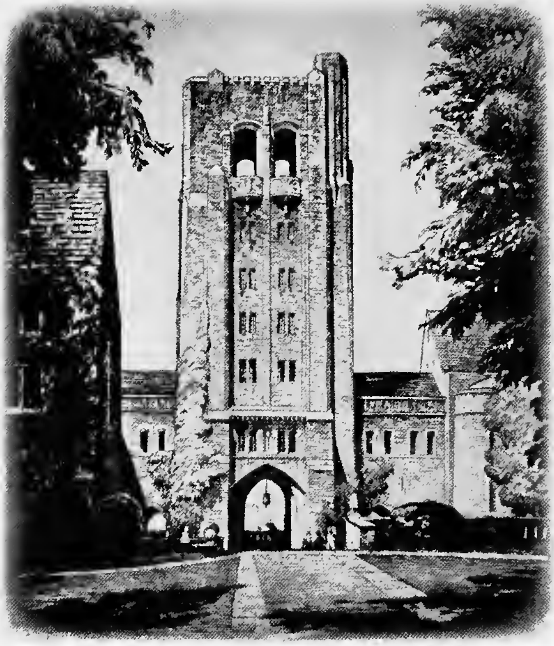

NOTES OF LECTURES

ON

EQUITY JURISPRUDENCE

TO ACCOMPANY

Merwin's Equity

Prepared for the Use of Students of the Law School
of the University of Virginia

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NOTES ON EQUITY JURISPRUDENCE

(To Accompany Merwin's Equity)

CHAPTER I

PRELIMINARY.

Equity Jurisprudence.—The term "Equity" here is a technical one, and is to be distinguished from "equity" in the sense of natural justice. The technical term is, for most purposes, interchangeable with that of "chancery." The expression "court of equity" and "courts of chancery" are synonymous.

To explain at length the origin and scope of equity jurisprudence is beyond the purpose of these Notes.

Inasmuch, however, as the principles of equity have permeated almost every department of the municipal law, it is important that the student, early in his legal studies, should apprehend something of the ancestry and proportions of this younger but vigorous sister of the common law.

Definition of equity.—In brief, equity, as the term is used in our legal terminology, may be defined as that peculiar system of remedial justice which was administered by the High Court of Chancery in England, as distinguished from that administered in the ordinary courts of common law.[1]

In some of the states of the American Union, the equity jurisdiction is still administered, as formerly in England, in separate courts of chancery; in others, (as in Virginia and the Federal Courts) the two systems of law and equity are kept distinct, but are administered by the same courts; while in still a third group, the two systems have been, to a large extent, blended into a single system.[2]

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[1] Bisham's Equity, 1.

[2] It is interesting to note that where this amalgamation has taken place, the principles of *equity* override those of the *common law*, in case of conflict.

Origin of equity.—The equity jurisdiction originated at an early period in the history of the English people. Its birth and subsequent development were due to several causes, chief of which was the extremely narrow jurisdiction exercised by the common law courts.

How narrow was this jurisdiction may be gathered from the subjoined outline of the remedies afforded in the common law courts.

The need of equity—list of common law remedies.—For purposes of comparison, these remedies are here listed. The student will note how limited they are, both in number and scope. These remain to us to-day in our common law courts, with practically no change either in number or in scope.

1. Action of *debt*—to recover a specific sum of money due by contract.
2. *Assumpsit.*—to recover damages for a breach of a simple contract.
3. *Covenant*—to recover damages for a breach of a sealed contract.
4. (a) *Trespass* and (b) *Trespass on the Case*—to recover damages for a tort to person or property.
5. (a) *Detinue* and (b) *Replevin*—to recover a specific chattel, wrongfully taken.
6. *Trover and conversion*—To recover the value of a specific chattel, wrongfully taken.
7. (a) *Ejectment*—and (b) *Unlawful Entry, etc.*—to recover real property, wrongfully taken or withheld.

And as a condition precedent, in every instance, the plaintiff must have *legal title* to the thing claimed—a mere equitable title, howsoever meritorious, being utterly rejected in a court of law.[2a]

[2a] In Strader *v.* Metropolitan Life Ins. Co. (Va.) 105 S. E. 74 (1920), in an action at law on an insurance policy, the plaintiff's declaration alleged (1) that the policy was payable to the insured; (2) that insured during his lifetime assigned one-half thereof to plaintiff; (3) that by his will, insured bequeathed the residue to plaintiff, and (4) that plaintiff was *complete owner* of the policy. There was no allegation, however, of the assent of insured's executor to *the passage* of *legal title from the executor* of the insured to the plaintiff. *Held,* Plaintiff's declaration does not set out a legal title and the action cannot be maintained.

These common law courts, created in earlier periods, in an unenlightened age, when litigation was comparatively rare, and when notions of justice were correspondingly crude, refused to extend their jurisdiction, or to modify their principles and procedure, to meet the increased needs of a more enlightened civilization. Cases were constantly arising, many illustrations of which will appear later, for which no remedy was afforded by the common law courts; or in which the remedy was inadequate; or, again, in which, from the peculiar circumstances of the case, manifest injustice would result from the application of the rigid rules of the common law.

Origin of equity, continued.—According to English conceptions, certainly after the Norman Conquest (A. D. 1066), the king was the supreme fountain of justice, and theoretically (perhaps sometimes actually) presided in the courts. As cases arose for which the common law courts, exercising the narrow jurisdiction already referred to, could not afford a proper remedy; or in which unrighteous judgments resulted, or were likely to result, by reason of the technical and inelastic rules which were the delight of the common law courts; or, again, in which, the poor and the humble suffered injustice because of the undue influence exerted by rich and powerful upon the judges and juries, it was but natural that special application for relief in such cases should be made directly to the king in person. So long as these applications for the exercise of the royal discretion were infrequent, the king sometimes dealt with them in person, and sometimes referred them to his secretary or chancellor.

The same—origin continued.—In the course of time, as these applications for the exercise of the royal interposition increased in number and importance, they were regularly referred to the chancellor for proper action; and, still later, they came to be addressed directly to the chancellor himself.

This officer naturally viewed the growth of his jurisdiction with satisfaction, as it tended to magnify his office and to dignify his own importance in the realm. Litigants were therefore encouraged to bring their grievances before the chancellor, and the equity jurisdiction grew apace.[4]

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[4] 1 Story's Eq. Jurisp. ch. 2; Bispham. Princ. of Eq. ch. 1; 1 Pomeroy, Eq. Jurisp. ch. 1, et seq.

Test of equity jurisdiction.—The test of the chancellor's jurisdiction was, from the beginning, as the test of equity jurisdiction has remained substantially to this day, the *absence of a plain and adequate remedy at law.*

Original sources of equity jurisprudence.—Originally, in undertaking to provide a remedy for a particular grievance, or to devise an equitable principle unknown to the common law, the Chancellor was guided by no fixed rules, but acted according to his conscience. Hence arose the satirical remark of Selden, that the measure of justice in equity was more or less according to the length of the Chancellor's foot.[5]

This officer was, however, usually an ecclesiastic, and therefore learned in the civil or Roman Law, upon which highly developed system he naturally drew as an aid to his conscience. From this circumstance it happens that the principles and procedure of modern courts of equity are largely borrowed from the civil law.

Equity established.—It was from this accidental beginning, and from this crude and informal procedure in the office of the secretary of the king, that there gradually developed, under the guiding hands of a long line of learned and distinguished chancellors, an organized court, with clearly delimited jurisdiction, fixed methods of procedure, and that fine system of modern law known as Equity Jurisprudence.

Subjects of equitable cognizance.—The subjects of equitable cognizance are, in the main, *trusts* (that is, where the legal title to property is held by one person and the beneficial ownership is in another) ; *fraud; unconscionable bargains not amounting to fraud at law; discovery of evidence; relief from forfeitures and penalties, and from accident and mistake; specific performance of contracts; injunctions; and the settlement of complicated accounts.*

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[5] "Equity is a roguish thing. For law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a 'foot', a chancellor's foot; what an uncertain measure this would be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the chancellor's conscience." —*Table Talk.*

As illustrating the difference in the rights recognized at law and in equity, it may be said that an estate conveyed to A, in trust for B, is treated in a court of law as belonging exclusively to A—B's rights being recognized only in a court of equity. Again, at law, the remedy for a breach of contract is an action for damages—in equity, in a proper case, the contract will be specifically enforced. At law where injury is threatened to the property of another, there is no preventive remedy—the only relief being an action for damages *after the wrong has been consummated.* In equity, on the other hand, an injunction will be granted to prevent the threatened injury, if serious enough to bring the case within the equity cognizance.[6]

At law there is no remedy or compelling the *re-execution* of important documents which have been lost or destroyed—or for the reformation of written instruments which, by mistake, do not express the true intention of the parties. Equity, however, has a complete workshop of its own, and will make a remedy for every conceivable legal wrong, where no remedy, or an inadequate one, exists at law—its maxim being "equity will suffer no wrong to be without a remedy." *Ubi inuria, ibi remedium.*

Procedure at law and in equity contrasted.—The procedure in equity also differs widely from that at law. For instance in equity the judge (or "chancellor") decides both of law and of fact wthout a jury; and the testimony is heard not *ore tenus,* as at law, but in the form of written depositions, taken, in advance of the trial, before a notary or other official—the chancellor himself neither seeing nor hearing the witnesses. The chancellor may, however, where the testimony is conflicting, call in a jury as an aid to his conscience—but he may reject

[6] The history of medicine furnishes a parallel. Formerly, the art of disagnosing and healing diseases was assiduously cultivated, to the almost total neglect of the art of prevention. The patient was allowed to become sick, or the wound to suppurate, and then the medical man administered curative agents. Here we have the common law action for damages, after the wrong is consummated. In more recent times, a large part of the physician's efforts is devoted to the preventive side—hygiene and asepsis. Here we have the injunction in equity. Both illustrate the application of the maxim "Prevention is better than cure."

the verdict, when returned, if the justice of the case seems to demand it.[7]

Common law and Equity compared further.—The subjoined comparison may aid the student's mental conception of the two systems of law and equity. Suppose the two to be represented as two hospitals:

1. The common law hospital is hoary with age, non-progressive and wedded to its own traditions and customs; proud of its prestige, and intensely jealous of its long-enjoyed monopoly. Its peculiar features are a medical side only—its administrators neither knowing nor practicing surgery—and knowing nothing, and caring less, about preventive medicine. It prescribes fixed, old-time, ironclad remedies, and one only for each of the very few diseases which it recognizes and treats. It accepts but seven diseases out of all the ills that assail the flesh, and hence there are but seven varieties of drugs in its entire pharmacopeia. It admits no patient even with a recognized ailment, unless he is clothed in an approved and prescribed costume.

2. The equity is a later and a more scientific home for the sick, and board of health for the well. In response to the persistent clamor of the people for better medical and surgical treatment, the new hospital is established by and under the immediate patronage of the king, and is served by the king's household physicians, familiar with all the modern medical and surgical learning of Continental Europe. Surgery and preventive medicine are skillfully practiced; new diseases are diagnosed, and new remedies devised, whenever the occasion makes the necessity. It is open to every sufferer, whatever the nature of his malady—*but with one sharply drawn exception.* This exception, established at the very beginning of the new enterprise, and ever since vigorously enforced, is that *no patient will be received who is a proper subject for the older rival.* If his disease is one that can be, and will be, properly treated in the older hospital, his application for admission to the newer will be rejected. Such refusal, in such circumstances, to accept the patient avoids

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[7] Miller *v.* Wills, 95 Va. 337, 28 S. E. 337. See "Issue out of chancery," *infra.*

the appearance of rivalry, and enables the younger to escape the jealousy and ill will likely to flow from loss of patients or diminution of prestige on the part of the older. In such case, then, and in such case only, the patient will be denied admission—not on the ground that he is not ill, nor because of lack of facilities for his cure, but solely on the ground that *he can receive proper treatment at the other place.* But if really ill, and his disease is thought to be subject to palliation or cure, and is one not recognized, or otherwise not satisfactorily remediable, at the other place, then the patient will be welcomed. Nor is question ever raised as to the garb in which he is clothed, provided it be honestly his own.

The court of law is the old hospital, the court of equity the new; the required garb is the legal title. Thus neither interferes with the business of the other, and neither occupies or asserts over the other a position of superiority. Each has its own peculiar functions, wholly independent of the other. Equity has simply stepped in and pre-empted a portion of the field of justice which the common law courts refused to occupy.

It often happens, however, that a patient suffering with a disease for which the older hospital would treat him, is, notwithstanding, received and treated in the younger. This occurs where the latter is convinced that the treatment prescribed in the older is, *for that particular case,* not a satisfactory one—but that its own course of treatment is far more scientific and efficacious. In legal terminology this is a case of *concurrent* jurisdiction—equity taking cognizance of a common law case because the remedy in the law courts is not "plain, adequate and complete." We shall have occasion to deal at some length with this topic of concurrent jurisdiction, in another place.

Mr. Snell [8] in his learned treatise on the equity of jurisdiction, has well expressed the thought of the last paragraph but one: "Equity may then be defined as that portion of natural justice, which, though of such a nature as properly to admit of being judicially enforced, was, from circumstances hereafter to be noticed, omitted to be enforced by the common law divisions, and which the chancery division, or court of chancery, for reasons of its own, enforced."

[8] Princ. of Equity, 3.

Foundation of equity.—In striking contrast with the rules of the common law, many of which are in the highest degree technical, and the application of which frequently results in gross injustice to the litigant, the principles of equity jurisprudence are based on equity and good conscience. No principle that would shock the conscience of an intelligent layman possessing a delicate ethical sense, is likely ever to be found embodied in equity jurisprudence. The formalism and the inelasticity of the common law—the measuring out of justice by prescribed formulæ as a dealer measures out his wares—the frigid indifference of the common law judge to the injustice of his judgment based on a settled but highly technical common law rule—are all foreign to equity jurisprudence. The study of this branch of the law is, therefore, a study of human ethics, concretely applied.

Advice.—Unless the student cultivates a close and intimate relation with this topic, and learns to live in its atmosphere from his first acquaintance with it, he cannot hope to reap the full benefit of his pursuit of legal wisdom while in the Law School. If he holds himself aloof, and tries merely to remember written rules, he can never realize the aspiration to become a learned, practical, dependable and conscientious practitioner. The surest test of a sound legal mind is its appreciation of those elementary principles of equity jurisprudence which we shall be studying together during this first term of our second-year law studies. The student must, therefore, live close to his equity studies, and endeavor to make equitable principles a part of his every day thought.

Page 6, § 10. **Issue out of chancery.**—When the chancellor finding himself in doubt on an issue of fact, by reason of conflicting testimony, sends the issue to one of the common-law courts to be tried before a jury, as mentioned in the text, this is known as an "issue out of chancery," or a "feigned issue." The student will observe that it is within the discretion of the chancellor thus to call in the aid of a jury, or not, as he pleases; and that even after the jury brings in its verdict on the issue, the chancellor may disagree with the jury, and not only overrule the verdict, but himself decide the issue of fact contrary to the view taken by the jury.

The Text refers to the issue out of chancery as if it were a rare proceeding, but it is quite common in many of the States, including Virginia. In Virginia, where the same judge is at once a common-law judge and a chancellor, these issues out of chancery are tried before the chancellor himself, thus affording an illustration of a jury trying a chancery cause:[9]

The same—court's power to direct issue not subject to control of parties.—In Shoemaker *v.* Shoemaker,[10] the chancellor decided certain disputed questions of fact without the aid of a jury—neither party requesting a jury trial. On appeal the court found the testimony of so conflicting a nature that grave doubt was entertained whether the finding of the lower court was or was not erroneous. Thereupon the appellate court reversed the decree and directed the chancellor to submit the issues to a jury. This decision has been criticized;[11] but when it is recalled that in this State the erroneous exercise of judicial discretion is ground for reversal; and that it is the duty of the court of appeals, on appeal in a chancery case, to consider the testimony and pass upon the issues of fact involved, in spite of the findings of the chancellor below, and hence as much its duty and right *ex mero motu* to direct an issue for trial by jury as it is the right and duty of the chancellor, the criticism loses force. If, on consideration of the whole record, the appellate court is not satisfied that the ends of justice have been met by the findings of the chancellor, to reverse the decree and direct a jury trial seems eminently a proper proceeding—in spite of the waiver of a jury by the parties below. In short, if the parties by their waiver cannot deprive the chancellor of the power to direct an issue, neither should such waiver deprive the appellate court of that power.

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[9] See Lavell *v.* Gold, 25 Gratt. 473, and note in Michie's edition. It is immaterial in Virginia whether the issue be tried on the law or the equity side of the court. Meade *v.* Meade, 111 Va. 451. See further: Powell *v.* Manson, 22 Gratt. 177 (where Staples, J., explains the practice and procedure); Stevens *v.* Duckett, 107 Va. 17; Carter *v.* Jeffries, 110 Va. 735.

[10] 112 Va. 798.

[11] 17 Va. Law Reg. 717.

CHAPTER II.

This chapter is a résumé of the contents of the volume, intended to give the student a bird's-eye view of the ground over which he is to travel later, and with more attention to minute detail.

CHAPTER III.

CONCURRENT JURISDICTION.

Page 26. **Test of equity jurisdiction.**—The test of equity jurisdiction as given in the Text is not strictly accurate, namely, that equity does not take jurisdiction "where there *is* a complete remedy at law." As we shall see presently, there may be a complete remedy at law, and yet equitable jurisdiction may exist concurrently with it. The real test is, *Has there always been a complete remedy at law.* See third note below.

Page 27, § 56. **Equity jurisdiction in cases of fraud.**—Let us change the first sentence of the second paragraph here to read, "Equity also has concurrent jurisdiction over cases of fraud but *it will not assume this jurisdiction in every case.*" Equity will not, as a rule, assume jurisdiction in cases of fraud, save where the remedy at law is less convenient or less complete than that which equity can provide.[1]

Page 29. In several places on this page, the author repeats the inaccurate test of equity jurisdiction, namely, *Is* there a complete remedy at law? instead of, *Has there always been a complete remedy at law?* as previously noted.

Page 29. **Effect on equity jurisdiction of statute giving law courts jurisdiction.**—It is settled that where equity has once taken jurisdiction because of the lack of legal remedy, it will *continue to exercise the jurisdiction, even though subse-*

[1] See Green *v.* Spalding, 76 Va. 411, and Text, 305.

quently courts of law have assumed a similar jurisdiction, as the result of statute, or otherwise.[2]

Page 30, § 62. **Remedy at law must be plain and adequate—illustrations.**—Where an insurance policy was made payable to the "estate" of a dead man, it was doubtful who should be proper plaintiff in a court of law; hence, equity took a jurisdiction.[3] After a decedent's death, a number of securities belonging to him were in possession of and claimed by a kinsman, as a gift from the decedent before his death. The administrator denied the gift, and employed counsel to sue for recovery of the securities. Inasmuch, however, as the administrator could not describe the securities, a declaration at law could not be drawn. Because of this difficulty at law, equity took jurisdiction of the purely legal claim.[4]

So where one party is both maker and joint payee of a note —*e. g.,* a note executed by A to A and B—as A cannot, in a law court, be both plaintiff and defendant in the same action, the remedy is in equity only.[5]

Page 32, § 66. **Specific performance of contract for personal property.**—(Omit first paragraph.) The better rule here is that equity will never enforce a contract concerning personal property, unless the property be of a unique character, not procurable in the open market, and where damages will not compensate for the breach of the contract, or there are special circumstances, rendering the aid of the court of equity necessary to prevent a failure of justice.[6]

Page 34, §§ 68-73. **Shares in corporations.**—Whatever may be the English rule on this subject, by the overwhelming weight of authority in America, a contract for the sale of cor-

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[2] ("Equity, like the proverbial turtle, when it once takes hold, never lets loose until it thunders, which thunder is the fulmination of a statute so directing it.") Thompson *v.* Allen County, 115 U. S. 550; Steinman *v.* Vicars, 99 Va. 595; Herring *v.* Wilton, 106 Va. 176; Johnson *v.* Black, 103 Va. 477.

[3] Portsmouth Ins. Co. *v.* Reynolds, 32 Gratt. 614.

[4] Smith *v.* Smith, 92 Va. 696. See further, Perkins *v.* Siegfried, 97 Va. 744.

[5] Reid *v.* Windsor, 111 Va. 825.

[6] Southern Iron, etc., Co. *v.* Vaughan (Ala.), L. R. A. 1918E, 594, and full note.

porate stocks will not be specifically enforced, save where the circumstances are peculiar, as stated in the preceding note. The sound doctrine on this subject is stated in the text, in § 72.[7]

The fact that the purchaser's object is to secure control of the corporation, is no valid objection to specific performance of a contract for the sale of shares, if the contract be otherwise proper for specific performance; unless, perhaps, where the control is sought from improper motives.[8]

Page 39, § 75. (Omit last four lines of this page and remainder of paragraph, page 40).

CHAPTER IV.

CONCURRENT JURISDICTION (Continued).

Bill to remove cloud from title—(1) Title-holder out of possession.—Where the holder of the legal title to real property is *out of posesssion,* it is an elementary principle that since he may maintain ejectment at law against the adverse claimant in possession, his remedy is *at law* and not in equity.

The same—(2) title-holder in possession.—But where the holder of the legal title is *in possession* of the property, so that he cannot maintain an action at law against an adverse claimant, then, because of the inadequacy of the legal remedy, a court of equity will entertain a bill in his behalf for inquiring into any adverse claim constituting a cloud on the title; and, on proper proof, will decree the removal of such cloud.[1]

The same—(3) title of plaintiff in possession.—The authorities are not uniform as to the character of the title (that is whether legal or equitable) which the plaintiff in possession must exhibit in order to sustain a bill to remove a cloud from his title.

In many jurisdictions, including Virginia (until a recent stat-

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[7] See note, 50 L. R. A. 501; L. R. A. 1915D, 300.

[8] See 3 Cl. & Marsh. on Corp. 1663; Text, § 75.

[1] Glenn *v.* West, 103 Va. 521; 3 Pomeroy's Eq. Jurisp. 1399; Whitehouse *v.* Jones (W. Va.), 12 L. R. A. (N. S.) 49 and extensive note.

ute altered the rule) and the Federal jurisdiction, it is held essential that the *plaintiff have legal title.* If he has equitable title only, he must acquire the legal title before filing his bill, since the purpose of such a bill is to protect the owner of the legal title from being disturbed in his possession, and his title rendered less secure, or less marketable, by reason of the cloud resting thereon.[2]

The rule is now otherwise in Virginia, by virtue of a recent statute declaring that such a bill may be maintained on an *equitable title,* and this whether the plaintiff be in possession or not.[3]

Pages 47-49, §§ 90-3. (Omit.)

Page 45, § 85. **Enjoining domestic and foreign judgments.**—The last sentence in this section "Judgments of the several states are domestic judgments within this principle," is out of place. It should be placed at the end of the first paragraph. The Text will then read as follows: "A domestic judgment is conclusive between the parties; *i. e.* in a suit at law upon it, it is not open to the defendant to impeach it for fraud or for any other cause. It is conclusively presumed to be correct. Judgments of the several states are domestic judgments within this principle"—this because of the provision in the United States Constitution requiring that each state shall give full faith and credit to the judicial proceedings of every other state.[4]

The result is: (1) As to *domestic* judgments, and judgments of other states of the Union, these being conclusive at law, equity will intervene, and enjoin their enforcement, when they have been secured by fraud—because there is no relief at law. But (2) In the case of *foreign* judgments (but not judgments of sister states), these are not conclusive at law, and hence the law court itself will afford relief in a proper case. For this reason equity will not here intervene.

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[2] Tax Title Co. *v.* Denoon, 107 Va. 201; Frost *v.* Spitley, 121 U. S. 552.

[3] Va. Code 1919, § 6248. The subject is regulated by statute in many states. See, generally, both as to the unwritten law and as to the effect and construction of governing statutes, 3 Pomeroy's Eq. Jurisp. 1395-96; monographic note, 12 L. R. A. (N. S.) 49-82.

[4] See Christmas *v.* Russell, 5 Wall 290; Maxwell *v.* Stuart, 22 Wall 77.

CHAPTER V.

CONCURRENT JURISDICTION (Continued).

Page 53, § 98. **Where the ground for equitable relief fails, will a court of equity give legal relief?**—The conclusion reached by the Text, in the several sections devoted to this question, is that the equity must be answered in the negative, namely, that equity in such case *will decline further jurisdiction* and remit the plaintiff to his remedy at law. The weight of authority is probably the reverse. That is to say, if the plaintiff comes into equity *in good faith,* on an allegation of peculiar circumstances giving equity jurisdiction, the court may retain the bill and give complete relief, even though the proof does not establish the peculiar circumstances alleged, or the equitable character of the claim, and though the claim turn out to be purely legal. The plaintiff must, however, have gone into court *in absolute good faith,* since if the court is not satisfied of this good faith it will dismiss the bill as an effort to obtain equitable jurisdiction by fraud.

The same—illustration.—This is well illustrated in the case of Walters *v.* Farmers Bank.[1] Here the plaintiff held a note, made by a married woman, and endorsed by one Walters, her trustee. As the law then stood, a married woman's contract was void at law, but if she possessed equitable separate estate when the contract was made, such estate might (and may still) be subjected in equity. Suit in equity was instituted against the married woman to subject her equitable separate estate to the payment of the note, the endorser properly being made a party, though the claim against him was purely legal. If the court had jurisdiction of the married woman, it had also jurisdiction of the endorser, notwithstanding the legal nature of his obligation, since it is a maxim of equity, that when it takes jurisdiction of a matter, it will give complete relief. It turned out subsequently, that at the time the bill was filed, the married woman *had no equitable separate estate,* having previously sold it, but of this,

[1] 76 Va. 12.

the *plaintiff was ignorant.* Hence, there was in fact no equitable claim to be considered by the court, and in consequence the suit was dismissed as to the female defendant. The defendant endorser thereupon moved to dismiss as to him also, for want of jurisdiction. The court held, however, that the bill might be retained, and purely legal relief against the endorser be administered. The court said, speaking through Staples, J.:

> "It has been said, however, that inasmuch as Mrs. Neal had no separate estate at the time the bill was filed, the jurisdiction of equity could not attach as to any of the parties, and the bill ought to have been dismissed as to all. * * * The principle is almost universal that *jurisdiction of the subject matter does not depend upon the ultimate existence of a good cause of action* in the particular case. Being once properly and lawfully acquired, so subsequent fact can defeat that jurisdiction. Gocinwell *v.* Burwell, 1 Lord Raymond, 466-67; Hunt *v.* Hunt, 72 N. Y. 217; Salter *v.* Salter, 6 Black, 625; Wells on Jurisdiction of Courts, 68; Bush *v.* Campbell, 25 Gratt. 435.
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> "The learned counsel for the appellant relies upon the case of Jones *v.* Bradshaw, 16 Gratt. 356, in which it was held that where a party resorts to a court of equity for a discovery as the sole ground for equitable relief, if it appear that he is full handed with proof, his bill must be dismissed. In such case it is manifest that the object is by a *false pretence* to transfer the controversy from a legal to an equitable forum. The rule can have no application to a plaintiff who, in the *bona fide* assertion of an equitable right, invokes the jurisdiction of a court of equity, but, from some cause developed in the course of the investigation, fails in establishing his title to the specific relief claimed in his bill. In every instance the court must determine upon the facts and circumstances of the particular case, whether it is better to leave the parties to their legal rights and remedies, or to go on and end the litigation by giving complete and final relief in the cause. 1 Bart. Ch. Pract. 339, and notes."

This principle does not include the case where the plaintiff comes into equity from mere ignorance of the *law*—but extends only to miscarriages of *fact,* accompanied by the utmost good faith.[2]

Page 56, § 105. **May consent confer jurisdiction?**—It is settled, save possibly in Massachusetts (as noted in Text, §§ 106-7), that *consent cannot confer jurisdiction*—that is to say, if a suit which properly belongs to a court of law he brought in equity, even though the defendant makes no objection, and be

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[2] See 1 Pomeroy Eq. Jur. 181; Paper by Prof. H. St. G. Tucker, 15 Va. St. Bar Asso. Rep. 221; Gordonsville, etc., Co. *v.* Jones (Tenn.), 57 S. W. 63; Case *v.* Minot (Mass.), 22 L. R. A. 536; Johnson *v.* Bunn, 108 Va. 490, annotated in 19 L. R. A. (N. S.) 1064.

willing that equity shall adjudge the matter, the chancellor himself will take notice of the defect of jurisdiction and the cause will be dismissed. This is substantially the doctrine stated in §§ 105 and 108 of the Text.

Page 59, §§ 106-7. (Omit.)

Page 59. **Distinction between "jurisdiction" and "venue"**—The student must carefully distinguish between *jurisdiction*—that is, the right of the court to adjudicate causes *of the nature of that alleged in plaintiff's bill*—and mere *venue*—that is, the *place of suit.*

For example, we may say, with a fair degree of accuracy, that every chancery court in Virginia (and there is one for every county and city) has complete jurisdiction (in a case proper for equitable relief) over *every person and all property, real and personal, within the borders of the State.* The defendant, however, has the *privilege*—in case he sees fit to avail himself of it, in the proper time and manner—of being sued in a certain locality, namely, in his county, or where the property is, etc. This privilege he may waive, and does waive, unless he objects at a very early stage of the proceedings. Here, his objection is not to the *jurisdiction,* but to the *venue,* or place of suit.[3]

Page 59. **Effect where court of equity takes jurisdiction by mistake.**—It is a general rule that the judgment or decree of a court without jurisdiction of the subject matter, is *coram non judice* and void. This, however, does not apply in civil cases where the only question of jurisdiction is between a court of law and a court of chancery, in the erroneous exercise by the latter court of its concurrent jurisdiction. The rule here is, therefore, that if, through inadvertence or outright error, a court of equity does take jurisdiction of a matter with respect to which there was an adequate remedy at law, the decree is not void as being the judgment of a court without jurisdiction, but is merely erroneous, or voidable—that is to say, it is valid and binding until impeached by an appeal taken in due time, or by other proper proceeding *directly assailing the decree.*[4]

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[3] Moore *v.* N. & W. R. R. Co., 124 Va. 628—quoting this note.

[4] Lemon *v.* Herbert, 92 Va. 653; Mellen *v.* Iron Works, 131 U. S. 352; Goodman *v.* Winter, 64 Ala. 420, 431-433.

"If," says Brickell, C. J., in the Alabama case cited above, "an action of ejectment, or a real action were instituted in the court of chancery; or an indictment or information for crime were preferred, the case would be *coram non judice*, and the decree pronounced void. Or, if in the mode of pleading at common law, any cause of action cognizable exclusively at law was presented, the decree of the court would be void. But if, by appropriate pleading, a case was presented, of which the court would have jurisdiction, if there were not an adequate remedy at law, the error of the court in adjudging that it had jurisdiction, though the bill disclosed the adequacy of legal remedy, and was [for that reason] demurrable, would not render the decree void. * * * It would be erroneous and reversible, but binding and conclusive until it was reversed. A court having jurisdiction to decide the case as presented, does not avoid its judgment by deciding erroneously that it belongs to a class in which relief ought to be granted. * * * The court has power, and is bound to hear and determine—and the case is *coram judice*. De Guindre *v.* Williams, 31 Ind. 456; Shroyer *v.* Richmond, 16 Ohio St. 455; Cox *v.* Thomas, 9 Gratt. 312."

But if a court without any equity jurisdiction whatsoever—for example, one of the character of the recently abolished county courts of Virginia, or the hustings court of the city of Richmond—should entertain a bill in equity, its decree would be not merely erroneous and subject to reversal on appeal, but absolutely void.

CHAPTER VI.

MAXIMS.

