance of fact; that he did not mean to say, that ignorance of law will generally open an account. But, that the parties standing in this relation to each other, he would not hold the mortgagor, acting in ignorance of his rights to have given a binding assent.³

¹ Dig. Lib. 50, tit. 17, l. 116, § 2.

² 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (t); Id. note (x).—Mr. Fonblanque has remarked, that the effect of error in contracts is very well treated by Pothier, in his Treatise on Obligations, Pt. 1, ch. 1, art. 3, § 1, 16. See also 1 Domat, Civil Law, B. 1, tit. 1, § 5, n. 10; Id. tit. 18, § 2; and ante, § 111, note 2.

³ Longstaffe v. Fenwick, 10 Ves. R. 405, 406.

§ 336. There are, also, some other cases, in which relief has been granted in Equity, apparently upon the ground of mistake of law. But they will be found, upon examination, rather to be cases of defective execution of the intent of the parties from ignorance of law, as to the proper mode of framing the instrument. Thus, where a husband, upon his marriage, entered into a bond to his wife, without the intervention of trustees, to leave her a sum of money, if she should survive him; the bond, though released at law by the marriage, was held good, as an agreement in Equity, entitling the wife to satisfaction out of the husband's assets.¹ And so, *e contrà*, where a wife before marriage executed a bond to her husband, to convey all her lands to him in fee; it was upheld in favor of the husband after marriage, as an agreement defectively executed, to secure to the husband the land as her portion.²

§ 137. We have thus gone over the principal cases, which are supposed to contain contradictions of, or exceptions to, the general rule, that ignorance of the law, with a full knowledge of the facts, furnishes no ground to rescind agreements, or to set aside solemn acts of the parties. Without undertaking to assert, that there are none of these cases, which are inconsistent with the rule, it may be affirmed, that the real exceptions to it are few, and generally stand upon some very urgent pressure of circumstances.³ The rule prevails in England in all cases of compromises of doubtful, and perhaps, in all cases of doubted rights; and especially, in all cases

¹ *Acton v. Pierce*, 2 Vern. R. 480; S. C. Prec. Ch. 237.

² *Cannel v. Buckle*, 2 P. Will. 243; Newl. on Contr. ch. 19, p. 345, 346; 1 Fonbl. Eq. B. 1, ch. 1, § 7.

³ See *Eden on Injunct.* ch. 2, p. 8, 9, 10, and note (b).

of family arrangements. It is relaxed in cases, where there is a total ignorance of title, founded in the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, and surprise.¹ In America, the general rule has been recognised, as founded in sound wisdom and policy, and fit to be upheld with a steady confidence. And hitherto the exceptions to it, (if any,) will be found not to rest upon the mere foundation of a naked mistake of law, however plain and settled the principle may be,

¹ The English Elementary writers on this subject treat it in a very loose and unsatisfactory manner, laying down no distinct rules, when mistakes of the law are, or are not, relievable in Equity; but contenting themselves for the most part with mere statements of the cases. Thus, Mr. Maddock, after saying, that a mistake of parties, as to the law, is not a ground for reforming a deed, founded on such mistake, and that it has been doubted, whether ignorance of law will entitle a party to open an account, proceeds to add, that there are several cases, in which a party has been relieved from the consequences of acts, founded on ignorance of the law. He afterwards states, that, in general, agreements relating to real or personal estate, if founded on mistake, (not saying, whether of law or fact,) will, for that reason, be set aside. 1 Madd. Ch. Pr. 60, 61, 62. Mr. Jeremy says, 'That ignorance of the law will not excuse, is a maxim respected in Equity, as well as at Law. "A knowledge of the law is consequently presumed, and therefore no mutual explanation of it is *primâ facie* required between the parties to a compact. If one of them should in truth be ignorant of a matter of law involved in the transaction, and the other should know him to be so, and should take advantage of the circumstance, he would, it is conceived, be guilty of a fraud; and although, if both should be ignorant thereof, it would be, what is technically called, a case of surprise, *it does not appear, that this Court will, in any other case, interfere upon a mere mistake of law.*" Jeremy on Eq. Jurisd. 366. Mr. Fonblanque has collected many of the cases in his valuable notes; but he has not attempted to expound the true principles, on which they turn, or the reason of the differences. 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v). Mr. Cooper, (Eq. Plead. p. 140,) disposes of the whole subject with the single remark, "On the ground of mistake or misconception of parties, Courts of Equity have also frequently interfered in a variety of cases." Lord Redesdale leaves it in the same unsatisfac-

nor upon mere ignorance of title, founded upon such mistake.¹

§ 138. It is matter of regret, that, in the present state of the law, it is not practicable to present in any more definite form the doctrine respecting the effect of mistakes of law; or to clear the subject from the obscurities and uncertainties, which still surround it. It may, however, be added, that, where a judgment is fairly obtained at law upon a contract, and afterwards, upon more solemn consideration of the subject, the point of law, upon which the cause was adjudged, is otherwise decided, no relief will be granted in Equity against the judgment, upon the ground of

tory manner. Mitford, Eq. Pl. by Jeremy, p. 129, (edit. 1827.) Mr. Newland (on Contracts in Equity, ch. 23, p. 432) says, "Cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, are entitled to the interference of the Court," (without making any distinction as to law or fact,) and cites *Turner v. Turner*, 2 Ch. R. 31; *Bingham v. Bingham*, 1 Ves. 126, and *Lansdowne v. Lansdowne*, Moseley, 364. He then adds, that it is different in compromises of doubtful rights. Lord Hardwicke is reported to have said, in *Langley v. Brown*, 2 Atk. 202, "that a person puts a groundless and unguarded confidence in another, is not a foundation in a Court of Equity to set aside a deed." This is true in the abstract. But groundless and unguarded confidence often constitutes with other circumstances a most material ingredient for relief.

¹ The general rule is affirmed in *Shotwell v. Murray*, 1 John. Ch. R. 512, 215; and *Lyon v. Richmond*, 2 John. Ch. R. 51, 60, and *Storrs v. Barker*, 6 John. Ch. R. 169, 170. In *Hunt v. Rousmaniere*, 8 Wheaton, R. 211, 214, 215, the Court said, "Although we do not find the naked principle, that relief may be granted on account of ignorance of the law, asserted in the books, we find no case, in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach of Equity." But, when the case came again before the Court, upon appeal, in 1 Peters, 1, 15, the Court (as has been already stated in the text) said, "We hold the general rule to be, that a mistake of this character, (that is, mistake arising from ignorance of the law,) is not a ground for reforming a deed, founded on such mistake. And whatever excep-

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mistake of the law ; for that would be to open perpetual sources for renewed litigation.¹

§ 139. And where a bona fide purchaser, for a valuable consideration, without notice, is concerned, Equity will not interfere to grant relief in favor of a party, although he has acted in ignorance of his title, upon a mistake of law ; for in such a case the purchaser has, at least, an equal right to protection with the party laboring under the mistake ; and where the equities are equal, the Court withholds itself from any interference.²

tions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters." (Ante, § 116.) But the Court added, that it was not their intention to lay it down, that there may not be cases, in which a Court of Equity will relieve against a plain mistake, arising from ignorance of law. *Id.* p. 17

¹ *Mitf. Pl. Eq.* by Jeremy, 131, 132 ; *Lyon v. Richmond*, 2 John. Ch. R. 51.

² See *Malden v. Merrill*, 2 Atk. 8 ; *Storrs v. Barker*, 6 John. Ch. R. 166, 169, 170. — In the Civil Law, there is much discussion as to the effect of error of law ; and no inconsiderable embarrassment exists in stating, in what cases of error in law the party is relievable, and in what not. It is certain, that a wide distinction was made between the operation of errors of law, and errors of fact. In omni parte in jure non eodem loco, quo facti ignorantia haberi debet ; cum jus finitum et possit esse et debeat ; facti interpretatio plerumque etiam prudentissimos fallat. *Dig. Lib. 22, tit. 6, l. 2.* Hence, in many cases, error of law will prejudice a party in regard to his rights ; but not error of fact, unless in cases of gross negligence. *Dig. Lib. 22, tit. 6, l. 7.* The general rule of the Civil Law seems to be, that error of law shall not profit those, who are desirous of acquiring an advantage or right ; nor shall it prejudice those, who are seeking their own right. *Juris ignorantia non prodest adquirere volentibus ; suum vero petentibus non nocet.* *Dig. Lib. 22, tit. 6, l. 7 ; Pothier, Pand. Lib. 22, tit. 6, § 2, n. 2, 3.* But then this text is differently interpreted by different Civilians. See 2 *Evans, Pothier, Appendix, No. xviii.* p. 408 to 447 ; *Ayliffe, Pand. B. 2, tit. 15, p. 116 ; 1 Domat. B. 1, tit. 8, § 1, art. 13 to 16.* Domat, after saying that error of law is not sufficient, as an error in fact is, to annul contracts, says, that

§ 140. In regard to the other class of mistakes, that is, mistakes of fact, there is not so much difficulty. The general rule is, that an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable in Equity. The ground of this distinction between ignorance of law and ignorance of fact seems to be, that, as every man of reasonable understanding is presumed to know the law, and to act upon the rights, which it confers or supports, when he knows all the facts, it is culpable negligence in him to do an act, or make a contract, and then to set up his ignorance of law, as a defence. The general maxim here, as in other cases, is, that the law aids those, who are vigilant, and not those, who slumber over their rights. And this reason is recognised as the foundation of the distinction, as well in the Civil Law, as in the Common Law.¹ But no person can be presumed to be

error or ignorance of law hath different effects in contracts; and then he lays down the following rules. (1.) If error or ignorance of law be such, that it is the only cause of a contract, in which one obliges himself to a thing, to which he is otherwise not bound, and there be no other cause for the contract, the cause proving false, the contract is null. (2.) This rule applies, not only in preserving the person from suffering loss, but also in hindering him from being deprived of a right, which he did not know belonged to him. (3.) But, if by an error or ignorance of the law one has done himself a prejudice, which cannot be repaired without breaking in upon the right of another, the error shall not be corrected to the prejudice of the latter. (4.) If the error or ignorance of the law has not been the only cause of the contract, but another motive has intervened, the error will not annul the contract. And he proceeds to illustrate these rules. 1 Domat, B. 1, tit. 18, § 1, art. 13 to 17. See also Ayliffe, Pand. B. 2, tit. 15; Id. tit. 17; 2 Evans, Pothier on Oblig. Appendix, xviii. p. 403; Id. 437; Pothier, Pand. Lib. 22, tit. 6, per tot.

¹ See Pothier, Pand. Lib. 22, tit. 6, § 3, n. 4, 5, 6, 7; § 4, n. 10, 11; Ayliffe's Pand. B. 2, tit. 15, p. 116; 1 Domat, B. 1, tit. 18, § 1; Doct. & Stud. Dial. 2, ch. 47; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v);

acquainted with all matters of fact ; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge ; and, therefore, an ignorance of facts does not import culpable negligence. And the rule applies, not only to cases, where there has been a studied suppression, or concealment of the facts by the other side, which would amount to fraud ; but also to many cases of innocent ignorance and mistake on both sides.¹

§ 141. The rule, as to ignorance or mistake of facts, entitling the party to relief, has the important qualification, that the fact is material to the act or contract, that is, that it is essential to its character, and an efficient cause of its concoction. For though there may be an accidental ignorance or mistake of a fact ; yet, if the act or contract is not materially affected by it, the party, claiming relief, will be denied it. This distinction may be easily illustrated by a familiar case. A buys an estate of B, to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, unknown at the time to the parties, that B has no title (as if

Pooley v. Ray, 1 P. Will. 355 ; Cosking v. Pratt, 1 Ves. 406 ; Hitchcock v. Giddings, 4 Price, R. 135 ; Leonard v. Leonard, 2 Ball. & Beatt. 171, 180 to 184 ; Pearson v. Lord, 6 Mass. R. 81 ; Garland v. Salem Bank, 9 Mass. R. 408 ; 1 Madd. Ch. Pr. 60 to 64.

¹ Ignorance of facts and mistake of facts are not precisely equivalent expressions. Mistake of facts always supposes some error of opinion as to the real facts ; but ignorance of facts may be without any error, but result in mere want of knowledge or opinion. Thus, a man knowing, that he has some interest in a parcel of land, may suppose it to be a *life estate*, when it is a *fee*. That is an error, or mistake. But if he is ignorant, that there exists any such land, and that he had any title to it, that very ignorance may lead him to form no opinion whatever on the subject. It may be a case of sheer negation of thought. The phrases are, however, commonly used as equivalent in legal discussions.

there was a nearer heir than B, who was supposed to be dead, but is, in fact, living); in such a case Equity would relieve the purchaser, and rescind the contract.¹ But suppose, A were to sell an estate to B, whose location was well known to each, and they mutually believed it to contain twenty acres, and in point of fact it contained only nineteen acres and three fourths of an acre, and the difference would not have varied the purchase in the view of either party; in such a case; the mistake would not be a ground to rescind the contract.²

§ 142. In cases of mutual mistake, going to the essence of the contract, it is by no means necessary, that there should be any presumptive fraud. On the contrary, Equity will often relieve, however innocent the parties may be. Thus, if one person should sell a messuage to another, which was, at the time, swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party; a Court of Equity would relieve the purchaser, upon the ground, that both parties intended the purchase and sale of a subsisting thing, and implied its existence, as the basis of their contract. It constituted the very essence and condition, therefore, of the obligation of their contract:³ The Civil Law holds the same principle. *Domum emis, cum eam et ego, et venditor combustam ignoraremus. Nerva, Sabinus*

¹ See 1 Evans, Pothier on Oblig. Pt. 1, ch. 1, art. 9, n. 17, 18; Bingham v. Bingham, 1 Ves. 126; 1 Fonbl. Eq. B. 1, ch. 2, § 7. See also Calenley v. Williams, 1 Ves. jr. 210, 211.

² See Smith v. Evans, 6 Binn. 102; Mason v. Pearson, 2 John R. 37.

³ Hitchcock v. Geddings, 4 Price, R. 135, 141; 2 Kent, Comm. Lect. 39, p. 469, (2d edit.) But see Sugden on Vendors, p. 237 and note I, 7th edition; Stent v. Bailis, 2 P. Will. 220.

*Cassius, nihil venisse, quamvis area maneat, pecuniamque solutam condici posse aiunt.*¹

§ 143. The same principle will apply to all other cases, where the parties mutually bargain for and upon the supposition of an existing right. Thus, if a purchaser should buy the interest of the vendor in a remainder in fee, expectant upon an estate tail, and the tenant in tail had at the time, unknown to both parties, actually suffered a recovery, and thus barred the estate in remainder, a Court of Equity would relieve the purchaser in regard to the contract, purely upon the ground of mistake.²

§ 144. The same principle will apply to cases of purchases, where the parties have been innocently under a mutual mistake as to the extent of the thing sold. Thus, if one party thought, that he had purchased bona fide, and the other thought he had not sold, a piece of land, as parcel of an estate, under a mutual mistake of the bargain; that would furnish a ground to set aside the contract; because (as has been said) it is impossible to say, that one shall be forced to give that price for part only, which he intended to give for the whole; or, that the other shall be obliged to sell the whole for what he intended to be the price of part only.³

¹ Dig. Lib. 18, tit. 1, l. 57; 2 Kent, Comm. Lect. 39, p. 468, 469, (2d edit.); Grotius de Jure Belli, B. 2, ch. 11, § 7. — If the house were partially burnt, the civilians seemed to have entertained different opinions, whether the vendor was bound by the contract, having an abatement of the price or allowance for the injury, or had an election to proceed or not with the contract, with such an abatement or allowance. See 2 Kent, Comm. Lect. 39, p. 469, (2d edit.); Pothier de Vente, n. 4. Grotius has made some sensible remarks upon the subject of error in contracts. Grotius de Jure Belli, B. 2, ch. 11, § 6.

² Ibid.

³ Calverley v. Williams, 1 Ves. jr. 210, 211.

§ 145. It is upon the same ground, that the Court proceeds, where an instrument in its terms is so general, as to release the rights of the party to property, to which he was wholly ignorant, that he had any title, and which was not within the contemplation of the bargain at the time, when it was made. In such cases, the Court restrains the instrument to the purposes of the bargain, and confines the release to the right intended to be released or extinguished.¹

§ 146. It is not, however, sufficient in all cases to give the party relief, that the fact is material ; but it must be such, as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For, if by such reasonable diligence he could have obtained knowledge of the fact, Equity will not relieve him ; since that would be to encourage culpable negligence. Thus, if a party has lost his cause at law from want of proof of a fact, which by ordinary diligence he could have obtained, he is not relievable in Equity ; for the general rule is, that if the party becomes remediless at law by his own negligence, Equity will leave him to bear the consequence.²

§ 147. Nor is it in every case, where even a material fact is mistaken or unknown without any default of the parties, that a Court of Equity will

¹ Farewell v. Cocker, cited 2 Meriv. R. 352 ; Ramsden v. Hylton, 2 Ves. 304.

² 1 Fonbl. Eq. B. 1, ch. 3, § 3 ; Penny v. Martin, 4 John. Ch. R. 566. — The rule of the Civil Law is the same. *Sed facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur. Quod, enim si omnes in civitate sciant, quod ille solus ignorat ? Et recte Labeo definit, scientiam neque curiosissimi neque negligentissimi hominis accipiendam ; verum ejus, qui eam rem diligenter inquirendo notam habere possit.* Dig. Lib. 22, tit. 6, l. 9, § 2 ; Pothier, Pand. Lib. 22, tit. 6, § 4, n. 11.

interpose. The fact may be unknown to both parties, or it may be known to one, and unknown to the other. If it is known to one party, and unknown to the other, that will in many cases afford a solid ground for relief; as, for instance, where it operates as a surprise, or fraud, upon the ignorant party.¹ But in all such cases, the ground of relief is, not the mistake or ignorance of material facts alone; but the unconscientious advantage taken of the party by the concealment of them.² For if the parties act fairly, and it is not a case, where one is bound to communicate the facts to the other upon the ground of confidence, or otherwise, there the Court will not interfere. Thus, if A, knowing that there is a mine in the land of B, of which he knows B is ignorant, should buy the land without disclosing the fact to B, for a price, in which the mine is not taken into consideration, B would not be entitled to relief from the contract; because A as the buyer, is not obliged, from the nature of the contract, to make the discovery.

§ 148. And it is essential, in order to set aside such a transaction, not only that an advantage should be taken; but it must arise from some obligation in the party, to make the discovery; not an obligation in point of morals, but of legal duty. In such a case the Court will not correct the contract, merely because a man of nice morals and honor would not have entered into it. It must fall within

¹ Jeremy on Eq. Jurisd. B. 3, ch. 2, p. 366, 367; Id. ch. 3, p. 387; Leonard v. Leonard, 2 Ball & Beatt. 179, 180, and the case cited in Mortimer v. Capper, by the Lord Chancellor, 4 Brown Ch. R. 158, 6 Ves. 24; Gordon v. Gordon, 3 Swanst. 462, 467, 471, 473, 476, 477.

² See East India Company v. Donald, 9 Ves. 275; Earl of Bath and Montague's case, 3 Ch. Cas. 56, 74, 103, 114.

some definition of fraud or surprise.¹ For the rules of law must be so drawn, as not to affect the general transactions of mankind; or to require, that all persons should in all respects be upon the same level, as to information, diligence, and means of judgment. Equity, as a practical system, though it will not aid immorality, does not affect to enforce mere moral duties. But its policy is to administer relief to the vigilant, and to put all parties upon the exercise of a searching diligence.² Where confidence is reposed, or the party is intentionally misled, relief may be granted; but in such a case, there is the ingredient of what the law deems a fraud. Cases, falling under this predicament, will more properly come in review in a subsequent part of this work.³

§ 149. A like principle applies to cases, where the means of information are open to both parties; and where each is presumed to exercise his own skill, diligence, and judgment in regard to all extrinsic circumstances. In such cases Equity will not relieve. Thus, if the vendee is in possession of knowledge, which will materially enhance the price of the commodity, and of which he knows the ven-

¹ *Fox v. Mackreth*, 2 Bro. Ch. R. 420; 1 Madd. Eq. Pl. 63, 64; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (n); *Earl of Bath & Montague's Case*, 3 Ch. Cas. 56, 74, 103, 114.

² 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (h).

³ See *Lebnard v. Leonard*, 2 Ball. & Beatt. R. 179, 180; *Gordon v. Gordon*, 3 Swanst. 463, 467, 470, 473, 476, 477. — See on this subject, 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (n); *Jeremy on Eq. Jurisd.* 383, &c.; 1 Madd. Eq. Pr. 204, &c.; *Laidlaw v. Organ*, 2 Wheat. R. 178; *Pothier de Vente*, n. 233 to 241; 2 Wheat. R. 185, note; *Smith v. Bank of Scotland*, 1 Dow. Parl. R. 294; *Pidcock v. Bishop*, 3 B. & Cresw. 605; *Etting v. Bank of U. S.*, 11 Wheat. R. 59, and cases there cited.

dor to be ignorant, he is not bound to communicate the facts to the vendor; and the contract will be held valid.¹ It has been justly observed, that it would be difficult to circumscribe the contrary doctrine within proper limits,² where the intelligence is equally accessible to both parties; and, where it is not, the same remark applies with the same force, if it is not a case of mutual confidence, or a designed misleading of the vendor.³ Thus, if a vendee has private knowledge of a declaration of war, or of a treaty of peace, or of other political arrangements, (in respect to which men speculate for themselves,) which materially affect the price of commodities, he is not bound to disclose the fact to the vendor at the time of his purchase; but, at least in a legal and equitable sense, he may be innocently silent. For there is no pretence to say, that upon such matters men repose confidence in each other, any more than they do in regard to other matters, affecting the rise and fall of markets.⁴ The like principle applies to all other cases, where the parties act upon their own judgment in matters mutually open

¹ Laidlaw v. Organ, 2 Wheat. R. 178, 195.

² Ibid.

³ Pothier, in his Treatise on the subject of Sales, has treated this subject with great ability; and he has cited the doctrines of the civil law, and the discussions of Civilians and writers upon natural law on this subject. While he contends strenuously for the doctrine of good faith and full discovery in all cases; he is compelled to admit, that the doctrines *in foro conscientiæ* have had little support in judicial tribunals, and, indeed, are not easily applicable to the common business of life. Indeed, he admits, that, though concealment of material facts by the vendee, which may enhance the price, is wrong *in foro conscientiæ*; yet that it would too much restrict the freedom of commerce to apply such a rule in civil transactions. See Pothier, *Traité de Vente*, P. 2, ch. 2, n. 233 to 242; Id. P. 3, § 2, n. 294 to 298; 2 Wheat. R. 185, note (c).

⁴ Ibid.

to them. Thus, if an agreement or composition of a cause is fairly made between parties with their eyes open, and rightly informed, a Court of Equity will not overhaul it, though there has been a great mistake in the exercise of judgment.¹

150. In like manner, where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a Court of Equity will not interpose.² For in such cases the equity is deemed equal between the parties; and, when it is so, a Court of Equity is generally passive, and rarely exerts an active jurisdiction. Thus, where there was a contract by A to sell to B, for £20, such an allotment, as the commissioners under an inclosure act should make for him; and neither party at the time knew, what the allotment would be, and were equally in the dark as to the value, the contract was held obligatory, although it turned out upon the allotment to be worth £200.³ The like rule will apply to all cases of sale of real or personal estate, made in good faith, where material circumstances affecting the value are equally unknown to both parties.

§ 151. The general ground, upon which all these distinctions proceed, is, that mistake or ignorance of facts in parties is a proper subject of relief, only

¹ *Brown v. Pring*, 1 Ves. 408.

² 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v); 1 Powell on Contr. 200; 1 Madd. Ch. Pr. 62 to 64.

³ Cited in *Mortimer v. Capper*, 2 Bro. Ch. R. 158; 6 Ves. 24; 1 Madd. Eq. Pr. 63; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v). See also *Pullen v. Ready*, 2 Atk. R. 592; *Gordon v. Gordon*, 3 Swanst. 463, 467, 470, 471, 473, 476, 477; *Ainslie v. Medlycott*, 9 Ves. 13.

when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations, which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts, which the other party has a right to know, and no surprise or imposition, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuriâ*.¹

§ 152. One of the most common classes of cases, in which relief is sought in Equity, on account of a mistake of facts, is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent.² In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, Equity will reform the contract, so as to make it conformable to the precise intent of the parties. But, if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, Equity will withhold relief; upon the ground, that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy.³

¹ See Jeremy on Eq. Jurisd. B. 3, Pt. 2, p. 358.

² See *Durant v. Durant*, 1 Cox, R. 58; *Calverley v. Williams*, 1 Ves. jr. 210.

³ *Shelburne v. Inchiquin*, 1 Bro. Ch. R. 338, 341; *Henkle v. Royal Assur. Company*, 1 Ves. 317; *Davis v. Symonds*, 1 Cox, R. 404;

§ 153. It has, indeed, been said, that, where there is a written agreement, the whole sense of the parties is presumed to be comprised therein; and it would be dangerous to make any addition to it in cases, where there does not appear to be any fraud in leaving out any thing; and that it is against the policy of the Common Law to allow parol evidence to add to, or vary the terms of such an agreement.¹ As a general rule, there is certainly much to recommend this doctrine. But, however correct it may be, as a general rule, it is very certain, that Courts of Equity will grant relief upon clear proof of a mistake, notwithstanding that mistake is to be made out by parol evidence.² Lord Hardwicke, upon an occasion of this sort, said; “No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that, if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified.”³ And this doctrine has been recognised upon many other occasions.⁴

Townshend v. Stangroom, 6 Ves. 332 to 338; *Woolam v. Hearn*, 7 Ves. 217, 218; *Gillespie v. Moon*, 2 John. Ch. R. 585; *Lyman v. United Insur. Co.*, 2 John. Ch. R. 630; *Graves v. Boston Marine Insur. Co.*, 2 Cranch, 442, 444.

¹ 1 Fonbl. Eq. B. 1, ch. 3, § 11, and note (o); *Irnham v. Child*, 1 Bro. Ch. 92, 93; *Woolam v. Hearn*, 7 Ves. 211; *Rich v. Jackson*, 4 Bro. Parl. R. 514; S. C. 6 Ves. 334, note; *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 4, § 1, p. 432; *Davis v. Symonds*, 1 Cox, R. 402, 404.

² *Marquis of Townshend v. Stangroom*, 6 Ves. 332, 333; 1 Fonbl. Eq. B. 1, ch. 3, § 11; *Shelburne v. Inchiquin*, 1 Bro. Ch. R. 338, 350; *Simpson v. Vaughan*, 2 Atk. 31; *Langley v. Brown*, 2 Atk. 203.

³ *Henkle v. Royal Assur. Co.*, 1 Ves. 314. See *Townshend v. Stangroom*, 6 Ves. 332 to 339; *Shelburne v. Inchiquin*, 1 Bro. Ch. R. 338, 350; Sugden on Vendors, p. 146 to 159, (7th edit.); *Hunt v. Rousmaniere*, 8 Wheat. R. 211; S. C. 1 Peters, Sup. C. R. 13.

⁴ *Ibid.* *Motteux v. London Assur. Co.*, 1 Atk. R. 545; *Gillespie*

§ 154. It is difficult to reconcile this doctrine with that, which studiously excludes the admission of parol evidence to vary, or control written contracts. The same principle lies at the foundation of each class of decisions, that is to say, the desire to suppress frauds, and to promote general good faith and confidence in the formation of contracts. The danger of setting aside the solemn engagements of parties, when reduced to writing, by the introduction of parol evidence, substituting other material terms and stipulations, is sufficiently obvious.¹ But what shall be said, where those terms and stipulations are suppressed, or omitted by fraud or imposition? Shall the guilty party be allowed to avail himself of such a triumph over innocence and credulity, to accomplish his base designs? That would be to allow a rule, introduced to suppress fraud, to be the most effectual promotion and encouragement of it. And, hence, Courts of Equity have not hesitated to entertain jurisdiction to reform all contracts, where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding it breaks in to some extent upon the uniformity of

v. Moon, 2 John Ch. R. 585; *Lyman v. United Insur. Co.*, 2 John. Ch. R. 630; *Simpson v. Vaughan*, 2 Atk. 33; *Langley v. Brown*, 2 Atk. 203; *Bust v. Barlow*, 3 Bro. Ch. R. 454; 5 Ves. 595; *Irnham v. Child*, 1 Bro. Ch. R. 94; *Baker v. Paine*, 1 Ves. 457; *Crosby v. Middleton*, Pr. Ch. 309; *Wiser v. Blachley*, 1 John. Ch. R. 607; *South Sea Co., v. D'Olliffe*, cited 1 Ves. 317; 2 Ves. 377; 5 Ves. 601; *Pitcairne v. Ogbourne*, 2 Ves. 375; 1 Fonbl. Eq. B. 1, ch. 3, § 11, and note (o); *Mitf. Pl.* 127, 128; *Clowes v. Higginson*, 1 Ves. & Beames, 524; *Ball v. Storie*, 1 Sim. & Stu. R. 210; *Marshall on Insurance*, B. 1, ch. 8, § 4; *Clinan v. Cooke*, 1 Sch. & Lefr. 32, &c. See *Sugden on Vendors*, p. 146 to 159, (7th edit.); *Andrews v. Essex F. & M. Insur. Co.*, 3 Mason, R. 10.

¹ See *Woolam v. Hearn*, 7 Ves. 219.

the rule, as to the exclusion of parol evidence to vary or control contracts; wisely deeming such cases to be a proper exception to the rule, and proving its general soundness.¹

§ 155. It is upon the same ground, that Equity interferes in cases of written agreements, where there has been an innocent omission, or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake. To allow it to prevail in such a case, would be to work a surprise, or fraud, upon both parties; and certainly upon the one, who was the sufferer. As much injustice would to the full be done under such circumstances, as would be by a positive fraud, or an inevitable accident.² A Court of Equity would be of little value, if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the intention of parties. It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the

¹ Newl. Eq. Contr. ch. 19; 1 Eq. Abridg. 20, pl. 5; *Filmer v. Gott*, 4 Bro. Parl. Cas. 230; 1 Fonbl. Eq. B. 1, ch. 2, § 8; *Id.* ch. 3, § 4, and note (n); *Irnham v. Child*, 1 Bro. Ch. R. 92; *Portmore v. Morris*, 2 Bro. Ch. R. 219; 1 Eq. Abridg. 19; *Id.* 20, Agreements, B.; *Hunt v. Rousmaniere*, 8 Wheat. R. 211; S. C. 1 Peters, Sup. C. R. 13. — In cases of this sort it is often said, that the admission of the parol evidence to establish fraud, or circumvention, is not so much to vary the contract, as to establish something collateral to it, which shows, that it ought not to be enforced. *Davis v. Symonds*, 1 Cox, R. 402, 404, 405. But in cases of mistake, the party often seeks to enforce the contract after insisting upon its being reformed. See also 3 Starkie on Evid. Pt. 4, p. 1015, 1016, 1018; *Pitcairne v. Ogbourne*, 2 Ves. 375, 376; *Baker v. Paine*, 1 Ves. 456.

² *Jóynes v. Statham*, 3 Atk. 388; *Ramsbottom v. Golden*, 1 Ves. & Beames, R. 168; 1 Fonbl. Eq. B. 1, ch. 2, § 8, note (z); *Id.* § 7, note (v).

benefit of the mistake, to resist the claims of justice, under the shelter of a rule framed to promote it.¹ In a practical view, there would be as much mischief done by refusing relief in such cases, as would be introduced by allowing parol evidence in all cases to vary written contracts.

§ 156. We must, therefore, treat the cases, in which Equity affords relief, and allows parol evidence to vary, and reform written contracts and instruments, upon the ground of accident and mistake, as properly forming, like cases of fraud, exceptions to the general rule, excluding parol evidence, and standing upon the same policy as the rule itself.² If the mistake should be admitted by the other side, the Court would certainly not overturn any rule of Equity by varying the deed; but it would be an Equity *dehors* the deed.³ And if it should be proved by other evidence entirely satisfactory, and equivalent to an admission, the reasons for relief would seem to be equally cogent and conclusive.⁴ It would be a great defect in the moral jurisdiction of the Court, if, under such circumstances, it was incapable of administering relief.⁵

¹ *Townshend v. Stangroom*, 6 Ves. 336, 337; *Gillespie v. Moon*, 2 John. Ch. R. 596; *Joyes v. Statham*, 3 Atk. 385; 3 Starkie, Evid. P. 4, p. 1018, 1019; *Pitcairne v. Ogbourne*, 2 Ves. R. 377, and *South Sea Company v. D'Oliffe*, there cited.

² *Joyes v. Statham*, 3 Atk. 388; *Ramsbottom v. Golden*, 1 Ves. & Beam. R. 168; 1 Fonbl. Eq. B. 1, ch. 2, § 11, note (o); Mitf. Eq. Pl. by Jeremy, 129; *Clowes v. Higginson*, 1 Ves. & Beam. R. 526, 527; *Ball v. Storie*, 1 Sim. & Stu. 210.

³ *Davis v. Symonds*, 1 Cox, R. 404, 405.

⁴ *Irnham v. Child*, 1 Bro. Ch. R. 92, 93.

⁵ See *Townshend v. Stangroom*, 6 Ves. 336, 337; *Gillespie v. Moon*, 2 John. Ch. R. 596.

§ 157. And this remark naturally conducts us back again to the qualification of the doctrine, (already stated,) which is insisted upon by Courts of Equity. Relief will be granted in cases of written instruments, only where there is a plain mistake, clearly made out by satisfactory proofs.¹ It is true, that this in one sense leaves the rule somewhat loose, as every Court is still to say, what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity belonging to the administration of justice generally; for in many cases different judges will differ as to the result and weight of evidence; and, consequently, they may make different decisions upon the same evidence.² But the qualification is most material, since it cannot fail to operate as a weighty caution upon all Judges; and it forbids relief, whenever the evidence is loose, equivocal, contradictory, or in its texture open to doubt, or opposing presumptions.³

§ 158. Many of the cases arising under this head have arisen under circumstances, which brought them within the reach of the Statute of Frauds, (as it is commonly called,) which requires certain con-

¹ Gillespie v. Moon, 2 John. Ch. R. 595 to 597; Lyman v. United Insurance Company, 2 John. Ch. R. 630; Henkle v. Royal Assurance Company, 1 Ves. 317; Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 368; Id. ch. 4, p. 490, 491; Townshend v. Stangroom, 6 Ves. 328, 339.

² See Lord Eldon's Remarks in Townshend v. Stangroom, 6 Ves. 333, 334.

³ Lord Thurlow, in one case, said, that the final evidence must be strong irrefragable evidence. Shelburne v. Inchiquin, 1 Bro. Ch. R. 347. If by this language his Lordship only meant, that the mistake should be made out by evidence clear of all reasonable doubt, its accuracy need not be questioned. But if he meant, that it should be in its nature or degree incapable of refutation, so as to be beyond any doubt, and beyond controversy, the language is too general.

tracts to be in writing. But the rule, as to rejecting parol evidence to contradict written agreements, is by no means confined to such cases ; but stands as a general rule of law, independent of that statute.¹ It is founded upon the ground, that the written instrument furnishes better evidence of the deliberate intention of the parties, than any parol proof can supply. And the exceptions to the rule, originating in accident and mistake, have been equally applied to written instruments within and without the Statute of Frauds. Thus, for instance, relief has been granted, or refused, according to circumstances, in cases of asserted mistakes in policies of insurance, even after a loss has taken place.³ And, in the same manner, Equity has interfered in other cases of contract, whether of a commercial or other nature.⁴

§ 159. The relief granted by Courts of Equity, in cases of this character, is not confined to mere

¹ *Woolam v. Hearn*, 7 Ves. 218 ; 1 Fonbl. Eq. B. 1, ch. 2, § 11, note (v) ; *Clowes v. Higginson*, 1 Ves. & Beames, R. 526 ; *Pitcairne v. Ogbourne*, 2 Ves. 375 ; *Sugden on Vendors*, ch. 3, § 3 ; *Parteriche v. Powlet*, 2 Atk. 383, 384 ; 3 Starkie on Evid. Pt. 4, tit. Parol Evid. p. 995 to 1020 ; *Davis v. Symonds*, 1 Cox, R. 402, 404, 405.

² *Ibid.*

³ *Motteux v. London Assur. Co.* 1 Atk. 545 ; *Henkle v. Royal Ex. Assur. Co.* 1 Ves. 317 ; *Lyman v. United Insur. Co.* 2 John. Ch. R. 630 ; *Head v. Boston Mar. Ins. Co.* 2 Cranch, 419, 444 ; *Marsh, Insur. B.* 1, ch. 3, § 4 ; *Ib. Andrews v. Essex Fire and Mar. Ins. Co.* 3 Mason, R. 10 ; *Delaware Ins. Co. v. Hogan.* 2 Wash. Cir. R. 5.

⁴ *Baker v. Paine*, 1 Ves. 456 ; *Getman's Executors v. Beardsley*, 2 John. Ch. R. 274 ; *Simpson v. Vaughan*, 2 Atk. 30 ; *Bishop v. Church*, 2 Ves. 100, 371 ; *Thomas v. Frazer*, 3 Ves. 399 ; *Finley v. Lynn*, 6 Cranch, 238 ; *Mitf. Pl. Eq. by Jeremy*, 129, 130 ; *Pitcairne v. Ogbourne*, 2 Ves. 375, and *South Sea Company v. D'Oliffe*, there cited, p. 377 ; 3 Starkie, Evid. Pt. 4, p. 1019 ; *Underhill v. Harwood*, 10 Ves. 225, 226 ; *Edwin v. East India Company*, 2 Vern. 210 ; *Edwards v. Child*, 2 Vern. 727.

executory contracts, by altering and conforming them to the real intent of the parties; but it is extended to solemn instruments, which are made by the parties, in pursuance of such executory or preliminary contracts. And, indeed, if the Court acted otherwise, there would be a great defect of justice, and the main evils of the mistake would remain irremediable. Hence, in preliminary contracts for conveyances, settlements, and other solemn instruments, the Court acts efficiently by reforming the preliminary contract itself, and decreeing a due execution of it, as reformed, if no conveyance or other solemn instrument in pursuance of it has been executed. And if such conveyance or instrument has been executed, it reforms the latter also, by making it such, as the parties originally intended.¹

§ 160. There is less difficulty in reforming written instruments, where the mistake is mainly or wholly made out by other preliminary written instruments, or memorandums of the agreement. The danger of public mischief, or private inconvenience, is far less in such cases, than it is in cases, where parol evidence is admitted. And, accordingly, Courts of Equity interfere with far less scruple to correct mistakes in the former, than in the latter.² Thus, marriage settlements are often reformed, and varied, so as to conform to the previous articles; and con-

¹ See Newland on Contr. ch. 19, p. 338 to 347; Mitf. Eq. Pl. by Jeremy, 128, 129, 130; Sugden on Vendors, p. 146 to 159, (7th edit.); South Sea Company v. D'Olive, cited 2 Ves. 377, 2 Atk. 525; Henkle v. Royal Ex. Assurance Comp. 1 Ves. 317, 318; Baker v. Paine, 1 Ves. 456.

² Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 363, 369; ch. 4, § 5, p. 490, 491; Durant v. Durant, 1 Cox, R. 58; Francis, Maxims, M. 113, p. 81, (edit. 1751); Toth. 229, [131].

veyances of real estate are in like manner controllable by the terms of the prior written contract.¹ And memorandums of a less formal character are admissible for the same purpose.² But in all such cases, it must plainly be made out, that the parties meant in their final instruments merely to carry into effect the arrangements designated in the prior contract or articles. For, as the parties are at liberty to vary the original agreement, if the circumstances of the case lead to the supposition, that a new intent has supervened, there can be no just claim for relief upon the ground of mistake.³ The very circumstance,

¹ The cases on this head are exceedingly numerous. Many of them will be found collected in Newland on Contr. ch. 19, p. 337; Com. Dig. Chancery, 3 Z. 11, 12; 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (p); Id. ch. 6, § 7, and notes; 2 Bridg. Dig. Marriage, ii, p. 300; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (v); Chitty, Eq. Dig. Settlement on Marriage, ix; Randall v. Randall, 2 P. Will. 464; Randall v. Willis, 5 Ves. 275; West v. Erissey, 2 P. Will. 349, and Mr. Cox's note (1), p. 355; Jeremy, Eq. Jurisd. Pt. 2, ch. 2, p. 378 to 382; 3 Starkie, Evid. tit. Parol Evid. 10, 19; Barstow v. Hillington, 5 Ves. 592. — In cases of marriage articles, the Court will frequently give a construction to the words more favorable to the presumed intent of the parties, than it does in some other cases. Thus, in marriage articles, if there be a limitation to the parents for life, with remainder to the heirs of their bodies, the latter words are, in Equity, generally construed to be words of purchase; and, accordingly, the Court will carry such articles into effect by way of strict settlement. Newland on Contr. ch. 19, p. 337; Fearne on Conting. Rem. p. 90 to 113, (7th edit. by Butler); 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (p); Id. ch. 6, § 7, and notes, § 16, note (e); Randall v. Willis, 5 Ves. 275; West v. Erissey, 2 P. Will. 349; and Mr. Cox's note, *ibid.* (1); Hineage v. Hunloke, 2 Atk. 455, and Sanders's note; Id. p. 457, (1); Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 378 to 382; Taggart v. Taggart, 1 Sch. & Lefr. 84; Blackburn v. Staples, 2 V. & Beam. 368, 369; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 377, 378, 379.

² Motteux v. London Assurance Company, 1 Atk. R. 545; Baker v. Paine, 1 Ves. 456.

³ 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (p); Id. ch. 6, § 1, 13; Legg v. Goldwire, Cas. Temp. Talb. 20; West v. Erissey, 2 P. Will. 349, and Mr. Cox's note (1), 355; Beaumont v. Bromley, 1 Turn.

that the final instrument of conveyance or settlement differs from the preliminary contract, affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates, that it was merely in pursuance of the original contract.¹ It is upon a similar ground, that Courts of Equity, as well as Courts of Law, act, in holding, that where there is a written contract, all antecedent propositions, negotiations, and parol interlocutions on the same subject, are to be deemed merged in such contract.²

§ 161. In cases of asserted mistake in written contracts, where the mistake is to be established by parol evidence, the question has often been mooted, how far a Court of Equity ought to be active in granting relief, by a specific performance in favor of the party seeking to reform the contract upon such parol evidence, and to obtain performance of it, when it shall stand reformed: It is admitted, that a defendant, against whom a specific performance of a written agreement is sought, may insist, by way of answer, upon the mistake, as a bar to such a bill; because he may insist upon any matter, which shows it to be inequitable to grant such relief. A Court of Equity is not, like a Court of Law, bound to enforce a written contract; but it may exercise its discre-

& Russ, R. 41; Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 379, 380; Id. 50, 51, 52, 53; ch. 4, § 5, p. 490, 491; Id. 1 Madd. Eq. Pr.

¹ Ibid.

² Rich v. Jackson, 4 Bro. Ch. R. 513; S. C. 6 Ves. 334, note; Pickering v. Dawson, 4 Taunt. 786; Kain v. Old, 2 B. & Cresw. 634; Parkhurst v. Van Cortlandt, 1 John. Ch. R. 273; S. C. 14 John. R. 15; 1 Fonbl. Eq. B. 1, ch. 3, § 8, 11; Davis v. Symonds, 1 Cox, R. 402, 404; Vandervoort v. Smith, 2 Cain. R. 155.

tion, when a specific performance is sought, and may leave the party to his remedy at law.¹ It will not, therefore, interfere to sustain a bill for a specific performance, when it would be against conscience and justice so to do. And, on the other hand, it seems equally clear, that a party may, as plaintiff, have relief against a written contract, by having the same set aside, and cancelled, or modified, whenever it is founded in mistake of material facts, and it would be unconscientious and unjust for the other party to enforce it at law or in Equity.² But the case, intended to be put, differs from each of these. It is, where the party plaintiff seeks, not to set aside the agreement, but to enforce it, when it is reformed and varied by the parol evidence. A very strong inclination of opinion has been repeatedly expressed by the English Courts not to decree a specific performance in this latter class of cases; that is to say, not to admit parol evidence to establish a mistake in a written agreement, and then to enforce it, as varied and established by that evidence. On various occasions such relief has, under such circumstances, been denied.³ But it is extremely difficult to per-

¹ Com. Dig. Chancery, 2 C. 16; *Joynes v. Statham*, 3 Atk. 388; *Garrard v. Grinling*, 2 Swanst. R. 257; *Pitcairne v. Oghourne*, 2 Ves. 375; *Legali v. Miller*, 2 Ves. 299; *Mason v. Armitage*, 13 Ves. 25; *Clark v. Grant*, 14 Ves. 519; *Hepburn v. Dunlop*, 1 Wheat. 197; *Clowes v. Higginson*, 1 Ves. & B. 524; *Winch v. Winchester*, 1 Ves. & B. R. 375; *Ramsbottom v. Golden*, 1 Ves. & B. 165; *Flood v. Finley*, 2 Ball & B. 53; *Clark v. Grant*, 14 Ves. 519; *Gillespie v. Moon*, 2 John. Ch. R. 585, 598; *Townshend v. Stangroom*, 6 Ves. 328; *Price v. Dyer*, 17 Ves. 357.

² See *Ball v. Storie*, 1 Sim. & Stu. R. and the cases there cited.

³ See *Woolam v. Hearn*, 7 Ves. 211; *Higginson v. Clowes*, 15 Ves. 516; *Clinan v. Cooke*, 1 Sch. & Lef. 38, 39; *Clowes v. Higginson*, 1 Ves. & B. 524; *Winch v. Winchester*, 1 Ves. & B. 375; *Clark v. Grant*, 14 Ves. 519; *Rich v. Jackson*, 6 Ves. 334; 4 Bro. Ch. R. 514;

ceive the principle, upon which such decisions can be supported, consistently with the acknowledged exercise of jurisdiction in the Court to reform written contracts, and to decree relief thereon. In America, Mr. Chancellor Kent, after a most elaborate consideration of the subject, has not hesitated to reject the distinction as unfounded in justice, and has decreed relief to a plaintiff standing in this precise predicament.¹

Ogilvie v. Foljambe, 3 Meriv. R. 53, 63; Townshend v. Stangroom, 6 Ves. 328; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 432; Clark v. Grant, 14 Ves. 519; Baker v. Paine, 1 Ves. 457; Gordon v. Uxbridge, 2 Madd. R. 106.

¹ Gillespie v. Moon, 2 John. Ch. R. 585; Keisselbrack v. Livingston, 4 John. Ch. R. 144. See also Baker v. Paine, 1 Ves. 456; Shelburne v. Inchiquin, 1 Bro. Ch. R. 339; Joynes v. Statham, 3 Atk. 388; 6 Ves. 337, 339; Ball v. Storie, 1 Sim. & Stu. 210; Burn v. Burn, 8 Ves. 573, 593; 1 Eq. Abridg. 20, Pl. 5; Sims v. Urrey, 2 Ch. Cas. 225; S. C. Freem. R. 16; Jalabert v. Chandos, 1 Eden, R. 372; Pember v. Matthews, 1 Bro. Ch. R. 52; Jones v. Sherrieff, cited 9 Mod. 88. The Hiram, 1 Wheaton, R. 444; Hunt v. Rousmaniere, 8 Wheaton, R. 211; 1 Peters, Sup. C. R. 13; Hogan v. Delaware Insur. Co. 1 Wash. C. C. R. 422; Shelburne v. Inchiquin, 3 Bro. Ch. R. 338; Walker v. Walker, 2 Atk. 93. But see 1 Sch. & Lefr. 39; Kekewick, Dig. Eq. Equity I. — The distinction stated in the text is certainly of a very artificial character, and difficult to be reconciled with the general principles of Courts of Equity. It is in effect a declaration, that parol evidence shall be admissible to correct a writing as *against* a plaintiff, but not in *favor* of the plaintiff, seeking a specific performance. There is, therefore, no mutuality or equality in the operation of the doctrine. The ground is very clear, that a Court of Equity ought not to enforce a contract, where there is a mistake, against the defendant, insisting upon, and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground, why Equity should interfere at the instance of the party, as plaintiff, and, cancel it; and if the mistake is partial only, why at his instance it should reform it. In these cases, the remedial justice is equal; and the parol evidence to establish it is equally open to both parties to use as proof. Why should not the party, aggrieved by a mistake in an agreement, have relief in all cases, where he is plaintiff, as well, as where he is defendant? Why should not parol evidence be equally admissible to establish a mis-

§ 162. Courts of Equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established ; but also when it is fairly implied from the nature of the transaction. Thus, in cases where there has been a joint loan of money to two or more obligors, and they are by the instrument made jointly liable, but not jointly and severally, the Court has reformed the bond, and made it joint and several, upon the reasonable presumption from the nature of the transaction, that it was so intended by the parties, and was omitted by want of skill or mistake.¹ The debt

take, as the foundation of relief in each case ? The rules of evidence ought certainly to work equally for the benefit of each party. Mr. Chancellor Kent has forcibly observed, "that it cannot make any difference in the reasonableness and justice of the remedy, whether the mistake was to the prejudice of one party or the other. If the Court has a competent jurisdiction to correct such mistakes, (and that is a point understood and settled,) the agreement, when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement, perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the Court, as when made accurate by the act of the parties. *Res accendunt lumina rebus.*" *Keisselbrach v. Livingston*, 4 John. Ch. R. 148, 149. It may be added, that, if the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff, than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the Statute of Frauds, if not more intelligible, it would, at least, have been less inconvenient in practice. But it does not appear to have been thus restricted, although the cases, in which it has been principally relied on have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defence of this sort, against a plaintiff seeking the specific performance of a contract, and the correction of a mistake, as it will be to enforce a contract against a defendant, which embodies a mistake to his prejudice. See *Comyns, Dig. Chancery*, 2 C. 4 ; 2 X. 3 ; 4 L. 2.

¹ *Simpson v. Vaughan*, 2 Atk. 31, 33 ; *Bishop v. Church*, 2 Ves. 100, 371 ; *Thomas v. Frazer*, 3 Ves. 399 ; *Devaynes v. Noble*,

being joint, the natural, if not the irresistible, inference in such cases is, that it is intended by all the parties, that in every event the responsibility should attach to each obligor, and to all equally. This can be done only by making the bond several, as well as joint; for otherwise, in case of the death of one of the obligors, the survivor or survivors only would at law be liable for the debt.¹ But where the inference of a joint original debt or liability is repelled, a Court of Equity will not interfere; for, in such a case, there is no ground to presume any mistake.²

§ 163. This doctrine has been very clearly expounded by Sir William Grant. When (says he) the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in Equity as the several debt of each partner, though at law it is only the joint debt of all. But there all the partners have had a benefit from the money advanced, or the credit given; and the obligation of all to pay exists independently of any instrument, by which the debt may have been secured. So, where a joint bond has in Equity been considered as several, there has been a credit previously given to the different persons, who have

Sleech's case, 1 Meriv. R. 538, 539; Sumner v. Powell, 2 Meriv. 30, 35; Howe v. Contencin, 1 Bro. Ch. R. 27, 29; Ex parte Kendall, 17 Ves. 519, 520; Underhill v. Howard, 10 Ves. 209, 227; Hunt v. Rousmaniere, 8 Wheaton, R. 212, 213; S. C. 1 Peters, Sup. C. R. 16; Weaver v. Shryork, 6 Serg. & R. 262, 264; Ex parte Symonds, 1 Cox, R. 200; Burn v. Burn, 3 Ves. 573, 583; Ex parte Bates & Henckill, 3 Ves. R. 400, note; Gray v. Chiswick, 9 Ves. 118.

¹ Weaver v. Shryork, 6 Serg. & R. 262, 264; Gray v. Chiswick, 9 Ves. 118.

² See Hunt v. Rousmaniere, 8 Wheaton, R. 212, 213, 214; S. P. 1 Peters, Sup. C. R. 16.

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entered into the obligation. It is not the bond, that first created the liability.¹

§ 164. It is upon the same ground, that a Court of Equity will not reform a joint bond against a mere surety, so as to make it several against him, upon the presumption of a mistake from the nature of the transaction ; but it will require positive proof of an express agreement by him, that it should be several, as well as joint.² And in other cases, where the obligation or covenant is purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the obligors or covenanters to do, what they have undertaken, (as a bond or covenant of indemnity for the acts or debts of third persons,) a Court of Equity will not extend by implication the responsibility from that of a joint to a several undertaking.³ But if there be an express agreement to that effect, or to any other effect, and it is omitted by mistake in the instrument, a Court of Equity will, under such circumstances, grant relief as fully against a surety or guarantee, as against the principal party.⁴

§ 165. In all cases of mistake in written instruments Courts of Equity will interfere only as between the original parties, or those claiming under them in privity, such as personal representa-

¹ Sumner v. Powell, 2 Meriv. R. 35, 36. See also Underhill v. Harwood, 10 Ves. 227.

² Ibid. Weaver v. Shryock, 6 Serg. & R. 262, 264, 265.

³ Sumner v. Powell, 1 Meriv. R. 30, 35, 36 ; Harrison v. Mirge, 2 Wash. R. 186 ; Ward v. Webber, 1 Wash. R. 274.

⁴ Ibid. Wiser v. Blachley, 1 John. Ch. R. 607 ; Crosby v. Middleton, Prec. Ch. 309 ; S. C. 2 Eq. Abridg. 183, F. ; Berg v. Radcliffe, 6 John. Ch. R. 302, 307, &c. ; Rawstone v. Parr, 3 Russell, R. 424 ; S. C. Id. 539.

tives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts.¹ As against bona fide purchasers for a valuable consideration without notice, Courts of Equity will grant no relief; because they have, at least, an equal equity to the protection of the Court.²

§ 166. In like manner, as Equity will grant relief in cases of mistake in written instruments, to prevent manifest injustice and wrong, and to suppress fraud, it will grant relief, and supply defects, where, by mistake, the parties have omitted any acts or circumstances, necessary to give due validity and effect to written instruments. Thus, Equity will supply any defect of circumstances in conveyances, occasioned by mistake, as of livery of seisin in the passing of freehold, or of a surrender in case of copyhold, or the like; so also misprisions and omissions in deeds, awards, and other solemn instruments, whereby they are defective at law.³ It will also interfere in cases of mistake in judgments and other matters of record, injurious to the rights of the party.⁴

¹ *Warwick v. Warwick*, 3 Atk. 293; Com. Dig. Chancery 2 C. 2; 4 J. 4.

² 1 Fonbl. Eq. B. 1, ch. 1, § 7, and notes; *Id.* ch. 3, § 11, note; *Newland on Contracts*, 344, 345; *Davis v. Thomas*, *Sugden on Vend. ch.* 3, p. 143, 159, (7th edit.); *Warwick v. Warwick*, 3 Atk. 290, 293; *Malden v. Merrill*, 2 Atk. 13; *West v. Erissay*, 2 P. Will. 349; *Powell v. Price*, 2 P. Will. 535.

³ 1 Fonbl. Eq. B. 1, ch. 1, § 7; *Id.* ch. 3, § 1, and the cases there cited; *Id.* ch. 2, § 7, and notes; *Francis, Maxims*, Max. 112, p. 81, (edit. 1751); Com. Dig. Chancery, Z.; *Kekewick, Dig. Chan. Equity I.*; *Newland on Contracts*, ch. 19, p. 342 to 350; *Jeremy on Eq. Jurisd. B.* 3, Pt. 2, ch. 2, p. 367, 368, 369; *Id.* ch. 4, § 5, p. 489, 490, 494, 495; *Thorne v. Thorne*, 1 Vern. R. 141; Com. Dig. Chancery, 2 T. 1, to 2 T. 7; 1 Madd. Ch. Pr. 42; *Id.* 55, 65; *Fothergill v. Fothergill*, 2 Freeman, R. 256, 257.

⁴ *Jeremy on Eq. Jurisd. B.* 3, Pt. 2, ch. 4, § 5, p. 492; *Barnsley v. Powell*, 1 Ves. 289; Com. Dig. Chancery, 3 W.

§ 167. The same principle applies to cases, where an instrument has been delivered up, or cancelled, under a mistake of the party, and ignorance of the facts material to the rights derived under it. A Court of Equity will in such a case grant relief, upon the ground, that the party is conscientiously entitled to enforce such rights, and that he ought to have the same benefit, as if the instrument were in his possession with its entire original validity.¹

§ 168. And, for the same reason, Equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument and the circumstances of the case, although the instrument may be drawn up in a very inartificial and untechnical manner. For, however just in general the rule may be, *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est*;² yet that rule shall not prevail to defeat the manifest intent and object of the parties, where it is clearly discernible on the face of the instrument, and the ignorance, or blunder, or mistake of the parties, has prevented them from expressing it in the appropriate language.³ Thus, if one in consideration of natural love should execute a feoffment, or a lease and release, or a bargain and sale, it would, notwithstanding the use of the technical words, be held to operate as a cove-

¹ East India Co. v. Donald, 9 Ves. 275; East India Co. v. Neave, 5 Ves. 173.

² Co. Litt. 147 a.

³ Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 367, 368; Smith v. Packhurst, 3 Atk. 136; Stapilton v. Stapilton, 1 Atk. 8; 1 Fonbl. Eq. B. 1, ch. 6, § 11, 13, and note (d); Id. § 16, and note (e); Id. § 18, and note (n).

nant, to stand seised.¹ And the same rule would be applied, if, under the like circumstances, instead of the words "bargain and sell" the words "give and grant," or "enfeoff, alien and confirm," should be used in a deed.²

§ 169. There is also another marked instance of the application of the remedial authority of Courts of Equity, and that is in regard to the execution of powers. In no case will Equity interfere, where there has been a non-execution of a power, as distinguishable from a trust.³ But, if there be a defective execution or attempt at execution of a power, there Equity will interpose and supply the defect, not universally indeed, but in favor of parties, for whom the person entrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the power. Thus, such a defective execution will be aided in favor of persons, standing upon a valuable or a meritorious consideration, as of a bona fide purchaser for a valuable consideration, a creditor, a wife, and a legitimate child;⁴ unless, indeed, such aid of the defective execution would, under all the circumstances, be

¹ Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, p. 367, 368; Thompson v. Attfield, 1 Vern. R. 40; Stapilton v. Stapilton, 1 Atk. 8; Thorne v. Thorne, 1 Vern. 141; Brown v. Jones, 1 Atk. 190, 191.

² Jeremy, *ibid*; Harrison v. Austin, 3 Mod. R. 237.

³ See Brown v. Higgs, 8 Ves. 570; Holmes v. Coghill, 7 Ves. 499; S. C. 12 Ves. 206; Tollet v. Tollet, 2 P. Will. 489; 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (v); Id. ch. 4, § 25, note (h) and (k); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 376, 377; Sugden on Powers, ch. 6, § 3.

⁴ 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (v); Id. ch. 4, § 25, and note (h), (i), (m); Id. ch. 5, § 2, and notes; Fothergill v. Fothergill, 2 Freem. R. 256, 257; Com. Dig. Chan. 4 H. 1, to 4 H. 4; 4 H. 6; Gilbert Lex Pretoria, p. 300 to 306; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 372.

inequitable to other persons, or be repelled by a counter equity.¹

§ 170. The reason for this distinction between the non-execution of a power and the defective execution of it has been stated with great clearness and precision by a learned judge. "The difference," said he, "is betwixt a non-execution and a defective execution of a power. The latter will always be aided in Equity under the circumstances mentioned, it being the duty of every man to pay his debts, and of a husband or father to provide for his wife or child. But this Court will not help the non-execution of a power, which is left to the free will and election of the party, whether to execute, or not; for which reason Equity will not say, he shall execute it, or do that for him, which he does not think fit to do for himself."² Indeed, a Court

¹ 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (v).

² The Master of the Rolls, in *Tollet v. Tollet*, 2 P. Will. 490. See also *Lassells v. Cornwallis*, 2 Vern. 465; *Crossling v. Crossling*, 2 Cox, R. 396; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and notes; *Id.* ch. 1, § 7, and notes; *Sugden on Powers*, ch. 6, § 3, p. 315. — Sir William Grant, in *Holmes v. Coghill*, (7 Ves. 596,) and Lord Erskine in the same case on appeal, (12 Ves. 212,) have expressed dissatisfaction with this distinction, as not quite consistent with the principles of law or Equity, though fully established by authority. The former, in reasoning on the case of a power to charge an estate with £2000, by deed or will, which had not been executed, and of which creditors sought the benefit, as if executed, said, "To say, that, without a deed or will, this sum shall be raised, is to subject the owner of the estate to a charge in a case, in which he never consented to bear it. The chance, that it may never be executed, or, that it may not be executed in the manner prescribed, is an advantage he secures to himself by the agreement; and which no one has a right to take from him. In this respect, there is no difference between a non-execution and a defective execution of a power. By the compact the estate ought not to be charged in either case. It is difficult, therefore, to discover a sound principle for the authority, this Court assumes, for aiding a defective execution in certain cases. If the intention of the party, possessing the power, is to be regarded,

of Equity, by acting otherwise in the case of a non-execution of a power, would, in effect, deprive the party of all discretion, as to the exercise of it ; and

and not the interest of the party to be affected by the execution, that intention ought to be executed, wherever it is manifested ; for the owner of the estate has nothing to do with the purpose. To him it is indifferent, whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed ? He is an absolute stranger to the Equity between the possessor of the power and the party, in whose favor it is intended to be executed. As against the debtor, it is right, that he should pay. But what Equity is there for the creditor to have the money raised out of the estate of a third person, in a case, in which it was never agreed, that it should be raised ? The owner is not heard to say, it will be a grievous burthen, and of no merit or utility. He is told, the case provided for exists : it is formally right : he has nothing to do with the purpose. But upon a defect, which this Court is called upon to supply, he is not permitted to retort this argument ; and to say, it is not formally right : the case provided for does not exist : and he has nothing to do with the purpose. In the sort of Equity upon this subject there is some want of equality. But the rule is perfectly settled ; and, though perhaps with some violation of principle, with no practical inconvenience."

There is much strength in this reasoning, but, after all, it is open to some question. The party, possessing the power, intends to execute it ; he proceeds to do an act, which he supposes to be a perfect act of execution. He possesses the right to do it in a formal manner ; he has failed, by mistake, against his intention. But the objects, in whose favor it is to be executed, possess a high, moral, and equitable claim for its execution. Under such circumstances, why should a mere mistake, beside the intention, defeat the bounty, or the justice of the possessor of the power ? If it were the case of an absolute property in the party, a Court of Equity would not fail to correct the mistake in favor of persons having such merits. Why should it hesitate, when the possessor of the power has done an act, intended to reduce it to the case of absolute property ? There is no countervailing Equity in such a case in favor of the other side. The case stands dryly upon a mere point of strict law. The difficulty in the argument is, that it deals with the power, as a mere naked authority to act, without considering, that, when the party elects to act, an interest attaches to him in the execution of the power ; and, that the election thus made is defeated, and the

thus would overthrow the very intention, manifested by the parties in the recreation of the power. On the contrary, when the party undertakes to execute a power, but, by mistake, does it imperfectly, Equity interposes to carry his very intention into effect, and that too, in aid of those, who are peculiarly within its protective favor, that is, creditors, purchasers, wives, and children.¹

§ 171. What shall constitute an execution, or preparatory steps or attempts towards the execution, of a power, entitling the party to relief in equity, on the ground of a defective execution, has been largely and liberally interpreted. It is clear, that it is not sufficient, that there should be a mere floating and indefinite intention to execute the power, without some steps taken to give it a legal effect.² Some steps must be taken, or some acts done, with this sole and definite intention, which are properly referable to the power.³ Lord Mansfield, at one time contended, that whatever is an equitable ought to be deemed a legal execution of a power, because there should be a uniform rule of property ; and that, if Courts of Equity would presume, that a strict adherence to the precise form, pointed out in the creation of the power, was not intended, and therefore not necessary, the same rule should prevail at law.⁴

interest thus created fails by mere mistake from the defective execution against parties, standing on a strong Equity, and in favor of those having none. See 1 Fonbl. Eq. B. 1, ch. 4, § 25.

¹ *Moody v. Reid*, 1 Madd. R. 516 ; *Jeremy on Eq. Jurisd. B. 3*, Pt. 2, ch. 3, p. 369, 370, 371, 372, 375 ; *Darlington v. Pulteney*, Cowp. 266, 267.

² See 2 Chance on Powers, ch. 23, § 3, art. 3005, 3011.

³ See Sugden on Powers, ch. 6, § 2.

⁴ *Darlington v. Pulteney*, Cowper, R. 267.

But this doctrine has been overruled. And, indeed, Courts of Equity do not deem the power well executed, unless the form is adhered to; but in cases of a meritorious consideration they supply the defect.¹

§ 172. And relief will be granted, not only when the defect arises from an informal instrument, not within the scope of the power; but when also the defect arises from the improper execution of the appropriate instrument. It is only necessary, that the intention to execute the power should clearly appear in writing. Thus, if the donee of a power merely covenant to execute it; or, by his will, desire the remainder man to create the estate; or enter into a contract, not under seal, to execute the power; or by letters promise to grant an estate, which he can execute only by the instrumentality of the power; in all these, and the like cases, Equity will supply the defect.² And even an answer to a bill in Equity, stating, that the party does appoint, and intends by a writing in due form to appoint, the fund, will be an execution of the power for this purpose.³

§ 173. The like rule prevails, where the instrument selected is not that prescribed by the power; provided it is not in its nature repugnant to the true object of the creation of the power. Thus, if the power ought to be executed by a deed, but it is executed by a will, the defective execution will be aided.⁴ But, if the power ought to be executed by a

¹ Sugden on Powers, ch. 6, § 1, p. 344; Id. § 359; Id. 361 to 370.

² Ibid.

³ Carter v. Carter, Moseley, R. 365.

⁴ Smith v. Ashton, 1 Freeman, R. 308; S. C. 1 Ch. Cas. 269; Sugden on Powers, ch. 6, (4th edit.) p. 362 to 367; Follett v. Follett, 2 P. Will. 489; 2 Chance on Powers, ch. 23, § 1, p. 507, 508; Id. 513 to 516; Com. Dig. Chancery, 4 H. 6.

will, and the donee of the power should execute a conveyance of the estate by a deed, it will be invalid; because such a conveyance, if it avail to any purpose, must avail to the immediate destruction of the power, since it could no longer be revokable, as a will would be. The intention of the power, in its creation, was to reserve an entire control over its execution, until the moment of the death of the donee, which would be defeated by any other instrument than a will.¹ An act done, not strictly according to the terms of the power, but consistent with its intent, may be upheld in Equity; but an act, which violates the very purpose, for which the power was created, and the very control over it, which it meant to vest in the donee, is repugnant to it, and cannot be deemed, in any just sense, to be an execution of it.

§ 174. But in other respects there is no difference between a defective execution of a power by a will or by a deed; for in each case the remedial interposition of Equity will be applied. Thus, if a power is required to be executed in the presence of three witnesses, and it is executed in the presence of two only, Equity will interfere in such a case. So, if the instrument, whether a deed or a will, is required to be signed and sealed, and it is without seal or signature, Equity will relieve.² And where a power is required to be executed by a will, by way of appointment, there the appointment will be aided, although the will is not duly executed according to the Statute of Frauds; for it takes effect,

¹ Reid v. Shergold, 10 Ves. R. 378, 380.

² Sugden on Powers, ch. 6, (4th edit.) p. 369, 370; 2 Chance on Powers, ch. 23, p. 507 to 510; Wade v. Paget, 1 Bro. Ch. R. 363.

not under the will, but under the instrument creating the power.¹ Equity will also, in many cases, grant relief, where, by mistake, a different kind of estate or interest is given, than is authorized by the power ; or there is an excess of the power.²

§ 175. In all these cases it is to be understood, that the intention and objects of the power are not defeated, or put aside ; but they are only informally attempted to be carried into effect. But, where there is a defect of substance in the execution of the power, as the want of coöperation of all the proper parties in the act, there Equity will not aid the defect.³

§ 176. But in all these cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief

¹ *Wilkes v. Holmes*, 9 Mod. 487, 488 ; *Shannon v. Bradstreet*, 1 Sch. & Lefr. 60 ; *Sugden on Powers*, ch. 6, (4th edit.) p. 362 to 367 ; 2 *Chance on Powers*, ch. 23, § 1, p. 507, 508. But see *Gilb. Lex Pretoria*, p. 301 ; *Duff v. Dalzell*, 1 Bro. Ch. R. 147 ; *Wagstaff v. Wagstaff*, 2 P. Will. 259, 260 ; *Longford v. Eyre*, 1 P. Will. 741 ; *Com. Dig. Chancery*, 4 H. 7. — Where an attempt is made to execute a power by a will, (the power authorizing an execution by will,) and the will is left imperfect, the same reason does not seem to exist, as may in other cases, to carry it into effect ; for it may have been thus left intentionally imperfect, from a change of purpose. Lord Eldon, in remarking upon the difficulties of some of the cases, has said, “ If, in the instance of a want of a surrender of copyhold estate, the circumstance of the devise being to a child is considered, the more natural conclusion is, that the testator, whatever his purpose was, going only so far towards it, and not proceeding to make it effectual, had dropt it. So, the attempt to execute a power is no more than an intimation, that the party means to execute it. But if all the requisite ceremonies have not been complied with, it cannot be supposed, that the intention continued until his death.” *Finch v. Finch*, 15 Ves. 51.

² *Sugden on Powers*, ch. 6, § 1, art. 2 ; *Id.* ch. 9, §, 8, art. 2 ; 2 *Chance on Powers*, ch. 23, § 7, p. 610, 613 ; *Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 2, p. 373, 374.*

³ See 2 *Chance on Powers*, ch. 23, § 2, p. 540 to 543 ; *Com. Dig. Chancery*, 4 H. 7.

must stand upon some equity, superior to that of the party, against whom he asks it. If the equities are equal, a Court of Equity is silent and passive.¹ Thus Equity will not relieve one person, claiming under a voluntary defective conveyance, against another, claiming under a voluntary conveyance; but will leave the parties to their rights at law.²

¹ See Sugden on Powers, ch. 6, (4th edit.), 353, 358; 2 Chance on Powers, ch. 23, § 1, p. 502, 504, 507.

² 1 Fonbl. Eq. B. 1, ch. 1, § 7, and notes; Id. ch. 4, § 25, and notes; Id. ch. 5, § 2, and notes; Goodwin v. Goodwin, 1 Rep. Chan. 92, [173,]; Mitf. Eq. Pl. by Jeremy, 274; Moody v. Reid, 1 Madd. R. 516; 1 Madd. Eq. Pr. 45, 46, 47; Sugden on Powers, ch. 6, (4th edit.) p. 353 to 358; 2 Chance on Powers, ch. 23, § 1, p. 502, 504, 507; Com. Dig. Chancery, 4 H. 7, 4 H. 9, 2 T. 9, 2 T. 10, 2 C. 8, 4 O. 7. — 'There is one peculiarity as to the execution of powers, which may be here taken notice of, although for obvious reasons this is not the place to discuss the nature and effects of powers generally. It is this. If a party possesses a general power to raise money for any purposes, so that, if he pleases, he may execute it in his own favor, and he executes it in favor of mere volunteers; in such a case, it will be deemed assets in favor of creditors, upon the ground of his absolute dominion over the power. But if he does not execute the power at all, there Equity will not deem it assets. 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (c); Id. § 25, note (n); Harrington v. Harte, 1 Cox R. 131; Townsend v. Windham, 2 Ves. 1; Troughton v. Troughton, 3 Atk. 656; Lassels v. Cornwallis, 2 Vern. 465; George v. Milbank, 9 Ves. 189; Hollo-way v. Millard, 1 Madd. R. 414, 419, 420; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 376, 377. The distinction is a nice one, and not very satisfactory. Why, when the party executes a power in favor of others, and not of himself, a Court of Equity should defeat his intention, though within the scope of the power, and should execute something beside that intention and contrary to it, is not very intelligible. If it be said, that he ought to be just, before he is generous; that addresses itself merely to his sense of morals. The power enabled him to give, either to himself, or to his creditors, or to mere voluntary donees. Why should a Court of Equity restrict this right of election, if bona fide exercised? Is not this to create rights not given by law, rather than to enforce rights secured by law? If the power was bona fide created, why should Equity interpose to change its objects or its operations? See Sugden on Powers, ch. 6, § 3.

For, regularly, Equity is remedial to those only, who come in upon an actual consideration; and therefore there should be some consideration, equitable or otherwise, express or implied.¹ But there are excepted cases, even from this rule; for a defective execution has been aided in favor of a volunteer, where a strict compliance with the power has been impossible, from circumstances beyond the control of the party; as where the prescribed witnesses could not be found; or an interested party, having possession of the deed creating the power, has kept it from the sight of the party executing the power, so that he could not ascertain the formalities required.²

§ 177. Nor will Equity supply a surrender, or aid the defective execution of a power to the disinheritance of the heir at law; or in favor of creditors, where there are, otherwise, assets sufficient to pay their debts;³ or against a purchaser for a valuable consideration without notice.⁴ And there are other cases of the defective execution of powers, where Equity will not interfere; as, for instance, in regard to powers, which are in their own nature *legal*, where Equity must follow the law, be the consideration ever so meritorious. As, for instance, the power of a tenant in tail to make leases under a *Statute*, if not executed in the requisite form, will not be made

¹ 1 Fonbl. Eq. B. 1, ch. 5, § 2, and the cases there cited, note (h); 1 Madd. Eq. Pr. 44, 45; Sugden on Powers, ch. 6, § 1.

² 1 Fonbl. Eq. B. 1, ch. 5, § 2, and note (h); Gilbert, *Lex Pretoria*, p. 305, 306.

³ 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (v); *Id.* ch. 4, § 25, note (e); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 369, 370, 371.

⁴ 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (v); *Id.* ch. 4, § 25, and note (f); *Id.* B. 6, ch. 3, § 3. But see *Id.* B. 1, ch. 1, § 7, note (t).

available in Equity, however meritorious the consideration may be.¹ And, indeed, it may be generally, though not universally, stated, that the remedial power of Courts of Equity does not extend to the supplying of any circumstance, for the want of which the Legislature has declared the instrument void ; for, otherwise, Equity would, in effect, defeat the very policy of the legislative enactments.²

§ 178. Upon one or both of these grounds, to wit, that there is no superior Equity, or that it is against the policy of the law, the remedial power of Courts of Equity does not extend to the case of a defective fine, as against the issue, or of a defective recovery, as against a remainder man ;³ unless, indeed, there be something in the transaction to affect the conscience of the issue or the remainder man.⁴

§ 179. In regard to mistakes in wills, there is no doubt, that Courts of Equity have jurisdiction to correct them, when they are apparent upon the face of the will, or are to be made out by construction of its terms ; for in cases of wills the intention will

¹ *Darlington v. Pulteney*, Cowp. R. 267 ; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (l). But see 2 Chance on Powers, ch. 23, § 2, p. 541 to 545. See Gilbert, *Lex Pretoria*, p. 304, 305, the difference of a power created by the parties. See also, 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (l).

² 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (t) ; *Hibbert v. Rolleston*, 3 Bro. Ch. R. 571, and Mr. Belt's note, *ibid.* Ex parte Bulteel, 2 Cox, R. 243 ; *Duke of Bolton v. Williams*, 2 Ves. jr. 138 ; *Curtis v. Perry*, 6 Ves. R. 739, 745, 746, 747 ; *Mestaer v. Gillespie*, 11 Ves. 621, 624, 625 ; *Dixon v. Ewart*, 3 Meriv. R. 321, 332 ; *Thompson v. Leake*, 1 Madd. R. 39 ; *Thomson v. Smith*, 1 Madd. R. 395. Quere, how it would be, where a due execution was prevented by fraud, accident, or mistake. See 11 Ves. 625 ; 1 Madd. 39 ; *Id.* 395.

³ 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (u) ; *Id.* ch. 5, § 2, and note (h).

⁴ 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (k) ; *Id.* 15 ; Com. Dig. Chancery, 2 T. 4, and 2 T. 8, 2 T. 10, 3 N. 2.

prevail over the words. But, then, the mistake must be apparent on the face of the will, otherwise there can be no relief; for at least, since the Statute of Frauds, which requires wills to be in writing, (whatever may have been the case before the statute,)¹ parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.²

§ 180. But the mistake, in order to lead to relief, must be a clear mistake or clear omission, demonstrable from the structure and scope of the will.³ Thus, if in a will there is a mistake in the

¹ Lord Hardwicke, in *Milner v. Milner*, (1 Ves. R. 106,) remarked, that, in the early ecclesiastical law, in accordance with the civil law, it was held, that errors in legacies might be corrected by the intention of the testator, contrary to his words; and he cited Swinburne on Wills, p. 7, ch. 5, § 13, and Godolphin, p. 3, 477, and the text of the civil law, and the commentary on Cujacius on the Digest, Lib. 30, tit. 1, l. 15; Cujacii Opera, (1758,) tom. 7 comment. ad. id. Leg. p. 993, 994. He then added, "Indeed, at the time some of these books were written, the Statute of Frauds had not taken place; and as the law [was] then held, parol evidence might be given in all Courts to explain a will. And perhaps some contrariety of opinions may have been on this subject, where the intention appears on the face of the will, and where not; almost all the authorities in the civil law agreeing in the first case, that the intention shall prevail against the words. But some have thought otherwise in the latter case, where the intention appeared, not on the face of the will, but only by matter *dehors*; although the better opinion even there is, that the intention shall prevail. However, that difficulty cannot be here, as the intention appears on the face of the will."

² *Milner v. Milner*, 1 Ves. R. 106; *Ulrich v. Litchfield*, 2 Atk. 373; *Hampshire v. Peirce*, 2 Ves. R. 216; *Bradwin v. Harper*, Ambler, R. 374; *Stebbing v. Walkey*, 2 Bro. Ch. R. 85; S. C. 1 Cox, R. 250; *Danvers v. Manning*, 2 Bro. Ch. R. 18; S. C. 1 Cox, R. 203; *Campbell v. French*, 3 Ves. 321; 1 Fonbl. Eq. B. 1, ch. 11, § 7, note (v); 1 Madd. Ch. Pr. 66, 67.

³ *Mellish v. Mellish*, 4 Ves. 49; *Phillips v. Chamberlaine*, Id. 51, 57; *Del Mare v. Rebello*, 3 Bro. Ch. R. 446; *Purse v. Snaplin*, 1 Atk. R. 415; *Holmes v. Custance*, 12 Ves. 279.

computation of a legacy, it will be rectified in Equity.¹ So, if there is a mistake in the name, or description, or numbers of the legatees intended to take;² or of the property intended to be bequeathed,³ Equity will correct it.

§ 181. But in each of these cases, the mistake must be clearly made out; for, if it is left doubtful, Equity will not interfere.⁴ And so, if the words of the bequest are plain, evidence of a different intention is inadmissible to establish a mistake.⁵ Neither will Equity rectify a mistake, if it does not appear, what the testator would have done in the case, if there had been no mistake.⁶

§ 182. The same principle applies, where a legacy is revoked, or is given upon a manifest mistake of facts. Thus, if a testator revokes legacies to A and B, giving as a reason, that they are dead; and they are, in fact, living, Equity will hold the revocation invalid, and decree the legacies.⁷ So, if a woman give a legacy to a man, describing him as her husband, and in point of fact the marriage is void, he having a former wife then living, the bequest will, in Equity, be decreed void.⁸

¹ *Milner v. Milner*, 1 Ves. R. 206; *Danvers v. Manning*, 2 Bro. Ch. R. 19; *Door v. Geary*, 1 Ves. R. 255, 256.

² *Stebbing v. Walkey*, 2 Bro. Ch. R. 85; *Rivers's Case*, 1 Atk. R. 410; *Parsons v. Parsons*, 1 Ves. jr. R. 266; *Beemont v. Fell*, 2 P. Will. 141; *Hampshire v. Peirce*, 2 Ves. 216; *Bradwin v. Harper*, Ambler, R. 374.

³ *Selwood v. Mildmay*, 3 Ves. 306; *Door v. Geary*, 1 Ves. 250.

⁴ *Holmes v. Custance*, 12 Ves. 279.

⁵ *Chambers v. Minchin*, 4 Ves. R. 676. But, see *Tonnereau v. Poyntz*, 1 Bro. Ch. R. 472, 480; *Powell v. Mouchett*, 6 Madd. R. 216; *Smith v. Streatfield*, 1 Meriv. R. 358.

⁶ See *Smith v. Maitland*, 1 Ves. 363.

⁷ *Campbell v. French*, 3 Ves. 321.

⁸ *Kennell v. Abbott*, 4 Ves. R. 808.

§ 183. But a false reason given for a legacy, or a revocation of a legacy, is not always a sufficient ground to avoid the act or bequest in Equity. To have such an effect, it must be clear, that no other motive mingled in the legacy, and that it constituted the substantial ground of the act or bequest.¹ The civil law seems to have proceeded upon the same ground. The Digest² says, *Falsam causam legato non obesse verius est; quia ratio legandi legato non cohæret. Sed plerumque doli exceptio locum habebit, alios legaturus non fuisse.* The meaning of this passage is, that a false reason given for the legacy is not of itself sufficient to destroy it. But there must be an exception of any fraud practised, from which it may be presumed the person giving the legacy would not, if that fraud had been known to him, have given it.³ And the same reasoning applies to a case of clear mistake.

¹ Kennell v. Abbott, 4 Ves. R. 302.

² Dig. Lib. 35, tit. 1, l. 72, § 6. See also Swinburne on Wills, Pt. 7, § 22, p. 557.

³ Kennell v. Abbott, 4 Ves. 808.

CHAPTER VI.

ACTUAL OR POSITIVE FRAUD.

§ 184. LET us now pass to another great head of concurrent jurisdiction in Equity, that of Fraud. It has been already stated, that in a great variety of cases fraud is remediable, and effectually remediable at law.¹ Nay, in certain cases, as of fraud in obtaining a will, whether of personal estate, or real estate, the proper remedy is exclusively vested in other Courts; in wills of personal estate in the Ecclesiastical Courts; and in wills of real estates in the Courts of Common Law.² But there are many

¹ 3 Black. Com. 431; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (r); 4 Inst. 84; *Bright v. Eynor*, 1 Burr. R. 396; *Jackson v. Burgott*, 10 John. R. 457, 462.

² 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (u); 3 Black. Com. 431; *Webb v. Cleverden*, 2 Atk. 424; *Kenrich v. Brownly*, 3 Bro. Parl. Cas. 358; *Bennet v. Wade*, 2 Atk. 324; *Andrews v. Pavis*, 2 Bro. Parl. Cas. 476; *Jeremy Eq. Jurisd. B. 3*, Pt. 2, ch. 4, § 5, p. 488, 489; *Pemberton v. Pemberton*, 13 Ves. 297; 1 *Hovenden on Frauds*, Introd. 17; *Cooper, Eq. Pl. 125*.—I use this qualified language, though broader language is often used by elementary writers, who assert, that Courts of Equity have jurisdiction to relieve against all frauds, except in cases of wills. (See *Cooper on Eq. Pl. 125*; 1 *Hovenden on Frauds*, Introd. p. 17.) Lord Hardwicke, in *Chesterfield v. Janssen*, 2 Ves. 155, said, "This Court has an undoubted jurisdiction to relieve against every species of fraud."

Yet there are some cases of fraud, in which Equity does not ordinarily grant relief; as in warranties, misrepresentations, and frauds, on the sale of personal property; but leaves the parties to their remedy at law. So also in cases of deceitful letters of credit. See *Russell v. Clarke's Ex'rs*, 7 Cranch, 89. But Lord Eldon has intimated, that in such cases relief might also be had in Equity, *Evans v. Bicknell*, 6 Ves. 182; and Mr. Chancellor Kent has affirmed the same doctrine; *Bacon v. Bronson*, 7 John. Ch. R. 201. In *Hardwick v. Forbes's Adm'r*, (1 Bibb. Ky R. 212,) the Court said, "It

cases, in which fraud is utterly irremediable at law ; and Courts of Equity, in relieving against it, often go, not only beyond, but even contrary to the rules of law.¹ And with the exception of wills, as above stated, the Courts of Equity may be said to possess a general, and perhaps a universal, concurrent jurisdiction with Courts of Law in cases of frauds cognizable in the latter ; and exclusive jurisdiction in cases of frauds beyond the reach of the Courts of Law.²

§ 185. The jurisdiction in matters of fraud is probably coëval with the existence of the Court of Chancery ; and it is equally probable, that, in the early history of the Court, it was principally exercised in matters of fraud, not remediable at law.³

is a well settled rule of law, that wherever a matter respects personal chattels, and lies merely in damages, the remedy is at law only, and for these reasons ; 1st. because Courts of law, are as adequate, as a Court of Chancery, to grant complete and effectual reparation to the party injured ; 2d. because the ascertainment of damages is peculiarly the province of a jury." And the Court farther suggested, that the same principle applied to a rateable deduction for fraud in like cases. But, that a Court of Equity might properly interfere in such cases, to set aside and vacate the *whole* contract, at the instance of a party injured, in a case of *suppressio veri*, or *suggestio falsi* ; not entering into the point of damages. *Waters v. Mattinglay*, 1 Bibb. R. 244.

¹ *Garth v. Cotton*, 3 Atk. 755 ; *Man v. Ward*, 2 Atk. 229 ; *Trenchard v. Wanley*, 2 P. Will. 167.

² *Colt v. Wollaston*, 2 P. Will. 156 ; *Stent v. Bailis*, 2 P. Will. 220 ; *Bright v. Eynon*, 1 Burr. 396 ; *Chesterfield v. Janssen*, 2 Ves. 155 ; *Evans v. Bicknell*, 6 Ves. 132. — The jurisdiction of the Courts of Equity, in regard to the frauds in obtaining wills, was formerly subject to much doubt, the Court sometimes asserting the jurisdiction ; at other times disclaiming it ; and at other times adopting an intermediate course ; holding the will good ; but declaring the party, who practised the fraud, a 'Trustee for the party prejudiced. Mr. Fonblanque, (on Eq. B. 1, ch. 2, § 3, note (u),) has collected and arranged the cases and stated the result, which is now decidedly settled against the jurisdiction.

³ 4 Inst. 84.

Its present active jurisdiction took its rise in a great measure from the abolition of the Court of Star Chamber, in the reign of Charles the First,¹ in which Court the plaintiff was not only relieved, but the defendant was punished for his fraudulent conduct. So that the interposition of Chancery before that period was generally unnecessary.²

§ 126. It is not easy to give a definition of fraud in the extensive signification, in which that term is used in Courts of Equity ; and it has been said, that these Courts have, very wisely, never laid down, as a general proposition, what shall constitute fraud,³ or any general rule, beyond which they will not go upon the ground of fraud, lest other means of avoiding the Equity of the Courts should be found out.⁴ Fraud is even more odious than force ; and Cicero has well remarked, *Cum autem duobus modis, id est, aut vi aut fraude fiat injuria ; fraus quasi vulpeculæ, vis, leonis videtur. Utrum homine alienissimum ; sed fraus odio digna majore.*⁵ Pothier says, that the term, *fraud*, is applied to every artifice made use of by one person, for the purpose of deceiving another.⁶ *On appelle Dol toute espèce d'artifice,*

¹ 16 Car. I, ch. 10.

² Fonbl. Eq. B. 1, ch. 2, § 12 ; 1 Madd. Ch. Pr. 89.

³ Mortlock v. Buller, 10 Ves. 306.

⁴ Lawley v. Hooper, 3 Atk. 279. — Lord Hardwicke, in his Letter to Lord Kaimes, of the 30th of June, 1759, (Parke's Hist. of Chan. p. 508,) says, "As to relief against frauds no invariable rules can be established. Fraud is infinite ; and were a Court of Equity once to lay down rules how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive." See also 1 Domat, Civil Law, B. 1, tit. 18, § 3, art. 1.

⁵ Cic. de Offic. Lib. 1, ch. 13.

⁶ 1 Pothier on Oblig. by Evans, Pt. 1, ch. 1, § 1, art. 3, n. 28, p. 19.

*dont quelqu'un se sert pour en tromper un autre.*¹ Servius, in the Roman Law, defined it thus, *Dolum malum machinationem quandam alterius decipiendi, cum aliud simulatur, et aliud agitur.* To this definition Labeo justly took exception, because a party might be circumvented by a thing done without simulation; and, on the other hand, without fraud, one thing might be done and another thing be pretended. And therefore he defined *Fraud* to be any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. *Dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam.* And this is pronounced in the Digest to be the true definition. *Labeonis Definitio vera est.*²

§ 187. This definition is beyond doubt sufficiently descriptive of what may be called positive, actual fraud, where there is an intention to commit a cheat or deceit upon another to his injury.³ But it can hardly be said to include the large class of implied or constructive frauds, which are within the remedial jurisdiction of a Court of Equity. Fraud, indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage

¹ Pothier, *Traité Des Oblig.* Pt. 1, ch. 1, n. 28.

² Dig. Lib. 4, tit. 3, l. 1, § 2; Id. Lib. 2, tit. 14, l. 7, § 9. See also 1 Domat, Civ. Law, B. 1, tit. 18, § 3, n. 1. See also 1 Bell, Comm. B. 2, ch. 7, § 2, art. 173; *Le Neve v. Le Neve*, 3 Atk. 654; S. C. 1 Ves. 64; Ambler, 446.

³ Mr. Jeremy has defined fraud to be a device, by means of which one party has taken an unconscientious advantage of the other. *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, p. 358.

is taken of another.¹ And Courts of Equity will not only interfere in cases of fraud to set aside acts done ; but will also, if by fraud acts have been prevented from being done by the parties, interfere, and treat the case exactly, as if the acts had been done.²

§ 188. Lord Hardwicke, in a celebrated case,³ after remarking, that a Court of Equity has an undoubted jurisdiction to relieve against every species of fraud, proceeded to give the following enumeration of frauds. First. Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. Secondly. It may be apparent from the intrinsic nature and subject of the bargain itself ; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other ; which are inequitable and unconscientious bargains, and of such even the Common Law has taken notice.⁴ Thirdly. Fraud, which may be presumed from the circumstances and condition of the parties contracting ; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the Court of Chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance. Fourthly. Fraud, which may be collected

¹ See 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (r) ; *Chesterfield v. Janssen*, 2 Ves. 155, 156.

² *Middleton v. Middleton*, 1 Jac. & Walk. 96 ; *Lord Waltham's case*, cited 11 Ves. 698.

³ *Chesterfield v. Janssen*, 2 Ves. 155.

⁴ See *James v. Morgan*, 1 Lev. 111.

and inferred in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement. Fifthly. Fraud in what are called catching bargains with heirs, reversioners, or expectants in the life of the parents, which indeed seems to fall under one or more of the preceding heads.

§ 189. Fraud, then, being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances, in which Courts of Equity grant relief under this head. It will be sufficient, if we here collect some of the more marked classes of cases, in which the principles, which regulate the action of Courts of Equity, are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.

§ 190. Before, however, proceeding to these subjects, it may be proper to observe, that Courts of Equity do not restrict themselves by the same rigid rules, as Courts of Law do, in the investigation of fraud, and the evidence and proofs required to establish it. It is equally a rule in Courts of Law and Equity, that fraud is not to be presumed; but it must be established by proofs.¹ Circumstances of mere suspicion, leading to no certain results, will not, in either of these Courts, be deemed sufficient

¹ In 10 Coke, R. 56, it is laid down, that covin shall never be intended or presumed at law, if it be not expressly averred, *Quia odiosa et inhonesta non sunt in lege præsumenda*, et, in facto, quod in se habet ad bonum et malum, magis de bono quam de malo præsumendum est. And this is in conformity to the rule of the civil law. *Dolum ex indiciis perspicuis probari convenit.* Cod. Lib. 2, tit. 21, l. 6.

ground to establish fraud.¹ But, on the other hand, neither of the Courts insist upon positive and express proofs of fraud; but deduces them from circumstances affording strong presumptions. But Courts of Equity will act upon circumstances, as presumptions of fraud, where Courts of Law would not deem them satisfactory proofs. In other words, Courts of Equity will grant relief upon the ground of fraud, established by presumptive evidence, which evidence Courts of Law would not always deem sufficient proofs to justify a verdict at law. It is in this sense, that the remark of Lord Hardwicke is to be understood, when he said, that "fraud may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that fraud must be *proved*, not *presumed*."² And Lord Eldon has illustrated the same proposition by remarking, that a Court of Equity will, as it ought, in many cases order an instrument to be delivered up, as unduly obtained, that a jury would not be justified in impeaching by the rules of law, which require fraud to be proved, and are not satisfied, though it may be strongly presumed.³

§ 191. One of the largest classes of cases, in which Courts of Equity are accustomed to grant relief, is where there has been a misrepresentation, or *suggestio falsi*.⁴ It is said, indeed, to be a very

¹ Trenchard v. Wanley, 2 P. Will. 166; Townsend v. Lowfield, 1 Ves. 35; 3 Atk. 534; Walker v. Symonds, 3 Swanst. R. 61; Bath & Montague's Case, 3 Ch. Cas. 85; 1 Madd. Ch. Pr. 208; 1 Fonbl. Eq. B. 1, ch. 11, § 9.

² Chesterfield v. Janssen, 2 Ves. 155, 156.

³ Fullager v. Clark, 18 Ves. 483.

⁴ Broderick v. Broderick, 1 P. Will. 240; Jarvis v. Duke, 1 Vern. 20; Evans v. Bicknell, 6 Ves. 173, 182.

old head of Equity, that, if a representation is made to another person, going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good, if he knows it to be false.¹ To justify, however, an interposition in such cases, it is not only necessary to establish the fact of misrepresentation; but that it is in a matter of substance, or important to the interests of the other party, and that it actually does mislead him.² For, if the misrepresentation was of a trifling or immaterial thing; or if the other party did not trust to it, or was not misled by it; or if it was vague and inconclusive in its own nature; or was upon a matter of opinion or fact, equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other; in these and the like cases there is no reason for a Court of Equity to interfere to grant relief, upon the ground of fraud.³

§ 192. Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression,⁴ in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud in the truest sense of the terms; there is an evil act with an evil intent; *dolum malum ad circumveniendum*. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to

¹ *Evans v. Bicknell*, 6 Ves. 173, 182.

² *Neville v. Wilkinson*, 1 Bro. Ch. R. 546; *Turner v. Harvey*, Jacob, Rep. 178; 1 Fonbl. Eq. B. 1, ch. 2, § 3.

³ See 1 Domat, B. 1, tit. 18, § 3, art. 2; *Trower v. Newcome*, 3 Meriv. R. 704; 2 Kent, Comm. Lect. 39, p. 484, (2d edit.)

⁴ See *Laidlaw v. Organ*, 2 Wheaton, R. 178, 195; *Pidlock v. Bishop*, 3 B. & Cresw. 605; *Smith v. The Bank of Scotland*, 1 Dow, Parl. R. 272; *Evans v. Bicknell*, 6 Ves. 173, 182.

mislead, as well as by positive assertions.¹ The Civil Law has well expressed this, when it says, *Dolo malo pactum fit, quotiens circumscribendi alterius causâ aliud agitur, et aliud agi simulatur.*² And again; *Dolum malum a se abesse præstare venditor debet, qui non tantum in eo est, qui fallendi causâ obscure loquitur, sed etiam qui insidiosè obscure dissimulat.*³ The case falls directly within one of the species of frauds enumerated by Lord Hardwicke, to wit, fraud arising from facts and circumstances of imposition.⁴

§ 193. Whether the party, thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally in morals and law as unjustifiable, as the affirmation of what is known to be positively false.⁵ And even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party.⁶

¹ 3 Black. Com. 165; 2 Kent, Com. Lect 39, p. 484, (2d edit.); Laidlow v. Organ, 2 Wheaton, 195; 1 Dow, Parl. R. 272.

² Dig. Lib. 2, tit. 14, l. 7, § 9.

³ Dig. Lib. 18, tit. 1, l. 43, § 2; Pothier de Vente, n. 234, 237, 238.

⁴ Chesterfield v. Janssen, 2 Ves. 155. — In Neville v. Wilkinson, 1 Bro. Ch. R. 546, the Lord Chancellor (Thurlow) said, "It has been said, here is no evidence of actual fraud on R; but only a combination to defraud him. A Court of Justice would make itself ridiculous, if it permitted such a distinction. Misrepresentation of circumstances is admitted, and there is positively a deception." And he added, "If a man, upon a treaty for any contract, will make a false representation, by means of which he puts the party bargaining under a mistake, upon the terms of the bargain, it is a fraud. It misleads the parties contracting, on the subject of the contract."

⁵ Ainslie v. Medlecott, 9 Ves. 21; Graves v. White, Freem. R. 57. See also Pearson v. Morgan, 2 Bro. Ch. R. 389.

⁶ See Pearson v. Morgan, 2 Bro. Ch. R. 389; Burrows v. Locke,

§ 194. These principles are so consonant to the dictates of natural justice, that it requires no argument to enforce or support them. The principles of natural justice and sound morals do, indeed, go farther ; and require the most scrupulous good faith, candor, and truth, in all dealings whatsoever. But Courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction, far short of the principles deducible *ex æquo et bono* ; and, with reference to the concerns of human life, they endeavour to aim at practical good and general convenience. Hence, many things may be reprov'd in sound morals, which are left without any remedy, except by an appeal *in foro conscientiae* to the party himself.¹ Pothier has expounded this subject with his usual force and sterling sense. “As a matter of conscience,” says he, “any deviation from the most exact and scrupulous sincerity is repugnant to the good faith, that ought to prevail in contracts. Any dissimulation concerning the object of the contract, and what the opposite party has an interest in knowing, is contrary to that good faith : for, since we are commanded to love our neighbour as ourselves, we are not permitted to conceal from him

10 Ves. 475 ; *De Mannville v. Compton*, 1 Ves. & B. 355 ; *Ex parte Carr*, 3 Ves. & B. 111 ; 1 Marsh. on Insur. B. 1, ch. 10, § 1. — In *Pearson v. Morgan*, 2 Bro. Ch. R. 385, 388, the case was that A, being interested in an estate in fee, which was charged with £8000 in favor of B, was applied to by C, who was about to lend money to B, to know if the £8000 was still a subsisting charge on the estate. A stated, that it was, and C lent his money to B accordingly ; it appearing afterwards, that the charge had been satisfied, it was nevertheless held, that the money lent was a charge on the lands in the hands of A's heirs, because he either knew, or ought to have known, the fact of satisfaction, and his representation was a fraud on C.

¹ Pothier *De Vente*, n. 234, 235, 239.

any thing, which we should be unwilling to have had concealed from ourselves under similar circumstances. But in civil tribunals a person cannot be allowed to complain of trifling deviations from good faith in the party, with whom he has contracted. Nothing, but what is plainly injurious to good faith, ought to be there considered as a fraud, sufficient to impeach a contract ; such as the criminal manœuvres and artifices employed by one party to induce the other to contract. And these should be fully substantiated by proof. *Dolum non nisi perspicuis indicii probari convenit. L. 6, C. de Dol. mal.*"¹

§ 195. The doctrine of law, as to misrepresentation, being in a practical view such as has been already stated, it may not be without use to illustrate it by some few examples. In the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury.² Thus, if a person, owning an estate, should sell it to another, representing, that it contained a valuable mine, which constituted an inducement to the other side to purchase, and the representation were utterly false, the contract for the sale, and the sale itself, if completed, might be avoided for fraud ; for the representation would go to the essence of the contract.³ But if he should represent, that it contained twenty acres of wood-land or meadow, and the actual quantity was only nineteen acres and three quarters, there, if the difference

¹ 1 Pothier on Oblig. by Evans, p. 19, n. 30.

² Phillips v. Duke of Bucks, 1 Vern. 227 ; 1 Fonbl. Eq. B. 1, ch. 2, § 8.

³ See Lowndes v. Lane, 2 Cox, R. 363.

would have made no distinction to the purchaser, in price, value, or otherwise, it would not, on account of its immateriality, have avoided the contract. So if a person should sell a ship to another, representing her to be five years old, of a certain tonnage, coppered and copper fastened, and fully equipped, and found with new sails and rigging; either of these representations, if materially untrue, so as to affect the essence or value of the purchase, would avoid it. But a trifling difference in either of these ingredients, in no way impairing the fair value, or price, or material to the purchaser, would have no such effect. As, for instance, if the ship was a half ton less in size, was a week more than five years old, was not copper fastened in some unimportant place, and was deficient in some trifling rope, or had some sails, which were in a very slight degree worn; for, under such circumstances, the differences must be treated as wholly inconsequential.¹ The rule of the civil law here applies. *Res bonâ fide vendita propter minimam causam inempta fieri non debet.*²

§ 196. So if an executor of a will should obtain a release from a legatee upon a representation, that he had no legacy left him by the will, which was false;³ or if a devisee should obtain a release from the heir at law upon a representation, that the will was duly executed,⁴ when it was not; in each of these cases the release might be set aside for fraud.

¹ See 1 Domat, B. 1, tit. 2, § 11, art. 12.

² Dig. Lib. 18, tit. 1, l. 54.

³ Jarvis v. Duke, 1 Vern. 19.

⁴ Broderick v. Broderick, 1 P. Will. 239, 240; Parey v. Desbouvrie, 3 P. Will. 318.

But if, in point of fact, in the first case, the legacy, though given in the will, had been revoked by a codicil ; or, in the second case, if the will had been duly executed, though not at the time or in the manner, or under the circumstances, stated by the devisee ; the misrepresentation would not avoid the release, because it is immaterial to the rights of either party.

§ 197. In the next place, the misrepresentation must not only be in something material, but it must be in something, in regard to which the one party places a known trust and confidence in the other.¹ It must not be a mere matter of opinion, equally open to both parties for examination and inquiry, and where neither party is presumed to trust to the other, but to rely on his own judgment. Not but that misrepresentation, even in a matter of opinion, may be relieved against, as a contrivance of fraud in cases of peculiar relationship or confidence, or where the other party has justly reposed upon it, and has been misled by it. But, ordinarily, matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against ; because they are not presumed to mislead, or influence the other party, when each has equal means of information. Thus, a false opinion; expressed intentionally by the buyer to the seller, of the value of the property offered for sale, where there is no special confidence, or relation, or influence between the parties, and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a

¹ See *Smith v. The Bank of Scotland*, 1 Dow, Parl. R. 272 ; *Laidlaw v. Organ*, 2 Wheaton, R. 178, 195 ; *Evans v. Bicknell*, 6 Ves. 173, 182 to 192.

contract of sale.¹ In such a case the maxim seems to apply, *Scientia utrinque par pares contrahentes facit*.²

¹ But see *Wall v. Stubbs*, 1 Madd. 80; *Cadman v. Horner*, 18 Ves. 10; 2 Kent, Com. Lect. 39, p. 485, (2d edit.) — A mistaken opinion of the value of property, if honestly entertained, and stated as opinion merely, unaccompanied by any assertion or statement untrue in fact, can never be considered as a fraudulent misrepresentation. *Hepburn v. Dunlop*, 1 Wheaton, R. 189.

² 1 Marshall on Insur. B. 1, ch. 11, § 3, p. 473; 1 Domat, B. 1, tit. 2, § 11, n. 3, 11, 12. — Mr. Chancellor Kent has expounded the doctrine on this subject with admirable clearness and strength in the following passage of his Commentaries. (Vol. 2, Lect. 39, p. 484, 485, (2d edit.) “When, however, the means of information relative to facts and circumstances, affecting the value of the commodity, are equally accessible to both parties, and neither of them does or says any thing tending to impose upon the other, the disclosure of any superior knowledge, which one party may have over the other, as to those facts and circumstances, is not requisite to the validity of a contract. There is no breach of any implied confidence, that one party will not profit by his superior knowledge, as to facts and circumstances, open to the observation of both parties, or equally within the reach of their ordinary diligence; because neither party reposes in any such confidence, unless it be specially tendered or required. Each one, in ordinary cases, judges for himself, and relies confidently, and perhaps presumptuously, upon the sufficiency of his own knowledge, skill, and diligence. The Common Law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith, to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars, which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects, which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to these points, where attention would have been sufficient to protect him from surprise or imposition, the maxim, *Caveat emptor*, ought to apply. Even against this maxim he may provide, by requiring the vendor to warrant that, which the law would not imply to be warranted; and if the vendor be wanting in good faith, *Fides servanda* is a rule equally enforced at Law and in Equity.” See also 1 Domat, B. 1, tit. 2, § 11.

