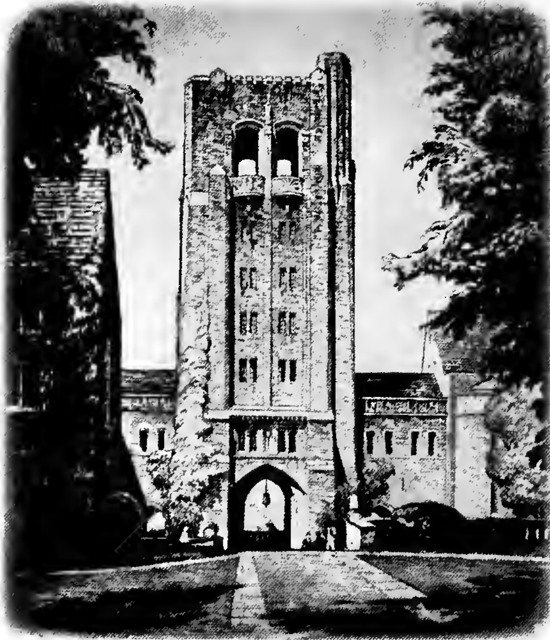

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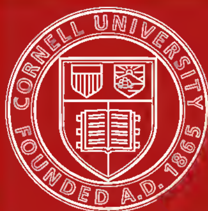

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JURIDICAL EQUITY

ABRIDGED,

FOR THE USE OF STUDENTS.

PART I

PRESENTING AN OUTLINE OF EQUITY PROCEDURE, AS USED IN THE COURTS OF THE UNITED STATES AND OF THE STATE OF MARYLAND.

PART II

BEING LIMITED TO THE FIRST PRINCIPLES OF EQUITY JURISPRUDENCE, HISTORICALLY AND PRACTICALLY ILLUSTRATED.

BY

Charles E. Phelps,

Professor of Juridical Equity in the University of Maryland, and Associate Judge of the Supreme Bench of Baltimore.

BALTIMORE:
M. CURLANDER,
LAW BOOKSELLER, PUBLISHER AND IMPORTER.
1894.

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CHARLES E. PHELPS.

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TO THE

LAW GRADUATES

OF THE

UNIVERSITY OF MARYLAND,

ALREADY FAMILIAR WITH

"THESE PRESENTS,"

AND SOMEWHAT RESPONSIBLE

FOR THEIR EXISTENCE,

THE SAME ARE NATURALLY

DEDICATED.

* * * *"Not so much to endeavor to teach these things fully to you, as to induce you to learn them for yourselves—to point out what you are to look for, and how you are to find it. It must depend upon yourselves whether you will look for it, whether you will find it, and what uses you will make of the information."*

Judge Curtis, Lect. Jurisd. U. S. Courts, 3.

"Most of all is needed a disposition in the profession, not to take things on trust, but for every man to LOOK AND SEE FOR HIMSELF."

Bishop, Crim. Law, Preface.

PREFACE.

The scope of this work is sufficiently indicated by its title. Upon the voluminous subjects of equity procedure and equity jurisprudence it does not profess to be an exhaustive treatise. It does not offer to compete with any existing work. It may be called a horn-book, nothing more. It has not been prepared by contract. It is the gradual outgrowth of many years experience and reflection in the work of practical instruction.

There are two ways of teaching equity. One is to take up in succession, with more or less of technical detail, the practical topics treated in some approved text-book, until the time limited for that department expires. The other method is more elementary. It assumes that what the young lawyer especially wants is the faculty and the habit of original investigation. Give him that, and he will have no trouble in finding what he wants in the books, as occasion requires. It therefore aims to put the student in complete possession of those few central principles which command the whole field. Thorough mastery of those principles is given by historical explanation, by copious illustration and by systematic drill.

"Some of these principles are so comprehensive and fruitful, that one who has grasped them in their fulness of conception has already mastered the system of equity. All else is the application of these grand truths to particular circumstances." (Pomeroy.)

The more elementary method is the one reflected in these pages.

For the illustration of principle the main reliance is, of course, upon adjudged cases. The student should be frequently called on to state from memory their substance in connection with propositions illustrated. This exercise in the presence of a class gives accuracy of thought, clearness of statement, self-confidence. It is a discipline to prepare the candidate for his profession, not simply for his examination.

In order to apprehend with ease decided cases, the learner must first be made familiar with the mould or form in which they are cast. For that reason, and also because the distinction between law and equity grows mainly out of the essential difference of procedure, that subject is first presented in brief outline, preceded by a chapter on courts. The effort here has been to avoid as much of technical detail as is not inextricably involved with a fair outline of procedure.

Passing thence to the complex subject of equity jurisprudence, its master principles are reached by two stages. The more fundamental ones, those upon

the ground floor, so to speak, are grouped into a definition, and afterwards maxims are considered with their illustrations. The definition is simply a piece of temporary scaffolding to aid the student while he is building up a fuller conception for himself, after which he will have no further use for it except to refresh his memory and co-ordinate his results. It is short enough to be remembered, and comprehensive enough to furnish the analytical basis for a sufficiently full discussion. The maxims of equity are so classified and arranged as to present the form and substance of a connected system. Their contrasted functions are exhibited in two opposite tables, under the respective heads of "enabling" and "restrictive" maxims. This is merely another device to aid the understanding and memory.

With these general principles and their practical illustrations, the course closes. If proper use is made of the cases cited, or even of a moderate selection, there will be no time for more. As these citations are drawn from the whole field of juridical equity, the student will have incidentally learned much of its practical doctrines.

Imperfect as the execution of the plan may be, the plan itself, that is to say, the elementary method of instruction, has received the weighty approval of the American Bar Association. In the report of the committee on legal education, submitted at the Saratoga meeting in 1892, the professedly technical method of instruction is condemned upon the ground that

"the entire time spent in the study of the law is too brief and precious to be wasted in merely committing to memory what the learner can find in the books as he wants it." On the other hand, they recommend that process by which "the student's memory is charged only with those fundamental principles which he must always carry there in order to make any use of them," and by which he is given a "complete and thorough comprehension of the nature of the subject, under which all his subsequent acquisitious will arrange themselves according to the very law of thought."

The substance of the same idea was concisely stated in a recent address to English law students by Sir Edward Fry:—"Learn in order to know; not in order to answer questions." (Law Q. Rev. for April, 1893.)

An American jurist of international reputation, in his latest publication, issued from the press since the following pages were printed, has placed his unqualified endorsement upon the report above cited, which seems also to have made a powerful impression upon the Council of Legal Education of the Inns of Court. (Dillon on the Laws and Jurisprudence of England and America, 82.) Himself a former professor of equity jurisprudence in the Law School of Columbia College, Judge Dillon further criticises the "course of instruction in our law schools as too intensely practical and technical," and suggests that "the great drawback to-day, alike of the teacher

and the student, is the non-existence of elementary works written by lawyers of competent learning and experience, designed for the specific purpose of enabling the teacher to teach and the student to learn the elements, the great primordial and essential principles of our jurisprudence.'' (*Ibid.* 86, 87.)

This text-book is easily perceived to be designed primarily for the Maryland law student. In the absence of any other book on a similar plan, it may be found helpful to instructors and students elsewhere. It will be seen that there are liberal citations of recent federal and state decisions, as well as from the latest English reports. The references, generally, are of a character to be serviceable to the equity practitioner, to whom it may also be suggested that among old things for young heads there may perhaps be found some new things for old heads.

For valuable assistance in the compilation of the table of cases, acknowledgment is due to C. Hopewell Warner, Esq., and in the preparation of the index to the same gentleman, in connection with Ralph Robinson, Esq., both members of the Baltimore bar, and Maryland University graduates of 1893.

For whatever notice he may receive of errors discovered, whether of omission or commission, the writer will be grateful, and he will also be grateful to the mind which coined the consoling reflection, that "the man who never makes a mistake, never makes anything."

C. E. P.

MARCH, 1894.

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*To avoid duplication, reference is suggested to the tables at the heads of chapters, and for further detail to the index, title "*Juridical Equity.*"

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Juridical Equity.

Part I.

Courts of Equity.

Equity Procedure.

CHAPTER I.

COURTS OF EQUITY.

1. *Curia Regis.*
2. Courts of Westminster Hall.
3. High Court of Chancery—its ordinary jurisdiction.
4. Writ.
5. Chancellor—his extraordinary jurisdiction.
6. Ecclesiastical Courts.
7. Their specific operation.
8. Their influence upon Chancery.
9. A hybrid product.
10. The war between the Courts.
11. Other Courts of Equity.
12. House of Lords.
13. Organization of the Court of Chancery.
14–15. Its abuses—reform and abolition.
16. Judicature Acts.
17. Courts of Equity in the United States.
18. Federal Courts.
19. Courts of Equity in Maryland.

§ 1. **Curia Regis.** All courts of equity, as to their jurisdiction, principles and procedure, are substantially modelled after the late high court of chancery in England. To find the place in history of this venerable court it will be necessary to go back to the *Curia* or *Aula Regis* of the early Norman kings, and trace the successive formation of the historic tribunals which eventually came to supersede it.[1] While

[1] 1 Bl. Com. 147; 3 Bl. Com. 46–55, 426–455; 1 Spence, Eq. 78, 328, &c.; Parke's Hist. C. C.; Haynes' Outlines, Lect. II; Maitland's J. and P., ch. IV; Hallam, M. A., ch. 8; Reeves' Hist. Com. Law; Bisph. Pr. Eq., ch. I; 1 Pom. Eq. Jur., secs. 31–35; Barton's Suit in Eq., by Ingersoll.

making this inquiry, it is to be remembered that the strict separation of the three great branches of government between the executive, legislative and judicial departments, which has been found so essential to constitutional liberty,[1] is an idea of modern growth.[2] All these attributes of sovereignty were in very early times confounded and concentrated in the crown. The Agora of primitive Greece was the "scene in which justice was administered, and the king is spoken of as constituted by Zeus, the great judge of society."[3] Æneas, on his arrival in Carthage, finds the queen engaged as legislator and judge.[4] The judges of Israel were *de facto* rulers;[5] and the "judgments" of Solomon were highly esteemed, although hardly available as precedents.[6] In like manner, the kings of old England claimed and exercised both judicial and legislative power.[7] Shakespeare, in the first act of king John, dramatizes a suit involving the title to real estate, heard and decided by the king in person.

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[1]Dorsey, 37 Md. 79; U. S. vs. Bell Telephone Co., 128 U. S. 358; Craig vs. Leitensdorfer, 123 U. S. 211, Paul vs. Gloucester. 50 N. J. Law, 585, 610; Splane. 123 Pa. 540.

[2]Montesquieu, Esprit des Lois, XI, 6.

[3]Grote's Greece, II, 99; Hom. Il., I, 238.

[4]*Jura dabat legesque viris.*, Æn., I, 507; evidently a Roman, not less than a Punic picture.

[5]Judges, III,10; X, 22; Ruth, I, 1.

[6]I Kings, III, 25, 28.

[7]In theory, the administration of justice in England, both civil and criminal, still belongs of common right to the crown. Coomber's Case, 9 App. Ca. 67.

This was not, however, a despotism of the oriental type, as, with a standing army, it might have been. It was a despotism tempered by the feudal system, and by an alien hierarchy. The king was only *primus inter pares*. It was his policy to conciliate his peers, temporal and spiritual, who, united by a common grievance, could at any time have arrayed against him the physical force of the realm, and aroused the "thunders of the Vatican." Practically, barons and bishops were recognized as an advisory council in all matters of administration. This "Great Council," which at the Norman conquest took the place of the Saxon Witenagemot, was the germ of the Parliament. It does not fall within present limits to show when or how the Commons were called in by representation as a financial expedient, nor how the Great Council divided into two houses of legislation. Attention is rather to be given to a lesser council, formed out of the Great Council, of a select number of peers, including the chancellor and other dignitaries of the palace. This was the *Curia Regis, par excellence,* (the same term being sometimes applied to the Great Council,) the germ of the privy council, and of the higher courts of justice. The limits of its jurisdiction were not accurately defined, being mainly appellate, but sometimes original, exercising apparently the broad powers of a board of arbitration. It has been called, a "Supreme Court of Judicature." administering equal justice, accord-

ing to law or equity, as the case required.[1] But its functions were not wholly judicial.[2]

§ 2. **Courts of Westminster Hall.** The first court of original jurisdiction which grew out of the *Curia Regis* appears in its infancy to have been simply a board or committee of barons to audit matters of revenue. By the aid of fictitious allegations, these barons of the exchequer came at length to constitute a court of general jurisdiction, both at law and in equity, called the Court of Exchequer.

These were the days of sparse population, bad roads, travel on horseback, and sumpter mules. It was easier for the king and his retinue[3] to pack up and travel to find their supplies, than for supplies to be hauled. After exhausting one region of country, they merrily saddled up and rode off to "fresh fields and pastures new." Hence we read of old statutes passed at different places, and hence justice, like legislation, was ambulatory. After a while suitors tired of chasing justice on horseback, and the clamor for a stationary tribunal became loud enough to be heard in Magna Charta,[4] which provided that "common-pleas," (suits between subjects,) should be held

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[1] 3 Bl. Com. 37, 49.

[2] Our associations of courts of justice will mislead if applied to the "courts" of the early kings. They were more like public meetings for the transaction of public business generally, whether judicial, financial or military. 1 Step. Hist. Cr. Law, 77.

[3] Cohort=court.

[4] A. D., 1215.

in some certain place, afterwards established at Westminster. Hence the origin of the Court of Common Pleas, the second court of original jurisdiction which grew out of the *Curia Regis*.

Finally, the *Curia Regis* itself, or what was left of it, the king in person being supposed to be actually present, assumed, or rather, retained, the name of the Court of King's Bench. The times when the king undertook to dispense justice himself were naturally crude. Commerce was rudimentary, contracts few. Tedious disputes about land he was glad to delegate to his judges of the common pleas; perplexing revenue matters to his barons of the exchequer. Like a father settling disputes in his family, or a patriarch in his tribe, the king as judge would naturally find his attention most attracted to simple cases involving a breach of the peace. Hence we find the primary jurisdiction of the Court of King's Bench limited to criminal cases and to such civil causes as savored of a criminal nature. In the general scramble among the courts for civil business, as cases multiplied, the king's bench managed to get its share, and enlarged its jurisdiction by means similar to those used by the Court of Exchequer, so as to include civil common-law causes generally. The justices of this court, besides their duties *in banc*, also rode the circuit of the counties, presiding over the trial of issues at *nisi-prius*,[1] and thus the functions of the old county courts, presided over by

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[1] Assizes.

the sheriff, which had come down from Saxon times, were gradually absorbed, and those courts finally superseded.

There was also an intermediate appellate court called the Court of Exchequer Chamber, consisting, in certain cases, of all the judges, and, in certain other cases, of a majority of them. As this was a tribunal of later and statutory origin,[1] nothing more need be said of it here, except to note its co-ordinating influence in securing some degree of uniformity in legal procedure.

§ 3. **High Court of Chancery — its ordinary jurisdiction.** While the common-law courts of Westminster Hall were in process of evolution from the *Curia Regis*, the lord chancellor, who, next to the king, was its most conspicuous figure, and who happened to be assigned to neither of them, was building up a court of his own. This was also a common-law court, when exercising what was called its "ordinary jurisdiction." The ordinary jurisdiction was the issuing of writs under the great seal, of which the chancellor was, *ex officio*, the "keeper." It also included the cancellation of royal patents, to which the great seal had been unduly obtained, the adjudication of claims against the crown, or by or against officers of the court, and some other matters not now of much interest. Although the Court of Chancery, when exercising this ordinary jurisdiction,

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[1] 3 Bl. Com. 55.

was a court of common law, all issues of fact had to be tried elsewhere, as the chancellor never claimed the power of summoning a jury. The most important of these functions was the issuing of writs under the great seal.

§ 4. **Writ.** These indispensable writs were the means by which the king delegated his judicial power to the several courts of law, and were supposed to confer jurisdiction in each particular case. No case could be instituted without such a writ, purchased out of chancery.[1] All the mystery which envelopes these august formalities, leading some writers to contemplate their potency with a sort of reverence,[2] vanishes at the touch of a practical consideration. The fees and fines exacted for the purchase of writs represented an important source of revenue, the amount of extortion varying with the needs and rapacity of the king or his favorites. Apart from feudal assumptions and the exigencies of the royal exchequer (substantially equivalent expressions), there never was practically any use for the writ, and it has long since been superseded by summons.[3]

There was an original and fundamental distinction between the jurisdiction of the chancellor and that

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[1] *Officina brevium.*

[2] Co. Litt. 73 b.

[3] 1 Reeves, Hist. C. Law, Finlason's note, 286-7; 3 Bl. Com. 273-4. For precedents of writs in various forms of action, see app. to 3 Bl. Com.

of the common-law courts. The latter acquired jurisdiction in each particular case by virtue of the *writ*, which could only be issued in cases already provided for and found in the registry of writs, or, by statute of Westminster II, *in consimili casu*.[1]

On the other hand, the chancellor, originally by usage, finally sanctioned by express general writ of 22 Edward III, A. D. 1348, acquired general jurisdiction "over all such matters as were of grace," i. e., such as required an exercise of the prerogative jurisdiction, formerly lodged in king and council, for the granting of such special remedies as the law courts were unable or unwilling to give.[2] The dispensation of discretionary royal "grace" in such cases was closely analogous to the grace still dispensed by the crown in the exercise of the pardoning power.[3] Of course, no such distinction has ever existed in this country, where all courts, whether of law or equity, derive their jurisdiction from the same constitutional or statutory source.[4]

§ 5. **Chancellor—his extraordinary jurisdiction.** The office of lord chancellor was one of the greatest antiquity, and, after the abolition of the office of chief justiciary, first in dignity and power. It was at the same time, ecclesiastical, political and

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[1] 3 Bl. Com. 51, 273; 1 Poe, Pl. & Pr. sec. 54, 55.

[2] 1 Spence, Eq. 337-8; Stansbury vs. Inglehart, 20 D. C. 134, 148.

[3] Maitland, Just. & Police, 36.

[4] 1 Pom. Eq. Jur. sec. 35; Lang. Eq. Pl. sec. 38.

judicial. His influence and patronage were enormous, and his influence was increased by the comparative immunity from secular control which he enjoyed as an ecclesiastic. Down to the time of the English reformation, one hundred and sixty prelates, in almost unbroken succession, held the great seal under the mitre. It has been well observed that no one, in such an age, but a "dignified ecclesiastic, would ever have thought of establishing a court, constituted in effect of one man, for the correction of the law, when there was a legislature, consisting of king, lords and commons, existing for that express purpose."[1] By a narrow construction of the statute of Westminster II, already referred to, the writs issued by his clerks failed to give adequate remedy in many cases of palpable injustice. Perhaps it was not always intended that they should. That meant simply a residuum of judicial power remaining in the king, not as yet delegated to any of his courts. Hence, applications for relief directly to the king, or what amounted to the same thing, to his chancellor.[2] "The courts tell me that the writ issued by your clerk does not suit my case. Your clerk says he has no other writ to sell me. Writ or no writ, I appeal to you for justice." This was in substance the petition addressed to this powerful official, who,

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[1] 1 Spence Eq. 355.

[2] When the chancellor was himself a party, the bill was addressed directly to the sovereign in his or her high court of chancery, 3 Dan. Ch. Pr. 4th Am. ed. 1878.

besides being the keeper of the king's seal and his secretary, was also the keeper of his conscience, and the constant attendant upon his person.

In what way the relief thus prayed was originally granted, and what sort of a system was, in process of centuries, developed from this beginning, remains to be considered. That system was, in short, the equity jurisprudence which will engage our attention, and the exercise of it by the chancellor was called his "extraordinary jurisdiction." The fundamental requisite for it has been from the first, as it is now, the want of remedy at law, that is, either no remedy at all or no adeqate remedy.

§ 6. **Ecclesiastical Courts.** Alongside of, but altogether foreign to, the judicial system thus rapidly sketched, other tribunals claimed equal, if not superior, authority. These were the courts ecclesiastical of the bishops and their derivative officers, every bishop being *judex ordinarius* within his diocese.[1] They claimed spiritual jurisdiction over the conscience, wholly independent of the crown, derived in fact from the pope.[2] Exclusive jurisdiction came to be asserted over all ecclesiastical persons and causes, including within the latter the religious opinions, morals and fiduciary contracts of the laity.[3] The procedure followed that of the canon law, based

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[1] Hale, Hist. Com. Law, 34, 35.

[2] 3 Bl. Com. 62.

[3] Report of the Eng. Ecc. Courts Com. 1883.

on that of the Roman civil law. They administered the oath of purgation, employed informers, took secret depositions, tried questions of fact without a jury, and admitted appeals to Rome. Methods so alien to the national sentiment, enforcing such a jurisdiction, could not fail to bring these courts into constant collision with the common law and its trial by jury. The struggle, in fact, continued through centuries, and its vicissitudes varied with the temper and ability of successive popes and kings. After furnishing some of the most notable incidents of English history, it resulted at length in restricting the cognizance of the English ecclesiastical courts to causes testamentary and matrimonial (probate, administration and divorce), to which were added some few special causes of a pecuniary nature.[1]

§ 7. **Their specific operation.** In no respect was the contrast of method between these foreign judicatories and the king's courts so pronounced as in the matter of the judgment and its incidents. The great, the almost universal, common-law remedy was compensation in damages. It rarely provided measures of specific relief. The sentence of the spiritual courts, on the other hand, was always *in personam*, operating upon the conscience, and always specific, that is to do, or to refrain from doing, some specific act. The mode of enforcing sentence was by excom-

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[1] 3 Bl. Com. 88.

munication, followed up, in cases of contumacy, by corporal imprisonment.[1]

§ 8. **Their influence upon Chancery.** It was this operation *in personam* or upon the conscience, or, in plain English, this personal coercion, familiar to the ecclesiastical chancellors from their practice in the spiritual courts, that they imported and improved as the basis of their extraordinary or equitable jurisdiction.[2] The typical illustration is the doctrine of *specific performance*, both in its direct or enabling form, and in its inverted or restrictive form of *injunction*. *Sequestration* was also imported into chancery procedure from the ecclesiastical courts, where it was used to preserve the profits of a vacant living for a future incumbent.[3] From that process, and the idea it suggested of taking charge of the subject of controversy pending suit, was naturally evolved the *receiver*. Jurisdiction over fiduciary contracts, wrested from the ecclesiastical courts, reappeared in the court of chancery as the great doctrine of *trusts*. The borrowed notion of a direct operation upon conscience likewise assumed the varied forms of equitable interference in cases of *fraud*, *accident*, *mistake*, *penalties* and *forfeitures*. The titles mentioned, together with that of *administration*, and its inci-

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[1] Hale, Hist. Com. Law, 39; Lang. Eq. Pl., § 42. Sentences of divorce and deprivation seem to have been the only judgments *in rem*, operating upon *status*.

[2] Lang. Eq. Pl., secs. 43, 44.

[3] 3 Burns, Ecc. Law, 321.

dent, *account*, also reflected from the same source, cover nearly the entire field of equitable cognizance. The subject of *divorce* and its incidents, retained by the English ecclesiastical courts, has in this country been generally assigned to courts of equity, with or without trial by jury, according to the legislation of the various states.

§ 9. **A hybrid product.** The extraordinary or equitable jurisdiction of the court of chancery may thus be roughly conceived. as a cross between the spiritual and temporal courts. Its heterogeneous origin is disclosed, not only in its history, but in the diverse elements combined in its blended character. It has been seen that excrescences lopped from the ecclesiastical courts by the national spirit of resistance to a foreign establishment, were adopted and adapted by the chancellors to supply the deficiencies of the common law. While it is an approved maxim that "*equity follows law*," equity also followed, and to some extent still follows conscience, as something above and beyond law. While equity is bound by fixed rules it also is much influenced by special circumstances. The procedure of equity is a common law graft upon a canon law stock. While equity pleading is fairly simple and free from unreasonable technicality, in at least one department of it, that of pleas, the learning was, and is, sufficiently artificial for a black-letter lawyer. Taking the system as a whole it presents a phenomenon whose counterpart has been seen nowhere else than in England and her

colonial off-shoots, although analogies have been traced in the jurisprudence of ancient Rome.

§ 10. **The war between the Courts.** No sooner was the nature and extent of this extraordinary jurisdiction of the chancellor, with its possibilities, comprehended, than it began to encounter strenuous opposition, at first from Parliament, and afterward from the law courts. The old struggle for jurisdiction between the laws of England and Rome, aroused by the pretensions of the ecclesiastical courts, was continued against this new "upstart and usurper," the Court of Chancery.[1] The royal ordinance of 22 Edward III, referring to the chancellor all such matters as were of "grace,"[2] was soon followed by the act of Parliament of 27 Edward III, c. 1, denouncing with severe penalties those "which do sue in any other court to defeat or impeach the judgments given in the King's Court." This was the famous statute of *premunire*, so called from the leading word in the writ by which the sheriff was charged to summon delinquents, and was afterwards much relied on by the common-law judges in their opposition to the equity jurisdiction of restraining judgments by injunction.[3]

In the succeeding reign of Richard II, the introduction into chancery procedure of the writ of subpoena, attributed to John Waltham, master of the

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[1] Lord Cairns in debate in the House of Lords, 30 April, 1872.

[2] *Ante.* sec. 4.

[3] 3 Inst. 119, 122; 4 Inst. 83.

rolls, and the interference of the chancellor in cases of violence cognizable at common law, but which could not be efficiently redressed through the ordinary tribunals, (where the jury would often be packed in the interest of the oppressor) called forth repeated remonstrances from the Commons. The chancellor was sustained by the king and his council, and Parliament, finding it impossible to suppress this encroachment enacted a statute for its regulation.[1]

In the succeeding reigns of Henry IV, Henry V and Henry VI, the growing power of the chancellors was again supported by the royal authority against the renewed opposition of Parliament, the most important of whose measures was the statute of prohibition, 4 Henry IV, declaring that judgments at law should not be annulled excepting by attaint or for error, and the act of 15 Henry VI, requiring, among other things, that all plaintiffs in equity should give security. In the despotic reign of Edward IV (1461-1483), the court of chancery was firmly in the saddle, no further opposition was made in Parliament, and the struggle was transferred to the courts of law. The long controversy was narrowed down to a single issue, the power of the chancellor to restrain judgments at law by injunction. The judges took the ground that they would not respect such injunctions, and would release on *habeas corpus* any suitor who should be imprisoned by the chancellor for violation

[1] 17 Rich. II., Ch. 6; 1 Spence Eq. 343-5.

of them.[1] Indictments under the statute of *premunire* were repeatedly found against parties suing out such injunctions. One of these indictments against a well known barrister named Heal, in 1588, caused a storm which brought down upon the judges the wrath of Queen Elizabeth.[2]

In 1597, a case in which Queen Elizabeth was personally interested in maintaining an iniquitous judgment obtained by her grantee, was brought into chancery upon a bill to restrain the judgment by injunction. The case being referred to the twelve judges of England by the order of the queen, they unanimously decided that the injunction could not issue, upon the broad ground that after judgment at law there could be no relief in equity.[3]

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[1] 3 Inst., 123; Cro. Jac., 344. An instance of the kind occurred in 1571, in the case of Humphrey, reported by Crompton on Courts, 60.

[2] Lord Bacon's letter to the king, Cabala, Montague's Bacon, vol. 12, pp. 36, 41; 3 Inst. 124.

[3] Throckmorton vs. Finch, 3 Inst., 124; 4 Inst., 86; Cro. Jac., 344. In its preliminary stages in the courts of law, this case is reported with unusual fulness by nearly all the contemporary reporters. Popham, 25 and 53; 1 Anderson, 303; Moor, 291; 2 Leonard, 134; Cro. Eliz., 221. In view of the importance and historical significance of this case, it is not apparent why it should have been slighted by modern text writers. An anonymous version of the same case, to be found in the appendix to 1 Rep. Chan., also printed in 1 Collect. Jurid., 71, so far as it varies from Coke's report, and the other reports above cited, may be regarded as of no authority. The supposition of Mr. Spence that its author was Lord Ellesmere (1 Sp. Eq. 683, note), is a palpable error. Not only is the death of Ellesmere distinctly referred to, but the death of Coke also, nearly twenty years later.

Several years later, the chancellor, Lord Ellesmere, nothing daunted by this array of authority, because certain of the royal support, took occasion to lay down the doctrine which has ever since prevailed, that "when a judgment is obtained by oppression, wrong and a hard conscience, the chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party."[1]

In 1616, through the efforts of Bacon and Ellesmere, this doctrine was finally established by a prerogative order of James I,[2] and shortly afterwards Lord Coke, the most active champion of the common law side of the controversy, was removed from the chief-justiceship of the Court of King's Bench.

Later in the seventeenth century the appellate jurisdiction of the House of Lords over the Court of Chancery became firmly settled, thus removing all occasion for further dispute.

§ 11. **Other Courts of Equity.** Besides the Court of Exchequer, whose functions were peculiarly connected with the royal authority, certain counties palatine (Chester, Lancaster and Durham), the principality of Wales, the Universities, the city of London, the Cinque Ports, and even great lords in their several manors, silently assumed extraordinary judicial powers like those of the Court of Chancery,

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[1] Earl of Oxford's Case, 1 Ch., Rep. 1., 2 Lea. Ca. in Eq. 601.
[2] Cary's Rep. 163.

most of which have been extinguished by Parliament. The equitable jurisdiction of the Exchequer was in course of time exercised by the barons severally, and was finally transferred, in 1841, to the Court of Chancery.

§ 12. **House of Lords.** The original jurisdiction of the *Curia Regis* having been parcelled out among the courts mentioned, its appellate jurisdiction finally, but not until after a struggle, devolved upon the House of Lords. The fact that the decisions of the chancellor were open to review by an assemblage of laymen, practically controlled by lawyers advanced by their ability to the peerage, had its effect in preventing encroachments of equity upon the province of law. The appellate jurisdiction of the House of Lords was not finally settled until late in the seventeenth century. Earlier, as has been seen, the chancellors were held in check, in a measure, by opposition in Parliament and from the law courts.

§ 13. **Organization of the Court of Chancery.** Returning to the Court of Chancery, it must be understood that the *clerks*, to whom reference has been made in connection with the issuance of writs, were officers whose duties corresponded with those of masters in chancery, and who were afterwards known as such. The chief of these clerks was the master of the rolls, whose functions gradually ripened into those of a judge, and were often administered by jurists of eminence, like Sir Joseph Jekyll,

Sir William Grant and Sir George Jessel. The officer whose duties corresponded to those of the clerk of the court in our system, was known as the registrar. Then there was the accountant-general and his staff, who had charge of the trust funds under the control of the court.[1] Besides these officers and the examiners, whose duties concerned the taking of testimony out of court, there was a host of inferior functionaries and supernumeraries, many of them created for no other purpose than to swell the patronage of the chancellor.

§ 14. **Its abuses.** Their vexatious interference at every stage of a suit, with their incessant exactions, was one of the principal causes of ruinous expense and heart-breaking delays to suitors, so graphically portrayed in Jarndyce vs. Jarndyce.[2] At the close of Lord Eldon's "conservative" administration, the Court of Chancery resembled a ship built for high speed, with engines of enormous power and corresponding appetite, but so fouled with barnacles and weeds as to be slow beyond endurance. The popular cry for reform was, of course, obstinately resisted by "vested rights." Every abuse had its tap root in "influence." Every sinecure was backed by a "family." In opposing Mr. Burke's bill to reform the civil list expenditure, Lord Thur-

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[1]These moneys paid into the Bank of England to the credit of the accountant-general sometimes amounted to over £50,000.

[2]"Bleak House."

low gravely argued in the House of Lords that some of the sinecure places sought to be abolished were so ancient and illustrious "that to annihilate them was in fact an attempt to destroy the constitution."[1]

§ 15. **Its reform and abolition.** Reform was, therefore, at first compelled to take the direction of building new ships, instead of cleaning the old one. The accumulated arrears of business were, to some extent, relieved by the appointment of a vice-chancellor, in 1813, by the appointment of two more in 1841, and by the creation, in 1850, of three "lords justices." Reinforced by these accessions, by an enlargement of the functions of the master of rolls in 1833, and still further assisted by the Chancery Amendment Act of 1852,[2] the Court of Chancery, as thus reorganized and partially reformed in its procedure, was enabled in great measure to keep pace with its ever-increasing business, when it was finally abolished by the Judicature Acts of 1873 and 1875.[3]

§ 16. **Judicature Acts.** By this radical and sweeping legislation, the entire jurisdiction of the Court of Chancery, together with that of all the other principal courts, was transferred to the whole corps of judges, consolidated as the "Supreme Court of Judicature in England," consisting of two perma-

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[1] 7 Campbell's Lives, Chan. 73, chap. 48.
[2] 15 and 16 Vict., c. 86.
[3] 36 and 37 Vict., c. 66; 38 and 39 Vict., c. 77.

nent divisions, the "High Court of Justice," of original jurisdiction generally, with certain appellate jurisdiction from inferior courts, and the "Court of Appeal,"of appellate jurisdiction only, with such original jurisdiction as may be necessary to the determination of any appeal.[1] For the more convenient despatch of business the judges of the high Court of Justice are assigned to five divisions, entitled respectively, the Chancery, Queen's Bench, Common Pleas, Exchequer, and Probate, Divorce and Admiralty Divisions. The Chancery Division has specially assigned to it matters of administration, partnership, account, mortgages, portion, liens, charges, trusts, rectification or cancellation, specific performance, partition, infants. But in every cause in the High Court of Justice, law and equity are administered according to certain rules which secure to plaintiffs equitable relief for equitable rights, to defendants, equitable defenses, and also equitable relief with power to make new parties, and generally calculated to avoid multiplicity of proceedings, with a sweeping provision that "in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law, the rules of equity shall prevail." In short, in all the divisions of the High Court of Justice, and in the Court of Appeal, law and equity are now administered concurrently, with a preference for equity, in any case of conflict between the two. This was practi-

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[1] Morg. Ch. Acts, 248-260.

cally an adoption by Parliament of the reformed procedure, long established in New York and other States, by which all distinction between legal and equitable suits is abolished, and all forms of action, as well as bills in equity, are superseded by one judicial instrument, the civil action; by which both legal and equitable remedies are enforced, singly or in combination.

The abolition in England of the dual system of judicature was put upon the ground of its habitual violation of justice in two of its cardinal principles. It was charged that it sacrificed substance to form, and that it promoted multiplicity of litigation. The special evils of its practical work were said to be the failures of justice in cases, where, upon a doubtful point of jurisdiction, litigants were made to discover that much time and money had been expended in the wrong court, and also the delays of justice in cases where suits had to be brought in one court merely to facilitate, or to suppress, actions in another.[1]

§ 17. **Courts of Equity in the United States.** The growing power of the chancellor in England was from an early day viewed with suspicion and alarm. Among the English common people there was a deeply-rooted sentiment of attachment to the Saxon trial by jury, and of aversion to the "one man

[1]Kendall vs. Hamilton, 4 App. Ca. 530, 531; Ind vs. Emerson, 12 App. Ca. 306.

power" of adjudication. The colonists who settled America largely brought this sentiment with them. They regarded the common law as their safe-guard from oppression, and feared the Court of Chancery as a possible engine of arbitrary power. In colonial New England, no similar court was tolerated, and no equity jurisdiction existed.[1] In Pennsylvania, the courts of law measurably supplied the want of a chancery court by various devices, ingeniously adapting common law forms to secure both specific and preventive relief.[2] Other colonies recognized that the principles of equity were the birthright of Englishmen as well as those of the common law.[3] In some of them the governors alone, in others, with their councils, acted as courts of equity; in others, the legislature, usually by committee; in others, equity judges were appointed.[4] But in the American colonies generally, there was little im-

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[1] Woodbury vs. Gordon, 77 Maine, 68; 1 Sto. Eq. Jur., sec. 56.

[2] An "equitable ejectment" was allowed as a means of enforcing *specific performance.* Reno vs. Moss, 120 Pa. 49. The obsolete writ of *estrepement* was used as a substitute for *injunction.* Kulp vs. Bowen, 122 Pa. 78. "Between the date when provincial simplicity put an end to Gov. Keith's Court of Chancery, (1739,) and the time when the legislature waked up to the fact that equitable powers and process are a necessary part of legal machinery, in the complicated civilization of the present century, the early lawyers of Pennsylvania, by a series of make-shifts, administered equity under the forms of the common law." Cox vs. Ledward, 124 Pa. 448; see Church vs. Kelsey, 121 U. S. 282.

[3] Fox vs. Wharton, 5 Del. Ch. 211.

[4] Barton's Suit, by Ingersoll, 20.

portance attached to the cultivation of equity jurisprudence until after the revolution, and the first real impetus was given to the study by the labors of Chancellor Kent and the works of Justice Story. Separate chancery courts still exist in a number of states,[1] subordinate, however, to appellate courts, which review both judgments of the law courts, and decrees in chancery. Another and larger class is composed of those states in which full equity powers are devolved upon common law judges, preserving, however, the distinction between the two systems, with a law side and an equity side to the same court, and a separate docket for each.[2] The remaining states are those which have adopted the code procedure, abolishing both common law forms of action, and the bill in equity, and providing one civil action for all judicial controversies.[3]

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[1]New Jersey, Delaware, Tennessee, Alabama and Mississippi. Maryland has separate local courts of equity for the city of Baltimore. Virginia, Kentucky and Arkansas have similar local arrangements.

[2]To this class belong the New England states, (except Connecticut, which, in 1879, took its place among the code states,) and also Pennsylvania, Maryland, (outside of the city of Baltimore,) the two Virginias, Georgia, Florida, Michigan, Illinois, Arkansas and Texas. The federal courts assimilate with this class.

[3]The state of Louisiana may be assigned to this group, its civil code being based mainly upon the Roman law. The term "code states" is applied for convenience to those states which have substantially adopted the New York code of procedure, and not to states whose revised statutes are called "codes." The code states represent about one-half the entire population of the United States, and the states in which equity prevails as a separate system, whether administered by exclusive courts or not, represent the remaining half.

§ 18. **Federal Courts.** The judicial power of the United States extends "to all cases in law and *equity*," arising under its Constitution in any of the modes therein enumerated.[1] The reference here is to the distinction, at the time of the adoption of the Constitution, between law and equity, the latter being modelled after the methods and jurisdiction of the High Court of Chancery in England.[2] In the courts of the United States the distinction between law and equity is regarded as matter of substance, and not merely of form and procedure.[3] The system of federal equity is uniform throughout the Union, and is not controlled either by state legislation,[4] or by the decisions[5] or practice[6] of the state courts.[7] Hence, federal courts in New York, Ohio and other code states do not recognize any fusion of law and equity.[8]

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[1]Cons. U. S. Art, III, sec. 2.

[2]U. S. vs. Bell Telephone Company, 128 U. S. 360; U. S. Eq. Rules, 90.

[3]Cates vs. Allen, 149 U. S. 459.

[4]Hollins vs. Brierfield, 150 U. S. 371; Cates vs. Allen, 149 U. S. 451; Lawrence vs. Nelson, 143 U. S. 215; Scott vs. Neely, 140 U. S. 106; Leighton vs. Young, 10 U. S. App. 312; Whitehead vs. Shattuck, 138 U. S. 146; Arrowsmith vs. Gleason, 129 U. S. 99.

[5]Neves vs. Scott, 13 How. 272.

[6]New Orleans vs. Louisiana C. Co. 129 U. S. 46.

[7]Although U. S. courts will administer equitable rights as enlarged by state legislation, when constituting a rule of property. Parker vs. Dacres, 130 U. S. 43, 48; 1 Foster's Fed. Pr. sec. 7.

[8]Mississippi Mills vs. Cohn, 150 U. S. 202; Northern Pacific R. R. vs. Paine, 119 U. S. 561. Thus an equitable title or an equitable defence, though allowed to be set up in a state court,

In the courts of the United States parties have a constitutional right to trial by jury in suits at common law.[1] In addition, the judiciary act of 1789 provided that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."[2] This provision was merely declaratory of the pre-existing rule,[3] and was intended to emphasize it.[4] The "remedy" referred to is that which existed when the Judiciary Act was adopted, unless subsequently changed by Congress, and not the existing remedy in a state by virtue of local legislation.[5]

The jurisdiction of the federal courts within the states is a limited one, depending upon either the existence of a federal question, or diverse citizenship of the parties. When these elements of jurisdiction are wanting, the court cannot proceed, even with the consent of parties.[6] This of course does not apply to the territorial courts, nor to the

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cannot be set up in an action at law in the same state in the federal courts, but must be made the subject of a suit in equity. Ridings vs. Johnson, 128 U. S. 217. By Act of Congress of 7th April, 1874, a different rule was applied to the territorial courts. Brown vs. Rank, 132 U. S. 218.

[1] When the value in controversy exceeds $20. Cons. U. S. Amt. Art. VII.

[2] U. S. Rev. Stat., sec. 723.

[3] Parker vs. Winnipiseogee Co., 2 Black, 551.

[4] Buzard vs. Houston, 119 U. S. 352.

[5] McConihay vs. Wright, 121 U. S. 201, 206.

[6] Byers vs. McAuley, 149 U. S. 608; Empire, 150 U. S. 159.

District of Columbia.[1] The equity procedure of the federal courts is governed by general rules, promulgated by the Supreme Court under authority of law.[2] Also by rules and orders of the several Circuit and District Courts, and of the several Circuit Courts of Appeals and of the courts of the District of Columbia.[3]

§ 19. **Courts of Equity in Maryland.** "The judges of the several judicial circuits and the judge of the Circuit Court of Baltimore city shall each, in his respective circuit, have and exercise all the power, authority and jurisdiction which the Court of Chancery formerly held and exercised, except in so far as the same may be modified by this Code."[4] The reference here is to the old Court of Chancery, established by the Constitution of 1776, and abolished by the Constitution of 1851, whose principles and powers were the same as those of the English chancery, at the time of the revolution, except where altered by statute or inapplicable to our political institutions.[5] Prior to the revolution the functions of chancellor devolved upon the proprietary governors or their appointees.[6] Since 1851, they have been exer-

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[1] 1 Foster's Fed. Pr. sec. 13.

[2] U. S. Rev. St. sec. 917.

[3] 2 Foster's Fed. Pr. 1253, 1311.

[4] Md. Code, Art. 16, sec. 70.

[5] Cunningham vs. Browning, 1 Bland, 299, 301; Amelung vs. Seekamp, 9 G. & J. 468; Koontz vs. Nabb, 16 Md. 555.

[6] The governor was allowed to commission a substitute to act during his absence. Md. Archives, Proc. of Council, 50, 231, 439, 541, 545.

cised by the common law courts throughout the state, sitting, *quoad hoc*, as courts of equity, keeping separate terms and dockets, and with jurisdictions as distinct as if exercised by different functionaries. The only courts of exclusive equity jurisdiction in Maryland are those required for the larger population and business of its chief city. The Circuit Court of Baltimore city derives its exclusive jurisdiction in equity directly from the Constitution.[1] Circuit Court number two of Baltimore city was established by the legislature in 1888, under constitutional authority,[2] and has concurrent jurisdiction.[3] The pecuniary limit of the jurisdiction in equity is the sum of $20.[4] Besides the judge or judges, the officers of courts of equity in Maryland, are the clerk, sheriff, solicitors, auditors, examiners, and bailiffs.[5] In addition, are occasional and temporary officers, such as trustees, receivers, commissioners, committees, *prochein ami*, guardian *ad litem*.[6] The pressure of business in the city of Bal-

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[1]Md. Cons., Art. IV., sec. 29.

[2]Md. Cons., Art. IV., sec. 39.

[3]1888, ch. 194; P. L. L., IV, 176-178. The name "*circuit*" as applied to these stationary and local courts is a curious case of the *lucus a non lucendo*.

[4]Md. Code, Art. 16, sec. 91. This is exclusive of costs.

[5]Generally, the duties of these several officers are carefully defined by statute, and may readily be found by reference to the Code under the appropriate heads.

[6]Gibson's case, 1 Bland, 139; Gaither vs. Stockbridge, 67 Md. 224; Quincy vs. Humphrey, 145 U. S. 82, 98; Sto. Eq. Pl., sec. 57, Md. Code, Art. 16, sec. 124. Also, executors, administrators and guardians, when exercising their several trusts under the jurisdiction of equity.

timore has required that some of the functions of masters in chancery should be superadded to those of two of the auditors. General rules of procedure in equity have been promulgated by the judges of the Court of Appeals, which have the force of law,[1] and are incorporated in the Code.[2] Subordinate to these general rules, each court has particular rules of its own, founded originally upon those of the old chancery court. For the two equity courts in the city of Baltimore, as well as for the four law courts, these rules are promulgated by the Supreme Bench, under constitutional authority.[3]

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[1]Md. Const. IV, 18.

[2]Md. Code, Art. 16, secs. 117-127, 131-150, 159-166, 184-186, 216-226, 20-23.

[3]Md. Const. Art. IV, sec. 33.

CHAPTER II.

EQUITY PROCEDURE. PARTIES.

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§ 20. **Procedure in general.** Procedure is a general term, including pleading, practice and evidence. It comprises the entire system of rules for setting and

keeping in motion the machinery of a court. In all procedure there are certain well-defined stages—the preliminary process by which the defendant is brought before the court; the pleadings, by which the parties formally notify the court and each other of their respective grounds of claim and defence; the trial or hearing, at which the issues made by the pleadings, whether of fact or law, are maintained by the litigants;[1] the decision by the tribunal; the rehearing, re-trial, review or appeal, at the instance of the dissatisfied party; and finally, process of execution, whereby the physical force of the state is, if necessary, brought to bear upon the property or person of the defendant.

These are the typical stages, in varied form common to all systems of jurisprudence, and, in addition, the special requirements of particular cases may introduce, at any stage, incidental proceedings of great variety, and in courts of equity, especially, of frequent occurrence.[2]

§ 21. **Sources of equity procedure.** Equity procedure is derived in part from the practice of the English ecclesiastical courts (which was the procedure of the canon law and was based upon the civil law of Rome), and in part from the common law of England. Thus, the *bill* in equity follows the *libel* of the

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[1]In the one case by adducing their proofs, documentary or oral; in the other, by citing authority; generally supplemented, in either case, by argument of counsel.

[2]Holland on Jurisp., ch. 15; Noble vs. Ahier, 11 P. D., 161.

civilian and canonist, and the *answer* may be traced to their *responsive allegations*, while the *demurrer* and *plea*, are borrowed, with some change, from the common law.[1] As under the civil law and the ecclesiastical system, issues of fact are determined by the court, without jury.[2]

Equity procedure is mainly governed by written regulations to be found in statutes and rules of court. But besides these there is an important system of unwritten rules, constituting settled usage or established precedent. Many of these are embodied in judicial decisions, while others are preserved only in oral tradition or approved treatises. When these sources fail, new questions are determined by analogy to existing precedent, and where no light can be obtained from either statute, rule, usage, analogy, or conflicting analogies, the discretion of the court is guided to a decision by general principles of justice, necessity or convenience. Even a long established practice contrary to these principles may be overthrown.[3]

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[1] Lang, Eq. Pl., secs. 1–7.

[2] Although such issues may be sent to a court of law for trial by jury, and, by modern legislation, trial by jury has been, in some jurisdictions, and to a limited extent, imported into courts of equity.

[3] Booraem vs. North, 44 N. J. Eq. 70, where many cases are cited to show that the maxim *communis error facit jus* has its exceptions. In this case a practice of thirty years' standing was turned down, viz: to tax maps filed as exhibits upon the basis of affidavits requiring the same time to prepare. See also Haskie vs. James, 75 Md. 572.

§ 22. **Distinguishing features.** The absence of a jury is the feature which especially differentiates the typical or normal equity procedure from that of the common-law.[1] This accounts for the limited jurisdiction of equity, which is confined to matters of property; crimes and personal torts excluded.[2] It also accounts for the absence of scientific pleading to issue, for the absence of set forms of action, for the suppression of alternate pleadings later than the replication, and for the more comprehensive requirements of equity as to parties.

Careful separation of issues of fact from those of law is required at some stage of a common-law trial by the dual nature of the tribunal. Hence the rules of common-law pleading all relate to an issue of fact to be determined by a jury, and therefore an issue which is to be material, certain, single and clear. While this is still true in theory, it was found in practice that the scientific rules of special pleading designed to develop a clear-cut issue, favored over-subtlety and chicane at the expense of substantial justice. The science of special pleading fell into disrepute and gave place to the convenient vagueness of the general issue. Hence the necessity for hypothetical instructions, and for requests or prayers for instructions, a supplementary system of special plead-

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[1] Timson vs. Wilson, 38 Ch. D. 77; Alex. Hamilton in 83d Federalist; Pomeroy on Rem. sec. 59; Bliss, Code Pl. sec. 10.

[2] Sawyer 124 U. S. 210; Fornshill vs. Murray, 1 Bland 484; 1 Bl. Com. 92; Bispham Principles Eq., fifth ed., secs. 453, 465, p. 584, note 2.

ing resorted to after the evidence is taken, and designed to accomplish the same object, the separation of issues of fact from those of law.[1]

In equity there is no such dual judicature, and therefore no necessity for formal separation of issues. With a professional judge or chancellor there is more time, and with the important aid of counsel, presumably more aptitude, for discriminating in a mingled mass of allegation and proof the real questions in dispute, whether of fact or law. Hence equity procedure is not dependent upon special pleading under scientific rules, and has no place for any substituted system under the form of requests or prayers for instructions. For a similar reason there are in equity no set forms of action, such as were once supposed essential to apprise the jury in advance of the precise nature of the controversy, but the bill or petition may be moulded to suit any state of facts or equitable remedy. And for a like reason the series of pleadings in equity is not indefinitely drawn out, but closes with the bill, answer and general replication. The plaintiff is not only permitted, but expected, to anticipate and meet the defense, either in his original or amended bill.[2] "Thus the bill contains within itself the entire series of pleadings on the part of the plaintiff, as the answer does on the part of

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[1] 1 Poe, Pl. & Pr. secs. 636, 691; Bliss, Co. Pl. sec. 139.
[2] U. S. Equity Rule 21; Md. Code, Art. 16, sec. 133.

the defendant."[1] There is no special replication and no rejoinder.

§ 23. **Comprehensive requirements as to parties.** Trial by jury requires that controversies should be simple, not complicated, easily understood and quickly determined. To secure simplicity and despatch, that mode of trial is necessarily limited to bi-lateral controversies, cases between two parties or sets of parties, only.[2]

No such considerations restrict the ampler functions of courts of equity, which are well adapted to complicated and multilateral controversies.[3] It is one of the maxims of equity that it prevents multiplicity of suits. A court of equity is enabled to act upon this principle by the facility with which, not only the immediate parties, but all those parties and all those interests (within reasonable limits), incidentally involved in the controversy, may be subjected to its

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[1]Lang. Eq. Pl. sec. 53.

[2]In attachment cases of garnishment, where there are generally three parties at least, and may be more, in the persons of claimants of the property attached, the several parties are not brought together in the same action, but separate suits are docketed as between plaintiff and defendant, between plaintiff and garnishee, and between plaintiff and each claimant.

[3]Lang. Eq. Pl. sec. 41. An executor and trustee, for instance, who has erroneously overpaid certain legatees, to the prejudice of others, may be decreed reimbursement by the overpaid legatees in the same decree which establishes his own liability. And in such a case, in order to prevent the necessity for a second suit, it would be proper to make the overpaid legatees co-defendants with the executor and trustee. Hanson v. Worthington, 12 Md. 418.

decree, and saved the necessity for ulterior litigation. What a court has the power to do, it is its duty to do, if in the interest of private individuals or the public. Hence, the general rule as to parties, to be next considered, with its exceptions.

§ 24. **The general rule as to parties — its rationale.** "All persons are to be made parties who are legally or beneficially interested in the subject matter and result of the suit."[1] This rule is based upon two distinct principles of justice, one natural and universal, the other conventional. Natural justice demands that in order to bind any person by any judicial proceeding whatever, that person must have due notice and due opportunity to be heard.[2] The principle of conventional justice or expediency upon which the general rule as to parties is also based has already been referred to as the maxim of

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[1]Caldwell vs. Taggart, 4 Peters, 190, 202; Cromwell vs. Owings, 6 H. & J., 10, 14; Gregory vs. Stetson, 133 U. S., 579, 586, citing Sto. Eq. Pl., sec. 72; Christian vs. R. R., 133 U. S., 233, 241; Shields vs. Barrow, 17 How., 130, 139; Williams vs. Bankhead, 19 Wall. 563; M'Arthur vs. Scott, 113 U. S., 340. Jewett vs. Tucker, 139 Mass. 566, 578; Dewey vs. St. Albans, 60 Vt. 12; Martin vs. Purnell, 4 Del. Ch. 252.

[2]Windsor vs. McVeigh, 93 U. S., 274, 277; Jenkins vs. Whyte, 62 Md., 427, 435; Handy vs. Waxter, 75 Md., 517, 523; Stuart vs. Palmer, 74 N. Y., 183; Ulman vs. Baltimore, 72 Md., 587, 593; Baltimore Belt R. R. Co., vs. Baltzell, 75 Md., 94; Paulsen vs. Portland 149 U. S., 30. It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental. Gregory vs. Stetson, 133 U. S., 579, 586.

equity that "prevents multiplicity of suits." It is inexpedient, and, in a conventional sense, unjust that a party affected by a decree should be left in a position either to sue, or to be sued by, a stranger to the proceeding. Every concurrent or incidental right or liability should, if possible, be determined together with the principal, and therefore expediency requires that the persons representing such rights or liabilities should be parties to be bound by the decree. The object of the rule is to do complete and not fractional justice, to make the performance of the decree safe to those compelled to obey it, and to prevent future litigation.[1] To the extent that the rule is founded on natural justice, it is inflexible, and its violation in that respect is not a mere irregularity, but a jurisdictional defect.[2] To the extent that the rule is founded upon policy, as distinguished from natural justice, it is the creature of courts of equity, is flexible in its application, and is controlled by important exceptions.[3] Much must be left to the discretion of the court (subject, however, to appeal,) in view of the character of the suit and its object, the nature of the interest in question and its extent, and other special circumstances of particular cases.[4] In the exercise

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[1]Sto. Eq. Pl. sec. 72; 1 Pom. Eq. Jur. sec. 186; Walter vs. Riehl, 38 Md. 211, 215; Brian vs. Thomas, 63 Md. 476, 483.

[2]Handy vs. Waxter, 75 Md. 517, 523; Adams, 50 N. J. Eq. 751.

[3]Elmendorf vs. Taylor, 10 Wheat. 152, 166.

[4]Barney vs. Latham, 103 U. S. 205; Payne vs. Hook, 7 Wall. 425; Crook vs. Brown, 11 Md. 171.

of this discretion, the court will require the plaintiff, if practicable, to bring every person concerned in interest before it. But if the case be such as to admit of a sufficient decree as between the parties actually litigant, the circumstance that an interest exists in some other person whom the process of the court cannot reach will not prevent a decree upon its merits. But such decree cannot, of course, bind the absent interest.[1]

§ 25. **Its difficulty and importance.** This element of convenience, discretion and flexibility accounts for the doubt and difficulty so often experienced in the practical application of the general rule as to parties.[2]

Notwithstanding the admitted difficulty, the correct application of the rule is often of vital importance, not only to the immediate suitors, but to those who come after them as purchasers or incumbrancers. Very few properties are offered for sale or mortgage that have not, at some time or other, been sold under the decree of a court of equity. As a sale under such a decree passes only the title of the parties to the cause, and to such sales, although judicial, the rule *caveat emptor* in general applies, the question as to whether all the necessary parties have been properly made is a vital one to a purchaser and his assigns. Even the running of the statute

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[1] Mallow vs. Hinds, 12 Wheat. 198.

[2] Walter vs. Riehl, 38 Md. 215; Crook vs. Brown, 11 Md. 171; Sto. Eq. Pl. sec. 76.

of limitations for their protection may be prevented by the intervention of a protracted life-estate, and cases may be found where they have been dispossessed by remaindermen born after the sale was made.[1]

§ 26. **Its exceptions**. These exceptions fall under two general heads; parties beyond the jurisdiction of the court, and parties within what is called the doctrine of representation. When a person who would ordinarily be made a party is beyond the jurisdiction of the court and therefore omitted, an objection will not prevail if the decree sought would not prejudice his interests, and if the merits of the controversy can be sufficiently adjusted in his absence.[2] This exception is especially important in the federal courts, whose jurisdiction within states is ousted by placing persons of the same citizenship upon opposite sides of a suit. It is of less practical moment in state courts, which are enabled by legislation to make non-resident or unknown owners of property within the state, without regard to citizenship, parties, upon constructive notice by publication. This subject will be more fully considered under the head of

[1]McArthur vs. Scott, 113 U. S. 340; Long vs. Long, 62 Md. 33 Bowen vs. Gent, 54 Md. 555; Kerchner vs. Kempton, 47 Md. 591; Timanus vs. Dugan, 46 Md. 402; Shreve vs. Shreve, 43 Md. 382; Downin vs. Sprecher, 35 Md. 481; 2 Dan. Ch. Prac. 1275, 1276. But when all parties *in esse*, having any interest, are before the court, those not *in esse* are also bound by the decree. Benson vs. Yellott, 76 Md. 159, 169; Md. Code, Art. 16, sec. 198.

[2]Sto. Eq. Pl. sec. 78–90; 1 Foster's Fed. Pr., sec. 50.

constructive parties, and cases within the doctrine of representation will be mentioned under the head of *quasi* parties.

§ 27. **The rule and exceptions consolidated.** It may tend to simplify a somewhat involved subject to so formulate the rule as to comprehend the exceptions. We will then have the following: *All persons interested in the object of the suit must be made parties, either actually, constructively, or by representation.* In this consolidated form the rule will be subject to but one important qualification, to be considered under the head of multifariousness. Owing, however, to the limited jurisdiction of the federal courts in cases of diverse citizenship, the exception as to parties beyond the jurisdiction will still obtain therein in those cases where the making of constructive parties by publication does not relieve the constitutional difficulty. The rule as thus framed may perhaps suggest a more simple and practically useful classification of parties than that hitherto followed by text-writers.

§ 28. **Classification of parties.** This will consist of cross-divisions, the same party being found in several classes at once.

§ 29. **Real and quasi parties—actual and constructive.** The first division is that between real and *quasi* parties. Real parties again may be either actual or constructive parties. Actual parties are

those only over whom the court has acquired plenary jurisdiction *in personam*, by service of process within the state, or by voluntary appearance. Constructive parties are of two descriptions:

First. *Non-resident, or unknown persons, interested in property within the state, over which property the court has acquired by due publication a statutory jurisdiction competent to bind the interests of such persons in rem.*[1]

A decree against a non-resident founded upon an order of publication can only affect his interest in property within the state, and cannot bind him *in personam*.[2] The requirements of publication statutes must be strictly followed.[3] The publication will be of no effect if the party be not in fact a non-resident,[4] although he may be temporarily ab-

[1]Md. Code, Art. 16, secs. 55, 105, 115; Worthington vs. Lee, 61 Md. 530; Jenkins vs. Whyte, 62 Md. 427; U. S. Rev. Stat. sec. 738, as amended by Act 3d March, 1875, ch. 137, sec. 8, 18 Stat. L. 472. Mitford, Story and Daniel, and the text-writers following them, are silent as to constructive parties. Publication process was no part of English chancery practice until partially introduced by statute in 1832, 2 Wm. IV c. 33, nor was it part of federal equity procedure until 1872, when introduced by the Acts of Congress referred to above. It was in Maryland first applied to non-resident mortgagors by 1785, ch. 72, sec. 30, and has been by subsequent legislation extended to other non-resident interests. Alex. Ch. Prac. 34. Similar legislation exists in all the states, whose procedure, in this respect, is binding upon the federal courts. Arndt vs. Griggs, 134 U. S. 316.

[2]Worthington vs. Lee, 61 Md. 530; Pennoyer vs. Neff, 95 U. S. 714.

[3]Guaranty Co. vs. R. R. Co., 139 U. S. 137; Bank vs. Copeland, 18 Md. 305; Johnson vs. Robertson, 31 Md. 476.

[4]Snowden, 1 Bland 550.

sent.[1] Nor will it be of any effect for purposes not stated in the bill and in the order of publication.[2] It is but a substitute for a *subpoena*, its object simply is notice, and if the notice is to "unknown heirs" of a decedent who had himself no interest, the publication will not avail to support a decree.[3]

Second. *Non-resident persons married to a resident husband or wife, over whose marital status the court has acquired by due publication a statutory jurisdiction in rem, competent to decree a valid divorce.*[4]

Jurisdiction thus acquired is limited to *status*, and cannot be enforced *in personam*. It is valid as to the divorce, and probably as to custody of children, but invalid as to alimony, costs, or prohibition of re-marriage.[5]

§ 30. **Representation—quasi parties.** *Quasi parties, or parties by representation, are interested persons, not named as parties, being neither served with process, nor warned by publication, but deemed to be sufficiently represented for certain purposes of the suit by real parties holding special relations to them.*[6]

The special relations referred to are the varieties of privity, community or identity of interest existing

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[1] McKim vs. Odom, 3 Bland 407.

[2] Fox vs. Reynolds, 50 Md. 564.

[3] Savary vs. DaCamara, 60 Md. 139, 148.

[4] Md. Code, Art. 16, sec. 35, 38; Stewart, M. & D. sec. 338.

[5] Stewart M. & D. sec. 217 a.

[6] Calvert on Parties, 62, 65, 428.

between executors, administrators, and in certain cases trustees, and their several beneficiaries; between life tenants and remainder men; and between individuals of a numerous class, such as creditors, legatees, taxpayers, stockholders and members of associations.

Executors and administrators, in all suits by or against them to recover claims for or against the estate, are deemed, in equity as at law, to represent all persons beneficially interested therein. In such suits legatees, distributees, next of kin and creditors (except in cases of collusion), are neither necessary nor proper to be made real parties to the record.[1]

Trustees do not in general represent their *cestuis que trust* in suits respecting the trust property, and beneficiaries as well as trustees are necessary parties thereto.[2] But when trustees have full powers of sale and receipt, they represent their beneficiaries, who, however, may be made parties on application.[3] Trustees under railroad mortgages, and others having large powers, often represent their beneficiaries.[4]

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[1] Md. Code, Art. 93, sec. 104; Gordon vs. Small, 53 Md. 550, 556; Little vs. Cushing, 62 Md. 416, 418; Whiting, 64 Md. 157, 160; Robard & Lamb, 127 U. S. 58, 62; McArthur vs. Scott, 113 U. S. 340, 396; Re Young, 30 Ch. D. 421; Gravely, 84 Va. 153; Butler vs. Sisson, 49 Conn. 580 (a strong case.)

[2] Sto. Eq. Pl., sec. 207; 1 Foster's Fed. Pr., sec. 45; Hawkins vs. Chapman, 36 Md. 83, 98; Long vs. Long, 62 Md. 33, 66; Cary vs. Brown, 92 U. S. 171, 172; Vetterlein vs. Barnes, 124 U. S. 169, 172.

[3] Md. Code, Art. 16, sec. 160; Rule 49, U. S. These rules follow the English chancery order of 1841, 1 Dan., Ch. Pr. 222 (4th Am. Ed.)

[4] Shaw vs. R. R. Co. 100 U. S. 605; Kerrison vs. Stewart, 93 U. S. 155; Elwell vs. Fosdick, 134 U. S. 500, 512; McArthur vs. Scott, 113

§ 31. **Representation of multitudes.** When parties having a common or identical interest are too numerous to be conveniently joined, that is, too numerous to be joined without the inconvenience and delay arising from frequent change of parties by death, birth, marriage or insolvency, one or more of the class may sue or defend in behalf of all, provided they fairly represent the absent interests.[1] This principle is often applied, so far as plaintiffs are concerned, to creditors' bills, although the number of creditors in the particular case may be quite limited. Whether the object of the creditors' suit be to vacate a fraudulent conveyance, or to compel administration of the assets of a deceased debtor, it is common practice for the bill to be filed by one or more of the creditors in behalf of the rest.[2]

U S. 340, 396; Long vs. Long, 62 Md. 33, 68. Both debtors and creditors are often represented by an assignee in bankruptcy, Glenny vs. Langdon, 98 U. S. 20; Trimble vs. Woodhead, 102 U. S. 647; by a trustee in insolvency, Diggs vs. McCullough, 69 Md. 609; Haugh vs. Maulsby, 68 Md. 423; Magruder vs. Peter, 11 G. & J. 217, 246; Jamison vs. Chestnut, 8 Md. 34, 39, by a conventional trustee for creditors, Sixth vs. Wilson, 41 Md. 506, 513; Cowman vs. Colquhoun, 60 Md. 127, 131, 136, and by a receiver, Doggett vs. R. R. Co., 99 U. S. 72. As to representation of remainder men, whether in being or after born, by life tenants or holders of other particular estates, see Md. Code, Art. 16, sec. 198; Benson vs. Yellott, 76 Md. 159, 169; Long vs. Long, 62 Md. 33; Newbold vs. Schlens, 66 Md. 587; McArthur vs. Scott, 113 U. S. 340, 401.

[1] Sto. Eq. Pl., sec. 94; 1 Foster's Fed. Pr., sec. 46; M'Arthur vs. Scott, 113 U. S. 340, 394; Bowen vs. Gent, 54 Md. 555, 571; Commissioners vs. Gellatley, 3 Ch. D. 615-617.

[2] Md. Code, Art. 16, sec. 46, 188; Foley vs. Bitter, 34 Md. 649; Richmond vs. Irons, 121 U. S. 27; Burgess vs. Vinnicourt, 31 Ch. D. 668;

The same principle applies to tax-payer's bills, to restrain municipal corporations from illegal tax, contract or appropriation.[1]

Stockholders and creditors of a corporation are in general sufficiently represented by the directors,[2] but stockholders do not represent the corporation.[3] In those exceptional cases where suits may be maintained by stockholders, the same principle applies as in creditors' bills.[4] And it has also been applied to railroad bondholders' bills.[5] And also to members of voluntary or unincorporated societies.[6]

The most important modern application of the doctrine of representation to defendants is that the general liability of stockholders may be fixed in suits against the corporation.[7] The decree, although passed in their absence, will establish their liability,

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Hammond vs. Hammond, 2 Bland 306; Brian vs. Thomas, 63 Md. 476, 483; Johnson vs. Waters, 111 U. S. 641, 674; Simms vs. Lloyd, 58 Md. 477; Brown vs. Iron Co. 134 U. S. 530, 533.

[1]Pom. Eq. Jur., sec. 260; R. R. Co. vs. Pumphrey, 74 Md. 86, 104; Baltimore vs. Gill, 31 Md. 375, 393; Chicago vs. McCoy, 136 Ill. 344.

[2]R. R. Co. vs. Alling, 99 U. S. 463, 472; Ferris, 56 Conn. 396; Booth vs. Robinson, 55 Md. 419, 435; Glenn vs. Williams, 60 Md. 93, 115.

[3]Swan vs. Frank, 148 U. S. 603, 610.

[4]Dodge vs. Woolsey, 18 How. 331, 345; Hawes vs. Oakland, 104 U. S. 450.

[5]Trustees vs. Greenough, 105 U. S. 527; R. R. Co. vs. Pettus, 113 U. S, 116.

[6]Mears vs. Moulton, 30 Md. 142. Smith vs. Swormstedt, 16 How. 288.

[7]Glenn vs. Williams, 60 Md. 93, 115; Lycoming vs. Langley, 62 Md. 196, 214; Hawkins vs. Glenn, 131 U. S. 319; Glenn vs. Liggett, 135 U. S. 533.

but only as the foundation for a direct proceeding *in personam*.[1] In no case, indeed, is a *quasi* party so bound by the decree as that an execution may issue against him. Such parties are bound only *sub modo*, "in a sense, not absolutely." All persons whom it is proposed to affect by the decree compulsorily must be made real parties.[2]

§ 32. **Parties as plaintiff and defendant.** All persons having an interest in the subject and in the relief demanded, may be joined as plaintiffs, and if they will not join as plaintiffs, may be made defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or whose presence is necessary to a complete determination or settlement of the questions involved therein.[3] The plaintiff must have an interest.[4] A son, during his father's life, has no subsisting interest such as entitles him to maintain a bill to vacate his father's deed for fraud or undue influence.[5] Otherwise, when the father is dead and the son has an interest under the will.[6]

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[1]Glenn vs. Garth, 147 U. S. 360, 367.

[2]Calvert on Parties, 68; Commissioners vs. Gellatley, 3 Ch. D. 615.

[3]Pomeroy's Rem. sec. 116. These are in substance provisions of the reformed procedure of the code states, which are simply declaratory of pre-existing equity rules, and are the most concise statements thereof.

[4]McMicken vs. U. S. 97 U. S. 204; Baxter vs. Baxter, 43 N. J. Eq. 82; Reid vs. Mayer, 80 Ga. 757.

[5]Lefew vs. Hooper, 82 Va. 946; Sellman vs. Sellman, 63 Md. 520.

[6]Canton vs. McGraw, 67 Md. 583.

A party who has sold all his interest in land cannot maintain a bill for partition or sale.[1] Equity deals with the real party in interest. A suit in equity cannot be maintained in the name of A for the use of B.[2] When several are joined as co-plaintiffs, the interest of each must be shown in the bill.[3] The interests of co-plaintiffs must be concurrent and not conflicting or alternative;[4] although the court may decree as between plaintiffs, as if they occupied positions of plaintiff and defendant, and may so decree as between co-defendants.[5] The same person cannot be both plaintiff and defendant, even in distinct capacities.[6]

§ 33. **Corporations.** Corporations may sue and be sued, as natural persons, in equity as at law, under special statutory provisions as to the service of process upon the agents of corporations, both domestic and foreign.[7] In all matters affecting corporate interests, the corporation must be made a party.[8]

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[1] Bannon vs. Comegys, 69 Md. 411; Fulton vs. Greacen, 44 N. J. Eq. 443.

[2] Kellam vs. Sayre, 30 W. Va. 199.

[3] House vs. Mullin, 22 Wall. 42.

[4] Stebbins vs. St. Anne, 116 U. S. 386; Ellicott vs. Ellicott, 2 Md. Ch. 468; Crook vs. Brown, 11 Md. 158, 170; Walker vs. Powers, 104 U. S. 245.

[5] Md. Code, Art. 16, sec. 161.

[6] Byrne, 94 Cal. 576; Blaisdell vs. Ladd, 14 N. H. 129; Eastman vs. Wright, 6 Pick. 316; Owens vs. Crow, 62 Md. 491, 497.