Page 60, § 110. **"Equity follows the law"—restricted application.**—Whatever may have been the efficacy of this maxim in earlier times, and during the formative period of the equity jurisdiction, its operation has become so restricted in the course of the development of equity, as almost to warrant its exclusion from the category of equitable maxims.

If equity had followed the law in all cases there would been no need for the system. The student will remember that the birth and remarkable development of the equity system were due to the narrowness and inadequacy of the common law—and it was by the refusal of equity to follow the law that it has won and maintained the important place is now occupies in English and American jurisprudence.

The same—to what extent equity follows the law.—In developing its own system, equity did not wholly reject the principles recognized at law. It seems to have exercised its own judgment in adopting such of these principles as seemed wise and just, and in rejecting the rest.

Thus, in the recognition of trust estates in direct opposition to the common law, equity follows the rules of descent and distribution as existing in the common-law courts. It also follows, in the main, general legal principles applicable to the formation and validity of contracts; the general rules of construction and interpretation of written instruments; the substantial rules of the law merchant; the ordinary rules of evidence—with same striking exceptions in cases of mistake, fraud, and accident; and always where *legal rights and titles* are the subject of inquiry. Other instances will appear hereafter.

But, as already indicated, much of equity jurisprudence is made up of principles peculiar to that system, with a complete disregard of legal rules, and in direct conflict therewith.

For example, in opposition to legal rules, equity enforces trusts; it ignores the sanctity of the seal on a bond or other obligation when justice demands it; compels the adversary to discover evidence against himself; grants injunctions, specific performance, and relief from penalties; relieves from the results of accident or mistake; and recognizes the right of the mortgagor to redeem after breach of condition—in all of which cases it acts in direct opposition to the rules of the common law.[1]

Equity following the law, continued—legal title.—It is in connection with questions of *legal title* to property that this maxim is most frequently applied in equity. Here equity follows legal rules as strictly as do courts of law. Whatever is necessary or sufficient to constitute legal title in the one court is equally necessary and sufficient in the other. But after following the legal rule as far as that rule goes, equity, in a proper case, goes a bow-shot beyond, and lays upon the owner of the legal title such further duties and obligations as justice and good conscience require.

Thus, where A conveys or devises an estate to B, in trust for C, the law court would declare legal title in B, and ignore any right in C. Equity follows the law court in assigning legal title to B, and then proceeds to compel B to recognize C's equitable ownership.

So where A induces B to devise an estate to him, on a promise to hold it for the benefit of C—or where an only son induces his father not to make a will so that the father's estate will pass to the son on the former's death intestate, but with a promise on the part of the son to dispose of some portion of the estate so passing to him in a particular way (as to endow the Law Library of the University of Virginia)—a court of equity would concur with the court of law in holding that in the first case the entire estate passed to A, under the will, and, in the second case, to the son by inheritance; but equity would attach to this legal title an *equitable obligation* to perform the trusts upon which the legal title was accepted.

Pages 62-66, §§ 113-118. **Statute of limitations in equity —does equity follow the law here?**—The student will observe that these sections are devoted, under the general head of

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[1] See an interesting article on this maxim in 40 Am. Law Review, 108.

the maxim before mentioned, to the subject of the statute of limitations in equity.

Perhaps it may serve to clear up the situation somewhat by pointing out the circumstance that, as a general rule, the statutes of limitation *do not, in terms, refer to equitable claims,* but only to claims asserted at law. Where a particular equitable claim is expressly included in the statute, there is no room left for discussion—since courts of equity are as much under the control of the legislature as courts of law.

In § 115, the Text lays down, with a fair degree of accuracy, two rules on the subject of the statute of limitations in equity, where equitable claims are not expressly mentioned in the statute, namely:

(1) *Concurrent jurisdiction.*—In cases of *concurrent jurisdiction,* that is, where the claim is *legal,* but equity jurisdiction is invoked because of the more convenient *remedy,* then equity considers itself bound by the statute of limitations applicable to the legal claim, even though the statute itself makes no reference to the equitable remedy.

Illustrations here would be a suit in equity to enforce liability on a lost negotiable note—the claim being purely legal, and the equity jurisdiction being invoked merely by reason of the accident of loss of the instrument.

So, in the same case, if the equity jurisdiction had been invoked on the ground of the maker's death, and the necessity of equity's aid in winding up his estate. So where an author sues an infringer of his copyright in equity for an injunction, and, as incidental thereto, for an account of all profits resulting from the infringement. Here the claim for profits is a purely legal one, and is asserted in equity only because of the more convenient remedy there. In each of these cases equity would follow the law by applying the statute of limitation (if pleaded), just as if the claim were being prosecuted in a court of law.[2]

[2] Redford *v.* Clarke, 100 Va. 115; See Winston *v.* Gordon, 115 Va. 899—a case in equity against bank directors to hold them liable for negligence in the performance of their duties—a mere tort, but enforceable in equity for special reasons. The statute of limitations applicable to tort actions at law was held applicable. It will be noticed that in these cases, though the procedure in the two tribunals is different, the *relief given is precisely the same in each court.*

(2) *Following legal analogy.*—Although the claim of the plaintiff rests on an equitable title merely, yet if, in an analogous case at law, the statute would have barred the claim—and this is particularly true in the case of adverse titles—then equity, though not in terms bound by the statute, will follow the *analogy of the law,* and apply the statute.

Thus, where A. procures a conveyance to himself of B's farm, by fraudulent representations, or other inequitable conduct, B may sue either at law or in equity. At law his action would be for damages only—usually an unsatisfactory remedy. In equity he would sue for a rescission of the conveyance and a reinvestment of the title in himself. Here the case, as in (1) above, is one of concurrent jurisdiction, but which a wholly *different remedy sought.* Here, again, equity would permit the statute of limitations to be set up against the plaintiff's claim (but excluding the time during which the plaintiff was in ignorance of the facts constituting the fraud). Here A is treated in equity, as a constructive trustee for B. Hence the rule, that in equity a constructive trustee may claim the benefit of the statute of limitations.[3]

Let us add a third and a fourth case:

(3) *Claims purely equitable.*—Where the right sought to be enforced in equity is a *purely equitable* one (that is one not recognized at law) and there is *no express statutory bar, and no analogy to be followed* because claims of the character asserted are unknown to the law courts, then equity applies its own peculiar rule of *laches,* explained *infra.*[4]

Thus, the claims of the *cestui* against the trustee of an express or resulting trust (it is otherwise, as we have seen, in the case of the constructive trust) constitute *subject-matter* purely

[3] Rowe *v.* Bentley, 29 Gratt. 756, 759-760; cases in preceding foot note; 2 Va. Law Reg. (N. S.) 622. It is generally held that although a debt be barred by the statute at law, equity will enforce any valid *lien* by which the debt is secured, whether the lien be legal or equitable. A note secured, for example, by a mortgage or vendor's lien, or a subscription to corporate shares, secured by a lien on the shares, would illustrate such cases. See U. S. Cigarette Machine Co. *v.* Brown, 119 Va. 813; Brent *v.* Bank of Washington, 10 Pet. 596.

[4] See Craufurd *v.* Smith, 93 Va. 633, and cases cited below.

equitable. The question is not one of *remedy* but of *right.* A law court knows nothing of such claims.

Suits to foreclose mortgages; to redeem mortgages; to cancel written instruments for fraud or mistake, or to correct written instruments for the same causes; to compel re-execution of written instruments, lost, destroyed or mutilated; for relief from forfeitures and penalties, etc., are illustrations of purely equitable claims, to which, in absence of special provision, the statute of limitations does not apply. They are, however, subject to the defense of *laches* presently to be noticed.

(4) *Equitable claims expressly mentioned in statute.*—Where claims purely equitable are *expressly mentioned* in the statute of limitations, *e. g.*, foreclosure of mortgage (twenty years in Virginia); suit to set aside voluntary conveyance (five years). Here, of course, equity must obey the statute, subject to the next section.

Page 64, § 116. **Lack of notice prevents the running of statute of limitations in equity.**—The rule of the common-law courts is that ignorance of one's rights does not clog the running of the statute, save where there has been *fraudulent* concealment. But in equity the rule is the reverse, and courts of equity, as a general rule, regard the statute of limitations as running, if at all, *only from the time that the plaintiff discovered his right,* or by due care might have discovered it, even though there has been no fraudulent concealment.[5]

Laches.—The rule of *laches* referred to in the paragraph numbered (3) above, is, that although equity, in such cases, is not bound by the statute of limitations, it will yet refuse relief to a plaintiff who has *knowingly* or *negligenly* slept on his rights, as the result of which enforcement of the claim is likely to produce a failure of justice by reason of the loss of evidence—as by the death or forgetfulness of witnesses, or by loss or destruction of papers.

But where, on the other hand, none of these reasons exist—as

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[5] See 2 Pomeroy's Eq. 917; Kilbourn *v.* Southerland, 130 U. S. 519; Rowe *v.* Bentley, 29 Gratt. 756; Hall *v.* Graham, 112 Va. 560; Wingfield *v.* McGhee, 112 Va. 644; Winston *v.* Gordon, 115 Va. 899.

where the plaintiff was ignorant of his rights, without his fault, or the justice of the claim rests in written documents, or in the well authenticated admissions of the defendant—then equity may enforce the claim in spite of the long lapse of time, unless the circumstances of the delay indicate an abandonment of the claim.

Laches, continued—illustrations.—Thus, in a recent case in Virginia,[6] after the estate of a decedent who died forty years before, intestate, had been distributed among his heirs and distributees, a will was discovered which was duly probated, devising and bequeathing the estate to others than the distributees and heirs. In a suit instituted by the beneficiaries under the will to recover the estate from those who had thus unlawfully received it, it was held that since this sort of a case was not mentioned in the statute of limitations, and since there was no legal analogy to follow, the court would be governed by its own peculiar rule as to stale claims. And inasmuch as the rights of the plaintiff appeared on the face of the will, and the character of the estate and its distribution among the defendants was a matter of record, and not dependent on oral testimony, the defendants were required to account to the rightful owners for what they had received.

Laches—illustrations, continued.—In Southern Railway Co. *v.* Gregg,[7] a vendor's lien on real property was enforced after the lapse of sixteen years, although as a simple claim for money it would have been barred at law in five years or less. In this case the claim had been continuously asserted, and continuously acknowledged.

In a still more recent case,[8] under similar circumstances, a legacy charged on land was enforced after the lapse of fifty years. And in still another case, it was held that where plaintiff discovered a considerable shortage in the acreage of a tract of land purchased by him of the defendant, he might maintain a bill in equity against the seller to recover the purchase money

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[6] Craufurd *v.* Smith, 93 Va. 633.
[7] 101 Va. 308.
[8] Wingfield *v.* McGhee, 112 Va. 644.

pro tanto, although twenty-four years had elapsed between the date of the payment and the discovery of the shortage.[9]

Laches, continued—rationale of the doctrine.—The word *laches* is borrowed from the French, and literally means *negligence.* Generally speaking, therefore, a plaintiff, to be barred of his claim by laches, must have been guilty of negligence in not asserting it earlier.

All courts abhor stale claims—for the reason that their enforcement is apt to result in injustice to the defendant by reason of his inability to establish his defence after long lapse of time, or, that in honest reliance upon the *status quo,* he has altered his condition for the worse. There is also a presumption that a claimant who has known of his right but has failed for a long time to prosecute it, has either abandoned it, or has purposely delayed his suit from some sinister motive—as the hope of the death of those most familiar with the facts, or of their forgetfulness of the facts, or of the loss otherwise of adverse evidence. The burden, therefore, of removing such presumption is on the claimant.

There is also a *prima facie* (*i. e.,* rebuttable) presumption that after a lapse of twenty years all matured claims have been settled or adjusted.

The same—overcoming the presumption of laches.—It is to be observed that every case of alleged laches stands on its own bottom; and the question of laches or no laches, in any case, depends on the *peculiar facts of that particular case.*

In its last analysis, the question for the court in all such cases is, Can the court, in this case, enter a decree for the plaintiff without serious risk of doing injustice to the defendant? If the claim has been continuously asserted and continuously acknowledged, the case is plain. If not thus continuously asserted and acknowledged, then the court must consider whether the lapse of time and the acquiescence and other conduct of the plaintiff

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[9] Hall *v.* Graham, 112 Va. 560. The decision in this case is placed by the court more distinctly on the ground that the statute of limitations (assuming it applicable from analogy to a claim for money at law) did not begin to run in equity (it is otherwise at law) until the discovery of the mistake. Southern Pac. R. Co. *v.* Bogert, 250 U. S. 483, is an interesting case in this connection.

have not indicated abandonment on his part. If not, then the question is, Has the lapse of time resulted adversely to the defendant, in the loss or serious impairment of the evidence by which he would meet plaintiff's allegations? If the court can answer this question affirmatively then, unless there be other countervailing circumstances, the plaintiff will be denied relief. But if the answer be negative, and the presumption of abandonment has been repelled, and the court is satisfied that in spite of the delay a decree may now be entered for the plaintiff, without serious risk of injustice to the defendant, the defence of laches will be rejected.[10]

Page 66, § 119. "**Where equities are equal the law will prevail.**"—The first paragraph of the Text contains an excellent statement of the real meaning of this maxim. This, in substance, is that as between two adverse claimants of the same property, both equally honest and both having paid value, he who has acquired the *legal title* (as opposed to the mere *equitable* title of his adversary) will prevail, not only, as of course, in a court of law (where equitable titles are not recognized), but in a court of equity as well.

The student has already seen something of the same rule in his studies of negotiable instruments, and of the law of sales of personal chattels. A holder in due course of a negotiable instrument, tracing legal title to himself, has priority, not only over the equities of the maker, but of any other claimant of the paper, who must necessarily stand on a mere equitable title.

The principle enunciated in the maxim is one of the most important in the whole realm of equity, and one of constant recurrence in this branch of jurisprudence. The more common form in which it finds expression is that "a *bona fide* purchaser, for value, of the legal title to property, real or personal, takes the property free from all equitable claims of third persons of which he had no notice." We shall have occasion to make many prac-

[10] There is no fixed period of time within which flesh or fruit will become stale. This period depends upon the temperature and other surrounding conditions—each according to its own peculiar surroundings. So with a case in equity on the question of laches, when unaffected by the positive bar of the statute of limitations.

tical applications of this principle, and the student's careful attention is invited to it here.[11]

Page 67, § 120. "**He who seeks equity must do equity.**"—This is one of the most valuable maxims in the scope of equity jurisprudence. The student will observe that it is especially applicable to the *plaintiff*, or to one seeking *affirmative* relief. It may be said to be the *price which the court charges the plaintiff for its assistance.* There are several excellent illustrations of the application of the maxim in the Text footnotes.

A good illustration is the rule that while a court of equity will not enjoin a creditor who, before proceeding against the principal, seeks to subject at law the estate of a surety (which he has a right to do, since the surety is as much liable for the debt as is the principal), yet if this creditor should find himself in need of the aid of the court of equity, to enforce his claim against the surety, the court will *put him upon terms*—that is to say, will make him "do equity" by compelling him first to exhaust the estate of the *principal.* It is, therefore, a settled rule of equity that it *will not subject the estate of a surety at the suit of a creditor, until the principal's estate is first subjected*—save where the application of this principle would cause inequitable delay or other injustice to the creditor.[12]

The same—"putting plaintiff on terms."—The applcation of the foregoing maxim is frequently called "putting plaintiff on terms." By this is meant that the court will consent to grant the relief, in whole or in part, prayed by the plaintiff, on condition that the plaintiff will himself comply with such terms and conditions as equity and good conscience demand that he should concede to his adversary.[13]

If the terms or conditions which the court may thus exact of the plaintiff were confined to such as the defendant might have demanded *as of right,* in an independent suit against the plaintiff,

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[11] See an interesting application of the maxim in Evans *v.* Roanoke Savings, Bank, 95 Va. 294; 3 Va. Law Reg. 705.

[12] See Horton *v.* Bond, 28 Gratt. 815.

[13] Striking illustrations of this principle will be found in the cases cited: Shoffela *v.* Nugent, 217 U. S. 499; Veazie *v.* Williams, 8 How. (U. S.) 133; Tennant *v.* Dunlop, 97 Va. 235. Numerous illustrations occur also in the Text and footnotes.

or as plaintiff or defendant in a court of law, this principle would lose much of its force and scope. But it is not so limited. On the contrary, the court may, under this rule, decline relief to which the plaintiff is clearly entitled, unless the plaintiff, as the price of the court's assistance, will do or perform something which the court thinks the plaintiff as an honest person should do in behalf of the defendant, *even though the terms and conditions thus exacted are not of themselves justiciable rights,* enforceable independently against the plaintiff.

The same—illustrations.—A few illustrations may make this clearer:

Thus where the plaintiff seeks to recover property of which he has been defrauded by the defendant, he must return to the defendant the consideration received—though defendant, as the penalty for his fraudulent conduct, could not recover such consideration in an independent suit.

Again, a usurious borrower who comes into equity for relief from the usurious contract, will be required, as the price of the court's entertaining his suit, to repay to the usurious creditor the entire principal of the debt, with legal interest—although the vice of usury has rendered the contract void, or voidable, and thus debarred the creditor from any recovery whatsoever in an independent action.

The same—illustrations—continued.—Although a contract made by an infant, not for necessaries, is voidable both at law and in equity, yet if the infant comes into equity for relief against his contract—say, a mortgage on his farm—equity will require him to account for all benefits actually accruing to him from the loan or other consideration received—for instance taxes paid, or betterments to the property, or prior incumbrances paid off, out of the loan.

A quite striking illustration occurs in the recent case of U. S. Cigarette Machine Co. *v.* Brown.[14] Brown had subscribed for shares in the defendant company, but had failed to pay his subscription in full. The company sued, in a court of law, for the balance due, but was defeated on Brown's plea of the statute of

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[14] 119 Va. 813.

limitations. By statute, the company had a lien on the shares for unpaid subscriptions. Later Brown sued in equity to compel the issue and delivery of the shares. The court decreed that Brown was entitled to delivery of the shares only on condition that he pay the full balance due thereon.

Page 69, § 124. **"Equity treats that as done which ought to be done"—doctrine of "conversion."**—A common application of this maxim is that mentioned in Text, footnote 2, viz: that where a testator directs (not merely authorizes), his real property to be sold and the proceeds divided among certain beneficiaries, the interest of the latter in the estate is regarded as personal property.

And, *e converso,* where money is bequeathed, or contracted, to be laid out in real property, for a named beneficiary, a similar conversion occurs—the money being regarded as real property. The presumption of a change in the nature of a particular *res,* prior to the fact, is known as the doctrine of *"conversion."*

So, where one validly contracts to sell real property to another, in equity the land is regarded as belonging to the purchaser, and the purchase money to the seller. And hence, where after such a contract, the vendor marries a wife, she will not be entitled to dower in the real property so sold although it be not conveyed to the purchaser until after the marriage.[15]

It is in accordanc with this principle that a vendee of real property, under an executory contract of sale, (*i. e.* before title conveyed), is regarded as the "unconditional and sole owner," under a fire insurance policy requiring that the insured shall be such, in order to render the policy valid.[16]

The same—extent of conversion.—It is carefully to be observed, however, that this conversion is a mere equitable concept, adopted only for fixing the rights of the parties—and is limited to that purpose. There is no presumption, for example, that the

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[15] See Chapman *v.* Chapman, 92 Va. 538; Tazewell *v.* Smith, 1 Rand. 320; Shanks *v.* Edmondson, 28 Gratt. 811; Re Handy's Estate (Pa.), 37 Atl. 854; Given *v.* Hilton, 95 U. S. 591; 17 Harvard Law Review, 189.

[16] See Arkansas Ins. Co. *v.* Cox (Okla.), 98 Pac. 552, 20 L. R. A. (N. S.), 775, and note.

formalities required for the passage of title have actually been complied with.

For example, where A ought to have conveyed title to B at a specified date, according to his contract, but did not, the *rights* of the parties will be determined as if the conveyance had actually been made at the time stipulated; but the *legal title* will not be regarded as actually passing to B until formal transfer by deed.

The maxim, continued—conversion is complete.—Where proper circumstances concur for application of the theory of conversion, such conversion, so far as concerns the rights of ownership, is out and out.

Thus, a devise of Blackacre to a trustee, with directions to sell and pay over the proceeds to A, operates as a conversion of the real property into personality from the moment the will becomes effective. Should A now die intestate before the sale actually takes place, his interest would be treated in equity as personal estate, and would pass, not to his heirs, but to his personal representative. Nor would it be subject to his widow's dower.

Carrying the principle a little further, if, instead of dying intestate A had by will given, in general terms, 'all his real estate' to B, and 'all his personal estate' to C, the latter and not the former would be entitled to the theoretically converted *res*. And, as we shall see in the following section, C might elect to take it *in its original form of real property,* and thus bring about what is known as *"reconversion."*

The maxim, continued—"reconversion."—It is interesting and of practical importance to note that where real property is thus directed to be converted into money, or *vice versa,* and devised or bequeathed absolutely to a named beneficiary in its converted form, the beneficiary, if *sui juris,* may *elect to receive it in its original, unconverted form,* and may require the executor or trustee to transfer it to him in such original form. This is known as *"reconversion."*

This right of election follows necessarily from the circumstance that the entire *res* belongs to the beneficiary. If the property to be sold is real property, the beneficiary, who is to receive the entire proceeds, may appear at the sale and outbid any other prospective purchaser, since he is complete master of the situation, and may pay the purchase price with a simple receipt to the executor or trustee for the proceeds of the sale, whatever the amount.

If, on the other hand, the *res* consists of money to be laid out in land, the beneficiary may reconvert by demanding the money. Here he is similarly *dominus rei,* since if the fund be actually laid out in land, he may reconvert into money by a sale of the land immediately upon the transfer of the latter to him.

In either case, therefore, equity accords to the beneficiary the right to elect in which form he will receive the gift—thus avoiding the doing of a vain act.

Page 70, § 125. **"Equality is equity."**—This maxim is rather narrow in its scope, and is of less practical importance than most of the others here presented. It simply means that equity, (like a good parent with his children) when free to exercise discretion in the distribution of benefits or of burdens among a class, all the members of which have an equal claim to the consideration of the court, will, as far as possible, distribute these benefits or burdens equally. Expressed in briefer form, wherever in equity and good conscience benefits or burdens should be borne equally by the interested parties, equity will so distribute them, when not prevented by the positive terms of the law, or of the will, contract or other instrument or transacaction giving rise to the controversy. But the student must not entertain the idea that equity ever exercises the autocratic power of overturning the provisions of law, or the vested rights of parties under a will, deed or other instrument, in order to carry out its own ideas of equality—thus substituting its own will for that or the original testator or grantor.

Page 70, § 125. **The maxim, continued—illustrations.**—In Kass *v.* Kastleberg,[17] a testator bequeathed to his four sons, "all my property used in my butchering business," and the residue of his estate to his wife and all of his children, including the four sons. In the settlement of his estate, it was doubtful from the tes-

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[17] 98 Va. 278.

timony whether a certain balance in bank was connected with the "butchering business" or not. The court settled the doubt by applying the maxim and dividing the balance among all the children.

Omit § 126. Notice illustrations in §§ 127, 128 and 129.

Another illustration is found in the rule that where one having the power of appointment of an estate among a named class, or among designated persons, dies without making any appointment, equity will itself make the appointment; and, in accordance with the maxim, will appoint to all of the possible beneficiaries equally. Thus a bequest "to my wife for life, with remainder to such of our children living at her death, as she may by last will appoint." Here the wife may exercise a choice among the children—including some and excluding others. But if she fails to make any appointment at all, equity will distribute the estate equally among all the children.

Page 72, § 130. **"Equity deals with the individual"—in rem proceedings.**—While it is true that equity deals with the individual, and, having jurisdiction of the individual, may generally settle the rights of the parties, although the subject-matter of the controversy be in another state, the student must not infer that equity deals with the individual only.[18] For the reverse of the proposition stated is equally true, namely, that if equity has jurisdiction of the *subject-matter,* it may adjudicate the rights of the parties thereto, even though by reason of non-residence, or otherwise, it may be unable to obtain jurisdiction *in personam.*

Thus, if a New York citizen have property in Virginia, which he has incumbered with a mortgage to a creditor, the latter may bring a bill to foreclose the mortgage in Virginia, although the mortgagor refuses to appear, and the process of the Virginia court cannot reach him in New York. In other words, equity may deal *in rem* as well as *in personam.*[19]

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[18] Vaught *v.* Meador, 99 Va. 569, 7 Va. Law Reg. 341 and note; n. 23 L. R. A. 294; Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89, and full note.

[19] See Pennoyer *v.* Neff, 95 U. S. S. 714; Freeman *v.* Alderson, 119 U. S. 398; Wilson *v.* Seligman, 144 U. S. 41; note, 32 Am. St. Rep. 624.

The same—exception to the rule that equity may dispose of exraterritorial estate, where it has jurisdiction over the parties.—While, as shown, it is usually sufficient for the purpose of adjusting controversies concerning property in another State, that equity can obtain jurisdiction of the individual, an exception exists where it is necessary for the court to deal *directly* with the extraterritorial property itself. In such case, jurisdiction of the person is not sufficient, and the court will decline to grant relief. As for example, in the case of partition.[20]

The same—a second application of the maxim—passing legal title.—The maxim that equity deals with the individual has another important application, in connection with the force and effect of an equity decree.

A judgment at law, for example, that A recover a particular parcel of land, fixes the legal title in A as against all parties to the action. But the reverse is true in equity—it being a settled principle that the decree of a court of equity does not operate *ex proprio vigore,* so as to affect the legal title to property—but its force is, in large measure, due to its effect on the *conscience* of the individual against whom the decree is directed, and the power of the court to compel obedience to its decree, by its process of contempt. *Hence the rule is that the decree in equity cannot of its own force divest or transfer legal title to property.* The maxim does not mean that equity cannot, by a proper proceeding, act *in rem,* where the *res* is within the jurisdiction, but that its decree can, *of itself,* operate only *in personam.*

Hence, in order to pass legal title to real property under a decree, from one person to another, there must be a *conveyance* by the party in whom is the legal title, or by a master, or commissioner, acting in pursuance of the decree—and of course, the holder of the legal title must be a party to the suit.[21]

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[20] See Poindexter *v.* Burrell, 82 Va. 507; Hotchkiss *v.* Middlekoff, 96 Va. 649.

It is generally held also that an *injunction for trespass on lands* is so local in its nature, that courts of equity outside of the State where the land is situated will not assume jurisdiction. Northern Ind. Ry. Co. *v.* Mich. Cent. Ry. Co., 15 Howard, 233; 2 L. C. E. 1817-1832.

[21] Proctor *v.* Ferebee (N. C.) 36 Am. Dec. 34, and full note; 4 Min. Inst. 1464.

By statute in Virginia, a decree in a partition suit vests legal title in the parties.[22] And a decree appointing a new trustee to execute a trust, vests legal title in the appointee, without a deed or other formality.[23]

To meet the inconvenience frequently arising from the rule in question—particularly where the legal title to be conveyed is vested in infants or lunatics, though not confined to those cases —courts of equity have the power, either by statute[24] or by unwritten rule, to appoint a master, or commissioner, to convey title as directed by the decree, on behalf of all parties to the suit. Such a conveyance will convey complete legal title as effectually as if executed by every party in interest represented in the suit.[25]

The same—conveyance by foreign master.—It seems scarcely necessary to point out that since the decree operates only on the conscience of the defendant, and not *ex proprio vigore,* the court cannot through its officers exercise, as of right, authority over property in another state. Hence a conveyance of land in one state made by a master in chancery acting under the decree of a court in another state, is ineffectual to pass title.[26]

A conveyance of land in another state must, then, be made by the *party in whom the title is.* If he be within the jurisdiction of the court and *sui juris,* such a conveyance may be compelled by the process of contempt—operating, it will be observed, in *personam only.* If he is beyond the jurisdiction, the court is powerless in the premises.

The same—a third application—enjoining proceedings at law.—As we shall see later, courts of equity constantly exercise the jurisdiction to enjoin proceedings at law, where satisfied that complete justice cannot be administered in the common law court. This may be done before action brought, or while the action is pending, or after judgment at law.

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[22] Va. Code 1919, § 5282.
[23] Va. Code 1919, § 5303.
[24] Va. Code 1919, § 6296.
[25] Hurt *v.* Jones, 75 Va. 341.
[26] Fall *v.* Eastin, 215 U. S. 1, reported with annotations in 23 L. R. A. 924; extensive annotation, 69 L. R. A. 673, 694.

But under the influence of the rule that 'equity deals with the individual,' this injunction is addressed, not to the common law court itself, nor to the sheriff or clerk, or other official of that court, but *solely to the plaintiff in the common law action;* and its purport is that he shall not proceed further in the law court, or avail himself of the judgment recovered, until the court of equity has adjudicated the rights of the parties.

In such case, where equity has taken jurisdiction it will at once proceed to administer relief; and even though the plaintiff in equity (defendant at law) fails to make out his equitable defence at the trial, the court may generally proceed to do what is right between the parties, even to the administering of legal relief.

Such an injunction operates only on the *enjoined individual,* and in no wise interferes with the proceedings in the law court, until the enjoined party (necessarily *dominus litis* in that court) himself stays the proceedings, in obedience to the mandate of the chancellor. Thus the court of equity avoids a clash of jurisdiction with the law court, or the arousing of its jealousy or ill will—a very important consideration in the earlier days of the equity jurisdiction.

Page 78 (footnote). "**He who comes into equity, must do so with clean hands.**"—This maxim is one of frequent application in equity, and its significance and scope may best be indicated by examples.

Thus: Where one consort goes into equity seeking a divorce on the ground of the other's adultery, recrimination by the defendant is a bar to the suit. That is to say, if the defendant can prove that the plaintiff is himself guilty of adultery, the plaintiff has not come into court with clean hands and will not be heard.

Again, where the plaintiff seeks to enjoin the defendant from infringing an alleged trademark, if it appear to the court that the trademark is itself fraudulent, and tends to deceive the public, no relief will be granted, because of the lack of clean hands on the part of the plaintiff.[27]

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[27] See the famous Fig Syrup case, Worden *v.* Cal. Fig Syrup Co., 187 U. S. 516; Houchens *v.* Houchens (Md.), 51 Atl. 822.

One of the most familiar applications of this maxim is in denying relief to one who has conveyed his property to a confederate, in order to defraud his creditors. The grantee may hold the property and defy the grantor in his effort to recover it—since the latter must set up his own fraud, and thus exhibit the unclean hands condemned by the maxim.[28]

The same—unclean hands in the very subject-matter of the suit.—The uncleanness, however, which debars the plaintiff from relief must have a direct and immediate connection with the equity which he is seeking to enforce. As said by the court in Shaver *v.* Heller & Mertz Co.,[29] "the maxim does not repel all sinners from courts of equity; nor does it disqualify any complainant from obtaining relief there who has not dealt unjustly in the *very transaction concerning which he complains.*"

Other maxims in equity.—Thus far effort has been made to deal, somewhat in detail, with the more important maxims—but the list has been in no wise exhausted. Others are noticed briefly in Text footnotes pp. 78-79. For example:

(a) "**Between equal equities time shall prevail.**"—Sometimes expressed, *"First in time first in right"*—*"prior in tempore potior in jure."*

This maxim is one usually resorted to as the rule of decision where neither party has the legal title to the *res* in controversy, and there is no other principle decisive of the case. It is always applied with caution, as it expresses a broad general principle only.

The case (inadequately) stated in the Text footnote (p. 78) is a good illustration. Here A held the legal title to Blackacre, subject to an equitable lien in B's favor. C purchased from A without notice of B's lien, but A's conveyance to C was defective, and did not carry legal title. Here the equities of B and C

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[28] Harris *v.* Harris, 23 Gratt. 737; note 3 Am. St. Rep. 727.