§ 198. But it would be otherwise, where a party knowingly places confidence in another, and acts upon his opinion, believing it to be honestly expressed. Thus, if a man of known skill and judgment in paintings should sell a picture to another, representing it to have been painted by some eminent master, as, for instance, by Rubens, Titian, or Corregio, and it should be false; there could be no doubt, that it would be a misrepresentation, for which the sale might be avoided.¹ And the same principle would apply in a like case, if he should falsely state his opinion to be, that it was such a genuine painting of such a master, with an intent to influence the buyer in the purchase, and the latter, placing confidence in the skill, and judgment, and assertion of the seller, should complete the purchase on the faith thereof. But if the seller should truly represent the painting to be of such a master, and add, that it once belonged to a nobleman, or was fixed in a church, (which circumstances he knew to be untrue,) in such a case, if the representation of these collateral circumstances had no real tendency in the mind of the buyer to enhance or influence the purchase, it would not avoid the contract.²

§ 199. Nor is it every wilful misrepresentation even of a fact, which will avoid a contract, upon the ground of fraud, if it be of such a nature, that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for Courts of Equity, like Courts of Law, do not aid parties, who will not use their own sense and dis-

¹ See 1 Pothier on Oblig. n. 17 to 20, and note (*a.*)

² See 2 Kent, Com. Lect. 39, p. 482, 483, (2d edit.); Hill v. Gray
1 Starkie, R. 352.

cretion upon matters of this sort.¹ This may be illustrated by a case at law, where a party, upon making a purchase for himself, and his partners, falsely stated to the seller, to induce him to the sale, that his partners would not give more for the property than a certain price. It was held, that no action would lie at law for a deceitful representation of this sort. Lord Ellenborough on this occasion expressed himself in the following language, which presents many suggestions, applicable to the subject now under consideration. "If" (said he) "an action be maintainable for such a false representation of the will and purpose of another, with reference to the purposed sale, should not an action be also at least equally maintainable for a false representation of the party's own purpose? But can it be contended, that an action might be maintained against a man for representing, that he would not give, upon a treaty of purchase, beyond a certain sum; when it could be proved, that he had said he would give much more than that sum? And supposing also that he had upon such treaty added, as a reason for his resolving not to give beyond a certain sum, that the property was in his judgment damaged in any particular respect; and supposing further, that it could be proved he had, just before the giving such reason, said, he was satisfied it was not so damaged; would an action be maintainable for this untrue

¹ See *Trower v. Newcome*, 3 Meriv. R. 704; *Scott v. Hanson*, 1 Simons, R. 13; *Fenton v. Browne*, 16 Ves. 144; 2 Kent, Comm. Lect. 39. p. 484, 485, (2d edit.); Id. 486, 487, note (b); *Davis v. Meeker*, 5 John. R. 354; *Hervey v. Young*, Yelv. R. 21, and Metcalf's note; 1 Domat, B. 1, tit. 2, § 11, n. 11, 12; *Sherwood v. Salmon*, 2 Day, R. 128.

representation of his own purpose, backed and enforced by this false reason given for it? And in the case before us, does the false representation, made by the defendant, of the determination of his partners, amount to any thing more than a falsely alleged reason for the limited amount of his own offer? And if it amount to no more than this, it should be shown, before we can deem this to be the subject of an action, that, in respect of some consideration or other, existing between the parties to the treaty, or upon some general rule or principle of law, the party treating for a purchase is bound to allege truly, if he state at all, the motives, which operate with him for treating, or for making the offer he in fact makes. A seller is unquestionably liable to an action of deceit, if he fraudulently represent the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means with himself of knowing; or if he do so, in such a manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage he would otherwise have made. But is a buyer liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity, than the price, which such proposed buyer offers? I am not aware of any case, or recognised principle of law, upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum* by the bidder, in respect to which the bidder was under no legal pledge, or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own

indiscretion to rely ; and for the consequences of which reliance, therefore, he can maintain no action.”¹

§ 200. A Court of Equity would, under the like circumstances, probably hold a somewhat more rigorous doctrine, at least, if the party appeared to have been materially influenced by the representation to his disadvantage ; and if it did not avoid the contract, would refuse a specific performance of it.² If the seller of a farm should falsely affirm at the sale, that it had been valued by two persons at the price, and the assertion had induced the buyer to purchase, the contract would certainly not be enforced in Equity ; and upon principle would seem void.

§ 201. To the same ground of unreasonable indiscretion and confidence may be referred the common language of puffing and commendation of commodities, which, however reprehensible in morals as gross exaggerations, or departures from truth, are nevertheless not treated as frauds, which will avoid contracts. In such cases the other party is bound, and indeed is understood, to exercise his own judgment, if the matter is equally open to the observation, examination, and skill of both. To such cases the maxim applies, *simplex commendatio non obligat*. The seller represents the qualities or value of the commodity, and leaves them to the judgment of the buyer.³ The Roman Law adopted the same doctrine. *Ea, quæ commendandi causâ in venditionibus dicuntur, si palam ap-*

¹ *Vernon v. Keys*, 12 East, 637, 638 ; *Sugden on Vendors*, (7th edit.) p. 6. See also *Davis v. Meeker*, 5 John. R. 354 ; 2 Kent, Comm. Lect. 39, p. 486, and note (b) ; *Id.* 487, (2d edition.)

² 2 Kent, Comm. Lect. 39, p. 486, 497, and note (b), (2d edit.) ; *Buxton v. Lister*, 3 Atk. 386.

³ 2 Kent, Comm. Lect. 39, p. 495, (2d edition.)

*pareant, venditorem non obligant ; veluti, si dicat servum speciosum, domum bene ædificatam.*¹ But if the means of knowledge are not equally open, the same law pronounced a different doctrine. *At si dixerit, hominem literatum, vel artificem, præstare debet ; nam hoc ipso pluris vendit.*² The misrepresentation enhances the price. The same rule will apply, if any artifice is used to disguise the character or quality of the commodity ;³ or to mislead the buyer at the sale ; such as using puffers and underbidders at an auction, or other sale ; or holding out false colors, and thereby taking the buyer by surprise.⁴

§ 202. In the next place, the party must be misled by the misrepresentation ; for, if he knows it to be false when made, it cannot be said to influence his conduct ; and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances.⁵

§ 203. And, in the next place, the party must have been misled to his prejudice or injury ; for Courts of Equity do not, any more than Courts of Law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that, to support an action at law for a misrepresentation, there must be a fraud committed

¹ Dig. Lib. 18, tit. 1, l. 43.

² Ibid.

³ 2 Kent, Comm. Lect. 39, p. 482, 483, 484, (2d edition) ; Turner v. Harvey, Jacobs, R. 178.

⁴ Bromley v. Alt, 3 Ves. 624 ; Smith v. Clarke, 12 Ves. 493 ; Twining v. Maurice, 2 Bro. Ch. R. 330 ; Marquis of Townshend v. Stangroom, 6 Ves. 338 ; Bexwell v. Christie, Cowper, R. 385 ; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (x) ; Pickering v. Dawson, 4 Taunt. R. 785.

⁵ See Pothier de Vente, n. 210.

by the defendant, and a damage resulting from such fraud to the plaintiff.¹ And it has been observed with equal truth, by a very learned Judge in Equity, that fraud and damage coupled together will entitle the injured party to relief in any Court of Justice.²

§ 204. Another class of cases for relief in Equity is, where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another.³ It is not every concealment, even of facts material to the interest of a party, which will entitle him to the interposition of a Court of Equity. The case must amount to the suppression of facts, which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent. It has been said by Cicero, *Aliud est celare, aliud tacere. Neque enim id est celare quicquid reticeas ; sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.*⁴ It has been remarked by a learned author, that this definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favor of either party, who is misled by his ignorance of the thing concealed.⁵ And Cicero proceeds to denounce such concealment in terms of vehement indignation.

¹ *Vernon v. Keys*, 12 East, 637, 638.

² *Bacon v. Bronson*, 7 John. Chan. R. 201 ; *Fellows v. Lord Gwydyr*, 1 Simons, R. 63.

³ 1 Fonbl. Eq. B. 1, ch. 2, § 8, and note (z) ; *Id.* ch. 3, § 4, and notes ; *Jarvis v. Duke*, 1 Vern. R. 19 ; *Evans v. Bicknell*, 6 Ves. 173, 182. — Sometimes, as in the case of *Broderick v. Broderick*, (1 P. Will. 239, 240,) there may occur both a *suppressio veri* and a *suggestio falsi*.

⁴ *Cic. de Offic. Lib.* 3, ch. 12, 13. See also Pothier de Vente, n. 242, 243.

⁵ *Marshall on Insur. B.* 1, ch. 11, § 3, p. 473.

*Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? Certè non aperti, non simplicis, non ingenui, non justis, non viri boni; versuti potius, obscuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri.*¹

§ 205. But this statement is not borne out by the acknowledged doctrines, both of Courts of Equity and Courts of Law, in a great variety of cases. However correct Cicero's view may be of the duty of every man in point of morals, to disclose all facts to another, with whom he is dealing, which are material to his interest; ² it is by no means true, that Courts of Justice generally, or, at least, in England and America, undertake the exercise of such a wide and difficult jurisdiction.³ Thus, it has been held by Lord Thurlow, (and the case falls precisely within the definition by Cicero of undue concealment,) that if A, knowing there to be a mine in the land of B, of which he knew B was ignorant, should, concealing

¹ Cic. de Offic. Lib. 3, cap. 13.

² Dr. Paley adopts Cicero's doctrine in its full extent, as a duty of moral and religious obligation. "To advance (says he) a direct falsehood in recommendation of our wares, by ascribing to them some quality, which we know they have not, is dishonest. Now compare with this the designed concealment of some fault, which we know they have. The motives and the effects of actions are the only points of comparison, in which their moral quality can differ. But the motives in these two cases are the same, namely, to produce a higher price than we expect otherwise to obtain; the effect, that is, the prejudice to the buyer is the same." Paley, Moral Philos. B. 3, ch. 7, p. 116. The question, What degree of concealment is unjust in a legal or moral sense? has been often mooted by distinguished jurists, as well upon the cases put by Cicero, as in other cases. See Grotius, B. 2, ch. 12, § 9; Puffendorf, Law of Nature, B. 5, ch. 3, § 4; Pothier de Vente, n. 233 to 242; Id. n. 297, 298; 2 Kent, Comm. Lect. 39, p. 485 to 491, and notes; 1 Ruth. Inst. B. 1, ch. 13 § 11 to 19.

³ See Pothier, Contract. de Vente, n. 234, 239, 242, 243; 1 Domat, B. 1, tit. 2, § 11; 2 Kent, Comm. Lect. 39, p. 484, 485, 490, 491, and note (c), (2d edition.)

the fact, enter into a contract to purchase the estate of B, for the price, which the estate would be worth without considering the mine, the contract would be good; because A as the buyer is not obliged, from the nature of the contract, to make the discovery. In such cases the question is not, whether an advantage has been taken, which in point of morals is wrong, or which a man of delicacy would not have taken. But it is essentially necessary in order to set aside the transaction, not only, that a great advantage should be taken; but it must arise from some obligation in the party to make the discovery. A Court of Equity will not correct, or avoid a contract, merely because a man of nice honor would not have entered into it. It must fall within some definition of fraud; and the rule must be drawn, so as not to affect the general transactions of mankind.¹ And this in effect is the conclusion, to which Pothier arrived, after a good deal of struggle, in adjusting the duties arising from moral obligation, with the necessary freedom and convenience of the common business of human life.²

§ 206. Mr. Chancellor Kent, in his learned Commentaries, after admitting the doctrine and authority of Lord Thurlow, in the case above stated, concludes with the following acute and practical reflections. "From this and other cases it would appear, that human laws are not so perfect as the dictates of conscience, and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties, that belong to the class of imperfect

¹ Fox v. Mackreth, 2 Bro. Ch. R. 420; Turner v. Harvey, 1 Jacob, Rep. 178.

² Pothier de Vente, n. 234 to 242; Id. n. 295 to 299. Ante, § 194.

obligations, which are binding on conscience, but which human laws do not, and cannot undertake directly to enforce. But when the aid of a Court of Equity is sought, to carry into execution such a contract, then the principles of ethics have a more extensive sway; and a purchase, made with such a reservation of superior knowledge, would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery. It is a rule in Equity, that all the material facts must be known to both parties, to render the agreement fair and just in all its parts; and it is against all the principles of Equity, that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance."¹ The importance and value of the distinction, here pointed out, will be made more apparent, when we come to the consideration of the cases, in which Courts of Equity refuse to decree a specific performance of contracts, which yet they will not undertake to set aside.

§ 207. The true definition, then, of undue concealment (which amounts to a fraud) in the sense of a Court of Equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate; and which the other party has a right, not merely in *foro conscientiæ*, but *juris et de jure*, to know.² Mr. Chancellor

¹ 2 Kent, Comm. Lect. 39, p. 490, 491, (2d edition); *Parker v. Grant*, 1 John. Ch. R. 630; *Ellard v. Llandaff*, 1 B. & Beatt. 250, 251.

² *Fox v. Mackreth*, 2 Bro. Ch. R. 420; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (n). — Mr. Justice Buller, in *Pearson v. Morgan*, 2 Bro.

Kent has avowed a broader doctrine. "As a general rule," says he, "each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation." This doctrine in this latitude of expression may, perhaps, be thought not strictly maintainable, or in conformity with that, which is promulgated by Courts of Law or Equity; for many most material facts may be unknown to one party, and known to the other, and not equally accessible, or at the moment within the reach of both; and yet contracts, founded upon such ignorance on one side and knowledge on the other, may be completely obligatory.¹ Thus, if one party has actual knowledge of an event or fact from private sources, not then known to the other party, from whom he

Ch. R. 390, said, "In cases where it [fraud] is a question of fact, it is always considered as a constructive fraud, where the party knows the truth, and conceals it; and such constructive fraud always makes the party liable." But in that case the party, when applied to, misrepresented the fact, and concealed the truth; and the language must be limited to such circumstances. See *Fox v. Mackreth*, 2 Bro. Ch. R. 420; *Turner v. Harvey*, Jacob, R. 178.

¹ The case of the unknown mine, already put, *Fox v. Mackreth*, 2 Bro. Ch. R. 420, seems to fall within this predicament; and in *Turner v. Harvey*, Jacob, R. 178, Lord Eldon said, "The Court in many cases has been in the habit of saying, that, where parties deal for an estate, they may put each other at arm's length; the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of the property. As in the case, that has been mentioned; if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry; I am not bound to give him any information of it. He acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of the principle. If a single word is dropped, which tends to mislead the vendor, that principle will not be allowed to operate." See also ante, § 147 and 148.

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purchases goods, and which knowledge would materially enhance the price of the goods, or change the intention of the party, as to the sale; the contract of sale of the goods will, nevertheless, be valid.¹

§ 208. Even Pothier himself, strongly as he inclines, in all cases of this sort, to the principles of sound morals, declares, that the buyer cannot be heard to complain, that the seller has not informed him of circumstances extrinsic of the thing sold, whatever may be the interest, which he has to know them.² So that the doctrine of Mr. Chancellor Kent would seem to require some qualification by limiting it to cases, where one party is under some obligation to communicate the facts, or where there is a peculiar known relation, trust, or confidence, between them, which authorizes the other party to act upon the presumption, that there is no concealment of any material fact. Thus, if a vendor should sell an estate, knowing that he had no title to it, or knowing that there were incumbrances on it, of which the vendee was ignorant; the suppression of such a material fact, in respect to which the vendor must know, that the very purchase implies a trust and confidence on the part of the ven-

¹ See *Laidlaw v. Organ*, 2 Wheaton, 178; *Fox v. Mackreth*, 2 Bro. Ch. R. 20. — In *Laidlaw v. Organ*, 2 Wheaton, 195, the question was put in this general form; “whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor?” And on this question, so put, the Court expressed an opinion, “that he was not bound to communicate it,” without adding any qualification. But the Court added, “It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties.” Ante, § 149.

² Pothier de Vente, n. 242, 298, 299.

dee, that no such defect exists, would clearly avoid the sale on the ground of fraud.¹

§ 209. The like reason would apply to a case, where the vendor should sell a house, situate in a distant town, which he knew at the time to be burnt down, and of which the vendee was ignorant ; for it is impossible to suppose, that the actual existence of the house should not be understood by the vendee, as implied on the part of the vendor, at the time of the bargain.² And the same doctrine prevails in the civil law. *Sin autem venditor quidem sciebat domum esse exustam, emptor autem ignorabat, nullam venditionem stare.*³

§ 210. These latter cases are founded upon circumstances intrinsic in the contract, and constituting its essence. And there is often a material distinction between circumstances, which are intrinsic, and form the very ingredients of the contract, and circumstances, which are extrinsic, and form no part of it, though they create inducements to enter into it, or affect the value or price of the thing sold.⁴ Intrinsic circumstances are properly those, which belong to the nature, character, condition, title, safety, use, or enjoyment, &c., of the subject matter of the contract, such as natural or artificial defects in the subject matter. Extrinsic circumstances are properly those, which are accidentally connected with it, or rather bear upon it, at

¹ Arnot v. Biscoe, 1 Ves. 95, 96 ; Pothier de Vente, n. 240 ; Pillage v. Armitage, 12 Ves. 78. Ante, § 142, 143.

² See Pothier de Vente, n. 4. Ante, § 142.

³ Dig. Lib. 18, tit. 1, l. 57, § 1.

⁴ 2 Kent, Com. Lect. 39, p. 482, (2d edit.); Pothier, n. 242, 243 ; Id. n. 203 to 210 ; 1 Domat, B. 1, tit. 2, § 8, art. 11 ; Id. § 11, art. 2, 3, 5, 15.

the time of the contract, and may enhance or diminish its value or price, or operate as a motive to make or decline the contract ; such, as facts respecting peace or war, rise or fall of markets, character of the neighbourhood,¹ increase or diminution of duties, or the like circumstances.

§ 211. In regard to extrinsic as well as intrinsic circumstances, the Roman law seems to have adopted a very liberal doctrine, carrying out to a considerable extent the clear dictates of sound morals. It required the utmost good faith in all cases of contracts involving mutual interests ; and, therefore, not only prohibited the assertion of any falsehood, but also the suppression of any facts, of which the other party was ignorant, and which he had an interest in knowing, touching the subject matter of the contract. In an especial manner it applied this doctrine to cases of sale ; and required, that the vendor and vendee should disclose, each to the other, every circumstance within his knowledge, touching the thing sold, which each had an interest in knowing. The declaration in regard to the vendor (as we have seen) is, *Dolum malum a se abesse præstare venditor debet, qui non tantum in eo est, qui fallendi causâ obscure loquitur ; sed etiam, qui insidiosè, obscure dissimulat ;* and the same applies to the vendee.² According to these principles, the vendor was by the Roman law required, not only not to conceal any defects of the thing sold, which were within his knowledge, and of which the other party was ignorant, and which defects might, upon the implied warranty, created by the sale, as vices, entitle him

¹ Pothier de Vente, n. 236.

² Dig. Lib. 18, tit. 1, l. 43, § 2 ; Pothier de Vente, n. 233, 296.

to a redhibition or a rescision of the contract ; but all other defects, which the other party was interested in knowing.¹

§ 212. In regard to intrinsic circumstances, the Common Law, however, has, in many cases, adopted a rule, very different from that of the Civil Law ; and especially in cases of sales of goods. In such cases, the maxim, *caveat emptor*, is applied ; and unless there be some misrepresentation, or artifice to disguise the thing sold, or some warranty, as to its character or quality, the vendee is understood to be bound by the sale, notwithstanding there may be intrinsic defects and vices in it, known to the vendor, and unknown to the vendee, materially affecting its value. However questionable such a doctrine may be in its origin in point of morals or general convenience, (upon which many learned doubts have, at various times, been expressed,) it is too firmly established to be now open to legal controversy.² And Courts of Equity, as well as Courts of Law, abstain from any interference with it.

§ 213. In regard to extrinsic circumstances generally, Courts of Equity, as well as Courts of Law, seem to adopt the same maxim to a large extent ; and relax its application, only when there are circumstances of peculiar trust and confidence, or relation between the parties.³

¹ Pothier de Vente, n. 235.

² See 2 Kent, Com. Lect. 39, p. 478, 479, (2d edit.); 2 Black. Com. 451.

³ The case of *Martin v. Morgan*, 1 Brod. & Bing. R. 289, is a strong application of the doctrine of concealment, avoiding a payment. In that case there was no special confidence between the parties ; but a postdated check being paid to the holder by a banker, at a time when the latter had no funds of the drawer, and

§ 214. But there are cases of intrinsic circumstances, in which Courts of Law and Courts of Equity both proceed upon a doctrine, strictly analogous to that of the Roman law, and treat the concealment of them, as a breach of trust and confidence justly reposed. Indeed, in most cases of this sort, the very silence of the party must import as much as a direct affirmation, and be deemed equivalent to it.¹

§ 215. Thus, if a party, taking a guaranty from a surety, conceals from him facts, which go to increase his risk, and suffers him to enter into the contract under his false impressions, as to the real state of facts, such concealment will amount to a fraud ; because the party is bound to make the disclosure ; and the omission to make it is, under such circumstances, equivalent to an affirmation, that the facts do not exist.² So if a party, knowing himself to be cheated by his clerk, and, concealing the fact, applies for security in such a manner, and under such circumstances, as holds the clerk out to others, as one whom he considers as a trustworthy person ; and another person becomes his security, acting under the impression, that the clerk is so considered by his employer ; the contract of suretiship will be void ;³ for the very silence, under such circumstan-

the holder knew, that the drawer had become insolvent, of which the banker was ignorant, the amount was allowed to be recovered back on account of the concealment.

¹ See *Martin v. Morgan*, 1 Brod. and Bing. 289 ; *Pidlock v. Bishop*, 3 B. & Cresw. 605 ; 2 Kent, Com. Lect. 39, p. 483 ; *Id.* 488, note, (2d edit.) ; *Smith v. Bank of Scotland*, 1 Dow, Parl. R. 292, 294 ; *Etting v. Bank of United States*, 11 Wheaton, 59.

² *Pidlock v. Bishop*, 3 B. & Cresw. 605.

³ *Malthy's Case*, cited 1 Dow, Parl. Cas. 294 ; 11 Wheaton, R. 68, note (d) ; *Smith v. Bank of Scotland*, 1 Dow, Parl. Cas. 272. See *Etting v. Bank of United States*, 11 Wheaton, R. 59.

ces, becomes expressive of a trust and confidence, held out to the public equivalent to an affirmation.

§ 216. Cases of insurance afford a ready illustration of the same doctrine. In such cases the underwriter necessarily reposes a trust and confidence in the insured, as to all facts and circumstances affecting the risk, which are not of a public and general nature, and which the underwriter either knows, or is bound to know ; and which are peculiarly within the knowledge of the insured.¹ Indeed, the facts and circumstances, which may affect the risk, are generally within the knowledge of the insured only ; and therefore the underwriter may be said emphatically to place trust and confidence in him as to all such matters. And hence the general principle is, that, in all cases of insurance, the insured is bound to communicate to the underwriter all facts and circumstances, material to the risk, within his knowledge ; and whether the concealment be by design or by accident, it is equally fatal to the contract.²

§ 217. The same principle applies in all cases, where the party is under an obligation to make a disclosure, and conceals material parts. Therefore, if a release is obtained from a party in ignorance of material facts, which it is the duty of the other side to disclose, the release will be held invalid.³ So, in

¹ 1 Marshall on Insur. B. 1, ch. 11, § 3.

² Ibid, *Lindenau v. Desborough*, 8 B. & Cresw. 586, 592 ; 2 Kent, Com. Lect. 39, p. 488, note, (2d edit.) — It has been remarked by Lord Eldon, that concealment is of different natures ; an intentional concealment, and an actual concealment where there may be an obligation not to conceal, even if a disclosure is not required. *Walker v. Symonds*, 3 Swanst. R. 62.

³ *Bowles v. Stewart*, 1 Sch. & Lefr. 209, 224 ; *Broderick v. Broderick*, 1 P. Will. 240. Ante, § 147, 148, 196, 197.

cases of family agreements and compromises, if there is any concealment of material facts, the compromise will be held invalid, upon the ground of mutual trust and confidence reposed between the parties.¹ And in like manner, if a devisee, by concealing from the heir the fact, that the will has not been duly executed, procures from the latter a release of his title, pretending it will facilitate the raising of money to pay the testator's debts; the release will be void for the fraudulent concealment.²

§ 218. But by far the most comprehensive class of cases of undue concealment arises from the peculiar relation, or fiduciary character between the parties. Among this class of cases are to be found those, which arise from the relation of Client and Attorney, Principal and Agent, Principal and Surety, Landlord and Tenant, Parent and Child, Guardian and Ward, Ancestor and Heir, Husband and Wife, Trustee and Cestui que Trust, Executors or Administrators and Creditors or Distributees, Appointor and Appointee under powers, and Partners, and Part-owners. In these, and the like cases, the law, in order to prevent undue advantage, from the unlimited confidence, affection, or sense of duty, which the relation naturally creates, requires the utmost degree of good faith, (*uberrima fides*,) in all transactions between the parties. If there is any misrepresentation or concealment of any material fact, or any just suspicion of artifice or undue influence, Courts of Equity will interpose, and pronounce

¹ *Gordon v. Gordon*, 3 Swanst. R. 399, 463, 467, 470, 473, 476, 477; *Leonard v. Leonard*, 2 B. & Beatt., R. 171, 180, 181, 182.

² *Broderick v. Broderick*, 1 P. Will. 239, 249.

the transaction void, and, as far as possible, restore the parties to their original rights.¹

§ 219. This subject will naturally come in review in a subsequent page, when we come to consider, what may be deemed the peculiar equities between parties in these predicaments, and the guards, which are interposed by way of prohibition upon their transactions. It may suffice here, merely by way of illustration, to suggest a few applications of the doctrine. Thus, for instance, if an attorney, employed by the party, should designedly conceal from his client a material fact, or principle of law, by which he should gain an interest, not intended by the client, it will be held a positive fraud, and he will be treated as a mere trustee for the benefit of his client and his representatives. Nor would it be permitted in a case of this sort for the attorney to set up his ignorance of law, or his negligence, as a defence or an excuse. It has been justly remarked, that it would be too dangerous to the interests of mankind, to allow those, who are bound to advise, and who ought to be able to give good and sound advice, to take advantage of their own professional ignorance to the prejudice of others.² Attornies must, from the nature of the relation, be held bound to give all the information, which they ought to give, and not be permitted to plead ignorance of that, which they ought to know.³

¹ See *Ormond v. Hutchinson*, 13 Ves. 51 ; *Beaumont v. Boulton*, 5 Ves. 485 ; *Gartside v. Isherwood*, 1 Bro. Ch. R. App. 558, 560, 561.

² See Lord Eldon's Judgment in the House of Lords, in *Bulkley v. Wilford*, 2 Clarke & Finn. R. 102, 177 to 191, 189.

³ *Ibid.*

§ 220. In like manner a trustee cannot, by suppression of a fact, entitle himself to a benefit, to the prejudice of his *cestui que trust*. Thus, a creditor of the husband, concealing the fact, cannot, by procuring himself by such concealment to be appointed the trustee of the wife, entitle himself to deduct his debt from the trust fund against the wife, or her representatives, or even against the person, in whose favor and at whose instance he had made the suppression.¹ So, if a partner, who exclusively superintends the business and accounts of the concern, should, by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void.²

§ 221. Having taken this general notice of cases of fraud, arising from the misrepresentation or concealment of material facts; we may now pass to the consideration of some others, which, in a moral as well as a legal view, seem to fall under the same predicament, that of being deemed cases of actual intentional fraud, as contradistinguished from constructive or legal fraud. In this class may properly be included all cases of unconscientious advantages in bargains, obtained by imposition, circumvention, surprise, and undue influence over persons in general; and in an especial manner, all unconscientious advantages, or bargains obtained over persons, disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from

¹ Dalbiac v. Dalbiac, 16 Ves. 115, 124; Neville v. Wilkinson, 1 Bro. Ch. R. 543.

² Maddeford v. Austwick, 1 Sim. R. 89. See Smith *in re Hay*, 6 Madd. R. 2.

taking due care of, or protecting their own rights and interests.¹

§ 222. The general theory of the law, in regard to acts done and contracts made by parties, affecting their rights and interests, is, that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.² And, therefore it has been well remarked by an able Commentator upon the law of nature and nations, that every true consent supposes three things ; first, a physical power ; secondly, a moral power ; and thirdly, a serious and free use of them.³ And Grotius has added, that, what is not done with a deliberate mind, does not come under the class of perfect obligations.⁴ And hence it is, that, if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. For, although the law will not generally examine into the wisdom or prudence of men in disposing of their property, or in binding themselves by contracts, or other acts ; yet it will not suffer them to be entrapped by the fraudulent contrivances, or cunning, or deceitful management of those, who purposely mislead them.⁵

§ 223. It is upon this general ground, that there is a want of rational and deliberate consent, that

¹ See *Gartside v. Isherwood*, 1 Brown, Ch. R. 358, 360, 361.

² 1 Fonbl. Eq. B. 1, ch. 2, § 3 ; Grotius de Jure Belli, Lib. 2, ch. 11, § 5.

³ Puffendorf, Law of Nat. and Nations, Barbeyrac's note, 1 B. 3, ch. 6, § 3, cited 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (a).

⁴ Grotius de Jure Belli et Pacis, Lib. 2, ch. 11, § 4.

⁵ See Fonbl. Eq. B. 1, ch. 2, § 3, notes (r), (u) ; Id. § 8.

the contracts and other acts of idiots, lunatics, and other persons *non compotes mentis*, are generally deemed to be invalid in Courts of Equity. Grotius has with great propriety insisted, that it is a part of the law of nature ; for (says he) the use of reason is the first requisite to constitute the obligation of a promise, which idiots, madmen, and infants are consequently incapable of making. *Primum requiritur usus rationis ; ideo, et furiosi, et amentis, et infantis nulla est promissio.*¹ The Civil Law has emphatically adopted the same principle. *Furiosus* (say the Institutes) *nullum negotium gerere potest, quia non intelligit, quod agit.*² And afterwards, in the same work, distinguishing infants from pupils (technically so called) the Civil Law proceeds to declare, that infants are in the like situation as madmen ; *nam infans, et qui infantiae proximus est, non multum a furioso distant ; quia hujus modi ætatis pupilli nullum habent intellectum.*³

§ 224. The doctrine, laid down in the older writers upon the Common Law, is not materially different. Bracton says ; *Furiosus autem stipulari non potest, nec aliquod negotium agere, quia non intelligit, quid agit. Eodem modo, nec infans, vel qui infanti proximus est, et qui multum a furioso non distat, nisi hoc fiat ad commodum suum et cum tutoris auctoritate.*⁴ And Fleta repeatedly uses language to the same effect.⁵

¹ De Jure Belli, Grotius, B. 2, ch. 11, § 5.

² Inst. Lib. 3, tit. 20, § 8 ; Dig. Lib. 50, tit. 17, l. 5, l. 40.

³ Inst. Lib. 3, tit. 20, § 10 ; Dig. Lib. 50, tit. 17, l. 5, l. 40 ; 1 Donat, B. 1, tit. 2, § 1, art. 11, 12. See Ersk. Inst. B. 1, tit. 7, § 51, p. 160 ; B. 3, tit 1, § 15, p. 495.

⁴ Bracton, Lib. 3, ch. 2, § 8, p. 100.

⁵ Fleta, Lib. 2, ch. 56, § 19 ; Id. Lib. 3, ch. 3, § 10 ; Beverly's case, 4 Co. R. 126.

§ 225. Yet clear as this doctrine appears in common sense and common justice, it has met with a sturdy opposition from the common lawyers, who have insisted (as has been justly remarked) in defiance of natural justice, and the universal practice of all the civilized nations in the world,¹ that, according to a known maxim of the Common Law, no man of full age should be admitted to disable or stultify himself; and that a Court of Equity could not relieve against a maxim of the Common Law.² And a distinction has been taken between the party himself, and his privies in blood (heirs) and privies in representation, (executors and administrators); for it has not been doubted, that privies in blood and privies in representation might, after the death of the insane party, avoid his contract, or other acts, upon the ground that he was *non compos mentis*.³ How so absurd and mischievous a maxim could have found its way into any system of jurisprudence, professing to act upon civilized beings, is matter of wonder and humiliation.⁴ There have been many struggles against it by eminent lawyers, in all ages of the Common Law; but it is, perhaps, somewhat difficult to resist the authorities, which assert its establishment in the fun-

¹ 1 Fonbl. Eq. B. 1, ch. 2, § 1.

² See Sugden on Powers, ch. 7, § 1. — The best defence of the maxim, which I have seen, is in 3 Bac. Abridg. Idiots and Lunatics F., where it is put upon the ground of public policy to favor alienations. Yet it seems wholly unsatisfactory in principle. Mr. Evans has exposed the absurdity of the maxim in a few striking remarks, in his note to Pothier on Obligations, vol. 2, App. No. 3, p. 28.

³ Co. Litt. 247, a. b.; Beverly's case, 4 Co. R. 123, 124; 2 Black. Comm. 291, 292; 1 Fonbl. Eq. B. 1, ch. 2, § 1, and note (h); Shelford on Lunatics, ch. 6, § 2, p. 255, 263; Newland on Contracts, ch. 1, p. 19; Sugden on Powers, ch. 7, § 1.

⁴ See Evans's note, 2 Pothier on Oblig. App. No. 3, p. 28.

damentals of the Common Law ;¹ a circumstance, which may well abate the boast so often and so rashly made, that the Common Law is the perfection of human reason. Even the Courts of Equity in England have been so far regardful of the maxim, that they have hesitated to retain a bill to examine the point of lunacy ;² though, when a party has been found a lunatic under an inquisition, they will entertain a bill by his committee or guardian, to avoid all his acts, from the time he has been found *non compos*.³ And formerly, they were so scrupulous in

¹ 2 Black. Comm. 291, 292 ; 1 Fonbl. Eq. B. 1, ch. 2, § 1, and note (d) ; Co. Litt. 247 ; Beverly's case, 4 Co. R. 123 ; Yates v. Boen, 2 Str. R. 1104. See Shelford on Lunatics, ch. 6, § 2, p. 263 ; ch. 9, § 2, p. 407, &c. ; Bagster v. Portsmouth, 7 Dowl. & Ry. 618 ; S. C. 5 Barn. & Cresw. 170 ; Brown v. Jodrell, 3 Carr & Payne, 30 ; Newland on Contracts, ch. 1, p. 15 to 21. — The subject is a good deal discussed by Mr. Justice Blackstone in his Commentaries, who does not attempt to disguise its gross injustice. (2 Black. Comm. 291, 292.) It is also fully discussed by Mr. Fonblanque, in his learned notes, (1 Fonbl. Eq. B. 1, ch. 2, § 1, and notes (a) to (k) ; and by Lord Coke, in his Commentary on Littleton. Co. Litt. 247, a. and b., who adheres firmly to it (as we should expect) as a maxim of the Common Law. See also Beverly's case, (4 Co. R. 123, and Shelford on Lunatics, ch. 6, § 1, 2, p. 242, 255 ; ch. 9, § 2, p. 407, &c.) In America this maxim has not been of universal adoption in the State Courts ; if, indeed, it has ever been recognised as binding, in any of the Courts of Common Law. See *Somes v. Skinner*, 16 Mass. R. 348 ; *Webster v. Woodford*, 3 Day, R. 90, 100 ; *Mitchell v. Kingman*, 5 Pick. R. 431. In modern times the English Courts of Law seem to be disposed, as far as possible, to escape from the maxim. *Baxter v. Earl of Portsmouth*, 5 Barn. & Cresw. 170 ; S. C. 7 Dowl. & Ryl. 614 ; *Ball v. Maurice*, 3 Bligh. R. (new series) 1. And, even in England, although the party himself could not set aside his own act ; yet the King, as having the general custody of idiots and lunatics, might, by his attorney general, on a bill set aside the same acts. See 1 Fonbl. Eq. B. 1, ch. 2, § 2 ; Co. Litt. 247 ; Newland on Contracts, ch. 1, p. 15 to 21 ; Buller, N. Prius, 172.

² 1 Fonbl. Eq. B. 1, ch. 2, § 1, note (e), cites *Tothill*, R. 130. See also 1 Eq. Abrid. 278, B. 1.

³ 1 Fonbl. Eq. B. 1, ch. 2, § 1, note (e) ; 1 Eq. Abridg. 278, B. 2 ;

adhering to the maxim, that cases have occurred, in which a lunatic was not allowed to be a party to a bill to be relieved against an act done during his lunacy.¹ But this rule is now with great propriety abandoned.²

§ 226. The true and only rational exposition of the maxim, which has been adopted by Courts of Equity, is, that the maxim is to be understood of acts done by the lunatic in prejudice of others ; as to which he shall not be permitted to excuse himself from civil responsibility, on pretence of lunacy ; and it is not to be understood of acts done to the prejudice of himself ; for this can have no foundation in reason and natural justice.³

Addison v. Dawson, 2 Vern. 678 ; S. C. 1 Eq. Abridg. B. 4 ; Newland on Contracts, ch. 1, p. 17 to 21.

¹ Attorney General v. Parkhurst, 1 Cas. Ch. 112. See also Attorney General v. Woolwich, 1 Cas. Ch. 153. — Some acts of a lunatic are by the Common Law deemed voidable, and some void. Where the estate passes by his own hand, as by livery of seisin, there it is voidable ; where by a deed, and the conveyance does not pass by his own hand, it is void. For example, a surrender by deed of a *non compos* tenant for life, will not bar a contingent remainder. 1 Fonbl. Eq. B. 1, ch. 2, § 1 ; 1 Eq. Abridg. 278, B. 3 ; Thompson v. Leach, 3 Mod. R. 301 ; 1 Ld. Ray. 313 ; 2 Salk. 427 ; Shower, Parl. Cas. 150 ; 3 Lev. R. 234. See Shelford on Lunatics, ch. 6, § 2, p. 255, &c.

² See Ridley v. Ridley, 1 Eq. Abridg. 278, 279, B. 5 ; Addison v. Dawson, 2 Vern. R. 678 ; Clerk v. Clerk, 2 Vern. R. 412 ; Shelford on Lunatics, ch. 10, § 2, p. 415, &c. ; Newland on Contracts, ch. 1, p. 17 to 19 ; 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (n).

³ 1 Fonbl. Eq. B. 1, ch. 2, § 2 ; Ridler v. Ridler, 1 Eq. Abridg. 279, B. 5 ; 3 Bac. Abridg. Idiots and Lunatics, C. F. — In discussing the subject of Idiots and Lunatics, and persons *non compos mentis* in this place, it is important to state, that it is not intended to examine the nature and history of the jurisdiction of the Court of Chancery, or rather of the Chancellor personally, as the special delegate of the Crown, over Idiots, Lunatics, and other persons *non compos* generally. That is a subject of a widely different character from the one now before us ; for here the Court of Chancery acts upon its general principles, in setting aside the contracts and acts of such persons,

§ 227. The ground, upon which Courts of Equity now interfere, to set aside the contracts, and other acts (however solemn) of persons, who are idiots, lunatics, and otherwise *non compotes mentis*, is fraud. Such persons being incapable in point of capacity to enter into any valid contract, or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights. And surely, if there be a single case, in which all the ingredients, proper to constitute a genuine fraud, are to be found, it must be a case, where these unfortunate persons are the victims of the cunning, the avarice, and corrupt influence of those, who would make an inhuman profit from their calamities. Even Courts of Law now lend an indulgent ear to cases of defence against contracts of this nature ; and, if the fraud is made out, will declare them invalid.¹

§ 228. But Courts of Equity deal with the subject upon the most enlightened principles ; and watch with most jealous care every attempt to deal with persons *non compotes mentis*. Wherever, from the nature of the transaction, there is not evidence of entire good faith (*uberrimæ fidei*), or the contract or act is not seen to be just in itself, or for the benefit

upon the ground of fraud, circumvention, imposition, and undue advantage taken of them. The jurisdiction of the Crown, as *parens patriæ*, to take care of Idiots, Lunatics, and other persons *non compotes* is given at considerable length in Jeremy on Equity Jurisd. B. 1, ch. 4, p. 210 ; 2 Madd. Ch. Pr. ch. 4, p. 565 ; 2 Fonbl. Eq. Pt. 2, ch. 2, § 1, and note (a) ; 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (e). See also Beverly's case, 4 Co. R. 124.

¹ Yates v. Boen, 2 Str. R. 1104 ; Baxter v. Earl of Portsmouth, 5 B. & Cresw. 170 ; S. C. 7 Dowl. & Ryland, 618 ; Faulder v. Silk, 3 Camp. R. 125 ; Brown v. Joddrell, 1 Mood. & Malk. 105 ; Levy v. Barker, 1 Mood. & Malk. 106, note.

of these persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests. Where, indeed, a contract is entered into with good faith, and is for the benefit of such person, as for necessities, there, Courts of Equity will uphold it, as well as Courts of Law.¹ And so, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, Courts of Equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo* before the purchase.²

§ 229. And not only may contracts and deeds of a person *non compos* be thus set aside for fraud ; but instruments and acts of the most solemn nature, even of record, such as fines levied, and recoveries suffered by such a person, may be in effect overthrown in Equity, although held binding at law.³ For, although Courts of Equity will not venture to declare such fines and recoveries utterly void, and vacate them ; yet they will decree a reconveyance of the estate to the party prejudiced, and hold the conusee of the fine, and the demandant in the recovery to be a trustee for the same party.⁴

¹ *Baxter v. Earl of Portsmouth*, 5 B. & Cresw. 170 ; S. C. 7 Dow. & Ry. R. 614, 618. See also *ex parte Hall*, 7 Ves. 264.

² *Niell v. Marley*, 9 Ves. 478, 482 ; *Sergeson v. Sealey*, 2 Atk. 412.

³ See *Mansfield's case*, 12 Co. R. 123, 124. — But at law the King might avoid the fine or recovery by a *scire facias*, during the lifetime of the idiot. 1 Fonbl. Eq. B. 1, ch. 2, § 2 ; *Beverley's case*, 4 Co. R. 124, 126, *b* ; *Tourson's case*, 8 Co. R. 338 ; 3 Bac. Abridg. *Idiots and Lunatics*, C. and F.

⁴ See *Addison v. Dawson*, 2 Vern. 678 ; *Welby v. Welby*, Tothill, R. 164 ; *Wright v. Booth*, Tothill, R. 166 ; *Shelford on Lunatics*, ch. 6, § 1, p. 252 ; 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (*k*) ; *Wilkinson v. Brayfield*, 2 Vern. 307. See *Clark v. Ward*, *Preced.*

§ 230. Lord Coke has enumerated four different classes of persons, who are deemed in law to be *non compotes mentis*. The first is an idiot, or fool natural; the second, he, who was of good and sound memory, and by the visitation of God has lost it; the third, a lunatic, *lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound memory, and sometimes *non compos mentis*; and the fourth, by his own act, as a drunkard.¹ In respect to the last class of persons, although it is regularly true, that drunkenness doth not extenuate any act or offence, committed by any person against the laws; but it rather aggravates it, and he shall gain no privilege thereby;² and although, in strictness of law, the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*;³ yet Courts of Equity will relieve against acts done, and contracts made by him, while under this temporary insanity, where they are procured by the fraud or imposition of the other party.⁴ For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of Courts

Chan. 150; *Ferres v. Ferres*, 2 Eq. Abridg.; 3 Bac. Abridg. *Idiots and Lunatics*, F. — What circumstances afford proofs or presumptions of insanity, are not fit topics for discussion in this place, but more properly belong to a treatise on Medical Jurisprudence. There are many reported cases, in which the subject is discussed with great ability and acuteness. See Shelford on Lunatics, ch. 2, p. 35 to 74; *Attorney General v. Parnter*, 3 Bro. Ch. R. 441; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (x). See also Mr. Evans's note to 2 Pothier on Oblig. No. 3, p. 25.

¹ *Beverly's case*, 4 Co. R. 124; Co. Litt. 247, a.

² *Ibid.* 4 Black. Comm. 25; 3 Bac. Abridg. *Idiots and Lunatics*, A.

³ 3 Bac. Abridg. *Idiots and Lunatics*, A.

⁴ 1 Fonbl. Eq. B. 1, ch. 2, § 3; *Johnson v. Medlicott*, cited 3 P. Will. 130, note (A).

of Equity against his grossly immoral and fraudulent conduct.¹

§ 231. But to set aside any act or contract on account of drunkenness, it is not sufficient, that the party is under undue excitement from liquor. It must rise to that degree, which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part; and without this, no contract or other act can or ought to be binding by the law of nature.² If there be not

¹ See *Cooke v. Clayworth*, 18 Ves. 12. — The maxim has sometimes been laid down, *qui peccat ebrius, luat sobrius*. *Hendrick v. Hopkins*, Cary, R. 93. But even at law, drunkenness is a good defence against a deed executed by a party, when so drunk, that he did not know what he was doing. *Cole v. Robbins*, Bull, N. P. 172. See 2 Shelford on Lunatics, ch. 7, p. 276; *Id* 304.

² 1 Fonbl. Eq. B. 1, ch. 2, § 3; *Cooke v. Clayworth*, 18 Ves. 12; *Reynolds v. Waller*, 1 Wash. R. 169; *Rutherford v. Ruff*, 4 Dessaus. R. 350; *Wade v. Colvert*, 2 Rep. Const. Ct. 27; *Peyton v. Rawlins*, 1 Hayw. 77. — Sir Joseph Jekyll is said to have intimated an opinion, that the having been in drink is not any reason to relieve a man against any deed or agreement, gained from him to encourage drunkenness. Secus, if through the management or contrivance of him, who gained the deed, &c., the party, from whom the deed has been gained, was drawn in to drink. *Johnson v. Medlicott*, 1734, cited 3 P. Will. 130, note A. But this distinction seems wholly unsatisfactory; for in each case it is the fraud of the party, who obtained the deed or agreement, which constitutes the ground of declaring it invalid; and the fraud is in morals and common sense the same, whether the drunken party has been enticed into the drunkenness, or becomes the victim of the cunning of another, who takes advantage of his mental incapacity. The case of *Cooke v. Clayworth*, (18 Ves. 12,) requires no such distinction, where the circumstances indicate fraud. In this last case, Sir William Grant said, "As to that extreme state of intoxication, that deprives a man of his reason, I apprehend, that even at law it would invalidate a deed, obtained from him while in that condition." See also *Cole v. Robbins*, Buller, N. P. 172; *Wigglesworth v. Steers*, 1 Hen. & Munf. 70.

that degree of excessive drunkenness, then Courts of Equity will not interfere at all, unless there has been some contrivance, or management to draw the party into drink, or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him.¹ For, in general, Courts of Equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person, who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there be some fraudulent contrivance or imposition practised.²

§ 232. It is upon this special ground, that Courts of Equity have acted in cases, where a broader principle has sometimes been supposed to have been acted upon. They have indeed indirectly, by refusing relief, sustained agreements, which have been fairly entered into, although the party was intoxicated at the time.³ And especially, have they refused relief, where the agreement was to settle a family dispute, and was in itself reasonable.⁴ But they have not gone the length of giving a positive sanction to such agreements, so entered into, by enforcing them

¹ *Cooke v. Clayworth*, 18 Ves. 12; *Say v. Barwick*, 1 Ves. & Beames, 195; *Campbell v. Ketcham*, 1 Bibb, R. 406; *White v. Cox*, 3 Hayw. R. 82; *Wigglesworth v. Steers*, 1 Hen. & Munf. 70; *Taylor v. Patrick*, 1 Bibb, R. 168.

² *Cooke v. Clayworth*, 18 Ves. 12; *Newland on Contracts*, ch. 22, p. 365; *Rich v. Sydenham*, 1 Ch. Cas. 202.

³ *Cooke v. Clayworth*, 18 Ves. 12. See also 5 Barn. & Cresw. 170.

⁴ *Corey v. Corey*, 1 Ves. R. 19. See *Storkley v. Storkley*, 18 Ves. R. 30; *Dunnage v. White*, 1 Swanst. R. 137, 150.

against the party, or in any other manner, than by refusing to interfere in his favor against them.¹

§ 233. In regard to drunkenness, the writers upon natural and public law adopt it, as a general principle, that contracts made by persons in liquor, even though their drunkenness be voluntary, are utterly void, because they are incapable of deliberate consent, like other persons, who are insane, or *non compos mentis*. The rule is so laid down by Heineccius,² and Puffendorf.³ It is adopted by Pothier, one of the purest of jurists, as an axiom requiring no illustration.⁴ Heineccius, in discussing the subject, has made some sensible observations. Either (says he) the drunkenness of the party entering into a contract is excessive, or moderate. If moderate, and it did not quite so much obscure his understanding, as that he was ignorant, with whom or what he contracted, the contract ought to bind him. But if his drunkenness was excessive, that could not fail of being perceived, and therefore the party dealing with him must have been engaged in a manifest fraud; or at least he ought to impute it to his own fault, that he has dealt with a person in such a situation.⁵ The Scottish Law seems to have adopted this distinction; for by that law persons in a state of absolute drunkenness, and consequently deprived of reason, cannot bind themselves by contracts. But a lesser degree of drunkenness, which

¹ See *Cragg v. Holme*, cited 18 Ves. 14, and note (C) at the Rolls, 1811.

² Heinecc. Elem. Jour. Natur. Lib. 1, ch. 14, § 392, and note *ibid*.

³ Puffend. Law of Nat. and Nat. B. 1, ch. 4, § 8.

⁴ Pothier, *Traité des Oblig.* n. 49. See also 2 Evans, *Pothier on Oblig.* No. 3, p. 28.

⁵ Heinecc. *Juris Nat.* Lib. 1, ch. 14, § 392, note.

only darkens reason, has not the effect of annulling contracts.¹

§ 234. Closely allied to the foregoing are cases, where a person, although not positively *non compos* or insane, is yet of such great weakness of mind, as to be unable to guard himself against imposition, or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness arises, whether it arises from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions, which result from sudden fear or overwhelming calamities. For it has been well remarked, that, although there is no direct proof, that a man is *non compos*, or delirious ; yet, if he is a man of weak understanding, and is harassed and uneasy at the time ; or if the deed be executed *in extremis*, or by a paralytic, it cannot be supposed, that he had a mind adequate to the business, he was about, and he might be more easily imposed upon.²

§ 235. It has, indeed, been said by a learned Judge, that, if a weak man give a bond, if there be no fraud or breach of trust in the obtaining of it, Equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis* ; neither will a Court of Equity measure the size of people's understandings or capacities, there being no such thing, as an equitable incapacity, where there is a legal capacity.³ But whatever weight there may be

¹ Erskine, Inst. B. 1, tit. 1, § 15, p. 485 ; 1 Madd. Ch. Pr. 239 ; 1 Stair, Inst. B. 1, tit. 10, § 13 ; 2 Stair, Inst. B. 4, tit. 20, § 49.

² 1 Fonbl. Eq. B. 1, ch. 2, § 3.

³ Sir Joseph Jekyll ; *Osmond v. Fitzroy*, 3 P. Will. 129, 130. See also *ex parte Allen*, 15 Mass. R. 58.

in this remark in a general sense, it is obvious, that weakness of understanding must constitute a most material ingredient in examining, whether a bond or other contract has been obtained by fraud, or imposition, or undue influence ; for although a contract, made by a man of sound mind and fair understanding, may not be set aside, merely from its being a rash, improvident, or hard bargain ; yet, if the same contract be made with a person of weak understanding, there arises a natural inference, that it was obtained by circumvention or undue influence.¹

§ 236. It has been asserted by another eminent Judge, that it is not sufficient, to set aside an agreement in a Court of Equity, to suggest weakness and indiscretion in one of the parties, who has engaged in it ; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter

¹ 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (r) ; Blackford v. Christian, 1 Knapp, R. 73, 77 ; Clarkson v. Hanway, 2 P. Will. 203 ; Gartside v. Isherwood, 1 Bro. Ch. R. Appendix, 559, 560, 561. — Lord Thurlow is said to have remarked in Griffin v. De Veulle, (3 Woodes. Lect. App. 16,) that he admitted, “that this Court would not set aside the voluntary deed of a weak man, who is not absolutely *non compos*, nor any deed of improvidence or profuseness, for these reasons merely, where no fraud appears, as was laid down by Sir Joseph Jeykill, in Osmond v. Fitzroy, 3 P. Will. 130. But he said, that Sir Joseph Jekyll might have been pleased to add, that from these ingredients, there might be made out and evidenced a collection of facts, that there was fraud and misrepresentation used. The case of Osmond v. Fitzroy cannot be supported, but upon the mixed ground of Lord Southampton’s extreme weakness of understanding, as well as the situation of Osmond.” And in Mr. Cox’s note to 3 P. Will. 131, he is represented to have stated, “that in almost every case upon this subject, a principal ingredient was a degree of weakness, short of a legal incapacity.” Mr. Maddock seems to think, that Osmond v. Fitzroy went principally upon the ground of the relation between the parties, (servant and master ;) and holds the doctrine of Sir Joseph Jekyll the most conformable to the authorities. 1 Madd. Ch. Pr. 224, 225.

into it with his eyes open, Equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of, to draw him into such an agreement.¹ But this language, if maintainable at all, requires many qualifications; for, if a person be of feeble understanding, and the bargain be unconscionable, what better proof can one wish of its being obtained by fraud, imposition, or undue influence, or the power of the strong over the weak?²

§ 237. The language of another eminent Judge, in a very recent case, is far more satisfactory and comprehensive, and applies a mode of reasoning to the subject, compatible at once with the dictates of

¹ Lord Hardwicke in *Willis v. Jernegan*, 2 Atk. R. 251.

² See *Malin v. Malin*, 2 John. Ch. R. 238; *Shelford on Lunatics*, ch. 6, § 3, p. 258, 267, 268, 272; *White v. Small*, 2 Ch. Cas. 103; *Bridgman v. Green*, 2 Ves. 627; *Clarkson v. Hanway*, 2 P. Will. 203; *Bennet v. Wade*, 2 Atk. 325, 529; *Nantes v. Corrock*, 9 Ves. 181, 182; *Willan v. Willan*, 16 Ves. 72; *Blackford v. Christian*, 1 Knapp, R. 73 to 97; *Griffith v. Robins*, 3 Madd. R. 191; *Ball v. Mannin*, 3 Bligh, R. 1, (new series); S. C. 1 Dow. R. 392, (new series); 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (r); *Filner v. Gott*, 7 Bro. Par. R. 70; *Dodds v. Wilson*, 1 Rep. Const. Ct. of S. Car. 448; *Newland on Contracts*, ch. 22, p. 362; *Gartside v. Isherwood*, 1 Bro. Ch. R. 558, 560, 561. — In truth there was not the slightest proof of any weakness of understanding of the party in the case of *Willis v. Jernegan*, 2 Atk. 251; but merely of a sanguine and ardent temper and imagination, speculating with rashness upon the hope of imaginary profits. And, indeed, it appears, that the speculation might have been profitable, but for the party's insisting upon an exorbitant premium for the lottery tickets, until the market had fallen. The weakness alluded to in this case by Lord Hardwicke, was probably not so much in capacity of mind, as credulity or want of judgment; for he expressly negatives any fraud or imposition. See Lord Eldon's Remarks in *Huguenin v. Basley*, 14 Ves. 290; *Fox v. Mackreth*, 2 Bro. Ch. R. 420; 2 Hovend. Suppt. 113, note to 9 Ves. 182; *Shelf. on Lunatics*, Introd. § 2, p. 36, &c.; *Id.* ch. 6, § 3, p. 265, 267, 268, 272. See also *Lewis v. Peard*, 1 Ves. jr. 19; 1 Fonbl. Eq. B. 1, ch. 2, § 3, and note (r).

common sense, and legal exactness and propriety. "The law," said Lord Wynford, "will not assist a man, who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no Court of justice can release him from it. Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property. Indeed, from the fluctuation of prices, owing principally to the gambling spirit of speculation, that now unhappily prevails, it would be difficult to determine, what is an inadequate price for any thing sold. At the time of the sale the buyer probably calculates on a rise in the value of the article bought, of which he would have the advantage. He must not, therefore, complain, if his speculations are disappointed, and he becomes a loser, instead of a gainer by his bargain. But those, who from imbecility of mind are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood. A bargain, therefore, into which a weak one is drawn under the influence of either of these, ought not to be held valid; for the law requires, that good faith should be observed in all transactions between man and man." And, addressing himself to the case before him, he added, "If this conveyance could be impeached on the ground of imbecility of F only, a sufficient case has not been made out to render it invalid; for the imbecility must be such, as would justify a jury under a commission of lunacy, in put-

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ting his property and person under the protection of the Chancellor. But a degree of weakness of intellect, far below that, which would justify such a proceeding, coupled with other circumstances, to show, that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed.”¹

§ 238. The doctrine, therefore, may be laid down as generally true, that the acts and contracts of persons, who are of weak understandings, and who are thereby liable to impositions, will be held void in Courts of Equity, if the nature of the act or contract justify the conclusion, that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome, by cunning or undue influence.² The rule of the Common Law is said to have gone farther in cases of wills, (for it is said, that, perhaps, it can hardly be extended to deeds without circumstances of fraud or imposition;) for the Common Law requires, that a person, to dispose of his property by will, should be of sound and disposing memory, which imports, that the testator should have understanding to dispose of his estate with judgment and discretion; and this is to be collected from his words, actions, and behaviour

¹ Blackford v. Christian, 1 Knapp, R. 77. See Gartside v. Isherwood, 1 Bro. Ch. R. App. 560, 561.

² Ibid. — In the Treatise on Equity, (1 Fonbl. Eq. B. 1, ch. 2, § 3,) it is laid down, that the protection of Courts of Equity, “is not to be extended to every person of a weak understanding, unless there be some fraud or surprise; for Courts of Equity would have enough to do, if they were to examine into the wisdom and prudence of men, in disposing of their estates. Let a man be wise, therefore, or unwise, if he be legally compos mentis, he is a disposer of his property, and his will stands instead of a reason.” S. P. Bath and Montague’s Case, 3 Ch. Cas. 107.

at the time, and not merely from his being able to give a plain answer to a common question.¹ But, as fraud in regard to the making of wills belongs in a peculiar manner to Courts of Law, though sometimes relievable in Equity, that part of the subject seems more proper to be discussed in a different treatise.²

§ 239. Cases of an analogous nature may easily be put, where the party is subjected to undue influence, although in other respects of competent understanding.³ As, where he does an act or makes a contract, when he is under duress, or the influence of extreme terror, or threats, or apprehensions, short of duress. For in cases of this sort he has no free will, but stands *in vinculis*; and the constant rule in Equity is, that, where a party is not a free agent, and is not equal to protecting himself, the Court will protect him.⁴ The maxim of the Common Law is, *Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur*.⁵ On this account Courts of Equity watch with extreme jealousy all contracts, made by a party while under imprisonment; and, if there is the slightest ground to suspect oppression or imposition

¹ 1 Fonbl. Eq. B. 1, ch. 2, § 3, and note (u) and (x); Donegal's case, 2 Ves. R. 407, 408; Attorney General v. Parmeter, 3 Brown, Ch. R. 441; Id. 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (x).

² 1 Fonbl. Eq. B. 1, ch. 2, § 3, and note (u) and (x).

³ See Debenham v. Ox, 1 Ves. 276; Cory v. Cory, 1 Ves. 19; Young v. Peachey, 2 Atk. 254; 1 Madd. Ch. Pr. 245, 246.

⁴ Evans v. Llewellyn, 1 Cox, R. 340; Crome v. Ballard, 1 Ves. jr. 215, 220; Hawes v. Wyatt, 3 Bro. Ch. R. 158; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 3, § 1; 2 Eq. Abridg. 183, pl. 2; Gilb. Eq. R. 9; 3 P. Will. 294, note E; Attorney General v. Sothen, 2 Vern. R. 497.

⁵ 3 Co. R. 78.

in such cases, they will set the contracts aside.¹ And circumstances of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency, as to justify the Court in setting aside a contract, made by him, on account of oppression, or fraudulent advantage, or imposition.²

¹ *Roy v. Duke of Beaufort*, 2 Atk. 190; *Nichols v. Nichols*, 1 Atk. 409; *Hinton v. Hinton*, 2 Ves. 634, 635; *Falkner v. O'Brien*, 2 B. & Beatt. 214; *Griffith v. Spratley*, 1 Cox, R. 333; *Underhill v. Harwood*, 10 Ves. 219; *Attorney General v. Sothorn*, 2 Vern. R. 497.

² See *Gould v. Okeden*, 3 Bro. Parl. R. 560; *Bosanquet v. Dashwood*, Cas. Temp. Talbot, 37; *Proof v. Hines*, Cas. T. Talb. 111; *Hawes v. Wyatt*, 3 Bro. Ch. R. 156; *Picket v. Loggon*, 14 Ves. 215; *Beasley v. Maggreth*, 2 Sch. and Lef. 31, 35; *Carpenter v. Elliot*, cited 2 Ves. jr. 494; *Wood v. Abrey*, 3 Madd. R. 417; *Ramsbottom v. Parker*, 6 Madd. R. 6; *Fitzgerald v. Rainsford*, 1 B. & Beatt. R. 57, note (d); *Underhill v. Harwood*, 10 Ves. 219; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (e); *Crowe v. Ballard*, 1 Ves. jr. 215, 220; *Huguenin v. Basley*, 14 Ves. 273; *Newland on Contracts*, ch. 22, p. 362, &c.; *Id.* p. 365, &c. — The doctrine of the Common Law, upon the subject of avoiding contracts upon the ground of mental weakness, force, and undue influence, does not seem in any essential manner to differ from that adopted in the Roman Law, or in the law of modern continental Europe. Thus, we find in the Roman Law, that contracts may be avoided, not only for incapacity, but for mental imbecility, the use of force, or the want of liberty in regard to the party contracting. *Quod metus causa gestum erit ratum non habebit, ait Pretor. Dig. Lib. 4, tit. 2, l. 1.* But then the force, or fear must be of such a nature, as may well overcome a firm man. The party must be intimidated by the apprehension of some serious evil; and of a present and pressing nature. *Metus non vani hominis, sed qui merito et in hominem constantissimum cadat; Dig. Lib. 4, tit. 2, l. 6.* He must act, *Metu majoris mali*; and feel, that it is immediate; *Metum presentem accipere debemus non suspicionem inferendi ejus.* See *Dig. Lib. 4, tit. 2, l. 1, 2; 5, 9*; 1 Domat, Civ. Law, B. 1, tit. 18, § 2, art. 1 to 10. Pothier gives his assent to this general doctrine; but deems the Civil Law too rigid in requiring the menace or force, such as might intimidate a constant or firm man; and very properly thinks, that regard should

§ 240. The acts and contracts of infants, that is, of all persons under twenty-one years of age, (who are by the Common Law deemed infants,) are *a fortiori* treated as falling within the like predicament. For infants are by law treated generally, as having no capacity to bind themselves, from the want of sufficient reason and discernment of understanding; and, therefore, their grants and those of lunatics, are, in many respects, treated as parallel both in law and reason.¹ There are, indeed, certain excepted cases, in which infants are permitted by law to bind themselves by their acts and contracts. But these are all of a special nature; as for instance, infants may bind themselves by a contract for neces-

be had to the age, sex, and condition of the parties. Pothier on Oblig. n. 25. Mr. Evans thinks, that any contract, produced by the actual intimidation of another, ought to be held void, whether it were the result of personal infirmity merely, or of such circumstances, as might ordinarily produce the like effect upon others. 1 Evans, Pothier on Oblig. n. 25, note (a), p. 18. The Scottish Law seems to have followed out the line of reasoning of the Roman Law with a scrupulous deference and closeness. Ersk. Instit. B. 4, tit. 1, § 26. The Scottish Law also puts the case of imposition from weakness upon a clear ground. "Let one be ever so subject to imposition; yet if he has understanding enough to save himself from a sentence of idiocy, the law makes him capable of managing his own affairs; and consequently his deeds, however hurtful they may be to himself, must be effectual, unless evidence be brought, that they have been drawn or extorted from him by unfair practices. Yet where lesion (injury) in the deed and facility in the grantor concur, the most slender circumstances of fraud, or circumvention are sufficient to set it aside." Ersk. Inst. B. 4, tit. 1, § 27. Mr. Bell has also stated the same principle in the Scottish Law with great clearness. There may be in one of perfect age a degree of weakness, puerility, or prodigality, which although not such as to justify a verdict of insanity, and place him under guardianship, as insane, may yet demand some protection for him against unequal or gratuitous alienation. 1 Bell. Com. 139.

¹ 1 Fonbl. Eq. B. 1, ch. 2, § 4.

saries suitable to their degree and quality ;¹ or by some act, which the law requires them to do. And, generally, infants are favored by the law, as well as by Equity, in all things, which are for their benefit, and are saved from being prejudiced by any thing to their disadvantage.² But as this rule is designed as a shield for their own protection, it is not allowed to operate, as a fraud and injustice to others ; at least not, where a Court of Equity has authority to reach it in cases of meditated fraud.³

§ 241. In regard to the acts of infants, some are voidable and some are void ; and so in regard to their contracts. Where they are utterly void, they are from the beginning mere nullities, and incapable of any operation. But where they are voidable, there it is in the election of the infant to avoid them or not, which he may do at full age. And in this respect he is by law differently placed from idiots and lunatics ; for the latter, as we have seen, are not, or at least may not at law, be allowed to stultify themselves. But an infant may, at his coming of age, avoid or confirm any voidable act or contract at his pleasure. In general, where a contract may be for the benefit or to the prejudice of an infant, he may avoid it, as well at law as in Equity. Where it can never be for his benefit, it is utterly void.⁴ And in respect to the acts of infants of a more solemn nature, such as deeds, gifts,

¹ *Zouch v. Parsons*, 3 Burr. 1801 ; 1 Fonbl. Eq. B. 1, ch. 2, § 4, and note (y) and (a) ; Co. Litt. 172 a.

² 1 Fonbl. Eq. B. 1, ch. 2, § 4, and notes (y) and (a). ♦

³ See 1 Fonbl. Eq. B. 1, ch. 2, § 4, note (z) ; *Zouch v. Parsons*, 3 Burr. 1802.

⁴ 1 Fonbl. Eq. B. 1, ch. 2, § 4, notes (y), (x), (b) ; *Zouch v. Parsons*, 3 Burr. 1801, 1807.

and grants, this distinction has been insisted on ; that such as do take effect by delivery of his hand are voidable ; but such as do not so take effect are void.¹

§ 242. But, independently of these general grounds, it must be clear, that contracts made and acts done by infants in favor of persons, knowing their imbecility and want of discretion, and intending to take advantage of them, ought, upon general principles, to be held void and set aside, on account of fraud, circumvention, imposition, or undue influence. And it is upon this ground of an inability to give a deliberate and binding consent, that the nullity of such acts and contracts is constantly put by publicists and civilians ;² *infans non multum a furioso distat*.

§ 243. In regard to femes covert the case is still stronger ; for, generally speaking, at law they have no capacity to do any act or to enter into any contracts ; and such acts and contracts are treated as mere nullities. And in this respect Equity generally follows the law.³ This disability of married women proceeds, it is said, upon the consideration, that, if they were allowed to bind themselves, the law having vested their property in their husbands, they would be liable to engagements without the means of answering them. And, if they were allowed to bind their husbands, they might, by the abuse of such a power, involve their husbands and families in ruin.⁴ But perhaps the more exact statement would be, that it

¹ *Zouch v Parsons*, 3 Burr. R. 1794 ; *Perkins*, § 12. See 8 American Jurist, 327 to 330.

² See ante, § 222, 223 ; *Ayliffe*, Pand. B. 2, tit. 38, p. 216, 217.

³ 1 Fonbl. Eq. B. 1, ch. 2, § 6.

⁴ 1 Fonbl. Eq. B. 1, ch. 2, § 6, note (A).

is a fundamental policy of the Common Law, to allow no diversity of interests between husband and wife ; and for this purpose it is necessary to take from her all power to act for herself without his consent ; and even with his consent to disable her (for her own protection against his influence) from becoming personally bound by any act or contract whatsoever, done *in pais*.¹ Courts of Equity have, indeed, broken in upon this doctrine ; and have, in many respects, treated the wife, as capable of disposing of her own separate property, and doing other acts, as if she were a feme sole.² In cases of this sort, the same principles will apply to the acts and contracts of a feme covert, as would apply to her as a feme sole, where the circumstances give rise to the presumption of fraud, imposition, unconscionable advantage, or undue influence.³

§ 244. Of a kindred nature, to the cases already considered, are cases of bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence. This is the sort of fraud, to which Lord Hardwicke alluded in the passage already cited,⁴ when he said, that they were such bargains, as no man in his senses and not under delusion would

¹ See Comyns, Dig. *Baron and Feme*, D. 1, E. 1 to 3, H. N. O. P. Q. ; Id. Chancery, 2 M. 1 to 16.

² See on this subject the learned notes of Mr. Fonblanque in 1 Fonbl. Eq. B. 1, ch. 2, § 6, notes (h) to (s) ; Chancy on Rights &c. of Husband and Wife ; and Roper on Husband and Wife ; Com. Dig. Chancery, 2 M. 1 to 16.

³ See 1 Fonbl. Eq. B. 1, ch. 2, § 8 ; *Dalbrai v. Dalbrai*, 16 Ves. 115.

⁴ Ante, § 188 ; Mitf. Pl. Eq. by Jeremy, 132, 133, 134 ; *Rosevelt v. Fulton*, 2 Cowen, R. 129 ; *M'Donald v. Neilson*, 2 Cowen, R. 129.

make on the one hand, and as no honest and fair man would accept on the other, being inequitable and unconscientious bargains.¹ Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting *per se* a ground to avoid a bargain in Equity.² For Courts of Equity, as well as Courts of Law, act upon the ground, that every person, who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms, as he chooses; and whether his bargains are wise and discreet, or otherwise, profitable or unprofitable, are considerations, not for Courts of Justice, but for the party himself to deliberate upon.

§ 245. Inadequacy of consideration is not then, of itself, a distinct principle of relief in Equity. The Common Law knows no such principle. The consideration more or less supports the contract. Common sense knows no such principle. The value of a thing is, what it will produce; and it admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances, which may induce him to part with it at a particular time. If Courts of Equity were to unravel all these transac-

¹ *Chesterfield v. Janssen*, 2 Ves. 155; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (e).

² *Griffith v. Spratley*, 1 Cox, R. 383; *Copis v. Middleton*, 2 Madd. R. 409; *Collier v. Brown*, 1 Cox, R. 428; *Low v. Barchard*, 8 Ves. 133; *Western v. Russell*, 3 Ves. & Beam. R. 180; *Naylor v. Winch*, 1 Sim. & Stu. R. 565; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (d); *Osgood v. Franklin*, 2 John. Ch. R. 1.

tions, they would throw every thing into confusion, and set afloat the contracts of mankind.¹ Such a consequence would of itself be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine, that mere inadequacy of consideration should form a distinct ground for relief.

§ 246. Still, however, there may be such unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or undue influence; and in such cases Courts of Equity ought to interfere, upon the satisfactory ground of fraud.² But then such unconscionableness or such inadequacy should be made out, as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud.³ And where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud.⁴

§ 247. The difficulty of adopting any other rule, which would not, in the common intercourse and business of human life, be found productive of serious

¹ Per Lord Ch. Baron Eyre in *Griffith v. Spratley*, 1 Cox, R. 383; 1 Madd. Ch. Pr. 213, 214.

² Ibid, *Gartside v. Isherwood*, 1 Bro. Ch. R. App. 558, 560, 561.

³ *Coles v. Trecothick*, 9 Ves. 246; *Underhill v. Harwood*, 10 Ves. 219; *Copis v. Middleton*, 2 Madd. R. 409; *Stillwell v. Wilkinson*, Jacob, R. 280; *Peacock v. Evans*, 16 Ves. 512; *Gwynne v. Heaton*, 1 Bro. Ch. R. 9; *Osgood v. Franklin*, 2 John. Ch. R. 1, 23; S. C. 14 John. R. 527.

⁴ Ibid; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (e); Id. § 10, and notes (g) and (h); Id. § 11; Id. ch. 4, § 26; 1 Madd. Ch. Pr. 212, 213, 214; *How v. Wheldon*, 2 Ves. 516, 518; Com. Dig. Chancery, 3 M. 1; *Huguenin v. Basley*, 14 Ves. 273.

inconvenience, and endless litigation, is conceded by civilians and publicists; and, for the most part, they seem silently to abandon cases of inadequacy in bargains, where there is no fraud, to the forum of conscience, and morals, and religion. Thus, Domat, after remarking, that the law of nature obliges us not to take advantage of the necessities of the seller, to buy at too low a price, adds, "But because of the difficulties in fixing the just price of things, and of the inconveniences, which would be too many and too great, if all sales were annulled, in which the things were not sold at their just value, the laws connive at the injustice of buyers, except in the sale of lands, where the price given for them is less than half of their just value."¹ So that sales of personal property are usually without redress; and even sales of immovable property are in the same predicament, unless the inadequacy of price amounts to one half the value; a rule purely artificial, and which must leave behind it many cases of gross hardship, and unconscionable advantage. The Civil Law, therefore, in fixing a moiety, and confining it to immovable property, admits in the most clear manner the impracticability of providing for all cases of this nature. *Rem majoris pretii* (says the Code) *si tu, vel pater tuus minoris distraxerit, humanum est, ut vel pretium te restituente emptoribus, fundum venundatum recipias, auctoritate judicis intercedente, vel si emptor elegerit, quod deest justo pretio recipias;*² thus laying down the broadest rule of Equity, and

¹ 1 Domat, Civil Law, B. 1, lit. 2, § 3, 9, art. 1. See also Heineccius, Elem. I. N. et G. § 352. Id. § 340.

² Cod. Lib. 4, tit. 44, l. 2; Id. l. 9; Heinecc. Elem. J. N. and N. § 340, 352.

morals, adapted to all cases. But, in the same law, struck with the unlimited nature of the proposition, it immediately adds, that the party shall not be deemed to have sold at an undervalue, unless it amounts to one half; *Minus autem pretium videtur, si nec dimidia pars veri pretii soluta sit*; ¹ a logic not very clear and indisputable.² And yet the Civil Law was explicit enough in denouncing fraudulent bargains. *Si pater tuus per vim coactus domum vendidit, ratum non habebitur, quod non bonâ fide gestum est. Malæ fidei emptio irrita est.*³ *Ad rescindendam venditionem et malæ fidei probationem hoc solum non sufficit, quod, magno pretio fundum comparatum, minoris distractum esse commemoras.*⁴ So that we see, in this last passage, the very elements of the doctrine of Equity on this subject.

§ 248. Pothier, too, of whom it has been remarked, that he is generally swayed by the purest morality, says, “Equity ought to preside in all agreements; hence it follows, that, in contracts of mutual interest, where one of the contracting parties gives or does something, for the purpose of receiving something else, as a price and compensation for it, an injury suffered by one of the contracting parties, even when the other has not had recourse to any artifice

¹ Cod. Lib. 4, tit. 44, l. 2, 9; 1 Domat, Civil Law, B. 1, tit. 2, § 9; 1 Fonbl. Eq. B. 1, ch. 2, § 10, note (f).

² In another place the Civil Law, in relation to sales, seems plainly to wink out of sight the immorality of inadequate bargains. *Quemadmodum in emendo et vendendo naturaliter concessum est, quod pluris sit, minoris, quod minoris sit, pluris vendere. Et ita invicem se circumscribere, ita in locationibus quoque et conditionibus juris est.* Dig. Lib. 19, tit. 2, l. 3; 1 Domat, Civil Law, B. 1, tit. 18, p. 247.

³ Cod. Lib. 4, tit. 44, l. 1, 4, 8.

⁴ Cod. Lib. 4, tit. 44, l. 4, 8, 10. See 1 Domat, B. 1, tit. 18; Vices of Covenants, p. 247.

to deceive him, is alone sufficient to render such contracts vicious. For, as Equity in matters of commerce consists in Equality, when that Equity is violated, when one of the parties gives more than he receives, the contract is vicious for want of the Equity, which ought to preside in it." He immediately adds. "Although any injury whatever renders contracts inequitable, and consequently vicious, and the principle of moral duty (*le for interieur*) induces the obligation of supplying the just price; persons of full age are not allowed in point of law to object to their agreements as being injurious, unless the injury be excessive; a rule wisely established for the security and liberty of commerce, which require, that a person shall not be easily permitted to defeat his agreements; otherwise we should not venture upon making any contract, for fear, that the other party, imagining himself to be injured by the terms of it, would oblige us to follow it by a lawsuit. That injury is commonly deemed excessive, which amounts to more than a moiety of the just price. And the person, who has suffered such an injury, may within ten years obtain letters of rescission for annulling the contract."¹

§ 249. After such concessions, we may well rest satisfied with the practical convenience of the rule of the Common Law, which does not make the inequality of the bargain depend solely upon the price; but upon the other attendant circumstances, which demonstrate imposition or some undue influence.² The Scottish Law has adopted the same practical doctrine.³

¹ Pothier on Oblig. n. 33, 34, by Evans.

² 1 Fonbl. Eq. B. 1, ch. 2, § 10.

³ Erskine, Inst. B. 4, tit. 1, § 27. Ante, § 247, note (2), p. 252.

§ 250. This part of the subject may be concluded by the remark, that Courts of Equity will not relieve in all cases even of very gross inadequacy, attended with circumstances, which might otherwise induce them to act, if the parties cannot be placed *in statu quo*; as, for instance, in cases of marriage settlements; for the Court cannot unmarry the parties.¹

§ 251. Cases of surprise and sudden action, without due deliberation, may properly be referred to the same head of fraud or imposition.² An undue

¹ 1 Madd. Ch. Pr. 215; *North v. Ansall*, 2 P. Will. 619.

² See ante, § 120, note (1). *How v. Wheldon*, 2 Ves. 516. — Mr. Baron Powel, in the *Earl of Bath and Montague's Case*, (3 Ch. Cas. 56,) used the following language. "It is said, that this is a deed, that was obtained by surprise and circumvention. Now, I perceive this word, *surprise*, is of a very large and general extent. They say, that if the deed be not read to, or by the party, that is a surprise; nay, the mistake of a counsel, that draws the deed, either in his recitals or other things, that is a surprise of a counsel, and the surprise of counsel must be interpreted the surprise of the client, &c. If these things be sufficient to let in a Court of Equity, to set aside deeds found by verdict to be good in law, then no man's property can be safe. I hardly know any surprise, that should be sufficient to set aside a deed after a verdict, unless it be mixed up with fraud, and that expressly proved." Lord Chief Justice Treby, in the same case (p. 74) said, "As to the first point of surprise, &c., I confess, I am still at a loss for the very notion of surprise, for I take it to be either falsehood or forgery, that is, though I take it, they would not use the word, in this case, fraud; if that be not the meaning of it, to be something done unawares, nor with all the precaution and deliberation, as possibly a deed may be done. Here was a case cited not long ago, &c., out of the Civil Law, about surprise, &c. A man was informed by his kinsman, that his son was dead, and so got him to settle his estate upon him. This is called in the Civil Law, *surreptio*, &c. Now the civilians define that thus. *Surreptio est cum per falsam rei narrationem aliquid extorquetur*; when a man will by false suggestion prevail upon another to do that, which otherwise he would not have done. And I make no doubt, that Equity ought to set aside that; but then this is probably called a fraud." See Lord Holt's opinion in the same case, (p. 103). The Lord Keeper (Lord Somers) in the same case said, (p. 114,) "Now, for this word, *surprise*, it is a word of a general

advantage of the party is taken under circumstances, which mislead, confuse, or disturb the just result of his judgment ; and thus expose him to be the victim of the artful, the importunate, and the cunning. It has been very justly remarked by an eminent writer, that it is not every surprise, which will avoid a deed duly made. Nor is it fitting ; for it would occasion great uncertainty ; and it would be impossible to fix, what is meant by surprise ; for a man may be said to be surprised in every action, which is not done with so much discretion, as it ought to be.¹ The surprise, here intended, must be accompanied with fraud and circumvention ;² or at least by such circumstances, as demonstrate, that the party had no opportunity to use suitable deliberation ; or that there was some influence or management to mislead him. If proper time is not allowed to the party, and he acts improvidently ; if he is importunately pressed ; if those, in whom he places confidence, make use of strong persuasions ; if he is not fully aware of the consequences, but is suddenly drawn in to act ; if he is not permitted to consult disinterested friends, or counsel, before he is called upon to act, in circum-

signification, so general and so uncertain, that it is impossible to fix it. A man is surprised in every rash and indiscreet action, or whatsoever is not done with so much judgment as it ought to be. But I suppose the gentlemen, who use that word in this case, mean such surprise, as is attended and accompanied with fraud and circumvention. Such a surprise may, indeed, be a good ground to set aside a deed, so obtained, in Equity, and hath been so in all times. *But any other surprise never was*, and I hope never will be, because it will introduce such a wild uncertainty in the decrees and judgments of the Court, as will be of greater consequence, than the relief in any case will answer for." See ante, § 120, note (1).

¹ 1 Fonbl. Eq. B. 1, ch. 2, § 8.

² Ibid. Madd. Ch. Prac. 212, 213, 214.

stances of sudden emergency, or unexpected right or acquisition; in these and many like cases, if there has been great inequality in the bargain, Courts of Equity will assist the party, upon the ground of fraud, imposition, or unconscionable advantage.¹

§ 252. Many other cases might be put, illustrative of what is denominated actual or positive fraud.² Among these, are cases of the fraudulent suppression or destruction of deeds and other instruments, in violation of, or injury to, the rights of others; ³ fraudulent awards, with an intent to do injustice; ⁴ fraudulent and illusory appointments and revocations, under powers; ⁵ fraudulent prevention of acts to be done for the benefit of others, under false statements or false promises; ⁶ frauds in relation to trusts of a secret or special nature; ⁷ frauds in verdicts, judgments, decrees, and other judicial proceedings; ⁸ frauds in the confusion of boundaries of

¹ *Evans v. Llewellyn*, 1 Cox, R. 339, 140; S. C. 1 Bro. Ch. R. 150; *Irnham v. Child*, 1 Bro. Ch. R. 92; *Townshend v. Stangroom*, 6 Ves. 338; *Pickett v. Loggon*, 14 Ves. 215.

² See Com. Dig. Chancery, 3 M. 1, &c.

³ 1 Madd. Ch. Pr. 255 to 260; *Bowles v. Stewart*, 1 Sch. & Lefr. 222, 225; *Dormer v. Fortescue*, 3 Atk. 124; *Eyton v. Eyton*, 2 Vern. 280.

⁴ 1 Madd. Ch. Pr. 233, 234; *Brown v. Brown*, 1 Vern. 157, and Mr. Raithby's note (1), 159; Com. Dig. Chancery, 2 K. 6; *Champion v. Wenham*, Ambl. R. 245.

⁵ 1 Madd. Ch. Pr. 246 to 252.

⁶ 1 Madd. Ch. Pr. 252, 253; *Luttrel v. Lord Waltham*, 14 Ves. 290; *Jones v. Mantin*, 6 Bro. Parl. Cas. 437; 5 Ves. 266, note; 1 Fonbl. Eq. B. 1, ch. 2, § 13, note (q); *Id.* B. 1, ch. 4, § 25, and note; 2 Chance on Powers, ch. 23, § 3, art. 3015 to 3025; Sugden on Powers, ch. 6, § 2, p. 377, 378, (3d edition.)

⁷ 2 Madd. Ch. Pr. 97, 98; 1 Hovenden on Frauds, ch. 13, p. 463, &c.; *Dalbiac v. Dalbiac*, 16 Ves. 124.

⁸ 1 Madd. Ch. 236, 237; Com. Dig. Ch. 3 M. 1, 3 N. 1, 3 W.

estates, and matters of partition and dower ;¹ frauds in the administration of charities ;² frauds upon creditors, and other persons, standing upon a like Equity.³

§ 253. Some of the cases, falling under each of these heads, belong to that large class of frauds, commonly called constructive frauds ; which will naturally find a place in our future pages. But, as it is the object of these Commentaries, not merely to treat of questions of relief, but also of principles of jurisdiction, a few instances will be here adduced, as examples of both species of fraud.

§ 254. In the first place, as to the suppression and destruction of deeds, and wills, and other instruments, if an heir should suppress, either in order to prevent another party, as a grantee or devisee, from obtaining the estate vested in him thereby, Courts of Equity, upon due proof by other evidence, would grant relief, and perpetuate the possession and enjoyment of the estate in such grantee or devisee.⁴ For cases for relief against spoliation come in a favorable light before Courts of Equity, *in odium spoliatoris* ; and where the contents of a suppressed, or destroyed instrument are proved, the party (as he ought) will receive the same benefit, as if the instrument were produced.⁵

¹ 1 Madd. Ch. Pr. 237 ; Mitf. Eq. Pl. 117 ; 1 Hovenden on Frauds, ch. 8, p. 239 ; Id. ch. 9, p. 244.

² 2 Hovend. on Frauds, ch. 28, p. 293.

³ Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 411, &c. ; 1 Fonbl. Eq. B. 1, ch. 4, § 12, 13, 14, and notes ; Com. Dig. Chancery, 3 M. 4 ; Jones v. Martin, 6 Bro. Parl. Cas. 437 ; 5 Ves. 266, note.

⁴ See Hunt v. Matthews, 1 Vern. R. 408 ; Wardour v. Binsford, 1 Vern. R. 452 ; 2 P. Will. 748, 749 ; Dalston v. Coatsworth, 1 P. Will. 731 ; Woodreff v. Barton, 1 P. Will. 734 ; Finch v. Neunham, 2 Vern. 216.

⁵ Saltern v. Melhuish, Ambler, R. 247 ; Cowper v. Cowper, 2 P.

§ 255. In the next place, frauds in regard to powers of appointment. A person, having a power of appointment for the benefit of others, shall not, by any contrivance, use it for his own benefit. Thus, if a parent has a power to appoint to such of his children as he may choose; he shall not, by exercising it in favor of a child in a consumption, gain the benefit of it himself; or by a secret agreement with a child, in whose favor he makes it, derive a beneficial interest from the execution of it.¹ The same rule applies to cases, where a parent, having a power to appoint among his children, makes an illusory appointment, by giving to one child a nominal and not a substantial share; for, in such a case, Courts of Equity will treat the execution as a fraud upon the power.²

§ 246. In the next place, the fraudulent prevention of acts to be done for the benefit of third persons. Courts of Equity hold themselves entirely competent to take from third persons, and *a fortiori* from the party himself, the benefit, which he may have derived from his own fraud, imposition, or undue influence, in procuring the suppression of such acts.³ Thus, where a person had fraudulently prevented another, upon his death bed, from suffering a

Will. 748, &c.; *Rex v. Arundel*, Hob. R. 109; *Hampden v. Hampden*, 1 P. Will. 733; 1 Bro. Parl. Cas. 250; *Bowles v. Stewart*, 1 Sch. & Lefr. 225.

¹ *McQueen v. Farquhar*, 11 Ves. 479; *Meyn v. Belcher*, 1 Eden. R. 138; *Palmer v. Wheeler*, 2 Ball & Beatt. 18; Sugden on Powers, ch. 7, § 2; *Morris v. Clarkson*, 1 Jac. & Walk. 111.

² Sugden on Powers, ch. 7, § 2; ch. 9, § 4; *Butcher v. Butcher*, 9 Ves. 392; 2 Hovend. on Frauds, ch. 23, p. 220, &c.; 1 Madd. Ch. Pr. 246 to 252.

³ *Bridgman v. Green*, 2 Ves. R. 627; *Huguenin v. Basley*, 14 Ves. 289.

recovery, with a view, that the estate might devolve upon another person, with whom he was connected ; it was held, that the estate ought to be held, as if the recovery had been perfected ; and that it was against conscience to suffer it to remain where it was.¹ So, if a testator should communicate his intention to a devisee of charging a legacy on his estate, and the devisee should tell him, that it is unnecessary, and he will pay it ; the legacy being thus prevented, the devisee will be charged with the payment.² And where a party procures a testator to make a new will, appointing him as executor, and agrees to hold the property in trust for the use of the testator, he will be held a trustee for the latter, upon the like ground of fraud.³

§ 257. We may close this head of positive or actual fraud, by referring to another class of frauds of a very peculiar and distinct character. Gifts and legacies are often bestowed upon persons, upon condition, that they shall not marry without the consent of parents, guardians, or other confidential persons. And the question has sometimes occurred, how far Courts of Equity can, or ought to interfere, where such consent is fraudulently withheld by the proper party for the express purpose of defeating the gift or legacy, or of insisting upon some private and selfish

¹ *Luttrell v. Lord Waltham*, cited 14 Ves. 290 ; S. C. 11 Ves. 638.

² Cited in *Mestaer v. Gillespie*, 11 Ves. 638. See *Goss v. Tracely*, 1 P. Will. 288 ; 2 Vern. 700 ; *Thynne v. Thynne*, 1 Vern. 296 ; *Reach v. Kennigate*, Ambler, R. 67 ; *Chamberlain v. Agar*, 2 Ves. & B. 259 ; *Drakeford v. Walker*, 3 Atk. 539.

³ *Thynne v. Thynne*, 1 Vern. 296 ; *Reach v. Kennigate*, Ambler, R. 67 ; *Devenish v. Barnes*, Prec. Ch. 3 ; *Oldham v. Litchfield*, 2 Vern. R. 504 ; *Barrow v. Greenough*, 3 Ves. 152 ; *Chamberlain v. Agar*, 2 Ves. & B. 262 ; *Whitton v. Russell*, 1 Atk. R. 448. See also cases in note (a) to 3 Ves. 39.

advantage, or from motives of a corrupt, unreasonable, or vicious nature. The doctrine now firmly established upon this subject is, that Courts of Equity will not suffer the manifest object of the condition to be defeated by the fraud, or dishonest, corrupt, or unreasonable refusal of the party, whose consent is required to the marriage.¹ It is, indeed, a very delicate and difficult duty to be performed by such Courts; but, to permit a different rule to prevail, would be to encourage frauds, and to enable a party to withhold consent upon grounds utterly wrong, or upon motives grossly corrupt and unreasonable.

¹ *Peyton v. Bury*, 2 P. Will. 625, 628; *Eastland v. Reynolds*, 1 Dick. R. 317; *Goldsmid v. Goldsmid*, 19 Ves. 368; *Strange v. Smith*, Ambler, R. 263; *Clarke v. Parkins*, 19 Ves. 1, 12; *Mesgrett v. Mesgrett*, 2 Vern. R. 580; *Merry v. Ryves*, 1 Eden. R. 1, 4.

CHAPTER VII.

CONSTRUCTIVE FRAUD.

§ 253. HAVING thus considered some of the most important cases of actual, or meditated and intentional fraud, in which Courts of Equity are accustomed to administer a plenary jurisdiction ; we may now pass to another class of frauds, which, as contradistinguished from the former, are treated as legal, or constructive frauds. By constructive frauds are meant such contracts or acts, as, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore, are prohibited by law, as within the same reason and mischief, as contracts and acts done *malo animo*. Though, at first view, the doctrines on this subject may seem to be of an artificial, if not of an arbitrary, character ; yet, upon closer observation, they will be found to be founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice, after the wrong has been committed. By disarming the parties of all legal sanction and protection, they suppress the temptations and encouragements, which might otherwise be found too strong for their virtue.

§ 259. Some of the cases under this head are principally so treated, because they are contrary to some general public policy, or to some fixed artificial policy of the law. Others, again, rather grow out of some special confidential or fiduciary relation between the parties, or some of them, which is watched with especial jealousy and solicitude, because it affords the means and the power of taking undue advantage, or of exercising undue influence over others. And others again are of a mixed character, combining, in some degree, the ingredients of the preceding with others of a peculiar nature; but are chiefly prohibited, because they operate substantially as a fraud upon the private rights, interests, duties, or intentions of third persons; or unconscientiously compromise, or injuriously affect, the private interests, rights, or duties of the parties themselves.

§ 260. And, in the first place, let us consider the cases of constructive fraud, which are so denominated, on account of their being contrary to some general public policy, or fixed artificial policy of the law.¹ Among these may properly be placed contracts and agreements respecting marriage, (commonly called marriage brokerage contracts,) by which a party engages to give another a compensation, if he will negotiate an advantageous marriage for him. The Civil Law does not seem to have held contracts of this sort in such severe rebuke; for it allowed

¹ See Mr. Cox's note to *Osmond v. Fitzroy*, 3 P. Will. 131; *Newland on Contracts*, ch. 33, p. 469, &c.—By being contrary to public policy, we are to understand, that in the sense of the law they are injurious to, or subversive of, the public interests. See *Chesterfield v. Janssen*, 1 Atk. 352; S. C. 2 Ves. 125.

proxenetae, or match makers, to receive a reward for their services to a limited extent.¹ And the period is comparatively modern, in which a different doctrine was engrafted into the Common Law, and received the high sanction of the House of Lords.

§ 261. The ground, upon which Courts of Equity interfere in cases of this sort, is not upon any notion of damage to the individuals concerned, but from considerations of public policy.³ Marriages of a suitable nature, and upon the fairest choice, are of the deepest importance to the well being of society; since upon the equality, and mutual affection, and good faith of all parties, much of its happiness, sound morality, and mutual confidence must depend. And upon these only can dependence be placed for the due nurture, education, and solid principles of

¹ Cod. Lib. 5, tit. 1, l. 6

² Hall and Kean v. Potter, 3 P. Will. 76; 1 Eq. Cas. Abridg. 39 F; S. C. 3 Lev. 411; Show. Parl. Cas. 76; 1 Fonbl. Eq. B. 1, ch. 4, § 10; Grisley v. Lothor, Hob. R. 10; Law v. Law, Cas. temp. Talb. 140, 142; Vauxhall Bridge Company v. Spencer, Jac. R. 67. — In Boynton v. Hubbard, 7 Mass. R. 112, Mr. Chief Justice Parsons said, "We do not recollect a contract, which is relieved against in Chancery, as originally against public policy, which has been sanctioned in Courts of Law, as legally obligatory on the parties. For although it has been said in Chancery, that marriage brokerage bonds are good at law, but void in equity; yet no case has been found at law, in which those bonds have been holden good." But see Grisley v. Lothor, Hob. R. 10, and a case cited in Hall v. Potter, 3 Levinz. R. 411, 412; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (r).

³ 1 Fonbl. Eq. B. 1, ch. 4, note (r); Newland on Contracts, ch. 33, p. 469 to 472. — "Marriage brokerage bonds, which are not fraudulent on either party, are void in equity, because they are a fraud on third persons, and a public mischief, as they have a tendency to cause matrimony to be sold, and to subvert the principles, and without the advice of the Court, which is against public policy, and is a public mischief, for it is against the principles of justice, as Mr. Chief Justice Parsons, Ch. Boynton v. Hubbard." — 7 Mass. R. 112.

their children. Hence every temptation to the exercise of an undue influence or a seductive interest in procuring a marriage, should be suppressed ; since there is infinite danger, that it may, under the disguise of friendship, confidence, flattery, or falsehood, accomplish the ruin of the hopes and fortunes of most deserving persons, and especially of females. The natural consequence of allowing any validity to contracts of marriage brokage would be, to introduce improvident, ill advised, and often fraudulent matches, in which advantage would be taken of youth and inexperience, and warm and generous affections ; and the parties would be led on, until they would become the victims of a sordid cunning, and be betrayed into a surrender of all their temporal happiness ; and thus, perhaps, be generally prepared to sink down into gross vice, and an abandonment of conjugal duties. Indeed, contracts of this sort have not been inaptly called a sort of kidnapping into a state of conjugal servitude ;¹ and no acts of the parties can make them valid in a Court of Equity.²

§ 262. The public policy, therefore, of protecting ignorant and credulous persons from being the victims of secret contracts of this sort, would seem to be as perfectly clear, as any question of this nature well can be. And the surprise is, not that the doctrine should have been established in a refined, enlightened, and christian country ; but that its propriety should ever have been made matter of debate. It is one of the innumerable instances, in which the persuasive morality of Courts of Equity

¹ *Drury v. Hocke*, 1 Vern. 412.

² *Shirley v. Martin*, cited by Mr. Cox, in 3 P. Will. 75 ; S. C.

¹ Ball and Beatty, 357, 358.

has subdued the narrow, cold, and semibarbarous dogmas of the Common Law. The Roman Law, while it admitted the validity of such contracts in a qualified form, had motives for such an indulgence, founded upon its own system of conjugal rights, duties, and obligations, very different from what, in our age, would be deemed either safe, or just, or even worthy of toleration.

§ 263. Be this as it may, the doctrine is now firmly established, that all such marriage brokerage contracts are utterly void, as against public policy;¹ so much so, that they are deemed incapable of confirmation;² and even money paid under them may be recovered back again in a Court of Equity.³ Nor will it make any difference, that the marriage is between persons of equal rank, and fortune, and age; for the contract is equally open to objection upon general principles, as of dangerous consequence.⁴ Indeed, some writers treat contracts of this sort, as involving considerations of turpitude, and entitled to be classed with others of a highly vicious nature.⁵

¹ *Arundel v. Trevillian*, 1 Rep. Ch. 47 [87]; *Drury v. Hook*, 1 Vern. R. 412; *Hall v. Potter*, 3 Lev. 411; *S. C. Shower*, Parl. Cas. 76; *Cole v. Gibson*, 1 Ves. 507; *Debonham v. Ox*, 1 Ves. 276; *Smith v. Aykerill*, 3 Atk. 566; *Hylton v. Hylton*, 2 Ves. 548; *Stribblehill v. Brett*, 2 Vern. 446; *S. C. Prec. Ch.* 165, 1 Bro. Parl. Cas. 57; *Roberts v. Roberts*, 3 P. Will. 74, note (1); *Id.* 75, 76; *Law v. Law*, 3 P. Will. 391, 394; *Williamson v. Gihon*, 2 Sch. and Lef. 357; 1 Eq. Cas. Abridg. F.

² *Cole v. Gibson*, 1 Ves. 503, 506, 507; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (s); *Roberts v. Roberts*, 3 P. Will. 74, and Cox's note (1).

³ *Smith v. Bruning*, 2 Vern. 392; 1 Fonbl. Eq. B. 1, ch. 4, § 10; *Goldsmith v. Bruning*, 1 Eq. Abrid. 89.

⁴ 1 Fonbl. Eq. B. 1, ch. 4, § 10; *Newland on Contracts*, ch. 33, p. 470, 471.

⁵ *Newland on Contr.* ch. 33, p. 469.

§ 264. The doctrine has gone even farther ; and, with a view to suppress all undue influence and improper management, it has been held, that a bond, given to the obligee, as a remuneration for having assisted the obligor in an elopement and marriage without the consent of friends, is void, even though it is given voluntarily after the marriage, and without any previous agreement for the purpose¹ ; for it may operate an injury to the wife, as well as give encouragement to a grossly iniquitous transaction, calculated to disturb the peace of families, and to involve them in irremediable distress.¹ It approaches, indeed, very near to the case of a premium in favor of seduction.

§ 265. Of a kindred nature, and governed by the same rules, are cases, where bonds are given, or other agreements made, as a reward for using influence and power over another person, to induce him to make a will in favor of the obligee, and for his benefit ; for all such contracts tend to the deceit and injury of third persons, and encourage artifices and improper attempts to control the exercise of their free judgment.² But such cases are carefully to be distinguished from those, where there is an agreement among heirs, or other near relatives, to share the estate equally between them, whatever may be the will made by the testator ; for such an agreement is generally made to suppress fraud and undue influence, and cannot be said truly to disappoint the testator's intention, if he does not impose any restriction upon his devisee.³

¹ *Williamson v. Gihon*, 2 Sch. and Lefr. 356, 362.

² *Debonham v. Ox*, 1 Ves. 276.

³ *Beckley v. Newland*, 2 P. Will. 191 ; *Harwood v. Tooker*, 2 Sim. R. 192 ; *Wethered v. Wethered*, Id. 183.

§ 266. Upon a similar ground, secret contracts made with parents, or guardians, or other persons, standing in a peculiar relation to the party, whereby, upon a treaty of marriage, they are to receive a compensation, or security, or benefit in promoting the marriage, or giving their consent, are held void. They are in effect equivalent to contracts of bargain and sale of children and other relatives; and of the same public mischievous tendency, as marriage brokerage contracts.¹ They are underhand agreements, subversive of the due rights of the parties; and operating as a fraud upon those, to whom they are unknown, and yet whose interests are controlled, or sacrificed by them. And as marriages are of public concern and ought to be encouraged, so nothing can more promote this end than open and public agreements on marriage treaties, and the discountenance of all others, which secretly impair them.²

§ 267. Thus, where a bond was taken from a son by his father, upon his marriage, it was held void, as being obtained by undue influence, or undue parental awe.³ So where a party, upon his marriage with the daughter of A, gave the latter a bond for a sum of money, (in effect a part of his wife's portion on the marriage,) in order to obtain his consent to the marriage, it was held utterly void.⁴ So where, upon a

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 10; *Keat v. Allen*, 2 Vern. R. 589; S. C. Prec. Ch. 267; 1 Madd. Ch. Pr. 231, 232.

² *Roberts v. Roberts*, 3 P. Will. 74, and Mr. Cox's note (1); *Payton v. Bladwell*, 1 Vern. R. 240; *Redman v. Redman*, 1 Vern. R. 348; *Gale v. Lindo*, 1 Vern. R. 475; *Cole v. Gibson*, 1 Ves. 503; *Morrison v. Arbuthnot*, 1 Bro. Ch. R. 547, note; S. C. 8 Bro. Parl. Cas. 247 (by Tomlins); 1 Fonbl. Eq. B. 1, ch. 4, § 10, 11.

³ 1 Fonbl. Eq. B. 1, ch. 4, § 10, 11; *Williamson v. Gihon*, 2 Sch. & Lefr. 362; *Anon.* 2 Eq. Abr. 187.

⁴ *Keat v. Allen*, 2 Vern. R. 589; 1 Fonbl. Eq. B. 1, ch. 4, § 11; 1 Eq. Cas. Abr. F. 5.

marriage, a settlement was agreed to be made of certain property by relations on each side ; and after the marriage one of the parties procured an underhand agreement from the husband to defeat the settlement in part ; it was set aside, and the original settlement carried into full effect.¹ In all these and the like cases, Courts of Equity proceed upon the broad and general ground, that that, which is the open and public treaty and agreement upon marriage, shall not be lessened, or any way infringed by any private treaty or agreement.² The latter is a meditated fraud upon innocent parties, and upon this account properly held invalid. But it has a higher foundation, in the security, which it is designed to throw round the contract of marriage, by placing all parties upon the basis of good faith, mutual confidence, and equality of condition.³

§ 268. The same principle pervades the class of cases, where persons upon a treaty of marriage by any concealment, or misrepresentation mislead other parties, or do acts, which are by other secret agreements reduced to mere forms, or become inoperative. In all cases of such agreements relief will be granted to the injured parties, upon the same enlightened public policy. For Equity insists upon principles of the purest good faith, and nothing could be more subversive of it, than to allow parties by

¹ *Peyton v. Bladwell*, 1 Vern. R. 240 ; *Stribblehill v. Brett*, 2 Vern. R. 445 ; *Prec. in Ch.* 165.