[7] Md. Code, Art. 23, sec. 295–299; 1892 ch. 601.

[8] 3 Pom. Eq. Jur. sec. 1091-1096; Boone Corp. sec. 150, 151; Wilkens vs. Thorne, 60 Md. 253, 258; Fiery vs. Emmart, 36 Md. 464,

Although, in general, no person ought to be made a defendant against whom no decree can be had, the officers and members of a corporation may be joined as co-defendants with the corporation for purposes of discovery.[1]

§ 34. **States:** A state may sue as plaintiff in equity, and the attorney-general is the legal representative of the state for that purpose, and a bill filed by him in the name of the state will be presumed to be authorized.[2] It is the function of that officer to file informations in certain cases of charities.[3] The state's attorney is required to prosecute and defend on the part of the state, all cases in his county in which the state may be interested.[4] In a suit in equity against sureties upon official bonds given to the state, it is erroneous to file the bill in the name of the state for the use of the beneficiaries.[5]

A state cannot be sued except by its express consent.[6] A state may sue another state in the

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475; Morton vs. Grafflin, 68 Md. 555; Smith vs. Stephen, 66 Md. 381, 389; St. Louis vs. Wilson, 114 U. S. 60; Kendig vs. Dean, 97 U. S. 423; Davenport vs. Dows, 18 Wal. 626; Dewing vs. Perdicaris, 96 U. S. 193; Hawes vs. Oakland, 104 U. S. 450; Swan vs. Frank, 148 U. S. 603; Porter vs. Sabin, U. S. Sup. Ct. Oct. Term, 1892.

[1] Sto. Eq. Pl. sec. 234, 235; McKim vs. Odom, 3 Bland 421. But all the purposes of discovery can now be secured more effectually by examining the officers as other witnesses.

[2] Pennsylvania vs. Wheeling, 13 Howard 560.

[3] Hunt vs. Evans, 134 Ill. 499; Barnum's case, 62 Md. 299.

[4] Md. Code, Art. 10, sec. 17.

[5] Bayne vs. State, 62 Md. 109.

[6] Cons. U. S. 11th Amendment, Virginia vs. Canal Co. 32 Md. 501.

Supreme Court of the United States, but not as a mere collecting agency for bondholders.[1] Suits against state officers have in some cases been held within the inhibition of the eleventh amendment as suits in effect against the state itself, and in other cases have been maintained as suits against the individual officers.[2] In certain cases of claims against the United States, the United States District and Circuit Courts have concurrent jurisdiction with the Court of Claims.[3]

When a non-consenting state is an indispensable party the bill will be dismissed.[4]

§ 35. **Infants and non-compotes.** Infants and parties under disability may sue in equity by their guardian or committee, if any, or by their *prochein ami*, subject to the order of court for their protection.[5] Infant and non-sane defendants, under order of court, defend by legal guardian or committee, if any, or the court may appoint a guardian *ad litem*.[6] No committee, trustee or guardian of a luna-

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[1]New Hampshire vs. Louisiana, 108 U. S. 76. See Wisconsin vs. Insurance Co. 127 U. S. 265.

[2]See the cases reviewed in Pennoyer vs. McConnaughy, 140 U. S. 1; 1 Foster's Fed. Prac. sec. 37.

[3]Act of 1887, 24 St. at L. ch. 359; 1 Foster's Fed. Pr. sec. 36.

[4]Christian vs. R. R. Co., 133 U. S. 233.

[5]But the name of a next friend cannot be used without his written authority filed with the bill. Md. Code, Art. 16, sec. 125; Sto. Eq. Pl., sec. 57, 58, 59, 60; see Rule 87 U. S. 77 Md. 157

[6]No guardian *ad litem* can be appointed having an adverse interest, and the court may also appoint a solicitor for the infant or non-sane defendant. Md. Code, Art. 16, sec. 124.

tic can be appointed until after the verdict of a jury of mental unsoundness upon a writ *de lunatico inquirendo*.[1]

§ 36. **Married women.** A married woman having no trustee may, by her next friend, sue in a court of law or equity in all cases for the protection of her property.[2] In cases of divorce and alimony she sues and defends in her own name.[3] Husband and wife may sue each other in equity. If the wife is sued by a third party, the husband must ordinarily be joined as a co-defendant.[4]

§ 37. **Formal, proper, necessary and indispensable parties.** Formal or nominal parties, having no substantial interest,[5] may readily be omitted,

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[1] Hamilton vs. Traber, 27 Atl. Rep. 229, 77 Md. —.

[2] Md. Code, Art. 45, sec. 4.

[3] Stewart M. & D., sec. 322.

[4] Notwithstanding the broad language of the proviso to Md. Code, Art. 45, sec. 7, the capacity of a married woman to sue alone is not extended beyond the scope of the context, viz: special business or earnings. When the husband has abandoned the wife and abjured the state, she may sue alone. Wolf vs. Baureis, 72 Md. 481. She may be sued alone on her covenants in leases, Md. Code, Art. 45, secs. 15, 16, and on her contracts as licensed trader, *Ibid.* Art. 45, sec. 36.

[5] Such as a husband when the suit relates only to the wife's sole and separate estate; Bridges vs. McKenna, 14 Md. 258, 270; Wormley vs. Wormley, 8 Wheat. 421, 451; the state, in a suit to vacate a fraudulent land patent; Hoye vs. Johnston, 2 Gill. 291, 319; a trustee, having the naked legal title; Walden vs. Skinner, 101 U. S. 577, 589; Weaver vs. Leiman, 52 Md. 708, 712; but see Cowell vs. Taylor, 31 Ch. D. 34; purchasers of railroad property, acting merely

although not error to join them.[1] Proper parties, having a substantial interest in the general subject matter, may or may not be so inseparably connected with the particular controversy, according to its aim and object, as to be also necessary and even indispensable parties.[2]

A person directly affected by a decree is an indispensable party, that is, the suit cannot proceed in his absence. A person is affected by a decree when his rights against or liability to any of the parties to the suit may be thereby determined.[3] Occupying tenants, for instance, claiming title, are indispensable parties.[4] To a suit by a surety for contribution, all solvent obligors must be parties, as well as obligees.[5] To a bill to vacate a sale of land, the vendee, or his heirs, are indispensable parties.[6] To a bill for

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as agents; Minnesota Co. vs. St. Paul Co., 2 Wal. 609, 618, 634; see Walter vs. Riehl, 38 Md. 211, 221; an assignor when the assignment is absolute; Sto. Eq. Pl. sec. 153; Day vs. Cummings, 19 Vt. 496, 499; Grand vs. Merklin, 65 Md. 579, 583.

[1] Sto. Eq. Pl. sec. 229, 552; 1 Foster's Fed. Prac. sec. 51.

[2] The difficulty in the application of the general rule as to parties already adverted to (*ante* sec. 25), bears with full force upon this distinction, and the difficulty has been aggravated by the loose manner in which the terms "proper" and "necessary" are sometimes used as if convertible, and still oftener the terms "necessary" and "indispensable." The statement in the text substantially follows the well known classification of Mr. Justice Bradley, in Williams vs. Bankhead, 19 Wal. 563, 571.

[3] 1 Foster's Fed. Prac. sec. 53.

[4] Oliver vs. Caton, 2 Md. Ch. 297; Williams vs. Bankhead, 19 Wall. 563.

[5] Young vs. Lyons, 8 Gill. 128; Robertson vs. Carson, 19 Wall, 94. /

[6] Buchanan vs. Torrance, 11 G. & J. 342, 346. 47 Md. 166

removal of a trustee, all the *cestuis que trust* are indispensable parties;[1] and generally to all suits respecting the trust property;[2] so also the trustees of a railroad mortgage, in a foreclosure suit;[3] so also first-mortgage trustees, when the effect of the suit by second-mortgage bondholders is to defeat their possession by a receivership.[4] In general, the trustee must be a party to all suits affecting the estate.[5]

Heirs and devisees must be parties to all suits for the sale of land,[6] also for the construction of a will.[7] In a bill to enforce specific performance the only proper parties are the parties to the contract and their representatives.[8]

When the suit is to compel the transfer of stock of a decedent, or to effect partition and sale of his leasehold property the administrator must be a party.[9]

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[1]Baxter vs. Proctor, 139 Mass. 151.

[2]Stewart vs. Firemen's, 53 Md. 564, 574; Smith vs. Gaines, 39 N. J. Eq. 545; Brokaw, 41 N. J. Eq. 215, 223; Tyson vs. Applegate, 40 N. J. Eq. 305; Sergeant vs. Baldwin, 60 Vt. 17.

[3]Hale vs. R. R. Co., 60 N. H. 333; Hambrick vs. Russell, 86 Ala. 201.

[4]Tome vs. King, 64 Md. 182; Miltenberger vs. R. R. Co., 106 U. S. 306.

[5]Thayer vs. Life Asso. 112 U. S. 717.

[6]Long, 62 Md. 33; Bowen vs. Gent, 54 Md. 555.

[7]Lomerson vs. Vroom, 42 N. J. Eq. 290; Dugan vs. Capner, 44 N. J. Eq. 339; Handy vs. Waxter, 75 Md. 517.

[8]Johns Hopkins U. vs. Middleton, 76 Md. 186, 207; Woodbury vs. Gardner, 77 Maine 68, 70 (vendor's devisee).

[9]Baltimore Retort Co. vs. Mali, 65 Md. 93; Foos vs. Scarf, 55 Md. 301, 312. 80 Md. 253

To a partition suit, all tenants in common are indispensable.[1]

To a bill filed by a corporation to rescind a contract, under which property was sold by a syndicate, formed to first buy the property and then sell it to a company formed by them at a great overvalue, all the members of the syndicate, together with representatives of deceased or bankrupt members, must be made parties.[2] A corporation is an indispensable party to a bill for relief against a fraudulent transfer of stock,[3] but the purchaser is not.[4] When the bill is filed for the sale of an equitable interest in land, and it appears that since the date of the contract creating such interest, the land has been sold, the purchaser must be made a party.[5]

When a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is a necessary party; that is, he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached.[6]

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[1]Barney vs. Baltimore, 6 Wall. 280; Savary vs. Da Camara, 60 Md. 139, 145. 86 Md. 663

[2]Erlanger vs. New Sombrero Phosphate Co., 3 App. Ca. 1218, 1265.

[3]Kendig vs. Dean, 97 U. S. 423. 94 Md. 562

[4]St. Romes vs. Levee, 127 U. S. 619.

[5]Bridge Co. vs. Bannon, 47 Md. 130.

[6]"Necessary" here means reasonably necessary, the same sense in which the term is used in the Constitution of the U. S. in Art. I, sec. 8, cl. 8, as construed by the Supreme Court in McCulloch vs. Maryland, 8 Wheat. 316, 413. The distinction between necessary and indispensable parties is often jurisdictional in the federal courts,

When a person is not interested in a particular controversy, but has an interest in its subject-matter which may be conveniently settled in the suit and thereby prevent further litigation, he is a proper party, but the non-joinder of such party would not be error. Thus to a bill filed against a canal company for re-execution, (lost bonds,) the state, a prior mortgagee who had waived its lien, was held a proper but not a necessary party.[1] So, a prior mortgagee whose debt is not due, in a creditor's suit to vacate fraudulent deeds.[2]

So as to prior incumbrancers not made parties to a foreclosure suit by a subsequent mortgagee.[3] So as to junior incumbrancers.[4] In a suit for the enforce-

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and instances may be found collected in 1 Foster's Fed. Pr. sec. 52. It is of less importance in state courts, where persons beyond the jurisdiction can be made constructive parties by publication, unembarrassed by the constitutional restriction as to diverse citizenship. In the language of the state decisions, the term "necessary" as applied to parties, when unqualified, almost always means "indispensable," and quite often the word "proper" may be found loosely used in the same sense.

[1] Chesapeake and Ohio Canal Co. vs. Blair, 45 Md. 102, 109.

[2] Walter vs. Riehl, 38 Md. 211, 219.

[3] Ellicott vs. Ellicott, 6 G. & J. 35, 48; Brooks vs. Brooke, 12 G. & J. 306, 318; Smith vs. Shafer, 46 Md. 578; Jerome vs. McCarter, 94 U. S. 734; Hagan vs. Walker, 14 How. 37. See Miltenberger vs. R. R. Co., 106 U. S. 286, 306; Hefner vs. Northwestern, 123 U. S. 747, 754.

[4] Neal vs. Rathell, 70 Md. 592, 599; Leonard vs. Groome, 47 Md. 505; Harris vs. Hooper, 50 Md. 547; Johnson vs. Hambleton, 52 Md. 384; Chilton vs. Brooks, 71 Md. 445; (mortgage with power of sale); Carroll vs. Kershner, 47 Md. 262, (mortgage with consent to decree); Andreas vs. Hubbard, 50 Conn. 351, 366; Hambrick vs. Russell, 86 Ala. 199.

ment of vendors' lien, where the vendee, pending suit, conveyed to a third party, under a contract of sale, with partial payment antedating the suit, the assignee was held a proper, but not an indispensable party.[1] Persons jointly and severally liable are all proper, but not necessary parties defendant, and if not made parties originally, may come in or be brought in by a defendant.[2]

§ 38. **Proper and necessary parties.** Omitting the term "indispensable," as peculiar to federal practice, the two remaining classes may be thus described: Necessary parties are those without whom no decree can be effectively made determining the principal issues. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all questions and adjust all rights involved in the litigation. Or, more briefly: Necessary parties are those without whom no decree can be rendered. Proper parties are those whose presence renders the decree more effectual.[3]

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[1]Fisher vs. Shropshire, 147 U. S. 133.

[2]Md. Code, Art. 16, sec. 159; U. S. Eq. Rule 51; Eng. Orders in Ch. of 1841, No. 32.

[3]Pomeroy's Rem., sec. 329, 330. To illustrate: in a foreclosure suit, the mortgagor is a necessary party, simply because no sale can be made behind his back, and other incumbrancers are not, because the sale can be made subject to their outstanding liens. But if the validity or extent of their liens be questioned, or if for any reason the sale should be not of the equity of redemption alone, but of the unencumbered title, then all incumbrancers are proper parties; that is they are not necessary to a sale *per se*, although necessary to an effectual and satisfactory sale. It is possible, although it may not be convenient, for the judicial machinery to be put in motion without them. It is not even possible without the mortgagor, or his

§ 39. **Misjoinder and nonjoinder—how availed of and remedied.** When apparent upon the face of the bill these defects are availed of by demurrer, otherwise, by plea or answer. They may also be suggested at the hearing, but in most cases an objection, not fatal, if not taken in the pleadings, would be regarded as waived.[1] Whatever may have been the old practice, all such objections are now usually obviated by amendment.[2]

When the omission of a party is so radical as to amount to a jurisdictional defect, and is not covered by amendment, the decree as to such party is always open to collateral attack, and a sale under such decree will pass no title from the omitted party.[3]

§ 40. **Multifariousness.** The maxim that equity "prevents multiplicity of suits" has its limitation

heirs, representatives or assigns. *Ibid.;* Sto. Eq. Pl. sec. 193; 17 Am. and Eng. Ency. 649.

[1]Hamilton vs. Whitridge, 11 Md. 128, 148; Chew vs. Bank, 14 Md. 299; Oliver vs. Piatt, 3 How. 333, 412; Nelson vs. Hill, 5 How. 127. Or, in such case, the court may, in its discretion, make a decree saving the rights of the absent parties, or may require the plaintiff to bring in such absent party. Md. Code Art. 16, sec. 162; Rule 53 U. S. 92 Md. 166

[2]Md. Code Art. 16, sec. 16, 17, 161. The equity rules now in force provide for speedy hearing of objections for want of parties, the cause to be set down for that purpose at the instance of the plaintiff, within fifteen days after answer filed (in U. S. courts fourteen.) If not so set for speedy hearing, and the objection should finally be allowed, the plaintiff will not be entitled to amend, as of course, and the bill may be dismissed. Md. Code, Art. 16, sec. 163; U. S. Eq. Rule 52. A dismissal of the bill for want of necessary parties, or for misjoinder, will be without prejudice. House vs. Mullen, 22 Wal. 42, 46.

[3]*Ante*, sec. 24, 25.

in the doctrine of multifariousness. This is a tradition of pleading, designed for convenience, to save the delay, expense and unnecessary complexity which have been found by experience to result from the attempt to confuse in one suit remotely connected parties or claims and thus pursue at the same time two or more independent lines of investigation.[1] The difficulty in the application of the general rule as to parties, already adverted to[2] is made especially apparent by this limiting, but vague doctrine, which offers no precise definitions and prescribes no precepts of universal application. "Each case must depend upon its own circumstances, and much must be left to the sound discretion of the court."[3]

The objection is usually raised by demurrer,[4] and obtains in case of (first) misjoinder of parties, and (second) misjoinder of claims or equities or subject-matter.

§ 41. **Misjoinder of plaintiffs.** It has been seen that plaintiffs having conflicting or alternative interests cannot be joined.[5] But if plaintiffs' several interests are not antagonistic, it matters not that

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[1]Heffron vs. Gore, 40 Ill. App. 257.

[2]*Ante*, sec. 25.

[3]Barney vs. Latham, 103 U. S. 205, 215; U. S. vs. U. P. R. R. Co., 98 U. S. 604; Hefner vs. Ins. Co. 123 U. S. 747, 751; Brown vs. Guarantee, 128 U. S. 403, 411; Brian vs. Thomas, 63 Md. 476, 480; Neal vs. Rathell, 70 Md. 592, 598; Eastman vs. Bank, 58 N. H. 421; Langdon vs. R. R. Co., 53 Vt. 228, 236; Shaffer vs. Fetty, 30 W. Va. 269; Bank vs. Thornton, 83 Va. 157.

[4]Neal vs. Rathell, 70 Md. 592, 595; Mendenhall vs. Hall, 134 U. S. 559; Snook vs. Pearsall, (Mich.) 55 N. W. Rep. 459.

[5]*Ante*, sec. 32.

they are distinct, and unconnected plaintiffs may join where there is one connected interest among them all centering in the point in issue.[1]

In a bill to redeem a prior incumbrance, it is not multifarious to join subsequent mortgagees as co-plaintiffs, even if two separate decrees should be the result.[2] Riparian proprietors on the same stream, although holding under distinct titles, may join in the same bill against a defendant who has injured the common right.[3] On the other hand, several plaintiffs asserting distinct and unconnected rights against the same defendant cannot join.[4]

§ 42. **Misjoinder of defendants.** Generally, it is multifarious to join in one bill distinct and independent matters, and thereby confound them, as to demand several such matters against several defendants.[5] The following are instances: an account-

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[1]Peters vs. Van Lear, 4 Gill. 249, 264; Rafferty vs. Central (Pa.), 23 Atl. 884; Hawes on Parties, sec. 96. As mechanics and material men entitled to liens, and a mortgagee upon the same property, Hamilton vs. Schwer, 34 Md. 107, 117, where such claims were consolidated; (although the usual practice is for one claimant to file his bill and make the other claimants co-defendants with the owner, Trustees vs. Heise, 44 Md. 453 463,) Poland vs. R. R. Co., 52 Vt. 144, 172. Also sureties who have paid the entire debt in a suit for contribution against a co-surety, Young vs. Lyon, 8 Gill, 162, 166.

[2]Neal vs. Rathell, 70 Md. 592, 599.

[3]Cadigan vs. Brown, 120 Mass. 493; Cornwall vs. Swift, 89 Mich. 503.

[4]Yeaton vs. Lenox, 8 Peters 123; Wade vs. Pulsifer, 54 Vt. 45, 72. In this case the objection came too late. See further, cases cited 1 Foster's Fed. Pr. sec. 72.

[5]Wilson, 23 Md. 162, 170; Trego vs. Skinner, 42 Md. 432; Broadbent vs. State, 7 Md. 416, 428. 79-357

ing with two or more distinct and independent partnerships;[1] uniting separate infringers of a patent, each having no concern with the other;[2] in a suit for specific performance to claim relief against defendants, not parties to the contract, asserting an interest in the property;[3] to enforce in one suit the individual liabilities of several stockholders in the same bank;[4] to include in one partition suit real estate owned jointly by A and B, and also real estate owned jointly by A, B and C;[5] or in a bill which prays relief against executors, to claim also against one of them as a mortgagee.[6]

On the other hand, it is not indispensable that all parties should have an interest in all the matters contained in the suit. It is sufficient if each party has an interest in some matters, and they are connected with the others.[7] It is not multifarious to join as defendants to a creditor's bill to vacate fraudulent deeds, all the grantees in the several deeds;[8] nor, the bill being filed against the grantees

[1] Griffin vs. Merril, 10 Md. 364, 371; Corner vs. Gilman, 53 Md. 364; see Nelson vs. Hill, 5 How. 127; Lewis vs. Loper, 47 Fed. Rep. 259.

[2] Drewry Eq. Pl. 41; see U. S. vs. Telephone Co., 128 U. S. 315.

[3] Crook vs. Brown, 11 Md. 158, 171; but see Barry, 64 Miss. 709.

[4] Bundy vs. Cocke, 128 U. S. 187.

[5] Reckefus vs. Lyon, 69 Md. 589.

[6] Cocks vs. Varney, 42 N. J. Eq. 514. A bill is multifarious which joins distinct claims against different defendants. Keith, 143 Mass. 262, 264; Tullar vs. Baxter, 59 Vt. 468; Farmer vs. Rogers, (Ga.) 14 S. E. Rep. 188.

[7] Brown vs. Guarantee Co., 128 U. S. 403; Lenz vs. Prescott, 144 Mass. 505, 512.

[8] Brian vs. Thomas, 63 Md. 476, 480; Trego vs. Skinner, 42 Md. 426; Handley vs. Heflin, 84 Ala. 601; Pullman vs. Stebbins, 51 Fed. Rep. 10.

of a deceased surety on a guardian's bond, was it multifarious to join as co-defendants the administrator of the deceased guardian and the widow and children of a deceased co-surety.[1] A bill is not multifarious where one general right is claimed, though the defendants have separate and distinct rights;[2] nor where the defendants are interested in all the matters in suit, and the suit has a common object.[3]

§ 43. **Misjoinder of claims.** To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must concur: 1st, the grounds of suit must be different; 2d, each ground must be sufficient as stated to sustain a separate bill.[4] This objection is more frequently overruled than sustained.[5]

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[1] Brian vs. Thomas, 63 Md. 476, 480.

[2] Smith vs. Scribner, 59 Vt. 103; De Wolf vs. Sprague, 49 Conn. 282; Murguiondo vs. Hoover, 72 Md. 9.

[3] Bolles, 44 N. J. Eq. 385; Woolley vs. Pemberton, 41 N. J. Eq. 394, 398; Winsor vs. Pettis, 11 R. I. 506; Miller vs. Baltimore Co. Marble Co., 52 Md. 642; N. P. R. Co. vs. Walker. 47 Fed. Rep. 681. See further cases cited, 1 Foster's Fed. Pr. sec. 73.

[4] Brown vs. Guarantee Co., 128 U. S. 403, 412. *e. g.:* A bill for partition and also to enforce a mortgage. Belt vs. Bowie, 65 Md. 350; Mitchell vs. Farrish, 69 Md. 239. But a bill for partition, which also seeks an account of advancements, has been held not multifarious. Marshall, 86 Ala. 383. So, a bill for partition and vacating deeds. Vreeland, (N. J.) 24 Atl. Rep. 551. Similar illustrations in Walker vs. Powers, 104 U. S. 245, 250; Sadler vs. Whitehurst, 83 Va. 46; Columbus vs. Humphries, 64 Miss. 258; Bank vs. Thornton, 83 Va. 157; Wells vs. Sewell, (Va.) 17 S. E. Rep. 2; Mobile vs. Burke, (Ala.) 10 So. Rep. 328; Reckefus vs. Lyon, 69 Md. 589.

[5] U. S. vs. Telephone Co., 128 U. S. 315; Canton vs. McGraw, 67 Md. 584; Dunphy vs. Traveller, 146 Mass. 495; Lockwood vs. Law-

§ 44. **How remedied.** Multifariousness does not render a decree void or liable to collateral attack.[1] The objection may be obviated by amendment, or by dismissing the bill or petition as to such of the parties or subject-matter as may be improperly joined.[2]

§ 45. **Intervention.** The practice of allowing an interested stranger to the suit to intervene therein by petition is of civil-law origin, and has not been fully imported into equity procedure.[3] The objection for non-joinder must come from the defendant, or from the court, and if the plaintiff refuses to amend, the court may refuse to decree. The general rule is

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rence, 77 Maine 297; Page vs. Whidder, 59 N. H. 507; Shafer vs. O'Brien, 31 W. Va. 601; Sumter vs. Mitchell, 85 Ala. 318; Foos vs. Scarf, 55 Md. 301; Chappell vs. Funk, 57 Md. 465; Cleland vs. Casgraive, (Mich.) 52 N. W. Rep. 460; Ashley vs. Little Rock, (Ark.) 19 S. W. Rep. 1058; Torrent vs. Hamilton, (Mich.) 54 N. W. Rep. 634; Dickerson vs. Winslow, (Ala.) 11 So. Rep. 918.

[1]Hefner vs. Northwestern, 123 U. S. 747.

[2]Md. Code, Art. 16, sec. 161; Canton vs. McGraw, 67 Md. 583, 590; Walker vs. Powers, 104 U. S. 245, 249; Price vs. Coleman, 21 Fed. Rep. 357. 81-582

[3]Smith vs. Gale, 144 U. S. 509; Pom. Remedies, sec. 416. From the Louisiana code it has passed into the "reformed procedure" of the code states, to a greater or less extent. *Ibid.* The "third party procedure" under the English judicature acts is limited to the case of an outside party called in by a defendant for contribution or indemnity. Morgan's Ch. Acts, 347. The English courts have discretion to always admit new parties, either upon or without application. *Ibid.* 336. The broad language of a recent Maryland enactment has not as yet received judicial construction. 1892 ch. 654.

that an omitted person, although interested and proper to be made a party, cannot on his own application alone be admitted as such.[1] This rule, like all those where parties are concerned, is flexible, and there are many cases where intervention may be allowed: As where the plaintiff consents;[2] where the intervenors are already *quasi parties*;[3] or claimants of property under control of the court;[4] *cestuis que trust*, in some cases;[5] purchasers under decrees for sale;[6] assignees *pendente lite*;[7] stockholders in corporation suits where there is fraud of directors;[8] intervenors claiming that the

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[1] Gregg vs. Baltimore, 14 Md. 479, 487; Holthaus vs. Nicholas, 41 Md. 241, 267; Postal vs. Snowden, 68 Md. 118; Shields vs. Barrow, 17 How. 130, 145; 1 Foster's Fed. Pr. sec. 201.

[2] French vs. Gapen, 105 U. S. 509, 525; Brumbaugh vs. State, 54 Md. 641, 647.

[3] Fidelity vs. Mobile, 53 Fed. 850, citing Anderson vs. R. R. Co., 2 Woods 628; as in a creditor's bill, Myers vs. Fenn, 5 Wall. 205, 207; Calvert on Parties 428; Abrahams vs. Myers, 40 Md. 499, 508; Chickering, 56 Vt. 82.

[4] Knippendorf vs. Hyde, 110 U. S. 282, 287; Gumbel vs. Pitkin, 124 U. S. 131, 146; Peoria vs. Chicago, 127 U. S. 201; Tome vs. King, 64 Md. 166, 182; Wingert vs. Gordon, 66 Md. 106.

[5] Sto. Eq. Pl. sec. 208; Williams vs. Morgan, 111 U. S. 684; U. S. Eq. Rule 49; Md. Code, Art. 16, sec. 160.

[6] Camden vs. Mayhew, 129 U. S. 85; Holthaus vs. Nicholas, 41 Md. 266-7; Johnson vs. Hoover, 75 Md. 486-7 (as parties to contracts with the court).

[7] Mellen vs. Moline, 131 U. S. 353, 371; Brown vs. Thomas, 46 Md. 636, 641; Chenoweth vs. Smith, 29 Md. 18, 23; but see Stockett vs. Goodman, 47 Md. 54; Hall vs. Jack, 32 Md. 253; *post.* sec. 47.

[8] Bronson vs. La Crosse R. Co., 2 Wal. 283, 302.

suit is collusive and fictitious, to their prejudice;[1] persons jointly and severally liable with the defendants;[2] or claimants after a decree and reference to a master or auditor.[3] The filing of a petition is not enough to make intervenors parties; there must be an order of court.[4]

There may also be cases where actual knowledge of a pending suit directly affecting a person's interest will conclude his rights, if he has the opportunity to intervene for their protection, upon the principle of estoppel,[5] especially when he participates actively in the litigation, although under the name of a party to the record.[6]

§ 46. **Abatement and revivor.** When a sole plaintiff or defendant dies, whose interest so terminates

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[1] American vs. Heft, 131 U. S. XCII (appendix).

[2] Md. Code, Art. 16, sec. 159.

[3] Gregg vs. Baltimore, 14 Md. 479, 489.

[4] Walters vs. Chichester, 84 Va. 724; Jordan, 94 U. S. 248, 249. Creditors, without formal petition, become real parties by filing their vouchers with the clerk. Md. Code, Art. 16, sec. 189; Strike McDonald, 2 H. & G. 191, 233-4; Gibson vs. McCormick, 10 G. & J. 65, 100; Hall vs. Ridgely, 33 Md. 310; Thomas vs. Bank, 46 Md. 44; Simms vs. Lloyd, 58 Md. 477, 481.

[5] 1 Greenleaf Ev. sec. 522, 523; Robbins vs. Chicago, 4 Wal. 672; Smith vs. Express Co. 135 Ill. 289; Chamberlain vs. Preble, 11 Allen 370; Lyon vs. Stanford, 42 N. J. Eq. 411; Litchfield vs. Goodnow, 123 U. S. 549; Albert vs. Hamilton, 76 Md. 304.

[6] Parr vs. State, 71 Md. 220, 235; St. Johnsbury vs. Morrill, 55 Vt. 168. But see Stryker vs. Goodnow, 123 U. S. 527, 540, where there was participation without estoppel.

with his life as to leave no subject of litigation remaining, the suit necessarily abates, in the common law sense, that is, expires.[1] In other cases of death of parties, pending suit, and in some cases of marriage, the suit was formerly deemed to have abated, in the equity sense of the term, meaning simply suspended until formally revived by bill of revivor.[2] The inconvenience of the proceeding by bill has, in many states, led to enabling legislation authorizing a simpler method of revival, by suggestion or petition, the voluntary or involuntary appearance of personal representatives, and the making of new or additional parties by amendment.[3]

§ 47. **Assignment**. Assignees, *pendente lite*, need not, in general, be made parties, being subject to all the equities of the parties under whom they claim.[4] Nor will they, ordinarily, be entitled to intervene in the suit or claim title to the property;[5] but may be

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[1]Sto. Eq. Pl. 356.

[2]Sto. Eq. Pl. sec. 354; Glenn vs. Clapp, 11 G. & J. 1. The only method of revival in the federal courts is by bill. 1 Foster's Fed. Prac. sec. 178.

[3]Md. Code, Art. 16, secs. 1–13, 1892 ch. 654; 2 Am. & Eng. Ency. 269–275.

[4]Tilton vs. Cofield, 93 U. S. 163; Inloes vs. Harvey, 11 Md. 519; Boulden vs. Lanahan, 29 Md. 200, 210; Schaferman vs. O'Brien, 28 Md. 573; Mount vs. Manhattan, 43 N. J. Eq. 25; Darling vs. Osborn, 51 Vt. 158. The principle is that during the pendency of an equitable suit neither party can alienate the property in dispute so as to affect the rights of his opponent. 2 Pom. Eq. Jur. sec. 633.

[5]Hall vs. Jack, 32 Md. 253, 264; Stockett vs. Goodman, 47 Md. 54, 60.

admitted as parties, in the discretion of the court, when other parties would not be prejudiced thereby.[1]

§ 48. **Process and appearance.** These titles indicate the means whereby parties are made. Plaintiffs always, and defendants sometimes, submit themselves personally to the jurisdiction of the court by voluntary appearance, ordinarily through their solicitors. The authority of the solicitor is presumed. A general appearance is equivalent to service of process, and waives all defects therein. A special appearance does not. No process in equity can issue until after the filing of a bill. The process for defendants within the jurisdiction of the court is the subpœna, and for non-resident defendants an order of publication.[2] Due service of subpœna gives plenary jurisdiction *in personam*, while due publication gives a limited jurisdiction in *rem*. One makes actual, the other constructive parties.[3] The subpœna differs from the writ of summons at law in two respects: 1. It cannot be issued before the pleadings. 2. It is directed to the defendants personally and not to the sheriff. The rules as to service and return of process do not differ

[1] Mellen vs. Moline, 131 U. S. 353, 371; Chenowith vs. Smith, 29 Md. 18, 23; Foley vs. Bitter, 34 Md. 646, 649; Rhodes vs. Amsinck, 38 Md. 345, 350, Brown vs. Thomas, 46 Md. 636, 641; Bridge Co. vs. Bannon, 47 Md. 130. 156 U. S. 518

[2] 1 Md. Code, Art. 16, secs. 105, 106, 108, 112, 114, 115; Carey's Forms, No. 733.

[3] See *ante*, sec. 29.

materially from those in actions at law.[1] Service must be made upon persons under disability, as well as upon their legal representatives. There is no provision in Maryland for substituted service, but defendants who evade service may be proceeded against as non-residents.[2] Merely naming a person in a bill as a defendant does not make him a party, unless process is prayed against him.[3]

Anciently the mode of appearance was by the party's actual attendance, and after service of subpœna and default of appearance or answer, the defendant was further pursued (1) by attachment for contempt, (2) by attachment with proclamations, (3) by commission of rebellion, (4) by search by the sergeant-at-arms, and (5) by sequestration.[4] Of these Nos. 3 and 4 are abolished,[5] and Nos. 1, 2 and 5 recognized by statute,[6] and the plaintiff has still theoretically his election to resort to them.[7] This cumbrous chain of process has in practice been altogether superseded by the simpler and speedier method of at once taking the bill *pro confesso*, after a default in either appearing or answering.[8]

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[1] 22 Am. and Eng. Ency. 107.
[2] Md. Code, Art. 16, sec. 108.
[3] Binney's case, 2 Bland 99, 106; White vs. Davis, 48 N. J. Eq. 24.
[4] Bl. Com. 444; Alex. Ch. Prac. 20.
[5] Md. Code, Art. 16, sec. 168.
[6] *Ibid.* secs. 172–174, 168.
[7] *Ibid.* sec, 175.
[8] *Ibid.* 127–130.

CHAPTER III.

EQUITY PROCEDURE. PLEADING AND EVIDENCE.

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§ 49. **Pleading.** The maxim that "equity regards substance rather than form," understood within reasonable limits, has been a controlling factor in shaping the system of equity pleading. The substantial rights of parties are not sacrificed to the letter of the

rule.[1] The same precision and technical exactness are not required as in common law pleading.[2] One important reason for this has been already indicated in the absence of jury trial.[3] In this country, the English chancery rules of pleading have been somewhat relaxed in practice.[4] The character of a bill, for instance, is determined rather by the allegations and relief prayed, than the title it assumes. Thus a creditor's bill will operate as such, although filed on behalf of a single creditor only.[5] When a bill is filed for relief, nominally in one character, and facts are alleged showing title to relief in another, relief will be granted according to the allegations and proof.[6]

When the facts of the case disclose an equitable title to relief impossible to be afforded upon the allegations of the bill, the appellate court may remand the case to the court below for an amendment of the pleadings and such further proceedings as may be just.[7] A decree, although erroneous, will not be reversed for a departure from technical rule when no

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[1] Kneeland vs. American Loan Co., 138 U. S. 509, 512; Adkins vs. Edwards, 83 Va. 306.

[2] Grove vs. Rentch, 26 Md. 367.

[3] *Ante*, sec. 22.

[4] Ridgely vs. Bond, 18 Md. 433, 450.

[5] Gibson vs. McCormick, 10 G. & J. 65, 100; Simms vs. Lloyd, 58 Md. 477, 481.

[6] Wootten vs. Burch, 2 Md. Ch. 190; Ridgely vs. Bond, 18 Md. 433, 450.

[7] Wiggins vs. Railway, 142 U. S. 396, 415; Jeffrey vs. Flood, 70 Md. 42.

substantial harm has been done.[1] Many other instances might be cited to show that in administering the rules of equity pleading, the ends of substantial justice are not sacrificed to mere form.[2] Some of the rules relating to *pleas* in equity are quite artificial, and the learning in that department is abstruse and sometimes obscure, but in general the rules of equity pleading are simple and liberal. Conscience, good faith and reasonable diligence are the spirit of the system. Sometimes, however, behind a technicality there is substance.[3] Even a court of equity must insist upon reasonable compliance with its established forms of procedure, adopted for the general purposes of justice, to prevent surprise, and for the more convenient despatch of business.[4] It is, for instance, quite obvious that a decree of a court of equity upon oral allegations, without written pleadings, would be an idle act.[5] Even the liberality of code pleading does not admit recovery upon a cause of action altogether different from that claimed.[6]

The object of pleading being to give *notice* to the court and to the adverse party of the real grounds of claim and defence, its essential requisites are that its matter should be true, intelligible, and pertinent.

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[1]Bigham's Appeal, 123 Pa. 262; Rice vs. Edwards, 131 U. S. Appendix, CLXXV.

[2]Hardin vs. Boyd, 113 U. S. 756; Fearey vs. Hayes, 44 N. J. Eq. 425, 426.

[3]Westmoreland vs. Fielder, (1891) 3 Ch. 15, 26.

[4]Knowles vs. Roberts, 38 Ch. D, 263, 270; Trotter vs. Hecksher, 41 N. J. Eq. 478, 479; Commonwealth vs. Perkins, 124 Pa. 36.

[5]Windsor vs. McVeigh, 93 U. S. 274, 283.

[6]Reed vs. McConnell, 133 N. Y. 434.

Its truth, if denied, is tested by proof, and determined by the court, upon issue joined by replication. Vagueness, obscurity and ambiguity are, in a bill, defects that may be availed of by a demurrer for uncertainty, in a plea or answer, by setting the same for argument, which is equivalent to a demurrer, and by exceptions to the answer for insufficiency. Impertinence or irrelevancy, especially when it savors of scandal, or tends to prolixity, will be expunged on motion, or exception.[1]

Besides these, there are formal requisites adopted for convenience, to guaranty good faith, and to prevent surprise and delay. Such are, the division of the bill and answer into numbered paragraphs, the affidavit required to special classes of bills, and to all demurrers and pleas, and the various regulations as to time, manner and circumstance. The division into numbered paragraphs is simply a restoration of the pleading by "allegation" of the ecclesiastical courts, based upon Roman procedure. Each allegation, or separate paragraph, should properly contain a distinct fact with its group of subordinate circumstances, so far as essential to color the fact, omitting those minute circumstances which are merely matter of evidence.[2]

§ 50. **The pleadings.** All the pleadings in a modern equity suit may be, and frequently are,

[1] U. S. Equity Rules 26, 27; Md. Code Art. 16, Sec. 131; Sto. Eq. Pl. sec. 266, 862.

[2] Pomeroy on Rem. sec. 506.

comprised in bill and answer. The formal replication is simply a punctuation mark, of such value as the plaintiff elects to give it; a full stop, if satisfied with the answer; a colon, if proof is required. To avoid prolixity and reach promptly the real merits, the series of allegations on the part of the plaintiff which, under the old system, would find place in bill, special replication, surrejoinder and so on, are now incorporated in the original or amended bill, and all defences that formerly appeared in answer, special rejoinder, or any of the successive pleadings, open to a defendant, are now condensed in the answer.[1] Although all defences to the merits and objections to defect of parties, may be availed of in the answer,[2] demurrers are resorted to when a bill is defective in form,[3] or substance.[4] The learning of pleas is at once the most difficult and the most useless part of the system, and cases are now rare in which a plea is found preferable to an answer.[5]

§ 51. **Special case.** Formal pleadings by bill and answer may be dispensed with by agreement submitting a question of construction of any statute, deed, will, or other instrument of writing, or other matter in controversy, to the court, in the form of a special

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[1] Wade vs. Pulsifer, 54 Vt. 45, 69.

[2] U. S. Eq. Rule, 39, 52; Md. Code, Art. 16, sec. 142, 163.

[3] 1 Foster's Fed. Pr. sec. 110.

[4] *Post*, sec. 59.

[5] Drewry, Eq. Pl. 64; Heard, Eq. Pl. 85; Beames on Pleas, 61; 1 Foster's Fed. Pr. sec. 143.

case stated. In such special case, married women may join with their husbands, and infants and lunatics by their guardians or committees. It is regularly entitled and docketed and treated, for all purposes, as if instituted by formal pleading. Such facts and documents are concisely stated in numbered paragraphs as may be necessary to enable the court to decide the question raised, and the decree thereon is enforced and appealed from as other decrees. No rights are affected other than those of parties and those claiming under them.[1]

This procedure has not been adopted and is not recognized in federal practice.[2]

§ 52. **The bill.** The bill in equity is historically cognate with the bill in parliament, which in its early form consisted of a statement of grievances and a prayer for relief.[3] These are the two essential parts of the modern bill in equity, with a formal introduction, and a closing prayer for process.[4]

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[1] Md. Code, Art. 16, secs. 184-186, following 13 and 14 Vict. ch. 35, modified by Chan. Order No. 34; Morgan, ch. 400. See Carey's Forms, Nos. 634, 635. Flook vs. Hunting, 76 Md. 178. § 97U(,4(

[2] 1 Foster's Fed. Pr., sec. 296.

[3] See the preamble to Stat. of Uses, 27 Henry 8, ch. 10; Alex. Br. Stat. 293.

[4] Md. Code, Art. 16, secs. 132, 133, 134, Carey's Forms, No. 606. Formerly the bill contained nine parts, in the following order: 1, the address; 2, the introduction; (these two parts are now considered as one, containing the name of the court, and the names of the parties, and in the federal courts, their citizenship); 3, the premises, or stating part, (still retained of course, as the substance of the complaint); 4, charge of confederacy, (now omitted);

Suits in equity are commenced by bill, the term "bill" embracing also petition or information.[1] Petitions will be mentioned further on. An information differs from a bill only in name and form, and is a bill filed by the attorney-general, or other proper officer, in behalf of the state, or of those whose rights are the objects of its protection.[2]

§ 53. **Classification of bills.** The most general division is into bills original and bills not original. Original bills relate to matters not before litigated in the same court by the same parties. Bills not original relate to some matters already litigated in the same court by the same parties.[3] Original bills are again subdivided into bills praying relief and bills

5, charging part, in which evidence to sustain the complaint was often set forth in detail, and hypothetical suggestions made and denied of pretended defences, (now omitted, except when the plaintiff really anticipates an expected defence); 6, jurisdiction clause, (formal allegation of want of legal remedy, now omitted); 7, interrogating part, (now omitted, but special interrogations may be appended); 8, prayer for relief; 9, prayer for process, (the last two are retained.) Sto. Eq. Pl. sec. 26, &c; Md. Code, Art. 16, sec. 143.

[1] Md. Code, Art. 16, sec. 119.

[2] 1 Foster's Fed. Pr. sec. 63.

[3] Such as amended and supplemental bills, bills of revivor, bills both of revivor and supplement, cross-bills, bills of review, a bill to impeach a decree for fraud, a bill to suspend or avoid a decree, a bill to carry a decree in a former suit into execution, and bills in the nature of such bills as have just been mentioned. Sto. Eq. Pl. secs. 16, 20, 21; 1 Foster's Fed. Pr. sec. 64; 6 Am. and Eng. Ency. 729; Barton, Suit in Eq. 28. Cross bills, bills of review, &c., are otherwise styled bills in the nature of original bills. 4 Minor Inst. 1126-1139.

not praying relief. Of the latter class there are but two, bills for the perpetuation of testimony, and bills of discovery proper.[1] The sole object of these bills when used, was in aid of an action at law, and, in modern practice, they have been superseded by statutory reforms in the law of evidence.[2] Original bills praying relief are those most frequently encountered in practice, and the relief prayed may be either preventive, as by injunction, or remedial, as by specific performance, cancellation, reformation, &c.

§ 54. **Contents of the bill**. The essential parts of the bill have been already mentioned.[3] All bills and petitions are now divided into numbered paragraphs, each containing a succinct but complete statement of fact, the same requirement being applicable to special prayers for relief. The bill contains simply a statement of the facts upon which the plaintiff asks relief, and, at his option, the facts which are intended to avoid an anticipated defence, and such averments as may be necessary to entitle the plaintiff to relief, and the prayer for relief particularly specifies the relief desired, and also contains the prayer for general relief. An injunction, or other writ, or special order required, should be specially prayed for, but need not be repeated in the prayer for process. The names of all

[1] Sto. Eq. Pl. sec. 19.

[2] Making parties competent witnesses: Md. Code, Art. 35, secs. 1-5; providing for discovery and production of documents, *Ibid.* Art. 75, sec. 94.

[3] *Ante*, sec. 52.

the parties are given in the introduction, and the prayer for process or for order of publication contains the names of all defendants, with their places of residence, so far as known, designating such defendants as are known to be under disability.[1] To every bill the signature of counsel must be annexed, and in a few exceptional cases the bill is supported by affidavit.[2]

§ 55. **Its allegations.** Every material fact should be stated upon which relief is sought. The decree is *secundum allegata et probata*, and, in general, no decree can be had upon proof or admissions not founded upon some allegation in the bill.[3] The facts should be set forth with reasonable certainty.[4] And *facts* should be stated, not merely conclusions of law. The court must be enabled to see that the conclusions are well founded.[5] While the allegations

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[1]Md. Code, Art. 16, secs. 132, 133, 134; 1 Foster's Fed. Pr. secs. 65–67.

[2]Sto. Eq. Pl. sec. 47; 1 Foster's Fed. Pr. secs. 86, 87. An affidavit is generally required to a bill for injunction or receiver; to a bill for relief for lost instruments; to a bill of interpleader; and in the federal courts, to a stockholders' bill against a corporation. *Ibid*, Alex. Ch. Pr. 16. Signature of counsel may be dispensed with by plaintiffs' acknowledgment of his signature before a justice of the peace. Rule 2, Circuit Court Baltimore, and C. C. No. 2.

[3]Sto. Eq. Pl. sec. 257; Jeffrey vs. Flood, 70 Md. 42. But care must be taken to except to testimony not sustained by the bill, otherwise a decree may be passed upon proof not thus excepted to Schroeder vs. Loeber, 75 Md. 195, 201.

[4]Sto. Eq. Pl. sec. 240; 1 Foster's Fed. Pr. sec. 69.

[5]Lamm vs. Burrell, 69 Md. 272.

should be specific and definite,[1] it is not necessary to set forth minute circumstances of proof, but the allegations will suffice if they fairly apprise the defendant of the case made against him and of the defence required.[2] There are some cases in which the rules as to certainty are applied with peculiar stringency.[3] A bill must not state inconsistent grounds of relief, but bills with a double aspect are allowed, when the facts are of a different nature, but the relief is identical, and alternative relief may be prayed according to the conclusion of law that the court may draw from the facts stated.[4] Lengthy documents are not to be copied into the bill. They are filed as exhibits, and their contents succinctly stated upon the pleaders' theory of their true construction and legal effect. Such theory is not admitted by a demurrer.

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[1]Worthington vs. Lee, 61 Md. 530, 535.

[2]Canton vs. McGraw, 67 Md. 585; U. S. vs. Bell, 128 U. S. 356.

[3]*e. g.* in bills anticipating the defence of laches by the allegation of recent discovery. Felix vs. Patrick, 145 U. S. 317, 332. When fraud is charged, the particulars which constitute the fraud must be distinctly alleged. Wenstrom Co. vs. Purnell, 75 Md. 113, 120; Ambler vs. Chotean, 107 U. S. 586, 591; Wallingford vs. Mutual, 5 App. Ca. 686, 697, 701.

[4]Sto. Eq. Pl. sec. 254; 1 Foster's Fed. Pr. sec. 70. Thus, in a bill for an account and delivery of property, the plaintiff may claim either as devisee or as heir-at-law. Gaines vs. Chew, 2 How. 619, 643. A bill for the cancellation of a contract may pray in the alternative for the enforcement of a vendors' lien. Hardin vs. Boyd, 113 U. S. 756, 763. A case may be stated in the alternative aspect of a conveyance upon trust, or else as an absolute sale with an incident equitable lien. Lingan vs. Henderson, 1 Bland, 236, 252. Charges both of fraud and mistake in the same transaction may be coupled, and the bill sustained upon one, if the other fail. Williams vs. U. S. 138 U. S. 514, 517.

§ 56. **Filing the bill.** The draft of the bill having been settled, revised and legibly copied (preferably in typewriting or print), is then endorsed with the names of the parties and an order to the clerk to issue process. The bill, together with all exhibits mentioned therein, conveniently numbered for reference, is then filed at the office of the clerk, who endorses the date of the filing, makes the proper entries upon the docket, and forthwith issues the proper process.[1] This is called the "exhibiting" of a bill. No process can issue until the bill and exhibits are thus filed.[2]

§ 57. **Taking the bill** *pro confesso*. Upon default of any adult defendant not insane in failing to appear and answer, plead or demur, within the limits prescribed,[3] the bill may be taken *pro confesso*, which corresponds to a judgment by default, and the case is proceeded with *ex parte* as against the defaulting defendant. If no defence be still interposed, and the bill presents a proper case for relief, a final decree may be had after thirty days from the date of the order *pro confesso*. Or the court may order

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[1] *Ante*, sec. 48; Alex. Ch. Pr. 16.

[2] Md. Code, Art. 16, sec. 120; U. S. Eq. Rules, 11, 12.

[3] Defendants have fifteen days from the time of the return of process served within which to enter an appearance, and twenty days more to answer, etc., unless the time be enlarged by special order. Md. Code, Art. 16, sec. 126. In the federal courts the appearance is to be entered on or before the return day, and the answer, etc., to be filed on or before the next succeeding rule day. U. S. Equity Rules, 12, 18.

the allegations of the bill to be supported by proof.[1] The defendant is not precluded from contesting the sufficiency of the bill, or from insisting that its averments do not justify the decree. The decree must be strictly in line with the matter of the bill, and a departure will be available on appeal.[2]

§ 58. **The defence.** The several modes of defence in equity are by disclaimer, demurrer, plea, answer (either with or without cross-bill), and in rare cases by objection taken at the hearing. The opportunity for pure disclaimer is seldom presented, and an answer is generally required in explanation. It must be explicit in renouncing all claim or interest.[3]

§ 59. **The demurrer.** The office of a demurrer is the same as at law, although in equity it lies only to the bill.[4] Its object is to avoid discovery, and to prevent delay and expense. It admits, for the purposes of the demurrer, all the facts alleged in the

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[1] Md. Code, Art. 16, sec. 127-130; Carey's Forms, Nos. 694, 734; 1 Foster's Fed. Pr. sec. 103, 104; Ad. Eq. 329, note; Thomson vs. Wooster, 114 U. S. 104; Hefner vs. Insurance Co., 123 U. S. 756; Ohio R. R. vs. Trust Co., 133 U. S. 83; Rust vs. Lynch, 54 Md. 636.

[2] Ohio R. R. vs. Trust Co. 133 U. S. 83.

[3] Carey's Forms, No. 643; Sto. Eq. Pl. sec. 838; 1 Foster's Fed. Pr. sec. 155; Worthington vs. Lee, 2 Bland 678; Bentley vs. Cowman, 6 G. & J. 152. It was formerly required, like an answer, to be under oath. Alex. Ch. Pr. 62; Barroll, Md. Ch. Pr. 107.

[4] Madigan vs. Workingmen, 73 Md. 317; Rouskulp vs. Kershner, 49 Md. 521. In a somewhat anomalous case a demurrer has been entertained to a motion of *ne recipiatur* to a plea. Bush vs. Linthicum, 59 Md. 354.

bill that are "well pleaded," but nothing more.[1] It does not admit the plaintiff's conclusions of law, nor his theory of the construction of instruments.[2] A "speaking demurrer" is one which brings in facts outside the bill, and is always overruled.[3] The most usual grounds of demurrer are: for want of jurisdiction, as where the remedy is at law;[4] for want of equity on the whole merits of the case;[5] for want of interest in the plaintiff;[6] for any defect of parties apparent on the bill;[7] for want of certainty;[8] for multifariousness;[9] for laches or limitations.[10]

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[1]Miller vs. Marble Co., 52 Md. 643, 646.

[2]Reddington vs. Lanahan, 59 Md. 429, 437; Fogg vs. Blair, 139 U. S. 118; U. S. vs. Des Moihes Co., 142 U. S. 544; Kent vs. Canal Co., 144 U. S. 91; Ankeny vs. Hannon, 147 U. S. 118, 130; Dillon vs. Barnard, 21 Wall. 430, 437; Interstate vs. Maxwell, 139 U. S. 569; Louisville, &c., R. R. vs. Palmes, 109 U. S. 244, 253. In Felix vs. Patrick, 145 U. S. 317, 333, it is said that allegations are not admitted which it is "very improbable" that the plaintiff could prove.

[3]Sto Eq. Pl. sec. 448.

[4]Arrowsmith vs. Gleason, 129 U. S. 86, 95. In the federal courts this objection may be taken at the hearing, or by the court *sua sponte*, even on appeal. Allen vs. Pullman, 139 U. S. 658. Otherwise by Md. Code, Art. 5, sec. 35; Biddinger vs. Willard, 67 Md. 363; Shryock vs. Morris, 75 Md. 76.

[5]Taylor vs. Mallory, 76 Md. 1; Huntington vs. Attrill, 146 U. S. 657; Hedges vs. Dixon County, 150 U. S. 182; Edes vs. Garey, 46 Md. 24; Carey's Forms, No. 854.

[6]Sellman, 63 Md. 520; Hamilton vs. Traber, 27 Atl. Rep. 230, 77 Md.

[7]Gregory vs. Stetson, 133 U. S. 579, 585.

[8]Riley vs. Carter, 76 Md. 581, 599; Goldsmith vs. Gilliland, 22 Fed. 865.

[9]Carey's Forms, No. 858; *Ante*, sec. 40.

[10]Biays vs. Roberts, 68 Md. 510; Noble vs. Turner, 69 Md. 519; Norris vs. Haggin, 136 U. S. 386; Bank vs. Carpenter, 101 U. S. 567.

Demurrers are said to be viewed with disfavor,[1] and are not generally advisable where the defect may be readily avoided by amendment.[2] Where the defect is radical and incurable, and appears upon the face of the bill, the demurrer is the proper defense. Other points relating to the topic will be next mentioned, in connection with pleas, to avoid repetition.

§ 60. **Demurrer or plea.** Both instruments have several points in common. They are borrowed from the common law. They have the same object, to avoid discovery, and prevent delay, although practically their effect is sometimes to secure delay. Both may be filed with an answer, and may be to the whole bill, or to a part.[3] Neither is allowed unless supported by an affidavit that it is "not intended for delay."[4] Either may be set down for argument by the plaintiff, and if he does not, by the defendant.[5] Upon the allowance of either, the plaintiff may obtain leave to amend, in the discretion of the court, and upon terms.[6] Upon the overruling of demurrer or plea, the defendant is required to answer the bill, or the part unanswered, and in default thereof, or if

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[1] Chappell vs. Funk, 57 Md. 465, 472.

[2] Md. Code, Art. 16, sec. 139; unless the amendment would be of some use to the plaintiff.

[3] Md. Code, Art. 16, sec. 135.

[4] *Ibid.* Art. 16, sec. 136, and, if a plea, that it is true in fact. Sheffield vs. Witherow, 149 U. S. 574; Wagoner, 76 Md. 311.

[5] Md. Code, Art. 16, secs. 137, 138.

[6] *Ibid.* sec. 139.

the demurrer or plea be found frivolous, and interposed for vexation or delay, a decree may be taken *pro confesso.*[1]

Without resort to demurrer or plea, the ground of either, if a defence to the merits, may be availed of by answer.[2] There may be demurrer to part of the bill, plea to part, and answer as to the residue.[3]

§ 61. **The plea.** This is not a frequent mode of defense in modern practice.[4] The learning of pleas is the most technical department of equity procedure. It flourished when bills were prolix, when answers entailed much expense, and when the taking of evidence sometimes dragged through years. All this is now simplified and expedited, and the utility of pleas is consequently diminished. The most recent writers discourage their use, except in abatement, or in rare cases.[5] There is no general issue plea in equity. A plea in equity is a special answer, relying upon some fact or facts tending to a single point, sufficient to bar or delay the suit. An affirmative, otherwise called a pure plea, sets up

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[1] *Ibid.* sec. 140. Carey's Forms No. 856. If demurrer or plea be overruled, or withdrawn without leave, the defendant is liable to a forfeit of ten dollars and costs, and to be in contempt until paid, unless otherwise ordered. *Ibid.* sec. 141.

[2] *Ibid.* sec. 142.

[3] *Ibid.* sec. 135. 88 Md. 662

[4] Rouskulp vs. Kershner, 49 Md. 516, 521.

[5] 1 Foster's Fed. Pr. sec. 143; Drewry Eq. Pl. 64; Heard Eq Pl. 85. 148 U.S., 31

new matter as a defense, outside the bill.[1] A negative, by some also called an anomalous, plea, merely denies some material allegation of the bill.[2] The first corresponds to the common law plea in confession and avoidance, and the second to the traverse. Besides these there is a third form of plea, by some writers called anomalous, which is a plea supported by an answer.[3] It sets up a fact in avoidance of the bill, and is so far affirmative, but the fact is one which has been anticipated and replied to in the bill, and to the extent that the plea meets and denies this anticipatory allegation, the plea is also negative, and to that extent must be supported by an answer.[4]

§ 62. **Pleas in abatement.** Pleas in abatement correspond to the declinatory and dilatory exceptions of the civil law. They are to the jurisdiction, to the person and to the bill. Pleas to the *jurisdiction* are that the subject of the suit is not within the jurisdiction of equity, or that some other court of equity has proper jurisdiction of the case, or that

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[1] Carey's Forms No. 653.

[2] Carey's Forms, No. 644.

[3] Carey's Forms, No. 749.

[4] Lang. Eq. Pl. sec. 101; 1 Foster's Fed. Pr. sec. 124; Sto. Eq. Pl. sec. 651. Upon this particular branch of the subject the learning is the most subtle and not always harmonious. Unless a sworn answer is required, a plea supported by an answer is no longer necessary. Cheatham vs. Pearce, 89 Tenn. 679; 1 Barbour Ch. Pr. 128. It may be regarded as practically superseded by modern provisions, for all such defenses being taken by answer. Md. Code, Art. 16, sec. 142; U. S. Eq. R. 39.

the defendant has not been properly served with process. Pleas to the *person*, as that the plaintiff is an infant without *prochein ami*, or a receiver suing without leave of court, or that he is not the person he pretends to be, not administrator, not heir, not partner, &c. Pleas to the *bill*, as that there is a former suit in equity pending in the same state,[1] or, that there is a defect of parties, in which case the names of omitted parties must be given.[2]

§ 63. **Pleas in bar.** Correspond to the peremptory exceptions of the civil law, and are founded upon *statute*, such as the statute of frauds,[3] of limitations, of usury, &c. Upon matters of *record*, such as the plea of *res judicata* by former judgment or decree[4] or upon matter *in pais*, such as the plea of payment, release, account stated, award, and of purchase for valuable consideration without notice.[5]

§ 64. **Pleas in general.** If the facts of the plea are admitted or assumed to be true, but their legal effect controverted, the plea is not demurred to,[6] but is "set down for argument."[7] If the plea be

[1]Carey's Forms, No. 653; Insurance Co. vs. Brune, 96 U. S. 592; Seebold vs. Lockner, 30 Md. 133; Liggett vs. Glenn, 4 U. S. Ap. 438.

[2]1 Foster's Fed. Pr. sec. 125-130.

[3]Carey's Forms, No. 864.

[4]Royston vs. Horner, 75 Md. 557, 560; Wagoner, 76 Md. 311.

[5]1 Foster's Fed. Pr. secs. 131, 133; Sto. Eq. Pl. secs. 795–815.

[6]As stated in Barr. Md. Ch. Prac. 112, and inadvertently sanctioned in 54 Md. 214.

[7]Sto. Eq. Pl. sec. 697; Rouskulp vs. Kershner, 49 Md. 516, 521; Farley vs. Kittson, 120 U. S. 303, 314.

allowed, nothing remains in issue, so far as the plea extends, but its truth, which may then be denied by replication and determined by proof.[1] If proved to be true, the facts stated in the plea "shall avail the defendant as far as in law or equity they ought to be available, but no farther."[2]

If disproved, the plea is overruled and the defendant ordered to answer.[3]

§ 65. **The answer.** It has been already remarked that in equity procedure there is no plea of the general issue.[4] Facts not disputed are required to be admitted by an answer. Formerly an answer was invariably required to be sworn to,[5] and could be used by the defendant as evidence. Not only so, but as the plaintiff was, by reason of interest, an incompetent witness in his own behalf, the answer was conclusive so far as responsive to the allegations of the bill, unless contradicted by two disinterested witnesses, or by one witness corroborated by circumstances equivalent in weight to a second witness.[6] Now,

[1] Rouskulp vs. Kershner, 49 Md. 516, 522.

[2] 1 Md. Code, Art. 16, sec. 137; U. S. Eq. Rule 33. These provisions modify the old English chancery practice, under which the bill was dismissed without reference to other allegations of the bill than those encountered by the plea. Farley vs. Kittson, 120 U. S. 303, 314.

[3] 1 Md. Code, Art. 16, sec. 140; Dalzell vs. Dueber, 149 U. S. 315. /5

[4] *Ante*, sec. 61.

[5] The old spelling was *answeare*.

[6] Feigley, 7 Md. 537; 2 Sto. Eq. Jur. sec. 1528. Irresponsive matter, setting up new facts in avoidance, required independent proof. *Ibid.* sec. 1529; St. Eq. Pl. sec. 849 a.

however, an answer need not be under oath unless required by the plaintiff, nor is it evidence, whether sworn to or not, unless used as such by the plaintiff.[1]

The answer is the usual, and in most cases the advisable defence. Any defence to the merits which could be raised by demurrer or plea can be relied on in the answer. Its function is two fold, that of discovery and defence; and it is a two fold instrument, both of evidence and of pleading.[2] Its utility for purposes of discovery and evidence is of less importance than formerly, for reasons that have just been explained, and also by reason of modern legislation removing the disability of interest from witnesses. Like the bill, it is paragraphed, and every material allegation of the bill must be answered, (that is admitted or denied, or knowledge disclaimed.)[3] But the defendant may decline to answer irrelevant matter, or anything which might subject him to any punishment or penalty,[4] or which involves a breach of professional confidence, and upon such declination the matter may be set for hearing by either party on short notice.[5]

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[1]Md. Code, Art. 16, sec. 146; U. S. Eq. Rule 41; U. S. Rev. St. sec. 858. Motions to dissolve an injunction or to discharge a receiver, are still under the old rule, and on such motions, and also upon motions to grant an injunction or appoint a receiver, or on any other incidental motion, an answer under oath may be used with the same effect as heretofore. 1 Md. Code, Art. 16. secs. 146, 147. See U. S. Rev. Stat. sec. 858; U. S. Eq. Rule 41. 88-249

[2]Ad. Eq. 342, 343.

[3]1 Md. Code, Art. 16, sec. 142; Carey's Forms, No. 663.

[4]Dennison vs. Yost, 61 Md. 140.

[5]Three days. 1 Md. Code, Art. 16, sec. 144; see U. S. Eq. Rule 44. After the defendant has put in his answer, he may file interroga-

§ 66. **Exceptions to answer.** Contrary to the rule of the common law, that every pleading is taken to confess such traversable matter alleged on the other side as it does not traverse,[1] an omission to deny a material averment of a bill in the answer is not an admission.[2] A respondent submitting to answer must answer fully, but if the answer be insufficient to meet the allegations and interrogatories of the bill, the plaintiff cannot rely upon silence, but must prove his allegation, or if he desires a fuller response he must except to the answer for insufficiency.[3] The exceptions must be in writing, signed by counsel, specifying the particular points in the answer that are objected to.[4] They are heard on short notice,[5] and if the exceptions are sustained the effect is the same as if no answer had been filed,[6] and the defendant may be pressed by exceptions until he answers fully and explicitly.[7] The answers of

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tories to be answered by any plaintiff. Answers to interrogatories by either side are due within thirty days, unless the time be extended by special order, and such answers may be compelled by attachment. 1 Md. Code, Art. 16, sec. 143.

[1]Zihlman vs. Cumberland Glass Co. 74 Md. 303, 307.

[2]1 Foster's Fed. Pr. sec. 146.

[3]Warfield vs. Gambrill, 1 G. & J. 503; Litch vs. Clinch, 136 Ill. 410. The cogent reasoning of Chancellor Bland to the contrary of this proposition will be found instructive. Neale vs. Hagthorp, 3 Bland 569–578.

[4]Alex. Ch. Pr. 64; Carey's Forms, No. 686.

[5]Five days. Md. Code, Art. 16, sec. 144; costs and solicitor's fee may be awarded to prevailing party, *ibid.* 158.

[6]Keighler vs. Savage Co. 12 Md. 412.

[7]Rider vs. Risley, 22 Md. 540.

persons under disability are not liable to exception for insufficiency.[1] Exceptions should be substantial, not captious. They are less important than formerly, since now the defendant may be compelled to testify as a witness. An answer may also be excepted to for impertinence and scandal, and such exceptions should be disposed of before exceptions for insufficiency. Nothing is scandalous which is responsive or relevant.[2]

§ 67. **Cross-bill.** An answer is a defensive pleading, and if the defendant seeks affirmative relief, germane to the suit, against the plaintiff or a co-defendant, he must in general file a cross-bill.[3] The principal exceptions to this are in cases of account and specific performance.[4] Cross-bills for discovery only are not allowed, the defendant being at liberty to file interrogatories to the plaintiff. The rules regulating the form of bills apply to cross-bills.[5]

§ 68. **Proceedings upon answer.** After answer filed, the plaintiff has one of five alternatives. 1. He may except to the answer.[6] 2. He may amend his bill. 3. He may dismiss his bill, on payment of

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[1] Alex. Ch. Pr. 64.

[2] 1 Foster's Fed. Pr. sec. 147; Sto. Eq. Pl. sec. 867.

[3] Sto. Eq. Pl. sec. 389.

[4] Lang. Eq. Pl. sec. 156.

[5] 1 Md. Code, Art. 16, sec. 145. The tendency of the modern authorities is to dispense with cross-bills, and where possible to make the answer serve the same purpose. Young vs. Twigg, 27 Md. 620, 632; Alex. Ch. Pr. 111.

[6] *Ante*, sec. 66.

costs.[1] 4. He may set the case for hearing. Or, 5. He may file the general replication. There is no demurrer to an answer; the equivalent is to set the case for hearing on bill and answer, the effect of which is that all well-pleaded averments of the answer, whether responsive or not, are to be taken as admitted.[2]

§ 69. **Replication.** Special replications were formerly used in equity, and were sometimes quite prolix.[3] They are now entirely superseded by amendment of the bill.[4] The general replication is a mere form to close the pleadings and make the issue, without rejoinder or other pleading.[5] If the case is submitted without replication, the answer is to be taken

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[1] Dismissal before hearing is usually without prejudice. Otherwise, when evidence has been taken and the case set for hearing. 1 Foster's Fed. Pr. sec. 291.

[2] Royston vs. Horner, 75 Md. 557, 566; Sto. Eq. Pl. sec. 456, note. When the case is set for hearing upon bill, answer and replication, the averments in the answer will only be taken as proved so far as they are responsive to the bill. *Ibid., Note* 5. But see Iowa vs. Illinois, 147 U. S. 7; Lang. Eq. Pl. sec. 83.

[3] For a remarkable order in a case of this kind see Milward vs. Weldon, 1 Spence Eq. 376, *note.* Another interesting specimen of the special replication may be found in the suit of the parents of Shakespeare vs. Lambert, in Hallowell-Phillips' "Outlines," Vol. II, 16.

[4] U. S. Eq. Rule, 45.

[5] U. S. Eq. Rule, 66; Md. Code, Art. 16, sec. 148, where the form is given. Upon failure to file replication within fifteen days, the defendant shall be entitled to a "rule further proceedings" within ten days after notice, and upon failure to comply with such rule, the bill may be dismissed. *Ibid.*

as true, because the defendant has not had the opportunity to supply proof. Otherwise, when proof has actually been taken. The cause may be at issue by consent, express or implied, without a replication.[1] A replication to a plea admits the plea to be sufficient in law, if the facts be established by proof.[2] A replication to an answer admits its sufficiency as regards discovery only, and is a general denial of its truth and sufficiency as a defence.[3]

§ 70. **Evidence.** The rules in equity as to the admissibility of evidence and competency of witnesses are, in general, the same as at law. The exceptions are:

1. As to the mode of taking testimony. 2. As to the burden of proof in the treatment of fiduciaries. 3. In the quantity of proof required in cases of fraud, mistake and trust.[4]

Evidence, or proof, is a general term, including, first, judicial knowledge and presumptions; second, admissions; third, documentary testimony; and fourth, oral testimony.[5] The matters of which courts

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[1] Hall vs. Clagett, 48 Md. 237; Bank vs. Insurance Co., 104 U. S. 54, 77. And a replication may be allowed to be filed *nunc pro tunc*, but rarely after the case has been heard on bill and answer. 1 Foster's Fed. Pr. sec. 157.

[2] Rouskulp vs. Kershner, 49 Md. 516, 522.

[3] Sto. Eq. Pl. sec. 878; 1 Foster's Fed. Pr. sec. 158.

[4] 3 Greenl. Ev. sec. 250-255. To these may be added, 4th, admissibility in equity of parol testimony to vary or defeat written instruments in cases of trust, accident, mistake or fraud, or to avoid the statute of frauds by parol proof of part performance, or to convert an absolute deed into a mortgage. *Ibid*, sec. 360-365.

[5] 3 Greenl. Ev. sec. 268.

take judicial notice are the same in equity as at law.[1] Admissions may be *express*, as by the pleadings, or by agreement in writing, or orally, in open court; or they may be *implied*, as by setting a case for hearing on bill and answer, or by default in allowing a *pro confesso*, or by a demurrer, or by a plea, which is taken to admit so much of the bill as is not denied.[2] Documentary testimony is presented in the form of exhibits, duly proved and filed, and of books and papers required to be produced by the court upon application.[3] Oral testimony, as distinguished from documentary, includes testimony given orally, but reduced to the form of written depositions. Depositions may be in the form of *ex parte* affidavits, for which there are special and limited uses,[4] or they may be, and in general must be, taken under order of court, by its officers, upon notice and under cross-examination. The officer before whom such depositions are taken, if within the jurisdiction, is the examiner; and if elsewhere, a commissioner or commissioners.[5]

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[1] 1 Greenl. Ev. chap. 2; 1 Poe, Pl. and Pr. sec. 553.