[29] 108 Fed. (C. C. A.) 821.

[30] See Trice *v.* Comstock (C. C. A.), 121 Fed. 620; Stoffela *v.* Nugent, 217 U. S. 499—a particularly interesting case, in which Holmes, J., said, very sententiously, that "a man by committing a fraud does not become an outlaw and *caput lupinum.*"

were precisely equal, and neither had legal title. Hence B, being first in time, was held to be first in right.

The principle is frequently applied in contests between competing assignees of *choses* in action, neither of whom, by the common law, can have legal title. Nothing else appearing, the first assignee is preferred, as there is an equality of equities. But if the first assignee fails to take possession of the instrument evidencing the *chose,* whereby the second assignee is misled into believing the assignor still to be the owner—or fails to notify the debtor of the assignment to himself—or is otherwise guilty of fraud or negligence,—and the second assignee has been alert in making his title as secure as possible—then the equities of the latter assignee are superior to those of the former, and the maxim has no application. In order for the maxim to apply the equities must be *"equal;"* and in order for the equities to be equal the one claimant must not have excelled, or fallen short of, the honesty and diligence of the other. It is only where equities of the parties are evenly balanced, that a mere hair thrown into the balance will turn the scales in favor of one or the other. The equity of priority of time may in a sense be likened to this deciding hair.

(b) "**Equity gives complete relief.**"—A favorite and frequently applied principle in equity. It means, in brief, that where equity has taken jurisdiction of a cause for one equitable purpose, it will proceed to settle the entire controversy among all parties concerned, *even though this requires the administering of legal relief.*

The case of Walters *v.* Farmers Bank already noted [31] illustrates the rule. In that case the holder's claim against the married woman (maker of the note) was in equity, while the claim against the indorser was at law. It was held that equity would take jurisdiction of the indorser as well, and thus give complete relief in a single suit.

So where equity takes jurisdiction to discover evidence in connection with a *purely legal claim,* it may retain the bill and enter a decree for the amount justly due. So where equity has

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[31] 76 Va. 12; *supra* Ch. V.

granted an injunction to prevent the cutting of timber, the infringement of copyrights, trademarks or patent rights, and similar wrongs primarily legal, it may go further and direct an account of the profits made by the defendant, though his wrong is but a tort remediable in a court of law. As the parties are already in a court of equity, that court will completely dispose of the whole controversy. We shall encounter many illustrations of the application of this principle in the course of these studies.

(c) **"Equity looks at substance, not at forms."**—An extremely wise and just principle is embodied in this maxim. We shall see its influence in many directions as we advance in our pursuit of equitable principles.

For example, the common law fetish-worship of the seal has no place in equity. At law the seal cuts off all inquiry as to the consideration of the sacred instrument; it permits no plea of failure or fraud in the consideration; the sacrosanct writing may only be released by a writing of equal dignity and sanctity; no agent may execute it without sacred credentials under seal; even payment of the obligation in full may not be pleaded, unless accompanied by a discharge under seal.

In equity, on the other hand, while the seal *prima facie* imports a consideration, the court does not hesitate, where justice demands it, to break the sacred seal, and to uncover and condemn whatever is of evil behind it. The form of the contract here does not deter the chancellor from exploring the substance.[32]

The same—further illustrations.—So equity will treat a deed, absolute in form, as a mortgage, on clear proof that such was the real intention of the parties; and will similarly deal with any other instrument really meant as a mere security for the payment of a debt, but given the form of a 'sale' or a 'lease' or otherwise.[33] So equity delights in relieving distressed defendants (compare Shylock *v.* Antonio) from the payment of penal-

[32] In most of the states, statutes have been adopted, permitting the law courts in these cases to give relief to a limited extent—the defendant being privileged to file equitable pleas in actions on sealed instruments. See Va. Code 1919, § 6145.

[33] Gates *v.* Arbuckle, 95 Va. 802.

ties and forfeitures, where it clearly appears that these were intended to secure payment of money, or the performance of other obligations.[34] Other applications of the principle will appear hereafter.

(d) **"Equity will never allow a trust to fail for want of a trustee."**—The maxim embodies a settled and favorite doctrine of equity. In brief, its significance is, that where a court of equity is satisfied that the testator or grantor, in transferring an interest in property, real or personal, *intended a trust,* the circumstances that he named an improper trustee, or even failed to name a trustee, or that the trustee named declined the trust, or later died or resigned, the court will not suffer the trust to fail, but will *itself appoint a trustee* to execute the trust.

CHAPTER VII.

TRUSTS.

Page 84, § 151. **Who may be a trustee.**—The Text answers this question by the statement that *"all persons sui juris"* may be trustees. There is a manifest distinction between who *may,* in the first instance, be a trustee, and who *will be appointed or sanctioned* by the court of equity as a *permanent trustee to hold or manage an estate.* The first question—who may be a trustee—may be answered by the statement that *any living person* may be a trustee—whether sane, or insane, infant, or adult, individual or corporate.

This means that legal title to property, real or personal, may be vested in any person in trust for another. But it does not follow that the court, on objection made by one in interest, would sanction the appointment or retention of an improper person—whether the objection go to the trustee's moral character, his business ability, or otherwise. If for any reason the court is satisfied that the trustee is an unfit person, it has ample power to remove him and to substitute another trustee in his stead.

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[34] See *post,* ch. xv.

Page 85, § 154. **Appointment of new trustee.**—Where for any reason the office of trustee is vacated, and a new trustee is appointed, it is essential that there be a conveyance of the legal title from the former trustee, or his heirs, to the new trustee, since, as we have heretofore seen, the mere decree of a court of chancery *cannot divest legal title to real property.* This is so inconvenient that in many states, statutes have been passed to remedy the difficulty.[1]

In Virginia, by statute, the personal representative of a sole trustee (even where the trust estate is real property), may execute the trust, or the court may appoint a new trustee, in which case no conveyance to the newly appointed trustee is necessary. Title passes by force of the statute.[2]

Page 87, § 160. **Statute of frauds—parol trusts in realty.** Logically it would seem that in those States in which § 7 of the Statute of Frauds (requiring that declaration of trusts in lands to be proved by a *writing*) has not been reenacted, trusts might still be created by parol. This clause of the statute does not exist in Virginia nor in West Virginia, nor, as it seems, in Texas, Delaware, North Carolina, Rhode Island, or Tennessee. The question was long a debated one in Virginia, and there are *dicta* to the effect that such trusts *cannot be established by parol.*[3] But the validity of these trusts is now firmly settled in Virginia provided they are clearly proved.[4]

Page 88, § 162. **Proof of trust under statute of frauds.**—The student's especial attention is called to this section, and to

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[1] Note, 130 Am. St. Rep. 508-523.

[2] Va. Code 1919, §§ 6298-6303.

[3] See Sprinkle *v.* Hayworth, 26 Gratt. 384; Miller *v.* Miller, 99 Va. 125; Kline *v.* Kline, 103 Va. 263; article in 7 Va. Law Reg. 15.

[4] Young *v.* Holland, 117 Va. 433, 84 S. E. 637; Fleenor *v.* Henley, 121 Va. 367. Authorities on the question generally are collected in n. 39 L. R. A. (N. S.) 906; 12 Mich. Law Rev. 423 (excellent discussion). Parol trusts upheld in West Virginia: Currence *v.* Ward, 27 S. E. 329; and so in several of the other States mentioned: Insurance Co. *v.* Waller (Tenn.), 95 S. W. 811; Leaky *v.* Gunter, 25 Tex. 400; 5 Mich. Law Rev. 145. See post, note to § 185, where the rule is stated that a parol trust may be engrafted upon a devise in spite of the statute of wills—where a fraud would otherwise be perpetrated on the testator or his intended beneficiary.

the statement that the trust need not be *"declared"* by writing, but only *"proved"* by writing.

A striking illustration of this principle is presented in the case of Byers *v.* McAulley.[5] The facts were that A held the legal title to certain real property under a devise in terms absolute, but in fact on a parol trust to dispose of it in a certain way at her death. She died leaving a will *reciting the trust,* and disposing of the property accordingly. The will was, however, improperly executed, and therefore void *as a will.* Notwithstanding the invalidity of the will, it was held sufficient as a *written acknowledgment of the trust,* and hence the intended beneficiary obtained possession of the estate—not through the will as a *devisee* but as the beneficiary of a parol trust, established by the invalid will as a writing.

Page 89. **Simple deed with a declaration of trust in return.**—The method of creating a trust mentioned in the first paragraph here—by making an absolute conveyance to the intended trustee, who, in return, executes a written declaration of the trust, would certainly create a good trust. But no careful person would create an important trust in that way—since this would enable the trustee to dispose of the estate to a *bona fide* purchaser, and thus defeat the equitable title of the *cestui.* Where, on the other hand, the trust appears *on the face* of the conveyance, every purchaser must take notice of its existence, since one cannot claim through an instrument and deny notice of what appears on its face.

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[5] 149 U. S. 608. See also, *Re* McAully's Estate (Pa.), 39 Atl. 31.

CHAPTER VIII.

TRUSTS CREATED BY PRECATORY WORDS.

Page 94, § 174. **Trust created by precatory words.**—The student will observe that there is nothing peculiar about a trust created by precatory words. If the words *do create a trust,* then it is an express trust like those we have been considering in a former chapter. The only difficulty presented in this connection is to determine *whether the words used do in fact create a trust.* In short, an express trust created by *plain* language is one way of creating a trust; but another way (common to laymen) is to create it by *ambiguous* language—the donor using such expressions as "I hope," "I feel sure," "in the confidence that," etc., generally without considering or caring whether he is creating a trust or not.

It is useless for the student to endeavor to memorize the illustrations given in this chapter, since the solution of each case depends largely on its own peculiar surrounding facts, and most of the learning of the subject consists of what is known as "case law." The practitioner who is called upon to construe precatory words, must examine carefully the decisions in his own local jurisdiction.[1]

Page 101. **Gift to wife and children.**—In Virginia, there has been much discussion, and much litigation, over conveyances and devises to, or for the benefit of, "wife and children." The situation may be thus summed up:

1. Where the limitation is *directly to the wife,* or to a *trustee for the wife,* with a clause superadded, such as "intending this for the benefit of herself and children," or "for the support and maintenance of herself and children," the mention of the children is construed as a mere indication of the *motive of the gift,* and no trust results for the children—the wife taking the whole.

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[1] The subject will be found discussed at large in a note 106 Am. St. Rep. 500 to 531. See Virginia cases collected in 4 Va. Law Reg. 545.

2. Where also there is a gift *directly to "wife and children,"* or to a trustee for their benefit, but there is an *indication in the instrument of grant, that the wife was the real object* of the donor's bounty, a similar result will follow, the *wife taking the whole;* and the court will strain a point to reach this result, searching the whole instrument to find such indication of intent that the wife shall take the whole.

3. But where the gift is *simply* to, or in trust for, *"wife and children,"* and there is nowhere within the four corners of the instrument any indication of a contrary intent, then wife and children take as *joint tenants,* or tenants in common as the case may be—the wife taking merely her proportion along with the children.[2]

The precatory words—discretionary or imperative?—The intelligent student will at once see the difficulties of interpretation presented by such words in a deed or will. The purpose of interpretation is to ascertain the *intent of the testator or donor*—and the whole effort of the court is directed to that end. By using precatory words instead of clear, clean-cut language of command, the donor has so beclouded his intent that it cannot be gathered from the instrument itself. Hence the rule in such cases is to endeavor to solve the riddle, as best the court may, by *reading the instrument in the light of* (a) the *whole instrument* and (b) (in case of a will) of the *general scheme* which the testator appears to have had in mind in the distribution of his entire estate; as well as (c) in the light of the *circumstances surrounding the parties* at the time of the execution of the instrument of gift. To portray these circumstances parol evidence must be resorted to. As these conditions are never precisely the same in any two cases, it follows that every case here must stand on its own bottom, and be settled according to its own peculiar facts.

The same—circumstances that conclusively repel the presumption of a trust.—(1) Where *complete power of dis-*

[2] See Fitzpatrick *v.* Fitzpatrick, 100 Va. 552; 5 Va. Law Reg. 427, 443, 491; 7 Va. Law Reg. 547 and note; 8 Va. Law Reg. 21 and note; Wright *v.* Wright, 104 Va. 8; Hansbrough *v.* Trustees Presb. Church (Va.), 65 S. E. 465.

position is given to the first taker, in terms or by implication, no trust for another person can possibly result—since the power of disposition carries complete ownership, inconsistent with any ownership in another. For example "to my wife in fee, but I desire *what is left* at her death to go to the Law Library of the University of Virginia." [3]

The Same.—(2) So where the precatory words apply not only to the *res* passing under the will, but to property of the first taker *over which the testator had no control.* For example "to my wife in fee; but in the confidence that at her death she will bequeath *all of her estate* to the Law Library of the University of Virginia." [4]

The same.—(3) Where the subject-matter to which the precatory words apply is not *sufficiently described,* or the amount is *too uncertain* to be judicially ascertained, no trust can result—as no trust could result in like case even under an express declaration of trust. The subject-matter of every trust, as of every other transaction legal or equitable, must be definite and certain.

Precatory words, continued—circumstances not determinative but important.—(1) The presumption of a trust is much strengthened where the alleged *cestuis* were *dependents* of the testator at the time the will was executed, and he was under a moral duty to provide for them. This was the situation of the celebrated case of Colton *v.* Colton,[5] mentioned but inadequately stated in Text, § 182.

(2) Where an interpretation in favor of the trust would furnish an *immediate and needed support for the claimants,* the

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[3] See May *v.* Joynes, 20 Gratt. 692; 1 Va. Law Reg. 214 and note. Full discussion by Prof. Graves in 3 Va. Law Reg. 65. The Virginia court has carried this principle to the extreme limit. See article in 8 Va. Law Reg. 705. In this connection see copy of the late President McKinley's will in 7 Va. Law Reg. 440; Mayo *v.* Harrison (Ga.), 68 S. E. 497; Brant *v.* Va. Coal & I. Co., 93 U. S. 291; Roberts *v.* Lewis, 153 U. S. 367. Conrad *v.* Conrad, 123 Va. 711—a case in which the testator, after devising his estate in fee simple, with full power of disposition, added "at my wife's death my estate *should* be so apportioned among my children as to give each an equal share of the whole." *Held,* this clause was merely advisory (precatory), and the children took nothing under the will. Compare Va. Code 1919, § 5147.

[4] See Text § 183, discussing these various tests of trust or no trust.

[5] 127 U. S. 300.

presumption of a trust intent is naturally much stronger than where the claimants are not needy, or where enjoyment is *postponed to an indefinite time* (as after a life estate).

(3) Where the words are addressed to the donee *personally* (as "I desire *him* to give at least $10,000 to the Law Library"), the presumption of an imperative trust is less strong than in the case where the precatory words are *objective* and attached to the *res* itself—e. g. "my entire estate to A, but it is my desire that at least $10,000 thereof shall go to the Law Library." [6]

Page 102, § 184. **Express trusts by will defined by independent writing.**—[Alter the Text-title to read as here. Insert between §§ 183 and 184 "Chapter VIIIA"—since what follows here has no connection with Trusts Created by Precatory Words discussed in Chapter VIII.]

The principle of the Text, that where the trust is set forth in an independent writing, the writing must be *in existence at the date of the will,* and clearly identified, is well illustrated in a recent Connecticut case, in which the distinguished Democratic statesman, William Jennings Bryan, figured, both as counsel and beneficiary.[7]

This rule follows, as of course, from the rule that a will must be complete *at the time of its execution*—and hence, in order that an independent writing may be incorporated into it by reference or otherwise, the writing must necessarily be in existence at the date of the execution of the will.

Page 103, § 185. **Express trusts in wills defined orally.**[8] —The law of this subject may be briefly stated in the following propositions, viz:

1. Where the trust character of the bequest is shown *on the face of the will,* but the purposes or the *beneficiaries are not so disclosed*—for example, devise or bequest "to A in trust," or "in trust for such purposes as I have orally communicated to

[6] Board of Foreign Missions *v.* Culp (Pa.) 25 Atl. 17; *In re* Dickinson's Estate, (Pa.) 58 Atl. 120.

[7] Bryan's Appeal (Conn.) 107 Am. St. Rep. 34; Bryan *v.* Bigelow (Conn.), 107 Am. St. Rep. 64, and full note.

[8] See luminous discussion, 12 Mich. Law Rev. 423.

him:" Here the bequest fails and there is a *resulting trust* for the heirs or next of kin.

To admit oral proof of the character of the trust intended would violate the rule requiring the *whole of a will* to be in writing. The enforcement of the rule here involves no opportunity for a fraudulent perversion of the testator's intent, since the result is to vest the *res* in the testator's heirs and next of kin.

2. Where the trust character of the bequest *does not appear on the face of the will,* and the gift is in absolute terms, but the donee has *been orally directed,* or has orally promised to hold in trust for another—for example, "to A in absolute estate," but with oral directions, or agreement on A's part, to hold in trust for the Law Library: Here if oral proof be not received the trust will fail, and A will enjoy the gift contrary to the testator's intention, and thus a fraud be perpetrated, either on the testator's estate, or on his intended beneficiary. To prevent such a fraud, oral testimony is permitted to establish the trust, and the absolute donee will be held as a trustee *ex maleficio.*

Under this rule, the statute requiring all wills to be wholly in writing is not violated—since the estate passes, as the will directs, to A. The will is in nowise altered by parol testimony. But in order to prevent a gross fraud, equity, as in other cases of fraud, treats the fraudulent devisee or legatee as a *constructive trustee* for the real beneficiary, as established by the parol testimony.

Of course in such case the proof must leave no doubt of the fact that the parol trust was created by the testator.

3. Where the *trust character* of the bequest is shown *on the face* of the will and the *beneficiary is named,* but with *no further declaration of the terms of the trust,* such beneficiary will enjoy the estate free from any restrictions or limitations which the testator may orally have communicated to the trustee; and this, even though the will on its face indicates that there were such oral limitations or restrictions. For example: "To A in trust for the Law Library of the University of Virginia, on such trusts and with such limitations and restrictions as I have orally communicated to A." Here the rule requiring the whole will

to be in writing is applied, the trust is absolute, and the oral restrictions fail.

It appears, therefore, from a consideration of these three propositions, that a trust by will cannot be established by oral testimony, save where to *reject such testimony, would result in the perpetration of a fraud.*[9]

Page 103, § 185. **Heir as trustee ex maleficio.**—A situation somewhat similar to that discussed in the preceding note is presented where a presumptive heir or distributee *induces the ancestor not to make a will* in favor of a certain beneficiary, on a parol promise that when the estate shall vest in himself on the ancestor's death, he will carry out the wishes of the decedent. Where these facts appear and are clearly proved, a trust will arise in favor of such beneficiary, and it may be proved by parol testimony—otherwise a palpable fraud will be perpetrated under cover of the statute of frauds.[10]

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[9] See full note, 106 Am. St. Rep. 91; Sims *v.* Sims, 94 Va. 580; Towles *v.* Burton (S. C.) 24 Am. Dec. 409 and note; note 20 L. R. A. 465; Amherst College *v.* Ritch, 151 N. Y. 282, 37 L. R. A. 305—Fayerweather Will Case—as the result of which the University of Virginia received a legacy of several hundred thousand dollars.

[10] In a recent Georgia case, it was held, on unsatisfactory reasoning, that such a trust would not arise, unless there were proof that the heir was guilty of fraudulent intent *at the time of making such a promise.* Cassles *v.* Finn (Ga.), 106 Am. St. Rep. 91. In a note appended to this case, the decision is criticized by Mr. Freeman, the editor, with a striking array of reason and authority to the contrary. See our author's views on this subject, in accordance with Mr. Freeman's, post, § 255 of Text. Compare Ragsdale *v.* Ragsdale (Miss.), 11 L. R. A. 317; 9 Mich. Law Rev. 629; Amherst College *v.* Ritch, 151 N. Y. 282, 37 L. R. A. 305; Gilpatrick *v.* Glidden, 81 Me. 137, 16 Atl. 464 (excellent discussion); Strickland *v.* Aldridge, 9 Ves. 516.

CHAPTER IX.

TRUSTS BY WAY OF GIFTS AND VOLUNTARY SETTLEMENTS[1]—SUMMARY.

How these differ from other trusts.—After a voluntary trust is *actually created,* precisely the same principles apply as to other trusts; that is to say, a gift to A in trust for B, without consideraion, and a grant to A in trust for B for valuable consideration, stand precisely on the same footing, so far as the validity and character of the trust are concerned.

The difficulty in the case of a voluntary gift or trust (as with the trust created by precatory words) is to *ascertain whether* a *complete gift or trust has been created or not.* No such difficulty arises where there is a valuable consideration, because here, if the intended grantor refuses to complete the transaction, a court of equity will compel him to specifically perform his contract. On the contrary, in the case of an incomplete *voluntary* gift or trust, if the donor likewise refuse to complete the transaction, a court of equity *cannot compel* him to do so, because his agreement, being without consideration, is not enforceable. The only difficulty, therefore, that the voluntary transaction presents is in the question *whether the transaction is complete or not.* If complete, and otherwise valid as a trust, it is good; if incomplete, it fails, howsoever carefully the trust may have been defined.

Hence it follows that

The question here is always; Is the transaction executory or executed?—This brings us to consider the several ways in which a complete gift of real or personal estate may be made, both at law and in equity. Knowing these essentials, we shall be better prepared to determine whether or not a given

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[1] For authorities on this general subject, consult the following: 1 Va. Law Reg. 871 (article by Prof. Graves); note 34 Am. St. Rep. 189-224; Elam *v.* Keen, 4 Leigh, 333; Ewing *v.* Ewing, 2 Leigh, 337; Mayo *v.* Carrington, 19 Gratt. 74; Tabb *v.* Cabell, 17 Gratt. 160, 172; Yancey *v.* Field, 85 Va. 756; Spooner *v.* Hilbish, 92 Va. 333; Thomas *v.* Lewis, 89 Va. 1; Bank *v.* Holland, 99 Va. 465; Ingersoll *v.* Pond, 108 Va.179; and especially the brief of Judge Burks, of counsel, in Thomas *v.* Lewis, reproduced in full in 89 Va. 1.

state of facts is sufficient to establish the alleged trust by way of gift or settlement.

Conflict in authorities—confusion in the Text.—The student will find it impossible to reconcile the numerous authorities cited and discussed in the Text. There is little or no controversy over the *principles* involved, but in their *application the* results have been most inharmonious. There is, therefore, all the more reason why the student should clearly grasp the *principles* rather than endeavor to reconcile the numerous conflicting applications of these principles.

Gifts and voluntary settlements—(A) Requisites at Law—(1) real property.—By statutes existing in all the States, title to real property can pass only by *deed* or *will,* whether the transaction be a sale and purchase for value, or be purely voluntary.

As questions discussed in this chapter cannot arise in the case of devises and bequests by will, we need not here further consider gifts by will.

Hence, at law, a gift of real property inter vivos can only be consummated by a *deed, duly signed, sealed and delivered.*

Gifts—requisites at law, continued—(2) personal property—(a) tangible chattels.—To pass title *at law* by gift of a tangible chattel requires (1) *actual or symbolical delivery;* or (2) a *deed delivered.*

Symbolical delivery is permitted where from the situation, or the nature of the property, actual delivery is impossible or inconvenient—as a gift of the contents of a house, or trunk, or safety deposit box, by delivery of the key thereto.[2]

Gifts of tangible chattels—statutory provision in Virginia.—The Virginia statute[3] declares that "no gift of goods or chattels shall be valid unless (a) *by deed* or (b) *will,* or (c) unless *possession shall have come to and remained with* the donee or some person claiming under him.

"If the donor and donee *reside together* at the time of the

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[2] See article by Prof. Graves, 1 Va. Law Reg. 871; Thomas *v.* Lewis, 89 Va. 1.

[3] Va. Code 1919, § 5142.

gift, possession at the place of their residence, shall not be a sufficient possession within the meaning of this section. This section shall not apply to the wife's paraphernalia."

This provision renders gifts not made in accordance with its terms invalid, not only between *donor and donee,* but as between the *donee,* on the one side, and *creditors of the donor* on the other.

The same statute—further provision as to creditors.—The statute further provides that where the gift is *by deed* (i. e. without change of possession), the gift shall be void as to the *donor's creditors* unless and until recorded.[4]

Gifts of personalty at law, continued—(b) choses in action.—With the exception of negotiable instruments—and certain *quasi*-negotiable instruments, such as bills of lading, warehouse receipts, etc.—true legal title to choses in action cannot be transferred from one person to another, either by way of gift or of sale and purchase. But, as shown in Chapter V of the Text, by virtue of the privilege which the assignee has of suing in the name of his assignor, such transfers of choses in action are in fact recognized and enforced in courts of law—whether made for valuable consideration or merely as gifts.

In order that a gift of a chose in action may be good at law, much the same principles apply as in the case of tangible chattels. That is to say, there must be (1) Actual or symbolic *delivery* of the instrument (if any) evidencing the chose in action; or (2) A deed or writing, delivered to the donee or some one for him.

Thus it was held that a life insurance policy found among the papers of the insured after his death, with a written assignment to a named donee attached, and signed by the insured, was insufficient to establish a gift thereof, for *lack of delivery* of the policy or of the assignment.[5] But that where the obligee of a bond —the latter being in the hands of counsel for suit thereon—delivered counsel's receipt to the donee, accompanied by an oral

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[4] Va. Code 1919, § 5195; 1 Va. Law Reg. 876 (by Prof. Graves); 7 Va. Law Reg. 214. This statute does not apply to choses in action: See *infra.*

[5] Spooner *v.* Hilbish, 92 Va. 333.

declaration of gift, there was at least a symbolical delivery, and the gift was held good.[6]

The Virginia statute referred to in the previous section is not applicable to choses in action.[7]

Having concluded this brief glance at the requisites of a valid gift at law, we now proceed to a brief consideration of the situation in equity.

Gifts and voluntary settlements, continued—(B) Requisites in Equity.—In equity there are three ways of making a valid gift *inter vivos,* namely:

(1) By making it with all the essentials of the common law, as explained above; that is, if it be *real* property, by a deed direct to the donee (with some qualifications as to *delivery;* see title *"Undelivered Deeds"* below). If the subject matter be *personal* property, then by deed or delivery, actual or symbolical, as at law—and subject to the Virginia statutes discussed above.

In short, any gift good at law is always good in equity. Equity here follows the law.

It should be clear to the student that where a gift is thus made according to the common law, *legal title* passes directly to the donee, and there is no trust involved.

(2) By transferring it in the ordinary common law way to a *trustee,* in trust for the proposed donee.

(3) By the proposed donor unequivocally *declaring himself a trustee* for the proposed donee. The last two methods are unknown to the law courts.

If the subject matter be *real* property, under the 7th section of the statute of frauds this declaration of trust must be *in writing.* Possibly in those States (including Virginia) in which this 7th section has not been adopted, a mere parol declaration under class (3) above may be sufficient—*sed quere.*[8]

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[6] Elam *v.* Keene, 4 Leigh, 333.

[7] Bank *v.* Holland, 99 Va. 495, 55 L. R. A. 155; 7 Va. Law Reg. 214.

[8] See *ante*, note to § 160.

The same—selection of method.—It is a settled principle here, that the gift must operate, if at all, *according to that method* (of the three foregoing) *which the donor has selected.* This means that while the donor has *three methods* by which to make a gift, yet when he selects one of these, and attempts to confer his bounty in that way, *the gift must operate, if at all, according to the method selected, and no other.*

For example, if I mean to confer personal property directly upon A—that is, by an ordinary gift, good at law as well as in equity—but fail to deliver it or to transfer it by deed, as the common law requires, the gift fails, and will not be allowed to operate as if I had declared myself a trustee for him, as I might have done in the first instance. Or, again, if I mean to interpose a trustee between the proposed donee and myself, but fail to complete the transfer to the trustee, I may not be held to have declared myself a trustee—and there is again a failure of the gift.

The same—benevolent intent alone insufficient—unexecuted intention.—Most of the litigated cases that arise in connection with gifts and voluntary settlements are cases where the proof is clear that the donor intended to confer the benefit at *some time,* but has failed to completely carry out that intention in one of the three methods already mentioned.

The donative spirit alone is not sufficient. There must first be the intention to give *then and there,* and not merely in the *future;* and, second, the *actual giving,* accompanied by words or acts indicative of the intent of the alleged donor to make the gift presently complete according to the method selected. The donor must have so far committed himself that there remains no *locus penitentiæ,* and no further control retained in himself (save as trustee in case 3 above); and he must have consummated his benevolent intent in one of the methods before described.

Pages 109-111. **Undelivered conveyances.**—At law an undelivered deed (or other writing) has no more vitality as a conveyance, or other contract, than an unuttered thought. Generally speaking equity follows the law here.

But, under the doctrine of trusts, and the under influence of the maxim that 'equity looks at substance and not at forms,' there are certain instances in equity where actual delivery of deeds is dispensed with. Examples follow:

The same—(1) donor as trustee—(2) deed direct to donee, recorded.—*Where the donor has in the deed declared himself a trustee,* non-delivery of the deed is not at all inconsistent with the idea of a complete gift, since the grantor, as trustee, is the proper custodian of the instrument. Here non-delivery to the donee is immaterial to the validity of the trust.

(2) *Where the undelivered conveyance is direct, or to a third person as trustee.* (a) *Deed recorded*: If the conveyance has been filed by the grantor in a public office for recordation, such recordation is very generally held to be tantamount to delivery, and therefore the gift is good.

(b) *Deed neither delivered nor recorded*: Even where the grantor has retained possession of the deed and there has been neither actual nor constructive delivery thereof, a *prima facie* presumption arises in equity in favor of the donee. But this presumption may be overcome by evidence, written or parol, of an intention, by retaining the deed, not to make an absolute gift.[9]

Pages 119-122, §§ 210-215. **Gifts of stocks and promissory notes.**—Whatever may be the rule in England, in a number of the American States it is held that these may be the subject of a voluntary gift without complete assignment—mere delivery being sufficient—even in the case of stock in terms transferable only on the books of the company in order to pass legal title.[10]

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[9] See n. 34 Am. St. Rep. 212; Wadd *v.* Hazelton, 137 N. Y. 215, 21 L. R. A. 693, and note; Wigmore's Ev. § 2408.

[10] See Bank *v.* Holland, 99 Va. 495; 2 Thompson on Corporations, § 2390; n. 2 L. R. A. (N. S.) 804.

We have now completed for the present, our review of the *Express Trust.* We have seen that the express trust, like the express contract, is one created by the express declaration of the grantor or donor. We have seen also that this declaration may be made: (1) in *plain language,* expressing an intention to create a trust—though the word "trust" need not be used; (2) in *ambiguous terms,* in the form of *precatory* language, provided the court is satisfied that the language used was meant to be imperative and not discretionary; and (3) that if there be a consummation of the donative intent, by a *complete transfer* of property in the subject matter, there need be no valuable consideration passing to the donor—and what is termed a *voluntary trust* results.

In the following two chapters we shall take up the other class of trusts, namely *Implied Trusts.* These, as explained in the following chapters, are *Resulting Trusts* (Chapter X) and *Constructive Trusts* (Chapter XI).

CHAPTER X.

RESULTING TRUSTS.

Page 127, §§ 222-223. **Distinction between the resulting and the constructive trust.**—Note the distinction, well stated in the Text: The one is based on the *presumed intention* of the parties—and the transaction, therefore, is an honest one between the parties; the other is forced upon the conscience of the defendant *regardless of intention,* in order to prevent a fraud on the plaintiff. Such a trust, therefore, usually suggests a *dishonest* transaction. Sometimes, however, as noted in the Text, the line between the two is so close that it is difficult to distinguish the one from the other. Nor, in most instances, is the distinction of the slightest importance, as both, are, in the main, governed by precisely the same principles. But for accuracy of classification and of terminology, the distinction must be made and observed.