² 1 Fonbl. Eq. B. 1, ch. 4, § 11 ; 1 Eq. Cas. Abr. F. 5, 6.

³ *Lamlee v. Hanman*, 2 Vern. 499, 500 ; *Pitcairn v. Ogbourne*, 2 Ves. 375 ; *Neville v. Wilkinson*, 1 Bro. Ch. R. 543, 547 ; 1 Fonbl. Eq. B. 1, ch. 4, § 11, and note (x).

holding out false colors, to escape from their solemn engagements.¹

§ 269. Thus, where a parent declined to consent to a marriage with the intended husband, on account of his being in debt ; and the brother of the latter gave a bond for the debt, to procure such consent ; and the intended husband then gave a secret counter bond to his brother, to indemnify him against the first ; and the marriage proceeded upon the faith of the extinguishment of the debt ; the counter bond so given was treated as a fraud upon the marriage, (*contra fidem tabularum nuptialium*) ; and all parties were held entitled, as if it had not been given.²

§ 270. So, where a parent, upon a marriage of his son, made a settlement of an annuity or rent charge upon the wife, in full of her jointure ; and the son secretly gave a bond of indemnity to his parent, of the same date, against the annuity or rent charge ; it was held void, as a fraud upon the faith of the marriage contract ; for it affected to put the female party contracting for marriage in one situation by the articles, and, in fact, put her in another and worse situation by a private agreement.³ So, where a brother, on the marriage of his sister, let her have a sum of money privately, that her fortune might appear to be as much, as was insisted on by the other side ; and the sister gave a bond to the brother to repay it ; the bond was set aside.⁴

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 11, and note ; *Lamlee v. Hanman*, 2 Vern. 499 ; *McNeil v. Cahill*, 2 Bligh, R. 228.

² *Redman v. Redman*, 1 Vern. 348 ; *Scott v. Scott*, 1 Cox, R. 366 ; *Turton v. Benson*, 1 P. Will. 496 ; *Morrison v. Arbuthnot*, 8 Brown, Parl. Cases, p. 247, by Tomlins ; 1 Bro. Ch. R. 547, note.

³ *Palmer v. Neave*, 11 Ves. 165 ; *Scott v. Scott*, 1 Cox, R. 366, 378 ; *Lamlee v. Hanman*, 2 Vern. 466.

⁴ *Gall v. Linde*, 1 Vern. 475 ; *Lamlee v. Hanman*, 2 Vern. 499 ; 1 Fonbl. Eq. B. 1, ch. 2, § 11.

§ 271. And where, upon a treaty of marriage, a party, to whom the intended husband was indebted, concealed his own debt, and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage; and the creditor was prevented by injunction from enforcing his debt, although it did not appear, that there was any actual stipulation on the part of the wife's father, in respect to the amount of the husband's debts.¹ Upon this occasion the Lord Chancellor said, "The principle, on which all these cases have been decided, is, that faith in such contracts is so essential to the happiness, both of the parents and children, that whoever treats fraudulently on such an occasion, shall not only not gain, but even lose by it.² Nay, he shall be obliged to make his representation good; and the parties shall be placed in the same situation, as if he had been scrupulously exact in the performance of his duty."³

§ 272. In all these cases, and those of a like nature, the distinct ground of relief is the meditated fraud or imposition, practised by one of the parties upon third persons, by intentional concealment or misrepresentation. And, therefore, if the parties act, under a mutual innocent mistake, and with entire good faith, the concealment or misrepresentation

¹ *Neville v. Wilkinson*, 1 Bro. Ch. R. 543; S. C. 3 P. Will. 74, Mr. Cox's note; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (x); 3 Ves. 461; 16 Ves. 125.

² *Ibid.* See also *Montefiori v. Montefiori*, 1 W. Black. R. 363; S. C. cited 1 Bro. Ch. R. 548.

³ *Ibid.* See also *Thompson v. Harrison*, 1 Cox, R. 344; *Eastabrook v. Scott*, 3 Ves. 461; *Scott v. Scott*, 1 Cox, R. 366; *Hunsden v. Cheney*, 2 Vern. R. 150; *Beverly v. Beverly*, 2 Vern. 133; *Montefiori v. Montefiori*, 1 W. Black. R. 363; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (x); *Vauxhall Bridge v. Spencer*, Jac. R. 67.

of a material fact will not compel the party, concealing or affirming it, to make it good, or to place the other party in the same situation, as if the fact were, as the latter supposed.¹ There must be some ingredient of fraud, or wilful misstatement, or concealment, which has misled the other side.

§ 273. Upon a similar ground, a settlement, secretly made by a woman in contemplation of marriage, of her property to her own separate use without her husband's privity, will be held void, as it is in derogation of the marital rights of the husband,² and a fraud upon his just expectations.³ And a secret conveyance made by a woman, under like circumstances, in favor of a person, for whom she is under no moral obligation to provide, would be treated in the like manner. But if she only reasonably provides for her children by a former marriage under circumstances of good faith, it would be otherwise.⁴

§ 274. It is upon the same ground of public policy, that contracts in restraint of marriage are held void.⁵ A reciprocal engagement between a man and a woman to marry each other is unquestionably

¹ *Merewether v. Shaw*, 2 Cox, R. 124; *Scott v. Scott*, 1 Cox, R. 366; 1 Fonbl. Eq. B. 1, ch. 4, § 11; *Pitcairn v. Ogbourne*, 2 Ves. 375.

² 1 Fonbl. Eq. B. 1, ch. 4, § 11, and note (z); *Id.* ch. 2, § 6, note (o); *Jones v. Martin*, 3 Anst. R. 882; S. C. 5 Ves. 266, note; *Forrescue v. Hennah*, 19 Ves. 66; *Bowes v. Strathmore*, 2 Bro. Ch. R. 345; S. C. 2 Cox, R. 29; 1 Ves. jr. 22; 6 Bro. Par. Cas. (by Tomlin,) 427; *Ball v. Montgomery*, 2 Ves. jr. 194; *Carlton v. Earl of Dorset*, 2 Vern. 17; *Gregor v. Kemp*, 3 Swanst. R. 404, note; *Godard v. Snow*, 1 Russell, R. 485.

³ *Ibid.* *Lance v. Norman*, 2 Ch. Rep. 41, [79]; *Blanchet v. Foster*, 2 Ves. 264.

⁴ *Ibid.* *King v. Cotton*, 2 P. Will. 357, 674; *St. George v. Wake*, 1 Mylne & Keen, 610.

⁵ *Hartley v. Rice*, 10 East, R. 22; *Lowe v. Peers*, 4 Burr. 2225;

good.¹ But a contract, which restrains a person from marrying at all, or from marrying any body, except a particular person, without enforcing a corresponding reciprocal obligation on that person, is treated as mischievous to the general interests of society, which are promoted by the encouragement and support of suitable marriages.² Courts of Equity have in this respect followed, though not to an unlimited extent, the doctrine of the Civil Law, that marriage ought to be free.³

§ 275. Where, indeed, the obligation to marry is reciprocal, though the marriage is to be deferred to some future period, there may not be, as between the parties, any objection to the contract in itself, if in all other respects it is entered into in good faith, and there is no reason to suspect fraud, imposition, or undue influence.⁴ But even in these cases, if the contract is designed by the parties to impose upon third persons, as upon parents, or friends, standing *in loco parentis*, or in some other particular relation to the parties, so as to disappoint their bounty, or to defeat their intentions in the settlement or disposal of their estates ; there, if the contract is clandestine, and kept secret for this purpose, it will be treated by Courts of Equity, as a fraud upon such parents or

Woodhouse v. Shipley, 2 Atk. 539, 540 ; Newland on Contracts, ch. 33, p. 472 to 476.

¹ Cork v. Richards, 10 Ves. 438 ; Key v. Bradshaw, 2 Vern. 102.

² 1 Fonbl. Eq. B. 1, ch. 4, § 10 ; Baker v. White, 2 Vern. 215 ; Woodhouse v. Shipley, 2 Atk. 595 ; Lowe v. Peers, 4 Burr. 2225 ; Cork v. Richards, 10 Ves. 429 ; Key v. Bradshaw, 2 Vern. 102 ; Atkins v. Farr, 1 Atk. R. 297 ; S. C. 2 Eq. Abridg. 247, 248.

³ Dig. Lib. 35, tit. 1, l. 62, 63, 64 ; Key v. Bradshaw, 2 Vern. 102 ; 1 Fonbl. Eq. B. 1, ch. 4, § 10.

⁴ Lowe v. Peers, 4 Burr. 2229, 2230 ; Key v. Bradshaw, 2 Vern. 102.

other friends, and as such be set aside; or the equities will be held the same, as if it had not been entered into.¹ The general ground, upon which this doctrine is so sustained, is, that parents, and other friends, standing *in loco parentis*, are thereby induced to act differently, in relation to the advancement of their children and relatives, from what they would, if the facts were known; and the best influence, which might be exerted in persuading their children and relatives to withdraw from an unsuitable match, is entirely taken away. To give effect to such contracts would be an encouragement to persons to lie upon the watch to procure unequal matches against the consent of parents and friends, and to draw on improvident and clandestine marriages, to the destruction of family confidence, and the disobedience of parental authority.² These are objects of so great importance to the best interests of society, that they can scarcely be too deeply fixed in the public policy of a nation, and especially of a christian nation.

§ 276. In the Civil Law a strong desire was manifested to aid in the establishment of marriages, as has been already intimated. And, hence, all conditions annexed to gifts, legacies, and other valuable interests, which went to restrain marriages generally, were deemed inconsistent with public policy, and held void. A gift, therefore, to a woman of land, if she should not marry, was held an absolute gift. *Maviæ, si non nupserit, fundum, quum morietur, lego; potest dici etsi nupserit eam confestim ad legatum*

¹ Woodhouse v. Shepley, 2 Atk. 535, 539; Cork v. Richards, 10 Ves. 436, 438.

² Woodhouse v. Shepley, 2 Atk 539; Cork v. Richards, 10 Ves. 438, 439; Newland on Contracts, ch. 33, p. 476.

*admitti. Si testator rogasset heredem, ut restituat hereditatem mulieri, si non nupsisset, dicendum erit compellendum heredem, si suspectam dicat hereditatem, adire, et restituere eam mulieri etiamsi nupsisset.*¹ So a gift to a father, if his daughter, who is under his authority, (*in potestate*,) should not marry, was treated as an absolute gift; the condition being held void.² The avowed ground of these decisions was, that all such conditions were a fraud upon the law, which favored marriage; *quod in fraudem legis ad impediendas nuptias scriptum est, nullam vim habet.*³

§ 277. But a distinction was taken in the Civil Law between such general restraints of marriage, and a special restraint, as to marrying or not marrying a particular person; the latter being deemed not unjustifiable. Thus, a gift upon condition, that a woman should not marry Titius, or not marry Titius, Seius, or Mævius, was held valid.⁴ And the distinction was in some cases even more refined; for, if a legacy was given to a wife upon condition, that she should not marry, while she had children, (*si a liberis ne nupserit*,) the condition was nugatory; but, if it was, that she should not marry, while she had children in puberty, (*si a liberis impuberibus ne nupserit*,) it was good.⁵ And the reason given is, that the care of children, rather than widowhood might be enjoined; *quia magis cura liberorum, quam viduitas injungeretur.*⁶

¹ Pothier, Pand. Lib. 35, tit. 1, § 33, 34, 35; Dig. Lib. 36, tit. 1, l. 65; Dig. Lib. 35, tit. 1, l. 72, § 5.

² Pothier, Pand. Lib. 35, tit. 1, § 35.

³ Pothier, Pand. Lib. 35, tit. 1, § 35; Dig. Lib. 35, tit. 1, l. 79, § 4.

⁴ Pothier, Pand. Lib. 35, tit. 1, § 34; Dig. Lib. 35, tit. 1, l. 63, § 64.

⁵ Pothier, Pand. Lib. 35, tit. 1, § 34; Dig. Lib. 35, tit. 1, l. 62, § 2.

⁶ Ibid.

§ 278. Courts of Equity, in acting upon cases of a similar nature, have been in no small degree influenced by these doctrines of the Civil Law.¹ But it has been doubted, whether the same grounds, upon which the Roman Law acted, can or ought to be acted on in a christian country, under the Common Law. Lord Rosslyn has endeavoured to account for the introduction of the doctrines into the English Courts of Equity, from the desire of the latter to adopt, upon legatory questions, the rules of the Ecclesiastical Courts, which were borrowed directly from the Civil Law. And speaking upon the subject of the rule of the Civil Law, as to conditions in restraint of marriage, he said,² “How it should ever have come to be a rule of decision, in the Ecclesiastical Court, is impossible to be accounted for, but upon this circumstance, that in the unenlightened ages, soon after the revival of letters, there was a blind, superstitious adherence to the text of the Civil Law. They never reasoned ; but only looked into the books, and transferred the rules without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how, in a christian country, they should have adopted the rule of the Roman Law, with regard to conditions as to marriage. First, where there is an absolute, unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law, where divorce is not permitted. Next, the favor to mar-

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 10; *Stackpole v. Beaumont*, 3 Ves. jr. 96.

² *Stackpole v. Beaumont*, 3 Ves. jr. 96, per Lord Rosslyn. See also Lord Thurlow's Judgment, in the case of *Scott v. Tyler*, 2 Bro. Ch. R. 497; S. C. 2 Dick. R. 712.

riage, and the objection to the restraint of it, were a mere political regulation, applicable to the circumstances of the Roman Empire at that time, and inapplicable to other countries. After the civil war, the depopulation occasioned by it led to habits of celibacy. In the time of Augustus the Julian Law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established as a rule in restraint of celibacy, (it is an odd expression,) and for the encouragement of all persons, who would contract marriage, it necessarily followed, that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore it became a rule of construction, that these conditions were null. It is difficult to apply that to a country, where there is no law to restrain individuals from exercising their own discretion, as to the time and circumstances of the marriage, which their children, or objects of bounty may contract. It is perfectly impossible now, whatever it might have been formerly, to apply that doctrine, not to lay conditions to restrain marriage under the age of twenty-one, to the law of England; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one without the consent of the parent."

§ 279. It is highly probable, that this view of the origin of the English doctrine, as to conditions in restraint of marriage, annexed to gifts, legacies, and other conveyances of interests, is historically correct.¹ But, whether it be so or not, it may be affirm-

¹ See *Scott v. Tyler*, 2 Bro. Ch. R. 487; S. C. 2 Dick. R. 712; *Clarke v. Parker*, 19 Ves. 13; *Reynish v. Martin*, 3 Atk. 330, 331,

ed without fear of contradiction, that the doctrine on this subject, at present maintained and administered by Courts of Equity, (for it has undergone some im-

332; 1 Roper on Legacies, by White, ch. 13, § 1, p. 654. — Lord Thurlow, in *Scott v. Tyler*, (2 Dick. R. 716 to 721,) has traced out with much learning and ability the gradual introduction and progress of the Civil Law doctrine, through the instrumentality of the Canon Law, into the Law of England. I gladly extract a portion of his statements, as they may tend to instruct the student more exactly in a branch of the law, confessedly not without some anomalies. “The earlier cases (said he) refer, in general terms, to the Canon Law, as the rule by which all legacies are to be governed. By that law, undoubtedly, all conditions, which fell within the scope of this objection, the restraint of marriage, are reputed void; and, as they speak, *pro non adjectis*. But those cases go no way towards ascertaining the nature and extent of the objection.

“Towards the latter end of the last, and beginning of the present century, the matter is more loosely handled. The Canon Law is not referred to, (professedly at least,) as affording a distinct and positive rule for annulling the obnoxious conditions: on the contrary, they are treated as partaking of the force allowed them by the law of England. But, in respect of their imposing a restraint of marriage, they are treated at the same time as unfavorable, and contrary to the common weal and good order of society. It is reasoned, that parental duty and affection are violated, when a child is stripped of its just expectations. That such an intention is improbably imputed to a parent; particularly in those instances where there was no misalliance; as in marriage with the houses of Bellases, Bertie, Cecil, and Semphile; which the parent, if he had been alive, would probably have approved. These ideas apply indifferently to bequests of lands, and of money, and were, in fact, so applied in one very remarkable case: nay, to avoid the supposed force of these obnoxious conditions, strained constructions were made upon doubtful signs of consent; and every mode of artificial reasoning was adopted, to relax their rigor. This was thought more practicable by calling them conditions subsequent; although, if that had made such difference, they were, and, indeed, must have been generally, conditions precedent, as being the terms on which the legacy was made to vest; at length, it became a common phrase, that such conditions were only *in terrorem*. I do not find it was ever seriously supposed to have been the testator’s intention to hold out the terror of that, which he never meant should happen; but the Court disposed of such conditions so as to make them amount to no more.

“On the other hand, some provisions against improvident matches,

portant changes,) is far better adapted to the exigencies of modern society throughout Christendom, than that, which was asserted in the Roman Law. While

especially during infancy, or to a certain age, could not be thought an unreasonable precaution for parents to entertain. The custom of London has been found reasonable, which forfeits the portion on the marriage of an infant orphan without consent. The Court of Chancery is in the constant habit of restraining and punishing such marriages: and the Legislature has at length adopted the same idea, as far as it was thought general regulation could, in sound policy, go.

“In this situation the matter was found about the middle of the present century; when doubts occurred, which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases; or, rather, the arguments on which they proceeded. The better opinion, or, at least, that which prevailed, was, that devises of land, with which the Canon Law never had any concern, should follow the rule of the Common Law; and that legacies of money, being of that sort, should follow the rule of the Canon Law.

“Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands, (though I do not find this yet resolved,) follow the rule of the Common Law, and such trusts are to be executed with analogy to it.

“Mere money legacies follow the rule of the Canon Law; and all trusts of that nature are to be executed with analogy to that.

“But still, if I am not mistaken, the question remains unresolved, what is the nature and extent of that rule, as applied to conditions in restraint of marriage.

“The Canon Law prevails in this country, only so far as it hath been actually received, with such ampliations and limitations as time and occasion have introduced; and subject at all times to the Municipal Law. It is founded in the Civil Law: consequently the tenets of that law also may serve to illustrate the received rules of the Canon Law.

“By the Civil Law the provision of a child was considered as a debt of nature, of which the laws of civil society also exacted the payment; insomuch, that a will was regarded as inofficious, which did not in some sort satisfy it.

“By the positive institutions of that law, it was also provided, *Si quis cælibatûs, vel viduitatis conditionem hæredi, legatariove injunxerit; hæres, legatariusve é conditione liberi sunt; neque eo minus delatam hæreditatem, legatumve, ex hac lege, consequantur.*

“In ampliation of this law it seems to have been well settled in all

it upholds the general freedom of choice in marriages, it at the same time has a strong tendency to preserve a just control and influence in parents, in regard to the marriages of their children, and a reasonable power in all persons to qualify and restrict their bounty in such a manner, and on such conditions, as the general right of dominion over property in a free country justifies and protects upon grounds of general convenience, and safety.

§ 280. The general result of the modern English doctrine on this subject (for it will not be easy to reconcile all the cases)¹ may be stated in the following summary manner. Conditions annexed to gifts, legacies, and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition be in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void.² And so, if the condition is not in

times, that if, instead of creating a condition absolutely enjoining celibacy, or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly ; that is, the condition so imposed is holden for void.

“Upon the same principle, in further ampliation of the law, all distinction is abolished between precedent and subsequent conditions ; for it would be an easy evasion of such a law, if a slight turn of the phrase were allowed to put it aside. It has rather, therefore, been construed, that the condition is performed by the marriage, which is the only lawful part of the condition, or by asking the consent, for that also is a lawful condition : and, for the rest, the condition not being lawful, is holden *pro non adjectâ*.”

¹ Scott v. Tyler, 2 Bro. Ch. R. 437 ; 2 Dick. R. 718 ; Stackpole v. Beaumont, 3 Ves. 95 ; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (q).

² Kelly v. Monck, 3 Ridgw. P. R. 205, 244, 247, 261 ; 1 Fonbl. Eq.

restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party, upon whom it is to operate, is unreasonably restrained in the choice of marriage, it will fall under the like consideration.¹ Thus, where a legacy was given to a daughter on condition, that she should not marry without consent, or should not marry a man, who was not seized of an estate in fee simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage.²

§ 281. But the same principles of public policy, which annul such conditions, when they tend to a general restraint of marriage, will confirm and support them, when they merely prescribe such reasonable and provident regulations and sanctions, as tend to protect the individual from those rash consequences, to which an over-hasty, rash, or precipitate match would probably lead.³ If parents, who must naturally feel the deepest solicitude for the welfare of their children, and other near relatives and friends, who may well be presumed to take a lively interest in the happiness of those, with whom they are associated by ties of kindred, or friendship, could not by imposing some restraints upon their bounty, guard the inexperience and ardor of youth against the wiles and delusions of the crafty and the corrupt, who should seek to betray them from motives of the

B. 1, ch. 4, § 10, note (q); *Pratt v. Tyler*, 2 Bro. ch. R. 487; *Harvey v. Aston*, Com. Rep. 726; S. C. 1 Atk. 361.

¹ *Keely v. Monck*, 3 Ridgw. Parl. R. 205, 244, 247, 261; 1 Eq. Abridg. p. 110, *Condition*. C. in Marg.

² *Keely v. Monck*, 3 Ridgw. Parl. R. 205, 244, 247, 261; 1 Chitty, Eq. Dig. *Marriage*. W.

³ 1 Fonb. Eq. B. 1, ch. 4, 10, note (q).

grossest selfishness, the law would be lamentably defective, and under a pretence of upholding the institution of marriage, subvert its highest purposes. It would, indeed, encourage the young and the thoughtless to exercise a perfect freedom of choice in marriage; but it would be at the expense of all the best objects of the institution, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence. Such a reproach does not belong to the Common Law in our day; and, least of all, can it be justly attributed to Courts of Equity.

§ 282. Mr. Fonblanque has with great propriety remarked, that “the only restrictions, which the Law of England imposes, are such as are dictated by the soundest policy, and approved by the purest morality. That a parent, professing to be affectionate, shall not be unjust; that professing to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that what purports to be an act of generosity shall not be allowed to operate as a temptation to do that, which militates against nature, morality, or sound policy, or to restrain from doing that, which would serve and promote the essential interests of society; are rules, which cannot reasonably be reprobated, as harsh infringements of private liberty, or even reproached, as unnecessary restraints on its free exercise. On these considerations are founded those distinctions, which have from time to time been recognised in our Courts of Equity, respect-

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ing testamentary conditions with reference to marriage."¹

§ 283. Godolphin has very correctly laid down the general principle. "All conditions against the liberty of marriage are unlawful. But, if the conditions are only such, as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect to time, place, or person, then such conditions are not utterly to be rejected."² Still, this language is to be understood with proper limitations; that is to say, that the restraints upon marriage in respect to time, place, or person, are reasonably asserted. For it is obvious, that restraints, as to time, place, and person, may be so framed, as to operate a virtual prohibition upon marriage, or, at least, upon its most important and valuable objects. As for instance, a condition, that a child should not marry until fifty years of age;³ or should not marry any person inhabiting in the same town, county, or state, or should not marry any person, who was a clergyman, a physician, or a lawyer, or any person, except of a particular trade or employment; for these would be deemed a mere evasion or fraud upon the law.⁴

§ 284. On the other hand, some provisions against improvident matches, especially during infancy, or to a certain age of discretion, cannot be deemed an unreasonable precaution for parents and other persons to affix to their bounty.⁵ Thus, a legacy

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (q).

² Godolphin's Orphan's Legacy, Pt. 1, ch. 15, § 1.

³ But see 1 Roper on Legacies, ch. 13, § 2, p. 716, Edit. by White.

⁴ See *Scott v. Tyler*, 2 Dick. R. 721, 722; 2 Brown, Ch. R. 488.

⁵ *Scott v. Tyler*, 2 Dick. R. 719.

given to a daughter to be paid her at twenty-one years of age, if she did not marry until that period, would be held good ; for it postpones marriage only to a reasonable age of discretion.¹ So a condition annexed to a gift or legacy, that the party should not marry without the consent of parents, or trustees, or other persons specified, is held good ; for it does not impose an unreasonable restraint upon marriage ; and it must be presumed, that the persons selected will act with good faith and sound discretion in giving or withholding their consent.² The Civil Law, indeed, seems on this point to have adopted a very different doctrine ; holding that the requirement of the consent of a third person, and especially of an interested person, is a mere fraud upon the law.³

§ 285. Other cases have been stated, which are governed by the same principles. Thus, it has been said, that a condition not to marry a widow, is no unlawful injunction ; for it is not in general restraint of marriage. So a condition, that a widow shall not marry, is not unlawful, or an annuity during widowhood.⁴ A condition to marry or not to marry 'Titius

¹ See *Stackpole v. Beaumont*, 3 Ves. 96, 97 ; *Scott v. Tyler*, 2 Dick. R. 721, 722, 724.

² *Desbody v. Beyville*, 2 P. Will. 547 ; *Scott v. Tyler*, 2 Bro. Ch. R. 431, 485 ; 2 Dick R. 712 ; *Clarke v. Parker*, 19 Ves. 1 ; *Lloyd v. Branton*, 3 Meriv. R. 108 ; *Dashwood v. Bulkley*, 10 Ves. 229.

³ Lord Thurlow in *Scott v. Tyler*, 2 Dick. R. 720 ; *Ayliffe, Pand. B. 3*, tit. 21, p. 374.

⁴ Conditions requiring widowhood, were void by the Civil Law. *Legatum alii sub conditione sic relictum, si uxor nuptui se post mortem mariti non collocaverit ; contractis nuptiis conditione deficit, ideoque pati nequaquam potest.* Cod. Lib. 6, tit. 40, l. 1. In *Parsons v. Winslow*, (6 Mass. R. 169,) where the legacy was during widowhood and life, without any bequest over, the Court held the condition to be in *terrorem* only ; and that the legatee took, notwithstanding a

or Mœvia is good. So a condition, prescribing due ceremonies and a due place of marriage, is good. And so any other conditions of a similar nature, if not used evasively, as a covered purpose to restrain marriage generally.¹

§ 286. But Courts of Equity are not inclined to lend an indulgent consideration to conditions in restraint of marriage ;² and on that account, (being in no small degree influenced by the doctrines of the Civil and Canon Law,) they have not only constantly manifested an anxious desire to guard against any abuse, to which the giving one person any degree of control over another might eventually lead ; but have, on many occasions, resorted to subtleties and artificial distinctions, in order to escape from the positive directions of the party imposing the conditions.

§ 287. One distinction is, between cases, where, in default of a compliance with the condition, there is a bequest over, and cases, where there is not a bequest over, upon a like default of the party to comply with the condition. In the former case, the bequest over becomes operative upon such default, and defeats the prior legacy.³ In the latter case,

second marriage. But, see *Scott v. Tyler*, 2 Dick. R. 721, 722 ; S. C. 2 Brown, Ch. R. 488 ; *Harvey v. Aston*, 1 Atk. 379 ; *Marples v. Bainbridge*, 1 Madd. R. 590 ; *Richards v. Baker*, 2 Atk. 321 ; 1 Roper on Legacies, by White, ch. 13, § 2, p. 721, 722.

¹ *Scott v. Tyler*, 2 Bro. Ch. R. 488 ; 2 Dick. R. 721, 722 ; *Godolp. Orp. Leg. Pt. 3*, ch. 17, § 1 to 10 ; *Ayliffe, Pand. B. 3*, tit. 21, p. 374.

² See *Long v. Dennis*, 4 Burr. R. 2052. — Lord Mansfield, in *Long v. Dennis*, 4 Burr. R. 2055, said, “ Conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness.” Lord Eldon seems to have disapproved of this generality of expression in *Clarke v. Parker*, 19 Ves. 19.

³ *Clarke v. Parker*, 19 Ves. 13 ; *Lloyd v. Branton*, 3 Meriv. R. 108, 119 ; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (q) ; *Wheeler v.*

(that is, where there is no bequest over,) the condition is treated as ineffectual; upon the ground, that the testator is to be deemed to use the condition *in terrorem* only, and not to impose a forfeiture; since he has failed to make any other disposition of the bequest upon default in the condition.¹

§ 288. Another distinction is taken between such conditions in restraint of marriage, annexed to a bequest of personal estate, and the like conditions, annexed to a devise of real estate, or a charge on real estate, or savoring of the realty. In the latter case the doctrine of the Common Law, as to conditions, is strictly applied. If the condition be precedent, it must be strictly complied with, in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent, its validity will depend upon its being such, as the law will allow to divest an estate. For, if the law deems the condition void, as against its own policy, then the estate will be absolute, and free from the condition. If, on the other hand, the condition is good, then a non compliance with it will defeat the estate, in the same manner as any other condition subsequent will defeat it.²

Bingham, 3 Atk. 368.; Malcolm v. O'Callagan, 2 Madd. R. 350; Chauncy v. Graydon, 2 Atk. 616.

¹ Harvey v. Aston, 1 Atk. 361, 375, 377; Reynish v. Martin, 3 Atk. 330; 1 Will. R. 130; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (q); Pendarvis v. Hicks, 2 Freeman, R. 41; Pullen v. Ready, 2 Atk. R. 587; Long v. Dennis, 4 Burr, 2055; 1 Eq. Abridg. 110, C.; Parsons v. Winslow, 6 Mass. R. 169; 1 Roper on Legacies, by White, ch. 13, § 1, p. 654 to 660; Id. § 2, p. 687, 715 to 727; Eastland v. Reynolds, 1 Dick. R. 317.

² Co. Litt. 206, a & b; Id. 217, a; Id. 237, Harg. and Butler's note, 152; Bertie v. Faulkland, 3 Ch. Cas. 130; S. C. 2 Freeman R. 220; 2 Vern. R. 333; 1 Eq. Cas. Abridg. 108, margin; Harvey v. Aston, Com. R. 726; S. C. 1 Atk. 361; Reynish v. Martin, 3

§ 289. But if the bequest be of personal estate, a different rule seems to have prevailed, founded, in all probability, upon the doctrines maintained in the Ecclesiastical Courts, as derived from the Canon and Civil Law.¹ If the condition in restraint of marriage be subsequent and general in its character, it is treated, as the like conditions are at law in regard to real estate, as a mere nullity; and the legacy becomes pure and absolute. And if it be only a limited restraint, (as with consent of parents, or not until the age of twenty-one,) and there be no bequest over upon default, the condition subsequent is treated as merely *in terrorem*; and the legacy becomes pure and absolute.² But, if the restraint be a condition precedent, then, it admits of a very different application from the rule of the Common Law in similar cases as to real estate. For if the condition regard real estate, and be in general restraint of marriage; there, although it is void, yet, for the non compliance with it, the estate never arises in the devisee. But, if it be a legacy of personal estate under like circumstances, the legacy will be held good and absolute, as if no condition whatsoever had been annexed to it.

Atk. 330, 332, 333; Fry v. Porter, 1 Mod. R. 300; Long v. Rickets, 2 Sim. & Stu. R. 179; Popham v. Bamfield, 1 Vern. R. 93; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (q); Graydon v. Hicks, 2 Atk. 16; Peyton v. Bury, 2 P. Will. 626; 1 Roper on Legacies, by White, ch. 13, § 1, p. 650, 666; Id. § 2, p. 687 to 727.

¹ 1 Roper on Legacies, by White, ch. 13, § 1, p. 650 to 660; Scott v. Tyler, 2 Bro. Ch. R. 487; 2 Dick. R. 712; Stackpole v. Beaumont, 3 Ves. 96.

² Lloyd v. Branton, 3 Meriv. R. 117; Marples v. Bainbridge, 1 Madd. R. 590; 1 Roper on Legacies, by White, ch. 13, § 1, p. 654, &c.; Id. § 2, p. 715, 747; Garret v. Pretty, 2 Vern. R. 293; Wheeler v. Brigham, 3 Atk. 364.

§ 290. Whether the same rule is to be applied to legacies of personal estate upon a condition precedent, not in restraint of marriage generally, but of a limited, and qualified, and legal character, where there is no bequest over, and there has been a default in complying with the condition, has been a question much vexed and discussed in Courts of Equity ; and upon which some diversity of judgment has been expressed. There are certainly authorities, which go directly to establish the doctrine, that there is no distinction in cases of this sort between conditions precedent and conditions subsequent. In each, if there is no bequest over, the legacy is treated, as pure and absolute, and the condition, as made *in terrorem* only. The Civil Law and Ecclesiastical Law recognise no distinction between conditions precedent and conditions subsequent, as to this particular subject.¹ On the other hand, there are authorities, which seem to inculcate a different doctrine, and to treat conditions precedent, as to legacies of this sort, upon the same footing, as any other bequests or devises at the Common Law ; that is to say, that they are to take effect only upon the condition precedent being complied with, whether there be a bequest over or not.²

¹ See *Harvey v. Aston*, 1 Atk. 375 ; S. C. Com. Rep. 738 ; *Reynish v. Martin*, 3 Atk. R. 332.

² The former doctrine (that is, that there is no difference between conditions precedent and conditions subsequent as to this point) was maintained by Lord Hardwicke, in *Reynish v. Martin*, 3 Atk. 330 ; and was recognised by Lord Clare, in *Keiley v. Monck*, 3 Ridgw. R. 263, and by Sir Thomas Plumer in *Malcolm v. O'Callagan*, 2 Madd. R. 349, 353. See also *Garbut v. Hilton*, 1 Atk. 391. But the contrary doctrine is indicated in *Hemmings v. Munckley*, 1 Bro. Ch. R. 303 ; *Scott v. Tyler*, 2 Bro. Ch. R. 488 ; 2 Dick. R. 723, 724 ; *Stackpole v. Beaumont*, 3 Ves. 89. See also *Knight v.*

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

Cameron, 14 Ves. 388; Clarke v. Parker, 19 Ves. 13; Elton v. Elton, 1 Ves. 4. Mr. Roper, in his work on Legacies, 1 Roper, Leg. by White, ch. 13, § 1, p. 654 to 660; Id. § 2, p. 715 to 727, is of opinion, that the weight of authority is with the latter doctrine; and so is Mr. Hovenden, in his Supplement to Vesey, jr. Vol. 1, p. 353, note to 3 Ves. 89. See also Mr. Saunders's note to Harvey v. Aston, 1 Atk. 381.

A distinction has also been taken between cases of personal legacies, and cases of portions charged on land. In the former the condition may, perhaps, be dispensed with, at least, under some circumstances; in the latter, the condition must be complied with, to entitle the party to take, although there may be no devise over. See Harvey v. Aston, 1 Atk. R. 361; S. C. Com. Rep. 726; Cas. F. Talb. 212.

the survivor or survivors, would be deemed a sufficient compliance with the condition.¹ And, *a fortiori*, this doctrine will be applied to conditions subsequent.²

§ 292. Another class of constructive frauds, and deemed so, because inconsistent with the general policy of the law, is bargains and contracts made in restraint of trade. And, here, the known and established distinction is between such bargains and contracts, as are in general restraint of trade, and such as are in restraint of it only, as to particular places or persons. The latter, if founded upon a good and valuable consideration, are valid. The former are universally prohibited. The reason of this difference is, that all general restraints upon trade have a tendency to promote monopolies, to discourage industry, enterprise, and just competition; and thus to do mischief to the party, by the loss of his livelihood and the subsistence of his family, and mischief to the public, by depriving it of the services and labors of a useful member.³ But the same reasoning does not apply to a special restraint, not to carry on trade in a particular place, or with particular persons, or for a limited reasonable time; for this restraint leaves all other places, and persons, and times free to the party, to pursue his trade and employment. And it may even be beneficial to the

¹ Swinburne on Wills, Pt. 4, § 7, n. 4, p. 262; 1 Roper on Legacies, by White, ch. 13, § 2, p. 691, 692. See *Clarke v. Parker*, 19 Ves. 1, 16, 19.

² See 1 Roper on Legacies, ch. 13, § 2, p. 691; *Peyton v. Bury*, 2 P. Will. 626; *Graydon v. Hicks*, 2 Atk. 16, 18; *Aislabie v. Rice*, 3 Madd. R. 256; *Worthington v. Evans*, 1 Sim. and Stu. R. 165.

³ *Mitchell v. Reynolds*, 1 P. Will. 181, where the subject is most elaborately considered. See also *Pierce v. Fuller*, 8 Mass. R. 223; *Morris v. Colman*, 18 Ves. 436.

country, that a particular place should not be overstocked with artisans or other persons, engaged in a particular trade or business ;¹ or a particular trade may be promoted by being for a short period limited to a few persons ; especially if it be a foreign trade recently discovered, and it can be beneficial but to a small number of adventurers.² And for a like reason a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret.

§ 293. Upon analogous principles, agreements, whereby parties engage not to bid against each other at a public auction, especially in cases where such auctions are directed or required by law, as in cases of sales of chattels or other property on execution, are held void ; for they are unconscientious, and against public policy, and have a tendency injuriously to affect the character and value of sales at public auction, and mislead private confidence. They operate virtually as a fraud upon the sale.⁴ So, if underbidders or puffers are employed at an auction to enhance the price, and deceive other bidders, and they are in fact misled, the sale will be held void, as against public policy.⁵

¹ Ibid. *Davis v. Mason*, 5 T. R. 118 ; *Chesman v. Nainby*, 3 Bro. Parl. Cas. 349 ; *Shackle v. Baker*, 14 Ves. 468 ; *Crutterell v. Lye*, 17 Ves. 336 ; *Harrison v. Gardner*, 2 Madd. R. 198 ; *Pierce v. Fuller*, 8 Mass. R. 228 ; *Perkins v. Lyman*, 9 Mass. R. 522 ; *Stearns v. Barrett*, 1 Pick. R. 443 ; *Palmer v. Stebbins*, 3 Pick. R. 198 ; *Pierce v. Woodward*, 6 Pick. R. 206.

² *Perkins v. Lyman*, 9 Mass. R. 522, 530.

³ *Bryson v. Whitehead*, 1 Sim. & Stu. 94.

⁴ *Jones v. Caswell*, 3 John. Cas. 29 ; *Doolin v. Ward*, 6 John. R. 194 ; *Wilbur v. Howe*, 8 John. 444 ; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (x).

⁵ See *Howard v. Castle*, 6 T. R. 642 ; *Bramlet v. Alt*, 3 Ves. 619, 623, 624 ; *Condly v. Parsons*, Id. 624, note ; *Smith v. Clarke*, 12 Ves. 477. But see *Bexwell v. Christie*, Cowp. R. 395 ; *Twining*

§ 294. In like manner agreements, which are founded upon violations of public trust or confidence, or the rules, adopted by Courts in furtherance of the administration of public justice, are held void. Thus, an agreement made for a remuneration to commissioners, appointed to take testimony, and bound to secrecy, by the nature of their appointment, upon their disclosure of the testimony so taken, is void.¹ So, an assignment of the half pay of a retired officer of the army is void ; for it operates as a fraud upon the public bounty.² So, an assignment of the fees and profits of the office of keeping a house of correction, and of the profits of the tap house connected with it ; for the former plainly tends to oppression and extortion, and the latter to increase riot and debauchery among the prisoners.³ Agreements, founded upon the suppression of criminal prosecutions, fall under the same consideration. They have a manifest tendency to subvert public justice.⁴ So, wager contracts, which are contrary to sound morals, or injurious to the feelings or interests of third persons, or against the principles of public policy or duty, are void.⁵ So contracts, which have a tendency to encourage champerty.⁶

v. Morrice ; 2 Bro. Ch. C. 326 ; 1 Madd. Ch. Pr. 257 ; *Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 1, p. 390.*

¹ *Cooth v. Jackson*, 6 Ves. 12, 31, 32, 35.

² *Stone v. Liddledale*, 2 Anst. 533 ; *M'Carthy v. Goned*, 1 Ball & Beatty, R. 389. See *Davis v. Duke of Marlborough*, 1 Swanst. R. 74, 79 ; *Osborne v. Williams*, 18 Ves. 379.

³ *Methwold v. Walbank*, 2 Ves. 238.

⁴ *Johnson v. Ogilby*, 3 P. Will. 276, and *Cox's note* (1) ; *Newl. on Contr. ch. 8, p. 158.*

⁵ *De Costa v. Jones*, Cowp. 729 ; *Atherford v. Beard*, 2 T. Rep. 610 ; *Gilbert v. Sykes*, 16 East, R. 150 ; *Hartley v. Rice*, 10 East, 22 ; *Allen v. Hearn*, 1 T. Rep. 56 ; *Shirley v. Shankey*, 2 Bos. & Pull. 130.

⁶ *Power v. Knowler*, 2 Atk. 224.

§ 295. Another extensive class of cases, falling under this head of constructive fraud, respects contracts for the buying, selling, or procuring of public offices. It is obvious, that all such contracts must have a material influence to diminish the respectability, responsibility, and purity of public officers, and to introduce a system of official patronage, corruption, and deceit, wholly at war with the public interests.¹ The confidence of public officers may thereby not only be abused and perverted to the worst purposes; but mischievous arrangements may be made to the injury of the public, and persons introduced or kept in office, who are utterly unqualified to discharge the proper functions of their stations.² Such contracts are justly deemed contracts of moral turpitude;³ and are calculated to betray the public interests into the administration of the weak, the profligate, the selfish, and the cunning. They are, therefore, held utterly void, as contrary to the soundest public policy; and, indeed, as a constructive fraud upon the government.⁴ It is acting against the spirit of the constitution of a free government, by which it ought to be served by fit and

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (u); *Chesterfield v. Janssen*, 1 Atk. 352; S. C. 2 Ves. 124, 156; *Boynton v. Hubbard*, 7 Mass. R. 119; *Hartwell v. Hartwell*, 4 Ves. 811, 815.

² *Chesterfield v. Janssen*, 1 Ves. 155, 156; S. C. 1 Atk. 352; *Newland on Contracts*, ch. 33, p. 477 to 492.

³ *Morris v. McCulloch*, 2 Eden, R. 190; S. C. Ambler, R. 435; *Law v. Law*, 3 P. Will. 391; S. C. Cas. T. Talb. 140; *Harrington v. Du Chastel*, 2 Swanst. 167, note; S. C. 1 Bro. Ch. R. 124.

⁴ *Bellamy v. Burrow*, Cas. T. Talb. 97; *Harrington v. Du Chastel*, 1 Bro. Ch. R. 124; S. C. 2 Swanst. R. 167, note; *Garforth v. Fearon*, 1 H. Black. 327, 329; *Palmer v. Bate*, 6 Morse, R. 28; S. C. 2 Bro. & Bing. 673; *Waldo v. Martin*, 4 B. & Cres. R. 819; *Parsons v. Thompson*, 1 H. Black. 322, 326.

able persons, recommended by the proper officers of the government for their abilities; and from motives of disinterested purity.¹ It has been strongly remarked, that there is no rule better established (it should be added, in law and reason, for unfortunately it is often otherwise in practice) respecting the disposition of every office, in which the public are concerned than this, *Detur Digniori*. On principles of public policy, no money consideration ought to influence the appointment to such offices.² It was observed of old, that the sale of offices accomplished the ruin of the Roman Republic. *Nullâ aliâ re magis Romana Respublica interiit, quam quod magistratus officia venalia erant*.³

§ 296. Another class of agreements, which are held to be void on account of their being against public policy, are such as are founded upon corrupt considerations, or moral turpitude, whether they stand prohibited by statute or not; for these are treated as frauds upon the public or moral law.⁴ The rule of the civil law, on this subject, speaks but the language of universal justice. *Pacta, quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est*.⁵ It is but applying a preventive check, by withholding every encouragement from wrong, and aiming thereby to

¹ *Morris v. McCulloch*, 2 Eden, R. 190; *S. C. Ambler*, R. 432, 435; *Ive v. Ash*, Prec. Ch. 199; *Co. Litt.* 234 a.; *East India Company v. Neave*, 5 Ves. 173, 181, 184; *Hartwell v. Hartwell*, 4 Ves. 811.

² Lord Kenyon in *Blackford v. Preston*, 3 T. Rep. 92; *Newland on Contracts*, 478.

³ Cited *Co. Litt.* 234, a.

⁴ *Newland on Contracts*, ch. 32, p. 469, &c.; 1 *Fonbl. Eq. B.* 1, ch. 4, § 4.

⁵ *Cod. Lib.* 2, tit. 3, l. 6.

enforce the obligations of virtue. For although the law, as a science, must necessarily leave many moral precepts, as rules of imperfect obligation only, it is most studious not thereby to lend the slightest countenance to the violations of such precepts. Wherever the divine law, or positive law, or the common law, prohibits the doing of certain acts, or enjoins the discharge of certain duties, any agreement to do such acts, or not to discharge such duties, is against the dearest interests of society, and therefore is held void; for otherwise the law would be open to the just reproach of winking at crimes and omissions, or tolerating in one form, what it affected to reprobate in another.¹ Hence, all agreements, bonds, and securities, given as a price for future illicit intercourse, (*præmium pudoris*,) or for the commission of a public crime, or for the violation of public laws, or for the omission of a public duty, are deemed incapable of confirmation or enforcement, upon the maxim, *Ex turpi contractu non oritur actio*.²

§ 297. Other cases might be put to illustrate the doctrine of Courts of Equity, in setting aside agreements and acts in fraud of the policy of the law. Thus, if a devise is made upon a secret trust for charity, in evasion of the statutes of mortmain, it will be set aside.³ So, if a parent grant an annuity

¹ Fonbl. Eq. B. 4, ch. 4, § 4, and notes (s), (y).

² 1 Fonbl. Eq. B. 1, ch. 4, § 4, and notes (s), (y); *Walker v. Perkins*, 3 Burr. 1568; *Franco v. Bolton*, 3 Ves. 370; *Clarke v. Permain*, 2 Atk. 333, 337; *Whaley v. Norton*, 1 Vern. R. 483; *Robinson v. Gee*, 1 Ves. R. 251, 254; *Gray v. Mathias*, 5 Ves. 286; *Ottley v. Browne*, 1 Ball & Beatt. 360; *Battersley v. Smith*, 3 Madd. R. 110; *Thompson v. Thompson*, 7 Ves. 470; *St. John v. St. John*, 11 Ves. 535, 536. But see *Spear v. Hayward*, Prec. Ch. 114.

³ *Strickland v. Aldrich*, 9 Ves. 516; *Muckleston v. Bruen*, 6 Ves. 52.

to his son to qualify him to kill game, he shall not be permitted, by tearing off the seal, to avoid the conveyance.¹ So, if a person convey an estate to another to qualify him to sit in Parliament, or to become a voter, he will not be permitted to avoid it, upon the ground of its having been done by him in fraud of the law, and upon a secret agreement, that it shall be given up.² So, conveyances made of estates in trust, in order to secure the party from forfeitures for treason or felony, will be set aside against the crown ; but they will be good against the party. So contracts affecting public elections, and assignments of rights or property *pendente lite*; for they either are, or partake of the character of, maintenance or champerty, and are reprehended as such.³

§ 298. And, here, it may be well to take notice of a distinction, often, but not universally, acted on in Courts of Equity, as to the nature and extent of the relief, which will be granted to persons, who are parties to agreements or other transactions against public policy, and therefore are to be deemed *participes criminis*. In general (for it is not universally true)⁴ where parties are concerned in illegal

¹ Madd. Ch. Pract. 242 ; Curtis v. Perry, 6 Ves. 747 ; Birch v. Blagrove, Ambler, R. 264, 265.

² See The Duke of Bedford v. Coke, 2 Ves. 116, 117 ; 3 P. Will. 233 ; 1 Madd. Ch. Pr. 243.

³ Waller v. Duke of Portland, 3 Ves. 494 ; Stevens v. Bagwell, 15 Ves. 139 ; Strachan v. Brander, 1 Eden, R. 303 ; 18 Ves. 127, 128.

⁴ The relief, granted in Courts of Equity in cases of usury, constitutes an exception. Smith v. Bromley, Doug. R. 695, note ; Id. 697, 698. In this case Lord Mansfield said, "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action [to recover back the money] ; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against

agreements or other transactions, whether they are *mala prohibita*, or *mala in se*, Courts of Equity, following the rule of law, as to participators in a common crime,¹ will not at present interpose to grant any relief; upon the known maxim, *In pari delicto potior est conditio defendentis, et possidentis*.² But

oppression extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover. And it is astonishing, that the Reports do not distinguish between the violation of the one sort and the other." *Id.* p. 697; *Astley v. Reynolds*, 2 Str. R. 915. See 1 Fonbl. Eq. B. 1, ch. 2, § 13, and note (r); 1 Madd. Ch. Pr. 241, 242; *Browning v. Morris*, Comp. R. 790.

¹ Buller, N. P. 131, 132.

² See *Bromley v. Smith*, Doug. R. 697, note; *Id.* 698; *Vandyck v. Herritt*, 1 East, R. 96; *Hanson v. Hancock*, 8 T. Rep. 575; *Browning v. Morris*, Cowp. R. 790; *Osborne v. Williams*, 18 Ves. 379; Buller, N. P. 131, 132; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (y); *Besanquet v. Dashwood*, Cas. T. Talb. 37, 40, 41. — I say, *at present*; for there has been considerable fluctuation of opinion, both in Courts of Law and Equity, on this subject. The old cases often gave relief both at Law and in Equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties, where it finds them, giving no relief, and no countenance to claims of this sort. See the cases at law, *Tompkins v. Bernet*, 1 Salk. 22; *Bromley v. Smith*, Doug. R. 695, note; *Collins v. Blantern*, 2 Wils. R. 347; *Loury v. Bourdieu*, Doug. R. 468; *Marak v. Abel*, 3 Bos. & Pull. 35; *Vandyck v. Herritt*, 1 East, R. 96; *Lubbock v. Potts*, 7 East, R. 449, 456; *Browning v. Morris*, Cowp. R. 750; *Hanson v. Hancock*, 8 T. Rep. 575; *McCullum v. Gourley*, 8 John. R. 147; Buller, N. P. 181; 1 Fonbl. Eq. B. 1, ch. 4, § 4, and note (y); Buller, N. P. 131, 132; *Inhab. of Worcester v. Eaton*, 11 Mass. R. 368, 376, 377; *Phelps v. Decker*, 10 Mass. R. 267, 274.

And in Equity, see the cases of *Neville v. Wilkinson*, 1 Bro. Ch. R. 543, 547, 548; *Jacob*, R. 67; *Watts v. Brooks*, 3 Ves. jr. R. 612; *East India Company v. Neave*, 5 Ves. 173, 181, 184; *Thompson v. Thompson*, 7 Ves. 469; *Knowles v. Haughton*, 11 Ves. 168; *St. John v. St. John*, 11 Ves. 535, 536; *Osborne v. Williams*, 18 Ves. 379; *Bosanquet v. Dashwood*, Cas. T. Talb. 37; *Rider v. Kidder*, 10 Ves. 366; *Rawdon v. Shadwell*, Ambler, R. 269, and Mr. Blunt's notes. In the case of *Phelps v. Decker*, (10 Mass. R. 274,) it was

in cases where the agreements or other transactions are repudiated, on account of their being against public policy, the circumstance, that the relief is asked by a party, who is *particeps criminis*, is not in Equity material. The reason is, that the public interest requires, that relief should be given; and it is given to the public through the party.¹ And in these cases relief will be granted, not only by setting aside the agreement or other transaction; but, in many cases, by ordering a repayment of any money paid under it.² Lord Thurlow, indeed, seems to have thought, that in all cases where money had

broadly laid down, that, "by the Common Law, deeds of conveyance, or other deeds, made contrary to the provisions of a general statute, or for an unlawful consideration, or to carry into effect a contract unlawful in itself, or in consequence of any prohibitory statute, are void, *ab initio*, and may be avoided by plea; or on the general issue, *non est factum*, the illegality may be given in evidence." But in a later case, the doctrine was qualified; and the Court took the distinction between bonds and contracts sought to be enforced; and actual conveyances of lands or other property. The former might be avoided; the latter were treated as actual transfers, and governed by the same rule, as the payment of money, or delivery of a personal chattel. *Inhabitants of Worcester v. Eaton*, 11 Mass. 375 to 379.

¹ *St. John v. St. John*, 11 Ves. 535, 536; *Bromley v. Smith*, Doug. R. 695, 697, 698; *Hatch v. Hatch*, 9 Ves. 292, 298; *Roberts v. Roberts*, 3 P. Will. 66, 74, and note (1.); *Browning v. Morris*, Cowp. R. 790; *Morris v. McCulloch*, 2 Eden, R. 190, and note 193.

² See *Goldsmith v. Bruning*, 1 Eq. Abrid. Bonds, &c. F. 4, p. 89; 1 Fonbl. Eq. B. 1, ch. 2, § 13, and note; *Smith v. Bruning*, 2 Vern. R. 392; *Morris v. McCulloch*, Ambler, R. 432; S. C. 2 Eden, R. 180. — Money paid will not in all cases be ordered to be paid back. For instance, a bond, given for future illicit intercourse, will be decreed to be set aside; but money paid under the bond will not, under all circumstances, be directed to be repaid. See *Newland on Contracts*, ch. 33, p. 483 to 492; *Hill v. Spencer*, Ambler, R. 641, and *Id.* App. 836 (Blunt's edition); *Nye v. Morely*, 6 B. & Cresw. 133; Dig. Lib. 12, tit. 5, l. 4, § 3. See also cases of gaming before statute, in *Chesterfield v. Janssen*, 2 Ves. 137, 138. See also *Inhabitants of Worcester v. Eaton*, 11 Mass. R. 376, 377.

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been paid for an illegal purpose, it might be recovered back, observing, that, if Courts of Justice mean to prevent the perpetration of crimes, it must be, not by allowing a man, who has got possession, to remain in possession ; but, by putting the parties back to the state, in which they were before.¹ But this is pushing the doctrine to an extravagant extent, and effectually subverting the maxim, *in pari delicto melior est conditio defendentis*. The ground of reasoning, upon which his Lordship proceeded, is exceedingly questionable in itself, and the suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and thus introducing a preventive check, naturally connected with a want of confidence, and a sole reliance upon personal honor. And so, accordingly, the modern doctrine is established. Relief is not granted, where both parties are truly in *pari delicto*, unless in cases where public policy would thereby be promoted.²

§ 299. Even in case of a *præmium pudicitiae*, the distinction has been constantly maintained between cases of restraining the woman from enforcing the security given, and compelling her to give up property already in her possession under the contract. At least, there is no case to be found, where the contrary doctrine has been acted on, except where creditors were concerned. And in this respect the English Law seems to have had a steady eye cast upon Roman Jurisprudence.³

¹ *Neville v. Wilkinson*, 1 Bro. Ch. R. 547, 548 ; 18 Ves. 382.

² See the remarks of Lord Eldon in *Rider v. Kidder*, 10 Ves. 366 ; *Smith v. Bromley*, Doug. R. 696, note.

³ *Rider v. Kidder*, 10 Ves. 366. — The Roman Law has stated some doctrines and distinctions upon this subject, which are worthy of con-

§ 300. And, indeed, in cases, where both parties are *in delicto*, concurring in an illegal act ; it does not always follow, that they stand *in pari delicto* ; for there may be and often are very different degrees in their guilt.¹ One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age ; so that his guilt may be far less in degree, than that of his associate in the offence.² And, besides ; there may be a

sideration. I shall quote them without commenting upon them. They are partially cited in 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (y). Three cases are put. (1.) Where the turpitude is on the part of the receiver only ; and there the rule is, *Quod si turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest*. Dig. Lib. 12, tit. 5, l. 1, 2. (2.) Where the turpitude is on the part of the giver alone ; and there the rule is the contrary. *Cessat quidem conditio quum turpiter datur*. Pothier, Pand. Lib. 12, tit. 5, art. 8. (3.) Where the turpitude affects both parties ; and here the rule is, *Ubi autem et dantis et accipientis turpitudine versatur, non posse repeti dicimus, veluti si pecunia detur ut male judicetur*. The reason given is, *In pari causa possessor potior haberi debet*. Dig. Lib. 50, tit. 17, l. 128. Several other examples are given under this head. *Item si ob stuprum datum sit, vel si quis in adulterio deprehensus redemerit se, cessat enim repetitio*. *Item, si dederit fur, ne proderetur ; quoniam utriusque turpitudō, versatur, cessat repetitio*. *Cum te propter, turpem causam contra disciplinam temporum meorum donum adversariæ dedisse profitearis, frustra enim sibi restitui desideras ; cum in pari causa possessoris conditio melior habeatur*. *Sed quod meretrici datur repeti non potest ; sed nova ratione, non eâ, quod utriusque turpitudō versatur, sed solius dantis ; a new reason which Pothier, as well as the Civil Law seems to doubt*. See Dig. Lib. 12, tit. 5, l. 1, 2, 3, 4 ; Cod. Lib. 4, tit. 7, l. 2 ; Pothier, Pand. Lib. 12, tit. 5, art. 1, § 1 to 3. On the other hand, when the money had not been paid, or the contract fulfilled, the Roman Law deemed the contract void. *Quamvis enim utriusque turpitudō versatur, ac solutæ quantitatis cessat repetitio, tamen ex hujusmodi stipulatione contra bonos mores interposita, denegandas esse actiones juris auctoritate demonstratur*. Cod. Lib. 4, tit. 7, l. 5 ; Pothier, Pand. Lib. 12, tit. 5, art. 2, § 9.

¹ Smith v. Bromley, Doug. R. 696 ; Browning v. Morris, Cowp. R. 790 ; Osborne v. Williams, 18 Ves. 379.

² Bosanquet v. Dashwood, Cas. T. Talb. 37, 40, 41 ; Chesterfield v. Janssen, 2 Ves. 156, 157 ; Osborne v. Williams, 18 Ves. 379.

necessity of supporting the public interests or public policy in many cases by the Court itself, however reprehensible the acts of the parties may be.¹

§ 301. In cases of usury, this distinction has been adopted by Courts of Equity. All such contracts being declared void by the statute against usury, Courts of Equity will follow the law in the construction of the statute. If, therefore, the usurer or lender come into Court, seeking to enforce the contract, Courts of Equity will refuse any assistance, and repudiate the contract.² But, on the other hand, if the borrower comes into Court, seeking relief against the usurious contract, the only terms, upon which Equity will interfere, are, that the plaintiff will pay the defendant, what is really and bona fide due to him, deducting the usurious interest; and, if the plaintiff do not make such offer in his bill, the defendant may demur to it, and the bill will be dismissed.³ The ground of this distinction is, that a Court of Equity is not positively bound to interfere in such cases by an active exertion of its powers, but, has a discretion on the subject, and may prescribe the terms of its interference; and he, who seeks equity at its hands, may well be required to do equity. And it is against conscience, that the party should have full re-

¹ See *Woodhouse v. Meredith*, 1 Jac. & Walk. 224, 225; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (y); *Bosanquet v. Dashwood*, Cas. T. Talb. 37, 40, 41; *Smith v. Bromley*, Doug. R. 696, note; *Browning v. Morris*, Cowp. R. 790; *Morris v. McCulloch*, 2 Eden, 190, and note 193.

² 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (h); *Fanning v. Dunham*, 5 John. Ch. R. 142, 143, 144.

³ 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (h); *Id.* B. 1, ch. 4, § 7, note (k); *Mason v. Gardner*, 4 Bro. Ch. R. 436; *Rogers v. Rathbun*, 1 John. Ch. R. 367; *Fanning v. Dunham*, 5 John. Ch. R. 142, 143, 144.

lief, and at the same time pocket the money loaned, which may have been granted at his own mere solicitation.¹ For then a statute, made to prevent fraud and oppression, would be made the instrument of fraud. But, in the other case, if Equity should relieve the lender, who is plaintiff, it would be aiding a wrong doer, who was seeking to make the Court the means of carrying into effect a transaction manifestly wrong and illegal in itself.²

§ 302. And, upon the like principles, if the borrower has paid the money upon an usurious contract, Courts of Equity (and indeed Courts of Law also)³ will assist him to recover back the excess paid beyond principal and lawful interest; but not farther. For it is no just objection to say, that he is *particeps criminis*, and that *volenti non fit injuria*. It would be absurd to apply the latter maxim to the case of a man, who from mere necessity pays more than the other can in justice demand, and who has been significantly called the slave of the lender. He can in no just sense be said to pay voluntarily. And as to being *particeps criminis*, he stands *in vinculis*, and is compelled to submit to the terms, which oppression and his necessities impose upon him.⁴ Nor can it be said in any case of oppression, that the

¹ *Scott v. Nesbit*, 2 Bro. Ch. R. 641; S. C. 2 Cox, R. 183; *Benfield v. Solomons*, 9 Ves. 84.

² 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (h); *Id.* B. 1, ch. 4, § 7, and note (k).

³ 1 Fonbl. Eq. B. 1, ch. 4, § 7, and note (k); *Smith v. Bromley*, Doug. R. 696, note; *Browning v. Morris*, Cowp. R. 792; *Bond v. Hays*, Ex'r. 12 Mass. R. 34.

⁴ *Smith v. Bromley*, Doug. 696, note; *Bosanquet v. Dashwood*, Cas. Temp. Talb. 39; *Browning v. Morris*, Cowp. R. 790; *Rawdon v. Shadwell*, Ambler, R. 269, and Mr. Blunt's notes; 1 Fonbl. Eq. B. 1, ch. 4, § 8, note (k).

party oppressed is *particeps criminis*; since it is that very hardship, which he labors under, and which is imposed upon him by another, that makes the crime.¹

§ 302. In regard to gaming contracts, it would follow *a fortiori*, that Courts of Equity would not interfere in their favor, since they are not only prohibited by statute, but may justly be pronounced to be immoral, as the practice tends to idleness, dissipation, and the ruin of families.² No one has doubted, that, under such circumstances, a bill in Equity might be maintained to have any gaming security delivered up and cancelled.³ But it was at one time held, that, if the money were actually paid in the case of gaming, Courts of Equity ought not to assist the loser to recover it back, upon the ground, that he is *particeps criminis*. Lord Talbot on one occasion said, "The case of gamesters, to which this (of usury) has been compared, is no way parallel; for there both parties are criminal. And, if two persons will sit down, and endeavour to ruin one another, and one pays the money; if after payment he cannot recover it at law, I do not see, that a Court of Equity has any thing to do but to stand neuter; there being

¹ Lord Ch. J. Talbot in *Bosanquet v. Dashwood*, Cas. Temp. Talb. 41. — The same principle applies to cases of annuities set aside for want of a memorial duly registered, and an account of the consideration paid, and payments made will be taken, and the balance only is required to be paid upon a decree to give up the security. *Holbrook v. Sharpey*, 19 Ves. 131.

² 1 Fonbl. Eq. B. 1, ch. 4, § 6, and note (c). See *Robinson v. Bland*, 2 Burr. 1077.

³ *Rawdon v. Shadwell*, Ambler, R. 269, and Mr. Blunt's notes; *Woodroffe v. Farnham*; 2 Vern. 291; *Wynne v. Callendar*, 1 Russ. R. 23; *Baker v. Williams*, cited in Blunt's note to Ambler, R. 269.

in that case no oppression upon the party, as in this.”¹

§ 305. But it is difficult to perceive, why, upon principle, the money should not be recoverable back ; independent of any statutable provision ; since it is in furtherance of a great public policy ; and it is very certain, that, if money is paid upon a gaming security, it may be recovered back, for the security is utterly void.² Is not the original gaming contract equally void ; and therefore equally within the rule and the policy, on which it is founded ?

§ 306. The Civil Law contains a most wholesome enforcement of moral justice upon this subject. It not only protects the loser against any liability to pay the money, won in gaming ; but if he has paid the money, he and his heirs have a right to recover it back at any distance of time, and no presumption or limitation of time runs against the claim. *Victum in aleæ lusu non posse conveniri. Et si solverit, habere repetitionem, tum ipsum, quam hæredes ejus adversus victorem et ejus hæredes ; idque perpetuo et etiam post triginta annos.*³ Thirty years was the general limitation.

§ 307. Questions are also often made, as to how far contracts, which are illegal by positive law, or which are declared so upon principles of public policy, are capable as between the parties of a substantial confirmation. This subject has been already alluded to, and will be again touched in other places. The general rule is, that wherever any contract or conveyance is void, either by a positive law, or upon

¹ Bosanquet v. Dashwood, Cas. Temp. Talb. 41 ; 1 Fonbl. Eq. B. 1, ch. 4, § 6.

² 1 Fonbl. Eq. B. 1, ch. 4, § 6, and note (c).

³ Cod. Lib. 3, tit. 43, l. 1 ; 1 Fonbl. Eq. B. 1, ch. 4, § 6, note (c).

principles of public policy, it is deemed incapable of confirmation ; upon the maxim, *Quod ab initio non valet, tractu temporis non convalescit*. But where it is merely voidable, or turns upon circumstances of undue advantage, surprise, or imposition, there, if it is deliberately and upon examination confirmed by the parties, such confirmation will avail to give it *ex post facto* validity.¹

§ 308. Let us, in the next place, pass to the consideration of the second head of constructive frauds, viz. those, which arise from some peculiar confidential, or fiduciary relation between the parties. In this class of cases, there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle, on which Courts of Equity act in regard thereto, stands, independent of such ingredients, upon a motive of general public policy ; and, in some degree, it is designed as a protection to the parties against the effects of overweening confidence, and self delusion, and the infirmities of hasty and precipitate judgment. These Courts will, therefore, often interfere in such cases, where, but for such peculiar relation, they would either abstain wholly from granting relief, or grant it in a very modified and abstemious manner.²

¹ Newland on Contracts, ch. 25, p. 496 to 503 ; Chesterfield v. Janssen, 2 Ves. 125 ; S. C. 1 Atk. 301 ; Roberts v. Roberts, 3 P. Will. 74, Mr. Cox's note ; Cole v. Gibson, 1 Ves. 507 ; Crone v. Ballard, 3 Bro. Ch. R. 120 ; Cowen v. Milner, 3 P. Will. 292, note (C) ; Cole v. Gibbons, 3 P. Will. 289 ; 1 Fonbl. Eq. B. 1, ch. 2, § 13, note (r) ; Id. ch. § 14, note (v), and the note to § 263.

² See Goddard v. Carlisle, 9 Price, R. 169 ; Gallatiani v. Cunningham, 3 Cowen, R. 361.

§ 309. It is undoubtedly true, as has been said, that it is not upon the feelings, which a delicate and honorable man must experience, nor upon any notion of discretion to prevent a voluntary gift or other act of a man, whereby he strips himself of his property, that Courts of Equity have deemed themselves at liberty to interpose in cases of this sort.¹ They do not sit, or affect to sit, in judgment upon cases, as *custodes morum*, enforcing the strict rules of morality; but they do sit to enforce, what has not inaptly been called, a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition; if influence is acquired, it must be kept free from the taint of selfish interests, and cunning, and overreaching bargains; if the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of Equity will not, therefore, arrest, or set aside an act or contract, merely because a man of more honor would not have entered into it. There must be some relation between the parties, which compels one to make a full discovery to the other, or to abstain from all selfish projects. But, when such relation does exist, Courts of Equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation, of which he can avail himself against the other, to derive advantage from that circumstance; for it is founded in a breach of confidence.² The general principle, which governs in all cases of this sort, is,

¹ *Huguenin v. Baseley*, 14 Ves. 290.

² *Fox v. Mackreth*, 2 Bro. Ch. R. 407, 420.

that, if a confidence is reposed, and that confidence is abused, Courts of Equity will grant relief.¹

§ 310. In the first place, as to the relation of parent and child. The natural and just influence, which a parent has over a child, renders it peculiarly important for Courts of Justice to watch over and protect the interests of the latter; and, therefore, all contracts, and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy, and, if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them; especially where the original purposes, for which they have been obtained, are perverted, or used as a mere cover.²

§ 311. In the next place, as to the relation of client and attorney, or solicitor. It is obvious, that this relation must give rise to great confidence between the parties, and to very strong influences over the actions, and rights, and interests of the client.³ The situation of an attorney, or solicitor, puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains,

¹ *Gartside v. Isherwood*, 1 Bro. Ch. R. App. 560, 562; *Osmond v. Fitzroy*, 3 P. Will. 129, 131, Cox's note.

² *Young v. Peachy*, 2 Atk. 254; *Glissen v. Ogden*, Ibid. 258; *Cocking v. Pratt*, 1 Ves. 400; *Hawes v. Wyatt*, 3 Bro. Ch. R. 156; 1 Madd. Ch. Pract. 244, 245; *Carpenter v. Heriot*, 1 Eden. R. 338; *Blackborn v. Edgley*, 1 P. Will. 607; *Blunden v. Barker*, 1 P. Will. 639; *Morris v. Burroughs*, 1 Atk. 402; *Tendril v. Smith*, 2 Atk. 85; *Heron v. Heron*, 2 Atk. R. 160.

³ *Walmesley v. Booth*, 2 Atk. R. 25; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (k). See also *Barnesly v. Powel*, 1 Ves. 284; *Bulkley v. Wilford*, 2 Clarke and Finn. R. 102, 177 to 181; Id. 183, ante, § 218.

and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament ; but often interposes to declare transactions void, which, between other persons, would be held unobjectionable.¹ It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties.² By establishing the principle, that while the relation of client and attorney subsists in its full vigor, the former shall derive no benefit to him from the contracts, or bounty, or other negotiations of the latter ;³ it supersedes the necessity of any inquiry into the particular means, extent, and exertion of influence in a given case ; a task, often difficult, and ill supported by evidence drawn from satisfactory sources.⁴

§ 312. On the one hand, it is not necessary to establish, that there has been fraud or imposition upon the client ; and on the other hand, it is not necessarily void throughout, *ipso facto*. But the burthen of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney ; upon the general rule, that he, who

¹ 1 Madd. Ch. Pr. 94 ; Welles v. Middleton, 1 Cox, R. 112, 125 ; 3 Peere Will. 131, Cox's note (1) ; Wright v. Proud, 13 Ves. 136 ; Wood v. Downes, 18 Ves. 126.

² Wood v. Downes, 18 Ves. 126.

³ Ibid ; Jones v. Tripp, Jac. Rep. 322 ; Goddard v. Carlisle, 9 Price R. 169.

⁴ See Welles v. Middleton, 1 Cox, R. 125 ; Wright v. Proud, 13 Ves. 137.

bargains in a matter of advantage with a person placing a confidence in him, is bound to show, that a reasonable use has been made of that confidence ; a rule applying equally to all persons standing in confidential relations with each other.¹ If no such proof is established, Courts of Equity treat the case as one of constructive fraud. In this respect there is said to be a distinction between the case of attorney and client, and that of trustee and *cestui que trust* ; that in the former, if the attorney, retaining his connexion, contracts with his client, he is subject to the *onus* of proving, that no advantage has been taken of the situation of the latter. But in the case of trustee, it is not sufficient to show, that no advantage has been taken ; but the *cestui que trust* may set aside the transaction at his option.²

§ 313. Thus if a bond is obtained from a client, who is poor and distressed, by an attorney, and it does not appear to be for a full and fair consideration, it will be set aside, as obtained by undue influence from his station.³ And, upon a like ground, a bond, taken by an attorney from his client for a specific sum, will not be allowed to stand as a security, except for the amount of fees and charges due to the attorney ; for it is the general policy of Courts of justice, in cases between client and attorney, to protect the suitors, and not to suffer any advantage to be taken of them by securities of this sort.⁴ And

¹ Gibson v. Jeyes, 6 Ves. 278 ; Montesquieu v. Sandys, 18 Ves. 313 ; Bellew v. Russell, 1 B. & Beatty, R. 104, 107 ; Harris v. Tremeneere, 15 Ves. 34, 39 ; Cane v. Lord Allen, 2 Dow, R. 289, 299.

² Cane v. Lord Allen, 2 Dow, 289, 299.

³ Proof v. Hines, Cas. T. Talb. 111 ; Walmsley v. Booth, 2 Atk. 29.

⁴ Newman v. Payne, 4 Bro. Ch. R. 350 ; S. C. 2 Ves. jr. 200 ; Langstaffe v. Taylor, 14 Ves. 262 ; Wood v. Downes, 13 Ves. 120, 127 ; Pitcher v. Rigby, 9 Price, R. 79.

for the same reason a judgment, obtained by a solicitor against his client for security for costs, will be overhauled even after a considerable lapse of time.¹ So, a gift made to an attorney *pendente lite*, (for it would be otherwise, if the relation had completely ceased,) will be set aside, as arising from the exercise of improper influence;² for it has been said with great force, that there would be no bounds to the crushing influence of the power of an attorney, who has the affairs of a man in his hand, if it were not so.³ And sales made and annuities granted to attorneys under similar circumstances, will, upon the same principles of public policy, be set aside, at least, unless they are established *uberrimâ fide*.⁴

§ 314. Indeed, the general principle is so well established, that Lord Eldon on one occasion said, "It is almost impossible, in the course of the connexion of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty.⁵ But, where the relation is

¹ *Drapers' Company v. Davis*, 2 Atk. 295.

² *Oldham v. Hand*, 2 Ves. 259; *Welles v. Middleton*, 1 Cox, 112, 125; *Harris v. Tremeneheere*, 15 Ves. 34; *Wood v. Downes*, 18 Ves. 120, 127; *Morse v. Royal*, 12 Ves. 371.

³ *Welles v. Middleton*, 1 Cox, R. 125; *Hatch v. Hatch*, 9 Ves. 292, 296.

⁴ *Harris v. Tremeneheere*, 15 Ves. 34; *Gibson v. Jeyes*, 6 Ves. 266; *Wood v. Downes*, 18 Ves. 120; *Bellew v. Russell*, 1 Ball & Beatt. 104.

⁵ *Hatch v. Hatch*, 9 Ves. 296, 297. — Mr. Maddock, in 1 Madd. Ch. Pr. 95, note (f), has suggested, that what is said, as to an attorney, in *Morse v. Royal*, 12 Ves. 371, and in *Wright v. Proud*, 13 Ves. 138, does not seem warranted by the authorities. I confess myself at a loss precisely to understand, what Mr. Maddock intended by this remark. Surely he could not mean to say, that a gift to an attorney, while that relation continued, could not be avoided, unless fraud or imposition were proved; for that would be

completely dissolved ; and the parties are no longer under the antecedent influence ; but deal with each other at arms length, there is no ground to apply the principle ; and they stand upon the rights and duties common to all other persons.¹ And the same principle applies, where the transaction is totally disconnected with the relation, and concerns objects and things, not embraced in, or affected by, or dependent upon, that relation.²

§ 315. In the next place, the relation of principal and agent. This is affected by the same considerations as the preceding, founded upon the same enlightened public policy.³ In all cases of this sort the principal contracts for the aid and benefit of the skill and judgment of the agent ; and the habitual confidence, reposed in the latter, makes all his acts and statements possess a commanding influence over the former. Indeed, in such cases the agent too often so entirely misleads the judgment of his principal, that, while he is seeking his own peculiar advantage, he seems too often, but consulting the

contradicted by the doctrine maintained in several cases. *Welles v. Middleton*, 1 Cox, R. 125 ; *Hatch v. Hatch*, 9 Ves. 296, 297 ; *Gibson v. Jeyes*, 6 Ves. 276 ; *Wood v. Downes*, 18 Ves. 123 ; *Oldham v. Hand*, 2 Ves. 259 ; *Montesquieu v. Sandys*, 18 Ves. 313. See also *Bellew v. Russell*, 1 Ball & Beatt. R. 104, 107 ; *Harris v. Tremenheere*, 14 Ves. 34, 42 ; *Walmesley v. Booth*, 2 Atk. 29, 30. See also *Wendell v. Van Rensselaer*, 1 John. Ch. R. 350 ; *Hylton v. Hylton*, 2 Ves. 547, as cited by Lord Eldon, 18 Ves. 126 ; *Newland on Contracts*, ch. 31, p. 453, &c. ; *Welles v. Middleton*, 1 Cox. R. 125 ; 18 Ves. 126.

¹ *Gibson v. Jeyes*, 6 Ves. 277 ; *Oldham v. Hand*, 2 Ves. 259 ; *Montesquieu v. Sandys*, 18 Ves. 313 ; *Walmesley v. Booth*, 2 Atk. 29, 30 ; *Wood v. Downes*, 18 Ves. 126, 127.

² *Montesquieu v. Sandys*, 18 Ves. 313 ; *Newland on Contracts*, ch. 31, p. 456, 457, 458 ; *Howell v Baker*, 4 John. Ch. R. 118.

³ 1 Fonbl. Eq. B. 1, ch. 3, § 12, note (k).

advantage and interests of his principal; placing himself in the odious predicament, so strongly stigmatized by Cicero; *Totius autem injustitiæ nulla capitalior est, quam eorum, qui, cum maxime fallunt, id agunt, ut viri boni esse videantur.*¹ It is, therefore, for the common security of all mankind, that gifts procured by agents, and purchases made by them from their principals, should be scrutinized with a close and vigilant suspicion. And, indeed, considering the abuses, which may attend any dealings of this sort between principals and agents, a doubt has been expressed, whether it would not have been wiser for the law in all cases to have prohibited them; since there must almost always be a conflict between duty and interest on such occasions.² Be this as it may, it is very certain, that agents are not permitted to become secret vendors or purchasers of property, which they are authorized to buy or sell for their principals; or, by abusing their confidence, to acquire unreasonable gifts or advantages;³ or, indeed, to deal validly with their principals in any cases, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.⁴

¹ Cic. de Offic. Lib. 1, ch. 13; 14 Ves. 284.

² Dunbar v. Tredenrick, 2 B. & Beatty, R. 319; Norris v. Le Neve, 3 Atk. R. 38.

³ See Church v. Mar. Ins. Co. 1 Mason, R. 341; Barker v. Mar. Ins. Co. 2 Mason, R. 369; Woodhouse v. Meredith, 1 Jac. & Walk. 204, 222; Massey v. Davies, 2 Ves. jr. 318; Crowe v. Ballard, 3 Bro. Ch. R. 120.

⁴ See Crowe v. Ballard, 3 Bro. Ch. R. 117; Purcell v. Macnamara, 14 Ves. 91; Huguenin v. Baseley, 14 Ves. 273; Watt v. Grove, 2 Sch. and Lefr. 492; Fox v. Mackreth, 2 Bro. Ch. R. 400; S. C.

§ 316. Upon these principles, if an agent, employed to purchase for another, purchases for himself, he will be considered as the trustee of his employer.¹ And in all cases of purchases and bargains respecting property, directly and openly made between principals and agents, the utmost good faith is required. The agent must conceal no facts within his knowledge, which might influence the judgment of his principal, as to the price or value; and if he does, the contract will be set aside.² The question in all such cases does not turn upon the point, whether there is any intention to cheat or not; but upon the obligation, from the fiduciary relation of the parties, to make a frank and full disclosure.³ Of course, upon the principles already stated, if the relation of principal and agent has wholly ceased, the parties are restored to their common competency to deal with each other.

§ 317. In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts the same principles prevail, and with larger and more comprehensive efficiency. During the existence of the guardianship, it is obvious, that the transactions of the guardian cannot be binding on the ward, if they are of any disadvantage to him; and, indeed, the relative situation of the par-

2 Cox, R. 320; Coles v. Trecothick, 9 Ves. 246; Lowther v. Lowther, 13 Ves. 102, 103; Seley v. Rhodes, 2 Sim. & Stu. R. 49; Morret v. Paske, 2 Atk. 53; Green v. Winter, 1 John. Ch. R. 27; Parkist v. Alexander, 1 John. Ch. R. 394. — The case of Cray v. Mansfield, 1 Ves. R. 379, has been very justly doubted by Mr. Belt, as not consistent with established principles. See Belt's Supplement, 167.

¹ Lees v. Nuttall, 1 Russ. & M. 53.

² Farnam v. Brooks, 9 Pick. R. 212.

³ Ibid.

ties imposes a general inability to deal with each other.¹ But Courts of Equity proceed yet farther in cases of this sort. They 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 under circumstances demonstrating, in the highest sense of the terms, full deliberation and *uberrima fides*. For in all such cases the relation is still considered as having an undue influence upon the mind, and as virtually subsisting, especially if all the duties attached to the situation have not ceased, if the accounts between the parties have not been fully settled, and if the estate still remains in some sort under the control of the guardian.²

§ 318. Lord Hardwicke has expounded the general ground of this doctrine in a clear manner. "Where," says he, "a man acts as guardian, or trustee in nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward's coming of age, and at the time of settling accounts, or delivering up the trust; because an undue advantage may be taken. It would give an opportunity, either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such an advantage. And therefore the principle of the Court is of the same nature with relief in this Court on the head of public

¹ See 3 P. Will. 131, Cox's note (1); 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (k); 1 Madd. Ch. Pr. 102, 103; Dawson v. Massey, 1 B. & Beatt. R. 226.

² Dawson v. Massey, 1 B. & Beatt. R. 229; Wright v. Proud, 13 Ves. 136.

utility ; as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brokage bonds. All depends upon public utility ; and therefore the Court will not suffer it, though, perhaps, in a particular instance there may not be any actual unfairness.”¹ His Lordship afterwards added, “The rule of the Court, as to guardians, is extremely strict, and in some cases does infer some hardship ; as where there has been a great deal of trouble, and he has acted fairly and honestly, that yet he shall have no allowance. But the Court has established that on great utility, and on necessity, and on this principle of humanity, that it is a debt of humanity, that one man owes to another, as every man is liable to be in the same circumstances.”

§ 319. Lord Eldon has expressed himself in even a more emphatic manner on this subject. “There may not be,” says he, “a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future than, if a trustee having done his duty, the *cestui que trust*, taking into his fair, serious, and well informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied, that the act is of that nature, for the reason often given ; and recollecting, that in discussing, whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a Court of Justice ; that, instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness, or

¹ *Hylton v. Hylton*, 2 Ves. 548, 549 ; *Pierce v. Waring*, cited *ibid.* and in 1 Ves. 390 ; 1 P. Will. 120, Cox’s note ; 1 Cox, R. 125 ; *Wright v. Proud*, 13 Ves. 136, 138 ; *Wood v. Downes*, 13 Ves. 126.

forced by oppression ; and the difficulty of getting property out of the hands of the guardian or trustee thus increased. And, therefore, if the Court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud, where the connexion is not dissolved, the account not settled, every thing remaining pressing upon the mind of the party under the care of guardian or trustee.”¹ The same principles are applied to persons standing in a situation, as *quasi* guardians or confidential advisers.²

§ 320. In the cases, to which these principles have been applied in order to set aside grants and other transactions between guardian and ward, two circumstances of great importance have generally concurred ; first, that the grants and transactions have taken place immediately upon the ward's attaining age ; and secondly, that the former influence of the guardian has been demonstrated to exist to an undue degree ; or that the parties have not met upon equal terms.³ If, therefore, the relation has entirely ceased, not merely in name, but in fact ; and such a time has elapsed as puts the parties in complete independence as to each other ; and a full and fair settlement of all transactions, growing out of the relation, has been made ; there is no objection to any bounty or grant conferred by the ward upon his guardian.⁴ Indeed, in such cases, it is only the performance of a high moral duty, recommended, as well by law, as by natural justice.

¹ Hatch v. Hatch, 9 Ves. 297.

² Revett v. Harvey, 1 Sim. & Stu. R. 502.

³ See Dawson v Murray, 1 B. & Beatt. 229, 232, 236 ; Aylward v. Kearney, 2 B. & Beatt. R. 463.

⁴ Hylton v. Hylton, 2 Ves. 547, 549.

§ 321. In the next place, the relation of trustee and *cestui que trust*, or rather beneficiary, or fide-commissary, as we could wish the person beneficially interested might be called, to escape from the awkwardness of a barbarous foreign idiom.¹ In this class of cases the same principles govern, as in cases of guardian and ward, with at least as much enlarged liberality of application, and upon grounds quite as comprehensive. Indeed, the cases are usually treated, as if they were identical.² A trustee is never permitted to partake of the bounty of the party, for whom he acts, except under circumstances, which would make the same valid, if it were a case of guardianship. A trustee cannot purchase of his *cestui que trust*, unless under like circumstances; or, to use the expressive

¹ The phrase, *cestui que trust*, is a barbarous Norman law French phrase; and is so ungainly and ill adapted to the English idiom, that it is surprising, that the good sense of the English legal profession has not long since banished it, and substituted some phrase in the English idiom, furnishing an analogous meaning. In the Roman Law the trustee was commonly called *Hæres Fiduciarius*; and the *cestui que trust*, *Hæres Fidei Commissarius*, which Dr. Halifax has not scrupled to translate *Fide-Committee*. (Halifax, Anal. of Civil Law, ch. 6, § 16, p. 34; Id. ch. 8, § 2, 3, p. 45, 46.) I prefer *Fide-commissary*, as equally at least within the analogy of the English language. But *Beneficiary*, though a little remote from the original meaning of the word, would be a very appropriate word, as it has not, as yet, acquired any general use in a different sense. *Hæres fidei commissarius* was sometimes used in the Civil Law to denote the trustee. See *Vicat, Vocab. voce, Fidei commissarius*. The French Law calls the *cestui que trust*, *fidei commissaire*. See *Ferriere Dict. voce Fidei commissaire*. *Merlin Repertoire, voce, Substitution, et Substitution fidei commissaire*. Dr. Brown uses the word, *Fidei commissary*. 1 Brown, Civil Law, 190, note.

² *Hatch v. Hatch*, 9 Ves. 292, 296, 297; *Newland on Contracts*, ch. 32, p. 459, &c.; *Jeremy on Eq. Jurisd. B. 1, ch. 1, § 3. p. 142, &c.*; 1 *Fonbl. Eq. B. 1, ch. 2, § 12, note (k)*; *Farnam v. Brooks*, 9 Pick. R. 212. See also *Bulkley v. Wilford*, 2 *Clarke & Finn. R.* 102, 177 to 183. *Ante*, § 314.

language of an eminent Judge, a trustee may purchase of his *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended, that the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him as trustee. But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price, or inequality in the bargain.¹ And, therefore, if a trustee, though strictly honest, should buy for himself an estate of his *cestui que trust*, and then should sell it for more, according to the rules of a Court of Equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself.²

§ 322. But we are not to understand from this last case, that to entitle the *cestui que trust* to relief, it is indispensable to show, that the trustee has made some advantage, where there has been a purchase by himself; and that, unless some advantage has been made, the sale to the trustee is good. That would not be putting the doctrine upon its true ground, which is, that the prohibition arises from the subsisting relation of trusteeship.³ The ingredient of

¹ *Coles v. Trecothick*, 9 Ves. 246 ; *Fox v. Mackreth*, 2 Bro. Ch. R. 400 ; *Gibson v. Jeyes*, 6 Ves. 277 ; *Whichcote v. Lawrence*, 3 Ves. 740 ; *Campbell v. Walker*, 5 Ves. 678 ; *Ayliffe v. Murray*, 2 Atk. R. 59.

² See *Fox v. Mackreth*, 2 Brown, Ch. R. 400 ; *S. C.* 2 Cox, R. 320, 327 ; *Prevost v. Gratz*, 1 Peters, Cir. R. 367, 368.

³ See *Newland on Contracts*, ch. 32, p. 461 ; *Ex parte Lacey*, 6 Ves. 625, 626 ; 1 Madd. Ch. Pr. 92, 93 ; *Chesterfield v. Janssen*, 2 Ves. 138.

advantage made by him would only go to establish, that the transaction might be open to the strong imputation of being tainted by imposition or selfish cunning.¹ But the principle applies, however innocent the purchase may be in a given case.² It is poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the Court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. There may be fraud, and the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come at his own option, and, without showing essential injury, to insist upon having the experiment of another sale.³ So that in fact, in all cases, where a purchase has been made by a trustee on his own account of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust* to set aside the sale, whether *bonâ fide* made or not.⁴ And the doctrine applies, not only to trustees strictly so called, but to other persons standing in like situations; as assignees and solicitors of a bankrupt or insolvent estate, who are never permitted to become pur-

¹ See *Campbell v. Walker*, 5 Ves. 678; 13 Ves. 601.

² *Ex parte James*, 337, 345; *Ex parte Bennett*, 381, 385; *Cane v. Lord Allen*, 2 Dow, R. 289, 299.

³ *Davoue v. Fanning*, 2 John. Ch. Rep. 252, where Mr. Chancellor Kent has examined the cases with a most exemplary diligence; *Ex parte Bennett*, 10 Ves. 381, 385, 386.

⁴ *Campbell v. Walker*, 5 Ves. 678, 680; 13 Ves. 601; *Ex parte Lacey*, 6 Ves. 625; *Ex parte Bennett*, 10 Ves. 381, 385, 386; *Morse v. Royal*, 12 Ves. 355; *Whitcomb v. Minchin*, 5 Madd. R. 91; *Belt's Supplement*, p. 11, 12.

chasers at the sale of the bankrupt or insolvent estate.¹ It applies in like manner to executors and administrators, who are not permitted to purchase up the debts of the deceased on their own account ; but whatever advantage is thus derived by purchases at an undue value, is for the common benefit of the estate.² Nor can executors or administrators be permitted under any circumstances to derive a personal benefit from the manner, in which they transact the business or manage the assets of the estate.³

§ 323. There are many other cases of persons, standing in regard to each other in the like confidential relations, in which similar principles apply. Among these may be enumerated cases, arising from the relation of landlord and tenant, of partners, of principals and sureties, and various others, where mutual agencies, rights, and duties are created between the parties by their own voluntary acts, or by operation of law. But it would occupy too much space to go over them at large ; and most of them are resolvable into the principles already commented on.⁴ The doctrine may be generally stated, that

¹ *Ex parte Lacey*, 6 Ves. 625 ; *Ex parte James*, 8 Ves. 337 ; *Ex parte Bennett*, 10 Ves. 381 ; *Davoue v. Fanning*, 2 John. Ch. R. 252 ; *Lady Ormond v. Hutchinson*, 13 Ves. 47 ; *Farnam v. Brooks*, 9 Pick. 202.

² *Ex parte Lacey*, 6 Ves. 623 ; *Ex parte James*, 8 Ves. 346 ; *Green v. Winter*, 1 John. Ch. R. 27 ; *Forbes v. Ross*, 2 Bro. Ch. R. 430 ; *Hawley v. Mancius*, 7 John. Ch. R. 174.

³ *Schieffelin v. Stewart*, 1 John. Ch. R. 620 ; *Brown v. Brewerton*, 4 John. Ch. R. 303 ; 4 Dow, Parl. R. 131 ; *Evartson v. Tappan*, 1 John. Ch. R. 497 ; *Hawley v. Mancius*, 7 John. Ch. R. 174 ; *Cook v. Coolingridge*, Jac. R. 607, 621 ; *Jeremy on Equity Jurisd. B. 1*, ch. 1, § 3. p. 142, &c. ; 1 Fonbl. Eq. B. 2, ch. 7, § 6, note (p) ; *Id.* § 7, and note (r).

⁴ See 1 Hovenden on Frauds, ch. 6, p. 199, 209 ; *Id.* vol. 2, ch. 20,

wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests, which he is bound to protect, he shall not be permitted to hold any such advantage.¹

§ 324. The case of principal and surety, however, as a striking illustration of this doctrine, may be briefly referred to. The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage, information, or surprise, taken of the surety by the creditor, will undoubtedly furnish a sufficient ground to invalidate the contract. So, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety.² If any stipulations, therefore, are made between the creditor and the debtor, which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interest therein, they will operate as a virtual discharge of the surety from the obligation of his contract.³ And, on the other hand, if any stipulations for additional security or other advantages are obtained between the credi-

p. 153, ch. 21, p. 171 ; *Maddeford v. Austwick*, 1 Sim. R. 89 ; 1 Chitty, Dig. Fraud, vii ; *Oliver v. Court*, 8 Price, R. 127 ; *Farnam v. Brooks*, 9 Pick. R. 212.

¹ Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 2, p. 395 ; *Griffiths v. Robius*, 3 Madd. R. 191.

² See *Cecil v. Plaistow*, 1 Anstr. R. 202 ; *Leicester v. Rose*, 4 East, R. 372 ; *Pidecock v. Bishop*, 3 B. & Cresw. 605 ; *Smith v. Bank of Scotland*, 1 Dow, R. 272 ; *Bank of United States v. Etting*, 11 Wheat. R. 59.

³ See *King v. Baldwin*, 2 John. Ch. R. 554, and the cases there cited ; *S. C.* 17 John. R. 384 ; *Nisbet v. Smith*, 2 Bro. Ch. R. 583.

tor and the debtor, the surety is entitled to the fullest benefit of them.¹

§ 325. Indeed the proposition may be stated in a more general form, that if a creditor does any act injurious to the surety, or inconsistent with his rights, or omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety ; in all such cases the latter will be discharged, and may set up such conduct as a defence to any suit brought against him, if not at law, at all events in Equity.²

§ 326. It is upon this ground, that, if a creditor, without any communication with the surety and assent on his part, should afterwards enter into any new contract with the principal, inconsistent with the former contract, or stipulate, in a binding manner, upon a sufficient consideration, for further delay and postponement of the day of payment of the debt, that will operate as a discharge of the surety.³ But there is no

¹ *Hayes v. Ward*, 4 John. Ch. R. 123 ; *Mayhew v. Crickett*, 2 Swanst. R. 186, and the authorities cited, p. 191, note (a) ; *Boulton v. Stubbs*, 18 Ves. 23 ; *Ex parte Rushforth*, 10 Ves. 409, 421.

² The proposition is thus qualified, because it is certainly very questionable in a variety of cases, whether the defence can be asserted at law ; though there is no doubt, that it can be asserted in all cases in Equity. It has, indeed, been said by a learned Court, that there is nothing in the nature of a defence by a surety, to make it peculiarly a subject of Equity jurisdiction ; and that whatever would exonerate a surety in one Court, ought to exonerate him in the other. *The People v. Janssen*, 7 John. Rep. 332 ; S. P. 2 John. Ch. R. 554, 557. But this doctrine does not seem universally adopted ; and certainly has not been acted upon in England to the extent, which its terms seem to import. See *Theobald on Principal and Surety*, p. 117 to 138.

³ *Skip v. Huey*, 3 Atk. 91 ; *Boulton v. Stubbs*, 18 Ves. 20 ; *Ludlow v. Simond*, 2 Cain. Cas. Err. 1 ; *King v. Baldwin*, 2 John. Ch. R. 554 ; 17 John. R. 384 ; *Ex parte Gifford*, 6 Ves. 805 ; *Rees v. Berrington*, 2 Ves. jr. 540.

positive duty incumbent on the creditor to procure measures of active diligence ; and, therefore, mere delay on his part, (at least if some other equity does not interfere,) unaccompanied by any contract for such delay, will not amount to laches, so as to discharge the surety.¹ And, on the other hand, if the creditor has any security from the debtor, and he parts with it, or by his gross negligence it is lost, without communication with the surety, this will operate, at least to the value of the security, to discharge him.²

§ 327. Sureties also are entitled to come into a Court of Equity, after a debt has become due, and to compel the debtor to exonerate them from their liability, by paying the debt.³ And though (as we have seen) the creditor is not bound by his general duty to active diligence in collecting the debt ; yet it has been said, that a surety, when the debt has become due, may come into Equity, and compel the creditor to sue for, and collect the debt from the principal ; at least, if he will indemnify the creditor against the risk, delay, and expense of the suit.⁴ But, whether this may be required in all cases or not, the surety has a clear right, upon paying the debt to the principal, to be substituted to the place of the creditor, as to all securities held by the latter for the debt,

¹ *Wright v. Simpson*, 6 Ves. 734 ; *Heath v. Hay*, 1 Y. & Jere. 434 ; *United States v. Kirkpatrick*, 9 Wheat. R. 720 ; *McLemore v. Powell*, 12 Wheat. R. 554.

² *Mayhew v. Crickett*, 2 Swanst. R. 185, 191, and note (a) ; *Law v. East India Company*, 4 Ves. 833 ; *Capel v. Butler*, 2 Sim. & Stu. R. 457.

³ *Nesbitt v. Smith*, 2 Bro. Ch. R. 579 ; *Lee v. Brook*, *Moseley*, R. 318 ; *Cox v. Tyson*, 1 Turn. & Russ. R. 395.

⁴ *Hayes v. Ward*, 4 John. Ch. R. 123, 131, 132 ; *King v. Baldwin*, 2 John. Ch. R. 554 ; *S. C.* 17 John. Rep. 384 ; *Wright v. Simpson*, 6 Ves. 734.

and to have the same benefit, that he would have therein.¹ This, however, is not the place to consider at large the general rights and duties of persons, standing in the relation of creditors, debtors, and sureties; and we shall have occasion again to advert to the subject, when considering the marshalling of securities in favor of sureties.

§ 328. Let us now pass to the consideration of the third class of constructive frauds, combining, in some degree, the ingredients of the others; but prohibited mainly, because they operate substantially as frauds upon the private rights, interests, duties, or intentions of third persons, or unconscientiously compromise, or injuriously affect, the private rights, interests, or duties of the parties themselves.

§ 329. With regard to this last class, much that has been already stated under the preceding head of positive or actual fraud, as to unconscionable advantages, overreaching, imposition, undue influence, and fiduciary situations, may well be applied here, though certainly with diminished force, as the remarks there did not turn exclusively upon constructive fraud.

§ 330. To this same class may also be referred many of the cases arising under the Statute of Frauds,² which requires certain contracts to be in writing, in order to give them validity. In the construction of that statute, however, a general principle has been adopted, that, as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection of fraud. Hence, in a variety of cases,

¹ See *Langthorne v. Swinburne*, 14 Ves. 162; *Wright v. Moseley*, 11 Ves. 12, 22; *Hayes v. Ward*, 4 John. Ch. R. 123.

² Stat. 29 Charles II, ch. 3, § 1, 4.

where from fraud, imposition, or mistake, a contract of this sort has not been reduced to writing ; but has been suffered to rest in confidence or parol, Courts of Equity will enforce it against the party, guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute.¹ Some instances of this sort have been already mentioned ; and others again will occur in the subsequent pages. And, here, we may apply the remark, that the proper jurisdiction of Courts of Equity is to take every one's act according to conscience, and not to suffer undue advantage to be taken of the strict forms of positive rules.²

§ 331. Hence it is, that, although there be no proof of fraud or imposition ; yet, if upon the whole circumstances the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, Courts of Equity will sometimes interfere and grant relief ;³ though they are certainly very cautious of interfering unless upon very strong circumstances.⁴ The fact, that the bargain is a very hard or unreasonable one, is not generally sufficient

¹ See 3 Woodes. Lect. 57, p. 431, 432 ; *Montecut v. Maxwell*, 1 P. Will. 619, 620 ; 1 Eq. Abrid. 19.

² *Chesterfield v. Janssen*, 2 Ves. 137, *arguendo*.

³ *Nott v. Hill*, 1 Vern. R. 167, 211 ; S. C. 2 Vern. 26 ; *Bearry v. Pitt*, 2 Vern. 14 ; *Chesterfield v. Janssen*, 2 Ves. 145, 148, 154, 155, 158 ; *Twistleton v. Griffith*, 1 P. Will. 310 ; *Cole v. Gibbons*, 3 P. Will. 290 ; *Bowes v. Heaps*, 3 Ves. & B. 117 ; *Gwynne v. Heaton*, 1 Bro. Ch. R. 1.

⁴ In some cases of grossly unreasonable contracts, relief may be had, even at law, as in the case of the contract to pay for a horse a barley corn a nail, doubling it every nail, and there were thirty-two nails in the shoes of the horse. *James v. Morgan*, 1 Lev. 111, cited 2 Ves. 155 ; 1 Atk. 351, 352.

per se to induce the interference of these Courts.¹ And, indeed, it will be found, that there are very few cases, not infected with positive or actual fraud, in which they interfere, except where the parties stand in some very particular predicament, and in some sort under the protection of the law, from age, character, or relationship.²

§ 332. One of the most striking cases, in which the Courts interfere, is in favor of a very gallant, but strangely improvident class of men, who seem to have mixed up in their composition qualities of a very opposite nature; and from their habits seem to require guardianship during the whole course of their lives; having at the same time great generosity, credulity, extravagance, heedlessness, and bravery. Of course it will be at once understood, that we here speak of common sailors in the mercantile and naval service. Courts of Equity are always disposed to take an indulgent consideration of their interests, and to treat them in the same light, with which young heirs and expectants are regarded. Hence it is, that contracts of seamen respecting their wages and prize money are watched with great jealousy; and are generally relievable, whenever any inequality appears in the bargain, or any undue advantage

¹ *Willis v. Jernegan*, 2 Atk. 251, 252. See 1 Fonbl. Eq. B. 1, ch. 2, § 10, and note (h); *Proof v. Hines*, Cas. T. Talb. 111; *Ramsbottom v. Parker*, 6 Maddock, R. 5; 2 Swanston, R. 147, note (a), and especially under page 150, his citation from Lord Nottingham's MSS. of the case of *Berney v. Pitt*, and the remarks of Lord Hardwicke on this case, in 1 Atk. R. 352, and 2 Ves. 157; *Freeman v. Bishop*, 2 Atk. 39.

² See *Huguenin v. Baseley*, 14 Ves. 271. And see Mr. Swanston's valuable note to *Davis v. Duke of Marlborough*, 2 Swanst. 147, note (a); *Jeremy on Equity Jurisd.* B. 3, Pt. 2, ch. 3, § 4, p. 399; *Thornhill v. Evans*, 2 Atk. R. 330.

has been taken. It has been remarked by a learned Judge, that this title to relief arises from a general head of Equity, partly on account of the persons, with whom the transaction is had, and partly on account of the value of the thing purchased.¹ And, he added, that he was warranted in saying, they were to be viewed in as favorable a light as a young heir, by what has been often said in cases of this kind, and what has been done by the Legislature itself, which has considered them as a race of men, loose, and unthinking, who will, almost for nothing, part with what they have acquired, perhaps, with their blood.²

§ 333. But the great class of cases, in which relief is granted under this third head of constructive fraud, is that, where the contract or other act is substantially a fraud upon the rights, interests, duties, or intentions of third persons. And, here, the general rule is, that particular persons, in contracts and other acts, shall not only transact bona fide between themselves, but shall not transact mala fide in respect to other persons, who stand in such a relation to either, as to be affected by the contract or the consequences of it. And as the rest of mankind, besides the par-

¹ Sir Thomas Clarke, in *How v. Weldon*, 2 Ves. 516, 518 ; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*); Jeremy on Eq. Jurisd. B. 3, P. 2, ch. 3, § 1, p. 401 ; 3 P. Will. 131, Cox's note (1.); Taylor v. Rochfort, 2 Ves. 281 ; Baldwin v. Rochfort, 1 Wils. R. 229. — Yet it is obvious, that Lord Hardwicke, in *Chesterfield v. Janssen*, 2 Ves. 137, did not contemplate them as entitled to such peculiar protection ; for he puts their case as not relievable. "The contracts of sailors selling their shares, before they knew what they were, could not be set aside here." But see the cases in 1 Wilson, R. 229 ; 2 Ves. 218.

² *How v. Weldon*, 2 Ves. 516. See also the admirable opinion of Lord Stowell, in the *Juliana*, 2 Hagg. Aden. Rep. 504. But see *Griffith v. Spratley*, 1 Cox, R. 383.

ties contracting, are concerned, it is properly said to be governed by public utility.¹

§ 334. It is upon this ground, that relief has been constantly granted, in what are called catching bargains with heirs, reversioners, and expectants, in the life of their parents or other ancestors.² Many, and indeed most, of these cases have been (as has been pointedly remarked by Lord Hardwicke) mixed cases, compounded of all or every species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting, weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain, even if there be no proof of any circumvention, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons, not privy to the fraudulent agreement; the father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand.³

¹ *Chesterfield v. Janssen*, 2 Ves. 156, 157; 1 Madd. Ch. Pr. 97, 98, 99, 214; 1 Eq. Abrid. 90, &c.