[2] 1 Foster's Fed. Pr. sec. 264-266.

[3] 1 Md. Code, Art. 16, sec. 24, 25; 1 Foster's Fed. Pr. sec. 267.

[4] Such as affidavits required to pleas and demurrers and to certain classes of bills, *ante*, sec. 54, *note*, and affidavits in the matter of certain interlocutory proceedings.

[5] The powers and duties of examiners in the taking of testimony are detailed in the Code, Art. 16, secs. 216, 223. The first step is the petition to the court for an order granting leave to take testimony. Carey's Forms, No. 612; U. S. Eq. Rule, 67, 69; 1 Foster's Fed. Pr. sec. 284. The mode of taking testimony by commissioners is

The old method of taking depositions, imported from the practice of the ecclesiastical courts, was upon written interrogatories and cross-interrogatories, carefully prepared beforehand, upon which the witnesses were examined privately. The depositions were kept strictly secret until the whole were completed and publication passed, after which no further witnesses could be examined without special leave.[1] No such secresy is observed in modern practice, and no formal order of publication is necessary.[2] Formal written interrogatories are disused except in the case of a commission to take testimony beyond the jurisdiction, where the party or his solicitor may not be able to attend,[3] and the testimony is taken in the presence of parties and their solicitors by *viva voce* question and answer.

§ 71. **Exceptions to testimony.** If the objection be to the *question*, as leading, for instance, an excep-

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prescribed, Md. Code, Art. 16, secs. 227-232, and further regulated in detail by Rules Circuit Court and C. C. No. 2 of Baltimore city, Nos. 4-10; Carey's Forms, No. 618. Depositions upon interlocutory applications may be taken, upon notice, after leave granted, before an examiner or a justice of the peace. Md. Code, Art. 16, sec. 226. There is a provision for taking oral testimony in the presence of the court. *Ibid.* sec. 225; 1890 ch. 86.

[1] 1 Dan. Ch. Pr. fourth Am. ed. 920, 945; Ad. Eq. 367; Winder vs. Diffenderffer, 2 Bland 166, 184-191.

[2] Strikes' case, 1 Bland 57, 96.

[3] Winder vs. Diffenderffer, 2 Bland 166, 190; or in those rare cases where the option to file written interrogatories may still be availed of. 1 Md. Code, Art. 16, sec. 218.

tion should be interposed before the question is answered, and the exception noted by the examiner.[1] In practice, all exceptions to testimony, as "irrelevant," "hearsay," "opinion," "parol to vary written instrument," etc., or to the competency of a witness, are noted at the time by the examiner, at the request of the objecting counsel; but this is unnecessary, except as affording convenient memoranda. To be available at the hearing, and especially upon appeal, exceptions should be in writing, filed in the cause.[2] Exceptions tending to the suppression of depositions for want of notice or other irregularity must be taken within a reasonable time after the return, and if delayed until the hearing, and when too late for the defect to be remedied, they will be considered as waived.[3] Other exceptions are made at the hearing. A demurrer to evidence (inaccurately so called) is where a witness refuses to answer on the ground that the question requires a disclosure of professional confidence, or the answer might subject him to punishment, loss or discredit.[4] The matter is at once reported by the examiner (who has no judicial

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[1] Md. Code, Art. 16, sec. 220; Washington, &c., Co. vs. Davison, 30 Md. 91, 105. 80-406

[2] Md. Code, Art. 5, sec. 34; Young vs. Omohundro, 69 Md. 424.

[3] Barnum vs. Barnum, 42 Md. 251, 295; Howard vs. Stillwell, 139 U. S. 199, 205. The proper time for exceptions of this character is during the ten days after the return of the evidence. 1 Md. Code, Art. 16, sec. 223; Alex. Ch. Pr. 75. 89-416

[4] Alex. Ch. Pr. 72.

power) to the court, which hears and determines the same without delay.[1]

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[1] 1 Md. Code, Art. 16, sec. 220. General questions as to the admissibility of testimony, its relevancy, or the competency of witnesses cannot be raised in this way. Winder vs. Diffenderffer, 2 Bland 166, 191-195. The death of a witness before cross-examination does not necessarily make the testimony previously given inadmissible. Scott vs. McCann, 76 Md. 47.

CHAPTER IV.

EQUITY PROCEDURE. THE DECREE AND ITS INCIDENTS.

72. Hearing and submission.
73. Decree.
74. Decretal order.
75. Costs.
76. Enrollment, rehearing, review.
77. Appeal.
78. Appeal bond.
79. Record—diminution.
80. Dismissal.
81. Exceptions.
82. Rules as to appeals.
83. Execution.
84. Execution of personal decrees.
85. Execution of other decrees.

§ 72. **Hearing and submission.** Equity cases are not transferred, when at issue, from the docket to the calendar, by the clerk, as of course, but await the special order of court, upon application of either side, to set the cause down for hearing on a named day, whether on interlocutory matter, or for final decree, notice being given to the other side,[1]

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[1]See Carey's Forms Nos. 670, 687, 710, 776. If so set before proof taken, the opposite party has ten days to apply for leave to take testimony. Rule 3, C. C. B. C. & C. C. No. 2. Cases set for hearing are taken up in numerical order, *Ibid.* No. 1, and applications for postponement are to be supported by affidavit. *Ibid.* No. 13. See Rule 11, as to absence of counsel.

"Hearing" is a term peculiar to equity procedure, referring to the consideration of a cause or matter by the court, as contradistinguished from "trial," the common law term appropriate to a jury.[1] "The method of hearing causes in court is usually this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side, after which, the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom; and then such depositions as are called for by the plaintiff are read * * * * and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient; and after this the rest of the counsel for the plaintiff make their observations and arguments." Then the defendant's counsel go through the same process for him, and the counsel for the plaintiff are heard in reply.[2] From the above statement, most of which is substantially applicable in this country at the present time, it will appear that the reading *in extenso* of the pleadings and evidence is by no means necessary, although the time-killing process is sometimes resorted to by unprepared counsel in order to understand their own case. The court is at the mercy of counsel in this respect,

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[1] Niles vs. Edwards, 95 Cal. 43; Akerly vs. Vilas, 24 Wisc. 171, 1 Am. Rep. 166.

[2] 3 Bl. Com. 451. As to hearing on bill and answer, see sec. 68.

and must leave very much to their discretion the question of what parts of the record are material and what parts are formal or superfluous or easily susceptible of condensation.[1]

It has been already stated that certain defenses not expressly pleaded may be relied upon at the hearing,[2] but in general such defenses would be regarded as waived. No objection to the jurisdiction can be thus raised, unless in cases in which no circumstances could give it.[3] Whenever any cause is ready for hearing, and agreement is filed submitting it for decree, the decree has the same effect as if passed at a regular term.[4]

§ 73. **Decree.** Judgments at common law have always been regarded as the sentence of the "law," pronounced by the court.[5] A decree in equity was

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[1] After quoting from 1 Dan. Ch. Pr. (5th Am. ed.) 1988, which says that the "evidence is read," Prof. Foster adds, "It is usual here, however, to waive the reading, and for counsel to state merely the substance of the pleadings and testimony, which are submitted to the judge at the conclusion of the oral arguments, with written arguments upon the law and the facts, called briefs or points." 1 Foster's Fed. Pr. sec. 297. Argument is not essential to a hearing, which may be the consideration of the pleadings by the court. Royston vs. Horner, 75 Md. 557, 567.

[2] *Ante*, sec. 58.

[3] Shryock vs. Morris, 75 Md. 72, 77.

[4] Md. Code, Art. 16, sec. 77. In cases submitted without argument, the court will expect briefs. In cases submitted without contest, except in *ex parte* mortgage suits, the papers are referred to the auditor and master for report. Rules C. C. & C. C. No. 2, Rule 12. Those most frequently referred in practice, under this rule, are divorce and partition suits.

[5] 3 Bl. Com. 395-6.

originally the fiat of the chancellor, the expression of his personal conscience.[1] This distinction between judgments and decrees, since the principles of equity have become settled by precedent, has disappeared, although the influence of special circumstances and discretion is still felt to a much greater extent in shaping decrees than in rendering judgments.[2] Judgments at law are short, simple and uniform, while decrees in equity may be variously moulded to meet the reciprocal and complicated adjustments of multilateral controversies.[3]

Decrees are drawn up by the judge only in exceptional cases; ordinarily by the prevailing counsel, subject to suggestions from the other side, and then settled and signed by the judge. They are either interlocutory or final. An interlocutory decree is a decree preliminary to a decree that may be executed or appealed from, and yet it may determine substantial rights. A final decree disposes ultimately of the suit, and may be executed or appealed from.[4]

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[1] 1 Pom. Eq. Jur. sec. 49, 57.

[2] 1 Pom. Eq. Jur. sec. 59.

[3] Seton on Decrees, 1; 1 Spence Eq. 389. The word "judgment" is often used in equity to denote "opinion" as distinguished from decree. Thus we read of the "important judgments of Lord Nottingham," 4 Camp. Lives Chan. 205. "The elaborate judgment of Lord Hardwicke in Penn vs. Lord Baltimore," Smith Prin. Eq. 11. The decree is usually, in cases of any importance, preceded by an opinion, or judgment, either oral or written. See Md. Code, Art. 16, sec. 155. Cases are to be decided within two months, Md. Cons. Art. IV, sec. 23.

[4] Ad. Eq. 375; 1 Fos. Fed. Pr. sec. 318. Examples of interlocutory decrees: a decree *pro confesso;* Carey's Forms, No. 694; for an

Originally, all decrees were *in personam*, enforceable only by fine or imprisonment for disobedience, it being held that the chancellor could not bind the right, but could only coerce the person.[1] In modern practice, the powers of courts of equity have been enlarged by statute so as to bind the right in many cases, and pass decrees *in rem*.[2] These will be considered under the head of "execution." A declaratory decree is one that simply declares or defines the rights of the parties without more.[3]

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account, *ibid.* No. 646; for partition, *ibid.* No. 753; for construction of will and further administration, *ibid.* No. 630. Examples of final decrees: A decree dismissing bill, *ibid.* No. 701; ratifying distribution and construing will, *ibid.* No. 633, on creditor's bill, *ibid.* No. 650; divorce, *ibid.* No. 671; annulling deed, *ibid.* No. 690, reforming contract, *ibid.* No. 703; making injunction perpetual, *ibid.* No. 714; for foreclosure of mortgage, *ibid.* 731; for partition, *ibid.* No. 757, 768; for specific performance, *ibid.* No. 829. From comparing these and other examples the student will form a clearer idea of the distinction between interlocutory and final decrees than from the vague, and sometimes, discordant definitions in the books. A decree for a sale is final, as determining the liability of the property to be sold; it is also interlocutory, as the proceeds of sale are to be distributed, Alex. Ch. Pr. 144; Carey's Forms, Nos. 657, 735, 798, 805, 808. A final decree dismissing bill and discharging receiver, may also dispose of monies deposited to the credit of the suit. Royston vs. Horner, 75 Md. 557, 563. A decree may be final as to some defendants and interlocutory as to others, Hill vs. R. R. Co. 140 U. S. 52; Baltimore vs. Ketchum, 57 Md. 23. It may also be final as to some subjects, and interlocutory as to others, Jackson vs. Hodges, 24 Md. 468, 482.

[1] 1 Spence Eq. 391.

[2] 5 A. and E. Ency. 380.

[3] Md. Code, Art. 16, sec. 26-32. To obtain a declaratory decree there must be an existing propriety for the immediate decision of a *bona fide* controversy, the question must be one of strictly equitable

In cases where a prompt decision of the appellate court is desired by all parties, it is usual to submit to a *pro forma* decree, but agreements prescribing special terms for the hearing on appeal and for the award of costs can have no effect in the appellate court.[1]

§ 74. **Decretal order.** A decretal order is an order in the nature of a final decree, and in general subject to the same principles, such as an order to pay money into court,[2] or the final order ratifying an auditor's report.[3]

§ 75. **Costs.** The decree usually disposes of the question of costs. Costs as between party and party are confined to the taxed costs allowed by statute or

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cognizance, and the plaintiff must be unable to seek other relief than a mere declaration of title. Pennington, 70 Md. 418; McCoy vs. Johnson, 70 Md. 490. Provision is made for trial by jury in suits of this nature of questions as to which parties have a constitutional right to such trial, 1890 Ch. 64.

[1] Livingston vs. Hall, 73 Md. 386. In the case of *pro forma* decrees, as of others, the appellant has the advantage of the opening and closing arguments, and on the other hand takes the risk of affirmance by a divided court. This practice has been tolerated and allowed to become well settled in Maryland, although its manifest effect is to make the Court of Appeals practically a court of first instance. The Supreme Court refuses to take jurisdiction in cases certified *pro forma*. Webster vs. Cooper, 10 How. 54; but see Oregon vs. Rocca, 18 How. 570.

[2] Thompson vs. McKim, 6 H. & J. 302.

[3] United Lines Co. vs. Stevens, 67 Md. 157; Taylor vs. State, 73 Md. 208; Jenkins vs. State, 76 Md. 255, 259. The term had, in English chancery practice, an entirely different meaning. It was applied to the rough minutes of a decree, before enrollment. Burch vs. Scott, 1 Bland 112, 120.

rule of court.[1] These costs are ordinarily awarded to the prevailing party,[2] but not necessarily, the matter being within the discretion of the court, according to the circumstances of each case, without appeal.[3]

Costs as between solicitor and client are costs payable out of a fund in court, are not confined to statutory allowances, may include counsel fees and reasonable expenses, and are the proper subject of appeal.[4] The cases where such costs are allowed are cases where it is proper to make all the parties contribute in proportion to their respective interests in a fund or estate under the control of the court. As, for instance, where a doubtful will requires judicial construction;[5] or, when executors, administrators or trustees sue or defend for the benefit of the es-

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[1]Trustees vs. Greenough, 105 U. S. 527, 533. For statutory fees of attorneys or solicitors, clerks, and sheriffs, see Md. Code, Art. 36. Of auditors, *Ibid.* Art. 16, sec. 19. Of examiners, *Ibid.* sec. 216. For commissions on sales to trustees and receivers, Rule 24, C. C. and C. C. No. 2, B. C.

[2]Royston vs. Horner, 75 Md. 557, 567.

[3]Smith vs. Shaffer, 50 Md. 133; Dodge vs. Stanhope, 55 Md. 113; Andrews vs. Barnes, 39 Ch. D. 133, 138. Provision is made by statute for the imposition of costs in cases of amendment. Md. Code, Art. 16, sec. 16, and in other special cases; *ibid.* secs. 65, 95, 131, 141, 151, and for the enforcement of their payment, *ibid.* secs. 154, 169. In divorce cases, costs and counsel fees are in general allowed the woman, irrespective of the result. Rohrback, 75 Md. 317.

[4]Trustees vs. Greenough, 105 U. S. 527. What is to be considered as *expenses* will depend upon the particular circumstances. Cain vs. Warford, 33 Md. 23, 35. 91-411 709 93-74

[5]Patterson vs. Wilson, 64 Md. 194; Buchanan vs. Lloyd, 64 Md. 306.

tate;[1] or, in a creditor's bill, where the suit is brought on behalf of the plaintiff and all other creditors who come in and contribute to the expenses of the suit, and a fund is created by sale or otherwise.[2] With respect to the allowance of fees to counsel by whose services a fund has been created or preserved, the rule seems to be that unless there is an equitable assignment, or some other exceptional feature, contracts for professional services are enforced like other contracts, and counsel must look to their own clientsfor their compensation.[3] The underlying principle is said to be the principle of representation or agency. The party claiming compensation out of a common fund for expenses and services in the common behalf must be the recognized and authoritative representative of all, and therefore authorized to contract for all.[4]

§ 76. **Enrollment, rehearing and review.** Decrees were formerly *enrolled* by engrossment on parchment rolls, and the same term was employed afterwards when decrees were copied in the court

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[1]Carson vs. Phelps, 40 Md. 73, 101; see Lee vs. Pindle, 12 G. & J. 288, 305.

[2]Leiman's Estate, 32 Md. 225; Trustees vs. Greenough, 105 U. S. 527; Adams vs. Kepler, 38 Fed. 281.

[3]Davis vs. Gemmell, 73 Md. 530; McGraw vs. Canton, 74 Md. 554. See, in general, 1 Foster's Fed. Pr. secs. 335, 336: Cowdrey vs. Galveston, 93 U. S. 352; Central vs. Pettus, 113 U. S. 116; Stuart vs. Boulware, 133 U. S. 78; Jaffray, 1 Lowell, 321; Plitt, 2 Wall. Jr. 453; Stewart vs. Canal, 5 Fed. 149; Fechheimer vs. Baum, 43 Fed. 719, 730; Wilson vs. Kelly, 30 So. Ca. 483.

[4]Hand vs. R. R. Co., 21 So. Ca. 178; cited 74 Md. 559.

records in folio. After the lapse of the term at which the decree was passed it was, and in federal practice still is, deemed to be enrolled,[1] and no longer subject to correction except on review or appeal.[2] Before enrollment, clerical mistakes might, and still may be, corrected by order of court upon petition, without formal rehearing.[3] In Maryland, final decrees and orders in the nature of final decrees, are considered as enrolled from and after the expiration of thirty days from date, the day of date inclusive.[4] After enrollment, no rehearing is granted.[5] A petition for a rehearing is the proper method of correcting, before enrollment, errors not clerical or accidental.[6] The facts stated in such petition, if not apparent upon the record, must be verified by affidavit.[7] A petition for a rehearing must be filed before enrollment of the decree. A bill of review may be filed after enrollment, but within the time limited for appeal.[8]

There are but two general grounds upon which a bill of review can be maintained, 1, error of law apparent upon the face of the decree; 2, newly discovered evidence.[9] In the former case, the bill may be filed with-

[1] Tabler vs. Castle, 12 Md. 144; Pfeltz, 1 Md. Ch. 455; Whiting vs. Bank, 13 Peters, 6.

[2] Ad. Eq. 374.

[3] U. S. Eq. Rule 85; Md. Code, Art. 16, sec. 165.

[4] *Ibid.* sec. 164.

[5] *Ibid.* sec. 166.

[6] 1 Foster's Fed. Pr. sec. 352.

[7] Md. Code, Art. 16, sec. 166.

[8] Presstman vs. Mason, 68 Md. 91.

[9] Ad. Eq. 416.

out leave of court. The error complained of must not be of a character which would render a bill of review a mere substitute for an appeal, such as mistaken deductions from the evidence,[1] but the error must be clearly apparent on the face of the decree, such as the finding of a fact denied in the answer when no evidence was taken,[2] or the disregard of a statute,[3] or the want of jurisdiction.[4]

When a bill of review is founded upon the occurrence or discovery of new matter, leave of court must be first obtained upon an affidavit of facts substantially equivalent to allegations which would sustain a motion for a new trial at law. The new matter must be material, not merely cumulative nor impeaching a witness, and such as could not have been discovered by reasonable diligence.[5]

Decrees entered upon a default are open to still another method of attack upon the ground of surprise, mistake or other sufficient equitable circumstances, and that is by petition to vacate the enrollment. The fact that the cause has never been heard upon the merits, coupled with the inability of the injured party in many cases to obtain relief upon

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[1]Gregory vs. Lenning, 54 Md. 57; Buffington vs. Harvey, 95 U. S. 99.

[2]Clark vs. Killian, 103 U. S. 766.

[3]Savary vs. Da Camara, 60 Md. 139, 148.

[4]Fox vs. Reynolds, 50 Md. 573.

[5]Hollingsworth vs. McDonald, 2 H. & J. 230, Brantly's note; 1 Foster's Fed. Pr. sec. 355.

either of the grounds required for a bill of review, has been deemed sufficient to justify this proceeding.[1]

In addition to the foregoing modes of reviewing decrees without an appeal, if a decree has been obtained by fraud, as for instance if it was passed by consent fraudulently obtained, it may be impeached by original bill filed without leave of court.[2]

§ 77. **Appeal.** For error in decrees, either in point of fact or law, the more usual mode of correction is by appeal. In equity there is no necessity as at law for bills of exception, all the proceedings being in writing and already spread upon the record.[3] The right of appeal is wholly statutory,[4] and in general an appeal lies only from *final* decrees or orders.[5] The interlocutory orders from which appeal lies are, orders granting or refusing to grant, or dissolving or refusing to dissolve, an injunction; orders appointing receivers; orders for the sale, conveyance or delivery of property, or the payment of money, unless such delivery or payment be directed to be made to a receiver; and orders determining a right and di-

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[1]Straus vs. Rost, 67 Md. 479; Herbert vs. Rowles, 30 Md. 278. 8-

[2]Ad. Eq. 419; 1 Foster's Fed. Pr. sec. 358; Shryock vs. Morris, 75 Md. 72, 80. And a decretal order is, in this respect, upon the same footing. United Lines Co. vs. Stevens, 67 Md. 156.

[3]Ringgold's Case, 1 Bland 8, 14.

[4]Barth vs. Rosenfeld, 36 Md. 615; Dillon vs. Conn. Mutual, 44 Md. 386, 394.

[5]2 Foster's Fed. Pr. sec. 480; Ringgold's Case, 1 Bland 12-14; Hayward, 77 Md. —; Md. Code, Art. 5, sec. 24. 86-475

recting an account.[1] Interlocutory orders are open for revision on appeal from the final decree or order.[2] To stay the operation of any such previous order an appeal bond must be given.[3]

§ 78. **Appeal bond.** In order to stay execution of any decree or order appealed from, there must be an affidavit that the appeal is not taken for delay, and a sufficient appeal bond must be given and approved.[4] The penalty of the appeal bond is double the sum recovered, in the case of a decree or order for money; or double value of movable chattels recovered or decreed; to be estimated by the equity court.[5] On appeal from a decree for sale of lands, or for the conveyance of land in specific performance of a contract, or the like, the penalty of the bond will be sufficient to cover costs, mesne profits and possible damage by waste committed pending the appeal.[6] If no bond is given, execution of the decree may be enforced, notwithstanding appeal taken. If the decree be reversed, money paid under it may be

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[1] Art. 5, sec. 25, 29.

[2] Art. 5, sec. 26.

[3] *Ibid.* sec. 28.

[4] Md. Code, Art. 5, sec. 27, 51, 52, 53. But if the equity court shall decide in its discretion that the case is not a proper one for a stay of execution, an order may be passed upon such terms (as to duration, keeping an account, giving security, etc.,) as to the court may seem fit, directing that the decree or order appealed from shall not be stayed by such appeal, or only so far or on such terms as the court shall therein direct. 1890 ch. 32.

[5] Art. 5, sec. 51.

[6] Ringgold's Case, 1 Bland 23.

recovered in assumpsit.[1] If a sale has been made under the decree, the purchaser's title will not be affected by the reversal.[2]

§ 79. **Record—diminution.** In making up the transcript of the record it is the duty of the clerk to avoid needless prolixity and expense by the omission or abridgment of merely formal parts, and documents, saving to either party the right to direct any part of the proceedings to be incorporated at the risk of such party as to costs, if the matter should not be deemed material by the Court of Appeals.[3] For omissions or defects in the transcript, the remedy is by writ of diminution upon proper application to the appellate court.[4]

§ 80. **Dismissal.** An appeal will be dismissed by the Court of Appeals if taken too late, or if the record is not sent up in due time;[5] or if the decree

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[1]Owings, 10 G. & J. 267.

[2]Benson vs. Yellot, 76 Md. 159.

[3]Art. 5, sec. 32, 33.

[4]*Ibid.* sec. 44-46.

[5]The limit of time for an appeal is within two months from the date of the decree or order, unless obtained by fraud or mistake, when the two months run from the time of the discovery. Art. 5, sec. 30. The transcript of record must be transmitted to the court of appeals within three months from the time of the appeal prayed, or forthwith, in the case of orders refusing an injunction. Art. 5, sec. 31. A verbal order for an appeal has no effect. Miller vs. Murray, 71 Md. 61. An appeal will not be dismissed for delay in sending transcript occasioned by the negligence of the clerk. Garritee vs. Popplein, 73 Md. 322.

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or order appealed from is not final;[1] or the appeal is taken upon a matter within the discretion of the court below;[2] or the appeal is taken from a decree by consent;[3] or the appellant has no interest in the subject matter of the appeal;[4] or fails to have his appeal ready for argument.[5] Whether or not an appeal in any given case will lie, is a question exclusively for the court of appeals.[6]

§ 81. **Exceptions.** In order to prevent surprise, as well as to secure the Court of Appeals from being made a court of first instance, certain objections will not be entertained in that court unless it shall appear by the record that the particular objection was made by exceptions filed below.[7] Such are objections to the jurisdiction; to the competency of

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[1]Swift vs. Bank, 69 Md. 232; Burroughs vs. Gaither, 66 Md. 171; Meyer vs. Steuart, 48 Md. 423; Dennison vs. Wantz, 61 Md. 143; 2 Foster's Fed. Pr. sec. 480, p. 1023. 93-97

[2]Such as the awarding of costs; Mears vs. Moulton, 30 Md. 142, 145; *Ante*, sec. 75; or the refusal of a rehearing, Zimmer vs. Miller, 64 Md. 296, 299; or the granting an amendment, Hill vs. Reifsnider, 39 Md. 429; or the appointment of a trustee, Howard vs. Waters, 19 Md. 529; or allowing the re-examination of a witness, Swartz vs. Chickering, 58 Md. 290, 297.

[3]Gable vs. Williams. 59 Md. 46, 51.

[4]Lurman vs. Hubner, 75 Md. 268; Glenn vs. Reid, 74 Md. 238; McDonald vs. Work, 60 Md. 589; Stewart vs. Codd, 58 Md. 86. An attorney cannot appeal in his own name from an order against a client. Bank vs. Lanahan, 60 Md. 477, 515.

[5]Art. 5, sec. 47.

[6]Keighler vs. Savage, 12 Md. 383.

[7]Ringgold's Case, 1 Bland 21, 22; Young vs. Omohundro, 69 Md. 424.

a witness; to the admissibility of evidence; to the sufficiency of the averments of the bill or petition; to any accounts stated and reported in the cause.[1] In federal practice, likewise, the general rule obtains that no decree will be reversed on appeal upon an objection not raised below.[2]

§ 82. **Rules as to appeals.** Appeals stand for hearing at the first term of the Court of Appeals after transmission of the record.[3] Briefs, containing an abstract of the case, the points relied on and authorities cited, are furnished to the clerk in time to have them printed for use when the case is reached. The argument is opened and closed by appellant's counsel. In cross-appeals the counsel for the appellant opens the appeal first in order and concludes after a like opening by counsel for appellant in the second appeal, after which the counsel for the appellant in the second appeal will conclude. No case will be re-argued after the opinion of the court has been delivered, unless a re-argument shall be requested by some member of the court who concurred in the opinion, and the proposition receives the support of a majority of the judges who heard the case. The opinions of the court are filed with the clerk, and furnished to the reporter for publication.[4]

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[1] Art. 5, sec. 34, 35.

[2] 2 Foster's Fed. Pr. sec. 494, p. 1086.

[3] Md. Const. Art. IV, sec. 15. Cases of special urgency are advanced. Md. Code, Art. 5, sec. 42.

[4] Rules, Court of App.

The decree may be affirmed or reversed, corrected or modified, or the cause may be remanded. If the court is equally divided in opinion, the decree is affirmed. A decree may be affirmed in part and reversed in part. There will be no reversal, even for apparent error, where the appellant is not injured.[1] If the court has jurisdiction, a sale under a decree is not affected by its reversal.[2] Without either affirmance or reversal, a cause may be remanded for further proceedings, such as to amend, make additional parties, take further testimony or state further accounts.[3]

§ 83. **Execution.** The power of the Court of Chancery to compel obedience to its decree was originally confined to process of contempt, *i. e.*, imprisonment and sequestration, which, though intended as punishment, operated indirectly as a performance of a decree for payment of money.[4] In modern practice equity powers in this respect have been greatly expanded by statute, and a variety of modes of execution has been provided, adapted to the nature of the decree, whether *in personam* or *in rem*, or partaking of the nature of both. Whatever

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[1] Wagner vs. Shank, 59 Md. 313, 327; Rice vs. Edwards, 131 U. S. CLXXV.

[2] Benson vs. Yellott, 76 Md. 159, 168; Lenderking vs. Rosenthal, 63 Md. 28, 38; Dorsey vs. Thompson, 37 Md. 25, 45; Davis vs. Gaines, 104 U. S. 391.

[3] Art. 5, sec. 36; Riley vs. Carter, 76 Md. 581, 613.

[4] Ad. Eq. 393. 81-610 85-531

the mode, application is made by petition, upon which an order is passed, the proper writ issued by the clerk and sent to the sheriff.[1] Orders may be enforced by such process as might be had upon a judgment or decree to the like effect.[2] A decree may be enforced by the appropriate process at any time within twelve years from its date, and may within that time be renewed or revived by *scire facias*.[3] Decrees for specific performance, for the conveyance or for the sale of land, may be enforced in cases where the land or property lies, or parties reside, in different counties from that in which they were passed.[4]

§ 84. **Execution of personal decrees.** 1. The ordinary money decree, or decree for the payment of money, is upon the footing of a judgment. The execution is by writ of *fieri-facias* or attachment by way of execution.[5] Generally in such cases there is

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[1] Alex. Ch. Pr. 201; Barroll Ch. Pr. 209.

[2] Md. Code, Art. 16, sec. 169.

[3] Md. Code, Art. 26, sec. 20; 1890 ch. 114. The same section provides for the making of new parties upon suggestion of death or marriage, and authorizes more than one execution provided that but one satisfaction be made.

[4] Md. Code, Art. 16, sec. 76.

[5] Md. Code, Art. 16, sec. 168. The court has full authority to determine any question that may arise upon such attachment, subject to appeal, but if either party demands a jury trial the attachment proceedings shall be transmitted to a court of law for trial as in cases of attachment on judgment. *Ibid.* Art. 9, sec. 28. Money decrees, like judgments, may be superseded within two months, before the clerk, in Baltimore city, or before a justice of the peace,

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no attachment for contempt, the constitution having abolished imprisonment for debt. The exception is in the case of an order or decree for the payment of alimony, which is held enforceable, not as a debt, but as a duty.[1]

2. A decree for the performance of a specific act, such as the execution of a deed, the delivery of papers, &c., may be enforced by attachment for contempt.[2]

3. Disobedience of an injunction is punishable by fine or imprisonment, or both, and in cases of waste by fine to the extent of double damage, and imprisonment for non-payment.[3]

4. An order or decree for the delivery of chattels may be enforced by the same writs used in replevin.[4]

5. The delivery of possession of lands may be enforced either by injunction or by writ in the nature of a writ of *habere facias possessionem*.[5]

6. "Attachment with proclamations" and "sequestration" are antiquated but still theoretically possible methods of compelling performance of a

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in the counties, with stay of execution for six months. Art. 17, sec. 25. Art. 52, sec. 52. The lien of a money decree may be extended to counties other than that of the forum by transmitting a copy of the decree or order and docket entries. Art. 16, sec. 170.

[1] McCurly, 60 Md. 189; Stew. M. & D. sec. 378.

[2] Art. 16, secs. 151, 168.

[3] Art. 16, secs. 63, 64.

[4] Art. 16, sec. 171, in addition to the process provided in Art. 16, secs. 151, 168.

[5] Art. 16, sec. 168; Art. 75, sec. 88; 1890 ch. 635. In federal practice, by writ of assistance. U. S. Eq. Rule 9; 1 Foster's Fed. Pr. sec. 348.

decree.[1] Both have been practically superseded in modern practice by the more convenient and efficacious remedies already and hereinafter mentioned.[2]

§ 85. **Execution of other decrees.** Decrees *in rem* are decrees which operate directly upon either personal *status* or the title to property. Of the former class are decrees of *divorce*,[3] and decrees for change of name.[4] Decrees of this nature are self-executing. Of the latter class are decrees directing the execution of a deed or the renewal of a lease when passed under statutes which make such decrees self-executing.[5] To the same class belong final de-

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[1] U. S. Eq. Rules 7, 8; Md. Code, Art. 16, sec. 168. It was stated by Mr. Alexander, in 1839, that the writ of sequestration was then obsolete in Maryland. Alex. Ch. Pr. 203. In 1855, he successfully contended that it was still in force. Keighler vs. Ward, 8 Md. 254.

[2] Attachment with proclamations was a writ which issued only after an attachment for contempt had been returned *non est inventus*, directing the sheriff to cause public proclamation to be made warning the absent defendant to appear and answer for his contempt. A writ of sequestration was issued to two or more commissioners empowering them to "collect, receive and sequester" into their hands the rents and profits of the absconding defendant's real estate and all his personal estate, and "keep the same under sequestration" until he cleared his contempt. 2 Dan. Ch. Pr. 1048 (4th Am. ed.)

[3] Md. Code, Art. 16, secs. 35, 36.

[4] Art. 16, sec. 95.

[5] When the execution of a deed is directed, the decree is to have the same effect as the deed, and if the land is in another county the decree is to be recorded there in six months. Md. Code, Art. 16, sec. 80. When the renewal of a lease is decreed, the decree is sufficient of itself to renew title, if recorded. Art. 16, secs. 93, 94. To the same class may also be referred decrees for the re-

crees of partition, which confirm the return of the commissioners, declare that each party shall hold his part in severalty, and operate as a conveyance.[1] Such decrees are frequently of a mixed nature, adjusting inequalities by provisions for owelty or pecuniary compensation, which awards are simply personal decrees for so much money.[2]

The execution of orders and decrees for sales and for the appointment of receivers will be considered under the head of interlocutory proceedings.

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cording of unrecorded deeds, *ibid.* sec. 33, and for the acknowledgment of defectively acknowledged deeds or bills of sale. *Ibid.* sec. 34.

[1] Alex. Ch. Pr. 166; Carey's Forms, No. 757.

[2] 1 Sto. Eq. Jur. sec. 654; Carey's Forms, No. 768.

CHAPTER V.

EQUITY PROCEDURE. PRACTICE. (I).

86. Interlocutory proceedings.
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§ 86. **Interlocutory proceedings.** The suit in equity thus far traced has been, for convenience,

supposed to proceed without special incident to interrupt its progress. Such cases, however, are not common in practice. At any stage of a suit circumstances may arise to give occasion for interlocutory orders, either in furtherance of its main object or to keep the suit in line with the practice of the court. Such orders, or rules, as in some instances they are called, are obtained upon oral application by motion or upon more formal written application by petition.[1]

§ 87. **Motions.** Courts of equity are deemed to be always open for the transaction of business.[2] Motions may at any time be docketed by the clerk upon the application of counsel, and if made during the term may be addressed to the court *ore tenus.* They are usually resorted to where the circumstances are few and simple, and already appear in the proceedings.[3]

§ 88. **Petitions.** If new matter is to be introduced, or if the application rests on facts to be collected from different parts of the proceedings, it is usual to file a petition. When the petition states

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[1] Ad. Eq. 348; Alex. Ch. Pr. 78; 1 Foster's Fed. Pr. sec. 194.

[2] Md. Code, Art. 16, sec. 117; 1890 ch. 424. By this act, the regular terms of courts of equity are prescribed to be of two months duration, and in Baltimore city commence on the second Monday of January and of each alternate month thereafter; in the counties, on the first Monday of the same. See U. S. Eq. Rule 1.

[3] Alex. Ch. Pr. 78. Common examples are motions for leave to amend, for security for costs, for a continuance, for an order to set the case for hearing, to dissolve an injunction, etc. Carey's Forms, No. 699, 709.

new matter it should be sustained by affidavit or documentary evidence.[1] In addition to petitions interposed in a suit already begun, called "cause petitions," the procedure by petition is also resorted to for a variety of objects under a statutory and often summary jurisdiction.[2] Petitions, in form and substance, are subject to the rules which govern bills. They should be divided into numbered paragraphs, should avoid prolixity, scandal and impertinence, should be reasonably certain in their averments, should be properly addressed and entitled, and should set forth distinctly the specific relief prayed.[3]

§ 89. **Orders.** Merely formal orders are granted as of course and *ex parte*. Under this head are included leaves, rules and orders of routine practice not directly affecting substantial rights. Such orders are always understood to be taken at the risk of the

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[1] Alex. Ch. Pr. 78.

[2] Ad. Eq. 349; 1 Foster's Fed. Pr. sec. 199. Such are petitions to require security of trustees appointed by will or deed: Md. Code, Art. 16, sec. 203; by trustees seeking resignation of their trust, *ibid.* secs. 211, 212; Carey's Forms, No. 849; for inquisition *de lunatico inquirendo*, *ibid.* No. 722; for change of name, Art. 16, sec. 95; Carey's Forms, No. 636; for an *ex parte* decree for sale of mortgaged premises in Baltimore city, Md. Code, P. L. L. Art. 4, sec. 692; Carey's Forms, No. 740; by *feme sole* between the ages of eighteen and twenty-one, for leave to make a deed of trust, 1890 ch. 210 (amending Art. 21, sec. 1); an original petition of appeal from condemnation proceedings under statute, Cherokee Nation vs. R. R. Co. 135 U. S. 641, 651. (See Md. Code, P. L. L. Art. 4, sec. 710.)

[3] Md. Code, Art. 16, sec. 119, etc.

applicant, and liable to be promptly rescinded in case of surprise, irregularity or undue advantage. Orders affecting substantial rights are never granted without notice, unless in the presence of some pressing emergency. In such cases, which should be rare, opportunity is always afforded for a speedy hearing. Special orders, or orders other than those of routine, are preceded by a preliminary order, or order *nisi*, stating distinctly the precise terms of the order to be passed, *unless* cause be shown to the contrary on or before a given day, provided notice be served (usually by serving a copy of the order) upon all parties adversely interested within a sufficient time. In case of inability to effect service within the time limited, the time may be enlarged, and if parties are non-residents, not represented by counsel, constructive service by publication is necessary. But service of such orders is in general well made by service upon counsel, except where a foundation is sought to be laid for a contempt proceeding. If the adverse party objects to the proposed order as not called for by the premises, he sets the matter for hearing upon the face of the motion or petition. If he denies the facts, or has matter in avoidance, he shows cause by filing an answer, supported by affidavit.[1] If the parties are at issue on the facts, proof is taken in the ordinary way. *Ex parte* affidavits will not be admitted.[2]

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[1] Alex. Ch. Pr. 79.
[2] Gechter, 51 Md. 187.

§ 90. **Sale—trustee.** Upon this subject the powers of courts of equity have been much enlarged by statute, and decrees for the sale of real and personal property are authorized in a variety of cases.[1] A decree for a sale is final as it determines the liability of the property to be sold. It is also interlocutory, as the proceeds are to be distributed.[2] Following the English chancery practice, sales in the federal courts as courts of equity are made by the master.[3] In this state by a trustee or trustees named in the decree.[4]

The trustee, before he sells, is required to give bond to the state in a penalty named in the decree, with surety or sureties to be approved by the judge or clerk, with condition to faithfully perform and

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[1]Foreclosure of mortgage, Md. Code, Art. 16, sec. 187; *ibid.* P. L. L. Art. 4, sec. 692, &c.; creditor's suit, Art. 16, sec. 188; vendor's lien, *ibid.* sec. 193; change of investment, *ibid.* sec. 198; burial grounds, *ibid.* 92; partition suits, when the land is impartible, *ibid.* sec. 116; of vessels or other personal property held jointly, *ibid.* 190; of rent incident to reversion sold, *ibid.* 191; of the real or personal property of infants, when sale advantageous, *ibid.* 48, 49; of persons *non compos* on the application of creditors, *ibid.* 97, or of committees, &c., *ibid.* 98; of non-residents, *ibid.* 75, 105; of decedents leaving property to be sold for payment of debts or other purposes, *ibid.* 79. As to what court shall have jurisdiction in cases of sale of lands lying or defendants residing in different counties, see *ibid.* secs. 72-74. A sale may be ordered before final decree, *ibid.* sec. 192. 78-431

[2]Alex. Ch. Pr. 144.

[3]1 Foster's Fed. Pr. sec. 316.

[4]Md. Code, Art. 16, sec. 200. Nominally, the appointment is that of the court, but it is always upon the recommendation of parties in interest, and it is a matter of discretion, not reviewable on appeal. Howard vs. Waters, 19 Md. 529.

execute the trust reposed in him.[1] Suits at law upon such bonds are brought in the name of the state, as legal plaintiff. But the state, in fact, has no interest in the bond, and no cause of action can arise thereon until a breach of condition affecting a party interested. Only those can put the bond in suit for whose benefit it was taken.[2] If the bond is sued upon in equity, the name of the state is not used as plaintiff, but the real parties in interest.[3]

The trustee is next to give notice of the time, place, manner and terms of sale as directed by the decree. The advertisement should so describe and locate the property as clearly to indicate and identify it.[4] But a minute description with metes and bounds is not essential.[5] At such sale, the real vendor is the court, acting in behalf of all parties interested, the trustee being merely the court's agent, and the contract not being regarded as consummated until finally ratified.[6] The trustee should be very sure of his ground who takes the responsibility of deviating from his directions. If a sale be made in a different manner from that prescribed, and yet turn out to be

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[1] Md. Code, Art. 16, sec. 201.

[2] Le Strange vs. State, 58 Md. 26, 39.

[3] Bayne vs. State, 62 Md. 109.

[4] Kauffman vs. Walker, 9 Md. 229; Dickerson vs. Small, 64 Md. 395.

[5] Stevens vs. Bond, 44 Md. 506; White vs. Malcolm, 15 Md. 529. The non-observance of a custom among city auctioneers to place a notice upon a house for sale, will not vitiate. Chilton vs. Brooks, 69 Md. 584.

[6] Schindel vs. Keedy, 43 Md. 413; Lurman vs. Hubner, 75 Md. 268, 273.

advantageous under all the circumstances, it may be sanctioned.[1] If substantially unfair, it will be rejected, even although all modal regulations have been strictly observed.[2] But mere inadequacy of price, without more, is not a sufficient objection.[3] In general, a private sale will not be permitted under a decree directing a public sale until the property has been once offered at public sale.[4] Even then it will not be ratified, unless in all respects advantageous.[5] The rule requiring absolute good faith is especially applicable to sales under powers in mortgages, and as to such sales is strictly enforced.[6]

§ 91. **Report—exceptions.** The sale is next promptly reported to the court with an affidavit of the truth of the report and of the fairness of the sale.[7] Upon this report an order of ratification *nisi* is passed, and published by advertisement.[8] If no cause is shown to the contrary by the time limited, a final order of ratification is passed.[9] By consent of all parties interested, in writing,

[1] Andrews vs. Scotton, 2 Bland, 629, 637; Tyson vs. Mickle, 2 Gill, 376.

[2] Loeber vs. Eckes, 55 Md. 1; Chilton vs. Brooks, 69 Md. 584.

[3] Johnson vs. Dorsey, 7 Gill 269; Mahoney vs. MacKubin, 52 Md. 357, 366.

[4] Alex. Ch. Pr. 146; Tyson vs. Mickle, 2 Gill 376.

[5] Latrobe vs. Herbert, 3 Md. Ch. 378; Kelso vs. Jessop, 59 Md. 120.

[6] Chilton vs. Brooks, 69 Md. 584, 587.

[7] Carey's Forms No. 812.

[8] *Ibid.* No 816. This preliminary order is usually passed by the clerk, Art. 17, sec. 29.

[9] *Ibid.* No. 817.

the sale may be ratified immediately upon being reported, without notice.[1] Exceptions to the sale can only be filed by parties interested.[2] The court will not compel the purchaser to buy a law suit, and if the title is fairly doubtful, his exception for that reason will be sustained.[3] From an order setting aside the sale, or an order of final ratification, the losing party may appeal, but not the trustee himself.[4] Upon final ratification, the case goes to the auditor that an account may be stated distributing the proceeds.

§ 92. **Account—auditor.** The auditor is the calculator and accountant of the court, and when any calculations or statements are required, all the pleadings, exhibits and proofs are referred to him for investigation and report. His office, while not in all respects the same, is analogous to that of a master in chancery.[5]

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[1]Alex. Ch. Pr. 146.

[2]Griffith vs. Hammond, 45 Md. 85.

[3]Handy vs. Waxter, 75 Md. 517; Benson vs. Yellott, 76 Md. 157; Herzberg vs. Warfield, 76 Md. 446, 449; Newbold vs. Schlens, 66 Md. 585; Lurman vs. Hubner, 75 Md. 268, 272; Hamilton vs. Traber, 27 Atl. Rep. 229, 77 Md.

[4]Lurman vs. Hubner, 75 Md. 268.

[5]Alvey, J. in Trustees vs. Heise, 44 Md. 453, 464; Dorsey vs. Hammond, 1 Bland 463, 467; Townsend vs. Duncan, 2 Bland, 45, 74. Besides the taking of accounts, other matters are referred to masters in chancery, such as sales; appointment of trustees, &c.; impertinence or scandal in pleadings; the question as to who are entitled as heirs, &c. to a fund in court; as to whether the title to real estate is good, as to the state of the law of a foreign country; as to whether one of two publications is pirated from the other; as

Provision is made by statute for the appointment of sworn auditors to audit, state and settle accounts, with power to take testimony, and also for the temporary appointment and qualification of special auditors in certain cases. If the party at whose instance the reference is made fails to bring on the matter, any other party interested may do so, and the auditor is without delay to assign a time and place for taking testimony and filing claims, giving due notice thereof and of all adjournments. He may proceed *ex parte*, if parties notified fail to attend. In case of his delay, he may be speeded by an order of court. He has power to regulate the proceedings, examine on oath parties and witnesses, require production of books and papers, and report delinquents for the coercive process of the court. Parties accounting are to produce their accounts in the form of debtor and creditor, subject to cross-examination by adverse parties. In taking testimony the auditor follows the mode prescribed for examiners.[1]

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to the amount of damage suffered from the granting or withholding of an injunction; the settlement of conveyances, &c. Following the English chancery practice, the United States Circuit Courts in equity appoint masters in chancery for the respective districts. 1 Foster's Fed. Pr. sec. 307, 308. In Baltimore City, besides the staff of auditors, there are two "auditors and masters," to whom are referred all cases submitted without argument, except ex-parte mortgage suits. Const. Art. IV, sec. 9, Rule 12, C. C. and C. C. No. 2. Suits for divorce and suits for partition are the cases most frequently referred.

[1]Md. Code, Art. 16, sec. 18-23. In actions at law involving accounts the court may refer the same to an auditor, whereupon there shall be the same proceedings as in equity, reserving to the

§ 93. **Claims.** In cases of decrees for an account, such as on creditors' bills, where there may be numerous claimants, it is provided by the decree that notice shall be given, by advertisement, to file claims, properly authenticated, in the clerk's office, on or before a given day.[1] By thus filing his voucher, the claimant becomes a real party to the suit, without formal petition. But in cases for the enforcement of a special right, such as a sale under mortgage or other lien, any third person interested as a claimant should intervene by petition.[2] Uncontested claims are allowed by the auditor upon such vouchers as are required under the testamentary law to pass a claim in the orphans' court.[3] When full proof is demanded, it must be furnished and the *prima facie* proof is of no avail.[4] If a witness has been already examined on the merits, there can be no re-examination of the same witness upon the same matters, without special order of court.[5] Claimants may come in at any time before distribution actually made, but the account can only be re-opened at their expense.[6]

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parties the right to a jury trial, if demanded. Art. 26, sec. 9. The procedure is defined by Rule 49, Sup. Bench.

[1]Carey's Forms, No. 646, 647, 648. The suing creditor's claims are established by the decree, but not as to their *amount*. Jackson vs. Wilson, 76 Md. 567, 572.

[2]Thomas vs. Bank, 46 Md. 43, 85; Carson vs. Phelps, 40 Md. 73, 78; Strike's case, 1 Bland, 57, 85.

[3]Dorsey vs. Hammond, 1 Bland 463, 470; Art. 93, sec. 84, &c.

[4]Kent vs. Waters, 18 Md. 53, 72.

[5]Trustees vs. Heise, 44 Md. 453, 466.

[6]Alex. Ch. Pr. 143; Pfeaff vs. Jones, 50 Md. 263, 270.

§ 94. **Auditor's report—exceptions.** The functions of the auditor are said not to be judicial, because his findings are of no effect until confirmed by the court.[1] But he is frequently called upon to exercise judgment in the preliminary decision of important questions of fact and law. He is to decide in the first instance upon the sufficiency and weight of the proof in view of the pleadings and of the principles of equity, and his report is expected to embody his conclusions in the accounts submitted together with all the proofs taken. When the matter is doubtful, in the auditor's opinion, he states alternative accounts, presenting the case under a variety of aspects. And a dissatisfied party may require the statement of an account upon his own theory of fact or law.[2] In every report of an auditor two elements are involved; an expense account, bringing down a balance for distribution, and a distribution account, auditing that balance in due proportion to recognized claimants. In simple cases, these are combined in one account.[3] The report, after being filed, remains

[1] Alex. Ch. Pr. 6.

[2] Alex. Ch. Pr. 127.

[3] Carey's Forms, No. 822. In the expense account are included the auditor's fees at a *per diem* of $4.50 "for every day he shall be reasonably employed." Art. 16, sec. 19. Trustees' and receivers' commissions on sales are fixed by rule of court (four per cent. on proceeds of sale above $3,000, with a sliding scale below that figure, Rule 24, C. C. and C. C. No. 2. Auctioneers' fees are fixed by Rule 28). Other, and sometimes questionable allowances, figure in the expense account, and to guard against surprise, the auditor, as soon as he files his report, is required to give notice thereof and of the day upon which it may be ratified, to parties interested, by mail,

open for exceptions for a limited time prescribed by rule of court.[1]

Exceptions must be specific and in detail.[2] No exceptions are required to accounts stated under the instructions of parties.[3] The exceptions are set for hearing by either side. In point of practice, the hearing on these exceptions is frequently the final hearing, inasmuch as its result determines the real questions of property and title at issue in the cause,[4] and the decretal order of ratification is in the nature of a final decree.[5]

§ 95. **Interlocutory injunction.** An interlocutory (otherwise called preliminary, provisional, *ad interim, pendente lite,* temporary) injunction may be granted at the commencement of a suit, upon original bill, or at any stage of its progress, upon petition,

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in order to give them an opportunity to object. Rule 19, C. C. and C. C. No. 2, of Baltimore city.

[1]Ten days by Rule 19, C. C. and C. C. No. 2, but exceptions may be entertained at any time before final ratification. Calvert vs. Carter, 18 Md. 73, 110. The order of ratification *nisi* may be passed by the clerk, but not of course the final order. Md. Code, Art. 17, sec. 28. In federal practice exceptions are due within one month after the master's report is filed. U. S. Eq. Rule 83. The presumption is in favor of his findings. Kimberly vs. Arms, 129 U. S. 512, 524; 1 Foster's Fed. Pr. sec. 315.

[2]Darby vs. Rouse, 75 Md. 26; but all the reasons need not be stated, Stokes vs. Detrick, 75 Md. 256.

[3]Dennis vs. Dennis, 15 Md. 73.

[4]Carson vs. Phelps, 40 Md. 73; Baumgartner vs. Haas, 68 Md. 32.

[5]Taylor vs. State, 73 Md. 208; Seldner vs. McCreery, 75 Md. 287, 293; Robertson vs. Parks, 76 Md. 118, 134; State vs. Banks, 76 Md. 136, 143.

directing a party to do, or abstain from doing any act named therein.[1] It is granted upon a strong *prima facie* case, and where extreme urgency is apparent, *ex parte*. It concludes no rights. It merely preserves or restores the *status quo* until investigation can be made, and a proper decision reached. It is sometimes the main object of suit, but more often ancillary thereto. It continues in force until dissolved, or until made perpetual by decree.[2] It differs from a final (otherwise called perpetual) injunction, in that the latter is granted after full proof taken and hearing on the merits, and is an absolute and conclusive adjudication. The former is a writ, issued by the clerk, under the seal of the court, in pursuance of an interlocutory order, while the latter takes the form of a final decree.[3]

In England and in the code states, following New York procedure, the writ is no longer in use, and

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[1]Md. Code, Art. 16, sec. 177, which extends the right to make application to "any party in interest," allows application "by motion," or, without application, enables the court to order the issue "of its own motion." Comrs. vs. School Comrs. 26 Atl. Rep. 115, 77 Md. —. The application may be made in term or vacation, in or out of court hours, and may be acted on at any place within the circuit. Art. 16, sec. 71.

[2]Salmon vs. Clagett, 3 Bland 125, Brantly's note. Instead of granting the injunction at once, the court may set a day for hearing and pass a restraining order to operate meanwhile. Bonaparte vs. R. R. Co., 75 Md. 340; New Orleans vs. Paine, 147 U. S. 263; Cohen vs. Gray, 70 Cal. 85.

[3]Bispham Pr. of Eq. sec. 403; 2 Beach Mod. Eq. Jur. sec. 638; 3 Pom. Eq. Jur. sec. 1337; Ad. Eq. 194; Alex. Ch. Pr. 80; Carey's Forms, Nos. 705, 707, 714.

temporary injunctions are granted by order.[1] In the other states, and in federal practice, the writ should contain a concise description of the particulars wherein the defendant is enjoined, and should be addressed to the defendant and, where occasion requires, to his attorneys, agents, servants or workmen.[2] A perpetual injunction may be granted for the first time by the decree, or the final decree may perpetuate a prior interlocutory injunction.[3]

§ 96. **Injunction defined—mandatory—prohibitory.** Regarding effect and substance rather than form, injunction may be defined as the specific enforcement of an equitable right, or of a legal right otherwise remediless, either by mandate,[4] compelling its observance, or by prohibition, restraining its infringement.[5] It was formerly held that a mandatory injunction could not issue upon preliminary hearing, before final decree.[6] It was also the practice to frame the decree in indirect terms, so as to make the injunction prohibitory in form.[7] The tendency of modern adjudication and legislation is to place the mandate upon the same footing with the pro-

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[1]Morgan's Ch. Acts and Orders, 470; 2 Beach Mod. Eq. Jur. sec. 638.

[2]1 Foster's Fed. Pr. sec. 234.

[3]*Ibid.* sec. 238.

[4]Md. Code, Art. 16, sec. 177; otherwise, mandatory injunction.

[5]Prohibitory injunction.

[6]Washington University vs. Green, 1 Md. Ch. 97.

[7]Comrs. vs. School Comrs., 26 Atl. Rep. 115, 77 Md. —.

hibitory injunction,[1] subject of course to the qualification, that, as greater mischief may be done by its improvident exercise, it will be granted with corresponding caution, and that no other equitable remedy is more liable to be defeated by acquiescence in the erections or works complained of.[2] If the injury can be compensated by damages, or if the balance of convenience is strongly on the side of the defendant, this relief will be refused.[3]

§ 97. **Compared with specific performance.** Specific performance is limited to contract. Injunction deals also with tort. Specific enforcement of contract is substantially a mandate. An injunction restraining a specific wrong is in effect specific enforcement of the correlative right. An injunction restraining breach of contract is in effect a negative specific enforcement of contract.[4] Both are extraordinary equitable remedies, founded upon the want of adequate legal remedy. Both result from the maxim "equity acts specifically." Both result also from the maxim "equity acts *in personam*," and can thus be made to operate beyond the jurisdiction of the state.[5] Moreover, both remedies are *ex gratia* and

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[1]Md. Code, Art. 16, sec. 177; Bisph. Pr. Eq. (5th Ed.) sec. 400.

[2]3 Pom. Eq. Jur. sec. 1359; 2 Beach Mod. Eq. sec. 639.

[3]Smith's Pr. Eq. 620.

[4]3 Pom. Eq. Jur. sec. 1341.

[5]Injunction, by arresting inequitable legal proceedings—specific performance, by compelling the transfer of legal title to the equitable owner—in either case beyond state limits, provided the court has acquired not merely constructive but actual jurisdiction over

not *ex debito*, granted, as is often said, in the exercise of sound judicial discretion, in view of the special circumstances; a discretion, however, guided by rule and precedent, and reviewable on appeal.[1] They differ in this: that specific performance is in general the main object of suit, and is not an interlocutory proceeding.

§ 98. **Compared with mandamus.** The legal remedy of mandamus is affirmative, specific and coercive, and therefore analogous to a mandatory injunction. What has just been said as to the discretionary nature of injunction and specific performance applies as well to mandamus. Mandamus is not, like injunction and specific performance, a general remedy between private parties, but is founded upon some special corporate, official or ministerial duty, in which the applicant has an interest.[2]

§ 99. **To enforce equitable rights.** Equitable rights imply the non-existence of legal remedy. To restrain their violation, injunction is always the appropriate remedy. Such are trusts, the equities of cancellation, reformation or re-execution upon the ground of fraud, mistake or accident, the equity of redemption of a mortgagor, the lien of an equitable

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the person of the party. See the cases cited under these maxims, *post*.

[1] As to injunction, Wilde vs. Scotten, 59 Md. 72, 76; 10 Am. and Eng. Ency. 780. As to specific performance, Semmes vs. Worthington, 38 Md. 298, 325; 22 Am. and Eng. Ency. 910.

[2] 2 Poe, Pl. and Pr. sec. 709; Wailes vs. Smith, 76 Md. 469.

mortgagee, the rights of co-partners and married women. In suits founded on such equities, it is often necessary for their protection pending the suit that breaches of trust should be restrained and alienations or encumbrances prevented by interlocutory injunction.[1]

§ 100. **By restraining legal proceedings.** An injunction may be granted to restrain an action at law, at any stage, even after judgment, maintained in violation of an equitable right or title.[2] Under the former English chancery practice, injunctions to restrain proceedings at law were called common injunctions, and were granted as of course, without affidavit. All other injunctions were special. No such distinction exists here. Modern legislation enabling equitable defences to be pleaded at law,[3] has to a great extent obviated the necessity for injunctions of this nature, as to domestic suits. There are still

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[1] 3 Pom. Eq. Jur. sec. 1339; Bisph. Pr. Eq. sec. 425; Salmon vs. Clagett, 3 Bland 126, Brantly's note; Little vs. Price, 1 Md. Ch. 182, note; 1 Foster's Fed. Pr. sec. 206; Equitable vs. Baltimore, 63 Md. 285. In some cases the equitable right infringed is sufficiently protected by the injunction without other relief, as in the case of surreptitious reports of lectures. Abernethy vs. Hutchinson, 3 L. J. Rep. Ch. 209; 2 Sto. Eq. Jur. sec. 949; 2 Beach Mod. Eq. sec. 752; 1 Foster's Fed. Pr. sec. 206; Nichols vs. Pitman, 26 Ch. Div. 374. In other cases, injunction is auxiliary to the main object, as when the principal relief sought is to set aside a fraudulent transfer. Hyde vs. Ellery, 18 Md. 496.

[2] Bisph. Pr. Eq. sec. 410; Johnson vs. Christian, 128 U. S. 374; Brewer vs. Herbert, 30 Md. 301.

[3] Md. Code, Art. 75, sec. 83-85.

occasions for its use, as in cases controlled by considerations of public policy,[1] or other special circumstances.[2]

The maxim—*equity prevents multiplicity of suits*—operates by means of injunction to restrain unnecessary or vexatious litigation. A frequent illustration is afforded by the ordinary bill of *interpleader*, founded upon a conflict between two or more separate claimants upon the same debtor, who is therefore threatened with two or more suits in respect of a subject-matter wherein he is an indifferent stakeholder.[3] Upon a similar principle, *bills of peace* are brought to restrain a number of persons from litigating identical or similar matters in different suits, where there is a common right capable of being determined in one suit.[4] Formerly, a bill of peace also lay to prevent the same action of eject-

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[1]Emerson vs. Townsend, 73 Md. 224.

[2]Brady vs. Johnson, 75 Md. 445. No injunction to stay a sale or proceedings thereafter under a power in a mortgage shall be granted, except at the instance of a party to the mortgage, or of one claiming under such party an interest derived after the recording thereof, nor unless such party shall allege on oath full or partial payment not credited, or some specific fraud in obtaining the mortgage. Art. 66, sec. 16. Prompt hearing shall be had on motion to dissolve such injunction, and if the court finds that the same was obtained through misrepresentation and for delay, interest shall be decreed at the rate of ten per cent. *Ibid.* sec. 17. Bond shall be given by the plaintiff to secure such mortgage debt, damage, interest and costs. *Ibid.* sec. 18.

[3]Bank vs. Lanahan, 60 Md. 477, 514; Zihlman, 75 Md. 372; Weikel vs. Cate, 58 Md. 105; Emerick vs. New York Life, 49 Md. 352; Barth vs. Rosenfeld, 36 Md. 604; Killian vs. Ebbinghaus, 110 U. S. 568.

[4]Bisph. Pr. Eq. sec. 415; Sharon vs. Turner, 144 U. S. 541.

ment from being repeated by the losing party.[1] There is no longer occasion for a bill of this nature, since the legislative abolition of fictions in ejectment.[2] Certain cases of bills *quia timet* may also be referred to this head.[3] Comparing bills *quia timet* with other injunctions, it is the office of *mandatory* injunctions to correct *past* injuries and *restore* rights; of *prohibitory* injunctions to prevent *present* or *imminent* injuries and *preserve* rights; and of bills *quia timet* to anticipate and guard against *future* and *contingent* injuries, and, as it were, *insure* rights.[4] In order to maintain a bill *quia timet*, or to remove a cloud from title, there must be clear proof of both legal title and possession in the plaintiff.[5] A legal title in reversion will suffice.[6]

§ 101. **To enforce legal rights.** When injunction is to enforce a legal right, the jurisdiction is founded upon the inadequacy of legal remedy. The case must be one where damages are not real compensation, where the legal right is clear, and there is im-

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[1]Bisph. Pr. Eq. sec. 418.

[2]Md. Code, Art. 75, sec. 69.

[3]Polk vs Rose, 25 Md. 153; Drury vs. Roberts, 2 Md. Ch. 157; Cole vs. O'Neill, 3 Md. Ch. 174, 185.

[4]Bisph. Pr. Eq. 5th ed. sec. 568.

[5]Livingston vs. Hall, 73 Md. 386; Gage vs. Kauffman, 133 U. S. 471; Frost vs. Spitley, 121 U. S. 552; Polk vs. Pendleton, 31 Md. 118.

[6]Steuart vs. Meyer, 54 Md. 454, 467; Carter vs. Woolfork, 71 Md. 283, 287.

minent danger of irreparable injury.[1] In general, the cases falling under this head are cases of tort, the most frequent examples of which in practice are as follows: injunctions to prevent destructive trespass;[2] to restrain nuisance;[3] to restrain waste;[4] to restrain infringement of patents,[5] copyright,[6] and trade-mark;[7] to restrain negotiation of commercial paper;[8] to restrain municipal corporation from levying illegal tax,[9] or from making unlawful contract;[10] to restrain railroad corporation from unauthorized use of street,[11] or from injury to abutting property;[12]

[1] 3 Pom. Eq. Jur. sec. 1346; 2 Beach Mod. Eq. secs. 641-643. By the act of 1888 ch. 260 it is provided that an injunction shall not be refused on the mere ground that the party has an adequate remedy in damages, unless the other party shall show that he has property from which damages can be made, or shall give bond with approved security to answer the same with costs. Md. Code, Art. 16, sec. 69.

[2] Amelung vs. Seekamp, 9 G. & J. 468, note; Blaine vs. Brady, 64 Md. 373; Dudley vs. Hunt, 67 Md. 44; Riverdale vs. Westcott, 74 Md. 311; R. R. Co. vs. Lee, 75 Md. 596; Osborn vs. Missouri, 147 U. S. 248.

[3] Hamilton vs. Whitridge, 11 Md. 128; Baltimore vs. Warren, 59 Md. 96; Kay vs. Kirk, 76 Md. 41; Helfrich vs. Water Co., 74 Md. 269. In this case the injunction was refused, the defendant having a legal right to the use of the stream for his cattle, although such use might affect the purity of the water which supplied the works of the water company lower down.

[4] Duvall vs. Waters, 1 Bland 569.

[5] Bell Telephone Cases, 126 U. S. (whole volume.)

[6] Callaghan vs. Myers, 128 U. S. 617.

[7] Stackelburg vs. Ponce, 128 U. S. 686; Kenny vs. Gillet, 70 Md. 574.

[8] Bank vs. Lange, 51 Md. 138; Devries vs. Shumate, 53 Md. 211.

[9] Ulman vs. Baltimore, 72 Md. 587.

[10] Baltimore vs. Keyser, 72 Md. 106.

[11] R. R. Co. vs. R. R. Co., 75 Md. 233; Koch vs. R. R. Co., 75 Md. 222 (refused).

[12] O'Brien vs. R. R. Co., 74 Md. 363 (refused).

to arrest the mismanagement or misconduct of corporation officers.[1]

§ 102. **To restrain breach of contract.** Negative covenants in leases, such as covenants not to erect buildings of a certain class, or not to carry on a particular trade on the premises, are specifically enforced by injunction, restraining their violation.[2] So of any other contract of such a character as to be specifically enforced, and in such contracts a negative covenant may be implied.[3] In America, it is still a controverted question whether a breach of contract can be enjoined, where the contract cannot be specifically enforced—such as a contract for personal services.[4]

§ 103. **Violation.** An injunction is binding from the time when it shall come to the knowledge of the party, by service or otherwise.[5] Violation, or con-

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[1] Mason vs. Equitable League, 77 Md.

[2] Bisph. Pr. Eq. sec. 463; Guerand vs. Dandelet, 32 Md. 561.

[3] Equitable vs. Baltimore, 63 Md. 285, 300; Bisph. Pr. Eq. sec. 464.

[4] Burton vs. Marshall, 4 Gill 487, note; Hahn vs. Concordia, 42 Md. 460; Equitable vs. Baltimore, 63 Md. 285. In England the affirmative of the proposition has been established since the leading case of Lumley vs. Wagner, 1 D. M. & G. 604, and in this country the weight of authority seems to incline in favor of the English doctrine, that the violation of such contracts may be enjoined, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible. 3 Pom. Eq. Jur. sec. 1343; 2 Beach Mod. Eq. sec. 770; Bisph. Pr. Eq. sec. 462; 1 Foster's Fed. Pr. sec. 220; Brantly on Cont. 253.

[5] Md. Code, Art. 16, sec. 181; United Telephone Co. vs. Dale, 25 Ch. D. 778; Rapalje on Contempts, secs. 20, 46. See Eakle vs.

nivance at a violation, is punishable as a contempt of court. An attachment of contempt first issues, and if on proof the party be adjudged guilty, he may be fined or imprisoned, or both, in the discretion of the court.[1]

§ 104. **Requisites.** A remedy so prompt, thorough and effective, enforced if necessary by the whole power of the state, available in urgent cases without notice, requires to be carefully guarded from abuse. No interlocutory injunction will, in general, be granted, unless the following requisites are complied with: The bill or petition must be supported by affidavit;[2] a bond with approved security must be given to indemnify the defendant against all costs and damages that may be occasioned, unless the injunction be sustained, and to perform such decree or order as may be passed;[3] there must be candid

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Smith, 27 Md. 467, 482. Notice by telegram is sufficient. *Ex parte* Langley, 13 Ch. D. 110; Avory vs. Andrews, 51 L. J. Ch. 414. If a party with notice that an injunction is about to issue against him goes on with the act complained of, he does so at the risk of being compelled to undo what he has done. Daniel vs. Ferguson, (1891) 2 Ch. 27.

[1] Art. 16, sec. 63. In cases of waste, the fine may be to the extent of double damage. An assignee of forbidden property, with knowledge, may be required to surrender, as well as held in contempt. *Ibid.* sec. 64. If the party attached clears his contempt, the costs shall be paid by the party complaining. *Ibid.* sec. 65.

[2] In very special cases the affidavit may be dispensed with. Negro Charles vs. Sheriff, 12 Md. 274.

[3] Md. Code, Art. 16, sec. 66; Carey's Forms, No. 706. This is also a matter within the court's discretion. White vs. Davidson, 8 Md. 169. A bond is not required from a wife suing her husband.

disclosure of all material facts and production of all exhibits,[1] and opportunity should be offered for a speedy hearing upon answer and motion to dissolve the injunction.[2] The writ must be specially asked in the prayer for relief, but this need not be repeated in the prayer for process.[3]

§ 105. **Motion to dissolve.** On filing his answer, the defendant may enter on the docket a motion for dissolution of the injunction. Such motion may also be made by "any party in interest."[4] The motion will either stand for hearing, in regular order, or on special application and due notice, a short day may be assigned. Either party may thereupon obtain an order for taking depositions, or for a commission, if the witnesses are out of the jurisdiction of the court.[5] The answer, in such cases, must be sworn to, and has the effect of a sworn answer under former chancery practice, that is, all responsive allegations are to be taken as proved, unless countervailed by two witnesses (of whom the plaintiff may be one), or

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[1] Sprigg vs. Western, 46 Md. 67; Baltimore vs. Weatherby, 52 Md. 442, 450; Morton vs. Grafflin, 68 Md. 545, 556; Gottschalk vs. Stein, 69 Md. 51, 58; Lamm vs. Burrell, 69 Md. 272.

[2] Usually five days after notice. Carey's Forms, No. 705. See Md. Code, Art. 16, sec. 178.

[3] Md. Code, Art. 16, sec. 133, 134. See, however, sec. 177. Comrs. vs. School Comrs., 26 Atl. Rep. 115, 77 Md.

[4] Md. Code, Art. 16, sec. 178.

[5] Rule 16, C. C. and C. C. No. 2. The depositions may be taken before an examiner or a justice of the peace upon such notice and in such manner as the court may direct. Md. Code, Art. 16, secs. 68, 226; Carey's Forms, Nos. 709, 710.

by one witness with corroborating circumstances.[1] If the hearing is on bill and answer, the ordinary chancery rule does not obtain, and every material allegation not denied by the answer is taken for true.[2] So much of the answer as is responsive is taken for true, as in other cases, and this effect of the answer is not at all impaired by the filing of a replication without proof.[3] The motion is to dissolve, unless cause shown by the plaintiff, and therefore, on the hearing, the matter is opened by him, then the defendant is heard, and the argument is closed on the part of the plaintiff.[4] The result may be an order dissolving the injunction, or continuing it until the final hearing, or modifying its terms. When the answer does not deny the equity of the bill, but sets up new matter of defence, the injunction will be continued to the final hearing.[5] If the injunction be dissolved, the bill will still be retained, unless the injunction be, not ancillary, but the principal relief prayed, in which event the bill will be then dismissed.[6]

§ 106. **Appeal.** In addition to what has been already offered under the head of "appeal,"[7] it is

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[1] Md. Code, Art. 16, secs. 146, 147; Gilston vs. Rullman, 15 Md. 260.