The several instances of resulting trusts.—Resulting trusts are usually said to arise in four several ways: (1) The first is mentioned and discussed in the Text, §§ 225-241, namely, where one person pays, or assumes payment, of the purchase money for an estate, but has title conveyed to another, with no express mention of a trust on the face of the conveyance.

(2) The second (Text, §§ 242-246) is where two or more persons occupy a *fiduciary relation* to each other, and have a common interest in reference to a particular *res* or enterprise, and one of them acquires title to the *res,* or some outstanding claim or lien against the same. Here a trust will result for the *common benefit of all,* even though the party acquiring such interest does so with his own funds.

(3) The third instance (Text, §§ 247-251), occurs in the case of *unexhausted trust funds*—that is, where a trust is created for a particular purpose (as to pay grantor's debts), and the purpose is accomplished without exhausting the fund. Here a trust naturally results for the grantor's benefit.

(4) The fourth (Text, §§ 252-253) occurs (or rather occurred—as the doctrine is now obsolete) in the case of a conveyance from A to B (a stranger in blood) *without consideration.*

We shall glance at each of these briefly.

The same—first class—purchase by one, title conveyed to another.—Here, *nothing else appearing,* the title-holder is *prima facie* presumed to hold the title in trust for him who purchased and paid the purchase money.[1] This means that the so-called 'purchaser' must have paid the purchase money *as his own,* and not as mere *agent* of the title-holder, nor as a *loan* to the latter. The question here is not who drew the check, or *handed over the money* to the seller, but on *whose credit was the purchase made,* and *whose money was it* at the time of payment. If the payor of the money had already agreed to *advance* the amount to the (now) title-holder *as a loan,* it was of course the *latter's* money, and the other did not in fact purchase or pay

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[1] Straley *v.* Esser, 117 Va. 135.

for the property. There is a nice distinction here, which the student should not fail to note.

The same—first class continued—payment, or assumption, thereof must be contemporaneous with purchase.— It is obvious that if the plaintiff now asserting the trust did not pay, nor assume to pay[2] *at the time of the purchase,* any payment by him thereafter must have been in the nature of a *loan* or a *gift* to the title-holder, or made under some *special agreement* —in which case there is no presumption of a trust.[3]

The same—distinction between purchase and loan.— As indicated in the preceding section, the resulting trust of the class now under discussion, arises from a *"purchase"* by one person and a conveyance to another. In short, the person advancing the money, or assuming its payment, must be the *real purchaser* and not merely a *lender.*

By the term *"purchaser"* here is meant, as already shown, not necessarily the person who conducted the negotiation, or handed over the purchase money, but the person *upon whose credit the sale was made, and whose money went to satisfy the purchase price.*

For example, if A makes a contract to buy a certain farm, and B lends him the money with which to pay for it, the conveyance being taken in A's name, here, even though B pays the money over to the seller, there is no resulting trust for B—he is a mere *lender* or *creditor*—A being the real purchaser.

Conversely, suppose that A makes a contract to buy a farm, but, by arrangement between the two, B pays the purchase money to the seller, *taking the conveyance in his own name,* and *agreeing orally that it shall be treated as a loan* to A, who shall be entitled to the property on re-payment. Here, A may prove the facts by parol; and since *he is the real purchaser,* we have a case of property purchased by one person, (A) but conveyed to another (B); and B will be held as a trustee for A, subject to

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[2] The Text (§ 226) is in error in the statement that the money must actually have been *paid* at the time of the purchase. Jesser *v.* Armentrout, 100 Va. 666; DeBaun *v.* DeBaun, 119 Va. 85; Webb *v.* Bailey, 41 W. Va. 463.

[3] Lee *v.* Elliott, 113 Va. 613.

the re-payment of the purchase money. In this case, while B in fact paid the purchase money, he *paid it for A,* as a loan to the latter, and not for himself as the real purchaser. Hence it was in law, as well as in fact, *A's money,* and A was the real purchaser.[4]

The same, continued—distinction between loan and option to repurchase.—If, in the foregoing illustration, instead of a binding obligation on A's part to repay the purchase money advanced by B, A had merely *reserved the privilege of repurchasing* the farm from B within a prescribed time, then there is no trust—since the money paid was B's money from beginning to end, and he was, therefore, the real purchaser. This was but a mere parol contract, non-enforceable under the statute of frauds.

Page 129, §§ 227-228. **Oral agreement to purchase for, or jointly with, another.**—The doctrine here stated needs explanation. It is true that a mere oral agreement by one to purchase with his own funds and to hold real estate for another (subject of course to reimbursement of the purchase money) of itself raises no trust in favor of the latter—in the absence of a fiduciary relation, or of fraud. But it is equally tiue that if there be an agreement between the two that the one shall purchase with his own funds, and that *such payment shall be regarded as a loan,* so as to create the relation of *debtor and creditor* between them, then, as we have seen in the previous note, the money paid was really the money of the borrower—and we have the typical case of one person (the borrower) paying for the property, and title taken in the name of another (the lender). Hence the former may establish this fact by parol, and thus establish a resulting trust in his own favor—subject, of course to the repayment of the loan. This is subsequently stated in the Text, § 230.

And it is settled that where there is a *fiduciary relation* between the parties (e. g., agency or partnership), the fiduciary will not be permitted to betray his trust by taking advantage of

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[4] Kendall *v.* Mann, 11 Allen 15. This sound proposition seems not to have been universally accepted: n. 5 L. R. A. (N. S.) 123.

the confidence reposed in him to the injury of the other. But this would raise a constructive rather than a resulting trust. The principle stated in § 228 is true, therefore, only *in the absence of fiduciary relation* between the parties.[5]

Page 129, § 229. **Purchase money by several—title in one.**—The doctrine of the Text that in this case unless the plaintiff has put some "aliquot part" of the purchase money into the deal, the presumption of a trust fails, while sustained by some authority, is not the better docrine. The better rule is that a trust will result in favor of those who pay the purchase money, in proportion to the amounts paid whether these be aliquot parts of the whole or not.[6]

Page 130, §§ 233-236. **Resulting trusts of class 1, continued—exceptions to rule stated.**—[Omit § 235]. It is important to notice that the rule that payment of the price by one and conveyance of title to another, raises a *prima facie* presumption of a trust in favor of the former, is subject to one *highly important exception*—an exception based on good sense, and in keeping with the common experience of men.

This exception is that where the purchaser has the title conveyed (a) to *his wife, or child,*[7] *or other near relation in blood;* or (b) to one not a relation in blood but towards whom the purchaser stands in *loco parentis;* or (c) to one who occupies *a relation* of *dependency* upon *him,* and to whom he owes a legal or moral *duty of support*—then, in each of these cases the presumption of a trust *gives place to the presumption of a gift.*

These exceptions, as suggested above, are based on sound reason and have the universal sanction of the courts.

Page 132, §§ 237-238. **The same—presumption of trust prima facie only—rebuttable by parol evidence.**—The student who has, up to this point, received the impression that the presumption of a trust in this first class of resulting trusts is a

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[5] See Miller *v.* Ferguson, 107 Va. 249; Matney *v.* Yates, 121 Va. 506; *infra,* note to page 133, § 240, and note to pp. 136-138, §§ 242-245.

[6] See Miller *v.* Miller, 99 Va. 128; Neathery *v.* Neathery, 114 Va. 650; Currence *v.* Ward (W. Va.), 27 S. E. 332 (where the question is thoroughly discussed); note 51 Am. Dec. 753.

[7] Clary *v.* Spain, 119 Va. 58.

conclusive one, and that the rule is a hard and fast one, has seriously misunderstood the situation.

Where the parties are strangers in blood, and there is no close relationship of dependency or otherwise, the presumption of a trust does arise—but this presumption *is prima facie only,* and may be *rebutted by parol testimony* that no trust was contemplated, and that an *outright gift was intended.*

Conversely, where the grantee is wife, child or other dependent, as already explained, the presumption of a *trust* gives way to the presumption of a *gift.* But here, again, this presumption of a gift is *prima facie* only, and, as in the other case, is subject to rebuttal by parol testimony that *no gift was intended,* but that the intention was that the grantee (in spite of relationship, howsoever close, or of dependency howsoever great) should hold *in trust for the payer of the purchase money.*

The same—presumptions of trust, or of no trust, rebuttable by parol testimony.—The admission of parol testimony in these cases, to repel the presumption, whether of a trust or of a gift, rests on the principle of evidence that every *prima facie* presumption of fact is subject to contradiction by such testimony.

It follows that where A purchases an estate, pays the purchase money, and has title conveyed to B, a stranger, such transaction, unexplained, gives rise to a presumption that B holds in trust for A. But B may prove, if he can, by parol or other testimony, that A meant *not a trust but a gift to* him outright. A may, of course, meet this testimony by counter-evidence, parol or written, that a trust *was* contemplated.

So with the converse situation, where A, the purchaser, has the title conveyed to his wife, or child, or dependent. Unexplained, the presumption of a gift arises. But, as in the other case, A may repel this presumption by parol proof that the transaction contemplated *a trust in his own behalf.*

In short, in these cases, the door is *thrown wide open for the admission of parol testimony*—whether to repel the presumption on behalf of one party, or to sustain it on behalf of the other.[8]

[8] Clary *v.* Spain, 119 Va. 58.

The same—parol agreement to sustain or repel presumption.—It is agreed by all the courts that if the circumstances raise the implication of a *resulting* trust, the fact that there was an *express parol agreement for a trust,* will in nowise serve to alter the presumption of the *implied* trust, even in those jurisdictions in which section 7 of the statute prevails. If a trust is *implied* from the surrounding circumstances, it must follow that additional proof of an *express* parol agreement for a trust (in real property)—non-enforceable (in most states) because of the statute—cannot weaken the legal presumption of an *implied* trust. Indeed, it is probable that in a large majority of instances, resulting trusts of the first class, now under consideration, are accompanied by such an oral agreement.

So, on the other hand, where the circumstances *repel* the presumption of a trust (as where the conveyance is to the wife or child), and indicate an outright gift, the presumption of a gift may, in turn, be repelled, and a trust established by proof of an oral agreement that the *wife or child took only as trustee* for the husband or father.

Thus, where a husband, without fraudulent intent, purchased property with his own funds, and had title conveyed to his wife (hence presumption of a gift), but with an *express oral understanding* that the property should be held for *his benefit* and not hers, it was held that proof of this oral agreement could not (under the statute of frauds) be received to establish an *express* trust, yet that it might be received to *repel the presumption of a gift*—and, with this presumption eliminated, all of the essentials of a resulting trust were present, and such a trust was established.[9]

Resulting trust as to bona fide purchasers from trustee—secret equities.—It is a universal principle of equity that a *bona fide purchaser* for value from the trustee takes the legal title free of a resulting or other trust of which he has no notice.

We have already adverted to this universally accepted principle, in our chapter on Equitable Maxims. The rule applies not

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[9] Smithsonian Institution *v.* Meech, 169 U. S. 397. It may be noted also that the statute of frauds excludes parol evidence to *prove* an express trust in real property, but not to repel or *disprove* a trust, whether express or implied.

to *resulting* trusts only, but to *constructive* trusts as well, and *to every other equitable claim to or charge upon* property, not appearing on the face of the title papers, and of which an honest purchaser for value has no notice.

The resulting and the constructive trust are necessarily *secret* equities, not shown in the documents of title—for if so shown, the trust would be *express*. A conveyance of the legal title, therefore, by the trustee, to a *bona fide* purchaser for value, cuts off the *cestui's* secret trust, and the purchaser acquires title unincumbered by the trust.

It must be carefully noted that it is the acquisition of the *legal* title that places the purchaser in this favored position. If he acquires *equitable* title only, the rule is generally inapplicable.[10]

Nor may any purchase, howsoever *bona fide,* ever cut off a *legal* title. For example, the purchase of real property from a vendor supposed to be unmarried, would not affect the *dower rights of his wife,* even though her existence were unknown to the purchaser—since dower is a legal and not an equitable right. So the purchase of an estate from one supposed to be the *sole heir* of the deceased owner, could not affect the rights of others who were in fact co-heirs.[10a]

Resulting trusts as to creditors of trustee.—But it is carefully to be observed that *creditors* stand on a wholly different footing. The *creditor,* unlike the purchaser, not having laid out his money *on that specific property,* but merely on the *general credit* of his debtor, is bound by all the equities which bind his debtor; or, as it is generally expressed, the creditor *stands in the shoes* of his debtor.

Hence it follows that if A, holding legal title to real estate, should become insolvent, and judgments be entered against him, B, for whose benefit there is a resulting trust in the property, (created without fraudulent intent) may intervene in a suit

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[10] Ann. Cas. 1918C, 455.

[10a] Fallon *v.* Chidester (Iowa), 26 Am. Rep. 164; n. 49 Am. St. Rep. 127.

brought by A's creditors to subject the property, and his rights will prevail over those of the creditors.[10b]

The student is urged to take special note of the rule just stated, as to the distinction between the status of a *purchaser* and that of a *creditor*. The average student constantly overlooks the distinction, and as we shall have need of it throughout our equity studies especial attention is called to it.

The same—who is a purchaser and who creditor?—A *bona fide* purchaser *for value* in this connection is one who *has acquired the legal title, either in himself or in another for his benefit and who has laid out his money on that specific property,* without notice of the trust.

Hence, not only is one a purchaser who has acquired the legal title *outright,* under the circumstances just stated, but so also is one who has taken *a mortgage or deed of trust thereon to secure a debt.*[10c]

In other words, a creditor who puts out his money *specifically on a particular piece of property,* and secures from the borrower a conveyance of the legal title to the property, by way of pledge, mortgage or deed of trust as security for the loan, is, in equity, regarded as a *purchaser for value to the extent of his debt.* And rightly so, since to the extent of his debt he is the *owner,* and has legal title. "Where equities are equal, the law will prevail."

"Value."—In Virginia and a few other States, even though the money was not *originally* lent on the faith and credit of that specific property, yet if the creditor *subsequently* secures a voluntary lien such as is mentioned above, carrying legal title, he is elevated to the higher and more advantageous position of a purchaser *for value.*[11]

On the other hand, the taking of such a lien to secure a pre-

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[10b] Borst *v.* Nalle, 28 Gratt. 433; Coldiron *v.* Asheville Shoe Co., 93 Va. 364; 6 Va. Law Reg. 645; 7 Va. Law Reg. 333; Nolting *v.* Bank, 99 Va. 54; Straley *v.* Esser, 117 Va. 135; Charlottesville Hardware Co. *v.* Perkins, 118 Va. 34; American Sugar Refining Co. *v.* Fancher, 145 N. Y. 552.

[10c] In legal terminology, the term 'purchaser,' of itself, imports one who has acquired title to property otherwise than by inheritance. The term does not necessarily connote the payment of *value.*

[11] See *infra,* note to § 904; note 33 L. R. A. 305; Chapman *v.* Chapman, 91 Va. 400; Wasserman *v.* Metzger, 105 Va. 744.

existing debt, with no new consideration intervening, is held in many States not to constitute the creditor a purchaser *"for value."*

Page 133, § 238. **Resulting trust, continued—husband purchasing with wife's money.**—The statement of the Text that where the wife furnishes the consideration and the husband takes title in himself, a trust *prima facie* results in her favor, expresses a general truth where the estate is the wife's *equitable separate estate.* But, by well established doctrine in Virginia and many States, where the wife permits the husband to use her money and to buy property in his own name (the money not being her equitable separate estate) there is a strong, if not conclusive, presumption that she *meant to give it to him, unless contemporaneously with the transaction, there was an express understanding to the contrary.*[12]

Page 133, § 240. **Agent to purchase, buying with his own funds.**—If, as we have seen [13] there may be a trust implied [14] in favor of one of whom advantage has been taken by a *stranger,* not occupying toward him a fiduciary relation—*a fortiori* must an *agent* to buy be held a trustee for his principal, where, in fraud of the fiduciary relation, he purchases real property with his own funds and in his own name, and repudiates the right of the principal. It would seem immaterial whether the arrangement was that the *agent* should advance the funds, to be reimbursed by the principal, or whether the purchase money was to have been supplied by the principal in the first instance.[15]

The question in such cases as this is, was there an existing *agency,* and hence a *fiduciary relation* between the purchaser and the claimant *cestui;* or was there merely an *oral contract* by the one to purchase the (real) property and to convey, or have it conveyed, to the other—the breach of which contract

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[12] The authorities are collected in note to McConville National Bank, 5 Va. Law Reg. 695. See *infra,* note to § 536 (4).

[13] n. to § 226.

[14] Here, a 'constructive' rather than a 'resulting' trust.

[15] Halsey *v.* Monteiro, 92 Va. 581; Jackson *v.* Pleasanton, 95 Va. 614, and 101 Va. 282, 290 (the Text with approval); Johnson *v.* Hayward (Neb.), 103 N. W. 1058, 5 L. R. A. (N. S.) 112; Schmidt *v.* Beiseker (N. D.), 105 N. W. 1102, 51 L. R. A. (N. S.) 123. The cases are collected in note 5 L. R. A. (N. S.) 112 and 123.

is not *actionable under the statute of frauds.* The question in each case is, of course, one of *fact* rather than of law. It is well discussed by Kelly, P., in Matney *v.* Yates.[16]

We have already seen that the same principle applies where several persons agree by parol to purchase real estate as *partners.* An implied trust arises in favor of one excluded by the others, who purchase with their own funds and in their own names.[17]

This resulting trust abolished in several states by statute.—The presumption upon which the trusts of this class rest, namely that payment for conveyance to another who is a stranger in blood, is presumed to be intended as a trust for the payor, has never been entirely satisfactory to courts and lawyers. The reason upon which this conclusion of trust is based is the *improbability that one would thus make a gift to a stranger.* But the answer is, that if the payor does not mean a gift, he should take the precaution to set out the trust on the face of the conveyance. The recognition of such a trust, and the secrecy with which it may be created, open the door for fraud in two directions: It enables the payor to *secrete his ownership from his own creditors,* and thus to defeat them of their just claims; and it gives a *false credit to the grantee,* thus enabling him to work a fraud on creditors, who have extended credit to him on the faith of his apparent ownership of the trust property.

This class of resulting trusts in real property has been abolished in several of the states.[18]

Up to this point we have disposed of resulting trusts of the first class, and sundry equitable principles applicable to all implied trusts. We now come to glance very briefly at the remaining three classes of the resulting trust. These are quite satisfactorily treated in the Text.

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[16] 121 Va. 507.

[17] Miller *v.* Ferguson, 107 Va. 249.

[18] Namely in Indiana, Kansas, Kentucky, Michigan, Minnesota, New York and Wisconsin. See Bogert on Trusts, 111.

Page 136, §§ 242-246. **Resulting trusts of the second class —parties in joint interest.**—[Alter Text title to § 242 to conform]. This class requires but little comment. It is only important to point out that cases of *fraud* on the fiduciary relation are not properly classifiable under this head—belonging to the class of *constructive* trusts treated in the following chapter. The 'resulting' trust here—all resulting trusts connote *honest dealings,* and flow from *intention of the parties*—is properly confined to presumably honest conduct by parties occupying a confidential or quasi-fiduciary relation to others, because of their *common interest* in a particular *res* or enterprise.

The Text contains a number of proper illustrations of the principle. The principle applies not only to the case stated in § 242, where one of the interested parties obtains an outstanding *title* to the common property,[18] but to any case where a party in common interest acquires title to, or a *hostile claim* against, or any *peculiar advantage* over, his fellows, in that connection. In every such case he will be held to hold in trust for all—subject, of course, to reimbursement for his outlay. If done honestly and in good faith, the trust implied will be classified as *resulting* —if in bad faith, then *constructive.*

The principle applies to partners, co-owners, principal and surety, co-sureties, promoters of corporations as among themselves, and as concerns share-holders, executors and the estate of their testators, and to all persons jointly interested in a property or an enterprise, or who are bearing a common burden.

The same—illustrations.—The case of a surety compromising the debt at less than its face value, is a typical illustration. He may not look to the principal for exoneration beyond the amount actually paid; so with a surety and his co-surety. So, where one co-tenant discharges a lien or other burden on the common property, by compromise at less than face value, or acquires a hostile title or claim thereto; or an executor buys in a claim against the testator's estate; or the treasurer of a corporation purchases a claim against the corporation at a discount, or a trustee a claim against the *cestui;* or an agent purchases at a discount a debt due by his principal, etc.

[18a] Goodloe *v.* Woods, 115 Va. 540.

Page 138, §§ 247-251. **Resulting trusts, continued—the third class—unexhausted trust funds.**—The Text treatment of this third class seems sufficient. Note the distinction (§§ 250-251) between a *trust* and a *mere charge* on the estate passing. In the former case, any portion of the fund left after discharging the trust, results to the grantor—whereas, in the second case, the balance left remains the property of the grantee. There is a manifest difference, in intent, between a conveyance "to A *in trust* to pay my debts" and "to A, but *charged* with the payment of my debts." In the first case A has no beneficial interest; in the second, the whole interest is his, subject only to the charge.

Page 140, § 252. **Resulting trust of fourth class—voluntary conveyance to stranger.**—As indicated in the Text, the doctrine that a voluntary conveyance to a stranger in blood is presumed to be in trust for the grantor, if it was ever recognized in equity, is now obsolete and we need not notice it further.

Page 142, § 254. **Resulting trust under a will.**—This principle has already been discussed at some length in a previous note to p. 103, § 185, of Text.

CHAPTER XI.

CONSTRUCTIVE TRUSTS.

Page 143, § 256. **Constructive trusts—bulk of author's treatment deferred to later chapter.**—Observe that as most cases of constructive trusts involve questions of fraud, the author defers full treatment to a later chapter on Fraud. But, as will appear later in this chapter, equity uses the principle of the constructive trust in many other cases in order to prevent the unjust enrichment of one person at the expense of another.

The Vendor's Lien.

Page 144, § 257. **Vendor's lien on real property for purchase money.**—The student will recall that the vendor of *personal* property has no lien for the purchase money, after he has *delivered possession.* That doctrine should not be confused with that here discussed—the vendor's lien on *real property.*

The same—of three kinds—importance of distinguishing.—As the nature of the vendor's lien on real property to secure payment of the purchase money is not stated in the Text with the detail and accuracy needed to give the student a clear understanding of it, what follows may be substituted for our author's discussion of this topic.

The vendor's lien may be divided into three classes, each sharply distinguishable from the others.

The same.—The several kinds of vendor's liens mentioned above may be thus designated:

(1) The vendor's *equitable* lien—*implied after conveyance* of title to the vendee.

(2) The vendor's *equitable* lien, *expressly reserved* on the face of the conveyance to the vendee.

(3) The vendor's *legal* lien—existing after the *executory contract* of sale and purchase, but *before conveyance is actually made* to the vendee.

Vendor's lien, continued (1) Implied equitable lien.—Where a *conveyance of the legal title* to real property has been made by the vendor to the vendee, with no reserved or other contractual lien to secure deferred installments of purchase money, the vendor has no other remedy at law than an action on the promise to pay. Since the vendee in the meanwhile may have become insolvent and unable to pay, this remedy is a too precarious one to be of much value.

But inasmuch as it is highly unjust that the vendor in such case should lose recourse against the very property conveyed, equity, in order to secure the purchase money therefor, *raises an implied trust for the benefit of the vendor.* That is, equity treats the vendee with legal title as holding for the benefit of the vendor, to the extent of the unpaid purchase money—in other words, regards the property as affected by an equitable lien in favor of the vendor.

Implied equitable lien, continued—(a) cut off by sale to a bona fide purchaser.—Since this is a *secret lien,* not appearing on the face of the title papers, it would manifestly be unjust to permit it to be asserted against a subsequent honest purchaser from the vendee—who, having legal title, has passed legal title to the purchaser. Hence the rule is that while such lien is good against the *vendee himself,* and those claiming as *volunteers under him*—e. g., heirs or devisees, or his assignee in bankruptcy, or attachment or judgment creditors—*it cannot be asserted against a bona fide purchaser for value from the vendee.*

This lien, when it exists, can only be enforced by a bill in equity. As indicated in the Text, it is not recognized at all in some of the States. In Virginia it has been abolished by statute,[1] unless expressly reserved on the face of the conveyance—in which case it belongs to our second class treated below.

The same—(b) good against creditors.—The statement of the Text (page 144) that *attaching creditors* of the vendor are not bound by the lien here mentioned, and hence take priority over the vendee, contravenes the rule, already noted,[2] that *creditors stand in the shoes of their debtor,* in the absence of a statute to the contrary.

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[1] Va. Code 1919, § 5183.
[2] *Supra,* note to p. 130.

It follows, for example, that where A conveys Blackacre to B at the price of $10,000—one half cash, balance to be paid in one year—and later, before payment of the deferred balance, a judgment or attaching creditor of B attempts to subject Blackacre to the payment of the credior's claim, A's implied lien for the purchase money would take priority over the claim of the judgment or attaching creditor.

The recognition of this implied and secret lien in favor of the vendor, as superior to the claims of the *vendee's creditors,* frequently worked a hardship on these creditors, who were possibly induced to extend credit to B because of his apparent ownership of Blackacrė, under an unincumbered title. The situation clearly gave B a false credit—and it was largely for this reason that the statute in Virginia abolished the lien altogether. The statute seems a wise one.

Equitable vendor's lien, continued—(2) Expressly reserved on the face of the conveyance.—Manifestly this sort of a lien is far superior to the former, just treated. Here, having expressly *contracted* for his lien, and had it written at large on the *face of the conveyance,* the vendor is not dependent on the grace of the court to raise an implied lien in his favor, but may assert his express lien as *a matter of right* by bill in equity, and against all comers.

And, since the lien appears on the face of the conveyance itself, it is superior even to the rights of a *bona fide* purchaser for value, who is bound to take notice of everything appearing on the face of the documents of title through which he must necessarily claim—or, in lawyer's phrase, in his *chain of title.*

Notice imputed from chain of title.—As stated, this lien, appearing as it does on the face of the vendor's deed to the vendee, is good even against purchasers for value wlthout actual notice of its existence. This principle results from a fundamental rule of real property law, of which we shall see more hereafter, that a purchaser of real proprty is, by construction, *conclusively bound with notice of the contents of every document constituting a part or link of his chain of title.*

This means not only that the purchaser must take notice of what appears in the deed of conveyance from his *immediate* *vendor,* but also whatever appears in *all the deeds, wills or other title papers* (a multitude it may be) through which the title has been transmitted *since the original grant from the crown or commonwealth,* down to himself. Each of these makes up a link in his chain of title. He is therefore dependent upon each for the title he claims. Obviously, then, he will not be allowed to claim title through a particular deed, and yet ignore some part of it. He cannot be permitted to swing by a chain, and yet ignore or reject one of its links.

It follows, therefore—and this rule applies not only to the particular lien now under discussion, but is one of universal application—that in equity *there can be no bona fide purchaser of real property, so as to cut off equitable rights, where these rights appear on the face of any document constituting a link in the chain of title.*

The student will find the need of this principle throughout his studies of trusts, and generally throughout the study of equity jurisprudence. His special attention is therefore invited to the foregoing discussion.

The same—illustrations.—In a partition suit between A and B, co-tenants, the decree directed that a described portion of the estate be conveyed by the master to A, and the other portion to B; but as A's portion was the more valuable, the master was directed to reserve on the face of A's deed a lien for *owelty of partition,* in favor of B, for a sum named. This the master inadvertently omitted to do. Later, A sold and conveyed to C, who had no actual notice of the lien. B sued C, asserting his lien, whereupon C pleaded that he was a *bona fide* purchaser for value. It was held, that as the master's deed was the source of A's title, and as the court's decree was the source of the master's authority, C was bound to take notice of these links in his chain of title, and was therefore not a purchaser without notice.[3]

Again, in Charlottesville Hardware Co. *v.* Perkins,[4] the owner of real property conveyed the property to another, by deed reciting a cash payment, and the execution of the vendee's several obligations for the deferred payments of purchase money, "all

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[3] Jameson *v.* Rixey, 94 Va. 342.
[4] 118 Va. 34.

secured by a deed of trust on the land itself, which deed and this are parts of the same transaction." The deed of trust mentioned was not recorded, and was therefore, under the registry statutes, invalid as to purchasers for value without notice. Subsequently, the vendee conveyed to a third person who paid value and was ignorant of the unrecorded incumbrance. *Held,* the recital of the deed of trust in the original deed of conveyance was notice to the subsequent purchaser, who claimed title through that deed as a necessary link in his chain of title.[5]

Vendor's lien, continued—(3) Vendor's legal lien.—As already shown, this lien arises only under an *executory contract* to convey—*where the legal title remains in the vendor, awaiting payment of the purchase money* and conveyance of the legal title. In the other two cases discussed, the *vendee held the legal title,* but impressed with an *equitable* lien in favor of the vendor.

In the present case, the *vendor* himself holds the legal title—first, for his own benefit to secure the purchase money, and then in trust for the vendee.

So long as the vendor thus holds the legal title, it is clear that he has the whip hand—since he can be forced to surrender it only after payment of the contract price. In this situation he can, of course, defy the world. There could be no cutting off of his rights by a sale to a *bona fide* purchaser, since any purchaser from the vendee would be bound to take notice, (see preceding note) of the latter's title, which is equitable only. The *bona fide* purchase of an *equitable title* does not cut off equities, nor, *a fortiori,* legal title.[6]

This lien the vendor enforces by a bill in equity for *specific performance.* In such proceedings the court, if necessary, will enforce the lien by a sale of the property.

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[5] See *infra,* note to § 900; Roanoke Brick Co., *v.* Simmons (Va.), 20 S. E. 955; Bellenot *v.* Laube, 104 Va. 842; 8 Va. Law Reg. 735; note to Le Neve *v.* Le Neve, 2 L. C. E. 168. Compare the duty of the holder of negotiable paper to take notice of all equities appearing on the face of the paper, and in every indorsement through which he traces his title. Compare, again, the physiological rule that one may not repudiate the tainted blood of an ancestor, howsoever remote, nor deny the kinship.

[6] See Southern Railway Co. *v.* Gregg, 101 Va. 308, and note thereto in 8 Va. Law Reg. 873; Yancey *v.* Mauck, 15 Gratt, 390.

Pages 146-151. [Omit, as treated at large in our studies of Private Corporations.]

Constructive trusts, continued.—Before leaving this topic it may be well to point out that it is largely through the doctrine of constructive trusts that a court of equity applies its favorite principle that, if possible to prevent it, *one person must not be permitted unjustly to enrich himself at the expense of another.* The implied equitable vendor's lien discussed above illustrates the principle.

An excellent illustration is afforded by the New York case of West. Union Tel. Co. *v.* Shepherd.[7] Here, W conveyed a lot to T, reserving all claims for damages, past, present or future, against an elevated railway company operating in the street upon which the lot abutted, for injury to the property. Later, T conveyed to S, who was without actual notice of the reservation. Later S recovered damages of the railway company. *Held,* S will be held as trustee of the fund recovered, for W's benefit.[8]

Constructive trusts, continued—statute of limitations.—While, as we have seen, the statute of limitations does not run in favor of the trustee of an express, or, in general, a resulting trust, the rule is otherwise in the case of the constructive trust. The reason for this distinction is that in the former cases the trustee does not hold adversely to the *cestui*—the trustee's title and possession being a rightful one while in the case of the constructive trust the situation is otherwise. Here the trustee's title is wrongfully acquired, and his possession of the trust *res* a tortious possession.[5]

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[7] 169 N. Y. 170, 62 N. E. 154.