² 1 Fonbl. Eq. B. 1, ch. 2, § 12, and note (k); *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 3, § 4, p. 397, &c.; *Davis v. Duke of Marlborough*, 2 Swanst. R. 147, 151, 162, 165, 174.

³ *Chesterfield v. Janssen*, 2 Ves. 157.

§ 335. Strong as this language may appear, it is fully borne out by the general complexion of the cases, in which relief has been afforded. Actual fraud, indeed, has not unfrequently been repelled;¹ but there has always been constructive fraud, the nature and circumstances of the transaction being an imposition and deceit upon third persons, not parties to it. The doctrine is founded in part upon the policy of maintaining parental and *quasi* parental authority, and preventing the waste of family estates; and in part also upon the equity of protection against the designs of that calculating rapacity, which the law constantly discountenances; the distress frequently incident to the owners of profitable reversions; and the improvidence, with which men are commonly disposed to sacrifice the future to the present, especially when young, rash, and dissolute.²

§ 336. Indeed, in cases of this sort, Courts of Equity have extended a degree of protection to the parties, approaching to an incapacity to bind themselves absolutely by any contract, and, as it were, reducing them to the situation of infants, against the effects of their own conduct.³ Hence it is, that, in all cases of this sort, it is incumbent upon the party dealing with the heir expectant, or reversioner,

¹ *Bowes v. Heaps*, 3 Ves. & Beam. 117, 119; *Peacock v. Evans*, 16 Ves. 512.

² See *Davis v. Duke of Marlborough*, 2 Swanston, 147, 148, the Reporter's note; *Twistleton v. Griffith*, 1 P. Will. 310; *Cole v. Gibbons*, 1 P. Will. 293; *Baugh v. Price*, 1 Wils. R. 320; 2 Ves. 144, 155; *Barnardiston v. Lingood*, 2 Atk. 135, 136; *Bowes v. Heaps*, 3 Ves. & Beam. 117, 119, 120; *Walmesley v. Booth*, 2 Atk. 27, 28; 1 Madd. Ch. Pr. 97, 98, 99.

³ *Gwynne v. Heaton*, 1 Bro. Ch. R. 1, 9; *Peacock v. Evans*, 16 Ves. 512, 514.

to establish, not merely, that there is no fraud ; but, as the phrase is, to make good the bargain, that is, to show, that a full and adequate consideration has been paid ; for in cases of this sort, (contrary to the general rule,) mere inadequacy of price or compensation is sufficient to set aside the contract.¹ The Court will relieve upon general principle of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception.²

§ 337. The principle applies, as we have seen, not merely to heirs dealing with their expectancies, but to reversioners, and remaindermen, dealing with property already vested in them, but of which the enjoyment is future, and therefore apt to be under estimated by the giddy, the necessitous, the improvident, and the young.³ According, however, to the decisions, years do not seem to make much difference in the protection afforded to expectant heirs ; since the aim of the rule is principally to prevent deceit and imposition upon parents and other ancestors.⁴ And in regard to reversioners and remaindermen, if they have been necessitous, and laboring under pecuniary distress and embar-

¹ *Peacock v. Evans*, 16 Ves. 512, 514 ; *Gowland v. De Faria*, 17 Ves. 20 ; *Bernal v. Donegal*, 1 Bligh, (N. S.) 594.

² *Walmesley v. Booth*, 2 Atk. 28 ; 1 Madd. Ch. Pr. 97, 98 ; Sir John Strange in *Chesterfield v. Janssen*, 2 Ves. 149 ; *Gwynne v. Heaton*, 1 Bro. Ch. R. 1, 9.

³ *Gowland v. De Faria*, 17 Ves. 20 ; *Peacock v. Evans*, 16 Ves. 512 ; Mr. Swanston's note, 2 Swanston, 147, 148 ; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (k). But see *Nichols v. Gould*, 2 Ves. 422.

⁴ *Davis v. Duke of Marlborough*, 2 Swanst. R. 151 ; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (k) ; *Ormond v. Fitzroy*, 3 P. Will. 131 ; *Wireman v. Beake*, 2 Vern. R. 121.

rassment, an equally indulgent protection has also been afforded to them.¹

§ 338. The ground of the interposition of Courts of Equity in cases of reversioners has been commented on by a late learned Judge, with great clearness. "At law and in Equity also," says he, "generally speaking, a man, who has a power of disposition over his property, whether he sells to relieve his necessities, or to provide for the convenience of his family, cannot avoid his contract upon the mere ground of inadequacy of price. A Court of Equity, however, will relieve expectant heirs and reversioners from disadvantageous bargains. In the earlier cases it was held necessary to show, that undue advantage was actually taken of the situation of such persons. But in more modern times it has been considered, not only that those, who were dealing for their expectations, but those, who were dealing for vested remainders also, were so exposed to imposition and hard terms, and so much in the power of those, with whom they contracted, that it was a fit rule of policy to impose upon all, who deal with expectant heirs and reversioners, the *onus* of proving, that they had paid a fair price; and otherwise to undo their bargains, and compel a reconveyance of the property purchased. The principle and the policy of the rule may be both equally questionable. Sellers of reversions are not necessarily in the power of those, with whom they contract, and are not necessarily exposed to imposition and hard terms. And persons, who sell

¹ Ibid. Wood v. Abrey, 3 Madd. R. 418, 422; Chesterfield v. Janssen, 2 Ves. 157, 158; 1 Atk. 353; Gwynne v. Heaton, 1 Bro. Ch. R. 1, 9.

their expectations and reversions from the pressure of distress, are thrown by the rule into the hands of those, who are likely to take advantage of their situation; for no person can securely deal with them. The principle of the rule cannot, however, be applied to sales of reversions by auction;”¹ (meaning, when the auction is free, fair, and with the ordinary precautions.)

§ 339. The whole doctrine of Courts of Equity, with respect to expectant heirs and reversioners, and others in a like predicament, assumes, that the one party is defenceless, and exposed to the demands of the other under the pressure of necessity. It assumes also, that there is a direct or implied fraud upon the parent or other ancestor, who from ignorance of the transaction is misled into a false confi-

¹ Sir John Leach, in *Shelly v. Nash*, 3 Madd. 232. And see *Peacock v. Evans*, 16 Ves. 514, 515; 1 Madd. Ch. Pr. 98, 99. — Mr. Swanston is of opinion, that, though the principle of the relief, afforded to reversioners, by its generality seems to extend to every description of persons, dealing for or with a reversionary interest; yet it may be doubted, whether, in order to constitute a title to relief, the reversioner must not also combine the character of *Heir*. He has collected and compared the cases. Mr. Fonblanque manifestly does not contemplate any such limitation of the doctrine. He says, “The real object, which the rule proposes, being to restrain the anticipation of expectancies, which must, from its very nature, furnish to designing men an opportunity to practice upon the inexperience or passion of a dissipated man, its operation is not confined to heirs, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment, which might otherwise regulate their dealings.” 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (k). In *Wood v. Abrey*, 3 Madd. Rep. 423, the Vice Chancellor said, “The policy of this rule as to reversions may be well doubted; and, if the cases were looked into, it might be found, that the rule was *originally* referred only to expectant heirs and not to reversioners.” See also Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 398, 399; *Hinksman v. Smith*, 3 Russell, R. 433.

dence in the disposition of his property. Hence it should seem, that one material qualification of the doctrine is the existence of such ignorance. If, therefore, the transaction has been fully made known at the time to the parent or other person standing *in loco parentis* ; as for example, to the person from whom the *spes successionis* is entertained, or after whom the reversionary interest is to become vested in possession, and is not objected to by him, the extraordinary protection, generally afforded in cases of this sort by Courts of Equity, will be withdrawn. *A fortiori*, it will be withdrawn, if the transaction is expressly sanctioned or adopted by such parent, or person standing *in loco parentis*.¹ And it has been strongly said, that it would be monstrous to treat the contracts of a person of mature age, as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent it. The parent might thus lie by, and suffer his son to obtain the assistance, which he ought himself to have rendered ; and then only stand forward to aid him in rescinding agreements, which he had allowed him to make, and to profit by.²

§ 340. The other qualification of the doctrine is not less important. The contract must be made under the pressure of some necessity ; for the main ground of the doctrine is the pressure upon the heir, or the distress of the party dealing with his expectancies, and, therefore, under strong temptations to make undue sacrifices of his future interests.³ Both

¹ King v. Hamlet, 2 Mylne & Kean, 473, 474.

² Ibid. — The judgment of Lord Brougham in this case on this point is very able, and deserves a thorough examination.

³ Ibid.

of these qualifications need not, indeed, in all cases and under all circumstances, concur to justify relief. It may be sufficient, that either of them forms so essential an ingredient in a case, as to give rise to a just presumption of constructive fraud.¹

§ 341. The doctrine of Courts of Equity upon this subject, if it has not been directly borrowed from, does in no small degree follow out, the policy of the Roman Law in regard to heirs and expectants. By the Macedonian Decree, (so called from the name of the usurer, who gave occasion to it,) all obligations of sons, living under the paternal jurisdiction, contracted by the loan of money, were declared null without distinction; and they were not made valid by the death of the father; not so much out of favor to the son, as out of odium to the creditor, who had made an unlawful loan, and, therefore, it was vicious in its origin. *Verba Senatusconsulti Macedoniani hæc sunt, &c. Placere, ne cui, qui filiofamilias mutuam pecuniam dedisset, etiam post mortem parentis ejus, cujus in potestate fuisset, actio petitioque daretur; ut scirent, qui pessimo exemplo fænerarent, nullius posse filiifamilias bonum nomen, expectata patris morte, fieri.*² Upon which Lord Hardwicke has remarked, that the Senate and lawmakers in Rome were not so weak, as not to know, that a law to restrain prodigality, to prevent a son's running in debt in the life of his father, would be vain in many cases. Yet they made laws to this purpose, viz. the Macedonian

¹ Earl of Postmore v. Taylor, 4 Sim. R. 182; Davis v. Duke of Marlborough, 2 Swanst. 139, 154.

² Dig. Lib. 14, tit. 6, l. 1; 1 Domat, Civ. Law, B. 1, tit. 6, § 4, and art. 1, 2; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (I).

Decree already mentioned, happy if they could in some degree prevent it ; *est aliquod prodire tenus*.¹

§ 342. It is upon similar principles, that *post obit* bonds and other securities of a like nature are set aside, when made by heirs and expectants. A *post obit* bond is an agreement, on the receipt of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, upon the death of the person, from whom he has some expectation, if the obligor be then living.² Such bonds operate as a virtual fraud upon the bounty of the ancestor, and disappoint his intentions, generally by design, and usually in the event.

§ 343. A case of a very similar character is a contract, by which an expectant heir, upon the present receipt of a sum of money, promises to pay over to the lender a large, though uncertain proportion of the property, which might descend to him from his parent, or other ancestor. It is a fraud upon such parent or other ancestor, and introductive of the worst public mischiefs ; for the ancestor is thereby induced to submit in ignorance to the disposition, which the law makes of his estate, upon the supposition, that it will go to his heir, when in fact a stranger is made, against his will, the substituted heir.³ It might be very different, if there was a fair, though secret, agreement between all the heirs to share equally, and thus to cut off all attempts to

¹ *Chesterfield v. Janssen*, 2 Ves. 158.

² *Boynton v. Hubbard*, 7 Mass. R. 119 ; *Chesterfield v. Janssen*, 2 Ves. 157 ; 1 Atk. R. 352 ; *Fox v. Wright*, 6 Madd. R. 111 ; *Whar-ton v. May*, 5 Ves. 27 ; *Cushing v. Townshend*, 19 Ves. 628.

³ *Boynton v. Hubbard*, 7 Mass. R. 112.

overreach each other, and to prevent all exertions of undue influence.¹

¹ *Buckland v. Newland*, 2 P. Will. 182; *Wethered v. Wethered*, 2 Sim. R. 183; *Harwood v. Tooke*, 2 Sim. R. 192; *Hyde v. White*, 5 Sim. R. 524.—Mr. Chief Justice Parsons, in *Boynton v. Hubbard*, 7 Mass. R. 112, expounded this whole subject with admirable fulness and force; and held, that even at law such securities could be relieved against. I gladly extract the following passages from his opinion. “Another case is, where the deceit is upon persons not parties to the contract, as a deceit on a father or other relation, to whom the affairs of an heir or expectant are not disclosed; so that they are influenced to leave their fortunes to be divided amongst a set of dangerous persons and common adventurers, in fact, although not in form. This deceit is relieved against as a public mischief, destructive of all well regulated authority or control of persons over their children, or others having expectations from them; and as encouraging extravagance, prodigality, and vice.

“From the forms of proceeding in Courts of Equity, it must be admitted, that these principles may often be more correctly applied there than in Courts of Law. Chancery may compel a discovery of facts, which a Court of Law cannot; and from facts disclosed, a Chancellor, as a judge of facts, may infer other facts, whence deceit, public or private, may be irresistibly presumed.—Whereas, at law, fraud cannot be presumed, but must be admitted or proved to a jury.

“But when a Court of Law has regularly the fact of fraud admitted or proved, no good reason can be assigned, why relief should not be obtained there; although not always in the same way, in which it may be obtained in Equity.

“A case, in which an heir or expectant is frequently relieved against his own contract, is a *post obit* bond. This is an agreement, on the receipt of a sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, on the death of the person, from whom he has some expectation, if the obligor be then living. This contract is not considered as a nullity; but it may be made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard. But, whenever an advantage is taken of the necessity of the obligor, to induce him to make this contract, he is relieved, as against an unconscionable bargain, on payment of the principal and interest. This contract may be made on data, whence its reasonableness may be ascertained; for the lives of the obligor, and of the person, on whose death the payment is to be made, are subject to be valued, as is done in insurances upon lives. But the covenant declared on in the case at bar is not in the nature of a *post obit* contract.

§ 344. From what has been already said, it follows as a natural inference, that these contracts are not in all cases utterly void ; but they are sub-

“ Another case, in which an heir is relieved, is when he is entitled to an estate in reversion or remainder, expectant on the death of some ancestor or relative, and he contracts to sell the same for present money. All these cases are not relieved against as fraudulent ; because a reasonable and sufficient consideration may be paid, as ascertained by the annual value of the estate, and of the intervening life. But, as in *post obit* contracts, when an advantage is taken by the purchaser of the necessity of the seller, he will be relieved against the sale, on repaying the principal and interest, and sometimes paying for reasonable repairs made by the purchaser. This relief is granted on the ground, that the contract of sale was unconscionable.

“ In unconscionable *post obit* contracts, Courts of Law may, when they appear, in a suit commenced upon them, to have been against conscience, give relief by directing a recovery of so much money only, as shall be equal to the principal received and the interest. But in sales of remainders and reversions, by grants executed, I know of no relief, that Courts of Law can give, unless the grants shall appear to have been fraudulently obtained of the grantor ; in which case the fraud will vitiate and render null the grants so infected.

“ The contract before us is not a sale of a remainder or reversion ; but is different from any noticed in the reports, that have been cited. There is one case of a contract between presumptive heirs, respecting their expectancies from the same ancestor. It is the case of *Buckley v. Newland*. The parties had married two sisters, presumptive heirs of Mr. Turgis. The husbands agreed, that whatever should be given by Mr. Turgis should be equally divided between them. After Turgis's death, the defendant, who had the greater part given to him, was compelled to execute the agreement. The reciprocal benefit of the chance was a sufficient consideration. The tendency of the agreement was to guard against undue influence over the testator ; and it could not be unreasonable to covenant, to do what the law would have done, if Turgis had died intestate.

“ The covenant declared on in the case at bar is an agreement by an heir, having two ancestors then living, an uncle and an aunt, that if he survive them, or either of them, he will convey to a stranger one third part of all the estate, real and personal, which shall come to him from those ancestors, or either of them, by descent, distribution, or devise. And it is found by the jury, that

ject to all real and just equities between the parties, so that there shall be no inadequacy of price and no inequality of advantages in the bargain. If in other respects these contracts are perfectly fair, Courts of Equity will permit them to have effect as securities, for what *ex æquo et bono* the lender is entitled to; for he, who seeks Equity, must do Equity; and relief will not be granted upon such securities, except upon equitable terms.¹

this contract was not obtained from the heir by the fraud of the purchaser. If, therefore, this covenant is void, it must be on the principle, that it is a fraud, not on either of the parties, for that the jury have negatived, but on third persons not parties to it, productive of public mischief, and against sound public policy. If the contract has this effect, it is apparent to the Court from the record; the whole contract being a part of the record. And that a contract of this nature has this effect, we cannot doubt.

“The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the law, which had designated the defendant, as an heir. The defendant’s agreement with the plaintiff is to substitute him as a co-heir with himself to his uncle’s estate. The uncle is thus made to leave a portion of his estate to Boynton, a stranger, without his knowledge, and consequently without any such intention. This Lord Hardwicke calls a deceit on the ancestor. And what is the consequence of deceits of this kind upon the public? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them, than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice; and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens.”

¹ *Boynton v. Hubbard*, 7 Mass. R. 112, 120; *Curling v. Townshend*, 19 Ves. 628; *Bernal v. Donegal*, 3 Dow, R. 132; S. C. 1 Bligh, Rep. (N. S.) 594; *Wharton v. May*, 5 Ves. 27; 1 Fonbl. Eq. B. 1, ch. 2, § 13, and note (p); *Evans v. Cheshire*, Belt’s Supplement, 300; *Crowe v. Ballard*, 3 Bro. Ch. R. 120; *Gwynne v.*

Eq.

§ 345. And where, after the contemplated events have occurred, and the pressure of necessity has been removed, the party freely, and deliberately, and upon full information, confirms the precedent contract or other transaction, Courts of Equity will generally hold him bound thereby; for, if a man is fully informed, and acts with his eyes open, he may by a new agreement bar himself from relief.¹ But

Heaton, 1 Bro. Ch. R. 1, 9, 10; *Davis v. Duke of Marlborough*, 2 Swanst. 174.

¹ *Chesterfield v. Janssen*, 2 Ves. 125; 1 Atk. R. 354; *Crowe v. Ballard*, 3 Bro. Ch. R. 120; *Coles v. Gibbon*, 3 P. Will. 293, 294; *Cole v. Gibson*, 1 Ves. 503, 506, 507; *Cann v. Cann*, 1 P. Will. 723. — Mr. Fonblanque has remarked, that Lord Hardwicke, in *Chesterfield v. Janssen*, (2 Ves. 125; 1 Atk. 354,) has brought together, and classed, all the cases upon the subject of confirmation; and the result seems to be, that, if the original contract be illegal or usurious, no subsequent agreement or confirmation of the party can give it validity. But, if it be merely against conscience, then, if the party, being fully informed of all the circumstances of it and of the objections to it, voluntarily comes to a new agreement, he thereby bars himself of that relief, which he might otherwise have had in Equity; not so, if the confirmation be a continuance of the original fraud or imposition. 1 Fonbl. Eq. B. 1, ch. 2, § 13, note (r). See also *Id.* § 14, note (v). Whether this statement will be found fully borne out by the authorities, is, perhaps, not beyond doubt. Where a contract is utterly void, as from illegality, or being, *contra bonos mores*, or contrary to public policy, there seems the strongest reason to say, that it cannot acquire any validity from any confirmation, for the original taint attaches to it through every change. To give it efficacy would contradict two well established maxims of the Common Law. *Quod contra legem fit, pro infecto habetur. Quod ab initio non valet, in tractu temporis non convalescet; et quæ malo sunt inchoata principio, vix est, ut bono peragantur exitu.* 4 Co. R. 2; *Id.* 31; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (y). But where the conduct is merely voidable, it seems upon general principles capable of confirmation. The difficulty is, not so much in stating, that it is capable of confirmation; but under what circumstances the confirmation ought to be held conclusive. The remarks of Lord Hardwicke, in *Chesterfield v. Janssen*, 2 Ves. 158, 159; 1 Atk. R. 354; and *Cole v. Gibson*, 1 Ves. R. 506, 507, compared with those of Lord Thurlow, in *Crowe v. Ballard*, 3 Bro. Ch

if the party is still acting under the pressure of the original transaction, or original necessity ; or if he is still under the influence of the original transaction, and the delusive opinion, that it is valid and binding upon him ; under such circumstances, Courts of Equity will not hold him barred from relief by any confirmation.¹

§ 346. Similar principles will govern the case, where the heir or other expectant is relieved from his necessities, and becomes opposed to the person, with whom he has been dealing, and seeks to repudiate the bargain. In such a case he must do no act, by which the rights or property of the other party shall be injuriously affected, after he is thus deemed to be restored to his general capacity. If he does, he becomes affected with the ordinary rule, which governs in other cases, and forbids a party to repudiate a dealing, and at the same

R. 120 ; S. C. 1 Ves. 219, 220 ; S. C. 2 Cox, R. 257, and Lord Eldon, in *Wood v. Downes*, 18 Ves. 123, 124, 128, and Lord Erskine in *Morse v. Royal*, 12 Ves. 373, 374, have not wholly relieved the doctrine from difficulty. In *Cole v. Gibson*, 1 Ves. 503, 506, 507, Lord Hardwicke seemed to hold a marriage brokerage bond capable of confirmation, though held void upon public policy. But in *Sherley v. Martin*, 1779, the Court of Exchequer held, that contracts avoided on account of public inconvenience would not admit of subsequent confirmation by the party, and, therefore, that a marriage brokerage bond was incapable of confirmation. Cited 1 Fonbl. Eq. B. 1, ch. 2, § 14, note (v) ; Id. ch. 4, § 10, note (s) ; S. C. cited 1 Ball. & B. 357, 358 ; 3 P. W. 75, Cox's note. See also *Say v. Barwick*, 1 Ves. & B. 195. See *Gwynne v. Heaton*, 1 Bro. Ch. R. 1, and Mr. Belt's note (1), *ibid.* See also *ante*, § 263, and *Newland on Contracts*, ch. 25, p. 496 to 503.

¹ *Wood v. Downes*, 18 Ves. 123, 124, 128 ; *Crowe v. Ballard*, 3 Bro. Ch. R. 120 ; S. C. 1 Ves. 214, 219, 220 ; S. C. 2 Cox, R. 253, 257 ; *Taylor v. Rochfort*, 2 Ves. 281 ; *Murray v. Palmer*, 2 Sch. & Lefr. 486 ; *Roche v. O'Brien*, 1 B. & Beatt. R. 338, 339, 340, 353, 354, 356 ; *Morse v. Royal*, 12 Ves. 373, 374 ; *Gowland v. DeFaria*, 17 Ves. 20 ; *Dunbar v. Tredenwick*, 2 Ball. and B. 316, 317, 318.

time to avail himself fully of all the rights and powers resulting therefrom, as if it were completely valid.¹

§ 347. Even the sale of a *post obit* bond at public auction will not necessarily give it validity, or free it from the imputation of being obtained under the pressure of necessity. For the circumstances may be such as to establish, that the expectant is acting without any of the usual precautions to obtain a fair price; and is in great distress for money; and is really in the hands and under the control of those, who choose to become bidders for the purpose of fleecing him.² The case is not like the case of an ordinary sale of a reversion at public auction, where the usual precautions are taken; for there it may be perfectly proper not to require the purchaser to show, that he has given the full value; for where the sale is public and fair, there seems no reason to call in question its general validity; but it should be specially impeached. In sales of reversions at auction, there is not usually any opportunity, as upon a private treaty, for fraud and imposition upon the seller. The latter is in no just sense in the power of the purchaser. The sale by auction is evidence of the market price.³ But the sale of *post obit* bonds at auction carries with it, ordinarily, a presumption of distress and pecuniary embarrassment; and, if the ordinary precautions are thrown aside, there is violent presumption of extravagant rashness, imprudence, or circumvention.

¹ *King v. Hamlet*, 2 Mylne & Kean, R. 474, 480. See also *Gwynne v. Heaton*, 1 Bro. Ch. R. 1; *Peacock v. Evans*, 16 Ves. 512.

² *Fox v. Wright*, 6 Madd. R. 77.

³ *Shelly v. Nash*, 3 Madd. R. 125; *Fox v. Wright*, 6 Madd. R. 77.

§ 348. Cases of a nature nearly resembling *post obit* bonds have, in the cases of young and expectant heirs, been often relieved against, upon similar principles. Thus, where tradesmen and others have sold goods to such persons at extravagant prices, and under circumstances demonstrating imposition, or undue advantage, or an intention to connive at secret extravagance, and profuse expenditures, unknown to the parents, or other ancestors, Courts of Equity have reduced the securities, and cut down the claims to their reasonable and just amount.¹

§ 349. Another class of constructive frauds upon the rights, interests, or duties of third persons, embraces all those agreements and other acts of parties, which operate directly or virtually to delay, defraud, or deceive creditors. Of course, we do not here speak of cases of express and intentional fraud upon creditors ; but, of such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interests. It is difficult in many cases of this sort to separate the ingredients, which belong to positive and intentional fraud from those of a mere constructive nature, which the law pronounces fraudulent upon principles of public policy. Indeed, they are often found mixed up in the same transaction ; and any attempt to distinguish them, and weigh them separately, would be a task of little utility, and might, perhaps, mislead and perplex the inquiries of students.

¹ *Bill v. Price*, 1 Vern. R. 467, and Mr. Raithby's note 1, *ibid.* 1 Eq. Abrid. 91, G, pl. 3 ; *Lamplugh v. Smith*, 2 Vern. 77 ; *Witley v. Price*, 2 Vern. R. 78 ; *Brook v. Gally*, 1 Atk. 34, 35, 36 ; *Berkley v. Bishop*, 1 Atk. R. 39 ; *Gilbert's Lex Prætor.* 291. — But see *Barney v. Beak*, 2 Ch. Cas. 136 ; *Gwynne v. Heaton*, 1 Bro. Ch. R. 9, 10.

§ 350. It must be a fundamental policy of all enlightened nations, to protect and subserve the rights of creditors ; and a great anxiety to afford full relief against frauds upon them has been manifested in the Civil Law, and from a very early period, in the Common Law also. In the Civil Law it was declared, that whatever was done by debtors to defeat their creditors, whether by alienation or other dispositions, is held revoked, or null, as the case may require. *Necessario Prætor hoc edictum proposuit ; quo edicto consuluit creditoribus, revocando ea, quæcumque in fraudem eorum alienata sunt.*¹ *Ait ergo Prætor ; Quæ fraudationis causâ gesta erunt. Hæc verba generalia sunt, et continent in se omnem omnino in fraudem factam, vel alienationem vel quemcunque contractum. Quodcunque igitur fraudis causâ factum est, videtur his verbis revocari, quæcumque fuerit. Nam, latè ista verba patent. Sive ergo rem alienavit, sive acceptilatione, vel pacto aliquem liberavit.*² *Idem erit probandum. Et si pignora liberet, vel quem alium in fraudem creditorum præponat.*³ And the rule was not only applied to alienations, but to fraudulent debts, and, indeed, to every species of transaction or omission, prejudicial to creditors. *Vel ei præbuit exceptionem, sive se obligavit fraudandorum creditorum causâ, sive numeravit pecuniam, vel quodcunque aliud fecit in fraudem creditorum, palam est, edictum locum habere, &c. Et qui aliquid fecit, ut desinat habere, quod habet, ad hoc edictum pertinet. In fraudem facere videri etiam eum, qui non facit, quod debet facere, intelligendum est ; id est, si non utitur servitutibus.*⁴

¹ Dig. Lib. 42, tit. 8, l. 1, § 1.

² Dig. Lib. 42, tit. 8, l. 2 ; Pothier, Pand. Lib. 42, tit. 8, § 2.

³ Id. l. 2 ; 1 Domat, B. 2, tit. 10, art. 7.

⁴ Dig. Lib. 42, tit. 8, l. 3, § 1, 2 ; Id. l. 4 ; Pothier, Pand. Lib. 42, tit. 8, § 1 to 36 ; 1 Domat, B. 2, tit. 10, art. 1, pr. tot. ; Id. art. 8.

§ 351. Hence all voluntary dispositions, made by debtors upon the score of liberality, were revocable, whether the donee knew of the prejudice intended to the creditors, or not. *Simili modo dicimus, et si cui donatum est, non esse quærendum, an sciente eo, cui donatum, gestum sit, sed hoc tantum, an fraudentur creditores.*¹ And the like rule applied to purchasers even for a valuable consideration, if they knew the fraudulent intention at the time of the purchases, and thus became partakers of it, that they might profit by it.² *Quæ fraudationis causâ gesta erunt, cum eo, qui fraudem non ignoraverit de his, &c. actionem dabo. Si debitor in fraudem creditorum minore pretio fundum scienti emptori vendiderit, deinde hi, quibus de revocando eo actio datur, eum petant, quæsitum est, an præteritum restituere debent? Proculus existimat, omnimodo restituendum esse fundum, etiamsi pretium non solvatur; et rescriptum est secundum Proculi sententiam.*³

§ 352. The Common Law has adopted similar principles, which have been more fully carried into effect by the statutes of 50 Edward III, ch. 6, and 3 Henry VII, ch. 4, against fraudulent gifts of goods and chattels, and by the statute of 13 Elizabeth, ch. 5, against fraudulent conveyances of lands, to defeat or delay creditors, and the statute of 27 Elizabeth, ch. 4, against fraudulent or voluntary conveyances of lands, to defeat subsequent purchasers, which have always secured a favorable and liberal construction in suppression of fraud.⁴ Indeed, the

¹ Dig. Lib. 42, tit. 8, l. 6, § 11; 1 Domat, B. 2, tit 10, art. 2.

² Dig. Lib. 42, tit. 8, l. 1; Pothier, Pand. Lib. 42, tit. 8, § 1.

³ Dig. Lib. 42, tit. 8, l. 1; Id. l. 7; 1 Domat, B. 2, tit. 10, art. 4.

⁴ Cadogan v. Kennett, Cowp. R. 439; Jeremy on Eq. Jurisd. B. 3,

principles and rules of the Common Law, as now universally known and understood, are so strong against fraud in every shape, that Lord Mansfield has remarked, that the Common Law would have attained every end proposed by these statutes.¹ This is, perhaps, stating the matter somewhat too broadly, at least in regard to the statute of 27 Elizabeth, ch. 4, as it is now construed, for it applies in favor of subsequent purchasers in cases of voluntary conveyances, whether they be fraudulent or not.² Courts

P. 2, ch. 3, § 4, p. 410, 411, 412; Newland on Contracts, ch. 23, p. 370, 371; Com. Dig. *Covin*, B. 2, 3.

¹ Ibid. *Hamilton v. Russell*, 1 Cranch, 309; Com. Dig. *Covin*, B. 2. — The statutes, 50 Edward III, ch. 6, and 3 Henry VII, ch. 4, expressly declare all gifts, &c. of goods, and chattels, intended to defraud creditors, to be null and void. 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (c); Com. Dig. *Covin*, B. 2. In *Hamilton v. Russell*, (1 Cranch, R. 309,) the Supreme Court of the United States said, that the statute of 13 Eliz. and 27 Eliz. are considered as only declaratory of the principles of the Common Law. See 1 Fonbl. Eq. B. 1, ch. 4, § 13, and note (d); Co. Litt. 290, b.

² See *Buckle v. Mitchill*, 18 Ves. 110; *Doe v. Manning*, 9 East, R. 59; *Townshend v. Windham*, 2 Ves. 10, 11; *Walker v. Burroughs*, 1 Atk. 93, 94; *Cathcart v. Robinson*, 5 Peters, R. 264. — 'There is a distinction between the statute of 13 Eliz. ch. 5, and the statute of 27 Eliz. ch. 4, which should be here borne in mind, though it will naturally come under consideration in a subsequent page. All voluntary conveyances are not void against creditors, equally the same as they are against subsequent creditors. It is necessary on the statute of 13 Eliz. to prove, that the party was indebted at the time, or immediately after the execution of the deed, or otherwise it would be attended with bad consequences, because the statute extends to goods and chattels; and such construction would defeat every provision for children and families, though the father was not indebted at the time. *Walker v. Burroughs*, 1 Atk. 93; *Buttersbee v. Farrington*, 1 Swanst. R. 106, 113. But upon the statute of 27 Eliz. ch. 4, subsequent purchasers for a valuable consideration may set aside the former voluntary conveyance, though *bonâ fide* made, even though such purchasers had full notice of such voluntary conveyance. *Doe v. Rutledge*, Cowp. R. 711, 712; *Gooch's Case*, 5 Co. R. 60, 61; *Tayne's Case*, 3 Co. R. 83; *Doe v. Manning*, 9 East, R. 59; *Buckle v. Mitchill*, 18 Ves. 110; *Holloway v. Millard*, 1 Madd. R. 227, 228,

of Equity, from the enlarged principles, upon which they act, give full effect to all the provisions to protect the rights and interests of creditors, and exert their jurisdiction upon the same construction of these statutes, which is adopted by Courts of Law.¹ But they go farther ; and, (as we shall presently see,) extend their aid to many cases not reached by these statutes.

§ 353. And in the first place, let us consider the nature and operation of the statute of 13 Elizabeth, ch. 5, as to creditors, which has been universally adopted in America, as the basis of our jurisprudence on the same subject. The object of the Legislature evidently was, to protect creditors from those frauds, which are frequently practised by debtors under the pretence of discharging a moral obligation, that is, under the pretence of making suitable provisions for wives, children, and other relations. Independently of the statute, no one can reasonably doubt, that a gift or conveyance, which has neither a good nor a meritorious consideration to support it, ought not to be valid against creditors ; for, every man is bound to be just, before he is generous ;² and the very fact, that he makes a voluntary gift or conveyance to mere strangers, to the prejudice of his creditors, affords a conclusive ground, that it is fraudulent. The statute, while it seems to protect the legal rights of creditors against the frauds of their debtors, anxiously excepts from such imputation the bonâ fide discharge of a

229. 'The statute of 27 Eliz. ch. 4, does not apply to goods and chattels, but to lands and other real estate only. *Jones v. Croucher*, 1 Sim. & Stu. 315 ; *Atherley on Marr. Sett.* ch. 13, p. 207.

¹ *Ibid.*

² *Copis v. Middleton*, 2 Madd. R. 428 ; *Partridge v. Gopp*, 1 Eden, R. 166, 167, 168.

moral duty. It does not, therefore, declare all voluntary conveyances to be void; but all fraudulent conveyances to be void.¹ And, whether a conveyance be fraudulent or not, is declared to depend upon its being made “upon good consideration and bonâ fide.”² It is not sufficient, that it be upon good consideration or bonâ fide. It must be both; and, therefore, if a conveyance or gift be defective in either particular, though valid between the parties and their representatives, it is utterly void as to creditors.

§ 354. This leads us to the inquiry, what are deemed good considerations in the contemplation of the statute. A good consideration is sometimes used in the sense of a consideration, valid in point of law; and then it includes a valuable, as well as a meritorious, consideration.³ But it is more frequently used in a sense contradistinguished from valuable; and then it imports a consideration of blood or natural

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (a); Doe v. Routledge, Cowp. R. 708; Cadogan v. Kennett, Cowp. R. 432, 434; Holloway v. Millard, 1 Madd. R. 227; Sagitary v. Hide, 2 Vern. 44. — Many of the succeeding remarks upon this subject I have taken, almost literally, from Mr. Fonblanque’s very able notes; and I desire this general acknowledgement to be taken, as an expression of very great obligations to him in every part of my work. 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (a). The word “voluntary” is not to be found either in the statute of 13 Elizabeth, ch. 5, or of the statute of 27 Elizabeth, ch. 4. Holloway v. Millard, 1 Madd. R. 227, 228. — A voluntary conveyance to a stranger made bonâ fide by a party, not indebted at the time, would be good against subsequent creditors. Holloway v. Millard, 1 Madd. R. 227, 228; Walker v. Burroughs, 1 Atk. 93.

² Ibid. Bacon, Abridg. *Fraud*, C.

³ Hodgson v. Butts, 3 Cranch, 140; Copis v. Middleton, 2 Madd. R. 430; Twyne’s Case, 3 Co. R. 81; Taylor v. Jones, 2 Atk. 601; Newland on Contracts, ch. 23, p. 386; Partridge v. Gopp, Ambler, R. 598, 599; S. C. 1 Eden, R. 167, 168; Atherley on Marr. Sett. ch. 13, p. 191, 192.

affection ; as when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems as an equivalent given for the grant ; and it is therefore founded in motives of justice.¹ Deeds, made upon a good consideration only, are considered as merely voluntary ; those made upon a valuable consideration are treated as compensatory. The words, “good consideration,” in the statute may be properly construed to include both descriptions ; for it cannot be doubted, that it meant to protect conveyances, *bonâ fide* made for a valuable consideration, as well as those *bonâ fide* made, upon the consideration of blood or affection.²

§ 355. In regard to voluntary conveyances, they are unquestionably protected by the statute in all cases, where they do not break in upon the legal rights of others. But, when they break in upon such rights, and so far as they have that effect, they are not permitted to avail against those rights. If a man, therefore, who is indebted, conveys property to his wife or children, such a conveyance is, or at least may be, within the statute ; for, though the consideration is good, as between the parties ; yet it is not in contemplation of law *bonâ fide* ; for it is inconsistent with the good faith, which a debtor owes to his creditors, to withdraw it voluntarily from the satisfaction of their claims ;³ and no man has a right to prefer

¹ 2 Black. Comm. 297 ; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (a).

² Doe v. Routledge, Cowp. R. 708, 710, 711, 712 ; Copis v. Middleton, 2 Madd. R. 430 ; Hodgson v Butts, 3 Cranch, R. 140 ; Twyne's Case, 3 Co. R. 81.

³ 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (a) ; Twyne's Case, 3 Co. R. 81 ; Townshend v. Windham, 2 Ves. 10, 11 ; Doe v. Routledge, Cowp.

the claims of affection to those of justice. This doctrine, however, (as we shall presently see,) requires, or at least may admit of, some qualification in relation to existing creditors, where the circumstances of the indebtedment and conveyance repel any possible imputation of fraud; as where the conveyance is of a small property by a person of great wealth; and his debts bear a very small proportion to his actual means.

§ 356. But, at all events, the same doctrine does not apply to a man not indebted at the time, or in favor of subsequent creditors. There is nothing inequitable or unjust in a man's making a voluntary conveyance or gift, either to a wife, or child, or even to a stranger, if it is not at the time prejudicial to the rights of any other persons, nor in meditation of any future fraud or injury to other persons.¹ If, indeed, there is any design of fraud, collusion, or intent to deceive third persons, in such conveyances, although the party be not then indebted, the conveyance will be held void; for it is not *bonâ fide*.²

R. 711; *Russell v. Hammond*, 1 Atk. 15, 16; *Tynham v. Mullens*, 1 Madd. R. 119; *Holloway v. Millard*, 1 Madd. R. 227, 228; *Bayard v. Hoffman*, 4 John. Ch. R. 450; *Reade v. Livingston*, 3 John. Ch. R. 481; *Taylor v. Jones*, 2 Atk. 600, 601; *Townshend v. Windham*, 2 Ves. 10; *Copis v. Middleton*, 2 Madd. R. 425.

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (a); *Townshend v. Windham*, 2 Ves. 11; *Walker v. Burroughs*, 1 Atk. 93; Bac. Abrid. *Fraud*, C.; *Doe v. Routledge*, Cowp. R. 710, 711; *Russell v. Hammond*, 1 Atk. 15, 16; *Holloway v. Millard*, 1 Madd. R. 227, 228; *Battersbee v. Farrington*, 1 Swanst. R. 106, 113; *Reade v. Livingston*, 3 John. Ch. R. 481.

² *Stillman v. Ashdown*, 2 Atk. 481; *Reade v. Livingston*, 3 John. Ch. R. 481; *Richardson v. Smallwood*, Jac. R. 552. — As to *subsequent* creditors, it cannot be presumed, that a voluntary conveyance is fraudulent, unless the party at the time is deeply indebted. Lord Alvanley, in *Lush v. Wilkinson*, (5 Ves. 387,) said, "A single debt will not do. Every man must be indebted for the common bills of his

§ 357. It has been justly remarked, that the distinction between cases, where the party is indebted, and those, where he is not indebted, is drawn from considerations too obvious to require illustration from cases. For, if a man indebted were allowed to divest himself of his property in favor of his wife or children, his creditors would be defrauded. But if a man not indebted, and not meaning to commit a fraud, could not make an effective settlement in favor of such objects, because by possibility he might afterwards become indebted, it would destroy those family provisions, which are, under certain restrictions, a benefit to the public, as well as to the individual objects of them.¹

§ 358. In regard to voluntary conveyances, there is an intermediate case, touching creditors, which requires consideration. Suppose a party, possessed of large estate, and indebted at the same time to a considerable amount, but his debts bearing a small proportion to his actual property, should make a

house, though he pays them every week. It must depend upon this; whether he was in insolvent circumstances at the time." Mr. Chancellor Kent, in *Reade v. Livingston*, (3 John. Ch. R. 498,) said, "Such a loose dictum one would suppose, was not of much weight, as there is no preceding case, which gives the least countenance to it." But Lord Alvanley probably meant no more than this, that as to subsequent creditors, there could scarcely arise a presumption, that the conveyance was intentionally fraudulent, (without which, such subsequent creditors could have no case for relief,) unless the party were deeply indebted at the time, and contemplated a fraud upon his creditors. In this view there is much force in his Lordship's remarks. Indeed, this seems to be the view of the matter, entertained by Mr. Chancellor Kent, in the same case. *Ibid.* 301. See also the remarks of Sir William Grant, in *Kidney v. Coussmaker*, 12 Ves. 155, and Sir Thomas Plumer, in *Holloway v. Millard*, 1 Madd. R. 414.

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 12, note.

settlement, or other voluntary conveyance, in favor of his wife or children of a part of his estate, which should still leave a large surplus in his own hands beyond the assets necessary to pay his debts ; and afterwards, at a distance of time, he should lose, or spend so much of his property, as not to leave enough to discharge such debts. The question would then arise, whether, in regard to such creditors, the settlement or other conveyance would be held void or not. To such a case it is somewhat difficult to apply the preceding reasoning, so as to avoid the settlement or other conveyance ; because there is no pretence to say, that upon the posture of the facts any actual fraud could be intended ; or that the creditors were prejudiced, except by their own voluntary delay.

§ 359. Upon this question, a learned Judge has pronounced an opinion, which from his acknowledged ability and sagacity in sifting the cases, is entitled to very great weight. His language is ; “ The conclusion to be drawn from the cases is, that if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, [that is, those antecedently due,] and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of creditors, and prove an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate to

stand in the way of existing debts. This is the clear and uniform doctrine of the cases.”¹

§ 360. This doctrine is certainly *strictissimi juris*, and assumes, as a principle of law, that the mere indebtment of a party constitutes *per se* conclusive evidence of fraud in a voluntary conveyance, in all cases where the creditors, to whom one is then

¹ Mr. Chancellor Kent, in *Reade v. Livingston*, 3 John. Ch. R. 500, 501. See also 2 Sch. & Lefr. 714; *Fitrer v. Fitrer*, 2 Atk. 511, 513; *Taylor v. Jones*, 2 Atk. 602; *Bayard v. Hoffman*, 4 John. Ch. R. 450; *Richardson v. Smallwood*, Jac. R. 552. But see contra, *Verplank v. Strong*, 12 John. R. 536, and *Jackson v. Town*, 4 Cowp. R. 603, 604. — That there is very great weight in this reasoning, cannot be questioned. That it is upon principle entirely satisfactory as the true exposition of the statute of 13 Elizabeth, ch. 5, or of the Common Law, as to creditors, may admit of some diversity of judgment. Lord Mansfield has justly remarked, in *Cadogan v. Kennett*, Cowp. 434, upon the statute of 13 Elizabeth, “Such a construction is not to be made in support of creditors, as will make third persons sufferers. Therefore, the statute does not militate against any transaction *bonâ fide* made, and where there is *no imagination* of fraud. And so is the Common Law.” “A fair, voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance is an *argument* of fraud. The question in every case, therefore, is, whether the act done is a *bonâ fide* transaction, or whether a trick or contrivance to defeat creditors.” If this language contains a true exposition of the law on this subject, then the question of fraud, or not, is open in all cases, where a man is indebted, as a matter of *fact*; and the law does not absolutely pronounce, that the indebtment *per se* makes the settlement fraudulent. Lord Mansfield used language to a like effect, in *Doe v. Routledge*, Cowp. R. 708, 709, 710, 711. The doctrine (as we have seen) in *Hinde’s Lessee v. Longworth*, (11 Wheaton, R. 199,) stands upon grounds analogous to those of Lord Mansfield, and is not easily reconcilable with that in *Reade v. Livingston*, 3 John. Ch. R. 500, 501. See also *Holloway v. Millard*, 1 Madd. R. 414; *Jones v. Boulter*, 1 Cox, R. 288, 294, 295. In *Richardson v. Smallwood*, (Jac. Rep. 552,) the subject was considerably discussed by the Master of the Rolls; but from his reasoning I should not draw any other conclusion than, that an indebtment at the time was a circumstance presumptive of a fraudulent intent.

Reade v. Livingston is the highest authority
S.P. decided about 1750.

indebted, are concerned.¹ Nay; it is said to go farther; and upon the same reasoning subsequent creditors have been let in to participate in the same relief, even though as to them alone, without such antecedent debts, there could be no relief.² The doctrine was certainly not understood as going to this extent by Lord Alvanley; for he put the case upon proof of fraud arising from previous insolvency.³

§ 361. Where the conveyance is intentionally made to defraud creditors, it seems perfectly reasonable, that it should be held void, as to all subsequent as well as all prior creditors, on account of ill faith.⁴ But where the conveyance is *bonâ fide* made, and under circumstances demonstrative of the nonexistence of any intention to defraud any creditor, there seems some difficulty in seeing, how the subsequent creditors can make out any right as against the voluntary

¹ In *Townshend v. Windham*, (2 Ves. 10, 11,) Lord Hardwicke said, "I know no case on the statute of 13 Eliz. where a man, indebted at the time, makes a voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as a part of his estate for the benefit of his creditors, &c." "A man actually indebted, and conveying voluntarily, always means to be in fraud of creditors, as I take it." *Belt's Supp.* p. 243, 247. But this language, though so very general, ought not, on that very account, to have more than general truth ascribed to it, where the indebtedment is of a nature and extent, that makes it presumptive of fraud, or the conveyance is a direct and immediate interference with their rights. See *Richardson v. Smallwood*, *Jac. Rep.* 552.

² *Reade v. Livingston*, 3 *John. Ch. R.* 498, 499; *Walker v. Burroughs*, 1 *Atk.* 94; 1 *Madd. Ch. Pr.* 220, 221.

³ *Lush v. Wilkinson*, 5 *Ves.* 387; *S. C.* cited in *Kidney v. Coussmaker*, 12 *Ves.* 150, 155. See also *Copis v. Middleton*, 2 *Madd. R.* 430; *Reade v. Livingston*, 3 *John. Ch. R.* 501; *Stephens v. Olive*, 2 *Bro. Ch. R.* 90.

⁴ See *Reade v. Livingston*, 3 *John. Ch. R.* 499, 501; 1 *Hound. Supp. to Vesey, jr.* p. 124, (7); *Richardson v. Smallwood*, *Jac. Rep.* 552; *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 3, § 4, p. 413; *Newland on Contracts*, ch. 33, p. 389.

grantees through the equity of the antecedent creditors.¹ Mr. Chancellor Kent, in the case above referred to, after having remarked, "that there is no doubt in any case, as to the safety and security of

¹ See *Holloway v. Millard*, 2 Madd. R. 419; *Walker v. Burroughs*, 1 Atk. R. 94. — In *Taylor v. Jones*, (2 Atk. 600,) the Master of the Rolls manifestly proceeded upon the ground, that the conveyance was fraudulent in fact. In *Stephens v. Olive*, (2 Bro. Ch. R. 92,) where there were prior debts, but secured by mortgage, Lord Kenyon held the settlement good. See also *George v. Milbanke*, 9 Ves. 194, that a settlement containing a provision for payment of debts would be good against all future creditors. Lord Eldon there said, "In general cases *primâ facie* a voluntary settlement will be taken to be fraudulent." But this supposes, that it is not conclusive of fraud; but that it is open to be rebutted. In *Kidney v. Conssmaker*, (12 Ves. 136, 155,) Sir William Grant said, "Though there has been much controversy, and a variety of decisions upon the question, whether such a settlement (a voluntary settlement) is fraudulent as to any creditors, except such as were creditors at the time, I am disposed to follow the latest decision, that of *Montague v. Lord Sandwich*, which is, that the settlement is fraudulent only as against such creditors, as were creditors at the time." *Montague v. Lord Sandwich* is nowhere reported at large. It was decided in 1797 by Lord Rosslyn, and is referred to in 5 Ves. 386, and 12 Ves. 148. Mr. Chancellor Kent has said, that, in this case, "Lord Rosslyn declared a settlement void as to creditors, prior to its date. There was no question of insolvency made; but it was clearly held by Lord Rosslyn in this case (see 12 Ves. 156, note) that, if the settlement be affected as fraudulent against such prior creditors, the subject is thrown into assets, and all subsequent creditors are let in." He manifestly founds this remark upon the Reporter's note (a) in 12 Ves. 156. But I have not been able to ascertain, that Lord Rosslyn gave any such relief, in this case, to subsequent creditors. The note in 5 Ves. 536, and 12 Ves. 148, would rather lead my mind to an opposite conclusion, that he gave relief only to *prior* creditors *pro tanto*. Mr. Atherley (Marr. Sett. ch. 13, p. 213, note I,) has expressed an unqualified dissent from this supposed opinion of Lord Rosslyn; and, in my judgment, with very great reason. Where the settlement is set aside, as an intentional fraud upon creditors, there is strong reason for holding it so, as to subsequent creditors, and to let them into the full benefit of the property. *Richardson v. Smallwood*, Jac. Rep. 532. See also *Holloway v. Millard*, 1 Madd. R. 414. But see *Walker v. Burroughs*, 1 Atk. 94, on this point.

the *then existing* creditors," proceeded to state, that "no voluntary *post-nuptial* settlement was ever permitted to affect them. And the cases seem to agree, that the *subsequent* creditors are let in only in particular cases; as, where the settlement was made in contemplation of future debts; or where it is requisite to interfere and set aside the settlement in favor of the prior creditors; or where the subsequent creditor can impeach the settlement as fraudulent by reason of the prior indebtedness."¹ And he finally arrived at the conclusion, "that fraud, in a voluntary settlement, was an inference of law, and ought to be so, so far as it concerned *existing* debts. But, that as to subsequent debts, there is no such necessary legal presumption; and there must be proof of fraud in fact; and the indebtedness at the time, though not amounting to insolvency, must be such as to warrant that conclusion."²

§ 362. The same subject has undergone repeated discussions in the Supreme Court of the United States. The doctrine there established is, that a voluntary conveyance, made by a person, not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors, upon the mere ground of its being voluntary. It must be shown to have been fraudulent, or made with a view to future debts.³ And, on the other hand, the mere fact of indebtment at the time does not *per se* constitute a substantive ground to avoid the voluntary convey-

¹ Reade v. Livingston, 8 John. Ch. R. 497, 501. See Richardson v. Smallwood, Jac. Rep. 552.

² Ibid.

³ Sexton v. Wheaton, 8 Wheaton, R. 229, 230; Hinde's Lessee v. Longworth, 11 Wheaton, R. 199; Bennett v. Bedford Bank, 11 Mass. R. 421.

ance for fraud, even in regard to prior creditors. But the question, whether it is fraudulent or not, is to be ascertained, not alone from the mere fact of indebtedment at the time, but from all the circumstances of the case. And, if the circumstances do not establish fraud, then the voluntary conveyance is deemed above all exception. The language of the Court, upon the occasion alluded to, was as follows. "A deed from a parent to a child for the consideration of love and affection is not absolutely void as against creditors. It may be so under circumstances. But the mere fact of being indebted to a small amount would not make the deed fraudulent, if it could be shown, that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to a child was a reasonable provision, according to the state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud ; but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side."¹ And this language (it should be remembered) was used in a case, where the conveyance was sought to be set aside by persons claiming under judgment creditors upon antecedent debts.²

¹ *Hinde's Lessee v. Longworth*, 11 Wheat. R. 199. See also *Verplank v. Sterry*, 12 John. R. 536, 554, 556, 557 ; *Partridge v. Gopp*, Ambler, R. 597, 598 ; S. C. 1 Eden, R. 167, 168, 169 ; *Gilmore v. North American Land Co.*, Peters, C. R. 461.

² The doctrine of the Supreme Court seems in entire coincidence with that held by Lord Mansfield, in *Cadogan v. Kennett*, Cowp. R. 432, 434, and *Doe v. Routledge*, Cowp. R. 705, 710, 711, 712. See also *Lush v. Wilkinson*, 5 Ves. 387 ; *Holloway v. Millard*, 1 Madd. R. 414 ; *Kidney v. Coussmaker*, 12 Ves. 155 ; *Sagitary v. Hide*,

§ 363. The same doctrine has been asserted by the Supreme Court of Connecticut in a recent case, which hinged exclusively upon the point. It was there laid down, as the unanimous opinion of the Court, and there is much persuasiveness, as well as reasonableness and equity, in the doctrine, that, "Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child, in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unencumbered for the payment of his debts ; then such conveyance

2 Vern. 44. It approaches very nearly to the doctrine held in the Supreme Court, as to the construction of the statute of 27th of Elizabeth, as to subsequent purchasers ; for in the other case the voluntary conveyance is not held absolutely void ; but only the burthen of proof to repel fraud is thrown upon the claimants under it. *Cathcart v. Robinson*, 5 Peters, R. 277, 280, 291. See also *Verplank v. Sterry*, 12 John. R. 536, 554, 556, 557, 558. In this last case, Mr. Justice Spencer, in delivering his opinion in the Court of Errors, held the doctrine maintained in the Supreme Court of the United States, as to creditors, in the broadest terms. "If," said he, "the person making a settlement is insolvent, or in doubtful circumstances, the settlement comes within the statute (of 13th of Elizabeth, ch. 5). But if the grantor be not indebted to such a degree, as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one, against his creditors ; for in the language of the decisions, it is free from the imputation of fraud." *Ibid.* 557. Mr. Newland maintains the same opinion with great strength. *Newland on Contracts*, ch. 23, p. 384, 395. Mr. Fonblanque has remarked, that "if a conveyance or gift be of the whole, or of the greater part of the grantor's property, such conveyance or gift would be fraudulent ; for no man can voluntarily divest himself of all, or the most of what he has, without being aware, that future creditors will probably suffer by it." 1 *Fonbl. Eq. B.* 1, ch. 4, § 12, note (a).

will be valid against conveyances [debts] existing at the time. But though there be no fraudulent intent, yet, if the grantor was considerably indebted and embarrassed at the time, and on the eve of bankruptcy ; or, if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts ; then such conveyance will be void as to creditors."¹

¹ *Salmon v. Bennett*, 1 Connect. Rep. 525, 548 to 551 ; S. P. Newland on Contracts, ch. 23, p. 384, 385. — Mr. Chancellor Kent, in commenting on this case, says : "I have not been able to find the case, in which a mere voluntary conveyance to a wife, or child, has been plainly or directly held good against a creditor at the time. The cases appear to me to be upon the point uniformly in favor of the creditor." (*Reade v. Livingston*, 3 John. Ch. R. 504.) Mr. Athlerley (*Marr. Sett.* ch. 13, p. 212, to 219,) maintains the same doctrine. He holds that, if the party is in debt at the time of settlement, it is void as to subsequent as well as to prior creditors ; and this, without any reference to the amount of the debts. See note to *Bigelow's Dig.* (2d edition) p. 200, title, *Conveyance*. On the other hand, it may be asserted with some confidence, that there is no English case, which pointedly decides, that such a conveyance is void, merely from the circumstance, that the party was indebted at the time, if the debts bore no proportion to his assets, and there was no presumption of meditated fraud. The cases cited by Mr. Chancellor Kent do not appear to me to reach the point, at least not in a form free from difficulty and obscurity. The case of *St. Amand v. the Countess of Jersey*, 1 Comyn, R. 255, is quite obscurely reported ; but it may be gathered from that report, that the grantor was deeply indebted at the time, and probably there was a strong presumption of fraud in fact. The case of *Fitzer v. Fitzer*, 2 Atk. R. 511, was the case of a subsequent creditor having an assignment under the insolvent act of 2 Geo. II, ch. 2, to compel an execution of the trusts of a deed of separation in favor of a wife. It was not the case of a voluntary conveyance held void. In *Taylor v. Jones*, 2 Atk. 600, 602, the reasoning of the Master of the Rolls certainly goes to the maintenance of the doctrine. But the judgment seems ultimately to have turned upon the point, that the conveyance was fraudulent, and there was a trust in it in favor of the grantor *for life*. Some part of the doctrine of the Master of the Rolls would not now

§ 364. The same doctrine has been expressly held on different occasions by the Judges of the Supreme Court of New York ; and, in the latest case on this subject, it has been expressly affirmed, that

be held maintainable. The doctrine of Lord Hardwicke, in *Russell v. Hammond*, 1 Atk. 35, by no means warrants so general a conclusion. His Lordship's language in *Walker v. Burroughs*, 1 Atk. 39, though broad and sweeping, does not come up to it ; and the case turned on the Statute of Bankruptcy, 21 Jac. I. ch. 15. *Townshend v. Windham*, 2 Ves. 1, 10, 11, was the case of the execution of a power ; and Lord Hardwicke held the property assets for the payment of the debts of existing creditors. The question did not arise, whether the debtor had other estate at the time sufficient to pay his debts ; and Lord Hardwicke treated the case as an intentional execution of the power to defraud creditors. On the other hand, the case of *Stephens v. Olive*, 2 Bro. Ch. R. 90, shows, that the fact of indebtment is not sufficient to set aside the conveyance, if the debt is actually secured by mortgage. Now, it is somewhat difficult to distinguish between the case of a specific security for debts, and a general security founded upon an ample fortune in the grantor. Each operates, if at all, to repel the same imputation of fraudulent intent ; and if the law makes the mere fact of indebtment *per se* a fraud as to existing creditors, the security in either case cannot control the presumption. The doctrine, too, of Lord Alvanley, in *Lush v. Wilkinson*, 5 Ves. 383, trenches upon the conclusiveness of the presumption. And, notwithstanding Mr. Chancellor Kent's doubts on this case, in *Reade v. Livingston*, 3 John. Ch. R. 497, 499, it has been repeatedly recognised in later cases. 12 Ves. 150, 155 ; 2 Madd. R. 430. It must, therefore, be admitted, that there is some difficulty in reconciling the language of the English cases, although the cases themselves may be all distinguishable from each other. The question really resolves itself into this, whether a voluntary conveyance is void against creditors, because it ultimately operates to defeat the debts of existing creditors ; or whether it is void, only when from the circumstances the presumption fairly arises, that it either was intended to defraud, or did necessarily defraud such creditors. Sir Thomas Plumer, in *Holloway v. Millard*, 1 Madd. R. 417, 419, manifestly treated the statute of 13th of Eliz. as only applying to fraudulent conveyances. "This conveyance is not one of that description (i. e. to defraud creditors). It is not fraudulent merely, because it is voluntary. A voluntary conveyance may be made of real or personal property without any consideration whatever, and cannot be avoided by subsequent creditors, unless it be of the description mentioned in the statute, &c. Its be-

neither a creditor nor a purchaser can impeach a conveyance *bonâ fide* made, founded on natural love and affection, free from the imputation of fraud, and where the grantor had, independent of the property granted, an ample fund to satisfy his creditors. This qualification, however, was annexed, that, if a fraudulent use is made of such a settlement, it may be carried back to the time, when the fraud was commenced.¹

§ 365. Under this apparent diversity of judgment, it would ill become the commentator to interpose his own views, as to the comparative weight of the respective opinions. It will probably be found in the future, as it has been in the past, that professional opinions will continue divided upon the subject, until it shall have undergone a more searching judicial examination, not upon authority merely, but upon

ing voluntary is *primâ facie* evidence, (he does not say *conclusive*,) where the party is *loaded* with debt at the time, of an intent to defeat and defraud his creditors ; but if unindebted, his disposition is good." He afterwards added — "A voluntary disposition, even in favor of a child, is not good, if the party is indebted at the time." But this must be taken in connexion with his preceding remarks, as applying to a case of being *loaded* with debts. See also *Copis v. Middleton*, 2 Madd. R. 426, 428, 430. In *Jones v. Boulter*, (1 Cox, R. 288, 294,) Lord Ch. B. Skinner said, "There is no mention in the act (Stat. 13 Eliz.) of voluntary conveyances ; and the question has always been, whether in the transaction there has been fraud or covin. *Here were creditors at the time*, and this is said always to have been a badge of fraud. It is true, that this circumstance is always strong evidence of fraud. But, *if there are other circumstances in the case, that alone will not be sufficient.*" Eyre, B. is still more explicit. He said, "The 13th of Elizabeth is a wholesome law, plainly penned, and I wonder, how artificial reason could puzzle it. An artificial construction has entangled Courts of Justice, viz. that a voluntary conveyance of a person, indebted at the time, is to be deemed fraudulent." See also 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (a.)

¹ *Jackson v. Town*, 4 Cowp. R. 604 ; *Verplank v. Sterry*, 12 John. R. 536.

principle. If the question were now entirely freed from the bearing of dicta and opinions in earlier times, there is much reason to believe, that it would settle down into the proposition (certainly most conformable to the language of the Statute of 13 of Eliz.) that mere indebtment would not *per se* establish, that a voluntary conveyance was void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud, actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors.¹

§ 366. There is another qualification of the doctrine respecting the rights of creditors, which deserves attention in this place, not only from its prac-

¹ See *Jones v. Boulter*, 1 Cox, R. 238, 294, 295; *Stephens v. Olive*, 2 Bro. Ch. R. 90. See also 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (a.); *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 3, § 4, p. 412, 413; *Twyne's Case*, 3 Co. R. 81 b.; *Newland on Contr.* ch. 23, p. 383, 384, 385, where the learned author asserts the opinion intimated in the text in a positive manner, and maintains it by very cogent reasoning. — Mr. Chancellor Kent, in his learned opinion, already noticed, 3 John. Ch. R. 506, has traced out some of the analogies between the English law and the continental law on this subject, and I gladly refer the learned reader to his citations. Voet has discussed the subject in his Commentaries, 1 Voet ad Pand. Lib. 39, tit. 5, § 20; Pothier in his *Traité des Donations entre Vifs*, § 2, and Grenier in his *Traité des Donations*, Tom. 1, pte. 1, ch. 2, § 2, p. 253, &c. Voet holds, that the donee is liable to the existing, but not to the future debts of the donor, when he is donee of all, or of the major part of the donor's property; *utrum donatis omnibus bonis aut majore eorum parte*. Pothier says, that the donee of particular things is not bound to pay the existing debts of the donor, unless he knows, that the donor was insolvent at the time, or that he will not have sufficient left to pay his creditors, and the donation is in fraud of his creditors. But what is technically called *universal donees*, *donataires universals*, (which embrace not only donees of the whole property of the donor, but of the whole of a particular kind, as movables, &c.) are liable for the existing debts of the donor, but not for his future debts.

tical importance in regard to the jurisdiction of Courts of Equity ; but also from the fact, that it has given rise to some diversity of judicial opinion. The point intended to be suggested is, whether in order to make a conveyance void as against existing creditors, it is indispensable, that it should make a transfer of property, which could be taken in execution by creditors, or compulsorily applied to the payment of the debts of the grantor ; or whether the rule equally applies to the conveyance of any property whatsoever of the grantor, although not directly so applicable to the discharge of debts.

§ 367. The English doctrine upon this subject, after various discussions, has at length settled down in favor of the former proposition, viz. that, in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable, that it should transfer property, which would be liable to be taken in execution for the payment of debts. The reasoning, by which this doctrine is established, is in substance, that the Statute of 13th of Elizabeth did not intend to enlarge the remedies of creditors, or to subject any property to execution, which was not already in law or equity subject to the rights of creditors. That a voluntary conveyance of property, not so subject, could not be injurious to creditors, nor within the purview of the statute ; because it would not withdraw any fund from their power, which the law had not already withdrawn from it. It would be a strange anomaly to declare that to be a fraud upon creditors, which in no respect varied their rights or remedies. Hence, it has been decided, that a voluntary settlement of stock, or choses in action, or copyholds, or other property not

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liable to execution, is good, whatever may be the state and condition of the party as to debts.¹

§ 368. Mr. Chancellor Kent, in a very elaborate argument, has discussed the same subject, and doubted the soundness of the reasoning, by which it is attempted to be maintained. He maintains, that, in cases of fraudulent alienations of this sort, Courts of Equity ought to interfere, and grant remedial justice, whether the property could be reached by an execution at law, or not ; for otherwise a debtor under shelter of it might convert all his property into stock, and settle it upon his family, in defiance of his creditors, and to the utter subversion of justice. And he farther insists, that the cases antecedent to the time of Lord Thurlow, and especially in the time of Lord Hardwicke and Lord Northington, do maintain his own doctrine.²

¹ See *Dundas v. Dutens*, 1 Ves. jr., 196 ; *S. C.* 2 Cox, R. 196 ; *McCarthy v. Gould*, 1 B. & Beatt. 390 ; *Grogan v. Cooke*, 2 B. & Beatt. 233 ; *Caillard v. Estwick*, 1 Anst. R. 381 ; *Nantes v. Conork*, 9 Ves. 188, 189 ; *Rider v. Kidder*, 10 Ves. 368 ; *Guy v. Pearkes*, 18 Ves. 196, 197 ; *Cochrane v. Chambers*, 1825 ; MSS. cited in Mr. Blunt's note to *Horn v. Horn*, Ambler, R. 79 ; *Matthews v. Feaver*, 1 Cox, R. 278.

² *Bayard v. Hoffman*, 4 John. Ch. R. 452 to 459 ; *Edgell v. Haywood*, 3 Atk. 352. See also Mitf. Pl. by Jeremy, 115, and 1 Jac. & Walk. 371 ; *M'Durmut v. Strong*, 4 John. Ch. R. 687 ; *Spader v. Davis*, 5 John. Ch. R. 290 ; *S. C.* 20 John. R. 554. — The cases cited by Mr. Chancellor Kent go very far to establish the doctrine, which he contends for. *Taylor v. Jones*, (2 Atk. R. 600,) is a decision of the Master of the Rolls, directly in point. The case of *King v. Dupine*, cited in Mr. Saunders' note to 2 Atk. 603, note 2, and reported 3 Atk. R. 192, 200, is strong the same way ; and so is *Horn v. Horn*, Ambler, R. 79. Upon this latter case, Lord Thurlow is reported to have said, "The opinion in *Horn v. Horn* is so anomalous and unfounded, that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement, which, if set aside, leaves the stock, in the name of a person where you could not touch it." *Grogan v. Cooke*, 2 B. & Beatt. 233. In

§ 369. But, whatever may be the true doctrine as to these critical and nice questions, it is certain, that a conveyance, even if for a valuable consideration, is not, under the statute of 13th of Elizabeth, valid in point of law from that circumstance alone. It must also be *bonâ fide*; for, if it be with intent to defraud or defeat creditors, it will be void, although there may be in the strictest sense a valuable, nay, an adequate consideration. This doctrine was laid down in *Twyne's Case*, (3 Co. R. 81,) and has ever since been steadily adhered to.¹ Cases have repeatedly been decided, in which persons have given a full and fair price for goods, and where the possession has been actually changed; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore set aside.² Thus, where a person with knowledge of a decree bought the house and goods belonging to the defendant, and

Partridge v. Goff, Ambl. R. 596; S.C. 1 Eden, R. 163, Lord Chancellor Northington made the donees of £500 each refund in favor of creditors; but he seems to have been impressed with the opinion, that the transaction was fraudulent, or, to use his own words, that the transaction smelt of craft and experiment. 'The transaction was secret; and, *Dona clandestina sunt semper suspiciosa*. *Twyne's Case*, 3 Co. R. 81. Whatever may be the true doctrine on this subject, a distinction may perhaps exist between cases, where a party indebted actually converts his existing *tangible property* into stock, to defraud creditors; and cases, where he becomes possessed of stock without indebtedment at the time; or, if indebted, without having obtained it by the conversion of any other tangible property. Where tangible property is converted into stock to defraud existing creditors, there may be a solid ground to follow the fund, however altered.

¹ Newland on Contr. ch. 23, p. 370, 371; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (a); *Cadogan v. Kennett*, Cowp. R. 434; *Worseley v. De Mattos*, 1 Burr. 474, 475.

² *Cadogan v. Kennett*, Cowp. R. 434; *Bridge v. Eggleston*, 14 Mass. R. 245; *Harrison v. Trustees of Phillips Academy*, 12 Mass. R. 456.

gave a full price for them, the Court said, that the purchase, being with a manifest view to defeat the creditor, was fraudulent, and notwithstanding the valuable consideration, void.¹ So, if a man should know of a judgment and execution, and with a view to defeat it, should purchase the debtor's goods, it would be void ; because the purpose is iniquitous.²

§ 370. But cases of this sort are carefully to be distinguished from others, where a sale, or assignment, or other conveyance, merely amounts to giving a preference in payment to another creditor ; or where the assignment or conveyance is made for the benefit of all creditors ; for such preference, and such general assignment or conveyance, is not treated as *malâ fide*, but as merely doing, what the law admits to be rightful. A sale, assignment, or other conveyance, is not necessarily fraudulent, because it may operate to the prejudice of a particular creditor.³

§ 371. It may be added, that, although voluntary conveyances are, or may be void, as to existing creditors, they are perfect and effectual, as between the parties, and cannot be set aside by the grantor, if he should become dissatisfied with the transaction.⁴ It would be his own folly to have made such a conveyance. A conveyance of this sort, (it has been said with great truth and force,) is void only as against creditors ; and then only to the extent, in which it may be necessary to deal with the estate for their satisfaction. To this extent, and to this only, it is

¹ Ibid ; *Worseley v. De Mattos*, 1 Burr. 474, 475.

² Ibid.

³ *Holbird v. Anderson*, 5 T. R. 235 ; *Pickstork v. Lyster*, 3 M. & Selw. R. 371.

⁴ *Petre v. Espinasse*, 2 Mylne & Keen, 496 ; *Bill v. Cureton*, Id. 503, 510.

treated, as if it had not been made. To every other purpose it is good. Satisfy the creditors, and the conveyance stands.¹

§ 372. The circumstances, under which a conveyance will be deemed purely voluntary, or affected by a consideration valuable in itself, or in furtherance of an equitable obligation, are very important to be considered ; but they more properly belong to a distinct treatise upon the nature and validity of settlements. It may not, however, be useless to remark in this place, that a settlement made after marriage upon a wife is not to be treated as wholly voluntary, where it is done in performance of a duty, which a Court of Equity would enforce. Thus, if a man should contract a marriage by stealth with a young lady, having a considerable fortune in the hands of trustees ; and he should afterwards make a suitable settlement upon her in consideration of that fortune, the settlement could not be set aside in favor of the creditors of the husband ; since a Court of Equity would not suffer him to take possession of her fortune, without making a suitable settlement upon her.²

§ 373. And, in like manner, what circumstances, connected with voluntary or valuable conveyances,

¹ Sir W. Grant in *Curtis v. Price*, 12 Ves. 103 ; *Worseley v. De Mattos*, 1 Burr. 474 ; 1 Madd. Ch. Pr. 222, 223 ; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (a) ; *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 3, § 4 ; *Malin v. Gamsey*, 16 John. R. 189 ; *Reichart v. Castelor*, 5 Binn. 109 ; *Drinkwater v. Drinkwater*, 4 Mass. R. 354.

² *Moor v. Rycault*, Prec. Ch. 22, and other cases cited ; 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (b) ; *Id.* ch. 2, § 6, note (k) ; *Jones v. Marsh*, Cas. T. Talb. 64 ; *Wheeler v. Caryl*, Amb. R. 121 ; *Jewson v. Moulton*, 2 Atk. 417 ; *Middlecome v. Marlow*, 2 Atk. 519 ; *Ward v. Shallet*, 2 Ves. 16 ; *Ramsden v. Hylton*, 2 Ves. 304 ; *Arundell v. Phipps*, 10 Ves. 139 ; *Russell v. Hammond*, 1 Atk. 13.

are badges of fraud, or raise presumptions of intentional bad faith, though very important ingredients in the exercise of equitable jurisdiction, fall rather within the scope of treatises of evidence, than discussions of jurisdiction.¹ It may, however, be generally stated, that whatever would at law be deemed badges of fraud, or presumptions of ill faith, are fully acted upon in Courts of Equity. But, on the other hand, it is by no means to be deemed a logical conclusion, that because a transaction could not be reached at law as fraudulent, therefore it would be equally safe against the scrutiny of a Court of Equity ; for a Court of Equity requires a scrupulous good faith in transactions, which the law might not repudiate. It acts upon conscience, and does not content itself with the narrow views of legal remedial justice.²

§ 374. The question has been much discussed, how far a settlement made after marriage, in pursuance of an asserted parol agreement before marriage, is valid, as against creditors, in cases affected by the Statute of Frauds. There is no doubt, that such a settlement, made in pursuance of a prior valid written agreement, would be completely effectual against creditors. And the difficulty is, whether such a settlement, executed in pursuance of a parol contract, obligatory *in foro conscientia*, ought to be protected, when made, although it might not be capable of being enforced, if not made. It is certain, that the mere performance of a moral duty, even of the most meritorious nature, has not been deemed sufficient to

¹ See 1 Eq. Abridg. 149, E. ; 3 Stark. on Evid. Pt. 4, p. 615 to 622 ; Twyne's Case, 3 Co. R. 80.

² See 1 Fonbl. Eq. B. 1, ch. 2, § 8, and notes ; Id. ch. 3, § 4 ; Id. ch. 4, § 12, 13, and notes.

protect a voluntary conveyance even in favor of a deeply injured party, to whom it is designed to be a compensation for injustice and deceit.¹ And hence the difficulty is increased of giving effect to a contract, which, in its own character, though founded upon an intrinsic valuable consideration, is yet in contemplation of law deemed to be a *nudum pactum*. There has been some struggle in Courts of Equity to maintain the efficacy of such a *post-nuptial* settlement, where it purported to be founded upon a parol agreement before marriage, recited in the settlement. But the strong inclination now seems to be, to consider such a settlement incapable of support from any evidence of a parol contract ; since it is in effect an attempt to supersede the Statute of Frauds, and to let in all the mischiefs, against which that statute was intended to guard the public generally, and especially creditors.²

¹ *Gilham v. Locke*, 9 Ves. 612 ; *Lady Cox's case*, 3 P. Will. 339 ; *Priest v. Parrot*, 2 Ves. 160.

² See *Atherley on Marr. Sett.* ch. 9, p. 149. — According to Mr. Cox's Report of *Dundas v. Dutens*, (2 Cox, R. 235,) Lord Thurlow actually held such a settlement valid, asserting, that it could not be deemed fraudulent, and that the cases, though they had gone a great way in treating settlements after marriage as fraudulent, had never gone to such a length as that. Mr. Cox having been of counsel in that case, his report is probably accurate. The point is not quite so strongly stated in the report of the same case in 1 Ves. jr. 196. But Lord Thurlow is there made in effect to say, "That, if the husband made an agreement before marriage, that he would settle, and then, in fraud of the agreement, he got married, that he would be bound by the agreement ; and he thought there was a case in point. That it would be a kind of fraud, against which the Court would relieve. If there was a *parol* agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner. And he then asked the question, whether there was any case, where in the settlement the parties recite an agreement before marriage, in

§ 375. The same policy of affording protection to the rights of creditors pervades the provisions of the statute of 3d and 4th of William & Mary, ch. 14, respecting devises in fraud of creditors, and of the statute made in the American States *in pari materia*.¹ There is an apparent anomaly in Equity Jurisprudence upon this subject, not easily reconcilable with sound principles. The statute is confined to fraudulent devises; and therefore fraudulent conveyances, whether voluntary or not, are not reached by it. And hence it has been adjudged in England, that, if a man make a conveyance of lands in his lifetime, in order to defraud his creditors, and die, his bond creditors have no right to set aside the conveyance; for the statute (it is said) was only

which it has been considered as within the statute? "The distinction between cases of fraud and a reliance upon parol evidence is expressly taken in *Lady Montacute v. Maxwell*, (1 P. Will. 619, 620,) where the Lord Chancellor said, "In cases of fraud, Equity should relieve, even against the words of the statute, &c. But, where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making these promises void, Equity will not interfere." 1 Ves. jr. 199, note (a). All this seems perfectly correct. But, suppose the party to have fulfilled his parol promise after marriage, ought a Court of Equity to disturb the settlement in favor of creditors? The marriage in such a case is not the less a valuable consideration, because a parol promise was relied on; and, if relied on as valid, and the marriage is had on the faith thereof, is not the nonfulfilment of it a fraud upon the other party, whether intentional or not? Mr. Chancellor Kent, in *Reade v. Livingston*, 3 John. Ch. R. 481, after reviewing the authorities, has come to a conclusion unfavorable to the validity of such a settlement. Sir William Grant, in *Randall v. Morgan*, (12 Ves. 67,) seemed to think the question not settled. An anonymous case in *Preced. in Ch.* 101, is in favor of such a settlement. See also *Ramsden v. Hylton*, 2 Ves. 308, the remarks of Lord Hardwicke. See also *Lavender v. Blackstone*, 8 Lev. R. 146, 147; 1 Vent. 194.

¹ See 1 Roberts on Wills, ch. 1, § 20; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 415, 416; 1 Fonbl. Eq. B. 1, ch. 4, § 14, note (i).

designed to secure such creditors against any imposition, which might be supposed in a man's last sickness. But, if he gave away his effects in his lifetime, this prevented the descent of so much to the heir; and consequently took away their remedy against him, who was only liable in respect to land descended. And, as a bond is no lien whatever on lands in the hands of the obligor, much less can it be so, when they are given away to a stranger.¹ This doctrine has been strongly questioned; and at the time, when it was promulgated, gave great dissatisfaction.² And hence we may see the reason, why voluntary conveyances of lands cannot be set aside, except by creditors, who have reduced their debts to judgment before the death of the party; for until that time they constitute no lien on the land.³

§ 376. In America, however, the policy has taken a much wider and more effectual range to attain its objects. And generally, if not universally, lands and other hereditaments are with us made assets for the payment of debts, as auxiliary to the personal property of the deceased. And if the party, in his lifetime, has fraudulently conveyed his estate, with a view to defeat his creditors upon his decease, the real assets are subject to the same disposition, as if no such conveyance had been made.⁴ The French

¹ *Parslow v. Weaden*, 1 Eq. Abridg. 14, Pl. 7; 1 Fonbl. Eq. B. 1, ch. 4, § 12, 14, and note (I).

² *Ibid.* and *Jones v. Marsh*, Cas. T. Talb. 64.

³ 1 Fonbl. Eq. B. 1, ch. 4, § 12; Gilb. Lex Prætoria, p. 293, 294; *Colman v. Croker*, 1 Ves. jr. 160. See *Bean v. Smith*, 2 Mason, R. 282 to 285. See Mitf. Pl. Eq. by Jeremy, 126, 127; *Jackson v. Caldwell*, 1 Cowen, R. 622.

⁴ See *Drinkwater v. Drinkwater*, 4 Mass. R. 354; *Wildridge v. Patterson*, 15 Mass. R. 148.

law seems to have proceeded upon a policy equally broad and salutary ; and enables creditors, in cases of insolvency, to rescind alienations, either voluntary, or in fraud of their rights.¹

§ 377. These cases of interposition in favor of creditors being founded upon the provisions of positive statutes, a question was made at an early day, whether they were not exclusively cognizable at law ; and could be carried into effect in Equity. But the jurisdiction of Courts of Equity is now firmly established ; for it extends to cases of fraud, whether provided against by statute, or not ; and indeed, the remedial justice of a Court of Equity, in many cases arising under these statutes, is the only effectual one, which can be administered ; as that of Courts of Law would often fail.²

§ 378. There are other cases of constructive frauds against creditors, which the wholesome moral justice of the law has equally discredited. We refer to that not unfrequent class of cases, in which, upon the failure or insolvency of debtors, some creditors have by secret compositions obtained undue advantages ; and thus decoyed other innocent and unsuspecting creditors into signing deeds of composition, which they supposed to be founded upon a basis of entire equality and reciprocity among all the creditors ; when, in fact, there was a designed or real imposition upon all, but the favored few. The purport of a composition or trust deed, in cases of insolvency, usually is, that the property of the debtor shall

¹ Pothier, Oblig. art. 153.

² Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 408, 409 ; Id. ch. 4 ; 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (c) ; Id. § 14, notes (i) and (k) ; 1 Eq. Abridg. 149, E. 6 ; White v. Hussey, Preced. Ch. 14.

be assigned to trustees, and shall be collected and distributed by them among the creditors, according to the order and terms prescribed in the deed itself. And, in consideration of the assignment, the creditors, who become parties, agree to release all their debts, beyond what the funds will satisfy. Now, it is obvious, that in all transactions of this sort the utmost good faith is required; and that the very circumstance, that other creditors of known reputation and standing have already become parties to the deed, will operate as a strong inducement to others to act in the same way. But, if the signatures of such prior creditors have been procured by secret arrangements with them, more favorable to them than the general terms of the composition deed, those creditors really act, as has been said by a very significant, though homely figure, as decoy ducks upon the rest. They hold out false colors to draw in others, to their own loss or ruin.

§ 379. In modern times the doctrine has been acted upon in Courts of Law, as it has long been in Courts of Equity, that such secret arrangements are utterly void; and shall not be enforced, even against the assenting debtor, or his sureties, or friends.¹ There is great wisdom, and deep policy, the best of all protective policy, that which acts by way of precaution, rather than by mere remedial justice, in the doctrine; for it has a strong tendency to suppress all frauds upon the general creditors, by

¹ *Chesterfield v. Janssen*, 1 Atk. 352; 1 Ves. 155, 156; 3 P. Will. 131, Cox's note; *Spurrett v. Spiller*, 1 Atk. 105; *Jackman v. Mitchill*, 13 Ves. 581; *Smith v. Bromley*, Doug. 696, note; *Jones v. Barkley*, Id. 695, note; *Cockshott v. Bennett*, 2 T. Rep. 763; *Jackson v. Lomas*, 4 T. R. 166; *Fawcett v. Gee*, 3 Anst. 910.

making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted, not for the sake of the debtor, for no deceit or oppression may have been practised upon him ; but for the sake of honest, and humane, and unsuspecting creditors. And, hence, the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favored creditors ; or whether he has been a mere volunteer, offering, and aiding in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed ; but money paid under them is recoverable back, having been obtained against the clear principles of public policy.¹ And it is wholly immaterial, whether such secret bargains give to the favored creditors a larger sum ; or only an additional security or advantage ; or misrepresent some important fact ; for the effect upon other creditors is precisely the same. They are misled into an act, which they might otherwise not have assented to.²

§ 380. For the like reasons, any agreement made by an insolvent debtor with his assignee, by which the estate of the insolvent is to be held in trust by the assignee, to pay out of the rents and property annuities to himself and his wife, and the surplus to be for the extinction of a debt due to the assignee, will be held void, and will be rescinded upon the ground of public policy, when it comes before a Court of Equi-

¹ *Smith v. Bromley*, Doug. R. 696, note ; *Jones v. Barkley*, Id. 695, note ; *Jackman v. Mitchell*, 13 Ves. 581 ; *Ex parte Sadler and Jackson*, 15 Ves. 55 ; *Mawson v. Stork*, 6 Ves. 300 ; *Yeomans v. Chatterton*, 9 John. R. 294 ; *Wiggin v. Bush*, 12 John. R. 306.

² *Ibid.* *Eastabrook v. Scott*, 3 Ves. 456 ; *Constantein v. Blache*, 1 Cox, 287 ; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (x).

ty, even though the suit happen to be at the instance of the insolvent himself; for it is a contrivance in fraud of creditors, to which the assignee, who is a trustee for them, is a party.¹

§ 381. In concluding this discussion, so far as regards creditors, it is proper to be remarked, that though voluntary and other conveyances in fraud of creditors are declared to be utterly void; yet they are so only as to the original parties and privies, and others claiming under them, who have notice of the fraud. For bonâ fide purchasers for a valuable consideration, and without notice of the fraudulent or voluntary grant, are of such high consideration, that they will be protected, as well at law as in equity, in their purchases. For it would be plainly inequitable, that a party, who has paid his money upon the faith of a good title, should be defeated by any creditor of the original grantor, who has no superior equity; since it would be impossible for him to guard himself against such latent frauds. And the policy of the law, therefore, which favors the security of titles, as conducive to the public good, would be subverted, if a creditor, having no lien upon the property, should yet avail himself of his priority of debt to defeat such a bonâ fide purchaser. Where the parties stand equally meritorious, and equally innocent, the known maxim of Courts of Equity is, *Qui prior est in tempore, potior est in jure*; he is to be preferred, who has first acquired the title.² This point, however, will

¹ McNeill v. Cahill, 2 Bligh, R. 228.

² See Dame Burg's Case, Moore, R. 602; Woodcock's Case, 33 H. 6, 14; Predgers v. Langham, 1 Sid. R. 133; Wilson and Wormal's Case, Godbolt, R. 161; Bean v. Smith, 2 Mason, R. 272 to 282; Anderson v. Roberts, 18 John. R. 513; Fletcher v. Peck, 6 Cranch, 133, 134; Daubeny v. Cockburn, 1 Meriv. 638, 639.

naturally present itself in other aspects, when we come to the consideration of the general protection, afforded by Courts of Equity, to purchasers standing in such a predicament.

§ 382. Other underhand agreements, which operate as a fraud upon third persons, may easily be suggested, to which the same remedial justice has been applied. Thus, where a father, upon the marriage of his daughter, entered into a covenant, that he would leave her, upon his death, certain tenements, and that he would at his decease, by his will, give and leave her a full and equal share with her brother and sister, of all his personal estate ; and he afterwards, during his life, transferred to his son a very large portion of his personal property, consisting of public stock, retaining the dividends for his life ; it was held, that the transfer was void, as a fraud upon the marriage articles ; and the son was compelled to account for the same.¹ Covenants of this nature are proper in themselves, and ought to be honorably observed. They ought not to be, and, indeed, are not, construed to prohibit a father from making, during his lifetime, any dispositions of his personal property among his children, more favorable to one than another. But they do prohibit him from doing any acts, which are designed to defeat and defraud the covenant. He may, if he pleases, make a gift *bonâ fide* to a child ; but then it must be an absolute and unqualified gift, surrendering his own interest, and not a mere reversionary gift, which saves the income to himself during his own life.²

¹ Jones v. Martin, 3 Anst. R. 882 ; S. C. 5 Ves. 265. See also Randall v. Willis, 5 Ves. 261 ; 8 Brown, Parl. R. 242, by Tomlins ; McNeill v. Cahill, 2 Bligh, R. 228.

² Ibid.

- § 383. So, where a friend has advanced money to purchase goods for another, or to relieve another from the pressure of his necessities ; and the parties interested enter into a private agreement over and beyond that, with which the friend is not made acquainted ; such agreement is void at law, as well as in equity ; for the friend is drawn in to make the advance by false colors held out to him, and under a supposition, that he is acquainted with all the facts.¹ So, a guaranty of the payment of a debt, made by a friend, upon the suppression by the parties of material circumstances, is a virtual fraud upon him, and avoids the contract.²

§ 384. Another class of constructive frauds of a large extent, and over which Courts of Equity exercise an exclusive and very salutary jurisdiction, consists of those, where a man designedly or knowingly produces a false impression upon another, who is thereby drawn into some act or contract, injurious to his own rights or interests.³ This subject has been partly treated before ; but it should be again brought under our notice in this connexion. No man can reasonably doubt, that, if a party, by the wilful suggestion of a falsehood, is the cause of prejudice to another, who has a right to a full and correct representation of the fact, that in conscience his claim ought to be postponed to that of the person, whose confidence was induced by his representation. And there can be no real difference between an express

¹ Jackson v. Duchaise, 3 T. R. 551.

² Pidcock v. Bishop, 3 B. & Cresw. 605 ; Smith v. Bank of Scotland, 1 Dow. Real. R. 272.

³ Com. Dig. Chancery, 4 W. 28 ; Bean v. Smith, 2 Mason, R. 285, 286 ; 1 Madd. Ch. Pr. 256, 257. Ante, § 191, &c.

representation, and one, that is naturally and necessarily implied from the circumstances.¹ The wholesome maxim of the law upon this subject is, that a party, who enables another to commit a fraud, is answerable for the consequences ;² and, with proper limitations in its application, the maxim so often cited, *Fraus est celare fraudem*, is a rule of general justice.

§ 385. In many cases, a man may innocently be silent ; for, as has often been observed, *Aliud est tacere, aliud celare*. But, in other cases, a man is bound to speak out, and his very silence becomes as expressive, as if he had openly consented to what is said or done ; and had become a party to the transaction.³ Thus, if a man, having a title to an estate, which is offered for sale, and, knowing his title, stands by and encourages the sale, or does not forbid it ; and thereby another person is induced to purchase the estate, under the supposition, that the title is good, the former so standing by and being silent, shall be bound by the sale ; and neither he, nor his privies shall be at liberty to dispute the validity of the purchase.⁴ Indeed, cases of this sort are viewed with so much disfavor by Courts of Equity, that neither infancy nor coverture will constitute any excuse for the party, guilty of the concealment or misrepresentation ; for neither infants nor *femes covert*

¹ 1 Fonbl. Eq. B. 1, ch. 3, § 4, notes (m) and (n) ; Sugden on Vendors, ch. 16.

² Bac. Max. 16.

³ Fonbl. Eq. B. 1, ch. 3, § 4, and notes (m) and (n) ; Savage v. Foster, 9 Madd. R. 35 ; Com. Dig. Chancery, 4 I, 3, 4 W, 23 ; Hanning, v. Ferrers, 1 Eq. Abridg. 356, p. 10.

⁴ Ibid ; Storrs v. Barker, 6 John. Ch. R. 166, 169 to 172 ; Wendell v. Van Rensselaer, 1 John. Ch. R. 354.

are privileged to practise deceptions or cheats on other innocent persons.¹

§ 386. In order, however, to justify the application of this cogent moral principle, it is indispensable, that the party, so standing by and concealing his rights, should be fully apprised of them; and should, by his conduct, or gross negligence, encourage or influence the purchase; for, if he is wholly ignorant of his rights, or the purchaser knows them; or, if his acts, or silence, or negligence, do not mislead, or in any manner affect the transaction; there can be no just inference of actual or constructive fraud on his part.²

§ 387. There are, indeed, cases, where even ignorance of title will not excuse a party; for if he actually misleads the purchaser by his own representations, though innocently, the maxim is justly applied to him, that, where one of two innocent persons must suffer, he shall suffer, who, by his own acts, occasioned the confidence and the loss.³ Thus, where a tenant in tail under a settlement encouraged a stranger to purchase an annuity, charged on the land by his father's will, from a younger brother; and said, that he believed his brother had a good title; he was compelled to make good the annuity, notwithstanding his ignorance of his own title under

¹ 1 Fonbl. Eq. B. 1, ch. 3, § 4; *Savage v. Foster*, 9 Mod. R. 35; *Evroy v. Nichols*, 2 Eq. Abridg. 489; *Clare v. Earl of Bedford*, cited 2 Vern. 150, 151; *Becket v. Lordley*, 1 Bro. Ch. R. 357; Sugden on Vendors, ch. 16.

² See 2 Hovend. on Frauds, ch. 22, p. 184.

³ See *Neville v. Wilkinson*, 1 Bro. Ch. R. 546; 3 P. Will. 74, Mr. Cox's note; *Scott v. Scott*, 1 Cox, R. 378, 379, 380; *Evans v. Bicknell*, 6 Ves. 173, 182, 183, 184; *Pearson v. Morgan*, 2 Bro. Ch. R. 388; Com. Dig. Chancery, 4 W. 28.

the settlement, and of the annuity's being invalid ; for, under the circumstances of the case, there was negligence on his part, in not instituting proper inquiries, he having heard that there had been a settlement.¹ So where a mother, who was a tenant in tail, and absolute owner of a term, was present at a treaty for her son's marriage, and heard her son declare, that the term was to come to him after the death of the mother ; and she became a witness to a deed, whereby the son took upon himself to settle the reversion of the term expectant on his mother's death, upon the issue of the marriage ; and the mother did not insist upon more than a life estate therein ; she was held bound to make the title, notwithstanding it was insisted, that she was ignorant, that, as tenant in tail, she had an absolute power to dispose of it.²

§ 388. Another case, illustrative of the doctrine, may be put, arising from the expenditure of money upon another man's estate, through inadvertence, or a mistake of title.³ As, for instance, if a man, supposing he had an absolute title to an estate, should build upon the ground with the knowledge of the real owner, who should stand by, and suffer the erections to proceed, without giving any notice of his claim ; he would not be permitted to avail himself of such improvements, without paying a full compensation ; for, in conscience he was bound to disclose

¹ *Hobbs v. Norton*, 1 Vern. R. 136 ; 1 Eq. Abridg. 356, Pl. 8.

² *Hursden v. Cheyney*, 2 Vern. R. 150 ; *Storrs v. Barker*, 6 John. Ch. R. 166, 168, 173, 174. See also *Beverly v. Beverly*, 2 Vern. 133 ; *Redman v. Redman*, 1 Vern. 347 ; *Scott v. Scott*, 1 Cox, R. 366, 378 ; *Raw v. Potts*, 2 Vern. 239 ; *Savage v. Forster*, 9 Mod. 35 ; 1 Madd. Ch. Pr. 210, 211 ; Bac. Abridg. I, *Fraud B.* ; *Raw v. Potts*, Prec. Ch. 35.

³ Com. Dig. Chancery, 4, I. 3.

the defect of title of the builder.¹ Nay, a Court of Equity might, under circumstances, go further, and oblige the real owner to permit the person, making such improvements on the ground, to enjoy it quietly and without disturbance.²

§ 389. And, upon the like principle, if a person having a conveyance of land keeps it secret for several years; and knowingly suffers third persons afterwards to purchase parts of the same premises from the grantor, who remains in possession, and is the reputed owner, and to expend money on the land, without notice of his claim; he will not be permitted afterwards to assert his legal title against such innocent and bonâ fide purchasers. To allow him to assert his title, under such circumstances, would be to countenance fraud and injustice; and the conscience of the party is bound by an equitable estoppel; for in such a case, it is emphatically true, *Qui tacet, consentire videtur; qui potest et debet vetare, jubet, si non vetat.*³

§ 390. A more common case, illustrative of the same doctrine, is where a person, having an incumbrance or security upon an estate, suffers the owner to procure additional money upon the estate by way of lien or mortgage, concealing his prior incumbrance or security. In such a case he will be postponed to the second incumbrancer; for it would be inequita-

¹ Pilling v. Armitage, 12 Ves. 84, 85. See Wells v. Banister, 4 Mass. R. 514.

² East India Company v. Vincent, 2 Atk. 83; Davor v. Spurrier, 7 Ves. 231, 235; Jackson v. Cator, 5 Ves. 689; Storrs v. Barker, 6 John. Ch. R. 168, 169; Shannon v. Bradstreet, 1 Sch. & Lefr. 73.

³ Wendell v. Van Rensselaer, 1 John. Ch. R. 354; 2 Inst. 146, 305; Branch's Max. 181, 182; Hanning v. Ferrers, 1 Eq. Abridg. 357; Storrs v. Barker, 6 John. Ch. R. 166, 168.

ble to allow him to profit by his own wrong in concealing his claim, and lending encouragement to the new loan.¹ Such a transaction may well explain the maxim, *Fraus est celare fraudem*.

§ 391. In all this class of cases, the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet Courts of Equity will not grant relief.² It has, accordingly, been laid down by a very learned Judge, that the cases on this subject go to this only, that there must be positive fraud, or concealment, or negligence so gross as to amount to constructive fraud.³ And if the intention be fraudulent, although not pointing exactly to the object accomplished; yet the party will be bound to the same extent, as if it had been so exactly pointed.⁴

§ 392. Upon the same principles, if a trustee should permit the title deeds of the estate to go out of his possession for the purpose of fraud; and, intending to defraud one person, he should defraud another, Courts of Equity will grant relief against him.⁵ So,

¹ *Draper v. Borlau*, 2 Vern. 370; *Clare v. Earl of Bedford*, cited 2 Vern. R. 150, 151; *Mocatta v. Murgatroyd*, 1 P. Will. 393, 394; *Berrisford v. Milward*, 2 Atk. 49; *Beckett v. Cordley*, 1 Bro. Ch. R. 353, 357; *Evans v. Bicknell*, 6 Ves. 173, 182, 183; *Pearson v. Morgan*, 2 Bro. Ch. R. 385, 388; *Plumb v. Fluitt*, 2 Anst. R. 432; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (u); *Sugden on Vendors*, ch. 16; *Lee v. Munroe*, 7 Cranch, 368.

² *Tourle v. Rand*, 2 Bro. Ch. R. 652; 1 Madd. Ch. Pr. 256, 257.

³ *Evans v. Bicknell*, 6 Ves. 190, 191, 192; *Merewether v. Shaw*, 2 Cox, R. 124; *Sugden on Vendors*, ch. 16.

⁴ *Id.* 192; *Becket v. Cordley*, 1 Bro. Ch. R. 357; *Evans v. Bicknell*, 6 Ves. 191; 1 Fonbl. Eq. B. 1, ch. 3, § 4; *Plumb v. Fluitt*, 2 Anst. 432, 440.

⁵ *Evans v. Bicknell*, 6 Ves. 174, 191; *Clifford v. Brooke*, 12 Ves. 132.

where a bond is given upon an intended marriage, and to aid it; and the marriage with that person afterwards goes off, and another marriage takes place upon the credit of that bond; the bond will bind the party in the same way, as it would, if the original marriage had taken effect.¹

§ 393. What circumstances will amount to undue concealment, or misrepresentation, in cases of this sort, is a point more fit for a treatise of evidence, than of mere jurisdiction. But it has been held, that a first mortgagee's merely allowing the mortgagor to have the title deeds; or a first mortgagee's witnessing a second mortgage deed, but not knowing the contents; and even concealing from a second mortgagee information of a prior mortgage, when he made application therefor, the intention of the party applying to lend money not being made known; are not of themselves circumstances sufficient to affect the first mortgagee with constructive fraud.² There must be other ingredients to give color and body to these circumstances; for they may be compatible with entire innocence of intention and object.³ Nothing but a voluntary, distinct, and unjustifiable concurrence upon the part of the first mortgagee, to a mortgagor's retaining the title deeds, is now deemed a sufficient reason for postponing his priority. And, in regard to the other acts above stated, they

¹ See *Evans v. Bicknell*, 6 Ves. 191.

² *Jeremy on Eq. Jurisd. B. 1, ch. 2, § 2, p. 193, 194, 195; 1 Madd. Ch. Pr. 429 to 431; Id 256.*

³ See 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes (m) & (n); *Evans v. Bicknell*, 6 Ves. 172, 182, 190, 191, 192; *Ibbotson v. Rhodes*, 2 Vern. R. 554; *Plumb v. Fluitt*, 2 Anst. R. 432; *Barrett v. Weston*, 12 Ves. 133; *Berry v. Mutual Ins. Co.*, 2 John. Ch. R. 603, 608; *Tourle v. Rand*, 2 Bro. Ch. R. 650, and Mr. Belt's note; *Peter v. Russell*, 2 Vern. 726, and Mr. Raithby's note (1).

must be done under circumstances, which show a like concurrence and coöperation in some deceit upon the second mortgage.¹

§ 394. It is curious to trace, how nearly the Roman Law approaches that of England on this subject ; demonstrating, that, if they have not a common origin, at least each is derived from that sense of justice, which must pervade all enlightened communities. It is an acknowledged principle of Roman jurisprudence, that a creditor, who consents to the sale, donation, or other alienation of the property of his debtor, which is pledged or mortgaged for his debt, cannot assert his title against the purchaser, unless he reserves it ; for his loss of title, cannot, under such circumstances, be asserted to be to his prejudice ; since it is by his consent ; and otherwise the purchaser could be deceived into the bargain. *Creditor, qui permittit rem venire, pignus dimittit.*² *Si consensit venditioni creditor, liberatur hypotheca.*³ *Si in venditione pignoris consenserit creditor, vel ut debitor hanc rem permutat, vel donet, vel in dotem det, dicendum erit pignus liberari, nisi salva causa pignoris sui, consensit, vel venditioni vel cæteris.*⁴ But as to what shall be deemed a consent, the Roman law is very guarded. For it is said, that we are not to take for a consent of the creditor to an alienation of the pledge, the knowledge, which he may have of it ; nor the silence, which he may keep after he knows it ; as if he knows, that his debtor is about selling a house, which is mortgaged to him, and he says nothing about it. But

¹ Fonbl. Eq. B. 1, ch. 3, § 4, note (n) ; *Peter v. Russell*, 2 Vern. 726, and Mr. Raithby's note (1) ; 1 Madd. Ch. Pr. 256, 257.

² Dig. Lib. 50, tit. 17, l. 158.

³ Dig. Lib. 20, tit. 6, l. 7 ; Pothier, Pand. Lib. 20, tit. 6, art. 2, § 21.

⁴ Ibid. l. 4, § 1.

in order to deprive him of his right, it is necessary, that it appear by some act, that he knows, what is doing to his prejudice, and consents to it; or that there be ground to charge him with dishonesty for not having declared his right, when he was under an obligation to do it, by which the purchaser was misled. As if upon the alienation the debtor declares, that the property is not incumbered; and the creditor knowingly signs the contract as a party or witness, thereby rendering himself an accomplice in the false affirmation; he will be bound by the alienation. But the mere signature of the creditor, as a witness to a contract of alienation, will not of itself bind him, unless there are circumstances to show, that he knew the contents, and acted disingenuously and dishonestly by the purchaser.¹ *Non videtur autem consensisse creditor, si sciente eo, debitor rem vendiderit, cum ideo passus est venire, quod sciebat, ubique pignus sibi durare. Sed si subscripserit forte in tabulis emptionis, consensisse videtur, nisi manifeste appareat deceptum esse.*²

§ 395. Another class of constructive frauds consists of those, where a person purchases with full notice of the legal or equitable title of other persons to the same property. In such cases he will not be permitted to protect himself against such claims; but his own title will be postponed, and made subservient to theirs.³ It would be gross injustice to allow him to

¹ 1 Domat, B. 3, tit. 1, § 7, art 15, and Strahan's note.

² Dig. Lib. 20, tit 6, l. 8, § 15; Pothier, Pand. Lib. 20, tit. 6, art. 2, § 26, 27.

³ Com. Dig. Chancery, 4 O. 1; Sugden on Vendors, ch. 16, § 5, 10; ch. 17, § 1, 2. — An admitted exception (which is more fully adverted to in a subsequent note) is the case of a dowress. A person, purchasing with a notice of her title, may yet, by getting in a prior legal title or term, protect himself against her title. This is an anomaly; but it is now so firmly established, that it cannot be shaken.

defeat the just rights of others by his own iniquitous bargains. He becomes by such conduct a *particeps criminis* of the fraudulent grantor ; and the rule of Equity, as well as of law, is, *Dolus et fraus nemini patrocinari debent*.¹ And, in all cases of such purchases with notice, Courts of Equity will hold the purchaser a trustee for the benefit of the persons, whose rights he has sought to defraud or defeat.² Thus, if title deeds should be deposited as a security for money, (which would operate an equitable mortgage,) and a creditor, knowing the facts, should subsequently take a mortgage of the same property ; he would be postponed to the equitable mortgage of the first creditor ; and the notice would raise a trust in him to the amount of such equitable mortgage.³ So, if a mortgagee, with notice of a trust, should get a conveyance from the trustee, in order to protect his mortgage, he would not be allowed to derive any benefit from it ; but he would be held to be a trustee. For it has been significantly said, that, though a purchaser may buy an incumbrance, or lay hold on any plank to protect himself ; yet he shall not protect himself by the taking of a conveyance from a trustee, with notice of the trust ; for he thereby becomes a trustee ; and he must not, to get a plank to save himself, be guilty of a breach of trust.⁴

See *Swannock v. Lefford*, Ambler, R. 6, and Mr. Blunt's note, and note of Lord Hardwicke's judgment in *Co. Litt.* 208, a ; *Radnor v. Vanderberdy*, Show. Parl. Cas. 69 ; *Maundrell v. Maundrell*, 10 Ves. 271, 272 ; *Winn v. Williams*, 5 Ves. 130 ; *Male v. Smith*, Jacob. R. 497.