[2] Cronise vs. Clark, 4 Md. Ch. 403.

[3] Dougherty vs. Piet, 52 Md. 425.

[4] Heck vs. Vollmer, 29 Md. 507, 511.

[5] State vs. R. R. Co., 18 Md. 193.

[6] Kelly vs. Baltimore, 53 Md. 134; Bartlett vs. Hipkins, 76 Md. 5, 26, 40.

[7] *Ante*, sec. 77.

to be noted that upon appeal from an injunction order the defendant must file bis answer, although it will not be considered by the court, the sole question being as to the sufficiency of the averments of the bill.[1] Formerly, the effect of an appeal from an injunction order with approved appeal bond was to convert this powerful specific remedy into a mere claim for damages.[2] Now, however, it is in the discretion of the equity court to continue the operation of the injunction pending appeal.[3]

§ 107. **Modern legislation.** The scope of injunction has been widened and its efficacy increased by several enactments already mentioned.[4] The power to grant injunctions was first extended to courts of common law in England by the Common Law Procedure Act of 1854, and in 1873 conferred upon the High Court by the Judicature Act.[5] A similar enlargement of judicial power has obtained in New York since 1846, and has since been adopted in many states of the Union.[6]

§ 108. **Receiver.** A receiver is an indifferent person between the parties appointed by a court of

[1]Lamm vs. Burrell, 69 Md. 273-4. A demurrer to the whole bill may be taken as an answer, for the purpose of the appeal. Baltimore vs. Weatherby, 52 Md. 442.

[2]Glenn vs. Davis, 35 Md. 208, 220.

[3]1890 ch. 32; *ante*, sec. 78, note.

[4]*Ante*, secs. 95, 101, note, 106.

[5]Bonnard vs. Perryman (1891), 2 Ch. 283; Collard vs. Marshall (1892), 1 Ch. 571.

[6]Md. Code, Art. 75, secs. 116-128; Art. 47, sec. 23.

equity to take charge of property in controversy *pendente lite*. He is for the time being an officer of the court, and his holding is that of the court. His appointment is provisional, settles no question of right or title, and is made in the interest of whom it may concern.[1] In other words, a receiver is the court's stakeholder for the parties in litigation. He is required to give bond, to keep and render accounts, and to refer all matters of doubt or difficulty to the court for its special direction. As an officer of the court, he may be coerced by attachment, as well as by suit on his bond, for neglect of duty, and is protected from interference by process of contempt, if necessary. He collects and receives the rents and profits of land, paying, when authorized, taxes and necessary expenses. He takes into his custody personal property of every description, and holds the same, or sells it, as ordered. But he is not bound, as an assignee, to accept unprofitable leases or contracts, and is entitled to a reasonable time to elect whether to adopt or repudiate the same.[2] For his services, he is entitled to compensation as fixed by standing rule of court, or by special order.[3]

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[1]Williamson vs. Williams, 1 Bland 419, Brantly's note; Gaither vs. Stockbridge, 67 Md. 222; Quincy vs. Humphreys, 145 U. S. 97. A court of law has no power to appoint a receiver, even under a statute which authorizes the passing of orders for the protection of property in litigation from waste, destruction or removal. Oehm vs. Ruckle, 50 N. J. Law 84.

[2]U. S. Trust Co. vs. Wabash R. R., 150 U. S. 287, 299; Gaither vs. Stockbridge, 67 Md. 222.

[3]On sales under decree or order of court the same commissions are allowed as to trustees. Rule 24, C. C. and C. C. No. 2; *ante*, sec.

§ 109. **General rules.** 1. The power of appointing receivers is a delicate one, to be exercised with great circumspection. 2. It must appear that the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve it. 3. The court never appoints a receiver because the measure can do no harm. 4. Fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved. 5. Unless the necessity be of the most stringent character, a receiver will not be appointed *ex parte*.[1]

These rules are said by Prof. Pomeroy to be too strong for universal application, especially the fourth. "There are classes of cases in which a receiver is appointed almost as a matter of course, although no fraud nor *imminent* danger is proved."[2] He cites as instances cases where owners of property are incompetent, such as infants and lunatics, assigning to this class the estates of decedents.[3] The functions of guardian, committee and administrator are, however, ordinarily sufficient for such cases. Other

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These allowances are subject to be increased in cases of extraordinary trouble, or lessened in case of negligence or other default, in the discretion of the court. Such rules are the "law of the court." Tome vs. King, 64 Md. 166, 180.

[1]Blondheim vs. Moore, 11 Md. 364, recognized as a "leading authority in this country." Bisph. Pr. Eq. sec. 577; Beach on Receivers, sec. 125; 20 Am. & Eng. Ency. 16; 1 Foster's Fed. Pr. sec. 241; Davis vs. U. S. Electric, 77 Md. 35.

[2]3 Pom. Eq. Jur. sec. 1331, note 2.

[3]*Ibid.* sec. 1332.

cases instanced are suits between partners and suits for partition, where both parties are equally entitled to the possession, but it is improper under the circumstances that either should retain the exclusive control.[1] On the other hand, it has been more recently held that the rules laid down in Blondheim vs. Moore[2] are as applicable to suits between partners as in other cases.[3] The exclusion, however, by one partner of his co-partner from his share in the management is decisive in favor of the appointment of a receiver.[4]

§ 110. **Statutory receivers.** Statutory receivers may be appointed by decree for the dissolution of corporations, either when the corporation has been determined by legal proceedings to be insolvent, or when by vote of the directors, confirmed by the stockholders, shareholders or members, a voluntary dissolution is determined. They are vested with all the estate and assets of the corporation. Their duties are to wind up the affairs of the corporation under the direction of the court, and, if necessary, to sue delinquent stockholders for the balance of stock unpaid. All sales, assignments, transfers, mortgages or other dispositions, or conveyances of

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[1]Speights vs. Peters, 9 Gill 472; Whitman vs. Robinson, 21 Md. 30, cited 3 Pom. Eq. Jur. sec. 1333.

[2]11 Md. 365.

[3]Heflebower vs. Buck, 64 Md. 15, 21.

[4]Katz vs. Brewington, 71 Md. 79, 83. See Brantly's note to Williamson vs. Wilson, 1 Bland 392 (top paging); Beach, Receivers, chap. 15.

any part of the assets of the corporation made, and all judgments confessed, after the filing of the bill for dissolution are void as against the receiver.[1] There are few reported cases of proceedings under the statute,[2] which until recently was supposed not to have displaced the general jurisdiction of equity to appoint receivers of corporations in a variety of cases.[3]

It has, however, been recently decided that, independently of the statute, a court of equity has no jurisdiction to appoint a receiver of a corporation on the ground of mismanagement, fraud, or abuse of corporate powers.[4]

§ 111. **Managing receivers.** The progress and growth of equity jurisdiction in this country has largely expanded the functions of receivers, particularly in cases of foreclosure of defaulted railway mortgages. A railroad is property of a peculiar nature, in which the public are concerned. To preserve it from destruction as a public highway it must be kept in active operation and sold as a going

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[1]Md. Code, Art. 23, secs. 264-276. For the form of decrees appointing corporation receivers, but not under the statute, see Hayes vs. Brotzman, 46 Md. 519; Frank vs. Morrison, 58 Md. 423.

[2]Stillman vs. Dougherty, 44 Md. 380.

[3]Davis vs. U. S. Electric, 77 Md. 35; Gaither vs. Stockbridge, 67 Md. 222; Day vs. Postal, 66 Md. 354; Frostburg B. Ass. vs. Stark, 47 Md. 338; Hall vs. U. S. Insurance Co., 5 Gill, 484, 497; Ellicott vs. U. S. Insurance Co., 7 Gill. 307; 3 Pom. Eq. Jur. sec. 1334, p. 363, note 5; 1 Foster's Fed. Pr. sec. 240, p. 397.

[4]Mason vs. Supreme Court of Equitable League, 27 Atl. Rep. 171, 77 Md. —.

concern. Labor is to be kept employed, supplies, equipment and repairs are to be kept up, existing contracts are to be complied with and new ones are to be made. In the federal courts of equity and in those of many states, the practice has become established of appointing managing receivers charged with the practical operation of railroads which are the subject of litigation, until their financial embarrassments are removed, or they can be advantageously sold, when such a course is found to be necessary to secure the rights of creditors and owners. The jurisdiction is exercised upon the same principles which govern the appointment of receivers in the foreclosure of mortgages generally, and inadequacy of the mortgage security, coupled with insolvency of the mortgagor, are regarded as sufficient ground of relief.[1] To a limited extent, the same principle has been applied to other receivers, as for instance, under special circumstances, to managing receivers of a farm.[2]

§ 112. **Receivers' certificates.** Out of this practice has developed another innovation in the form of receivers' certificates of indebtedness, issued under special order of court for raising money upon the

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[1]Davis vs. Gray, 16 Wall. 203; Wallace vs. Loomis, 97 U. S. 146; Fosdick vs. Schall, 99 U. S. 235; High on Rec. sec. 376, 20 A. & E. Ency. 329; 1 Foster's Fed. Pr. sec. 246. The railway property in this country now under the management of receivers is said to exceed in value two billions of dollars, with a mileage of more than 42,000.

[2]Burroughs vs. Gaither 66 Md. 171.

credit of the property, when the income is found inadequate for the necessary purposes of the railroad. These evidences of indebtedness are assignable, but not negotiable, instruments, and holders are chargeable with notice of the authority by which, and of the specific purposes for which, they are issued. In order to market these securities of an embarrassed road, it is provided in the order for their issue that they will be entitled to a preference in payment over all prior mortgages and liens. No such order can be valid without due notice to all parties in interest, but notice to the trustees of the mortgage is deemed, upon the principle of representation,[1] to be notice to every mortgage bond-holder. Payment of receivers' certificates can only be enforced by an order of court, out of the proceeds of sale, or otherwise as may have been specially provided. No action lies upon them at law.

The device is an American invention, of recent origin, and marks, in the language of Mr. High, "the extreme limit which courts of equity have thus far attained in the exercise of their extraordinary jurisdiction."[2]

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[1] *Ante*, sec. 30.

[2] Meyer vs. Johnston, 53 Ala. 237; Wallace vs. Loomis, 97 U. S. 146; Miltenberger vs. Logansport R. Co., 106 U. S. 286; Kneeland vs. Am. L. & T. Co., 136 U. S. 89; Barton vs. Barbour, 104 U. S. 126, 137, 8. 1 Foster's Fed. Pr. sec. 247; High Rec. sec. 398, c; Beach Rec. Ch. XI; Jones' R. R. Securities, 507; 20 A. & E. Ency. 392.

CHAPTER VI.

EQUITY PROCEDURE. PRACTICE. (II.)

113. Amendment.
114. Of bill.
115. Of answer.
116. Taking off file.
117. Rule further proceedings.
118. Security for costs.
119. Consolidation.
120. Election of remedy.
121. Removal.
122. Payment into court.
123. Investment.
124. Contempt.
125. *Ne exeat.*
126. Production of books and papers.
127. Arbitration.
128. Issues. Jury trial.

§ 113. **Amendment.** "Equity regards substance rather than form," and courts of equity have always allowed amendment with great liberality. But in order to prevent surprise or abuse of the privilege, leave to amend must first be obtained upon application by motion or petition, and any unauthorized amendment may be ordered off the file.[1] The mode is within the discretion of the court. The correct practice, when the amendments are important, is to file a new and amended pleading, which should state

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[1] *Post*, sec. 116.

only so much of the original pleading as may be necessary to introduce the new matter, and the two are considered as one proceeding.[1] But amendment by interlineation or erasure is frequently allowed for convenience, especially in small matters.[2] Granting or refusal of leave to amend is within the discretion of the court, not reviewable on appeal.[3] The exercise of this discretion must depend largely upon circumstances, greater caution being necessary at a late stage of the litigation, or when serious inconvenience or expense would result to the other side. It is the duty of the court to see that the pleadings are put in such form that the substantial merits are reached.[4] When an amendment is allowed, new pleadings or proofs shall not be necessary, even where any of the parties are *non sui juris* or *non-resident*, unless required by the court, or by new parties introduced.[5]

§ 114. **Amendment of bill.** If a demurrer or plea be allowed, or if there be matter in an answer

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[1]Wagoner, 26 Atl. Rep. 284, 77 Md. —; Alex. Ch. Pr. 110.

[2]Scarlett vs. Academy of Music, 43 Md. 203.

[3]State vs. Brown, 64 Md. 201; Glenn vs. Clark, 53 Md. 580, 602; Calvert vs. Carter, 18 Md. 74, 107. Although the language of the Code is very broad, and provides that upon application of either party he shall have the right, upon payment of such costs as the court may direct, to amend at any time before final decree any of the pleadings or proceedings, so as to bring the merits of the case fairly to trial. Md. Code, Art. 16, sec. 16.

[4]Hardin vs. Boyd, 113 U. S. 756; Fearey vs. Hayes, 44 N. J. Eq. 426.

[5]Art. 16, sec. 17.

requiring a reply (no special replication being now permitted), in either case the bill may be suitably amended, leave of court being first obtained upon motion of the plaintiff, and upon such terms as the court may prescribe.[1] An amendment not made within the time allowed shall be considered abandoned, and the cause shall proceed as if no application had been made.[2] If, by the amendment thus made, the case should be materially varied by new facts, the defendant may answer anew, plead, or demur to the bill as amended, within such time as may be ordered after notice of the amendment made. Notice may be given by service of a copy of the bill as amended upon the defendant or his solicitor, or it may be by subpoena. The mode of proceeding in default of answer to the matter of the amendment shall be the same as that in default of answer to the original bill; and the proceeding on answer, plea or demurrer, filed to the amended bill, shall be the same as that on similar defences to an original bill.[3] If a case be set for preliminary hearing by the plaintiff upon the defendant's objection in his answer for want of parties to the bill, and, upon hearing, the objection be allowed, the plaintiff may amend by adding parties upon paying the cost of amendment.[4] But he may be deprived of the right to amend by failing so to set the case for preliminary

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[1] Art. 16, secs. 139, 149.

[2] *Ibid.* sec. 150.

[3] Art. 16, sec. 150.

[4] Art. 16, sec. 163.

hearing, and by taking the risk of the objection being allowed at final hearing.[1] Parties may be added on short petition and summons without formal amended bill.[2] An amendment to a bill will rarely be permitted at an advanced stage when its effect is to present substantially a new case.[3] New matter arising since the filing of the bill should not generally be added to it by amendment, but should be introduced by a supplemental bill,[4] unless the new matter has occurred before answer or other defence, or unless it be some formal act necessary to perfect an inchoate right, such as the obtaining probate of a will or letters of administration. The introduction, however, of such new matter irregularly by amended instead of by supplemental bill, is a matter not of substance but form, and is waived by failure to object at the proper time.[5] If the plaintiff's title has been acquired subsequently to the filing of his bill, he cannot get the benefit of the former proceedings by an amended or supplemental bill, but must assert his new title in a new bill.[6]

§ 115. **Amendment of answer.** Answers, particularly when sworn to, are allowed to be amended with

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[1] Art. 16, sec. 163.

[2] 1892 ch. 654.

[3] Hardin vs. Boyd, 113 U. S. 756, 761; Dexter vs. Joins, 133 N. Y. 551; 1 Foster's Fed. Pr. sec. 163. But see Jones vs. Van Doren, 130 U. S. 690; Jeffery vs. Flood, 70 Md. 42.

[4] 1 Foster's Fed. Pr. sec. 164.

[5] Straughan vs. Hallwood, 30 W. Va. 293.

[6] Bannon vs. Comegys, 69 Md. 422.

more caution than bills, where the object is to change essentially the grounds taken in the original answer. When the effort is to let in new facts and defences wholly dependant upon parol evidence, the reluctance of the court is increased. Such amendments will rarely be allowed, after the court has announced its opinion, or after the taking of testimony has disclosed the weak point. A special and strong case must be shown to allow such amendments. The facts constituting the proposed amendment must have been recently discovered, and the defendant must have acted in good faith and with reasonable diligence.[1] A defendant will rarely be allowed to retract an admission in his original answer.[2]

There is nothing of special importance to be said as to amendments of demurrers, pleas or replications.[3]

§ 116. **Taking off file.** For irregularity in point of form, any pleading or proceeding may, on motion, be ordered off the file, or stricken out; such as a bill or answer amended without leave;[4] an answer without affidavit;[5] an answer filed too late, or by a person not named as a defendant in the bill;[6] a plea or demurrer, filed without affidavit;[7] exceptions to sale, filed too

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[1] Glenn vs. Clark, 53 Md. 580; Thomas vs. Doub, 1 Md. 252, 323; Williams vs. Savage, 3 Md. Ch. 418; 1 Foster's Fed. Pr. sec. 167.

[2] McKim vs. Thompson, 1 Bland 150, 162.

[3] 1 Foster's Fed. Pr. sec. 166.

[4] Thomas vs. Frederick, 7 G. & J. 369, 388; Warren vs. Twilley, 10 Md. 39.

[5] Nesbitt vs. Dallam, 7 G. & J. 494, 510.

[6] 1 Foster's Fed. Pr. sec. 152.

[7] *Ibid.* Wagoner, 76 Md. 311.

late.[1] Such irregularities may be considered as waived, if the motion be not made in due time.

§ 117. **Rule further proceedings.** This procedure is the modern substitute for the English chancery practice of motions to dismiss for want of prosecution.[2] If the plaintiff fails to file his replication within fifteen days after answer filed, the defendant shall be entitled to a rule further proceedings within ten days after notice of such rule, and upon failure to comply with such rule, the defendant shall be entitled to have the bill dismissed.[3] But if the answer is accompanied with a demurrer or plea, they are to be first disposed of, and can be set for hearing on motion of either side.

§ 118. **Security for costs.** A rule security for costs may be laid at any time before final decree, by any defendant, against a plaintiff, non-resident at the time of filing the bill, or becoming so afterward.[4] When the fact of the non-residence does not appear upon the face of the bill, the usual order to show cause will be passed upon motion, and upon the plaintiff's failure to give security or to show cause, the bill will be dismissed.[5] The form of the security is by an entry upon the docket of the name of the person who agrees to become security for the costs,

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[1] White vs. Malcolm, 15 Md. 529, 547.
[2] Whelan vs. Cook, 29 Md. 8.
[3] Md. Code, Art. 16, sec. 148.
[4] Art. 16, sec. 152.
[5] Carey's Forms Nos. 699, 700, 701.

which is in the nature of a recognizance, to be enforced by *scire facias*.[1] Or, the rule may be complied with by the deposit of an agreed sum, or by the deposit of an approved specific security, such as a certificate of city stock, or by furnishing a regular bond, with collateral condition, in a penalty and with sureties, approved by the court.[2]

§ 119. **Consolidation.** Applying the maxim,—"equity prevents multiplicity of suits"—cases pending at the same time, relating to the same subject-matter, which can be conveniently determined by one decree, may, upon the application of either party be consolidated by order passed after due notice. The practical object in view is economy of time and costs,[3] and in cases of sales, to enable purchasers to acquire title free of liens.[4] Consolidation cannot be effected simply by arrangement between the several plaintiffs; the defendant should have notice and opportunity to show cause.[5] Nor is it proper that

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[1]Mayer vs. Tyson, 1 Bland 559, 565, Brantly's notes; Alex. Ch. Pr. 56, note.

[2]See 2 Poe, Pl. & Pr. sec. 81.

[3]Gibbs vs. Claggett, 2 G. & J. 14, 28; Orrick vs. Boehm, 49 Md. 72, 98; as in creditor's bills, Scott vs. Amos, 73 Md. 80, 81; Virginia vs. Canal Co., 32 Md. 501, 551; Campbell's case, 2 Bland 209, 241; Mississippi Mills vs. Cohn, 150 U. S. 202; in cases of partnership accounts, Gable vs. Williams, 59 Md. 46, 49; and in other cases, Thomas vs. Brown, 67 Md. 512, 521; Reid vs. Stouffer, 56 Md. 236, 250.

[4]Appold vs. Prospect, 37 Md. 457, 466; Holthaus vs. Nicholas, 41 Md. 241, 256; Trustees vs. Heise, 44 Md. 453, 463; Hamilton vs. Schwehr, 34 Md. 107, 117; Burger vs. Greif, 55 Md. 518, 525; Joy vs. St. Louis, 138 U. S. 1.

[5]Cornell vs. McCann, 37 Md. 89, 96.

suits should be consolidated whose objects are conflicting,[1] nor where the effect would be to make the proceeding multifarious,[2] or to delay the suit first brought.[3] From an order of consolidation, being interlocutory, no appeal will lie, but it is open for review upon appeal from the final decree.[4]

§ 120. **Election of remedy.** The maxim that "equity prevents multiplicity of suits" entitles a defendant in equity, who is also sued at law by the same plaintiff for the same matter, after filing his answer, to an order requiring the plaintiff to elect the court in which he will proceed.[5] The two suits must be *ad idem*, that is their objects must be identical. The application must be made promptly, or it will be regarded as waived.[6] A mortgagee may pursue his remedies at law and in equity at the same time, being entitled, however, to but one satisfaction.[7] The election is signified by writing filed in the case. If the election is to proceed in equity an injunction will issue to stay the proceeding at law. If the plaintiff elects to proceed at law, or fails to elect within the time limited by the order, his bill will be

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[1] Day vs. Postal, 66 Md. 354, 360.

[2] Young vs. Lyon, 8 Gill. 162, 168; Gibbs vs. Claggett, 2 G. & J. 14, 28; but see Joy vs. St. Louis, 138 U. S. 1.

[3] Mercantile vs. R. R. Co. 41 Fed. Rep. 8.

[4] Day vs. Postal, 66 Md. 354, 360.

[5] Alex. Ch. Pr. 100; 1 Foster's Fed. Pr. sec. 295.

[6] Foley vs. Bitter, 34 Md. 646, 650.

[7] 1 Dan. Ch. Pr. 815, 4th Am. ed.

dismissed with costs, but without prejudice to a subsequent suit.[1]

§ 121. **Removal.** An equity case shall be removed "to some other court having jurisdiction" upon suggestion that all the judges are constitutionally disqualified, that is to say, either from interest or from consanguinity, or from having been of counsel.[2] Equity cases are *not* removed upon suggestion that the party cannot have a fair and impartial trial, as in actions at law.[3] Such provision applies, however, to issues sent from a court of equity to be tried at law.[4] The laws of the United States provide for the removal from state to federal courts of suits in equity as well as actions at law, in certain classes of cases arising under the federal constitution, laws or treaties, in controversies between citizens of the same state claiming land under grants of different states, and between a citizen of the state in which suit is brought and a defendant, a citizen of another state, when it shall be made to appear to the federal court that from prejudice or local influence he will not be able to obtain justice in a state court.[5]

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[1] Alex. Ch. Pr. 100; 1 Foster's Fed. Pr. sec. 295; Bradford vs. Williams, 2 Md. Ch. 1. For the form of order, see Union Bank vs. Kerr, 2 Md. Ch. 460, 467.

[2] Md. Const. Art. IV, secs. 7, 8.

[3] Art. 75, sec. 97; Cooke, 41 Md. 362.

[4] Const. Art. IV, sec. 8.

[5] 2 Foster's Fed. Pr. secs. 383, etc.; 1 Desty's Fed. Procedure, sec. 96, etc.; Desty's Removal; 20 A. & E. Ency. 976, etc,; Fisk vs. Henarie, 142 U. S. 459.

§ 122. **Payment into court.** Payment of money into court is directed where the defendant admits money to be in his hands which he does not claim as his own, and in which the applicant is interested.[1] It is one of the methods by which the court enforces its jurisdiction of preserving property in dispute pending litigation.[2] The admission may be made in the answer, or in any subsequent proceeding, or in letters written before the suit.[3] But there must be an admission.[4] The mere relation of debtor and creditor is not sufficient to sustain this application. The relation must be a fiduciary one, and the money must be impressed with a trust.[5] Such an order can properly be passed only after notice to, and hearing of, the defendant.[6] The order is strictly one of precaution, for the preservation of the fund until the decree. It is not a final order, and no appeal from it will lie.[7] In all decrees for sale, it is usual to direct the trustee to bring the money into court, and the law so provides.[8] All money or securities brought into court under any order thereof shall be deposited in such bank as may be agreed on by the parties, or directed by the court, to the credit of the

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[1] Ad. Eq. 350; Alex. Ch. Pr. 96; Wartman, Taney C. C. Dec. 362.
[2] Dillon vs. Conn. Mutual, 44 Md. 386, 396.
[3] Porrett vs. White, 31 Ch. D. 52; Hampden vs. Wallis, 27 Ch. D. 251.
[4] Hollis vs. Burton, (1892) 3 Ch. 226, 235.
[5] Ad. Eq. 351; Dillon vs. Conn. Mutual, 44 Md. 386, 394.
[6] Brooks vs. Dent, 4 Md. Ch. 473.
[7] Dillon vs. Conn. Mutual, 44 Md. 386.
[8] Md. Code, Art. 16, sec. 202.

cause, and there remain subject to further order. The original order signed by the judge, together with the check of the clerk drawn payable to order, shall be the bank's authority for payment.[1] A *fieri facias* cannot properly be issued upon an order directing money to be paid into court, and if issued will be quashed.[2] Such an order is enforceable by attachment for contempt.[3] Payment of money into court may also be authorized upon the voluntary application of fiduciaries, plaintiffs in interpleader suits, etc. Where money has been paid into court, it may be ordered to be paid over to the party entitled, even after the bill has been dismissed.[4]

§ 123. **Investment.** Money paid into court, if the litigation promises to be protracted, is usually invested, under the order of the court; and trustees, for their own protection, are accustomed to invest under such orders, obtained upon their own application or upon that of parties interested. A trustee may be held personally liable for any loss incurred by the failure of an unauthorized investment, even although made in good faith.[5] In several states the

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[1]Rule 26, C. C. and C. C. No. 2.

[2]United Lines Co. vs. Stevens, 67 Md. 156.

[3]Md. Code, Art. 16, sec. 151; Wartman, Taney C. C. Dec. 362, a case arising after the abolition of imprisonment for debt, by the Constitution of 1851; see the note appended to his opinion by the Chief Justice on page 373.

[4]Republic of Liberia vs. Roye, 1 App. Ca. 139.

[5]Zimmerman vs. Fraley, 70 Md. 561, 568; Sullivan vs. Howard, 20 Md. 191; Murray vs. Feinour, 2 Md. Ch. 418.

character of investment securities is fixed by statute or usage, with varying results.[1] In Maryland there is no statute or general rule upon the subject.[2] The orphans' court may authorize administrators and guardians to "invest in bank or other incorporated stock, or any other good security."[3] Similar investments made by trustees have been justified by analogy to this provision.[4] Good bank stock, government securities and mortgages on real estate have always been considered here proper investments.[5] To these may be added well secured ground-rents, whether irredeemable or redeemable.[6] Of late years the high price and consequent low rate of income of all first-class securities has caused a pressure upon courts to authorize investments of a more questionable character, such as sub ground-rents,

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[1] Lamar vs. Micou, 112 U. S. 452. Investment of trust funds in private corporation stock or bonds is inhibited by the constitution of Pennsylvania, Art. 3, sec. 22, and condemned by decisions in New York and New Jersey, while in the New England and Southern states such investments are allowed, and in Alabama trust funds may be invested on "good personal security." Cases cited in Lamar vs. Micou, 112 U. S. 452, 468, &c.

[2] McCoy vs. Horwitz, 62 Md. 183, 189.

[3] Md. Code, Art. 93, sec. 237.

[4] Gray vs. Lynch, 8 Gill 419; McCoy vs. Horwitz, 62 Md. 183, 189. The guarantee capital of life insurance companies deposited in the state treasury is to be invested in securities either of the United States, of the state of Maryland, or of the city of Baltimore. Md. Code, Art. 23, sec. 116.

[5] Lamar vs. Micou, 112 U. S. 452, 469; citing Hammond vs. Hammond, 2 Bland 306, 413; Gray vs. Lynch, 8 Gill 403; Murray vs. Feinour, 2 Md. Ch. 418.

[6] *Ex parte* Huff, 2 Pa. St. 227.

improved ground-rents in excess of the value of the ground, mortgages upon leaseholds, railroad mortgage bonds, etc. Such investments are sometimes authorized by special order of court, but not unless the court is satisfied by proof of the entire safety of the particular security. An investment on a junior mortgage, or in mere personal security, would probably not be sanctioned under any circumstances. Railroad bonds are subject to the risk of losing priority of lien in case of a receivership.[1] Where investment is authorized generally, without designating the security, it must be made in the inscribed debt of the state of Maryland or of the city of Baltimore.[2] The certificate shall import on its face that it is made by the trustee subject to the order of the court. Every investment must be reported to the court for ratification. The certificate of investment is produced with the report, and on approval by the court is deposited in bank.[3] All trustees, receivers or other fiduciaries, administering any trust in either of the equity courts of Baltimore, are required to report, under oath, at stated times, where and under what names the trust moneys are deposited, and the nature and particulars of all investments. Such reports are referred to an auditor or master for actual inspection of the securities, which are to be produced, and for verification of

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[1] *Ante*, sec. 112.
[2] Rule 27, C. C. and C. C. No. 2.
[3] *Ibid.*

deposits. On the first day of April in each year the names of all fiduciaries failing to comply with this rule are to be reported for removal at the discretion of the court.[1]

Where the instrument creating the trust directs the mode of investment and designates the securities, the trustee is bound to follow these directions, and in general the court will not authorize any departure from them.[2]

§ 124 **Contempt.** The maxim—*aequitas agit in personam*—pointed originally to personal coercion as the executive process of the Court of Chancery. Attachment for contempt was the mode of compelling appearance and discovery, and of enforcing all orders and decrees, until altered, as already shown by legislation.[3] Historically, it is easy to trace this procedure to the usage of the English ecclesiastical courts.[4] Established at an early day in the Court of Chancery, it was, in some of its features, derived from thence to the English courts of common law.[5] Irrespective of historical antecedents, the doctrine has long been firmly settled that the power is inherent in all superior courts to punish for contempt, either of disorder or of disobedience.[6] This is a

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[1]Rule 31, C. C. and C. C. No. 2.

[2]2 Pom. Eq. Jur. sec. 1073; Abell vs. Abell, 75 Md. 44, 64; Zimmerman vs. Fraley, 70 Md. 561; Barney vs. Saunders, 16 How. 535.

[3]*Ante*, secs. 48, 83.

[4]*Ante*, sec. 7.

[5]4 Bl. Com. 287, 288.

[6]U. S. vs. Hudson, 7 Cranch 34; Anderson vs. Dunn, 6 Wheat, 204, 227; *ex parte* Robinson, 19 Wall. 505, 510; *ex parte* Maulsby, 13

power anterior to and independent of legislation, but it has been defined and regulated as to the federal courts by an act of Congress, substantially copied by state enactments.[1] The provision is as follows: "The power of the several courts of this state to issue attachments and inflict summary punishment for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, or the misbehavior of any of the officers of the said courts in their official transactions; or the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree or command of the said courts."[2]

If a direct contempt be committed in the immediate presence of the court, no attachment is necessary, and no proof is required. Punishment by fine or imprisonment, or both, in the discretion of the court, may be summarily inflicted,[3] For contempt peculiar to courts of equity, provision is made as follows: "In order to enforce obedience to the process, rules and orders of the courts of equity, in all cases where any party or person shall be in contempt, for disobedience, non-performance or non-observance

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Md. 635; 3 A. & E. Ency. 780; 4 Bl. Com. 284; Sto. Const. sec. 1774; Bac. Abr. *Courts*, E.

[1] U. S. Rev. St. sec. 725; Md. Code, Art. 26, sec. 4.

[2] Md. Code, Art. 26, sec. 4.

[3] 4 Bl. Com. 286, 287; *ex parte* Terry, 128 U. S. 289.

of any process, rule or order of the court, or for any other matter or things whatsoever, whereby or wherein a contempt, according to the rules, law, practice or course of the said courts may be incurred, such party or person shall, for every such contempt, and before he shall be released or discharged from the same, pay to the clerk of the court, (to be paid by him at the end of every six months to the treasurer, for the use of the state,) a sum not exceeding twenty dollars, as a fine for the purgation of every such contempt; and the said party or person being in court upon any process of contempt or otherwise, upon the order of the court, shall stand committed and remain in close custody until the said process, rule or order shall be fully performed, obeyed and fulfilled, and until the said fine or fines for such contempt imposed by the said court, and the costs shall be fully paid."[1]

When the order disobeyed is an order for alimony, for the payment of money into court, or the like, it is not usual to order the writ of attachment until after notice of an *order nisi*, and an opportunity to show cause.[2] When the contempt is by an officer of the court, by a witness, and in some cases by a party, the attachment may be issued forthwith.[3] But there

[1] Md. Code, Art. 16, sec. 151.

[2] Wartman, Taney C. C. Dec. 362, 368; 1 Foster's Fed. Pr. sec. 342; Gordon, 95 Cal. 374.

[3] Sheriff, Art. 87, secs. 16-19; trustee; Carey's Forms, No. 811; witness, Art. 16, sec. 232; defendant, refusing to appear or answer; Art. 16, secs. 172, 173, 174; or failing to perform decree or order; Art. 16, secs. 168, 169; or violating injunction; Art. 16, sec. 63.

can be no commitment for non-payment of a money decree or order.[1] And the state law in this respect is followed by the federal courts, except in special cases of officers of the court, purchasers at judicial sales and costs in the Supreme Court.[2] A party arrested under an attachment is entitled to an immediate hearing, or to be released on bail until it can be had, and if he purges his contempt, he is discharged, sometimes paying the costs of the attachment, and in other cases at the cost of the party complaining.[3] The question of contempt or not does not so much depend upon the intent as upon the character of the act. Disobedience is itself contempt, unless sufficient excuse be shown.[4] Until purged of his contempt, the party is not entitled to be heard on any motion or to proceed in any other way.[5] When a court commits a party for contempt, its adjudication is a conviction and its commitment in consequence is execution. No appeal lies, but the party may be discharged on *habeas corpus* if the court had no jurisdiction, or if obedience to the court's process has become impossible.[6] A distinction has been

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[1] Art. 16, sec. 168.

[2] 1 Foster's Fed. Pr. sec. 341; 2 *Ibid.* sec. 370; U. S. Rev. St. sec. 990.

[3] Alex. Ch. Pr. 23, 25. Art. 16, sec. 65.

[4] Wartman, Taney C. C. Dec. 362, 370.

[5] Gilbert vs. Arnold, 30 Md. 29, 35; Wartman, Taney C. C. Dec. 362, 368.

[6] *Ex parte* Maulsby, 13 Md. 625; Hayes vs. Fischer, 102 U. S. 121; *Ex parte* Fisk, 113 U. S. 713; *Ex parte* Terry, 128 U. S. 289; *Ex parte* Savin, 131 U. S. 267; *Ex parte* Cuddy, 131 U. S. 280; Stevens vs. Fuller, 136 U. S. 468; 2 Foster's Fed. Pr. sec. 366.

taken between proceedings for contempt to vindicate public justice, and for the mere enforcement of a private right.[1] When for the enforcement only of a private right the sentence has been held appealable, and the state of mind of the party towards the court is immaterial.[2] Disobedience of such an order is not excused by a disclaimer of intentional disrespect to the court.[3]

§ 125. **Ne Exeat.** The writ *ne exeat regno* issued in England to prevent a defendant from leaving the realm without giving security, at the instance of a plaintiff having an equitable claim, or a claim for alimony. The proceeding was an arrest in the nature of equitable bail, and the equitable demand must have been actually payable and certain, not contingent or unliquidated.[4] Prior to the abolition of imprisonment for debt by the Maryland Constitution of 1851, the writ had been repeatedly re-

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[1] Com. vs. Perkins, 124 Pa. 48; State vs. Irwin, 30 W. Va. 410.

[2] Dodd vs. Una, 40 N. J. Eq. 714, 719.

[3] Thompson vs. R. R. Co., 48 N. J. Eq. 105.

[4] 2 Sto. Eq. Jur. sec. 1474; Bisph. Eq. sec. 581; 16 A. & E. Ency. 373; Beames on *Ne Exeat*; Alex. Ch. Pr. 94. In some of these works there are learned inquiries into the antiquity of the process, but in none of them is there any mention of the case of Julius Cæsar. "The government of Spain was allotted Cæsar after his prætorship, but his circumstances were so embarrassed, and his creditors so importunate, when preparing for his departure, that he was compelled to apply to Crassus, the richest man in Rome. Crassus, thereupon, became his security for eight hundred and thirty talents, which procured him liberty to set out for his province." Plutarch's Lives, (Harper's ed.) 499.

cognized as available in this state.[1] Since that date the traces of its survival are few and inconclusive,[2] and it has been made a question whether a *ne exeat* can now be validly issued in Maryland for any purpose.[3] It is equally unsettled whether the writ can now issue from a federal court held in a state which has abolished imprisonment for debt[4] In a federal equity suit arising in Rhode Island for the correction of a mistake in a *ne exeat* bond, no notice appears to have been taken of this question, and the validity of the *ne exeat* proceeding was assumed throughout.[5] Decisions of state courts upon the subject are conflicting, some holding that the writ ceased with imprisonment for debt,[6] and others

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[1]Somerville vs. Johnson, 1 H. & McH. 348; Cox vs. Scott, 5 H. & J. 384; Johnson vs. Clendenin, 5 G. & J. 463; Bryson vs. Petty, 1 Bland 182, note; Sloss vs. M'Ilvane, 2 Bland 72, note; Bayly, 2 Md. Ch. 326; Feigley, 7 Md. 537,540.

[2]The writ is said to have been issued by the Circuit Court for Baltimore county, in a case of alimony, Barroll's Ch. Pr. 166. It was issued by the late Judge Miller on the circuit, against an absconding defendant in possession of securities obtained by the fraudulent abuse of confidence. Todd vs. Grove, 33 Md. 188, 201. See the forms used in this case, Carey's Forms Nos. 695, 696, 697.

[3]Barroll, Chan. Pr. 164; Barroll, Md. Eq. 216. Mr. Barroll is correct in saying that a *ne exeat* cannot now be used to enforce a "mere money demand," but his argument that alimony is "as much a debt as a decree in any other cause for the payment of money," is not sustained by authority. *Ante*, sec. 84.

[4]1 Foster's Fed. Pr. sec. 261; 2 *Ibid.* sec. 370; U. S. Rev. St. sec. 990; 24 Am. Law Review 535.

[5]Griswold vs. Hazard, 141 U. S. 260 (1890.)

[6]Cable vs. Alvord, 27 Oh. St. 654; *ex parte* Harken 49 Cal. 465.

the contrary.[1] In Maryland the proceeding has been incidentally recognized,[2] but no direct adjudication of the controverted point referred to has as yet been made. There would at least be arguable ground for the contention that a defendant attempting to evade or anticipate by flight a decree or order enforceable by attachment for contempt, such as for the payment of alimony,[3] or for the payment of money into court to the credit of a cause,[4] perhaps an assignee with knowledge of an injunction restraining the transfer,[5] would upon proper allegations on oath be detained by the writ of *ne exeat* until he should give bond not to go beyond the jurisdiction of the court without its leave.

§ 126. **Production of books and papers.** Original books, writings or papers, or copies certified by a justice of the peace of all such parts thereof as contain evidence pertinent to the matters in dispute, may be ordered to be produced on the application of either party, to be used as evidence, the court being satisfied on affidavit of their materiality and necessity as testimony. On failure to comply, the bill may be taken *pro confesso* and the case proceeded with

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[1]Dean vs. Smith, 23 Wisc. 483, 99 Am. Dec. 198; Brown vs. Haff, 5 Paige 235, 28 Am. Dec. 425, cited 16 A. & E. Ency. 374, 375. See Green's Pl. & Pr. under the Codes, 537.

[2]Todd vs. Grove, 33 Md. 188, 201.

[3]*Ante*, sec. 84.

[4]*Ante*, sec. 122.

[5]Md. Code, Art. 16, sec. 64.

ex parte.[1] The application may be by petition, as well as by bill. The power is to be exerted with caution, the existence of the writings called for must be shown, as well as their possession or control by the party. They must be designated with reasonable certainty, and the facts to be proved by them must be stated, so that their relevancy may appear. The party requiring their production must show his interest in them. If they relate solely to the case or defence of the opposite party, or merely contain accounts or entries made for his own security, their production cannot be required. If separate books of the transaction were kept the originals must be produced; if mingled with other matters, the order should be in the alternative to produce the original books, or certified copies of parts of their contents.[2]

§ 127. **Arbitration.** By virtue of the general powers of a court of equity, a pending case may, by consent of parties, be referred to arbitration.[3] "On

[1] Md. Code, Art. 16, secs. 24, 25; Carey's Forms, Nos. 654, 655, 656.

[2] Eschbach vs. Lightner, 31 Md. 528. This provision is, in terms, made available in aid of actions at law in the nature of discovery, but is never used for that purpose, there being provided a more convenient remedy. Art. 75, sec. 94.

[3] Alex. Ch. Pr. 99; Alex. British Stat. 615-632; Gardner vs. Dick, 2 Bland 276, note h; Dorsey, 11 G. & J. 299; Calvert vs. Carter, 6 Md. 135. The statute upon the subject, although general in terms, has been held to relate only to common law cases. 1778 Ch. 21, sec. 8; Md. Code, Art. 75, sec. 45; Phillips vs. Shipley, 1 Bland 516. The statute 9 and 10 William III, c 15, does not apply to suits pending or references by rule of court. Shriver vs. State, 9 G. & J. 1; Alex. Brit. Stat. 618.

motion, a decree will be passed on any complete and final award made by the person to whom a cause has been referred by rule or order of court, provided the said award shall have been filed and docketed, and shall have remained in court four days without exceptions, and a copy of said award shall have been served on the adverse party or his counsel, at least four days before said motion shall be made."[1] It is the duty of arbitrators to give notice of the time and place of meeting to the parties or their solicitors; but the fact need not be stated in the award.[2] An award may be set aside, not only for want of notice, but for going beyond the terms of submission or reference. If an award is divisible, one part may be void as not within the submission, and the other good.[3] An award may be set aside for uncertainty,[4] or for assigning erroneous reasons in point of law,[5] but not for erroneous judgment upon facts.[6] An award may also be set aside for misconduct of arbitrators, or other charges to be sustained by evidence.[7] When exceptions to an award allege matter not apparent on its face, they should be verified by affidavit, and leave will then be given to take testimony, after which the exceptions will be set for hearing, on mo-

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[1]Rule 21 C. C. and C. C. No. 2.
[2]Rigden vs. Martin, 6 H. & J. 406; Emery vs. Owings, 7 Gill, 488.
[3]Ebert, 5 Md. 353.
[4]Dorsey, 11 G. & J. 299.
[5]State vs. Williams, 9 Gill 175.
[6]Cromwell vs. Owings, 6 H. & J. 10; Ebert, 5 Md. 353.
[7]Cromwell vs. Owings, 6 H. & J. 10.

tion of either side. If the exceptions are overruled, a decree will be passed in conformity with the award. If allowed, the award will be set aside, and the cause may be remanded to the same or to another arbitrator, or it may be re-instated and proceeded with as a cause regularly in court.[1] Unless otherwise provided for in the submission, when there is a plurality of arbitrators, the award must be unanimous, and when they disagree, the reference is at an end, unless renewed by consent.[2] To prevent an award from being set aside by reason of interest on the part of an arbitrator, it must affirmatively appear that the fact of such interest was known to the objecting party before the award was signed, and was waived or acquiesced in.[3] Exceptions to an award are analogous to a motion in arrest of judgment,[4] but filing a bill to vacate an award is not analogous to an appeal from a decree.[5]

§ 128. **Issues—jury trial.** A court of equity has full power to decide every question of fact arising in the case over which it has jurisdiction. Framing issues of fact and sending them to a court of law to be tried by a jury is not a necessary, nor in this state, a usual incident to an equity suit. It is not in general a matter of right, and as an exercise of

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[1] Alex. Ch. Pr. 99.

[2] Harryman, 43 Md. 140.

[3] Baltimore & Ohio R. R. Co. vs. Canton Co., 70 Md. 405.

[4] Grove vs. Swartz, 45 Md. 228.

[5] Baltimore & Ohio R. R. Co. vs. Canton Co., 70 Md. 405, 417.

discretion, is allowed only where the proof before the judge creates doubt by reason of conflict, doubtful credibility of witnesses, or where, from a mass of circumstances, it may be difficult to draw a proper conclusion. It is never allowed as a substitute for the failure of proof, or for omitted evidence. When resorted to, it is only as a means of informing the conscience of the court. The verdict is advisory only, and not binding upon the court.[1] The former English practice of invariably directing an issue to try the validity of a will as against the heir at law is not recognized in Maryland.[2]

There are some cases, however, in which the sending of an issue is a matter of right in this state. One is where the plaintiff's debt, not reduced to judgment, is disputed in a creditor's bill to vacate a fraudulent deed or contract.[3] The verdict in such case, if not conclusive, is entitled to great weight, and should not be disregarded upon a mere doubt.[4] So also, where

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[1]Chase vs. Winans, 59 Md. 475; Watt vs. Starke, 101 U. S. 247; Wilson vs. Riddle, 123 U. S. 608; Idaho Co. vs. Bradbury, 132 U. S. 509; Brown vs. Buck, 75 Mich. 274; 3 Bl. Com. 452.

[2]Chase vs. Winans, 59 Md. 475, 480. Such an issue, when directed, must be tried in the county where the will is recorded. Md. Code Art. 93, sec. 339. Other cases in which issues were commonly ordered were those involving a question of forgery, and cases where a sworn answer was controverted by a single witness with corroborating circumstances. 1 Foster's Fed. Pr. sec. 301. Issues of fraud are said to be eminently suitable for such reference. Goodman vs. Wineland, 61 Md. 449, 454.

[3]Md. Code, Art. 16, sec. 46. The order in such case is passed upon application of any party.

[4]Goodman vs. Wineland, 61 Md. 449, 454.

property is attached in execution of a decree, and any party to the attachment prays a jury trial before the attachment case is determined by the equity court, such attachment proceedings shall be transmitted to a court of law, to be tried as in cases of attachment on judgment.[1] And likewise, where a bill is filed by a judgment creditor of an insolvent corporation to enforce payment from persons indebted to the corporation, any of the defendants may pray a trial at law of any issue of fact, which issue shall be sent to a court of law for trial.[2] A similar provision exists respecting suits for declaratory decrees involving questions as to which parties may have the constitutional right to a jury trial, and in such cases the order granting or denying issues shall be subject to appeal.[3]

In other cases, the application is not in order until after the testimony is taken.[4] The old English practice of making up feigned issues upon a fictitious wager,[5] is obsolete, and the issues, if not agreed upon by counsel, are settled by the court, which also directs the position of the litigants, as plaintiffs or defendants. Each issue should be some single, certain and material point, which cannot be affirmed or denied without finding all other facts necessary to the conclusion,

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[1]Md. Code, Art. 9, sec. 28.

[2]*Ibid.* Art. 23, sec. 300.

[3]*Ibid.* Art. 16, sec. 30, amended by 1890, ch. 64.

[4]Chase *vs.* Winans, 59 Md. 475; 1 Foster's Fed. Pr. sec. 303.

[5]3 Bl. Com. 452.

such as "*devisavit vel non,*" "was the will obtained by fraud," or the like. Such issues may involve law and fact, and where no objection to the form of the issues is interposed before trial, the objection will not be available on appeal. The position of parties as plaintiff and defendant depends upon the burden of proof.[1] After the issues are sent to the law court, the case may still be removed to another court for trial upon sworn suggestion that the party cannot have a fair and impartial trial.[2] Upon the trial, exceptions may be taken to any opinion given by the law court, and appeal had thereon.[3] In case the jury shall agree, the verdict, as already stated, is not binding upon the equity court, nor is it even conclusive upon the defeated party, who has a right to take further testimony in support of his case, notwithstanding the court, upon a motion for a new trial, refuses to disturb the verdict.[4] From the inconvenience, delay and expense incident to this procedure, and the inconclusive character of the result, it has long ceased to be familiar practice in this state.[5] Questions of testamentary capacity, and

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[1]Barth vs. Rosenfeld, 36 Md. 604.

[2]Md. Code, Art. 75, sec. 97.

[3]Art. 5, sec. 5.

[4]Barth vs. Rosenfeld, 36 Md. 604. 618, citing 2 Sto. Eq. Jur. sec. 1479, a. A statute giving finality to verdicts on issues of fact in equity proceedings, has been held unconstitutional, upon the ground that the right to have equitable controversies dealt with by equitable methods is as sacred as the right of trial by jury. Brown vs. Buck, 75 Mich. 274.

[5]The same observation applies to the local provision for summoning a jury in the equity courts of Baltimore City, P. L. L. Art. 4,

of fraud and undue influence in obtaining wills, and the like, are commonly tried upon issues sent from the orphans' court, upon the requirement of either party.[1]

Where the jurisdiction of equity is extended by statute to a case in which the right of trial by jury exists at common law, the sending of issues, ordinarily discretionary, is presumed to be imperative.[2]

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sec. 174, 1890 ch. 64. Upon the trial by such jury no exceptions can be taken to the rulings of the law court, and the verdict is not conclusive. Barth vs. Rosenfeld, 36 Md. 604. The power given to an equity court, upon occasion, to summon a jury, cannot be regarded as the equivalent of the constitutional right of trial by jury. Cates vs. Allen, 149 U. S. 459.

[1]Md. Code, Art. 93, sec. 240, 250; Connelly vs. Beall, 77 Md. 116.

[2]Wolverton vs. Taylor, 43 Ill. App. 424, 428; Md. Code, Art. 16, sec. 30, 1890, ch. 64.

Juridical Equity.

Part II.

Equity Jurisprudence.

Definition and Maxims.

CHAPTER VII.

EQUITY JURISPRUDENCE—ITS GENESIS AND EVOLUTION. DEFINITION.

129. Genesis of equity.
130. Sources of equity.
131. "Equity" in literature.
132. Divine law.
133. Roman law.
134. Jus prætorium.
135. Primitive equity.
136. Modern equity.
137. Distinction between law and equity. Fusion.
138. Definitions that do not define.
139. An ideal definition.
140. Blackstone's dictum.
141. Faulty definitions accounted for.
142. A definition that defines.
143. A working definition.

§ 129. **Genesis of equity.**[1] Research into the origin of institutions, when pressed back to the initial stage from which all development issues, gropes in the twilight of a strange and rudimentary condition, and is sometimes lost in myth.[2] It is so

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[1] 1 Bl. Com. 62, 92; 2 *ibid.* 159; 3 *ibid.* 46–55, 426–455; 4 *ibid.* 430; 1 Kent Com. 489; 1 Pom. Eq. Jur. Intro.; 1 Sto. Eq. Jur. ch. 1, 2; 1 Spence Eq. Jurisd.; Adams' Eq. Intro.; Haynes' Outlines, I; Bisp. Pr. Eq. ch. 1, 2.

[2] "All absolute beginning lies beyond the reach of our mental conceptions, which comprehend nothing beyond development and progress." Nieb. Rome, 1, 55.

with the origin of that supplementary system of English law called equity jurisprudence or juridical equity.[1] For over a thousand years the succession of English chancellors who are responsible for its establishment, may be traced back to a legendary saint.[2] Three centuries later, the norm of primitive equity is first distinctly disclosed in a rude couplet, which sums up the judicial career of Thomas a Becket, another saint, and a martyr.[3] Coming down two centuries more, we are told that the "foundation of equity" was laid by Parnynge, the first lawyer who held the office of chancellor, A. D. 1343. Again we learn that the same "foundation" was laid by John De Waltham, A. D. 1386, by his invention of the writ of *subpœna*, when master of the rolls. Still later, we are informed that some have ascribed the "origin of equity jurisdiction" to the chancellorship of Cardinal Beaufort, in the reign of Henry V, while others assign that honor to Cardinal Wolsey, in the reign of Henry VIII.[4] By this time, it might be reasonably supposed that the real "founder" had been found, and we are therefore inclined to be somewhat surprised at the information we are next to receive, that Lord Chancellor Ellesmere, in the

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[1]The term equity jurisprudence is commonly, although not necessarily, used in contradistinction to equity procedure. The broader term juridical equity includes both.

[2]A. D. 836, Legend of St. Swithin, Camp. Lives, Chan. 1, 34.

[3]*Hic est qui leges regni cancellat iniquas*
Et mandata pii principis aequa facit.

3 Bl. Com. 50, note; 1 Spence Eq. 335; Clark's Prac. Jur. 374.

[4]Camp. Lives, Chan. I, 233, 273, 312, 434.

reign of Elizabeth, was considered as the "earliest founder of our system of equity."[1] After reposing upon that assurance for nearly a century, the discovery is yet to be made that in the reign of Charles II, we at length find the real "father of equity" in Sir Heneage Finch, Lord Chancellor Nottingham.[2]

§ 130. **Sources of equity.** In all this apparent contradiction and real obscurity, there is no occasion for surprise. The "absolute beginning" eludes our grasp. The successive stages of growth are all that we discover. Each new departure stands for a new beginning. Without stopping to note minor and subordinate steps in the march,[3] the first great transformation is that from *primitive* to *modern* equity; the next is the *fusion* of *law and equity*. The last is a process now actually going on before our eyes. For the first transition, like that from dawn to daylight, no precise date can be definitely assigned. For all practical purposes, a slack line may be drawn A. D. 1530, when Cardinal Wolsey was succeeded in the office of chancellor by Sir Thomas More.[4] Until

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[1]Camp. Lives, Chan. II, 272.

[2]*Ibid.* IV, 190.

[3]It has already been shown that down to the year 1616 the history of the development of equity was mainly the history of its struggle for jurisdiction against the opposition of parliament and of the courts of common law, in which the chancellors, uniformly supported by the crown, finally prevailed. *Ante*, sec. 10.

[4]More was wiser than his generation. He was of the opinion that law and equity might be beneficially administered by the same tribunal, and endeavored, though without success, to induce

that date, there had been an almost (not quite) uninterrupted succession of ecclesiastics. After it, the office was held, with unimportant exceptions, by lawyers, generally of eminence in the profession. Beginning with the primitive conception of equity as originally administered in England by the clerical chancellors, (A. D. 836?–1530), two distinct sources are to be independently traced, to the divine law of morality, upon the one hand, and to the Roman civil law on the other.[1]

§ 131. **"Equity" in literature.** Before making this inquiry, it will be found instructive to determine the exact place and value in standard English literature of the word "equity" itself. For the sake of brevity, it fortunately happens that there may be gathered from the English bible and Shakespeare all that is necessary for that purpose. In the Old Testament Scriptures[2] the word rendered in the standard English version, "equity" occurs in close connection (*noscitur a sociis*) with such terms as "righteousness," "justice," "judgment," "wisdom," "truth,"

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the common-law judges, his own father being one of them, to relax the rigor of their rules to meet the justice of particular cases. 2 Camp. L. Ch. 38.

[1] 1 Pom. Eq. Jur. sec, 55.

[2] "All that is best in the ethics of the modern world, in so far as it has not grown out of Greek thought or barbarian manhood, is the direct development of the ethics of old Israel. There is no code of legislation, ancient or modern, at once so just and so merciful, so tender to the weak and poor, as the Jewish law." Huxley in Nineteenth Cent. June, '89, page 940.

and in contrast with "iniquity."[1] Sometimes the same word is rendered in one version "equity," and in another "uprightness,"[2] or "justice."[3]

Collation of texts exhibits "equity" in the Bible use as a complex ethical conception, covering that department of morals which inculcates absolute good faith, integrity and impartiality, equality of right in theory, and fairness in practice. Briefly, it stands for *justice* in the broad sense of the Roman law,—*jus suum cuique tribuere—jus* being understood in opposition to *lex*. In the Bible, the word "equity" is invariably used in the same general sense.

With regard to the use of the term by Shakespeare, the case is notably different. Each time that the word occurs, it appears with a distinctly varied import. In one instance, equity is used in the Bible sense, as the equivalent of justice:

> "Foul subornation is predominant,
> And equity exiled your highness' land."[4]

In another connection, the reference is to juridical or court equity:

> "Thou robed man of justice, take thy place,
> And thou, his yoke-fellow of equity,
> Bench by his side."[5]

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[1] Ps. 98:9–99:4. Prov. 1:3–2:9–17:26. Ecc. 2:21. Isa. 11:4–59:14. Mic. 3:9. Mal. 2:6.

[2] Ps. 111:8.

[3] Ps. 89:14.

[4] 2 Henry VI, Act III, scene 1. Compare Isa. 59:14,—"Truth is fallen in the street and equity cannot enter."

[5] K. Lear, Act III, scene 6.

In another place, we find the term figuratively used in the still more narrow and special sense of a particular equitable right or claim:

> "For this down-trodden equity we tread
> In warlike march these greens before your town."[1]

The remaining instance is the comic passage in which Falstaff exclaims:

> "An the Prince and Poins be not two arrant cowards, there's no equity stirring."[2]

§ 132. **Divine law.** Nothing was more natural than that the learned prelates who first held the great seal should have taken the Bible meaning of equity as their standard, and looked to the *divine law of morality* as the basis of their system of justice. Of this the evidence is pointed and clear.

In the Year Books (temp. H. 7,) Archbishop Lord Chancellor MORTON is thus reported: "Well do I know that every law is or of right should be according to the *law of God*, and the law of God

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[1] K. John, Act. II, scene 1.

[2] 1 K. Henry IV, Act. II, scene 2. There is no note or comment upon this passage in any of the editions. At the time the play was produced (1597) there was active warfare between the courts of law and equity (*ante*, sec. 10), which is enough of itself to explain the local side allusion. In addition, there was probably a "gag" at a ludicrous scene then recently enacted publicly in Westminster Hall, in the execution of a peculiar order of the chancellor in the case of Milward vs. Weldon (1 Spence Eq. 376, note h). There may also have been a personal allusion, for the benefit of the Stratford people, to the case of Shakespeare vs. Lambert, then pending in chancery. (See the writer's "Falstaff and Equity," Shakespeariana, vol. ix, 159, 195; x, 63.)

forbids that an executor should in bad faith waste all the goods of his testator, and if he does so without making amends to the extent of his power, he shall be damned in hell."[1]

So profoundly stamped was the system of primitive equity with this impression, that we find the divine law appealed to by the earlier lay chancellors in quite as emphatic terms as by their clerical predecessors: Ld. Chan. ELLESMERE (temp. Eliz): "The law of God speaks for the plaintiff. By the law of God, he that builds a house ought to dwell in it, and he that plants a vineyard ought to gather the grapes. Deut. 28:30. And equity speaks as the law of God speaks."[2]

§ 133. **Roman civil law.** At the same time it is to be remembered that these learned ecclesiastics of the Roman church, many of them trained canonists and civilians, were quite familiar with the Roman theory of *prœtorian equity*, and with its eclectic

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[1] 4 H. 7, fol. 5. 1 Spence Eq. 578. 1 Camp. Lives, 401.

[2] 2 Lea. Ca. in Eq. 601, Earl of Oxford's Case.

Thus, with true historical insight, Shakespeare introduces the Archbishop of Canterbury as citing the Mosaic law in confirmation of the claim of Henry V. to the crown of France, through female succession:

> "*K. Hen.* May I with right and conscience make this claim?
> *Cant.* The sin upon my head, dread sovereign!
> For, in the book of Numbers is it writ
> When the man dies, let the inheritance
> Descend unto the daughter."
>
> K. Henry V, Act. I, scene 2.

international elements of *universality, impartiality* and *good faith.*[1]

Accordingly, the famous definition in the *pandects* of Justinian (promulgated A. D. 533, discovered 1137), was adopted as their model in mitigating, as they did, some of the hardships and supplying some of the imperfections of the common law.

§ 134. **Definition of jus prætorium.** *Jus prætorium est, quod Prætores introduxerunt, adjuvandi vel supplendi, vel corrigendi, juris civilis gratia, propter utilitatem publicam.*[2]

The authorship of this definition is attributed to *Papinian,* who during a portion of the three centuries and a half (A. D. 43-403?) that Britain was under Roman law, presided as Prætor in the forum of York.[3] (temp. Sep. Sev.)[1]

§ 135. **Definition of primitive equity.** Importing into this definition of the civil law the two elements referred to, it may be paraphrased into an approximately adequate conception of equity as administered under the *ecclesiastical* chancellors. It will then

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[1] Austin's Jurisp. 293; 1 Pom. Eq. Jur. sec. 8.

[2] Dig. Lib. 1, tit. 1, l. 7; 1 Sto. Eq. Jur. sec. 5.

[3] Austin on Jurisp. 303; 1 Spence Eq. 2.

Note here two great revivals in the study of civil law, consequent upon two important manuscript discoveries in Italy—the discovery of the *Pandects* above referred to A. D. 1137, at Amalfi (although this has been questioned by Savigny), and the discovery by Neibuhr in 1816, at Veróna, of the Institute of *Gaius.* I Kent's Com. 538, note.

read: Equity jurisprudence was that system of justice founded on the ethics of the Bible and of the Roman law, which was introduced by the chancellors for the public convenience, to assist or supplement the deficiencies and to correct the rigors of the common law.

§ 136. **Modern equity.** For more than three centuries (1530-1875,) the administration of equity in England was in the hands of chancellors, trained in the schools of the common law. It was imported into America, and became a distinct part of the jurisprudence of many separate states, as well as of the federal Union. It has been elaborated into a system "of almost infinite complexity and variety."[1] It is scarcely necessary to state that it is with modern equity, and with modern equity in its present state of development, that we are practically concerned. It is not in any crude, primitive form that we are to look for the essential nature of equity, but rather in its maturity. Its doctrines and rules are progressive, they are refined and improved by use, they accommodate themselves to changed conditions of society and new methods of business and intercourse, and are to be found in modern rather than ancient cases.[2]

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[1]Sto. Life, II, 240. Opposition to courts of chancery in the colonies, particularly in Massachusetts and Pennsylvania, has been already referred to. *Ante*, sec. 17.

[2]Knatchbull vs. Hallet, 13 Ch. D. 696, 710; Joy vs. St. Louis, 138 U. S. 1, 50. "The natural development of everything is properly

§ 137. **Distinction between law and equity—fusion.** It has been said that the distinction between law and equity is not necessary or normal, but "accidental and anomalous;"[1] that it is rather a matter of form and history than of substance;[2] and that it is substantially a mere question of *procedure.*[3] In accordance with this view, the distinction between law and equity, as separate systems, was virtually abrogated in New York in 1848, an example which has been followed by a majority of the Western states and territories, as well as by a number of the older states, and notably by the English Judicature Act of 1873, providing for a concurrent administration of law and equity in every civil case, with a preference for the rules of equity whenever in conflict with the rules of law.[4]

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its end. For that which is the character of each thing when its growth is fully completed, that, we say, is its true nature, as in the case of a man, a horse, or a house." Aristotle, Politics, Book I, ch. 2.

[1] Aus. Jur. 296, secs. 842, 885; Clark's Prac. Jur. 370.

[2] Snell's Eq. 3, following Haynes' Outlines, 7.

[3] 3 Bl. Com. 434, 436. But see Cates vs. Allen, 149 U. S. 451, 459.

[4] 1 Pom. Eq. sec. 40; Bisp. sec. 11; *ante*, sec. 16. "The main object of the Judicature Act was to enable the parties to a suit to obtain in that suit, and without the necessity of resorting to another court, all remedies to which they are entitled in respect of any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings." Ind vs. Emerson, 12 App. Ca. 306. It was "based upon the broad principle of making forms, rules and modes of procedure subordinate to the prime and paramount object of reaching the justice of the case. It abolished all the old forms of action, and technical forms of procedure, and established a new procedure for the enforcement

On the other hand, the separation of law and equity is still strictly observed in Maryland and in several other states, as well as in the federal jurisprudence of the United States.[1] In New Jersey, legislative interference with the ancient jurisdiction of the courts is expressly prohibited by the constitution, and in Michigan, impliedly.[2] A tendency towards fusion begins to be observable in Maryland by the important legislation of 1888, conferring equity powers upon courts of law in cases of *account*, *injunction* and *equitable defence*.[3]

Experience, under the modern reformed procedure, has proved that the distinction between law and equity, if theoretically unphilosophical, is, to a great extent, practically tenacious, if not vital. The great obstacle in the way of a complete fusion is the institution of *trial by jury* in civil cases. So long as that mode of trial prevails (and it is not at all likely to be abolished), there will always be a distinction between two classes of cases, one class comprising

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indiscriminately of both legal and equitable rights, which is independent of all the old rules of law upon the subject. Particularly, it did away with all objections and defences arising out of the misjoinder or non-joinder of parties." Kendall vs. Hamilton, 4 App. Ca. 530, 531.

[1]Taylor vs. State, 73 Md. 209, 222; Clayton vs. Shoemaker, 67 Md. 219; Hamilton vs. Conine, 28 Md. 635, 641; Smith vs. McCann, 24 How. 398, 403; Burns vs. Scott, 117 U. S. 582, 587; Cates vs. Allen, 149 U. S. 451, 459; Insurance Co. vs. Simpson, 43 Ill. App. 98.

[2]Smith vs. Essex, 48 N. J. Eq. 637; Brown vs. Buck, 75 Mich. 274.

[3]Md. Code, Art. 26, sec. 9; *ibid.* Art. 75, secs. 116-128; *ibid.* Art. 75, secs. 83-85.

all cases to which trial by jury is adapted, and another class for which it is eminently unfit; and here we find at once a broad line of demarcation impossible to be obliterated. Hence in England and in all the code states the courts continue to speak of legal and equitable principles, of legal and equitable titles and estates, and of legal and equitable rights and remedies, actions and defences; and the term "court of equity" is still applied to every court dealing with questions of an equitable nature.[1]

§ 138. **Definitions that do not define.** "*Equity jurisprudence may 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.*"[2] Definitions more or less different in form, but identical in substance, may be found in other standard treatises.[3]

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[1]Basey vs. Gallagher, 20 Wall. 680; Re Cawley, 42 Ch. D. 229; Whitley vs. Challis, (1892) 1 Ch. 68; Foster vs. Reeves, (1892) 2 Q. B. (C. A.) 255; Thomas vs. Musical Union, 121 N. Y. 45; Steinau vs. Gas Co., 48 Ohio St. 324; Kitts vs. Wilson, 130 Ind. 492, 500; Edwards vs. Wigginton, 47 Mo. App. 307, 315; Bates vs. Babcock, 95 Cal. 479; Reid vs. McGowan, 28 S. C. 80; Smith's Pr. Eq. 3; 1 Pom. Eq. Jur. sec. 84; Bliss Co. Pl. sec. 10; Green Pl. and Pr. Co. sec. 58, 1085. See Alex. Hamilton in 83d Fed. It has been found in England that the distinction between chancery and common-law barristers, since the Judicature Act, has not only not ceased, but has become more marked. 1 Law Q. Rev. 320.

[2]1 Sto. Eq. Jur. sec. 25.

[3]Snell's Eq. 4; Smith's Pr. Eq. 9; Bouvier, Law Dict.; 1 Pom. Eq. Jur. sec. 130.

All such definitions answer very satisfactorily two questions: First question—What system of justice is administered in courts of equity? Answer—equity jurisprudence. Second question—What is equity jurisprudence? Answer—That system of justice administered in oourts of equity.

§ 139. **An ideal definition.** Lord Coke, speaking incidentally of equity, calls it "a just correction of law in some cases,"[1] herein following Aristotle, who defined equity as "the correction of the law wherein it is defective by reason of its universality."[2] This may be called an ideal definition,[3] but it is to be observed that it also contemplates law, in the abstract, as an ideal system, imperfect only by reason of its "universality." It fails to give an adequate conception of juridical equity as administered in our courts for this reason: the common law of England was not an ideal system, but was, and is, defective for quite other reasons besides that of universality, as will be shown in detail further on.

§ 140. **Blackstone's dictum.** It was a dictum of Sir William Blackstone that every definition of equity which "draws a line between the two juris-

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[1] 4 Inst. 79; Co. Litt. 24 *b*.

[2] Ethic. Nicom. 5, 14; 1 Spence Eq. 326; 1 Sto. Eq. Jur. sec. 3.

[3] "Who would have supposed that Aristotle would have given a better definition of equity than any lord chancellor of England? What was the condition of Athenian jurisprudence which enabled him to draw his clear line of distinction between law and equity?" Sir Edward Fry, in Law Qu. Rev. for April, 1893.

dictions by setting law and equity in opposition to each other will be found either totally erroneous, or erroneous to a certain degree."[1] There is a fallacy here, and it lies in the use made of the equivocal expression "law." If that word is understood merely as law in general, there is of course no real opposition between such a conception of law and what we term equity, for the former will then include the latter. But that is not the sense in which the learned author intended his language to be taken. It clearly appears from the context that the proposition is meant to be applied to the common law of England. Four or five examples are speciously offered of exceptional cases in which equity had followed the common law in all its rigor, while a multitude of familiar instances to the contrary are judiciously suppressed.[2] The mission of Sir William Blackstone as a professed champion of the common law was to show its superiority to other systems, especially that of Rome. The natural zeal of the advocate was sometimes allowed to prevail over the candor of the impartial commentator.[3] For the refutation of the fallacy it is unnecessary to look outside the same volume, where the origin of equity is traced to the "harsh or imperfect judgments of the law courts, requiring an appeal to the chancellor who mitigated the severity or supplied the defects

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[1] 3 Bl. Com. 430.

[2] 3 Bl. Com. 430. These instances will be found cited below.

[3] Austin, Jurisp. 463; Clark's Prac. Jur. 315; 1 Spence Eq. 418; 1 Pom. Eq. Jur. sec. 54.

of the judgments pronounced by the courts of law upon weighing the circumstances of the case."[8] The obvious inconsistency between this undisputed historical fact and the dictum which boldly denied any opposition between equity and law is its own commentary.