[8] See further: Manning *v.* Rippen, 86 Ala. 357, 5 South. 472; n. 2 L. R. A. (N. S.) 820.

[5] Cochran *v.* Hiden (Va.), 107 S. E. 708 (1921). See the Text, § 338.

CHAPTER XII.

INCIDENTS OF TRUST ESTATES.

[*Alter Text chapter title to conform to ours.*]

Preliminary.—We have now considered the various kinds of trusts—their classification, and how arising. We come now to consider the various *incidents* of trust estates, assuming their trust character granted—for instance, curtesy and dower therein; nature and extent of trustee's title; rights of *cestui* therein, and his right to transfer his equitable interest; liability to *cestui's* debts, etc.

Page 152, § 272. **Curtesy and dower in trust estates.**—Questions of curtesy and dower are treated at large in Professor Minor's course on Real Property. It is sufficient to say here that, in absence of statute, the husband's curtesy in the wife's equitable estate (not equitable *separate* estate) has existed from earliest times. But the rule was the reverse in the case of the wife's claim to dower.

The Virginia statute [1] places curtesy and dower in trust estates on the same footing, by declaring that where other requisites exist, trust estates are subject to curtesy and dower in the same manner as legal estates.

Page 154, § 276. **Quantum of trustee's estate.**[2]—The doctrinehere stated as to the cessation of the trustee's title so soon as the purposes of the trust have been fulfilled, seems to be sustained by many authorities, but lawyers in practice assume the rule to be otherwise, and whenever a trust has been satisfied, or has otherwise ceased, and it is desired to revest the legal title in the grantor or his heirs, careful lawyers require a deed from the trustee (known as a "release"), reconveying the title.[3]

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[1] Va. Code 1919, § 5158.

[2] Consult article by Paxton, 9 Va. Law Reg. 1; 10 Va. Law Reg. 491.

[3] See Ashley *v.* Coake (Ga.), 35 S. E. 89; authorities *supra;* n. 2 L. R. A. (N. S.) 180.

Page 155, § 279. **Following trust funds.**[4]—The doctrine of the Text applies not only to misappropriation of trust funds by a *fiduciary,* but generally to all cases where one person wrongfully appropriates the property of another—even where the wrongdoer is a stranger, and obtains possession or title by fraud or theft, and against the will of the real owner—and the remedy at law is not adequate and complete.

In the latter case, equity regards the wrongdoer as a constructive trustee from the moment he becomes possessed of the property, and his subsequent disposition thereof as a misappropriation of trust funds. A few older cases have held otherwise, as indicated in Text footnotes to § 279, but the modern view is clearly opposed to this view.[5]

The same—identity of fund—"earmarked."—The whole doctrine of following trust funds rests on the assumption that the *res* is so earmarked that the *cestui* is able satisfactorily to trace his property therein through the several transmutations which it has undergone since its wrongful conversion, and thus constructively to identify his own. If he cannot thus identify the *res* no trust can be established.

The courts, however, are extremely liberal to the *cestui* in the matter of the establishment of this identity, as we shall see in the following pages.

Page 156, § 280. **The same—funds mixed in bank deposit by wrongdoer—(1) Where contest is between cestui and creditors of depositor.**—Where the proceeds of the misappropriated property are mixed by the wrongdoer with funds of his own—as by deposit in bank, or, let us suppose, in a bag or strongbox in which his own money is kept—the identity of the precise bills or coins is of course lost. But it does not necessarily follow that the *cestui* loses his right to subject the mixed fund to his claim, in priority to other creditors of the wrongdoer. Whether he may or may not insist upon impressing such

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[4] See an illuminating article on this subject, by the late distinguished Dean Ames, of the Harvard Law School, in 19 Harv. Law Rev. 511.

[5] American Co. *v.* Fancher, 145 N. Y. 552; Menz *v.* Beebe, 102 Wis. 342; Nat. Bank *v.* Barry, 125 Mass. 20; Dean Ames' article, *supra;* 27 Harv. L. Rev. 125; Barksdale *v.* Finney, 14 Gratt. 338; Brown *v.* Orr, 110 Va. 1; cases *infra.*

mixed fund with a trust or lien in his favor, will depend on circumstances, now to be considered.

Funds mixed in bank deposits, continued—(a) where the trust fund is intact, though mixed.—It is clear that where the wrongdoer thus mixes the trust fund with his own, in a general bank deposit in his own name, equity at once attaches a trust or lien in favor of the *cestui* on the *whole fund.*

If the depositor subsequently checks out a portion of the deposit, equity presumes that he has meant to draw on his own funds rather than on those of the *cestui.* So long, then, as his general balance in bank *does not fall below the amount of the trust fund*—even though numerous fresh deposits be made, and continuous checking out occur—the trust fund is presumed to remain intact.

This presumption that a rascally trustee has meant to draw on his own funds rather than those of the wronged *cestui,* is, of course, pure fiction, and maybe discarded, and the same result reached by simply treating the *whole deposit as affected with a lien or trust;* which lien attaches to whatever is left of the mixed deposit. This, however, only where it appears that the trust *res,* under the presumption mentioned, remains intact.

The same—(b) trust res encroached upon—fresh deposits.—It is obvious that if the wrongdoer's general balance ever *falls below the amount of the trust fund,* to that extent the trust fund has been encroached upon, and the *cestui's* lien can attach only to what is left. New deposits of the wrongdoer's own funds thereafter, cannot revive the lien and extend it to the new deposits—since the latter are in nowise affected by the trust [6]—unless, of course, there be proof that such new deposits were *meant as a restoration* of the depleted trust fund.

The same—tracing the withdrawn trust funds.—As pointed out, the presumption that the trustee has drawn on his

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[6] Knatchbull *v.* Hallett, 13 Ch. Div. (1879) 696; *In re* O. A. Brown & Co., 189 Fed. 432; Humphreys *v.* Butler, 51 Ark. 351; Harrison *v.* Tierny, 254 Ill. 271; Englar *v.* Offutt, 70 Md. 78; Peters Shoe Co., *v.* Murray (Tex.), 71 S. W. 977; Peters *v.* Bain, 133 U. S. 670; Schuyler *v.* Littlefield, 232 U. S. 707; 27 Harvard Law Rev. 135-136. See Miller *v.* Norton, 114 Va. 609; Pennington *v.* Bank, 114 Va. 609.

own funds rather than on those of the *cestui,* is a mere fiction, resorted to only in order to impress a trust upon the balance in bank. Fictions are not permitted to work a legal wrong. Hence where the trust fund in bank has been *depleted,* in whole or in part, but the trust deposit so withdrawn can be traced into an investment which is still intact, the *cestui* may assert a lien on the *res* represented by the new investment.[7]

The same—bank deposits—(2) Contest between depositors of insolvent bank.—In accordance with the doctrine that the owner of trust funds may follow them regardless of their mutation and transmutation, as long as they are *earmarked and capable of identification*—and the further principle that the mingling of funds in bank does not destroy the earmark—a well settled principle of importance arises in controversies between depositors of an insolvent bank.

Ordinarily the relation between a bank and its depositor is one simply of *debtor and creditor,* and not that of trustee and *cestui que trust.* Hence, the common rule, in case of insolvency of the bank, is that depositors all *share equally* in the distribution of its assets.

But the same doctrine of constructive trusts and the following of trust funds applies as well between a bank and its depositor as between individuals. If the bank has received the deposit *under circumstances that would induce a court of equity to attach a constructive trust* to the fund, had the transaction been beween two individuals, *the bank will be treated as a trustee,* and the fund a trust fund—thus giving the depositor in whose favor the trust arises preference over the general depositors.

The same—when bank trustee.—Hence if the bank receives or collects the fund as *agent* only, and *not as borrower,* the fund is a trust fund, and will be so treated, if properly identified—as to which, later.

So, if the bank receive the fund through its *own fraud*—or from a *wrongdoer, knowing his lack of title,* or his authority to

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[7] In re Otway (1903), 2 Ch. 356; Lamb *v.* Rooney, 72 Neb. 322; Primeau *v.* Granfield, 184 Fed. 480 (good discussion); In re O. A. Brown Co., 189 Fed. 432; Brennan *v.* Tillinghast, 201 Fed. 609.

make such a deposit—or *expressly as trustee* for the depositor or another—in every such case, on insolvency of the bank, the princial, or depositor, or *cestui,* as the case may be, will be preferred, as equitable lienor over the general creditors of the bank.

The same—illustrations.—Thus, money collected by a bank on a bill or check deposited *"for collection"* only, *with no intention of allowing the proceeds to remain on deposit*—thus rendering the bank agent, or trustee, and not a debtor, as it would be if the fund were meant for deposit—is regarded as a trust fund; and if the bank fails, the customer's claim will be treated as a preferential one. To so treat it would manifestly be an advantage to the owner of the fund, since if he were a *mere creditor* he would be obliged to come into the distribution of the bank's assets as a general creditor, and take his dividend, large or small, with the other creditors. Treating the fund as a trust fund, however, places the claimant on a plane superior to that of creditors.[8]

So, where a bank receives a deposit with *knowledge of its own insolvency.* When the depositor is ignorant of such condition, such acceptance of the deposit is a *fraud on the depositor,* and the bank will be treated as holding the deposit in trust.[9]

Again, where a banker received from one about to lease property from another, money to be kept as security for the performance of the lessee's covenants, and executed to the lessee a written receipt setting forth the terms of the trust on which the money was to be held, on insolvency of the banker it was held that the deposit was *impressed with a trust* in favor of the depositor, notwithstanding the fact that it had been mingled with the general funds of the bank.[10]

The same—resume.—In short, whether a bank deposit is to be treated as a trust fund or not, as between the depositor and

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[8] Miller *v.* Norton, 114 Va. 609; Pennington *v.* Bank, 114 Va. 674; n. 32 L. R. A. 715; n. 34 L. R. A. 532; Central Nat. Bank *v.* Ins. Co., 104 U. S. 54; Peters Shoe Co. *v.* Murray (Tex.), 71 S. W. 977; authorities *supra.*

[9] Pennington *v.* Bank, 114 Va. 674; Western German Bank *v.* Norvell, 134 Fed. 724, 69 C. C. A. 330; Tiffany, Banks and Banking, 89; n. 25 L. R. A. 546.

[10] Woodhouse *v.* Crandall, 197 Ill. 104, 58 L. R. A. 385.

other creditors of the bank, depends upon the question whether the deposit was made and honestly received as an *ordinary loan,* creating the mere relation of *debtor and creditor;* or whether the bank was mere agent *to collect or hold* for a specified purpose, under circumstances excluding the idea of a loan; or whether acceptance of the deposit was in itself a *fraud on the depositor;* or was otherwise made under circumstances such as would induce a court of equity to construe the transaction as a trust between individuals.

The same—bank's assets diminished below trust deposit.—Here is applicable, again, the principle, already noticed, that if the whole mixed fund ever becomes diminished to a point *below the amount of the trust fund,* then the lien of the depositor attaches only to what is left, and the trust fund is depleted by the amount of the diminution. Nor will subsequent accretions to the bank's funds alter the situation in favor of the depositor asserting the lien.

The same—Dean's Ames' statement of the rule.—In the luminous discussion by Dean Ames,[11] mentioned *supra,* the situation is so well presented as to warrant the following quotation: "There is," says Dean Ames, "another class of cases illustrating the confusion of funds. A bank receives money on general deposit, knowing that it has no right to receive it, either because of its known insolvency, or because the depositor is an official who is prohibited by law from so depositing the money he holds as an official. The bank fails soon afterwards, having in the meantime received and paid out divers sums of money. The money wrongfully received was mixed, of course, with other money of the bank. Must the depositor, or the body which he represents, come in with the general creditors, or is he entitled to a preference?

"The answer depends upon the amount continuously in the bank from the time of the bank's wrongful receipt of the deposit. The moment the $1,000" [supposed to be deposited] "was mixed with the other money of the bank, the depositor became *cestui que trust* of that proportion of all the money then in the bank,

[11] 19 Harv. Law Review, 511, 520.

which $1,000 bore to the total money; or he might claim a lien to the amount of $1,000 upon all the money in the bank. If the total amount of the money in the bank was continuously, from the moment of the deposit up to the time the bank closed its doors, equal to or more than $1,000, the depositor would be paid in full. If at any time the total amount dropped below $1,000, the depositor's security would be reduced *pro tanto,* and would not be increased by any subsequent receipt of money of its own.

"The mixing of the depositor's money and the bank's money in the vaults of the bank is not to be distinguished from the mixing by the wrongdoer who puts his own gold eagles with those of another in a bag, or, as in Kirby *v.* Wilson (98 Ill. 240) in his pockets."

Following trust funds, continued—cestui has option to claim either the new res or a lien thereon.—Where the *cestui* has satisfactorily traced the trust fund into a particular *res,* under circumstances proper to raise a trust therein for his benefit under principles previously discussed, he has the option to demand the *entire thing so purchased with his funds,* or to claim a lien thereon, as he may prefer. This may, of course, result in a profit to the *cestui qui trust*—as where the property has enhanced in value since its acquisition by the wrongdoer.[12]

Page 158, § 284. [In the third line of this section, the words "or a creditor" should be erased for reasons heretofore noticed.]

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[12] Francis *v.* Cline, 96 Va. 201; Bitzer *v.* Bobo, 39 Minn. 18, 38 N. W. 609; Crawford *v.* Jones, 163 Mo. 578, 63 S. W. 838; Oliver *v.* Piatt, 3 How. (U. S.) 333; Holmes *v.* Gilman, 138 N. Y. 369; Green *v.* Haskell, 5 R. I. 447; Shaler *v.* Trowbridge, 28 N. J. Eq. 595; 27 Harvard Law Rev. 125, 127. See Lehman *v.* Gunn, 124 Ala. 213, 27 So. 475, where an insolvent debtor insured his life for the benefit of his parents as a gift to them, executing his note for the small amount of the first premium. Shortly afterwards he died *before actual payment of the premium.* It was held that this transaction amounted to a gift of the policy to his parents; that this was in fraud of his existing creditors; and that hence the parents held the entire proceeds in trust for the creditors of the insured, to the full extent of his indebtedness, although the only sum which the debtor could be said to have wrongfully diverted from his creditors was represented by the note for the first premium. The proceeds of the note, namely, the insurance policy and its subsequent proceeds, were many times of more value than the original amount thus constructively diverted.

Page 158, § 285. **Notice that the title is fiduciary is sufficient.**—In accordance with the principle stated in the Text, namely, that one who buys from a trustee, knowing that his title is held in trust, must take notice of the *limitations and restrictions upon his authority,* and buys at his peril, it was recently held in Virginia, under a deed of trust executed to secure a debt, and containing the usual provision that the trustee should sell *"at the request of the creditor,"* that where the trustee sells without such request, the purchaser, though obtaining legal title, will take it encumbered with the trust.[13]

Page 162, § 291. **Spendthrft Trusts.**—The student will better understand this subject by bearing in mind a fundamental rule of the English common law, still existing in England, Virginia (anterior to Code of 1919), and many of the States, that the *right of alienation and liability for debt are essential incidents of the ownership of property,* real or personal—and, in general, whether the owner have legal or equitable title.[14]

That is to say, a gift directly to A, "but not to be subject to sale by him or liable for his debts"—or to a trustee for A, with the same restrictions—is really an endavor to accomplish two inconsistent things, namely, to make A complete owner, without the rights or incidents of complete ownership. Various methods have been attempted, more or less successfully, to evade this settled rule, recognized as well in equity as at law. We may mention the two most usual of these:

The same—First method.—(1) A conveyance to A, or to a trustee for A, but his right to the property to *cease immediately upon his becoming insolvent, or bankrupt,* or upon his attempting to alienate—with limitation over to another. This accomplishes one purpose, namely, to prevent A from selling the property or charging it with debt, but it fails to accomplish the main purpose, namely, that notwithstanding his improvidence A may *continue to enjoy the donor's bounty.* For by the very terms of the trust, he forfeits the estate the moment his spendthrift habits produce insolvency or an attack from his creditors.

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[13] Wasserman *v.* Metzger, 105 Va. 744.

[14] Scott *v.* Patterson, 104 Va. 455; Petty *v.* Moore's Brook Sanatorium, 110 Va. 815.

It is therefore, theoretically, a complete protection against alienation, or liability for debt, but it is of little practical value to the spendthrift himself.[15]

The same—Second method.—(2) A second method, and a more practical one, operates on the theory that A may be provided for *without giving him either legal or equitable ownership* of the property. The plan here is to convey the estate to a trustee, in whose judgment and discretion the donor has confidence, upon trust to pay over to A *so much of the rents, issues, profits or income thereof, as the trustee may, in his uncontrolled discretion, see fit.* So much of the income as is not thus devoted to A's support and maintenance is to be reinvested as a part of the principal, and at A's death the entire *corpus* is to go over to another designated beneficiary, according to the provisions of the trust instrument. These provisions may even go to the extent of permitting A to designate by will how the principal shall be disposed of at his death.

It is perfectly clear here that A can *of right* demand nothing of the trustee. The latter has unlimited discretion to devote all or none of the income to A's necessities. *Since A has no vested interest, and hence can demand nothing, his creditors,* who, as we have seen, stand in his shoes, *can likewise demand nothing.* This plan seems to answer fairly well, provided of course the trustee feels interested enough in A to see that he actually gets the benefit of the income, or enough of it, to maintain him comfortably.

The student will observe that the keynote in this plan is an *absolute and uncontrolled discretion in the trustee,* as to the disposal of the income, in its application to A's wants, with complete lack of any vested property right in the latter.[16]

The same—Third method—prevailing in a few states only.—(3) In some of the American States, the fundamental

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[15] See Camp *v.* Cleary, 76 Va. 144.

[16] The leading case of Nichols *v.* Eaton, 91 U. S. 716, illustrates this sort of a trust. The leading case on this subject in Virginia is Hutcheson *v.* Maxwell, 100 Va. 169; 7 Va. Law Reg. 785 and note. In this case the draughtsman of the trust instrument failed to observe this keynote, and by its omission, gave A the *right to demand a "comfortable support,"* which right, as the court properly held, could be sequestered by his creditors.

rule noticed previously, that the right of alienation and liability for debt are essential accompaniments of the ownership of property, has been relaxed; and in such States a third and simpler method has been approved by the courts, namely, a gift to a beneficiary, or to a trustee for him, *with a simple declaration that it shall not be alienable or liable for his debts.* This rule exists in Massachusetts, Kentucky, and a number of other States, including West Virginia by recent decision.[17]

Page 164, § 296. **Spendthrift trusts continued—for benefit of grantor himself.**—All of the authorities agree that the owner of property cannot create a trust therein *for his own benefit,* with restrictions upon his right of alienation or his power to charge it with his debts—even where uncontrolled discretion is vested in the trustee, as under our second method above.[18]

The same—Virginia statute.—By the revisal of 1919[19] spendthrift trusts are declared valid within certain limits—the value of the corpus of the trust estate not to exceed one hundred thousand dollars.

The same—quasi-spendthrift trust under so-called family settlements.—Something in the nature of a spendthrift trust, arising out of trusts erected for the *support and main-*

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[17] It was approved *obiter* by the Supreme Court of the United States in Nichols *v.* Eaton, *supra.* Note 24 Am. St. Rep. 686 to 697, where the cases are collected; Guernsey *v.* Lazear (W. Va.), 41 S. E. 405; Jackson Square Association *v.* Bartlett (Md.), 93 Am. St. Rep. 416 and note. This is the doctrine of the Text, § 294.

[18] This is regarded by the courts as a fraudulent effort on the part of the owner to shield his property from his own debts, and contrary to public policy. Petty *v.* Moore's Brook Sanatorium, 110 Va. 815; Menkin *v.* Brinkley, 93 Tenn. 721, 31 S. W. 92; Bank *v.* Windram, 133 Mass. 175; Mackason's Appeal, 42 Pa. 330, 82 Am. Dec. 517; Ghormley *v.* Smith, 139 Pa. 584, 21 Atl. 135, 23 Am. St. Rep. 215, 11 L. R. A. 565.

[19] Va. Code 1919, § 5157. Equitable estates are declared subject to debts of the *cestui* to the same extent as legal estates—"but any such estate, not exceeding $100,000 in actual value, may be holden or possessed in trust upon condition that the *corpus* thereof, and income therefrom, or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries, without being subject to their liabilities or to alienation by them; but no such trust shall operate to the prejudice of any existing cerditor of the creator of such trust."

tenance of a family—or doubtless of any designated group of persons—has long been recognized by the courts.

Instances of such trusts appear in settlements of property by deed or will, on a trustee, the income to be used for the support of a designated family, where it appears, in express terms or by plain implication from the trust instrument, that the intention of the settlor was that the entire subject is to be preserved by the trusee for the *common and joint maintenance of all members of the family,* or other designated group, so that no one of them has such a separable interest therein as to authorize a separate alienation by him, or the subjection of any portion thereof to the payment of his debts.[20]

CHAPTER XIII.

TRUSTEE AND BENEFICIARY.[1]

Page 165, § 298. **Security by trustee.**—As the trustee is not a public official, being appointed by the grantor of the instrument of trust, or by the court in substitution, he is not required to give bond unless there be a statute requiring it. In Virginia, trustees may be required to give bond with good sesecurity, if in the opinion of the court this is necessary for the protection of the trust fund.[2]

Page 166, §§ 300-309. **New and substituted trustees.**—As to how legal title passes to new, or substituted trustees, see *ante,* note to § 154.

Page 170, § 310. **Trustee may not purchase the trust res.**—The rule, well stated in the Text, that a trustee's purchase of the trust property may always be avoided by the *cestui,* is a fundamental principle of equity. The rule applies even though the

[20] Markham *v.* Guerrant, 4 Leigh 279; Johnston *v.* Zane, 11 Gratt. 552, 569-570.

[1] See Va. Code §§ 6298-6304; id. Ch. 221.

[2] Va. Code 1919, § 6301.

trustee acted in good faith, from laudable motives, and paid the best price to be had.[3]

Page 172, §§ 313-316. **Investments by trustees.**—The student will note the conservative rule existing in England on this subject. In America, there are two rules, known as (1) New York Rule; and (2) Massachusetts Rule.

The same—1. New York rule.—This rule is not so conservative as in England, and yet much more conservative than the Massachusetts rule. Generally speaking, in the absence of statute, or of provisions in the trust instrument to the contrary, the trustee may invest only in (a) *government securities;* (b) *real estate mortgages,* and (c) *first mortgage bonds of established corporations.*

The same—2. Massachusetts rule.—This rule is much more liberal. Under this, the trustee may invest in such securities as prudent and intelligent business men regard as good for an investment *meant to be permanent,* and *not merely speculative.*

Hence stocks in safe business corporations, as well established banks, railroads, mnufacturing companies, insurance companies, etc., are regarded as proper. But in no case may the trustee invest in *new enterprises* just being established, and therefore necessarily speculative, or on mere *personal loans to individuals,* howsoever solvent, unless there be other security than the mere personal promise to pay, nor in any security the value of which is *purely speculative.*

Prior to the statute presently to be mentioned, the Massachusetts rule probably prevailed in Virginia.[4]

The safest plan, however, is for the trustee to take the *advice of a court of chancery,* and thus relieve himself of what frequently proves to be a very serious responsibility.

The same—Virginia statute.—A very recent Virginia statute [5] provides that executors, trustees or other fiduciaries may

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[3] Smith *v.* Miller, 98 Va. 535; Jackson *v.* Smith, U. S. (Jan. '21).
[4] See Davis *v.* Harmon, 21 Gratt. 194, 201; Waller *v.* Catlett, 83 Va.
[5] Va. Code 1919, § 5431. See also *id.* § 2595.

invest in Virginia state bonds[6] obligations of the United States or for which its faith is pledged, including bonds of the District of Columbia; bonds issued by cities, towns or counties in Virginia, issued under certain conditions named; bonds and negotiable notes secured by first lien (mortgage or deed of trust) on real estate in this State, not to exceed eighty *per centum of its* assessed valuation.[7]

Page 174, § 320. **Trustee's liability for mingling trust funds with his own.**—The doctrine of the Text seems in the main sound. The student will consult the additional authorities[8] cited in the footnote.

The same—Virginia cases.—There are a number of cases in Virginia which seem at first glance to run counter to the doctrine of the Text.[9]

In all of these cases, the trustee, who had deposited trust funds to his own credit, was exonerated from liability on failure of the bank. This exoneration, however, was based on the express ground that the fund was lost, not primarily by the *failure of the bank,* but by the *failure of the currency of the country,* as the result of the Civil War—all these cases representing transactions in Confederate money. As the court well said, the fund would have perished whatever the form of the deposit. In Davis *v* Harman, the court expressly disclaims any intention to dispute the authority of the cases holding a trustee liable for mingling funds with his own, under ordinary circumstances.

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[6] Limited to "Riddlebergers" and "Centuries."

[7] The statute was probably not meant to be exhaustive. If not so meant, it is subject only to the criticism that eighty *per centum* of the assessed value of the security leaves too small a margin of safety. No prudent lender would approve such a loan. If, on the other hand, the statute is meant to be exhaustive, and by implication to exclude other investments by fiduciaries (e. g. bonds of other states and of cities, towns and counties of other states) it is subject to serious objection. See criticism in 7 Va. Law Rev. (Oct. 1921).

[8] Nolting *v.* Bank, 99 Va. 54; National Bank *v.* Insurance Co., 104 U. S. 64; note 75 Am. Dec. 799-805; 2 Pomeroy's Equity 1067. The case of Naltner *v.* Dolan (Ind.), 53 Am. Rep. 61, is interesting and valuable in this connection. See also, Vaiden *v.* Stubblefield, 28 Gratt, 153.

[9] Davis *v.* Harmon, 21 Gratt. 194; Hale *v.* Wall, 22 Gratt. 424; Parsley *v.* Martin, 77 Va. 376; Barton *v.* Ridgeway, 92 Va. 162.

Page 176, §§ 322-323. **Tortious conveyance by trustee—distinction between "authority" and "power" to sell—** The Text here confuses the two essentially distinct attributes of *power* and *authority*.

It is elementary that when a trustee makes conveyance of the legal title to trust property, the legal title passes to his grantee, *even though the conveyance be made in derogation of the trustee's authority as set out on the face of the deed.* But, of course, in such case the purchaser would take the property, subject to the terms of the trust.

The student must therefore carefully note the difference between the trustee's *power* to sell and his *authority* to sell. *The former always exists; the latter, never—unless it be contained in the terms of the trust,* or expressly conferred by a decree of the court.[10]

Trustee's authority to mortgage.—As the trustee has no right to *sell* without express authority, and as a mortgage is an inchoate sale—since it may result in a complete alienation by foreclosure—it follows as a matter of course that he has no right to *mortgage* the trust property, howsoever beneficial or necessary the raising of funds may be, for the use or protection of the trust property. He should apply to a court of chancery for advice.[11]

Even where the trustee has express power to *"sell,"* this carries with it no *implied power* to *"borrow"* or *"mortgage."*

Page 176, § 322. **Sale or mortgage by court of equity.**—As just indicated, courts of equity possess inherent jurisdiction to sell or incumber trust property when the necessities of the trust demand it, and in the absence of a prohibitory clause in the trust instrument. The exercise of this power is now regulated by statute in most of the States, especially where the beneficiaries are infants, or are otherwise under disability.[12]

Page 177, §§ 325-326. **Suits by or against trustees.**—The statement is sometimes judicially made that wherever a trustee

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[10] See Gibson *v.* Gibson, 5 Leigh, 370; Robertson *v.* Pierce (Ala.), 24 South, 984; Reece *v.* Allen, 5 Gilm. (Ill.) 336; n. 19 Am. St. Rep. 266; n. 92 id. 573-598.

[11] See Shirkey *v.* Kirby, 110 Va. 455.

[12] See Va. Code 1919, § 5335; Shirkey *v.* Kirby, *supra.*

is a necessary party, plaintiff or defendant, a court of equity will take jurisdiction.[13]

But the rule is clearly, otherwise. It is settled, that a court of equity will not assume jurisdiction of a *purely legal* claim, merely because the claim is asserted by or against a trustee. Here the remedy at law is usually plain and adequate, and there is no occasion for equitable intervention.

For example, if Blackacre be held by A in trust for B, who is in possession, and who is subsequently ousted by C, a wrongdoer, the remedy is ejectment at law by the trustee, and not a bill in equity by B, the beneficiary.[14]

In order for the court of equity to take jurisdiction, there must be some equitable right involved, not remediable at law, or some needed equitable remedy—as, for example, a controversy between the trustee and the *cestui que trust.*

Claims of third persons against the legal estate, must be brought against the trustee, and at law.[15]

Page 178, § 327. **Trustee a principal not an agent—personal liability.**—It should be observed that the trustee is not in any sense an *agent of the trust,* with authority to bind the trust *res* by his contracts—save in certain respects when authorized by the trust instrument, or by a court of equity. *At law,* where the very term 'trustee' is ignored, (*descriptio personæ*') and equitable titles are unknown, he is personally responsible for all his contracts, whether concerning the trust estate or not. When thus made personally liable at law, the question whether equity wil permit him to recoup such liability out of the trust fund, depends on the circumstances stated in the following section.

Indemnity to trustee.—Where the trustee incurs a personal liability or lays out his own funds in connection with the trust estate, a court of equity will permit him to indemnify or reimburse himself out of the trust estate, provided the liability or outlay was authorized (1) expressly or by implication, in the trust instrument; or (2) by the court; or (3), though not so

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[13] Fowle *v.* Lowrason, 5 Peters 495; Huff *v.* Thrash, 75 Va. 546.

[14] Hayward *v.* Andrews, 106 U. S. 672; Clark *v.* Oliver, 91 Va. 421; 1 Va. Law Reg. 195 and note.

[15] Armstrong *v.* Pitts, 13 Gratt. 235; cases *supra.*

authorized, if not violative of the terms of the trust instrument, and the transaction was manifestly in the interest of the trust and its beneficiaries. In this last case, the court exercises its judicial discretion in approving or disapproving the trustee's outlays.

In providing such indemnity to the trustee, or to raise funds for any necessary purposes of the trust, the court, as the guardian of all trusts, has inherent power to authorize a sale or a mortgage of the trust *res*.[16]

Page 179. **Settlement of trustee's accounts.**—In probably all the States, there are statutes requiring trustees, as well as other fiduciaries, to make regular settlements of their accounts before some court or official. In Virginia they are required to account annually, or whenever a sale is made of the trust property—before the commissioner of accounts.[17]

Page 181, § 335. **Beneficiary's control of legal estate—ending the trust.**—It is important to observe that while the legal estate is in the trustee, yet, unless it would clearly defeat the plain intention of the trust instrument, the beneficiary, if *sui juris* and sole beneficial owner, has in equity complete conrtol, not only of the *res* itself, but of the title as well—that is to say, the trustee may be required by the *cestui* to make such conveyance of the legal title as the latter may direct, and even a conveyance to the *cestui* himself, thus *putting an end to the trust.*

For example, "to A in trust for B" (passive trust). Here B, if *sui juris,* may end the trust at his discretion.

Or, again, "to A in trust for B for life, remainder to C." C then purchases B's life estate. Being now complete owner of the equitable title, C may end the trust at pleasure, by requiring the legal title to be conveyed to him. So, where the trust has, from any cause, come to an end, the beneficial owner is entitled to a conveyance or release of the legal title by the trustee.