¹ 2 Fonbl. Eq. B. 2, ch. 6, § 3 ; 3 Co. R. 78.

² Ibid. 1 Fonbl. Eq. B. 2, ch. 6, § 2 ; *Munley v. Ballou*, 1 John. Ch. R. 566 ; *Murray v. Finster*, 2 John. Ch. R. 158 ; *Maundrell v. Maundrell*, 10 Ves. 260, 261, 270.

³ *Birch v. Ellames*, 2 Anst. 427 ; *Plumb v. Floritt*, 2 Anst. R. 433.

⁴ *Saunders v. Dehaw*, 2 Vern. R. 271 ; 2 Fonbl. Eq. B. 2, ch. 6, § 2.

§ 396. The same principle applies to cases of contract to sell lands, or to grant leases thereof. If a subsequent purchaser has notice of the contract, he is liable to the same equity, and stands in the same place; and is bound to do that, which the person, who contracted, and whom he represents, would be bound to do.¹

§ 397. It is upon the same ground, that, in a country, where the registration of conveyances is required, in order to make them perfect against subsequent purchasers, if a subsequent purchaser has notice at the time of his purchase of prior unregistered conveyances, he shall not be permitted to avail himself of his title against the prior conveyance.² This has been long the settled doctrine in Courts of Equity; and it is often applied in America, though not in England, in Courts of Law, as a just exposition of the Registry Acts.³ The object of all Acts of this sort is, to secure subsequent purchasers and

¹ Taylor v. Stebbert, 2 Ves. jr. 438; Davis v. Earl of Strathmore, 16 Ves. 419, 428, 429; Underwood v. Courtown, 2 Sch. & Lefr. 64; Macreath v. Symmons, 15 Ves. 350; Jeremy on Eq. Jurisd. B. 1, ch. 2, § 2, p. 192, &c.; Com. Dig. Chancery, 4 C. 1.

² Sugden on Vendors, ch. 16, § 5, 10; ch. 17, § 1, 2; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (h); 1 Madd. Ch. Pr. 260; Bushell v. Bushell, 1 Sch. & Lefr. 99 to 103; Eyre v. Dolphin, 2 B. & Beatt. 302; Blades v. Blades, 1 Eq. Abrid. 358; Worseley v. De Mattos, 1 Burr. 474, 475; Forbes v. Dennister, 1 Bro. Par. Cas. 425; Sheldon v. Cox, 2 Eden, R. 224; Le Neve v. Le Neve, 3 Atk. 646; S. C. 1 Ves. 64; Amb. R. 436; Chandos v. Brownlow, 2 Ridg. Par. R. 428; Bean v. Smith, 2 Mason, R. 285; Coppinger v. Fernyhough, 2 Bro. Ch. R. 291; Sugden on Vendors, ch. 16; Eyre v. Dolphin, 2 B. & Beatt. 301, 302; Sheldon v. Cox, 2 Eden, R. 224.

³ Doe. d. Robinson v. Alsop, 5 B. & Ald. 142; Norcross v. Widgery, 2 Mass. R. 506; Bigelow's Dig. *Conveyance*, P. and note; Jackson v. Sharp, 9 John. R. 163; Jackson v. Burgott, 10 John. R. 457; Jackson v. West, 10 John. R. 466; Johnson's Dig. *Deed*, VIII.; Farnsworth v. Childs, 4 Mass. R. 637.

mortgagees against prior secret conveyances and incumbrances. But where such purchasers and mortgagees have notice of the prior conveyance, it is impossible to hold, that it is a secret conveyance, by which they are prejudiced. On the other hand, the neglect to register the prior conveyance is often a matter of mistake, or of over-weening confidence in the grantor; and it would be a manifest fraud to allow him to avail himself of the power, by any connivance with others, to defeat such prior conveyance.¹ The ground of the doctrine is, (as Lord Hardwicke has remarked,) plainly this, “that the taking of a legal estate, after notice of a prior right, makes a person a *malâ fide* purchaser; and not, that he is not a purchaser for a valuable consideration, in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate; and after knowing that, he takes away the right of another person, by getting the legal title.”² And this exactly agrees with the definition of the Civil Law of *dolus malus*.³ “Now, if a person does not stop his hand, but gets the legal estate, when he knows the equity was in another, *machinatur ad circumveniendum*.”⁴

§ 398. This doctrine as to postponing registered to unregistered conveyances, upon the ground of notice, has broken in upon the policy of the Regis-

¹ *Le Neve v. Le Neve*, 3 Atk. 646; 1 Ves. 64; *Ambler*. 436, and Blunt's note, *ibid.*; Belt's Suppl. 50; *Bushell v. Bushell*, 1 Sch. & Lefr. 98, 99, 100, 101, 102; *Eyre v. Dolphin*, 2 Ball & Beatt. 299, 300, 302; 1 Madd. Ch. Pr. 260, 261; *Toulman v. Steere*, 3 Meriv. R. 209, 224.

² *Ibid.*

³ Dig. Lib. 4, tit. 3, l. 2; Id. Lib. 2, tit. 14, § 9.

⁴ *Ibid.*

tration Acts in no small degree; for a registered conveyance stands upon a different footing from an ordinary conveyance. It has, indeed, been greatly doubted, whether Courts ought ever to have suffered the question of notice to be agitated as against a party, who has duly registered his conveyance. But they have said, that fraud shall not be permitted to prevail. There is, however, this qualification upon the doctrine, that it shall be available only in cases, where the notice is so clearly proved, as to make it fraudulent in the purchaser to take and register a conveyance, in prejudice to the known title of the other.¹

§ 399. What shall constitute notice in cases of subsequent purchasers is a point of some nicety, and resolves itself, sometimes into matter of fact, and sometimes into matter of law.² Notice may be either actual and positive; or it may be constructive.³ Actual notice requires no definition; for in that case knowledge of the fact is brought directly home to the party. Constructive notice is in its nature no more than evidence of notice, the presumptions of which are so violent, that the Court will not allow even of its being controverted.⁴

§ 400. An illustration of this doctrine of constructive notice is, where the party has possession or

¹ *Wyatt v. Borwell*, 19 Ves. 439; *Sugden on Vendors*, ch. 16, § 5, 10.

² *Com. Dig. Chancery*, 4 C. 2. See *Day v. Dunham*, 2 John. Ch. R. 190.

³ *Sugden on Vendors*, ch. 17, § 1, 2. — In a treatise, like the present, it is impracticable to do more than glance at topics of this nature. The learned reader will find full information on the subject in treatises, which profess to examine it at large. See *Sugden on Vendors*, ch. 16, 17; *Newland on Contracts*, ch. 36, p. 504 to 516.

⁴ *Plumb v. Fluitt*, 2 Anst. R. 438, Per Eyre, C. B.

knowledge of a deed, under which he claims his title, and it recites another deed, which shows a title in some other person; there the Court will presume him to have notice of the contents of the latter, and will not permit him to introduce evidence to disprove it. And, generally, it may be stated as a rule on this subject, that, where a purchaser cannot make out a title, but by a deed, which leads him to another fact, he shall be presumed to have knowledge of such fact.² So, the purchaser is in like manner supposed to have knowledge of the instrument, under which the party, with whom he contracts, as executor, or trustee, or appointee, derives his power.³ Indeed, the doctrine is still broader; for whatever is sufficient to put a party upon inquiry, (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons,) is in Equity

¹ Ibid. *Cuyler v. Brandt*, 2 Cain. Cas. in Err. 326; 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (m); *Eyre v. Dolphin*, 2 B. & Beatt. 301, 302.

² 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (b); *Martins v. Jolliffe*, Ambler, R. 311, 314; *Marr v. Bennett*, 2 Ch. Cas. 246; *Sugden on Vendors*, ch. 16; 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (m); *Com. Dig. Chancery*, 4 C. 2. — This doctrine, however, is to be received with some qualifications. For if a man purchases an estate under a deed, which happens to relate also to other lands, not comprised in that purchase; and afterwards he purchases the other lands, to which an apparent title is made, independent of that deed, the former notice of the deed will not itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed, which had no relation to the particular purchase, he was then about, nor to take notice of more of the deed than affected his then purchase. *Hamilton v. Royal*, 2 Sch. & Lefr. 327. In short, he is bound to take notice of those things only in the deed, which affect his present purchase, not any future purchase. *Martins v. Jolliffe*, Ambler, R. 311.

³ 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (m); *Id.* B. 3, ch. 3, § 1, note (b); *Mead v. Lord Orrery*, 3 Atk. 238; *Draper's Company v. Yardloy*, 2 Vern. R. 662; *Daniel v. Kent*, 1 Vern. R. 319; *Jackson v. Nealy*, 10 John. R. 374; *Sugden on Vendors*, ch. 17, § 2.

held to be good notice to bind him.¹ Thus, notice of a lease will be notice of its contents.² So, if a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate, which these tenants have; and therefore he is affected with notice of all the facts as to their estates.³ But, in a great variety of cases, it must necessarily be matter of no inconsiderable doubt and difficulty to decide, what circumstances are sufficient to put a party upon inquiry. Vague and indeterminate rumor, or suspicion, is quite too loose and inconvenient in practice, to be admitted to be sufficient.⁴ But there will be found almost infinite gradations of presumption between such rumor, or suspicion, and that certainty as to facts, which no mind could hesitate to pronounce enough to call for farther inquiry, and to put the party upon his diligence. No general rule can, therefore, be laid down to govern such cases. Each must depend upon its own circumstances.⁵ There is no case, which goes the length of saying, that a

¹ 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (*m*); B. 3, ch. 3, § 1, and note (*b*); *Smith v. Low*, 1 Atk. 490; *Ferrers v. Cheney*, 2 Vern. R. 384; *Daniels v. Davison*, 16 Ves. 250; *Howorth v. Deem*, 1 Eden, R. 351, and Mr. Eden's note, *ib.*; *Sterry v. Arden*, 1 John. Ch. R. 267; *Surman v. Barlow*, 2 Eden, R. 167; *Parker v. Brooke*, 9 Ves. 583; *Green v. Slayter*, 4 John. Ch. R. 33; *Eyre v. Dolphin*, 2 B. & Beatt. 301, 302; Com. Dig. Chancery, 4 C. 2.

² *Hall v. Smith*, 14 Ves. 426.

³ *Taylor v. Stibbert*, 2 Ves. jr. 440; *Daniels v. Davison*, 16 Ves. 249, 252; *Smith v. Law*, 1 Atk. 489; *Allen v. Anthony*, 1 Meriv. R. 262; 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (*m*); *Meux v. Maltby*, 2 Swanst. 281; *Chesterman v. Gardner*, 5 John. Ch. R. 29.

⁴ *Sugden on Vendors*, ch. 17; *Wildgrove v. Wayland*, Golb. R. 147; *Jolland v. Stainbridge*, 3 Ves. 478.

⁵ See 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (*b*); *Eyre v. Dolphin*, 2 B. & Beatt. 301; *Hine v. Dodd*, 2 Atk. 275.

failure of the utmost circumspection shall have the same effect of postponing a party, as if he were guilty of fraud, or wilful neglect, or he had positive notice.¹ And though a mistake of law, upon the construction of a deed or contract, will not alone discharge a purchaser from the legal effects of notice of such deed or contract; yet there may be a case of such doubtful equity under the circumstances, that it ought not to be enforced against such a purchaser.²

§ 401. How far the registration of a conveyance in countries, where such registration is authorized and required by law, shall operate as constructive notice to subsequent purchasers by mere presumption of law, independent of any actual notice, has been much discussed, both in England and in America. It is not doubted in either country, that a prior conveyance, duly registered, operates to give full effect to the legal and equitable estate conveyed thereby, against subsequent conveyances of the same legal and equitable estates.³ But the question becomes important, as to other collateral effects, such as defeating the right of tacking of mortgages, and other incidental accruing equities between the different purchasers; for if the mere registry in such cases, without actual knowledge of the conveyance, operates as constructive notice, it shuts out many of these equities, which otherwise might have an obligatory priority.⁴ And it has been truly remarked,

¹ *Plumb v. Fluitt*, 2 Anst. R. 433, 440. See *Dey v. Dunham*, 2 John. Ch. R. 190, 191.

² *Cordwill v. Mackrill*, 2 Eden, R. 344, 348; *Parker v. Brooke*, 9 Ves. 583, 589; 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note; *Bovey v. Smith*, 1 Vern. 144, 149; *Walker v. Smallwood*, Amb. R. 676.

³ *Wrightson v. Hudson*, 2 Eq. Abrid. 609, pl. 7.

⁴ *Newland on Contracts*, ch. 36, p. 503.

that there is a material difference between actual notice, and the operation of the registry acts. Actual notice might bind the conscience of the parties; the operation of the acts may bind their title, but not their conscience.¹

§ 402. In England, the doctrine seems at length to be settled, that the mere registration of a conveyance shall not be deemed constructive notice to subsequent purchasers; but that actual notice must be brought home to the party, amounting to fraud.² The subject certainly is attended with no inconsiderable difficulty; and some learned Judges have expressed a doubt, whether Courts of Equity ought not to have said, that, in all cases of registry, which is a public depository for conveyances, a subsequent purchaser ought to search, or be bound by notice of the registry, as he would by a decree in Equity, or a judgment at law.³ Other learned Judges have intimated a different opinion; because, if the registration of the conveyance should be held constructive notice, it must be notice of all, that is contained in the conveyance; for the subsequent purchaser would be bound to inquire after the contents, the inconveniences of which they have deemed exceedingly great.⁴ The question, however, having arisen in a case of tacking of mortgages, as

¹ *Underwood v. Courtown*, 2 Sch. & Lefr. 66. See *Latouche v. Dunsany*, 1 Sch. & Lefr. 137; *Dey v. Dunham*, 2 John. Ch. R. 190, 191.

² *Wyatt v. Barwell*, 19 Ves. 435; *Jolland v. Stainbridge*, 3 Ves. 477; *Com. Dig. Chancery*, 4 C. 1.

³ *Morecock v. Dickens*, Ambl. R. 480; *Hine v. Dodd*, 2 Atk. 275; *Parkhurst v. Alexander*, 1 John. Ch. R. 399; *Sugden on Vend.* ch. 16, 17.

⁴ *Latouche v. Dunsany*, 1 Sch. & Lefr. 157; *Underwood v. Courtown*, 2 Sch. & Lefr. 64, 66; *Pentland v. Stokes*, 2 B. and Beatt. 75.

early as 1730, was then decided by Lord Chancellor King, who held, that the mere registration of a second mortgage did not prevent a prior mortgagor from tacking a third mortgage, when he had no actual notice of the existence of the second mortgage.¹ And, it has since been adhered to, as much, if not more, from its having become a rule of property, as from a sense of its intrinsic propriety.

§ 403. In America, however, the doctrine has been differently settled; and it is held, that the registration of a conveyance operates as constructive notice upon all subsequent purchasers of any estate legal or equitable in the same property.² The reasoning, upon which this doctrine is founded, is the obvious policy of the registry acts; the duty of the party, purchasing under such circumstances, to search for prior incumbrances, the means of which search are within his power; and the danger (so forcibly alluded to by Lord Hardwicke) of letting in parol proof of notice, or want of notice of the actual existence of the conveyance.³ The American doctrine certainly has the advantage of certainty and universality of application; and it imposes upon subsequent purchasers a reasonable degree of diligence only, in examining their titles to estates.⁴

¹ *Bedford v. Backhouse*, 2 Eq. Abrid. 615, Pl. 12; *S. P. Wrightson v. Hudson*, 2 Eq. Abrid. 609, Pl. 7; *Cator v. Cooley*, 1 Cox, R. 182; *Wiseman v. Westland*, 1 Y. and Jen. 117.

² *Parkhurst v. Alexander*, 1 John. Ch. R. 394.

³ *Hine v. Dodd*, 2 Atk. 275.

⁴ *Johnson v. Strong*, 2 John. R. 510; *Frost v. Beekman*, 1 John. Ch. R. 298, 299; *S. C.* 18 John. R. 544; *Parkhurst v. Alexander*, 1 John. Ch. R. 394. — The better opinion also seems to be, that the registration of an equitable mortgage, or title, or incumbrance, is notice to a subsequent purchaser, as much as if it were a legal security or title. *Parkhurst v. Alexander*, 1 John. Ch. R. 398, 399, and the cases there cited.

§ 404. But this doctrine, as to the registration of deeds being constructive notice to all subsequent purchasers, is not to be understood of all deeds and conveyances, which may be *de facto* registered ; but of such only, as are authorized and required by law to be registered ; and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, it is to be treated as a mere nullity ; and then the subsequent purchaser is affected only by such actual notice, as would amount to a fraud.¹

§ 405. It is upon similar grounds, that every man is presumed to be attentive to what passes in the Courts of Justice of the state or sovereignty, where he resides. And, therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner, as if he had such notice ; and he will be bound by the judgment or decree in the suit.²

§ 406. Ordinarily, it is true, that the decree of a Court binds only the parties and their privies in representation or estate. But he, who purchases during the pendency of a suit, is bound by the decree, that

¹ Ibid ; Underwood v. Courtown, 2 Sch. & Lefr. 68 ; Latouche v. Dunsany, 1 Sch. & Lefr. 157 ; Astor v. Wells, 4 Wheat. R. 466 ; Frost v. Beekman, 1 John. Ch. R. 300 ; Lessee of Heister v. Fortne, 2 Binn. R. 40.

² Com. Dig. Chancery, 4 C. 3 and 4 ; 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (n) ; Sorrell v. Carpenter, 2 P. Will. 492 ; Worsley v. Earl of Scarborough, 3 Atk. 892 ; Bishop of Winchester v. Paine, 11 Ves. 194 ; Garth v. Ward, 2 Atk. 175 ; Mead v. Lord Orrery, 3 Atk. 242 ; Gaskeld v. Durdin, 2 B. & Beatt. 169 ; Moore v. Macnamara, 2 B. & Beatt. 186 ; Murray v. Ballou, 1 John. Ch. R. 566.

may be made against the person, from whom he derives title; and the litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit.¹ Where there is a real and fair purchase, without any notice, the rule may operate very hardly.² But it is a rule founded upon a great public policy; for, otherwise, alienations made during a suit might defeat its whole purpose; and there would be no end to litigation.³ And hence the maxim, *Pendente lite nihil innovetur*; the effect of which is, not to annul the conveyance; but only to render it subservient to the rights of the parties in the litigation.⁴ As to the rights of those parties, the conveyance is treated as if it never had any existence; and it does not vary them.⁵ *Lis pendens*, however, being only a general notice of an equity to all the world, it does not affect any particular person with a fraud, unless such person had also special notice of the title in dispute in the suit.⁶ If, therefore, the right to relief in Equity depends upon any supposed coöperation in a fraud, it is indispensable to establish an express or direct notice of the fraudulent act. And although, as we have seen, a registered deed will be postponed to a prior unregistered deed, where the second purchaser had actual notice of the first purchase; yet

¹ Bishop of Winchester v. Paine, 11 Ves. 197; Metcalf v. Pulvertoft, 2 V. & Beam. 205

² 2 P. Will. 483.

³ Co. Litt. 244, (b); Metcalf v. Pulvertoft, 2 V. & Beam. 199; Gaskeld v. Durdin, 2 B. & Beatt. 169.

⁴ Ibid.

⁵ Ibid; Bishop of Winchester, v. Paine, 11 Ves. 197; Murray v. Ballou, 1 John. Ch. R. 566; Murray v. Finster, 2 John. Ch. R. 155.

⁶ Mead v. Lord Orrery, 3 Atk. 242, 243; 2 Fonb. Eq. B. 2, ch. 6, § 3, note (n); Id. B. 3, ch. 3, § 1, note (b).

the doctrine has never been carried to the extent of making a *lis pendens* constructive notice of the prior unregistered deed ; but actual notice is required.¹

§ 407. In general, a decree is not constructive notice to any persons not parties or privies to it ; and, therefore, other persons are not presumed to have notice of its contents. But a person, who is not a party to a decree, if he has actual notice of it, will be bound by it ; and if he pays money in opposition to it, he will be compelled to pay it again.² And a purchaser, having notice of a judgment, will be bound by it, although it has not been docketted, so as to secure the priority of lien and satisfaction attached to judgment.³

§ 408. And, to constitute constructive notice, it is not indispensable, that it should be brought home to the party himself. It is sufficient, if it is brought home to the agent, attorney, or counsel, of the party ; for in such case the law presumes notice in the principal, since it would be a breach of trust in the former, not to communicate the knowledge to the latter.⁴ But in all these cases, notice, to bind the principal, should be notice in the same transaction, or negotiation ; for if the agent, attorney, or counsel was employed in the thing by another person, or in another business or affair, and at another time, which he may, perhaps, have forgotten, it would be

¹ Wyatt v. Barwell, 19 Ves. 439.

² 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (n) ; Harvey v. Montague, 1 Vern. R. 57 ; Sugden on Vend. ch. 17, § 1, 2.

³ Davis v. Earl of Strathmore, 16 Ves. 419.

⁴ Com. Dig. Chancery, 4 C. 5 and 6 ; 2 Fonbl. Eq. B. 2, ch. 6, § 4 ; Sheldon v. Cox, 2 Eden, R. 224, 228 ; Jennings v. Moore, 2 Vern. R. 609 ; Sugden on Vend. ch. 17 ; Astor v. Wells, 4 Wheat. R. 466.

unjust to charge his present principal, on account of such a defect of memory.¹ It was significantly observed by Lord Hardwicke, that, if this rule were not adhered to, it would make purchasers' and mortgagees' titles depend altogether upon the memory of their counsellors and agents; and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions.²

§ 409. The doctrine, which has been already stated in regard to the effect of notice, is strictly applicable to every purchaser, whose title comes into his hands affected with such notice. But it in no manner affects any title derived from another person, in whose hands it stands free from any such taint. Thus, a purchaser with notice may protect himself by purchasing the title of another *bonâ fide* purchaser for a valuable consideration without notice; for, otherwise, such *bonâ fide* purchaser would not enjoy the full benefit of his unexceptionable title.³ Indeed, he would be deprived of the marketable value of such a title; since it would only be necessary to have public notoriety given to the existence of a prior incumbrance, and no buyer could be found, or none, except at a depreciation equal to the value of the incumbrance. For a similar reason, if a person, who has notice, sells to another, who has no notice, and is a *bonâ fide* purchaser for a valuable consideration, the latter may protect his title, although it

¹ *Ibid*; *Fitzgerald v. Falconberg*, Fitz Gibb. R. 211.

² *Warwick v. Warwick*, 3 Atk. 294; *Worsley v. Earl of Scarborough*; *Lowther v. Carlton*, 2 Atk. 242, 392.

³ 1 Fonbl. Eq. B. 2, ch. 6, § 2, note (i); Mitf. Plead. by Jeremy, (1827) p. 278; Com. Dig. Chancery, 4 A. 10; 4 I. 3, 4 I. 4, 4 I. 11.

was affected with the Equity arising from notice, in the hands of the person, from whom he derived it ; for, otherwise, no man would be safe in any purchase, but would be liable to have his own title defeated by secret equities, of which he could have no possible means of making a discovery.

§ 410. This doctrine, in both of its branches, has been settled for nearly a century and a half; and it arose in a case, in which A purchased an estate, with notice of an incumbrance, and then sold it to B, who had no notice ; and B afterwards sold it to C, who had notice ; and the question was, whether the incumbrance bound the estate in the hands of C. The Master of the Rolls thought, that, though the Equity of the incumbrance was gone, while the estate was in the hands of B, it was revived upon the sale to C. But the Lord Keeper reversed the decision ; and held, that the estate in the hands of C was discharged of the incumbrance, notwithstanding the notice of A and C.¹ The doctrine has ever since been adhered to, as an indispensable muniment of title.² And it is wholly immaterial, of what nature the Equity is, whether it be a lien, an incumbrance, a trust, or otherwise ; for the bonâ fide purchase, for a valuable consideration, purges away the Equity from the title, in the hands of all persons, who may obtain a derivative title, except it be that of the original party, whose conscience

¹ *Harrison v. Forth*, Prec. Ch. 51 ; S. C. 1 Eq. Abrid. Notice, A. 6, p. 331.

² 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (i) ; *Brandlyn v. Ord*, 1 West. R. 512 ; S. C. 1 Atk. 571 ; *Lowther v. Carlton*, 2 Atk. 242 ; *Ferrers v. Cherry*, 2 Vern. 383 ; *Martins v. Jolliffe*, Ambl. R. 313 ; *Sweet v. Southcote*, 2 Bro. Ch. R. 66 ; *McQueen v. Farquhar*, 11 Ves. 477, 478.

stands bound by the violation of a trust, and a meditated fraud.¹

¹ Ibid; and *Kennedy v. Daly*, 1 Sch. & Lefr. 379; *Bumpus v. Plattner*, 1 John. Ch. R. 219; *Jackson v. Henry*, 10 John. R. 185; *Jackson v. Given*, 8 John. R. 573; *Demarest v. Wyncoop*, 3 John. Ch. R. 147; *Alexander v. Pendleton*, 8 Cranch R. 462; *Ingram v. Pelham*, Amb. R. 153; *Fitz Simmons v. Ogden*, 7 Cranch, 218. — The rule adopted in Equity, in favor of *bonâ fide* purchasers without notice, not to grant any relief against them, is founded, as we have seen, upon a general principle of public policy. *Waldron v. Lee*, 9 Ves. R. 24. It is not, however, absolutely universal; for it has been broken in upon in two classes of cases. In the first place, it is not allowed in favor of a judgment creditor, who has no notice of the plaintiff's Equity. This appears to proceed upon the principle, that such judgment creditor shall be deemed entitled merely to the same rights as the debtor had, as he comes in under him, and not through him; and upon no new consideration, like a purchaser. *Burgh v. Burgh*, Rep. Temp. Finch. 28. In the second place, it is not allowed in favor of a *bonâ fide* purchaser without notice against the claims of a Dowress, as such. *Williams v. Lambe*, 3 Brown, Ch. Rep. 264. This last exception is apparently anomalous; and has been established upon the distinction, that the protection of a *bonâ fide* purchaser does not apply against a party plaintiff, seeking relief upon the ground of a legal title, (such as Dower is,) but only against a party plaintiff, seeking such relief upon an equitable title. The propriety of the distinction has been greatly questioned. It has been impugned by Lord Rosslyn, in *Jerrand v. Saunders*, (2 Ves. jr., 454). The case of *Burlare v. Cook*, (2 Freem. R. 24,) and *Parker v. Blythmore*, (2 Eq. Abridg. 79, pl. 1,) are against it. *Rogers v. Leele*, (2 Freeman, R. 84,) and the above case of *Williams v. Lambe* are in its favor. Mr. Sugden doubts the correctness of the distinction. *Sugden on Vend. ch. 18. sub. finem.* On the other hand, Mr. Belt maintains its correctness. Belt's note (1), to 3 Brown, 264. So does Mr. Beames; (Beam. Pl. Eq. 245, 234) and Mr. Roper also, in his work on Husband and Wife, vol. 1, 446, 447. Mr. Hovenden, in his note to 2 Freem. R. 24, acquiesces in it. See also *Medlicott v. O'Donel*, 1 B. & Beatt. 171. See also *Mitf. Plead. Eq. by Jeremy*, p. 274, note (d). There is a peculiarity in case of a Dowress, which operates against her, and, upon this point of notice, is proper to be mentioned. Though notice of the title will protect every other interest in the inheritance, it will not protect hers. *Maundrell v. Maundrell*, 10 Ves. 271, 272; *Wynn v. Williams*, 5 Ves. 130; *Mole v. Smith*, Jacob. R. 497; *Swannock v. Lifford*, Amb. R. 6; *S. C. Co. Litt. 208, a. Butler's note (105)*; *Radner v. Vanderbendy*, Show. Parl. Cas 69.

§ 411. Indeed, purchasers of this sort are so much favored in Equity, that it may be stated to be a doctrine now generally established, that a *bonâ fide* purchaser for a valuable consideration, without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage, or other incumbrance. If he can defend himself by them at law, his adversary shall have no help in Equity, to set these incumbrances aside ; for Equity will not disarm such a purchaser ; but will act upon the wise policy of the Common Law, to protect and quiet lawful possessions, and strengthen such titles.¹ We shall have occasion, hereafter, in various cases, to see the application of this doctrine.

§ 412. And this naturally leads us to the consideration of the equitable doctrine of, what is technically called, tacking, that is, uniting securities given at different times, so as to prevent any intermediate purchasers from claiming title to redeem, or otherwise discharge one lien, which is prior, without redeeming or discharging other liens also, which are subsequent to his own title.² Thus, if a third mortgagee, without notice of a second mortgage, should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee would not be permitted to redeem the first mortgage without redeeming the third mortgage also ; for in such a case Equity tacks both mortgages together in his favor. And, in such a case, it will make no difference, that the third mortgagee at the time of purchasing the first mortgage had notice of the second mort-

¹ 2 Fonbl. Eq. B. 3, ch. 2, § 3 ; Com. Dig. Chancery, 4 A. 10, 4 I. 3, 4 I. 11, 4 W. 29.

² Jeremy on Equity Jurisd. B. 1, ch. 2, § 1, p. 188 to 191.

gage, for he is still entitled to the same protection.¹

§ 413. There is, certainly, great apparent hardship in this rule; for it seems most conformable to natural justice, that each mortgagee should, in such a case, be paid according to the order and priority of his incumbrances.² The general reasoning, by which this doctrine is maintained, is, that *In aequali jure, melior est conditio possidentis*. Where the Equity is equal, the law shall prevail; and he, that hath only a title in Equity, shall not prevail against a title by Law and Equity in another.³ But, however correct this reasoning may be, when rightly applied, its applicability to the case stated may be reasonably doubted. It is assuming the whole case, to say, that the right is equal, and the Equity is equal. The second mortgagee has a prior right, and at least an equal Equity; and then the rule justly applies, that where the equities are equal, that, which is prior in time, shall prevail; *Qui prior est in tempore potior est in jure*.

§ 414. It has been significantly said, that it is a plank gained by the third mortgagee, in a shipwreck, *tabula in naufragio*.⁴ But, independently of

¹ 2 Fonbl. Eq. B. 3, ch. 2, § 2, and notes (b) (c); Com. Dig. Chancery, 4 A. 10; Marsh v. Lee, 2 Vent. R. 337, 338; S. C. 1 Ch. Cas. 162; Maundrell v. Maundrell, 10 Ves. 260, 270; Morret v. Parke, 2 Atk. 53, 54; Matthews v. Cartwright, 2 Atk. 347; Robinson v. Davison, 1 Bro. Ch. R. 63; Newland on Contracts, ch. 36, p. 515; Sugden on Vendors, ch. 16, 17; Powell on Mortgages, vol. 2, p. 454, Mr. Coventry's note (A).

² Brace v. Duchess of Marlborough, 2 P. Will. 492; Lowtheon v. Kassel, 3 Bro. Ch. R. 163.

³ Jeremy on Equity Jurisd. B. 1, ch. 2, § 1, p. 188 to 192; 2 Fonbl. Eq. B. 3, ch. 3, § 1, and notes.

⁴ Marsh v. Lee, 2 Vent. 337; Wortley v. Birkhead, 2 Ves. 574; Brace v. Duchess of Marlborough, 2 P. Will. 491.

the inapplicability of the figure, which can justly apply only to cases of extreme hazard to life, and not to mere seizures of property ; it is obvious, that no man can have a right, in consequence of a shipwreck, to convert another man's property to his own use, or to acquire an exclusive right against a prior owner. The best apology for the actual enforcement of the rule is, that it has been long established, and that it ought not now to be departed from, since it has become a rule of property.

§ 415. Lord Hardwicke has given the following account of the origin and foundation of the doctrine. "As to the Equity of this Court, that a third incumbrancer, having taken his security or mortgage without notice of the second incumbrance, and then, being puisne, taking in the first incumbrance, shall squeeze out and have satisfaction before the second ; that equity is certainly established in general ; and was so in *Marsh v. Lee*, by a very solemn determination by Lord Hale, who gave it the term of the creditor's *tabula in naufragio*. That is the leading case. Perhaps it might be going a good way at first ; but it has been followed ever since ; and, I believe, was rightly settled only on this foundation by the particular constitution of the law of this country. It could not happen in any other country but this ; because the jurisdiction of Law and Equity is administered here in different Courts, and creates different kind of rights in estates. And, therefore, as Courts of Equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates ; and, therefore, where there is a legal title and equity on one side, this Court never thought fit, that by

Eq.

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reason of a prior equity against a man, who had a legal title, that man should be hurt; and this by reason of that force this Court necessarily and rightly allows to the Common Law and to legal titles. But if this had happened in any other country, it could never have made a question; for if the Law and Equity are administered by the same jurisdiction, the rule, *Qui prior est tempore, potior est in jure*, must hold."¹

§ 416. Indeed, so little has this doctrine of tacking to commend itself, that it has stopped far short of the analogies, which would seem to justify its application; and it has been confined to the cases, where the party, in whose favor it is allowed, is originally a bonâ fide purchaser of an interest in the land for a valuable consideration. Thus, if a puisne creditor, by judgment, statute, or recognisance, should buy in a prior mortgage, he would not be

¹ *Wortley v. Birkhead*, 2 Ves. 573. The same quotation is in 2 Fonb. Eq. 304, in n.(e) — Mr. Coventry, in his valuable notes to Powell on Mortgages, (vol. 2, p. 454, note) supposes, that the English law on this subject is sanctioned by the Civil Law. In this view of the matter he is entirely mistaken. The Civil Law admits no such principle as tacking; the general rule is, *Qui prior est in tempore, potior est in jure*. There are two acknowledged exceptions; one, where the first incumbrancer consents to the second pledge, so as to give a priority; another is, when the second pledge is for money to preserve the property. The doctrine of the Civil Law, referred to by Mr. Coventry, simply gives to a third mortgagee, paying off a first mortgage, the same priority by way of substitution, which the first mortgagee had. It does not change the rights of the third mortgagee as to his own mortgage. So the doctrine is stated in the Pandects, (incorrectly referred to by Mr. Coventry,) and so is the doctrine of Domat in the passages cited. See Dig. Lib. 20, tit. 4, l. 16; 1 Domat, B. 3, tit. 1, § 6, art. 6; Pothier Pand. Lib. 20, tit. 4, § 1, art. 1 to 32. The language of the Civil Law in the principal passage cited is; *Plane, cum tertius creditor primum de sua pecunia dimisit, in locum ejus substituitur in ea quantitate, quam superiori exsolvit.* Dig. Lib. 20, tit. 4, l. 16.

allowed to tack his judgment to such mortgage, so as to cut out a mesne mortgagee.¹ The reason is said to be, that a creditor can in no just sense be called a purchaser ; for he does not advance his money upon the immediate credit of the land ; and, by his judgment, he does not acquire any right in the land. He has neither *jus in re*, nor *jus ad rem* ; but a mere lien upon the land, which may, or may not afterwards be enforced upon it.² But if, instead of being a judgment creditor, he were a third mortgagee, and should then purchase in a prior judgment, statute, or recognisance, in such case he would be entitled to tack both together. The reason for the diversity is, that, in the latter case, he did originally lend his money upon the credit of the land ; but, in the former, he did not ; but was only a general creditor, trusting to the general assets of his debtor.³

§ 417. The same principle applies to a first mortgagee lending to the mortgagor a further sum upon statute or judgment. In such case he will be entitled to retain against the mesne mortgagee, till both his mortgage and statute or judgment are paid ; for he lent his money originally upon the credit of the land ; and it may well be presumed, that he lent the farther sum upon the statute or judgment on the same security ; though it passed no present interest in the land, but gave a lien only.⁴

¹ 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (a) ; Id. B. 3, ch. 1, § 9, and note (n) ; *Brace v. Duchess of Marlborough*, 2 P. Will. 492 to 495 ; *Anon.* 2 Ves. 262 ; *Morret v. Paske*, 2 Atk. 52, 53 ; *Ex parte Knott*, 11 Ves. 617 ; *Belchier v. Butler*, 1 Eden, R. 522, and *Mr. Eden's* note. But see *Wright v. Pilling*, Prec. Ch. 499.

² *Ibid.*

³ *Ibid.* ; *Higgen v. Lyddal*, 1 Cas. Ch. 149.

⁴ *Ibid.* ; *Shepherd v. Titley*, 2 Atk. 352. *Ex parte Knott*, 11 Ves. 617. — *A fortiori*, the same principle applies to the first mortgagee's

§ 418. And yet, such prior mortgagee, having a bond debt, has never been permitted to tack it against any intervening incumbrancers of a superior nature between his bond and mortgage; nor against other specialty creditors; nor even against the mortgagor himself; but only against the heir, to avoid circuitry of action.¹ The reason given is, that the bond debt, except in the hands of the heir, is not a charge on the land. And tacking takes place only, when the party holds both securities in the same right; for if a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he will not be allowed to tack two mortgages together, to the prejudice of intervening incumbrancers.²

§ 419. It cannot be denied, that some of these distinctions are extremely thin, and stand upon very artificial and unsatisfactory reasoning. The account of the matter given by Lord Hardwicke³ is probably

lending on a second mortgage; for, in such case, he positively lends on the credit of the land, and will be allowed to tack against a mesne incumbrancer. *Morret v. Paske*, 2 Atk. 53, 54. And, even, sums subsequently lent on notes, if distinctly agreed at the time, to be on the security of the mortgaged property, will be allowed to be tacked. *Matthews v. Cartwright*, 2 Atk. 347.

¹ *Parvis v. Corbet*, 3 Atk. 556; *Lowthian v. Hasel*, 3 Brown, Ch. R. 163; *Morret v. Paske*, 2 Atk. 52, 53; *Shuttleworth v. Laycock*, 1 Vern. 245; *Coleman v. Winch*, 1 P. Will. 775; *Price v. Fastnedge*, Ambler. R. 685, and Mr. Blunt's note; *Houghton v. Troughton*, 1 Ves. 86; *Heames v. Bance*, 3 Atk. 630; *Jones v. Smith*, 2 Ves. jr. 376; *Adams v. Claxton*, 6 Ves. 229; 2 Fonbl. Eq. B. 3, ch. 1, § 11; *Id.* § 9.

² *Morret v. Paske*, 2 Atk. 53; 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (n.)

³ *Wortley v. Birkhead*, 2 Ves. 574; ante, § 415, p. 401. See *Berry v. Mutual Ins. Co.*, 2 John. Ch. R. 603, 608. — Lord Rosslyn, in *Jones v. Smith*, (2 Ves. jr., 377,) said; "Why a bond is not upon the same footing, I do not know. It is impossible to say, why a bond

the true one. But it is a little difficult to perceive, how the foundation could support such a superstructure; or rather, why the intelligible Equity of the case, upon the principles of natural justice, should not be rigorously applied to it. Courts of Equity have found no difficulty in applying it, where the puisne incumbrancer has bought in a prior equitable incumbrance; and, in such cases, they have declared, that where the puisne incumbrancer has not obtained the legal title; or where the legal title is vested in a trustee; or where he takes *in autre droit*; the incumbrances shall be paid in the order of their priority in point of time, according to the maxim above mentioned.¹ In all such cases, Courts of Equity have said, that he, who has the better right to call for the legal title, or its protection, shall prevail.²

may not be tacked to a mortgage, as well as one mortgage to another." The asserted ground doubtless is, that a bond debt is no lien on the land, whereas a mortgage and judgment are. This may be still more distinctly shown by the rule, that a mortgagee of a copyhold estate cannot tack a judgment to his mortgage; the reason is, that a judgment does not affect or bind copyhold estates. Heir of Carmore v. Park, 6 Vin. Abridg. p. 222, pl. 6; cited 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (u); Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, p. 190, 191.

¹ Brace v. Duchess of Marlborough, 2 P. Will. 495; Ex parte Knott, 11 Ves. 618; Berry v. Mutual Ins. Co., 2 John. Ch. R. 608; Frexe v. Moore, 8 Price, R. 475; Barrett v. Weston, 12 Ves. 130; Price v. Fastnedge, Ambler R. 685, and Mr. Blunt's note; Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, 2, p. 191, 193, 194; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (e); Pomfret v. Windsor, 2 Ves. 472, 486; Brantly v. Ord. 1 Atk. 571.

² Ibid; Medlicott v. O'Donel, 1 B. & Beatt. 171; 2 Fonbl. Eq. B. 2, ch. 6, § 2. — In America, the doctrine of tacking is never allowed as against mesne incumbrances, which are duly registered; for the plain reason, that the Registry Acts are held not only to be constructive notice; but the Acts themselves, in effect, declare the priority to be fixed by the registration. Grant v. Bissett, 1 Caines' Cas. in Err. 112; Frost v. Beekman, 1 John. Ch. R. 298, 299; Parkhurst

§ 420. The Civil Law has proceeded upon a far more intelligible and just doctrine. It wholly repudiates the doctrine of tacking; and gives the fullest effect to the maxim, *Qui prior est in tempore, potior est in jure*; excluding it only in cases of fraud or consent, or of a superior equity.¹

§ 421. But whatever may be thought as to the foundation of the doctrine, it is now firmly established. It is, however, to be taken with this most important qualification, that the party, who seeks to avail himself of it, is a *bonâ fide* purchaser without notice at the time, when he took his original security; for if he then had notice, he has not the slightest claim to the protection or assistance of a Court of Equity; and he will not be allowed, by purchasing in a prior security or mortgage, to tack his own tainted mortgage or other title to the latter.²

§ 422. Another instance of the application of this wholesome doctrine of constructive frauds, arising from notice, may be seen in the dealings with executors, and other persons holding a fiduciary character, and colluding with them in a violation of their trust. Thus, purchases from executors of the personal property of their testator are ordinarily obli-

v. Alexander, 1 John. Ch. R. 398, 399; *St. Andrew's Church v. Tompkins*, 7 John. Ch. R. 14. The same doctrine exists in other Registry Countries. *Latouche v. Lord Dunsany*, 1 Sch. & Lefr. 137, 157.

¹ See Dig. Lib. 20, tit. 4, l. 16; Pothier, Pand. Lib. 20, tit. 4, § 1, art. 1 to 32; 1 Domat, B. 3, tit. 1, § 6, art. 6; ante, § 415, p. 401, note.

² 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (b); *Id.* B. 2, ch. 6, § 2, and note (i); *Brace v. Duchess of Marlborough*, 2 P. Will. 491, 495; *Sugden on Vend.* ch. 16, 17; *Green v. Slater*, 4 John. Ch. R. 38; *Toulman v. Steere*, 3 Meriv. R. 210; *Powel on Mortgages*, by Coventry, vol. 2, p. 454, note A.; *Com. Dig. Chancery*, 4 A. 10, 4 I. 3, 4 I. 4, 4 W. 28.

gatory and valid, notwithstanding they may be affected with some peculiar trusts or equities in the hands of the executors. For the purchaser cannot be presumed to know, that the sale may not be required, in order to discharge the debts of the testator, for which they are legally bound before all other claims.¹ But if the purchaser knows, that the executor is wasting and turning the testator's estate into money, the more easily to run away with it, or for any other unlawful purpose; he will be deemed *particeps criminis*, and his purchase set aside as fraudulent.²

§ 423. The reason for this diversity of doctrine has been fully stated by Sir William Grant. "It is true, that executors are in equity mere trustees for

¹ 2 Fonbl. Eq. B. 2, ch. 6, § 2, and notes (*k*) and (*l*); *Humble v. Bill*, 2 Vern. R. 444; *Ewer v. Corbet*, 2 P. Will. 148; *McLeod v. Drummond*, 14 Ves. 359; S. C. 17 Ves. 154, 155; *Hill v. Simpson*, 7 Ves. 166; *Scott v. Tyler*, 2 Dick. 712, 725; *Newland on Contr.* ch. 36, p. 512, 513, 514; *Com. Dig. Chancery*, 4 W. 29; *Rayner v. Pearsall*, 3 John. Ch. R. 578. — This doctrine was overthrown in the case of *Humble v. Bill*, upon appeal to the House of Lords. 1 Bro. Par. Cas. 71. It was, however, reasserted in *Ewer v. Corbet*, 2 P. Will. 148; *Nugent v. Clifford*, 1 Atk. 463; *Elliot v. Merryman*, 2 Atk. 42; *Ithell v. Beame*, 1 Ves. R. 215; *Meade v. Lord Orrery*, 3 Atk. 235; *Dickenson v. Lockyer*, 4 Ves. 36; *Hill v. Simpson*, 7 Ves. 152; *Taylor v. Hawkins*, 8 Ves. 209; *McLeod v. Drummond*, 14 Ves. 352; S. C. 17 Ves. 153. In this last case, the whole of the authorities were examined at large by Lord Eldon, and commented on with his usual acuteness. See, also, *Andrews v. Wrigley*, 4 Bro. Ch. R. 125.

² *Worseley v. De Mattos*, 1 Burr. 475; *Ewer v. Corbet*, 2 P. Will. 148; *Meade v. Lord Orrery*, 3 Atk. 235, 237; *Benfield v. Solomons*, 9 Ves. 86, 87; *Hill v. Simpson*, 7 Ves. 152; *McLeod v. Drummond*, 14 Ves. 359; S. C. 17 Ves. 153; *Newland on Contr.* ch. 36, p. 513; 1 Madd. Ch. Pr. 228, 229, 230; *Drohan v. Drohan*, 1 Ball & Beatt. 185; *Com. Dig. Chancery*, 4 W. 28; *Scott v. Tyler*, 2 Bro. Ch. R. 431; 2 Dick. 712, 725; *Bonney v. Ridgard*, cited 2 Bro. Ch. R. 438; 4 Bro. Ch. R. 130; *Scott v. Nesbit*, 2 Bro. Ch. R. 641; S. C. 2 Cox, R. 183.

the performance of the will ; yet, in many respects, and for many purposes, third persons are entitled to consider them absolute owners. The mere circumstance, that they are executors, will not vitiate any transaction with them ; for the power of disposition is generally incident, being frequently necessary. And a stranger shall not be put to examine, whether, in the particular instance, that power has been discreetly exercised. But, from that proposition, that a third person is not bound to look to the trust in every respect, and for every purpose, it does not follow, that dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character, as trustee, when he knows the executor is applying the assets to a purpose wholly foreign to his trust. No decision necessarily leads to such a consequence.”¹ Indeed, the doctrine may be even more generally stated ; that he, who has voluntarily concurred in the commission of a fraud by another, shall never be permitted to obtain a profit thereby against those, who have been thus defrauded.

§ 424. It seems at one time to have been thought, that no person, but a creditor, or a specific legatee of the property, could question the validity of a disposition made of assets by an executor, however fraudulent it might be. But that doctrine is so repugnant to true principles, that it could scarcely be maintained, whenever it came to be thoroughly sifted.² It is now well understood, that pecuniary and residuary legatees may question the validity of such a disposition ; and, indeed, residuary legatees

¹ *Hill v. Simpson*, 7 Ves. 166.

² *Meade v. Lord Orrery*, 3 Atk. 235 ; 14 Ves. 361 ; 17 Ves. 169.

stand upon a stronger ground than pecuniary legatees generally ; for, in a sense, they have a lien on the fund, and may go into Equity to enforce it upon the fund.¹

425. The last class of cases, which it is proposed to consider under the present head of constructive fraud, is that of voluntary conveyances of real estate, in regard to subsequent purchasers.² This class is founded, in a great measure, if not altogether, upon the provisions of the Statute of 27th of Eliz. ch. 4, which has been already alluded to. The object of that Statute was, to give full protection to subsequent purchasers from the grantor, against mere volunteers under prior conveyances. As between the parties themselves, such conveyances are positively binding, and cannot be disturbed ; for the statute does not reach such cases.³

§ 426. It was for a long period of time a much litigated question in England, whether the effect of the Statute was to avoid all voluntary conveyances, (that is, such as were made merely in consideration of natural love or affection, or were mere gifts,) in

¹ *Hill v. Simpson*, 7 Ves. 152 ; *McLeod v. Drummond*, 14 Ves. 359 ; S. C. 17 Ves. 169 ; *Bonny v. Redgard*, cited 2 Bro. Ch. R. 438 ; 4 Bro. Ch. R. 130 ; 17 Ves. 165. — Mr. Maddock (1 Madd. Ch. Pr. 230) states, that “Residuary and General Legatees, and, as it seems, Co-executors, are never permitted to question the disposition, which the executors have made of the assets. But Creditors, and specific and pecuniary Legatees, may follow either legal or equitable assets into the hands of third persons, to whom fraud is imputable.” It appears to me, that the cases above cited, and especially that of *McLeod v. Drummond*, 14 Ves. 353 ; S. C. 17 Ves. 153, establish a different conclusion.

² The Statute does not extend to conveyances of personal property, but only of real property. *Jones v. Croucher*, 1 Sim. & Stu. R. 315.

³ *Petre v. Espinasse*, 2 Mylne & Kean, 496 ; *Bill v. Claxton*, Id. 503, 510.

favor of subsequent purchasers; whether such purchasers had notice of the conveyance or not; or whether the conveyance was *bonâ fide* made, or made with a fraudulent intent. After no inconsiderable diversity of judgment and opinion, the doctrine has at length been established in England, (whether in conformity to the language or intent of the Statute, is exceedingly questionable,) that all such conveyances are void, as to subsequent purchasers, whether with or without notice, and although the conveyance was *bonâ fide*, and without the slightest admixture of intentional fraud; upon the ground that the statute in every such case infers fraud, and will not suffer the presumption to be gainsaid.¹ The

¹ *Doe v. Manning*, 9 East, R. 58; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 86, 111; *Buckle v. Mitchell*, 18 Ves. 100; Com. Dig. Chancery, 4 C. 7; *Sterry v. Arden*, 1 John. Ch. R. 261, 267 to 271; Com. Dig. *Covin*, B. 3, 4; Sugden on Vendors, ch. 16, § 1, art. 1, 2.—The elaborate judgment of Lord Ellenborough, in *Doe v. Manning*, (9 East. R. 58,) contains a large survey of the authorities, to which the learned reader is referred. See also, 1 Madd. Ch. Pr. 421 to 427; 1 Fonbl. Eq. B. 1, ch. 4, § 3, and notes (f) and (g); Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, p. 188 to 192; Newland on Contracts, ch. 34, p. 391; 2 Hovenden on Frauds, ch. 18, p. 73, &c.; Belt's Suppt. to Vesey, 25, 26; Atherley on Marr. Set. ch. 13, p. 187, &c. 193, 194; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 409 to 411; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 86, 111; *Doe v. Rutledge*, Cowper R. 711, 712. Mr. Fonblanque has assailed the doctrine, that a purchaser with notice should still be entitled to prevail against the voluntary conveyance, with great force of reasoning. He asserts, that it amounts to an encouragement, on the part of the purchaser, of a breach of that respect, which is morally due to the fair claims of others; and that it may render the provisions of a Statute, intended by the Legislature to be preventive of fraud, the most effectual instrument of accomplishing it. 1 Fonbl. Eq. B. 1, ch. 4, § 13, note (g). To which, it may be added, that it affords a temptation, nay, a premium and justification on the part of the grantor, to violate those obligations, which his own voluntary conveyance imports, and which, in conscience and sound morals, he is bound to hold sacred.

doctrine, however, is admitted to be full of difficulties ; and it has been confirmed, rather upon the pressure of authorities, and the vast extent, to which titles have been acquired and held under it, than upon any notion, that it has a firm foundation in reason and just construction. The rule, *stare decisis*, has here been applied, to constitute the repose and security of titles fairly acquired, upon the faith of judicial decisions.¹

§ 427. In America, a like diversity of judgment has been exhibited. Mr. Chancellor Kent has held the English doctrine obligatory, as the true result of the authorities. But at the same time, he is strongly inclined to the opinion, that, where the purchaser has actual (not merely constructive) notice, it ought not to prevail.² When the same case, in which this opinion was declared, came before the Court of Errors of New-York, Mr. Chief Justice Spencer delivered an elaborate opinion against the English doctrine ; and asserted, that no voluntary conveyance, not originally fraudulent, was within the Statute. The Court of Errors then left the question open for future decision ;³ and the doctrine of Mr. Chief Justice Spencer has been asserted in the Supreme Court of the same State at a later period.⁴

§ 428. The question does not seem, positively, to have been adjudged in Massachusetts. But in an important case of a voluntary conveyance, (which the Court adjudged to be intentionally fraudulent,)

¹ Ibid.

² *Sterry v. Arden*, 1 John. Ch. R. 261, 270, 271 ; S. C. 12 John. R. 536.

³ *Sterry v. Arden*, 12 John. R. 536, 554 to 559.

⁴ *Jackson v. Town*, 4 Cowen, R. 603, 604.

the Court said; "That deed conveyed his (the grantor's) title to the plaintiff, as against the grantor, and *every other person*, unless it was *fraudulent* at the time of its execution; in which case it was void against creditors and subsequent purchasers."¹ From this language, it is certainly a just inference, that voluntary conveyances, *bonâ fide* made, are valid against subsequent purchasers.

§ 429. The Supreme Court of the United States have come to the same conclusion; and it may be fit here to state in their own words the grounds of that opinion. "The Statute of Elizabeth is in force in this district [of Columbia]. The rule, which has been uniformly observed by this Court in construing statutes, is to adopt the construction made by the Courts of the country, by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes, which are adopted in any of these states. By adopting them, they become our own, as entirely as if they had been enacted by the Legislature of the State. The received construction in England, at the time they are admitted to operate in this country, indeed, to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however we may respect subsequent decisions, (and certainly they are entitled to great respect,) we do not admit their absolute authority. If the English Courts vary their construction of a statute, which is common to the two countries, we do not hold ourselves bound to fluctuate with them.

¹ *Ricker v. Ham*, 14 Mass. R. 139. And see Mr. Bigelow's note, Big. Dig. *Conveyance*, p. 200.

§ 430. “ At the commencement of the American Revolution, the construction of the Statute of 27th of Elizabeth seems not to have been settled. The leaning of the Courts towards the opinion, that every voluntary settlement should be deemed void, as to a subsequent purchaser, was very strong ; and few cases are to be found, in which such a conveyance has been sustained. But these decisions seem to have been made on the principle, that such subsequent sale furnished a strong presumption of a fraudulent intent ; which threw on the person, claiming under the settlement, the burthen of proving it, from the settlement itself, or from extrinsic circumstances, to be made in good faith ; rather than as furnishing conclusive evidence not to be repelled by any circumstances whatever.

§ 431. “ There is some contrariety and some ambiguity, in the old cases on the subject. But this Court conceives, that the modern decisions, establishing the absolute conclusiveness of a subsequent sale, to fix fraud on a family settlement, made without valuable consideration — fraud not to be repelled by any circumstances whatever — go beyond the construction, which prevailed at the American Revolution ; and ought not to be followed.

§ 432. “ The universally received doctrine of that day unquestionably went as far as this. A subsequent sale, without notice, by a person, who had made a settlement, not on a valuable consideration, was presumptive evidence of fraud ; which threw on those, claiming under such settlement, the burthen of proving, that it was made *bonâ fide*. This principle, therefore, according to the uniform course of this

Court, must be adopted in construing the Statute of 27th of Elizabeth, as it applies to this case."¹

§ 433. The doctrine, as to subsequent conveyances of the grantor, avoiding prior voluntary conveyances, applies only to purchasers, strictly and properly so called; for, as between voluntary conveyances, the first prevails; unless the last be for the payment of debts, which, indeed, can scarcely, under such circumstances, be called voluntary.² The doctrine is to be understood with this qualification, that the first conveyance is *bonâ fide*; for if it be fraudulent, the second will prevail.³ But then in cases between different volunteers, a Court of Equity will generally not interfere, but will leave the parties where it finds them, as to title. It will not aid one against another; neither will it enforce a voluntary contract.⁴ There are exceptions; but they stand upon special grounds; such as the interference of Courts of Equity in favor of settlements of a wife

¹ *Cathcart v. Robinson*, 5 Peters, 280.

² 1 Fonbl. Eq. B. 1, ch. 4, § 12; *Id.* B. 1, ch. 5, § 2, and note (h); *Jeremy on Eq. Jurisd.* B. 2, ch. 3, p. 293, § 25; *Atherley on Setts.* ch. 13, p. 185; *Goodwin v. Goodwin*, 1 Ch. Rep. 92, [173]; *Clavering v. Clavering*, 2 Vern. R. 473; S. C. Prec. Ch. 235; S. C. 1 Bro. Parl. Cas. 122; *Villiers v. Beaumont*, 1 Vern. 100; *Allen v. Arne*, 1 Vern. 365; *Earl of Bath and Montague's Case*, 3 Ch. Cas. 88, 89, 93; *Chadwill v. Dollman*, 2 Vern 530, 531; *Boughton v. Boughton*, 1 Atk. 625; *Worral v. Worral*, 3 Meriv. 256, 269; *Sear v. Ashvell*, 3 Swanst. 411, note.

³ *Naldred v. Gilham*, 1 P. Will. 580, 581; *Colton v. King*, 2 P. Will. 359; *Cecil v. Butcher*, 2 Jac. & Walk. 573 to 578; 1 Fonbl. Eq. B. 1, ch. 4, § 25; *Viers v. Montgomery*, 4 Cranch, 177.

⁴ *Pulvertoft v. Pulvertoft*, 18 Ves. 91, 93, 99; *Colman v. Sarrel*, 1 Ves. jr. 52, 54; *Ellison v. Ellison*, 6 Ves. 656; *Antrobus v. Smith*, 12 Ves. 39; *Minturn v. Seymour*, 4 John. Ch. R. 500; *Atherley on Setts.* ch. 13, p. 186; *Id.* ch. 5, p. 125, 131 to 145; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and notes (e) and (i); *Id.* B. 1, ch. 5, § 2, and note (h), § 3.

and children, for whom the party is under a natural and moral obligation to provide.¹

§ 434. But although voluntary conveyances and covenous conveyances may thus, though good between the parties, be set aside, and held void as to creditors, and purchasers, and others, whom they may injure in their rights and interests; yet we are not to understand, that Courts of Equity grant this relief, and interpose in favor of the latter, under all circumstances. On the contrary, they never do interpose at all, where the property has been conveyed by the voluntary and covenous grantee to a bonâ fide purchaser for a valuable consideration, without notice. Such a person is a favorite in the eyes of Courts of Equity; and is always protected (as has been already intimated) against claims of this sort.² Indeed, in every just sense, his Equity is equal to that of any other person, whether creditor or purchaser of the grantor; and where the Equity is equal, we have seen, that the rule applies, *Potior est conditio possidentis*.³ And, where there is a bonâ fide purchaser from the voluntary or fraudulent

¹ 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (c); Id. B. 1, ch. 5, § 2; Atherley on Setts. ch. 3, p. 131 to 139; 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (v.)

² Com. Dig. Chancery, 4 I. 3, 4 I. 11, 4 W. 29, ante, § 381; Atherley on Marr. Sett. ch. 5, p. 129, ch. 14, p. 238; 2 Fonbl. Eq. B. 3, ch. 3, § 1, and notes; Id. B. 2, ch. 6, § 2; Com. Dig. *Covin*, B. 3, 4; Chancery, 4 I. 3, 4 I. 4, 4 W. 29; Sugden on Vendors, ch. 16, § 10; Prodgers v. Langham, 1 Sid. R. 133; Parr v. Eliason, 1 East. 92, 95; Sterry v. Arden, 1 John. Ch. R. 261, 271; S. C. 12 John. R. 536; Roberts v. Anderson, 3 John. Ch. R. 377, 378; S. C. 18 John. R. 513; Bean v. Smith, 2 Mason R. 278, 279, 280; Gore v. Brazier, 3 Mass. R. 541; State of Connecticut v. Bradish, 14 Mass. R. 296; Trull v. Bigelow, 16 Mass. R. 406.

³ 2 Fonbl. Eq. B. 3, ch. 3, § 1; Id. B. 2, ch. 6, § 2; 1 Fonbl. B. 1, ch. 4, § 25; Fletcher v. Peck, 6 Cranch, 87, 133.

grantor, and another from the voluntary or fraudulent grantee, the grantees will have preference, according to the priority of their respective titles.¹

§ 435. The Civil Law proceeded upon the same enlightened policy. In the case of alienations of movables and immovables, bonâ fide purchasers for a valuable consideration, having no knowledge of any fraudulent intent of the grantor or debtor, will be protected. *Ait Prætor. Quæ fraudationis causa gesta erunt, cum eo, qui fraudem non ignoraverit, actionem dabo.* Upon this, there follows this comment. *Hoc Edictum eum coercet, qui sciens eum in fraudem creditorum hoc facere, suscepit, quod in fraudem creditorum fiebat. Quare, si quid in fraudem creditorum factum sit, si tamen is, qui cepit, ignoravit, cessare videntur verba Edicti.*² And the very case is afterwards put, of a bonâ fide purchaser from a fraudulent grantee, the validity of which is unequivocally affirmed. *Is, qui a debitore, cujus bona possessa sunt, sciens rem emit, iterum alii bonâ fide ementi vendidit; quæsitum sit, an secundus emptor conveniri potest. Sed verior est Sabini sententia, bonâ fide emptorem non teneri; quia dolus ei duntaxat nocere debeat, qui eum admisit; quemadmodum diximus, non teneri eum, si ab ipso debitore ignorans emerit. Is autem, qui dolo malo emit, bonâ fide autem ementi vendidit, in solidum pretium rei, quod accepit, tenebitur.*³ The same doctrine is fully recognised by Voet;⁴ and, indeed, its intrinsic justice is so persuasive and satisfactory, that, whether derived from

¹ Anderson v. Roberts, 18 John. R. 513; S. C. 3 John. Ch. R. 377, 378; Sands v. Hildreth, 14 John. R. 498. But see Preston v. Cropot, 1 Connect. R. 527, note; Sugden on Vendors, ch. 16, § 10.

² Dig. Lib. 42, tit. 8, l. 6, § 8; 1 Domat. B. 2, tit. 10, § 1, art. 3.

³ Dig. Lib. 42, tit. 8, l. 9; Pothier, Pand. Lib. 42, tit. 8, art. 3, § 25.

⁴ 2 Voet, Comm. Lib. 42, tit. 8, § 10, p. 195.

Roman sources or not, it would have been truly surprising, not to have found it embodied in the jurisprudence of England.¹

§ 436. Indeed, the principle is more broad and comprehensive, and, though not absolutely universal, (for we have seen that there are anomalies in the case of judgment creditors, and the case of dower),² yet it is generally true, and applies to cases of every sort, where an equity is sought to be enforced against a *bonâ fide* purchaser of the legal estate without notice; or even against a *bonâ fide* purchaser, not having the legal estate, where he has a better right or title to call for the legal estate, than the other party.³ It applies, therefore, to cases of accident and mistake, as well as to cases of fraud, which, however remediable between the original parties, are not relievable, as against such purchasers, under such circumstances.

§ 437. We have thus gone over the principal grounds, upon which Courts of Equity grant relief in matters of accident, mistake, and fraud. In all these cases, (to recur to a train of remark already suggested,) it

¹ *Wilson v. Worral's case*, Godb. 161; *Bean v. Smith*, 2 Mason, 279 to 281; *Anderson v. Roberts*, 18 John. R. 513.

² See ante, § 410, note; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note, p. 22; 2 Fonbl. Eq. B. 2, ch. 6, § 2, notes (*h*) and (*i*); Id. B. 3, ch. 3, § 1, note (*a*); Id. B. 6, ch. 3, § 3, note (*i*); 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*u*); Id. B. 1, ch. 1, § 3, note (*f*), p. 22; Id. B. 1, ch. 5, § 4; *Jeremy on Eq. Jurisd.* B. 2, ch. 3, p. 283; *Mitford, Pl. Eq. by Jeremy*, 274, note (*d*).

³ 2 Fonbl. B. 2, ch. 6, § 2, and note (*h*); 1 Fonbl. B. 1, ch. 4, § 25, and note (*e*); Id. B. 1, ch. 1, § 7; *Sugden on Vendors*, ch. 16; 2 *Chance on Powers*, ch. 23, § 1, art. 2859 to 2863; *Pomfret v. Windsor*, 2 Ves. 472, 486; *Medlicott v. O'Donel*, 1 B. & Beatt. 171; *Ex parte Knett*, 11 Ves. 618; *Brace v. Duchess of Marlborough*, 2 P. Will. 495; ante, § 411.

may be truly asserted, that the remedy and relief administered are, in general, more complete, adequate, and perfect, than they can be at Common Law. The remedy is more complete, adequate, and perfect, because it uses instruments and proofs, not accessible at law ; such as an injunction, operating to prevent future injustice, and a bill of discovery, addressing itself to the conscience of the party for matters of proof. The relief, also, is more complete, adequate, and perfect, inasmuch as it adapts itself to the special circumstances of each particular case ; adjusting all cross equities ; and bringing all the parties in interest before the Court, so as to prevent multiplicity of suits and interminable litigation.¹ Courts of Law, on the other hand, cannot do more than pronounce a positive judgment in a set formulary, for the plaintiff, or for the defendant, without professing or attempting to qualify that judgment, according to the relative equities of the parties. Thus, if a deed is fraudulently obtained without consideration ; or for an inadequate consideration ; or if, by fraud, accident, or mistake, a deed is framed contrary to the intention of the parties in their contract on the subject ; the forms of proceeding in the Courts of Common Law will not admit of such an investigation of the matter in those Courts, as will enable them to do justice. The parties claiming under the deed have, therefore, an advantage in proceeding in a Court of Common Law, which it is against conscience, that they should use. Courts of Equity will, (as we have seen,) on this very ground interfere to restrain proceedings at law, until the matter

¹ See Mitf. Pl. Eq. by Jeremy, p. 111, 112, 113.

has been properly investigated. And, if it finally appears, that the deed has been improperly obtained ; or that it is contrary to the intention of the parties in their contract ; they will, in the first case, compel a delivery and cancellation of the deed ; or order it to be deposited with an officer of the Court ; and farther direct a reconveyance of the property, if any has been so conveyed, that a reconveyance may be necessary. In the second case, they will either rectify the deed according to the intention of the parties ; or will restrain the use of it in the points, in which it has been framed contrary to, or has gone beyond, their intention in the original contract.¹

§ 438. In like manner, Courts of Equity will (as we have seen) aid defective securities under like circumstances. They will also interfere, not only to relieve against instruments, which create rights ; but against those, which destroy rights ; such as a release fraudulently or improperly obtained.² And, finally, they will not only prevent the unfair use of any advantage in proceeding in a Court of ordinary jurisdiction, gained by fraud, accident, or mistake ; but they will, also, if the consequences of the advantage have been actually obtained, restore the injured party to his rights.³

§ 439. The flexibility of Courts of Equity, too, in adapting their decrees to the actual relief required by the parties, in which their proceedings form so marked a contrast to the proceedings at the Common Law, is illustrated in a striking manner, in cases of accident, mistake, and fraud. If a decree were in all cases required to be given in

¹ Mitf. Pl. Eq. by Jeremy, 128, 129 ; Id. 112, 113.

² Mitf. Pl. Eq. by Jeremy, 129, 130.

³ Id. 131.

a prescribed form, the remedial justice would necessarily be very imperfect, and often wholly beside the real merits of the case. Accident, mistake, and fraud, are of infinite variety in form, character, and circumstances; and are incapable of being adjusted by any single and uniform rule. Of each of them, one might say, *Mille trahit varios adverso sole colores*. The beautiful character, or pervading excellence, if one may so say, of Equity Jurisprudence is, that it varies its adjustments and proportions, so as to meet the very form and pressure of each particular case in all its complex habits. Thus, (to present a summary of what has been already stated,) if conveyances or other instruments are fraudulently or improperly obtained, they are decreed to be given up and cancelled.¹ If they are money securities, on which the money has been paid, the money is decreed to be paid back. If they are deeds, or other muniments of title, detained from the rightful party, they are decreed to be delivered up.² If they are deeds suppressed or spoliated, the party is decreed the same rights, as if they were in his possession and power.³ If there has been any undue concealment, or misrepresentation, or specific promise collusively broken, the injured party is placed in the same situation, and the other party is compelled to do the same acts, as if all had been transacted with the utmost good faith.⁴ If the party says nothing; but by his expressive silence misleads an-

¹ See 1 Madd. Ch. Pr. 208, 211, 212, 261; Mitf. Pl. Eq. by Jeremy, 127, 128, 132.

² Mitf. Pl. Eq. by Jeremy, 124.

³ Mitf. Pl. Eq. 117, 118; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 1, 385, &c.; 1 Madd. Ch. Pr. 211, 258.

⁴ 1 Madd. Ch. Pr. 209, 210; 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes.

other to his injury, he is compellable to make good the loss ; and his own title, if the case requires it, is made subservient to that of the confiding purchaser.¹ If the party, by fraud or misrepresentation, induces another to do an act injurious to a third person, he is made responsible for it.² If, by fraud or misrepresentation, he prevents acts from being done, Equity treats the case, as to him, as if it were done ; and makes him a trustee for the other.³ If a will is revoked by a fraudulent deed, the revocation is treated as a nullity.⁴ If a devisee obtains a devise by fraud, he is treated as a trustee of the injured parties.⁵ In all these, and many other cases, which might be mentioned, Courts of Equity undo, what has been done, if wrong ; and do, what has been left undone, if right.

§ 440. We may conclude this head, by calling the attention of the reader to the remark, (which has been necessarily introduced in another place,) that Courts of Equity will exercise a concurrent jurisdiction with Courts of Law in all matters of fraud, excepting only of fraud in obtaining a will, which, if of real estate, is constantly referred to a Court of Law to decide it, in the shape of an issue of *devisavit vel non* ; and which, if of personal estate, is in England cognizable in the Spiritual or Ecclesiastical Courts.⁶

¹ 1 Madd. Ch. Pr. 211 ; 1 Fonbl. B. 1, ch. 3, § 4, and notes (m) and (n).

² 3 P. Will. 131, note ; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 388, 389.

³ 1 Madd. Ch. Pr. 252 ; 1 Jac. & Walk. 96 ; 11 Ves. 638.

⁴ 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), p. 13 ; Id. B. 1, ch. 2, § 13, note (q). But see Ambler, R. 215 ; 3 Bro. Ch. R. 156, note ; 7 Ves. 373, 374.

⁵ 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), p. 13 ; 2 Fonbl. B. 4, Pt. 1, ch. 1, § 3, and note (g) ; Mitf. Pl. Eq. by Jeremy, 257.

⁶ Ante, § 184.

But, even in this case, the bill may be retained, to abide the decision in the proper Court, and relief be decreed according to the event. No other excepted case is known to exist ; and it is not easy to discern the grounds, upon which this exception stands, in point of reason or principle, though it is clearly settled by authority.¹ But where the fraud does not go to the whole will, but only to some particular clause ; or where the fraud is in unduly obtaining the consent of the next of kin to the Probate, Courts of Equity will lay hold of these circumstances, to declare the executor a trustee for the next of kin.²

¹ Ante, § 184 ; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), p. 13 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 3, and note (e) ; Kenrick v. Brandly, 3 Brown. Parl. Cas. 353. See Wild v. Hobson, 2 Ves. & B. 108 ; Mitf. Pl. Eq. by Jeremy, 257 ; Barnesley v. Powell, 1 Ves. 284 ; Id. 119 ; 1 Madd. Ch. Pr. 206.

² Mitf. Pl. Eq. by Jeremy, 257 ; Barnesley v. Powell, 1 Ves. 284.

CHAPTER VIII.

ACCOUNT.

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

§ 442. Let us begin with matters of ACCOUNT. One of the most ancient forms of action at the Common Law is the action of account. But the modes of proceeding in that action, though aided from time to time by statutable provisions, were found so very dilatory, inconvenient, and unsatisfactory, that, as

soon as Courts of Equity began to assume jurisdiction in matters of account, as they did at a very early period, the remedy at law began to decline; and, though some efforts have been made in modern times to resuscitate it, it has in England fallen into almost total disuse.¹ Courts of Equity have for a long time exercised a general jurisdiction in all cases of mutual accounts, upon the ground of the inadequacy of the remedy at law; and have extended the remedy to a vast variety of cases, (such as to implied and constructive trusts,) to which the remedy at law never was applied.² So that now the jurisdiction extends not only to cases, of an equitable nature; but to many cases, where the form of the account is purely legal; and the items, constituting the account, are founded on obligations purely legal. On such legal obligations, however, actions, though not in the form of accounts, yet in the form of assumpsit, covenant, and debt, are still daily prosecuted in the Courts of Common Law,³

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

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

³ It was, at one time, doubted, whether an action of Assumpsit would lie for the balance of an account, where there are items on both sides. But it is now fully established, that however numerous the items may be, still, if there appears any thing due on one side, an action of Assumpsit will lie for the balance. *Tomkins v. Willshear*,

and legal defences are there brought forward. But even in these cases, as the Courts possess no authority to stop the ordinary progress of such suits, for the purpose of subjecting the matters in dispute to the investigation of a more convenient tribunal than a jury; unless the parties agree to a voluntary arrangement for this purpose, the cause often proceeds to trial in a manner wholly unsuitable to its real merits.¹

§ 443. The difficulties in the modes of proceeding in actions of account, and the convenience of the modes of proceeding in suits in Equity, to attain the ends of substantial justice, are stated in an elementary work of solid reputation, with great clearness and force. The language of the learned author is as follows. “The proceedings in this action being difficult, dilatory, and expensive, it is now seldom used, especially if the party have other remedy, as debt, covenant, case, or if the demand be of consequence, and the matter of an intricate nature; for in such case, it is more advisable to resort to a Court of Equity, where matters of account are more commodiously adjusted, and determined more advantageously for both parties; the plaintiff being entitled

5 Taunt. R. 431; S. C. 1 Marsh. R. 115, and the cases there cited; 2 Saund. 127, Williams's note (*d*). The use of the old action of Account is there said to be, where the plaintiff wants an account, and cannot give evidence of his right without it. *Ibid*.

¹ 2 Parl. Common Law Rep. 1830, p. 25, 26; *Wilkin v. Wilkin*, Salk. 9; 3 Black. Comm. 184. — The Parliamentary Commissioners, in their second Report on the Common Law, (8 March, 1830, p. 26,) proposed to invest the Courts of Common Law with power to refer such accounts to Auditors in such cases; a suggestion, which has since been adopted; as, indeed, it had been adopted before in some of the American States. See *Duncan v. Logan*, 3 John. Ch. R. 361; Act of Massachusetts, 20 Feb. 1818, ch. 142.

to a discovery of books, papers, and the defendant's oath; and, on the other hand, the defendant being allowed to discount the sums paid or expended by him; to discharge himself of sums under forty shillings by his own oath; and if by answer or other writing, he charges himself, by the same to discharge himself, which will be good, if there be no other evidence. Farther, all reasonable allowances are made to him; and if, after the accmpt is stated, any thing be due to him upon the balance, he is entitled to a decree in his favor."¹

§ 445. To expound and justify the truth of these remarks, it may be well to take a short review of the old action of account; and, to see to what narrow boundaries it was confined, and by what embarrassments it was surrounded.

446. At the Common Law, an action of account lay only in cases, where there was either a privity in deed by the consent of the party, as against a bailiff or receiver appointed by the party, or a privity in law, *ex provisione legis*, as against a guardian in socage.² An exception, indeed, or rather an extension of the rule, was, for the benefit of trade and the advancement of commerce, allowed in favor of and between merchants; and, therefore, by the law merchant, one naming himself merchant, might have an account against another, naming him merchant, and charge him as receiver.³ But in truth, in

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

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

³ Co. Litt. 172 a; *Earl of Devonshire's Case*, 11 Co. R. 89.

almost every supposable case of this sort, there was an established privity of contract. With this exception, however, (if such it be,) the action was strictly confined to bailiffs, receivers, and guardians in socage.¹ So strictly was this privity of contract construed, that the action did not lie by or against executors and administrators. The Statute of 13th of Edw. III, ch. 23, gave it to the executors of a merchant; the Statute of 25th of Edw. III, ch. 5, gave it to the executors of executors; and the Statute of 31st of Edw. III, ch. 11, to administrators.² But it was not until the Statute of 3d and 4th of Anne, ch. 16, that it lay against executors and administrators of guardians, bailiffs, and receivers.³

§ 447. But in all cases of this sort, though there was no remedy at the Common Law, yet a bill in Equity might be maintained for an account against the personal representatives of guardians, bailiffs, and receivers; and such was the usual remedy, prior to these remedial Statutes.⁴ And no action of account lay at the Common Law against wrong doers;⁵ nor by one jointenant or tenant in common, or his executors or administrators, against the other, as bailiff, for receiving more than his share; or against his executors or administrators, unless there was some special contract between them, whereby the one made the other his

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

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

³ Ibid; Bull. N. P. 127; Earl of Devonshire's Case, 11 Co. R. 89.

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

⁵ Bac. Abridg. *Accompt* B. — We shall presently see that Courts of Equity frequently administer relief in cases of account against wrong doers. See Bac. Abridg. *Accompt* B.; Bosanquet v. Dashwood, Cas. T. Tall. 38, 41.

bailiff; for the relation itself was held not to create any privity of contract by operation of law.¹ This defect was afterwards cured by the Statute of 3d and 4th of Anne, ch. 16.² And the Common Law was strict, as to who was to be accounted a bailiff or receiver; for a bailiff was understood to be one, who had the administration and charge of lands, goods, and chattels, to make the best benefit for the owner; and against whom, therefore, an action of account would lie for the profits, which he had made, or might, by his industry or care, have reasonably made; his reasonable charges and expenses being deducted.³ A receiver was one, who received money to the use of another to render an account; but upon his account, he was not allowed his expenses and charges, except in the case of merchant receivers; and this was provided (as it was said) by the law of the land in favor of merchants, and for the advancement of trade and traffic.⁴ So that it will be at once perceived from these cases, (and many others might be mentioned,)⁵ that the remedy at the Common Law was very narrow; and, though it was afterwards enlarged, that would not of itself displace the jurisdiction originally vested in equity.

§ 446. In the next place, as to the modes of proceeding in actions of account. At the Common

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

² *Ibid*; 3 Black. Comm. 164.

³ Co. Litt. 172 *a*; 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note (*n*).

⁴ Co. Litt. 172 *a*.

⁵ See Bac. Abridg. *Accompt B, C*; Com. Dig. *Accompt A, B, D*; 3 Reeves, Hist. L. 337, 338, 339; 3 Reeves, Hist. L. 75; 4 Reeves, Hist. L. 388.

Law, before either the Statute of Marlebridge, ch. 23, or of Westminster 2d, ch. 11, there were two methods of proceeding against an accountant; one, by which the party, to whom he was accountable, might by consent of the accountant, either take the account himself, or assign an auditor or auditors to take it; and then have his action of debt for the arrearages; or, in more modern times, an action on the case, or *insimul computassent*. And the accountant, if aggrieved, might have his writ of *ex parte talis*, to reëxamine the account in the exchequer. The other proceeding of the plaintiff was, in the first instance, by way of a writ of account. The process, by which this latter remedy might be made more effectual, is particularly described in the Statute of Marlebridge, and the Statute of Westminster 2d, upon which it is unnecessary to dwell.

§ 447. In the action of account, there are two distinct courses of proceeding. In the first place, the party may interpose any matter in abatement or bar of the proceeding; and if he fails in it, then there is an interlocutory judgment, that he shall account (*quod computet*) before Auditors.² After this judgment is entered, it is the duty of the Court to assign auditors, who are armed with authority to convene the parties before them, *de die in diem*, at any time or place they shall appoint, until the accounting is determined. The time, by which the account is to be settled, is prefixed by the Court. But if the account be of a long or confused nature, the Court will, upon the application of the parties, enlarge the time. In taking the account, the auditors in an action of account at the

¹ Com. Dig. *Accompt* A. and note (a); 3 Reeves, Hist. Law, 75, 76.

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

Common Law could not administer an oath, except in one or two particular cases. But under the Statute of 3d and 4th Anne, ch. 16, the auditors are empowered to administer an oath and examine the parties touching the matters in question, in cases within that act.¹

§ 448. If, in the progress of the cause before the auditors, when the items are successively brought under review, any controversy arises before the auditors, as to charging or discharging any items, the parties have a right, if the points involve matters of fact, to make up and join issues upon such items respectively; and if the points involve matters in law, they have a right in like manner to put in, and join demurrers upon each distinct item. These issues, when so made up, are to be certified by the auditors to the Court; and then the matters of law will be decided by the Court; and the matters of fact will be directed to be tried by a jury; after which the accounts are to be settled by the auditors according to the results of these trials. From this circumstance the proceedings before the auditors are often tedious, expensive, and inconvenient.² And, indeed, as different points, both of fact and law, may arise in different stages of the suit, and in different examinations before the auditors, as well after as before such issues have been joined and tried; it ought not to be surprising, that the cause should be procrastinated for a great length of time,

¹ Co. Litt. 199; Harg. note 83; *Wheeler v. Home*, Willes, R. 208, 210; 1 Selwyn N. P. 6; Buller, N. P. 127; Bac. Abridg. *Wager of Law*, C.

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

by its transition from one tribunal to another, for the various purposes incident to a due settlement of its merits. And besides these difficulties, there are many actions of account, in which the defendant may wage his law; and thus escape from answering his adversary's claim.¹

§ 449. This summary view of the modes of proceeding in the action of account is sufficient to show, that it was a very unfit instrument to ascertain and adjust the real merits of long, complicated, and cross accounts. In the first place, it was inapplicable to a vast variety of cases of equitable claims, of constructive trusts, of fraudulent contrivance, and of tortious misconduct.² In the next place, there was a want of due power to draw out the proper proofs from the party's own conscience; so that, if evidence *aliunde* was unattainable, there was, and there could be no effective redress.³ And it has been well observed by Mr. Justice Blackstone, that notwithstanding all the legislative provisions in aid of the common law action of account, "it is found by expe-

¹ Com. Dig. *Pleader* 2 W. 45; Co. Litt. 90 *b*; Ib. 295 *b*; 2 Saund. Rep. 65 *a*; Archer's Case; Cro. Eliz. 579; Bac. Abridg. *Wager of Law*, D. G.

² See 1 Fonbl. B. 1, ch. 1. § 3, note (*f*) p. 13, 14; 2 Fonbl. Eq. B. 2, ch. 7 § 6, and notes; ante, § 67.

³ Mr Chancellor Kent, in *Duncan v. Lyon*, (8 John. Ch. R. 361) said "I have not been able to find any good reason, why that action [account] has so totally fallen into disuse," assigning as a ground of his remark, that "in that action the auditors have all the requisite powers; for they can compel the parties to account, and be examined under oath." If what is stated in the text be correct, it is manifest, that the action of account, as administered in England, cannot be admitted to be an equivalent for a Court of Equity. It is, perhaps, uncertain, whether the learned Chancellor did not mean to confine his remarks to the actual state of the action in New York. See on this point the opinion of the same learned Judge, in *Ludlow v. Simond*, 2 Cain. Cas. Err. 52, 53.

rience, that the most ready and effectual way to settle these matters of account is by a bill in a Court of Equity, where a discovery may be had on the the defendant's oath, without relying merely on the evidence, which the plaintiff may be able to produce."¹

§ 450. Courts of Equity, in suits of this nature, proceed, in many respects, in analogy to what is done at law. The cause is referred to a Master, (acting as an auditor,) before whom the account is taken ; and he is armed with the fullest powers, not only to examine the parties on oath, but to make all the inquiries by testimony under oath, and by documents, and books, and vouchers, to be produced by the parties, which are necessary for the due administration of justice. And when his report is made to the Court, any objections, which have been made before the master, and any exceptions taken to his report may be re-examined by the Court at the instance of the parties, and the whole case moulded, as *ex æquo et bono* is required.² It may, besides, bring all the proper parties in interest before it, where there are different parties concerned in interest ; and if any doubt arises upon any particular demand, it may direct the same to be ascertained by an issue and verdict at law.³ So that there cannot be any real doubt, that the remedy in Equity in cases of account is generally more complete and adequate, than it is, or can be at law.⁴

¹ 3 Black. Com. 164 ; ante, § 67.

² Ex parte Bax, 2 Ves. 388.

³ 1 Eq. Abridg. A. p. 5, note (a).

⁴ See Mitford on Pl. Eq. by Jeremy, 120 ; Corporation of Carlisle v. Wilson, 13 Ves. 278, 279 ; Ante, § 67.

§ 451. This has accordingly been considered in modern times as the true foundation of the jurisdiction.¹ Mr. Justice Blackstone has indeed placed it upon the sole ground of the right of Courts of Equity to compel a discovery ;— “For want,” said he, “of this discovery at law, the Courts of Equity have acquired a concurrent jurisdiction with every other Court in matters of account.”² But this, though a strong, is not the sole, ground of the jurisdiction. The whole machinery of Courts of Equity is better adapted to the purpose in general ; and in many cases, independent of the searching power of discovery, and supposing a Court of Law to possess it, it would be impossible for the latter to do entire justice between the parties ; for equitable rights and claims, not cognizable at law, are often involved in the contest.³ Lord Redesdale has justly said, that in a complicated account a Court of Law would be incompetent to examine it at *Nisi Prius*, with all the

¹ Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 504 ; Mitf. Pl. Eq. by Jeremy, 120 ; Ludlow v. Simond, 2 Cain. Err. 38, 52 ; Rathbone v. Warren, 10 John. R. 595, 596 ; Post v. Kimberley, 9 John. R. 493 ; Duncan v. Lyon, 3 John. Ch. R. 361.

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

³ Ante, § 67.

necessary accuracy.¹ This is the principle, on which Courts of Equity constantly act, by taking cognizance of matters, which, though cognizable at law, are yet so involved with a complex account, that it cannot be properly taken at law ; and until the result of the account, the justice of the case cannot appear.² Matters of account (he added) may indeed be made the subject of an action ; but an account of this sort is not a proper subject for this mode of proceeding. The old mode of proceeding upon the writ of account shows it. The only judgment was, that the party should account ; and then the account was taken by the auditors. The Court never went into it.³

§ 452. It is not improbable, that originally in cases of accounts, which might be cognizable at law, Courts of Equity interfered upon the ground of accident, mistake, or fraud. If so, the ground was very soon enlarged, and embraced mixed cases not governed by these matters. The Courts soon arrived at the conclusion, that the true principle, upon which they should entertain suits for an account in matters cognizable at law, was, that either a Court of Law could not give any remedy, or not so complete a remedy as Courts of Equity. And the moment this principle was adopted in its just extent, the concurrent jurisdiction became almost universal, and reached almost instantaneously its present boundaries.⁴

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

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

³ *Ibid* ; *Cooper, Eq. Pl.* 134.

⁴ *Ante*, § 67 ; *Corporation of Carlisle v. Wilson*, 13 Ves. 278.

§ 453. In virtue of this general jurisdiction in matters of account, Courts of Equity exercise a very ample authority over matters, apparently not very closely connected with it; but which naturally, if not necessarily, attach to such a jurisdiction. Mr. Justice Blackstone has said, "As incident to accounts, they take a concurrent cognizance of the administration of personal assets; consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to, or end in, accounts."¹ But it is far from being admitted, that the sole origin of Equity Jurisdiction on these subjects arises from this source. It is one, but not the sole, source. In many of these cases, as well as in others, which will hereafter be considered, in which accounts may be taken as incidents in the relief granted, there are other distinct, if not independent, sources of jurisdiction; and especially that source, the peculiar attribute of Courts of Equity, the jurisdiction over trusts, not merely express, but implied and constructive.²

§ 454. One of the most difficult questions arising under this head, (and which has been incidentally

¹ 3 Black. Comm. 437.

² Jeremy in Eq. Juris. B. 3. Pt. 2, ch. 5, p. 522, 523, 543; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f); 2 Fonbl. Eq. B. 2, ch. 7, § 6, and notes.

discussed in another place,)¹ is to ascertain, whether there are any, and if any, what are the true boundaries of Equity Jurisdiction in matters of account, cognizable at law. We say cognizable at law; for wherever the account stands upon equitable claims, or has equitable trusts attached to it, there is no doubt, that the jurisdiction is absolutely universal, and without exception, since the party is remediless at law.²

§ 455. But in cases, where there is a remedy at law, there is no small confusion and difficulty in the authorities. The jurisdiction in matters of this sort has been asserted to be maintainable upon two grounds, distinct in their own nature, and yet often running into each other.³ In the first place, it has been asserted, that where, in a matter of account,

¹ Ante, § 67.

² Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 504, 505, 506.

³ See Ante, § 64 to 69, and note (1) to § 69; *Corporation of Carlisle v. Wilson*, 13 Ves. 278, 279. — Lord Chancellor Erskine, in *Corporation of Carlisle v. Wilson*, 13 Ves. 278, 279, maintained the concurrent jurisdiction of Courts of Equity, in matters of account, in a very broad extent. He said, "The principle, upon which Courts of Equity originally entertained suits for an account, where the party had a legal title, is, that though he might support a suit at law, a Court of Law, either cannot give a remedy, or cannot give so complete a remedy as a Court of Equity; and by degrees, Courts of Equity assumed a concurrent jurisdiction in cases of account; for it cannot be maintained, that this Court interferes only, when no remedy can be had at law. The contrary is notorious." — "The proposition asserted against this bill is, that this Court ought to refuse to interfere, by directing an account, if an action for money had and received, or an *indebitatus assumpsit*, can be maintained. That proposition cannot be maintained," &c. — "The proposition is, not that an account may be decreed in every case, where an action for money had and received, or *indebitatus assumpsit*, may be brought, (and, certainly, *indebitatus assumpsit* lies for tolls); but that where the subject cannot be so well investigated in those actions, this Court exercises a sound discretion in decreeing an account."

the party seeks discovery of facts, and these appear upon his bill to be material to his right of recovery ; there, if the answer does in fact make a discovery of such material facts, (for it would be no ground of jurisdiction, if the discovery failed,)¹ the Court, having once a rightful jurisdiction of the cause, ought to proceed to give relief, in order to avoid multiplicity of suits.² And this plain ground is asserted by the learned author of the Treatise of Equity, in the passage already cited ; and it has been often maintained in the English Courts of Equity.³ But (as we have already seen)⁴ there are other authorities in the English Courts, which conflict with this doctrine ; and which, without attempting to lay down any rule for a practical discrimination, as to cases within, and cases without, the jurisdiction, seem to deliver over the subject to interminable doubts.⁵

§ 456. The doctrine, now generally (perhaps not universally) held in America, is, (as we have seen)⁶ that in all cases, where a Court of Equity has jurisdiction for discovery, and the discovery is effectual, that

¹ Ante, § 71, 74 ; *Russell v. Clarke's Ex'rs.* 7 Cranch, 69 ; *Dinwiddie v. Bailey*, 6 Ves. 140, 141.

² *Ryle v. Haggie*, 1 Jac. & Walk. 237.

³ 2 Fonbl. Eq. B. 6, ch. 3, § 6 ; *Lee v. Alston*, 1 Bro. Ch. R. 195, 196 ; *Barker v. Dacie*, 6 Ves. 688 ; *Corporation of Carlisle v. Wilson*, 13 Ves. 278, 279.

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

⁵ See ante, § 64, to 69, and note (1) to § 69. — Many of the cases on this head have been already commented on at large, in the note (1) to § 69. The difficulty of reconciling the authorities is very great. Is there any distinction between cases of account founded in *privity*, and those founded in *tort*, (as waste, &c.) ?

⁶ Ante, § 67, 71, 74 ; *Middletown Bank v. Russ*, 3 Connect. R. 135.

becomes a sufficient foundation, upon which the Court may proceed to grant full relief. In other words, where the Court has legitimately acquired jurisdiction over the cause for the purpose of discovery, it will, to prevent multiplicity of suits, entertain the suit also for relief.¹

§ 457. Another, and more general ground has been asserted for the jurisdiction; and that is, not that there is not a remedy at law, but that the remedy is more complete and adequate in Equity; and, besides, it prevents a multiplicity of suits. This is, indeed, a very broad and general ground of jurisdiction; and especially, as applied to cases founded in privity of contract, where it is contemplated, that the matter should give rise to an account.² Upon this ground, Lord Hardwicke expressed himself in favor of the jurisdiction generally, in a case then before him, saying—“It is a matter of contract and account; and consequently a proper subject for the jurisdiction of this Court.”³ And this is manifestly the doctrine maintained by Lord Redesdale, who said, that in matters of account, “a Court of Equity will entertain jurisdiction of a suit, though a remedy might perhaps be had in the Courts of Common Law. The ground, upon which Courts of Equity first interfered in these cases, seems to have been the difficulty of proceeding, to the full extent of justice, in the Courts of Common Law.”

¹ See ante, § 64 to 69, 71; *Armstrong v. Gilchrist*, 2 John. Cas. 424; *Rathbone v. Warren*, 10 John. R. 587; *King v. Baldwin*, 17 John. R. 384; *Ludlow v. Simond*, 2 Cain. Err. 1, 38, 39, 51, 52; *Stanley v. Cramer*, 4 Cowen, R. 727, 728.

² *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 5; *Barker v. Dacie*, 6 Ves. 688; 3 Black. Comm. 437.

³ *Billon v. Hyde*, 1 Atk. 127, 128.

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

§ 458. Courts of Equity will also entertain jurisdiction in matters of account, not only when there are mutual accounts, but also when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account, and is obtained.⁵ But,

¹ Mitford on Pl. Eq. by Jeremy, 119, 120; *Barker v. Dacie*, 6 Ves. 688; *Mackensie v. Johnston*, 4 Madd. R. 374.

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

³ *Dinwiddie v. Bailey*, 6 Ves. 140, 141; 2 Parl. Rep. of Common Law Commissioners, 1830, (p. 26); *Courtenay v. Godshall*, 9 Ves. 473.

⁴ *Armstrong v. Gilchrist*, 2 John. Cas. 424; *Rathbone v. Warren*, 10 John. R. 587; *King v. Baldwin*, 17 John. R. 384; *Ludlow v. Simond*, 2 Cain. Err. 1, 38, 39, 51, 52; *Post v. Kimberley*, 9 John. R. 493; *Hawley v. Cramer*, 4 Cowen, R. 727, 728; 2 Parl. Report of Common Law Commissioners, 26; *Porter v. Spencer*, 2 John. Ch. R. 171.

⁵ *Barker v. Dacie*, 6 Ves. 687, 688; *Frietas v. Don Santos*, 1 Y. & Jerv. 574; *Courteney v. Godshall*, 9 Ves. 473; *Mackensie v. Johnston*, 4 Madd. R. 374; *Massey v. Banner*, 4 Madd. R. 416, 417; *Ludlow v. Simond*, 2 Cain. Err. 1, 38, 52; *Post v. Kimberley*, 9 John. R. 470, 498. — The Vice Chancellor (Sir John Leach) has

in such a case, if no discovery is asked, or required by the frame of the bill, the jurisdiction would not be maintainable.¹ And, *a fortiori*, where there are no mutual demands, but a single matter on one side, and no discovery is required, a Court of Equity will not entertain jurisdiction of the suit, though there may be payments on the other side, which may be set off; for in such a case, there is not only a complete remedy at law; but there is nothing requiring the peculiar aid of Equity, to ascertain or adjust it.²

held generally, that in all cases of agency a bill will lie in Equity for an account, by the principal against his agent. *Mackensie v. Johnston*, 4 Madd. R. 374; *Massey v. Banner*, 4 Madd. R. 416. The ground seems to be, though not explicitly stated by him, that, there being a necessity for a discovery, the relief is consequent on that; and that it would be most unreasonable, that he should pay his agent for a discovery, and then be turned round to a suit at law, which would be the case, if he could not have relief on his bill. The case of *Hoare v. Contencin* (1 Bro. Ch. R. 27) is distinguishable; for there the bill was to recover back money lent, and no discovery seemed necessary. Lord Thurlow there said, "As to an account, this is only of a repayment of money, and that the money, for which the teas sold, should be deducted. As it stood originally, therefore, the bill could not have been supported." In *Frietas v. Don Santos*, (1 Y. & Jerv. 574,) the Court of Exchequer said, "It is the settled practice at this time, that, if a bill be filed for a discovery, the relief is made ancillary to it; and the party must stand or fall by the discovery, &c. It is not every account, which will entitle a Court of Equity to interfere. It must be such an account, as cannot be taken, justly and fairly, in a Court of Law." The same doctrine was asserted in *King v. Rossett*, (2 Y. & Jerv. 33,) which was a bill by a principal against his agent for discovery and relief. Lord Chief Baron Comyns, in his invaluable Digest, (Chancery 2 A.) lays down the principle broadly, upon his own authority, that "Chancery will oblige any one to give an account for money by him received."

¹ *Dinwiddie v. Bailey*, 6 Ves. 136; *Frietas v. Don Santos*, 1 Y. & Jerv. R. 574; *King v. Rossett*, 2 Y. & Jerv. 33; *Cooper Eq. Pl.* 134; but see *Mackensie v. Johnston*, 4 Madd. R. 374; *Massey v. Banner*, 4 Madd. R. 416; *Com. Dig. Chancery*, 2 A.

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

To found the jurisdiction, in cases of claims of this sort, there should be a series of transactions on one side, and of payments on the other.

§ 459. So, that, on the whole, it may be laid down as a general doctrine, that in matters of account, growing out of privity of contract, Courts of Equity have a general jurisdiction, where there are mutual accounts, (and, *a fortiori*, where these accounts are complicated); and also where the accounts are on one side, but a discovery is sought, and is material to the relief.¹ And, on the other hand, where the accounts are all on one side, and no discovery is sought, or required; and also, where there is a single matter on the side of the plaintiff seeking relief, and mere set-offs on the other side, and no discovery is sought, or required; in all such cases, Courts of Equity will decline taking jurisdiction of the cause.² The reason is, that no peculiar remedial process, or functions of a Court of Equity are required; and if, under such circumstances, the Court were to entertain the suit, it will merely administer the same functions in the same way, as a Court of Law would in the suit. In short, it would act as a Court of Law.

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

¹ Mackensie v. Johnston, 4 Madd. R. 374; Mussey v. Banner, 4 Madd. 416, 417; Pendleton v. Wambersie, 4 Cranch, R. 73.

² See ante, § 458, and cases there cited. But see Com. Dig. Chancery, 2 A.

§ 461. In our subsequent examination of this branch of jurisdiction, it certainly would not be going beyond its just boundaries, to include within them all subjects, which arise from the two great sources already indicated, and terminate in matters of account ; viz., first, such as have their foundation in contract, or quasi contract ; and, secondly, such as have their foundation in trusts, actual or constructive, or in torts affecting property. But as many cases included under one head are often connected with principles belonging to the other ; and as the jurisdiction of Courts of Equity is often exercised upon various grounds, not completely embraced in either ; or upon mixed considerations ; it will be more convenient, and perhaps not less philosophical, to treat the various topics under their own appropriate heads, without any nice discrimination between them. We may thus bring together in this place such topics only, as do not seem to belong to more enlarged subjects ; or such as do not require any elaborate discussion ; or such as peculiarly furnish matter of illustration of the general principles, which regulate the jurisdiction.

§ 462. Let us, then, in the first place, bring together some cases arising *ex contractu*, or *quasi ex contractu*, and involving accounts. And here, one of the most general heads, is that AGENCY, where one person is employed to transact the business of another for a recompense or compensation. The most important agencies of this sort, which fall under the cognizance of Courts of Equity, are those of Attornies, Factors, Bailiffs, Consignees, Receivers, and Stewards.¹ In most agencies of this sort,

¹ Jeremy on Eq. Jurisd. B. 3, P. 2, ch. 5, p. 513 to 515. — In

there are mutual accounts between the parties; or, if the account is on one side, as the relation naturally gives rise to great personal confidence between the parties, it rarely happens, that the principal is able, in cases of controversy, to ascertain his rights, or to ascertain the true state of the accounts, without resorting to a discovery from the agent. Indeed, in cases of factorage and consignments, and general receipts and disbursements of money by receivers and stewards, it can scarcely be possible, if the relation has long subsisted, that very intricate and perplexing accounts should not have arisen, where, independent of a discovery, the remedy of the principal would be utterly nugatory, or grossly defective. It would be rare, that specific sales and purchases, and the charges growing out of them, could be ascertained, and traced out with any reasonable certainty; and still more rare, that every receipt and disbursement could be verified by direct and positive evidence. The rules of law in all such agencies require, that the agent should keep regu-

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

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

§ 463. In agencies also of a single nature, such as a single consignment; or the delivery of money to be laid out in the purchase of an estate or in a cargo of goods, or to be paid over to a third person; although a suit at law may be often maintainable; yet if the thing lie in privity of contract and personal confidence, the aid of a Court of Equity is often indispensable for the attainment of justice. Even when not indispensable, it may often be exceedingly convenient and effectual, and prevent a multiplicity of suits. And the party in such a case often has an

¹ *Pearce v. Green*, 1 Jac. & Walk. 135; *Ormand v. Hutchinson*, 13 Ves. 53.

² *East India Company v. Henschman*, 1 Ves. jr. 289; *Massey v. Davies*, 2 Ves. jr. R. 318; *Borr v. Vandall*, 1 Ch. Cas. 30.

³ *Earl of Hardwicke v. Vernon*, 14 Ves. 510.

election of remedy. This doctrine is expounded by Lord Chief Justice Willes, in delivering the opinion of the Court in a celebrated case, with great clearness and force. Speaking of the propriety of sometimes resorting to a suit at law, he said ; “ Though a bill in Equity may be proper in several of these cases, yet an action at law will lie likewise ; as if I pay money to another to lay out in the purchase of a particular estate, or any other thing, I may either bring a bill against him, considering him as a trustee, and praying, that he may lay out the money in that specific thing ; or I may bring an action against him, as for so much money had and received for my use. Courts of Equity always retain such bills, when they are brought under the notion of a trust ; and therefore in this very case, (of a consignment to a factor for sale) have often given relief, where the party might have had his remedy at law, if he had thought proper to proceed in that way.”¹

§ 464. Perhaps the doctrine here laid down, though generally true, is a little too broadly stated. The true source of jurisdiction in such cases is not the mere notion of a virtual trust ; for then Equity Jurisdiction would cover every case of bailment. But it is the necessity of reaching the facts by a discovery ; and having jurisdiction for such a purpose, the Court, to avoid multiplicity of suits, will proceed to administer the proper relief.² And hence it is, that, in the case of a single consignment to a factor for sale, a Court

¹ Scott v. Surman, Willes, R. 405.