§ 141. **Faulty definitions accounted for.** The real trouble about definitions of equity has been, not so much any inherent difficulty, as (1) a reluctance frankly to admit the imperfections of the common law, in which Blackstone, its avowed advocate, has been too closely followed by the old-school lawyers and text-writers; (2) a fallacious idea that any such definition must, of necessity, attempt to describe equity in its content, and compress into a single sentence an epitome of its doctrines. The most successful attempt yet made in this direction will be found embodied in the following extract: "The writer believes it is impossible to give a short definition of equity jurisprudence, without either failing to convey any accurate and definite knowledge, or else positively misleading the student. But equity jurisprudence in the specific and technical sense of the term, as contradistinguished from natural, abstract and universal equity, and from law and the statutory jurisprudence of the Court of Chancery, may be described to be a portion of justice or natural equity, not embodied in legislative enactments or in

[1]3 Bl. Com. 50.

the rules of the common law, yet modified by a due regard thereto, and to the complex relations and convenience of an artificial state of society, and administered in regard to cases where the particular rights in respect whereof relief is sought come within some general class of rights enforced at law, or may be enforced without detriment or inconvenience to the community, but where, as to such particular rights, the courts of law cannot, or originally did not, clearly afford any relief or adequate relief, at least not without circuity of action or multiplicity of suits, or cannot make such restrictions, adjustments, compensations, qualifications or conditions, as may be necessary in order to take due care of the rights of all who are interested in the property in litigation."[1] (3) And finally, the apprehension (which is correct) that any reference to the *principles* upon which equity builds its work (natural justice and public policy) will disclose no inherent difference from those which ought to underlie law itself. A frank recognition of the ultimate identity of these common fundamental principles is of course the only way out of this difficulty.

§ 142. **A definition that defines.** *"By equity is meant a supplemental system of law to enforce certain rights either not recognized at all, or not adequately remedied by law."*[2]

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[1] Smith, (J. W.) Manual of Equity, 2.

[2] Maitland's Justice and Police, 38, 39, paraphrased.

The above is accurate, so far as it goes, and it goes far enough to impart some definite information. It contains, however, no reference to the peculiar character of the *tribunal*, and none to the distinctive *method* upon which that tribunal works. The definition should, in terms, exclude *trial by jury*, the presence or absence of which procedure is, after all, the great practical difference between the two jurisdictions, important in itself, and still more so in its consequences.[1] Another distinctive feature is that the jurisdiction of equity is limited to *civil* cases, without some recognition of which no definition can be complete.

The definition should also refer to the broad principles of natural justice and public policy upon which equity works out its results, although it is true that law also professes to keep the same principles in view. But custom and precedent had already fastened their iron grip upon the law, while yet equity, untrammeled by either, or, more accurately, not trammeled to the same extent, was more free to follow conscience and morality. The influence of precedent and positive law was, however, ultimately felt in restraining the play of crude conscience, and the interaction of these conflicting forces in moulding the modern system of equity jurisprudence should be seen reflected in the definition. The term "equity," itself, moreover, should be so qualified as to distinguish the technical or juridical equity that

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[1] *Ante*, secs. 22, 137.

is meant to be defined, from that broad natural equity (righteousness), which includes it and a great deal besides.

§ 143. **A working definition.** What the student wants at this early stage is not an ideally perfect, but a practical working definition, which shall serve as a temporary scaffolding while he is building up a fuller conception of equity for himself; after which he will have no further use for it, except to refresh his memory and co-ordinate his results. Experience has shown that the following definition sufficiently answers these purposes:

By juridical equity is meant a systematic appeal for relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in a measure as well by considerations of public policy as by established precedent, and by positive provisions of law."

Comparing the above with prior definitions,[1] it will be observed that avoiding reference in terms to the English Court of Chancery (now a thing of the past), it attempts to grasp the fundamental conception of juridical equity whensoever and wheresoever administered as a system separate from law. It involves the assumption that the idea of equity, as a

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[1] 1 Sto. Eq. sec. 25; Snell, p. 4—again following Haynes' Outlines, 7; Bisp. Pr. Eq. sec. 1.

collateral and merely incidental branch of jurisprudence, is essentially abnormal and transient. It therefore, by implication, points to the ultimate transfusion of equity into the *corpus juris*, and assimilation with it, by a radical *reform of legal procedure*—a result which has in fact been reached by legislation in England and in many states of the Union. It will further be noticed that the reference to the *principles* upon which equity proceeds equally applies to law as it *should* be, and as it is in fact *claimed* to be by its admirers.[1]

The analysis of this definition will be found to furnish of itself a sufficiently full discussion of the *nature and extent* of equity, and as inseparably connected therewith, or necessarily involved therein, of the various *courts* in which equity has been or is administered, with some reference to the characteristic *procedure* of those courts. The latter subjects having been anticipated, the former will now be considered as the definition is expanded.

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[1] 3 Bl. Com. 434, 4 *ibid.* 430.

CHAPTER VIII.

EQUITY JURISPRUDENCE. ITS NATURE AND EXTENT. THE DEFINITION EXPANDED.

144. "A systematic appeal."
145. "Relief."
146. "Defective laws."
147. Primitive common law.
148. Artificial methods.
149. Formalism.
150. Fictions.
151. Feudal system.
152. Value of common law.
153. "Cramped administration."
154. Rome and England contrasted.
155. "Disciplined conscience."
156. "Competent magistrate."

§ 144. **"A systematic appeal."** "It (chancery) was to afford relief to suitors upon circumstances of hardship, fraud or trust, where the king's courts allowed none. This was, in effect, *an appeal* from the ancient customs and statutes of the realm to the conscience and discretion of a single person."[1]

"Appeal" here means simply habitual resort to one mode of obtaining justice, over the head of another found inadequate in the particular case, and is characterized as *systematic* both as to principles (maxims, doctrines and rules,) and procedure.

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[1]2 Reeve's Hist. Com. Law 600, ch. 22 (H. VI); 3 Bl. Com. 50; Willard vs. Ramsburg, 22 Md. 206, 218.

According to Lord Redesdale, the principles of equity are fixed and certain as those of law,[1] while Lord Eldon, with characteristic caution, qualifies with an *almost*.[2] There is in fact some apparent diversity of opinion as to the absolutely fixed and bounded character of equity.[3] This apparent diversity may be explained as depending very much upon the observers' standpoint. Viewing equity in its primitive and rudimentary stages, it seems plastic and accommodating enough to justify the most liberal conception. In its modern and crystallized form, its principles are sufficiently fixed to warrant at least the guarded language of Lord Eldon.

It has been seen that the distinguishing features of equity procedure were borrowed from the civil and canon law, and may be briefly summarized as follows: Absence of jury trial; absence of scientific pleading to issue; anticipation by plaintiff of defendant's case; comprehensive requirements as to *parties;* written depositions for *viva voce* testimony; discovery; flexibility of form; no distinct forms of action; liberality of amendment.[4]

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[1]Bond vs. Hopkins, 1 Sch. & Lef. 428-9; 1 Pom. Eq. Jur. sec. 59, note.

[2]Gee vs. Pritchard, 2 Swanst. 414.

[3]The most rigid view is that presented 3 Bl. Com. 430, 1 Kent. Com. 489. The most liberal, that of Lord Chancellor Hardwicke (temp. G. 2), cited in Parke's Hist. of Chancery, 501–506, criticised 1 Sto. Eq. sec. 18, but approved 1 Pom. Eq. sec. 60, and fully sustained by 1 Bl. Com. 62, *ibid.* 92. It will be observed that Blackstone is found on *both sides* of the question. Kent also, 1 Kent's Com. 490, *note d.*

[4]*Ante*, sec. 22.

§ 145. "**Relief**" is a term of constant use in equity, and means rather more than "remedy," its legal counterpart. Since it is a fundamental principle that no equitable relief will be granted where the legal remedy is adequate, all equitable relief, whatever its form, must be either by mitigating the rigor, or by supplementing the deficiencies of the common law. Some examples of rigor are as follows:

Law did not listen to defence of payment of a bond, unless there was a release under seal; nor to defence of payment after the day. It treated assignments of choses in action and assignments of expectancies as void. It refused to recognize a beneficial interest as against the mere legal title of a trustee; or to vacate a fraudulent conveyance; or to reform a mistaken instrument; or to relieve against an accident, such as the loss of a bond or deed; or to relieve against a forfeiture, such as a mortgage; or against the penalty of a bond. It refused to allow set-off; or to allow suit by one co-executor, co-partner, joint tenant or tenant in common against the other; or to allow contribution as between joint debtors. No contract was enforced unless for debt *certain*, or by writing under *seal*. No remedy was given for a *tort*, unless with *violence*, express or implied. There was the unjust fiction of unity of person between husband and wife, *feme covert* losing all civil capacity and legal identity.[6]

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[6]The common-law disabilities of married women were not founded upon any reasonable presumption against the freedom of acts supposed to be done under marital control, nor were they

The following are examples of deficiencies: Law gave only damages for breach of contract, no *specific remedy* to enforce its performance; it gave damages only for an injury, no preventive process of *injunction*;[1] trial of fact by jury, and technical pleading to issue, fitted proceedings at law for contentious, not *administrative*, justice. The verdict and judgment in the fictitious action of *ejectment*, were not conclusive upon the real parties, thus inviting unnecessary and vexatious litigation. Law had no means of *securing* property pending litigation; nor of imposing conditions upon a party, such as *indemnity*; nor of reaching property nor controlling legal proceedings beyond the jurisdiction of the state; nor of making *partition* between co-owners of personal property; nor of winding up defunct or insolvent corporations. The common-law action of *account* was practically useless by *wager of law*, and other embarrassments.[2] Judgments at law are rigid, uniform, inflexible, always between two parties or sets of parties, whereas decrees in equity are plastic, multiform, capable of being so moulded as to adjust and settle complicated or alternate

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subject to exception in the light of circumstances sufficient to repel such a presumption. The principle is stated by Litt. (sec. 168): "A man and his wife are but one person in the law." From this fiction were logically deduced all her disabilities as to contract and property, with results so unjust that equity, in later times, through the medium of trusts, enabled her to acquire separate estate, and to deal with it as a *feme sole*. Cahill, 8 App. Ca. 425.

[1] As to the old writs of *estrepement* and *ne injusti vexes*, see 3 Bl. Com. 225–227, 234. As to other preventive writs, Co. Litt. 100 a.

[2] 3 Bl. Com. 348; Sm. Pr. Eq. 468–9; Bisp. sec. 481.

rights of numerous parties. Law refused to permit a party to testify even on the call of his adversary, or to require production of documents in his possession.

Several of the instances cited have, by means to be shortly adverted to, become obsolete; but the jurisdiction of equity is not ousted by expansion of the legal remedy.

§ 146. **"Defective laws."** The reference here is more particularly to the state of the law and its administration at the early period when equity jurisdiction originated, and is not so emphatically applicable at present, after the great improvements made by statutory and judicial legislation, the effect, in a measure, of the reaction of equity upon law. Existing law, however, is still in a great measure inexorably bound by the iron trammels anciently fastened upon it, and rigidly refuses remedy to its suitors in all cases deemed exclusively cognizable in equity. Thus a recovery in ejectment can be had upon the strict legal title only, and courts of law will not recognize an equitable title, either as a ground of action,[1] or as a defence.[2] In like manner, the equitable owner of personal property has no standing in a court of law; his rights can only be asserted therein by his trustee.[3] Courts of law do not recognize facts which, in

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[1] Langdon vs. Sherwood, 124 U. S. 83; Leonord vs. Diamond, 31 Md. 541.

[2] Johnson vs. Christian, 128 U. S. 382.

[3] Denton, 17 Md. 403; Woodruff vs. Apgar, 42 N. J. Law, 198; Bank vs. Barnes, 82 Ala. 607, 621.

equity, would afford ground of relief, as by reforming a mistake in a deed,[1] or as constituting a valid equitable defence.[2] A mistake in a single bill amounting simply to the unintentional omission of the word "dollars," was held fatal to recovery in a court of law, and could only be relieved in equity.[3] Action at law lies not for breach of trust; remedy exclusively in equity.[4] In suit at law, not competent to prove by parol that absolute deed a mortgage only; that jurisdiction exclusively in equity.[5] No recovery at law on lost note; relief only in equity.[6] So, where two are jointly bound as principals, it cannot be shown at law, when both are sued, that one is surety for the other, and that the time of the principal was extended; an equitable defence, available only in chancery.[7] No liberality on the part of modern judges can accommodate the law to such

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[1]Prentice vs. Stearns, 113 U. S. 435; Ivinson vs. Hutton, 98 U. S. 79; Farrow vs. Hayes, 51 Md. 505; Winn vs. Eaton, 64 N. H. 234.

[2]Burns vs. Scott, 117 U. S. 582; N. P. R. Co. vs. Paine, 119 U. S. 561.

[3]Newcomer vs. Kline, 11 G. & J. 458. And the same of an error in calculation. Boyce vs. Wilson, 32 Md. 122. See also People's Bank vs. Shryock, 48 Md. 427; Donelson vs. Polk, 64 Md. 501; Franklin vs. Waters, 8 Gill 331. (The difficulty in this case removed by legislation, Md. Code, Art. 57, sec. 13.)

[4]Norton vs. Ray, 139 Mass. 230; Sanford vs. Lancaster, 81 Maine 435.

[5]Lindley vs. O'Reilly, 50 N. J. Law, 639; Bailey vs. Knapp, 79 Me. 6.

[6]Adams vs. Edmunds, 55 Vt. 352. But see Md. Code, Art. 13, sec. 11; Ches. & O. Can. Co. vs. Blair, 45 Md. 102, 112.

[7]Anthony vs. Fritts, 45 N. J. Law, 1; Yates vs. Donaldson, 5 Md. 389. "If the defendants have an equity, they must go into equity. Such considerations have no place in a court of law." McIntyre vs. Miller, 13 M. & W. 472. But see, as to equitable defence in Maryland, Code, Art. 75, sec. 83.

cases until the whole system is radically altered by legislation like the English Judicature Act of 1873. The definition is therefore strictly, although less significantly, applicable to the present state of the law.

§ 147. **Primitive common law.** The "wisdom-of-our-ancestors" fallacy was exploded by Lord Bacon. "These times are the ancient times, when the world is ancient, and not those which we account ancient by computation backward from ourselves."[1] "That reverence for existing usages, which is always strong in human nature, was far stronger in antiquity than it is now. The belief in the wisdom of ancestors which seems to be caused by the curious delusion that ancestors must needs be old and therefore deeply experienced men, was stronger among the ancients than among the moderns, because their impression of their ancestors was derived, not from history, but from poetry. They traced their institutions to semi-divine or inspired legislators, and held it almost impious to change what came to them marked with such authority; while we, however proud we may be of our ancestors, do not disguise from ourselves that they were barbarians, and can hardly fancy their handiwork incapable of improvement."[2] Notwithstanding the "veneration of the

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[1] Advancement of Learning, Book I.

[2] *Ecce Homo*, ch. 17, p. 215. Pascal, Pensées, I, Art. 1, p. 7. For what real wisdom they have let come down to us, we are grateful. For their old wigs we have no use. H. C. Robinson, in 50 Conn. 608.

sages," inculcated by Coke and Blackstone, it is now universally admitted on both sides of the Atlantic that "the common law was in all ways a most defective system," and "a barbarous code."[1] As alchemy was to chemistry, astrology to astronomy, magic to medicine, such was the relation of the ancient common law to its modern successor. The clergy monopolized all learning, and much property; prelates were judges and monks lawyers; juries were packed from tumultuous assemblages of retainers. The law was a medley of semi-barbarous customs, primitive British, Anglo-Saxon, Danish, Norman, engrafted upon faint traditions of Roman jurisprudence.[2]

"The inheritance of Roman wisdom was transmitted to the fierce barbarians of the West, and as they wrought the materials of the temple and amphitheatre into their own rude fortresses, so did they occa-

[1] 1 Stephen's Hist. Crim. Law, 176, 177; 1 Pom. Eq. Jur. sec. 17. Miracle appealed to for decision of questions of fact—4 Bl. Com. 342—ordeal—the *corsned*—4 Bl. Com. 343-346—trial by battle, 3 Bl. Com. 337, 4 *ibid.* 346—compurgators, 3 Bl. Com. 342, 4 *ibid.* 368, 414. "To recollect a few traditionary customs, to mark out the lists of battle, to observe the issue of the combat, and to pronounce whether it had been conducted according to the laws of arms, included everything that a baron, who acted as judge, found it necessary to understand." Rob. Charles V 36. Yet, such as this were the figures that loomed up from the dust of the dark ages as great authorities, and were pointed to with pride as the "venerable sages of the law." 1 Kent Com. 476, 477. Jury trial was often a failure from oppression and corrupt influence, 1 Step. H. Cr. L. 176, 177, to say nothing of perjury and subornation. 4 Bl. Com. 368.

[2] 1 Bl. Com. 35, 36, 64, 65, 66, 67; 4 Bl. Com. 409.

sionally incorporate the precious fragments of Roman law into their own unformed and scanty jurisprudence."[1]

The codes of the barbarians, archaic as they seem, were only a compound of true primitive usage with half understood Roman rules. It was not the reformed jurisprudence of Justinian, but the undigested system of Roman law which prevailed in the western empire, and which the eastern *Corpus Juris* never succeeded in displacing, that clothed with flesh and muscle the scanty skeleton of barbarous usage.[2]

§ 148. **Artificial methods.** A barren and frivolous logic, replete with mediæval conceits and scholastic subtleties, too often presided over the application of these laws, instead of hard sense and the spirit of equity. Justice was perpetually entangled "in a net of mere technical jargon."[3] Rights were of less importance than remedies. Form was preferred to substance. Statement to the thing stated.[4] The phil-

[1]Phillimore Int. to Roman law, 11.

[2]Maine's Anc. Law, 287, 288.

[3]3 Bl. Com. 410.

[4]In 1821, Copley, (afterwards Ld. Chancellor Lyndhurst) said facetiously to Campbell, (afterwards also Lord Chancellor) "one has more pleasure from succeeding in a cause by a piece of roguery than upon the merits." Hardcastle's life of Campbell I, 405. Chief Justice Taney, writing of his professional experience, says: "In that day strict and nice technical pleading was the pride of the bar, and I might also say of the court. And every disputed suit was a trial of skill in pleading between counsel, and a victory achieved in that mode was much more valued than one obtained on the merits of the case." Taney's Autob. 61.

osophy of Aristotle, as seen through the medium of his Arabian commentators, was caricatured by a preposterous dialectic, which involved both divinity and law in metaphysical mazes of hopeless intricacy.[1]

§ 149. **Formalism.** In the early attempts of every primitive community at constructing for itself a jurisprudence, there is observable a superstitious reverence for the bald letter of the law, with corresponding disregard of its spirit and essence. Judicial proceedings are governed by set phrases and formulas, and, as in the case of the early Roman actions, "the over-subtlety of the ancient jurists made the slightest error fatal."[2] "A close adherence to the letter is a mark of unripeness every where, and especially so in law. The history of law might write over its first chapter as a motto—*In principio erat verbum.*"[3] Inherited from old Germanic custom, the primitive common law of England displayed in all its iron rigor this painful precision of adherence to the strict letter, and minute observance of the merest externals of procedure.[4] From such a method, many instances of gross injustice must of necessity result, and, as these accumulate, new times calling for new measures, relief must be found, either in legislation, in the invention of fictions, or in a more liberal administration of justice.[5] The reforms introduced by legislation

[1] 4 Bl. Com. 417; cf. 1 Bl. Com. 10; 1 *ibid.* 58.
[2] Institutes of Gaius, cited 1 Pom. Eq. Jur. sec. 3.
[3] Von Ibering, cited by Brantly, Cont. 34.
[4] Anglo-Saxon Law, 185.
[5] DeLolme, Cons. of Eng. Ch. 10.

are slow and stinted, and thwarted by the same narrow interpretation. The persistence of this judicial conservatism was a subject of remark by Chief Justice Taney, so late as 1854. "There are many technicalities in common law proceedings which the courts ought to have reformed long ago. The power has been given them by the legislature to give judgment according to the right of the matter, without regard to matter of form; and yet they have obstinately, I must say, continued to treat as matter of substance what evidently was nothing but form, merely because it was called substance in some of the old law books."[1] The expedient of fictions, (to be noticed presently), occasionally employed to introduce by stealth real innovations, proves only that courts were more willing to sacrifice truth than form. The last alternative suggested, namely, the more liberal administration of justice, is but an equivalent expression for equity, which regards substance rather than form, the spirit and intent rather than the letter.

§ 150. **Fictions.** It has just been suggested that too little regard was had for truth, as truth. Fiction, indeed, was often a greater favorite than fact. Collusive legal proceedings, fines, recoveries, fictitious ejectments, pretended trovers, fictitious requests and promises in assumpsit, fictitious multiplication of counts in declarations, such were the

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[1]Tyler's Memoir of Taney, 323.

"awkward shifts, subtle refinements and strange reasoning, to which our ancestors were obliged to have recourse" (these are the words of Blackstone)[1] in order to escape the tyranny of form. These things were not frowned upon by the courts of law. They were encouraged by what Blackstone civilly styles their "finesse."[2] These courts, in fact, filched each others' jurisdiction, and obliged their suitors to make and to admit false allegations in pleading to color the usurpation. In the King's Bench, a defendant found himself compelled to admit that he had been arrested for a supposed *vi et armis*, when he was only wanted for debt. In the Exchequer, a plaintiff was encouraged to commence suit upon the false surmise that he was the King's personal debtor. The Court of Common Pleas, the subject of these solemn frauds, joined the other courts of Westminster Hall in raiding the courts of Admiralty of their proper maritime jurisdiction by feigning that contracts, really made at sea, were made on shore,[3]

"These fictions of law," says Blackstone, "though at first they may startle the student, he will find upon further consideration to be *highly beneficial and useful.*"[4] Elsewhere he calls them, as already

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[1] 2 Bl. Com. 360.

[2] 2 Bl. Com. 357. The discreditable practice of filing sham pleas for delay was tolerated in England until 1832. 1 Ch. Pl, 570, 16th Am. Ed.

[3] 3 Bl. Com. 43, 45, 107,

[4] 3 Bl. Com. 43, 283; 4 *ibid.*, 426.

quoted, "awkward shifts," &c.[1] They are now recognized as the blundering devices of an unphilosophic age, which has not yet learned from science to value truth for its own sake. When base metal is made a legal tender, gold disappears from circulation. Although nobody was actually deceived by these tricks, at least not after they had been once introduced, and although said to be invented to "promote justice," they were conspicuous object-lessons in high places of the utility of falsehood and craft. Their influence was sinister. Their example was contrary to public policy because hostile to the cultivation of good faith among men. Their reaction upon the courts which practiced them was a powerful, though indirect, agency in making a court of conscience a necessity.[2]

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[1] 2 Bl. Com. 360.

[2] "A bail!"

"Yes, my dear sir, half a dozen of 'em here. Bail you to any amount, and only charge half a crown. Curious trade, isn't it," said Perker, regaling himself with a pinch of snuff.

"What! Am I to understand that these men earn a livelihood by waiting about here to perjure themselves before the judges of the land, at the rate of half a crown a crime!" exclaimed Mr. Pickwick, quite aghast at the disclosure.

"Why, I don't exactly know about the perjury, my dear sir," replied Mr. Perker. "Harsh words, my dear sir, very harsh words, indeed. Its a legal fiction, my dear sir, nothing more."

All this time the man in the spectacles was hard at work swearing the clerks, the oath being invariably administered without any effort at punctuation, and usually in the following terms:

"Take the book in your right hand this is your name and handwriting you swear that the contents of this affidavit are true so help you God a shilling you must get change I havn't got it."

Pickwick Papers, Ch. 41.

§ 151. **Feudal system.** Such, with elaborately organized oppression, under the name of the *feudal system,* superadded, was the origin of the English common law, as it hardened into arbitrary and technical form in the reign of Edward I, 1272–1307.[1]

The abolition of the feudal tenures left many of the rules composing the system of real property law absolutely indefensible upon any other principle than that of *stare decisis.* Reason for them there was none.[2] While some of these fossil remains have been swept away by legislation, others have been evaded by forced and refined distinctions,[3] and others have been religiously preserved.[4] The result, as bluntly put by Carlyle in the mouth of Oliver Cromwell, was a "tortuous ungodly jingle." So he characterizes English law as late as the seventeenth century.

Its principal defects, viewed from the standpoint of equity, have been in part mentioned.[5]

§ 152. **Value of the common law.** Buried under a mass of rubbish of the dark ages were fruitful

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Another interesting phase of this subject will be found developed in Maine's Anc. Law, 24, 25, where fictions are regarded as the expedients of an infant society for overcoming the rigidity of the law, satisfying the desire for improvement, while not offending the disrelish for change.

[1] 4 Bl. Com. 418–420, 425–428.

[2] Horne vs. Lyeth 4 H. & J. 435.

[3] Culbreth vs. Smith, 69 Md. 455.

[4] Warner vs. Sprigg, 62 Md. 14, 20; Cunliff vs. Brancker, 3 Ch. D. 399, 407.

[5] *Ante,* section 145.

germs of much that was wise, just and liberal, deposited in part from lingering traditions of the civil law, (which for more than three centuries of Roman occupation had been administered in Britain by a succession of Prætors, of whom Papinian, and probably Paulus and Ulpian, were the most illustrious), and in part due to the unconquerable Saxon spirit of liberty, a legacy from the German forests, as depicted by Tacitus. This sturdy Teutonic instinct of freedom revolted against the slavish maxim of the imperial law, *quod principi placuit, legis habet vigorem*,[1] imported with the Norman conquest, tamely adopted into the common law by its earliest text-writers,[2] enforced by the Plantagenets and Tudors, and their servile judges, to the extent of their courage and ability, actually enacted into law by one of their pusillanimous parliaments,[3] and finally decapitated and expelled with the Stuarts. The real value of the common law is to be found in its free political spirit. Its best legacy is trial by jury, especially in state cases.

§ 153. **"Cramped administration."** There is no doubt that equity as a separate system owes its origin principally to the narrow-minded obstinacy of the early English judges, admitted even by Blackstone.[4] These men were such as the spirit of their time made

[1] Inst. I, 2 V1.
[2] Glanville, Bracton, Fleta.
[3] 4 Bl. Com. 431.
[4] 3 Bl. Com., 51, 409, 433, 435; 4 *ibid.* 430; Aus. Jur., 311.

them; to use the words of Carlyle, "narrow, more or less opaque persons of the pedant species, heavily pressed by traditions, formulas, antiquarian rubrics, dead letters of many things. The sheep-skin record failing them, and old use-and-wont ending, they cannot farther." These characteristics were perhaps exaggerated by some degree of personal timidity. There was a tradition, doubtless apocryphal, but none the less current, that Alfred hung forty-four judges for malversation and mistakes of judgment.[1] Henry II and Edward I cashiered most of their judges and confiscated their property for corruption and altering records.[2] These severe sentences are supposed for some ages to have induced their successors to adhere too rigorously to forms and the letter of the law.[3] There is also a suggestion, for which we have the authority of Sir Thomas More, that the disinclination of the judges to relax the rigor of their rules, was often the result of sheer indolence, and a desire to shirk responsibility.[4] As soon as they understood that there was a power elsewhere to remedy their injustice, they felt the less anxiety to repair it themselves.[5]

§ 154. **Rome and England contrasted.** The ancient civil law, when its crude symbolism and rigid

[1] Mirror of Justices, 239; 1 Reeves, 43,
[2] 2 Lingard, 231.
[3] 1 Camp. Lives Ch. 165; 3 Bl. Com. 409.
[4] 2 Camp. Lives Ch. 39.
[5] Clark's Pr. Jur. 378.

formulas were found inadequate to the demands of a progressive civilization, was continuously improved and developed by the Roman prætors, upon principles of natural justice or equity, first made familiar under the name *jus gentium*, by those prætors specially appointed to administer justice between foreigners in Rome and between Romans and foreigners, (Prætor *peregrinus*.)[1]

There were several causes which, in England, checked the development of law in the direction of equity, and necessitated resort to a separate tribunal.[2] The feudal system,[3] with its anomalous code of laws concerning real property and personal relations, had nothing in common with the doctrines of the Roman law, with which it refused to assimilate. The national antagonism to the ecclesiastical courts[4] was unfortunately extended to the Roman jurisprudence itself, which was finally altogether excluded as an authority, thus compelling the establishment of a tribunal in which its principles of universal justice should be recognized and enforced. The stubborn adhesion to precedent,[5] and especially to the technical structure of a meagre supply of writs[6] prescribing a limited number of fixed forms of action, persistently thwarted all efforts at the expansion of

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[1] Maine Anc. Law, 59, 60; Aus. Jur., 280; 1 Pom. Eq. Jur., secs. 5, 6.
[2] 1 Pom. Eq. Jur. 16–29; Bisp. Pr. Eq. sec. 7.
[3] 4 Bl. Com. 419.
[4] 4 Bl. Com. 111-113; *Ante*, sec. 6.
[5] 1 Kent Com. 476; Hallam Mid. Ages, 446.
[6] 3 Bl. Com. 51, 184; *Ante*, sec. 4.

the common law to meet the exigencies of new cases as they arose. Although a statute[1] was passed for the express purpose of relieving the difficulty, by widening the scope of writs and thus enlarging the jurisdiction of the law courts, its beneficial operation was measurably defeated by the narrow construction placed upon it by those courts, and the design of parliament to check the further growth of chancery by the infusion of equitable remedies into the common law, was thus frustrated. The only results of this legislation which were at all important were the additional legal actions known as case, trover and assumpsit, applicable to an almost unlimited variety of torts and contracts, and approximating equitable remedies in their convenience and flexibility. The statute referred to was moreover deficient in omitting any provision for equitable defences.[2] Thus it happened that, in their insular position, remote from the ancient seats of civilization, the English nation unfortunately failed to enrich their crude system of customary law by the approved principles of equity and good faith drawn from the ripest experience of ages, and embodied in the Roman jurisprudence.[3] As these principles were found absolutely essential to the progress and even the convenience of society, a new and separate judicature was required for their administration. Thus the national opposition to the

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[1] Westminster II, 13 Edward I, A. D. 1285; *Ante*, sec. 4.

[2] 1 Pom. Eq. Jur., sec. 27.

[3] Advocate Walton, in Juridical Rev. for October, 1893; Richard Malcolm Johnston, "Studies," 34.

civil law, instead of excluding it from the realm, only succeeded in confining it to the court of chancery, and in establishing the extraordinary or equitable jurisdiction of the chancellor upon a valid basis.

§ 155. **"Disciplined conscience."** Under this head is to be noticed an original distinction between the methods of law and equity. The theory of the common law was, and, to some extent, still is, that every case, no matter how novel, is already decided *in gremio legis*. There is a *law* for that case, and the only business of the judge is to declare, not from his conscience, but from his experience or his learning, what the law is, not what it ought to be.[1] Hence the extravagant fiction that "the common law is nothing else but statutes worn out by time."[2] Westbury, Lord Chancellor, is reported as follows: "By a legal fiction it is supposed that the law contains within itself the material for the decision of every case, however novel the circumsances, and accordingly, when the judges have a new case before them, they do not profess to arrive at the law by reasoning, by theory, or by philosophic inquiry, but they profess to discover it by searching among the records of former decisions for cases supposed to be analogous, and they derive from these analogies the rule which they desire for the determination of the particular case."[3]

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[1] 1 Bl. Com. 45; Maine Anc. Law, ch. 2, p. 30; Bish. First Book, sec. 179. See Clark's Prac. Jur. 378; Aus. Jur. 321.

[2] 2 Wils. 348, cited 1 Bl. Com. 74, Chitty's note 12.

[3] Nash, Life of West., II, 59.

"The common law is a system of principles not capable of expansion, but always existing," and ready to attach to circumstances as they arise.[1]

Equity, on the other hand, recognizes new adjustments for new situations, not upon a dogmatic basis, but upon principles which address themselves to the conscience and intelligence, and therefore admit of a rational and progressive development.[2]

The terms of the definition here bring together the ancient and modern conceptions of equity. As already stated, the first chancellors were high ecclesiastics, and with few exceptions continued so down to the 16th century. Their decisions, particularly the earlier ones, were based upon their idea of natural justice, understood as synonymous with the divine law of morality. This was the "*conscience*" of the court, personal and arbitrary, and often vacillating, justly provoking the apprehension of common lawyers and judges, the opposition of parliament, and sarcastic comments like that of Selden:[3] "'Tis all one as if they should

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[1]Buchanan, C. J. in State vs. Buchanan, 5 H. & J. 357. Sixty years later, the progress of the law is shown by the following expression: "Flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." Matthews J. in Hurtado vs. California, 110 U. S. 530.

[2]Knatchbull vs. Hallet, 13 Ch. D. 696, 710.

[3]The antagonisms referred to at times threatened the existence of the Court of Chancery. Aided by the scandalous abuses which occasionally marred its administration, they would in all probability have destroyed it, as a court of equity, but for the fact that the chancellors themselves, whether clerical or lay, were usually the most influential and successful politicians of their day, securely intrenched behind an impregnable breastwork of "patronage."

make his foot the standard for the measure we call the chancellor's foot. * * * 'Tis the same thing with the chancellor's conscience."[1] This uncertain standard was, however, steadied in a measure by constant reference to the principles of the Roman civil law, in which the prelates who presided in the court of chancery were versed. Such was the older conception of *conscience*, a personal, arbitrary, and somewhat capricious standard, supposed to be enlightened by divine wisdom, except when prompted by the code and pandects.

With the fall of Cardinal Wolsey the cycle of the clerical chancellors virtually closed, and with the accession of Sir Thomas More, (A. D. 1529,) and a long line of lawyer chancellors, (conspicuously Nottingham, temp. C. 2; Hardwicke, temp. G. 2; Eldon, temp. G. 3,) came in the modern conception of a *disciplined conscience*, or professionally trained sense of justice.[2] Not the natural conscience, not the

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[1]Selden's Table Talk, cited 3 Bl. Com. 432, *note*, 1 Spence, 414. 1 Pom. Eq. sec. 57. The king's commission to his chancellor was originally as extensive as that of the duke to Angelo:

"Your scope is as mine own,
So to enforce or qualify the laws
As to your soul seems good."
Meas. for Meas. I, 1.

"The discretion of a judge is the law of tyrants. It is always unknown. It is different in different men. It is casual, and depends upon temperament. In the best, it is oftentimes caprice. In the worst, it is vice, folly and passion." Lord Camden, cited Fearne Cont. Rem. 429, note, "Juges injustes! ne faites pas des ois sur l'heure; jugez par celles qui sont établies." Pascal.

[2]"Science is nothing but trained and organized common-sense, differing from the latter only as a veteran may differ from a raw

crude impulse of an untrained mind, however honest and intelligent, not even the *arbitrium boni viri*,[1] but an artificial or judicial conscience, only to be acquired by large experience, study and practice, and only made possible of acquisition by the accumulation of a mass of precedent, and the evolution therefrom of a settled system of principles, maxims and doctrines.[2]

§ 156. "**Competent magistrate.**" The reference of course is to a duly commissioned and qualified judge, clothed with the requisite jurisdictional authority as a separate tribunal, sole judge of law and fact, without a jury.

It has been seen that although provision exists in the equity system for the sending of issues of fact in certain cases to be tried by a jury in a common-law court, the trial by issue forms no necessary incident to proceedings in equity, and the verdict is advisory only, and not binding on the court or chancellor.[3] It is also true that by statutory enact-

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recruit. Its methods differ from those of common-sense, only so far as the guardsman's cut and thrust differs from the manner in which the savage wields his club." Huxley, Lay Serm. 77.

[1] Co. Litt. 97, b.

[2] 1 Pom. Eq. Jur. secs. 49, 53, 59. Function of *precedent* at law and in equity contrasted. *Ibid.* sec. 60. 2 Pom. Eq., page 405. *Examples* of jurisdiction, not the *measure* of jurisdiction. Slim vs. Croucher, 1 DeG. F. & J. 518, 528. 1 Kent. Com. 477-8.

[3] *Ante*, sec. 128; Chase vs. Winans, 59 Md. 475, 480; Garsed vs. Beall, 92 U. S. 684, 695; Benefit Asso. vs. Parks, 81 Maine 80, 84; Fishburne vs. Ferguson, 84 Va. 101; Terra Cotta Co. App. 124 Pa. 368, 375.

ment in several jurisdictions, it is now made possible for a jury to be called in for the trial of issues of fact in the equity court. By the ordinary type of such enactments, however, the effect of the verdict is the same as already stated,[1] and the court may not only disregard the findings of the jury, but may decree in opposition thereto, upon its own estimate of the testimony.[2] It is clear beyond all question that trial without a jury is the normal mode of trial in equity,[3] and equally clear that it is the feature which especially characterizes the system, and differentiates it from law.[4]

The terms of the definition are broad enough to include technical equity as a separate system in either Roman, English or American jurisprudence. The "Magistrate" may be a Prætor, a Lord Chancellor, or Vice Chancellor, a Baron of the Exchequer, a Lord Justice, a Master of the Rolls, or an American Chancellor, or Judge.[5] Occasionally in England,

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[1]Barth vs. Rosenfeld, 36 Md. 604, 614; Kohn vs. McNulta, 147 U. S. 238; Watt vs. Starke, 101 U. S. 247, 250; Hess vs. Callender, 120 Pa. 152.

[2]Idaho Land Co. vs. Bradbury, 132 U. S. 509; Reed vs. Axtell, 84 Va. 231; Brownlee vs. Martin, 28 S. C. 364; Brundage vs. Deschler, 131 Ind. 174.

[3]Timson vs. Wilson, 38 Ch. D. 77; *ante*, sec. 22.

[4]Alex. Hamilton in 83d Fed.; Pom. on Rem. sec. 59; Bliss Co. Pl. sec. 10.

[5]It is quite common to speak of any judge exercising equity powers as a "chancellor," and of his court as a "court of chancery." Wilson vs. Riddle, 123 U. S. 614; Fosdick vs. Schall, 99 U. S. 253; Powers' App. 125 Pa. 186; Warren vs. Bunch, 80 Ga. 124; Williams, 23 Fla. 324, 335.

when the great seal was in commission, the tribunal was plural, and so it was formerly with the Court of Exchequer. Appellate tribunals also consist of a plurality of judges. The subject of *courts* has been already considered.[1] The first and essential part of the definition ends here. What remains is no less important to be known, but is descriptive rather than definitory.

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[1] *Ante*, chap. 1.

CHAPTER IX.

EQUITY JURISPRUDENCE. THE DEFINITION FURTHER EXPANDED.

157. "Special circumstances."
158. "Limited classes of civil cases."
159. Heads of equity jurisdiction.
160. Defences.
161. "Civil cases" exclusively.
162. Equity and criminal justice.
163. Their present relations.
164. Quasi equitable jurisdiction.
165. "Natural justice."
166. "Public policy."
167. Reaction of equity upon law.
168. Law reform.
169. Substance rather than form.
170. Present state of law and equity.
171. "Precedent."
172. "Positive provisions of law."
173. Recapitulation.

§157. **"Special circumstances."** This is a phrase of constant occurrence, and is used in two different applications. It may refer either to transactions and events of purely equitable cognizance, common to whole classes of cases, such as trust, fraud, accident, mistake &c., and which occasion jurisdiction over them; or, it may refer to those more particular circumstances which distinguish some cases from others of the same general class, and finally determ-

ine as to the fact, mode and extent of relief. When jurisdiction is once assumed upon any valid foundation, it will, in general, be fully exercised over the whole case to the end. But the peculiar principles of equity will be applied only to those features of the case which are of equitable cognizance, while as to the other features, the ordinary legal rules will be applied in obedience to the maxim, "equity follows the law."[1] "While the principles of equity are fixed, they are to be applied according to the circumstances of each particular case."[2] "The case stands upon its own special circumstances, and it is with reference to those circumstances that we hold that relief should be granted."[3] "The great and primary use of a court of equity is to give relief in *extraordinary cases,* which are exceptions to general rules. It is true that the principles by which that relief is governed are now reduced to a regular system, but it is not the less true that they are in the main applicable to *special circumstances,* which form exceptions to general rules."[4] "In equity there is no rule so inflexible as not to bend to the special circumstances of a particular case."

1 Kent Com. 490, note d. It is questionable whether this dictum is not laid down too broadly, unless the term, "special circumstances," is to be taken in a conventional sense. Understood literally, it would seem to throw everything open to the discretion of the judge, which has been seen to be very far from true.

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[1]Smith Man. Eq. 13; Ad. Eq. Int. 12; *post,* sec.

[2]Lord Eldon in Gee vs. Pritchard. 2 Swanst, 414.

[3]Worthington vs. Lee, 61 Md. 540.

[4]Alex. Hamilton, in 83d Federalist.

The proposition is everywhere repudiated that a court of equity will always do what the justice of the particular case requires, regardless of any rules. Ryan vs. Mutual, (1893), 1 Ch. 116, 124. But the cases in equity, which are said to be governed by their own "special circumstances" are extremely numerous. The following references to recent cases will suffice to indicate something of their nature and variety. *Construction of Wills:* Larmour vs. Rich, 71 Md. 369, 384; Abell vs. Abell, 75 Md. 44, 56. *Of Contract;* Moser vs. Lower, 48 Mo. App. 85; Saxton vs. Seiberling, 48 Oh. St. 561. *Laches:* Noble vs. Turner, 69 Md.; 527; B. & O. R. R. Co. vs. Canton Co., 70 Md., 415; Kilbourne vs. Sunderland, 130 U. S. 518; Morse vs. Hill, 136 Mass. 65; Gregory vs. Commonwealth, 121 Pa , 622; Heyder vs. Excelsior, 42 N. J. Eq. 408; Waterman vs. Sprague, 55 Conn. 574; Sedgwick vs. Taylor, 84 Va. 825. *Parties:* Barney vs. Latham, 103 U. S. 205; Wanger vs. Aspell, 47 Oh. St. 255; *ante* sec. 24. *Negligence:* Harkness vs. Scammon, 48 Mo. App. 136. *Multifariousness:* Neal vs. Rathell, 70 Md. 598; Brown vs. Trust Co., 128 U. S. 411; Coates vs. Legard, L. R. 19 Eq. 59; Bank vs. Thornton, 83 Va. 166; Wade vs. Pulsifer, 54 Vt. 70; De Wolf vs. Sprague, 49 Conn. 298; *ante* sec. 40. *Amendment of Pleadings:* Hardin vs. Boyd, 113 U. S. 761; Richmond vs. Irons, 121 U. S. 47; Harrigan vs. Bacon, 57 Vt. 644. *Appointment of Receiver:* Sage vs. R. R. Co. 125 U. S. 376; Fosdick vs. Schall, 99 U. S. 254; Owen vs. Homan, 3 Mac. & G. 378, 411, affd. 4 H. L. 997; Ashurst vs. Leman, 86 Ala. 371. *Specific Performance:* Worthington vs. Lee, 61 Md. 540; Semmes vs. Worthington, 38 Md. 298, 325; Nickerson, 127 U. S. 675; Barrett vs. Forney, 82 Va. 276; Short vs. Kieffer, 43 Ill. App. 575. *Fraud:* Bank vs. Hume, 128 U. S. 211; Shoemaker vs. Cake, 83 Va. 5. *Vendor's lien:* Fisher vs. Shropshire, 147 U. S. 133, 140; Porter vs. Dubuque, 20 Iowa, 442. As to the *purchase* of a *reversionary interest:* O'Rorke vs. Bolingbroke, 2 App. Ca. 814, 837. As to a *sale* to a *corporation* by a *stockholder:* Farrar, 40 Ch. D. 406. As to whether a *preference* is *fraudulent:* Smith vs. Craft, 123 U. S. 436. As to *inadequacy* of *consideration:* Fuller vs. Brewster, 53 Md. 361. As to whether a transaction was a *payment*, or a *purchase* of a *security:* Wood vs Trust Co., 128 U. S. 425. As to allowance to a *life-tenant* for betterments out of the *corpus* of an estate: Re Lytton, 38 Ch. D. 22. As to what *misconduct* of a *trustee* should affect his *compensation:* Jacobson vs. Munn, 38 N. J. Eq. 625; Trevelyan vs. Loft,

83 Va. 149—or justify his removal: Marrey vs. Stout, 4 Del. Ch. 282. As to *accident* or *mistake:* Martin vs. Osborn, 146 Mass. 401. *Account:* Root vs. Railway Co., 105 U. S. 216. *Set off:* Trotter vs. Hickshe, 40 N. J. Eq. 657. *Costs:* Andrews vs. Barnes, 39 Cn. D. 133, 138; Chamberlin vs. Estey, 55 Vt. 384. *Divorce:* Williams, 23 Fla. 324. *Alimony:* Cralle, 84 Va. 202. As to what constitutes *constructive notice:* Simmons vs. Doran, 142 U. S. 417; Savings Bank vs. Natl. Bank, 53 Vt. 90; Knapp vs. Bailey, 79 Me. 195-204. As to what constitutes a *cloud on title:* Eastman vs. Thayer, 60 N. H. 414. As to what is a *reasonable use* of a *stream* by *riparians:* Mason vs. Hoyle, 56 Conn. 262. As to what is a reasonable allowance for *maintenance:* Ela vs. Brand, 63 N. H. 16. As to *nunc pro tunc* orders: Bone vs. Chapman. 119 U. S. 597. As to *ratification* of judicial *sale:* Todd vs. Gallego, 84 Va. 590; Moran vs. Clark, 30 W. Va. 381. As to what encroachment on a public highway amounts to a *nuisance:* Philadelphia's Appeal, 78 Pa. 33; Gray vs. Baynard, 5 Del. Ch. 504. *Estoppel* by conduct: Klein vs. Richardson, 64 Miss. 46. In some of these cases the court is simply dealing with questions of *fact*, as a jury would do. In others, such as questions of costs, amendment, &c., the court exercises an absolute discretion, except in some states. Welch vs. County Court, 29 W. Va. 70, 71. While in the greater number of instances, (specific performance, injunction, receiver, laches, multifariousness, &c.), the discretion confided to the court is said to be a "sound judicial discretion," reviewable on appeal.

§ 158. **"Limited classes of civil cases."** The authority of the magistrate—in other words, the equitable jurisdiction of the court, is hedged in between fixed limits. The defects and omissions of the law, and of its modes of procedure, are no longer the criterion.[1] These limits are in great measure determined by *precedent.* The principle on which the precedents have been formed is, in general, the want of plain, adequate and complete

[1] 1 Pom. Eq. Jur. sec. 62; Sumter vs. Mitchell, 85 Ala. 321.

remedy at law. New *cases* may be and constantly are brought within the jurisdiction of equity, but no new *class* of cases, using the word "class" in a generic sense. Sometimes the word is used in a limited sense, as in Banks vs. Haskie,[1] where a particular class of contracts, viz: covenants for renewal of Baltimore city leases for 99 years, sought to be enforced after the expiration of the term during which they were expressly made renewable, was for the first time brought within an acknowledged head of equity jurisdiction, but without enlarging its boundaries. So where remedial equity was to be applied to a new subject matter, the court said: "The point is not whether an injunction has ever issued to prevent the establishment of a public nuisance of this kind, but whether the doctrines of equity applicable to nuisances should be applied to the present case."[2]

§ 159. **Principal heads of equity jurisdiction.** The *heads* of equity jurisdiction have been long established, and cover all possible cases which may properly be brought within the cognizance of courts of equity. Those of most frequent occurrence in practice are as follows: ACCIDENT, MISTAKE, FRAUD,

[1] 45 Md. 225.

[2] Hamilton vs. Whitridge, 11 Md. 145. So, in England, prior to 1888, there was no authority to be found for the proposition that a *lessee* under a mortgagor coming in after the date of the mortgage, has the right to redeem, when it was so decided upon the same principle which enables an *assignee* of the mortgagor to redeem. Tarn vs. Turner, 39 Ch. D. 456.

TRUST, specific performance, account, administration, mortgages and liens, partnerships, creditors' bills, partition, injunctions, receivers, interpleader, bills of peace, *quia timet*, divorce, alimony, infants, persons of unsound mind, married women.

More particularly, equity has jurisdiction: to relieve against a class of unforeseen and injurious occurrences, not attributable to mistake, neglect or misconduct—(ACCIDENT, and herein of *re-execution*); to relieve against acts, or contracts, done, or made, from ignorance of fact, forgetfulness or inadvertence—(MISTAKE, and herein of *reformation* and *rescission*); to set aside, correct, annul, or prevent advantage being taken of, instruments and acts induced by FRAUD, (and herein of *cancellation*); to enforce a benefical interest in property against the holder of the legal title—(TRUST, and herein of trusts, *active* and *passive*, *express* and *implied*, the latter including *constructive* and *resulting* trusts); to compel *specific performance* of contracts; to adjust accounts between co-owners, partners, principal and agent, principal and surety, debtor and creditor, &c. —(*account*, and herein of *set-off*, *contribution*, *exoneration*, *subrogation* and *marshalling* of assets and securities); to superintend, in certain cases, the settlement of decedent's estates—(*administration*, and herein of *election*, *conversion*, *satisfaction* and *performance*); to establish the true *construction of wills*; to enforce *mortages* by foreclosure, or to extinguish them by redemption; to enforce *liens* generally; to provide for the dissolution and settle-

ment of *partnerships;* to entertain applications to charge the real property of deceased owners, or the real and personal property of living owners, beyond the reach of ordinary legal process, with their debts —(*creditors' bills*)*;* among co-owners to make *partition;* to prevent persons from enforcing judgments, prosecuting suits, or setting up defences, in a court of law, where the claim or defence is inequitable, and to prevent the performance of acts, which, if performed, would inflict an injury on a person, for which he would have no adequate remedy—(*injunction*)*;* to secure property in dispute pending litigation —(*receiver*)*;* to prevent vexatious litigation by protecting a party liable to the suit of two or more conflicting claimants (*interpleader*), or of a numerous class insisting upon the same adverse right, or of the same party repeating an unsuccessful claim (*bills of peace*)*;* to preserve the means by which existing rights may be secured from impending violations (*quia timet*)*;* to dissolve, either partially or absolutely, the marriage relation, with incidental provision for *pendente lite,* or permanent, support (*divorce alimony*)*;* to guard and administer the estates of *infants,* persons of *unsound mind,* and *married women;* and to compel a party to a suit at law to disclose facts and produce documents within his knowledge and control—(*discovery*).[1]

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[1]The foregoing is borrowed, with a few slight, perhaps superfluous, alterations and additions, from Prof. Venable's abridgment of the Law of Real Property, page 123.

In the foregoing enumeration, the import of each separate particular should be first carefully observed, and then the endeavor should be to grasp the comprehensive practical significance of the whole scheme in its entirety. By thus sweeping over the wide range of chancery jurisdiction, and considering the varied and complex functions of its courts—their almost exclusive control over all fiduciary relations, including not only trustees, properly so called, but executors and administrators, guardians, attorneys, agents, directors in corporations, and the like—their exclusive control over all trust property—their protection over the persons and estates of infants and married women, including their destructive power over the *status* of marriage itself, and their power to take children from the care of their parents—their power to enforce the specific performance of contracts, or to rescind them entirely—the large field of preventive justice which they exclusively occupy in restraining trespasses, nuisances, abuses of trust, attempts to perpetrate fraud, unjust litigation, illegal taxation, and waste—the exclusive facilities at their command for analyzing and adjusting intricate transactions and complicated accounts, and settling the disputes of co-partners, and their joint or separate creditors, principals and their agents, debtors and their sureties, and all persons having mutal dealings—and the relief they afford in cases of accident, mistake and fraud, including the power to unravel and defeat the most artful and elaborate

schemes of imposition, and to strike down the most solemn assurances—it will at once be seen that a judiciary establishment, without such powers in some of its tribunals, would not only be defective in organization and cramped in administration, but could really make no claim to represent a system of jurisprudence for a civilized society.[1]

Not much stress is now laid upon the *auxiliary* jurisdiction, meaning by that term the power to compel discovery, produce documents, and perpetuate testimony *de bene esse.* Since those powers have been conferred by statute upon the courts of law,[2] the necessity for the *auxiliary jurisdiction*, may be said to be practically, almost entirely, superseded,[3] although still occasionally resorted to.[4] Observe, however, that bills for *discovery, as such*, are to be distinguished from the ordinary applications to probe the conscience of the defendant in all cases as to facts within his knowledge; in other words, bills not for discovery only, but for *relief*,[5] with incidental discovery.

To the above should be added, in Maryland, a number of subjects over which equity jurisdiction has been extended, enlarged or modified by statute, an index to which is appended.[6]

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[1] See 2 Am. Jurist, 314; 10 *ibid.* 227.

[2] Md. Code, Art. 75, sec. 94.

[3] 1 Pom. Eq. Jur. secs. 83, 124, 143, 215; Bisp. Pr. Eq. sec. 558.

[4] Union P. R. R. vs. Mayor, 71 Md. 238; 1 Foster's Fed. Pr. sec. 281.

[5] 1 Pom. Eq. Jur. sec. 144; Snowden vs. Dispensary, 60 Md. 85; Trego vs. Skinner, 42 Md. 430.

[6] *Abatement*, Md. Code, Art. 16, secs. 1–13; *Account*, Art. 26, sec. 9; *Alimony*, Art. 16, sec. 14; *Amendment*, Art. 16, secs. 16, 17; *Appeal*,

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§ 160. **Defences.** Further limitations are to be classified under this head, premising that nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence, and where these are wanting the court is passive and does nothing.[1]

Art. 5, secs. 24–36; *Attachment*, Art. 16, secs. 172–174; *Auditor*, Art. 16, secs. 18–23; *Burial Grounds*, Art. 16, sec. 92; *Charitable Uses*, Art. 93, sec. 315; *Corporations*, Art. 23, secs. 264–276; *Creditor's Bills*, Art. 16, secs. 46, 188; *Contempt*, Art. 16, sec. 151; Art. 26, sec. 4; *Declaratory Decree*. Art. 16, secs. 26–32; *Divorce*, Art. 16, secs. 35–40; *Dower*, Art. 16, sec. 41; Art. 45, sec. 5; *Equitable Defence*, Art. 75, secs. 83–85; *Examiners*, Art. 16, sec. 216; *Executor*, Art. 93, sec. 10; *Fraudulent Conveyances*, Art. 16, sec. 46, *Inebriates*, Art. 16, sec. 47; *Infants*, Art. 16, secs. 48-62; *Injunction*, Art. 5, secs. 29, 42; Art. 16, secs. 63–71, 177–181; Art. 17, sec. 24; Art. 23, sec. 263; Art. 66, secs. 16–18; Art. 75, secs. 116-128; *Invalid Deeds*, Art. 16, secs. 33–34; *Issues*, Art. 16, sec. 46; Art. 75, sec. 97; *Jurisdiction*, Art. 5, sec. 35; Art. 16, secs. 70–91; *Lease*, Art. 16, secs. 93–94; *Legacy*, Art. 16, sec. 82; Art. 93, secs. 10, 313; *Married Women*, Art. 45; *Mechanics' Lien*, Art. 63, sec. 25; *Mortgage*, Art. 16, sec. 187; *Names*, Art. 16, sec. 95; *Non Compos*, Art. 16, secs. 96-104; *Non Resident*, Art. 16, secs. 105–115; *Parties*, Art. 16, secs. 156, 159–163; *Partition*, Art. 16, sec. 116, *Possession, Writ of*, Art. 75, sec. 88; *Preservation, &c., of Property*, Art. 75, sec. 93, *Procedure*, Art, 16, secs. 117–186; *Production of Books, &c.*, Art. 167 sec. 24; *Revivor*, Art. 16, secs. 2–12; *Sales*, Art. 16, secs. 187–198; *Sequestration*, Art. 16, sec. 168; *Special Case*, Art. 16, secs. 184–186; *Specific Performance*, Art. 16, secs. 76, 85, 199; *Testimony*, Art. 16, secs. 216–234; *Trusts*, Art. 16, sec. 81; *Trustee*, Art. 16, secs. 28, 79–80, 200–215, Art. 79, secs. 7–9, Art. 93, sec. 286–290; *Unknown Parties*, Art. 16, secs. 111–113; *Vendors' Lien*, Art. 16, sec. 193; *Waste*, Art. 16, sec. 64; *Wills*, Art. 93, secs. 313–317. The following references are to sections of Art. 4 of the Public Local Laws, relating to the city of Baltimore: *Charitable Uses*, sec. 2; *Jury Trial*, sec. 174; *Opinions*, sec. 174; *Circuit Court*, *No.* 2, secs. 176–178. (As to Circuit Court of Baltimore city, see Const. of Md. Art. IV, sec. 29.) *Bailiffs, &c.*, secs. 223-227; *Mortgages*, secs. 692–704; *Park Condemnations*, secs. 710, 711.

[1] Lord Camden in Smith vs. Clay, Ambl. 645; 3 Bro. Ch. 638, cited in Noble vs. Turner, 69 Md. 527, and in many other cases.

The extraordinary powers of equity will not be exerted in such cases as the following: Where the remedy at law has always been plain, adequate and complete—(*no jurisdiction*); where the plaintiff has negligently slept upon his rights, for a period unreasonably long, in view of all the circumstances of the case—(*laches*); where he has permitted the period of time to elapse, limited by law in similar or analogous cases—(*limitations*); where his action or non-action, with knowledge of his rights, has been such as to import their voluntary waiver or abandonment—(*acquiescence, condonation*); or such as to have induced another party, in bona fide reliance thereon, to alter his own position—(*estoppel*); where he has voluntarily, and with full knowledge, done some act amounting to *confirmation or release;* where he has knowingly participated in the fruits of the transaction impeached or advisedly committed himself to an inconsistent or repugnant right—(*election*); where he has himself been guilty of inequitable, unrighteous or unlawful conduct in respect of the immediate subject-matter—(*fraud; illegality; recrimination*); or where the defendant is a *bona fide* purchaser for value without actual or imputed knowledge of the plaintiff's equity—(*notice*). Many of the foregoing are strictly equitable defences, in addition to those available also at law, such as the statute of frauds and of usury, accord and satisfaction, pending suit, and others. As already seen, the defence of multi-

fariousness no longer avails to dismiss the entire bill.[1]

§ 161. **"Civil cases" exclusively.** With criminal law, equity (in its technical sense), has nothing to do. Its office and jurisdiction are limited to the protection of property rights, unless enlarged by statute.[2] In ancient times the protection of the chancellor was frequently invoked by the weak against the powerful, but that species of jurisdiction has long been obsolete. A curious reminiscence of it to a late day may be found in the "confederacy" clause in bills, only recently disused.[3] The jealous vigilance with which equity guards the property rights of the helpless and confiding against trustees, guardians and other fiduciaries, to prevent advantage being taken of influence, even to the

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[1] *Ante*, sec. 40.

[2] 1 Bl. Com. 92; Fornshill vs. Murray, 1 Bland, 484. *In Re* Sawyer, 124 U. S. 210. But the mere fact that an act is criminal, does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights. Mobile vs. R. R. Co., 84 Ala. 116, 126; Quintini vs. Board, 64 Miss. 483. Prohibition liquor laws in some states make courts of equity instrumental in their prompt and summary enforcement by *injunction*, with fine and imprisonment as the penalty of disobedience. The objection that such statutes deprive the party of a *trial by jury* in a *quasi* criminal proceeding, has been overruled by the Supreme Court. Mugler vs. Kansas, 123 U. S. 623, 672; Eilenbecker vs. Plymouth, 134 U. S. 31. In England, of late years, injunctions have been granted to restrain libel and even slander injurious to plaintiff's business. Herman vs. Bran, 26 Ch. D. 306. *Contra* in U. S., 3 Pom. Eq. Jur., sec. 1358, Bisp. Pr. Eq., 5th ed. p. 584, note.

[3] 1 Spence Eq. 690.

extent of reversing the ordinary rules of evidence as to the *onus probandi,* appears to be the only trace left of the ancient jurisdiction referred to.

"In criminal matters the jurisdiction of the Court of Star Chamber grew up side by side with that of the chancellor, in civil."[1] "As the Chancery had the prætorian power for equity, so the Star Chamber had the censorian power for offences under the degree of capital."[2] In an age when juries were corrupt, judges often venal, and the ordinary administration of criminal justice perverted by influence, the Star Chamber not merely exercised a control over great nobles, which checked oppression, "but supplied some of the defects of a system which practically left unpunished, forgery, perjury, attempts and conspiracies to commit crimes, and many forms of fraud and force." "The tyrannical proceedings for political offences, which ultimately caused the abolition of the court, ought not to make us forget the great service it rendered, not only to the cause of good order, but to the law of the country."[3]

§ 162. **Equity and criminal justice.** Both in theory and practice, the early criminal code of England habitually violated almost every principle of justice now recognized as fundamental. For a series

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[1] 1 Steph. Hist. Cr. Law, 175.

[2] Lord Bacon's Works, VI, 85. DeLolme Cons. of Eng. B. 2, c. 17, part 2, page 440.

[3] 1 Steph. Hist. Cr. Law, 176, 177.

of centuries, what my Lord Coke calls the "perfection of reason,"[1] hunted witches, roasted heretics, mangled traitors, absolved intelligent crime by benefit of clergy, and punished ignorance with death, refused counsel to prisoners, refused the oath to their witnesses, crushed them to death if they did not plead,[2] and badgered them from the bench if they did. Says Lord Macaulay: "The earlier volumes of the State Trials are the most frightful record of baseness and depravity in the world. Our hatred is altogether turned away from the crimes and the criminals, and directed against the law and its ministers. We see villanies as black as ever were imputed to any prisoner at any bar, daily committed on the bench and in the jury box."[3]

With all this, equity found itself unable to interfere directly. In fact, it must be admitted, that sometimes chancellors, like Thurlow and Eldon, were the most formidable obstacles to reform. At length, however, the spirit of the age, catching the spirit of equity, enforced legislative reforms, which have in this country been embodied in our Constitutions and Bills of Rights. By these provisions, and by statutes like that enabling parties to testify, the rigors of the criminal code have been corrected and its defects measureably supplied.

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[1]Co. Litt., 97 b.

[2]4 Bl. Com. 61, 46, 93, 370, 359, 327.

[3]Mac. Essays, II, 270, quoted by Lord Campbell in his life of Somers, IV, 495.

§ 163. **Their present relations.** Trial by jury, the principle that the jury judge law as well as fact,[1] and that verdicts have not the slightest binding force as precedents, the wide margin of discretion in the court in the scale of punishments,[2] and the pardoning power in the Executive, have given ample scope for the equitable consideration of "special circumstances."

The presumption that every man is innocent until found guilty beyond a reasonable doubt, the principle that there can be no conviction of crime where there is not found the evil *intent*, and that ignorance or mistake in point of *fact*, is generally, in criminal cases, a sufficient defence,[3] concur in giving an equitable complexion to the whole criminal code.[4] There is also here, as in equity jurisprudence, no lack of appropriate *specific* remedies and *preventive* appliances. Habeas corpus is in effect a specific performance of the absolute right of personal liberty, and "security to keep the peace," or for "good hehavior,"[5] is in effect a process of injunction to restrain the commission of crime. The issues, moreover, in

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[1]Md. Cons. Art. 15, sec. 5. This provision is merely declaratory of pre-existing law. Beard vs. State, 71 Md. 275, 279. In some states the doctrine is altogether rejected. State vs. Burpee, (Vt.) 25 Atl. Rep. 964.

[2]Golson vs. State, 86 Ala. 603.

[3]Bl. Com. 27; 1 Bish. Cr. L. secs. 288, 301; Queen vs. Tolson, 23 Q. B. Div. 168; Folwell vs. State, 49 N. J. Law, 31.

[4]The few exceptions are founded in public policy, which is also influential in equity jurisprudence. Carroll vs. State, 63 Md. 564.

[5]4 Bl. Com. 251; Hyde vs. Greuch, 62 Md. 582.

criminal cases, are invariably simple, requiring no technical pleading to evolve them. There are but two parties to the proceeding; the state on one side, and the accused (whether in the singular or plural) on the other. As was anciently the practice in civil cases, the only pleading, after the indictment, is delivered orally, in open court, and in proper person. No complicated interests are to be nicely adjusted, and no relief is to be granted in successive stages, or adapted to varying conditions.[1] The laws affecting life and liberty are, and ought to be, so "plain, perspicuous, and easily apprehended by the common intelligence,"[2] that there is no room here, and should be none, for the "one man power" of adjudication.[3] In criminal jurisprudence, therefore, the fusion of law and equity may be said to be approximately complete.

§ 164. **Quasi Equitable Jurisdiction.** Among the classes of civil cases not usually referred to equity jurisprudence, but which are to a great extent within its province, may be mentioned:

1. Cases at law in certain stages where motions are pending to strike out judgments, quash executions, to amend, to postpone, &c. These motions are addressed to the equitable discretion of the

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[1] Brown vs. Buck, 75 Mich. 274, 285.

[2] Lamb vs. State, 67 Md. 534.

[3] The privilege of waiving trial by jury (Cons. art. 12, sec. 8) in criminal cases, should be restricted to cases not capital.

court, are governed by equitable principles,[1] and are granted on equitable terms.[2]

And when the principles of law and equity conflict, courts of law will in such cases follow equity in preference.[3]

Motions for *new trials* are also governed in great measure by equitable considerations, and are frequently granted on equitable terms.[4] Their comparatively modern introduction or development in courts of law has practically superseded resort to courts of equity for relief against judgments in a large class of cases formerly relieved only by injunction.[5]

2. Cases where a common law court has power by statute to compel discovery, production of documents and perpetuation of testimony.[6]

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[1] Huntington vs. Emory, 74 Md. 69; Snowden vs. Preston, 73 Md. 267; Smith vs. State, 46 Md. 617-620; Craig vs. Wroth, 47 Md. 283; Gorsuch vs. Thomas, 57 Md. 339; Phillips vs. Negley, 117 U. S. 677; Gumbel vs. Pitkin, 124 U. S. 131, 146; 2 Poe, Pl. and Pr. sec. 392; 3 Bl. Com. 405, 406; Schantz vs. Kearney, 47 N. J. Law, 56; Hier vs. Kaufman, 134 Ill. 226; Owen vs. Weston, 63 N. H. 602.

[2] Andrews vs. Bank, 77 Md. 21; Coulbourn vs. Fleming, 27 Atl. Rep. 1041, 77 Md.; Heaps vs. Hooper, 68 Md. 383; Ferrall vs. Farnen, 67 Md. 76, 84; Jenkintown Bank App. 124 Pa. 345.

[3] Smith vs. State, 46 Md. 620; and cases *supra.*

[4] State vs. Weiskittle, 61 Md. 48, 52; 2 Poe, Pl. and Pr. secs. 344, 347.

[5] Pom. Eq. Jur. sec. 1365; 3 Bl. Com. 392; Ratcliffe vs. Stretch, 130 Ind. 285.

[6] Md. Code, Art. 75, sec. 94; Art. 35, sec. 19; Austin Abbott in Harvard Law Review, VII, 82.

3. Cases at law involving an *account*, referred to an auditor.[1]

4. Cases where the plaintiff, upon bringing an action at law, or either party, after the commencement thereof, applies to the court where the action is pending, for an *injunction*.[2]

5. Cases where the defendant in an action at law, (including the plaintiff in replevin, when avowry or cognizance is made), in which, if judgment were obtained, he would be entitled to relief on equitable grounds, is empowered to plead the facts which entitle him to such relief, by way of *equitable defence*.[3]

6. Statutory proceedings for the forfeiture of a charter for abuse or non-user.[4]

7. Cases where the orphans' court has jurisdiction concurrent with courts of equity in sales of intestates' real estate, not exceeding in appraised value $2,500, with like powers to adopt rules and appoint trustees.[5] Decrees of orphans' court in matters within its special, limited jurisdiction,[6] are enforceable as decrees of courts of equity,[7] and in the exercise of such jurisdiction it applies the principles

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[1]Art. 26, sec. 9; Rules of courts, R. 49; Yelverton vs. Coley, 101 N. C. 248; Poullain vs. Brown, 80 Ga. 28.

[2]Art. 75, see. 116.

[3]Art. 75, sec. 83; Williams vs. Peters, 72 Md. 584; Taylor vs. State, 73 Md. 209, 222; Miles vs. State, 73 Md. 398.

[4]Md. Code, Art. 23, sec. 255; Bel Air Social vs. State, 74 Md. 297, 302.

[5]Code, Art. 93, secs. 282–287; Nally vs. Long, 56 Md. 567.

[6]Eichelberger vs. Hawthorn, 33 Md. 595; Levering, 64 Md. 410, 411.

[7]Code, Art. 93, sec. 231.

of equity when applicable,[1] but without intruding upon chancery jurisdiction with respect to *trusts.*[2] Orphans' court has also concurrent jurisdiction with courts of equity, in providing for the disposition and security of property retained by an executor to await time or contingency.[3]

8. Cases for small amounts before *justices of the peace,* to be determined "according to the laws of the land, and the *equity and right* of the matter."[4] But these magistrates, not having full equity powers (injunction, specific performance, &c.), have, therefore, "not the means of doing that full and ample justice which the particular case may require."[5]

9. Cases referred to *arbitration*—"a scion of equity engrafted on the common law."[6]

10. Cases before the commissioner of the land office, declared to be a "court of record," with power to decree according to the "principles established in courts of equity."[7]

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[1]Orem vs. Wrightson, 51 Md. 34; Potter, 56 Conn. 16; Stevens vs. Gage, 55 N. H. 175; Odd Fellows' Appeal, 123 Pa. 357.

[2]Code, Art. 16, sec. 81; Art. 93, sec. 256; Keplinger vs. Maccubin, 58 Md. 213; McBride vs. McIntyre, 91 Mich. 406; Hewitt's Appeal, 53 Conn. 24, 37.

[3]Code, Art. 93, sec. 10; Hindman vs. State, 61 Md. 475.

[4]Code, Art. 52, sec. 5; see 3 Bl. Com. 82.

[5]1 Spence Eq. 634, note *b;* Foster vs. Reeves, (1892), 2 Q. B. (C. A.,) 255; Stafford vs. Scroggin, 43 Ill. App. 48; Thompson vs. Ogle, 55 Ark. 101.

[6]Haynes' Outlines of Equity, 235; Code, Art. 7, secs. 1-6; 2 Poe Pl. & Prac., sec. 136, &c. Defect of arbitration is, that parties have to furnish their own court room, and pay their own judge.

[7]Code. Art. 54, secs. 1, 15; Armstrong vs. Bittinger, 47 Md. 111. So by U. S. Rev. Stat., sec. 2450.