On the other hand, where the *cestuis,* or some of them, are *not sui juris,* or where the instrument vests a *discretion* in the

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[16] Shirkey *v.* Kirby, supra; n. 19 Am. St. Rep. 71.
[17] Va. Code 1919, §§ 5404-5408.

trustee (i. e., an active trust), which would be defeated by permitting the *cestui* to control the title, then such control will not be permitted.[18]

Page 184. **Duty of purchser from trustee to see to the application of the purchase money.**—This subject is not treated in the Text. It is meant here to discuss the duty of an honest purchaser to see to the application of the purchase money, where he buys from a trustee fully authorized by the terms of the trust instrument to sell the trust *res*, but who, by the terms of the same instrument, is required to give the proceeds a particular direction—as to pay particular debts, or all debts, or to reinvest in designated securities. If there be any such duty resting on the purchaser, then the property so purchased from the trustee continues burdened with the trust, in spite of full payment to the trustee, unless and until the trustee gives to the proceeds the indicated direction. In other words, the purchaser must pay again in case of the trustee's default.

The same, continued.—We have already seen that one buying from a trustee *lacking authority to sell,* himself becomes a constructive trustee, and, of course, is liable to indemnify the trust fund against loss.

But the question whether an honest purchaser from a trustee *having ample authority to sell,* and after payment of the purchase money in full, is under further obligation to see to the application of the purchase money, has been much confused by ill-considered *dicta* to be found profusely scattered through the reported cases in America. In England, the question is probably answered in the affirmative. There are also in America numerous cases which seem to indicate that where it distinctly appears from the trust instrument that the trustee is to reinvest the fund, after a sale of the trust subject, in a particular class of securities, or is to pay specific sums to creditors, or others—that is to say, *where the purchaser may distinctly see from the trust instrument what is to be done with the money*—then there is an obligation on him to see that it is so applied; otherwise he may be personally responsible if the trustee make default.

[18] Vass *v.* Scott, 2 Leigh 356; Armistead *v.* Hart, 97 Va. 316; Thom *v.* Thom, 95 Va. 413; note by Prof. Burks, 3 Va. Law Reg. 732.

It is proper to say, however, that most of these statements are made *obiter*. In an elaborate note discussing the question, Mr. Freeman concludes with the statement that he has been unable to find a single American case in which an honest purchaser from a trustee, under a sale made in a proper discharge of the trust, has been held responsible for the default of the trustee in the application of the purchase money; and he expreses grave doubt whether the English rule to the contrary ever existed in America.[19]

Page 184. **Deed of trust to secure debts.**—(Not discussed in Text.) Before leaving this chapter on Trustee and Beneficiary, it may be well enough to call the student's attention to the modern method of securing debts by *deed of trust* instead of *mortgage*. Under such an instrument, the borrower conveys to a third party, agreed upon between him and the creditor, the property upon which the security is to be given, with a trust declared for the benefit of the creditor—but with right of the grantor to remain in possession and enjoyment of the property until default in payment. The instrument usually provides that should the debtor fail to pay at maturity, the trustee (who of course holds the legal title), at the request of the creditor, shall, after due advertisement, expose the property for sale at public auction; that he shall apply the proceeds, first to the payment of the costs of executing the trust; second to the payment of the creditor's debt, principal and interest; the balance, if any, to be paid over to the grantor.

This form of security is more advantageous to the creditor than a mortgage, since, in order to realize his debt, *he need not resort to the courts*—he merely calls upon the trustee to sell, and it is the duty of the latter, if the debt is not paid, to obey such direction.

If the debtor pays the debt without making default and no sale becomes necessary, this leaves the legal title still outstand-

[19] 19 Am. St. Rep. 281, 285. Mr. Bispham likewise repudiates the English rule to the contrary (Bispham's Equity, 279); and Mr. Redfield also doubts its soundness (3 Redfield on Wills, 235). It has been abolished in England by act of Parliament. 23 and 24 Vict. ch. 145, § 29. The rule is settled in Virginia that no such liability rests on the purchaser. Redford *v.* Clarke, 100 Va. 115; and note 7 Va. Law Reg. 857.

ing in the trustee. In the absence of statute, the title can only be divested out of the trustee and revested in the grantor, by a deed, commonly known as *a deed of release.* In Virginia, however, a statute [20] provides that release may be made by a simple endorsement by the creditor or his agent, on *the margin of the deed book* where the original deed of trust is recorded. It is further declared that such endorsement of payment in full shall operate to *revest legal title* in the grantor, as effectually as if such endorsement were a deed of release. We shall see more of this subject under the head of "Mortgages," *post.*[21]

CHAPTER XIV.

CHARITABLE, OR PUBLIC, TRUSTS.

Conflicting authorities.—While the coutrs are fairly agreed as to *what constitutes a charitable trust,* there is a most unhappy division of opinion in the different States as to *what charitable trusts will be enforced.* The law of this topic is largely case law, and the decisions in one State are of comparatively little aid in solving the question in another State. The student must therefore, carefully examine local precedents before advising on this subject.[1]

Peculiarities of the charitable trust.—Trusts of this character present several features unknown to the ordinary private trust, and are governed in several respects by principles not applicable to such trusts. These features and principles are fairly well set out in the Text. A résumé of them will be found *infra.*

It is meant to point out in this preliminary section but one of these features—and this in order that the student may appre-

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[20] Va. Code 1919, § 5456.

[21] On the general subject of deeds of trust to secure debts, see monographic note, 92 Am. St. Rep. 573-598.

[1] An exhaustive collection of authorities from all the States will be found in a monographic note, 64 Am. St. Rep. 745, and in a voluminous brief of Judge Burks in the case of Protestant Epis. Soc. *v.* Churchman, 80 Va. 718. See also 2 Pom. Eq. Jur. 1029. The Virginia and West Virginia cases are collected in note to Kelly *v.* Lovell, 20 Gratt. 124, Va. Rep. Ann.; note 3 Va. Law Reg. 537.

hend some of the reasons why these trusts have made difficulty for the American courts.

In our studies of the private trust we have learned that one of the essentials of an ordinary trust is the *certainty of the beneficiaries.* Without this certainty, the trust fails, and there is a resulting trust for the donor. On the other hand an essential feature of the charitable trust is the *uncertainty* of the beneficiaries.

An illustration of such a trust is the gift (hypothetical) of $100,000 "to T and his successors in title, the corpus to be held in perpetual trust, and invested in safe interest-bearing securities, and the income thereof to be used for the education, at the University of Virginia, of *six students, male or female, residents of Albemarle county, to be selected annually* as directed in the following clause of this my will."

Here it is obvious that at the inception of the trust, the beneficiaries are *wholly uncertain.* It is equally obvious that even after the six beneficiaries are selected for the first year, *the beneficiaries for future years,* in perpetuity, remain uncertain. So that there is never a moment during the continuance of the trust, when the *whole beneficial interest* can be represented in court for the purpose of protecting trust rights, or of holding the trustee accountable for the preservation of the *corpus* of the trust fund.

The same—effect of uncertainty of beneficiaries.—A court of equity never sets its machinery in motion for the protection of any equitable right *on its own initiative.* There must be a plaintiff, who has an equitable right to be protected, and who must get the ear of the court by a bill filed—and all other beneficiaries *must be parties to the proceeding.* How is this possible in the case of the charitable trust? Howsoever eager the court may be to recognize and enforce so obviously worthy a charity as that illustrated above, there seem insuperable difficulties in the way. Hence the conflict of judicial view already mentioned.

The same—how the difficulty solved—(1) in Engand.—By the famious statute of 43 Elizabeth (1601), these trusts were recognized, and the English court of equity displayed a liberal disposition in the enforcement of the statutory mandate.

As these charities are manifestly most beneficial to the State, proceedings for their protection and enforcement—in the absence of any other representative of the trust—naturally fell to the crown itself, through the Attorney General. The result is that today England abounds in institutions established by generous donors, in aid of such classes of persons as are mentioned in the statute, and other numerous analogous classes.

The same—(2) in America generally.—Early in the history of America, the question arose as to the validity of the charitable trust, *in the absence of the statute of* 43 *Elizabeth,* or a similar enactment.

One of the earliest cases involving the question was Baptist Association *v.* Hart,[2] in the United States Supreme Court—the case arising under the law of Virginia. The opinion was by Chief Justice Marshall, and the validity of the trust was denied, on the ground of the uncertainty of the beneficiaries and the absence of a remedial statute like 43 Elizabeth. This case was followed in several other states and fixed in those jurisdictions the invalidity of these trusts.

The question first arose in the Court of Appeals of Virginia in 1832, and the court followed Baptist Ass'n *v.* Hart without question, since Virginia was without the statute of 43 Elizabeth.[3]

The same—new English precedents discovered.—After the decision of these two cases, the publication of some of the ancient chancery precedents found in Tower of London, *antedating* 43 *Elizabeth,* proved conclusively that charitable trusts *had been recognized prior to that statute,* and hence were not dependent thereon for their existence—the statute being merely declaratory of the existing law. This discovery, coming to the attention of the court in the famous Girard Will Case,[4] the Supreme Court of the United States, in a learned opinion by Mr. Justice Story, repudiated the doctrine laid down in Baptist Ass'n *v.* Hart, and adopted the more ancient and more enlightened doctrine, that *a charitable trust will be enforced even in the ab-*

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[2] 4 Wheat (U. S.) 1.
[3] Gallego *v.* Atty. Gen'l, 3 Leigh 450.
[4] Vidal *v.* Girard's Executors, 2 Howard 127 (1844).

sence of statute—and this is now the accepted doctrine in almost every State of the Union.

The same—(3) in Virginia.—The Virginia court, however, averring that it would rather be consistent than right, declined to adopt the doctrine of the Girard Will Case, or to follow the light shed by the discoveries before mentioned; and in a long line of subsequent cases, affirmed the doctrine of Gallego *v.* Atty. Gen'l.

Finally, however, in 1885, in the Churchman Case [5] the court, in a strong opinion, seemed to repudiate the old error, and to place Virginia in line with her sister States. This case was followed later by the Guthrie Case [6] where the court again repudiated the erroneous doctrine of the Gallego Case. But in a still later case [6a] arising in 1897, the court rejected the doctrine laid down in the last two cases mentioned—asserting, as was doubtless true, that the queston was not there distinctly presented, and hence that the outgivings of the court in these cases were *obiter* and extra-judicial—and re-affirmed the old doctrine of the Gallego Case. So that the law of that case remained the law of Virginia, with slight statutory modifications,[7] until 1914,[8] when the legislature finally awoke from its Rip Van Winkle lethargy, and made provision for charitable trusts in the broadest and most liberal terms. We shall notice the statute presently.

The effect of this judicial stubborness and legislative lotus eating lost to the State innumerable charities which wealthy and philanthropic persons had endeavored to establish for the benefit of needy and deserving citizens of the commonwealth.[8a]

The same—Virginia statutes.—As indicated above, provision has long existed in this state for charitable trusts for *literary* and *educational* purposes [9] and to a limited extent for *re-*

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[5] 80 Va. 718.
[6] (1889), 86 Va. 125.
[6a] Field *v.* Vanwyck, Va.
[7] Trusts for literary and educational purposes, and to a limited extent for religious purposes.
[8] Acts 1914, p. 411; Va. Code 1919, § 587.
[8a] See the long list of failed charities in note to Kelly *v.* Dovell, 20 Gratt 124, in Va. Rep. Ann.
[9] Va. Code 1919, §§ 587-593.

ligious purposes;[10] and finally (and happily!) by the statute of 1914,[11] it is declared that "every gift grant, devise or bequest hereafter made *for charitable purposes,* whether made in any case to a body corporate or unincorporated, or to a natural person, *shall be as valid as if made to or for the benefit of a certain natural person.*"

Further provision is made for the protection and enforcement of such trusts by the attorney for the Commonwealth, and in the name of the Commonwealth.[12] So that after more than a century's struggle, all good citizens of Virginia may rejoice that it is now possible in this commonwealth for any generous and affluent philanthropist to establish by his will[13] a home for poor widows, a hospital for the sick, an asylum for the insane, a sanatorium for the drug addict or the alcoholic inebriate—or any other institution for the alleviation of human ills, or for the comfort and happiness of those 'suffering in mind, body or estate.'

Page 210. **Liability of charitable funds for negligence of trustee or agents.**—In view of the public character of these trusts, and the interest of the State therein, it is usually held

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[10] As the Virginia Constitution prohibits the incorporation of churches in this state, necessarily all property of these bodies must be held by *trustees;* and as the beneficiaries of these trusts for churches are always uncertain, such trusts are typical examples of charitable trusts. Such congregations may hold, through their trustees, not more than two acres of land in a city or town, and not more than seventy-five acres in the country—and personalty not to exceed $30,000: Va. Code 1919, §§ 38-46.

[11] Now carried into Va. Code 1919, § 587.

[12] Id. § 590.

[13] The few charitable institutions already existing in this state (not educational, literary or religious) owe their legal existence to the *state itself* (*e. g.* the State Insane Hospitals, and the University Hospital), or to legislative action in *incorporating charitable organizations* with authority to administer a designated charity, (*e. g.* St. Vincent's Hospital, Norfolk, and similar hospitals erected on private foundations). But it must be noted that the charitable gift could be validly made *only to an already existing corporation.* So that *after* incorporation—tantamount to legislative assent to the charitable trust—gifts could be freely made by act *inter vivos* or by will; but, *in absence of the existing corporation,* the gift by will would be invalid and title thereto would at once vest in the heirs or next of kin *before incorporation could be secured;* so that subsequent incorporation would not save the charity. See Jordan *v.* Richmond Home for Ladies, 106 Va. 710; Jordan *v.* Trustees, 107 Va. 79; Pirkey *v.* Grubb (Va.), 94 S. E. 344.

that charitable institutions enjoy (or should enjoy) the same immunity from liability for the negligence of their trustees, officers and agents, as does the State,[14] and as do public institutions erected and maintained by the state—such as the University of Virginia, the Virgina Mlitary Institute, the several state hospitals for the insane, etc.

Page 211, § 395. **Control of charities.**—The doctrine of the Text that the State, through its Attorney General, is charged with the protection and enforcement of public charities, is well settled.[15] It is scarcely true, however, that this is the prerogative of the State alone, since any person who can clearly bring himself within the class of beneficiaries under the trust may file a bill for the enforcement of his rights.[16]

It would seem, however, that where there is a complete dedication, and hence no possibility of a resulting trust, the grantor himself, no longer having an interest in the trust, has no standing in court to have the trust enforced.[17]

And, of course, if there be a trustee or trustees of the fund, he or they may sue for the protection of the fund or enforcement of the trust.

Charitable Trusts—Résumé.

This résumé of the peculiar characteristics of the charitable trust is meant rather as a skeleton for the guidance of the student, than as a substitute for the Text, where these headings are elaborated.

1. Uncertainty of beneficiaries.
2. Generally of indefinite and continuous duration; and

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[14] Perry *v.* House of Refuge (Md.), 52 Am. Rep. 495; Nims *v.* Boy's School, 160 Mass. 177; Powers *v.* Hospital, 109 Fed. 294; note, 23 L. R. A. 200; Mich. Law Rev. 552, 662; 9 id. 151; 24 HARV. LAW Rev. 232; 1 Va. Law Rev. But see *contra* Hospital of St. Vincent *v.* Thompson, 116 Va. 101—liable to strangers; Weston *v.* Hospital of St. Vincent, 23 Va. App. 435 (1921)—not liable to beneficiaries. See liability strongly asserted, in Tucker *v.* Mobile Infirmary Assn, 191 Ala. 572, 68 So. 4.

[15] In Virginia, the Commonwealth's Attorney—see *supra*.

[16] General Board State Hospital *v.* Robertson, 115 Va. 527.

[17] Clarke *v.* Oliver, 91 Va. 421; Emory and Henry College *v.* Shoemaker, 92 Va. 320; Wambersie *v.* Orange Humane Society; 84 Va. 446. See 6 Cyc. 968-71.

3. Therefore not subject to the rule against perpetuities.
4. Not subject strictly to the rule against restraints upon alienation.
5. Where a general charitable intent appears, the 'judicial' (not, in America, the 'prerogative') *cy pres* doctrine is applied, and hence there is *no resulting trust* should the precise purpose of the trust fail.
6. The trust may fail for the want of a trustee, where the direction the trust is to take is left specifically to the *personal discretion* of the trustees, and they refuse to accept the trust or to designate the beneficiaries—*e. g.* "to such charitable purposes as my friends A and B, trustees, may in writing, recorded, appoint."
7. Not generally subject to the statute of limitations.
8. According to the better view, the funds are not liable to answer in damages for the negligence of the trustees or their agents.
9. In the case of the private trust, the donor selects his own beneficiaries and generally by name—in the charitable trust this is never possible, but the beneficiaries are selected by the trustees or by other designated means.
10. In private trusts, if the donor so desired, title to the *res* might in most cases, have been conveyed *directly to the beneficiaries,* by name or by description—while in the charitable trust this is never possible.
11. In the private trust, as a general rule, the trustees, *and all the beneficiaries, may be convened before the court at any given period* in the duration of the trust, for the purpose of fixing their several rights and duties—whereas, in the charitable trust the trustees are generally the only parties that may thus be brought into court. Hence, as shown, the state, through its Attorney General, (in Virginia, the Commonwealth's Attorney), is the peculiar guardian of these trusts. Hence the term charitable, or *public,* trusts.

CHAPTER XV.

ACCIDENT.

Page 211, § 397. **Definition of "accident."**—Substitute the following for our author's definition: An unforeseen and injurious occurrence, *subsequent to the main transaction,* not attributable to the plaintiff's own agency or gross negligence or misconduct, as the proximate cause, and against the consequence of which a court of law affords no adequate redress.

The accident of making a note for $100 instead of $200, or *vice versa,* being contemporaneous with the main transaction, is classified, not as an "accident," but as a "mistake". But, if later the note is lost or destroyed this misfortune, being *subsequent* to the main transaction, is technically an "accident." The difference between accident and mistake is, after all, merely a question of classification, and one of no practical value, since equity relieves in either case. Relief from mistake is discussed in a subsequent chapter.

Accident—author's treatment.—Under the unhappy but accepted title of *Accident,* our author classifies and discusses:

1. Lost Instruments.
3. Relief from Forfeitures.
2. Relief from Penalties.

Let us take up these in order.

1. *Lost Instruments.*

Page 213, § 398. **(a) Lost bonds, notes, checks, etc.**—[Alter Text section-title to correspond.] The student will note from the Text why lost *bonds* could not be sued on at law (necessity for *profert*), and why, for a different reason, (viz. necessity for *indemnity*) there was a similar difficulty in the case of lost *negotiable* instruments.

The same—Virginia statute—action at law.—By statute in Virginia,[1] the courts of the law are given jurisdiction to entertain actions on lost instruments, including bonds and negotia-

[1] Va. Code 1919, § 6242; id. § 6082 abolishing necessity for profert of sealed instruments.

ble instruments. The statute removes the necessity for making *profert* of sealed instruments, and authorizes courts of law to require the necessary indemnity in actions on negotiable paper.

The same—effect of this statute on the equity jurisdiction.—As this statute does not in terms exclude the equity jurisdiction in case of lost instruments, it follows (in accordance with the principle, previously noted, that a legal remedy given by statute *does not exclude the already acquired jurisdiction in equity,* unless so declared) that equity still has jurisdiction in such cases.[2]

(b) Lost conveyances—re-execution.—Here there is no question either of *profert* or of *indemnity,* but the need of the grantee is for the deed of conveyance as *evidence of his title*—in short, *re-execution* of the lost deed. As a court of law lacks the necessary machinery for directing such re-execution, equity assumes jurisdiction for that purpose. This third instance of lost instruments seems not to be mentioned in the Text.[3]

2. *Relief from Penalties.*

Penalty and forfeiture—distinction. — The Text does not clearly distinguish between the nature of a *penalty* and of a *forfeiture,* respectively.

1. **Penalty.**—A penalty is something exacted for his own benefit of one contracting party of the other (thus far similar to a forfeiture; but it is always) by way of an *addition to the main obligation*—the penalty clause being added to secure satisfactory performance of the main promise. For example, a promise to pay $1000, or to do some other thing, at a named date, *plus* $100 *more* in case of default in prompt payment or performance. Here the main undertaking is to *pay* $1000—and the $100 is something added, by way of security, or *in terrorem, over and above* the real debt assumed.

2. **Forfeiture.**—Forfeiture, on the other hand, does not contemplate any additional burden, but the *surrendering of the whole or some portion of the benefit* or consideration of the main

[2] Kabler *v.* Spencer, 114 Va. 589.
[3] See 13 A. & E. Enc. L. 555.

contract—*i. e.* some right, title or benefit already passed or passing under the contract out of which the forfeiture springs—the forfeiture clause being inserted (as in case of the penalty) to secure prompt and complete performance of the main undertaking—as, for example, a clause in a lease, declaring that on failure to pay the rent promptly, the tenant shall forfeit (*i. e.* surrender) his tenancy—or where a builder agrees to forfeit a named *per diem* of the contract price, in case of delayed completion of the building.

In the case, then, of the *penalty* the defaulting party is to *pay more*—in case of *forfeiture* he is to *receive or retain less.*

Penalties—(1) at law.—The contrast between the common law and the equity jurisprudence is nowhere more strikingly presented than in the way in which the courts of the two systems deal with penalties. The theory of the common law is that where both parties to a contract are *sui juris,* and there is no fraud, they are free to make their own contracts, so long as the contract is not illegal and violates no policy of the law. Hence, at law, contracts for penalties, howsoever severe, if free from the features mentioned, are enforced literally according to their terms. A promise to pay one dollar, or in default thereof to pay one thousand dollars, is a valid and enforceable contract at law.

Penalties, continued—(2) how treated in equity.—Courts of equity are extremely hostile to the exaction of a penalty from one party to a contract by the other party. And whenever opportunity is presented, the court will be astute to condemn the extortion.

This opportunity presents itself in two forms: (1) where the aid of equity is sought for the *enforcement* of the penalty; and (2) where the victim applies to the court for *relief* from the penalty.

In case (1) equity uniformly refuses to enforce the penalty; and in case (2), with like uniformity, relieves the victim of all obligation to pay it.

The same—ground of relief.—Equity regards stipulations for penalties in a contract as intended by the parties merely as an additional *incentive* to pay, or to perform promptly, or as additional *security* for prompt performance—and that therefore it is unconscionable to exact literal performance of the stipulation. If, therefore, the party claiming the penalty sues at law—where the contract, howsoever severe, is enforceable literally according to its terms—equity, looking at substance and not at form, will enjoin the action at law, and will itself adjust the controversy by eliminating the penalty.

The same—penalty in form only.—But we must proceed cautiously here. The question whether a stipulation laying an additional burden on one of the parties in case of default in performance, is a *true penalty* or not, is determined not from the words used only, but from the *substance and manifest purpose* of the stipulation. The fact that the parties have themselves designated the stipulation as a "penalty", is of little or no importance.

The same—penalty or not?—(1) in contract to pay money.—Where the main contract is to pay *money*, an additional stipulation increasing the amount in case of default, or laying additional obligations on the debtor, in whatever form, beyond payment of *legal interest*, is necessarily a penalty—since the damages suffered by the creditor on default of payment cannot, at law or in equity, be greater than the *legal rate of interest* on the principal sum. No other damages can possibly flow from nonpayment of money beyond the amount of the principal plus interest thereon at the legal rate.[4]

The same—(2) contract to do collateral thing—difficulty of determining whether penalty or not—liquidated damages.—Where the main obligation is not to pay money, but to do a *collateral thing*—as to perform service, to deliver

[4] Fidelity bonds, executed by sheriffs, state and county treasurers, cashiers and other officers of corporations, are typical examples of penal bonds. These bonds in terms bind the obligor and their sureties to pay to the state or county, or to the corporation, as the case may be, the entire amount named on the face of the instrument (generally $10,000 to $100,000 or more) in case of any default whatsoever in accounting for funds received—howsoever small the amount of the deficit. A court of law will give judgment for the full amount of the penalty of the bond, howsoever small the real amount of the default; and, in absence of statute, the defendant is driven into

goods, to construct a house, to refrain from engaging in a competitive business on sale of the promisor's business to another, etc.—with an added provision, (in terms designated as a "penalty" or not), that in case of default the defaulting party shall pay to the other a named sum over and beyond the main obligation, question at once arises whether the latter stipulation is a *penalty,* or whether it is not an effort on the part of the parties, in advance of any controversy, to agree on *what damages will flow from the breach,* and thus, in advance, definitely to fix the measure of such damages—legally to "liquidate" the damages.

If the court is satisfied that the clause, though penal in form, was a *bona fide* effort on the part of both parties thus to agree on the measure of damages in advance of the default, and not an effort on the part of one to punish the defaulting party, or *unjustly to enrich one at the expense of the other,* then the court will refuse to interfere. The damages thus agreed upon are known as "liquidated or "stipulated" damages. The principles governing contracts of the latter class are discussed in the section following.

Page 218, § 408. **Liquidated damages.**—The distinction between *penalties* and *liquidated damages,* is extremely close, but the legal results, when the distinction is made out, are of great importance—the rule being, that if the stipulation be a *penalty, equity will relieve,* but if it be *liquidated damages,* the contract *must stand as made.*

It becomes important, therefore, to notice the methods by which the one is distinguished from the other. Mr. Pomeroy [5] has formulated some excellent rules on this subject, which follow in abbreviated form:

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a court of equity for relief against the penalty. In such case, equity relieves from the penalty, but requires the obligor to do equity by paying the amount really due. This inconvenient and shockingly unjust and expensive procedure has probably been remedied in all the states, (as in England by Statute 8 & 9 Wm. III) by statutes, which authorize courts of law to enter judgments in such cases for the amount actually due. This is true in Virginia—judgment to be entered for the penalty of the bond, but "to be discharged by payment of the principal" [actually due] "and the interest thereon." Va. Code 1919, § 6261.

[5] Equity Jurisp., §§ 441-447.

Liquidated damages—(1) promise to pay money.—If the payment of a smaller sum of money be secured by the promise to pay a larger sum on default, the larger sum, to the extent of the excess above the actual sum due, with interest, will always be treated as a penalty and eliminated from the contract—since here the court can fix with certainty the damages to flow from breach of the contract, namely, the legal rate of interest—or the conventional rate where statute permits. Here *the law has itself liquidated the damages;* and to permit the creditor to exact more would throw wide open the door for evasion of the usury laws.

The same—(2) agreement to perform a single collateral act.—Where the agreement is for the performance or nonperformance of a *single act,* for the breach of which there is *no certain measure of damages, and the actual damages are dependent upon extrinsic considerations and circumstances,* a promise to pay a stipulated sum, not out of all proportion to *the probable loss, in case of breach, will be deemed a contract for liquidated damages.*

Thus, where defendant sold his business as an expressman to the plaintiff for $600, and agreed not to compete with the plaintiff, with the stipulation that if he broke his contract, he should pay the plaintiff $900—the latter sum was held to be liquidated damages.[6]

But the rule is subject to the obviously sound exception that if the case be one of a contract for sale of goods *readily obtainable in the open market,* since the law here provides a certain measure of damages for failure to deliver, namely, the difference between contract price and the market price, a larger sum agreed to be paid in case of breach, would not be liquidated damages but a penalty.[7]

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[6] Cushing *v.* Drew, 97 Mass. 445. Green *v.* Price, 13 Mees. & W. 695, was a similar case and similarly decided. See Sun Printing and Pub. Ass'n *v.* Moore, 183 U. S. 642—an extremely interesting and illuminating opinion by Mr. Justice White, in which the leading English and American cases are reviewed. The case involved the charter of a ship, with a stipulation that if lost the charterer should pay a specified sum, considerably larger than the probable value of the vessel. The stipulation was held not a penalty.

[7] Jemmison *v.* Gray, 29 Iowa 537; Lee *v.* Overstreet, 44 Ga. 507.

The same—(3) contract for performance of several acts.—Where the agreement is for the performance of *several acts of different degrees of importance,* and a single sum is stipulated to be paid for violation *of any* or *of all,* such sum will be regarded as a penalty and not as liquidated damages.

For example, in Kemble *v.* Farren,[8] the defendant, an actor, had agreed to perform at the plaintiff's theatre during a stated period, for which he was to receive a stipulated compensation. The agreement contained a clause that the defendant should conform to all the rules of the theatre. Another clause provided that if either party failed to fulfill the "said agreement or *any part thereof*" he should pay to the other £1,000, as liquidated damages. It was held that this was a clear case of a penalty and not liquidated damages, since the damages to be paid were the same whether the defendant failed utterly to perform any part of his contract, or whether he broke a single rule of the theatre.

The same—(4) agreement to perform one act, capable of separation into parts.—Where the agreement provides for the performance or non-performance of a single act, which yet is of such a nature that it may be *divided into parts,* from the performance or non-performance of any of which, the other party will obtain a benefit, and there is a stipulation for the payment of a *single sum* for breach of the contract or *any part of it,* this sum will be regarded as a penalty and not as liquidated damages. This rule is a corollary from—or practically identical with—the third rule above.

For example, in Shreve *v.* Brereton,[9] the seller agreed to deliver one thousand barrels of petroleum, for which the buyer agreed to pay a certain price, and the parties bound themselves in the sum of $10,000 for the performance of the contract. Here, while in a certain sense, this was a contract to perform a single act, it was yet separable into parts, that is to say, the seller would violate his contract if he failed to deliver a single barrel of the one thousand. As the court said, it was clearly not the intention of the parties, that if default were made with respect

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[8] 6 Bingham 141.
[9] 51 Pa. St. 175.

to a single barrel, that the $10,000 should be paid, and hence the sum was held to be a penalty and not liquidated damages. The two cases of Jemmison *v.* Gray, and Lee *v.* Overstreet, cited above, were practically similar cases.

See also Hamaker *v.* Schroers,[10] where defendant agreed to sell and deliver 100 grain drills at a certain time and at a certain price, and to be liable to pay $1,600 if he made default. Here, again, since by the terms of the contract the $1,600 were to be paid whether the seller failed to deliver one of the drills or the entire 100, the stipulated sum was held to be a penalty.

The same—in builders' contracts.—In the common case of a contract with a builder for the erection of a house, this last rule is most frequently relied upon by the defaulting contractor. For instance, the builder agrees to erect and to turn over to the owner, by a fixed day, a house built according to certain specifications, at an agreed price. A stipulation is added that if he make default in the time of completion, or other clause of the contract, he shall pay to the owner a fixed sum, *per diem* or otherwise.

Here if the stipulation be literally interpreted, and the agreed sum be held to be liquidated damages, the builder would have bound himself to pay the stipulated amount, whether he had *wholly failed to complete the building, so that no part of it could be occupied* or used by the owner, or whether he had left off a *single brick from a chimney,* or *a single pane out of a window,* or had failed to complete and have ready for occupancy a single room in the building. Hence, it is argued, the sum agreed upon is a penalty and not liquidated damages.

But the courts are not disposed to accept this argument as decisive of the question. If the sum agreed upon as liquidated damages is not, under all the circumstances of the case, unreasonable, and, added to this, the sum agreed upon is expressly termed liquidated or stipulated damages (though this is not essential), the agreement will not be treated as a penalty, but will be enforced as made.[11]

This note should be read in connection with that following.

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[10] 49 Mo. 406.

[11] Crawford *v.* Heatwole, 110 Va. 358, 66 S. E. 46, 15 Va. Law Reg. 787, and excellent note; Peeskill, etc., R. Co. *v.* Peeskill, 165 N.