² Ante, § 71, § Black. Comm. 437 ; Ludlow v. Simond, 2 Cain. Err. 1, 38, 52 ; Mackensie v. Johnston, 4 Madd. R. 374 ; Pearce v. Green, 1 Jac. & Walk. 135.

of Equity will, under the head of discovery, entertain the suit for relief, as well as discovery ; there being accounts and disbursements involved, which, generally speaking, cannot be so thoroughly investigated at law,¹ though (as we have seen) a Court of Equity is cautious of entertaining suits upon a single transaction, where there are not mutual accounts.² Nay, so far has the doctrine been carried, that, even though the case may appear as a matter of account, to be perfectly remediable at law ; yet, if the parties have gone on to a hearing of the merits of the cause, without any preliminary objection being taken to the jurisdiction of the Court upon this ground, the Court will not then suffer it to prevail ; but will administer suitable relief.³

§ 465. Cases of account between trustees and *cestui que trust* may properly be deemed confidential agencies, and are peculiarly within the appropriate jurisdiction of Courts of Equity.⁴ The same general rules apply here, as in other cases of agency. A trustee is never permitted to make any profit to himself in any of the concerns of his trust. On the other hand, he is not liable for any loss, which occurs in the discharge of his duties, unless he has been guilty of negligence, malversation, or fraud.⁵ The same doctrines are applicable

¹ Ludlow v. Simond, 2 Cain. Err. 1, 38, 52 ; Post v. Kimberley, 9 John. R. 493 ; Mackensie v. Johnston, 4 Madd. 374.

² Porter v. Spencer, 2 John. Ch. R. 171 ; Wells v. Cooper, cited 6 Ves. 136 ; ante, § 451.

³ Post v. Kimberley, 9 John. R. 493.

⁴ Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 522, 523.

⁵ Wilkinson v. Stafford, 1 Ves. jr. 32, 41, 42 ; Shepherd v. Towgood, 1 Turn. & R. 379 ; Adair v. Shaw, 1 Sch. and Lefr. R. 272 ; Caffrey v. Darby, 6 Ves. 488.

to cases of guardians, and wards, and other relations of a similar nature.¹

§ 466. Cases of account between tenants in common, between jointenants, between partowners, between partowners of ships, and between owners of ships and the masters, fall under the like considerations. They all involve peculiar agencies, as bailiffs or managers of property, requiring the same operative power of discovery, and the same interposition of Equity.² Indeed, in all cases of such joint interests, where one party receives all the profits, he is bound to account to the other parties in interest for their respective shares, deducting the proper charges and expenses, whether he acts expressly by their authority, as bailiff, or only by implication, as manager, without dissent, *jure domini*, over the property.³

§ 467. In many cases of frauds by agents, a Court of Common Law cannot administer effectual remedies ; as, for instance, it cannot give damages against his estate for a loss arising from his torts, when such torts die with the person ; and, *a fortiori*, the rule will apply to Courts of Equity. But where the tort arises in the course of an agency from a fraud of the agent, and respects property, Courts of Equity will treat the loss sustained as a debt against his estate.⁴

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

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

³ *Strelly v. Winson*, 1 Vern. 297 ; *Horn v. Gilpin*, Ambl. R. 255 ; *Poultney v. Warren*, 6 Ves. 73, 78.

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

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

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

¹ *White v. Lady Lincoln*, 8 Ves. 363 ; S. P. 15 Ves. 441.

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

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

and that it would be inequitable to suffer the fraud, or negligence, of the agent to prejudice the rights of his principal.¹

§ 469. Another head is that of APPORTIONMENT, AVERAGE, and CONTRIBUTION, which are in some measure blended together, and require, and terminate in Accounts. In most of these cases, a discovery is indispensable for purposes of justice; and, where this does not occur, there are other distinct grounds for the exercise of Equity Jurisdiction, in order to avoid circuitry and multiplicity of actions. Some cases of this nature spring from contract; others again, from a legal duty independent of contract; and others again, from the principles of natural justice, confirming the known maxim of the law, *Qui sentit commodum, sentire debet et onus*. The two latter may, therefore, properly be classed among obligations resulting *quasi ex contractu*.² This will abundantly appear in the sequel of these commentaries.³

¹ *Lufton v. White*, 15 Ves. 441.

² *Deering v. Earl of Winchelsea*, 1 Cox, R. 318; S. C. 2 Bos. & Pull. 270.

³ Mr. Chancellor Kent has, in several of his judgments, treated the subject of contribution, and insisted strongly, that it was not necessarily founded upon contract, but upon principles of natural justice, independent of contract. See *Cheeseborough v. Millard*, 1 John. Ch. R. 409; *Stearns v. Cooper*, 1 John. Ch. R. 425; *Campbell v. Mesier*, 4 John. Ch. R. 334. In this opinion he is not only fully borne out by the doctrines of the English Law, (*Deering v. Earl of Winchelsea*, 1 Cox, R. 318; S. C. 2 Bos. & Pull. 270,) but by the Roman and foreign law, which he has, with his usual ability and learning, commented upon. And he has applied it to the case of an old party wall, which divided two estates, and was necessary to be rebuilt, and was rebuilt by the owner of one, who claimed contribution from the other, and had a decree in his favor. There is a most persuasive course of reasoning used to support this judgment;

§ 470. Lord Chief Baron Eyre, in one of his most luminous judgments, has expounded the general grounds of the doctrine, as known at the Common Law, as well as in Equity, in a manner so clear, that it will be better to quote his own language, than risk impairing their force by any abridgment. "If we take a view," said he, "of the cases both in Law and Equity, we shall find, that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, as in *Swain v. Wall*, 1 Ch. Rep. 149. In the Register, 176 (b), there are two writs of contribution, one *inter co-hæredes*, the other *inter co-feoffatos*. These are founded on the statute of Marlebridge; the great object of the statute is to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet in *Fitz. N. B.* 338, there is a writ of contribution at common law amongst tenants in common, as for a mill falling to decay. In the same page Fitzherbert takes notice of contribution between co-heirs and co-feoffees; and as between co-feoffees he supposes there shall be no contribution without an agreement; and the words of the writ countenance such an idea; for the words are '*ex eorum assensu*;' and yet this seems to contravene the express provision of the statute. As to co-heirs the statute is express; it does not say so as to feoffees; but it gives contribution in the same manner. In *Sir William Harbert's Case*, 3 Co. 11 (b), many cases

but it is mainly rested upon principles of equity, derived from the civil and foreign law. See *Campbell v. Mesier*, 4 John. Ch. R. 334; S. C. 6 John. R. 21.

of contribution are put ; and the reason given in the books is, that *in equali jure* the law requires equality ; one shall not bear the burthen in ease of the rest, and the law is grounded in great equity. Contract is never mentioned. Now the doctrine of equality operates more effectually in this Court, than in a Court of Law. The difficulty in Coke's Cases was how to make them contribute ; they were put to their *auditâ querelâ*, or *scire facias*. In equity there is a string of cases in 1 Eq. Ca. abr. tit. 'Contribution and Average.' Another case occurs in Harg. Law Tracts on the right of the King on the prisage of wine. The King is entitled to one ton before the mast, and one ton behind, and in that case a right of contribution accrues ; for the King may take by his prerogative any two tons of wine he thinks fit, by which one man might suffer solely ; but the contribution is given of course on general principles, which govern all these cases."¹

§ 471. Some cases of apportionment arising under contract, or *quasi* contract, have already been mentioned under the head of accident.² But at the Common Law the cases are few, in which an apportionment under contracts is allowed, the general doctrine being against it, unless specially stipulated by the parties. Thus, for instance, where a person was appointed collector of rents for another ; and was to receive £100 per annum for his services, and he died at the end of three quarters of the year, while in the service ; it was held, that his executor could

¹ Deering v. Earl of Winchelsea, 1 Cox, R. 321 ; S. C. 2 Bos. & Pull. 270, 271, 272.

² Ante, § 93.

not recover £75 for the three quarters' service ; upon the ground, that the contract was entire, and there could be no apportionment ; for the maxim is, *Annua nec debitum judex non separat ipsum*.¹ So where the mate of a ship engaged for a voyage, at 30 guineas for the voyage, and died during the voyage ; it was held, that at law there could be no apportionment of the wages.²

§ 472. Courts of Equity, to a considerable extent, act, as we have seen, upon this maxim of the Common Law, in regard to contracts. But where equitable circumstances intervene, they will grant redress. Thus, if an apprentice fee of a specific sum be given, and the master afterwards becomes bankrupt, Equity will, (as we have seen,) decree an apportionment.³ So where an attorney, while he lay ill, received the sum of 120 guineas for a clerk, who was placed with him ; and he died within three weeks afterwards, the Court decreed a return of 100 guineas, notwithstanding the articles provided, that in case of the attorney's death £60 only should be returned.⁴ This case, upon the statement in the report, is certainly open to the objection taken to it by Lord Kenyon, who said, that it carried the jurisdiction of the Court, as far as it could be ;⁵ for it overturned the maxim, *Modus et conventio vincunt legem*. But, in

¹ Co. Litt. 150 a ; Countess of Plymouth v. Brogmorton, 1 Salk. 65 ; 3 Mad. R. 153.

² Cutler v. Powell, 6 T. R. 320. See also Appleby v. Dodd, 8 East. R. 300 ; Jesse v. Roy, 1 Crompt. Jerv. & Rosc. 316, 329, 339.

³ Ante § 93 ; Hale v. Webb, 2 Bro. Ch. R. 78 ; Ex parte Sandby, 1 Atk. 149.

⁴ Newton v. Rowse, 1 Vern. 460, and Raithby's note, 2.

⁵ Hale v. Webb, 2 Bro. Ch. R. 80 ; 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (g).

truth, the case seems to have been (according to the Register's Book) very correctly decided ; for in the pleadings it was stated, that the plaintiff at the time was unwilling to sign the articles, or pay the 120 guineas, until the attorney had declared, that, in case he should not live to go abroad, the 120 guineas should be returned to him; and, that he was only troubled with a cold, and hoped to be abroad in two or three days; and thereupon the plaintiff signed the articles.¹ This allegation was, in all probability, proved, and was the very turning point of the case. If so, the case stands upon a plain ground of Equity, that of mutual mistake, misrepresentation, or unconscientious advantage.

§ 473. Other cases of apprentice fees may exemplify the same salutary interposition of Courts of Equity. Thus, where an apprentice had been discharged from service, in consequence of the misconduct of the master, it was decreed, that the Indentures of apprenticeship should be delivered up, and a part of the apprentice fee paid back.² So, where the master undertook, in consideration of the apprentice fee, to do certain acts during the apprenticeship, which by his death were left undone, and could not be performed, an apportionment of the apprentice fee was decreed.³

§ 474. There are cases, where an apportionment might not always be reached at the Common Law ; but yet, which belong to the recognised principles of equity. But, on the other hand, where an apprentice fee has been paid, and the apprenticeship has been

¹ Mr. Raithby's note, to 1 Vern. 460.

² *Lockley v. Eldridge*, Rep. Temp. Finch. 128. See *Therman v. Abell*, 2 Vern. 69.

³ *Savin v. Bowdin*, Rep. Temp. Finch. 396.

dissolved at the request of the friends of the apprentice, but without any default in the master, without any agreement for a return of any part of the fee ; there a Court of Equity will not interfere ; for there is no equity attaching itself to the transaction ; and the contract does not import any return.¹

§ 475. In regard to apportionment of rents, (which word, *apportionment*, Lord Coke says, comes from *partio*, *quasi partio*, which signifies a part of the whole,) it is a division of a rent, or common, or other charge.² It was well known at the Common Law ; and sometimes denoted the contribution, which was to be made by different persons having the same right, towards a common burthen or charge upon all of them ; and sometimes a subdivision or extinguishment of a portion of a charge held by a single individual. Thus, for instance, if a man had a rent charge, and purchased a part of the land, out of which it issued, the whole rent charge was extinguished.³ But, if a part of the land came to him by operation of law, as by descent, then the rent charge was apportionable ; that is, the tenant and the heir were to pay according to the value of the lands, respectively held by

¹ Hall v. Webb, 2 Bro. Ch. R. 78.

² Co. Litt. 148, a.; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes. Bac. Abridg. *Rent*, M.; Com. Dig. Chancery, 4 N. 5, 2 E.

³ Co. Litt. 147 b, 148, a. But see 1 Swanston, R. 333, note a.—Mr. Swanston in his Note (a) to *Ex parte Smith*, 1 Swanst. R. 338, says, “Apportionment frequently denotes, not division, but distribution ; and, in its ordinary technical sense, the distribution of one subject in proportion to another previously distributed.” There is some reason to question the accuracy of this statement. Apportionment does not refer to a distribution of one subject, in proportion to another “previously distributed,” but a distribution of a claim or charge, among persons having different interests or shares, in proportion to their interest or shares in the subject matter, to which it attaches.

them ; and, of course, the part apportionable on the heir was extinguished.¹ But a rent service was in both cases apportionable.² So, if a lessor granted part of a reversion to a stranger, the rent was to be apportioned.³ On the other hand, if part of the land, out of which the rent charge issue is evicted by a title paramount, the rent will be apportioned. And if a rent service descends to parceners, and they make partition, and one is distrained for the whole, she may compel the others to contribution. And the same doctrine would apply to co-feoffees of the land, or different parts of the land.⁴

§ 476. Cases of a different sort may easily be stated, where contribution is indispensable. Thus, if a man, owning several acres of land, should be bound in a judgment, or statute, or recognisance, operating as a lien on the land, and should alien one acre to A, another to B, and another to C, &c.; there, if one alienee should be compelled, in order to save his land, to pay the judgment, statute, or recognisance, he would be entitled to contribution from the other alienees.⁵ The same principle would apply in the like case, where the land should descend to parceners, who should make partition ; and then one should be compelled to pay the whole charge, contribution would lie against the other parceners.⁶

§ 477. In all these cases, and others might be mentioned,⁷ a writ of contribution would lie at the

¹ Co. Litt. 149 *b* ; Bac. Abridg. *Rent*, M.

² Ibid.

³ Ibid.

⁴ Co. Litt. 147, 148, 149 ; Com. Dig. *Suspension*, E. G. ; 2 Inst. 119. Bacon Abridg. *Rent*, M. 1, 2.

⁵ Harbert's Case, 3 Co. R. 12, 13.

⁶ Ibid.

⁷ See Harbert's Case, 3 Co. R. 12.

Common Law, or in virtue of the statute of Marlebridge.

§ 478. But there were many difficulties in proceeding in these cases at the Common Law ; and, where the parties were numerous, as each was liable to contribute only for his own portion, separate actions and verdicts were necessary against each ; and thus multiplicity of suits took place, and no judgment in one suit was conclusive in regard to the amount of contribution in a suit against another person. Whereas, in Equity, all parties could at once be brought before the Court in a single suit ; and the decree, apportioning the rent, would be conclusive upon all parties in interest.

§ 479. But the ground of Equity jurisdiction, in cases of rent and other charges on land, does not arise solely from the defective nature of the remedy at Common Law, where such a remedy exists. It extends to a great variety of cases, where no remedy at all exists in law, and yet where *ex æquo et bono* the party is entitled to relief. Thus, for instance, where a plaintiff was lessee of divers lands, upon which an entire rent was reserved ; and, afterwards the Inhabitants of the town, where part of the lands lay, claimed a right of common in part of the lands so let, and, upon a trial, succeeded in establishing their right ; in this case, there could be no apportionment of the rent at law, because, though a right of common was recovered, there was no eviction of the land. But, it was not doubted, that in Equity a bill was maintainable for an apportionment, if a suitable case for relief were made out.¹ So, where by an ancient composition, a rent

¹ Com. Dig. Chancery, 2 E. 4 N. 5 ; *Jew v. Thirkenell*, 1 Ch. Cas. 31 ; S. C. 3 Ch. Rep. 11.

is payable in lieu of tithes, and the lands come into the seisin and possession of divers grantees, the composition will be apportioned among them in Equity, though there may be no redress at law.¹ So, where money is to be laid out in land, if the party, who is entitled to the land in fee when purchased, dies before it is purchased, the money being in the meantime secured on a mortgage, and the interest made payable half yearly, the interest will be apportioned in Equity between the heir and the administrator of the party so entitled, if he dies before the half yearly payment is due.² So, where portions are payable to daughters at eighteen or marriage, and until the portions are due maintenance is allowed, payable half yearly at specific times, if one of the daughters come of age in an intermediate period, the maintenance will be apportioned in Equity.³

§ 480. But still there are many cases, in which Courts of Equity have refused to allow apportionments of rent, acting (it must be admitted) not upon the principles, which ordinarily govern, but upon the notion of a strict obedience to the analogies of the law. Thus, where a purchaser from a husband of an interest in New South Sea Annuities during his life, remainder to other persons (which had been originally secured upon a mortgage, but by order of the Court had been transferred to government securities), insisted in a petition in Equity, that, notwithstanding the husband died before the Christmas half year became due, yet he was entitled to be paid proportionally for the time the husband lived; Lord Hard-

¹ Com. Dig. Chancery, 4 N. 5, cites Saville, R. 5. See Aynsley v. Woodsworth, 2 V. and Beam. 331.

² Edwards v. Countess of Warwick, 2 P. W. 176.

³ Hay v. Palmer, 2 P. Will. 501.

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

§ 481. So, where a tenant for life leased for years rendering rent half yearly, and died in the middle of the half year, an apportionment of the rent was denied. Upon this occasion, the Lord Chancellor said,

¹ *Pearley v. Smith*, 3 Atk. 261 ; 1 Fonbl. Eq. B. 1, ch. 5, § 9, note (o) ; *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 5, p. 520, 521, 522.

² *Sherrard v. Sherrard*, 3 Atk. 502 ; *Rashleigh v. Master*, 3 Bro. Ch. R. 99, 101 ; *Webb v. Shaftesbury*, 11 Ves. 361 ; *Wilson v. Harman*, Ambl. R. 279 ; S. C. 2 Ves. 672 ; 1 Fonbl. Eq. B. 1, ch. 5, § 9, note (o) ; *Hay v. Palmer*, 2 P. Will. 502, and Mr. Cox's note.

“There are several remedial statutes relating to rents ;¹ but this is a *casus omissus*. The Law does not apportion rent in point of time, and I do not know, that Equity ever did it.² This is an account, which the judgment creditor (the plaintiff) might have guarded against, by receiving the rent weekly ; so that it is his fault, and becomes a gift in law to the tenant.”³ And yet, if the tenant had actually paid the whole rent to the remainderman, including this period, from a conscientious sense of duty, the party might, under such circumstances, have been entitled to his share *pro ratâ*. At least in the case where a tenant in tail leased, but not according to the statute, and died without issue between the days of payment, and afterwards the remainderman received the whole rents, Lord Hardwicke decreed, that the Executors of the tenant were entitled against him to an apportionment, although, in strictness, the tenant could not have been compelled to pay it.⁴

¹ Before the statute of 11 Geo. II, ch. 19, § 15, if a tenant for life died before the rent day, the intermediate rent was lost. That statute has cured many hardships of the Common Law on this subject, but not all. Paget v. Gee, Ambler, R. 198 ; S. C. Id. App. p. 807, Mr. Blunt's edition. See also Ex parte Smith, 1 Swanston, R. 337, and Mr. Swanston's learned note, *ibid.*, where the principal cases are commented on at large. 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes ; Jeremy on Eq. Jurisd. B. 3. Pt. 2, ch. 5, p. 519, 520, 521, 522.

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

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

⁴ Paget v. Gee, Ambler R. 198 ; S. C. App. F. Blunt's Edition, p. 807 ; Ex parte Smith, 1 Swanst. R. 337, and note ; Id. 355, 356 ; Aynsley v. Woodsworth, 2 V. and Beam. 331 ; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 520.

§ 482. The distinction between this case and the former case is extremely thin ; and the reasons given for it are rather ingenious and subtile, than satisfactory. If it would not be unconscientious for the tenant to withhold the rent, because the executor of the tenant for life had no Equity, it is difficult to perceive, that there can spring up any Equity against the remainderman, unless the tenant paid the rent with an express understanding, that there should be an apportionment, which can hardly be pretended to have been proved in the cases on this point.¹ It would have been, perhaps, more consonant to the general principles of Courts of Equity, to have decided, that, as the tenant held his lease upon the terms of a compensatory contract, it was against conscience, that he should be at liberty to treat the rent, under any circumstances of involuntary departure from the terms of the lease, as a gift ;² and that, as the parties had omitted to provide in their contract for the exigency, Equity would presume an intention of the parties to treat the rent as accruing *pro tanto* from day to day ; and as a *debitum in presenti*,

¹ See *Hawkins v. Kelly*, 8 Ves. 309 to 312 ; *Ex parte Smith*, 1 Swanst. R. 346, 347, 348, note.

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

solvendum in futuro. Lord Hardwicke on one occasion, in discussing a question of apportionment, after quoting the maxim, *Æquitas sequitur legem*, added, “when the Court finds the rules of law right, it will follow them; but then it will likewise go beyond them.”¹

§ 483. But a more beneficial exercise of Equity Jurisdiction, in cases of apportionment and contribution, is in cases, where incumbrances, fines, and other charges on real estate are required to be paid off, or are actually paid off by some of the parties in interest.² In most cases of this sort, there is no remedy at law, from the extreme uncertainty of ascertaining the relative proportions, which different persons, having interests of a very different nature, quality, and duration, in the subject-matter, ought to pay. And where there is a remedy, it is inconvenient and imperfect, because it involves multiplicity of suits, and opens the whole matter for contestation anew, in every successive litigation.

§ 484. This may be illustrated by one of the most common cases, that of an apportionment and contribution towards a mortgage upon an estate, where the interest is required to be kept down, or the incumbrance paid. Let us suppose a case where different parcels of land are included in the same mortgage, and these different parcels are afterwards sold to different persons, each holding in fee and severalty the parcel sold to himself. In such

¹ *Paget v. Gee*, Ambler, R. App. p. 810, Mr. Blunt's edition.

² Com. Dig. Chancery, 2 J. 2 S; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes; *Ritson v. Brumlow*, 1 Ch. Rep. 91; *Cheeseborough v. Millard*, 1 John. Ch. R. 409; *Scribner v. Hitchcock*, 4 John. Ch. Rep. 530.

a case, each purchaser is bound to contribute to the discharge of the common burthen or charge, in proportion to the value, which his parcel bears to the whole included in the mortgage.¹ But, to ascertain the relative values of each is a matter of great nicety and difficulty ; and, unless all the different purchasers are joined in a single suit, as they can be in Equity, though not at Law, the most serious embarrassments may arise in fixing the exact proportion of each purchaser, and in making it conclusive upon all others.

§ 485. So, if there are different persons, having different interests in an estate under mortgage, as for instance, parceners,² tenants for life, or in tail, remaindermen, tenants in dower, or for a term of years, or other limited interests, it is obvious, that the question of apportionment and contribution in redeeming the mortgage, as well as of payment of interest, may involve most important and intricate inquiries, and to do entire justice, it may be indispensable, that all the parties in interest should actually be brought before the Court. Now, in a suit at Common Law, this is absolutely impossible ; for no persons can be made parties, except those, whose interest is joint, and of the same nature and character, and is immediate in possession. So that a resort to a Court of Equity, where all these interests can be brought before the Court, and definitely ascertained and disposed of, is indispensable. If to this we add, that, in most cases of mortgage, an account of what has been paid upon the mortgage, either by direct

¹ *Cheeseborough v. Millard*, 1 John. Ch. R. 409, 415 ; *Stevens v. Cooper*, 1 John. Ch. R. 425 ; *Harris v. Ingledew*, 3 P. Will. 98, 99 ; *Harbert's case*, 3 Co. R. 14 ; *Taylor v. Porter*, 7 Mass. R. 355.

² *Stirling v. Forrester*, 3 Bligh, R. 590, 596.

payments, or by perception of the rents and profits of the estate, is necessary to be taken, we shall at once see, that the machinery of a Court of Common Law is very ill adapted to any such purpose. But, if we add farther to all this, that there may be mesne incumbrances and other cross equities between some of the parties, all of which require to be adjusted, in order to arrive at a just result, and to attain the full end of the law by closing up all future litigation, we shall not fail to be convinced, that the only appropriate, adequate, and effectual remedy must be administered in Equity. Indeed, from its very nature, as we shall have occasion to see hereafter, the jurisdiction over mortgages belongs peculiarly and exclusively to Courts of Equity. And wherever, as is the case in some of the American States, an attempt has been made to engraft the remedy of redemption upon the ordinary processes of Courts of Law, it has been found to be inconvenient, embarrassing, and, in complicated cases, impracticable.

§ 486. Very delicate, and often very intricate questions arise in the adjustment of the rights and duties of the different parties in interest in the inheritance. In the first place, in regard to the paying off of incumbrances. If a tenant in tail in possession pays off an incumbrance, it will ordinarily be treated as extinguished; and the remainderman cannot be called upon for contribution, unless the tenant in tail has kept alive the incumbrance, or preserved the benefit of it to himself, by some suitable assignment, or has done some other act or thing, which imports a positive intention to hold himself out as a creditor of the estate, in lieu of the mortgagee. The reason for this doctrine is, that a tenant in

tail can, if he pleases, by fine or recovery, become the absolute owner of the estate ; and therefore his discharge of incumbrances are treated, as made in the character of owner, unless he clearly shows, that he intends to discharge them, and become a creditor thereby.¹ But the like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated by the birth of issue of another person ; for it must be inferred, that such a tenant in tail, in paying off an incumbrance without an assignment, means to keep the charge alive.² *A fortiori* the doctrine would not apply to the case of a tenant for life paying off an incumbrance ; for, if he should pay it off without taking an assignment, he would be deemed to be a creditor to the amount paid, upon the ground, that there could be no presumption, that with his limited interest he could intend to exonerate the estate.³ He cannot be presumed *prima facie* to discharge the estate from the debt ; for that would be discharging the estate of another person. But in both cases, the presumption may be rebutted by circumstances demonstrating a contrary intention.⁴

§ 487. In respect to the discharge of incumbrances, it was formerly a rule in Equity, that the

¹ Wigsell v. Wigsell, 2 Sim. & Stu. R. 364 ; Jones v. Morgan, 1 Bro. Ch. R. 206 ; Kirkham v. Smith, 1 Ves. 258 ; Amesbury v. Brown, 1 Ves. 477 ; Shrewsbury v. Shrewsbury, 3 Bro. Ch. R. 120, S. C. 1 Ves. jr. 227 ; St. Paul v. Viscount Dudley and Ward, 15 Ves. 173.

² Wigsell v. Wigsell, 2 Sim. & Stu. R. 364.

³ Saville v. Saville, 2 Atk. 463, 464 ; Jones v. Morgan, 1 Bro. Ch. R. 218 ; Shrewsbury v. Shrewsbury, 1 Ves. jr. 233 ; S. C. 3 Bro. Ch. R. 120.

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

tenant for life, and the reversioner, or remainderman were bound to contribute towards the payment of incumbrances, in a proportion fixed by the Court ; so that they paid a gross sum, in proportion to their interests in the estate. And the usual proportion was for the tenant for life to pay one third, and the remainderman, or reversioner, two thirds of the charge.¹ And a similar rule was applied to cases of fines paid upon the renewal of leases.² But the rule is now in both cases entirely exploded in England, and a far more reasonable rule adopted. It is this, that the tenant shall contribute beyond the interest, in proportion to the benefit he derives from the liquidation of the debt, and the consequent cessation of annual payments of interest during his life, (which, of course, will depend much upon his age, and the computation of the value of his life ;) and it will be referred to a Master, to ascertain and report what proportion, upon this basis, of the capital sum due, the tenant for life ought to pay, and what ought to be borne by the remainderman, or reversioner.³ And if the estate is sold to discharge incumbrances, (as the incumbrancer may insist, that it shall be,) in such case, the surplus, beyond what is necessary to discharge the incumbrances, is to be applied as follows ; the income thereof is to go to the tenant for life during his life ; and then the

¹ Powell on Mortg. ch. 11, p. 311 ; *Ballett v. Sprainger*, Prec. Ch. 62.

² *White v. White*, 4 Ves. 33 ; *Verney v. Verney*, 1 Ves. 428 ; S. C. Amb. R. 88 ; *Nightingale v. Lawson*, 1 Bro. Ch. R. 440.

³ See 1 Powell on Mortg. ch. 11, 311, 312 ; Mr. Coventry's note M. ; *Penrhyn v. Hughes*, 5 Ves. 107 ; *White v. White*, 4 Ves. 33 ; 9 Ves. 554 ; *Allan v. Backhouse*, 2 Ves. & B. 70, 79.

whole capital is to be paid over to the remainderman, or reversioner.¹

§ 488. In regard to the interest upon mortgages and other incumbrances, the question often arises, by whom and in what manner it is to be paid. And here the general rule is, that a tenant for life of an equity of redemption is bound to keep down and pay the interest; though he is under no obligation to pay off the principal.² But a tenant in tail is not bound to keep down the interest; and yet if he does, his personal representative has no right to be allowed the sums so paid, as a charge on the estate.³ The reason of this distinction is, that a tenant in tail, discharging the interest, is supposed to do it as owner, for the benefit of the estate. He is not compellable to pay the interest, because he has the power at any time to make himself absolute owner against the remainderman, and reversioner. And the latter have no equity to compel him in their favor to

¹ *Penrhyn v. Hughes*, 5 Ves. 107; *White v. White*, 4 Ves. 33; 3 Powell on Mortg. ch. 19, p. 922, Mr. Coventry's note; *Lloyd v. Johnes*, 9 Ves. 37. — Many cases may occur of far more complicated adjustment, than are here stated; but in a treatise like the present, little more than the general rules can be indicated. See *Rives v. Rives*, Prec. Ch. 21; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and note. See also *Gibson v. Crehore*, 5 Pick. R. 146. The converse case of that stated in the text will readily occur to the learned reader, viz., where mortgage money, or a mortgage is devised to a tenant for life, and remainder over, and the mortgage money is paid by the mortgager. The old rule used to be, to divide it between the tenant for life and remainderman, in the proportion of one third and two thirds. But it would probably now be governed by the same rules, as those in the text. 3 Powell on Mortg. 1043, Mr. Coventry's note O.

² *Saville v. Saville*, 2 Atk. 463, 464; *Shrewsbury v. Shrewsbury*, 1 Ves. jr. 233.

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

keep down the interest, inasmuch as they take any thing solely by his forbearance, and, of course, they must take it *cum onere*.¹

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

§ 490. Another class of cases, which still more fully illustrates the importance and value of this branch of Equity Jurisdiction, is that of **GENERAL AVERAGE**, a subject of daily occurrence in maritime and commercial operations. General Average, in the sense of the maritime law, means a general contribution, that is to be made by all parties in in-

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

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

terest towards a loss or expense, which is sustained or incurred for the benefit of all.¹ The principle, upon which this contribution is founded, is not the result of contract, but has its origin in the plain dictates of natural law.² It has been more immediately derived to us from the positive declarations of the Roman Law, which itself borrowed from the more ancient text of the Rhodian Jurisprudence. Thus, the Rhodian Law, in cases of Jettison declared, that "if goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all shall be made good by the contribution of all. *Lege Rhodia*," says the Digest, "*cavetur, ut si levandæ gratia jactus mercium factus est, omnium contributione sarcitur, quod pro omnibus datum est.*"³ But the principle is by no means confined to cases of Jettison; but is applied to all other sacrifices of property, sums paid, and expenses incurred voluntarily, in the course of maritime voyages for the common benefit of all persons concerned in the adventure. The principle has indeed been confined to sacrifices of property, and the contribution confined to property; though it certainly might have gone farther, and have required a corresponding apportionment of the loss or sacrifice upon all persons, whose lives have been preserved thereby, upon the same common sense of danger, and purchase of safety, alluded to by Juvenal, when in a similar case his friend desired his life to be saved by a sacrifice of his property; — *Fundite, quæ mea sunt, etiam pulcherrima.*

¹ Abbott on Shipp. Pt. 3, ch. 8, § 1, p. 342; Moore's Rep. 297.

² Id. Deering v. Earl of Winchelsea, 1 Cox, R. 318, 323; S. C. 2 Bos. & Pull. 270, 274; Stirling v. Forrester, 3 Bligh, R. 590, 596.

³ Dig. Lib. 14, tit. 2, l. 1.

§ 491. General average being, then, as has been already stated, not confined to cases of Jettison, but extending to other losses and expenditures for the common benefit, it may readily be perceived, how difficult it would be for a Court of Law to apportion and adjust the amount, which is to be paid by each distinct interest, which is involved in the common calamity and expenditure. Take, for instance, the common case of a general ship or packet, trading between Liverpool and New York, and having on board shipments of goods for various persons, as owners or consignees, not unfrequently exceeding a half hundred in number ; and suppose a case of general average to arise during the voyage, and the loss or expenditure to be apportioned among all these various shippers according to their respective interests, and the amount, which the whole cargo is to contribute to the reimbursement thereof. By the general rule of the maritime law, in all cases of general average, the ship, the freight for the voyage, and the cargo on board, are to contribute to such reimbursement, according to their relative values. The first step in the process of general average is to ascertain the amount of the loss, for which contribution is to be made ; as, for instance, in the case of Jettison, the value of the property thrown overboard, or sacrificed for the common preservation. The value is generally indefinite and unascertained, and, from its very nature, rarely admits of an exact and fixed computation. The same remark applies to the case of ascertainment of the value of the contributory interests, the ship, the freight, and the cargo. These are generally differently estimated by different persons ; and rarely admit of a positive and indisputable estimation in price

or value. Now, as the owners of the ship, and the freight, and the cargo may be, and generally are, in the case supposed, different persons, having a separate, and often an adverse, interest, to each other, it is obvious, that, unless all persons in interest can be made parties in one common suit, so as to have the whole adjustment made at once, and made binding upon all of them, infinite embarrassments must arise in ascertaining and apportioning the general average. In a proceeding at the Common Law, every party having a sole and distinct interest must be separately sued;¹ and as the verdict and judgment in one case would not only not be conclusive, but not even be admissible evidence in another suit, as *res inter alios acta*; and as the amount to be recovered must in each case depend upon the value of all the interests to be affected, which of course might be differently estimated by different juries; it is manifest, that the grossest injustice, or the most oppressive litigation might take place in all cases of average on board of general ships. A Court of Equity, having capacity to bring all the parties before it, and to refer the matter to a Master, to take an account, and adjust the whole apportionment at once, affords a safe, convenient, and expeditious remedy. And it is accordingly the customary mode of remedy in all cases, where a controversy arises, and a Court of Equity exists, capable of administering the remedy.²

§ 492. Another class of cases to illustrate the beneficial effects of Equity Jurisdiction over matters

¹ Abbott on Shipp. P. 3, ch. 8, § 17.

² Abbott on Shipp. P. 3, ch. 8. § 17; *Shepherd v. Wright*, Shower, Parl. Cas. 18; *Hallett v. Bousfield*, 18 Ves. 190, 196.

of Account, is that of CONTRIBUTION BETWEEN SURETIES, who are bound for the same principal, and upon his default, one of them is compelled to pay the money, or perform any other obligation, for which they all became bound.¹ In cases of this sort, the surety, who has paid the whole, is entitled to receive contribution from all the others, for what he has done in relieving them from a common burthen.²

§ 493. The claim certainly has its foundation in the clearest principles of natural justice ; for as all are equally bound, and are equally relieved, it seems but just, that in such case all should contribute in proportion towards a benefit obtained by all, upon the maxim, *Qui sentit commodum, sentire debet et onus*.³ And the doctrine has an equal foundation in morals ; since no one ought to profit by another man's loss, where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim ; and, upon motives of mere caprice or favoritism, to make a common burthen a most gross personal oppression. It can be no matter of surprise, therefore, to find, that Courts of Equity adopted and acted upon this salutary doctrine, as equally founded in equity and morality, at a very early period.⁴ The ground of relief does not, therefore, stand upon any notion of mutual contract, express or implied, between the

¹ Com. Dig. Chancery, 4 D. 6.

² Laver v. Nelson, 1 Vern. 456.

³ See Shelley's Case, 1 Co. Rep. 99 ; Deering v. Earl of Winchelsea, 1 Cox, R. 318, 322 ; S. C. 2 Bos. & Pull. 270, 274 ; Craythorne v. Swinburne, 14 Ves. 159 ; Rogers v. Mackensie, 4 Ves. 752.

⁴ 3 Com. Dig. Chancery, 4 D. 6, S. 2 ; Peter v. Rich, 1 Ch. R. 34 ; Morgan v. Seymour, 1 Ch. Rep. 121.

sureties to indemnify each other in proportion, (as has been sometimes argued) ; but it arises from principles of equity independent of contract.¹ If the doctrine were otherwise, a surety would be utterly without relief ; because (it seems) neither in Equity, nor in Law, has he a title to compel the obligee to assign over the bond to him upon his making payment, or otherwise discharging the obligation.²

¹ *Deering v. Earl of Winchelsea*, 1 Cox, R. 318 ; S. C. 2 Bos. & Pull. 270 ; *Ex parte Gifford*, 6 Ves. 805 ; *Craythorne v. Swinburne*, 14 Ves. 159 ; *Stirling v. Forrester*, 3 Bligh, R. 590, 596 ; *Campbell v. Mesier*, 4 John. Ch. R. 334, 338. But see *Johnson v. Johnson*, 11 Mass. R. 359 ; *Taylor v. Savage*, 12 Mass. R. 98.

² *Gammon v. Stone*, 1 Ves. 339 ; *Woffington v. Sparks*, 2 Ves. 569, 570. But see *Morgan v. Seymour*, 1 Ch. Rep. 120, and *Ex parte Crisp*, 1 Atk. 135. — Mr. Chancellor Kent, in *Cheeseborough v. Milard*, (1 John. Ch. R. 413,) seems to have thought, that a surety, paying off a debt, is entitled to a cession or assignment of the security to enable him to have satisfaction from the principal and his co-sureties. He relied on the cases in 1 Ch. R. 20, and 1 Atk. 35 ; but he did not cite the cases in 1 Ves. 339, and 2 Ves. 569, 570. However, the point was not decided by him. See also *Avery v. Petten*, 7 John. Ch. R. 211, where the same learned Chancellor acted upon the ground, that an assignment might be decreed ; but for very satisfactory reasons refused it in that case. His grounds, however, seem equally applicable against any assignment in any case, where all the parties in interest are not before the Court ; and if they are, there seems no necessity for the assignment, since there may be a direct decree for contribution without it. It is one thing to decide, that a surety is entitled, on payment, to have an assignment of the debt, and quite another to decide, that he is entitled to be subrogated, or substituted as to equities in the place of the creditor, against the debtor and his co-sureties. See *King v. Baldwin*, 2 John. Ch. R. 560 ; *Hayes v. Ward*, 4 John. Ch. R. 123. In *Sterling v. Forrester*, 3 Bligh, R. 590, 591, Lord Redesdale said ; “ If several persons are indebted, and one makes payment, the creditor is bound in conscience, if not by contract, to give the party, paying the debt, all his remedies against the other debtors.” Mr. Theobald, in his *Treatise on Principal and Surety*, ch. 10, § 270, has by mistake attributed a remark of Sir Samuel Romilly, arguendo, to the Lord Chancellor. It bears on this very point, and therefore the error should be corrected.

§ 494. In the Roman law analogous principles existed, though, from the different arrangements of that system, they were developed under very different modifications. By that law, sureties were liable indeed for the whole debt due to the creditor ; but this liability was subject to three modifications. In the first place, the creditor was generally bound to proceed by process of discussion, (as it is now called,) in the first instance against the principal debtor to obtain satisfaction out of his effects, before he could resort to the sureties. In the next place, in a suit against one surety, although each surety was bound for the whole debt after the discussion of the principal debtor ; yet the surety in such suit had a right to have the debt apportioned among all the solvent sureties on the same obligation, so that he should be compellable to pay his own share only ; and this was called the benefit of division.¹ But if a surety should pay the whole debt, without insisting upon the benefit of division, then he had no right of recourse over against his co-sureties, unless (which is the third case) upon the payment he procured himself to be substituted to the original debt, (which he might insist on,) by a cession thereof from the creditor ; in which case he might insist upon a payment of a proper proportion from each of his co-sureties.² And, in case of insolvency of either of the sureties, the share of the insolvent was to be apportioned upon all the

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

² 1 Domat, B. 3, tit. 4, § 4, art. 1 ; Pothier on Oblig. n. 407, n. 519, 520, 521 ; Pothier, Pand. Lib. 46, tit. 1, art. 2, n. 45 to 51.

solvent sureties *pro ratâ*.¹ The same principles now, in a great measure, but not in all cases, regulate the same subject among the continental nations of Europe, whose jurisprudence is derived from the Civil Law.²

§ 495. Originally, contribution between sureties, unless founded upon positive contract between them, incurring such liability, seems to have been questioned, as a matter capable of being enforced at law. But there is now no doubt, that it may be enforced at law, as well as in equity, although no such contract exists. And it matters not in case of a debt, whether the sureties are jointly and severally bound, or only severally, or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if they are for the same identical debt.³

¹ 1 Domat, B. 3, tit. 4, art. 2; Pothier on Oblig. n. 407, 415, 418, 419, 420, 421, 445, 518, 519, 520, 521; Id. 282; Pothier, Pand. Lib. 46, tit. 1, art. 2, n. 45 to 51; Dig. Lib. 46, tit. 1, l. 26. See also 1 Bell. Comm. B. 3, Pt. 1, ch. 3, § 3, art. 283 to 286; Ersk. Inst. B. 3, tit. 3, art. 61 to 74.

² Merlin Repert. art. *Discussion*; Id. *Division*; Pothier on Oblig. Pt. 2, ch. 6, art. 2, n. 407, 415, 416; Id. P. 2, ch. 3, art. 8, n. 280; Id. P. 3, ch. 1, art. 6, § 2, n. 519, 520 to 524.—The same principle in regard to the necessity of the creditor's discussing the principal debtor before resorting to the surety, has been adopted in most countries deriving their jurisprudence from the Civil Law; but it is not universally adopted. It prevails in France, Holland, and Scotland; but not (as it seems) generally in Germany. See Mr. Chancellor Kent's learned opinion in *Hayes v. Ward*, 4 John. Ch. Rep. 133, where he cites Pothier on Oblig. n. 407 to 414; Code. Napol. art. 2021 to 2023; Voet. ad Pand. tit. De Fidejussoribus, Lib. 46, tit. 1, § 14 to 20; Hub. Prælect. Lib. 3, tit. 21, § 6; Ersk. Inst. B. 3, tit. 3, § 61, p. 548; Heineccii. Elem. Lib. 2, tit. 16, § 449. These authorities fully justify his statement.

³ *Deering v. Earl of Winchelsea*, 1 Cox, R. 318; S. C. 2 Bos. & Pul. 270; 1 Saund. R. 264, a, Mr. Williams's note c; *Craythorne v. Swinburne*, 14 Ves. 159, 169.

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

§ 497. And, upon the like grounds, if one of the sureties dies, the remedy at law lies only against the surviving parties; but in Equity it may be enforced against the representative of the deceased

¹ *Wright v. Hunter*, 5 Ves. 792.

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

³ *Cornell v. Edwards*, 2 Bos. & Pul. 268; *Brown v. Lee*, 6 B. & Cresw. 697. See also *Rogers v. Mackensie*, 4 Ves. 752; *Wright v. Hunter*, 5 Ves. 792.

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

party, and he may be compelled to contribute to the surviving surety, who shall pay the whole debt.¹ Where there are several distinct bonds with different penalties, and a surety upon one pays the whole, the contribution between the sureties is in proportion to the penalties of their respective bonds. But, as between the sureties to the same bond, the general rule is of equality of burthen *inter sese*.²

§ 498. These are cases of contribution of a simple and distinct character. But, in cases of suretyship, others of a very complicated nature may arise from counter equities between some or all of the parties, resulting from contract or equities between themselves, or from peculiar transactions regarding third persons.³ Thus, for instance, though the general rule is, that there shall be a contribution between sureties by the rule of equality, that may be modified by express contract between them; and, in such a case, Courts of Equity will be governed by the terms of such contract in giving or refusing contribution.⁴ And, in like manner, there may arise by implication from the nature of the transaction, an exemption of one surety from becoming liable to contribution in favor of another. Thus, if one surety should not upon his own mere motion, but at the express solicitation of his co-surety, become a party to the instrument; and such co-surety should afterwards be com-

¹ *Primrose v. Bromley*, 1 Atk. 89.

² See *Deering v. Earl of Winchelsea*, 1 Cox, R. 318; S. C. 2 Bos. & Pull. 270.

³ See *Hyde v. Tracey*, 2 Day, Cas. 422; *Ransom v. Keyes*, 9 Cowen, R. 128.

⁴ *Swain v. Wall*, 1 Ch. R. 149; *Craythorne v. Swinburne*, 14 Ves. 159, 169; *Deering v. Earl of Winchelsea*, 1 Cox, R. 318; S. C. 2 Bos. & Pull. 270.

pelled to pay the whole debt ; in such a case he would not be entitled to contribution, unless it clearly appeared, that there was no intention to vary the general right of contribution in the understanding of the parties.¹ So, if there should be separate bonds given, with different sureties ; and one bond is intended to be subsidiary to, and a security for, the other, in case of a default in payment of the latter, and not a primary concurrent security ; in such a case, the sureties in the second bond would not be compellable to aid those in the first bond by any contribution.²

§ 499. Sureties also have, as between themselves, a right to the benefit of all counter securities ; and often are placed by way of substitution to the creditor in all the equities, which the creditor himself had against third persons. Thus, where the principal in a bond had been sued, and gave bail, and judgment was had against the bail by the creditor ; and afterwards the sureties in the first bond (who had counter bonds) were compelled to pay the bond, and brought their bill to have the benefit of the judgment of the creditor against the bail, by having it assigned to them, it was decreed accordingly.³ Indeed, the

¹ *Turner v. Davies*, 2 Esp. R. 478 ; *Mayhew v. Crickett*, 2 Swanst. R. 193 ; *Taylor v. Savage*, 12 Mass. R. 98, 102.

² *Craythorne v. Swinburne*, 14 Ves. 159. See *Cooke v. —*, 2 Freem. R. 97.

³ *Parsons v. Breddock*, 2 Vern. 608 ; *Wright v. Morley*, 11 Ves. 22 ; *Sterling v. Forrester*, 3 Bligh, R. 590, 591. — In *Ex parte Gifford*, (6 Ves. 805,) Lord Eldon held, that a discharge of one surety did not discharge the other sureties ; and that, as each surety was bound to contribute his share towards the general payment, no one could recover over against another, who had been discharged, unless for the excess paid by him beyond his due proportion. The creditor might, therefore, accept a composition from one surety ; and still proceed

principle is general, that sureties, who pay a debt, shall be entitled to stand in the place of the creditor, as to all securities, funds, liens, and equities, which he may have against other persons, or property, on

against another to recover his full proportion of the original debt, without deducting the composition paid, if it did not exceed the proportion, for which the surety was originally liable. Mr. Theobald, in his *Treatise on Principal and Surety*, (ch. 11, § 283, note (i,) p. 267,) thinks this decision could not have been made; and that it is misreported. I see no reason to question either the accuracy of the Report, or the soundness of the doctrine. If the discharge of one surety is not the discharge of another, it seems difficult to see, how the sum paid by one surety shall take away the obligation of another to pay his proportion of the original debt, if, upon the discharge, the right to proceed against such surety for his proportion was expressly, or by implication, reserved to the extent of that proportion. This seems to have been the ground of Lord Eldon's decision. In *Stirling v. Forrester*, (3 Bligh, R. 591,) Lord Redesdale said, "If the creditor discharges one of the co-parceners, he cannot proceed for his whole debt against the others; at the most they are only bound for their proportions." The same principle would apply to co-sureties; and indeed *Stirling v. Forrester*, (3 Bligh, R. 591, 596,) seems mainly to have been decided upon this ground. The distinction is between a discharge of the principal, and a discharge of the surety; between a part payment by a surety, and a part payment by the principal. Pothier adopts very much the same principles and reasoning, asserting, that the release of the creditor of one debtor would liberate all the others, if the creditor meant thereby to extinguish the debt; but not, if the creditor meant to reserve his rights against the other co-debtors for their proportions. — 1 Pothier on Oblig. n. 275, 280; Id. n. 521. — Pothier has also treated the point of a discharge of one surety; and holds, that a discharge of one surety discharges the other sureties for such proportion of the debt, as upon payment of the whole debt, they could have had recourse to him for. Pothier on Oblig. n. 521. See Id. n. 428, 429, 445. The rule of the Civil Law is the same. *Si ex duobus, qui apud te fide jusserant in viginti, alter, ne ab eo peteres, quinque tibi dederit, vel promisserit; nec alter liberabitur. Et si ab altero quindecim petere institueris, nulla exceptione (cedendarum actionum) summo veris. Reliqua autem quinque si a priore fide jussore petere institueris, doli mali exceptione summo veris.* Dig. Lib. 46, tit. 1, l. 15, § 1; Pothier, Pand. Lib. 46, tit. 1, n. 47.

account of the debt.¹ It is often exemplified in cases, where a party, having two funds to resort to for payment of his debt, elects to proceed against one, and thereby disappoints another party, who can resort to that fund only. In such a case, the disappointed party is substituted in the place of the electing creditor; or the latter is compelled to resort in the first instance to that fund, which will not interfere with the rights of the other.²

§ 500. We have already seen, that a similar general doctrine pervades the Civil Law. *Fidejussoribus succurri solet, ut stipulator compellatur ei, qui solidum solvere paratus est, vendere ceterorum nomina. Cum is, qui et reum et fidejussores habens, ab uno ex fidejussoribus accepta pecunia præstat actiones; poterit quidem dici nullas jam esse, cum suum perceperit, et perceptione omnes liberati sunt. Sed non ita est; non enim in solutum accepit, sed quodammodo nomen debitoris vendidit. Et ideo habet actiones, a qui tenetur ad id ipsum, ut præstet actiones.*³ Here we have doctrine distinctly put, the objection to it stated, and the ground upon which its solution depends. The reasoning may seem a little

¹ Wright v. Morley, 11 Ves. 12; Ex parte Gifford, 6 Ves. 805, 807. See Rumbold v. Rumbold, 3 Ves. 63; Mayhew v. Crickett, 2 Swanst. R. 186, 191; Miller v. Ord, 2 Binn. 382; Cheeseborough v. Millard, 1 John. Ch. R. 409, 412; Stevens v. Cooper, 1 John. Ch. R. 430; Lawrence v. Cornell, 4 John. Ch. R. 545; King v. Baldwin, 2 John. Ch. R. 554; Hayes v. Ward, 4 John. Ch. R. 123; Clason v. Morris, 10 John. R. 524.

² Sagittary v. Hyde, 1 Vern. 455, and Mr. Raithby's note; Mills v. Eden, 10 Mod. R. 488; Aldrich v. Cooper, 8 Ves. 388; Trimner v. Bayne, 9 Ves. 209; Robinson v. Wilson, 2 Madd. R. 457; Cheeseborough v. Millard, 1 John. Ch. R. 412, 413; King v. Baldwin, 2 John. Ch. R. 554; Hayes v. Ward, 4 John. Ch. R. 123; 1 Madd. Ch. Pr. 202, 203. .

³ Dig. Lib. 46, tit. 1, l. 17, l. 36; Pothier, Pand. Lib. 46, tit. 1, n. 46.

artificial; but it has a deep foundation in natural justice. The same doctrine stands approved in substance in all the countries, which derive their jurisprudence from the Civil Law.¹

§ 501. The Civil Law carried its doctrines yet farther, in furtherance of the great principles of Equity. It held the creditor bound not to deprive himself of the power to cede his rights and securities to the surety, who should pay him the debt; and if by any voluntary and unnecessary act of his own, such a cession became impracticable; the surety might, by what was technically called *Exceptio cedendarum actionum*, bar the creditor of so much of his demand, as the surety might have received by a cession or assignment of his liens, and rights of action against the principal debtor. *Si creditor a debitore culpa sua causa ceciderit, prope est, ut actione mandati nihil a mandatore consequi debeat; cum ipsius vitio acciderit, ne mandatori possit actionibus cedere.*²

§ 502. The same doctrine has been transfused into the English Law in an analogous form; not indeed by requiring an assignment or cession of the debt to be made; but by placing the surety paying the debt in the place of the creditor. Thus, if a surety should pay off a specialty debt, he would be considered as a specialty creditor of his principal; and, if a mortgage were given as collateral security,

¹ Voet, ad Pand. lib. 46, tit. 1, § 27, 29, 30; Pothier on Oblig. n. 275, 280, 281, 427; Id. 519, 522; Huber, Prælect. Inst. Lib. 3, tit. 21, n. 8; 1 Bell. Comm. B. 3. Pt. 1, ch. 3, § 3, p. 264, &c. art. 283; Ersk. Inst. B. 3, tit. 3, art. 68; 1 Kaimes, Eq. 122, 124.

² Dig. Lib. 46, tit. 3, l. 95, § 11; Pothier Pand. Lib. 46, tit. 1, n. 46, 47; Pothier on Oblig. n. 520, 521; Cheeseborough v. Millard, 1 John. Ch. R. 414; Hayes v. Ward, 4 John. Ch. R. 130.

he would be entitled to the benefit of the latter.¹ And if the creditor should have knowingly done any act to deprive the surety of this benefit, the surety, as against him, would be entitled to the same equity, as if the act had not been done.² On the other hand, if a surety has a counter bond or security from the principal, the creditor will be entitled to the benefit of it; and may in equity reach such security to satisfy his debt.³

§ 503. There are many other cases of contribution, on which the jurisdiction of Courts of Equity is required to be exercised, in order to accomplish the purposes of justice. Thus, for instance, in cases of a deficiency of assets to pay all debts and legacies, if any of the legatees have been paid more than their proportion, after all the debts are ascertained, they may be compelled to refund and contribute in favor of the unpaid debts, at the instance of creditors, at the instance of other legatees, and in many cases, though not universally, at the instance of the executor himself.⁴

¹ *Robinson v. Wilson*, 2 Madd. 437. — In the case of a Crown debtor, a surety is substituted to the prerogative of the Crown in regard to the debt; and then is admitted to use the Crown Remedies. *The King v. Bennett*, Wight, W. R. 2 to 6.

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

³ 1 Eq. Abridg. p. 93, K. 5. See also Com. Dig. Ch. 4 D. 6.

⁴ Ante, § 90, 92; *Jeremy on Eq. Jurisd.* B. 3, Pt. 2 ch. 2, p. 364; *Id.* B. 3, Pt. 2, ch. 5, p. 518; *Noel v. Robinson*, 1 Vern. 94, and Mr. Raithby's notes, *ibid*; *Walcott v. Hall*, 2 Bro. Ch. R. 305; *Anon.* 1 P. Will. 495, and Mr. Cox's note; *Newman v. Barton*, 2 Vern. 265, and Mr. Raithby's note; *Edwards v. Freeman*, 2 P. Will. 447; *Hardwick v. Wynd*, 1 Anst. 112; *Davis v. Davis*, 1 Dick. R. 32; *Jervon v. Grant*, 3 Swanst. R. 659; Com. Dig. Ch. 3, V. 6.

§ 504. In like manner, contribution lies between partners for any excess, which has been paid by one partner beyond his share, against the other partners, if upon a winding up of the partnership affairs, such a balance appears in his favor ; or if upon a dissolution, he has been compelled to pay any sum, for which he ought to be indemnified. The cases, in which a recovery at law can be had by way of contribution between partners, are very few, and stand upon special circumstances. The usual, and indeed, almost the only effectual remedy is in equity, where an account of all the partnership transactions can be taken ; and the remedy, to ascertain and adjust the balance, is in a just sense, plain, adequate, and complete.¹ It is under the same circumstances, that an action of account at the Common Law lies ; but that, as we have already seen, is in most cases a very cumbersome, inconvenient, and tardy remedy. The same remark applies to an action of covenant on sealed articles of partnership, or an action of assumpsit upon unsealed articles, where there have been any breaches of the articles ; for there may be many breaches of them during the continuance of the partnership, which scarcely admit of adequate redress in this way.² This subject will, however, present itself in a more enlarged form hereafter.

§ 505. Contribution also lies between jointenants, tenants in common, partowners of ships and of other

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

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

chattels, for all charges and expenditures incurred for the common benefit. But it seems unnecessary to dwell upon these cases, and others of a like nature, as they embrace nothing more than a plain application of principles already fully expounded.¹ We may conclude this head with the remark, that the remedial justice of Courts of Equity, in all cases of apportionment and contribution, is so complete, and so flexible in its adaptation to all the particular circumstances and equities, that it has, in a great measure, superceded all efforts to obtain redress in any other tribunals.

§ 506. LIENS also give rise to matters of account; and though this is not the sole, or, indeed, the necessary, ground of the interference of Courts of Equity; yet directly or incidentally it becomes a most important ingredient in the remedial justice administered by them in cases of this sort. The subject, as a general head of Equity Jurisdiction, will more properly fall under discussion in another place. But a few considerations, touching matters of account involved in it, may be here glanced at. A Lien is not in strictness either a *jus in re*, or a *jus ad rem*; but simply a right to possess and retain property, until some charge attaching to it is paid or discharged.² It generally exists in favor of artisans and others, who have bestowed labor and services upon the property, in its repair, improvement, and preservation.³ It has also an existence in many

¹ Com. Dig. Chancery, 3 V. 6; Rogers v. Mackensie, 4 Ves. 752; Lingard v. Bromley, 1 V. & Beam. 114.

² Brace v. Duchess of Marlborough, 2 P. Will. 491; Gilman v. Brown, 1 Mason, R. 221.

³ Abbott on Shipp. P. 2, ch. 3, § 1, 17; Chase v. Westmore, 5 M. & Selw. 180.

other cases by the usages of trade ; and in maritime transactions, as in cases of salvage and general average.¹ It is often created and sustained in Equity, where it is unknown at law, as in cases of the sale of lands, where a lien exists for the unpaid purchase money.² It is not confined to cases of mere labor and services on the very property, or connected therewith ; but it often is, by the usage of trade, extended to cases of a general balance of accounts, in favor of factors and others.³ Now it is obvious, that most of these cases must give rise to matters of account ; and as no suit is maintainable at law for the property by the owner, until the lien is discharged ; and as the nature and amount of the lien often are involved in great uncertainty, a resort to a Court of Equity, to ascertain and adjust the account, seems in many cases absolutely indispensable for the purposes of justice ; since, if a tender were made at law, it would be at the peril of the owner ; and if it was less than the amount, he would inevitably be cast in the suit ; and be put to the necessity of a new litigation under more favorable circumstances. Cases of pledges present a similar illustration, whenever they involve indefinite and unascertained charges and accounts.

§ 507. Let us in the next place bring together some few cases involving accounts, which may arise either from privity of contract, or relation, or from adverse or conflicting interests.

¹ Abbott on Shipp. Pt. 2, ch. 3, § 1, 17 ; Pt. 3, ch. 3, § 11 ; Id. ch. 10, § 1, 2.

² Sugden on Vendors, ch. 12, § 1, p. 541, (7th edit.)

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

§ 508. Under this head the jurisdiction of Courts of Equity, in regard to RENTS AND PROFITS, may properly be considered. A great variety of cases of this sort resolve themselves into matters of account, not only when they arise from privity of contract ; but also when they arise from adverse claims and titles, asserted by different persons.¹ Between landlord and tenant accounts often extend over a number of years, where there are any special terms or stipulations, requiring expenditures on one side, and allowances on the other. In such cases, where there are any controverted claims, a resort to Courts of Equity is often necessary to a due adjustment of the respective rights of each party.²

§ 509. Mr. Fonblanque asserts, that Courts of Equity, when resorted to for the purpose of an account of mesne profits, will, in many cases, consult the principle of convenience ; and will, therefore, sometimes decree it, where the party has not already established his right at law³. To some extent, as in cases of share holders in real property of a peculiar nature, (such as share holders in the New River Waterworks, in England,) he is borne out by authority. But there is great reason to question, whether the doctrine is generally admissible, as a rule in Equity, resulting from mere convenience.⁴ It seems rather to result from the

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

² O'Conner v. Spaight, 1 Sch. & Lefr. 305. See *The King v. The Free Fishers of Whitstable*, 7 East, R. 353, 356.

³ 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (k).

⁴ *Townsend v. Ash*, 3 Atk. 336. See *Pulteney v. Warren*, 6 Ves. 91, 92 ; *Norton v. Frecker*, 1 Atk. 524, 525.

peculiar character of the property, where there are many proprietors, in the nature of partners, having a common title to the profits; and therefore the whole becomes appropriately a matter of account.¹

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

§ 511. It is observable, that in these cases of *elegit*, there exists a privity in law; and there is an implied trust between the parties. In the ordinary case of mesne profits, where a clear remedy exists at law, Courts of Equity will not interfere, but will leave the party to his remedy at law. Some

¹ *Adley v. Whitstable*, Comp. 17 Ves. 324; *Lorimer v. Lorimer*, 5 Madd. R. 369.

² *Bac. Abridg. Accompt*, B. — The gradual development of Equity Jurisdiction in cases of tort, mesne profits arising under contracts, trusts, and torts, is well stated in *Bac. Abridg. Accompt*, B.

³ *Yates v. Hambley*, 2 Atk. 362, 363; *Owen v. Griffith*, Ambl. R. 520; S. C. 1 Ves. 250.

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

special circumstances are, therefore, necessary to draw into activity the remedial interference of a Court of Equity;¹ and when these exist, it will interfere in cases not only arising under contract, but under direct, or constructive torts. Thus, for instance, if a man intrudes upon an infant's lands, and takes the profits, he is compellable to account for them, and will be treated as a guardian or trustee for the infant.² And this is but following out the rule of law in the like case; for so greatly does the law favor infants, that, if a stranger enters into, and occupies an infant's lands, he is compellable at law to render an account of the rents and profits, and will be chargeable, as guardian, or bailiff.³

§ 512. Other cases may be easily put, where a like remedial justice is administered in Equity. But in all these cases it will be found, that there is some peculiar equitable ground for interference; such as fraud, or accident, or mistake, the want of a discovery, some impediment at law, the existence of a constructive trust, or the necessity of interposing to prevent multiplicity of suits.⁴ It is perfectly clear, that, if there is a trust estate, and the *cestui que trust* comes into Equity upon his title to recover

¹ Tilley v. Bridges, Prec. Ch. 252; 1 Eq. Abridg. 285.

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

³ Littleton, § 124; Co. Litt. 89 b, 90 a; Pulteney v. Warren, 6 Ves. 88, 89; Com. Dig. *Accompt*, A. 2; Dormer v. Fortescue, 3 Atk. 129, 130; Curtis v. Curtis, 2 Bro. Ch. 628, 632; Townsend v. Ash, 3 Atk. 337.

⁴ Ibid. and Sayer v. Pierce, 1 Ves. 232; Curtis v. Curtis, 2 Bro. Ch. R. 628, 632, 633; Tilley v. Bridges, Bro. Ch. 252.

the estate, he will be decreed to have the further relief of an account of the rents and profits.¹ So, in the case of bond creditors, who come in for a distribution of assets ; they may have an account of rents and profits against the heir in Equity ; for it is clear, that they have an equity, and yet they are without remedy at law.² So, in the case of dower, (of which more will presently be said,) if the widow is entitled to dower ; and her claim is merely upon a legal title ; but she cannot ascertain the lands, out of which she is dowerable ; and comes into Equity for discovery and relief ; she will be entitled to an account of the rents and profits, upon having her title established.³ So, if an heir, or devisee, is compelled to come into Equity for a discovery of title deeds, and the ascertainment of his title ; or to put aside some impediments to his recovery ; there he will be entitled to an account of the rents and profits.⁴

§ 513. Another case, illustrative of the same doctrine as connected with torts, is, where a recovery has been had in an ejectment, brought to recover lands, and afterwards the plaintiff is prevented from enforcing his judgment, by an injunction obtained on a bill brought by the tenant, who dies before the bill is finally disposed of. In such a case, at law, the remedy by an action of trespass for the mesne profits is gone by the death of the tenant, as actions of

¹ *Dormer v. Fortescue*, 3 Atk. 129 ; *Coventry v. Hall*, 2 Ch. Rep. 259.

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

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

⁴ *Dormer v. Fortescue*, 3 Atk. 124 ; *Coventry v. Hall*, 2 Ch. Rep. 259 ; *Bennet v. Whitehead*, 2 P. Will. 644 ; *Poultney v. Warren*, 6 Ves. 88, 89.

tort do not survive at law. But a Court of Equity will, in such a case, entertain a bill for an account of the mesne profits in favor of the plaintiff in ejectment, against the personal representatives of the tenant ; for it is inequitable, that his estate should receive the benefit and profits of the property of another person. It would be a reproach to Equity, if a man, who has taken the property of another, and disposed of it in his lifetime, should, by his death, throw the proceeds into his own assets, and leave the injured party remediless.¹ It is true, that the death of the tenant cannot be treated as the case of an accident, against which a Court of Equity will relieve.² But there seems the most manifest justice in holding, that where property or its proceeds have come to the use of a party, the mere fact, that it has originated in a tort, should not prevent the party and his personal representatives from rendering an account thereof. And, in truth, this is but following out the principles now adopted in Courts of Law, where the action for a tort dies with the person ; but the right of property in the thing, or its proceeds, survives against the personal representative.³

§ 514. There is also another distinct ground, which, though not always followed out by the Courts of Equity in England, is of itself sufficient to maintain the jurisdiction ; and that is, that in these cases a discovery is sought ; and if it is effectual, then, to prevent multiplicity of suits, the Court ought

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

² *Pulteney v. Warren*, 6 Ves. 88 ; *Garth v. Cotton*, 3 Atk. 757 ; S. C. 1 Ves. 524 ; *Id.* 546.

³ *Hambley v. Trott*, Cowp. R. 371 ; *Lansdowne v. Lansdowne*, 1 Madd. R. 116. — There are recent statutes both in England and

to decree at once the payment of the mesne profits, which have thus been ascertained.¹ But a definite and very satisfactory ground to maintain the jurisdiction in such cases is, that it is inequitable, that a party, who suspends the just operation of a suit or judgment by an injunction, should thereby deprive the other party of his rights and profits, belonging to the suit or judgment, if the merits turn out to be ultimately in favor of the latter. He ought, under such circumstances, to be compelled to put the plaintiff in the original suit in the same situation, as if no such injunction had intervened.²

§ 515. Cases of WASTE, by tenants and other persons, afford another illustration of the same doctrine.³ Thus, where one held customary lands of a manor, and opened a copper mine in the lands, and dug the ore, and sold great quantities of it in his life time, and then died, and his heir continued digging and disposing of the ore in like manner; upon a bill brought against the executor for an account, and against the heir also for an account, it was decided, that the bill was maintainable, both against the executor and the heir. Lord Cowper seems to have entertained the jurisdiction upon general principles, and especially upon the ground, that the tenant was a sort of fiduciary of the lord;

America, which alter the Common Law in this respect. But this change has not taken away the original jurisdiction in Equity.

¹ See *Jesus College v. Bloom*, 3 Atk. 262; *S. C. Ambler*, R. 54; *Whitfield v. Barrit*, 2 P. Will. 240; *S. C. 3 P. Will*, 267; *Dormer v. Fortescue*, 2 Atk. 282; *S. C. 3 Atk.* 124; *Townsend v. Ash*, 3 Atk. 336, 337.

² *Pulteney v. Warren*, 6 Ves. 88, 92.

³ We here speak of *legal* waste; for if the waste be equitable only, of course a remedy lies in Equity. *Lansdowne v. Lansdowne*, 1 Madd. R. 116; *Marquis of Ormond v. Kynersby*, 5 Madd. R. 369.

and it was against conscience, that he should shelter himself or his representative from responsibility for a breach of trust in a Court of Equity.¹

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

§ 517. Cases of waste, by the cutting down of timber by tenants, have given rise to questions of the same sort, in regard to jurisdiction. In some of the cases upon this subject it seems to have been maintained, that though the remedy for waste is ordinarily at law ; yet, that if a discovery is wanted, that alone, if it turns out to be important and is obtained, will carry the ulterior jurisdiction to ac-

An injunction to stay waste will lie in favor of one tenant in common against another. *Hawley v. Clowes*, 2 John. Ch. R. 122.

¹ *Bishop of Winchester v. Knight*, 1 P. Will. 407 ; S. C. 2 Eq. Abridg. 226.

² *Pulteney v. Warren*, 6 Ves. 89, 90 ; *Jesus College v. Bloom*, 3 Atk. 262 ; S. C. Ambler. R. 54.

³ *Jesus College v. Bloom*, 3 Atk. 262 ; S. C. Ambler. R. 54 ; *Story v. Lord Windsor*, 2 Atk. 630 ; *Sayer v. Pierce*, 1 Ves. 232.

count, in order to prevent multiplicity of suits;¹ a ground, the sufficiency of which it seems difficult to resist upon general principles.² But other decisions, and those, which are relied on, as constituting the established doctrine of the Court, are differently qualified; and seem to require, to maintain the jurisdiction for an account, that there should be a prayer for an injunction to prevent future waste.³

§ 518. Lord Hardwicke upon one occasion expounded this ground of jurisdiction very clearly, (though he does not seem himself afterwards to have been satisfied with so limiting it,⁴) and said, “Waste is a loss, for which there is a proper remedy by action. In a Court of Law, the party is not necessitated to bring an action of waste, but he may bring trover. These are the remedies; and therefore there is no ground of equity to come into this Court. For satisfaction of damages is not the proper ground for the Court to admit of these sorts of bills, but the staying of waste; because the Court presumes, when a man has done waste, he may do the same again; and, therefore, will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time for an account of the waste done. And it is upon this ground, to prevent multi-

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

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

³ See *Pulteney v. Warren*, 6 Ves. 89, 90; *Gherson v. Eyre*, 9 Ves. 89; *Richards v. Noble*, 3 Meriv. R. 673. But see *Lansdowne v. Lansdowne*, 1 Madd. R. 116; *Eden on Injunct.* ch. 9, p. 206, &c.

⁴ See *Garth v. Cotton*, 3 Atk. 756; S. C. 1 Ves. 524, 546.

plicity of suits, that this Court will decree an account of waste done at the same time with an injunction. Just like the case of a bill for a discovery of assets ; an account may be prayed for at the same time. And though originally the bill was only brought for a discovery of assets ; yet, to prevent a multiplicity of suits, the Court will direct an account to be taken.”¹ Now, if this reasoning be well founded either in itself, or upon the analogy of the case put of assets, it goes clearly to show, that, where discovery is sought, and is obtained, there also, to prevent multiplicity of suits, an account ought to be decreed, without the additional ingredient of an injunction to stay future waste. And Lord Thurlow seems to have acted upon this ground.²

§ 519. In regard to TITHES, also, and incidentally to MODUSES, and other compositions, Courts of Equity in England exercise an extensive jurisdiction of an analogous nature.³ There is a very ancient jurisdiction in the Court of Exchequer in the matter of tithes ;

¹ *Jesus College v. Bloom*, Ambler, R. 54 ; S. C. 3 Atk. 262 ; *Pulteney v. Warren*, 6 Ves. 89 ; *Bishop v. Church*, 2 Ves. 104 ; *Yates v. Hambly*, 2 Atk. 362 ; *Watson v. Hunter*, 5 John. Ch. R. 169 ; *Smith v. Cooke*, 3 Atk. 381. — It may be said, that on a bill for a discovery of assets, an account is necessary to ascertain the assets ; and, when taken, the Court ought to proceed to decree satisfaction, in order to prevent multiplicity of suits. But precisely the same thing may occur on a bill for an account of waste. Before the waste can be ascertained, it may be indispensable to have an account ; and, when taken, the Court ought to proceed to decree satisfaction. In *Jesus College v. Bloom*, (Ambl. R. 54,) the term was gone by an assignment to another tenant, and no injunction was asked as to future waste.

² *Lee v. Alston*, 1 Bro. Ch. R. 194, 195 ; S. C. 1 Ves. jr. 78. See also *Eden on Injunct.* ch. 9, p. 206, &c. ; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f.)

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

Lord Nottingham is said to have stated, that the jurisdiction in the Exchequer over tithes by bill in Equity is not earlier than the reign of Henry VIII., and that took its rise from the statute of augmentations in his reign, (33 Hen. VIII. ch. 39.)¹ But other persons assert, that it had a more early origin; and, in respect to extra-parochial tithes, which are a part of the ancient inheritance of the Crown, they insist, that suits for tithes must always have fallen within the compass of the direct and substantial jurisdiction of the Court of Exchequer, as a Court of Revenue; and that the proper jurisdiction of tithes belongs there.² Be this as it may, the jurisdiction of the Court of Chancery over the same subject seems to have been of a much later origin, or at least to have been matter of doubt and controversy to a much later period; the jurisdiction not having been firmly established until after the restoration of Charles II.³ The Court of Chancery has ever since been held to have a concurrent jurisdiction with the Court of Exchequer.⁴ This concurrent jurisdiction in both Courts is now generally considered to be merely incidental and collateral, arising from the general equitable jurisdiction of these Courts in matters of account, and in compelling a discovery.⁵ And, therefore, wherever the right to tithes is clearly established, an account is consequential; for it would be otherwise impossible to give

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

² Ibid. *Hardcastle v. Smithson*, 3 Atk. 247.

³ Ibid. Anon. 1 Freem. R. 203; Anon. 2 Ch. Cas. 237; S. C. 2 Freem. R. 27; 1 Madd. Ch. Pr. 84.

⁴ Bacon Abridg. *Tithes*, B. 6; Com. Dig. Chancery, 3 C; Id. *Dismes*, M. 13.

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

full effect to that right, unless upon a discovery and account.¹ If the right is disputed, it must be first ascertained at law, before an account will be decreed.² Indeed, it may be truly said, that in all matters of tithes, a Court of Equity is far more competent than a Court of Law to administer an appropriate remedy.³

§ 520. Courts of Equity in England will not only enforce an account in cases of tithes ; but they will also exercise jurisdiction to establish a modus or composition, in cases where the party, insisting on the modus, has been disturbed by proceedings at law, or in Equity, or in the Ecclesiastical Courts, as to tithes ; but not otherwise. The peculiarities, belonging to the law of tithes and the doctrines respecting moduses, are the less important to be dwelt on in this place ; because they do not in any important manner illustrate any of the general doctrines of Equity ; but turn upon considerations eminently of an ecclesiastical nature ; and are more suitable for a general treatise on tithes.⁴

§ 521. Having passed under review some of the principal heads of Equity jurisdiction in matters of account, which do not require a very elaborate examination, or belong to subjects, which peculiarly illustrate the nature of that, we may

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

² Ibid. Hughes v. Davies, 5 Sim. R. 349.

³ Mitford, Pl. Eq. 125, by Jeremy ; Pulteney v. Warren, 6 Ves. 89.

⁴ Earl of Coventry v. Burslen, 2 Anst. R. 567, note ; Gordon v. Simpkinson, 11 Ves. 509 ; Starvell v. Atkins, 2 Anst. R. 564 ; 1 Madd. Ch. Pr. 202 ; Mayor of Yale v. Pilkington, 1 Atk. 282, 283 ; Warden, &c. of St. Paul's v. Morris, 9 Ves. 155. See also Whaley v. Dawson, 2 Sch. & Lefr. 37 a 371 ; Daws v. Binn, 1 Jac. & Walk. 493.

conclude this examination with some few matters, which appropriately belong to the head of account, and are incident to the exercise of this remedial jurisdiction in all its forms.

§ 522. In the first place, in all bills in Equity for an account, both parties are deemed actors, when the cause is before the Court upon its merits. It is upon this ground, that the party defendant, contrary to the ordinary course of Equity proceedings, is entitled to orders in a cause, to which a plaintiff alone is generally entitled. As for instance, in such a case, a defendant may have an order for a *ne exeat regno*, even against a co-defendant.¹ So, it is a general rule, that no person but a plaintiff can entitle himself to a decree. But in bills for an account, if a balance is ultimately found in favor of the defendant, he is entitled to a decree for such balance against the plaintiff. And for a like reason, though a defendant cannot ordinarily revive a suit, which has not proceeded to a decree; yet in a bill for an account, if the plaintiff dies after an interlocutory decree to account, the defendant is entitled to revive the suit against the personal representatives of the plaintiff.² And, if the defendant dies, his personal representatives may revive the suit against the plaintiff.³ The good sense of the doctrine seems to be, that wherever a defendant may derive a benefit from further proceedings, whether before or after a decree, he may

¹ Done's Case, 1 P. Will. 263.

² 1 Eq. Abridg. 3, Pl. 5; Anon. 3 Atk. 691, 692; Ludlow v. Simond, 2 Cain. Err. 39; Lord Stowell v. Cole, 2 Vern. 219, and Mr. Raithby's note; Harwood v. Schmedes, 12 Ves. 316.

³ Kent v. Kent, Prec. Ch. 197.

be said to have an interest in it, and consequently ought to have a right to revive it.¹

§ 523. In the next place, there are some matters of defence, either peculiarly belonging to cases of tort, or strikingly illustrative of some of the principles already alluded to, under the head of accident, mistake, or fraud. Thus, it is ordinarily a good bar to a suit for an account, that the parties have already in writing stated and adjusted the items of the account, and struck the balance.² In such a case, a Court of Equity will not interfere; for, under such circumstances, an *indebitatus assumpsit* upon an *insimul computassent* lies at law, and there is no ground for resorting to Equity. If, therefore, there has been an account stated, that may be set up by way of plea, as a bar to all discovery and relief, unless some matter is shown, which calls for the interposition of a Court of Equity.³ Now, if there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a Court of Equity will not suffer it to be conclusive upon the parties; but will allow it to be opened and re-examined.⁴ In some cases, as of gross

¹ Williams v. Cooke, 10 Ves. 406; Harwood v. Schmedes, 12 Ves. 311, 316.

² Dawson v. Dawson, 1 Atk. 1; Taylor v. Haylin, 2 Bro. Ch. R. 310; Johnson v. Curtis, cited 2 Brown, Ch. R. 310, Mr. Belt's note; S. C. 3 Bro. Ch. 266, and Mr. Belt's note; Burk v. Brown, 2 Atk. 399; Sumner v. Thorpe, 2 Atk. 1.

³ Ibid. Dawson v. Dawson, 1 Atk. 1; Anon. 2 Freeman. R. 62; Chambers v. Goldwin, 9 Ves. 265, 266; Taylor v. Hayling, 1 Cox, R. 435; S. C. 2 Bro. Ch. R. 310; Chappedelaine v. Dechenaux, 4 Cranch, R. 306; Perkins v. Hart, 11 Wheat. R. 237.

⁴ A settled account between client and attorney, or between other persons standing in confidential relations to each other, will be more

fraud or gross mistake, or undue advantage or imposition, made palpable to the Court, it will direct the whole account to be opened, and taken *de novo*.¹ In other cases, where the mistake, or omission, or inaccuracy, or fraud, or imposition, is not shown to affect, or stain all the items of the transaction, the Court will content itself with a more moderate exercise of its authority.² It will allow the account to stand, with liberty to the plaintiff to surcharge and falsify it; the effect of which is to leave the account in full force and vigor, as a stated account, except so far as it can be impugned by the opposing party, who has the burthen of proof on him to establish errors and mistakes.³ Sometimes a still more moderate course is adopted; and the account is simply opened to contestation, as to one or more items, which are specially set forth in the bill of the plaintiff, as being erroneous or unjustifiable; and in all other respects it is treated as conclusive.⁴

§ 524. When, upon a bill to open a stated account, liberty is given to surcharge and falsify, the cause is referred to a master. The examination of the account then takes place before him; and upon his report the

readily opened than any others; and even, it is said, upon general allegations of error, without any specific errors being pointed out, where the answer admits errors. *Matthews v. Wolwyn*, 4 Ves. 125; *Newman v. Payne*, 2 Ves. jr. 199. See also *Beaumont v. Boulton*, 5 Ves. 495.

¹ 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f); *Vernon v. Vawdry*, 2 Atk. 119; *Barrow v. Rhineland*, 1 John. Ch. R. 550; *Piddock v. Brown*, 3 P. Will. 298; *Wharton v. May*, 5 Ves. 27, 48, 49.

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

³ *Pitt v. Cholmondeley*, 2 Ves. 565, 566; *Perkins v. Hart*, 11 Wheat. R. 237.

⁴ *Brownell v. Brownell*, 2 Bro. Ch. R. 62, 63; *Consequa v. Fanning*, 3 John. Ch. R. 587; S. C. 17 John. R. 511; *Twogood v. Swanson*, 6 Ves. 484, 486.

Court finally acts ; for in matters of account it never acts directly, but only through the instrumentality of a master, by whom the whole matter is thoroughly sifted. The liberty to surcharge and falsify includes, not only an examination of errors of fact, but of errors of law.¹

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

¹ Roberts v. Kuffin, 2 Atk. 112.

wrong charge, he is at liberty to show it, and that is a *falsification*. But that must be by proof on his side. And that makes a great difference between the general cases of an open account, and where only [leave] to surcharge and falsify ; for such must be made out.”¹

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

¹ Pitt v. Cholmondeley, 2 Ves. 565, 566. See also Perkins v. Hart, 11 Wheat. R. 237, 256.

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

³ Willis v. Jernegan, 2 Atk. 251, 252.

⁴ Ibid.

⁵ Sherman v. Sherman, 2 Vern. 276 ; S. C. 1 Eq. Abridg. 12, pl. 10, 11 ; Irving v. Young, 1 Sim. & Stu. 333.

treated as an acquiescence in the correctness of the account transmitted ; and, therefore, it is deemed a stated account.¹ In truth, in each case, the rule admits, or rather requires, the same general exposition. It is, that an account rendered shall be deemed an account stated, from the presumed approbation or acquiescence of the parties, unless an objection is made thereto, within a reasonable time.² That reasonable time is to be judged of, in ordinary cases, by the habits of business at home and abroad ; and the usual course is required to be followed, unless there are special circumstances to vary it, or excuse a departure from it.

§ 527. Upon like grounds, and *a fortiori*, a settled account will be deemed conclusive between the parties, unless some fraud, mistake, omission, or inaccuracy is shown. For it would be most mischievous, to allow settled accounts between the parties, especially where vouchers have been delivered up or destroyed, to be unravelled, unless for urgent reasons, and under circumstances of plain error, which ought to be corrected.³ And, in cases of settled accounts, the Court will not generally open the account ; but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud.⁴

¹ Willis v. Jernegan, 2 Atk. 252 ; Tickel v. Short, 2 Ves. R. 239 ; Murray v. Toland, 3 John. Ch. R. 569, 575 ; Freeland v. Heron, 7 Cranch, 147.

² Ibid ; Com. Dig. Chancery 2, A. 3.

³ Brownell v. Brownell, 2 Bro. Ch. R. 62 ; Taylor v. Haylin, 2 Bro. Ch. R. 310 ; Johnson v. Curtis, 2 Bro. Ch. R. 310 ; S. C. 3 Brown, Ch. R. 266, Mr. Belt's notes ; Chambers v. Goldwin, 8 Ves. 837, 838 ; Pitt v. Cholmondeley, 2 Ves. 566.

⁴ Vernon v. Vawdry, 2 Atk. 119 ; Chambers v. Goldwin, 8 Ves. 265, 266 ; Drew v. Power, 1 Sch. & Lefr. 192.

§ 528. In regard to acquiescence in stated accounts, although it amounts to an admission, or presumption, of their correctness, it by no means established the fact of their having been settled, even though the acquiescence has been for a considerable time. There must be other ingredients in the case, to justify such conclusion of a settlement.¹

§ 529. It is, too, a most material ground in all bills for an account, to ascertain, whether they are brought to open and correct errors in the account, *recenti facto*; or whether the application is made after a great lapse of time. In cases of this sort, where the demand is strictly of a legal nature, or might be cognizable at law, Courts of Equity govern themselves by the same limitations, as to entertaining such suits, as are prescribed by the statute of limitations to suits in Courts of Common Law in matters of account. If, therefore, the ordinary limitation of such suits at law be six years, Courts of Equity will follow the same period of limitation.² In so doing, they do not act in cases of this sort, (that is, of matters of concurrent jurisdiction,) so much upon the ground of analogy to the statute of limitations, as positively in obedience to such statute.³ But where the demand is not of a legal nature, but is purely equitable; or where the bar of the statute is inapplicable; Courts of Equity have another rule, founded, sometimes upon the analogies of the law,

¹ Lord Clancarty v. Latouche, 1 B. & Beatt. R. 428; Irving v. Young, 1 Sim. & Stu. 333.

² Hovenden v. Lord Annesley, 2 Sch. & Lefr. 629; Smith v. Clay, 3 Brown, Ch. R. 639, n.

³ Hovenden v. Lord Annesley, 2 Sch. & Lefr. 629, 630, 631; Spring v. Gray, 5 Mason, R. 527, 528; Sherwood v. Sutton, 5 Mason, R. 143, 146.

where such analogy exists, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches, and negligence.¹ Hence, in matters of account, although not barred by the statute of limitations, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy; from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost; and from the consciousness, that the repose of titles, and the security of property, are mainly promoted by a full enforcement of the maxim, *Vigilantibus, non dormientibus, jura subveniunt*.² Under peculiar circumstances, however, excusing or justifying the delay, Courts of Equity will not refuse their aid in fur-

¹ *Sherman v. Sherman*, 2 Vern. R. 276; S. C. 1 Eq. Abrid. 12; *Bridges v. Mitchill*, Bunb. 217; S. C. Gilb. Eq. R. 217; *Foster v. Hodgson*, 19 Ves. 180, 184; *Sturt v. Mellish*, 2 Atk. 610; *Pomfret v. Lord Windsor*, 2 Ves. 472, 476, 477; *Bond v. Hopkins*, 1 Sch. & Lefr. 428; *Smith v. Clay*, Amb. R. 647; 3 Bro. Ch. R. 639, note; *Stackhouse v. Bamton*, 10 Ves. 466, 467; *Moore v. White*, 6 John. Ch. R. 360; *Rayner v. Pearsall*, 3 John. Ch. R. 578; *Ray v. Bogert*, 2 John. Cas. 432; *Ellison v. Moffat*, 1 John. Ch. R. 46; *Sherwood v. Sutton*, 5 Mason, R. 143, 146; *Robinson v. Hook*, 4 Mason, R. 139, 150, 152; *Piatt v. Vattier*, 9 Peters, R. 405; *Willison v. Watkins*, 3 Peters, R. 44; *Miller v. McIntire*, 6 Peters, R. 61, 66; 1 Fonbl. Eq. B. 1, ch. 4, § 27, and notes; *Brownell v. Brownell*, 2 Bro. Ch. R. 62.

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

therance of the rights of the party ; since, in such cases, there is no pretence to insist on laches, or negligence, as a ground for dismissal of the suit.¹

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

CHAPTER IX.

ADMINISTRATION.

§ 530. HAVING thus gone over some of the more important cases, in which matters of account are involved, as the principal, and, sometimes, as the exclusive ground of jurisdiction, we shall now take leave of this part of the subject, and proceed to the consideration of other branches of concurrent jurisdiction in Equity; in which, though accounts are sometimes involved, yet the jurisdiction is derived from, or essentially connected with, other sources of jurisdiction; and accounts, whenever taken, are mere incidents to other relief.

§ 531. And, in the first place, the jurisdiction of Courts of Equity in the Administration of the assets of deceased persons. The word, assets, is derived from the French word, *assez*, which means, sufficient, or enough; that is, sufficient, or enough, in the hands of the executor or administrator, to make him chargeable to the creditors, legatees, and distributees of the deceased, so far as the personal property of the deceased extends, which comes to the hands of the executor or administrator for administration. In an accurate and legal sense, all the personal property of the deceased, which is of a saleable nature, and may be converted into ready money, is deemed assets.¹ But the word is not confined to such property; for all other property of the

¹ 2 Black. Comm. 510; Toller on Executors, B. 2, ch. 1, p. 137.

deceased, which is chargeable with the debts or legacies of the deceased, and is applicable to that purpose, is, in a large sense, assets.¹

§ 532. It has been said, that the whole jurisdiction of Courts of Equity, in the administration of assets, is founded on the principle, that it is the duty of the Court to enforce the execution of trusts ; and that the executor or administrator, who has the property in his hands, is bound to apply that property in the payment of debts and legacies ; and to apply the surplus according to the will of the testator, or, in case of intestacy, according to the statute of distributions. The sole ground, on which Courts of Equity proceed in cases of this kind, is the execution of a trust.²

§ 533. This is certainly a very satisfactory foundation, on which to rest the jurisdiction, in many cases ; for, under many circumstances, as an execution of a trust, the subject would be properly cognizable in equity, and especially if the party would not be chargeable at law ; it being the ordinary reason for a Court of Equity to grant relief, that the party is remediless at law. It has been truly said, that the only thing inquired of in a Court of Equity is, whether the property bound by a trust has come into the hands of persons, who are either bound to execute the trust, or to preserve the property for the persons entitled to it. If we advert to the cases

¹ 2 Black. Comm. 244, 340 ; Toller on Ex'ors, B. 3, ch. 8, p. 409.

² *Adair v. Shaw*, 1 Sch. & Lefr. 262. See also *Farrington v. Knightley*, 1 P. Will. 548, 549 ; *Rachfield v. Careless*, 2 P. Will. 161 ; *Duke of Rutland v. Duchess of Rutland*, 2 P. Will. 210, 211 ; *Elliot v. Collier*, 1 Ves. 16 ; *Anon.* 1 Atk. 491 ; *Wind v. Jekyll*, 2 P. Will. 575 ; *Nicholson v. Sherman*, 1 Cas. Ch. 57 ; *Bac. Abridg. Legacy*, M ; 1 Madd. Ch. Pr. 466, 467.

on the subject, we shall find, that trusts are enforced, not only against those persons, who rightfully are possessed of trust property, as trustees; but also against all persons, who come into possession of the property bound by the trust, with notice of the trust. And whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust.¹

§ 534. Certainly, to no persons can these considerations more appropriately apply, than to Executors and Administrators, and those claiming under them, with notice of the administration and assets. But, if it were the sole ground of sustaining the jurisdiction, that it is the case of a trust cognizable in Equity alone, it would follow, that, instead of being a matter of concurrent jurisdiction, it would be a matter belonging to the exclusive jurisdiction of Equity. For, although Equity does not purport to entertain jurisdiction of all trusts, some of them, as cases of bailments, being ordinarily cognizable at law;² yet of such trusts, as are peculiar to Courts of Equity, the jurisdiction is in such Courts exclusive. Now, we all know, that both the Courts of Common Law and the Ecclesiastical Courts have cognizance of administrations, and many suits respecting the administration of assets are daily entertained therein. Courts of Equity, therefore, in assuming general jurisdiction over cases of administration, do indeed, in some measure, found themselves upon the notion of a constructive trust in the Executors or Administrators.³ But the fact of its being a constructive

¹ Ibid.

² 3 Black. Comm. 431, 432; 1 Woodes. Lect. vii, p. 208, 209.

³ Bac. Abridg. *Legacy*, M

trust is not the sole ground of jurisdiction. Other auxiliary grounds also exist ; such as the necessity of taking accounts, and compelling a discovery ; and the consideration, that the remedy at law, when it exists, is not plain, adequate, and complete. The jurisdiction, therefore, now assumed by Courts of Equity to so wide an extent over all administrations, and the settlement of estates, in cases of testacy and intestacy, is not (as it should seem) exclusively referrible to the mere existence of a constructive trust (often sufficiently remediable at law) ; but to the mixed considerations already adverted to, each of which has a large operation in Equity.²

§ 535. A little attention to the nature of the jurisdiction, exercised in the Courts of Common Law and the Ecclesiastical Courts, in cases of administrations, will abundantly show the necessity of the interposition of Courts of Equity. In the first place, in suits at Common Law nothing more can be done than to establish the debt of the creditor ; and, if there is any controversy as to the existence of the assets, and a discovery is wanted ; or, if the assets are not of a legal nature ; or, if a marshalling of the assets is indispensable to a due payment of the creditor's claim ; it is obvious, that the remedy cannot be effectual. But there may be other interests injuriously affected by the judgment of a Court of Common Law in a suit by a creditor, which injury that Court could not redress or prevent ; but which Courts of Equity could completely redress or prevent.

§ 536. In the next place, as to the Ecclesiastical Courts. They have, it is true, an ancient jurisdiction

¹ Com. Dig. Chancery, 2 A. 1 ; 3 Black. Comm. 99.

² See Mitford, Pl. Eq. by Jeremy, p. 125, 126, 136.

over the Probate of Wills, and the granting of administrations ; and as incident thereto, an authority to enforce the payment of legacies of personal property.¹ But by the Common Law, although an executor was compellable to account before the Ordinary, (or Ecclesiastical Judge,) and so was an administrator ; yet the Ordinary was to take the account, as given in by the executor or administrator, and could not oblige him to prove the items of it, or to swear to the truth of it.²

§ 537. The Statute of 31st of Edward III, ch. 11, put executors and administrators upon the same footing, as to accounting for assets ; but it in no manner whatsoever changed the mode of accounting by either of them.³ A legatee might falsify the account of an executor or administrator in the Spiritual Court, as may also the next of kin, since the Statute of Distributions of 22d and 23d of Car. II, ch. 10. But a creditor of the estate could not falsify the account in the Ecclesiastical Court ; for his proper remedy was held to be at the Common Law.⁴ By the Statute of 21st of Henry VIII, ch. 5, § 4, executors and administrators were bound to deliver an inventory of the effects of the deceased upon oath to the

¹ 2 Black. Comm. 494 ; 3 Black. Comm. 98 ; Bac. Abridg. *Legacies*, M. ; 2 Fonbl. Eq. B. 4, ch. 1, § 1, and notes ; *Marriott v. Marriott*, 1 Str. Rep. 666.

² 2 Fonbl. Eq. B. 4, ch. 3, § 2, and note (d) ; *Archbishop of Canterbury v. Wills*, 1 Salk. 315.

³ *Ibid.* 2 Black. Comm. 496 ; 4 Burns, *Eccles. Law, Wills, Distribution, Account*, viii, p. 368 ; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (d).

⁴ 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (d) ; *Hinton v. Parker*, 8 Mod. 168 ; *Catchside v. Ovington*, 3 Burr. R. 1922 ; *Archbishop of Canterbury v. Wills*, 1 Salk. 315.

Ordinary. But the inventory could not be controverted in the Ecclesiastical Courts by a creditor ; but only by a legatee.¹ Even an administration bond will not be broken by an omission to pay a creditor's debt ; but it is a security merely for those, who are interested in the estate.² Indeed, before the Statute of Distributions, it was a matter greatly debated, whether an administrator could be compelled to make any distribution of an intestate's estate ; and for a great length of time it was held, that an executor was in all cases entitled to the estate of his testator, not disposed of by his will.³

§ 538. The jurisdiction of the Ecclesiastical Courts being so manifestly defective in the case of creditors, resort was almost necessarily had to Courts of Equity to compel a discovery of assets, and an account. And where a creditor did not seek a general settlement of the estate, in a suit in behalf of himself and all other creditors ; still he was entitled to a discovery in Courts of Equity, to enable him to recover his own debt in an action at law.⁴

§ 539. In regard to legatees also, the remedy was in many cases quite as defective. No remedy lies at

¹ *Hinton v. Parker*, 8 Mod. 168 ; *Catchside v. Ovington*, 3 Burr. 1922 ; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3. § 2. — Mr. Fonblanque is in an error, when he says, " The Inventory could not be controverted in the Spiritual Court." The authorities cited by him show, that it could be by a legatee, but not by a creditor. 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2.

² *Archbishop of Canterbury v. Wills*, 1 Salk. 315 ; *Greenside v. Benson*, 3 Atk. 248, 252 ; *Ashley v. Baillie*, 3 Ves. 268 ; *Wallis v. Pipen*, Ambler, R. 183 ; *Archbishop of Canterbury v. House*, Cowp. R. 140 ; *Thomas v. Archbishop of Canterbury*, 1 Cox, R. 399.

³ 2 Black. Comm. 514, 515 ; Toller on Ex'ors, B. 3, ch. 6, p. 369.

⁴ Com. Dig. Chancery, 2 C. 3 ; Id. 3 B. 1, 2.

the Common Law in cases of pecuniary legacies ;¹ and although (as has been stated) a remedy does lie in the Spiritual Courts ; yet, in a great variety of cases, that remedy is insufficient and imperfect. Thus, if payment of a legacy should be pleaded to a suit in the Ecclesiastical Courts ; and there is but one witness of the fact, which the Ecclesiastical Courts will not admit as sufficient proof, for their law requires two ; there the temporal Courts will grant a prohibition to further proceedings.² So, if a husband should sue for a legacy in the Ecclesiastical Courts, the Court of Chancery will prohibit him ; because the Ecclesiastical Courts cannot compel him to make any settlement on his wife, in consideration of the legacy.³ So, if a legacy is due to an infant, the Court of Chancery will interfere, at the instance of the executor, and prevent the Spiritual Courts from proceeding, because the executor may be entitled to a bond to indemnify, and to refund in case of a deficiency of assets.⁴ Many other cases might be put of a like nature.

§ 540. But a stronger instance may be stated. If the testator does not dispose of the residue of his estate ; and yet, from the circumstances of the will, the executor is plainly not entitled to the residue ; there he will be held liable to distribute it, as trustee for the next of kin. But the Spiritual Courts have no jurisdiction whatsoever in such a case, to enforce a distribution ; for trusts are not cogniza-

¹ *Decks v. Strutt*, 5 Fern. R. 690 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2.

² Bacon, Abridg. *Legacy*, M. ; 3 Black. Comm. 112.

³ *Ibid.* 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, and note (d).

⁴ *Horrell v. Waldron*, 1 Vern. 26 ; *Noel v. Robinson*, 1 Vern. R. 91. But see *Anon.* 1 Atk. R. 491 ; *Hawkins v. Day*, Ambler, R. 162 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2.

ble in those Courts, and cannot be enforced by them.¹ Even in the common case of a legacy of personal estate, the legacy does not vest in the legatee, until the executor assents to it; and until he assents, it would seem not to be suable in the Spiritual Courts. But Courts of Equity consider the executor to be a trustee of the legatee; and will compel him to assent to and pay the legacy, as a matter of trust.² And, if there are no legal assets to pay a legacy, although there are ample equitable assets, the Spiritual Courts cannot enforce payment of the legacy; for they have no jurisdiction over equitable assets.³

§ 541. In cases of distribution of the residue of estates, the remedy in the Spiritual Courts is also, on other accounts, exceedingly defective; for those Courts do not possess any adequate means for a perfect ascertainment of all the debts; or to compel a payment of them when ascertained, so as to fix the precise residuum; or to protect the executor or administrator in his administration, according to their decrees.⁴ Besides; the interposition of a Court of Equity may be required for many other purposes, before a final settlement and distribution of the estate; as, for instance, to compel an executor to bring the funds into Court; or to give security for the payment of debts, legacies, and distributive shares, where there is danger of insolvency, or he is wasting the assets; and the debts, legacies, and distributive

¹ *Farrington v. Knightley*, 1 P. Will. 545, 548.

² *Wind v. Jekyll*, 1 P. Will. 575.

³ *Barker v. May*, 9 B. & Cresw. 489. See also *Paschall v. Ketcherich*, Dyer, 151 *b*; *Edwards v. Graves*, Hob. R. 265; *Bac. Abridg. Legacy*, M.

⁴ See 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (*d*); *Id.* B. 4, Pt. 1, ch. 1, § 2, and note (*d*).

shares are not presently payable, or payment cannot be presently enforced.¹

§ 542. The jurisdiction of Courts of Equity to superintend the administration of assets, and decree a distribution of the residue, after payment of all debts and charges, among the parties entitled, either as legatees or distributees, does not seem to have been thoroughly established until near the close of the reign of Charles II. The objection was made, that the Spiritual Courts had full authority, under the Statute of Distributions, to decree a distribution of the residue. But upon a demurrer filed to a bill for a distribution, it was held by the Lord Chancellor, that, there being no negative words in the Act of Parliament, (the Statute of Distributions,) the jurisdiction of the Court of Chancery was not taken away; for the remedy in Chancery was more complete and effectual than that in the Spiritual Courts; or, to use the language of the Court upon that occasion, the Spiritual Court in that case had but a lame jurisdiction.² And, although ordinarily, in cases of concurrent jurisdiction, the decree of the Court first having possession of the cause is held conclusive; yet Courts of Chancery have not held themselves bound by decrees of the Spiritual Courts in cases of distribution, from their supposed inability to do entire justice.³

¹ See 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, and note (d); *Duncumban v. Stint*, 1 Ch. Cas. 121; *Strange v. Harris*, 3 Bro. Ch. R. 365; *Blake v. Blake*, 2 Sch. & Lefr. 26.

² *Matthews v. Newby*, 1 Vern. 133; *Howard v. Howard*, 1 Vern. 134; *Buckle v. Atleo*, 2 Vern. R. 37; *Gibbons v. Dawley*, 2 Ch. Cas. 198; *Pamplin v. Green*, 2 Ch. Cas. 95; *Lord Winchelsea v. Duke of Norfolk*, 2 Ch. Rep. 367; 2 Fonbl. Eq. B. 4, ch. 1, § 2; *Digby v. Cornwallis*, 3 Ch. R. 72; *Petet v. Smith*, 1 P. Will. 7; 1 Madd. Ch. Pr. 467.

³ See *Bissell v. Axtell*, 2 Vern. 47, and Mr. Raithby's note; 1 Eq. Abrid. E. p. 136, pl. 2, 3, 4.

§ 543. For a great length of time the usual resort has been to the Court of Chancery to settle the administration of estates ; so that, practically speaking, in cases of any complication or difficulty, it has acquired almost an exclusive jurisdiction. In many cases, indeed, besides those, which have been already mentioned, it is impossible for any other than a Court of Equity, to administer full and satisfactory justice among all the parties in interest ; and especially, where equitable assets are to be administered ; or the assets are to be marshalled ; as we shall abundantly see in the farther progress of these commentaries.

§ 544. The application for aid and relief in the administration of estates is sometimes made by the executor or administrator himself, when he finds the affairs of his testator or intestate so much involved, that he cannot safely administer the estate, except under the direction of a Court of Equity. In such a case, it is competent for him to institute a suit against the creditors generally, for the purpose of having all their claims adjusted, and a final decree, settling the order and payment of the assets.¹ These are sometimes called bills of conformity, (probably, because the executor or administrator in such case undertakes to conform to the decree, or the creditors are compelled by the decree to conform thereto) ; and they are not encouraged, because they have a tendency to take away the preference, which one creditor may gain over another by his legal diligence. Besides, these bills may be made use of by executors and administrators, to keep creditors out of

¹ Com. Dig. Chancery, 3 G. 6 ; *Buckle v. Atleo*, 2 Vern. 37. See *Rush v. Higgs*, 4 Ves. jr. 638, 643 ; *Jackson v. Leap*, 1 Jac. & Walk. 231 ; 2 Fonbl. Eq. B. 4 Pt. 2, ch. 2, § 4, note (u.)

their money longer than they otherwise would be.¹ However correct these reasons may be for a refusal to interfere in ordinary cases, involving no difficulty, they are not sufficient to show, that the Court ought not to interfere in behalf of an executor or administrator under special circumstances, where injustice to himself, or injury to the estate, may otherwise arise.²

§ 545. A doubt has, indeed, been suggested, whether a bill can be maintained against all the creditors.³ But if the bill is brought against certain known creditors, who are proceeding at law, it may be asked, what is the difficulty of proceeding in the same way, as is done, as to all creditors, upon a bill brought by one or more creditors in behalf of themselves and all other creditors? Upon a decree for the executor or administrator to account, all the creditors are, or may be required, to present and prove their debts before the Master in the first case, as they now are required to do in the last case. But upon such a bill brought by an executor or administrator, the Court will not interpose, by way of injunction, to prohibit creditors proceeding at law, until there has been a decree against the executor or administrator to account in that suit; for otherwise the latter might without reason make it a ground of undue delay of the creditors.⁴

§ 546. But the more ordinary case of relief, sought in Equity in cases of administration, is by creditors. A creditor may file his bill for payment of his own debt, and seek a discovery of assets for this pur-

¹ *Morrice v. Bank of England*, Cas. T. Talb. 224; *Backwell's Case*, 1 Vern. 153, 155; 1 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 3, note (u.)

² Com. Dig. Chancery, 3 G. 6.

³ *Rush v. Higgs*, 4 Ves. jr. 638, 643.