11. Cases in insolvency, as to the two features of distribution and injunction.[1]

12. Cases in admiralty.[2]

§165. "**Natural justice.**" Justice is defined as "*the habitual disposition to give every one his due.*"[3] It is distinguished from *law*, which is defined as a "*rule prescribed,*"[4] and it is said to be "*natural,*" because this principle, or disposition (*voluntas*), is supposed to inhere in man as a social being, antedating all positive law, and properly forming its inspiration.[5]

Natural justice is equity in its broadest sense, involving the idea of morality, and especially *good faith.*[6] Juridical equity is "that portion of natural justice, which, though of such a nature as to admit properly of its being judicially enforced, was omitted to be enforced by the common law courts—an omission which was supplied by the court of chancery."[7]

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[1]Co., art. 47, secs. 11. 23; Gottschalk vs. Smith, 74 Md. 560; Paul vs. Locust Point Co., 70 Md. 288; Third Nat. Bank vs. Lanahan, 66 Md. 469; Gable vs. Scott, 56 Md. 177, 8; Freydendall vs. Baldwin, 103 Ill. 325.

[2]Hawes on Juris., sec. 83 *a;* Hall vs. Hurlbut, Taney C. C. 589, 600.

[3]*Justitia est constans et perpetua voluntas jus suum cuique tribuendi.* Inst. I, 1.

[4]1 Bl. Com. 44.

[5]*Montesq. Esp. des Lois, 1,* 1; Locke, Human Und. Book 1, ch. 3. How far many rules of the common-law departed from natural justice has already been seen. *Ante*, sec. 145; Carr vs. Hamilton, 129 U. S. 255; Railway Co. vs. McAlpine, 129 U. S. 313, 314.

[6] Pom. Eq. Jur. sec. 67.

[7]Haynes' Outlines, 7, 8.

§166. "**Public policy.**" Natural justice enjoins the performance of a class of duties which it would be highly inexpedient to enforce judicially, and with which technical or juridical equity has nothing to do. Such are the duties of charity, gratitude, generosity, courtesy and kindness, and of positive engagements without valid consideration,[1] or barred by statute.[2] These virtues are wisely classed among moral duties of imperfect obligation, since to compel their performance would destroy their very nature.[3] Even good faith, as known to equity, is obliged to ignore, not only some concealments, but actual misrepresentations forbidden by the strict moral law, or a high sense of honor or delicacy.[4] Nor is it

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[1]Forster vs. Ulman, 64 Md. 526.

[2]Dunphy vs. Ryan, 116 U. S. 498.

[3]Ch. Just. Parsons' Memoir, 202.—"I can only hope that they (next of kin) will consider the *claim* which this lady, (a disappointed legatee through technical indefiniteness of the trust,) has upon their *generosity.*" Kay, J. In re Boyes, 26 Ch. D. 537. "Whatever rights the agreement set up (for a division of trustee's commissions) may have given the appellant, according to the *courtesies of the profession*, he acquired none by it which he can enforce at law." Hopkins vs. Hinkley, 61 Md. 584, 590. "The case has the appearance of hardship, but that is beyond our control. It may appeal to the *benevolence* of the association of which the deceased was so long a member." Yoe vs. Howard Mutual Association, 63 Md. 93. See also, Brooking vs. Madslay, 38 Ch. D. 636, 643.

[4]Kerr on Fraud and Mistake, 82, cited Robertson vs. Parks, 76 Md. 118, 133; McAleer vs. Horsey, 35 Md. 439, 451; Wiest vs. Garman, 4 Del. 133, 136, 138; Shoemaker vs. Cake, 83 Va. 8. "It is nought, it is nought, saith the buyer; but when he is gone his way, then he boasteth." Prov. xx.. 14. "*Laudat venales qui vult extrudere merces.*" Hor. Ep. II, 2, 11.

every breach of trust that can be relieved even in equity.[1]

Nor can a court of equity relieve competent parties from their deliberate contracts, however unwise and improvident.[2] Certain rules of presumption, also, have been found necessary for the welfare of society, which may work injustice in particular cases.[3]

Public policy has been found by experience to require that pure ethics should, in its practical application to human affairs through the medium of courts, be alloyed with *expediency*. It is not senti-

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[1]In the case of a husband, who, before marriage, had encouraged expectations in his wife respecting the disposition of his property, which, after marriage, he failed to meet, she having confidingly permitted the title to remain in him without securing any binding agreement, the court said: "She relied upon his honor and has been deceived. But those facts, however strongly they appeal to our *sympathy*, cannot justify the court in finding, upon the meagre evidence in this cause, that there was an *agreement* upon his part in consideration of marriage." Nickerson, 127 U. S. 677.

[2]Goodwin vs. White, 59 Md. 509; Hemingway vs. Coleman, 49 Conn. 390.

[3]Campbell vs. Holt, 115 U. S. 628. "If by these means" (20 years adverse possession of a disseisor) "he succeeds in retaining what he has actually grasped, he secures to himself what public policy, not justice, allows." Hoye vs. Swan, 5 Md. 255. But see Balt. Chem. Co. vs. Dobbin, 23 Md. 218. "A fixed rule may give rise to occasional deviations from justice, but these amount to nothing more than the price which every member of the community must pay for the advantages of an enlightened code." Ld. Ch. Erskine, 8 Camp. L., Chan. 253. "Though a strict adherence to rules may sometimes produce hardship, a loyal adherence to them is best for the public and for litigants." Esdale vs. Payne, 40 Ch. D. 535; Bleckley vs. Branyan, 28 S. C. 453; Gemmill vs. Richardson, 4 Del. Ch. 614; Hazard vs. Durant, 14 R. I. 37.

mental or abstract justice in any individual case that is aimed at, so much as average justice to the great mass of mankind, and practical justice to the individual, so far as consistent with it. Principles of public policy reach further and aim higher than the apparent justice of the particular litigation, and contemplate more general interests than those of the immediate parties.[1]

§ 167. **Reaction of equity upon law.** Neither does juridical equity include that portion of natural equity adequately enforced by *legal* remedies, originally provided. When the result of statutory improvement, or of a more liberal and enlightened administration of the modern common law a concurrent jurisdiction is, in general, retained. Blackstone, over a century ago, complacently refers, although prematurely, and somewhat too broadly, to "the liberality of sentiment which (though late) has now taken possession of our courts of common law, and induced

[1] A striking illustration of this is to be found in the familiar rule of equity forbidding acquisitions by a trustee of the trust estate, through the application of which many transactions may be annulled, in which the purchase by the trustee was openly made, with no reason to doubt the fairness of his conduct. Conway vs. Green, 1 H. & J. 152; Lewis vs. Welch, 47 Minn. 193. Another is the principle which forbids a judicial accounting between confederates in crime. Prunty vs. Basshor, Cir. Ct. Balt. City, reported in Daily Record, May 11, '89, and cases cited. Still another is the principle which precludes recovery upon a contract whose consideration is the stifling of a prosecution. "It is an extremely discreditable defence, to which we are compelled to give effect upon grounds of public policy." Jones vs. Building Soc. (1892) 1 Ch. 173, 188.

them to adopt (when facts can be clearly ascertained) the same principles of redress as have prevailed in our courts of equity."[1] Thus the action of *assumpsit* for money had and received, is said to be "an equitable action in which the plaintiff may prove all equitable circumstances incident to his case, and recover any money in the hands of the defendant which *ex æquo et bono* belong to the plaintiff."[2] But this liberality must be materially qualified by the condition that it is not to be taken as obliterating any of the well defined lines of demarcation between law and equity nor as abrogating settled rules of law.[3] And thus the departments of mercantile law, of insurance, evidence, bailments, &c., in fact nearly the whole system of laws governing personal property, have under modern judges, been brought as closely up to the standard of natural justice and equity as human tribunals can probably attain, with all the aid that could be derived from constant reference to the oracles of Roman jurisprudence.

§ 168. **Law reform.** It is also true that by legislation enlarging the legal capacity of *married women*,[4] allowing *set-off*,[5] allowing suit on *lost negotiable in-*

[1] 4 Bl. Com. 442. Cf. 1 Bl. Com. 10.

[2] Nat'l Mechanics Bank of Balto. vs. Nat'l Bank of Balto., 36 Md. 26. Ashley vs. Jennings, 48 Mo. App. 143. For an instance of an action of assumpsit turning upon equitable principles exclusively, see Reiff vs. Horst, 52 Md. 264. See also Druid vs. Oettinger, 53 Md. 46; Hospital vs. Foreman, 29 Md. 532.

[3] Boyce vs. Wilson, 32 Md. 129.

[4] Md. Code, Art. 45.

[5] Md. Code, Art. 75, secs. 12, 13.

struments,[1] regulating the assignment of *choses in action*,[2] allowing *equitable interests* to be taken in *execution*,[3] or by *attachment*,[4] providing for *discovery* and *production* of *documents*,[5] and perpetuation of testimony,[6] removing the disability of *interest* from *witnesses*,[7] abolishing fictions in *ejectment*,[8] reforming the law of *penalty*,[9] *joint tenancy*,[10] *joint liability*,[11] and *merger*,[12] and still more notably by the legislation conferring equity powers upon courts of law in cases of *account*,[13] *injunction*,[14] and *equitable defence*,[15] much of the rigor and deficiency of the old law, which necessitated the intervention of equity, has disappeared. Still more of it has given way under the persuasive pressure of equity upon law, which has compelled judges to abandon some of the more extreme dogmas connected with the *effect of a seal*,[16] with *profert*, in its bearing, upon *lost instruments*, and with *penalties* and *forfeitures* in *bonds* and *mort-*

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[1] Md. Code, Art. 13, sec. 11.
[2] Md. Code, Art. 8, secs. 1-10.
[3] Md. Code, Art. 83, secs. 1-5.
[4] Md. Code, Art. 9, sec. 10.
[5] Md. Code, Art. 75, sec. 94.
[6] Md. Code, Art. 35, sec. 19.
[7] Md. Code, Art. 35, secs. 1-5.
[8] Md. Code, Art. 75, sec. 69.
[9] Md. Code, Art. 75, sec. 87.
[10] Md. Code, Art. 50, sec. 13.
[11] Md. Code, Art. 50, secs. 1-12.
[12] Md. Code, Art. 64, secs. 1, 2.
[13] Md. Code, Art. 26, sec. 9.
[14] Md. Code, Art. 75, secs. 116-128.
[15] Md. Code, Art. 75, secs. 83-85.
[16] Herzog vs. Sawyer, 61 Md. 352, 353; Canal vs. Ray, 101 U. S. 527.

gages:[1] and to enforce the liability of corporations not only for parol and implied contracts, but for torts.[2]

The same process of judicial reform has further enriched the common law, and enlarged its resources of effecting substantial justice, by the modern introduction or development of equitable doctrines calculated to prevent needless circuity of action, and to repress fraud, such as *stoppage in transitu,*[3] *recoupment*[4] and *estoppel in pais*, or *equitable estoppel;*[5] or to protect some of the equitable rights of *sureties, assignees, assignors*, and parties to *specialties,*[6] or to recognize the substantial distinction between *nominal* and *real* parties to suits.[7]

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[1] 1 Poe, Pl. and Pr. sec. 748; 1 Ch. Pl. 398; 4 Kent, 158.

[2] McKim vs. Odom, 3 Bland, 421.

[3] Smith's Merc. Law by Pomeroy, sec. 635; 2 Benj. Sales, sec. 1230, *note*.

[4] Harmon vs. Bannon, 71 Md. 424.

[5] Md. Ins. Co. vs. Gusdorf, 43 Md. 513; Kirk vs. Hamilton, 102 U. S. 68, 78.

[6] 2 Am. Lea. Ca. 431, 432.

[7] 1 Tay. Ev. sec. 741. In some states which still adhere to common-law forms, their technical difficulties are no longer allowed to obstruct justice. Thus, in New Hampshire, counts in contract and tort may be joined, either in the original declaration, or by amendment either before or after verdict. A new party may be joined as plaintiff, even after verdict, and may have judgment for his share of the damages. Misjoinder of plaintiffs or defendants may be cured after verdict. In an action at law, either party may file a bill in equity as an amendment of his pleadings, and in a suit in equity, either party may file a declaration at law. Owen vs. Weston, 63 N. H. 599, 603. This last result was reached as a logical deduction from the unity of judge and chancellor in the same person. "It is not the duty of the judge to consider himself two courts for

§ 169. **Substance rather than form.** Since the example set by the code states and followed in England, abolishing the old forms of action and pleading, and assimilating common law procedure to that of equity, there has been a marked change in the judicial temper on both sides of the Atlantic. Artificial refinements and technical subtleties are no longer encouraged. Meeson and Welsby, and the "Barons Surrebutter," in whom those excellent reporters delighted, have had their day. As a general rule, all courts are now disposed to brush away formal impediments in order to get at the real justice of the case, to subordinate remedies to rights, and not rights to remedies.[1]

§ 170. **Present state of law and equity.** Notwithstanding the modern expansion of law in the direc-

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the purpose of oppressing the parties by an unnecessary suit. Legal fictions are invented for the advancement of justice, but the fiction that one court is two courts is not to be invented for a mere purpose of injustice." Doe, C. J., in Metcalf vs. Gilmore, 59 N. H. 417, 431. In this connection it is to be remarked, that an action of *ejectment* in the Circuit Court of the United States for the Southern District of Georgia, was by an order of the court transferred to the equity docket, and by proper amendments converted into a *suit in equity*. Wilson vs. Riddle, 123 U. S. 609, 610.

[1] Alvey, C. J., in Herzog vs. Sawyer, 61 Md. 352, 353; Farrel vs. Baltimore, 75 Md. 493. "Abolition of the many abstruse technicalities of pleading and conveyancing, which were essentially narrowing in their tendency, has caused lawyers to take a broader view. To this must be added the influence of the bench, the more powerful occupants of which have endeavored to take what may be termed a common sense view of the law; and the influence of the new school of legal writers; such as Sir James Stephens." 1 Law Q. Rev. 322.

tion of equity, it is still true that of the two systems, equity is the one which, upon the whole, more nearly approaches the standard of morality and justice.[1]

§ 171. **"Precedent."** It has already been seen that the function of individual conscience in the administration of primitive equity has by modern equity been shaped and directed under the influence of a system of fixed rules, gradually evolved from accumulated decisions, that these rules have been accepted as the landmarks of equity, circumscribing its jurisdiction within settled boundaries, and that the active principle upon which these precedents have been established is the want of "plain, adequate and complete remedy at law." But it has likewise been seen that the same creative energy which gave birth to these precedents is still present in the system, although latent, yet potential; and that even the

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[1] 1 Pom. Eq. Jur. sec. 67. Any doubt as to this proposition will be removed by reference to such survivals of ancient common law as are recognized in the following cases—all good *law:* O'Brien vs. Fowler, 67 Md. 561; Smith vs. State, 66 Md. 218, 219, based on Stirling vs. Garritee, 18 Md. 448, 468, and Canton vs. Weber, 34 Md. 669, 670; Shertzer vs Ins. Co., 46 Md. 506, based on Deale's case, 18 Md. 51; State vs. Humbird, 54 Md. 327; Crisfield vs. State, 55 Md. 192; Boyce vs. Wilson, 32 Md. 129; Hamilton vs. Conine, 28 Md. 635. And the three following cases in combination: (Rachel Colvin's Will,) 7 Md. 582, 14 Md. 532, 20 Md. 357, from which it resulted that the same party was, at the same moment, while executing the same will, *sane* as to her *personal*, and *insane* as to her *real* estate, but inasmuch as the deed of the reversion to one of her leasehold lots had *no seal*, the want of that seal made her *sane* as to *that particular lot!* If Lloyd Rogers had not forgotten to seal his deed, she would have been insane altogether, that is, as to her real estate. She was "but mad north-north-west." Hamlet's case.

survey of modern equity affords many instances of its inventive exercise. To affirm, in the presence of this two-fold proposition, that equity, even at this late day, is *absolutely* controlled by the judgment of dead men, to all intents and purposes, would be to ignore its inherent vitality and capacity for development in order to keep step with the march of civilzation.[1] To check the tangential force of this progressive tendency, the gravitating power of precedent comes in and holds equity within its orbit. In this way the "principles of natural justice" are "controlled, *in a measure*," by "established precedent."[2] What that measure definitely and precisely is, no authority professes to teach. There is an apparent vagueness here, inherent in the nature of the subject, the reasons for which will be better understood when we come to consider the maxims of equity.

§ 172. **"Positive provisions of law."** Equity is also controlled, in its practical application, more or less, by "positive provisions of law.," statutory or common.[3] Just to what extent, or upon what precise principle equity thus follows the law, it is difficult to say.[4] On the one hand, the express terms of a positive statute will often be overruled by some favorite doctrine of equity, while on the other the

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[1]Bisph. Pr. Eq. sec 583; 1 Pom. Eq. Jur. sec. 60.

[2]Yingling vs. Miller, 77 Md. 104; Provost vs. Abercrombie, 46 Md. 172, 180; Dashiell vs. Atty. Gen. 5 H. & J. 1, Brantly's note.

[3]Hedges vs. Dixon Co. 150 U. S. 182.

[4]Sp. Eq. 421.

fundamental principles of equity will occasionally be waived to gratify the logic of some cherished legal dogma. Thus the main object of the statute of uses was defeated by the doctrine of trusts.[1] Thus the statute of frauds will not be allowed to obstruct the specific performance of a parol contract, partly performed,[2] nor of a mistaken written contract, as reformed by parol,[3] nor will the registry laws be suffered to prevent the enforcement of an equitable lien;[4] and yet, the conceded intention of a testator will be avowedly defeated to follow the rule in Shelley's case,[5] or some other arbitrary feudal survival of the dark ages, such as the rule of law requiring that in order to support a contingent remainder there must be an estate of freehold in existence at the time it becomes vested.[6]

The instances of hardship referred to by Blackstone,[7] which equity left unrelieved, have always proved a stumbling block to commentators.[8] Other instances have been more satisfactorily accounted for.[9] In most cases that may occur, a reference to

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[1]Bisph. Pr. Eq., sec. 53.

[2]Semmes vs. Worthington, 38 Md. 319; Brown vs. Sutton, 129 U. S. 239.

[3]Farmville vs. Butler, 55 Md. 237; Popplein vs. Foley, 61 Md. 387.

[4]Carson vs. Phelps, 40 Md. 100; Hartsock vs. Russell, 52 Md. 626; White vs. Neaylon, 11 App. Ca. 171.

[5]Warner vs. Sprigg, 62 Md. 20; Bowen vs. Lewis, 9 App. Ca. 890, 921; Evans vs. Evans, (1892) 2 Ch. 186, 187.

[6]Cunliff vs. Brancker, 3 Ch. D. 399, 407.

[7]3 Bl. Com. 430.

[8]1 Pom. Eq. Jur. sec. 54.

[9]*Ibid.* sec 53.

precedent will be the only practical guide to determine how far equity is controlled by law, and how far law is controlled by equity. Theoretically, the difficulty of finding any guide may be inferred from the vague expression of Lord Hardwicke: "When the court finds the rules of law right, it will follow them, but then it will likewise go beyond them."[1] On the other hand we find an English judge, as late as the year 1886; expressing himself in the Chancery Division in this wise: "But I am told that whatever may be the proper view of the case according to common justice and common sense, the law is against me, and I must decide according to law and in opposition to common justice and common sense. Let me consider whether I am in that painful position, because, if I am, I admit that I am bound by the common law of the land."[2] The still later expression of a Maryland judge offers perhaps as definite a proposition on this head as can be made with safety. "It is undoubtedly within the power of a court of equity to adapt its methods to the exigencies of justice, being careful, however, not to grasp at forbidden power for the purpose of relieving the hardship of a particular case."[3]

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§ 173. **Recapitulation.** Briefly, equity may be regarded as a system which derived its elements

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[1]Paget vs. Gee, Amb. App. 810. Cowper vs. Cowper, 2 P. Wms. 753; (Jekyl M. R.); 1 Pom. Eq. Jur. sec. 61, note.

[2]Pearson, J., in 32 Ch. D. 42.

[3]Bryan, J., in Gittings vs. Worthington, 67 Md. 149.

from the principles of natural justice found in conscience and the Roman jurisprudence. It was, however, controlled in its growth by "the necessity of conforming to the analogies of the common law." "But it has always answered the description of a body of comparatively novel legal principles, claiming to override the older jurisprudence on the strength of an intrinsic ethical superiority."[1]

"As Sir Henry Maine points out, it was greatly owing to Lord Eldon, during his long reign in the court of chancery (1801–1827), that equity became a body of rules scarcely more elastic than the common law, A similar stage was reached in the history of Roman equity, when the edicts of the prætors were consolidated by Julianus, in the time of the emperor Hadrian. The subsequent history of both systems is also not dissimilar. The work of the prætors was finally adopted into the body of the law by the legislation of Justinian, as were the doctrines of the chancellors into the law of England by the Judicature Act of 1873. In either case, equity ceased to exist as an independent system, but bequeathed its principles to the system into which it was absorbed."[2] The same thought was distinctly anticipated more than a century earlier by a shrewd foreign observer, in a passage remarkable for profound insight and prophetic sagacity. After referring to the codification of the Roman laws in the reign of

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[1]Maine's Anc. Law, 43.
[2]Holland's Juris., 56.

Justinian, he adds significantly: "This was an event of much the same nature as that which will take place in England whenever a coalition shall be effected between the courts of common law and those of equity, and both shall thenceforward be bound alike to frame their judgments from the whole mass of precedents then existing, at least of such as it will be possible to bring consistently together into one compilation."[1] In the view taken by this suggestive writer, the mission of the English chancery was that of an "*inferior, experimental legislature.*"[2]

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[1] DeLolme, Cons. of England, B. 1, c. 11, p. 146, note, A. D. 1784.
[2] *Ibid.*, 149.

CHAPTER X.

PRINCIPLES OF EQUITY.

174. How exhibited.
175. Maxims.
176. Doctrines.
177. Classification of doctrines.
178. Rules.
179. Jurisdictional rules.
180. Miscellaneous rules.
181. Equities.

§174. **How exhibited.** Having learned something of the principles of equity, in general, of their sources, nature, extent, and of the courts and procedure which are their instruments, it is now time to examine them more closely. In their concrete form they are exhibited as—1, general maxims; 2, doctrines; and 3, particular rules.[1]

§175. **Maxims.** There are a few broad and comprehensive precepts, condensed into pithy and pregnant phrases, so pervading the entire structure that together, they may be called the grammar of equity. These maxims are of different degrees of universality and importance. They are so elementary, and therefore so general and vague, as to require many qualifications. In their proper application consists much of the science of equity. It will be seen presently

[1] 1 Pom. Eq. Jur. secs. 360, 361.

that the leading maxims of equity are naturally divisible into two classes, one of an enabling, and the other of a restrictive character, and one illustration of each class may be given in passing, as follows: Enabling maxim—*equity regards that as done which ought to be done;* restrictive maxim—*between equal equities the law will prevail.*

§176. **Doctrines.** Those special systems of practical rules governing particular states of fact, or branches of equity, elsewhere called "*heads*,"[1] are commonly known as the doctrines of equity. The same term is also employed with a more limited application.[2] Most of these doctrines are the outgrowth of maxims. For instance, the doctrine of *conversion*, and the doctrine of *notice*, will be found upon examination to proceed respectively from the two maxims above cited.

The methodical treatment of these doctrines of equity constitutes in fact the body of a professedly full treatise on equity jurisprudence, and does not fall within the scope of this work. Of the most useful and important of these doctrines a sufficiently full conception for all the purposes of elementary instruction will be obtained from the study of their sources in the maxims of equity and in the illustrations of those maxims.

§177. **Classification of doctrines.** The older compilations were mere digests of decided cases,

[1] *Ante*, sec. 159.

[2] 1 Pom. Eq. Jur. sec. 361.

arranged under the three principal heads, *accident*, (using that term in a very broad acceptation,) *fraud*, *trust*.[1] Attempts at a more systematic division were made by Maddock, by Lord Redesdale,[2] by Josiah Smith, Spence and Adams. Neither of these plans has met with universal approbation.[3]

The classification until recently most familiar to the profession was that adopted by Judge Story,[4] following Fonblanque and Jeremy. It has the advantage of a more immediate tangible connection with the history of the subject itself, and obviously refers to the origin of equity as merely supplemental to law.[5] This well-known classification distributes the various subjects of equity jurisdiction under three heads, each referring directly to the courts of law. These heads are: 1. Concurrent jurisdiction. 2. Exclusive jurisdiction. 3. Auxiliary jurisdiction.

For reasons already stated,[6] the last of these heads has become of insignificant importance, if not practically obsolete. The recent reforms in legal procedure herein before referred to,[7] have obscured the distinction between the first two, by removing the basis of fact—the relations between equity and

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[1] 1 Mad. Ch. 21.

[2] Mitford's Eq. Pl.

[3] See observations on the methods of Smith's Manual, in Haynes' Outlines, 28, and strictures on the method of Adams' Equity, 1 Pom. Eq. Jur., sec. 123, note, and of Snell's Equity, *ibid*, 122, note.

[4] 1 Sto. Eq. Jur., sec. 75.

[5] Haynes' Outlines, 27.

[6] *Ante*, secs. 53, 159.

[7] *Ante*, secs. 16, 137.

law as separate systems—upon which that distinction was founded, so far as concerns England and her dependencies, and many of the most important and influential of these States.

It may further be said that what remains of the old classification, after the innovations in this state and others that have not yet adopted the reformed procedure in its entirety, is in standing conflict with the tendencies of legislation therein.[1] And, finally, the scheme itself, judged on its merits, was one of questionable utility. The writers adopting it do not agree in their arrangement of topics under the three general divisions of jurisdiction, and are not even consistent with their own principles of classification.[2] These topics or grounds of jurisdiction so often overlap and run into each other, that the most eminent of the writers who have attempted to follow out the plan scientifically has been obliged to admit that it is "impracticable and illusory."[3] It is, in fact, admitted that "with respect to the exclusive jurisdiction exercised by courts of equity in matters of trust, etc.—it seems impossible to define with exactness its boundaries or to enumerate with precision its various principles.[4] One of the more recent English authors, since the Judicature Acts, rejects the division as obsolete and confusing, "by treating as co-ordinate matters of substance and

[1] 1 Pom. Eq. Jur. secs. 124, 125.
[2] 1 Pom. Eq. Jur. secs. 122, 123.
[3] 1 Story Eq. Jur. sec. 77.
[4] Fonb. Eq. 23.

matters of form, placing side by side, titles so incongruous as trusts and injunctions, mortgages and interpleaders.'"[1] The latest American writers on equity jurisprudence take the same view, and the classification referred to may now be said to be everywhere abandoned. It is true that the acute and analytical mind of Prof. Pomeroy could not forbear the opportunity of wrestling with its difficulties in a labored attempt to explain by its aid the intricacies of equity *jurisdiction* as distinguished from equity jurisprudence. The sections he devotes to that discussion are the most ingenious and subtle, but the least available for practical use of any portion of his profound and philosophical treatise.[2]

The method of classification of the most recent text-writers on both sides of the Atlantic is substantially upon the line somewhat obscurely indicated by Mr. Spence,[3] but since more distinctly traced as the line of division between equitable rights and equitable remedies, or between those doctrines where the jurisdiction rests on the substantive principles of equity, and those founded on its distinctive procedure.[4]

In the first division, that of equitable rights, are included equitable *titles* under the head of *trusts*, *mortgages* and *assignments* (of choses in action and

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[1]Smith, Pr. Eq. 3.

[2]1 Pom. Eq. Jur. sec. 136; secs. 146–189.

[3]1 Spence, Eq. 430.

[4]1 Pom. Eq. Jur. sec. 126; Bisph. Pr. Eq. sec. 16; Smith. Pr. Eq. 5.

future property); and also equitable rights (as distinguished from *titles*) under the head of accident, mistake, fraud, &c. Under the second division the term "remedies" does not refer to the rules of practical procedure, but to such distinctively equitable reliefs as specific performance, injunction, reformation and the like.

The practical objection to this plan is that it somewhat awkwardly separates the right from its appropriate remedy, mistake from reformation, accident from re-execution, fraud from cancellation, trust from specific performance or injunction, thus requiring much repetition to re-establish the broken connection. The only answer to this criticism is that the nature of the subject is incompatible with any perfect system of logical arrangement, and that "these various heads of equity jurisdiction being merely the fruits of the shortcomings of the courts of common law, it might be expected that what is not a system in itself (though one is in the habit of so calling it), but only a supplement to the imperfections of another system, should hardly allow of a very methodical classification."[1]

From these considerations it results that the order to be observed in the treatment of the heads or doctrines of equity jurisprudence should be determined by practical convenience, rather than by the supposed requirements of scientific precision,[2] and

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[1] Haynes' Outlines, 26.

[2] 1 Pom. Eq. Jur. secs. 126, 127.

the latest treatise upon the subject seems to be arranged on that plan.[1]

§ 178. **Rules.** Particular rules are the components of doctrine, and are to be distinguished from "rules of court." Unlike maxims, they are narrow and definite in their scope, practical and pointed in their application. The first example below groups together a number of rules under the doctrine of conversion. The second example is a rule under the doctrine of notice.

1. *Conversion under a will dates from testator's death; under a deed, from delivery; under a decree for sale, from final ratification; and when the sale is dependent upon a contingency, the conversion dates from the happening of the contingency.*[2]

2. *One who takes with notice of a prior equity may resist its enforcement under cover of want of notice in his immediate vendor.*[3]

§ 179. **Jurisdictional rules.** There are several rules relating to jurisdiction which are too general to be subordinated to any particular doctrine, but are not usually classed among maxims. These rules have nothing to do with jurisdiction over *parties,*

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[1]Beach on Modern Eq. Jur.

[2]Bisp. Pr. Eq. sec. 320; Sloan vs. Safe Dep. Co., 73 Md. 239; Rowland vs. Prather, 53 Md. 239; Keller vs. Harper, 64 Md. 82; Croply vs. Cooper, 19 Wall. 171.

[3]Bisp. Pr. Eq. sec. 265; Hagthorp vs. Hook, 1 G. & J. 301; Basset vs. Nosworthy, 2 Lea. Ca. Eq. 33; Boone vs. Chiles, 10 Peters 177, 209.

already referred to under the head of procedure.[1] They relate to jurisdiction of the *subject-matter*. Jurisdiction of the subject-matter is in general the power to hear and determine,[2] and more particularly the power lawfully conferred to deal with the general class of subjects to which the particular case belongs.[3]

Equitable jurisdiction over the subject-matter is defined negatively, and in terms of the common law, by the first jurisdictional rule:

1. *Equity will not assume jurisdiction where the remedy at law has always been plain, adequate and complete.*[4]

To prevent the jurisdiction of equity from attaching, the legal remedy must be as efficient as the equitable, both in respect to the relief itself, and the mode of obtaining it.[5] Generally, if a proceeding be

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[1] *Ante.* sec. 24.

[2] Rhode Island vs. Massachusetts, 12 Peters 718; Riggs vs. Johnson Co., 6 Wall. 187.

[3] Hunt vs. Hunt, 72 N. Y. 217, 228-230, cited 1 Pom. Eq. Jur. sec. 129, note.

[4] Bisph. Pr. Eq. sec. 37, p. 59; 1 Pom. Eq. Jur. sec. 217; 1 Beach, Mod. Eq. sec. 2; Carter vs. Woolfork, 71 Md. 283; McCoy vs. Johnson, 70 Md. 490; Balls vs. Balls, 69 Md. 388; Clayton vs. Shoemaker, 67 Md. 216; Blaine vs. Brady, 64 Md. 373; Hecht vs. Colquhoun, 57 Md. 563; Edes vs. Garey, 46 Md. 24; Polk vs. Pendleton, 31 Md. 118; Frost vs. Spitley, 121 U. S. 552, 556; Buzard vs. Houston, 119 U. S. 347, 353; U. S. vs. Wilson, 118 U. S. 86; Killian vs. Elbighaus, 110 U. S. 568, 573; Watson vs. Sutherland, 5 Wall. 74; Earl vs. Circuit Judge, 92 Mich. 285; Wolverton vs. Taylor, 43 Ill. App. 424; Taylor vs. Todd, 48 Mo. App. 550.

[5] Tyler vs. Savage, 143 U. S. 95; Kilbourn vs. Sunderland, 130 U. S. 189, 215; Drexel vs. Berney, 122 U. S. 252; Scarborough vs.

coram non judice, that is, if the court act without jurisdiction, either as to parties or subject-matter, the decree is void, may be attacked collaterally, an attempt to enforce execution would be an actionable trespass, and a sale under it would pass no title.[1] But the assumption of an exclusively legal jurisdiction by a court of equity does not necessarily make the decree void, although erroneous and liable to reversal. It cannot be questioned collaterally.[2] The Supreme Court of the United States hold it discretionary whether to consider the objection or not,[3] and may reverse a decree, *sua sponte*, for want of equity jurisdiction, and even where no such objection was made below.[4] It is provided distinctly otherwise by statute in Maryland, that the objection to the jurisdiction, in order to be available on appeal, must appear by the record to have been made below.[5]

2. *Equitable jurisdiction is, in general, not ousted by a subsequent expansion of the legal remedy.*[6] This

Scotten, 69 Md. 140, 141; Gottschalk vs. Stein, 69 Md. 55, 56; Delaware Ins. Co. vs. Gillett, 54 Md. 219; Freeholders vs. Bank, 48 N. J. Eq. 54; Overmire vs. Haworth, 48 Minn. 372; Early's App. 121 Pa. 496, 511.

[1] Noble vs. Union, 147 U. S. 173, 174; Sawyer, 124 U. S. 200; Windsor vs. McVeigh, 93 U. S. 274, 277; McArthur vs. Scott, 113 U. S. 340; Long, 62 Md. 62, 66; Railroad vs. Sutton, 130 Ind. 413, and cases cited *ante* sec. 25.

[2] Mellen vs. Moline, 130 U. S. 352, 367.

[3] Reyner vs. Dumont, 130 U. S. 355; Amis vs. Myers, 16 How. 492 (a remarkable case).

[4] Allen vs. Pullman Co. 139 U. S. 658; but see Preteca vs. Maxwell, 4 U. S. App. 327.

[5] Md. Code, Art. 5, sec. 35; Biddinger vs. Willard, 67 Md. 359, 363.

[6] 1 Sto. Eq. Jur. sec 64; *i;* Bisp. Pr. Eq. sec 37, p. 62; 1 Pom. Eq. Jur. sec. 276; Shryock vs. Morris, 75 Md. 72, 79; Schroder vs. Loe-

rule explains the significance of the word "always" in the preceding rule, and applies whether the legal remedy be enlarged by statute or by what is called judicial legislation. The jurisdiction is not ousted by statute unless by express terms or clear and necessary implication.[2]

3. *Equitable jurisdiction once having attached to a case, will be maintained for the final adjudication of all rights involved.*[3]

This rule is one of the many applications of the maxim that equity prevents multiplicity of suits.[4] Its meaning simply is, that wherever jurisdiction has once rightfully attached for any legitimate purpose, it will be made effectual for the purposes of complete relief, the court will determine any incidental question necessarily involved, and the case will be retained for the final determination of all questions arising under the claim of any party interested.[5] Or,

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ber, 75 Md. 195; Union P. R. Co. vs. Baltimore, 71 Md. 238, 241; Alexander vs. Leakin, 72 Md. 199, 202; Crain vs. Barnes, 1 Md. Ch. 154, affirmed, 8 Gill. 395; Little vs. Price, 1 Md. Ch. 137, Brantly's note; Simmons vs. Doran, 142 U. S. 417, 449.

[1]Reeves vs. Morgan, 48 N. J. Eq. 429; Givens' App. 121 Pa. 260; Baxter vs. Moses, 77 Maine, 474.

[2]Rooney vs. Michael, 84 Ala. 588; Brotzman's App. 119 Pa. 645; Hoagland vs. See, 40 N. J. Eq. 469; Kinnan vs. Railroad, 21 N. Y. S. 789.

[3]Bisp. Pr. Eq. sec. 37 p. 58; 1 Pom. Eq. Jur. sec. 231; Phoenix Ins. Co. vs. Ryland, 69 Md. 437; Ben Franklin Ins. Co. vs. Gillet, 54 Md. 218; Kunkel vs. Fitzhugh, 22 Md. 576; Sunflower vs. Wilson, 142 U. S. 313; Chicago R. Co. vs. Bank, 134 U. S. 276, Leighton vs. Young, 10 U. S. App. 301.

[4]*Post.* sec. 229.

[5]Eastman vs. Bank, 58 N. H. 421; Poland vs. R. R. Co. 52 Vt. 144, 175; Barrett vs. Nealon, 119 Pa. 170.

as more briefly expressed, when a court of equity has jurisdiction over a cause for any purpose, it may retain it for all purposes.[1] The rule elsewhere is held applicable to orphans' courts when exercising equity powers.[2] The rule seems to have been never adopted in the state of New Jersey.[3] It was at one time supposed to have lost practical importance in the code states, the consolidation of law and equity in the same suit having removed all danger of a party being turned out of one court into another.[4] It will be noticed, however, from the references just given to recent decisions in several of those states that the rule is still practically operative therein.[5]

The fact that the remaining questions necessary for complete adjustment are legal, or that the rights to be finally established are legal rights, or that the remedies required for their maintenance are legal remedies, will not affect the jurisdiction of equity after it has properly attached.[6] And this principle is not an infringement of the constitutional right of trial by jury.[7] Thus, where an injunction has issued to stay a sale until certain accounts have been settled, the court may proceed to render a personal

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[1]McGean vs. Railroad, 133 N. Y. 16; Penn vs. Ingles, 82 Va., 69; Benson vs. Christian, 129 Ind. 735; Currie vs. Clark, 101 N. C. 321; Bouland vs. Carpin, 27 S. C. 239; Griffin vs. Fries, 23 Fla. 173; Crump vs. Ingersoll, 47 Minn. 179, 182.

[2]Odd Fellows' App. 123 Pa. 357. But see Md. Code, Art. 93, sec. 256.

[3]Lodor vs. McGovern, 48 N. J. Eq. 279.

[4]Willard's Eq. Jur. 49.

[5]And see *ante*, sec. 136.

[6]Gormly vs. Clark, 134 U. S. 338, 349; Beecher vs. Lewis, 84 Va. 630.

[7]Railroad vs. McKenzie, 85 Ala. 549.

decree for the balance due.[1] Where the jurisdiction of equity has been rightfully invoked to reform a mistake in a policy of insurance, full relief will be administered by decree for payment.[2]

§ 180. **Miscellaneous rules.** In addition to the classes of rules referred to above, there are unclassified rules, not referable to any particular doctrine, generally pointing the practical application of maxims. The following examples are of every day application in practice:

1. *A court of equity will ratify that when done, which, if previously applied to, it would have ordered.*[3] This rule will be at once recognized as a direct application of the enabling maxim previously cited, and more fully treated further on, that "equity regards that as done which ought to be done."

2. *That one of two innocent persons should suffer the loss who has most trusted the defaulter;*[4] *or, whose*

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[1] Beeher vs. Lewis, 84 Va. 630.

[2] Phœnix Ins. Co. vs. Ryland, 69 Md. 437, 449.

[3] Harding vs. Allen, 70 Md. 395, 399. (See Zimmerman vs. Fraley, 70 Md. 561, 570.) Gable vs. Scott, 56 Md. 181; Abell vs. Brown, 55 Md. 217, 226; Brown vs. Hazlehurst, 54 Md. 26, 31; Park Heights Co. vs. Oettinger, 53 Md. 46, 63; Johnson vs. Hambleton, 52 Md. 378, 383; Reeside vs. Peter, 35 Md. 220, 223; Krone vs Linville, 31 Md. 138, 147; Gray vs. Lynch, 8 Gill. 404, 426; Cunningham vs. Schley, 6 Gill. 208, 230; Tyson vs. Mickle, 2 Gill. 377; Harris vs. Alcock, 10 G. & J. 226, 252; Lee vs. Stone, 5 G. & J. 1, 20; Campbell vs. Digges, 4 H. & McH. 12, 15.

[4] Eversole vs. Maull, 50 Md. 95, 106; B. & O. R. R. Co. vs. Wilkens, 44 Md. 11, 29; Foley vs. Smith, 6 Wall. 492, 494; Carpenter vs. Longan, 16 Wall. 271, 273; Jaeger vs. Hardy, 48 Ohio St. 335, 342; Weaver vs. Gore, 44 N. H. 196.

negligence enabled him to commit the fraud;[1] *or, who, by reasonable care, could have protected himself;*[2] *or, whose conduct has misled the other.*[3]

This group of cognate rules will be found upon examination to proceed from the same restrictive maxim which is also the basis of the doctrine of laches, classified hereinafter as the sixth restrictive maxim. Several of the cases cited in the notes illustrate the extent to which the spirit of these rules has been imported into the common law.

§ 181. **Equities.** Equities, or equitable rights, are *prima-facie* well-founded claims to specific equitable relief, such as the wife's equity, the mortgagor's equity of redemption, the equities of reformation, cancellation, contribution, and the like. The wife's equity to a settlement out of her own property which the husband formerly sought to reduce to his own possession by the aid of chancery, has become practically unimportant since her entire property has been secured to her by statute.[4] As applied to other

[1]Burrows vs. Klunk, 70 Md. 451, 460; Dias vs. Chickering, 64 Md. 348, 355; Freidlander vs. Railway, 130 U. S. 416, 425; Heyder vs. Loan, 42 N. J. Eq. 403, 408; Schultz vs. McLean, 93 Cal. 356, citing Civil Code Cal. sec. 3,543; Mundorf vs. Wickersham, 63 Pa. St. 89, Wilde vs. Attix, 4 Del. Ch. 262; St. Johnsburg vs. Morrill, 55 Vt. 170; Filtz vs. Walker, 49 Conn. 100; Eaton vs. Davidson, 46 Ohio St. 355, 362; Green vs. Rick, 121 Pa. 142.

[2]Bank vs. Creswell, 100 U. S. 630, 643; Bank vs. Jackson, 33 Ch. D. 1.

[3]Hambleton vs. Railroad, 44 Md. 551, 559; Tubman vs. Lowekamp, 43 Md. 318, 324; Brown vs. Insurance Co. 42 Md. 384, 385; Lister vs. Allen, 31 Md. 543, 548.

[4]Bisp. Pr. Eq. sec 110; Md. Code, Art. 45.

equitable claims the term is of constant recurrence, and has been imported into the phraseology of the common, especially the commercial, law. In the legal sense, equities are rights incident to a property or contract as between parties, but not incident to the property or contract from its own nature.[1] In the equitable sense, equities may be regarded as of two classes; one primary, that is relating to rights, titles or estates, the other remedial, or relating to remedies. The equity of redemption is the type of the first class, and the equities of specific performance, reformation and others of similar nature, are examples of the other.[2]

Equities may be defeated by superior equities, by balanced or equal equities, by laches or acquiescence, by estoppel or election, by fraud or other inequitable conduct, or by transfer to a *bona fide* purchaser without notice.[3] They differ from legal estates, liens or charges, which can be divested only by legal modes, such as the conveyance of an estate, or the release or satisfaction of a lien or charge.[4]

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[1] Rapalje and Lawrence.

[2] See 1 Pom. Eq. Jur. sec. 146, note.

[3] *Ante.* sec. 160.

[4] Gemmill vs. Richardson, 4 Del. Ch. 612.

CHAPTER XI.

MAXIMS.

182. In general.
183. Approximative.
184. Not self-evident.
185. Their practical use.
186. Classification.
187. Enabling and restrictive.
188. Primary and remedial.
189. Combined operation.
190. Application.
191. Importance.

§182. **In general.** In all systems derived from the Roman law, maxims are of special authority.[1] The common law having been built upon the foundation of custom and precedent, the method of its evolution has been largely empirical. Equity, while not failing to avail itself of that method also, has in its growth owed more to the method *a priori*. It has been accustomed to assume certain postulates in which the fundamental principles of natural justice are happily blended with an enlightened public policy. The union has been a fruitful one. From these postulates or maxims has been deduced a system of juridical regulations for adjusting the relations of society in more advanced stages of

[1] Whart. Leg. Max. 5.

development than those for which the common law was originally adapted. Hence, the value of a thorough investigation of the maxims of equity, which are few in number and readily susceptible of philosophical division. They are supposed to be so well understood, that the reference to them in discussion is more often tacit than express. They will be found attractive, because "they clothe in a form which is at the same time precisely expressive and universally intelligible, imperishable truths that experience is every day confirming afresh."[1]

§183. **Approximative.** But equity, like war, like political economy, like law itself, cannot claim to be an exact science. Its maxims are not like the axioms of mathematics, inflexibly and universally true. The blended product of ethics and expediency, they cannot be expected to be more than approximations to the absolute truth. There is no one of them which is not, in many cases, of doubtful application. When it is seen, further on, how they are classified, it will be found that it is the business of one set of maxims to antagonize the other.

In the latest editions of a celebrated English work, we find it rather broadly claimed that "equity is pre-eminently a science, and like geometry, or any other science, starts with or assumes certain maxims which are supposed to embody and to express the fundamental notions of the science."[2] Equity may

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[1] 123 Ed. Rev. 235.

[2] Snell's Eq. 17.

be, in a general sense, called a science, but it is not "pre-eminently a science," like geometry. The axiom, for instance, that "the whole is greater than any of its parts," is an absolute and unqualified truth, which will never yield to any change of physical circumstances, or to any considerations of convenience or morality. As respects its application. there is never any room for doubt or difference of opinion. There is not a single "maxim" of equity of which so much can be said.

§184. **Not self-evident.** They also differ from the axioms of mathematics, as well as from the more general speculative maxims (such as, "what is, is," and "it is impossible for the same thing to be and not to be"), in that they are, none of them, self-evident propositions, shining by their own light, and carrying on their face their own warrant of assent. Like moral principles generally, they require, in order to discover their truth, some intellectual exercise, some process of reasoning and illustration, and some previous acquaintance with their subject matter. In a greater or less degree, they are refined, artificial, and, in a sense, technical. They are not an intuition, but an acquisition, the ripe development of many ages of accumulated experience. Their origin is as obscure as that of juridical equity itself. Take them simply for what they are, generalizations of experience, epigrammatic condensations of the world's ripest juridical attainment, crisp phrases into which whole cycles of litigation have

been packed and made portable. But no proverb, taken literally and by itself, can ever be an infallible guide, since its very conciseness is a virtue purchased at the expense of qualifications and limitations necessary to a rounded conception of the whole truth.

§ 185. **Their practical use.** If the question then be asked, of what use are these so-called maxims? it it may be candidly replied, of no practical use whatever, unless handled with judgment and experience, and always with reference to the special circumstances of the particular case.[1] The general principle that *equity regards special circumstances* is not formulated as a maxim, because it is rather a canon of constant application to all maxims.[2] Maxims are useful as standards of weight and measure by which the bearing and effect of circumstances in proof can be tested and estimated. Having performed this office, maxims then stand for the point of view from which a court will finally adjust its position to contemplate and adjudge the case.

§ 186. **Classification.** It is somewhat remarkable that no classification of the cardinal maxims of equity has yet been established, in response to the general

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[1] *Ante*, sec. 157.

[2] Tailby vs. Official Receiver, 13 App. Ca. 523, 547. If the enabling maxims, as will shortly be seen, are to be regarded as the motive power of equity, and the restrictive maxims as the brake, the principle that "equity regards special circumstances" may be called the head-light of the engine. For this apt comparison credit is due to a Maryland University graduate of 1893, Eugene Oudesluys, Esq.

demand for a systematic arrangement of all scientific, or *quasi* scientific, principles. No two authors are found independently presenting the same catalogue of maxims, or presenting those in which all agree in the same order.[1]

§ 187. **Enabling and restrictive.** A natural division of maxims is suggested by the contemplation of equity as a *force*, or system of forces. Its most familiar remedies, although ordinary enough in one sense, are commonly spoken of as *extraordinary powers*;[2] that is, extraordinary from a common-law standpoint. Such are injunction and mandate, the appointment of receivers, the cancellation or reformation of contracts, or their specific enforcement.[3] The handling of such powers by one man is felt by every judge to be a matter of extreme delicacy and responsibility. In all doubtful cases, and there are many such, the

[1]The assertion was even at one time ventured by highly respectable authority that "nothing like a logical division of these maxims is possible." Snell's Equity, 12. In later editions, the passage referred to has been judiciously omitted, without, however. offering any attempt at classification. *Ibid.*, 5th ed. 17. The arrangement in the text is a development of the method hinted at by Mr. Haynes, who offered, however, but four examples. Haynes' Outlines, 19.

[2]Ryan vs. Mutual, (1893), 1 Ch. 116, 128; Union R. R. Co. vs. Dull, 124 U. S. 183; Fosdick vs. Schall, 99 U. S. 253; Atlantic Co. vs. James, 94 U. S. 214; Mitchell vs. Comrs., 91 U. S., 206, cited in Shotwell vs. Moore, 129 U. S. 596; Railroad vs. Cromwell, 91 U. S. 645; Wagoner, 77 Md. 189, 195; Semmes vs. Worthington, 38 Md. 325; Wilde vs. Scotten, 59 Md. 76; M'Shane vs. Hazlehurst, 50 Md. 119; Little vs. Price, 1 Md. Ch, 185; Pollard vs. R. R. Co., 52 Vt. 177; Pilzer vs. Hughes, 27 S. C. 416; Joyce vs. Electric, 43 Ill. App. 157, 160.

[3]These remedies have been spoken of as the "extreme medicine of the law. Shriver vs. Seiss, 49 Md. 388.

court is called upon to weigh two sets of considerations, one impelling or enabling it to act, the other opposing or restraining its action. Looking at the maxims of equity from this natural point of view, they are found arranging themselves around opposite poles into two sets, one set consisting of affirmative, motive or positive principles, the other of negative, repellant or passive principles. Those affirmative principles which excite, or tend to set in motion, the extraordinary powers of equity, are the *enabling maxims*. The negative principles which restrain, or tend to keep those energies at rest, are the *restrictive maxims*. By very obvious analogy to the science of the physical forces,[1] the philosophy of the former may be called the *dynamics*, that of the latter, the *statics*, of equity. Moreover, between certain maxims of each class will be found striking resemblances, suggesting a further sub-division of each class into groups.

As thus classified and arranged, the leading maxims of equity are presented in the two following tables:

Enabling Maxims.

I. *Ubi jus ibi remedium.*
II. Equity regards substance rather than form.
III. Equity regards that as done which ought to be done.
IV. Equity imputes an intention to fulfil an obligation.
V. Equity acts *in personam.*
VI. Equity acts specifically.
VII. Equity prevents multiplicity.
VIII. Equality is equity.

[1] *Presque tous les axiomes de physique correspondent à des maximes de morale.* De Stael, L'Allemagne III, 10.

Restrictive Maxims.

I. Equity follows the law.
II. Between equal equities, law prevails.
III. Between equal equities, priority of time prevails.
VI. Who seeks, must do, equity.
V. Who seeks equity must come with clean hands.
VI. Equity aids the vigilant.

§ 188. **Primary and remedial.** The object of classification is to assist the learner, and not to confuse him. While, therefore, no formal cross-division of maxims is deemed expedient, it may be worth while to note that certain enabling maxims are sources of equitable rights, titles and estates, or equities, and that one of the restrictive maxims operates, when applicable, to prevent their arising. These may be called primary maxims. Other enabling maxims, again, are sources of equitable remedies, which remedies, under proper circumstances, it is the office of other restrictive maxims to defeat. Primary maxims, therefore, are those which especially relate to *rights*, and remedial maxims those which especially relate to *remedies*. A few partake of both characters.

§ 189. **Their combined operation.** Cases often occur in which several maxims are found co-operating or over-lapping. Take for instance the doctrine of *advancement*, as connected with the ademption or satisfaction of legacies. The general rule is that a gift by a parent to a child is presumptively an advancement, and a satisfaction or ademption, *pro tanto*, of a legacy previously given. Here equity

"imputes an intention" on the part of the parent "to fulfill an obligation," the obligation being the dictate of natural justice to give each child the amount it ought to have in view of the claims of all. At the same time, another maxim is also gratified, which, "regards that as done which ought to be done." But the effect of the rule is also to prevent any child from getting a double portion, or in other words, to enforce the maxim of *equality*. It is, however, the common law right of every man to dispose of his own property, even to prefer one child at the expense of another. The restrictive maxim that "equity follows the law," here comes in and prevents a court of equity from denying this common law right, even to gratify its favorite principle of equality. The whole question, therefore, ultimately resolves itself into one of intention, or in other words, the maxim, "equity regards the intent," enables the admission of parol evidence to show either by the parent's declarations at the time, or by any circumstances from which a legitimate inference may be raised, that the donation was in fact and substance not an advancement, but an actual gift in addition to the legacy.[1] Many similar instances will suggest themselves as we proceed.

§ 190. **Application.** In the application of maxims it must be borne in mind that most of them have primarily in view typical, average situations of fact, struck, like a composite photograph, from a wide

[1] Dilly vs. Love, 61 Md. 605; Wallace vs. Dubois, 65 Md. 159.

experience of human affairs and a vast multitude of instances. From these types, the particular situations encountered in practice are naturally found to vary, either on one side or the other, and in a greater or less degree. A slight variance from the typical form does not, a wide variance does, prevent the application of the maxim. Thus, in close cases the controversy often resolves itself into a question of degree, or in other words, a question of *fact*.

§ 191. **Importance.** Whoever has possessed himself of the philosophy of these maxims, by careful study of the cases cited to illustrate them, will find it easy to master the practical details of equity jurisprudence, under whatever head of *doctrine* they may be found. He will, at the same time, have learned much of the application of principle to doctrine, much of the doctrines themselves, and much of equity procedure, as the instrument of their utility. On the other hand, the lawyer who ventures to practice in equity without some such preliminary drill in its distinctive and fundamental principles, like an army attempting field manoeuvres before being set up in the school of the soldier, can expect nothing but blunder and disaster.

CHAPTER XII.

ENABLING MAXIMS. (I.)

192. In general.
193. I. **No right without remedy.**
194. II. **Equity regards substance rather than form.**
195. Penalties and forfeitures.
196. Mortgages.
197. Equitable mortgages.
198. Trusts.
199. Powers.
200. Specific performance—time.
211. Partnership—set off.
202. Corporation.
203. Treaties, Statutes, Wills, Contracts.
204. Other instances.
205. III. **Equity regards that as done which ought to be done.**
206. Conversion.
207. Executory contracts.
208. Assignment.
209. Fraud.
210. Constructive Trust.
211. Relation.
212. Capacities.
213. Other instances.
214. Qualification.
215. Probable origin.
216. IV. **Equity imputes an intention to fulfill an obligation.**
217. Performance and satisfaction.
218. Resulting trust.
219. Other applications.

§ 192. **In general.** The enabling maxims are the dynamics of equity. They are positive, aggressive,

generally of use to the plaintiff. It is to be noted here, that in some cases, as in account, both parties are *actors*, and in many cases a nominal defendant may, for all the purposes of these maxims, occupy the position of actual plaintiff toward some other defendant, or even towards a nominal plaintiff.[1] It is also to be stated here, once for all, and to be kept in view throughout, that the equities raised by these enabling maxims are all subject to the defences interposed in proper cases through the operation of the restrictive maxims.

As herein classified, the table of enabling maxims is as follows, the order being important:

I. *Ubi jus ibi remedium.*
II. Equity regards substance rather than form.
III. Equity regards that as done which ought to be done.
IV. Equity imputes an intention to fulfill an obligation.
V. Equity acts *in personam.*
VI. Equity acts specifically.
VII. Equity prevents multiplicity.
VIII. Equality is equity.

§ 193. **No right without a remedy.**[2] This maxim is both primary and remedial, and was the most important and prolific of all the enabling maxims of equity, in the earlier stages of its growth. It is, in fact, the foundation of equity, which supposes the absence or inadequacy of legal remedy. For reasons already anticipated, its importance at this day is historical and theoretical, rather than practical.

[1] Pomeroy, Remedies, sec. 60; Md. Code, Art. 16, sec. 161.

[2] Bisp. Pr. Eq. sec. 37; 1 Pom. Eq. Jur. sec. 423.

The question as to whether a remedy exists now in any particular case is determined rather by precedent, and by considerations drawn from other general principles, than by any existing force in this maxim.[1] It is held subordinate to positive institutions, and cannot be applied to subvert established rules, or give the courts a jurisdiction hitherto unknown.[2] It is, in short, to be taken subject to the limitations already noticed in the definition of juridical equity. "The principles of natural justice" are applied only to the "special circumstances of defined and limited classes of civil cases," and moreover that application is to be "controlled in a measure as well by considerations of public policy as by established precedent, and by positive provisions of law."[3]

Notwithstanding all this the maxim survives, with vitality enough to turn the scale in favor of the intervention of equity in any fair case of doubt of a civil right without other adequate means of enforcement.[4] The separate use of a married

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[1] Express Co. vs. Seibert, 142 U. S. 339, 348; Rees vs. Watertown, 19 Wall. 107; Heine vs. Commissioners, 19 Wall. 658; Thompson vs. Allen Co., 115 U. S. 550.

[2] Hedges vs. Dixon Co., 150 U. S. 182; Greene vs. Keene, 14 R. I 388, 395.

[3] *Ante*, secs. 142, 166–172.

[4] 1 Beach, Mod. Eq. Jur. sec. 1; Riley vs. Carter, 76 Md. 581, 598; Scarborough vs. Scotten, 69 Md. 137; Donelson vs. Polk, 64 Md. 501; Snowden vs. Dispensary, 60 Md. 85; Gorsuch vs. Briscoe, 56 Md. 573; Joy vs. St. Louis, 138 U. S. 50; Toledo R. Co. vs. P. R. Co., 54 Fed. Rep. 746; Watson vs. Sutherland, 5 Wall. 74; Piper vs. Hoard, 107 N. Y. 73; Britton vs. Royal, 46 N. J. Eq. 102; Wickersham v Crittenden, 93 Cal. 32.

woman, the restraint on alienation, the rule against perpetuities, and the rules of equitable waste, are among the modern inventions of chancellors upon the line of this maxim.[1] Still more recent innovations may be cited, one of English and two of American introduction. The former has been already described as the negative specific enforcement by injunction of a contract for special personal services.[2] One of the American inventions has also been referred to as the receiver's certificate, with its preference over all prior liens.[3] The other is the doctrine that capital stock, especially the unpaid subscription, is a trust fund for corporation creditors.[4] The doctrine has been criticised, and a disposition is manifested to retrench it.[5]

To this maxim may be generally referred all the enabling doctrines of equity, and especially those not referable to any other particular maxim. Its earliest and boldest application was in the foundation of the great system of *trusts*, which constitutes a large portion of equity jurisdiction.[6]

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[1] Knatchbull vs. Hallett, 13 Ch. D. 696, 710.

[2] *Ante*, sec. 102.

[3] *Ante*, sec. 112.

[4] Story, J., in Wood vs. Dummer, 3 Mason, 308, 311; Sawyer vs. Hoag, 17 Wall. 610; Rider vs. Morrison, 54 Md. 429, 443; Glenn vs. Williams, 60 Md. 93, 116; Cole vs. M. I. Co., 133 N. Y., 168; Rouse vs. Bank, 46 Ohio St. 493, 503; Bisp. Pr. Eq. sec. 527 (5th ed.) p. 643; 2 Pom. Eq. Jur. sec. 1046; 2 Beach, Mod. Eq. sec. 908.

[5] Hollins vs. Brierfield Co., 150 U. S. 371; Hosper vs. Car Co., 48 Minn. 174, 192.

[6] Haynes' Outlines, 19, 20; Bisph. Pr. Eq. secs. 49-148; 2 Pom. Eq. Jur. sec. 975, &c.

§ 194. **Equity regards substance rather than form.** This is a strong and leading maxim, pervading the entire system and of constant practical application. It is expressed in a variety of modes. "Equity regards the substance or spirit, and not the letter merely."[1] "Equity looks through form to substance."[2] "Equity looks to the intent rather than to the form."[3] It is the germ of the two enabling maxims which will be next presented in their order, viz: "Equity regards that as done which ought to be done;" and "imputes an intention to fulfill an obligation." Taken together, the three belong to the same group of primary maxims, all relating to rights, and often combining to effect the same result.

§ 195, **Penalties and forfeitures.** The maxim that equity regards substance rather than form is the basis of the equitable doctrine of penalties and forfeitures. Equity never aids in enforcing a penalty[4] nor requires a forfeiture,[5] because they disregard the substantial proportion which the value of the thing forfeited bears to the actual loss or injury

[1]Hayne's Outlines, 17. Essex vs. Day, 52 Conn. 483, 497; Thompson vs. Sheppard, 85 Ala. 618; Edward vs. Wigginton, 47 Mo. App. 307, 312.

[2]Texas vs. Hardenburg, 10 Wall. 89; Landis, 41 N. J. Eq. 128.

[3]1 Pom. Eq. Jur. sec. 378.

[4]Baumgartner vs. Haas, 68 Md. 32, 39; Cross vs. McClanahan, 54 Md. 21, 24; Leighton vs. Young, 10 U. S. App. 318.

[5]Lincoln vs. Quynn, 66 Md, 299, 306; Donelson vs. Polk, 64 Md. 501, 506; Birmingham vs. Lesan, 77 Maine 494; Otta vs. Newton, 57 Vt. 451, 467; Townsend vs. Shaffer, 30 W. Va. 178.

sustained.[1] While equity will relieve against penalty it will not relieve against stipulated or liquidated damages, but here again the substantial nature of the contract and not the mere form of words employed, will determine the rule to be applied.[2] So, in the case of an agreement that the whole debt, presently due, shall be enforced, unless a stipulated instalment thereof be paid by a named day, such payment, upon default in performing the condition will not be relieved against in equity, because equity will look to the substance of the transaction, and if the agreement, although it may assume a somewhat penal form, be not substantially inequitable, equity will enforce its performance.[3]

§ 196. **Mortgages.** The common law, looking to form only, treated a mortgage after condition broken as in all respects an absolute conveyance. Equity, only venturing at first to grant a timid relief in cases where the default in payment was occasioned by accident,[4] at length, considering the intent to give a mere security for a money loan, boldly invaded the

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[1]Chancellor vs. Gummere, 39 N. J. Eq. 585; Attrill vs. Huntington, 70 Md. 191, 196, reversed upon a federal question in Huntington vs. Attrill, 146 U. S. 657.

[2]Bisph. Pr. Eq. sec. 179.

[3]Thompson vs. Hudson, L. R. 4 H. L. 1, 15; Bisph. Pr. Eq. sec. 180.

[4]It is interesting to note that Shakespeare lost his maternal inheritance because in his day equity had not advanced so far as to relieve against a technical forfeiture of a mortgage caused by a default in payment at the precise day appointed. Halliwell-Phillip's Outlines, ninth ed. I, 59, 149-152: II, 14-17, 204; Shakespeariana, X, 63.

domain of law by creating a new estate in the mortgagor, called the equity of redemption.[1] Later, the recognition of this estate was forced upon the courts of law, in some states fully,[2] in others to a qualified extent.[3] In Maryland, the mortgagee is not considered as the substantial owner, even at law,[4] and has but a dry legal title, which cannot be affected by the lien of a judgment.[5] In equity, a mortgage is regarded as a mere security for money, a chattel interest, or *chose in action*, the debt being considered as the principal, and the mortgage as the incident.[6] An assignment of the debt operates as an assignment of the mortgage.[7]

Whether a particular instrument will be construed to be a mortgage depends upon the intent of the parties and the substance and effect of the transaction, and not upon the mere form of words.[8] A convey-

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[1] 1 Spence Eq. 601; Hayne's Outlines 22; Smith, Pr. Eq. 15; Tarn vs. Turner, 39 Ch. D. 456, 459; Lindley vs. O'Reilly, 50 N. J. Law, 640; Poland vs. Railroad, 52 Vt. 144, 171; Fox vs. Wharton, 5 Del. Ch. 226; Barrett vs. Hinckley, 124 Ill. 32.

[2] 1 Beach, Mod. Eq. secs. 395, 396.

[3] *Ibid*, sec. 397.

[4] Annapolis & E. R. R. Co. vs. Gantt, 39 Md. 115, 139; Arnd vs. Amling, 53 Md. 192, 200.

[5] Tucker vs. Sumwalt, 34 Md. 89.

[6] Timms vs. Shannon, 19 Md. 296.

[7] Byles vs. Tome, 39 Md. 461; Hewell vs. Coulbourn, 54 Md. 59, 63; Flanagin vs. Hambleton, 54 Md. 222, 231. By statute, however, the title to the debt now follows the record title, 1892 ch. 392, an act passed to prevent the fraudulent use of mortgage notes, retained after a release or assignment of mortgage.

[8] Locking vs. Parker, L. R. 8 Ch. App. 30; 1 Beach. Mod. Eq. sec. 400.

ance, absolute on its face, will be treated as a mortgage, when such is proved to be the real intention;[1] or a mortgage may be treated as substantially an absolute deed.[2] A lease may be regarded as a mere security,[3] and the external form of a redeemable ground rent will be disregarded, when the transaction amounts in substance to a mortgage loan.[4] An instrument, in form a contract of bailment, or conditional sale, however carefully worded to cover the real intention to create a security for a debt, will be held in substance a mortgage, if that be discovered to be the real intention of the parties.[5] A conditional sale, however, is not illegal, and, whenever plainly intended, will be upheld.[6] In cases of doubt the instrument will be held a mortgage.[7]

§197. **Equitable mortgages.** The maxim that equity regards substance rather than form to

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[1] 1 Jones on Mort. sec. 282; Booth vs. Robinson, 55 Md. 419, 450; Laeber vs. Langhor, 45 Md. 477, 481; Baugher vs. Merryman, 32 Md. 185; Wallace vs. Johnstone, 129 U. S. 58; Cadman vs. Peter, 118 U. S. 73; Jackson vs. Lawrence, 117 U. S. 679, 681; Peugh vs. Davis, 96 U. S. 332.

[2] Pairo vs. Vickery, 37 Md. 467, 485.

[3] Johns Hopkins Univ. vs. Williams, 52 Md. 229.

[4] Gaither vs. Clark, 67 Md. 18; Odd Fellows vs Merklin, 65 Md. 579, 580; Montague vs. Sewell, 57 Md. 407, 414; Rouskulp vs. Kershner, 49 Md. 516; Tulford vs. Keerl, 71 Md. 397, 401; Wells vs. Robinson, 53 Vt. 204.

[5] Heryford vs. Davis, 102 U. S. 235; *ex parte* Odell, L. R. 10 Ch. D. 76.

[6] Bisph. Pr. Eq. sec. 154; 1 Beach Mod. Eq. sec. 413–416; Hinckley vs. Wheelwright, 29 Md. 341.

[7] *Ibid.* Franklin vs. Ayre, 22 Fla. 662.

effectuate the real intent of the parties,[1] combines in its operation with the maxim next in order, that equity regards that as done which was agreed to be done,[2] to create the doctrine of equitable mortgages and liens.[3] A mortgage defectively executed, or invalid at law for want of some prescribed formality, an agreement in writing to give a mortgage of land, or a mere parol agreement to give a mortgage of personalty, will, if founded upon a sufficient consideration, be enforced in equity as a specific lien upon whatever property may be described with reasonable certainty.[4] The lien will be enforced, notwithstanding the registry laws, not only as against contracting parties[5] and their personal representatives,[6] but also against subsequent purchasers and incumbrancers with notice, whether actual or constructive,[7] and against prior creditors,[8] although their claims are reduced to judgment, subsequently to the lien,[9] but

[1] Poland vs. Railroad, 52 Vt. 144, 171.

[2] Daggett vs. Rankin, 31 Cal. 327; Ober vs. Keating, 26 Atl. Rep. 501; 77 Md. —

[3] 1 Pom. Eq. Jur. sec. 380.

[4] Alexander vs. Ghiselin, 5 Gill 138, Brantly's note; 1 Beach Mod. Eq. sec. 290; 3 Pom. Eq. Jur. sec. 1233, 1235; Hall, 50 Conn. 111; Morrill, 53 Vt. 78 ; Young, 27 S. C. 210.

[5] Tiernan vs. Poor, 1 G. & J. 216; Brundige vs. Poor, 2 G. & J. 1; Triebert vs. Burgess, 11 Md. 452.

[6] Wood vs. Fulton, 4 H. & J. 329; Aldridge vs. Weems, 2 G. & J. 36.

[7] McMechen vs. Maggs, 4 H. & J. 132; Hudson vs. Warner, 2 H. & G. 415; Baynard vs. Norris, 5 Gill. 468; Price vs. McDonald, 1 Md. 422; Johnson vs. Canby, 29 Md. 211; Russman vs. Wanser, 53 Md. 92.

[8] Alexander vs. Ghiselin, 5 Gill. 138.

[9] Dyson vs. Simmons; 48 Md. 207.

not as against subsequent creditors,[1] purchasers or incumbrancers without notice.[2] In some states equitable mortgages and liens are held inconsistent with recording statutes, so far as creditors are concerned.[3]

Under the statutory power of a married woman to "convey" her property "by a joint *deed* with her husband,"[4] a promissory *note* signed by the husband and wife, binding their "separate and individual estates," was enforced as a lien upon her separate estate in the nature of an equitable mortgage, the mere formality being held unimportant in view of the manifest intention.[5]

§ 198. **Trusts.** The influence of the same maxim that equity regards substance rather than form is manifest in shaping the doctrine of trusts. The equitable estate of the *cestui que trust* is regarded as the real substantial ownership, while the corresponding legal estate of the trustee is a mere form and shadow.[6] The duration of a trustee's estate is measured by the substantial objects and purposes of the trust, and not by the technical form of words

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[1] Hoffman vs. Gosnell, 75 Md. 577; Carson vs. Phelps, 40 Md. 73; Nelson vs. Bank, 27 Md. 57; Stanhope vs. Dodge, 52 Md. 483.

[2] Sitler vs. McComas, 66 Md. 135; Ober vs. Keating, 26 Atl. Rep. 501, 77 Md.

[3] Betz vs. Snyder, 48 Ohio St. 492.

[4] Md. Code, Art. 45, sec. 2.

[5] Hall vs. Eccleston, 37 Md. 510, 521.

[6] 2 Pom. Eq. Jur. sec. 975; Clay vs. Freeman, 118 U. S. 97, 108; Reid vs. Gordon, 35 Md. 174, 184.

creating it.[1] Where land is devised to a trustee, conduct which amounts to a disclaimer of the office of trustee will also amount to a disclaimer of the legal title.[2] A trust is never allowed to fail for want of a trustee,[3] nor because impossible of a literal execution.[4]

§ 199. **Powers.** Equity never permits the mere formality of a *seal* to supply the absence of substantial consideration,[5] nor the want of that, or any other formality, to defeat the execution of a power which carries out the substantial intention of the donor, that being the governing principle.[6] A power to purchase real estate may be well executed in the erection of buildings on property already in settlement, that being substantially equivalent,[7] but a trustee authorized to invest only in landed *securities* is not warranted in purchasing *land*, there being obviously a substantial difference.[8] Where the intention to execute the power is manifest, it is the duty

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[1] Abell 75 Md. 44, 62; Thompson vs. Ballard, 70 Md. 10 17; Long 62 Md. 33, 65; Young vs. Bradley, 101 U. S. 782.