Liquidated damages, continued—stipulation for unreasonable amount.—The fact that the amount of the damages stipulated for is *disproportionate to the damage* which would naturally result from a violation of the contract, is not sufficient of itself to condemn the stipulation as a penalty rather than an agreement for liquidated damages. The fact of such disproportion, however, will be taken into consideration in determining the *real intention* of the parties; and, where the sum fixed is *grossly out of proportion* to the actual damage likely to flow from the breach, such disproportion may serve to turn the scale in favor of a penalty, rather than of liquidated damages.[12]

Debtor's promise to pay attorney's fees in case of default.—In England, the victorious litigant usually recovers from his defeated adversary, not only the ordinary court costs (such as clerk's fees, etc.,) but, in general, the fees paid to his counsel and solicitor as well. But, it is a singular and interesting circumstance that, as a rule, attorney's fees (beyond an insignificant sum taxed by the clerk—$2.50 to $15 in Virginia) are not regarded in America as legitimate costs to be taxed against the defeated adversary.

It is still more singular that even where the *contract* between the parties embodies in plain terms a stipulation that the defaulting party shall pay a designated sum (or 'a reasonable sum') for counsel's fees of the other party, in case of default and the necessity of instituting suit on the contract, such stipulation is condemned by many American courts—in some of these on grounds of public policy, as opening the door for oppression of the debtor by the creditor—in others as usurious, if the contract be for the payment of money—while in still others it is treated as a penalty.[13]

The same—in Virginia.—That such a stipulation for attorney's fees is a penalty was for a long time the settled law of Vir-

Y. 628, 59 N. E. 1128; Carter *v.* Kaufman, 67 S. C. 456, 45 S. E. 1017; Young *v.* Gaut, 69 Ark. 114, 61 S. W. 372; Wheeling Mould, etc., Co. *v.* Wheeling Steel, etc., Co., 58 W. Va. 62, 51 S. E. 129; Sutherland on Damages, 291; 1 Pomeroy, Eq. Jurisp., § 443, n. (E.).

[12] 1 Pomeroy Equity Jurisp. 440; Sun Printing Ass'n *v.* Moore, 183 U. S. 642; Sutherland on Damages, 284; cases *supra.*

[13] Bullock *v.* Taylor, 39 Mich. 137; full note 55 Am. St. Rep. 438.

ginia.[14] But under the influence of that provision of the Negotiable Instruments Law,[15] later prevailing in this state, that such provision for attorney's fees in a negotiable instrument shall not affect the *negotiability* of the instrument (not that the stipulation shall be *valid*), the Virginia court has recently over-ruled the Virginia cases to the contrary, and sustained such stipulation as valid, if reasonable.[16]

Penalties, continued—accelerating time of payment on default in payment of installment or of interest.—[Not in Text]. It is a settled principle that where there is a promise to pay money at a certain time in the future, with interest or installments of principal at fixed periods, a stipulation that the whole debt, with accrued interest, shall become due, if default be made in the payment of a single installment, is not a penalty, but is a valid stipulation, both at law and in equity.[17]

Page 219, § 410. **The same—no relief against statutory penalties.**—Where the penalty against which relief is sought is one prescribed by *statute*, and not by *contract* of the parties, courts of equity, being as much bound by statute as courts of law, cannot absolve the defendant from payment of the penalty. Not only will equity decline to relieve the defendant of such a penalty, but, where equitable jurisdiction attaches, will itself enforce the penalty.[18]

An illustration here is the case of a penalty inflicted by statute for unlawful sale or possession of liquor—or upon a tax collector for failure to make prompt returns of taxes collected—or the penalty laid by Federal and State governments for the tardy payment of taxes. In late years Federal courts of equity have been crowded with suits brought by the Government, and by individuals, to enforce statutory penalties against persons and

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[14] Fields *v.* Fields, 105 Va. 714.
[15] N. I. L. 2 (5).
[16] Colley *v.* Summers-Parrott Hardware Co., 119 Va. 439. See Raleigh County Bank *v.* Poteet, 74 W. Va. 511, L. R. A. 1915B, 928, collating the authorities.
[17] 1 Pomeroy's Equity, 439; Olcott *v.* Bynum, 17 Wallace 44; Nickles *v.* Building Fund Ass'n, 93 Va. 380; 2 Va. Law Reg. 515 and note.
[18] State *v.* Hall, 70 Miss. 678; State *v.* McBride, 76 Ala. 51.

corporations guilty of illegal restraint of trade, under the Sherman Act.[19]

In those states where, by statute, *equitable* pleas may be set up in courts of law, as in Virginia [3a] in certain cases, of course relief from penalties may be had in the law court under proper pleadings.

3. *Relief from Forfeitures.*

Forfeitures.—We have already noted the distinction between a penalty and a forfeiture—the one a burden laid in addition to the principal obligation—the other the surrendering of some right, title or benefit to which the party incurring the forfeiture is entitled under the contract out of which the forfeiture springs.

The same—(1) at law.—The law courts occupy the same supine attitude toward the forfeiture as toward the penalty, and exact the pound of flesh with the relish of Shylock himself. The victim's only refuge is a court of equity.

The same—(2) in equity—use of terms.—The principles applicable to the penalty are applicable, to a large extent, to the forfeiture, with some qualifications to be noted. It is especially to be observed that whether a particular stipulation is a penalty or a forfeiture, is determined not by the terms used by the parties, but by its *inherent nature,* according to the essential difference between the two, already pointed out. An agreement by the borrower to "forfeit" $100, on default of prompt payment of a debt, provides for a *penalty* and not a forfeiture. So an agreement is a lease to pay the rent promptly, under "penalty" of a surrender of the lease, is a stipulation for a *forfeiture* and not for a penalty.

The same—(a) for failure to pay money.—Here equity assumes the same attitude as toward the penalty—regarding the stipulation for forfeiture as intended as *mere security* for the prompt performance of the main obligation, and the effort of the

[19] See, for example, the Standard Oil Co. *v.* U. S., 221 U. S. 1; U. S. *v.* American Tobacco Co., 221 U. S. 106.

[3a] Va. Code 1919, § 6145. See n. 4 *infra.*

creditor strictly to enforce the forfeiture as harsh and unconscionable. As in the case of the penalty for non-payment of money, the damages here, flowing from a breach, are already *fixed by law,* namely, legal interest on the debt, and equity finds no difficulty in relieving from the forfeiture.[20]

It follows that if the exaction be for *non-payment of money,* it is immaterial whether the secondary stipulation be for a penalty or a forfeiture.

The refusal of equity to relieve against forfeitures of *life insurance policies,* for failure to pay premiums *ad diem,* or of corporate shares for non-payment of subscriptions, rest on the peculiar character of these contracts, and is justified on soundest principles. These are scarcely exceptions to the general rule.

The same—for failure to pay money, continued—options.—A familiar practice in real estate transactions, is the purchase of an "option"—a phrase in common use in the real estate market. Here the proposed purchaser, not yet prepared to enter into a binding contract of purchase, secures from the proposed vendor a written agreement, for a valuable consideration paid, that the former shall have the exclusive privilege, for a designated and limited period, of purchasing the particular parcel, at a price named. The effect of this is to give the proposed vendee (optionee) an option to buy, which he may exercise or not, within the agreed period. The contract here is purely *unilateral*—the optionee not having, as yet, bound himself at all by any contract whatsoever. If he accepts the option *within the period,* and complies with its terms, including such payment of money as it requires, a binding contract for the sale and purchase of the property results; but if he fails to accept, or otherwise to comply with the terms of the option, *within the time limited,* he "forfeits" all rights in the premises. This so-called forfeiture is somtimes provided for in express terms; but whether so provided for or not, as a *matter of law* the vendee's option has expired by its own limitation, and no contract results. Nor

[20] In accordance with this rule, and as noted in the Text, page 221, § 415, equity will, in a proper case, relieve the tenant who has incurred a forfeiture of the lease by default in payment of the rent. This application of the rule is recognized, and the method of procedure regulated, by statute in Virginia. Va. Code 1919, §§ 5531-5534.

will equity afford the proposed vendee any relief from this result.

Here there is no semblance of a forfeiture. The holder of the option has received and enjoyed precisely what he purchased, namely the *privilege* of purchasing up to a fixed day—of which privilege he has not seen fit to avail himself, and the privilege has now expired. Here performance *ad diem* is a condition precedent, and time is the essence of the contract.[21]

The same—distinction between option and executory contract of sale.—There is a manifest distinction between the option to purchase, just noticed, and an actual contract of purchase and sale. The one is purely unilateral, binding the vendor only, the other is mutual and binds both parties.

If, for example, the holder of the option has exercised his privilege ('closed the option'), and entered into a contract of purchase, equity ('regarding that as done which ought to be done'—and 'looking at substance not at form'), regards the purchaser as (equitable) owner of the property, but the property subject to a vendor's legal lien for the deferred installments of purchase money. If, now, the contract of sale provides for a forfeiture of any or all of the rights of the vendee, both as to payments already made and as to the property purchased, or either, in case of default in prompt payment of any installment, then we have the instance of a true forfeiture for *non-payment of money,* and a typical case for equitable relief. The situation here differs only in form from that presented by a mortgage to secure the payment of money. Nothing is more elementary than the rule that no provision in the mortgage waiving or forfeiting the mortgagor's right to redeem after default, will defeat the right of redemption.[22]

Forfeiture, continued—(b) for failure to do a collateral act.—Here a situation is presented wholly different from the contract to pay money, discussed in the last note but one—since here there is *no certain measure of damages* to flow from nonperformance, as in the money contract.

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[21] See Keffer *v.* Grayson, 76 Va. 517; 1 Pomeroy, Eq. Jurisp. 455; n. 104 Am. St. Rep. 265.
[22] See *Mortgages, post.*

Hence, in these cases of collateral undertakings, where the parties have agreed upon a forfeiture of the whole or some portion of the right title or benefit provided for in the main contract, for failure to perform promptly or completely, we have a situation quite similar to that presented by the stipulation for *liquidated damages,* discussed under our title of penalties.

Examples of such stipulations are quite usual in leases of real property—the tenant agreeing to forfeit his tenancy and to surrender the premises on failure to *repair,* or to *insure,* or for *subleasing,* or for using the premises for prohibited purposes (as gambling or the sale of liquor), and similar breaches of the terms of the lease. In such cases equity is loath to interfere with the enforcement of the contract according to its terms, unless there be special circumstances of fraud, mistake waiver, surprise or accident calling for equitable intervention.

Thus, under a contract for personal service (a collateral undertaking) in which the servant agrees to forfeit a specified sum in case he leaves the employer's service before the expiration of the term, without giving two weeks' notice of his intention, equity will refuse to interfere.[23]

So in the case of an agreement on the part of the vendor to forfeit all rights under the contract (*i. e.* agreement for rescission) and to repay the purchase money paid on failure to *make title* to the vendee by a particular day—being a true forfeiture for default in the doing of a collateral thing for which there is no certain measure of damages—equity will refuse to interfere.

We have already seen, on the other hand, that if the contract had exacted a similar forfeiture from the *vendee* for default in the payment of the *purchase money,* equity would intervene and relieve from the forfeiture, on tender of the actual amount due with interest and costs; since here the damages are measured by interest on the principal sum due.

The same—fraud, waiver, misconduct, mistake, accident or surprise.—In spite of the rule stated that equity will not ordinarily relieve from a forfeiture for default in the performance of a collateral act, it is yet true that forfeitures are always odious to a court of equity, and the court will not hesi-

[23] Tennessee Mfg. Co. *v.* James, 91 Tenn. 154, 30 Am. St. Rep. 865.

tate to give relief where the case presents circumstances of fraud, waiver, estoppel, or misconduct on the part of the claimant, or of mistake, surprise, ignorance or accident whereby the other party was prevented from performance, and where no injustice will result to the other party from such action on the part of the court.[24] In all such cases of relief from a forfeiture the court requires equity to be done by making full compensation to the other party.

4. *Time as Essence of the Contract.*

Time as essence—forfeitures.—Thus far we have dealt with forfeitures *expressly* contracted for. Under the present title we shall glance briefly at a kindred question, but one for which the contract makes no special provision, namely, the effect on the contract itself of *failure of one party to perform on the precise day fixed* (*ad diem*). In such case question arises whether, on failure thus to perform *ad diem,* the other party may *rescind* the entire contract—or, otherwise expressed, whether he may exact a *forfeiture* of the defaulting party's rights under the contract. The question may be presented in still another form, namely, *When in equity is performance ad diem a condition precedent to enforcement of either party's rights under a contract?*

The same—(1) at law.—At law, time is always the essence of the contract, in the absence of countervailing circumstances of fraud, waiver or estoppel. A failure, for example, on the part of the purchaser of real estate, under an executory contract, to pay the purchase money, or some installment thereof—or, *per contra,* of the seller's ability to make title, or to convey title—*on the very day fixed,* entitles the seller in the one case, or the buyer in the other, to *rescind the entire contract,*[25] or to maintain an action for damages, according to the circumstances.

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[24] See Hill *v.* Barclay, 18 Ves. 58; Bostwick *v.* Stiles, 35 Conn. 195; Kupper *v.* Dyer, 59 Vt. 477, 59 Am. Rep. 742, 12 Atl. 4 (an instructive opinion on the general subject); Wilson *v.* Mayor, 83 Md. 303, 55 Am. St. Rep. 339—check deposited by bidder as a guarantee that if contract is awarded to him he will enter into a formal contract, with proper sureties—the check to be forfeited in default of entering into the contract—held, after plaintiff received the award, to be a forfeiture, but bidder relieved by requiring a return of the check, on proof that he was unable to obtain proper sureties.

[25] See Sachs *v.* Owings, 121 Va. 162.

The same—(2) in equity.—Equity, on the other hand, looking at the substance rather than form, is much less strict in requiring the performance of contracts *ad diem,* and therefore time as the essence of a contract. Equity is, in general, content with *substantial performance,* if compensation be made for the loss resulting from the delay.

The same—in equity, continued—(A) promise to pay money.—1. *Optional Contracts*: We have already seen that where a contract is purely *unilateral,* as in contracts giving one party the privilege of entering into a particular contract or not, while the other party has bound himself (for a special consideration) to leave the offer or privilege for a specified period, acceptance of the offer, or the exercise of the option, strictly according to its terms, *ad diem,* is a condition precedent to any rights under the unilateral optional contract, in equity as well as at law; and this whether the option contract expressly so provides or not. The making of a money payment, therefore, *ad diem,* if required by the terms of the option, would be of the essence of the contract.

The same—in equity, continued.—(2) *Mutual contracts*: If, as we have already seen, under a contract no longer unilateral (or optional) but one under which each party has acquired a right and incurred an obligtaion—and hence payment of the money is a *condition subsequent,* a forfeiture cannot be exacted, even though stipulated for in express terms, it follows, *a fortiori,* that in equity payment of the money *ad diem* is not a condition precedent to the enforcement of the contract by the defaulting party, and that time is not the essence of the contract.

Hence, under an executory contract to sell and purchase real property—payments to be made at stipulated periods—the vendee does not forfeit his right to specific performance by having defaulted in one or more payments—provided he tenders the amount with interest within a reasonable time thereafter. Here, failure of prompt payment cannot possibly have damaged the seller beyond legal interest on the money due.[26]

So, in the case of the mortgage, as we shall see later in more

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[26] See Booten *v.* Scheffer, 21 Gratt. 474, 492; Powell *v.* Berry, 91 Va. 568; McAllister *v.* Hannon, 101 Va. 17.

detail. In substance, the mortgage contract binds the debtor to pay on a fixed day, *with no right of redemption thereafter;* and yet equity regularly permits the redemption at any time within twenty years, on tender of principal, interest and costs.

The same—(B) Contracts to perform collateral acts.—Where, however, the stipulation does not concern the payment of money, but concerns some *collateral act* or circumstance—as, for example, the removal by the vendor, of a lien on the property sold, or the conveyance of a proper title by the vendor, or delivery of possession to the vendee—all or any of these on or before a day named—equity is less willing to relieve than in the case of default in the payment of money, since the damage resulting from the breach is not so easily measured. But even here, equity will not regard time as of the essence of the contract, save (1) where the parties have *expressly so agreed,* (in which case we have the case of a forfeiture expressly provided for—already discussed *supra*) or (2) the circumstances render it inequitable not to do so.[27]

Thus, it is the common practice in suits for specific performance of contracts concerning real property, where there is no stipulation to the contrary, to give the vendor *further time to make title,* if unable to do so on the stipulated day. Whether or not this will be done depends upon the particular circumstances of each case. It will never be done where this would work injustice to the vendee, or where the parties have expressly agreed otherwise. See authorities *supra.*

We shall see later, in connection with the topic of specific performance, that not only is time not always the essence of a contract in equity, but that in connection with sales of real property, *quantity* of acreage and other details contracted for, are not always of the essence—and that in a proper case, the vendee may be required to accept less than he contracted for, with compensation for the shortage. This is known as *"performance with a variation."*

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[27] As, for example, where the property is of a speculative value—or, to the knowledge of the vendor, the vendee's purposes require prompt performance, or there are other circumstances rendering it unjust to require the vendee to accept performance beyond the day named.

Relief from penalties and forfeitures—compensation required.—In leaving this brief discussion of equitable relief against penalties and forfeitures, and in giving further time for the performance of contracts beyond the day fixed by the parties, the student need hardly be reminded that in giving such relief equity applies its favorite maxim that 'he who wants equity must do equity'—and requires the relieved party, as a condition of such relief, to make full compensation to the other party.

Page 228, § 249. **Accidents not relievable—loss of public funds by public officials.**—Under the rule prevailing in many States, a public official who receives money in the course of his official duty, and which, under his official bond, or under statutory provisions, he is required to account for and pay over, is regarded as a *debtor* for the amount coming into his hands, and *not as a mere bailee* of the money. This seems to be the settled rule in the Federal Courts. The authorities in the State courts are badly divided.[28]

Accordingly, such official is held liable for public funds lost, even though by violence or unavoidable misfortune—as by robbery, or failure of a bank in which the funds are deposited—and a court of equity is without power to relieve him of this liability.

The case of Smythe v. U. S. (*supra*),[29] was a particularly hard case—the superintendent of the United States Mint, at New Orleans, being held liable for money lost by the destruction of the building by fire, without negligence on his part.

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[28] See 2 Va. Law Reg. 457; Smythe *v.* U. S., 188 U. S. 156; Van Trees *v.* Territory (Okla.), 54 Pac. 497 (full discussion); n. 67 Am. Dec. 365-373.

[29] So postmasters are held responsible for losses due to burglary of the post office, or to thefts by their assistants—without relief in equity, howsoever innocent of wrong or of negligence themselves.

CHAPTER XVI.

MISTAKE CALLING FOR RESCISSION.

The student will observe that the author divides his discussion of the subject Mistake into two parts or chapters, and that this first chapter deals with mistake of such a character as calls for *rescission* of the contract, and not *reformation*. The student will further carefully observe that in the case of Mistake calling for Rescission, there has *never been any real contract* between the parties—their minds not having met on the same thing at the same time, and hence rescission is the natural and only relief possible.

On the other hand, the equity of Reformation implies two things, to-wit: (1) A *valid contract,* well understood by both parties; (2) A subsequent reduction thereof to writing and a *mistake in thus reducing it to writing.* The latter is dealt with in the next chapter.

In spite of this classification of the two phases of mistake, our author does not observe his own classification, and constantly runs from one class to the other, in both chapters. The reader should carefully note, in the various instances of mistake illustrated in this and the succeeding chapter, whether the mistake is of the one kind or the other.

Page 233, § 436. **Mistake of law.**—The student should observe the precise form of the maxim, "ignorance of the law *excuses no man.*" This is sometimes misquoted as "everybody is supposed to know the law." There is no such rule, either in law or in equity, as last quoted. This is strongly and strikingly illustrated by the case of Ryan *v.* State,[1] where a rascally attorney defrauded an ignorant negro woman, whose husband was in jail on a conviction of a misdemeanor, by representing to her that he could secure the prisoner's release on payment to himself of a sum of money. On trial of the attorney for obtaining money under false pretenses, he defended on the ground that "everybody was presumed to know the law", and hence that the prosecuting witness, knowing the law governing the situation,

[1] (Ga.), 30 S. E. 678, 4 Va. Law Reg. 397.

was not deceived by the false statement—a defense, it is needless to say, which the Georgia court rejected, as based on a false conception of the maxim.

Page 233, § 437. **The same—exceptions to the general rule—(1) Title to property.**—The cases referred to in this section were all cases where there was a mistake of law, resulting in a mistake as to the *title to property*—or, to express the situation in another form, where there was a mistake of *fact as to the ownership of property,* due to a mistake of *law.*

Such cases form a striking exception to the rule that mistake of law is not a proper ground for equitable relief.[2]

Pages 237-238. **The same—exceptions, continued—(2) Money paid to court official, or trustee, in pending proceedings.**—The meaning of this exception, noted in the Text, is, that while courts of equity will not relieve one who has voluntarily paid money to another under a pure mistake of law, the *court will yet not take advantage of such a rule, when the court itself is the payee of the money,* in proceedings pending before it. This indicates on the part of the court, an extremely delicate sense of the moral and ethical situation presented in such a case.

Mistakes of law—exceptions, continued—(3) Misstatement of the law by one party.—A third exception to the general rule exists, where the parties are *not on equal footing,* and one intentionally misleads the other as to the legal effect of a proposed contract between them, or consciously takes advantage of the other's ignorance of the law under circumstances that render it inequitable that such advantage should be retained. This principle is especially applicable where there is a *fiduciary* relation between the parties, or in cases of *invited confidence.* It belongs, however, rather under the head of fraud than of mistake.

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[2] To the authorities cited in the Text may be added, Webb *v.* City Council, 33 Gratt. 168; Throckmorton *v.* Throckmorton, 91 Va. 42, 50; Burton *v.* Hayden, 108 Va. 51; note 15 Am. Rep. 171, 184; note 55 Am. St. Rep. 495-520; 2 Va. Law Reg. 62 (by Prof. Graves); Hutchinson *v.* Fuller (S. C.), 44 S. E. 164; Hoy *v.* Hoy (Miss.), 136 Am. St. Rep. 548; 32 Harvard Law Rev. 283.

In Kentucky, the courts make no distinction between mistakes of law and of fact, whether in connection with titles, or otherwise, and both are relievable. Georgia Co. *v.* Gaines, 49 S. W. 462.

Thus, where the holder of a time-barred note sold it to a woman, representing that it was not barred by limitation, it was held that the purchaser was entitled to relief.[3]

A fourth exception is noted *infra,* note to § 442.

Page 236, § 440. **Money paid under mistake of law as to the payer's liability.**—Subject to the exceptions before mentioned, it is settled that money voluntarily paid, under a pure mistake of law, cannot be recovered.

The reasons upon which this rule rests are indicated at length in the opinion of Tucker, P., in Mayor of Richmond *v.* Judah,[4] from which the following brief extract is made: "It is for the peace and happiness of society" says the learned President, "that it" [the law] "declares that no man who has made a voluntary payment shall be permitted to allege it was made under a mistake of law, since this is so easy to affirm, and so difficult to disprove such ignorance. It is better that here and there an individual should suffer injury from the very rare occurrence of his paying what he was not bound to pay, than that we should at one blow annihilate all finality in the transaction of business. Men's affairs, instead of being settled by payments, would be still left open and unsettled. The payer would not be bound by his payment, nor the creditor by his release; for, *pari ratione,* he too must be entitled to the benefit of this noxious principle of unravelling transactions whenever he can show, or fancy he can show, that he has mistaken his obligations. And thus it would happen that the payment of money would soon become but the parent of a suit, and the settlement of an account the harbinger of litigation" (p. 322).

The stronger reason is that first assigned by Judge Tucker, namely, the practical impossibility of *disproving the plea* that the defendant was ignorant of the law. To permit such a defence generally, would, as suggested by the court, unsettle all business transactions, and furnish to dishonest persons a ready escape from their obligations.

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[3] Brown *v.* Rice, 26 Gratt. 467. See also a striking illustration in Griswold *v.* Hazard, 141 U. S. 284; *infra,* note § 505.

[4] 5 Leigh 305, 318. See also Barrow *v.* County of Prince Edward, 121 Va. 1.

The same—involuntary payment—duress—protest. — The principle first mentioned applies to *voluntary* and not to *involuntary* payments of money.

Wherever, therefore, one is called upon to pay money, his liability for which rests upon a question of law as to which he is in doubt, if he desires to save the question and litigate it afterwards, he should be careful not to pay voluntarily or without protest against the demand. The proper way is to decline payment *until there is imminent duress of person or goods.* Such duress would occur, for example, where the other party is in possession of plaintiff's goods and refuses to deliver possession without payment; or where a tax collector or sheriff threatens *immediately* to levy in default of payment. In such cases, the money may be paid *under protest,* and in an action thereafterwards brought to recover it, the plaintiff's rights will be held not to have been waived by such payment. Payment under *protest alone, without the duress, is not sufficient.*[5]

In some States, it is held that if the property to which the duress applies *be real property,* and hence not possible of loss or destruction by reason of the unlawful seizure and sale thereof, payment under protest is not sufficient, since there is in fact no duress, because a sale of the property under the illegal process would be void. It is therefore, mere *brutum fulmen.* But since a void sale would cast a cloud on the title, the principle seems unsound.[6]

Page 238, §§ 442, 467, 472. **Mistake as to legal effect of contract as made.**—The doctrine of the Text, that where the contract *conforms precisely to the actual agreement* of the parties, although one or either would not have entered into it had he understood its *legal effect,* equity, in the absence of fraud (see exception 3 above) will not relieve, is well settled. This was the situation in the great case of Hunt *v.* Rousmanier.[7]

But, conversely (forming a fourth exception to the rule that relief cannot be granted for a mistake of law), where the *real*

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[5] Note 45 Am. Dec. 145-160; 5 Va. Law Reg. 270; Va. Brewing Co. *v.* Com., 113 Va. 145.

[6] See Hoke *v.* Atlanta (Ga.), 33 S. E. 412; 5 Va. Law Reg. 270.

[7] 1 Pet. 1—by mistake of law, power of attorney taken as security instead of a mortgage; the borrower died, thus revoking the power—held, equity will not reform and convert into a mortgage.

intention of the parties *is not expressed in the instrument,* although this is due to a mistake of law in drafting the instrument, equity will reform. The distinction between this proposition and that which immediately precedes it, is pointed out in § 472 of the Text. The student should note the distinction, which is clear but quite fine.

Thus, if in Hunt *v.* Rousmanier the parties had agreed upon a mortgage, but by mistake of law the attorney (or justice of the peace) had drawn a power of attorney, equity would have reformed the instrument to conform to the real intention of the parties [8]—since here they did not get the character of instrument desired. In the actual case, the one party executed, and the other party accepted, *the precise form of instrument agreed upon*—whereas, in the supposed case, the reverse occurred; the parties desired a mortgage, but by mistake of law accepted a power of attorney.

Page 241. **Compromises.**—The rule that mistake of *fact,* and in certain cases, of *law,* may be relieved against, is inapplicable to the case of *compromise of rights known, or believed, to be doubtful.* In compromising, each party consciously takes the chance of being mistaken, and hence of getting more or less than he is entitled to; and he intentionally *waives the right of further inquiry.* Every compromise is, therefore, in the nature of a *speculation,* the result of which winner or loser must abide by, when fairly entered into.

If such were not the rule—if, after compromising a claim asserted by the one party to a controversy and denied by the other, the compromise agreement were subject to be defeated by the discovery that one of the parties had entered into it in ignorance of material facts—the result would be to leave the controversy in as unsettled a condition after the compromise as it was before, thus defeating the very purpose of every compromise.[9]

The same—mistake as to collateral fact.—But where the compromise is based upon the mutually presumed existence of certain material facts, *collateral to the main facts in dispute,*

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[8] See note to p. 254 *infra*.

[9] Moore *v.* Fitzwater, 2 Rand. 444; Smith *v.* Penn, 22 Gratt. 402; full note, 99 Am. Dec. 492.

and a mistake is made as to the existence of such collateral facts, then the compromise may be set aside on the ground of mistake of fact.

Suppose, for example (hypothetically) that there is a controversy between A and B as to the amount due on a certain bond, held by one against the other, and that a compromise is reached, by which the debtor agrees to pay so much in settlement; and that after the compromise, it turns out that *A had meant one bond and B had in mind another.* Here, it is clear that there has really been no contract of compromise, and the attempt at compromise will fail on the ground of mistake of fact.

Or, again, suppose that A, as assignee of B, has a controversy with C, as to the amount of C's debt to B, and a compromise is made between the two, in which C promises to pay A, say, $150, in full of the claim. It is subsequently discovered that *A was not assignee of this particular debt,* though in good faith he believed himself to be. Here, again, the compromise was based on a mistake of the collateral fact and will be set aside. What the parties meant to compromise was, not the question of A's *title* to the claim, but the *amount* of it.[10] In short, a compromise settles only such matters as are in *dispute.*

But the student must carefully notice that any subsequently discovered mistake as to facts *actually in dispute,* howsoever grievously the mistake may operate upon one or the other, and howsoever clear the proof of its existence, will, in the absence of fraud or misrepresentation, or other inequitable conduct, afford *no ground for relief at law or in equity*—since, as said at the beginning, in entering into the compromise the parties consciously took the chance of being mistaken, and speculated upon the result.

Page 242. [Between § 448 and § 449 there should be inserted §§ 460-466 of the Text.]

Page 243, § 449. **Mistake, continued—Rescission for failure of title—(1) personal property.**—That portion of § 449 found on this page has reference to personal property only, though this is not made entirely clear in the Text.

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[10] 2 Pomeroy's Equity, 855; 2 Min. Inst. 625.

Page 243, § 450. **The same—(2) real property.**—While it is generally true, as stated in the Text, that equity will not take jurisdiction where damages at law would be recoverable on the warranty of title—or where, as on a quitclaim conveyance, no damages could be recovered at law, since the vendee, by accepting such a conveyance, has no ground of complaint against the vendor for failure of title—yet where title has failed, in whole or in part, by reason of a material mistake of fact,—such fact *assumed by both parties to be otherwise,* and hence a mutual mistake—equity will take jurisdiction to remedy the mistake, even where there is a warranty on which the vendee might base an action at law, for damages.

The same—real property, continued—(a) executory contracts.—It is settled in the case of *executory* contracts for the sale of *real property,* that there is an *implied warranty of title.* Hence if the title fail, whether from mistake or otherwise, not only will equity not compel specific performance, but it will entertain a bill on the part of the vendee to *rescind the contract,* and require the repayment of such purchase money as has been paid, and the cancelling and delivery up of any securities that the vendee may have executed in fulfillment of the contract."[11]

The same—(b) Executed contracts.—Here, if the conveyance contains warranties of title, under which a court of law might award damages for failure of title, the exercise of the equitable jurisdiction is by some authorities denied. But the greater liberality with which equity deals with the rules of evidence in cases of mistake, and its ability to mould the relief to suit the peculiar circumstances of each case, seem clearly to warrant the exercise of the jurisdiction in many cases of executed conveyances with warranty.[12]

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[11] Cabell *v.* Christian, 22 Gratt. 82; Matney *v.* Ratliff, 96 Va. 231; Clark *v.* Hutzler, 96 Va. 73; Pomeroy's Specific Performance 204. All these are cases of specific performance. See Morrison *v.* Waggy, 43 W. Va. 405, 27 S. E. 314; Bailey *v.* James, 11 Gratt. 468; Clark *v.* Hargrave, 7 Gratt. 399; Pack *v.* Whitaker, 110 Va. 122; Wardell *v.* Birdsong (Va.), 78 S. E. 564; Renick *v.* Renick, 5 W. Va. 285.