⁴ *Ibid.*

pose only. If he does so, and the bill is sustained, and an account is decreed to be taken, the Court will, upon the footing of such an account, proceed to make a final decree in favor of the creditor, without sending him back to law for the recovery of his debt; for this is one of the cases, in which a Court of Equity, being once in rightful possession of a cause for a discovery and account, will proceed to a final decree upon all the merits.¹ Upon a bill thus brought by a single creditor for his own debt only, there is no general account of debts directed to be taken; but the course is to direct an account of the personal estate, and of that particular debt, which is ordered to be paid in the course of administration.²

§ 547. The usual course, however, pursued in the case of creditors, is for one or more creditors to file a bill, (commonly called a creditor's bill,) by and in behalf of him, or themselves, and all other creditors, who shall come under the decree, for an account of the assets, and a due settlement of the estate.³ Bills

¹ *Attorney-General v. Cornthwaite*, 2 Cox, 44. See *McKay v. Green*, 3 John. Ch. R. 58; *Thompson v. Brown*, 4 John. R. 619, 630 to 643; *Morrice v. Bank of England*, Cas. Temp. Talb. 220.

² *Attorney-General v. Cornthwaite*, 2 Cox, R. 44; *Morris v. Bank of England*, Cas. Temp. Talb. 217; *Anon.* 3 Atk. 572; *Perry v. Philips*, 10 Ves. 38. — Although this is the usual course in the case of a creditor seeking an account and payment of his own debt only; it is not, therefore, to be considered, that the Court itself is absolutely incompetent, upon such a bill, to make a more general decree in the form of a decree upon a general creditor's bill. On the contrary, a case may be made out upon the answer and proofs, which might render it, if not indispensable, at least highly expedient for the purposes of justice, to adopt the latter course. See *Ram on Assets*, &c. ch. 24, § 2; *Martin v. Martin*, 1 Ves. 213, 214; *Sheppard v. Kent*, Prec. Ch. 190, 193; S. C. 2 Vern. 435; *Anon.* 3 Atk. 572; *Perry v. Philips*, 10 Ves. 38, 40, 41; *Rush v. Higgs*, 4 Ves. 638; *Thompson v. Brown*, 4 John. Ch. R. 610, 630, 643, 646.

³ See the *Case of the Creditors of Sir Charles Cox*, 3 P. Will. 343.

of this sort have been allowed upon the mere principle, that, as executors and administrators have vast powers of preference at law, Courts of Equity ought upon the principle, that equality is equity, to interpose upon the application of any creditor by such a bill, to secure a distribution of the assets, without preference to any one or more creditors.¹ And, as a decree in Equity is held of equal dignity and importance with a judgment at law, a decree upon a bill of this sort, being for the benefit of all creditors, makes them all creditors by decree upon an equality with creditors by judgment, so as to exclude from the time of such decree all such preferences.²

§ 548. The usual decree in the case of creditors' bills, against the executor or administrator, is (as it is commonly phrased) *quod computet*, that is to say, it directs the master to take the accounts between the deceased and all his creditors; to cause the creditors, upon due public notice, to come before him to prove their debts, at a certain place, and within a limited period; and also directs the master to take an account of all the personal estate of the deceased in the hands of the executor or administrator; and the same to be applied in payment of the debts and other charges in a due course of administration.³

¹ *Rush v. Higgs*, 4 Ves. jr. 638, 643; *Gilpin v. Lady Southampton*, 18 Ves. 469; *Martin v. Martin*, 1 Ves. 210; *Thompson v. Brown*, 4 John. Ch. R. 619, 630, 643.

² *Ibid.* *Morrice v. Bank of England*, Cas. T. Talb. 217; *Perry v. Philips*, 10 Ves. 38, 39, 40; *Brooks v. Reynolds*, 1 Bro. Ch. R. 183; *Paxton v. Douglas*, 8 Ves. 520; *Thompson v. Brown*, 4 John. Ch. R. 619.

³ *Van Heythuysen*, Eq. Draft. Title, *Decrees*, p. 647; the Creditors of Sir Charles Cox, 3 P. Will. 343; *Sheppard v. Kent*, Prec. Ch. 190; S. C. 2 Vern. 435; *Kenyon v. Worthington*, 2 Dick. R. 668; *Thompson v. Brown*, 4 John. Ch. R. 619.

§ 549. As soon as the decree to account is made in such a suit, brought in behalf of all the creditors, and not before, the executor or administrator is entitled to an injunction out of Chancery, to prevent any of the creditors from suing him at law, or proceeding in any suits already commenced, except under the direction and control of the Court of Equity, where the decree is passed.¹ The object of the Court, under such circumstances, is to compel all the creditors to come in and prove their debts before the master; and to have the proper payments and discharges made under the authority of the Courts; so that the executor or administrator may not be harassed by multiplicity of suits, or a race of diligence be encouraged between different creditors, each striving for an undue mastery and preference.² But in order to prevent any abuse of such bills, by connivance between an executor or administrator and a creditor, it is now a common practice to grant an injunction only, when the answer or affidavit of the executor or administrator states the amount of the assets, and upon the terms of bringing the assets into Court, or obeying such other order of the Court, as the circumstances of the case may require.³ The same remedial justice is applied, where the application, instead of being

¹ *Morrice v. Bank of England*, Cas. Temp. Talb. 217; *Martin v. Martin*, 1 Ves. 211, 212; *Perry v. Philips*, 10 Ves. 38, 39; *Brooks v. Reynolds*, 1 Bro. Ch. R. 183, and Mr. Belt's note; *Douglas v. Clay*, 1 Dick. R. 393; *Kenyon v. Worthington*, 2 Dick. R. 668; *Paxton v. Douglas*, 8 Ves. 520; *Jackson v. Leap*, 1 Jac. & Walk. 231, and note; *McKay v. Green*, 3 John. Ch. 58.

² *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 5, p. 538 to 543.

³ *Gilpin v. Lady Southampton*, 18 Ves. 469; *Clarke v. Ormond*, Jac. Rep. 122, 123, 124, 125; *Mitford, Eq. Pl. by Jeremy*, p. 311.

made by creditors, is made by legatees or trustees.¹

§ 550. The considerations already mentioned apply to cases, where the assets are purely of a legal nature; and no peculiar circumstances require the interposition of Courts of Equity, except those appertaining to the necessity of taking an account, and having a discovery, and decreeing a final settlement of the estate. But, in a great variety of cases, the jurisdiction of Courts of Equity becomes indispensable, from the fact, that no other Courts possess any adequate jurisdiction to reach the entire merits, or dispose of the whole merits. This must necessarily be the case, where there are equitable assets, as well as legal assets; and also, where the assets are required to be marshalled, in order to a full and perfect administration of the estate, and to prevent any creditor, legatee, or distributee, being disappointed of his own proper benefit by reason of prior claims, which obstruct it.

§ 551. And, first, in relation to equitable assets. That portion only of the assets of the deceased party are deemed legal assets, which by law are directly liable in the hands of his executor or administrator for the payment of debts and legacies.² It is not within the design of these commentaries to enter into a minute examination of what are deemed legal assets. But, generally speaking, they are such as can be reached in the hands of an executor or administrator by a suit at law against him, either by a common

¹ *Perry v. Philips*, 10 Ves. 38; *Brooks v. Reynolds*, 1 Bro. Ch. R. 182; *Jackson v. Leap*, 1 Jac. & Walk. 231, and note.

² 1 Madd. Ch. Pr. 473; *Ram on Assets*, ch. 8, p. 143; *Id.* ch. 27, p. 317; 3 Woodes. Lect. 59, p. 482 to 488.

judgment, or by a judgment upon a *devastavit* against him personally.¹ But it is perhaps more accurate to say, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is entrusted with by law, *virtute officii*, to dispose of in the course of administration;² or, in other words, whatever an executor or administrator takes, *qua* executor or administrator, or in respect to his office, is to be considered as legal assets.³

§ 552. Equitable assets are, on the other hand, all assets, which are chargeable with the payment of debts, or legacies in equity; and which do not fall under the description of legal assets. They are called equitable assets, because, in obtaining payment out of them, they can be reached only by the

¹ See *Farres v. Newnham*, 4 T. Rep. 621; *Whale v. Booth*, 4 T. Rep. 625, note; S. C. 4 Doug. R. 36. — In some cases, it is necessary to go into a Court of Equity, to enforce payment out of what are properly legal assets. Thus, for instance, if there should be a lease for years, or a bond debt, or an annuity in a trustee's name, belonging to the deceased, there, although a creditor could not come at it without the aid of a Court of Equity; yet the assets would be treated as legal assets, and should be applied in the course of administration as such. *Wilson v. Fielding*, 2 Vern. R. 763; the Case of Sir Charles Cox's creditors, 2 P. Will. 342, 343; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (f.) So a term of years taken in the name of A in trust for B, is legal assets, although recoverable in Equity only. *Ibid.* 3 P. Will. 342, 343, and Mr. Cox's note (2); *Hartwell v. Chitters*, Ambler. R. 308, and Mr. Blunt's note. By the statute of 29 Charles II. ch. 3, the trusts of an inheritance in land are liable for the payment of bond debts, which makes such trust estates legal assets, although they can be enforced only in Equity. See 2 Freeman, Rep. 150, C. 130; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (f); *Moses v. Murgatroyd*, 1 John. Ch. R. 119, 130.

² 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1; Bac. Abridg. *Executors and Administrators*, H.; 3 Woodes. Lect. 59, p. 484 to 488.

³ 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and note (e); *Deg v. Deg*, 2 P. Will. 416, and Mr. Cox's note.

aid and instrumentality of a Court of Equity.¹ They are also called equitable for another reason ; and that is, that the rules of distribution, by which they are governed, are different from those of the distribution of legal assets. In general, it may be said, that equitable assets are of two kinds ; the first is, where assets are so created by the intent of the party ; the second is, where they result from the nature of the estate made chargeable. Thus, for instance, if a testator devises land to trustees, to sell for the payment of debts, the assets resulting from the execution of the trust, are Equitable assets, upon the plain intent of the testator, notwithstanding the trustees are also made his executors ; for by directing the sale to be for the payment of debts generally, he excludes all preferences ; and the property would not otherwise be liable to the payment of simple contract debts.² The same principle applies, if the testator merely charges his lands with the payment of his debts.³ On the other hand, if the estate be of an Equitable nature, and be chargeable with debts, the fund is to be deemed Equitable assets, unless by some statute it is expressly made legal assets ; for it cannot be reached, except through the instrumentality of a Court of Equity.⁴ And it may be laid

¹ 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and notes (e), (f), (g) ; Wilson v. Fielding, 2 Vern. 763 ; Gott v. Atkinson, Willes, R. 523, 524 ; 1 Madd. Ch. Pr. 473 ; Ram on Assets, ch. 27, p. 317 ; 3 Woodes. Lect. 59, p. 486, 487.

² Lewin v. Oakley, 2 Atk. 50 ; Newton v. Bennet, 1 Bro. Ch. R. 135 ; Silk v. Prime, 1 Bro. Ch. R. 138, note ; Bailey v. Ekins, 7 Ves. 319 ; Shiphard v. Lutwidge, 8 Ves. 26, 30 ; Benson v. Leroy, 4 John. Ch. R. 651 ; Clay v. Willis, 1 B. & Cresw. 364 ; Barker v. May, 9 B. & Cresw. 489.

³ Ibid.

⁴ 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (g).

down as a general principle, that every thing is considered as Equitable assets, which the debtor has made subject to his debts generally, and which, without his act, would not have been subject to the payment of his debts generally.¹

§ 553. In the course of the administration of assets, Courts of Equity follow the same rules in regard to legal assets, which are adopted by Courts of Law; and give the same priority to the different classes of creditors, which is enjoyed at law; thus maintaining a practical exposition of the maxim, *Æquitas sequitur legem*.² In the like manner, Courts of Equity recognise and enforce all antecedent liens, charges, and claims *in rem*, existing upon the property, according to their priorities; whether they are of a legal, or of an Equitable nature, and whether the assets are legal or Equitable.³

¹ 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (e); Ram on Assets, ch. 17, p. 317. — In *Silk v. Prime*, 1 Bro. Ch. R. 138, note. Lord Camden took notice of the early cases, which had decided, that where land is devised to be sold by executors, *qua* executors, or devised to executors, *qua* executors, to be sold for payment of debts, the assets were purely legal. (Co. Litt. 112*b*, 113*a*;) and he added, "I can hardly now suggest a case, where the assets would be legal, but where the executor has a naked power to sell *qua* executor." (See also *Girling v. Lee*, 1 Vern. R. 63, and Raithby's notes.) It is questionable, whether, even in this latter case, the assets would now be held to be legal. See *Barker v. May*, 9 B. & Cresw. 489, 493; *Paschall v. Ketterich*, Dyer, R. 151*b*; *Anon. Dyer*, R. 264 (*b*); Bac. Abridg. *Legacy*, M; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (e). *Deg v. Deg*, 2 P. Will. 416, Cox's note.

² See 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, 2; *Wride v. Clarke*, 1 Dick. R. 382; *Morrice v. Bank of England*, Cas. Temp. Talb. 220, 221.

³ *Freemault v. Dedire*, 1 P. Will. 429; *Finch v. Earl of Winchelsea*, 1 P. Will. 277, 278; *Burgh v. Francis*, 1 Eq. Abridg. 320, pl. 1; *Girling v. Lee*, 1 Vern. 63, and Raithby's notes; *Plunkett v. Penson*, 2 Atk. 290; *Pope v. Gwinn*, 8 Ves. 23, note; *Morgan v. Sherard*, 1 Vern. 273; *Cole v. Warden*, 1 Vern. 410, and note; *Wilson*

§ 554. But, in regard to Equitable assets, (subject to the exception already stated,) Courts of Equity, in the actual administration of them, adopt very different rules from those adopted in Courts of Law, in the administration of legal assets. Thus, in Equity it is a general rule, that Equitable assets shall be distributed equally, and *pari passu*, among all the creditors, without any reference to the priority or dignity of the debts ; for Courts of Equity regard all debts in conscience, as equal *jure naturali*, and equally entitled to be paid ; and here they follow their own favorite maxim, that equality is Equity ; *Æquitas est quasi æqualitas*.¹ And if the fund falls short, all the creditors are required to abate in proportion.²

§ 555. It frequently happens, also, that lands and other property not strictly legal assets, are charged,

v. Fielding, 2 Vern. 763, 764 ; Foly's Case, 2 Freem. R. 49 ; Wride *v.* Clarke, 1 Dick. R. 382 ; Sharpe *v.* Earl of Scarborough, 4 Ves. 538.

¹ Co. Litt. 24 ; Hixam *v.* Witham, 1 Cas. Ch. 248 ; Gott *v.* Atkinson, Willes, R. 521 ; Turner *v.* Turner, 1 Jac. & Walk. 45 ; Creditors of Sir Charles Cox, 3 P. Will. 343, 344 ; Deg *v.* Deg, 2 P. Will. 412, 416 ; Wride *v.* Clark, 1 Dick. 392 ; Morrice *v.* Bank of England, Cas. Temp. Talb. 220.

² Hickson *v.* Witham, 1 Freem. R. 301 ; S. C. 1 Ch. Cas. 248 ; Deg *v.* Deg, 2 P. Will. 412 ; Wride *v.* Clark, 1 Dick. 382 ; Foly's Case, 2 Freem. 49 ; Woolstonecroft *v.* Long, 2 Freem. R. 175 ; S. C. 2 Eq. Abridg. 459 ; 1 Cas. Ch. 32 ; 3 Ch. Rep. 12. — The Civil Law, like the Common Law, had different classes of debts, to which it annexed different privileges, or priorities, founded, indeed, upon principles more general and more sound, than those of the Common Law, in its classification. There were in the Civil Law three orders of creditors. (1.) Those, who go before all others and take priority among themselves, according to the distinctions of their privileges. (2.) Those who have mortgages, and rank after the privileged creditors according to the dates of their respective mortgages. (3.) Those who are creditors, by bonds, or others, who have only personal actions, (the two first have liens or privileges *in rem*,) and who come in, therefore, together, and share equally, in proportion to their debts. 1 Domat, B. 3, tit. 1, § 5, and especially, art. 34.

not only with the payment of debts ; but also with the payment of legacies. In that case, all the legatees take, *pari passu*, and if the Equitable assets (after payment of the debts) are not sufficient to pay all the legacies, the legatees are all required to abate in proportion. But, suppose the case to be, that the Equitable assets are sufficient to pay all the debts ; but, after such payment, not to pay any of the legacies ; and the property is charged with the payment of both debts and legacies. In such a conflict of rights the question must arise, whether the creditors and legatees are to share in proportion, *pari passu* ; or the creditors are to enjoy a priority of satisfaction out of the Equitable assets. This was formerly a matter of no inconsiderable doubt ; and it was contended, with much apparent strength of reasoning, that, as both creditors and legatees, in such a case, take out of the fund by the bounty of the testator, and not of strict right, they ought to share in proportion, *pari passu*. After some struggle in the Courts of Equity upon this point,¹ it is at length settled, that, though as between themselves, in regard to Equitable assets, creditors are all equal, and are to share in proportion, *pari passu* ; yet, as between them and legatees, the creditors are entitled to a priority and preference ; and that legatees are to take nothing, until the debts are all paid.

§ 556. The ground of this decision is, that it is the duty of every man to be just, before he is generous ; and no one can doubt the moral obligation of every man to provide for the payment of all his debts. The

¹ See Anon. 2 Vern. 133 ; Hixon v. Witham, 1 Cas. Ch. 248 ; S. C. 1 Freem. R. 305 ; Anon. 2 Vern. 405 ; Walker v. Meager, 2 P. Will. 550.

presumption, therefore, in the absence of all other words, showing a different intent, (which intent would in such a case still prevail,) is, that a testator means to provide, first, for the discharge of his moral duties, and next, for the objects of his bounty, and not to confound one with the other. For, otherwise, the testator would in truth, and *in foro conscientiæ*, be disposing of another's debt, and not making gifts *ultra æs alienum*.¹ The good sense of this latter reasoning can scarcely escape observation. It proceeds upon the just and benignant interpretation of the intention of the party to fulfil his moral obligations in the just order, which natural law would assign to them.

§ 557. In cases, where the assets are partly legal, and partly Equitable, Courts of Equity will not interfere to take away the legal preference of any creditors to the legal assets. But if any creditor has been partly paid out of the legal assets by insisting on his preference, and he seeks satisfaction of the residue of his debt out of the Equitable assets, he will be postponed, till all the other creditors, not possessing such a preference, have received out of such Equitable assets an equal proportion of their respective debts.² This doctrine is founded upon, and flows from that, which we have already been considering, that in natural justice and conscience all debts are equal; and the

¹ *Hixon v. Wytham*, 1 Cas. Ch. 248; S. C. 1 Freem. R. 305; *Walker v. Meager*, 2 P. Will. 551, 552; S. C. *Moseley*, R. 204; *Petre v. Bruen*, cited *ibid*; *Greaves v. Powell*, 2 Vern. R. 248, and Mr. Raithby's note (2); 1 Eq. Abrid. 141, pl. 3; *Kidney v. Cousmaker*, 12 Ves. 154.

² *Sheppard v. Kent*, 2 Vern. R. 435; *Deg v. Deg*, 2 P. Will. 417; *Haslewood v. Pope*, 3 P. Will. 323; *Morrice v. Bank of England* Cas. Temp. Talb. 220; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1.

debtor himself is equally bound to satisfy them all ;¹ and that equality is Equity. When, therefore, a Court of Equity is called upon to assist a creditor, it has a right to insist, before relief is granted, that he, who seeks Equity, shall do Equity ; that he shall not make use of the law in his own favor to exclude Equity, and at the same time insist, that Equity shall aid the defects of the law, to the injury of equally meritorious claimants. The usual decree in cases of this sort is, that, "if any of the creditors by specialty have exhausted (or shall exhaust) any part of the testator's personal estate in satisfaction of their debts, then they are not to come upon, or receive any farther satisfaction out of, the testator's real estate, (or other Equitable assets,) until the other creditors shall thereout be made up equal with them."² This is sometimes called a marshalling of the assets.³ But that appellation more appropriately belongs (as we shall immediately see) to another mode of Equitable interference. The present is rather an exercise of Equitable jurisdiction in refusing relief, unless upon the terms of doing Equity.

§ 558. In the next place, as to marshalling assets, (strictly so called) in the course of administration.⁴ In the sense of lexicographers, to marshal, is to arrange, or rank in order ; and in this sense, the marshalling of assets would be, to arrange or rank assets in the due order of administration. This primary sense of the language has been transferred into the vocabulary of Courts of Equity ; and has there re-

¹ *Morrice v. Bank of England*, Cas. Temp. Talb. 219, 220, 221 ;
² *Fonbl. Eq. B. 4*, Pt. 2, ch. 2, § 1.

³ *Plunket v. Penson*, 2 Atk. 294 ; *Wride v. Clarke*, 1 Dick. R. 382.

⁴ See *Aldrich v. Cooper*, 8 Ves. 388, 394.

⁵ *Aldrich v. Cooper*, 8 Ves. 388, 394.

ceived a somewhat peculiar and technical sense, though still german to its original signification. In the sense of Courts of Equity, the marshalling of assets is such an arrangement of the different funds under administration, as shall enable all the parties, having Equities thereon, to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds.¹ Thus, where there exist two or more funds, and there are several claimants against them, and at law, one of the parties may resort to either fund for satisfaction, but the others can come upon one only ; there, Courts of Equity exercise the authority to marshal (as it is called) the funds, and by this means enable the parties, whose remedy at law is confined to one fund only, to receive due satisfaction.² The general principle, upon which Courts of Equity interfere in these cases is, that without such interference, he, who has a title to the double fund, would possess an unreasonable power of defeating the claimants upon either fund by taking his satisfaction out of the other to the exclusion of them. So that in fact it would be entirely in his election, whether they should receive any satisfaction or not. Now, Courts of Equity treat such an exercise of power as wholly unjust and unconscientious ; and therefore will interfere, not, indeed, to modify or absolutely to destroy the power, but to prevent it from being made an instrument of caprice,

¹ See 3 Woodes. Lect. 59, p. 488, 489.

² 1 Madd. Ch. Pr. 499 ; Ram on Assets, ch. 28, § 1, p. 329 ; Alldrich v. Cooper, 8 Ves. 388, 398 ; Lanoy v. Duke of Athol, 2 Atk. 446 ; Attorney General v. Tyndall, Amb. R. 614 ; 2 Fonbl. Eq. B. 3, ch. 2, § 6.

injustice, or imposition.¹ Equity, in affording redress in such cases, does little more than apply the maxim, *Nemo ex alterius detrimento fieri debet locupletior*.

§ 559. And this principle is by no means confined to the administration of assets ; but it is applied to a vast variety of other cases, (as we shall hereafter see) ; as, for instance, to cases of mortgages, where one covers two estates, and the other but one ; to cases of extents by the Crown ; and, indeed, to cases of double securities generally.² It may be laid down as the general rule of the Courts of Equity in cases of this sort, that if a creditor has two funds, he shall take his satisfaction (if he may) out of that fund, upon which another creditor has no lien ; and the like rule is applied to other persons standing in a similar predicament.³

§ 560. But, though the rule is so general, it is not to be understood without some qualifications. It is never applied, except where it can be done without injustice to the other creditor, or party in interest, having a title to the double fund, and without injustice to the common debtor. Nor is it applied in favor of persons, who are not common creditors of the same common debtor, except upon some special Equity. Thus, a creditor of A has no right, unless some peculiar Equity intervenes, to in-

¹ 2 Fonbl. Eq. B. 3, ch. 2, § 6, and note (i). See *Mills v. Eden*, 10 Mod. 489.

² 1 Madd. Ch. Pr. 202, 203 ; *Lanoy v. Duke of Athol*, 2 Atk. 446 ; *Aldrich v. Cooper*, 8 Ves. 382, 388 ; *Kempe v. Antill*, 2 Bro. Ch. R. 11 ; *Wright v. Simpson*, 6 Ves. 714 ; 2 Fonbl. Eq. B. 3, ch. 2, § 6.

³ *Lanoy v. Athol*, 2 Atk. 446 ; *Colchester v. Stamford*, 2 Freem. R. 124 ; *Lacam v. Mertins*, 1 Ves. 312 ; *Ex parte Kendall*, 17 Ves. 514, 520 ; *Aldrich v. Cooper*, 8 Ves. 388, 395 ; *Trimmer v. Bayne*, 9 Ves. 210, 211 ; *Rumbold v. Rumbold*, 3 Ves. 64 ; *Dow v. Shaw*, 4 John. Ch. R. 17 ; *Cheeseborough v. Millard*, 1 John. Ch. R. 412 ; *Greenwood v. Taylor*, 1 Russell & Mylne, 185.

sist, that a creditor of A and B shall proceed against B's estate alone for the satisfaction of his debt, that he may thereby receive a greater dividend from A's estate.¹ It has, indeed, been said by Lord Hardwicke, that Courts of Equity have no right to marshal the assets of a person, who is alive ; but only the real and personal assets of a person deceased ; for the assets are not subject to the jurisdiction of Equity until his death.² But this language is to be understood with reference to the case, in which it was spoken ; for there is no doubt, that there may be a marshalling of the assets of living persons under particular circumstances, where peculiar equities attach upon the one, or the other ; though such cases are very rare.³

§ 561. The rule of Courts of Equity in marshalling assets in the course of administration is, that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement, consistent with the nature of their respective claims, be applied in satisfaction thereof.⁴ The rule must, necessarily, in its application to the actual circumstances of different cases admit, nay must require, very different modifications of relief. It may be illustrated by the suggestion of a few cases, which present its application in a clear view, and show the limitations belonging to it.

§ 562. In the first place, if a specialty creditor, whose debt is a lien on the real estate, receive sat-

¹ *Ex parte Kendall*, 17 Ves. 514, 520.

² *Lacam v. Mertins*, 1 Ves. 312.

³ See *Ex parte Kendall*, 17 Ves. 514 ; *Aldrich v. Cooper*, 8 Ves. 388, 389, 394 ; *Dorr v. Shaw*, 4 John. Ch. R. 17 ; *Sneed v. Lord Culpepper*, 2 Eq. Abrid. 255, 260.

⁴ See *Clifton v. Burt*, 1 P. Will. 679, Mr. Cox's valuable note (1), from which I have freely drawn ; 2 Fonbl. Eq. B. 3, ch. 2, § 6.

isfaction out of the personal assets of the deceased, a simple contract creditor, (who has no claim except upon those personal assets,) shall, in Equity, stand in the place of the specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt, and no farther.¹ But the Court will not in cases of this sort, extend the relief to creditors farther than the nature of the contract will justify it. Therefore, it must be a specialty creditor of the person, whose assets are in question; such a one, as might have a remedy against both the real and personal estate of the deceased debtor, or either of them. For it is not every specialty creditor, in whose place the simple contract creditors can come to affect the real assets. If the specialty creditor himself cannot affect the real estate, as if the heirs are not bound by the specialty; or if there is no personal covenant binding the party to pay; or if the creditors are not creditors of the same person, and have not any demand against both funds, as the property of the same person; in these and the like cases, there is no ground for the interposition of Courts of Equity.²

§ 563. On the other hand, if a specialty creditor, having a right to resort to two funds, has not as yet received satisfaction out of either, a Court of Equity will interfere, and either throw him upon the fund, which can be affected by him only, for satisfaction;

¹ *Anon.* 2 Ch. Cas. 4; *Sagittary v. Hyde*, 1 Vern. 455; *Neave v. Alderton*, 1 Eq. Abridg. 144; *Galton v. Hancock*, 2 Atk. 436; *Clifton v. Burt*, 1 P. Will. 679, Cox's note (1); *Cheeseborough v. Mil-lard*, 1 John. Ch. R. 413.

² *Lacam v. Mertins*, 1 Ves. 312, 313; *Aldrich v. Cooper*, 8 Ves. 388, 389, 390, 394; *Ex parte Kendall*, 17 Ves. 520.

to the intent, that the other fund shall be clear for him, who can have access to the latter only ;¹ or it will put the creditor to his election between the one fund and the other. And if the creditor resorts to the fund, upon which alone the other party has any security, it will decree satisfaction *pro tanto* to the latter out of the other fund.² The usual decree in such cases is, that “in case any of the specialty creditors shall exhaust any part of the personal estate, then the simple contract creditors are to stand in their place, and receive a satisfaction *pro tanto* out of” the real assets.³

§ 564. The same principle applies to the case of a mortgagee, who exhausts the personal estate in the payment of his debt. In such a case, the simple contract creditors will be allowed to stand in the place of the mortgagee, in regard to the real estate bound by the mortgage.⁴ And where the personal assets have been so applied in discharge of a mortgage, the simple contract creditors may, in furtherance of the same principle, compel the heir to refund so much of the personal assets as have been applied to pay off the mortgage.⁵

§ 565. In general, legatees are entitled to the same equities, where the personal estate is exhaust-

¹ *Sagittary v. Hyde*, 1 Vern. 455 ; *Lanoy v. Duke of Athol*, 2 Atk. 446 ; *Pollexfen v. Moore*, 3 Atk. 272 ; *Attorney-General v. Tyndall*, Ambler. R. 615.

² *Aldrich v. Cooper*, 8 Ves. 389, 394, 395 ; *Trimner v. Bayne*, 9 Ves. 210, 211.

³ *Westfaling v. Westfaling*, 3 Atk. 467 ; *Davies v. Topp*, 1 Bro. Ch. R. 526.

⁴ *Aldrich v. Cooper*, 8 Ves. 388, 395, 396 ; *Lutkins v. Leigh*, Cas. Temp. Talb. 53 ; *Wilson v. Fielding*, 2 Vern. 763.

⁵ *Wilson v. Fielding*, 2 Vern. 763.

ed by specialty creditors ; for they would otherwise be without any means of receiving the bounty of the testator.¹ They are, therefore, permitted to stand in the place of the specialty creditors against the real assets descended to the heir.² So, they are permitted, in like manner, to stand in the place of a mortgagee, who has exhausted the personal estate in paying his mortgage.³ And their equity will prevail, not only in cases, where the mortgaged premises have descended to the heir at law ; but also, where they have been devised to a devisee, who is to take subject to the mortgage.⁴ But their equity will not generally prevail against a devisee of the real estate not mortgaged, whether a specific or residuary devisee ; for he also takes by the bounty of the testator ; and between persons equally taking by the bounty of the testator, Equity will not interfere, unless the testator has clearly shown some ground of preference or priority of the one over the other.⁵ So that there is a distinction between cases, where the estate is devised, and there are specialty creditors, and cases, where it is devised, and there is a mortgage on it. In the latter cases, the legatees stand in the place of the mortgagee, if he exhausts the personal

¹ *Arnold v. Chapman*, 1 Ves. 110 ; *Mogg v. Hodges*, 2 Ves. 51 ; *Aldrich v. Cooper*, 8 Ves. 396.

² *Herne v. Myrick*, 1 P. Will. 101, 102 ; *Culpepper v. Aston*, 2 Ch. Cas. 117 ; *Bowaman v. Reeve*, Prec. Ch. 578 ; *Tipping v. Tipping*, 1 P. Will. 729, 730 ; *Clifton v. Burt*, 1 P. Will. 679, Cox's note ; *Fenhoulhet v. Passavant*, 1 Dick. R. 253.

³ *Lutkins v. Leigh*, Cas. Temp. Talb. 53.

⁴ *Lutkins v. Leigh*, Cas. Temp. Talb. 53, 54 ; *Forrester v. Leigh*, Ambl. R. 171 ; *Norris v. Norris*, 2 Dick. R. 542.

⁵ *Clifton v. Burt*, 1 P. Will. 679, 680, and Cox's note ; *Haslewood v. Pope*, 1 P. Will. 322, 324 ; *Scott v. Scott*, Ambl. R. 383 ; S. C.

assets; in the former cases, they do not stand in the place of the specialty creditors. The reason assigned is, that a specialty debt is no lien on land in the hands of the obligor, or his heir, or devisee. But a mortgage is a lien, and an estate in the land. By a devise of land mortgaged, nothing passes but the equity of redemption, if it is a mortgage in fee; if it is for years, the reversion and equity of redemption pass.¹

§ 566. In like manner, where lands are subjected to the payment of all debts, legatees are permitted to stand, in regard to such land, in the place of simple contract creditors, who have come upon the personal estate, and exhausted it so far, as to prevent a satisfaction of their legacies.² So, where legacies given by

1 *Eden*, R. 458; *Forrester v. Leigh*, *Ambl. R.* 171; *Aldrich v. Cooper*, 8 Ves. 396, 397. — Such preference or priority may be shown in various ways. Thus, if real estate is devised for or subject to the payment of debts, if the personal estate is exhausted in payment of debts, the legatees will stand in the place of creditors on the real assets. 2 *Fonbl. Eq. B.* 3, ch. 2, § 7, note *k*; *Foster v. Cook*, 3 Bro. Ch. R. 347; *Pope v. Haslewood*, 3 P. Will. 323; *Aldrich v. Cooper*, 8 Ves. 396, 397. Such preference or priority may also be rebutted by circumstances. Thus, it has been said, that there is no rule, that where real and personal estate is charged with the payment of debts, and the residue is given to a legatee or children, the Court would in such case turn the charge on the real, to give the whole personal estate to the legatee. *Arnold v. Chapman*, 1 Ves. 110.

¹ *Forrester v. Leigh*, *Ambl. R.* 171, 174. See also *Lutkins v. Leigh*, *Cas. Temp. Talb.* 53; 2 *Fonbl. Eq. B.* 3, ch. 2, § 7, and note (*k*); *Aldrich v. Cooper*, 8 Ves. 396, 397. — This distinction between the heir and the devisee, makes it very important, in many cases, to ascertain, whether under a will an heir takes by descent or by purchase. See *Herne v. Meyrick*, 1 P. Will. 201; *Scott v. Eden*, 1 *Eden R.* 458; *S. C. Ambl. R.* 383; *Clifton v. Burt*, 1 P. Will. 678, 679, *Cox's* note (1.)

² *Clifton v. Burt*, 1 P. Will. 678, 679, and *Cox's* note; *Haslewood v. Pope*, 3 P. Will. 323.

a will are charged on real estate, but legacies by a codicil are not; the former legatees will be compelled to resort to the real assets, if there is a deficiency of the personal assets to satisfy both.¹

§ 567. The doctrine, adopted in all these cases, of allowing one creditor to stand in the place of another, having two funds to resort to, and electing to take satisfaction out of one, to which another creditor can alone resort, was probably transferred from the Civil Law into Equity jurisprudence. It is certainly founded in principles of natural justice; and it early found its way, under the title of substitution, into the Civil Law, where it was applied in a very large and liberal manner. But upon this subject we shall have occasion to speak hereafter in another place.²

§ 568. There are other cases, in which a marshaling of assets is in like manner enforced in Courts of Equity. Thus, for instance, in favor of the widow of a person deceased. After the death of a husband, his creditors cannot take his widow's necessary apparel in satisfaction of their debts.³ But, with this exception, a widow's paraphernalia are generally subject to the payment of the debts of her husband.⁴ But, in favor of the widow, and to preserve her paraphernalia, Courts of Equity will interfere by turn-

¹ *Hyde v. Hyde*, 3 Ch. Rep. 155; *Masters v. Masters*, 1 P. Will. 422; *Bligh v. Earl of Darnley*, 2 P. Will. 620; *Clifton v. Burt*, 1 P. Will. 679, Cox's note; *Norman v. Merrill*, 4 Ves. 769.

² See *Cheeseborough v. Millard*, 1 John. Ch. R. 412, 413, and ante, § 494, on the subject of contribution between sureties.

³ 2 Black. Comm. 436; *Noy's Maxims*, ch. 49; *Townshend v. Windham*, 2 Ves. 7.

⁴ *Ram on Assets*, ch. 10, § 1; 2 Black. Comm. 436; *Toller on Executors*, B. 3, ch. 8, p. 421, 422, 423.

ing creditors, entitled to proceed against real assets or funds, over to these assets and funds for satisfaction. And if the paraphernalia have been actually taken by creditors in satisfaction of their debts, the widow will be allowed to stand in their place, and the assets will be marshalled, so as to give her a compensation *pro tanto*.¹

§ 569. In speaking of the marshalling of assets in cases of legacies, whether specific or residuary, (when the latter are entitled to the benefit,) it must be understood, that the legacies are to private persons, taking for their own benefit, and not legacies for charity, either directly, or through the instrumentality of a trustee or legatee. In general, legacies of personal property to charitable uses are valid in point of law. But since the statute of 9th George II., ch. 36, in England, legacies or bequests by will to charitable uses, payable out of real estate, or charged on real estate, or to arise from the sale of real estate, are utterly void. And, Courts of Equity, following out the intent and object of the statute, have refused to interfere in favor of legatees of personal property for charity, by marshalling assets for this purpose in any case whatever; as by throwing the debts or legacies on real assets for payment; or by allowing the charity legatees to stand in the place of any creditor or legatee, who has exhausted the personal estate, against the real assets.²

¹ Ram on Assets, ch. 18, p. 353, 354, and the cases there cited; Aldrich v. Cooper, 8 Ves. 397; Incledon v. Northcote, 3 Atk. R. 438.

² Ram on Assets, ch. 18, § 3, p. 346 to 353; Mogg v. Hodges, 2 Ves. 52; Attorney-General v. Tyndall, Amb. R. 614; Clifton v. Burt, 1 P. Will. 670, Cox's note; Bridges v. Morrison, 1 Cox R. 189; Toller on Executors, B. 3, ch. 8, p. 423.

§ 570. Hitherto we have been speaking of marshalling assets in favor of creditors, legatees, or widows. But, it is not to be understood, that these are the only persons entitled to the benefit of this wholesome doctrine of Courts of Equity. Heirs at law and devisees are, in a great variety of cases, entitled to the protection of it. Thus, for instance, if an heir or devisee of real estate is sued by a bond creditor, he may, in many cases, be entitled to stand in the place of the specialty creditor against the personal estate of the deceased testator or intestate.¹

§ 571. In order more fully to comprehend the nature and limitations of this doctrine, it is necessary to state, that, in the view of Courts of Equity, the personal estate of the deceased constitutes the primary and natural fund for the payment of his debts; and they will direct it to be applied in the first instance to that purpose, unless from the will of the deceased or some other controlling equities, it is clear, that it ought not to be so applied. But in the order of satisfaction out of the personal estate of the deceased, if it is not sufficient for all purposes, creditors are preferred to legatees; specific legatees are preferred to the heir and devisee of the real estate, charged with specialties, or with the payment of debts;² the devisee of mortgaged premises is preferred to the heir at law of descended estates;³ and *a fortiori*, the devisee of premises not mortgaged is

¹ *Mogg v. Hodges*, 2 Ves. 52; *Galton v. Hancock*, 2 Atk. 424, 425.

² 2 Fonbl. Eq. B. 3, ch. 2, § 3, 4, 5, and notes (e), (f), (g), (h); *Cope v. Cope*, 2 Sulk. 449.

³ *Toller on Executors*, B. 3, ch. 8, p. 418; *Howell v. Price*, 2 P. Will. 294, Mr. Cox's note; *Cope v. Cope*, 2 Sulk. 449, Mr. Evans's note. Lord Hardwicke at first decided otherwise in *Galton v. Hancock*, 2 Atk. 424, but afterwards altered his opinion; *Id.* 2 Atk. 430.

preferred to the heir at law.¹ In case unincumbered lands and mortgaged lands are both specifically devised, but expressly after the payment of all debts, they are to contribute proportionally in discharge of the mortgage.² And where the equities of the legatees and devisees are equal, which (as we have seen) is sometimes the case, Courts of Equity remain neutral, and silently suffer the law to prevail.³ But where the personal assets are sufficient to pay all the debts and legacies and other charges, there the heir or devisee, who has been compelled to pay any debt or incumbrance of his ancestor or testator, binding upon him, is entitled, (unless there be some other equity, which repels the claim,) to have the debt paid out of the personal assets, in preference to the residuary legatees or distributees. Thus, for instance, if a specialty debt or mortgage of an ancestor or testator is paid by the heir or devisee, he is entitled to have it paid out of the personal assets in the hands of the executor, unless the testator, by express words or other manifest intention, has clearly exempted the personal assets from the payment.⁴

¹ *Chaplin v. Chaplin*, 3 P. Will. 364; *Davies v. Topp*, 1 Bro. Ch. R. 524; *Manning v. Spooner*, 3 Ves. 1141; *Livingston v. Newkirk*, 3 John. Ch. R. 319; 2 Fonbl. Eq. B. 3, ch. 2, § 3, 4, 5, and notes.

² *Carter v. Barnardiston*, 2 P. Will. 505; 2 Bro. Par. Cas. 1; *Howell v. Price*, 1 P. Will. 294, Cox's note.

³ The whole subject was largely discussed in *Davies v. Topp*, 1 Bro. Chan. R. 524, Appx.; *Downe v. Lewis*, 2 Bro. Ch. R. 257; *Manning v. Spooner*, 3 Ves. 114; *Galton v. Hancock*, 2 Atk. 424, 430; *Harwood v. Oglander*, 8 Ves. 106, 124; *Milnes v. Slater*, 8 Ves. 294, 303, and in Mr. Cox's note to *Howell v. Price*, 1 P. Will. 294, and *Evelyn v. Evelyn*, 2 P. Will. 664; *Bootle v. Blundell*, 1 Meriv. R. 215 to 238; *Ram on Assets*, ch. 28, § 1 to 4, ch. 29, § 1 to 4.

⁴ 2 Fonbl. Eq. B. 3, ch. 2, § 1, and note (a); 1 Madd. Ch. Pr. 474, 475; *Toller on Ex'ors*. B. 3, ch. 3, p. 418; *Howell v. Price*, 1 P.

And the personal assets are liable, in such cases of mortgage, even though there may not be any personal covenant for the payment of the debt or collateral bond.¹ And lands subject to, or devised for, the payment of debts, are in like manner liable to discharge such mortgage in favor of the heir or devisee, to whom the mortgaged lands may belong.²

§ 572. What shall constitute proof of such an intended exemption, by the testator, is not in all cases ascertainable upon abstract principles; but must depend upon circumstances. It is certain, however, that a devise of all the testator's real estate subject to the payment of his debts, or a devise of a particular estate subject to the payment of debts, will not alone be sufficient to exempt the personal estate.³ But, on the other hand, if the real estate be directed to be sold for the payment of debts, and the personal estate is expressly bequeathed to legatees; there the personal estate will, by necessary implication, be exempted.⁴

§ 573. The doctrine of the Court in all cases of this sort, is founded upon the same principle, that is

Will. 291, 294, and Cox's note (1); *Cope v. Cope*, 2 Salk. 449; *Ancaster v. Mayer*, 1 Bro. Ch. R. 454.

¹ Ibid.

² *Bartholomew v. May*, 1 Atk. 487; *Tweedale v. Coventry*, 1 Bro. Ch. R. 240; *Howell v. Price*, 1 P. Will. 294, Cox's note; *Serle v. St. Eloy*, 2 P. Will. 386.

³ Ibid; *Bridgman v. Dove*, 3 Atk. 201, 202; *Haslewood v. Pope*, 3 P. Will. 325; *Inchiquin v. French*, Ambl. R. 33; S. C. 1 Cox, R. 1; 1 Wils. R. 82; 1 Bro. Ch. R. 458; *Lupton v. Lupton*, 2 John. Ch. R. 628; *Livingston v. Newkirk*, 3 John. Ch. R. 319; *Walker v. Jackson*, 2 Atk. 625; *Ancaster v. Mayer*, 1 Bro. Ch. R. 454; *Boottle v. Blundell*, 1 Meriv. R. 194, 210.

⁴ 2 Fonbl. Eq. B. 3, ch. 2, § 1, and note (a); Id. § 3, and note (e), (a); *Wainwright v. Bendlowes*, 2 Vern. 718; S. C. Prec. Ch. 451; *Bamfield v. Wyndham*, Prec. Ch. 101; *Walker v. Jackson*, 2 Atk. 624, 625; *Gray v. Minnethorpe*, 3 Ves. 103; *Boottle v. Blundell*, 1 Meriv. R. 194, 210, 224; *Milnes v. Slater*, 8 Ves. 293, 303.

to follow out the intention of the testator. The personal estate is deemed the natural and primary fund for the payment of all debts ; and the testator is presumed to act upon this legal doctrine, until he shows some other distinct and unequivocal intention. The general rule, therefore, of Courts of Equity, though sometimes delivered in one form, and sometimes in another, is, (as Lord Hardwicke has expressed it,) that the personal estate shall be first applied to the payment of debts, unless there be express words, or a plain intention of the testator to exempt his personal estate, or to give his personal estate as a *specific* legacy ; for he may do this, as well as give the bulk of his real estate, by way of specific legacy.¹

§ 574. But, although the personal estate is thus deemed the general and primary fund for the payment of debts, and still remains so, notwithstanding the real estate is also collaterally chargeable ; yet the rule is otherwise, or rather is differently applied, where the charge of the debt is principally and primarily upon the real estate, and the personal security or covenant is only collateral ; for the primary fund ought in conscience, in all cases, to exonerate the auxiliary fund. The debt or incumbrance may be in its nature real, or may become so by the act of the person, who has the power of charging both the real and the personal funds ; or the land, although it be auxiliary only to the personal estate of the original contractor of the debt or incumbrance may yet become the primary fund, as between itself and the personal estate of any other person, who may take the land, either by descent or purchase,

¹ Walker v. Jackson, 2 Atk. 625.

subject to the charge. In both these cases, the personal estate is charged, (if at all,) only as a surety for the land; and it shall have the same measure of equity, as the land is entitled to, when it is pledged as a surety for a personal debt.¹

§ 575. The first class of cases may be illustrated by the case of a jointure or portion to be raised out of lands, by the execution of a power. In such a case, notwithstanding there may be a personal covenant or agreement so to raise the jointure or portion to the stipulated amount; yet the charge, when raised, is to be deemed a primary charge on the lands, and the personal estate of the covenant or only security therefor. In other words, although the covenantor is the original contractor; yet the charge being in its nature real, and the covenant only an additional security, the land will be decreed to bear the burthen in exoneration of the personal estate.² The same principle will apply to pecuniary portions, to be raised in favor of daughters in a marriage settlement out of lands placed in the hands of trustees for this purpose, although there be a personal covenant also of the settler to have the portion thus raised.³

¹ I borrow this language and the cases, which illustrate it, from the valuable note of Mr. Cox to *Evelyn v. Evelyn*, 2 P. Will. 664, note (1.) See also Mr. Cox's note to *Howell v. Price*, 294, note (1).

² *Coventry v. Coventry*, 9 Mod. 13; S. C. 2 P. Will. 222; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note (b).

³ *Edwards v. Freeman*, 2 P. Will. 435; *Evelyn v. Evelyn*, 2 P. Will. 664; Mr. Cox's note, (1); *Ward v. Dudley & Ward*, 2 Bro. Ch. R. 316; S. C. 1 Cox, R. 438; *Wilson v. Darlington*, 1 Cox, R. 172; *Duke of Ancaster v. Mayer*, 1 Bro. Ch. 454, 464, and *Belt's* note (2); *Basset v. Percival*, 1 Cox, R. 268; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note (b).

§ 576. The second class of cases may be illustrated by the common case of a mortgage created by an ancestor, and the mortgage estate descending upon his heir. There, although the heir should become personally bound to pay the mortgage, his personal estate would not be liable to be charged in favor of any person, who should derive title by descent under him to the mortgaged premises, subject to the mortgage ; for the debt was not originally contracted by him ; and it was, as to him, primarily chargeable on the land ; and his covenant to pay the mortgage would only be considered as a security for the debt.¹ So, where land descended to the wife, subject to a mortgage made by her father ; and on an assignment of the mortgage, the husband covenanted to pay the money to the assignee ; it was decreed, that the husband's personal estate should not exonerate the mortgaged premises ; for the debt was originally the father's ; and the husband's covenant was only collateral security therefor.² So, if a mortgaged estate is purchased by an ancestor, subject to the mortgage, and of course so much less is paid for it, as the mortgage amounts to ; there, upon a descent cast, if it be a fee, or a devolution upon executors or legatees, if it be a leasehold estate, the personal estate of the purchaser shall not exonerate the mortgaged premises from the mortgage ; for it is not the personal debt of the purchaser.³

¹ *Cope v. Cope*, 2 Salk. 449 ; *Evelyn v. Evelyn*, 2 P. Will. 664, and Mr. Cox's note (1), and also his note (1) to *Howell v. Price*, 1 P. Will. 294 ; *Leman v. Newnham*, 1 Ves. 51 ; *Lacam v. Mertins*, 1 Ves. 312 ; *Ancaster v. Morgan*, 1 Bro. Ch. R. 454, 464, and Belt's note (2) ; *Lawson v. Hudson*, 1 Bro. Ch. R. 59, and Mr. Belt's note.

² *Ibid* ; *Bagot v. Oughton*, 1 P. Will. 347.

³ *Ancaster v. Mayer*, 1 Bro. Ch. R. 454, and Mr. Belt's note ;

§ 577. These illustrations may suffice to explain some of the more important doctrines of Courts of Equity upon this complicated subject of the marshalling of assets (for, in a work like the present, it is impossible to examine all of them minutely);¹ and to show upon what nice presumptions and curious analogies they sometimes proceed, some of which (to say the least of them) are sufficiently artificial, and elaborate, and subtle. The manner, in which assets are now generally marshalled, in the payment of debts, may be arranged in the following order. First; the general personal estate, unless exempted expressly, or by plain implication. Secondly; any estate particularly devised for the payment of debts, and only for that purpose. Thirdly; estates descended to the heir. Fourthly; estates specifically devised to particular devisees, though charged with the payment of debts.²

§ 578. This review of the jurisdiction of Courts of Equity over the administration of assets, however imperfect, and brief, is quite sufficient to establish the truth of the remarks already stated, that the jurisdiction is not wholly and solely dependent upon

Tweddell v. Tweddell, 2 Bro. Ch. R. 101, and Mr. Belt's note; *Butler v. Butler*, 5 Ves. 534, 538; *Cumberland v. Codrington*, 3 John. Ch. R. 229, Mr. Cox's note to *Howell v. Price*, 1 P. Will. 294, and his note to *Evelyn v. Evelyn*, 2 P. Will. 664; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note (b); 4 Kent, Comm. Lect. 65, p. 420, 421, (2d edition.)

¹ See other cases, 2 Fonbl. Eq. B. 3, ch. 2, § 1, 2, 3, and notes; *Harwood v. Oglander*, 8 Ves. 106, 124; *Milnes v. Slater*, 8 Ves. 293, 303.

² *Davies v. Topp*, 1 Bro. Ch. R. 526; *Downe v. Lewis*, 2 Bro. Ch. R. 263; *Harwood v. Oglander*, 8 Ves. 106, 124; *Milnes v. Slater*, 8 Ves. 293, 303; *Livingston v. Newkirk*, 3 John. Ch. R. 319; 4 Kent, Comm. Lect. 65, p. 420, 421, (2d edit.); 1 Madd. Ch. Pr. 474; *Ram on Assets*, ch. 30, p. 374; *Jeremy on Eq. Jurisd.* B. 3, Pt. 2, ch. 5, p. 524, 537 to 543.

the mere fact, that there exists a constructive trust of the funds in the hands of the personal representative, requiring them to be properly applied and distributed. But, there are other and numerous sources of jurisdiction collaterally connected with it ; such as the necessity of a discovery, and taking accounts, and cross equities by substitution, and otherwise, existing in a great variety of cases in very complicated forms, all of which are or may be necessary to a full and due administration of the estate. Indeed, the whole topic of marshalling assets seems properly to belong rather to the peculiar doctrines of Courts of Equity, in regard to conflicting rights and equities, than to any notion of trust in the parties.

§ 579. Before quitting this subject, it may be useful to take notice of the interposition of Courts of Equity in regard to the administration of assets, in cases, where there is any alienation or waste of them on the part of the personal representative of the deceased. At Common Law, the executor or administrator is treated for many purposes, as the owner of the assets, and has a power to dispose of and alien them.¹ There is no such thing known as the assets in the hands of an executor being the debtor ; or a creditor's having a lien on them ; but the person of the executor in respect to the assets, which he has in his hands, is treated as the debtor.² At Law, the assets of the testator may, perhaps, at

¹ *Hill v. Simpson*, 7 Ves. 166 ; *McLeod v. Drummond*, 14 Ves. 353 ; S. C. 17 Ves. 153, 168.

² *Farr v. Newnham*, 4 T. Rep. 621, 634 ; *Whale v. Booth*, 4 T. R. 625, note ; S. C. 4 Doug. R. 36 ; *Nugent v. Gifford*, 1 West, Rep. 496, 497 ; S. C. 1 Atk. 463 ; S. C. 2 Ves. 269. But see *Hill v. Simpson*, 7 Ves. 152 ; *McLeod v. Drummond*, 14 Ves. 361 ; S. C. 17 Ves. 154, 168.

least, under special circumstances, be taken in execution for the personal debt of the executor ; unless, indeed, there be some fraud or collusion between the execution creditor and the executor ;¹ as they certainly may also be for the debt of the testator.² But, in Courts of Equity the assets are treated as the debtor, or in other words, as a trust fund, to be administered by the executor for the benefit of all persons, who are interested in it ; whether they are creditors, or legatees, or distributees, or otherwise, according to their relative priorities, privileges, and equities.³

§ 580. Still, however, Courts of Equity do not supersede the principles of law upon the same subject. And, therefore, a sale *bonâ fide* made by the executor for a valuable consideration, even with notice of their being assets, will be held valid ; so that they cannot be followed by creditors or others into the hands of the purchaser.⁴ In this respect, there is a manifest difference between the cases of ordinary trusts, where notice takes away the protection of a *bonâ fide* purchase from the party ; and this peculiar sort of trust, mixed up in some measure with general ownership.⁵ To affect a sale or other transaction of an executor, attempting to bind the assets, so as to let in the claim of creditors and others, who are principally interested, there must be

¹ *Whale v. Booth*, 4 T. R. 623, note ; S. C. 4 Doug. R. 36 ; *Farr v. Newnham*, 4 T. Rep. 621 ; *McLeod v. Drummond*, 17 Ves. 154 ; *Ray v. Ray*, Cooper, R. 264.

² *Ibid* ; Contra, *McLeod v. Drummond*, 17 Ves. 168.

³ *Farr v. Newnham*, 4 T. R. 636, Per Buller J. ; *Whale v. Booth*, 4 T. R. 625, note ; S. C. 4 Doug. R. 36.

⁴ *Ibid* ; *McLeod v. Drummond*, 17 Ves. 154, 155, 168 ; *Keane v. Roberts*, 4 Madd. 357.

⁵ *Mead v. Lord Orrery*, 3 Atk. 236, 239, 240.

some fraud, or collusion, or misconduct between the parties.¹ A mere secret intention of the executor to misapply the funds, unknown to the other party dealing with him, or a subsequent unconnected misapplication of them, would not affect the purchaser. He must be conusant of such intention, and designedly aid or assist in its execution.² But, in the view of Courts of Equity, there is a broad distinction between cases of a sale or pledge of the testator's assets for a present advance, and cases of such sale or pledge for an antecedent debt of the executor;³ for in the latter case the parties must be generally understood to co-operate in a misapplication of the assets from their proper purpose, unless that inference is repelled by the circumstances.⁴

§ 581. The general doctrine, now maintained by Courts of Equity upon this subject, cannot be better summed up than it is by the late Vice-Chancellor, (Sir John Leach,) in an important case.⁵ "Every person," said he, "who acquires personal assets by a breach of trust, or a *devastavit* in the executor, is responsible to those, who are entitled under the will, if

¹ *Hill v. Simpson*, 7 Ves. 152; *Nugent v. Gifford*, 1 Atk. 463, cited 4 Bro. Ch. R. 136, and 17 Ves. 160, 163; *Andrew v. Wrigley*, 4 Bro. Ch. R. 125; *Mead v. Lord Orrery*, 3 Atk. 235, 238, 239; *McLeod v. Drummond*, 14 Ves. 355; 17 Ves. 154, 168, 169, 170, 171.

² *McLeod v. Drummond*, 14 Ves. 355; S. C. 17 Ves. 154, 158, 169, 170, 171; *Andrew v. Wrigley*, 4 Bro. Ch. R. 125; *Scott v. Tyler*, 2 Bro. Ch. 431; 2 Dick. R. 724; *Keane v. Robarts*, 4 Madd. Rep. 357.

³ *McLeod v. Drummond*, 14 Ves. 361, 362; S. C. 17 Ves. 154, 155, 158 to 169, 170, 171; *Hill v. Simpson*, 7 Ves. 152.

⁴ *Ibid.* See also Mr. Roscoe's learned note to *Whale v. Booth*, 4 Doug. R. 47, note (66.)

⁵ *Keane v. Robarts*, 4 Madd. Rep. 357, 358. See also Ram on Assets, ch. 37, § 4, p. 484; 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (I); *Walkins v. Cheep*, 2 Sim. & Stu. 205.

he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving, as a pledge for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will or otherwise ; because this sale or pledge is held to be *primâ facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt ; because this sale or pledge is *primâ facie* inconsistent with the duty of an executor. I preface both of these propositions with the term 'generally speaking' ; because they both seem to admit of exceptions." And it may be added, that whenever there is a misapplication of the personal assets, and the assets or their proceeds can be traced into the hands of any persons affected with notice of such misapplication ; there the trust will attach upon the property or proceeds in the hands of such persons, whatever may have been the extent of the misapplication or conversion.¹

§ 582. In cases, where during coverture the assets of a feme covert executrix are wasted by the husband, and he then dies, no action at law lies by the creditors against the assets of the husband. But Courts of Equity will in such a case interfere, and relieve the creditors, upon the ground of the breach of trust in the husband, and the con-

¹ See Ram on Assets, ch. 37, § 4, p. 491, 492 ; *Adair v. Shaw*, 1 Sch. & Lefr. 261, 262.

version of the assets of the wife's testator into funds in aid of his own assets.¹

§ 583. And here we might treat of the nature and extent of the jurisdiction, which Courts of Equity will exercise in regard to the assets of foreigners, collected under what is called an ancillary administration, (because it is subordinate to the original administration,) taken out in the country, where the assets are locally situate. This subject, however, has been largely discussed in another place, in considering the conflict of laws in different countries upon the subject of administrations of property situated therein; and, therefore, it will be very briefly taken notice of here.² In general, it may be said, that where a domestic executor or administrator collects assets of the deceased without any letters of administration taken out, or any actual administration accounted for in a foreign country, and brings them home, they will be treated as personal assets of the deceased, to be administered here under the domestic administration.³ But, where such assets have been collected abroad under a foreign administration, and such administration is still open, there seems much difficulty in holding, that the executor or administrator can be called upon to account for such assets under the domestic administration, unless, perhaps, under very peculiar circumstances; since it would constitute no just bar to proceedings under the foreign administration in the foreign

¹ *Adair v. Shaw*, 1 Sch. & Lefr. 261, 262, 263.

² See Story's Comm. on Conflict of Laws, ch. 13.

³ *Dowdale's Case*, 6 Co. Rep. 47, 48; S. C. Cro. Jac. 55; *Attorney General v. Dimond*, 1 Cromp. & Jervis, 370; *Erving's Case*, 1 Cromp. & Jerv. R. 151; S. C. 1 Tyrw. R. 91.

Courts.¹ And, indeed, probate of wills and letters of administration are not granted in any country in respect to assets generally ; but only in respect to such assets as are within the jurisdiction, by which the probate is established, or the administration granted.²

§ 584. Where there are different administrations,³ granted in different countries, those, which are in their nature ancillary, are, as we have seen, generally held subordinate to the original administration. But each administration is deemed so far independent of the others, that property received under one cannot be sued for under another, though it may at the moment be locally situate within the jurisdiction of the latter. Thus, if property is received by a foreign executor or administrator abroad, and afterwards remitted here, an executor or administrator appointed here could not assert a claim to it here, either against the person, in whose hands it might happen to be, or against the foreign executor or administrator. The only mode of reaching it, if necessary for the purposes of due administration, would be to require its transmission or distribution, after all claims against the foreign administration had been ascertained and settled.⁴

§ 585. In relation to the mode of administering assets by executors and administrators, there are in different countries very different regulations. The priority of debts, the order of payments, the marshal-

¹ See Story's Comm. on Conflict of Laws, ch. 13, § 512 to 519. But see Attorney General v. Dimond, 1 Crompt. & Jerv. 370; Erving's Case, 1 Crompt. & Jerv. 151 ; 1 Tyrw. R. 191.

² Ibid.

³ This and the three following sections are taken verbatim from Story's Conflict of Laws, § 518, 524, 525, 528.

⁴ Story's Conflict of Laws, § 518.

ling of assets for this purpose, and, in cases of insolvency, the mode of proof, as well as of distribution, differ in different countries. In some countries, all debts stand in equal order ; and, in cases of insolvency, the creditors are to be paid *pari passu*. In others, there are certain classes of debts entitled to a priority of payment, and are therefore deemed privileged debts. Thus, in England bond debts and judgment debts possess this privilege ; and the like law exists in some of the states of this Union. Similar provisions may be found in the law of France in favor of particular classes of creditors. On the other hand, in Massachusetts, and in many other states of the Union, all debts, except those due to the government, possess an equal rank, and are payable *pari passu*. Let us suppose, then, that a debtor dies domiciled in a country, where such priority of right and privilege exists ; and he has assets situate in a state, where all debts stand in an equal rank, and administration is duly taken out, in the place of his domicil, and also in the place of the *situs* of the assets. What rule is to govern in the marshalling of the assets ? The law of the domicil ? Or the law of the *situs* ? The established rule now is, that in regard to creditors the administration of the assets of deceased persons is to be governed altogether by the law of the country, where the executor or administrator acts, and from which he derives his authority to collect them ; and not by that of the domicil of the deceased. The rule has been laid down with great clearness and force on many occasions.¹

§ 586. The ground, upon which this doctrine has been established, seems entirely satisfactory. Every nation, having a right to dispose of all the property

¹ Story's Conflict of Laws, § 524.

actually situate within it, has (as has often been said) a right to protect itself and its citizens against the inequalities of foreign laws, which are injurious to their interests. The rule of a preference, or of an equality in the payment of debts, whether the one or the other course is adopted, is purely local in its nature, and can have no just claim to be admitted by any other nation, which in its domestic arrangements pursues an opposite policy. And in a conflict between our own and foreign laws, the doctrine avowed by Huberus is highly reasonable, that we should prefer our own. *In tali conflictu magis est ut jus nostrum, quam jus alienum, servemus.*¹

§ 587. In the course of administrations, also, in different countries, questions often arise, as to particular debts, whether they are properly and ultimately payable out of the personal estate, or are chargeable upon the real estate of the deceased; and in all such cases, the law of the domicil of the deceased will govern in cases of intestacy; and, in cases of testacy, the intention of the testator. A case, illustrating this doctrine, occurred in England many years ago. A testator, who lived in Holland, and was seised of real estate there, and of considerable personal estate in England, devised all his real estate to one person, and all his personal estate to another, whom he made his executor. At the time of his death, he owed some debts by specialty, and some by simple contract in Holland, and had no assets there to satisfy those debts; but his real estate was by the laws of Holland made liable for the payment of simple contract, as well as specialty debts, if there were not personal assets to answer the same.

¹ Story's Conflict of Laws, § 525.

The creditors in Holland sued the devisee, and obtained a decree for the sale of the lands devised for the payment of their debts. And then the devisee brought a suit in England against the executor (the legatee of the personalty) for reimbursement out of the personal estate. The Court decided in his favor, upon the ground, that in Holland, as in England, the personal estate was the primary fund for the payment of debts, and should come in aid of the real estate, and be charged in the first place.¹

§ 588. Every ancillary administration is upon principles of international law made subservient to the rights of creditors, legatees, and distributees in the country, where such administration is taken out, although the distribution, as to legatees and distributees, or heirs, is governed by the law of the place of the testator or intestate's domicil. But a most important question often arises ;—What is to be done as to the residue of the assets, after discharging all the debts and other claims of the deceased, due to persons resident in the country, where the ancillary administration is taken out ? Is it to be remitted to the forum of the testator's or intestate's domicil, to be there finally settled, adjusted, and distributed among all the claimants, according to the law of the country of the domicil of the testator or intestate ? Or may creditors, legatees, and distributees of any foreign country come into the Courts of Equity, or other Courts of the country granting such ancillary administration, and there have all their respective claims adjusted and satisfied, according to the law of the testator's or intestate's domicil, or any other law ? And in cases of insolvency, or other deficien-

¹ Story's Conflict of Laws, § 528.

cy of assets, what rules are to govern in regard to the rights, preferences, and priorities of different classes of claimants under the laws of different countries, seeking such distribution of the residue ?

§ 589. These are questions, which have given rise to very ample discussions in various Courts in the present age ; and they have been thought to be not unattended with difficulty. It seems now, however, to be understood, as the general result of the authorities, that Courts of Equity of the country, where the ancillary administration is granted, (and other Courts exercising a like jurisdiction in cases of Administrations,) are not incompetent to act upon such matters, and to decree a final distribution of the assets to and among the various claimants having equities or rights in the funds, whatever may be their domicil, whether it be that of the testator or intestate, or in some other foreign country. The question, whether the Court, entertaining the suit for such a purpose, ought to decree such a distribution, or to remit the property to the forum of the domicil of the party deceased, is treated, not so much as a matter of jurisdiction, as of judicial discretion, dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals, for the purpose of enforcing the rights of all persons having a title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities, which may call upon such tribunals for abstinence in the exercise of the jurisdiction.¹

¹ *Harvey v. Richards*, 1 Mason, R. 381 ; *Dawes v. Head*, 3 Pick. R. 128 ; *Story's Conflict of Laws*, ch. 13, § 513, and the cases in note (2), *ibid.*

CHAPTER X.

LEGACIES.

§ 589. ANOTHER head of concurrent jurisdiction in Equity, is in regard to LEGACIES. This subject, has been in part incidentally treated before; but it is proper to bring the subject more fully under view. It seems, that originally the jurisdiction over personal legacies was claimed and exercised in the Temporal Courts of Common Law; or, at least, that it was a jurisdiction *mixti fori*, claimed and exercised in the County Court, where the Bishop and Sheriff sat together.¹ Afterwards, (at least from the reign of Henry the Third,) the Spiritual or Ecclesiastical Courts obtained exclusive jurisdiction over the Probate of Wills of personal property; and as incident thereto, they acquired jurisdiction (though not exclusive) over legacies.² This latter jurisdiction still continues in the Ecclesiastical Courts; though it is at present rarely exercised, a more efficient and complete jurisdiction being, as we shall presently see, exercised by Courts of Equity.³

¹ Swinb. on Wills, Pt. 6, § 11, p. 430, 431, 432; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 1, and notes (a) and (b); 2 Black. Comm. 491, 492; 3 Black. Comm. 61, 95, 96; Marriot v. Marriot, 1 Str. R. 667, 669, 670; 2 Roper on Legacies, by White, ch. 25, p. 695; 1 Reeves' Hist. of the Law, 92, 303.

² Ibid; 3 Black. Comm. 98; Com. Dig. *Prohibition*, G. 17; Bac. Abridg. *Legacies*, M.; Atkins v. Hill, Cowp. R. 287.

³ Bac. Abridg. *Legacies*, M; 2 Roper on Legacies, by White, ch. 25, § 2, p. 693; 5 Madd. R. 357.

§ 591. In regard to legacies, whether pecuniary or specific, it is very clear, that no suit will lie at the Common Law to recover them, unless the executor has assented thereto.¹ If no such assent has been given, the remedy is exclusively in the Ecclesiastical Courts, or in Courts of Equity. But in cases of specific legacies of goods and chattels, after the executor has assented thereto, the property vests immediately in the legatee, who may maintain an action at law for the recovery thereof.² The same rule has been attempted to be applied to cases of pecuniary legacies, where the executor has *expressly* assented thereto; for it is agreed on all sides, that the mere possession of assets, without such assent, will not support an action.³ There are certainly decisions, which establish, that in the case of an express promise to pay a pecuniary legacy in consideration of assets, an action will lie at law for the recovery thereof.⁴ But these cases seem not to have been decided upon satisfactory principles; and though they have not been directly overturned in England, they have been doubted and disapproved by elementary writers and judges.⁵

§ 592. The ground, upon which these decisions have been doubted or denied, is the pernicious consequences, which would follow from allowing such an

¹ Deeks v. Strutt, 5 T. Rep. 690.

² Doe v. Gay, 3 East, R. 120; Paramour v. Yardley, Plowd. 539; Young v. Holmes, 1 Str. R. 70; 4 Co. Rep. 28 b.

³ Deeks v. Strutt, 5 T. R. 690; Doe v. Gay, 3 East, R. 120.

⁴ Atkins v. Hill, Cowp. 284; Hawkes v. Saunders, Cowp. R. 289.

⁵ See Deeks v. Strutt, 5 T. R. 690; Doe v. Gay, 3 East, R. 120; 2 Roper on Legacies, by White, ch. 25, § 2, p. 696, 697; Bac. Abrid. Legacies, M. Gwillim's note. See also 3 Dyer. Rep. 264, b; Beecker v. Beecker, 7 John. R. 99; Farish v. Wilson, Peake, Rep. 73; Mayor of Southampton v. Graves, 8 T. Rep. 593, 2 Madd. Ch. Pr. 1, 2, 3.

action at law ; for Courts of Law, if compellable to entertain the jurisdiction, cannot impose any terms upon the parties. Thus, for instance, a suit might be maintained by a husband for a legacy given to his wife without making any provision for her, or for her family ; whereas a Court of Equity would require such a provision to be made.¹

§ 593. But whether a pecuniary legacy is recoverable at law or not, after an assent thereto by an executor, it is very certain, that Courts of Equity now exercise a concurrent jurisdiction with all other Courts in cases of legacies, whether the executor has assented thereto or not.² The grounds of this jurisdiction are various. In the first place, the executor is treated as a trustee for the benefit of the legatees ; and therefore, as a matter of trust, legacies are within the cognizance of Courts of Equity, whether the executor has assented thereto or not. This seems a universal ground for the jurisdiction.³ In the next place, the jurisdiction is maintainable in all cases, where an account, or distribution, or discovery is required, upon general principles. Indeed, Lord Mansfield seems to have thought, that the jurisdiction arose as an incident to discovery and account.⁴ In the next place there is, in many cases,

¹ *Deeks v. Strutt*, 5 T. R. 692. — An action at law for a pecuniary legacy has been maintained against an executor after his assent to the legacy in some of the Courts of America. In some of the States an action at law is expressly given by statute. See *Dewitt v. Schoonmaker*, 2 John. R. 243 ; *Beecker v. Beecker*, 7 John. R. 99 ; *Farwell v. Jacobs*, 4 Mass. R. 634 ; *Bigelow's Digest. Legacy, C.*

² *Franco v. Alvares*, 3 Atk. 346.

³ 2 *Roper on Legacies*, by White, ch. 25, p. 685 ; *Jeremy on Eq. Jurisd.* B. 1, ch. 1, § 2, p. 104 ; *Farrington v. Knightley*, 1 P. Will. 549, 554 ; *Wind v. Jekyll*, 1 P. Will. 575 ; *Hurst v. Beach*, 5 Madd. R. 360 ; 2 Madd. Ch. Pract. 1, 2.

⁴ *Atkins v. Hill*, Cowper, R. 297, 2 Madd. Ch. Pract. 1, 2.

the want of any adequate or complete remedy in any other Court.¹

§ 594. Obvious as some of these grounds are to found a general jurisdiction in Equity in cases of legacies, it does not appear, that the jurisdiction was familiarly exercised until a comparatively recent period. Lord Kenyon, indeed, has said, that the jurisdiction over questions of legacies was not exercised in Equity until the time of Lord Chancellor Nottingham.² In this remark Lord Kenyon was probably under some slight mistake; for traces are found of an exercise of the jurisdiction as early as the time of Lord Chancellor Ellesmere, in cases, where the defendant answered the bill, and took no exceptions; though he appears to have entertained the opinion, that the Ecclesiastical Courts were more proper to give relief in cases of legacies.³ But it is highly probable, that the jurisdiction was not firmly established beyond any controversy until Lord Nottingham's time.

§ 595. Indeed, in many cases, Courts of Equity exercise an exclusive jurisdiction in regard to legacies; as, for instance, where the bequest of the legacy involves the execution of trusts, either express or implied; or where the trusts engrafted on the bequest are themselves to be pointed out by the Court; for (as we have seen) the Spiritual Courts cannot, any more than the temporal Common Law Courts, enforce the execution of trusts.

¹ 2 Madd. Ch. Pr. 1, 2, 3; *Franco v. Alvares*, 3 Atk. 346.

² *Deeks v. Strutt*, 5 T. Rep. 692.

³ 2 Madd. Ch. Pr. 1, 2.

⁴ 2 Roper on Legacies, by White, ch. 25, § 2, p. 693; *Farrington v. Knightley*, 1 P. Will. 549; *Anon.* 1 Atk. R. 491; *Hill v. Turner*, 1 Atk. 516; *Attorney-General v. Pyle*, 1 Atk. 435.

§ 596. It is upon this account, that where a testator, by his will, has not disposed of the surplus of his personal estate, the Spiritual Courts have no authority to decree distribution of it ; for, in such a case, at law the executor is entitled to it ; though, under circumstances, he may in Equity be held to be a trustee for the next of kin.¹ And, therefore, it is, that, if the Spiritual Courts attempt to enforce the payment of a legacy, which involves a trust, a Court of Equity will award an injunction in order to protect its own exclusive jurisdiction.²

¹ 2 Madd. Ch. Pr. 1, 2, 3 ; *Farrington v. Knightley*, 1 P. Will. 549, 550, 553, 554, and Mr. Cox's note (1) ; *Id.* 550 ; *Pettit v. Smith*, 1 P. Will. 7 ; *Hatton v. Hatton*, 2 Str. R. 665 ; ante, § 536, 537.—At law the appointment of an executor, is deemed to be a virtual gift to him of all the surplus of the personal estate, after the payment of all debts and legacies. But in Equity he is considered as a mere trustee of such surplus for the benefit of the next of kin, if from the nature and circumstances of the will, a presumption arises, that the testator did not intend, that the executor should take such surplus to his own use. The effect of the doctrine, therefore, is, that the legal right of the executor will prevail, unless there are circumstances which repel that conclusion. *Wilson v. Ivat*, 2 Ves. 165 ; *Bennett v. Bachelor*, 1 Ves. jr. 67 ; *Dawson v. Clarke*, 18 Ves. 254 ; *Haynes v. Littlefear*, 1 Sim. & Stu. 496. What circumstances will be sufficient to turn the legal estate of the executor into a trust, is a matter, which would require a very large discussion, in order to bring before the reader all the appropriate learning. It is in truth rather a matter of presumptive evidence, than of Equity Jurisdiction. The subject is amply treated in *Jeremy on Equity Jurisd.* B. 1, ch. 1, § 2, p. 122 to 135 ; 2 *Roper on Legacies*, by White, ch. 24, p. 579 ; *Id.* 590 to 640.

It may, however, be generally stated, that where there arises upon the face of the will a presumption, that the executor is not to take the surplus for his own use ; there, parol evidence may be admitted on his part to repel the presumption ; or on the part of the next of kin to confirm it. But if no such presumption arises on the face of the will, parol evidence is not admissible, on the part of the next of kin, to show, that the executor was not intended to take beneficially. *Ibid.* 1 *Roper on Legacies*, by White, ch. 6, § 2, p. 337, 338 ; *White v. Williams*, 3 Ves. & B. 72, 73 ; *Langham v. Sanford*, 2 Meriv. R. 17, 18 ; *Hurst v. Beach*, 5 Madd. R. 360.

² 2 *Roper on Legacies*, by White, ch. 25, § 2, p. 693 ; *Anon.* 1 Atk. 491.

§ 597. So, where the jurisdiction in the Spiritual Courts cannot be exercised in a manner adequate to protect the just rights of all the parties concerned in the case of a legacy, Courts of Equity will assume an exclusive jurisdiction, and grant an injunction to stay proceedings in the Spiritual Courts for such legacy. It was upon this account, that injunctions were formerly granted by Courts of Equity to proceedings in the Spiritual Courts for a legacy, where there was no offer or requirement of security to refund (which such Courts might insist on, or not,¹) in case of a deficiency of assets. For, it was said, that there is a difference between a suit for a legacy in a Court of Equity, and a suit for a legacy in the Spiritual Court. If, in the Spiritual Court, they would compel an executor to pay a legacy without security to refund, there a prohibition should go. But, in a Court of Equity, though there be no provision made for refunding, (which was formerly a usual provision, but is now discontinued ;) yet the common justice of the Court would compel a legatee to refund.²

§ 598. But there are other instances, illustrative of the same principle of exclusive jurisdiction, of a more

¹ *Nicholas v. Nicholas*, Prec. Ch. 546, 547 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2 ; *Harrell v. Waldron*, 1 Vern. 26, 27, Mr. Cox's note B. to *Slanning v. Style*, 3 P. Will. 337.

² *Noel v. Robinson*, 1 Vern. 93, 94 ; *Anon.* 1 Atk. 491 ; *Hawkins v. Day*, Ambler, R. 161, 162 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (d.) — In *Anon.* 1 Atk. 491, Lord Hardwicke said, that the rule of the Court was varied since the case in 1 Vern. 93, for legatees are not obliged to give security to refund upon a deficiency of assets. See ante, § 537, 538. In *Hawkins v. Day*, (Ambler, R. 162,) Lord Hardwicke said, "The rule of this Court to grant prohibitions, in case legatees sue in the Spiritual Court, and refuse to give security, is out of use now. But this Court will decree a legatee to refund."

general character, and dependent upon the state of the legatee. Thus, if a legacy is given to a married woman, and her husband sues therefor in the Spiritual Court, a Court of Equity will grant an injunction ; for the Spiritual Court has no authority to require him to make a suitable settlement on her and her family, as a Court of Equity has ; and, therefore, to allow the suit in the Spiritual Court to proceed, would enable the husband to do injustice to her rights, and to defeat her equity to a settlement.¹

§ 599. In general, it is true, that in cases of concurrent jurisdiction, (as of legacies,) that Court, which is first in possession of the cause, is entitled to go on with it ; and no other Court ought to intermeddle with it. But this rule is applicable only to cases, where the same remedial justice can be administered in each Court ; and the same protection furnished by each to the rights of the parties.² In cases of married women, it is obvious, from what has been above stated, that the same remedial justice cannot be administered in each Court ; and therefore, Courts of Equity will insist upon making it exclusive.

§ 600. In like manner in the case of infants, to whom legacies are given, Courts of Equity will interfere, and exercise an exclusive jurisdiction, and prevent proceedings in the Spiritual Court by an injunction ; for Courts of Equity can give proper directions for securing and improving the fund, which the Spiritual Court cannot do. And, indeed, it would

¹ *Meals v. Meals*, 1 Dick. R. 373 ; *Anon.* 1 Atk. 491 ; *Hill v. Turner*, 1 Atk. R. 516 ; *Jewson v. Moulson*, 2 Atk. 419, 420 ; *Prec. Ch.* 548 ; 2 *Fonbl. Eq. B.* 4, Pt. 1, ch. 1, § 2, note (*d*) ; 2 *Madd. Ch. Pr.* 2, Ante, § 539.

² *Nicholas v. Nicholas*, *Prec. Ch.* 546, 547.

be proper for the executor to resort to a Court of Equity, in order to procure suitable indemnity for the payment of the legacy ; and security to refund in case of a deficiency of assets.¹

§ 601. In cases, where a discovery of assets is required, or the due administration and settlement of the estate is indispensable to the rights of the legatees, as in the case of residuary legatees, it follows, of course, that Courts of Equity should entertain the exclusive jurisdiction, since they alone are competent to such investigation. But this subject has been already sufficiently examined under the preceding head of the jurisdiction of Courts of Equity in cases of administrations.²

§ 602. In regard to legacies charged on land, Courts of Equity, for the reasons already stated, also exercise an exclusive jurisdiction ; for the Spiritual Courts have no cognizance of legacies chargeable on land ; but only of purely personal legacies.³ In deciding upon the validity and interpretation of purely personal legacies, Courts of Equity implicitly follow the rules of the Civil Law, as recognised and acted on in the Spiritual Courts.⁴ But in legacies chargeable on land, they follow the rules of the Common Law, as to the validity and interpretation thereof.⁵

¹ *Horrell v. Waldron*, 1 Vern. R. 26 ; *Nicholas v. Nicholas*, Préc. Ch. 546, 547 ; 2 *Roper on Legacies*, by White, ch. 25, § 2, p. 694, Ante, § 597.

² Ante, § 534.

³ *Reynish v. Martin*, 3 Atk. 333.

⁴ *Ibid.* *Franco v. Alvares*, 3 Atk. R. 346 ; *Hurst v. Beach*, 5 Madd. R. 360 ; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, and note (*h.*) But see *Cray v. Willis*, 2 P. Will. 530.

⁵ *Reynish v. Martin*, 3 Atk. 333, 334 ; *Paschall v. Keterich*, *Dyer*, 151, b. (5.) But see *Dyer*, 264, b.

§ 603. But the beneficial operation of the jurisdiction of Courts of Equity, in cases of legacies, is even more apparent in other cases, where the remedies are peculiar to such Courts, and are protective of the rights and interests of legatees. Thus, for instance, in cases of pecuniary legacies, due and payable at a future day, (whether contingent or otherwise,)¹ Courts of Equity will compel the executor to give security for the due payment thereof;² or, what is the modern, and perhaps, generally, the more approved practice, will order the fund to be paid into Court, even if there be not any actual waste, or danger of waste of the estate.³

¹ Formerly, a distinction was taken between cases of contingent and cases of absolute legacies, payable in futuro; the latter were entitled to be made secure in Equity; the former were not. See *Palmer v. Mason*, 1 Atk. R. 505; *Heath v. Perry*, 3 Atk. 101, 105. But that distinction is now overruled. See Mr. Sanders's note to *Heath v. Perry*, 3 Atk. 105, note (1); Mr. Blunt's note to *Ferrand v. Prentice*, Ambler, R. 273, note (1); *Johnson v. De la Creuse*, cited 1 Bro. Ch. R. 105; *Green v. Pigot*, 1 Bro. Ch. R. 103, 105; *Flight v. Cook*, 2 Ves. 619; *Gawler v. Standerwick*, 2 Cox, R. 15, 18; *Carey v. Askew*, 2 Bro. Ch. R. 55; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 2, p. 351, 352; *Studholme v. Hodgson*, 3 P. Will. 300, 303, 304; *Johnson v. Mills*, 1 Ves. 282, 283; 1 Madd. Ch. Pr. 180, 181.

² 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (d); *Rous v. Noble*, 2 Vern. 249; S. C. 1 Eq. Abrid. 238, pl. 22; *Duncumbar v. Stein*, 1 Cas. Ch. 121.

³ *Johnson v. Mills*, 1 Ves. R. 282; *Ferrand v. Prentice*, Ambler, R. 273; S. C. 2 Dick. R. 569; *Phipps v. Annesley*, 2 Atk. R. 58; *Green v. Pigot*, 1 Bro. Ch. R. 104; *Webber v. Webber*, 1 Sim. & Stu. R. 311; *Johnson v. De la Creuse*, 1 Bro. Ch. R. 105; *Strange v. Harris*, 3 Bro. Ch. R. 365; *Yare v. Harrison*, 2 Cox, R. 377; *Slanning v. Style*, 3 P. Will. 336; *Batten v. Earnley*, 2 P. Will. 163; *Jeremy on Eq. Jurisd.* B. 3, ch. 2, § 2, p. 351, 352; *Green v. Pigot*, 1 Bro. Ch. R. 104; *Blake v. Blake*, 2 Sch. & Lefr. 26. In *Slanning v. Style*, 3 P. Will. 336, it was said by Lord Talbot; "Generally speaking, where the testator thinks fit to repose a trust, in such a case, until some breach of that trust be shown, or at least a tendency thereto, the Court will continue to entrust the same hand, without calling for any other security, than what the testator has required."

§ 604. Another class of cases of the same nature is, where a specific legacy is given to one for life, and after his death to another ; there, the legatee in remainder was formerly entitled, in all cases, to come into a Court of Equity, and to have a decree for security from the tenant for life, for the due delivery over of the legacy to the remainderman. But the modern rule is, not to entertain such a bill, unless there be some allegation and proof of waste, or danger of waste of the property. Without such ingredients, the remainderman is only entitled to have an inventory of the property bequeathed to him, so that he may be enabled to identify it ; and, when his absolute right accrues, to enforce a due delivery of it.¹

§ 605. This may suffice, in this place, on the subject of the peculiar jurisdiction of Courts of Equity in cases of legacies, where the relief sought and given is of a precautionary and protective nature. The subject will again come under review in the consideration of bills *quia timet*.²

§ 606. In regard to donations *mortis causâ*, which are a sort of amphibious gift between a gift *inter vivos*, and a legacy, they are not properly cognizable

Yet in that very case, where an annuity was charged on the residue of the personal estate of the testator, he ordered assets to the amount necessary to secure it to be brought into Court. But where there is any danger of loss or deterioration of the fund, Courts of Equity, in all cases, required security. *Rous v. Noble*, 2 Vern. 249 ; S. C. 1 Eq. Abridg. 238, pl. 22. But the modern practice seems to be, (as stated in the text,) to have the money paid into Court ; though it is certainly competent for the Court to adopt either course.

¹ 1 Madd. Ch. Pr. 178, 179 ; *Bracken v. Bentley*, 1 Ch. Rep. 110 ; *Anon.* 2 Freem. R. 206 ; *Foley v. Burnell*, 1 Bro. Ch. R. 279 ; *Slanning v. Style*, 3 P. Will. 335, 336 ; *Hyde v. Parrat*, 1 P. Will. 1 ; *Batten v. Earnley*, 2 P. Will. 163 ; *Leeke v. Bennett*, 1 Atk. 471 ; *Bill v. Kinaston*, 2 Atk. 82.

² Post, §

by the Ecclesiastical Courts ; neither do they fall regularly within an administration ; nor do they require any act of the executor to constitute a title in the donee.¹ They are properly gifts of personal property by a party, who is in peril of death, upon condition, that they shall presently belong to the donee, in case the donor shall die ; but not otherwise.² To give them effect, there must be a delivery of them by the donor ; and they are subject to be defeated by his subsequent personal revocation, or by his recovery or escape from the impending peril of death.³ If no event happens, which revokes them, the title of the donee is deemed to be directly derived from the donor in his life ; and, therefore, in no sense, from any testamentary act.⁴ And this is the reason, why the Ecclesiastical Courts have no jurisdiction, as they can interpose only in testamentary matters. Courts of Equity, however, maintain a concurrent jurisdiction in all cases of such donations, where the remedy at law is not adequate or complete. But, in such cases, the jurisdiction stands upon general grounds, and not upon any notion, that a donation *mortis causâ*, is from its own nature properly cognizable therein.

§ 607. Donations *mortis causâ* were originally derived into the English law from the civil law. In that law, it was thus defined ; — *Mortis causâ Donatio est, quæ propter mortis fit suspicionem ; cum quis ita donat, ut si quid humanitus, ei contigisset, haberet is, qui accepit. Sin autem supervixisset is, qui donavit, re-*

¹ 1 Roper, Legac. ch. 1, § 2, p. 2 ; Thompson v. Hodgson, 2 Str. R. 777 ; Ward v. Turner, 2 Ves. 481 ; Miller v. Miller, 3 P. Will. 356 ; 3 Woodeson, Lect. 60, p. 513.

² Ibid.

³ Ibid.

⁴ Ibid.

*ciperet ; vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit.*¹ It was a long time a question among the Roman lawyers, whether a donation *mortis causâ* ought to be reputed a gift, or a legacy, inasmuch as it partakes of the nature of both, (*et utriusque causæ quædam habebat insignia*); and Justinian finally settled, that it should be deemed of the nature of legacies; *Hæ mortis causâ Donationes ad exemplum legatorum redactæ sunt per omnia.*²

§ 608. It has been already stated, that, in the interpretation of purely personal legacies, Courts of Equity follow the rules of the Spiritual Courts; and in those, which are charged on lands, the rules of the Common Law.³ But, although this is generally true, it is not to be taken for granted, that Courts of Equity do in all cases follow the rules of Courts of Common Law, in deciding upon the nature, extent, interpretation, and effect of legacies. There are some cases, in which Courts of Equity act upon principles peculiar to themselves in relation to legacies.⁴ But any attempt to point them out in a satisfactory manner, would require a general review of the whole doctrine of legacies; a task, which is incompatible with the objects of the present commentaries.

¹ Inst. Lib. 2, tit. 7, § 1.

² Ibid.

³ Ante, § 602; *Keily v. Monck*, 3 Ridgew. Parl. Cas. 243.

⁴ See 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, 5, and notes (i) and (l); 3 Woodes. Lect. 59, p. 479, 490, 491; Id. 494; *Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2*, p. 106; *Arnald v. Arnald*, 1 Bro. Ch. R. 403.

⁵ The whole subject of legacies is very amply discussed in *Mr. Roper's Treatise on Legacies*, as newly edited by *Mr. White*; in 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, 2; in *Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2*, p. 104 to 135; 3 Woodeson, Lect. 60, p. 509, &c. The most important topics are the description of the persons, who are to take; when legacies are specific, or not; when they are ac-

CHAPTER XI.

CONFUSION OF BOUNDARIES.

§ 609. HAVING disposed of the subject of Administrations and Legacies, we shall next proceed to the consideration of another head of concurrent jurisdiction, arising from the Confusion of the Boundaries of land, and the confusion, or entanglement, of other rights and claims of an analogous nature, calling for the interposition of Courts of Equity, in order to restore, and ascertain, and fix them.

§ 610. In the first place, in regard to CONFUSION OF BOUNDARIES. The issuing of commissions to ascertain boundaries is certainly a very ancient branch of Equitable Jurisdiction.¹ A number of cases of this sort will be found in the earliest of the Chancery Reports. Thus, in *Mullineux v. Mullineux*, in 14th Jac. I, a commission was awarded “to set out lands, that lye promiscuously, to be liable for the payment of debts.” In *Peckering v. Kempton*, 5 Car. 1,² a commission was awarded “to set out copyhold lands free from land, which lye obscured; if the commissioners cannot sever it, then to set out so much in lieu thereof.”

cumulative, or not; when they lapse, or merge; when there is an ademption of them; when an abatement of them; when conditional; when personal, or chargeable on land; when they vest; when interest is allowed; and lastly, the marshalling of assets in favor of them.

¹ Jeremy on Eq. Jurisd. B. 3, ch. 1, § 3, n. 1, p. 301, 302.

² Tothill R. 39, edit. 1649. See also *Wake v. Conyers*, 1 Eden. R. 337, note. See Co. Litt. 169 a; Hargrave's note 23, vii.

§ 611. It is not very easy to ascertain with exactness the origin of this jurisdiction.¹ It has been supposed by Lord Northington and Lord Thurlow, that consent was the ground, upon which it was originally exercised.² There are two writs in the Register concerning the adjustment of controverted boundaries, from one of which, (in the opinion of Sir William Grant,) it is probable, that the exercise of this jurisdiction in the Court of Chancery took its commencement.³ The one is the writ *de Rationabilibus Divisis*, which properly lies, where two men have lands in divers towns or hamlets, so that one is seised of the land in one town or hamlet, and the other of the land in the other town or hamlet by himself; and they do not know the boundaries of the towns or hamlets, which is the land of one, and which is the land of the other. In such a case, to set the bounds certain, this writ lies for the one against the other.⁴ The other writ is *De Perambulatione facienda*. This writ is sued out with the assent of both parties, where they are in doubt of the bounds of their lordships or manors, or of their towns. And, upon such assent, the writ issues to the sheriff to make the perambulation, and to set out the bounds and limits between them in certainty.⁵ And it is added in Fitzherbert, (in which he follows the rule of the *Registrum Brevium*,) that the perambulation may be made for divers towns, and in divers counties; and the parties ought to come

¹ *Ibid.*

² *Spear v. Crawter*, 2 Meriv. R. 417.

³ *Ibid*; *Regist. Brevium*, 157 b.

⁴ *Fitz. Nat. Brev.* 300, [128].

⁵ *Fitzherb. Nat. Brev.* 309, [133].

into the Chancery, and there acknowledge and grant, that a perambulation be made betwixt them ; and the acknowledgment shall be enrolled in the Chancery ; and thereupon a commission or writ shall issue forth.¹

§ 612. Sir William Grant supposes, that the jurisdiction having thus originated in consent, the next step would probably be to grant the commission on the application of one party, who showed an equitable ground for obtaining it ; such as, that a tenant, or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And to its exercise, on such an equitable ground, no objection has ever been made ;² and it may be added, no just objection can be made.

§ 613. This account of the origin of the Chancery Jurisdiction seems highly probable in itself ; but, however satisfactory it may seem, it can scarcely be said to afford more than a reasonable conjecture, and is not a conclusive proof, that such was the actual origin. In truth, the recent discoveries made of the actual exercise of Chancery Jurisdiction in early times, as disclosed in the Reports of the Parliamentary Commissioners, already referred to in a former part of these commentaries, are sufficient to teach us to rely with a subdued confidence upon all such conjectural sources of jurisdiction. It is very certain, that in some cases the Court of Chancery has granted commissions, or directed issues on no other apparent ground, than that the boundaries of manors were in

¹ Ibid ; Regis. Brev. 157, and Regula. ibid.

² Spear v. Crawter, 2 Meriv. 417.

controversy.¹ And Lord Northington seems to have assigned a different origin to the jurisdiction upon one important occasion at least, viz ; that parties originally came into the Court for relief in cases of confusion of boundaries, under the equity of preventing multiplicity of suits.²

§ 614. The Civil Law was far more provident, than ours, upon the subject of boundaries. It considered, that there was a tacit agreement or duty between adjacent proprietors to keep up and preserve the boundaries between their respective estates ; and it enabled all persons, having an interest, to bring a suit to have the boundaries between them settled ; and this, whether they were tenants for years, usufructuaries, mortgagees, or other proprietors. The action was called *Actio finium regundorum* ; and if the possession was also in dispute, that might be ascertained and fixed in the same suit ; and, indeed, was incident to it.³ Perhaps it might not have been originally unfit for Courts of Equity to have entertained the same general jurisdiction, in cases of confusion of boundaries, upon the ground of enforcing a specific performance of the implied engagement or duty of the Civil Law. Such a broad origin or exercise of the jurisdiction has however never been claimed, or exercised.

§ 615. But, whatever may have been the origin of this branch of jurisdiction, it is one, which has

¹ Ibid. See *Lechuellier v. Castleman*, 1 Dick. R. 46 ; S. C. 2 Eq. Abridg. 161 ; Sel. Cas. Ch. 60 ; *Metcalf v. Beckwith*, 2 P. Will. 376.

² *Wake v. Conyers*, 1 Eden. R. 334 ; S. C. 1 Cox, R. 360.

³ See 1 Domat. B. 2, tit. 6, § 1, 2, p. 308, 309 ; Co. Litt. 169 a, Hargrave's note 23 ; Dig. Lil. 10, tit. 1, l. 1, per. tot.

been watched with a good deal of jealousy by Courts of Equity of late years ; and there seems no inclination to favor it, unless special grounds are laid to sustain it. The general rule, now adopted, is, not to entertain jurisdiction in cases of confusion of boundaries upon the ground, that the boundaries are in controversy ;¹ but to require, that there should be some equity superinduced by the act of the parties, as some particular circumstances of fraud ; or some confusion, where one person has ploughed too near another ; or some gross negligence, omission, or misconduct on the part of persons, whose special duty it is to preserve or perpetuate the boundaries.²

§ 616. Where there is an ordinary legal remedy, there is certainly no ground for the interference of Courts of Equity, unless some peculiar equity supervenes, which a Court of Common Law cannot take notice of, or protect. It has been said by Lord Northington, that where there is no legal remedy, it does not therefore follow, that there must be an equitable remedy, unless there is also an equitable right. Where there is a legal right, there must be a legal remedy ; and if there is no legal right, in many cases there can be no equitable one.³ On this account he dismissed a bill to settle the boundaries between manors ; it appearing, that there was no dispute as to the right of soil and freehold on both sides the boun-

¹ But see *Lethieullier v. Castlemain*, 1 Dick. 46 ; S. C. 2 Eq. Abridg. 161, Sal. Cas. in Ch. 60.

² *Wake v. Conyers*, 1 Eden, R. 331 ; S. C. 1 Cox, R. 360. See *Miller v. Warmington*, 1 Jac. & Walk. 473 ; *Eden on Injunctions*, ch. 16, p. 361, 362.

³ *Ibid.*

dary marks, (which right was admitted by the bill to be in the defendant,) and that the right of seignory alone, (an incorporeal hereditament,) and not the soil, was in dispute. And his Lordship on this occasion remarked, that "all the cases, where the Court has entertained bills for establishing boundaries, have been, where the soil itself was in question, or where there might have been a multiplicity of suits."¹

§ 617. So, in a case where a bill was brought by one parish against another, to ascertain the boundaries of the two parishes in making their rates, a number of houses had been built upon land formerly waste; and it was doubtful, to which parish each part of the waste belonged; Lord Thurlow refused to interfere; and observed, that the greatest inconvenience might arise from doing so. For if a commission were granted, and the bounds set out by commissioners, any other parties, on a different ground of dispute, might equally claim another commission. These other commissioners might make a different return; and so, in place of settling differences, endless confusion would be created.² In another report of the same case, he is reported to have said, that, if he should entertain the bill, and direct an issue in such a case as that, he did not see, what case would be peculiar to the Courts of Law; and he did not know how to extract a rule from the *Mayor of York v. Pilkington*, (1 Atk. R. 282.)³

¹ Ibid.

² *St. Luke's v. St. Leonard's Parish*, or *Waring v. Hotham*, cited by Ch. Baron McDonald, in *Atkins v. Hatton*, 2 Anstr. R. 395; S. C. 2 Dick. 550.

³ *Waring v. Hotham*, 1 Bro. Ch. R. 40, and Mr. Belt's note (2); *The Case of the Mayor of York v. Pilkington*, (1 Atk. 282,) was a bill brought to quiet the plaintiffs in a right of fishery in the river Ouse, of which they claimed the sole fishery, against the defendants, who, (as was suggested in the bill,) claimed *several* rights, either as lords of manors, or as occupiers of the adjacent lands; and also for a

Where there was a common right to be tried, such a proceeding was to be understood. The boundary between the two jurisdictions was apparent. That is the case, where the tenants of a manor claim a right of common by custom; because the right of all the tenants of the manor is tried by trying the right of one. But in the case before him, he saw no common right, which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom, on account of the poor laws.¹ The ground of dismissing the bill seems, from these very imperfect statements of the case, to have been; first, that the proper remedy was at law; and secondly, that no equity was superinduced; for it would not even suppress multiplicity of suits.

§ 618. In *Atkins v. Hatton*, (2 Anstr. R. 386,) the Court refused to entertain a bill brought by the rector of a parish principally for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe. The Court said, "The plaintiff here calls upon the Court to grant a commission to ascertain the boundaries of the parish, upon the presumption, that all the lands, which shall be found within those boundaries, would be titheable to him. That is, indeed, a *prima facie* inference; but by no means conclusive. And there is no instance of the Court ever granting a commission, in order to attain a remote consequential advantage. It

discovery and account of the fish taken. The defendants demurred to the bill, as being matter cognizable at law only. Lord Hardwicke at first sustained the demurrer, but afterwards overruled it. Lord Thurlow disapproved of this final decision; and to this, a part of his reasoning in 1 Bro. Ch. R. 40, is addressed.

¹ *Waring v. Hotham, or St. Luke's v. St. Leonard's Parish*, 1 Bro. Ch. R. 40; S. C. 2 Dick. 550. See *Metcalf v. Balkwitt*, 2 P. Will. 376.

is a jurisdiction, which the Courts of Equity have always been very cautious of exercising." It is observable, that no special equity was here set up. But the party desired the commission solely upon the ground of founding a possible right against some persons for tithes, upon the ground, that the land, which they occupied, was intra-parochial and titheable. This was properly a matter at law, to be ascertained by a special suit against every owner or occupant of land severally, and not against them jointly, in a bill to ascertain boundaries.

§ 619. These cases are sufficient to show, that the existence of a controverted boundary by no means constitutes a sufficient ground for the interposition of Courts of Equity, to ascertain and fix that boundary. Between independent proprietors such cases would be left to the proper redress at law.¹ It is, therefore, necessary to maintain such a bill, (as has been already stated,) that some peculiar equity should be superinduced.² In other words, there must be some equitable ground attaching itself to the controversy. And we may, therefore, inquire, what will constitute such a ground. This has been in part already suggested. In the first place, it may be stated, that, if the confusion of boundaries has been occasioned by fraud, that alone will constitute a sufficient ground for the interference of the Court.³ And if the fraud

¹ *Speer v. Crawter*, 2 Meriv. R. 410, 417; *Miller v. Warmington*, 1 Jac. & Walk. 472; *Loker v. Rolle*, 3 Ves. 4.

² *Wake v. Conyers*, 1 Eden, R. 331; S. C. 1 Cox, R. 360; *Speer v. Crawter*, 2 Meriv. R. 417, 418.

³ This is understood to have been the ground of the decision of the House of Lords in *Rouse v. Barker*, 3 Bro. Ch. Rep. 180, reversing the decree of the Exchequer in the same cause. See *Atkins v. Hatton*, 2 Anstruth. R. 396.

is established, the Court will by commission ascertain the boundaries, if practicable; and if not practicable, will do justice between the parties, by assigning reasonable boundaries, or setting out lands of equal value.¹

§ 620. In the next place, it will be a sufficient ground for the exercise of jurisdiction, that there is a relation between the parties, which makes it the duty of one of them to preserve and protect the boundaries; and that, by his negligence or misconduct, the confusion of boundaries has arisen. Thus, if through the default of a tenant or a copy-holder, (who is under an implied obligation to preserve them,) there arises a confusion of boundaries, the Court will interfere, as against such tenant or copy-holder, to ascertain and fix the boundaries.² But even in such cases, it is further indispensable to aver, and to establish by suitable proofs, that the boundaries without such assistance cannot be found.³ And the relation of the parties, entitling them to the redress, must also be clearly stated; for where the parties claim by adverse titles, without any superinduced equity, we have already seen, that the remedy is purely at law.⁴

§ 621. In the next place, a bill in Equity will lie to ascertain and fix boundaries, when it will prevent a

¹ *Speer v. Cawter*, 2 Meriv. R. 418; *Duke of Leeds v. Earl of Strafford*, 4 Ves. 181; *Grierson v. Eyre*, 9 Ves. 345; *Attorney-General v. Fullerton*, 2 Ves. & Beam. 263; *Willis v. Parkinson*, 2 Meriv. R. 507. — The common form of a decree for a commission, in a case of this nature, will be found in *Willis v. Parkinson*, 2 Meriv. R. 506, 509; *Duke of Leeds v. Strafford*, 1 Ves. jr. 186.

² *Ibid.* *Ashton v. Lord Exeter*, 6 Ves. 293; *Miller v. Warmington*, 1 Jac. & Walk. 472; *Attorney-General v. Fullerton*, 2 Ves. & Beam. 263; *Speer v. Cawter*, 17 Ves. 216.

³ *Miller v. Warmington*, 1 Jac. & Walk. 472.