[2] Birchall vs. Ashton, 40 Ch. D. 436.

[3] Poindexter vs. Burwell, 82 Va. 514; Doughten vs. Vandever, 5 Del. Ch. 65; Park Heights Co. vs. Oettinger, 53 Md. 46, 61; Colton, 127 U. S. 300, 320.

[4] Warehime vs. Carroll, 44 Md. 515, 520.

[5] Bayne vs. State, 62 Md. 100, 105; Black vs. Cord, 2 H. & G. 100.

[6] Bisph. Pr. Eq. sec. 193; Cooper vs. Haines, 70 Md. 282, 284; Thomas vs. Gregg, 76 Md. 169, 175; Nevin vs. Gillespie, 56 Md. 320, 327.

[7] Conway vs. Fenton, 40 Ch. D. 512, 515.

[8] Zimmerman vs. Fraley, 70 Md. 561, 569.

of the trustee to execute it, notwithstanding a mere formal defect, such as a verbal instead of a written request.[1] A power which is given to be executed by *deed* will be aided in equity when the execution has been by *will*,[2] but conversely, a power to be executed by will cannot be executed by deed, and equity will not aid if the attempt be made, because the donor of the power did not intend it to be so executed, but that it should remain ambulatory during the life of the donee.[3] A power of appointing new trustees being in substance fiduciary, the donee of such power cannot appoint himself.[4]

§ 200. **Specific performance—time.** Equity regards the substance of the agreement, and the object and intention of the parties, and will not permit terms that are not essential to be set up as a reason for refusing specific performance.[5]

Time is not deemed in equity as of the essence of the contract,[6] except where the *intention* appears,[7] as,

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[1] Insurance Co. vs. Everett, 40 N. J. Eq. 345, 350.

[2] Bisph. Pr. Eq. sec. 193.

[3] Wilkes vs. Burns, 60 Md. 64, 72, 73.

[4] Sheats vs. Evans, 42 Ch. D. 522, 526,

[5] Conaway vs. Wright, 5 Del.Ch. 474; Union P. R. Co. vs. McAlpine, 129 U. S. 305, 313; Bryant vs. Wilson, 71 Md. 440.

[6] Baltimore vs. Raymo, 68 Md. 569, 573; Myers vs. Silljacks, 58 Md. 319, 329; Maughlin vs. Perry, 35 Md. 352, 359; Smoot vs. Rea, 19 Md. 398, 406; Brown vs. Trust Co., 128 U. S. 403, 414; Smith vs. Profitt, 82 Va. 850; Vaught vs. Cain, 31 W. Va. 427.

[7] Wilson vs. Herbert, 76 Md. 489, 497; Coleman vs. Applegarth, 68 Md. 21, 28; Derrett vs. Bowman, 61 Md. 526, 528; Holgate vs. Eaton, 116 U. S. 33, 40; Battel vs. Matot, 58 Vt. 288.

in stipulations for prompt payment of life-insurance premiums, and the like.[1] Restrictive covenants, although not technically running with the land, will be enforced in equity against all parties in possession with notice.[2]

§ 201. **Partnership—Set off.** If a partnership *in fact* exists, no concealment of name or other indirect expedient will prevent the substance of the transaction being adjudged accordingly.[3] Real property of a partnership is, for the substantial purposes of *liquidation*, treated in equity as personal property,[4] while, for all other purposes, it is still treated as real estate.[5] A mortgage to a firm, as such, is substantially within the provisions of the registry law, requiring the names of parties to be given.[6] The mere fact that a note is in form a partnership note does not make the debt a partnership debt, if given for an individual obligation.[7] Although a joint debt cannot, in equity, any more than at law, be set off against a separate debt, yet where the debts are in reality mutual, although not so in form, as, where one of the joint debtors is a mere surety, equity will look through

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[1] Yoe vs. Howard, 63 Md. 86; Knickerbocker Insurance Co. vs. Dietz, 52 Md. 16, 28; Dungan vs. Insurance Co., 46 Md. 469, 493; Norrington vs. Wright, 115 U. S. 188, 203; Davison vs. Von Lingen, 113 U. S. 40, 50; Howe vs. Smith, 27 Ch. D. 89, 103.

[2] Newbold vs. Peabody Heights Co., 70 Md. 493, 500.

[3] Adams vs. Newbigging, 13 App. Ca. 308, 311.

[4] Allen vs. Withrow, 110 U. S. 130; Wilson (1893), 2 Ch. 343.

[5] Eberts, 5 Md. 353, 358; Goodwin vs. Stevens, 5 Gill, 2.

[6] Bernstein vs. Hableman, 70 Md. 29, 40.

[7] Edward vs. Wigginston, 47 Mo. App. 307, 312.

the form, and make an adjustment according to the substance of the transaction.[1]

§ 202. **Corporation.** Where a single individual is found holding practically the entire stock, with the exception of a merely nominal amount, equity will treat the individual, from a business point of view, as substantially the corporation.[2] A contract made substantially on behalf of a corporation will be so treated, although formally in the name of an individual, and a judgment recovered by him for a breach thereof will, in equity, be regarded as a judgment in favor of the company.[3] Disregarding the form of the dividend, equity will treat a distribution of net earnings, either as capital or income, according to the substance and intent.[4]

§ 203. **Treaties, statutes, wills, contracts.** In its application to treaties, the maxim is the light of that larger reason which constitutes the spirit of the law of nations. Treaties are construed liberally according to the substance of the right intended, without regard to technicalities.[5] In determining as to the constitutionality of statutes, the courts are not bound by mere form, but must look at the substance of things.[6] Statutes prescribing modal regulations

[1] Drexel vs. Berney, 122 U. S. 254.

[2] Wood vs. Trust Co., 128 U. S. 416, 425, Hoffman Co. vs. Cumberland Co., 16 Md. 456, 510; Chafee vs. Quidneck, 14 R. I. 75. 81.

[3] Davis vs. Gemmell, 70 Md. 356. 357.

[4] Thomas vs. Gregg, 12 D. R. 113, 78 Md. —

[5] DeGeofroy vs. Riggs, 133 U. S. 258; Choctaw Nation vs. U. S. 119 U. S. 28.

[6] Mugler vs. Kansas, 123 U. S. 623, 661; Trageser vs. Gray, 73 Md. 259.

require not a formal or strictly literal, but only a substantial compliance,[1] and the same liberal construction has been adopted by courts of law.[2] That principle of construction by which a legislative enactment is interpreted according to the "equity of the statute" by considering the reason and spirit of it,[3] and the cognate principles—*cessante ratione cessat et ipsa lex,—qui hoeret in litera hoeret in cortice,*—are but modes of this maxim.[4]

In the *construction of wills,* even where technical words are used, though the testator will ordinarily be presumed to have used them in their legal sense, a different meaning will be given to them when the context clearly indicates that such technical import would defeat his manifest intention.[5] And this intention will prevail over a strict grammatical construction.[6]

A devise of the rents and profits is, in substance a devise of the land, and will be held equivalent,[7] unless a different intention is manifest.[8] With

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[1] Basshor vs. Stewart, 54 Md. 376; Marlow vs. McCubbin, 40 Md. 132, 137.

[2] Friend vs. Hamill, 34 Md. 302.

[3] Church vs. U. S., 143 U. S. 457; Hawbecker, 43 Md. 516, 519.

[4] Great Western, 118 U. S, 520, 538; Riggs vs. Palmer, 115 N. Y. 506, 510; Merrill vs. Comrs., 70 Md. 269, 271; 1 Bl. Com. 61; Co. Litt. 24 a; 1 Kent. 462.

[5] Albert, 68 Md. 353, 366; Taylor vs. Watson, 35 Md. 519, 524; Cavendish, 30 Ch. D. 227.

[6] Dulany vs. Middleton, 72 Md. 67, 79.

[7] Cassilly vs. Meyer, 4 Md. 1, 11; Gisborne vs. Charter, 142 U. S. 326, 335.

[8] Cooke vs. Husbands, 11 Md. 492, 506; Boyle vs. Parker, 3 Md. Ch. 43, 45.

regard to contracts, the mere form and letter will be disregarded when necessary to reach the substance and intent; as when a wagering contract appears disguised as a sale,[1] or a conditional sale assumes the outward form of a lease,[2] or, when the reality of a loan transaction is cloaked by a sham purchase and hiring.[3]

The foregoing illustrations are sufficient to show that all rules of interpretation for discovering the *intent* expressly or tacitly refer to this maxim as their basis.

§ 204. **Other instances.** Where a person becomes grantee of an estate subject to a charge for his benefit, a *merger* of the security will not be effected if the *intention* be manifested to keep it alive.[4]

In applying the doctrine of *conversion*, substance, and not the form of the instrument, will be regarded, in order to reach the real intent.[5] In applying the doctrine of *subrogation*, equity looks to the debt to be paid, that being the matter of substance, and not to the hand which may happen to hold it.[6] In all cases of *suretyship*, whatever may be the form of the instrument, or the legal obligations of the parties, equity will inquire into the real nature and

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[1] Embrey vs. Jemison, 131 U. S. 336, 344.

[2] Hervey vs. Rhode, 93 U. S. 672.

[3] Watson, 25 Q. B. Div. 27.

[4] Shipley vs. Fox, 69 Md. 572, 577; Polk vs. Reynolds, 31 Md. 106, 111; Case vs. Fant, 10 U. S. App. 415.

[5] Lynn vs. Gephart, 27 Md. 547, 563.

[6] Orem vs. Wrightson, 51 Md. 34, 46.

object of the transaction, and afford relief accordingly.[1]

The influence of this maxim upon equity procedure has already been noticed,[2] and it has also been seen that the reformed code of procedure, both in this country and in England, is avowedly based upon it in part.[3]

Finally, it has been the great enabling factor in many important legislative law reforms, such as the provision that judgments are to be rendered "according to the very right" without regarding "matter of mere form,[4] and that in pleadings at law, departure from form shall be no longer fatal, "so long as substance is expressed."[5] Its liberalizing influence upon common law methods generally has been already remarked.[6] Obvious and absurd clerical mistakes in legal proceedings as well as in contracts will be set right by giving effect to the plain intent against the letter.[7]

The difficulty in the application of this maxim is in determining sometimes what is really matter of substance and what mere matter of form.[8] In this

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[1]Dodd vs. Wilson, 4 Del. Ch. 114, 409.

[2]*Ante*, sec. 49.

[3]*Ante*, secs. 16, 169.

[4]Md. Code, Art. 26, sec. 14.

[5]Md. Code, Art. 75, sec. 3, 7, 9, 23.

[6]*Ante*, sec. 169.

[7]Farrell vs. Baltimore, 75 Md. 493. Otherwise held as to a statute in Maxwell vs. State, 40 Md. 273.

[8]Smith vs. Bourbon Co. 127 U. S. 105, 112; Broadbent vs. State, 7 Md. 416, 429; Stewart vs. Flint, 57 Vt. 216, 217.

connection, reference need only be made to what has already been said as to the application of maxims generally.[1]

§ 205. III. **Equity regards that as done which ought to be done.**[2] As otherwise expressed, "equity considers that as done which was *agreed* to be done."[3]

In either mode, this maxim is an expansion or development of the maxim just considered that "equity regards substance rather than form." To a certain extent, both maxims cover the same ground. The doctrine of equitable mortgages, as already suggested,[4] may be ascribed to their combined operation, and indeed is frequently attributed exclusively to the maxim now under consideration. The same may be said of the equity of redemption.[5] The doctrine of conversion is another instance in point.

§ 206. **Conversion.** Conversion is an assumed change in the nature of property, by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such.[6]

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[1] *Ante*, sec. 185.

[2] 1 Pom. Eq. Jur. sec. 364; Bisp. Pr. Eq. sec. 44; Small vs. Marburg, 77 Md. 11; McRae, 27 Atl. Rep. 1038, 77 Md.

[3] Seymour vs. Freer, 8 Wall. 202, 214.

[4] *Ante*, sec. 197.

[5] 1 Pom. Eq. Jur. sec. 376, compare sec. 382.

[6] Hayne's Outlines, 325; Fletcher vs. Ashburner, 1 Brown's Ch. Ca. 497, 1 Lead. Ca. Eq. 619; Bisp. Pr. Eq. sec. 307; Craig vs. Leslie. 3 Wheat, 563; Small vs. Marburg, 77 Md. 11; Keller vs. Harper, 64 Md. 74: Barnum, 42 Md. 251, 308; Cropley vs. Cooper, 19 Wall. 167, 174; McFadden vs. Hefley, 28 S. C. 321; Duke of Cleveland (1893), 3 Ch. 244.

In such cases, the first step is to find in the will or other instrument of trust, an expression of *intention* that the money shall be invested in land, or that the land shall be sold and turned into money. When once that intention is sufficiently expressed, the accidental circumstance that the money has in fact not been laid out in land, or the land in fact not sold, can have no effect in equity, which regards that as actually done which ought to be done.[1]

§ 207. **Executory contracts.** Upon the same principle, an executory contract for the sale of land will be regarded in equity as if actually executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract, the land ought to be conveyed to the vendee, and the money ought to be paid to the vendor. Upon the principle which considers that as done which the parties have contracted to do, the vendor will be treated as a trustee for the purchaser of the estate sold, and the vendee as a trustee for the vendor of the purchase money to be paid. The vendee is in fact considered as the owner of the land, and although the legal title may still remain in the vendor, he holds it merely as trustee for the purchaser, with a lien on the estate as security for any unpaid portion of the purchase money.[2] The

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[1] Haynes' Outlines, 325.

[2] Robinson, C. J., in McRae, 27 Atl. Rep. 1038, 77 Md. ; 1 Pom. Eq. Jur. sec. 368; Woodbury vs. Gardner, 77 Maine, 75: Keep vs. Miller, 42 N. J. Eq. 106.

practical results of this doctrine are important to both parties. In the interval between the contract and the deed, the vendee, even although none of the purchase money has been paid, must bear any loss, such as by fire (his interest being an insurable one), which may happen to the property, and is entitled to any benefit which may accrue to the estate.[1]

§ 208. **Assignment.** Assignments of *choses in action*, originally void at law, were always recognized as enforceable in equity, and assignments of property not *in esse*, but to be acquired *in futuro*, void at law now,[2] are held valid and binding in equity.[3] An assignment for value of future property operates in equity by way of agreement, binding the conscience of the assignee, and so binding the property from the moment when the contract becomes capable of being performed, upon the principle that equity considers as done that which ought to be done.[4] The modern tendency of courts of law is towards adopting this equitable doctrine.[5] The same principle applies in the case of a deed made before the grantor has acquired title. Though the conveyance of an expectancy, as such, is impossible at law, the operation of this

[1] Brewer vs. Herbert, 30 Md. 301.

[2] Crocker vs. Hopps, 28 Atl. Rep. 99, 77 or 78 Md.

[3] Butler vs. Rahm, 46 Md. 541, 548; Bisph. Pr. Eq. secs. 22, 165; Patterson vs. Caldwell, 124 Pa. 461; Edwards vs. Peterson, 80 Maine 367.

[4] Tailby vs. Official Receiver, 13 App. Ca. 523, 546; Collyer vs. Isaac, 19 Ch. D. 342; 1 Pom. Eq. Jur. sec. 369, 373.

[5] Bisp. Pr. Eq. 5th ed. sec. 165, note 7.

maxim enables it to be enforced in equity as an executory agreement to convey, if sustained by a sufficient consideration.[1] An assignment for value of a fund to be created, as from a claim in litigation, stands upon the same footing.[2] An assignment and delivery, as collateral, of certificates of stock, not perfected by transfer on the books of the corporation, passes the equitable title.[3] But a married woman's assignment does not bind her after acquired separate estate,[4] and specific performance cannot be decreed of an agreement to convey property which has no existence, or to which the defendant has no title.[5] An order drawn for the whole of a particular fund amounts to an equitable assignment, but a partial order does not, in the absence of express or implied acceptance.[6]

§ 209. **Fraud.** The foregoing examples deal mainly with things *agreed* or directed to be done. They are very far from exhausting the enabling powers of this maxim, which also deals with things which *ought* to be done. It has already been suggested that this and the next maxim—"equity imputes

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[1]Moore vs. Crawford, 130 U. S. 122, 131, 132.

[2]Peugh vs. Porter, 112 U. S. 737; Bank vs. Bayonne, 48 N. J. Eq. 252.

[3]Noble vs. Turner, 69 Md. 519.

[4]Deakin vs. Lakin, 30 Ch. D. 169, 171; Aukeney vs. Hannon, 147 U. S. 118.

[5]Kennedy vs. Hazelton, 128 U. S. 667.

[6]Gibson vs. Finley, 4 Md. Ch. 75; Mandeville vs. Welch, 5 Wheaton 285.

an intent to fulfill an obligation''—are both offspring of the maxim—"substance rather than form.'' They overlap the parent maxim to a certain extent, but they go further. They dig below the crust of form, below the sub-soil of intent, and strike the bed rock of *conscience.* They inquire what intent an honest person should have formed, and demand adjudication upon that basis. They treat the fraudulent intent as if void and non-existent, and by enabling judicial control of the act, make the party behave as if he were honest. "The principle is, that a person is not allowed to derive any advantage from his own wrong-doing, and that, in order to prevent this, a court of equity will treat him as having done that which he ought to have done."[1] "Equity will not only interfere in cases of fraud to set aside acts done, but will also, if acts have, by fraud, been prevented from being done, interfere and treat the case exactly as if the acts had been done."[2] The resources of the maxim referred to in the promotion of justice by counteracting fraud are practically unlimited.[3]

§ 210. **Constructive trust.** Constructive trust may arise under contract, and instances have already been given under the head of executory contracts[4]

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[1]London R. Co. vs. S. E. R. Co. (1892) 1 Ch. 143.

[2]Moore vs. Crawford, 130 U. S. 122, 128; 1 Sto. Eq. Jur. sec. 187.

[3]German vs. Hammerbacker, 64 Md. 575, 607; Equitable vs. Baltimore, 63 Md. 285, cited 64 Md. 607; Fowler vs. Jacob, 62 Md. 326, 331; Ames vs. Richardson, 29 Minn. 330; Sewell vs. Slingluff, 62 Md. 592, 599, not a case of fraud, but illustrating the principle.

[4]*Ante*, sec. 207; Bisp. Pr. Eq. sec. 95.

and assignments.[1] They may also be raised independently of the intention of the parties, by actual or constructive fraud, including acts in violation of fiduciary obligations.[2] In all these cases of trust *ex maleficio*, where the party holds the legal title to property under such circumstances that in conscience he ought to convey it or restore it to the real owner, he will be treated in equity as if the conveyance had been made, so far as the power of the court can reach, that is, to the extent of holding him a trustee for the person beneficially entitled.[3]

§ 211. **Relation.** The doctrine of relation also proceeds from this maxim, by which the thing considered as done shall relate back to the time when it ought to have been done originally.[4] The issue of a land patent relates back to the inception of the patentee's right.[5] The title of an administrator relates back to the death of the intestate,[6] and the title of an insolvent trustee, or assignee in bankruptcy to the commencement of the proceedings.[7] Similarly, by

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[1] *Ante*, sec. 208; Bank vs. Bayonne, 48 N. J. Eq. 252.

[2] 1 Pom. Eq. Jur. sec. 155; 2 *ib.* sec. 1053.

[3] Turner vs. Sawyer, 150 U. S. 586.

[4] 3 Bl. Com. 438; Hammond vs. Warfield, 2 H. & J. 151, 158, 159; Jones vs. Badley, 4 Md. Ch. 167, 168; Smith vs. Devecmon, 30 Md. 473, 482; Brooks vs. Ahrens, 68 Md. 212, 223.

[5] Redfield vs. Parks, 132 U. S. 239, 246; Defferback vs. Hawke, 115 U. S. 393, 405.

[6] Dempsey vs. McNabb, 73 Md. 433, 439; Sommers vs. Boyd, 48 Ohio St. 648.

[7] Riley vs. Carter, 76 Md. 581, 612; Griffee vs. Mann, 62 Md. 248, 255; Conner vs. Long, 104 U. S. 228. See Pinckney vs. Lanahan, 62 Md. 447, 456.

statute, a mechanic's lien relates back to the commencement of the building,[1] and a condemnation to the time of the forfeiture.[2] A creditor who comes in and establishes his claim under a creditors' bill,[3] becomes a plaintiff by relation to the time of the filing of the bill, and when the statute of limitations is set up, the intervening time will not be counted against him.[4]

Some of the instances cited also illustrate the reaction of equity upon law,[5] or, the impression made by equitable principles upon the march of judicial and statutory legislation. So long ago as 1806, in an action of ejectment, it was said by the court, Chase C. J.: "The relation of the patent to the certificate, so as to overreach mesne grants, is founded on a principle of equity, and is a fiction of law introduced for the attainment of justice, and to prevent circuity of action, the court doing that which a court of equity would effect."[6]

§ 212. **Capacities.** In the case of several capacities in the same person, (such as trustee and executor, or guardian and administrator, or the like,) the respective capacities will be regarded as if distinct individuals,[7] and possession will attach to that

[1] Leib vs. Stribling, 51 Md. 285, 289.

[2] U. S. vs. Stowell, 133 U. S. 17.

[3] *Ante*, secs. 31, 93.

[4] Richmond vs. Irons, 121 U. S. 27, 28, 52, 55. *Contra*, Hall vs. Ridgely, 33 Md. 308, 310.

[5] *Ante*, sec. 167.

[6] Hammond vs. Warfield, 2 H. & J. 158.

[7] Long, 62 Md. 33, 66; Warner vs. Sprigg, 62 Md. 14, 21; Keplinger vs. Maccubbin, 58 Md. 203, 208; Pitney vs. Everson, 42 N. J. Eq. 361.

capacity in which of right the subject ought to be held,[1] or the act performed.[2] Of this doctrine, analogous to retainer or transfer by operation of law, the most interesting practical result to sureties on the official bonds of a defaulter holding these double capacities, is the release of one set of sureties at the expense of the other, or at the expense of *cestuis que trust*, if unsecured.[3] The origin of the doctrine, which is well settled at law as well as in equity, is distinctly attributed to the maxim that equity regards that as done which of right ought to be done.[4] A trustee, holding a double capacity, cannot act ambiguously and afterwards take advantage of the doubt, and claim that he acted not as trustee, but in some other character.[5]

§ 213. **Other instances.** From the same maxim obviously follows the rule which regards that as done *at the time* at which it ought to have been done. Thus, trustees will be charged with inter-

[1] Hanson vs. Worthington, 12 Md. 418; Carson vs. Phelps, 40 Md. 73, 98; Kirby vs. State, 51 Md. 383; Flickinger vs. Hull, 5 Gill. 60; Cavender, 114 U. S. 464, 472.

[2] State vs. Cheston, 51 Md. 352, 380; Wall vs. Bissell, 125 U. S. 382, 393; Bank vs. Murch, 23 Ch. D. 138; Corser vs. Cartwright, L. R. 7 H. L. 731.

[3] State vs. Cheston, 51 Md. 352, and cases cited.

[4] Watkins vs. State, 2 G. & J. 220, 226; Young vs. Thrasher, 48 Mo. App. 327, 337, in which case the court held that the doctrine as to executors holding the twofold capacity of creditor and debtor, was abolished in Missouri by statute. As to retainer in Maryland, see Art. 93, sec. 96.

[5] Carson vs. Phelps, 40 Md. 73, 98; Wooden vs. Kerr, 91 Mich. 188, 197; Lyell vs. Kennedy, 14 App. Ca. 437, 460.

est from the time at which it was their duty to invest, although no interest may have been actually received.[1] Property will be considered as converted from the time when it ought to have been converted.[2] A mortgaged railroad company is liable to account to its trustees for its earnings from the time a surrender of possession ought to have been made on proper demand.[3] An amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made.[4]

Reference has already been made to the rule that a court of equity will ratify that, when done, which it would have ordered to be done.[5]

An implied promise is a fiction which the law raises to express the equity of a situation. It is a promise which, though not made, ought to have been made.[6]

§ 214. **Qualification.** This maxim is not universally true. In cases depending on contract, it applies only in favor of parties entitled to enforce the contract, or those in privity with them, and not to mere volunteers or strangers.[7] It is never applied to the prejudice of innocent parties who have acquired in-

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[1] Evans vs. Iglehart, 6 G. & J. 172, 187, 8.

[2] Keller vs. Harper, 64 Md. 74, 82.

[3] Daw vs. Railroad Co., 124 U. S., 652.

[4] Reynolds vs. Stockton, 140 U. S. 254, 266 (*obiter*).

[5] *Ante*, sec. 180; Cheney vs. Roodhouse, 135 Ill. 265.

[6] Glenn vs. Garth, 133 N. Y. 43.

[7] Chetwynd vs. Morgan, 31 Ch. D. 596; Redfield vs. Parks, 132 U. S. 239, 247, 248.

tervening rights,[1] and operates only in favor of one who holds an equitable right to have the thing done, as against the one upon whom the duty of doing the thing has devolved.[2]

§ 215. **Probable origin.** Reference has been made to the obscure origin of maxims. Most of them, doubtless, have gradually expanded from slender beginnings. The exigencies of some special case may have suggested a solution of a difficulty, which happened to fit other difficulties occurring under widely different circumstances. We have very probably an example of this before us. In the Institutes of Justinian we find laid down a special rule, applicable in terms only to the particular case of suretyship. *Quodcunque scriptum sit quasi actum, videatur etiam actum.* "It is a general rule in all fide-jussorial stipulations, (contracts of surety-ship) that whatever is alleged in writing to have been done, is presumed to have been actually done. Therefore, if a man in writing confesses that he has become a *fide-jussor*, it is presumed that the necessary forms were observed."[3]

Without having at hand the means of tracing the successive stages of development, it is easy to find in this narrow rule applicable in terms only to the special case of suretyship, the embryo of the broad principle referred to.

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[1] Bowie vs. Berry, 3 Md. Ch. 359, 362; Farmers' Bank vs. Markell, 3 Gill. 448; Casey vs. Cavaroc, 96 U. S. 467, 491.

[2] Waterman vs. Alden, 42 Ill. App. 295, 310.

[3] Inst. iii, 21, 8; Cooper's Justinian, 269.

§ 216. **IV. Equity imputes an intention to fulfill an obligation.**[1]

Bearing in mind what has just been said in the preceding section, we now come to a maxim which has not as yet been generally recognized as advanced beyond the rudimentary stage of a special rule, applicable only to one or two doctrines of second rate importance. A recent English writer, finding few citations to refer to, takes rather abrupt leave of it "as one of the more refined doctrines of equity."[2] It seems as yet to be in the infancy of its development. Further on, its opportunities for usefulness will be indicated, and it will perhaps be conceded that the maxim has the "potency and the promise" of being a considerable factor in the equity jurisprudence of the future. In the mean time, brief reference must first be made to the two minor doctrines referred to.

§ 217. **Performance and satisfaction.** The doctrine first named has no connection with the doctrine of "specific performance," and is of little or no practical importance in this country.[3] It has been applied in England principally to covenants in marriage settlements. In respect to such and similar obligations, the rule has been established, that where a party is bound to do an act, and he does one capable of being construed to have been done in fulfill-

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[1] 1 Pom. Eq. Jur., sec. 420; Bisp. Pr. Eq., sec. 46.
[2] Chute, Eq. 29.
[3] Bisp. Pr. Eq. sec. 537.

ment of his obligation, it will be construed as a performance, either in whole or in part, according to its extent.[1]

The doctrine of satisfaction applies where a gift or legacy is made with the intention, express or implied, that it is to be an extinguishment of some existing right or claim of the donee. It arises generally under one of the two following states of fact: First, when a parent, or person *in loco parentis*, makes a double provision for a child; second, when a debtor confers, by will or otherwise, a pecuniary benefit on his creditor.[2] In the case of the parental relation, the double provision may be a legacy and a subsequent advancement,[3] or it may be a promise and a subsequent legacy.[4] In either case, the ordinary presumption is, that the prior obligation, whether legacy or promise, is extinguished by the subsequent advancement or subsequent legacy, or in other words, that the subsequent advancement or legacy is in satisfaction of the obligation. The intention is imputed to the parent, or to the person standing *in loco parentis*, to fulfil the moral obligation of providing for the child, but not at the expense of other children.[5] The imputed intent may, however, be rebutted by proof,

[1] Wilcocks vs. Wilcocks, 2 Vernon, 558; Blandy vs. Widmore, 1 P. Wms. 323; 2 Lea Ca. in Eq. 415, 833; 2 Spence Eq. 204; Smith's Man. Eq. 28; Bisp. Pr. Eq. sec. 535.

[2] Haynes' Outlines, 291 ; 2 Sto. Eq. Jur. sec. 1099.

[3] Wallace vs. DuBois, 65 Md. 153.

[4] Smith vs. Darby, 39 Md. 268, 279.

[5] Haynes Outlines, 292; *Ante*, sec. 189, where the effect of this maxim acting in combination with others is noticed.

either direct or circumstantial, of an actual intent to the contrary.[1]

Considering the limited scope and subordinate importance of these doctrines of performance and satisfaction, and the easily rebuttable character of the presumption of intent, it may be said that a rule, whose only office it was to serve as handmaid to such doctrines, could show no title to a place among the general maxims of equity.

§ 218. **Resulting trust.** A much broader significance has been attributed to the principle by Prof. Pomeroy, who discerns in it the basis for at least one class of resulting trusts, where a fiduciary buys property in his own name but with trust funds. In such case, an honest intention is imputed to the trustee of fulfilling his fiduciary obligation, which is to hold the property in trust for the real owner, rather than the intention to perpetrate a fraud.[2]

Another case of resulting trust is subject to the application of the principle of imputed intent, and that is when a trustee mingles the trust money with his own. Where a trustee improperly deposits trust funds in his own private account, and afterwards checks out various sums in the ordinary manner, the principle referred to will be applied rather than the general rule which attributes the first drawings out to the first deposits, and the trustee will be taken to

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[1]Smith vs. Darby, 39 Md. 268, 279; Hall, 107 Mo. 101; Watson vs. Murray, 54 Ark. 499.

[2]1 Pom. Eq. Jur., sec. 422.

have intended using his own money rather than the trust money which he had no right to use.[1]

§ 219. **Other applications.** In its broader and more useful application, this maxim is closely related to the two preceding ones, the object of the whole group, shortly stated, being to enforce fair play. Taken in this more comprehensive significance, the maxim now under consideration is the basis of the rule, in the case of an act capable of two constructions, that an honest, rather than a dishonest, intention, should be attributed, whenever the circumstances admit of such a presumption. The same rule may be stated in other terms: When a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongfully.[2]

Thus broadly stated by Sir George Jessel, M. R., the rule is shown to be of universal application, and not peculiar to equity. (Certainly, not one of its "more refined doctrines.") Thus, a man who has a right of entry, cannot say he committed a trespass in entering. A man who sells the goods of another as agent, cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. One who grants a loan, believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say that he did not grant

[1]Knatchbull vs. Hallet, 13 Ch. D., 696, 727, 743; Englar vs. Offutt, 70 Md. 78, 86; Central Bank vs. Ins. Co., 104 U. S. 54.

[2]Knatchbull vs. Hallet, *supra*.

it under the power. Whenever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. And it is upon this principle, as before stated, that a trustee who has blended trust monies with his own, cannot be heard to say that he took away the trust money when he had a right to take away his own money.[1]

Perhaps no maxim of equity has been so little quoted in decisions,[2] or so meagerly treated by the majority of text writers.[3] Instances may readily be found, however, where the principle has been impliedly acted on, generally in connection with the two other maxims of the same group. Thus, the city of New Orleans being indebted for public works, issued bonds to a larger amount, but without specifying that they were issued in discharge of such debt. The bonds were held to have substantially extinguished the debt. The court in so holding, quoted the maxim, "equity looks beyond the form to the substance of things." An examination of the case will show that the maxims—"equity regards that as done which ought to be done," and, "equity imputes an intent to fulfill an obligation," are also applicable, although not expressly referred to.[4]

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[1]Knatchbull vs. Hallet. 13 Ch. D. 696.

[2]Hawes vs. Chaille, 129 Ind. 435, 438. For an unsuccessful attempt to have it recognized, see Edes vs. Garey, 46 Md. 27, 28.

[3]It is significant of advance that the latest text-book upon the general subject gives special prominence to its bearing upon resulting trust. 1 Beach, Mod. Eq. Jur. sec. 24.

[4]Peake vs. New Orleans, 139 U. S. 342, 356-9.

CHAPTER XIII.

ENABLING MAXIMS (II).

220. Enabling remedial maxims.
221. **V. Equity acts in personam.**
222. And thus acts beyond the jurisdiction.
223. Qualification.
224. **VI. Equity acts specifically.**
225. Specific performance.
226. Accident—re-execution.
227. Mistake—reformation—cancellation.
228. **VII. Equity prevents multiplicity of suits.**
229. Influence upon procedure.
230. A ground of equity jurisdiction.
231. A factor in law reform.
232. **VIII. Equality is equity.**
233. Applications.
234. Qualification.
235. A factor in law reform.

§ 220. **Enabling remedial maxims.** Up to this point we have been dealing principally with primary maxims, or maxims which enable the creation of equitable rights. We come now to a group of three remedial maxims, or maxims which assume the existence of the equitable right, and enable the enforcement of the right by indicating the direction of remedy, not in detail, but in general scope and effect. They will now be considered in the order of importance.

§ 221. **Equity acts in personam.**[1] By a recent English author, this maxim is ranked first in importance. To its action upon conscience he ascribes the doctrines of trust, fraud, accident and mistake, and the three maxims, classed hereinafter as the last three restrictive maxims, which he thus makes derivative and subordinate.[2] Historically, this is a correct view, and coincides substantially with that herein presented.[3] Practically, and from the modern standpoint, the maxim may be now regarded as dealing exclusively with remedies. It is not necessary to repeat what has already been stated as to the historical source of the maxim.[4] It has been seen that it emphasizes a marked distinction between the methods of law and equity. A common-law court lays no command upon the defendant, personally, but issues a writ of execution directed to the sheriff, commanding him to put the plaintiff in possession of the property in controversy, or, in case of a judgment for debt or damages, commanding him to seize the defendant's property.[5] Equity acts upon the *conscience* of the defendant, imposes upon him personally a personal obligation, and enforces obedience against his person by attachment for contempt, in other words, by fine and imprisonment.[6]

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[1] 1 Pom. Eq. Jur., sec. 428; Bisp. Pr. Eq., sec. 47.

[2] Smith (H. A.), Pr. E. 10–15.

[3] *Ante*, sec. 8.

[4] *Ante*, sec. 7.

[5] Adams' Eq. Intro. 35; Lang, Eq. Pl. sec. 40.

[6] *Ante*, secs. 48, 84; Earl of Oxford's Case, 2 Lea. Ca. in Eq. 601; 2 Dan. Ch. P. 1031; Langdon vs. Sherwood, 124 U. S. 81; Jenkins vs. Jackson, 40 Ch. D. 77; Clements vs. Tillman, 79 Ga. 451.

§ 222. **And thus acts beyond the jurisdiction.** The present practical importance of this maxim is that by it the arm of equity is made long enough to reach property and even control legal proceedings, *beyond the jurisdiction of the state.*[1] "Courts of equity are courts of conscience, operating *in personam* and not *in rem,* and in the exercise of this personal jurisdiction compel the performance of contracts and trusts as to subjects that are not either locally, or *ratione domicilii,* within their jurisdiction."[2] A party may be compelled to convey land situated abroad,[3] although the conveyance must be according to the law of the foreign country, and must be sent there for record.[4] The court may decree the re-execution of a lost deed of land outside the state.[5] If the mortgagors and trustees of a railroad mortgage in default are all within the jurisdiction of the court, it may order a sale of the entire road, although part thereof is outside its jurisdiction.[6] A party may be enjoined from prosecuting a suit abroad,[7] for a court

[1]Penn vs. Lord Baltimore, 1 Vesey, 444, 2 Lea Ca. in Eq. 767; Morton vs. Grafflin, 68 Md. 566; Keyser vs. Rice, 47 Md. 211, 213; White vs. White, 7 G. & J. 208, Brantley's note; Carpenter vs. Strange, 141 U. S. 105; Cole vs. Cunningham, 133 U. S. 107; Muller vs. Dow, 94, U. S. 440; Snook vs. Snetzer, 25 Oh. St. 516; Procter vs. Bank, 152 Mass. 223; Wilson vs. Joseph, 107 Ind. 490; Allen vs. Buchanan (Ala.), 11 So. Rep. 803; Thorndike, 42 Ill. App. 491.

[2]Selbourne, L. Ch. in Ewing vs. Orr, 9 App. Ca. 34, 40.

[3]McQuery vs. Gilliland, 89 Ky. 434.

[4]Adams vs. Messinger, 147 Mass. 191.

[5]King vs. Pillow, 90 Tenn. 287; Pillow vs. King, 55 Ark. 633.

[6]Muller vs. Dows, 94 U. S. 444; McElrath vs. Railroad, 55 Pa. 189.

[7]Hutton, 40 N. J. Eq. 461.

of equity does not set aside or annul a judgment at law, but simply enjoins the plaintiff.[1] Such injunctions especially lie to restrain residents of the state, in evasion of its exemption or insolvent laws, from attachment proceedings in other states.[2]

In order that such far-reaching effect may be given to the decree, the defendant must be personally within the jurisdiction of the court, by service of process within the state, or by voluntary appearance, and constructive notice by publication has no effect outside the limits of the state.[3]

Although a court of equity, acting *in personam*, may decree the conveyance of land in another state, and enforce the decree by process against the defendant, yet neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the state.[4] Hence a foreclosure in one state of a mortgage upon land in another, is of no validity in the latter,[5] nor a decree of partition.[6] And in general, a decree cannot operate *ex proprio vigore* upon land in another jurisdiction, either to create, transfer or vest a title.[7]

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[1]Given 121 Pa. 265.

[2]Keyser vs. Rice, 47 Md. 203; Cole vs. Cunningham, 133 U. S. 107.

[3]*Ante*, sec. 29; Worthington vs. Lee, 61 Md. 542; Hart vs. Sansom, 110 U. S. 151.

[4]Watkins vs. Holman, 16 Peters, 25.

[5]Farmers vs. Postal, 55 Conn, 334; Burgess vs. Souther, 15 R. I. 202.

[6]Poindexter vs. Burwell, 82 Va. 507; Wimer, 82 Va. 890.

[7]Lindley vs. O'Reilly, 50 N. J. Law. 636, 640; Carpenter vs. Strange, 141 U. S. 87, 106.

§ 223. **Qualification.** It must not be understood that equity does not protect rights *in rem*, or that it interferes to enforce all personal rights. On the contrary, it will shortly be seen that equity deals with specific and identified land or specific funds. The subject of its jurisdiction is property, and not persons.[1] And when the *res* lies within the jurisdiction, although the owner may be non-resident, the court is now enabled by statute to enforce rights concerning it.[2] Modern legislation has, in other ways, abridged the scope of the maxim that equity acts *in personam*. Decrees for the payment of money are now upon the same footing as judgments, with respect to their enforcement.[3] Decrees for sale are carried into effect by the appointment of trustees, and whenever a decree directs a conveyance, the decree itself has the same effect that the deed would, if executed.[4] A decree of divorce is a decree *in rem*, so far as the main object is concerned. The enforcement of a defendant's appearance and answer by personal coercion, is still theoretically possible, but it has been practically superseded by means already explained.[5] For violation of injunctions and other specific orders, the remedy is still *in personam*.[6]

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[1] 1 Pom. Eq. Jur. sec. 429.
[2] *Ante*, sec. 29.
[3] *Ante*, sec. 84.
[4] *Ante*, sec. 85.
[5] *Ante*, sec. 48.
[6] *Ante*, sec. 84.

§ 224. **VI. Equity acts specifically.** Much that might be said under this title has been anticipated.[1] Another contrast between the *rationale* of law and that of equity is here sharply defined. The only actions by which specific property can be recovered at law are ejectment and replevin. In ejectment, the only result originally was a judgment for damages, but afterwards specific restitution was given in imitation of equitable relief.[2] In replevin, specific relief might be defeated by the defendant giving a *retorno habendo* bond, upon which the property must be restored to him, and the plaintiff's claim converted into an action for damages.[3] For breach of contract to convey land, the law gives compensation in damages, a remedy in many cases wholly inadequate or incapable of ascertainment.

The method of equity is the reverse of this. Its object is, in all cases of injury, to restore the plaintiff to the exact position, so far as practicable, that he would have occupied if the wrong had not taken place.

§ 225. **Specific performance.** Equity enforces the specific performance of contracts to convey land, and thus places the party in possession of the very

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[1] *Ante*, secs. 7, 8.

[2] 3 Bl. Com. 200.

[3] Gough vs. Crane, 3 Md. Ch. 120, 137. But now, by 1888 ch. 269, the court has power to enforce delivery of chattels eloigned by attachment of the person. Md. Code, Art. 75, sec. 111. This, of course, is also an imitation of equitable process. The legal remedy of mandamus is also specific, sec. 98.

subject.[1] It enforces also specific performance of contracts with respect to articles of personal property possessing some peculiar quality which cannot enter into the legal estimate of compensation,[2] or where the legal remedy is for any other reason inadequate.[3] Advancing upon the same line, it has gone so far as to specifically enforce contracts for personal services of a peculiar character, by injunction restraining their breach.[4] As already stated, time is not in general of the essence of the contract,[5] and the right to enforce specific performance is not lost by a failure to pay the money on the appointed day.[6] If, by the terms of the contract, notice of the intention to purchase is required, the failure to give such express notice will not bar relief, if notice is sufficiently indicated by acts and conduct.[7] But in matter of substance, the plaintiff must show performance of the contract or readiness to perform on his own part.[8] He must be able to make a good, and not a doubtful

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[1]Moale vs. Buchanan, 11 G. & J. 314, Brantly's note; Bisp. Pr. Eq. sec. 29, 361.

[2]Equitable vs. Coal Co., 63 Md. 285, 300; McAndrew vs. Bassett, 33 Ch. D. 561, 562.

[3]Gottschalk vs. Stein. 69 Md. 51; Southern Exp. Co. vs. Western, 99 U. S. 191.

[4]*Ante*, sec. 102.

[5]Beck vs. Colorado Co., 10 U. S. App. 465.

[6]Wilson vs. Herbert, 76 Md. 489; Cheney vs. Libby, 134 U. S. 68.

[7]*Ibid.*

[8]Carswell vs. Welch, 70 Md. 504; Penn vs. McCullough, 76 Md. 229; Walsh vs. Preston, 109 U. S. 297; Holgate vs. Eaton, 116 U. S. 33; Cheney vs. Libby, 134 U. S. 68.

title,[1] but objections to the title, in order to prevail must be well grounded.[2] The plaintiff must make out his case by clear and satisfactory proof,[3] and reasonable certainty is required as to the subject matter of the contract, but the description is sufficient if it identifies the property.[4] A court of equity will not enforce an unconscionable bargain,[5] but if the contract was fair at the time it was made, it will not be judged in the light of subsequent events.[6] A perpetual contract will not be enforced, for the court cannot undertake an endless duty.[7]

It is not necessary to repeat the suggestions already offered as to the analogies and distinctions between specific performance and injunction.[8] It will only be added that both remedies illustrate this and the preceding maxim, and that in their application these maxims combine with others.

§ 226. **Accident—re-execution.** In case of accident, as the loss of a note, bond or deed, accompanied by such circumstances as call for equitable

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[1]Kraft vs. Egan, 76 Md. 243; Bryant vs. Wilson, 71 Md. 440; Newbold vs. Peabody Co. 70 Md. 493.

[2]Seldner vs. McCreary, 75 Md. 287; Small vs. Marburg, 77 Md. 11.

[3]Dalzell vs. Dueber, 149 U. S. 315; Penn. vs. McCullough, 76 Md. 229; Semmes vs. Worthington, 38 Md. 298.

[4]Kraft vs. Egan, 76 Md. 243; Preston, 95 U. S. 200.

[5]Pope Mfg. Co. vs. Gormully, 144 U. S. 224; Jencks vs. Quidnicks, 135 U. S. 457; Mississippi R. R. vs. Cromwell, 91 U. S. 643.

[6]Franklin Co. vs. Harrison, 145 U. S. 459; Brewer vs. Herbert, 30 Md. 301.

[7]Texas R. R. vs. Marshall, 136 U. S. 393.

[8]*Ante*, sec. 97.

relief, such relief will be specific; that is, it will place the party, so far as practicable, in the same position he would have occupied had the loss not been sustained. Re-execution of the lost instrument will, if necessary, be decreed, and, in addition, further relief may be administered by directing a performance on the part of the defendant of the specific duty for which he was bound thereby.[1]

§ 227. **Mistake—reformation and rescission.**[2] When there has been a mistake in a written instrument, and the mistake is merely one of expression, or in terms, such as an inadvertence or omission of the scrivener, equity will act specifically in reforming (correcting, rectifying,) the instrument, so as to place both parties in the position they would have occupied, had the instrument been correctly drawn.[3]

To warrant the remedy of reformation the mistake must have been mutual, or, if unilateral, the mistake must have been induced by some act or omission of the defendant.[4] The mistake, also, if not admitted, must be established by clear and satisfactory proof,[5]

[1]Bisph. Pr. Eq. sec 467; Ches. & O. vs. Blair, 45 Md. 102.

[2]Wood vs. Patterson, 4 Md. Ch. 335, Brantly's note.

[3]Bisph Pr. Eq. sec. 190, 469; Popplein vs. Foley, 61 Md. 381; Coale vs. Merryman, 35 Md. 382; Cooke vs. Husbands, 11 Md. 492; Bond vs. Dorsey, 65 Md. 310; Wasatch vs. Crescent, 148 U. S. 293.

[4]Dulany vs. Rogers, 50 Md. 524, 533; Atlantic Co. vs. Maryland Co., 62 Md. 135, 142; Ben Franklin Ins. Co. vs. Gillett, 54 Md. 212; Delaware Ins. Co. vs. Gillett, 54 Md. 219.

[5]Farmville Ins. Co. vs. Butler, 55 Md. 233, 237; Mendenhall vs. Steckel, 47 Md. 453, 465; McDonnell vs. Milholland, 48 Md. 540; Stiles vs. Willis, 66 Md. 552.

as well as the precise form and import of the instrument intended.[1]

For a fundamental mistake, or a mistake in the subject matter itself, the remedy is rescission or cancellation, whether the mistake be of one or both parties.[2]

In cases of mistake the specific remedy of injunction is also applied, when appropriate.[3]

The equities of specific performance, re-execution, reformation, rescission, cancellation, injunction and the like, are all, of course, subject to the various defences arising under the restrictive maxims.

§ 228. **VII. Equity prevents multiplicity of suits.** Although restrictive in form, and in some of its minor applications, this is a powerful enabling maxim, in substance and effect. While its influence is felt throughout the entire system, it is especially active in equity procedure. Like the two preceding maxims, (equity acts *in personam* and specifically)—it deals with remedies rather than with rights. It has been already so often referred to that little remains to be said, except in the way of recapitulation.

§ 229. **Influence upon procedure.** Upon this broad principle is based the rule as to parties in

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[1]Keedy vs. Nally, 63 Md. 311; Milligan vs. Pleasants, 74 Md. 8; Second Nat. Bank vs. Wrightson, 63 Md. 81, 84; Bond vs. Dorsey, 65 Md. 310.

[2]Keating vs. Price, 58 Md. 532; Hunting vs. Walter, 33 Md. 60.

[3]Weikel vs. Cate, 58 Md. 105; Hartsock vs. Russel, 52 Md. 619.

equity suits, according to all the authorities.[1] The more general form of the rule, as hereinbefore stated,[2] involves the doctrine of representation, and the statutory doctrine of constructive parties, devices by means of which a multitude of separate suits, carried on in different places, may be conveniently forestalled and drawn into the compass of a single proceeding. It has also been seen to be the basis of the rules of practice as to the election of remedies,[3] and the consolidation of cases.[4] The converse of consolidation, known as the splitting of causes of action, is forbidden upon the same principle.[5] The plea of a pending suit is an obvious instance of its practical application,[6] and the cross-bill is another.[7] The defence of set-off is referred to the same principle,[8] and the third jurisdictional rule, (as to retaining jurisdiction for complete relief),[9] is simply a mode or a special case of this maxim.[10]

In several of the foregoing instances the maxim is used defensively, but its general enabling char-

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[1] *Ante*, secs. 23, 24.

[2] *Ante*, sec. 27.

[3] *Ante*, sec. 120.

[4] *Ante*, sec. 119.

[5] Sto. Eq. Pl. sec. 287; Hayden vs. Phillips, 89 Ky. 5; Roby vs. Eggers, 130 Ind. 415; Robbins vs. Conley, 47 Mo. App. 502.

[6] *Ante*, sec. 62; Chickering, 56 Vt. 92.

[7] Mannix vs. Purcell, 46 Ohio St. 102, 150.

[8] Bryant vs. Sweetland, 48 Ohio St. 194, 208.

[9] *Ante*, sec. 179.

[10] McGean vs. Railroad, 133 N. Y. 16; McKeesick vs. Seymour, 48 Minn. 158, 170; Lancy vs. Randlett, 80 Maine, 170, 175; School Directors' case, 135 Ill. 465.

acter appears as well from the main trend of its affirmative movement in procedure, as also, and more especially, from the two functions to be now mentioned.

§ 230. **A ground of equity jurisdiction.** The prevention of a multiplicity of suits enables a distinct and substantive ground of equitable jurisdiction in cases of discovery,[1] account[2] and contribution.[3] It also forms the sole basis of the remedial jurisdiction of equity in a large class of cases wherein the jurisdiction is wholly attributable to the inadequacy, rather than to the absence, of legal remedy. A court of equity will take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction may call for the adjudication of purely legal rights and confer purely legal relief.[4] The great instrument by which the principle is practically operated is the writ of injunction for the purpose of restraining unnecessary or vexatious litigation. Common instances are bills of interpleader, bills of peace, and bills *quia timet*.[5] Besides these well defined classes, there is a large and miscellaneous category of torts, trespasses and nuisances, cases, in a single instance of which, equity would have no cognizance, but where the injury is one of

[1] Snowden vs. Dispensary, 60 Md. 85.

[2] Bisph. Pr. Eq. sec. 484; Sto. Eq. Jur. sec. 457; Reynes vs. Dumont, 130 U. S. 354, 394.

[3] Bisph. Pr. Eq. sec. 329.

[4] Preteca vs. Maxwell, 4 U. S. App. 326.

[5] *Ante*, sec. 100.

repetition or continuance, and its redress at law could only be obtained by multiplicity of litigation, the inadequacy of such remedy to afford complete relief furnishes an independent ground of jurisdiction.[1] In the Mississippi case last cited, the parties were rival corporations in making cotton-seed oil, and the defendant was charged with sharp practice in getting hold of the empty sacks distributed by the plaintiff among its customers for the reception of material. Here a separate legal remedy for each tort might have been had, but the legal remedy would be inadequate to relieve the plaintiff against the vexation of bringing numerous small suits, and the defendant was accordingly restrained by injunction.

§ 231. **A factor in law reform.** The efficiency of this maxim is to be especially remarked in connection with recent law reforms. By the Judicature Act of 1873, the English courts are expressly required to grant remedies so that "all multiplicity of legal proceedings" may be avoided; and the main object of the reformed procedure, in both countries, is "to enable the parties to a suit to obtain in that suit, and without the necessity of resorting to another court, all remedies to which they are entitled in respect of

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[1] Lembeck vs. Nye, 47 Ohio St. 336; Canfield vs. Andrew, 54 Vermont, 1, 12; Adams vs. Manning, 48 Conn. 477; Audriessen's Appeal, 123 Pa. 303, 328; Lippincott vs. Barton, 42 N. J. Eq. 272; Beck vs. Beck, 43 N. J. Eq. 39, 44; Beecher vs. Lewis, 84 Va. 630, 633; Kavanagh vs. Railroad, 78 Ga. 271, 273; Mayer vs. Coley, 80 Ga. 207; Thompson vs. Sheppard, 85 Ala. 611, 618; Mills vs. Seed Company, 65 Miss. 391.

any legal or equitable claim or defence properly advanced by them, so as to avoid a multiplicity of legal proceedings.'"[1] The recent legislation in Maryland conferring equity powers upon law courts in certain cases already mentioned, is another instance in point.[2]

§ 232. VIII. **Equality is equity.**[3] This is the last of the enabling maxims, designedly so placed from the fact that its aggressive quality is the least pronounced of any of them, and that it may sometimes be used defensively. It might, indeed, be assigned to a class by itself, under the name of the administrative maxim. It does not enable the creation of any substantive equitable title, but it resembles the primary maxims in giving rise to important adjustive equities. Its active agency as a potent and progressive instrument of *law reform* is the positive feature that especially classifies it with the enabling maxims. No fundamental principle is broader in its scope, more characteristic of the genius of equity, or more universally pervasive of its jurisprudence.

§ 233. **Applications.** The more frequent occasions for its practical application are to creditors' bills,[4]

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[1] Morg. Ch. Act, 257; 12 App. Ca. 306, cited *ante*, sec. 137. Note here the combination of this with the third enabling maxim, to produce the result in question.

[2] *Ante*, sec. 164.

[3] Bisph. Pr. Eq. sec. 41; 1 Pom. Eq. Jur. sec. 405; Sm. Pr. Eq. 487; Co. Litt. 24*b;* 66 Md. Natl. Bank vs. Lanahan, 469; 61 Md., Dilley vs. Love, 605; Richmond vs. Irons, 121 U. S. 44.

[4] *Ante*, sec. 31; Bisph. Pr. Eq. secs. 525, 528; 3 Pom. Eq. Jur. sec. 1415; Swan vs. Dent, 2 Md. Ch. 111, Brantly's note; Hammond, 2

and administration suits,[1] to proceedings in insolvency,[2] to bills for an account of partnership,[3] or other transactions between creditors and debtors or their sureties,[4] or to foreclose mortgages and enforce liens.[5] In all cases of distribution of insolvent estates the apportionment among creditors is made *pro rata* upon the principle of equality. Upon the same principle, contribution will be enforced among joint debtors and co-sureties,[6] and also the marshaling, where

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Bland 306, note; Brian vs. Thomas, 63 Md. 476; Bannon vs. Lloyd, 64 Md. 48; Christopher, 64 Md. 583, 588; Natl. Bank vs. Lanahan, 66 Md. 461, 2, Morton vs. Grafflin, 68 Md. 544, 563, 566; Balls, 69 Md. 388; Balls vs. Dampman, 69 Md. 391; Jackson vs. Wilson, 76 Md. 567; Kennedy vs. Creswell, 101 U. S. 641, 646; Walker vs. Powers, 104 U. S. 245; Johnson vs. Waters, 111 U. S. 641, 674; Richmond vs. Irons, 121 U. S. 27, 44; Brown vs. Lake, 134 U. S. 530.

[1]Bisph. Pr. Eq. sec. 528; 3 Pom. Eq. Jur. sec. 1152; Barnes vs. Crain, 8 Gill. 391, Brantly's note; Woods vs. Fuller, 61 Md. 457; State vs. Dilley, 64 Md. 314; Board vs. Columbia College, 17 Wall, 521, 530.

[2]Riley vs. Carter, 76 Md. 581; Cross vs. Hecker, 75 Md. 574; Gottschalk vs. Smith, 74 Md. 560; Buschman vs. Hanna, 72 Md. 1; Brown vs. Smart, 69 Md. 320; Natl. Bank vs. Lanahan, 66 Md. 461, 469; Pinckney vs. Lanahan, 62 Md. 448; Castleburg vs. Wheeler, 68 Md. 266; Baker vs. Kunkel, 70 Md. 392.

[3]Bisph. Pr. Eq. sec. 505; Fleischman vs. Gottschalk, 70 Md. 523; Holloway vs. Turner, 61 Md. 217; Rhodes vs. Amsinck, 38 Md. 345, 355, 6.

[4]Orem vs. Wrightson, 51 Md. 34; Schaeffer vs. Bond, 72 Md. 501.

[5]Johnson vs. Hambleton, 52 Md. 378; Md. Brick Co. vs. Spilman, 76 Md. 337.

[6]Bisph. Pr. Eq. sec. 328; Lusby vs. Carr, 60 Md. 192; Burger vs. Greif, 55 Md. 518; Ramskill vs. Edwards, 31 Ch. D. 109; Wolmershausen v. Gullick (1893), 2 Ch. 514.

necessary, of assets,[1] and securities.[2] When the estate of a testator is inadequate to pay the legacies in full, abatement is made *pro rata*, and the same rule of equality governs in applying the statutory provisions as to advancement,[3] and the analogous doctrine in regard to the ademption of legacies.[4]

§ 234. **Qualification.** This maxim is not to be understood as interfering with the diligent pursuit of their legal right by creditors in obtaining liens by judgment, execution, attachment, or mechanics' lien, or a voluntary preference by *bona fide* assignment, mortgage, pledge, or other security, subject to the restrictions of the insolvent system, or of the bankrupt laws, when such are in force. Herein equity follows the law. Nor does it even prevent the active intervention of equity to aid creditors in perfecting liens, although formally defective, and therefore legally insufficient, when otherwise meritorious and founded on valuable consideration.[5] Herein equity assists and supplements the law.

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[1]Bisph. Pr. Eq. sec. 344; Price vs. Hobbs, 47 Md. 359, 384; Addison, 44 Md. 183, 202.

[2]Bisph. Pr. Eq. sec. 340; Morton vs. Grafflin, 68 Md. 545, 561; Dirks vs. Humbird, 54 Md. 399; Hall vs. Bank, 53 Md. 120, 124; Leib vs. Stribling, 51 Md. 285; Post vs. Mackall, 3 Bland, 486; Woolen vs. Hillen, 9 Gill. 186, note C.

[3]Md. Code, Art. 46, sec. 31; art. 93, sec. 125; Dilley vs. Love, 61 Md. 603.

[4]*Ante*, sec. 189.

[5]But although equity will aid in making an *execution* effective, (Harris vs. Alcock, 10 G. & J. 227, Br. note *f*,) it will not help an imperfect *attachment*, that being a special and statutory proceeding. Morton vs. Grafflin, 68 Md. 563–5.

§ 235. **Law reforms.**

There has been no more active agency than the maxim in question in promoting reforms embodied in statutes and constitutions. Besides being the basis, as already suggested, of bankrupt and insolvent systems, there is a numerous category of reforms in the law so plainly attributable to the principle of equality that they may be allowed to speak for themselves.

1. Abolition of primogeniture, and equal division of an inheritance.
2. Placing real and personal assets on same footing for payment of debts.
3. Abolition of distinction between different classes of debts as to distribution.
4. Reversing the common law presumption in favor of joint tenancy, and the *jus accrescendi.*
5. Equality of taxation.
6. Equality of representation.
7. Removing disabilities of coverture.
8. Removing disabilities of race and color.

CHAPTER XIV.

RESTRICTIVE MAXIMS.

236. In general.
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266. Elements of laches.
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§ 236. **In general.** Of the six restrictive maxims given below, the first operates to prevent the creation of distinctively equitable *rights*, and is therefore primary. The other five mainly operate to prevent their enforcement by the appropriate equitable *remedies*, and are, therefore, generally, remedial, in the broad sense of *relating* to the remedy; more correctly anti-remedial. The first is restrictive as to the *sphere* of equity, the other five as to the exercise of the *power* within its sphere. As these latter, and especially the last group of three, are by far the most important, and of the most frequent application in practice; and as they presuppose the *prima facie* existence of the equity which it is their office to defeat in the particular case, by reason of its special circumstances, the philosophy of the restrictive maxims may be called the *statics* of equity. They are constantly invoked by defendants, and by plaintiffs occupying a defensive position.[1]

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[1] As in Clay vs. Freeman, 118 U. S. 97, 108; Brown vs. Lake, 134 U. S. 530; Boon vs. Kent, 42 N. J. Eq. 135; Thomas vs. Brownville R. R. Co. 109 U. S. 522, 526, 7; Carter vs. Dennison, 7 Gill, 157, 174–176; Ridgely vs. Bond, 18 Md. 436, 451; Baumgartner vs. Haas, 68 Md. 32, 38; Md. Code, Art. 16, sec. 161.

Following is the table of the restrictive maxims as herein classified and arranged:

I. *Æquitas sequitur legem.*
II. Between equal equities, law prevails.
III. Between equal equities, priority of time prevails.
IV. Who seeks, must do, equity.
V. Who seeks equity must come with clean hands.
VI. *Vigilantibus non dormientibus æquitas subvenit.*

§ 237. **Æquitas sequitur legem.**[1] The manifest object of this maxim is to keep equity jurisdiction within bounds, or, at least, to profess to do so. The same principle bounded the jurisdiction of the Roman prætor.[2] Unlike the Roman prætors, the early English chancellors found themselves confronted by rival courts who alone possessed the power of punishing criminally, or of redressing by civil suit for damages, cases of homicide or assault in which the execution of a doubtful decree might be resisted by violence. It was for the courts of law, in such cases, to pronounce, in the last resort, upon the jurisdictional validity of the contested decree.[3] Hence, in doubtful questions of jurisdiction, the chancellors were accustomed to take the advice of the judges.[4] By the checks which the common law

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[1] Haynes' Out. 24, followed by 1 Pom. Eq. Jur. sec. 425; Bisp. Pr. Eq. secs. 38, 57, 60, 62, 66; *Ante*, sec. 172; Hedges vs. Dixon Co. 150 U. S. 182.

[2] *Jus prætorium jus civile subsequitur.* Dig. I, 1, 7; Fonb. Eq. 6; 1 Sp. Eq. 409.

[3] Coleston vs. Gardner, 2 Ch. Ca. 43; Gilbert's Forum Romanum (Am. ed.), 77; DeLolme, Const. of Eng. I, ch. 11, p. 151.

[4] Fermor's Case, 3 Rep. 79; 4 Inst. 85–87.

courts were thus able to interpose, the development of equity was cautiously effected under their vigilant supervision, and, to some extent, control. Common law analogies were kept in sight, and some of its harshest rules were untouched.[1] Historically, this is what is meant by the maxim—equity follows the law. Its net result is the outcome of the long struggle for jurisdiction, in which, by means of the royal support, the chancellors finally prevailed.[2] Practically, therefore, this maxim must be understood as partial and limited in scope,[3] since, as we have seen, the main business of equity is avowedly to correct and supplement the law. It is not, however, in England, considered as at all impaired by the provision in the Judicature Act, that in case of conflict between equity and law, with reference to the same matter, the rules of equity shall prevail.[4]

§ 238. **Applications.** 1st. Equity is governed by the rules of law (in some cases) as to *legal* rights, however rigorous or unreasonable,[5] or even where the rule, such as that in Shelley's case, defeats the manifest *intention* of a testator.[6] 2d. Equity also (in some cases) adopts the rules of law, *by analogy,*

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[1] *Ante,* secs. 140, 172; 3 Ree. Eng. Law, 75.

[2] *Ante,* sec. 10.

[3] 1 Pom. Eq. Jur. sec. 427.

[4] Haynes' Out. 26, note.

[5] Baumgartner vs. Haas, 68 Md. 39; 3 Bl. Com. 430; 1 Pom. Eq. Jur. sec. 53, 54; Hedges vs. Dixon Co. 150 U. S. 182.

[6] Hughes vs Nicklas, 70 Md. 487; Warner vs. Sprigg, 62 Md. 20; Fowler vs. Black, 136 Ill. 363. *Ante,* sec. 172.

as to equitable rights, as in the case of the *statute of limitations*, which does not in terms apply to cases in equity;[1] and, also, in the case of *trust estates*, where the same rules as to quality and devolution apply as in legal estates.[2] 3d. Equity follows law in the construction of statutes, wills and contracts, or rather, both law and equity use the same canons of interpretation as the means of arriving at the intent.[3] 4th. Equity also follows law, in general, as to the rules of *evidence*.[4]

§ 239. **Qualification.** The qualification of this maxim is nothing less than the entire system of juridical equity itself, both jurisprudence and procedure, based, as has been seen, upon the theory that equity does not follow the law where the law does not follow justice or the public convenience.[5] The reverse of the maxim is sometimes quoted, *lex sequitur æquitatem*.[6] The reference is to the constant progress of law in the direction of equity under the superior attractive force of the latter.[7]

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[1] 69 Md. 527, Chew vs. Farmers' Bank, 2 Md. Ch. 231, Brantly's note. Percy vs. Cockrill, 10 U. S. App. 574; Boone Co. vs. Railroad, 139 U. S. 684, 693; Menendez vs. Holt, 128 U. S. 523; Hollingshead vs. Webster, 37 Ch. D. 659; McCarty vs. Ball, 82 Va. 872; Binney's App. 116 Pa. 179; *Post*. sec. 261.

[2] Lemen vs. McComas, 63 Md. 157; Fairfax vs. Brown, 60 Md. 55.

[3] 3 Bl. Com. 435; White, 32 Ch. D. 28.

[4] *Ante*, sec. 70.

[5] *Ante*, secs. 145, 146, 172.

[6] 1 Sp. Eq. 638.

[7] *Ante*, secs. 167, 168.

§ 240. **Between equal equities the law will prevail.**[1]

This, and the following maxim, each presupposes the existence of conflicting equitable rights in and to the same subject matter, which are equally honest and meritorious, and equally founded upon sufficient consideration. Either alone would move the court to action, as against the legal title. Being equal, these conflicting equities simply neutralize each other, and equity declines to interfere, leaving the legal title stand. The most common illustrations are under what is called the doctrine of notice.

§ 241. **Notice.** A *bona fide* purchaser for value without notice of a secret equitable lien, or unrecorded equitable title, is considered as having an equal claim to the consideration of a court of equity, with the holder of the equitable lien or title. His legal title will therefore prevail. Any of the equities heretofore referred to as raised by the operation of the enabling maxims, is subject to be in this manner defeated by the defence of a *bona fide* purchaser without notice. A, through fraud obtains a deed from B under such circumstances that a court of equity would decree a cancellation of the deed, or, regarding that as done which ought to be done, would treat A, the holder of the legal title, as a trustee for B, who would be considered as still the real owner.

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[1] 1 Pom. Eq. Jur. sec. 416; Bisp. Pr. Eq. sec. 40; Black vs. Cord, 2 H. & G. 100; Fitzsimmons vs. Ogden, 7 Cranch, 2; Simmons vs. Ogle, 105 U. S. 271.

But, before any action taken by B to assert his equity, A promptly records his fraudulent deed, and then sells to C, who pays value before he has notice of the equitable claim of the defrauded party. Here is a new equity raised in C upon his payment in good faith without notice, which is equal to the equity of the defrauded vendor, and to such a case the maxim of equal equities applies, and the legal title prevails. But if C had either actual or constructive notice before he paid the money, then B's equity, being superior, would prevail over the legal title.[1]

The doctrine of notice is one of constant application. Its leading rule is that *a party taking with notice of an equity, takes subject to that equity.*[2] Another of its rules is that relating to constructive notice:—*when a party has information which puts him upon inquiry, he is charged with notice of every fact which that inquiry would have developed.*[3] This rule does not go so far as to require a party to act upon the assumption that every person with whom

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[1]Bisph. Pr. Eq. sec. 262, &c.; 2 Pom. Eq. Jur, sec. 591, &c; LeNeve, Ambler, 436, 2 Lea. Ca. Eq. 109; Brantly's note to Alexander vs. Ghiselin, 5 Gill. (top p.) 104; Seldner vs. McCreery, 75 Md. 287, 295.

[2]Ad. Eq. 148; Christopher, 64 Md. 587.

[3]Baltimore vs. Whittington, 11 D. R. 499, 77 Md. —; Higgins vs. Lodge, 68 Md. 229; Lincoln vs. Quynn, 68 Md. 299, 305; Biddinger vs. Wiland, 67 Md. 359, 362; Abell vs. Brown, 55 Md. 217; Stewart vs. Ins. Co., 53 Md. 564; Lowry vs. Bank, Taney C. C. 310; Simmons vs. Doran, 142 U. S. 417, 438; New Orleans vs. Gaines, 131 U. S. 191, 218; Percy vs. Cockrill, 10 U. S. App. 574.

he deals is likely to be a knave.[1] Another familiar rule under the doctrine of notice has already been used by way of incidental illustration.[2]

§ 242. III. **Between equal equities priority of time will prevail.**[3] The corresponding legal maxim is *qui prior est tempore potior est jure.*[4] When, as under the last maxim considered, conflicting equities are equal, so that the court has no other means of deciding, then, as a last resort, it falls back upon the legal principle of priority in the order of time. Hence it is apparent that, in the mode of their restrictive operation, the two maxims relating to equal equities substantially coincide. One prevents equitable interference with a legal title, the other with a legal principle. As one equity is always prior in date to the other, the expression "equal equities" does not refer to equality in date.[5] If, upon comparing the rival equities, either is found in any respect defective, the preference is given to the other, irrespective of the date of origin. Or if any circumstance is discovered which commends the junior equity to consideration as the more meritorious claim of the two, that circumstance will decide the question of priority, rather than the order of time.[6]

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[1]Bank vs. Kent, 39 Ch. D. 238, 247; Canal Co., L. R. 7 H. L. 496, 506; McGinn v. Tobey, 62 Mich. 252, 260, 261.

[2]*Ante*, sec. 178.

[3]1 Pom. Eq. Jur. sec. 413; Bisph. Pr. Eq. sec. 45.

[4]May vs. Buckhannon, 70 Md. 450.

[5]Farrand vs. Bank, 40 Ch. D. 182, 188.

[6]Rice, 2 Drew. 73.

In fact, it seldom happens that such exact equilibrium is maintained, and cases of that description are rarely met with in practice. In this country, moreover, all conveyances and incumbrances are required to be recorded. The effect of this system here, as in Ireland, is to preclude questions on equal equities, which often arise in England.[1]

§ 243. **Priorities.** The two maxims relating to equal equities combine in producing the doctrine of priorities. The doctrine of priorities is practically a branch of the larger doctrine of notice, which has just been briefly adverted to.[2] It must be remembered that both maxims relate to equities only. In the absence of fraud, or of negligence amounting in effect to fraud, neither of them can be used to deprive the holder of the legal title of his advantage.[3] Priority, in this connection, means priority of lien, or preference in distribution, and not simply priority in point of date, although the latter, as just stated, in the case of balanced equities, will generally determine the former. Any of the equities raised under the operation of enabling maxims, may come into competition with each other in a struggle for preference or

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[1]Bond vs. Hopkins, 1 Sch. & Lef. 430. Land title registration has, with local exceptions, been kept out of England, by the dislike of its "inquisitorial" character, on the part of the landed aristocracy.