⁴ *Ibid.*

multiplicity of suits. This is an old head of Equity Jurisdiction; and it has been very properly applied to cases of boundaries.¹ Indeed, in many cases of this nature, as for instance, where the right affects a large number of persons, such as a common right in lands, or in a waste, claimed by parishioners, commoners, and others, where the boundaries have become confused by lapse of time, accident, or mistake, the appropriate remedy to adjust such conflicting claims, and to prevent expensive and interminable litigation, seems properly to be in Equity.²

§ 622. There are cases of an analogous nature, (which constitute the second class of cases, arising from confusion or entanglement of other rights and claims than to lands,) where a mischief otherwise irremediable, arising from confusion of boundaries, has been redressed in Courts of Equity. Thus, where a rent is chargeable on lands; and the remedy by distress is by confusion of boundaries, or otherwise, become impracticable; the jurisdiction of Equity has been most beneficially exerted to adjust the rights and settle the claims of the parties.³

§ 623. Other illustrations will present themselves more appropriately under other heads, in the course of these commentaries. One instance, however, may

¹ *Wake v. Conyers*, 1 Eden, 331; S. C. 1 Cox, R. 360; *Waring v. Hotham*, 1 Bro. Ch. R. 40; S. C. cited 2 Anstruth. R. 395; *Bouverie v. Prentice*, 1 Bro. Ch. R. 200; *Mayor of York v. Pilkington*, 1 Atk. 282, 284. See *Whaley v. Dawson*, 2 Sch. & Lefr. 370, 371.

² See *ibid.*

³ *Bowman v. Yeat*, cited 1 Cas. Ch. 145, 146; *Duke of Leeds v. Powell*, 1 Ves. R. 171, and *Belt's Supp.* 98; *Bouverie v. Prentice*, 2 Bro. Ch. R. 200; *North v. Earl of Strafford*, 3 P. Will. 148, 149; *Duke of Leeds v. New Radner*, 2 Bro. Ch. R. 333, 518; *Mitf. Pl. Eq.* 117, by *Jeremy*; 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (g.)

be mentioned, in which Courts of Equity administer the most wholesome moral justice, following out the principles of law ; and that is, where an agent, by fraud or gross negligence, has confounded his own property with that of his principal, so that they are not distinguishable ; in such a case, will the whole be treated in equity as belonging to the principal, so far as it is incapable of being distinguished.¹

¹ *Lupton v. White*, 10 Ves. 432 ; *Panton v. Panton*, cited *ibid.* ; *Chedworth v. Edwards*, 8 Ves. 46 ; *Hart v. Ten Eyck*, 2 John. Ch. R. 108 ; 2 Black. Comm. 405 ; *Story on Bailm.* § 40.

CHAPTER XII.

DOWER.

§ 624. ANOTHER head of concurrent equitable jurisdiction is in matters of DOWER. As dower is a strictly legal right, it might seem at first view, that the proper remedy belonged to Courts of Common Law. The jurisdiction of Courts of Equity in matters of dower, for the purpose of assisting the widow by a discovery of lands or title deeds, or the removing of impediments to her rendering her legal title available at law, has never been doubted.¹ And, indeed, it is extremely difficult to perceive any just ground, upon which to rest an objection to it, which would not apply with equal force to the remedial justice of Courts of Equity, in all other cases of legal rights in a similar predicament. But the question has been made, how far Courts of Equity should entertain general jurisdiction to give general relief in those cases, where there appeared to be no obstacle to her legal remedy.² Upon this question there has in former times been no inconsiderable discussion, and some diversity of judgment. But the result of the various decisions upon this subject is, that Courts of Equity will now entertain a general concurrent jurisdiction with Courts of Law in the assignment of dower in all cases.³ The ground most commonly suggested for

¹ 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f.)

² 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f); *Huddleston v. Huddleston*, 1 Ch. Rep. 38; *Park on Dower*, ch. 15, p. 317.

³ *Curtis v. Curtis*, 2 Bro. Ch. R. 620; *Mundy v. Mundy*, 2 Ves. jr. 122; S. C. 4 Bro. Ch. R. 294. — I am aware that Mr. Park in his ex-

this result is, that the widow is often much embarrassed in proceeding upon a writ of dower at the Common Law to discover the titles of her deceased husband to the estates, out of which she claims her dower (the title deeds being in the hands of heirs, devisees, or trustees) ; to ascertain the comparative value of different estates ; and to obtain a fair assignment of her third part.¹ In such cases, where the title of the widow to her dower is not disputed, the Court proceeds directly to the assignment of dower ; but, if the title is disputed, it is first required to be established by an issue at law, or otherwise.²

§ 625. There are some cases, in which the remedy for dower in Equity seems indispensable. At law, if the tenant dies after judgment, and before damages are assessed, the widow loses her damages. And so, if the widow herself dies before the damages are assessed, her personal representative cannot claim any. But a Court of Equity will in such cases entertain a bill for relief ; and decree an account of rents and profits against the respective representatives of the several persons, who may have been in possession of the estate since the death of the husband ; provided, at the time of filing the bill, the legal right to damages is not gone.³

cellent Treatise on Dower, doubts, if the doctrine is maintainable to this full extent. But, notwithstanding his doubts, it appears to me the just result of the authorities, and maintainable upon principle. Indeed, Mr. Park seems to admit, that where a discovery or account is wanted, there seems no just objection to the jurisdiction. Park on Dower, ch. 15, p. 317, 320, 325, 326, 329, 330.

¹ Mitf. Pl. Eq. 121, 122, 123, by Jeremy, and note (a) ; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 508, 509.

² Ibid. Park on Dower, ch. 15, p. 329.

³ Park on Dower, ch. 15, p. 330 ; Id. 309 ; Curtis v. Curtis, 2 Bro. Ch. R. 632 ; Dormer v. Fortescue, 3 Atk. 180 ; Mordaunt v. Thorold, 3 Lev. R. 275 ; 1 Salk. 252.

§ 626. Upon principle, there would not seem to be any real difficulty in maintaining the concurrent jurisdiction in Courts of Equity in all cases of dower ; for a case can scarcely be supposed, in which the widow may not want either a discovery of the title deeds, or of dowable lands ; or some impediment to her recovery at law removed ; or an account of mesne profits before the assignment of dower ; or a more full ascertainment of the relative values of the dowable lands ; and for any of these purposes, (independent of cases of accident, mistake, or fraud, or other occasional equities,) there seems to be a positive necessity for the assistance of a Court of Equity.¹ And if a Court of Equity has once a just possession of the cause in point of jurisdiction, there seems no reason, why it should stop short of giving full relief, instead of turning the dowress round to her ultimate remedy at law, which is often dilatory, and always expensive.² Dower is favored as well in Law, as in Equity.³ And the mere circumstance, that a discovery of any sort may be wanted to enforce the claim, would, under such circumstances, seem to furnish a sufficient reason, why the jurisdiction for discovery should carry the jurisdiction for relief.⁴

¹ The action of Dower is now, in consequence of the jurisdiction in Equity being established, less frequently resorted to at law than in former times. And the Parliamentary Commissioners, in their report, (2 Report of Common Law, p. 7, 1830,) say, "The necessity for a discovery to ascertain the state of the legal title, before a widow can safely resolve to commence an action against any person as tenant of the freehold, and the convenience of a commission for setting out her dower under the authority of a Court of Equity, generally make it expedient, that a suit in Equity should be instituted."

² See Park on Dower, ch. 15, p. 318.

³ Com. Dig. Chancery, § E. 1, 2.

⁴ See *Dormer v. Fortescue*, 3 Atk. 130, 131 ; *Moor v. Black*, Cas.

§ 627. Lord Eldon has put this matter in a strong light. After having remarked, that he did not know any case, in which an heir had claimed, merely as heir, an account (of mesne profits) without stating some impediment to his recovery at law ; as that the defendant has the title deeds necessary to maintain his title ; that terms are in the way of his recovery at law ; or other legal impediments, which do, or may probably prevent it ; upon which probability, or upon the fact, the Court might found its jurisdiction ; he proceeded to say ; — “ The case of the dowress is upon a principle somewhat, and not entirely, analogous to that of the heir. An indulgence has been allowed to her case, upon the great difficulty of determining *a priori*, whether she could recover at law, ignorant of all the circumstances ; and the person against whom she seeks relief, &c., having in his possession all the information necessary to establish her rights. Therefore, it is considered unconscientious in him to expose her to all that difficulty, to which, if that information was fairly imparted, as conscience and justice require, she could not possibly be exposed.”¹

§ 628. But the propriety of maintaining a general jurisdiction in Equity in matters of dower is still more fully vindicated in a most elaborate opinion of Lord Alvanley, when Master of the Rolls, in a case, which now constitutes the pole star of the doctrine. After adverting to the fact, that dower is a mere legal demand, and the widow's remedy is at law,

Temp. Talb. 126 ; Herbert v. Wren, 7 Cranch, 370, 376 ; Curtis v. Curtis, 2 Bro. Ch. R. 620 ; Mundy v. Mundy, 2 Ves. jr. 122 ; S. C. 4 Bro. Ch. 294 ; Graham v. Graham, 1 Ves. 262 ; D'Arcy v. Blake, 2 Sch. & Lefr. 389, 390 ; Powell v. The Monson Manuf. Co., 3 Mason, R. 347.

¹ Pulteney v. Warren, 6 Ves. 89.

he said ; — “ But then the question comes, whether the widow cannot come either for a discovery of those facts, which may enable her to proceed at law ; and on an allegation of impediments thrown in her way in her proceeding at law, this Court has not a right to assume a jurisdiction to the extent of giving her relief for her dower ; and, if the alleged facts are not positively denied, to give her the full assistance of the Court, she being in conscience, as well as at law, entitled to her dower.” He then proceeded to state the reasons, why the widow should have the assistance of the Court by relief as well as by discovery ; insisting, that the case of the widow is not distinguishable from that of an infant, where the relief would clearly be granted ; and that it would be unconscientious to turn her round to a suit at law for the recovery of her dower, which must be supposed necessary for her to live upon, when she has been compelled to resort to Equity for a discovery. And he finally concluded by saying, that the widow labors under so many disadvantages at law, that she is fully entitled to every assistance, that this Court can give her, not only in paving the way for her to establish her right at law ; but also by giving complete relief, when the right is ascertained.¹

¹ *Curtis v. Curtis*, 2 Bro. Ch. R. 620, 630 to 634. — The judgment of the Master of the Rolls contains so masterly a view of the doctrine, that I venture to transcribe the material passages, as they cannot be abridged without injury to their force. — “ Dower, therefore, is a mere legal demand, and the widow’s remedy is *primâ facie* at law. But then the question comes, whether the widow cannot come, either for a discovery of those facts, which may enable her to proceed at law, and on an allegation of impediments thrown in her way in her proceedings at law, this Court has not a right to assume a jurisdiction, to the extent of giving her relief for her dower, and, if the alleged

§ 629. Dower, as has been already suggested, is highly favored in Equity. And, as was said by the Master of the Rolls, (Sir Thomas Trevor,) on one

facts are not positively denied, to give her the full assistance of this Court, she being, in conscience as well as law, entitled to her dower. Her remedy at law is a writ of dower. Generally there are no damages in real actions, but so favorable was the law to this particular action, that it provided a special relief for the widow, by giving her damages. If the widow was disturbed in her quarantine, she had a particular writ penned for her relief. As to dower, the widow, at first, was only entitled to have an assignment of the land by metes and bounds. Then came the statute of Merton, which showed particular anxiety for the relief of widows; and it is curious to see, that the attempt, now, is to drive the widow to that remedy, as the least advantageous, though, it is very evident, the statute was meant to give her an additional remedy. The deforcers of dower are (by that statute) to be in mercy, or fined at the pleasure of the king, which in those days was a very serious thing, and was meant as a real punishment to deforcers. I own, I think it an odd construction of this statute, that the damages given by it are to be considered strictly as damages, that is, as vindictive damages in the breast of a jury, and not capable of ascertainment by the Court, and that, therefore, they are to die with the person: however, so it has been determined. As to what is said in Sayer's Law of Damages, that a widow shall have no damages, when her dower is assigned to her in Chancery, it certainly is a mistake of the meaning of Co. Litt. 33 a; for Coke is there speaking of the writ *de Dote assignanda*, issued by the Court of Chancery, and not a decree of a Court of Equity. In Fitzherbert's *Natura Brevium*, the nature of the writ *de Dote assignanda* appears very clear; and on this there are no damages, because there is no enforcement of the widow, who is put to no trouble, but has a summary remedy provided for her.

"Now, as to the cases, which have been cited, *Hutton v. Simpson*, 2 Vern. 722, does not seem to bear much upon this case; *Tilly v. Bridges*, Prec. Ch. 252, is also reported in 2 Vern. 519, and I have some doubt about the authority of that case, for it is more particularly stated in Vernon than in Prec. Ch., and yet, what is said in Vernon as to the injunction not preventing the entry, certainly cannot be right. *Duke of Bolton v. Deane*, *Norton v. Frecker*, and other cases, have been mentioned, to show that there must be some fraud to give this Court a jurisdiction, and that, in the simple case of a widow claiming her dower, no such jurisdiction exists. *Dormer v. Fortescue* is also brought to show, that there must either be an infant concerned, or some particular circumstances in the case, to entitle this Court to proceed. Now it seems difficult to distinguish the two cases of the infant and the widow. The principle in the case of the infant is,

occasion, the right, that a dowress has to her dower, is not only a legal right, and so adjudged at law ; but it is also a moral right, to be provided for, and

that he is thought not conusant of his rights at law, sufficiently to enable him to proceed there, and, therefore, the Court of Equity will give him all the relief, he could have at law, and something more ; for, on a bill by an infant for an account, he will get the *mesne profits*, which would certainly be gone at law by the death of the party. I argue in the same manner for the widow. She comes here, and says, the law gives me dower out of the estates of my husband, and the *mesne profits* from his death : I do not know how to proceed ; for if there should turn out to be any mortgage, or term of years in my way, then I must pay the costs. The defendant has all the title deeds in his hands, and knows what the estates are ; his conscience is affected, and yet, instead of putting me in possession of my rights, he turns me out of doors, and keeps all the title deeds. Now, I think this argument is a strong one, on the subject of fraud and concealment on the part of the heir, in not informing the widow of all, that is necessary to enable her to proceed safely at law. If, then, she comes here for a discovery of these matters, which the heir withholds from her, she shall have her complete relief in this Court. If you deny her right to dower, the question must be tried at law : but when the fact is ascertained, she shall have her relief here. It must be supposed the dowress has nothing to live upon but her dower, and the *mesne profits* are her subsistence from the time of her husband's death ; and the course of this Court seems, therefore, to have been to assign her dower, and universally to give her an account from the death of her husband. I admit she has no costs, where the heir has thrown no difficulties in her way ; and if the heir admits the widow's case, he is safe. I wished to find, if I could, any instance of the widow's being turned round on such a case as this ; but I verily believe there is no such instance ; and, indeed, the case of *Moor v. Black*, (Forrest, 126,) is pretty clear to show, that Lord Talbot thought the widow's claim to be rightly made here ; for he overruled the demurrer, in that case, on both points. It shows that the difficulty, under which a widow labors, is a reason for her coming here. *Delver v. Hunter* does not govern this case ; for there the widow had recovered possession. *Lucas v. Calcraft* has also been mentioned as showing, that this Court would give no other relief as to dower, than such as the law would give the widow, and that the Lord Chancellor had refused to give costs, in that case, because no costs were given at law ; but, in that case, the heir had thrown no impediment in the widow's way, and, therefore, there were no costs on either side. Now, taking it for granted, that the widow, coming after the death of the heir, would not be entitled to her *mesne profits*, it by no means follows,

have a maintenance and sustenance out of her husband's estate to live upon. She is therefore in the care of the law, and a favorite of the law. And

that, when the widow is right in this Court, but the heir happens to die before she has fully established her right, she is not entitled to her mesne profits ; for, unquestionably, if the heir, instead of contesting the widow's right, had admitted it, she would have been entitled to her decree for mesne profits, and his having thrown an impediment in her way, shall not make the difference. At the same time I must again admit that the widow's right at law is gone by the death of the party. *Mordaunt v. Thorold* is principally relied upon as to this point. It has been cited from Salkeld, tit. *Dower*, but it is also reported in 3 Lev. 275, and the result is stated differently in the latter book, though the state of the case seems copied from the other ; for in Levinz it is said, the Court inclined to that opinion, but, it being a new case, they would advise, and no decision was given ; and it is to be observed, that Levinz was himself counsel in that case. *Aylward v. Robins*, 1 Lev. 38, is mentioned in the former case ; there the action was against the heir of the heir and the alienee of the heir, and not against the heir's executor ; and the ground of that case was, that neither the heir nor the alienee were deforcers, and the damages were not a lien upon the land ; and then the distinction is taken between the cases of tythes and dower ; that, in the first case, the damages were certain ; in dower, uncertain ; but surely, in common sense, they are equally certain. If it were not for the case of *Mordaunt v. Thorold*, I really should have doubted much the construction of this statute ; I should have thought, that the damages given by the statute were certain, and were not arbitrary uncertain damages to be ascertained by the discretion of a jury. However, it does seem a settled point at law, and that, at law, the widow could not have recovered against the executor of Thomas Curtis.

"This being so, it is insisted on the part of the widow, that still she has a right to come here for full relief, and that she ought to be in the same situation, as if the heir had admitted her claim at first, (and, to be sure, in this case, the heir has given every opposition to her claim, that he possibly could,) and that, in this and many other cases, this Court gives a further remedy than the law will do. It is true, where the law gives neither right nor remedy, however hard it may be, Equity cannot assist. So in the case of damages for a personal injury, which arises *ex delicto* and not *ex contractu*, they are gone with the person, but it is not so clear in the case of a demand, the recovery of which has been prevented by a difficulty, unconscientiously thrown in the way by another person. There Equity

upon this moral law is the Law of England founded, as to the right of Dower.¹ So much is this the case, that the widow will be aided in Equity for her dower against a term of years, which attends the inheritance, if it is not the case of a purchaser, against whom she claims.² And if she has recovered her dower against an heir, who is an infant, and there is a term to protect the inheritance, which by the neglect of his guardian is not pleaded, the term

will give relief, and the relief, it gives is beyond that, which the party could obtain at law. It is the practice in Equity, that bond-creditors coming for a distribution of assets shall have an account of rents and profits, which they could not have at law. And yet the same argument might be used against that additional relief, as has been used in this case. The law gives the creditor only the land to hold, until he is satisfied. Equity goes further, and says, if the remedy at law is not sufficient, we will sell the inheritance of the estate, and, if that will not do, we will direct an account of rents and profits against the heir. *Dormer v. Fortescue* certainly supports these ideas very strongly, though, I am sure, Lord Hardwicke's words must have been misconceived by Mr. Atkyns, as to what he was supposed to have said in respect of the time, from which the statute of 9 Hen. III. gives the widow damages. But, as far as one can collect Lord Hardwicke's sentiments from that case, he thought this Court would expect the widow to establish her title at law, but, she having so done, would give her relief here as to the mesne profits. That is saying, let the widow bring her action at law, out of form, for the purpose of determining her title to dower, and, when she has done that, we will give her an adequate remedy; here, I confess, I agree most fully in thinking, that the widow labors under so many disadvantages at law, from the embarrassments of trust-terms, &c. that she is fully entitled to every assistance, that this Court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained." — *Curtis v. Curtis*, 2 Bro. Ch. R. 630 to 634.

¹ *Dudley & Ward v. Dudley*, Prec. Ch. 244; *Banks v. Sutton* 2 P. Will. 703, 704.

² Com. Dig. Chancery, 3, E 1; *Radnor v. Vandebendy*, 1 Vern. R. 356; S. C. 2 Ch. Cas. 172; Prec. Ch. 65; 1 Eq. Abridg. 219; *Dudley v. Dudley*, 1 Eq. Abridg. 219; *D'Arcey v. Blake*, 2 Sch. & Lefr. 389, 390; *Mole v. Smith*, 1 Jac. 496, 497.

- will not be allowed in Equity to be set up against her.¹

§ 630. Indeed, so highly favored is dower, that a bill for a discovery and relief has been maintained, even against a purchaser for a valuable consideration without notice, who is, perhaps, generally as much favored as any one in Courts of Equity. The ground of maintaining the bill, in such a case, is, that the suit for dower is upon a legal title, and not upon a mere equitable claim, to which only the plea of a purchase for a valuable consideration can properly apply.²— This decision has been often found fault with, and in some cases the doctrine of it denied. It has, however, been vindicated with great apparent force upon the following reasoning. It is admitted, that dower is a mere legal right; and that a Court of Equity, in assuming a concurrent jurisdiction with Courts of Law upon the subject, professedly acts upon the legal right, (for dower does not attach upon an equitable estate.) In so acting, the Court should proceed in analogy to the law, where such a plea of a purchase without notice for a valuable consideration, would not be looked at; and, therefore, as an equitable plea, it should also be inadmissible. But this analogy will not hold, where the widow applies for equitable relief, as for the removal of terms out of her way, &c. In such cases, the equitable plea of a purchase for a valuable consideration without notice

¹ Com. Dig. Chancery, 3 E. 1; *Wray v. Williams*, Prec. Ch. 151; S. C. 1 Eq. Abridg. 219; 1. P. Will. 137; 2 Vern. 378, and Mr. Cox's note; *Dudley & Ward v. Dudley*, Prec. Ch. 241; *Banks v. Sutton*, 2 P. Will. 706, 707, 708; *D'Arcy v. Blake*, 2 Sch. & Lefr. 389, 390; *Swannock v. Lyford*, Ambl. R. 6, 7; *Hitchins v. Hitchins*, 2 Freem. 242.

² *Williams v. Lambe*, 3 Bro. Ch. R. 264.

cannot be resisted. In the former case, the widow, proceeding upon the concurrent jurisdiction of the Court, merely enforces a right, which the defendant cannot at law resist by such a mode of defence. In the latter case, she applies to the equity of the Court to take away from him a defence, which at law would protect him against her demand.¹

§ 631. Other learned minds have, however, arrived at a different conclusion; and have insisted, that, upon principle, the plea of a purchase for a valuable consideration without notice is a good plea in all cases, against a legal as well as an equitable claim; and that dower constitutes no just exception from the doctrine. They put themselves upon the general principle of conscience and equity, upon which such a plea must always stand; that such a purchaser has an equal right to protection and support as any other claimant; and that he has a right to say, that having *bonâ fide* and honestly paid his money, no person has a right to require him to discover any facts, which shall show any infirmity in his title. The general correctness of the argument cannot be doubted; and the only recognised exception seems to be that of dower, if that can be deemed a fixed exception.

¹ 1 Roper, *Husband and Wife*, 446, 447.

² The authorities are both ways. The case of *Williams v. Lambe*, 3 Bro. Ch. R. 264, and *Rogers v. Searle*, 2 Freem. R. 84, are in favor of the doctrine, that the plea is not good against a legal title. Against it is the decision in *Burlace v. Cooke*, 2 Freeman, R. 24; *Parker v. Blythmore*, 2 Eq. Abrid. 79, pl. 1; *Jerrard v. Saunders*, 2 Ves. jr. 454. Mr. Sugden, in a very late edition of his work on *Vendors and Purchases*, ch. 18, p. 762, 763, (1826,) maintains, that the authorities in favor of the sufficiency of the plea against a legal title preponderates; and that, therefore, we may venture to assert, that it will protect the purchaser against a legal, as well as an equitable claim. On the other hand, Mr. Beames, Mr. Belt, and Mr.

§ 632. Generally speaking, in America fewer cases occur in regard to dower, in which the aid of a Court of Equity is wanted, than in England, from the greater simplicity of our titles, and the rareness of family settlements, and the general distribution of property among all the descendants in equal, or in nearly equal proportions. Still, however, cases do occur, in which a resort to Equity is found to be highly convenient, and sometimes indispensable. Thus, for instance, if the lands, of which dower is sought, are undivided, the husband being a tenant in common ; and a partition, an account, or a discovery is necessary ; the remedy in Equity is peculiarly appropriate and easy.¹ So, where the lands are in the hands of various purchasers ; or their relative values are not easily ascertainable ; as, for instance, if they have become the site of a flourishing manufacturing establishment, or the right is affected with numerous or conflicting equities, the jurisdiction of a Court of Equity is, perhaps, the only adequate remedy.²

Roper, maintain the opposite doctrine. Beam. Pl. Eq. 234, 245 ; 3 Bro. Ch. R. 264, Belt's note (1) ; 1 Roper, *Husband and Wife*, 446, 447. See also *Medlicott v. O'Donel*, 1 Ball. & Beatt. 171 ; Mitford, Pl. Eq. 274, by Jeremy, and note (*d*) ; 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*h*) ; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note. In a case of such a conflict of learned opinions, a commentator's duty is best performed by leaving the authorities for the reader's own judgment. See Park on Dower, ch. 15, p. 327, 328.

¹ *Herbert v. Wren*, 7 Cranch. 370, 376.

² *Powell v. Monson Manufacturing Company*, 3 Mason, 347 ; Id. 459.

CHAPTER XIII

MARSHALLING OF SECURITIES.

§ 633. **ANOTHER** head of concurrent jurisdiction in Courts of Equity is that of **MARSHALLING SECURITIES**.¹ We have already had occasion, in another place, to consider the topic of marshalling assets in cases of administration, to which the present bears a very close analogy ; and also the doctrine of apportionment and contribution between sureties, to which it also has near relation. The general principle is, that if one party has a lien on, or interest in two funds for a debt, and another party has a lien on, or interest in one only of the funds for another debt ; the latter has a right in Equity to compel the former to resort to the other fund, in the first instance, for satisfaction ; if that course is necessary for the satisfaction of the claims of both parties.² Thus, if A has a mortgage upon two different estates for the same debt, and B has a mortgage upon one only of the estates for another debt ; B has a right to throw A, in the first instance, for satisfaction upon the security which he, B, cannot touch.³ The reason is obvious, and has been already stated ; for by compelling A, under such circumstances, to take satisfaction out of one of the funds, no injustice is done to him in point

¹ See *Aldrich v. Cooper*, 8 Ves. 394 ; *Eden on Injunct.* ch. 2, p. 38, 39, 40.

² *Lanoy v. Duke of Athol*, 2 Atk. 446 ; *Aldrich v. Cooper*, 8 Ves. 398, 395, 396 ; *Ex parte Kendall*, 17 Ves. 520 ; *Trimner v. Bayne*, 9 Ves. 209 ; *Cheeseborough v. Millard*, 1 John. Ch. R. 413.

³ *Ibid.* ; ante, § 499.

of security or payment. But it is the only way, by which B can receive payment. And natural justice requires, that one man should not be permitted from wantonness, or caprice, or rashness, to do an injury to another. In short, we may here apply the common civil maxim, *Sic utere tuo, ut non alienum lædas*; and still more emphatically the Christian maxim, "Do unto others, as you would, they should do unto you."¹

§ 634. The same principle applies to one judgment creditor, who has a right to go upon two funds, and another judgment creditor upon one only of them, belonging to the same debtor. The former may be compelled to apply first to the fund, which cannot be reached by the second judgment; so that both judgments may be satisfied.² But if the first creditor has a judgment against A and B, and the second against B only; and it does not appear, whether A or B ought to pay the debt due to the first creditor; nor whether any equitable right exists in B to have the debt charged on A alone; in such a case, Equity will not compel the creditor first to take the land of A in satisfaction; for it is not (as we shall presently and more fully see) a case of different debts and securities against one common debtor.³

§ 635. It is not improbable, that this doctrine, which under another form had its existence in the Roman Law, and was therein called subrogation, or substitution, was derived into the jurisprudence of Equity from that source, as it might well be, since it is a

¹ See *Cheeseborough v. Millard*, 1 John. Ch. R. 413.

² *Dorr v. Shaw*, 4 John. Ch. R. 17.

³ *Ibid.*

doctrine belonging to an age of enlightened policy and refined, though natural, justice. In the Roman Law, (as we have already seen,) a surety upon a bond or security, paying it to the creditor, was entitled to a cession of the debt, and a subrogation or substitution to all the rights and actions of the creditor against the debtor ; and the security was treated, as between the surety and the debtor, as still subsisting and unextinguished.¹ And where one creditor had any hypothecation or privilege upon property, as security for a debt, and another creditor had a like subsequent security upon the same property for another debt ; there the latter, upon payment of the prior debt to the prior creditor, was entitled to a cession of the property, and to a subrogation to all the rights and actions of the same creditor for that debt. So the doctrine is laid down in the Digest. *Plane, cum tertius creditor primum de sua pecunia dimisit in locum ejus substituitur in ea quantitate quam superiori exsolvit.*²

§ 636. We here see the original elements, from which our present system of equitable relief is, or at least, might have been, derived. The principal difference between the Roman system and ours is, that our Courts of Equity arrive directly at the same result, by compelling the first creditor to resort to the fund, over which he has a complete control for satisfaction of his debt ; and the Roman system substituted the second creditor to the rights of the first, by a

¹ Pothier on Oblig. n. 280, 427 ; Id. n. 520, 521, 522 ; 1 Domat, Civ. Law, B. 3, tit. 1, § 6, per tot. p. 377, 378, 379 ; 2 Voet, ad Pand. Lib. 46, tit. 1, § 27, 28, 29, 30 ; ante, § 494, 500.

² Dig. Lib. 20, tit. 4, l. 11, § 4, l. 12, § 9, l. 16, 17. See also 1 Domat, B. 3, tit. 1, § 6, art. 2, 3, 4, 6, 7, 8.

cession thereof upon his payment of the debt. It is true, that the case of a double fund is not put in the text of the Civil Law ; but it is an irresistible inference from the principles, upon which it is founded.¹

§ 637. Lord Kaims has put the very case, as founded in a clear and indisputable principle of natural equity. After having adverted to the cases of sureties (*fidejussores*), and *Correi debendi* (debtors bound jointly and severally to the same creditor),² he proceeds to state, “ Another connection, of the same nature with the former, is that between one creditor, who is infest in two different tenements for his security, and another creditor who hath an infestment on one of the tenements, of a later date. Here the two creditors are connected, by having the same debtor, and a security upon the same subject. Hence it follows, as in the former case, that if it be the will of the preferable creditor to draw his whole payment out of that subject, in which the other creditor is in-

¹ See Pothier on Oblig. n. 520, 521, B ; Hayes v. Ward, 4 John. Ch. R. 130 to 132 ; Cheeseborough v. Millard, 1 John. Ch. R. 414. — There are three texts of the Civil Law pointing to cases of hypothecations or mortgages, which bear upon the subject. In the Code it is said, Non omnino succedunt in locum hypothecarii creditoris hi, quorum pecunia ad creditorem transit. Hoc enim tunc observatur ; qui pecuniam postea dat, sub hoc pacto credat, ut idem pignus ei obligetur, et in locum ejus succedat. Quod cum in persona tua factum non sit, (judicatum est enim te pignora non accepisse,) frustra putas tibi auxilio opus esse Constitutionis nostræ ad eam rem pertinentis. And again, Si potiores creditores pecunia tua dimissi sunt quibus, obligata fuit possessio, quam emisit te dicis, ita ut pretium, perveniret ad eos dem priores Creditores, in jus eorum successisti ; et contra eos, qui inferiores illis fuerunt, justa defensione te tuere potes. And again, Si prior Republicæ contraxit, fundusque ei est obligatus, tibi secundo creditori offerenti pecuniam potestas est, ut succedas etiam in jus Reipublicæ. Cod. Lib. 8, tit. 19, l. 1, 3, 4. Pothier has expounded the sense of these passages with admirable clearness. Pothier on Oblig. n. 521, B. (3.)

² Ersk. Instit. B. 3, tit. 3, § 74.

feft, the latter for his relief is entitled to have the preferable security assigned to him: which can be done upon the construction above mentioned. For the sum recovered by the preferable creditor out of the subject, on which the other creditor is also infest, is juftly understood to be advanced by the latter, being a sum, which he was entitled to, and must have drawn, had not the preferable creditor intervened; and this sum is held to be the purchase-money of the conveyance. This construction, preserving the preferable debt entire in the person of the second creditor, entitles him to draw payment of that debt out of the other tenement. By this equitable construction, matters are restored to the same state, as if the first creditor had drawn his payment out of the separate subject, leaving the other entire for payment of the second creditor. Utility also concurs to support this equitable claim.”¹

§ 637. But the interposition of Courts of Equity is not confined to cases strictly of two funds, and of different mortgagees; for it will be applied (as we have seen) in favor of sureties, where the creditor has collateral securities, or property for his debt.² In such cases, the Court will place the surety exactly in the situation of the creditor as to such securities, whenever he is called upon to pay the debt; for it would be against conscience, that the creditor should use the securities to the prejudice of the sureties, or to refuse to them the benefit of them in aid of their own responsibility.³ And on the other hand, if a princi-

¹ 1 Kaims, Equity, B. 1, Pt. 1, ch. 3, § 1, p. 122, 123.

² Com. Dig. Chancery, 4 D. 6; Stirling v. Forrester, 3 Bligh, R. 590, 591; Ante, § 499, 502.

³ Aldrich v. Cooper, 8 Ves. 338, 339. See Gammon v. Stone, 1 Ves. 339; Cheeseborough v. Millard, 1 John. Ch. R. 413; Hayes

pal has given any securities to his surety, the creditor is entitled to all the benefit of such securities in the hands of the surety, to be applied in payment of his debt.¹ •

§ 639. Courts of Equity do not stop here. If the debt is due, and the creditor does not choose to call for payment, the surety may come into Equity by a bill against the creditor and the debtor, and compel the latter to make payment of the debt, so as to exonerate himself from his responsibility ; for it is unreasonable, that a man should always have such a cloud hang over him.² In cases of this sort, there is not, however, (as has been already stated,) any duty of active diligence incumbent upon the creditors. It is for the surety to move in the matter. But, if the surety requires the exercise of such diligence, and there is no risk, delay, or expense to the creditor, or a suitable indemnity is offered against the consequences of risk, delay, and expense, it seems, that the surety has a right to call upon the creditor to do the most he can for his benefit; and if he will not, a Court of Equity will compel him.³

v. Ward, 4 John. Ch. R. 130, 131, 132 ; *Clason v. Morris*, 10 John. R. 524, 539 ; *Stevens v. Cooper*, 1 John. Ch. R. 430, 431 ; *Robinson v. Wilson*, 2 Madd. Ch. Rep. 569 ; *Ex parte Rushforth*, 10 Ves. 410, 414 ; *Wright v. Morley*, 11 Ves. 22 ; *Parsons v. Ruddock*, 2 Vern. 608 ; *Ex parte Kendall*, 17 Ves. 520 ; *Wright v. Simpson*, 6 Ves. 734 ; 2 Fonbl. Eq. B. 3, ch. 2, § 6, note (i) ; *Stirling v. Forrester*, 3 Bligh. R. 590, 591 ; ante, § 324, 326.

¹ *Wright v. Morley*, 11 Ves. 22.

² Ante, § 327 ; *Ranelagh v. Hayes*, 1 Vern. 189, 190 ; 1 Eq. Abridg. 17, pl. 6 ; *Id.* 79, pl. 5 ; *Wright v. Simpson*, 6 Ves. 734 ; *Antrobus v. Davidson*, 3 Meriv. R. 579 ; *King v. Baldwin*, 2 John. Ch. R. 561, 562, 563 ; S. C. 17 John. Rep. 384 ; *Hayes v. Ward*, 4 John. Ch. R. 432 ; *Nesbitt v. Smith*, 2 Bro. Ch. 579 ; *Lee v. Rook*, *Moseley*, R. 318.

³ *Wright v. Simpson*, 6 Ves. 734 ; 1 *Nesbitt v. Smith*, 2 Bro. Ch.

Eq. 75

§ 640. But, as between the debtor himself and the creditor, where the latter has a formal obligation of the debtor, and also a security, or a fund, to which he may resort for payment, there seems no ground to say, (at least, unless some other equity intervenes,) that a Court of Equity ought to compel the creditor to resort to such fund, before he asserts his claim by a personal suit against his debtor. Why in such case should a Court of Equity interfere to stop the election of the creditor as to any of the remedies, which he possesses in virtue of, or under his contract? There is nothing in natural or conventional justice, which requires it. It is true, that a different doctrine has been strenuously maintained by very learned Judges, in a most elaborate manner.¹ But their opinions, however able, have been met by a reasoning exceedingly cogent, if not absolutely conclusive on the other side. And at all events, the settled doctrine now seems to be, in conformity to the early, as well as the latest decisions, that the debtor himself has no right to insist, that the creditor, in such a case, should pretermitt any of his remedies, or elect between them, unless some peculiar equity springs up from other circumstances.²

§ 641. The Civil Law, as we have seen, in the case of sureties required the creditor in the first instance, to pursue his remedy against the debtor. But if the

R. 579; *Cotten v. Blane*, 2 Anstr. R. 544; *Eden on Injunct.* ch. 2, p. 38, 39, 40; *King v. Baldwin*, 2 John. Ch. R. 561, 563; S. C. 1 John. R. 384; *Hayes v. Ward*, 4 John. Ch. R. 123.

¹ See Lord Thurlow's opinion in *Wright v. Nutt*, 1 H. Bl. 136, 150, and Lord Loughborough in *Folliott v. Ogden*, 1 H. Bl. 124.

² *Holditch v. Mist*, 695; *Wright v. Simpson*, 6 Ves. 713, 726, 728 to 738; Lord Eldon's opinion. See *Hayes v. Ward*, 4 John. Ch. R. 132, 133; *Eden on Injunct.* ch. 2, p. 38, 39, 40.

surety thought himself in peril of loss by the delay of the creditor, he might compel the latter to sue the debtor ; and thus obtain his indemnity. — *Fidejussor* (says the Digest¹) *an, et prius quam solvat, agere possit, ut liberetur ? Nec tamen semper expectandum est, ut solvat, aut judicio accepto condemnetur ; si diu in solutione recus cessabit, aut certe bona dissipabit ; præsertim, si domi pecuniam fidejussor non habebit, qua numerata creditori, mandati actione conveniat.* This is a very wholesome and just principle.

§ 642. But, although Courts of Equity will thus administer relief to parties in cases of double funds, which are subject to the same debt ; and will, in favor of sureties, marshal the securities for their benefit ; yet, this will be so done only in cases, where no injustice is done to the common debtor ; for then other equities may intervene. And the interposition always supposes, that the parties seeking aid are creditors of the same common debtor ; for if they are not, they are not entitled to have the funds marshalled, in order to leave a larger dividend out of one fund for those, who can claim only against that. This principle may be easily illustrated by supposing the case of a joint debt due to one creditor by two persons, and a several debt due by one of them to another creditor. In such a case, if the joint creditor obtains a judgment against the joint debtors, and the several creditor obtains a subsequent judgment against his own several debtor ; a Court of Equity will not compel the joint creditor to resort to the funds of one of the joint creditors, so as to leave the second judgment in full force against the funds of the other several

¹ Dig. Lib. 17, tit. 1, l. 38 ; *King v. Baldwin*, 2 John. Ch. R. 562 ; *Hayes v. Ward*, 4 John. Ch. R. 132, 133.

debtor. At least, it will not do so, unless it should appear, that the debt, though joint in form, ought to be paid by one of the debtors only ; or there should be some other supervening equity.¹

§ 643. Another case has been put of a similar nature by Lord Eldon. “ We have gone this length,” said he ; “ if A has a right to go upon two funds, and B upon one, having both the same debtor, A shall take payment from that fund, to which he can resort exclusively, that by those means of distribution both may be paid. That takes place, where both are creditors of the same person, and have demands against funds, the property of the same person. But it was never said, that if I have a demand against A and B, a creditor of B shall compel me to go against A, without more ; as if B himself could insist, that A ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent, that all obligations arising out of these complicated relations may be satisfied. But, if I have a demand against both, the creditors of B have no right to compel me to seek payment from A, if *not founded in some equity*, giving B the right for his own sake, to compel me to seek payment from A.”²

§ 644. Upon this ground, where there was a partnership of five persons, one of whom died, and the other four partners continued the partnership, and afterwards became bankrupt ; and the creditors of the four surviving partners sought to have the debts of the five paid out of the assets of the deceased partner, so that the dividend of the estate of the four bank-

¹ *Dorr v. Shaw*, 4 John. Ch. R. 17, 20.

² *Ex parte Kendall*, 17 Ves. 520.

rupts might be thereby increased in favor of their exclusive creditors ; without showing, that the assets of the deceased partner ought, as between the partners, to pay those debts ; or that there was any other equity to justify the claim ; the Court refused the relief. On that occasion the Lord Chancellor said, that even if it was clear, that the creditors of the five partners could go against the separate assets of the deceased partner, (which of course depended upon equitable circumstances, as the legal remedy was against the survivors only) ; yet, if it was not clear, that the survivors had a right to turn the creditors of the five against those assets, it did not advance the claim, that without such arrangement the creditors of the four would get less. Unless the latter could establish, that it is just and equitable, that the estate of the deceased partner should pay in the first instance, they had no right to compel a creditor to go against that estate, who had a right of resort to both funds.¹ Indeed, there might exist an opposite equity ; that of compelling the creditor to go first against the property of the survivors, before resorting to the estate of the deceased partner.²

§ 645. The ground of all these decisions is the same general doctrine already suggested, though the application of that doctrine is necessarily varied by the circumstances. Where a creditor has a right to resort to two persons, who are his joint and several debtors, he is not compellable to yield up his remedy against either, since he has a right to stand upon the letter and spirit of his contract, unless some supervening equity changes or modifies his rights.

¹ *Ex parte Kendall*, 17 Ves. 520.

² *Ibid.*

If each debtor is equally bound in equity and justice for the debt, as is the case of joint debtors or partners, where both have had the full benefit of the debt, the interference of a Court of Equity, to change the responsibility from both debtors or partners to one, would seem to be utterly without any principle to support it, unless there was a duty in one of the debtors or partners to pay in discharge of the other. And if this be so, *a fortiori*, the creditors of one of the debtors, or partners, cannot be entitled to such interference for their own benefit ; for they can in no just sense, in such a case, work out any right, except through the equity of the debtor or partner, under whom their title is derived.

CHAPTER XIV.

PARTITION.

§ 646. ANOTHER head of concurrent jurisdiction is that of PARTITION in cases of real estate, held by joint tenants, tenants in common, and coparceners. It is not easy, as has been well observed by Mr. Fonblanque, to trace back or establish the origin of any branch of equitable jurisdiction.¹ But the jurisdiction of Courts of Equity in cases of partition is beyond question very ancient. It is curious enough to observe the terms of apparent indignation, with which Mr. Hargrave has spoken of this jurisdiction, as if it were not only new, but a clear usurpation. Yet he admits its existence and practical exercise, as early as the reign of Queen Elizabeth ;² a period so remote, that at least one half of the law, which is at present, by way of distinction, called the Common Law, and regulates the rights of property, and the operation of contracts, and especially of commercial contracts, has had its origin since that time. “A new and compulsory mode of partition (says Mr. Hargrave) has sprung up, and is now fully established ; namely, by decree of Chancery, exercising its equitable jurisdiction on a bill filed, praying for a partition ; in which it is usual for the Court to issue a commission for the purpose to various persons, who proceed without a jury. How far this branch of equitable

¹ 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f) ; *Miller v. Warmington*, 1 Jac. & Walk. 473.

² See Mr. Fonblanque's Remarks on the passage, 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f).

jurisdiction, so trenching upon the writ of partition, and wresting from a Court of Common Law its ancient exclusive jurisdiction of this subject, might be traced by examining the records of Chancery, I know not. But the earliest instance of a bill of partition, I observe, to be noticed in the printed Books, is a case of the 48th Elizabeth, in Tothill's Transactions of Chancery, title *Partition*.¹ According to this short report of the case, the Court interfered from necessity, in respect of the minority of one of the parties, the book expressing, that on that account he could not be made a party to a writ of partition ; which reason seems very inaccurate ; for, if Lord Coke is right, that writ doth lie against an infant, and he shall not have his age in it, and after judgment he is bound by the partition.² But probably in Lord Coke's time this was a rare and rather unsettled mode of compelling partition ; for, I observe, in a case in Chancery of the 6th Car. I., which was referred to the Judges on a point of law between two coparceners, that the Judges certified for issuing a writ of partition between them, and that the Court ordered one accordingly ; which, I presume, would scarcely have been done, if the decree for partition, and a commission to make it, had then been a current and familiar proceeding with Chancery.³ However, it appears by the language of the Court in a very important cause, in which the grand question was, whether the Lord Chancellor here could hold plea of a trust of lands in Ireland, that in the reign of James II. bills of partition were become common.”⁴

¹ Spake v. Walton, &c., (a) Tothill Trans. 155 (edit. 1649.)

² Co. Litt. 171 b.

³ 1 Chan. R. 49.

⁴ Hargrave's note (2) to Co. Litt. 169 b.

§ 647. These remarks of the learned author are open to much criticism, if it were the object of these commentaries to indulge in such a course of discussion. It cannot, however, escape notice, that, when the learned author speaks of this branch of equitable jurisdiction, as trenching upon the writ of partition, and wresting from the Courts of Common Law their ancient *exclusive* jurisdiction over the subject, he assumes the very matter in controversy. That the writ of partition is a very ancient course of proceeding at the Common Law, is not doubted. But it by no means follows, that the Courts of Common Law had an exclusive jurisdiction over the subject of partition. The contrary may fairly be deemed to have been the case, from the notorious inadequacy of that writ to attain in many cases the purposes of justice. Thus, for instance, we know, that until the reign of Henry VIII. no writ of partition lay, except in the case of parceners. Littleton (§ 264) expressly says ; “for such a writ lyeth by parceners only.” And to show, how narrowly the whole remedial justice of this writ was construed, it was the known settled doctrine, that, if two coparceners be, and one should alien in fee, the remaining parcener might bring a writ of partition against the alienee ; but the alienee could not have such writ *against* the parcener. And the like diversity existed in cases of a writ of partition against or by a tenant by the curtesy.¹ Now, such a case would, upon the very face of it, constitute a clear case for the interposition of a Court of Chancery ; upon the ground of the total defect of any remedy at law, and yet of an unquestionable equitable

¹ Co. Litt. 175 a.

right to partition. Cases of jointenancy and tenancy in common afford equally striking illustrations. Until the statutes of 31st Hen. VIII. ch. 1, and 32d Hen. VIII. ch. 32, no writ of partition lay for a jointenant or tenant in common.¹ And yet the grossest injustice might have arisen, if a Court of Chancery should not in such a case have interposed, and granted relief, upon the analogy to the legal remedy. The reason given at the Common Law against partition in such cases was more specious than solid. It was, that a jointenancy being an estate originally created by the act or agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. The good sense of the doctrine would rather seem to be, that the jointenancy being created by an act or agreement of the parties, in a case capable of a severance of interest, the joint interest should continue (exactly as in cases of partnership) so long as, and no longer than, both parties should consent to its continuance.

§ 648. Mr. Justice Blackstone has cited the Civil Law, as confirmatory of the maxim of the Common Law, *Nemo enim invitus compellitur ad communionem*.² But that law deemed it against good morals to compel joint owners to hold a thing in common ; since it could not fail to occasion strife and disagreement among them. Hence, the acknowledged rule was, *In communione vel societate nemo compellitur invitus detineri*.³ And, therefore, a decree of partition might

¹ Co. Litt. 175 a ; 2 Black. Comm. 185 ; Com. Dig. *Parcener*, C. 6 ; *Miller v. Warmington*, 1 Jac. & Walk. 473 ; *Baring v. Nash*, 1 Ves. & B. 555.

² Dig. Lib. 12, tit. 6, l. 26, § 4 ; 2 Black. Comm. 185, note (c).

³ Cod. Lib. 3, tit. 37, l. 5, ult.

always be insisted on, even when some of the part-owners did not desire it. *Communi dividendo judicium ideo necessarium fuit.*¹ *Etsi non omnes, qui rem communem habent, sed certi ex his dividere desiderant, hoc judicium inter eos accipi potest.*²

§ 649. But independently of considerations of this sort, which might have brought many cases of partition into the Court of Chancery in very early times, from the manifest defect of any remedy at law, there must have been many cases, where bills for partition were properly entertainable upon the ordinary grounds of a discovery wanted, or other equities intervening between the parties.³ Lord Loughborough upon one occasion said, that there is no original jurisdiction in Chancery in partition, which is a proceeding at the Common Law.⁴ This may be true *sub modo*, where the party is completely remediable at law; but not otherwise. On another occasion his Lordship said, “A party, choosing to have a partition, has the law open to him; there is no equity for it. But the jurisdiction of this Court obtained upon a principle of *convenience*. It is not for the Court to say, one party shall not hold his estate, as he pleases; but another person has also the same right to enjoy his part, as he pleases; and therefore to have the estate divided. The law has provided, that one shall not defeat the right of the other to the divided estate. Then, the only question is, whether

¹ Dig. Lib. 10, tit. 3, l. 1; 1 Domat, Civ. Law, B. 2, tit. 5, § 2, art. 11.

² Dig. Lib. 10, tit. 3, l. 8; 1 Domat, Civ. Law, B. 2, tit. 5, § 2, art. 11, p. 303, 306; Id. B. 1, tit. 4, § 1, p. 632, 633; Fulb. Parcellel. B. 2, p. 57, 58; Ersk. Instit. B. 3, tit. 3, § 56; 1 Stair's Inst. 48.

³ See *Watson v. Duke of Northumberland*, 11 Ves. 155, *arguendo*.

⁴ *Mundy v. Mundy*, 2 Ves. 124.

the legal mode of proceeding is so convenient, as the means this Court affords, to settle the interest between them with perfect fairness and equality. It is evident, that the commission is much more convenient than the writ; the valuation of these proportions is much more considered; the interests of all parties are much better attended to; and it is a work carried on for the common benefit of both.”¹

§ 650. This language (it must certainly be admitted) is sufficiently loose and general. But it appears to be by no means a just description of the true nature and reason of the jurisdiction of Courts of Equity in cases of Partition. It is not a jurisdiction founded at all in mere convenience; but in the judicial incompetency of the Courts of Common Law to furnish a plain, complete, and adequate remedy for such cases.² The true ground is far more correctly stated by Lord Redesdale, in his admirable Treatise on Pleadings in Equity. “In case of partition of an estate,” says he, “if the titles of the parties are in any degree complicated, the difficulties, which have occurred in proceeding at the Common Law, have led to applications to Courts of Equity for partitions, which are effected by first ascertaining the rights of the several persons interested; and then issuing a commission to make the partition required; and upon the return of the commissioners, and confirmation of that return by the Court, the partition is finally completed by mutual conveyances of the allotments made to the several parties.”³

¹ *Calmady v. Calmady*, 2 Ves. jr. 570. See also *Baring v. Nash*, 1 Ves. & Beam. 555.

² *Mitford Pl. Eq.* by Jeremy, 120.

³ *Mitford Pl. Eq.* by Jeremy, 120; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), p. 120, 121. — The Commissioners do not ascertain the

§ 651. The ground here stated is of a complication of titles, as the true foundation of the jurisdiction. But it is not even here expressed with entire legal precision. However complicated the titles of the parties might be, still, if they could be thoroughly investigated at law, in the usual course of proceedings in the Common Law Courts, there would seem to be no sufficient reason for transferring the jurisdiction of such cases to the Courts of Equity. The true expression of the doctrine should have been, that Courts of Equity interfere in cases of such a complication of titles, because the remedy at law is inadequate and imperfect, without the aid of a Court of Equity to promote a discovery, or to remove obstructions to the right, or to grant some other equitable redress.¹

interests of the parties ; but they are first ascertained by the Court ; and the proportion of each party in the land ; and then the Commissioners make the allotments accordingly. *Agar v. Fairfax*, 17 Ves. 543. The mode of ascertainment is through the instrumentality of a Master, to whom the subject is referred. *Id.* See also *Phelps v. Green*, 3 John. Ch. R. 304, 305. But the Court will generally, where the title is denied, and has not been established at law, require it to be first established at law ; and retain the bill to await the decision. *Wilkin v. Wilkin*, 1 John. Ch. R. 117 ; *Parker v. Gerard*, Ambler, R. 236 ; *Phelps v. Green*, 3 John. Ch. R. 305 ; *Coxe v. Smith*, 4 John. Ch. R. 271, 276.

¹ See *Maraton v. Squire*, 2 Freem. 26 ; *Agar v. Fairfax*, 17 Ves. 551. See *Watson v. Duke of Northumberland*, 11 Ves. 153 ; *Mitford*, Pl. Eq. by Jeremy, 120 ; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), p. 20, 21 ; *Jeremy on Equity Jurisd.* B. 3, ch. 1, § 2, p. 303, 304. — This is the ground of the jurisdiction, as stated by Lord Eldon in *Agar v. Fairfax*, (17 Ves. 551.) “This Court,” said he, “issues the commission, not under the authority of any act of Parliament, but on account of the extreme difficulty attending the process of partition at law ; where the plaintiff must prove his title, as he declares, and also the titles of the defendants ; and judgment is given for partition according to the respective titles so proved. This is attended with so much difficulty, that, by analogy to the jurisdiction of a Court of Equity in the case of Dower, a partition may be obtained by Bill.

Besides ; the remedy in Courts of Equity, even in such cases, is more perfect and extensive than at law ; for in Equity conveyances are directed to be made by the parties in pursuance of the allotments of the Commissioners, which is a mode of redress of great importance, as a permanent muniment of title, and of which a Court of Law is by its own structure incapable.

§ 652. This is very clearly, but briefly, stated in a judgment of Lord Redesdale. "Partition at Law," (said that learned Judge,) "and in Equity are different things. The first operates by the judgment of a Court of Law, and delivering up possession in pursuance of it ; which concludes all the parties to it. Partition in Equity proceeds upon conveyances to be executed by the parties ; and, if the parties be not competent to execute the conveyances, the partition cannot be effectually had."¹ Hence, if the infancy of the parties or other circumstances prevent such mutual conveyances, the decree can only extend to make the partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made. If the defect arise from infancy, the infant must have a day, after attaining twenty-one, to show cause against the decree. If a contingent remainder, not barrable or extinguishable, is limited to a person not in existence, the conveyance

The plaintiff must, however, state upon the record his own title, and the titles of the defendants ; and, with a view to enable the plaintiff to obtain a judgment for partition, the Court will direct inquiries to ascertain, who are together with him entitled to the whole subject." The inquiries are, (as we have seen,) by a reference to a Master. See the form of a Decree in Partition in 17 Ves. 545, 553, 554.

¹ Whaley v. Dawson, 2 Sch. & Lefr. 371, 372.

cannot be made until he comes into being, and is capable, or until the contingency is determined.¹

§ 653. It is upon this account, that Lord Hardwicke has spoken of the remedy by partition in Equity being discretionary, and not a matter of right in the parties. "Here," said he, "the reason," (that the plaintiff should show a title in himself, and not allege generally, that he is in possession of a moiety of the land) "is, because conveyances are directed, and not a partition only; which makes it discretionary in this Court, where a plaintiff has a legal title, [whether] they [it] will grant a partition or not; and, where there are suspicious circumstances in the plaintiff's title, the Court will leave him to law."² His Lordship was here speaking of legal titles; for in the same case he expressly stated, that where the bill for a partition was founded in an equitable title, a Court of Equity might determine it; or otherwise it would be without remedy.³ And, indeed, if there are no suspicious circumstances, but the title is clear at law, the remedy for a partition in Equity is as much a matter of right, as at law.⁴

§ 654. In regard to partitions there is also another distinct ground, upon which the jurisdiction of Courts

¹ Mitford, Pl. Eq. by Jeremy, 120, 121; Attorney-General *v.* Hamilton, 1 Madd. Rep. 214; Wills *v.* Slade, 6 Ves. 498; Com. Dig. Chancery, 4 E.; Brook *v.* Hertford, 2 P. Will. 518, 519; Tuckfield *v.* Buller, 1 Dick. R. 240; Thomas *v.* Gyles, 2 Vern. 232.

² Cartwright *v.* Poultney, 2 Atk. 380.

³ Ibid. — It is essential to a partition in Equity, that the legal title should be before the Court. It would be a decisive answer, that the title is only equitable; for then, how could the conveyances be made, if any should be necessary? See the opinion of Sir Thomas Plumer (Master of the Rolls) in Miller *v.* Warmington, 1 Jac. & Walk. 473.

⁴ Baring *v.* Nash, 1 Ves. & B. 555, 556; Parker *v.* Gerard, Ambler, R. 236, and Mr. Blunt's note.

of Equity is maintainable, constituting a part of its appropriate and peculiar remedial justice. It is, that Courts of Equity are not restrained, as Courts of Law are, to a mere partition or allotment of the lands and other real estate between the parties, according to their respective interests in the same, and having a regard to the true value thereof.¹ But a Court of Equity may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty of partition, so as to prevent any injustice or unavoidable inequality.² This a Court of Common Law is not at liberty to do; for, when a partition is awarded by such a Court, the exigency of the writ is, that the sheriff do cause by a jury of twelve men the partition to be made of the premises between the parties, regard being had to the true value thereof; without any authority to make any compensation for any inequality in any other manner.³

§ 655. Cases of a different nature, involving equitable compensation, to which a Court of Law is utterly inadequate, may easily be put; such, for instance, as a case, where one party has laid out large sums in improvements on the estate; for

¹ Co. Litt. 167 *a* and *b*; 169 *a*.

² See *Calnody v. Calnody*, 2 Ves. jr. 570; *Earl of Clarendon*, 1 P. Will. 446, 447; *Warner v. Baynes*, Ambler, R. 589; *Wilkin v. Wilkin*, 1 John. Ch. R. 116, 117; *Phelps v. Green*, 3 John. Ch. R. 302, 305.

³ Co. Litt. 167 *b*; Com. Dig. *Pleader*, 3 F. 4. — Littleton (§ 251) has spoken of a rent charge in cases of partition for owelty in partition. But this is not in a case of compulsive partition by writ; but of a voluntary partition by deed or by parol, as the context abundantly shows. Co. Litt. 168 *b*; Litt. § 250, 252.

although, under such circumstances, the money so laid out does not in strictness constitute a lien on the estate ; yet a Court of Equity will not grant a partition, without first directing an account, and compelling the party applying for partition to make due compensation.¹ So, where one tenant in common has been in the perception of the rents and profits, on a bill for a partition and account the latter will also be decreed.²

§ 656. Indeed, in a great variety of cases, especially where the property is of a very complicated nature, as to rights, easements, modes of enjoyment, and interfering claims, the interposition of a Court seems indispensable for the purposes of justice. For since partition is a matter of right, no difficulty in making a partition is allowed to prevail in Equity, whatever may be the case at law ; as the powers of the Court are adequate to a full and just compensatory adjustment. There have been cases disposed of in Equity, which seemed almost impracticable for allotment at law, as in the great case of the Cold Bath Fields, which Lord Hardwicke did not hesitate to act upon, notwithstanding the admitted difficulties.³ Nor does it constitute any objection in Equity, that the partition does not, or may not, finally conclude the interests of all persons ; as if the partition is asked only by or against a tenant for life, or if there are contingent interests to vest in persons not *in esse*. For the Court will still proceed to make parti-

¹ Swan v. Swan, 8 Price, R. 518.

² Hill v. Fulbrook, Jac. R. 574 ; Lorimer v. Lorimer, 5 Madd. R. 363.

³ Warren v. Baynes, Ambler, R. 589 ; Turner v. Morgan, 8 Ves. 143, 144.

tion between the parties before the Court, who possess competent present interests; such as a tenant for life, or for years.¹ But, under such circumstances, the partition is binding upon those parties only, who are before the Court; and the interests of third persons are not affected.² Still, however, parties in interest may be brought before the Court, far more extensively than by any processes known to the Courts of Law, for the purpose of doing complete justice.³

§ 657. In Equity, too, (and it would seem, that the same rule prevails at law, though this has sometimes been doubted,)⁴ where there are divers parcels of lands, messuages, and houses, partition need not be made of each estate separately; so as to give to each party his moiety or other portion in every estate. But the whole of one estate may be allotted to one, and the whole of another estate to the other, provided, that his equal share is allotted to each.⁵ But it is obvious, that at law such a partition can rarely be conveniently made; because the Court cannot decree compensation, so as to make up for any inequality, which must ordinarily occur in the allotment of different estates to each party. In Equity it is in the ordinary course.⁶

§ 658. It is upon some or all of these grounds, the necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments,

¹ *Slade v. Wills*, 6 Ves. 498; *Baring v. Nash*, 1 Ves. & B. 555; *Wotten v. Copeland*, 7 John. Ch. R. 140.

² *Agar v. Fairfax*, 17 Ves. 544.

³ *Anon.* 3 Swanst. R. 139, note (b).

⁴ See *Arguendo* in *Earl of Clarendon v. Bligh*, 1 P. Will. 446, 447.

⁵ *Earl of Clarendon v. Bligh*, 1 P. Will. 446, 447.

⁶ *Ibid.*

the peculiar remedial processes of a Court of Equity, and its ability to clear away all intermediate obstructions against complete justice, that Courts of Equity have assumed a general concurrent jurisdiction with Courts of Law over all cases of partition. So that it is not now deemed necessary to state in the bill any peculiar ground of equitable interference.¹ And, unless I am greatly misled in my judgment, this review of the true sources and objects of this concurrent jurisdiction demonstrates in the most satisfactory manner, how ill founded the animadversions of Mr. Hargrave (already cited) are upon the exercise of this jurisdiction. But the most conclusive proof in its favor is, that, wherever it exists, it has almost entirely superseded any resort to Courts of Law to obtain a partition. In making partition, however, Courts of Equity, generally follow the analogies of the law; and will decree it in such cases, as the Courts of Law recognise, as fit for their interference.² But Courts of Equity are not, therefore, to be understood as limiting their jurisdiction in partition to cases cognizable or relievable at law; for there is no doubt, that they may interfere in cases, where a writ of partition would not lie at law;³ as, for instance, in the case, where an equitable title is set up.⁴

¹ Mitford, Plead. Eq. by Jeremy, 120; Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, p. 304, 305; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (f), p. 20, 21.

² Ibid.; *Wiles v. Slade*, 6 Ves. 498; *Baring v. Nash*, 1 Ves. & B. 555.

³ *Swan v. Swan*, 8 Price, R. 519.

⁴ *Cartwright v. Pultney*, 2 Atk. 380; *Coxe v. Smith*, 4 John. Ch. R. 276. See *Miller v. Warmington*, 1 Jac. & Walk. 473.

CHAPTER XV.

PARTNERSHIP.

§ 659. **ANOTHER** head of concurrent jurisdiction, arising from similar causes, is in relation to **PARTNERSHIPS**.¹ In cases of this nature, where a remedy at law actually exists, it is often found to be very imperfect, inconvenient, and circuitous. But, in a very great variety of cases, there is in fact no remedy at all at law, to meet the exigency of the case. We shall, in the first instance, take notice of such remedies as exist at law ; and then proceed to the consideration of others, which are peculiar to a Court of Equity.

§ 660. And, here, it may be proper to begin by a reference to that, which is, in its own nature, preliminary to all other inquiries, to wit, the actual existence of the partnership itself. Although, in many cases, written articles, or instruments of partnership exist, as the foundation of the joint concerns ; yet, in many other cases, the partnership itself exists merely in parol. And even in cases of written articles, there are many defects and omissions, which the parties have left unprovided for. Now, a controversy may arise in regard to the existence of the partnership between the partners themselves, or between them and third persons. In each case, its existence may mainly depend upon the discovery to be obtained through the instrumentality of a Court of Equity. If

¹ See Com. Dig. Chancery, 3 V. 6.

written articles exist, they may be suppressed or concealed ; if none exist, it may be impracticable to obtain due knowledge of the partnership by any competent witnesses in the ordinary course of law. But, in by far the most numerous and important class of cases, that of secret and dormant partners, there may not be, and indeed, ordinarily will not be any adequate means at law, to get at the names or numbers of the partners. In all such cases, the powers of a Court of Equity will be found most effective, by means of a bill of discovery, to bring out all the facts, as well in controversies between the partners themselves, as between them and third persons.

§ 661. But, admitting a partnership to exist, let us now proceed to consider, what are the remedies at law, which exist between the partners themselves. These, of course, are dependent upon the nature of the partnership, and the grievance, for which a remedy is sought. If the articles of partnership are under seal, and any violation of any of the stipulations therein contained exists, it may be, and is properly remediable by an action of covenant. If they are written articles not under seal, or the partnership is by a parol agreement, the proper remedy for any breach of the stipulations is by an action of assumpsit. But, as we shall presently see, both these remedies are utterly inadequate to provide for many exigencies and injuries, which may arise out of the violation of partnership rights and duties.

§ 662. The most extensive, and generally the most operative, remedy at law between partners is an action of account. This is the appropriate, and, except under very peculiar circumstances, is the only remedy at the Common Law for the final adjustment

and settlement of partnership transactions. It is a very ancient remedy between partners, in which one naming himself a merchant, may sue his partner for a reasonable account, naming him a merchant, as the receiver of the moneys of himself, arising from whatever cause or contract, for the common profit of both according to the law merchant.¹

§ 663. But, it is wholly unnecessary to dwell upon the inadequacy of this remedy in cases of partnership, as all the remarks already made in respect to the dilatory, cumbrous, and inconvenient proceedings in it apply with augmented force to cases of partnership, where it is absolutely impossible, in many cases, to settle the concerns of the partnership, without the production of the books, vouchers, and other documents belonging to the partnership, and the personal examination of the partners themselves. So intimate is the confidence, and so universal the community of interest and operations between partners, that no proceedings, not including a thorough and minute discovery, can enable any Court to arrive at the means of doing even reasonable justice. And, in addition to the common difficulties in ordinary cases, the death of either partner put an end at the Common Law to any means of enforcing this remedy by account; for it being founded in privity between the parties, no suit lay by, or against the personal representative of the deceased partner, to compel an account.

§ 664. In a few cases, indeed, where there has been a covenant, or promise to account, Courts of Law have attempted to approximate towards an ef-

¹ Co. Litt. 172 a; Fitz. N. B. 117 D.

fectual remedy, in the shape of damages for a breach of the obligation. But it is manifest, that even in these cases, the damages must be wholly uncertain, unless an account can be fully and fairly taken between the parties; for otherwise, there will be no rule, by which to ascertain the damages. There has, too, been a struggle in cases, where one partner has been compelled to advance or pay money on the partnership account out of his own private funds, to give him a remedy at law for a contribution from the other partners. But it is difficult to perceive, how, except under very peculiar circumstances, such a remedy will lie.¹ For it is impossible,

¹ It is no part of the object of these commentaries to show in minute detail the nature and extent of the legal remedies in cases of this sort. Where the partnership has been dissolved, and upon such a dissolution all the accounts of the partnership have been adjusted, as between the partners; or where one partner has purchased the property, and agreed to pay all the debts; there, if the other partner is called upon to pay a partnership debt, he may be entitled at law to contribution. So, where upon a dissolution of a partnership all the accounts have been adjusted, and a balance struck, an action at law will lie for such balance. So, where a sum of money has been received for one partner's separate account by the other partners, he may recover the same in an action of *Assumpsit*, as money had and received for his use. But all these, and other cases of the like nature, stand upon their own special circumstances; and steer wide of the general doctrine. There is no case in the English Courts, (though there may be in some of the American Courts,) where any action at law, except an account, has been held to lie generally to settle partnership accounts; or for a contribution by one partner against the others, for money paid by him for the use of the partnership. The learned reader will find many of the cases collected and commented on in Mr. Collyer's valuable work on Partnership, B. 2, ch. 3, § 1, 2, 4, and in the notes of the able American Editor, Mr. Phillips, in his edition of that work. Mr. Gow, in his work on the same subject, (ch. 2, § 3,) has discussed the same subject at large; and in his last, (the third) edition, has corrected some of the inadvertences, into which he had fallen on this subject, by relying too much upon some loose dicta in some of the authorities. See also, *Holmes v. Higgins*, 1 B. & Cresw. 74; *Harvey v. Crockett*, 5 M. & Selw. 336; *Berill v. Hammond*, 6 B. & Cresw. 149.

during the continuance of the partnership, without taking a general account, to say, that any one partner, so called upon to advance or pay money, is on the whole a creditor of the firm to such an amount; and if he is, how, in point of technical propriety, he can institute a remedy against his other partners alone, as contradistinguished from the partnership. It is very certain, that, if he should lend the partnership a sum of money, he could not sue for it at law, for he could not sue himself; and it is not very easy to perceive a clear distinction between this and the former case. And, if it should turn out, upon taking a general account, that such partner was a debtor to the partnership, it would be unreasonable and useless to allow him to recover the very money, which he must refund to the partnership; for the maxim of common sense, as well as of common justice, is, *Frustra petis, quod statim alteri reddere cogeris*.¹

§ 665. Cases also have occurred, in which suits at law have been maintained for the breach of an agreement to furnish a certain sum or stock for the partnership purposes. In such a case the transaction is not so much a partnership transaction, as an agreement to launch the partnership; and an agreement, to pay money or furnish stock for such a purpose, is an individual engagement of each partner to the other.² For the breach of such an agreement there seems no reasonable objection to the maintenance of a suit at law. But, what should be the measure of the damages, must depend upon the circumstances of each particular case. No general rule

¹ Branch's Maxims, 55.

² See *Venning v. Leckie*, 13 East, R. 7; *Gale v. Leckie*, 2 Stark. R. 107; *Terrill v. Richards*, 1 Nott & McCord, 20.

can be laid down to govern all cases. If the partnership has no specific term fixed for its continuance, in many cases the damages would be merely nominal. If it has such a specific fixed term, the damages must necessarily be of a very uncertain nature and extent. The whole sum agreed for the partnership stock could not be the true rule; for that would be in effect to give one partner the whole capital stock. And, on the other hand, the possible profits of the partnership, if carried on, would not furnish a rule, because of the uncertainty of such profits, and their being to arise *in futuro*, and the injury not being certain at the time of the breach.

§ 666. The remedial justice administered by Courts of Equity is far more complete, extensive, and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner, where no redress whatsoever could be obtained at law. In the first place, they may decree a specific performance of a contract to enter into a partnership for a specific term of time, (for it would ordinarily be useless to enforce one, which might be dissolved instantly, at the will of either party)¹ and to furnish a share of the capital stock; which a Court of Law is incapable of doing.²

¹ This qualification (ordinarily) is necessary; for a specific performance may in some cases be important to establish rights under a partnership, which has no fixed term for its continuance. Mr. Swanston, in his excellent note to *Crawshay v. Maule*, (1 Swanst. R. 511, 512, 513,) has clearly shown the propriety of the qualification. See also *Birchett v. Bolling*, 5 Munf. R. 442.

² *Anon.* 2 Ves. 629, 630; *Hercy v. Birch*, 9 Ves. 357; *Buxton v. Lister*, 3 Atk. 385; *Hibbert v. Hibbert*, cited in *Collyer on Part. B.* 2, ch. 2, § 2, p. 107; *Crawshay v. Maule*, 1 Swanst. 511, 512, Mr. Swanston's note; *Peacock v. Peacock*, 16 Ves. 49; *Birchett v. Bolling*, 5 Munf. R. 442.

This remedy, however, is rarely sought, for the plain reason, that few partnerships can be hoped to be successful, where they begin in mutual distrust, dissatisfaction, or enmity.

§ 667. In like manner, after the commencement and during the continuation of a partnership, Courts of Equity will interpose to decree a specific performance of other agreements in the articles of partnership. If, for instance, there be an agreement to insert the name of a partner in the firm name, so as to clothe him publicly with all the rights of acting for the partnership; and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name; a Court of Equity will grant a specific relief, by an injunction against the use of any other firm name, not including his. But the remedy in such cases is strictly confined to such studied delay and omission, and relief will not be given for a temporary, accidental, or trivial omission.¹ So, where there is an agreement not to raise money in the name, or on the credit of the firm, for the private use of any one partner; a Court of Equity will, from the manifest danger of injury to the firm, interpose by injunction to stop such an abuse of the credit of the firm.² So, where there is an agreement by the partners not to engage in any other business, a Court of Equity will act by injunction to enforce it; and, if profits have been made by any partner in violation of such an agreement in any other business, the profits will be decreed to belong to the partnership.³ So, if it is agreed, that upon the

¹ *Marshall v. Colman*, 2 Jac. & Walk. 266, 269.

² *Ibid.*

³ See *Somerville v. Mackay*, 16 Ves. 382, 387, 389.

dissolution of a partnership, a certain partnership book shall belong to one of the partners, and the other shall have a copy of it, a Court of Equity will decree a specific performance.¹

§ 668. A Court of Equity will even go farther ; and, in case of a partnership, existing during the pleasure of the parties, with no time fixed for its renunciation, will interfere (as it should seem) to qualify or restrain that renunciation, unless it is done under fair and reasonable circumstances ; for, if a sudden dissolution is about to be made in ill faith, and will work irreparable injury, a Court of Equity will, upon its ordinary jurisdiction to prevent irreparable mischief, grant an injunction against such a dissolution.² And this is in strict conformity to the doctrine of the Civil Law on the same subject. By that law a partnership, without any express agreement for its continuance, may be dissolved by either party, provided the renunciation be *bonâ fide* and reasonable. *Societas coiri potest vel in perpetuum, id est, dum vivunt, vel ad tempus, vel ex tempore, vel sub conditione. Dissociamur renunciatione, morte capitis minutione, et egestate.*³ But then it is afterwards added, *Diximus, dissensu solvi societatem ; hoc ita est, si omnes dissentiunt. Quid ergo, si unus renunciet. Cassius scripsit, eum qui renunciavit societati, a se quidem liberare socios suos, se autem ab illis non liberare. Quod utique observandum est, si dolo malo renunciatio facta sit, &c. Si intempestive renunciatur societati, est pro socio*

¹ *Lingin v. Simpson*, 1 Sim. & Stu. 600.

² See *Chavany v. Van Sommer*, 3 Woodes. Lect. 416, note ; S. C. cited 1 Swanst. R. 511, 512, in a note. See Id. 123, and 16 Ves. 49 ; 17 Ves. 298, 308.

³ Dig. Lib. 17, tit. 2, l. 1, 4.

*actionem.*¹ And again Labeo writes, *Si renunciaverit societati unus ex sociis eo tempore, quo interfuit socii non dirimi societatem, committere eum in pro socio actione.*

And again, in a more general form, it is said, *In societate coëundâ nihil attinet de renunciatione cavere ; quia ipso jure societatis intempestiva renunciatio in æstimationem venit.*² The same principles are recognised in the countries, which derive their jurisprudence from the Civil Law.³

§ 669. In like manner Courts of Equity will interfere, by way of injunction, to prevent a partner, during the continuation of the partnership, from doing any acts injurious thereto ; as by signing or indorsing notes to the injury of the partnership ; or by driving away customers ; or by violating the rights of the other parties, or his duty to them, even when a dissolution is not necessarily contemplated.⁴

§ 670. These are instances (and others might be mentioned)⁵ of the remedial justice of a Court of Equity, in carrying into specific effect the articles of partnership, where the remedy at law would be wholly illusory or inadequate. But it is not hence to be inferred, that a Court of Equity will, in all cases, interfere to enforce such specific performance of articles. Where the remedy at law is entirely adequate, no relief will be granted in Equity. And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the com-

¹ Dig. Lib. 17, tit. 2, l. 65, § 3 ; Id. l. 14.

² Dig. Lib. 17, tit. 2, l. 65, § 5 ; Id. l. 17, § 2 ; 1 Swanst. R. 510, 511, 312, note ; Vinn. in Inst. Comm. 680, § 1, 2, 3.

³ See 2 Bell, Comm. B. 7, ch. 3, n. 1227 ; Ersk. Inst. B. 3, tit. 3, § 26 ; 1 Stain, Inst. B. 1, tit. 16, § 4 ; Pothier, Traite de Societè, n. 65, 149, 150, 151.

⁴ See *Charlton v. Poulter*, 19 Ves. 148, *n.* ; *Goodman v. Whitcomb*, 1 Jac. & Walk. 569 ; *Collyer on Part. B. 2*, ch. 3, § 5.

⁵ See *Collyer on Part. B. 2*, ch. 3, § 5.

mon tribunals of justice, such as an agreement in case of any disputes to refer the same to arbitrators, a Court of Equity will not, any more than a Court of Law, interfere to enforce the agreement ; but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded, or interfered with, by such stipulations, if they were specifically enforced. And, at all events, Courts of Justice are presumed to be better capable of administering to the real rights of the parties, than any mere private arbitrators, from their superior knowledge, as well as their superior means of sifting the controversy to the very bottom.¹

§ 671. The remedial justice of Courts of Equity is not confined to cases of the nature above stated. They may not only provide for a more effectual settlement of all the accounts of the partnership after a dissolution ; but they may take steps for this purpose, which a Court of Law is inadequate to afford. They may, perhaps, interpose, and decree an account, where a dissolution has not taken place, and is not asked for ; though ordinarily they are not inclined to decree an account, unless under special circumstances, if there is not an actual or contemplated dissolution, so that all the affairs of the partnership may be wound up.²

¹ *Street v. Rigby*, 6 Ves. 815, 818 ; *Thompson v. Charnock*, 8 T. R. 139 ; *Waters v. Taylor*, 15 Ves. 9 ; *Wellington v. Mackintosh*, 2 Atk. 569.

² *Forman v. Humphrey*, 2 Ves. & B. 329 ; *Harrison v. Armitage*, 4 Madd. R. 143 ; *Loscombe v. Russell*, 4 Simons, R. 8 ; *Knowles v. Haughton*, 11 Ves. 169 ; *S. C. Collyer on Part. B. 2, ch. 3, § 3, p. 163*, note (a) ; *Waters v. Taylor*, 15 Ves. 15. — Lord Eldon, in *Forman v. Humphrey* (2 V. & Beam. 329) thought, that no account ought to be decreed, unless there is also a prayer for a dissolution. But the then Vice Chancellor, (Sir John Leach,) in *Harrison v. Armitage*,

§ 672. But where such dissolution has taken place, an account will not only be decreed ; but, if necessary, a manager, or receiver, will be appointed to close the partnership business, and make sale of the partnership property ; so that a final distribution may be made of the partnership effects.¹ This a Court of Law is incompetent to do. The accounts are usually directed to be taken (as has been already suggested) before a master, who examines the parties, if necessary, and requires the production of all the books, papers, and vouchers of the partnership ; and he is armed from time to time by the Court with all the powers necessary to effectuate the objects of the reference to him. If it is deemed expedient and proper, the Court will restrain the partners from collecting the debts, or disposing of the property of the concern ; and will direct the moneys of the firm, received by any of them, to be paid into Court. In this way it adapts its remedial authority to the exigencies of each particular case.²

§ 673. But, perhaps, one of the strongest cases, to illustrate the beneficial operation of the jurisdiction of Courts of Equity in regard to partnership, is their power to dissolve the partnership during the term, for which it is stipulated. This is a peculiar

(4 Madd. R. 143,) thought otherwise. In the later case of *Loscombe v. Russell*, (4 Simons, R. 8,) the present Vice Chancellor (Sir Lancelot Shadwell) agreed with Lord Eldon, and held the bill demurrable for not praying a dissolution. The point must, therefore, be held still open for further consideration.

¹ See *Crawshaw v. Maule*, 1 Swanst. R. 506, 523 ; *Peacock v. Peacock*, 16 Ves. 57, 58 ; *Featherstonehaugh v. Fenwick*, 17 Ves. 298, 308 ; *Crawshaw v. Collins*, 15 Ves. 129 ; *Wilson v. Greenwood*, 1 Swanst. R. 471 ; *Oliver v. Hamilton*, 2 Anst. R. 453.

² See *Collyer on Part. B. 2, ch. 3, § 3*, and the cases there cited ; *Foster v. Donald*, 1 Jac. & Walk. 252, 253.

remedy, which Courts of Common Law are capable of administering by the nature of their organization. Such a dissolution may be granted, in the first place, on account of the impracticability of carrying on the undertaking, either at all, or according to the stipulations of the articles.¹ In the next place, it may be granted on account of the insanity, or permanent incapacity, of one of the partners.² In the next place, it may be granted on account of the gross misconduct of one or more of the partners.³ But trifling faults and misbehaviour, which do not go to the substance of the contract, do not constitute a sufficient ground to justify a decree for a dissolution.⁴

§ 674. There are other considerations, which make a resort to a Court of Equity, instead of a Court of Law, not only more convenient, but even an indispensable instrument, for the purposes of justice. Thus, real estate may be bought, and held for purposes of the partnership, and really be a part of the stock in trade. The conveyance in such a case may be in the name of one for the benefit of all the partners; or in the name of all, as tenants in

¹ *Baring v. Dix*, 1 Cox, R. 213; *Waters v. Taylor*, 2 Ves. & B. 299; *Barr v. Spears*, 2 Ball, Comm. 642.

² *Waters v. Taylor*, 2 Ves. & B. 299; *Sayer v. Bennet*, 1 Cox, R. 107; *S. C.* 1 Montague on Part. Appx. 18; *Collyer on Part. B. 2*, ch. 3, § 3; *Pearce v. Chamberlain*, 2 Ves. 34, 35; *Wrexham v. Hudleston*, 1 Swanst. R. 514, note.

³ See *Marshall v. Colman*, 2 Jac. & Walk. [266] 300; *Goodman v. Whitcomb*, 1 Jac. & Walk. [569] 594; *Chapman v. Bennet*, Id. [573] 594; *Norway v. Rowe*, 19 Ves. 148; *Walton v. Taylor*, 2 Ves. & B. 304; *Master v. Kinton*, 3 Ves. 74; *De Berenger v. Hammel*, 7 Jarman. Conv. 26, cited *Collyer on Part. B. 2*, ch. 3, § 3, p. 161; *Loscombe v. Russell*, 4 Simons, R. 8.

⁴ *Goodman v. Whitcomb*, 1 Jac. & Walk. [569] 592; *Collyer on Part. B. 2*, ch. 3, § 3.

common, or as jointenants. In case of the death of a partner, by which a dissolution takes place, the real estate may thus become severed at law from the partnership funds, and vest in the surviving party exclusively, or in the heirs of a deceased partner, in common with the survivor, according to the particular circumstances of the case. In taking an account of the partnership effects at law, it is impossible for the Court for the benefit of creditors to bring such real estate into the account ; or to direct a sale of it ; or to hold it a part of the partnership funds. It must be treated in Courts of Law just as its character is according to the Common Law. But in a Court of Equity, in such a case, the real estate is treated, to all intents and purposes, as a part of the partnership funds, whatever may be the form of the conveyance. For a Court of Equity considers the real estate, to all intents and purposes, as personal estate ; and subjects it to all the equitable rights and liens of the partners, which would apply to it, if it were personal estate. And this doctrine not only prevails, as between the partners themselves and their creditors ; but (as it should seem) as between the representatives of the partners also. So that real estate, held in freehold fee or for the partnership, and as a part of the funds, will, upon the death of one partner, belong in Equity, not to the heirs at law, but to the personal representatives and distributees of the deceased ; unless, perhaps, there be a clear and determinate expression of the deceased party, that it shall go to the heir at law beneficially.¹

¹ See Collyer on Part. B. 2, ch. 1, § 1, p. 68 to 76 ; *Lake v. Craddock*, 3 P. Will. 158 ; *Elliot v. Brown*, 9 Ves. 597 ; *Thornton v. Dixon*, 3 Bro. Ch. R. 199, Belt's edition ; *Bell v. Phynn*, 7 Ves. 453 ; *Ripley v. Waterworth*, 7 Ves. 425 ; *Selking v. Davies*, 2 Dow,

§ 675. The lien also of partners upon the whole funds of the partnership, for the balance finally due to them, seems incapable of being enforced in any other manner, than by a Court of Equity through the instrumentality of a sale. Besides; the creditors of the partnership have a preference, to be paid their debts out of the partnership funds, before the private creditors of either of the partners. But this preference is, at law, generally disregarded; in Equity, it is worked out through the equity of the partners over the whole funds.¹ On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim any thing; which can only be accomplished by the aid of a Court of Equity; for at law, a joint creditor may proceed directly against the separate estate.² This is another illustration of the doctrine of marshallling assets; and proceeds upon analogous principles; and is commonly applied in cases of insolvency, or bankruptcy.

§ 676. There are certain exceptions to the rule, which confirm, rather than abate, its force; as they stand upon peculiar reasons. In like manner, in case of partnership debts, if one of the partners dies, and the survivor becomes insolvent or bankrupt, the joint creditors have a right to be paid out of the es-

R. 242; *Townsend v. Devaynes*, 1 Montague on Part. Appx. 96; *Gaw* on Part. ch. 2, § 1.

¹ *Twiss v. Massey*, 1 Atk. 67; *Ex parte Cook*, 2 P. Will. 500; *Ex parte Elter*, 3 Ves. 240; *Ex parte Clay*, 6 Ves. 833; *Collyer on Partnership*, B. 4, ch. 2, § 1, 2, 3; *Campbell v. Mullett*, 2 Swanst. 574, 575; *Ex parte Ruffin*, 6 Ves. 125, 126; *Gray v. Chiswell*, 9 Ves. 118; *Commercial Bank v. Wilkins*, 9 Greenl. 28.

² *Ibid*; *Dutton v. Morrison*, 17 Ves. 205 to 210; *Tucker v. Oxley*, 5 Cranch, 34.

tate of the deceased partner, through the medium of the equities subsisting between the partners.¹

§ 677. In regard to partnership property another illustration of a kindred character, involving the necessity of an account, may be put to establish the utility and importance of Equity Jurisdiction. It is well known, that at law an execution for the separate debt of one of the partners may be levied upon the joint property of the partnership. In such a case, however, the judgment creditor can levy, not the moiety or undivided share of the judgment debtor in the property, as if there were no debts of the partnership, or lien on the same for the balance due to the other partner ; but he can levy the interest only of the judgment debtor, if any, in the property, after the payment of all debts and other charges thereon.² In short, he can take only the same in-

¹ Collyer on Part. B. 3, ch. 3, § 4 ; Campbell v. Mullett, 2 Swanst. 574, 575 ; Ex parte Ruffin, 6 Ves. 125, 126 ; Ex parte Kendall, 17 Ves. 514, 526, 527 ; Lane v. Williams, 2 Vern. R. 277, 292 ; Vulliamy v. Noble, 3 Meriv. 614, 618 ; Gray v. Chiswell, 9 Ves. 118 ; Brice's case, 1 Meriv. R. 620 ; Hammersley v. Lambert, 2 John. Ch. R. 509, 510 ; Marshall v. Degroot, 1 Cain. Cas. Err. 122. — If the right of the joint creditors is worked out altogether through the equity of the partners, it seems somewhat difficult to perceive, how the separate estate of a deceased partner, who is a creditor of the firm far beyond all the partnership funds, should, the joint estate being insolvent, be compellable to pay any of the joint debts beyond these funds. Yet, Lord Eldon acted upon the ground of the liability of such separate estate, in Gray v. Chiswell, (9 Ves. 118). If, on the other hand, the true doctrine be that avowed by Sir Wm. Grant, in the case of Devaynes v. Noble, (1 Meriv. R. 529,) afterwards affirmed by Lord Brougham, (2 Mylne & K.) that a partnership contract is several as well as joint ; then there seems no ground to make any difference whatsoever in any case between joint and several creditors, as to payment out of joint or separate assets. See Collyer on Part. B. 3, ch. 3, § 4, p. 337 to 347 ; Hammersley v. Lambert, 2 John. Ch. R. 509, 510.

² West v. Skip, 1 Ves. 239 ; 2 Swanst. 526 ; Barker v. Goodair, 11 Ves. 85 ; Dutton v. Morrison, 17 Ves. 205, 206, 207 ; Gow on Part. ch. 4, § 1, p. 247, 248.

terest in the property, which the judgment debtor would have upon the final settlement of all the accounts of the partnership. When, therefore, the sheriff seizes such property upon an execution, he seizes only such undivided and unascertained interest ; and if he sells under the execution, the sale conveys nothing more to the vendee, who thereby becomes a tenant in common, substituted to the rights and interests of the judgment debtor in the property seized.¹ In truth, the sale does not transfer any part of the joint property to the vendee, so as to entitle him to take it from the other partners ; for that would be to place him in a better situation than the partner himself. But it gives him properly a right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property, which shall upon such settlement be ascertained to exist.² It is obvious, from what has been already stated, how utterly inadequate the means of a Court of Law are to take such an account. And, indeed, under a levy of this sort, it is not easy to perceive, what authority a Court of Law has to interfere at all to take an account of the partnership transactions ; or by what process it can enforce it.³ In such a case, therefore,

¹ *West v. Skip*, 1 Ves. 239 ; *Chapman v. Kooops*, 3 Bos. & Pull. 289 ; *Skip v. Harwood*, 2 Swansf. R. 586 ; S. C. cited Cowp. R. 451 ; *Dutton v. Morrison*, 17 Ves. 205, 206 ; *Hayden v. Hayden*, 1 Salk. 392 ; *Taylor v. Fields*, 4 Ves. 396 ; *Fox v. Hanbury*, Cowp. R. 445 ; *Nicoll v. Mumford*, 4 John. Ch. R. 522 ; *In re Wait*, 1 Jac. & Walk. 587, 588, 589 ; *Moody v. Payne*, 2 John. Ch. R. 543.

² *Gow on Part. ch. 4, § 1*, p. 249 to 254 ; *Mather v. Smith*, 16 John. R. 106 ; *Nicoll v. Mumford*, 4 John. Ch. R. 522, 525 ; S. C. 20 John. R. 611 ; *Shaver v. White*, 6 Mumf. R. 114 ; *Murray v. Murray*, 5 John. Ch. R. 70 ; *Marquand v. New York Manuf. Company*, 17 John. R. 525.

³ See *Chapman v. Kooops*, 3 Bos. & Pull. 369 ; *Eddie v. Davidson*, Doug. R. 651 ; *Waters v. Taylor*, 2 Ves. & B. 300, 301 ; *Dutton v.*

the proper remedy for the other partner, if nothing is due to the judgment debtor out of the partnership funds, is to file a bill in Equity against the vendee of the sheriff to have the proper accounts taken.¹

§ 678. In cases of the seizure of the joint property for the separate debt of one of the partners, a question has arisen, how far a Court of Equity would interfere, upon a bill for an account of the partnership, to restrain the sheriff from a sale, or the vendee of the sheriff from an alienation of the property seized, until the account was taken, and the share of the partner ascertained. Mr. Chancellor Kent has decided, that an injunction for such a purpose ought not to issue to restrain a sale by the sheriff, upon the ground, that no harm is done to the other partners; and the sacrifice, if any, is the loss of the judgment debtor

Morrison, 17 Ves. 205, 206; In re Wait, 1 Jac. & Walk. 585. — The remarks of Lord Eldon on this point, in *Waters v. Taylor*, (2 Ves. & B. 301,) are very striking and important. "If the Courts of Law," said he, "have followed Courts of Equity in giving execution against partnership effects, I desire to have it understood, that they do not appear to me to adhere to the principle, when they suppose, that the interest can be sold, before it has been ascertained, what is the subject of sale and purchase. According to the old law, I mean before Lord Mansfield's time, the sheriff, under an execution against partnership effects, took the undivided share of the debtor, without reference to the partnership account. But a Court of Equity would have set that right, by taking the account, and ascertaining what the sheriff ought to have sold. The Courts of Law, however, have now repeatedly laid down, that they will sell the actual interest of the partner, professing to execute the equities between the parties; but forgetting, that a Court of Equity ascertained previously, what was to be sold. How could a Court of Law ascertain, what was the interest to be sold, and what the equities; depending upon an account of all the concerns of the partners for years?"

¹ *Chapman v. Koops*, 3 Bos. & Pull. 290; *Waters v. Taylor*, 2 Ves. & B. 300, 301; *Taylor v. Fields*, 4 Ves. 396; *Dutton v. Morrison*, 17 Ves. 205, 206, 207; In re Wait, 1 Jac. & Walk. 588, 589; *Gow on Part. ch. 4, § 1*, p. 253, 254.

only.¹ But, that does not seem a sufficient ground, upon which such an injunction is to be denied. If the debtor partner has, or will have, upon a final adjustment of the accounts, no interest in the partnership funds ; and if the other partners have a lien upon the funds, not only for the debts of the partnership, but for the balance ultimately due them ; it may most materially affect their rights, whether a sale takes place or not. For it may be extremely difficult to follow the property into the hands of various vendees ; and their lien may, perhaps, be displaced, or other equities arise by intermediate bonâ fide sales of the property by the vendees to purchasers, without notice ; and the partners may have to sustain all the chances of any supervening insolvencies of the immediate vendees.² To prevent multiplicity of suits, and irreparable mischiefs, and to ensure an unquestionable lien, it would seem perfectly proper in cases of this sort to restrain any sale by the sheriff. And besides ; it is also doing some injustice to the judgment debtor, by compelling a sale of his interest under circumstances, in which there must generally, from its uncertainty and litigious character, be a very great sacrifice to his injury. If he has no right, in such a case, to maintain a bill to save his own interest ; it furnishes no ground, why the Court should not interfere in his favor, through the equities of the other partners. This seems (notwithstanding the doubts suggested by Mr. Chancellor Kent) to be the true result of the English decisions on this subject ; which do not distinguish between the case of an assignee of a

¹ *Moody v. Payne*, 2 John. Ch. R. 548, 549.

² See *Skipp v. Harwood*, 2 Swanst. R. 586, 587.

partner, and that of an executor or administrator of a partner, or of the sheriff, or of an assignee in bankruptcy.¹

§ 679. Another illustration of the beneficial result of Equity Jurisdiction in cases of partnership, may be found in the not uncommon case of two firms dealing with each other, in which some persons, but not all, are partners in each firm. Upon the technical principles of the Common Law in such a case, no suit can be maintained at law in regard to any transactions or debts between the two firms; for, in such a case, all the partners must join, and be joined; and no person can maintain a suit against himself, or against himself and others. The objection is a complete bar to the action.² Nay; even after the death of the partner or partners, belonging to both firms, no action upon any contract, or mutual dealing *ex contractu*, is maintainable by the survivors of one firm against those of the other firm; for, in a legal view, there never was any subsisting contract between the firms; as a partner cannot contract with himself.³

§ 680. But, there is no difficulty in proceeding in a Court of Equity to a final adjustment of all the concerns of both firms, in regard to each other; for in Equity, it is sufficient, that all parties in interest are before the Court as plaintiffs, or as

¹ See *Taylor v. Field*, 4 Ves. 396, 397, 398; S. C. 15 Ves. 559, note; *Barker v. Goodair*, 11 Ves. 85, 86, 87; *Skip v. Harwood*, 2 Swanst. R. 586, 587; *Franklin v. Thomas*, 3 Meriv. R. 234; *Hawkshaw v. Parkins*, 2 Swanst. 548, 549; *Parker v. Pistor*, 3 Bos. & Pull. 288, 289; *Eden on Injunct.* 31; *Collyer on Part. B.* 3, ch. 6, § 10, p. 474 to 478; 1 Madd. Ch. Pr. 112. See also *Brewster v. Hammett*, 4 Connect. R. 540. See also *Mather v. Smith*, 16 John. R. 106, and the Reporter's learned note; *Gow on Part. ch. 4*, § 1, p. 252.

² *Bosanquet v. Wray*, 6 Taunt. 597; S. C. 2 Marsh. 319; *Mainwaring v. Newman*, 2 Bos. & Pull. 120.

³ *Ibid.*

defendants ; and they need not, as at law, in such a case be on opposite sides of the record. In Equity all contracts and dealings between such firms, of a moral and legal nature, are deemed obligatory, though void at law.¹ Courts of Equity in all such cases look behind the forms of the transactions to their substance ; and treat the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies.

§ 681. Upon similar grounds, one partner cannot at law maintain a suit against his copartners to recover the amount of moneys, which he has paid for the partnership ; since he cannot sue them without suing himself also, as one of the partnership. And, if one partner, in fraud of the partnership rights or credits, should release an action, that release would at law be obligatory upon all the partners. But a Court of Equity would not, under such circumstances, hesitate to relieve the partnership.²

§ 682. Courts of Equity in this respect act upon grounds familiar to those acquainted with the Civil Law, and with the jurisprudence of those nations, which derive their law from that most extensive source. This will abundantly appear, by reference to the known jurisprudence of Scotland, and the continental nations of Europe.³ Indeed, it would be a matter, not merely of curiosity, but of solid instruction, (if this were the proper place for such an examination,) to trace out the strong lines of analogy between the law of Partnership, as

¹ Ibid.

² Ante, § 504, note ; *Jones v. Yates*, 9 B. & Cresw. 532, 538, 539, 540.

³ See 2 Bell, Comm. B. 7, ch. 2, § 2, art. 1214.

understood in England, and especially as administered in Equity, and that of the Roman Jurisprudence. Unexpected coincidences are every where to be found; while the differences are comparatively few; and for the most part these arise rather from the different processes and forms of administering justice in different countries, than from any general diversity of principles.¹ Among other illustrations, we may cite the general doctrine, that the partnership property is first liable to the partnership debts; that the right of any one partner is only to his share of the surplus; that joint creditors have a priority or privilege over separate creditors;² and that the estates of deceased partners are liable to contribute towards the payment of the joint debts.³

§ 683. This review of some of the more important cases, in which Courts of Equity interfere in regard to Partnerships, does, (unless my judgment greatly misleads me,) establish, in the most conclusive manner, the utter inadequacy of Courts of Law to administer justice in most cases growing out of partnerships, and the indispensable necessity of resorting to Courts of Equity, for plain, complete, and adequate redress. Where a discovery, account, contribution, injunction, or dissolution, or even a due enforcement of partnership rights and duties, and credits,

¹ To establish this statement, the learned reader may be referred to the Digest, Lib. 17, tit. 2, Pro Socio; and Voet, Comm. ad id Vinnius, Comm. Inst. Lib. 3, tit. 26; 1 Domat, Civil Law, tit. *Partnership*, B. 1, tit. 8, per tot.; 2 Bell, Comm. B. 4, ch. 2, art. 1250 to 1263; Code Civil of France, art. 1832 to 1873; Pothier *Traité de Société*, per tot.

² 1 Domat, B. 1, tit. 8, § 3, art. 10.

³ 1 Domat, B. 1, tit. 8, § 6, art. 1, 2; Pothier de *Société*, n. 96, 136, 161, 162.

is required, it is impossible not to perceive, that in many cases a resort to Courts of Law would be little more than a solemn mockery of justice. Hence, it can excite no surprise, that Courts of Equity now exercise a full concurrent jurisdiction with Courts of Law, in all matters of partnership ; and, indeed, it may be said, that, practically speaking, they exercise an exclusive jurisdiction over the subject.

Eq.

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CHAPTER XVI.

MATTERS OF RENT.

§ 684. ANOTHER head of concurrent jurisdiction of the same nature, and resulting from the imperfection of the remedy at law, is in the case of RENTS. This subject has been already touched in other places;¹ and a few particulars only will be here taken notice of, which have not been already fully discussed. Thus, for instance, in case of a rent seck, if the rent cannot be recovered at law, Courts of Equity will decree a seisin of the rent, and perhaps, also, that it be paid to the party.² So, if the deeds are lost, by which a rent is created, so that it is uncertain, what kind of rent it was;³ or if, (as we have seen,) by reason of confusion of boundaries the lands, out of which it issues, cannot be exactly ascertained, Courts of Equity will in like manner interfere.⁴ This is done upon the general principle, that where there is a right there ought to be a remedy; and if the law gives none, it ought to be administered in Equity.⁵ This is a principle of frequent application in Equity; but still not to

¹ Ante, § 508 to 515.

² Francis, Maxims, 6, § 3; *Ferris v. Newly*, cited 1 Cas. Ch. 147; *Palmer v. Whettenhal*, 1 Cas. Ch. 184; Francis, Maxims, 9.

³ *Collet v. Jaques*, 1 Cas. Ch. 120; *Cocks v. Foley*, 1 Vern. 359.

⁴ 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (f); Francis, Maxims, 6; *Bowman v. Yeat*, 1 Ch. Cas. 145; *Davy v. Davy*, 1 Ch. Cas. 147; *Cox v. Foley*, 1 Vern. 359. — As to the ancient remedy for Rents, see 3 Reeves's History of the Law, ch. 21, p. 317 to 320; 3 Black. Comm. 6; *Id.* 231; 2 Black. Comm. 42; *Id.* 288; Bacon, Abridg. *Rent*, A. K.

⁵ *Ibid.*

be understood as of as universal application, (as its terms import,) for there are limitations upon it.¹ An obvious exception is, where a man becomes remediless at law from his own negligence. So, if he should destroy his own remedy to distrain for rent, and debt would not lie for the arrears of rent, he would not be relievable in Equity.²

§ 685. But in cases of rent, where Equity does interfere, it does not grant a remedy beyond what, by analogy to the law, it ought to grant. As, for instance, if an annuity be granted out of a rectory and charged thereon, and the glebe be worth less per annum than the annuity; Equity will not extend the remedy to the tithes, they not being by law liable to a distress.³ So, if a rent be charged on land only, the party, who comes into possession of it, will not be personally charged with the payment of it, unless there be some fraud on his part to remove the stock, or he do some other thing to evade the right of distress.⁴

§ 686. Before the statute of Anne, (8 Ann. ch. 14,) it was often necessary to go into a Court of Equity for a remedy, in cases of a rent seck, for a suitable remedy.⁵ But that statute and other subsequent statutes enable the party in all cases, whether the rent be a rent service, or a rent seck, or a rent charge, to distrain or bring his action of debt.⁶ The remedy in Equity is, therefore, in a practical sense

¹ Francis, Maxims, 6.

² 1 Foul. Eq. B. 1, ch. 3, § 3.

³ Ibid. Thorndike v. Allington, 1 Cas. Ch. 79.

⁴ Ibid. Palmer v. Whettenhal, 1 Cas. Ch. 184.

⁵ See 3 Reeves, Hist. ch. 21, p. 316 to 320; Litt. § 218.

⁶ Stat. 4 Geo. II. ch. 28; 5 Geo. III. ch. 17; 3 Black. Comm. 6; Id. 230 to 233; Bac. Abridg. Rent, K. 6.

narrowed ; or rather, it is less advisable than formerly. Still, however, (as Mr. Fonblanque has properly remarked,) there are cases, in which a resort to a Court of Equity may be salutary, and perhaps indispensable ; as where the premises out of which the rent is payable are uncertain ;¹ or where the time or amount of payment is uncertain ; or where (as already hinted) the distress is obstructed or evaded by fraud ;² or where the rent is issuing out of a thing of an incorporeal nature, as tithes, where no distress can be made ;³ or where a discovery may be necessary ; or where an apportionment may be required, in order to attain complete justice.⁴

§ 687. This may be farther illustrated by reference to the doctrine at law in cases of derivative titles under leases. It is well known, that, though a derivative lessee, or under-tenant, is liable to be distrained for rent during his possession ; yet he is not liable to be sued for rent on the covenants of the lease ; there being no privity of contract between him and the lessor.⁵ But, suppose the case to be, that the original lessee is insolvent, and unable to pay the rent ; the question would then arise, whether the under-lessee should be permitted to enjoy the profits and possession of the estate, without accounting for the rent to the original lessor. Undoubtedly there would be no remedy at law. But it is understood, that in such a case a Court of Equity would

¹ *Benson v. Baldwin*, 1 Atk. 598.

² *Champernoon v. Gubbs*, 2 Vern. 382 ; S. C. Prec. Ch. 126.

³ 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (g), and cases there cited.

⁴ See *North v. Earl of Stafford*, 3 P. Will. 148, 151 ; *Benson v. Baldwin*, 1 Atk. 598.

⁵ *Halford v. Hatch*, Doug. R. 183 ; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (s).

relieve the lessor; and would direct a payment of the rent to the lessor, upon a bill making the original lessee and the under-tenant parties. For, if the original lessee were compelled to pay the rent, he would have a remedy over against the under-tenant. And besides; in the eyes of a Court of Equity, the rent seems properly to be a trust or charge upon the estate; and the lessor is bound, at least in conscience, not to take the profits without a due discharge of the rent out of them.¹

¹ See *Goodard v. Keate*, 1 Vern. 27; 1 Fonbl. Eq. B. 1, ch. 5, § 5, and note (x).

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