[2]*Ante*, sec. 242; 2 Pom. Eq. Jur. sec. 677; Central Co. vs. Arctic Co. 77 Md. 202; Taylor vs. Russell (1891), 1 Ch. 8.

[3]Mitchell vs. Farrish, 69 Md. 235, 241; Farrand vs. Bank, 40 Ch. D. 182, 188.

priority, such as the equity of a defrauded vendor, an equitable mortgage or other lien, the equity of an assignee of a chose in action, or of an expectancy.

One of the leading rules for determining priority is, that *an equity founded on a valuable consideration is superior to an equity founded on mere voluntary transfer.*[1] Thus a vendor's lien will be enforced against the grantee of the purchaser, the consideration for the conveyance being "natural love and affection."[2] It results from this rule, that when both the competing equities stand upon a valuable consideration, without other circumstances, the equities are equal, and the one prior in time is prior in right. Thus, under a general assignment for the benefit of creditors, the creditors have an equity equal to that of the holder of an unpaid check upon the insolvent assignor's bank, and, when notice of the assignment precedes the presentation of the check for payment, are entitled to priority.[3] Between a mortgagee whose mortgage has been discharged of record through the unauthorized act of a third party, and a purchaser who buys in the belief, induced by such release, that the mortgage is satisfied, the equities are balanced, and the rights in the order of time must prevail, in the absence of negligence on the part of the defrauded

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[1] 2 Pom. Eq. Jur. sec. 685.

[2] Christopher, 64 Md. 583.

[3] Laclede Bank vs. Schuler, 120 U. S. 511, 516; Covert vs. Rhodes, 48 Oh. St. 66, 73.

mortgagee.[1] An agreement giving an attorney a lien for professional services upon a judgment, constitutes an equitable assignment of the judgment *pro tanto*, and by priority of time prevails over the equal equity of set-off acquired by the judgment debtor, by his purchase of a judgment against the plaintiff.[2]

On the other hand, the equity of a beneficial owner is superior to the legal title of assignees in bankruptcy or insolvency who take as volunteers, subject to equities.[3] An equity of subrogation to a purchase money mortgage was enforced as against the mortgagor's trustees in insolvency.[4] Another rule for determining priority is that *an equity to a specific thing, or a specific lien is superior to a mere general lien*, such as that of a judgment.[5] The last rule that will be mentioned under this head is, that *the equity of a party who has been misled is superior to his who has misled him.*[6]

§ 244. IV. **Who seeks, must do, equity.**[7] We now come to the last group of three hard-working maxims, each of them of first-class importance, both

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[1]Heyder vs. Excelsior, 42 N. J. Eq. 403, 408.

[2]Terney vs. Wilson, 45 N. J. Law. 282, 288. But see Marshall vs. Cooper, 43 Md. 46.

[3]Dowler vs. Cushwa, 27 Md. 354; Dudley vs. Easton, 104 U. S. 99; Webber vs. Clark, 136 Ill. 268.

[4]Milholland vs. Tiffany, 64 Md. 455.

[5]2 Pom. Eq. Jur. sec. 685; Dyson, vs. Simmons, 48 Md. 207.

[6]Ad. Eq. 148; Brown vs. Ins. Co., 42 Md, 384, 391; Bickerton vs. Walker, 31 Ch. D. 151.

[7]1 Pom. Eq. Jur. sec. 385; Bisp. Pr. Eq. sec. 43; Davis vs. Gemmell, 73 Md. 530, 542; Menendez vs. Holt, 128 U. S. 514, 524.

theoretically and practically. They are closely connected, and are often so blended in their pronounced restrictive effect that it is difficult to distinguish their separate operation.[1] For many purposes they might be treated as one consolidated precept:—*He who seeks equity must do equity, must come with clean hands, and come promptly.* Referring to the common equitable defences before enumerated, it will be found upon examination that nearly all of them are based upon this group of maxims.[2] The fourth and fifth stand pre-eminently for conscience, and the sixth for public policy, although both factors are more or less apparent in each. They are all of universal and constant application in every variety of case in which a plaintiff seeks to set in motion the machinery of equity for the purpose of injustice or oppression, or to secure an undue advantage, or to profit by his own wrong, or in spite of his own neglect. Taken together they illustrate the often quoted expression of Lord Camden, "Nothing can call forth a court of equity into activity, but conscience, good faith and reasonable diligence, and where these are wanting the court is passive and does nothing."[3]

§ 245. **Older applications.** Taking up the maxim that he who seeks must do equity, there are one or two worn-out applications which must be first dis-

[1]See Sparhawk vs. Yerkes, 142 U. S. 1.
[2]*Ante*, sec. 160.
[3]*Ante*, sec. 160.

posed of, simply because they are so often made to figure as stock illustrations. The wife's equity to a settlement is one of them.

§ 246. **Wife's equity.** The wife's equity has been already referred to in another connection,[1] as superseded by modern legislation. Nothing further need be said of this obsolete doctrine except to state that it applied when the husband was obliged to resort to a court of equity to obtain possession of his wife's funds, and that the court required him to do equity by making a fair settlement upon his wife.[2]

§ 247. **Usury.** The case of usury is analogous. When the state of the law was such that the effect of usury was to absolutely avoid the contract, the borrower, claiming the intervention of equity to set it aside, was granted relief only upon his doing equity by paying the real debt with legal interest.[3] Since the only forfeiture now is as to the usurious excess,[4] this illustration also is of merely historical interest.

§ 248. **Tacking—consolidation.** The English doctrine of tacking mortgages was, in part, referred to this maxim, but more appropriately belongs to the second restrictive maxim.[5] Unlike most equitable

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[1] *Ante*, sec. 181.

[2] Oswald vs. Hoover, 43 Md. 360, 368; Poulter vs. Shackel, 39 Ch. D. 471, 476.

[3] Carter vs. Dennison, 7 Gill. 157, 174.

[4] Md. Code, Art. 45, sec. 4.

[5] Bisph. Pr. Eq. sec. 158.

doctrines, it is not founded in justice,[1] and has been generally rejected in this country as inconsistent with the registration system. It is only mentioned in this connection because a modified form of the doctrine, under the name of consolidation of mortgages, happens to be left in such an unsettled condition in this state, by reason of a catena of *obiter dicta*, that it may possibly make some figure in the equity litigation of the future. In this retrenched form, tacking or consolidation is distinctly attributed to the maxim now under consideration, and the meaning of it is this—"that in order to prevent circuity of action, and upon the principle that he who seeks equity must do equity, if a mortgagor goes into equity to redeem, he will only be permitted to do so upon payment, not only of the mortgage debt, but of all debts due from him to the mortgagee."[2] The rights of third parties will not be allowed to be prejudiced by the operation of this doctrine, which, as against creditors and assignees of the mortgagor who may seek to redeem, would seem inconsistent with the provisions of the registry law.[3] No instance can be

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[1]Coombs vs. Jordan, 3 Bland, 284, 330.

[2]Brown vs. Stewart 56 Md. 421, 431, and cases cited. See Jennings vs. Jordan, 6 App. Ca. 698.

[3]Md. Code, Art. 16, sec. 33; Art. 21, secs. 19, 30; Art. 66, sec. 2; Brown vs. Stewart, 56 Md. 431. There are some scholars who will be interested in the fact that the chancery suit of Shakespeare vs. Lambert, to which reference has previously been made, grew out of the refusal by the mortgagee, Lambert, to accept the tender of the mortgage debt made by the poet's father, unless other debts were also paid, upon the principle of consolidation.

found of the actual application of the doctrine in this state.

§ 249. **Modern applications—partition.** A plaintiff, suing in equity for a partition, must contribute his proportion of a mortgage on the land which had been paid off by a defendant.[1] If, in a case of partition, a defendant has made improvements on the common property, the court will give him the benefit of them by allotting to him, so far as practicable, that part of the land improved, according to the actual value of the land itself, without the improvement.[2] When the improved portion has been leased, the ground rents are not to be charged to the defendant in taking an account of mesne profits.[3]

§ 250. **Compensation.** Upon the same principle, when a court of equity is asked to vacate a deed obtained by a trustee from his *cestui que trust*, the latter will be required to refund the purchase money, with interest.[4] So, when a plaintiff seeks to dispossess a *bone fide* occupant who has made valuable improvements on the land, supposing his title to be good, the former will be required to make due compensation to the latter.[5] And the same equity of compensation for betterments has been applied in

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[1] 1 Pom. Eq. Jur. sec. 393, note 4.

[2] Dugan vs. Baltimore, 70 Md. 8.

[3] Worthington vs. Hiss, 70 Md. 173.

[4] Smith vs. Townshend, 27 Md. 368, 369.

[5] McLaughlin vs. Barnum, 31 Md. 425, 453; Union Association vs. Morrison, 39 Md. 281, 292.

the case of a trustee who has purchased trust property and been dispossessed at the suit of his *cestui que trust.*[1] So, in cases of specific performance, when a vendor is unable to convey to the vendee to the full extent agreed, but has acted in good faith, and the deficiency is comparatively immaterial, the vendor may still be entitled to enforce the contract so far as may be, but in such case he must also do equity by compensating the vendee, or submitting to a proportionate abatement from the contract price.[2]

An apt illustration of the maxim, and of its purely defensive operation, is afforded by fraudulent "construction company" contracts to build railroads for the illegitimate profit of directors. On a suit to foreclose a mortgage made in pursuance of such a contract, defrauded stockholders were allowed to intervene by cross-bill, contesting the validity of the mortgage. They thus made themselves actors, and as such were held amenable to the maxim that they who seek equity must do equity, which, in this case, required fair compensation for work actually done. "It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction."[3]

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[1]Smith vs. Townshend, 27 Md. 368, 369; Freichnecht vs. Meyer, 39 N. J. Eq. 551, 558.

[2]Foley vs. Crow, 37 Md. 51, 60; 1 Pom. Eq. Jur. sec. 392.

[3]Thomas vs. Brownsville R. Co., 109 U. S. 522; Wardell vs. Union Pacific R. Co., 103 U. S. 651.

§ 251. **Election.** Proceeding from the same maxim is the application of the doctrine of election expressed in the rule: *One who receives the fruits of a transaction cannot deny its validity whilst retaining its benefits.*[1] A creditor, for instance, who participates in the distribution under a deed of trust, elects to abide by its validity and waive his paramount lien.[2] And a creditor will not be permitted to claim a distributive share of an insolvent estate, and at the same time impeach the adjudication by which the debtor was adjudged insolvent.[3] But a creditor, filing his claim under a deed of trust, is not thereby precluded from proceeding against the assignor in insolvency.[4] A party who has accepted office under a questionable appointment is not allowed to dispute the title of others holding under the same appointment.[5] Where the consideration of the husband's debt went to the wife's separate use, no injunction will be granted at her instance

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[1] Brant vs. Virginia Coal Co., 93 U. S. 326, 336; Presstman vs. Mason, 68 Md. 78, 91; Mitchell vs. Colburn, 61 Md. 244, 248; Long, 62 Md. 33, 71; Edes vs. Garey, 46 Md. 24, 25; Moale vs. Buchanan, 11 G. & J. 314; Gough vs. Manning, 26 Md. 347, 367; See also, Chapman vs. Goodnow, 123 U. S. 540, 544; McConihay vs. Wright, 121 U. S. 201, 214; Richmond vs. Irons, 121 U. S. 28, 62; Cleland vs. Casgrain, 92 Mich. 152.

[2] Horsey vs. Chew, 65 Md. 555, 557; Thomas vs. Farmer's Bank, 46 Md. 43, 54; Loney vs. Bayly, 45 Md. 447, 450; Farmers' Bank vs. Thomas, 37 Md. 246, 258; Lanahan vs. Latrobe, 7 Md. 268, 272; Jones vs. Horsey, 4 Md. 306, 313.

[3] Gottschalk vs. Smith, 74 Md. 560.

[4] Castleberg vs. Wheeler, 68 Md. 266, 280.

[5] Jones vs. Keating, 55 Md. 145, 150.

to restrain the husband's creditors from taking her property.[1] Election is often confounded with estoppel, and both doctrines savor of laches or acquiescence. It is in the application of these doctrines that the maxim in question most frequently combines in its operation with the other two maxims of the same group.

§ 252. **Estoppel.** *He who has been silent when he ought to have spoken shall not be heard to speak when he ought to be silent.*[2] The principle of estoppel is, that when one party to a transaction has, by his representations, conduct[3] or silence,[4] obtained an unfair advantage over the other, he will not be permitted to avail himself of it by any court of justice.[5] This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault.[6] Estoppel is a rule founded in justice which prevents a party from alleging anything contrary to the conventional state of things on the faith of the truth of which he has induced another to act.[7] This doctrine

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[1] Erdman vs. Rosenthal, 60 Md. 312, 316.

[2] Morgan vs. R. R., 96 U. S. 716, 720; Funk vs. Newcomer, 10 Md. 301, 317; Burkenshaw vs. Nicolls, 3 App. Ca. 1026; Valentine vs. Lunt, 115 N. Y. 502.

[3] Hardy vs. Bank, 51 Md. 590; Ogle vs. Tayloe, 49 Md. 177; Leather Mfrs. Bank vs. Morgan, 96 U. S. 96, 108.

[4] Cases *supra*.

[5] Maryland Ins. Co. vs. Gusdorf, 43 Md. 506, 514; Union Ins. Co. vs. Wilkinson, 13 Wall. 222.

[6] Dickerson vs. Colgrove, 100 U. S. 578, 580; De Bussche vs. Alt, 8 Ch. D. 286, 314.

[7] Onward vs. Smithson (1893), 1 Ch. 10.

of equitable estoppel, or estoppel *in pais*, stands upon the broad ground of public policy and good faith, is interposed to prevent injustice and fraud, and is freely adopted and applied by courts of law.[1] It applies to corporations,[2] to married women,[3] and, in a measure, to infants.[4]

To make the principle of estoppel available, there must be fraud or its equivalent in culpable negligence,[5] and the negligence must have been the proximate cause of the loss,[6] and a neglect of some duty owing to the party misled, or to the public.[7] The statements relied on must have been made with full knowledge by the party of all facts affecting his rights.[8] Misrepresentations must have been as to alleged existing facts, for promises are binding only as contracts.[9] When the doctrine is invoked concerning the title to land, the party misled must not only appear to have been ignorant of the true state

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[1] Alexander vs. Walter, 8 Gill. 241, Brantly's note; Shipley vs. Fox, 69 Md. 572, 579; Homer vs. Grosholz, 38 Md. 520.

[2] Harrison vs. Railroad, 50 Md. 490, 513.

[3] Flanagin vs. Hambleton, 54 Md. 222; Harryman vs. Starr, 56 Md. 63; Long, 62 Md. 33, 72.

[4] Frazier vs. Gelston, 35 Md. 314; 2 Pom. Eq. Jur. sec. 815; 7 A. & E. Ency. 24.

[5] Leather Mfrs. Bank vs. Morgan, 117 U. S. 108; Henshaw vs. Bissell, 18 Wall. 271. See Lehigh Co. vs. Bamford, 150 U. S. 665.

[6] Brown vs. Ins. Co., 42 Md. 385, 391.

[7] Hardy vs. Bank, 51 Md. 591.

[8] Shipley vs. Fox, 69 Md. 572, 579.

[9] Jordan vs. Money, 5 H. L. C. 185; Madison vs. Alderson, 8 App. Ca. 473.

of the title, but without the means of acquiring knowledge.[1]

§ 253. **Other instances.** When a transaction is sought to be avoided on the ground of fraud or mistake, (*rescission*) the plaintiff must do equity by restoring the defendant, as nearly as possible, to the original condition, (*status quo*) by returning the consideration.[2] But the operation of this restrictive maxim in such a case may be itself restrained by higher considerations of public policy. Thus, where in a suit by a state to cancel a sale of school lands as obtained by bribery of a state agent, the defendant insisted that the state should "do equity" by returning the consideration, the court, nevertheless, decreed cancellation absolutely, without return of the money paid, upon the ground that a party ought not to be permitted to corrupt public officers with entire safety to himself.[3]

If a trustee misappropriates trust money (breach of trust) and has an *equitable* interest of his own at the same time, the court will not allow him to receive any part of the trust fund in which he is equitably interested, until he has made good his default as trustee. Otherwise, if the trustee's interest is a *legal* one.[4]

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[1]Schadt vs. Blaul, 66 Md. 141; Tongue vs. Nutwell, 17 Md. 230; Brant vs. Va. Coal Co., 93 U. S. 336.

[2]Foley vs. Crow, 37 Md. 51, 62; Brown vs. Norman, 65 Miss. 378.

[3]Kansas vs. Cross, 38, Kan. 696.

[4]Dixon vs. Brown, 32 Ch. D. 600.

As a general rule, the owner of taxable property, who seeks to enjoin the collection of a tax which he claims to be in excess of what is lawful, must do equity by paying or tendering so much of the tax as is justly due.[1]

An absolute deed will only be declared a mortgage upon payment of the debt secured.[2]

The power of late exercised by courts of equity to make railroad receivers' certificates prior liens over existing mortgages;[3] is claimed to be a legitimate application of the maxim, which compels the plaintiff, the trustee under the defaulted railway mortgage seeking foreclosure, to do equity by paying current debts out of current receipts.[4]

§ 254. **When available to plaintiffs.** The protection afforded by this maxim is also available to a *plaintiff* when occupying a *defensive* position, as when a defendant sets up a claim to some affirmative relief. Thus, where to a bill to enforce a lien, and a claim for rents and profits, there was a plea of limitations as to the rents and profits, and an affirmative claim in the answer to an allowance for improvements, the court compelled the defendant to do equity by deducting the allowance for improvements from the *whole amount* of rents and profits, including those barred by limitations.[5] And where, to a bill for fore-

[1] State Tax Cases, 92 U. S. 616; Bank vs. Kimball, 103 U. S. 732.

[2] Kemper vs. Campbell, 44 Ohio St. 210.

[3] *Ante*, sec. 112.

[4] Fosdick vs. Schall, 99 U. S. 235, 253.

[5] Ridgely vs. Bond, 18 Md. 435. And a similar application of the principle has been made in a common-law action. Tongue

closure, the defendant filed a cross bill, setting up a mistake in the mortgage, by which property was included which was intended to be excepted, the court held that by doing the simple equity of paying the mortgage debt, the defendant could extinguish the mortgage altogether.[1]

§ 255. **Qualification.** This maxim does not mean that the plaintiff must "do equity" to the defendant in all transactions which have ever taken place between them, but only with respect to the transaction on which the plaintiff is seeking equity, and such as are equitably related thereto. It is for the court to determine, upon the circumstances of each case, whether there is the requsite equitable connection between the grounds of complaint and defence.[2] And even in such cases, the operation of the maxim may be defeated by a paramount and special public policy.[3]

§ 256. **He who comes into equity must come with clean hands.**[4] "He that hath committed

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vs. Nutwell, 31 Md. 303; see also, Union Asso. vs. Morrison, 39 Md. 292, &c.

[1]Boon vs. Kent, 42 N. J. Eq. 135. See also Thomas vs. Brownsville R. Co., 109 U. S. 522, *ante*, sec. 250.

[2]Trotter vs. Hecksher, 40 N. J. Eq. 659; Otis vs. Gregory, 111 Ind. 504; U. S. vs. McRea, 3 L. R. Cn. 79; 1 Pom. Eq. Jur. sec. 387. Note the discrepancy here between the last clause of sec. 387 and sec. 399. The latter is correct and overrules the former, as will be seen further on. *Post.* sec. 259.

[3]*Ante*, sec. 253.

[4]1 Pom. Eq. Jur. sec. 397; Bisph. Pr. Eq. sec. 42; Dilly vs. Barnard, 8 G. & J. 187; Manhattan vs. Wood, 108 U. S. 225.

iniquity shall not have equity."[1] It is upon this principle that a fraudulent grantor is not permitted to gainsay his own deed,[2] nor a fraudulent grantee to obtain reimbursement for money paid as part of the fraudulent transaction,[3] nor a party to be relieved from a judgment on the ground that the obligation on which it was rendered was in fraud of the law.[4] Specific performance will not be decreed when it is apparent that the object of the contract was to defraud creditors.[5] No relief will be granted in equity to purchasers of claims against an insolvent corporation, for the purpose of speculating upon the liability of stockholders.[6] A party cannot have relief directly inconsistent with his sworn testimony as a witness in a previous stage of the same case,[7] or even in a previous case.[8] A party who has been obliged to make good a loss incurred through his own negligence, cannot, by subrogation, recover from another whose negligence contributed.[9] A

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[1] Milwaukee R. Co. vs. Soutter, 13 Wall. 523-4.

[2] Freeman vs. Sedwick, 6 Gill 29; Roman vs. Mali, 42 Md. 514; Schuman vs. Peddicord, 50 Md. 562; Brown vs. Reilly, 72 Md. 489; Dent vs. Ferguson, 132 U. S. 68; Nichols vs. McCarthy, 53 Conn. 299; McCall vs. Pixley, 48 Oh. St. 379, 388; Kitts vs. Wilson, 130 Ind. 492, 499; Respass vs. Jones, 102 N. C. 5.

[3] Hamilton vs. Halstead, 134 N. Y. 520, 526.

[4] Creath vs. Sims, 5 How. 192.

[5] Taylor vs. Von Schraden, 107 Mo. 206.

[6] Hospes vs. Car Co. 48 Minn. 174, 199.

[7] Hall vs. McCann, 51 Md. 345, 351.

[8] Roman vs. Mali, 42 Md. 513, 533. Otherwise, when not a statement of fact, but an expression of opinion as to the construction of a contract. Sturm vs. Boker, 150 U. S. 312.

[9] German Bank vs. U. S., 148 U. S. 573.

party depositing money with a banker to give a fictitious credit to a corporation, was not allowed to withdraw it, after the purpose of the fraud had been effected.[1] Upon the same principle the remedy of divorce can be obtained only by an innocent party, and recrimination, if sustained, is a valid defence.[2] So, also, when it appears that a non-resident plaintiff has moved into the state for divorce purposes only.[3]

Courts of equity are especially alert to enforce this principle in all applications for the extraordinary remedies of injunction, specific performance, reformation, cancellation or rescission, and the like. The conduct of the plaintiff throughout the matters leading up to the litigation will be carefully scrutinized. The typical case of injunction will serve for illustration.

§ 257. **Injunction.** It has already been seen that the utmost candor of statement is required from the plaintiff in his bill, especially when the application is for a preliminary injunction. There must be full disclosure of all material facts and documents.[4]

In a case where the testimony showed that the special circumstances set forth in the bill as the ground of jurisdiction were not the genuine reasons for prosecuting the suit, but that the plaintiff had an ulterior

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[1] Great Berlin S. Co. 26 Ch. D. 616.
[2] Hawkins, 65 Md. 104; Stew. M. and D., sec. 314.
[3] Albee, 43 Ill. App. 370.
[4] *Ante*, sec. 104.

purpose, not avowed, the bill was for that reason dismissed.[1] A party who has influenced the action upon which liability was incurred cannot restrain such action by injunction.[2] Infringement of a false trade-mark or label will not be restrained by injunction,[3] nor of one used under circumstances of fraud upon third parties,[4] or upon the public.[5]

If a plaintiff seeks to enjoin a railroad company from building on his land, upon the ground that he has not been paid, and it turns out that he bought the land in the interest of a rival company, and as its representative, for no other purpose than that of obstruction and litigation, this principle will be applied to defeat the "discreditable scheme."[6] But the fact that the plaintiff became a stockholder in a railway company in the interest of a rival company and for its purposes, does not disentitle him to the assistance of the court in enforcing by mandatory injunction his statutory right as stockholder to inspection of the register of stock and bond holders.[7]

Upon the same principle, where the minority members of a lodge filed an injunction bill to reclaim

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[1] Henderson, 18 Md. L. J. 612.

[2] Joyce vs. Electric, 43 Ill. App. 157.

[3] Kenny vs. Gillet, 70 Md. 574; Siegert vs. Abbott, 61 Md. 276; Bolander vs. Peterson, 136 Ill. 215, 220.

[4] Parlett vs. Guggenheimer, 67 Md. 549.

[5] Robertson vs. Berry, 50 Md. 602; Manhattan Co. vs. Wood, 108 U. S. 218.

[6] Piedmont R. Co. vs. Speelman, 67 Md. 275, 276.

[7] Mutter vs. Railway, 38 Ch. D. 92; Central R. R. vs. Collins 40 Ga. 582; Rice vs. Rockefeller, 134 N. Y. 174, 185.

their proportionate shares of the lodge fund, upon the ground that the separation of the lodge from the general order had deprived them of the benefits to which, as members of the order, they were entitled, it was held that the severance which formed the basis of the equity invoked must appear to have occurred otherwise than by their own fault; and inasmuch as these members were responsible for a series of inequitable proceedings which led to the separation, including a fraud upon the court itself in procuring a receivership of the lodge fund upon false charges, the court could not recognize any rights deduced from such proceedings, and dismissed the bill.[1]

An injunction bill prayed the removal of buildings extending by mistake a few feet over the plaintiff's line. The strip of land was "comparatively valueless, except for purposes of litigation." The manifest object of the proceeding being to extort an exorbitant price for the land, the application was refused as oppressive.[2] A mandatory injunction to remove an obstruction from a drain was refused, the plaintiff having caused an increase in the volume of drain water.[3] An injunction to restrain a nuisance will not be granted to a party committing the same nuisance.[4] A bill to re-

[1]Goodman vs. Jedidjah Lodge, 67 Md. 119.

[2]Hunter vs. Carroll, 64 N. H. 572.

[3]Davison vs. Hutchinson, 44 N. J. Eq. 474.

[4]Medford vs. Levy, 31 W. Va. 649. For an amusing case of a conflict of musical nuisances, see Christie vs. Davey (1893); 1 Ch. 316.

move a cloud from title was dismissed, the title being based upon an inequitable acquisition of a ward's property by a guardian.[1]

§ 258, **Common law analogies.** "*Ex turpi causa, non oritur actio.*" "*In pari delicto, potior est conditio defendentis.*" "All laws, as well as all contracts, may be controlled in their operation and effect by these general fundamental maxims of the common law, viz.: No one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime."[2] If a legatee wilfully murders the testator, although no statute has enacted a forfeiture, these principles will prevent his reaping the fruit of his crime.[3] If the assignee of a life insurance policy has murdered the assured, his crime defeats his recovery.[4] If a loss happens through the fault of the assured, the insurer is not liable, whatever may be the terms of the policy.[5] The same principle is of equally fami-

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[1] Dickinson vs. Durfee, 139 Mass. 232.

[2] Riggs vs. Palmer, 115 N. Y. 506.

[3] *Ibid.* A healthy majority decision of the N. Y. Court of Appeals, very properly disapproving Owens vs. Owens, 100 N. C. 240, where a widow, convicted as accessory to her husband's murder, made application from the State's prison *for her dower*, and the court, finding no authority, determined on the *reason* of the case, that there could be no forfeiture for crime unless provided by statute, and gave judgment for the felon against the children.

[4] N. Y. Mutual Life Ins. Co. vs. Armstrong, 117 U. S. 591.

[5] Providence Ins. Co. vs. Adler, 65 Md. 167, citing Pothier to the effect that no agreement can validly charge one man with another's fault.

liar application in cases *ex contractu.* In a suit for breach of contract, resting in mutual and dependent covenants, the plaintiff, to succeed, must have kept his covenants. No contract or claim can be enforced founded on a violation of law, or *contra bonos mores.*[1] No person can recover for a breach of contract occasioned by his own fraud.[2] Nor can an action be maintained upon a judgment obtained by fraud,[3] even although the fraud is such that it cannot be proved without retrying questions already adjudicated.[4] An action by a depositor to recover from a bank money paid out on raised checks, will be defeated by proof that the fraud was facilitated by the plaintiff's negligence.[5]

§ 259. **Qualifications.** 1. The unconscientious dealings charged upon the plaintiff must be confined to his conduct in the matter before the court, and not extended to matters *aliunde.*[6] The iniquity which deprives the suitor of his right is not general depravity, but wrongful conduct in the particular transaction.[7]

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[1] 2 Bish. M. & D. sec. 75.

[2] David vs. Sabin (1893), 1 Ch. 540.

[3] Abouloff vs. Oppenheimer, 10 Q. B. Div. 303.

[4] Vadala vs. Lawes, 25 Q. B. Div. 310.

[5] Leather Mfrs. Bank vs. Morgan, 117 U. S. 96; Hardy vs. Bank, 51 Md. 563. But the maker or endorser of a promissory note is not liable to an innocent holder for value, if the note has been raised, even although the fraud was facilitated by blanks. Burrows vs. Klunk, 70 Md. 451.

[6] Equitable vs. Coal Co., 65 Md. 84.

[7] 1 Pom. Eq. Jur. sec. 399; Woodward, 41 N. J. Eq. 224, 225.

2. When the transaction has been in effect a fraud upon public policy, which would be defeated by allowing it to stand, relief may be given against it, notwithstanding the plaintiff's participation.[1] Thus relief has been given against a gambling[2] or usurious contract.[3] And on the other hand, an illegal contract will be enforced when public policy requires it.[4]

3. Relief may also be granted when the plaintiff, although *particeps*, has acted under undue influence, such as may arise from circumstances of inequality between the parties.[5] But this inequality must be so pronounced that the parties cannot be said to be *in pari delicto*. The mere fact of the relation between them of attorney and client will not except the case from the general rule.[6]

4. In some cases, after the transaction has been fully completed and the money contributed has passed into other forms, a partner or agent in whose hands the profits are found cannot refuse to account for them to his copartner or principal upon the ground of the illegal character of the original contract.[7]

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[1]Freeman vs. Sedwick, 6 Gill. 40; Cone vs. Russell, 48 N. J. Eq. 217.

[2]Gough vs. Pratt, 9 Md. 526; Emerson vs. Townsend, 73 Md. 224.

[3]Thomas vs. Watson, Tan C. C. 297.

[4]Lester vs. Bank, 33 Md. 558, 1 Pom. Eq. Jur. sec. 403.

[5]Sm. Pr. Eq. 678; Long vs. Long, 9 Md. 348; Wilson vs. Watts, 9 Md. 356; Harrington vs. Grant, 54 Vt. 236.

[6]Roman vs. Mali, 42 Md. 513; Snyder, 51 Md. 80.

[7]State vs. B. & O. R. Co., 34 Md. 366; Haacker vs. Knights, 76 Md. 429; Brooks vs. Martin, 2 Wall. 70; Union Pac. R. R. Co. vs. Durant, 95 U. S. 576. This proposition is advanced with caution, and cannot claim to be well settled. The authority of the case of Sharp vs. Taylor, 2 Phil Ch. 801 (cited Bisp. Pr. Eq. sec.

5. The marriage *status* being on a different footing from contracts generally, a party may be relieved from a void marriage, although fully aware of its invalidity when contracted.[1]

§ 260. VI. **Equity aids the vigilant.** Vigilantibus non dormientibus æquitas subvenit.[2]

Referring to what has already been said respecting the close affinity between the last three restrictive maxims, their combined effect is well illustrated in the comprehensive doctrine of laches, commonly, and often with propriety referred exclusively to the maxim—equity aids the vigilant.[3] Closely connected with laches is the doctrine of equitable limitations.

42,), upon which the doctrine is founded, has been questioned in England. Sykes vs. Beadon, 11 Ch. D. 170, 1 Lind. Ptnp. 102, note. See also 1 Bates Ptnp. sec. 125; Gibbs vs. Gas Co., 130 U. S. 396; Dent vs. Ferguson, 132 U. S. 50, 68; Brooks vs. Cooper, 50 N. J. Eq. 761; Leonard vs. Poole, 114 N. Y. 371; Goodrich vs. Houghton, 134 N. Y. 115; Chambers vs. Church, 14 R. I. 398, Emery vs. Candle Co., 47 Oh. St. 320; Texas R. R. Co. vs. S. R. Co. (La.), 6 So. Rep. 888, and numerous cases, *pro* and *con*, cited in Prunty vs. Basshor, where it was held that the doctrine of Brooks vs. Martin, 2 Wall. 70, would not be extended to a case of accounting for the profits of joint transactions which were not only illegal, but immoral, against public policy and criminal. The court accordingly refused to entertain an accounting of sales to municipal corporations, effected by means of bribery, in the name of commissions allowed to influential officials, applying the maxim now under consideration. 2 D. R. 465, Brantly, on Cont. 156.

[1]Bonaparte (1892), P. 402; Andrews v. Ross, 14 P. D. 15.

[2]1 Pom. Eq. Jur. sec. 418; Bisph. Pr. Eq. sec. 39; 1 Beach Mod. Eq. Jur. sec. 17.

[3]Chew vs. Farmers' Bank, 2 Md. Ch. 231, Brantly's ed. 212, note. Reference must be made to this valuable note for the details omitted in the following outline sketch.

§ 261. **Limitations.** Although the statute of limitations does not in terms apply to cases in equity,[1] yet, upon the principle that equity follows the law, courts of equity apply the statute to all cases of concurrent jurisdiction,[2] such as, to bills for an account,[3] a surety's claim to subrogation,[4] bills to recover possession of land, when such bills are, for any reason, maintainable,[5] and bills for the recovery of money.[6] In such cases equity is said to act in obedience to the statute,[7] except under special circumstances.[8] In cases within the exclusive jurisdiction the statute is not necessarily applied at all,[9] but when applied, it is said to be by way of analogy.[10] Among instances of this class are creditors' bills,[11] bills to foreclose or redeem mortgages,[12] and bills to

[1]Md. Code, Art. 57, secs. 1, 3, 6, &c.; Alex. Br. St. 446, 457.

[2]Metropolitan Bank vs. St. Louis Despatch Co. 149 U. S. 436.

[3]Weaver vs. Leiman, 52 Md. 708; McKaig vs. Hebb, 42 Md. 227, 235; Phillippi vs. Phillipe, 115 U. S. 151. See Holloway vs. Turner, 61 Md. 217.

[4]Junker vs. Rusk, 136 Ill. 179.

[5]Hall vs. Law, 102 U. S. 461, 466; Norris vs. Haggin, 136 U. S. 386; Preston, 95 U. S. 200; Root vs. Woolworth, 150 U. S. 401; Long, 62 Md. 69.

[6]Tiernan vs. Rescaniere, 10 G. & J. 218; Teackle vs. Gibson, 8 Md. 86; Young vs. Mackall, 3 Md. Ch. 384, 398.

[7]Hall vs. Law, 102 U. S. 461, 466.

[8]Smith vs. Wood, 42 N. J. Eq. 563, 569; Agens, 50 N. J. Eq. 566.

[9]Riddle vs. Whitehill, 135 U. S. 621.

[10]Drummond vs. Green, 35 Md. 148, 151; Crook vs. Glenn, 30 Md. 55; Hagerty vs. Mann, 56 Md. 522. See B. & O. R. R. vs. Canton Co., 70 Md. 417.

[11]Bannon vs. Lloyd, 64 Md. 48; Richmond vs. Irons, 121 U. S. 27, 51.

[12]Dickey vs. Land Co., 63 Md. 170, 175; B. & O. R. R. Co. vs. Trimble, 51 Md. 99, 109.

enforce equitable titles, liens and trusts.[1] In the case of an express continuing trust, as the possession of the trustee is not adverse, but according to his title, neither limitations nor lapse of time will bar relief as between trustee and *cestui que trust*,[2] until the trust relation has been repudiated.[3] In the case of implied trusts, the statute is generally applied directly,[4] and in such cases the defence of laches is also available.[5] An application for injunction in support of a legal right will not be defeated by delay short of that required at law.[6]

The defence of the statute of limitations cannot be converted into an offensive weapon.[7] It is a personal privilege, and cannot, for instance, be availed of by a subsequent mortgagee to defeat foreclosure of a prior mortgage to which limitations might have been, but was not, pleaded.[8] The plea of the statute by one defendant does not enure to the benefit of

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[1] Noble vs. Turner, 69 Md. 519, 527; Dugan vs. Gittings, 3 Gill. 138; Speidel vs. Henrici, 120 U. S. 377, 386; Elmendorf vs. Taylor, 10 Wheat. 152.

[2] Gould vs. Baltimore, 58 Md. 52; Gordon vs. Small, 53 Md. 551; Hanson vs. Worthington, 12 Md. 441; Gray vs. Kerr, 46 Oh. St. 659; Lyell vs. Kennedy, 14 App. Ca. 437; Soar vs. Ashwell (1893), 2 Q. B. (C. A.), 390.

[3] Gisborn vs. Ins. Co., 142 U. S. 326, 338, Lemoine vs. Dunklin, 10 U. S. App. 227; Smith vs. Combs, 49 N. J. Eq. 420; Roby vs. Colehour, 135 Ill. 343; Owens vs. Crow, 62 Md. 491, 496; Needles vs. Martin, 33 Md. 609, 616.

[4] Weaver vs. Leiman, 52 Md. 708.

[5] Felix vs. Patrick, 145 U. S. 329.

[6] Menendez vs. Holt, 128 U. S. 514, 523; Fullwood, 9 Ch. D. 176.

[7] Nolan vs. Snodgrass, 70 Miss. 794.

[8] Sanger vs. Nightingale, 122 U. S. 176.

others.[1] In equity, the statute need not, in all cases, as at law, be specially pleaded, or even set up in the answer, but when, from the face of the bill, it can be plainly seen that the bar applies, and no facts are stated sufficient to relieve it from the operation of the statute, the defence of limitations as well as that of laches may be availed of on demurrer.[2]

§ 262. **Laches.**[3] Independently of the statute of limitations, courts of equity refuse relief in cases of unreasonable and unexplained delay in the prosecution of a suit. There may be laches in the failure to prosecute with diligence a suit actually commenced, as well as by delay in commencing a suit.[4] Laches may be called the typical equitable doctrine, for several reasons. In the first place, there is nothing arbitrary or technical in its rules, which rest upon the plainest principles of substantial

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[1] Simms vs. Lloyd, 58 Md. 477; Bannon vs. Lloyd, 64 Md. 48.

[2] Biays vs. Roberts, 68 Md. 510; Belt vs. Bowie, 65 Md. 350; Speidel vs. Henrici, 120 U. S. 377; Mercantile Bank vs. Carpenter, 101 U. S. 567; *Ante*, sec. 59. In code procedure, the defence can only be made by answer. Zebley vs. Farmer's Co. 139 N. Y. 468.

[3] "An old French word (lachesse) for slackness, or negligence, or not doing" (Co. Litt. 380 b.), properly used in the singular number, but sometimes, as when several omissions are included, used in the plural. 'After all these laches." Bacon vs. Ins. Co., 131 U. S. 258, 264. 85 Md 146

[4] Johnston vs. Standard, 148 U. S. 360; Dey vs. Hathaway, 41 N. J. Eq. 419. The bill will be dismissed on general principles, without a "rule further proceedings," and even although the defendant may have delayed availing of the plaintiff's laches. Sebring, 43 N. J. Eq. 59. *Contra*, Fisher vs. McNulty, 30 W. Va. 187.

justice and public policy.[1] Again, these rules are are all subject to the sound discretion of the court, to be freely exercised in view of the special circumstances of each case, or, in other words, every case, as to laches, is governed chiefly by its own circumstances.[2] And, lastly, it runs through the whole system to such an extent that to cite its applications would be to enumerate nearly all the enabling doctrines of equity.

In equity, a presumption exists against every stale claim, because, as a general rule, persons who have a right, and know that they have it, are prompt to assert it. But they do not always do so, and therefore the circumstances of each particular case which may explain the delay, usually control the application of the rule as to laches.[3] Courts of equity are not established to relieve parties from the consequences of their own negligence or folly,[4] or to assist those members of the profession who delve for practice in the remains of buried litigation.[5] "A court of equity, which is never active in giving relief against conscience or public convenience, has always

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[1] Underwood vs. Dugan, 139 U. S. 380; Hanner vs. Moulton, 138 U. S. 486; Naddo vs. Bardon, 4 U. S. App. 681; Steiger vs. Hillen, 5 G. & J. 132.

[2] Noble vs. Turner, 69 Md. 519, 527; Canton vs. McGraw, 67 Md. 583, 591; Pairo vs. Vickery, 37 Md. 467, 488; Hammond vs. Hopkins, 143 U. S. 224; Kilbourn vs. Sunderland, 130 U. S. 505, 518; Morse vs. Hill, 136 Mass. 60, 65.

[3] Noble vs. Turner, 69 Md. 527.

[4] Dunphy vs. Ryan, 116 U. S. 491, 498.

[5] DeGraw vs. Mechan, 48 N. J. Eq. 230.

refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. When these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced. *Expedit reipublicae ut sit finis litium.*"[1]

Sometimes, the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient, and sometimes the rule is applied where there is no statutable bar.[2]

We find the principle constantly reiterated that each case must necessarily be governed by its own circumstances, such as the situation of the parties, the extent of their means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the loss of evidence, and the presence or absence of impediments to the assertion of the claim.[3] Bearing in mind that decided cases can be taken here only as suggestive illustrations, attention will now be called to some of the varieties of special circumstances which have been held material to the application of the doctrine

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[1]This familiar extract from the celebrated judgment of Lord Camden, in Smith vs. Clay, 3 Bro. Ch. 639, has become a legal classic. Part of the language has been already quoted in other connections.

[2]Sullivan vs. Railroad, 94 U. S. 806, 811.

[3]Hammond vs. Hopkins, 143 U. S. 224, 250.

of laches, and also to some of those which have exempted particular cases from its operation.[1]

§ 263. **Affirmative circumstances.** The following circumstances attending delay have been held to characterize a case of laches: The intervention of an important death; especially, when the circumstance is colored by indications of "lying by."[2] The intervention of death is of less consequence when the death is one that disables the plaintiffs' testimony,[3] or when the invalidity of the transaction depends upon its intrinsic nature rather than upon proof *aliunde*,[4] or when the material discovery was not made until after the individual's death.[5]

The erection of valuable improvements;[6] except in the case of a void assessment for an illegal municipal improvement,[7] or where improvements are offset by rents.[8] Delay until other interests have become involved,[9] or until after the property has increased in

[1] 12 A. & E. Ency. 533.

[2] Hammond vs. Hopkins, 143 U. S. 224; Hoyt vs. Latham, 143 U. S. 553; U. S. vs. Beebe, 127 U. S. 338, 348; Keedy vs. McNally, 63 Md. 311, 318; Roman vs. Mali, 42 Md. 513, 533; Davis vs. Simpson, 5 H. & J. 149; Curlett vs. Newman, 30 W. Va. 185; Terry vs. Fontaine, 83 Va. 454.

[3] Pairo vs. Vickery, 37 Md. 467, 488.

[4] *Ibid.;* Whitridge, 76 Md. 54, 86.

[5] Gandy vs. Macaulay, 31 Ch. D. 16.

[6] B. & O. R. Co. vs. Strauss, 37 Md. 227, 244; Bacon vs. Ins. Co., 131 U. S. 258, 264; U. S. vs. Beebe, 127 U. S. 338; Penn. R. Co. Appeal, 125 Pa. 189, 202.

[7] Baltimore vs. Grand Lodge, 44 Md. 446.

[8] Allore vs. Jewell, 94 U. S. 512.

[9] Spencer vs. Turnpike, 70 Md. 136; Noble vs. Turner, 69 Md. 526; Foley vs. Crow, 37 Md. 62; Frazier vs. Gelston, 35 Md. 314; Sulli-

value,[1] or until transactions have become obscure and evidence lost.[2] Where the suit, after long delay, is finally brought with some indirect motive;[3] where the property is of a speculative character, and the party is playing fast and loose;[4] where the property requires constant expenditure for repairs, etc.;[5] or where there is simply long delay, unexplained,[6] especially if connected with such action or non-action that the other party is induced to infer acquiesence.[7]

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van vs. Railroad, 94 U. S. 812; Gemmell vs. Richardson, 4 Del. Ch. 614.

[1]Bacon vs. Ins. Co. 131 U. S. 264; Davison vs. Davis, 125 U. S. 75; Richards vs. Mackall, 124 U. S. 183; Harkness vs. Underhill, 1 Black, 325; Wallace vs. Smith, 155 Pa. St. 91.

[2]Chase vs. Winans, 59 Md. 475; Hewitt, 55 Md. 509; Hall vs. Claggett, 48 Md. 243; McDonnell vs. Milholland, 48 Md. 540; Hawkins vs. Chapman, 36 Md. 101; Stiles vs. Brown, 1 Gill, 350; Turner vs. Dillard, 82 Va. 536.

[3]Castleden, 9 H. L. C. 186, 191.

[4]Johnston vs. Standard, 148 U. S. 360; Hammond vs. Hopkins, 143 U. S. 224; Lacombe vs. Forstall, 123 U. S. 571; Holgate vs. Eaton, 116 U. S. 40; Grymes vs. Sanders, 93 U. S. 62; Twin Lick Oil Co. vs. Marbury, 91 U. S. 587; Clarke vs. Hart, 6 H. L. C. 656; Salsbury vs. Black, 119 Pa. 207; Knox vs. Spratt, 23 Fla. 64.

[5]Amey vs. Cockey, 73 Md. 306.

[6]Richardson vs. Billingslea, 69 Md. 407; Noble vs. Turner, 69 Md. 527; Yearly vs. Cockey, 68 Md. 174; Morganstern vs. Shuster, 66 Md. 250; McCoy vs. Poor, 56 Md. 207, 8; Hunt vs. Stewart, 53 Md. 229; Nelson vs. Bank, 27 Md. 75; Parker vs. Dacres, 130 U. S. 49; Taylor vs. Holmes, 127 U. S. 493; Landsdale vs. Smith, 106 U. S. 394; Martin vs. Gray, 142 U. S. 236.

[7]2 Pom. Eq. Jur. sec. 965; Washington vs. Opie, 145 U. S. 214; U. S. vs. Mining Co. 129 U. S. 579, 587; Marsh vs. Whitmore, 21 Wall. 184; Munnikhuysen vs. Magraw, 58 Md. 557; McGivney, 142 Mass. 160.

§ 264. **Negative circumstances.** Among the special circumstances which have been allowed to negative the defence of laches, the following are of the most frequent recurrence in practice: Delay is in general excused by infancy,[1] and the infancy of one co-tenant has been held to protect adult co-tenants.[2] Laches will not be imputed to a married woman, not *sui juris*;[3] otherwise, *quoad* her separate estate.[4]

A *cestui que trust*, whether infant or *feme covert*, may, however, be defeated by laches, when represented by a competent *trustee*.[5] And action must be taken within a reasonable time after the disabilities of infancy or *coverture* are removed, having respect to the special circumstances ot each case.[6]

Similar disabilities are mental incompetency,[7] extreme old age,[8] and continuing duress, or undue

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[1]B. & O. R. Co. vs. Trimble, 51 Md. 113; Owens vs. Crow, 62 Md. 491; Robertson vs. Mowell, 66 Md. 539; Dragoo, 50 Mich. 573; Holt vs. Wilson, 75 Ala., 67; Knight vs. Watts, 26 W. Va. 176.

[2]Boozer vs. Teague, 27 S. C. 348, 366.

[3]Wilson vs. McCarty, 55 Md. 277, 283; Dungan vs. Ins. Co. 46 Md. 469, 499; Carson vs. Phelps, 40 Md. 73, 81; Knight vs. Brawner, 14 Md. 7; Hanson vs. Worthington, 12 Md. 418, 441.

[4]Stewart, H. & W., Ch. 23, 1 Perry on Trusts, Sec. 32, 467; 2 *ibid.* 849; Wade vs. Pulsifer, 54 Vt. 45, 65; Kieley vs. McGlynn, (Broderick's will,) 21 Wall. 503.

[5]Crook vs. Glenn, 30 Md. 55; Weaver vs. Leiman, 52 Md. 708, 709; Meeks vs. Olpherts, 100 U. S. 564, 569.

[6]Amey vs. Cockey, 73 Md. 297, 306; Sims vs. Everhart, 102 U. S. 310; Felix vs. Patrick, 145 U. S. 330; Ela, 158 Mass. 59.

[7]Dungan vs. Ins. Co., 46 Md. 469, 499.

[8]Carson vs. Phelps, 40 Md. 73, 81.

influence.[1] Non-residence or absence has sometimes been recognized as an excuse;[2] so also, contributory neglect or fault of an adverse party,[3] possessing all the material for stating the account,[4] or lulling the plaintiff into security.[5] Neither laches nor limitations will run during the time when there was no one *in esse* competent to sue,[6] as when a creditor is himself the executor.[7] The pendency of collateral litigation is sometimes a negative circumstance;[8] but not where a tenant disputes his landlord's title.[9] The following have also been held negative circum-

[1]Highberger vs. Stiffler, 21 Md. 338, 355; Brown vs. Burdett, 40 Ch. D. 244; Fry vs. Lane, 40 Ch. D., 312, 324.

[2]Hagerty vs. Mann, 56 Md. 527; B. & O. R. Co. vs. Trimble, 51 Md. 113; Moore vs. Crawford, 130 U. S. 122, 139; Hallet vs. Collins, 10 How. 174; Benningfield vs. Barter, 12 App. Ca. 167, 181. *Contra*, Naddo vs. Bardon, 4 U. S. App. 683; Kieley vs. McGlynn, 21 Wall. 503.

[3]Gunston vs. Carroll, 101 U. S. 426.

[4]Glenn vs. Hebb, 17 Md. 260, 281; Loring vs. Palmer, 118 U. S. 321, 345.

[5]Banks vs. Haskie, 45 Md. 207, 226; Worthington vs. Lee, 61 Md. 530, 540; McConkey vs. Cockey, 69 Md. 286, 292; Zimmerman vs. Fraley, 70 Md. 561, 572.

[6]Juillard vs. Orem, 70 Md. 465, 471; Demsey vs. McNally, 73 Md. 433; Haslett vs. Glenn. 7 H. & J. 24. 85 Md.

[7]*Ibid.;* Spencer, 4 Md. Ch. 464-5; State vs. Reigart, 1 Gill. 1. But see Hardisty, 77 Md. 189, 195.

[8]Davis vs. Simpson, 5 H. & J. 147, 149; Little vs. Price, 1 Md. Ch. 182, 187; Dungan vs. Ins. Co. 46 Md. 499; Pacific R. Co. vs. Missouri R. Co., 111 U. S. 505, 520; Blake vs. Bank, 145 Mass. 13; Litch vs. Clinch, 136 Ill. 428, 9; Comins vs. Culver, 35 N. J. Eq. 94; Karberg (1892), 3 Ch. 13, 14, 17.

[9]Myers vs. Silljacks, 58 Md. 319, 335. And see Weaver vs. Leiman, 52 Md. 716; Smith vs. Railway. 1 Kay 408; 23 L. J. Ch. 562; Moore vs. Green, 19 How. 69, 71.

stances: Uniform possession consistent with the relief sought;[1] a wife declining to sue her husband,[2] or, a sister, her brother, living together;[3] remainder-man, before death of life-tenant;[4] insolvency,[5] or poverty, in connection with other circumstances;[6] natural hesitation on the part of a female plaintiff in a case of peculiar delicacy;[7] where stockholders, impeaching a corporate contract, have first to effect a change of directors;[8] where the plaintiffs represent a numerous class;[9] where nothing has occurred to alter the situation.[10]

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[1] Buchanan vs. Bordley, 4 H. & McH. 42, 43; Ruckman vs. Cory, 129 U. S. 387; Simmons vs. Doran, 142 U. S. 417, 448. But when relied on as part performance of an agreement, the possession must be in pursuance of it. Ridgway, 69 Md. 242, 247.

[2] Bowie vs. Stonestreet, 6 Md. 418, 432; Oswald vs. Hoover, 43 Md. 360, 369.

[3] Ogle vs. Tayloe, 49 Md. 158, 176; Robertson vs. Mowell, 66 Md. 530, 539. But reluctance of one brother to sue another is no excuse for laches, Philippi vs. Philippe, 115 U. S. 151, 158, nor the delay of a son to sue his father, when the relations between them were unfriendly. Ridgway, 69 Md. 247.

[4] Long, 62 Md. 33, 69; Bank vs. Wayman, 5 Gill. 336, 358; Sedgwick vs. Taylor, 84 Va. 827. But only when the title is purely reversionary, and no present interest exists. McCoy vs. Poor, 56 Md. 197, 206. See Zimmerman vs. Fraley, 70 Md. 572.

[5] Magruder vs. Peter, 11 G. & J. 217, 245.

[6] Beningfield vs. Baxter, 12 App. Ca. 167, 173, 181; Mason, 8 P. D. 21; Hovenden vs. Annesly, 2 Sch. & Lef. 607, 639. Poverty *alone*, per Lord Hatherly, in O'Rorke vs. Bolingbroke, 2 App. Ca. 814, 832. *Contra*, Washington vs. Opie. 145 U. S. 214, 294; Leggett vs. Standard, 149 U. S. 294; Naddo vs. Bardon, 4 U. S. App. 684.

[7] G. vs. M., 10 App. Ca. 171, 203, 209.

[8] Erlanger vs. New Sombrero Co., 3 App. Ca. 1218, 1280. But see Dunphy vs. Newspaper, 146 Mass. 495, 500.

[9] Boswell vs. Coaks, 27 Ch. D. 457.

[10] Hammond vs. Hopkins, 143 U. S. 224, 273; B. & O. R. Co. vs. Canton Co., 70 Md. 416; Sharpe (1892), 1 Ch. 154, 168; McGuire vs.

§ 265. **Ignorance of rights.** One of the most frequent of all the excuses for delay, is ignorance of rights, whether of fact or law.[1] Where the equitable claim is founded on the fraud of the other party, laches is no defence so long as the fraud remains undiscovered.[2] In a reduced form, the same principle has been introduced by statute, and in all actions at law, where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring suit shall be deemed to have first accrued at the time at which such fraud shall, or, with ordinary diligence, might have been discovered.[3] In equity, (especially as between trustee and *cestui que trust*) when the defence

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Devlin, 158 Mass. 67; Legendre vs. Byrnes, 44 N. J. Eq. 372; Waterman vs. Sprague, 55 Conn. 574; Essex vs. Day, 52 Conn. 493; Stansbury vs. Inglehart, 20 D. C. 134; Cranmer vs. McSwords, 24 W. Va. 601; Nudd vs. Powers, 136 Mass. 273. But long delay, without more, is enough to make a claim "repulsively stale." Green vs. Thompson, 84 Va. 396; Hendrickson, 42 N. J. Eq. 657. A delay of two and a half months was held fatal, where the other party had in the meantime incurred expense and assumed obligations. Chamberlain vs. Lynde, 64 N. H. 563.

[1]Whitridge, 76 Md. 54, Zimmerman vs. Fraley 70 Md. 561, 572; Sewell vs. Slingluff, 57 Md. 537, 555; McCoy vs. Poor, 56 Md. 197, 205; B. & O. R. Co. vs. Trimble, 51 Md. 99, 113; Pairo vs. Vickery, 37 Md. 467, 488; Cumberland Co. vs. Sherman, 20 Md. 117, 151; Hoffman Co. vs. Cumberland Co., 16 Md. 456, 508; Berry vs. Convention, 7 Md. 564, 581; Brown vs. Sutton, 129 U. S. 238, 248; Hammond vs. Hopkins, 143 U. S. 224; Gandy vs. Macaulay, 31 Ch. D. 1.

[2]McConkey vs. Cockey, 69 Md. 286, 292, 3; Brawner vs. Staup, 21 Md. 328; Middaugh vs. Fox, 135 Ill. 358; Lincoln vs. Judd, 49 N. J. Eq. 387; Vance vs. Motley, 92 Tenn. 310.

[3]Md. Code, Art. 57, sec. 13.

of laches is met by this excuse, the burden of proof is not upon the plaintiff to show ignorance, but upon the defendant to prove that the plaintiff had knowledge.[1] But a tenant cannot plead ignorance of the title under which he holds,[2] and if parties will accept the statements of others as to the effect of a deed, without taking the trouble to examine for themselves, they are liable to the defence of laches.[3] So, where releases are signed and money received, under circumstances which presuppose knowledge.[4] It has been held that ignorance is no excuse where it goes, not to the *fact*, but only to the *extent*, of the adverse right.[5] Ignorance of rights is no answer to laches when the result of deliberate choice, and of resolution not to inquire,[6] nor where the necessary information might have been obtained by inspection of public records.[7] In other words, the party may be bound by imputed knowledge from constructive notice. "The defence of want of knowledge on the part of one charged with laches is one easily made,

[1] Zimmerman vs. Fraley, 70 Md. 561, 571; Cumberland Co. vs. Sherman, 20 Md. 151; Wade vs. Pulsifer, 54 Vt. 45, 65; Lewis vs. Welsh, 47 Minn. 193, 203. Lindsay Petroleum Co. vs. Hurd, L. R. 5 P. C. 221. See B. & O. R. Co. vs. Canton Co., 70 Md. 412.

[2] Myers vs. Silljacks, 58 Md. 319, 333.

[3] McCoy vs. Poor, 56 Md. 197, 205. See Huyett vs. Slick, 43 Md. 284; Hutchins vs. Hope, 7 Gill. 119.

[4] Long, 62 Md. 33, 71.

[5] Naddo vs. Bardon, 4 U. S. App. 684.

[6] Allcard vs. Skinner, 36 Ch. D. 145, 188, 192.

[7] Biays vs. Roberts, 68 Md. 510, 515; Norris vs. Haggin, 136 U. S. 386, 393; Graham vs. Railroad, 118 U. S. 161; Sullivan vs. Railroad, 94 U. S. 806; Brant vs. Iron Co. 93 U. S. 326.

easy to prove by his own oath, and hard to disprove. Hence, the tendency of courts in recent years has been to hold the plaintiff to rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."[1] Accordingly, the rule before stated in another connection, also applies here, that where a party has information which puts him upon inquiry, he is charged with notice of every fact which that inquiry would have developed.[2] Others, acting in good faith, also have rights: the world must move on; and it is the interest of the community that controversies should have an end.[3] On the other hand, a *cestui que trust* is entitled to repose confidence in his trustee, and is not bound to inquire whether he has committed a fraud upon him, unless there be something to arouse suspicion.[4]

§ 266. **Elements of laches.** So far as a subject so elastic is capable of rules, the principle to be extracted from all the authorities may be stated as follows: Apart from the statute of limitations and its analogies, there are two elements, one or the other of which must be found, before the equitable conception of laches can arise. There must be such delay

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[1] Foster vs. Railroad, 146 U. S. 88.

[2] *Ante*, sec. 241; Johnston vs. Standard, 148 U. S. 360.

[3] Hoyt vs. Sprague, 103 U. S. 637.

[4] Re Vernon, 33 Ch. D. 410; Kilbourne vs. Sunderland, 130 U. S. 505, 519.

as, under the circumstances of the case, amounts to acquiescence or waiver, or else the delay must be accompanied with some material change in the situation, making the enforcement of the claim specially prejudicial.[1] Where both these elements concur, a stronger case of laches is of course exhibited than when either of them is absent, but even then the application of the doctrine may be prevented by special circumstances of satisfactory explanation, unless, perhaps, the acquiescence assumes the form of *election*, or the change in the situation is such as to raise an *estoppel.*[2] When the interests involved are of a fiduciary character, and especially where a trustee interposes the defence of laches against a charge of fraud, the latitude allowed the *cestui que trust* is more liberal than in other cases.[3]

§ 266. **Applications.** There is no equitable claim, under whatever head of doctrine, which may not in a proper case be met by this defence. The most frequent illustrations in practice occur in cases of specific performance, injunction, enforcement of equitable liens or trusts, cancellation of deeds, or rescission of contracts for fraud and reformation or rescission of contracts for mistake.[4]

A trustee, acting in good faith, is to be treated with leniency,[5] and to deprive a trustee wholly of

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[1]Erlanger vs. New Sombrero Co , 3 App. Ca. 1279.

[2]*Ante*, secs. 251, 252.

[3]Bechtold vs. Read, 49 N. J. Eq. 111.

[4]Chew vs. Bank, 2 Md. Ch. 231, Brantly's note.

[5]Webb vs. Jonas, 39 Ch. D. 660, 665.

the court's indulgence he must have been guilty of very supine negligence or willful default.[1] An executor and trustee made an erroneous distribution to the prejudice of an infant legatee, who, upon his coming of age, filed a bill against him and the overpaid legatees to reclaim the deficiency with fifteen years' interest. The trustee being confessedly liable, claimed reimbursement from his co-defendants,[2] to which claim the latter interposed the defence of *laches.* The defence was held good as to all arrears of *interest,* but as the good faith of the trustee had not been questioned he was allowed reimbursement to the extent of the principal sums overpaid.[3]

The rule, both in equity and at law, which forbids recovery for a voluntary payment of money under a mere mistake of law[4] is based upon the doctrine of laches. Courts do not invite litigation, and to those who voluntarily place themselves in the situation of becoming suitors, they decline assistance. If the party would resist an unjust demand he must do so at the threshold, and not delay until evidence may be lost or the situation changed.[5]

§ 268. **How available.** The defence of laches goes to the merits. When the objection appears

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[1]Gray vs. Lynch, 8 Gill. 431; Diffenderffer vs. Winder, 3 G. & J. 341.

[2]As in Hanson vs. Worthington, 12 Md. 418.

[3]Nyce vs. Horwitz, 18 Md. L. J. 596.

[4]Lester vs. Baltimore, 29 Md. 419; Manfrs. Bank vs. Swift, 70 Md. 515, 520; Milwaukee R. Co. vs. Soutter, 13 Wall. 517.

[5]Railroad vs. Iron Co., 46 Ohio St. 51.

upon the face of the bill, it may be availed of on demurrer, or at the hearing, and need not be set up by way of plea or answer.[1] Hence, negative circumstances relied on to avoid the defence of laches must be set forth in the bill of complaint, by way of anticipation.[2] In such cases, the plaintiff is held to stringent rules of pleading and evidence, and there must be distinct averments as to the time when the fraud, &c. was discovered, so that the court can see whether by ordinary diligence the discovery might not have been made sooner.[3] A party cannot, of course, avail himself of his own laches,[4] and may be bound by the laches of another under whom he claims.[5] Although it has been held that the defences of settlement and laches cannot be coupled so that one may eke out the other,[6] yet it is clear that where lapse of time would not prevail alone, it will sometimes be allowed weight in connection with other defences, such as estoppel, &c.[7]

§ 269. **Qualifications.** In addition to what has been offered under the head of "negative circum-

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[1] *Ante*, sec. 59, 261.

[2] Richards vs. Mackall, 124 U. S. 183; Badger, 2 Wall. 95; Noble vs. Turner, 69 Md. 527.

[3] Felix vs. Patrick, 145 U. S. 317, 332; Naddo vs. Bardon, 4 U. S. App. 688.

[4] Jones vs. Keating, 55 Md. 151; Ruppertsberger vs. Clark, 53 Md. 406; Berry vs. Convention, 7 Md. 581; Titman vs. Thornton, 107 Mo. 500.

[5] Learned vs. Foster, 117 Mass. 370; Noble vs. Turner, 69 Md. 526; Yearly vs. Cockey, 68 Md. 180.

[6] Hagerty vs. Mann, 56 Md. 523.

[7] Long, 62 Md. 33, 69; Sangston vs. Hack, 52 Md. 197.

stances,"[1] it must be noted that neither limitations nor laches will bar the government, either federal or state,[2] unless introduced as formal parties, and the real remedy sought in their name is but the enforcement of a private right.[3] When a state sues upon a private claim in another state, it is treated as a foreign private corporation.[4] The sovereign principle of exemption from the operation of laches or limitations is peculiar to the state, and does not pass to its creditors.[5] To a widow's claim of dower, the statute is not a bar, and a delay of over four years does not constitute laches.[6] Relief by injunction to restrain future infringements of trade-mark, &c., will not in general be refused by reason of laches, although the delay may be such as to preclude the plaintiff from any right to an account for past profits.[7] There can be no prescription in favor of a public nuisance, and therefore laches is no defence to an injunction bill to restrain such an injury as the pollution of a stream by a slaughter-house.[8]

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[1] *Ante*, sec. 264.

[2] *Nullum tempus occurrit regi.* Booth vs. U. S., 11 G. & J. 373; U. S. vs. Insley, 130 U. S. 263.

[3] Curtner vs. U. S. 149 U. S. 662; U. S. vs. Des Moines, 142 U. S. 510, 538; U. S. vs. Beebe, 127 U. S. 338.

[4] Asylum vs. Miller, 29 W. Va. 330.

[5] Cressy vs. Meyers, 138 U. S. 525.

[6] Mitchell vs. Farrish, 69 Md. 235.

[7] Menendez vs. Holt, 128 U. S. 523; McLean vs. Fleming, 96 U. S. 253.

[8] Woodyear vs. Shaeffer, 57 Md. 1.

§ 270. **Lapse of time.** Equity acts upon two general considerations, one having reference to the interests of the community, the other to the particular interests of individuals. The first takes account of mere lapse of time, and enforces, on behalf of society, the policy of repose.[1] It is sound public policy that no court should entertain a controversy after the ravages of time have destroyed all evidence, and when the lapse of time has been so great as to afford a clear presumption that all witnesses are dead and all proof lost.[2] After what lapse of time a disputable presumption (that of payment, for instance,) becomes conclusive, has never been fixed, but is left to the discretion of the court in view of the circumstances of each case.[3] After long acquiescence relief will be refused, not only when it is difficult to ascertain the facts, but also when the facts may be easily ascertained, and even when it is perfectly clear that relief would have been granted if asked for in time.[4]

§ 271. **Laches, apart from time.** In a broader sense, the term laches denotes any negligent omission involving a loss of rights,[5] such as the failure

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[1]Lansdale vs. Smith, 106 U. S. 394; Yearley vs. Cockey, 68 Md. 179; Stansbury vs. Inglehart, 20 D. C. 134, 162.

[2]Chase vs. Winans, 59 Md. 481; U. S. vs. Beebe, 127 U. S. 347; Turner vs. Dillard, 82 Va. 536; Sanchez vs. Dow, 23 Fla. 445; Beauclerk (1891), P. (C. A.) 203.

[3]Gregory vs. Commonwealth, 121 Pa. 622, 623.

[4]Hendrickson, 42 N. J. Eq. 657.

[5]Chew vs. Farmers' Bank, 2 Md. Ch. 238, Br. Ed., *note.*

to have a deed recorded; or the want of due diligence of a creditor in collecting securities held as collateral, or in notifying his debtor of their non-payment at maturity;[1] or the failure of a party to prepare his case for trial.[2] In this sense, laches is a term of frequent application to legal as well as equitable proceedings, is the basis of the doctrine of contributory negligence, and is sometimes identical, and sometimes confounded, with waiver, acquiescence, confirmation, estoppel and election.[3]

§ 272. **Acquiescence.** To prevent confusion in the use of this "slippery" term, distinction must be observed as to the *time* of its application to the particular transaction. Acquiescence while the transaction is in progress is simply *estoppel.*[4] To avail as a defence, it must have all the elements of estoppel. Thus, where a party expends money or does some act under a mistake as to his legal rights, misled either by the conduct, language or silence of the real owner, he being fully aware of his own right and of the mistake made by the other party, there is such fraud as will entitle the court to restrain the possessor of the legal right from exercising it.[5] Any

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[1] Haines vs. Pearce, 41 Md. 233.
[2] Ross vs. Railroad, 92 Ky. 583.
[3] Hutton vs. Marx, 69 Md. 256; Zimmerman vs. Fraley, 70 Md. 562, 572.
[4] De Bussche vs. Alt, 8 Ch. D. 314.
[5] Wilmot vs. Barber, 15 Ch. D. 105.

alleged acquiescence falling short of this standard cannot deprive a man of his legal right.[1]

Acquiescence *after* the transaction is complete, if the fruits are accepted, will amount to *election*,[2] or it may assume the form of *waiver*, by which a party sometimes loses a right by not asserting it in time.[3] If decisive steps of affirmation are taken, it may be merged in *confirmation* or *release*, provided the party is aware that he is confirming an impeachable transaction.[4] In cases of divorce, it may become *condonation.*[5] A vested legal right of action cannot in general be waived without accord and satisfaction, or release under seal.[6] A right strictly legal cannot in general be barred of an equitable remedy short of the statutory period of limitations,[7] and so as to an equitable claim to which the statute is applied by analogy.[8]

Where, however, the claim is equitable merely, and the acquiescence is marked by features like

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[1] *Ibid.;* Lamott vs. Bowly, 6 H. & J. 500; Lamotte vs. Wisner, 51 Md. 561; Russell vs. Watts, 25 Ch. D. 585-6; see Casey vs. Inloes, 1 Gill. 502; Schaidt vs. Blaul, 66 Md. 141; Menendez vs. Holt, 128 U. S. 524.

[2] *Ante*, sec. 251.

[3] Hutton vs. Marx, 69 Md. 256.

[4] Pairo vs. Vickery, 37 Md. 486; Wilson vs. Insurance Co., 60 Md. 154. "Ratification," "adoption," are terms properly applicable in cases of *agency*. Ellison vs. Water Co., 12 Cal. 550; Clough, 73 Maine, 488; 19 Central L. J. 482.

[5] Stew. M. & D. sec. 307; Bernstein (1893), P. (C. A.) 292.

[6] De Bussche vs. Alt, 8 Ch. D. 314.

[7] Fullwood, 9 Ch. D. 179; Lisle vs. Tribble, 92 Ky. 304.

[8] *Ante*, sec. 261.

those before referred to,[1] and is not explained by circumstances such as those already mentioned,[2] it will simply be identical with *laches*.[3] Whether it will or will not be a case of laches cannot be determined in advance by any hard and fast rule, but will depend upon its peculiar circumstances, in the sound discretion of the court, reviewable on appeal.[4] In any case, there must be perfect freedom of volition and action, and full knowledge of all the material facts and of the law applicable to them, a well-established exception to the rule *ignorantia legis neminem excusat*.[5]

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[1] *Ante*, sec. 263.

[2] *Ante*, sec. 264.

[3] Life Association vs. Siddal, 3 D. F. & J. 73; De Bussche vs. Alt, 8 Ch. D. 314.

[4] Owens vs. Crow, 62 Md. 496; *ante*, sec. 262.

[5] Zimmerman vs. Fraley, 70 Md. 572; Erlanger vs. New Sombrero, 3 App. Ca. 1218, 1261; Brown vs. Burdett, 40 Ch. D. 244; Fry vs. Lane, 40 Ch. D. 324; Smethurst vs. Hastings, 30 Ch. D. 490.

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