[12] See 2 Pomeroy's Eq. Jurisp. 468; Lee *v.* Laprade, 106 Va. 594, 56 S. E. 719, 117 Am. St. Rep. 1021, 10 Ann. Cas. 303; Pack *v.* Whitaker, 110 Va. 122; Hall *v.* Graham, 112 Va. 560; cases *supra.*

Page 245, § 455. **Duty on part of buyer to disclose advantages.**—The doctrine of the Text that the vendee is under no obligation to disclose facts in his possession, enhancing the value of the property which he seeks to buy, is settled—but with the important qualification *that he must not actively conceal the facts, or otherwise mislead the vendor.* The case is such a hard one on the vendor, that the court is anxious to grant him relief from the harsh bargain, and will do so, save where the vendee has done nothing more toward concealing the discovery than merely keeping his mouth closed; and in most of the reported cases relief was granted because of the inability of the vendee to observe this golden rule of silence.[13]

But, according to principles heretofore noticed, even mere failure to disclose is a ground for rescission where there is a *confidential relation* between the parties, or where for any other reason the duty of disclosure rests upon the vendee.

The principle stated above, denying the vendor relief on the ground of mistake, where he was ignorant of facts materially enhancing the value of the property sold, means that the contract or conveyance will not be *rescinded* on that ground, at the suit of the vendor. It does not mean that where the contract is still executory, a court of equity would necessarily *enforce the contract specifically,* at the suit of the vendee. Indeed, the reverse seems to be the case, under the influence of the principle that specific performance is peculiarly an *act of grace* on the part of the court, and will not be granted in the case of hard or unconscionable bargains.[14]

Page 248, §§ 460-466. [As heretofore indicated, these sections should be carried back into the preceding chapter, (XVI) since the relief was not reformation, but rescission.]

Compare Kager *v.* Kain, 5 Leigh 606; Max Meadows, etc., Co. *v.* Brady, 92 Va. 71.

[13] One of the leading cases on this subject is the Luray Caverns Case—Merchant's Bank *v.* Campbell, 75 Va. 455.

[14] Trigg *v.* Ready, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447; Bowman *v.* Irons, 2 Bibb (Ky.) 78, 4 Am. Dec. 686; Wollums *v.* Horsley, 93 Ky. 582, 20 S. W. 781; Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, and monographic note 382-414, and especially pp. 407-408.

Page 249, §§ 462-463. **Unilateral mistake.**—As already indicated, "mutual" mistake, as that term is used by courts and commentators in this connection, is generally important only where there is no mistake in the *original agreement*—that is where the minds of the parties have completely met—but an error has occurred in the subsequent *reduction of the contract to writing,* whether the error be due to the mistake of a third person, acting as scrivener, or of one or both of the parties.

Even here it is not material that the party profiting by the error actually knew of the mistake—since if he knew of it but keeps silent, and endeavors to take advantage of it, he is guilty of a fraud. Hence the term "mutual" seems scarcely applicable, though regularly used by law writers and courts to describe a mistake of this character—*i. e.* in subsequently reducing the contract to writing. The remedy here is, of course, *reformation.*[15]

The kind of mistake termed "unilateral," is a mistake made *solely by one of the parties*—as the result of which he has bound himself by a contract to the terms of which he has not meant to assent, while the other contracting party, understanding, and in good faith assenting to, the contract as made, is ignorant of the other's mistake. The remedy here, if any, is, of

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[15] This use of the term 'mutual' mistake seems in most cases to be as useless as it is confusing. Cases in which mutuality of mistake is necessary to relief are rare. If, for example, A intends to offer, in writing, Blackacre for sale to B, but by a slip of the pen or a mental lapse, he offers Whiteacre, which offer B at once accepts, no *mutual* mstake has occurred. A has made a grievous mistake, but B has accepted and bargained for the very tract that he meant to bargain for. And yet, on proper proof, A would be relieved because of the mistake. What is really presented here is not a mututal *mistake,* but the lack of *mutuality of agreement,* or meeting of minds.

The term 'mutual' is probably appropriate where the contract, as made, is based on the mistaken assumption by both parties of the existence, or nonexistence, of a material fact, or group of facts, *with reference to which both parties have contracted.* Thus, the purchase of a life estate from an assignee, both parties believing the life-tenant still alive, *both contracting on that assumption,* and neither meaning to speculate on the uncertainty of the fact whether the life tenant be alive or dead. If in fact the life tenant is already dead, a case of mutuality of mistake is presented. If the seller knew of the death already, a case of *fraud* would be presented. Other illustrations are found in the sale of insurance policies, both parties believing the insured alive, and the price fixed on that assumption, when in fact the policy has already matured by the insured's death.

course, *rescission,* since the minds of the parties have only apparently and not really met.

Such cases—that is where the mistake is due solely to the *oversight, carelessness* or *mental lapse of the complaining party*—in no wise contributed to by the defendant who has acted in good faith throughout—have given the courts much difficulty.

The same—illustrations.—Thus, in Steinmeyer *v.* Schroeppel,[16] the plaintiff offered by written bid to supply the defendant with a specified bill of lumber for $1,446, which bid was accepted by defendant. Subsequently discovernig that a mistake of $400 had been made in the bid by the error of the plaintiff's clerk in adding up a column of figures, plaintiff refused to comply with the contract, and filed a bill in equity to enjoin an action at law instituted by the defendant, and for rescission on the ground of mistake. Relief was refused, though in its opinion, the court seems not sure on what ground its refusal should be based. Negligence of the plaintiff in making the addition, absence of mistake in the substance of the contract, and instability in commercial transactions as the result of such relief, are all advanced as reasons for the conclusion.

On the other hand, in Board of School Com'rs *v.* Bender,[17] a similar mistake, made, as the court found, under excusable circumstances, was held to justify an annulment of the bid.[18]

The same—illustrations, continued.—In the Georgia case of Werner v. Rawson,[19] (opinion by Bleckley, C. J.), defendant had authorized his agent to sell two lots belonging to defendant at $2,500 each. The agent, misunderstanding the terms, offered the lots to the plaintiff at $2,500 *for the two,* which offer plaintiff accepted, in ignorance of the agent's mistake. The plaintiff's attorney prepared the deed of conveyance of both lots, reciting the consideration of $2,500, and presented it to defendant for his signature. Defendant still believing that the sale had been made in accordance with his original instructions, executed and delivered the deed and accepted the check for $2,500, without then

[16] 226 Ill. 9, 80 N. E. 564.
[17] (Ind. App.), 72 N. E. 154.
[18] The case of Moffett *v.* Rochester, 178 U. S. 373, was a case of similar character with a like decision.
[19] 79 Ga. 9, 15 S. E. 813.

and there reading either the check or the recital of consideration in the deed, or the description of the property conveyed. Subsequently, *on the same day*, having discovered the mistake, defendant applied to plaintiff's agent, who had possession of the deed, for permission to read it. On its being handed to him, he discovered the mistake, explained it to the agent, laid the check on the agent's desk, put the deed into his own pocket, and refused to re-deliver it.

In a suit by the vendee to establish a copy of the deed and to obtain possession of the land, defendant asked for the equitable relief of rescission on the ground of mistake.

The court found that the evidence abundantly established the mistake, and the good faith of both parties; that the failure of the defendant to read the deed was, under the circumstances (which are recited), not culpable negligence; and affirmed the action of the lower court in decreeing a rescission of the conveyance.

In each of these cases in which relief was granted, the complaining party acted *with great promptness* in notifying the other of the error, and before the latter had changed his position for the worse.

The same.—The case of Harris *v.* Pepperell, (cited in Text, p. 250), is scarcely in point here, since the facts in that case show a previous contract, which both parties understood alike, but the mistake was made in its *subsequent reduction to writing.* So in Gerrard *v.* Franklin, cited on the same page of the Text. The case of Webster *v.* Cecil, commented on in the Text, was not a suit for *rescission,* but for *specific performance,* to which different principles are applicable.

Page 251, § 465. **Unilateral mistake, continued—culpable negligence precluding relief.**—On the question as to what amount of care equity exacts of him who asks for rescission of a contract into which he has entered, by reason of his own mistake, unaided by and unknown to the other contracting party, we cannot do better than to quote the following statement of the equitable rule from Mr. Pomeroy.[20]

"It has sometimes been said in very general terms that a mis-

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[20] 2 Eq. Jurisp. 856.

take resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by the *want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty,* a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent *on its own circumstances.* It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be, that the *neglect must amount to the violation of a positive legal duty.* The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby." [21]

Page 263, § 488. **Mistake, continued—diligence required after discovery of mistake.**—Howsoever lenient a court of equity may be toward the party complaining of a mistake by which he has unwittingly, or even negligently, permitted himself to become bound on a contract which he had no intention of entering into, the court rigidly insists upon the rule that the complainant must act with the *utmost promptness and diligence* in the repudiation of the contract upon discovery of the mistake. "Delay or vacillation," as quoted in the Text, "are fatal to the right which had before subsisted. This is especially true where rescission is the relief sought."

The reasons for this insistence upon diligence and prompt action are (1) the possibility of injustice to the other party, if proceedings to rescind for mistake are delayed; and (2) the aversion that equity has for him who maintains a position in which he may blow either hot or cold, or who, in homely phrase, is endeavoring to 'ride both sides of a sapling.' Here a party to the contract will not be permitted to allow the voidable contract to stand, awaiting future results—meaning to keep silent should the transaction turn out to be advantageous to himself, or to disaffirm should the result prove unprofitable. In short, he may not speculate on the result of the mistake.

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[21] See Solenberger *v.* Strickler, 110 Va. 273, 65 S. E. 566.

CHAPTER XVII.

MISTAKE CALLING FOR REFORMATION.

Preliminary.—Thus far we have dealt with mistake calling for Rescission of the transaction—on the ground that as the minds of the parties have not met on the same thing, there is *no mutuality* of agreement and hence *no contract*.

We come now to consider mistake calling for *Reformation* of the contract—the ground of relief being that while the parties in fact came to an agreement, understood by both parties alike, yet in subsequently reducing it to writing the real contract was, by mistake, not expressed in the writing.

By the term 'reformation' here is meant a re-writing (actual or constructive) of the instrument, either by insertion of what has unintentionally been omitted, or by elimination of what has unintentionally been included. Equity cannot, of course, make a new contract for the parties—a contract to which both parties have not freely assented; but it can and does reform the *written evidence* of a valid contract previously entered into, on the same principle that it will decree re-execution of a lost or mutilated document.

Page 250, § 463. **Reformation illustrated.**—The case of Harris *v.* Pepperell,[1] here mentioned (insufficiently stated in the Text) was the case of an oral agreement for the sale of *one parcel* of land, but by error of counsel *two parcels* were included in the conveyance. The court reformed the conveyance by eliminating the erroneously included parcel.

In Garrard *v.* Frankel,[2] (similarly confused in the Text) by the oral agreement the rental was fixed at £230, but the lease, as written, called for only £130. The court reformed the lease to correspond with the actual agreement.

Page 254, § 472. **Writing not expressing intention of parties, because of mistake of law.**—As pointed out in the preceding chapter, there is a manifest difference between the situation presented in Hunt *v.* Rousmanier [3]—where the parties,

[1] L. R. 5 Eq. Cas. 1.
[2] 30 Beav. 445.
[3] 1 Pet. 1.

through a mistake of law, deliberately agreed upon a power of attorney instead of mortgage, and deliberately accepted the former—and the converse of that case, namely, where the parties agree to execute an instrument of a particular character (*e. g.* a mortgage) but by a mistake of law an *instrument of a different character* is ignorantly accepted. In the first case the power of attorney was the expression of the *real intention* of the parties—though such intention was caused by a mistake of law; whereas, in the second case, the parties agreed upon one instrument but by mistake of law accepted one of a different kind, ignorantly believing it to be the expression of their mutual intention. In the one case, the instrument embodied their intention —in the other it did not. Hence, in the one case, reformation was refused, while the other is a clear case for reformation.[4]

Page 258, § 476. **Right of bona fide purchaser.**—Mistake in a conveyance, though relievable in equity in a proper case *between the parties,* is an equity which, like all other equities, is cut off by a transfer to a *bona fide* purchaser for value, howsoever gross the mistake may be.[5]

Page 260, §§ 483-485. **Reformation—mistake in written contracts for real property—statute of frauds.**—The correct doctrine on this subject is well stated in the Text, except that the doctrine of Glass *v.* Hulbert (page 261) is local to Massachusetts and one or two other states, and does not prevail generally in this country. It probably also represents the English doctrine. We shall examine this doctrine more carefully later. We may state the general doctrine as to the effect of the statute of frauds, under this title, as follows, noting carefully the distinction between *rescission* and *reformation*:

The same—statute of frauds, continued—(1) suit for rescission.—Where the plaintiff, whether vendor or vendee, sues to *rescind* the contract for mistake—or where either of the parties, on the same ground, *defends* a suit for specific performance brought by the other—all the authorities agree that the mistake may be shown by parol evidence.

Here the introduction of parol evidence does not violate the

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[4] See Inge *v.* Inge, 120 Va. 329.
[5] Snyder *v.* Grandstaff, 96 Va. 473.

statute of frauds, since the purpose of such evidence is to *defeat* and not to *enforce* the contract. The statute merely prohibits the *enforcement* of contracts not in writing.

The same, continued—(2) suit for reformation.—(a) *Taking out.*—The *plaintiff vendor* may also, in a bill for reformation and spcific performance, prove a mistake by which *more was inserted in the written contract than the agreement called for,* and have this eliminated, and the contract reformed so as to show the real contract of the parties, and then have specific performance.

Here, again, the *statute of frauds* is clearly not violated, since the effect of the parol evidence is to *nullify* so much of the contract as it relates to, and hence there is *no enforcement of an oral contract.*

The receipt of the parol evidence, however, does violate the unwritten rule of evidence, that *a written contract cannot be contradicted by contemporaneous parol testimony.* The admission of parol testimony here is one of the few instances in which equity refuses to follow the common law rules of evidence. The departure is justified by the demands of justice, to prevent the unjust enrichment of one party at the expense of the other.

(b) *Putting in.*—May the plaintiff vendee set up a mistake in reducing the contract to writing, and by parol evidence have additional advantages *inserted* into the writing, as for example, a *greater acreage or area* than the written contract calls for? This is the only difficulty presented in this connection.

To state a concrete case: Suppose A orally agrees to sell B *two lots* of ground, and that by mistake of the scrivener in reducing the contract to writing, only *one lot* is called for by the writing, B's right to set this mistake up in *defense* to a suit by A for specific performance—or to maintain a suit to *resclnd*—is clear. But may B, the vendee, by parol evidence, have the *omitted lot inserted* in the written contract, and then *specific performance?*

As shown in the Text, it is held otherwise in the Massachusetts courts. The English rule is probably *contra also.* But by the great weight of American authority, even in this case, *parol evidence may be received to insert the omission into the written contract,* which will then be specifically enforced, notwithstanding the statute of frauds. In short, the American rule may be said to be, in cases of mistake in connection with contracts for the sale of real property, that the *statute of frauds imposes no impediment, either in case of rescission or of reformation,* and, in the latter case, of specific performance.[6]

The **same—rules of evidence.**—In all these cases, it is clear enough that the introduction of parol evidence to alter the written contract violates the common law rule of evidence that parol testimony may not be received to contradict or alter a written instrument, and, in the case last mentioned (*i. e.* insertion) the statute of frauds as well. But, as we have seen elsewhere, when equity assumed the jurisdiction in any case to afford relief because of a mistake in a written instrument, it necessarily adopted the principle of not permitting these rules of evidence to stand in the way of such relief.

The exercise of this jurisdiction in cases of mistake rests upon the same ground as where similar relief of reformation is granted, where the failure of the writing to express the real agreement results from the *fraud* of one of the parties. Such relief is always granted in the latter case. So it should likewise be granted in cases of mistake—since the effect on the complaining party is precisely the same in the one case as in the other.[7] Of course, in all of these cases of mistake, in which a writing signed by the complaining party is sought to be contradicted by parol testimony, the burden is on the plaintiff to establish the mistake clearly, by overwhelming testimony.[8]

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[6] The subject is discussed with a wealth of authority in 2 Pomeroy, Eq. Jurisp. 860 and following. See also, Beach *v.* Bellwood, 104 Va. 171. Mr. Wigmore justifies the reception here of parol testimony, and the exercise of the jurisdiction to reform by insertion, in spite of the statute of frauds, or of the parol evidence rule, on the same ground that similar relief would be afforded should some portion of the writing become illegible because of the fading of the ink, or of mutilation by accident. 2 Wigmore's Ev. § 2417.

[7] See 2 Pomeroy's Eq. Jurisp. 867 n.

[8] Inge *v.* Inge, 120 Va. 329.

CHAPTER XVIII.

ACTUAL FRAUD AS BETWEEN PARTIES TO CONTRACTS.

[*Alter Text chapter title to correspond.*]

Fraud at law and fraud in equity—contrast.—We must begin this chapter with a clear-cut conception of the difference between the constituents of fraud *at law*, in an action for *damages for the deceit*, and fraud *in equity*, in a suit for *rescission*. This is especially important, since our author seems to have confused the two throughout his chapter.

In so far as the fraud has originated in misrepresentations, as it generally does, the chief difference between the legal and the equitable essentials of fraud is in connection with the *scienter*, or knowledge on the part of the defendant that his representations were in fact false.

Fraud at law—necessity of the scienter.—The accepted rule at law is, that a misrepresentation of a fact by one party, howsoever material, and howsoever inflential upon the mind of the other party in inducing him to enter into the contract, is not fraudulent, unless made *with knowledge* of its falsity (*scienter*) —or else *recklessly*, without knowing or caring whether the statement be true or false. This principle was settled in England in the great case of Derry *v.* Peek,[1] and prevails quite generally in America.

Fraud in equity—scienter immaterial.—In equity, on the other hand, it is immaterial whether the party making the misrepresentation *knew it to be false*, or made it recklessly or in complete innocency—the inquiry being, *not did the one party know it to be false, but did the other party believe it to be true.*[2]

Advantages of rescission over action at law for damages.—These advantages are twofold: (1) In equity there need be no proof of the *scienter*. (2) If the defendant should be insolvent, and unable to meet his liabilities in full, a judgment against him for damages would be of little value to the injured

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[1] 14 App. Cas. 337. The question is fully treated in Flight *v.* Booth, 1 Bing. (N. C.) 375, 6 Eng. Rul. Cas. 746, n.
[2] Owens *v.* Boyd Land Co., 95 Va. 560.

plaintiff. Whereas, by rescission the plaintiff recovers the property itself, unless the legal title has, in the meantime, passed into the hands of an innocent purchaser for value—in which case, of course, the equity of rescission is cut off.

I. *Fraud by Misrepresentation.*

Page 267, § 495. **Misrepresentation.**—In view of the contrast drawn above between misrepresentation at law and in equity, respectively, let us endeavor to improve somewhat upon our author's definition of *misrepresentation,* as constituting ground for rescission of a contract in equity, namely: To entitle an injured party to a rescission in equity, the representation must be (1) *of a fact* (*present or past*); (2) the fact must be *a material one;* (3) *reasonably relied upon by plaintiff;* (4) *false in fact;* and (5) *injurious to the deceived party.*

The same—'future fact'—promissory representations.—The student will further observe that the misrepresentation must relate to a *present or past fact,*[2a] otherwise it is what is called a *promissory* representation, which, when resolved into its elements, must be a *promise,* an *opinion,* or a *statement of intention.* Such statements ordinarily do not in law constitute misrepresentation.

There may be, of course, a misrepresentation of existing fact expressed in the *form of an opinion,* or in the future tense. A statement, for example, that a certain farm "will produce" fifty bushels of wheat to the acre, is a statement, by implication, that the farm is good wheat land, and capable, in its present condition, of growing fifty bushels to the acre. The representation is, therefore, one of fact.

Promissory representation, continued—(1) as a contract.—If the representations be in the nature of promises, and *are embodied in the contract* between the parties in a legal way, then the plaintiff may have relief by an action at law, or appropriate equitable relief, according to circumstances—on the contract itself. But unless such promises are embodied in the writ-

[2a] This is implied *ex vi termini.* 'Fact' (Latin *factum*) connotes something *done,* or *already existing.* A 'future fact' is therefore a contradiction in terms.

ten contract (as usually they are not), so as to form a part of it, the rules of evidence exclude parol testimony as to prior or contemporaneous agreements. Mere failure to perform a promise (even where it is in the form of a binding contract) cannot constitute fraud or misrepresentation. If so, every breach of contract would be remediable by rescission.[3]

Page 268, § 497. **The same—(2) as statements of opinion or intention.**—Since one's intention, or opinion, is a mere state of mind, subject to change, either with or without cause, the existence or nonexistence of a particular intention or opinion in the mind of one party can scarcely be said to be a *material* inducement to the other party to enter into a contract in reliance thereon. It may be true that "the state of a man's mind is as much a fact as the state of his digestion," but it is generally not a *material* fact, for the reasons stated.

Hence such statements on the part of either vendor or vendee, even though false, are by the better authority not sufficient to call for rescission in equity.

Where the intention is expressed as that of a third person over whose actions the speaker has no control, the case becomes all the weaker for the complainant, since in the nature of things this is nothing more than a mere prophecy.

Hence, where a land company exploits its lots by advertising an intention to lay out improved streets, to supply water, light, etc., or to establish industrial and other enterprises on portions of the property—or a vendor of one lot enhances its price to the vendee by expressing his intention of building a handsome residence for himself on the adjoining lot—all such statements are regarded as promissory only, or as mere statements of intention, and failure to make them true is not a misrepresentation entitling a disappointed purchaser to rescission.

The same—statements of intention, continued.—The facts in Edgington *v.* Fitzmaurice (cited in the Text, p. 268), in which Lord Justice Bowen drew a parallel between the state of one's mind and the state of his digestion, were peculiar, in that

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[3] Watkins *v.* Wytheville, etc., Co., 92 Va. 1; Max Meadows, etc., Co. *v.* Brady, 92 Va. 71; Owens *v.* Boyd Land Co., 95 Va. 560. See the "Blue Sky Law" (criminal), Va. Code 1919, § 4465; Acts 1918, p. 676.

under the guise of an intention to apply the subscribed funds to improving the company's property, there was *concealment* and an implied misrepresentation of the true condition of the company's affairs—and by the officers of the company, who stood in a *fiduciary relation* to the subscribers, and who were therefore under obligation, if not to make a full disclosure of the situation, at least not actively to conceal it by a *false statement of the purpose of the subscription.*[4]

Where the suit is for *specific performance,* instead of *rescission,* it seems that false expressions of intention may sometimes become of importance as a *defense.* This is due, however, to the peculiar nature of suits for specific performance, as hereafter will appear.[5]

To whom misrepresentation made.—It is not always essential that the misrepresentation should have been made directly to the injured party, if it be meant to be communicated to him. Thus, a misrepresentation made to a *mercantile agency,* for the information of the mercantile world, is fraudulent as to subscribers to the agency who have relied upon the statement so made.[6]

Page 269, § 498. **Duty of injured party to investigate.**—The statement of the Text that whenever the property is equally open to the inspection of both parties, the vendee must inspect, and if he does not he cannot complain of the vendor's misrepresentation, is no longer the correct rule.[7] It does not lie in the mouth of one who has misled another by false representation, to assert that the other should not have believed him to be telling the truth, and should have investigated for himself. One party to a contract, therefore, may not deceive the other and then complain that the other honestly took him at his word, although the

[4] See Wilson *v.* Carpenter, 91 Va. 183; Watkins *v.* Wytheville, etc., Co., 92 Va. 1; Sawyer *v.* Prickett, 19 Wall. 146; Tacoma *v.* Tacoma, etc., Co., 16 Wash. 305, 47 Pac. 742; Pine Mountain Iron Co. *v.* Lord (Ky.), 50 S. W. 28; note, 8 Va. Law Reg. 646; 2 Pomeroy's Equity Jurisp. 885, and following.

[5] See authorities in n. 128 Am. St. Rep. 407.

[6] Eaton *v.* Avery, 83 N. Y. 31.

[7] The true doctrine is stated in footnote 2 to this section. See Brown *v.* Rice, 26 Gratt. 473; Hull *v.* Field, 76 Va. 607; note by Professor Graves, 2 Va. Law Reg. 694; n. 128 Am. St. Rep. 404; Marshall on Corp. 649.

deceived party might have discovered the falsehood by investigating for himself. Hence, a party to a contract falsifies at his peril.

Page 271, § 503. **Scienter not necessary.**—The English cases referred to in this section were cases *at law,* and not in equity. We have already disposed of the question of the *scienter,* in a note to a previous section. Our author continually nods over the *scienter.*

Page 272, § 504. **Reliance upon the statement.**—It is essential as stated in the Text, that the other party must have relied upon the false statement and been misled by it, but we must add: If the statement was material, the law presumes, in the absence of proof to the contrary, that *the other party did rely upon it.*[8]

Page 272, § 505. **Misrepresenation of law.**—While it is doubtless true, as stated in the Text, that equity does not relieve for a *mere* misrepresentation of law, yet this rule is to be applied with great caution, and is subject to exceptions sufficient almost to obscure the rule. The rule is applicable where the parties deal on *equal footing*—where one is supposed to know as much about the law of the subject as the other—and there is *no invited confidence, and no fiduciary relation* between the parties. Whether the relief granted here be under the head of *fraud* or *mistake* is not material in the result, though many courts and text-writers place the relief on the ground of mistake, rather than of fraud.

When a mistake of law by one party is induced or aided by the other, or is accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error.[9]

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[8] Wilson *v.* Carpenter, 91 Va. 183.

[9] 2 Pomeroy's Eq. Jurisp. 847. See Brown *v.* Rice, 26 Gratt. 467; Griswold *v.* Hazard, 141 U. S. 260; *ante,* note to pp. 237-238.

II. *Fraud by Concealment.*

Pages 274-276, §§ 507-509. **Concealment.**—Thus far we have dealt with fraud arising from active misrepresentation, by words or conduct. We come now to deal with fraud arising not from express affirmation by words, or by implied affirmation by conduct, but from the *silence* of the defendant when it was *his duty to speak.* The maxim here is, *qui tacet clamat*—in English (liberally), he who keeps silent when it is his duty to disclose the truth, is held to have spoken an untruth.

This makes it necessary to inquire when such duty to speak the truth, and not conceal it, rests upon a party to a contract. The Text (§ 508) may be followed here; and, as there pointed out, the two situations calling for a full disclosure are: (1) The existence of a *fiduciary or confidential relation* between the parties; and (2) Cases of *invited confidence*—where the wrongdoer secures the confidence of the other by assurances that the latter may rely upon the former's statement, or that the wrongdoer is disclosing, or will disclose, the whole truth about the subject-matter of the contract.

Page 274, § 507. **The same—no fiduciary relation.**—As shown in the Text, where no fiduciary relation exists, and no misrepresentation in fact, by words or by conduct other than mere silence, and no invited confidence, appear, one party is under no obligation to disclose to the other the advantages the one is securing for himself, or the disadvantages of the contract to the other.[11] But even here circumstances may convert mere silence into a false pretense—as where one purchases goods *on credit, not meaning to pay for them,* or with knowledge that he will *not be able to* pay for them. Such a transaction is a fraud even at law.[12]

Page 275, § 508. **The same—fiduciary relation.**—The doctrine of the Text may be followed here. To the list of fiduciaries there mentioned, may be added attorney and client; co-

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[11] See ante, note to § 455.

[12] Donaldson *v.* Farwell, 93 U. S. 631; Houghtaling *v.* Hills, 59 Iowa 287; 8 Va. Law Reg. 429; Benjamin on Sales, (Bennett's 6th ed.) 442-443—full collection of authorities.

partners;[13] co-tenants; executor and legatee; directors and corporation; directors and individual shareholders to a limited extent;[14] receiver and court; and all other persons occupying a relation of confidence to another.

III. *Fraud by Undue Influence—Surprise.*

Page 276, § 510. **Fiduciary relation, continued—presumption of undue influence.**—We may state the doctrine here somewhat more strongly than it is stated in the Text, namely, that *wherever a relation of confidence exists, and the person so trusted possesses himself of any benefit from the other, without paying an adequate consideration, a presumption of undue influence arises, and the burden of proof rests on the person receiving such benefit to disprove it.*

Thus, where the confidential agent of an elderly woman owed her a debt, and obtained from her, in her lifetime, a release of the debt, reciting that it was on account of faithful services rendered her by him, the court held, after her death, that a presumption of undue influence existed, and that the burden was on him to remove this presumption.[15]

Undue influence, continued—surprise.—Many cases under this title have arisen, in which the fiduciary or confidential relation is not so manifest, or not so strongly accentuated by the courts, as was the *unfair advantage* taken by one party over the other, made possible either by the relations of the parties or by the *special mental, physical or financial condition* of the complaining party—constituting what is known in legal phraseology

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[13] Well illustrated by the case of Tennant *v.* Dunlop, 97 Va. 235, where a *surviving partner*, who bought from the executrix of a deceased partner certain trade-marks belonging to the firm, at a price below their real value, was held to have owed the executrix the duty of full disclosure as to the value of the subject bought.

[14] See Strong *v.* Repide, 213 U. S. 419; Wilgus, 8 Mich. Law Rev. 267; Stewart *v.* Harris, 69 Kan. 498, 77 Pac. 277, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873.

[15] Triplett *v.* Woodward, 98 Va. 187, reported also with note 5 Va. Law Reg. 835. See also the two striking cases of Statham *v.* Ferguson, 25 Gratt. 38, and Davis *v.* Strange, 86 Va. 793. The latter case is of special interest because of its dramatic circumstances. The transaction here was between a father and his illegitimate negro daughter. A case for relief on two grounds was established—the confidential relation and surprise.

as "surprise." Relief is more frequently granted, and a much stronger case is made in such cases, where the one party, by reason of *extreme youth* or *old age* or of *mental or physical infirmity;* or *unfamiliarity with business;* or *dullness of intellect* (as a very ignorant person); or *of the particular sitution,* was a fit subject for the exercise of the improper influence alleged.[16]

In cases of this character, a second important question is, did the party who is alleged to have been defrauded *have the benefit of independent advice* and time for deliberation, or was the *transaction a hasty or secret one between the parties.*

It would be more difficult to establish a case for relief here where the complaining party labored under no special disability or embarrassment of mind, or body, or estate, or where both stood on an equal footing in the transaction.[17]

Fraud at law—fraud in equity—a second contrast.—In an earlier note to this chapter, a brief contrast was drawn between fraud at law and fraud in equity. It was pointed out that equity relieves one party from a contract into which he has been induced to enter by the misrepresentation of the other, even though the misrepresentation were made *honestly*—thus indicating equity's more delicate sense of the ethical situation.

We are now prepared to carry the contrast a little further. The student will recall from his studies of the law of contracts that, according to *common law* conceptions, an agreement involving nothing of illegality, based on a valuable consideration, mutually understood and assented to by both parties, who are *mentally capable of contracting,* is a valid contract; and may be defeated only by establishing *conscious fraud* on the part of one of the parties; and this fraud must have been an *actual misrepresentation of a material fact.* Bargain-making is regarded at law as a battle of wits; and, the bargain once made, the losing party may not set up the superior bargaining qualities of his

[16] The circumstances under which Jacob purchased Esau's birthright is a good illustration—Jacob, according to the biblical story, having taken advantage of his brother's hunger and fatigue to drive the hard bargain. A modern court of equity would have had little hesitation in setting the bargain aside on the two grounds of *surprise* and as being a '*catching bargain* with an expectant heir.' See Statham *v.* Ferguson, and Davis *v.* Strange, both *supra.*

[17] Huguenin *v.* Baseley, 14 Ves. 273, is the leading English case. It is cited and the facts stated on p. 277 of the Text.

adversary, due to his own inferior wit, if short of lunacy. That the other party took advantage of his pressing need, his mental inferiority, his inexperience, his incapacity for business, temporary or permanent, his mental disturbance—due to grief, sickness, drunkenness, anxiety or other emergency—is no defence to the contract. We have just seen the vast difference in the equitable conception of the same situation. Here one's mental state, or lack of bargaining wit, need not have reached the stage of lunacy in order that it may be set up as ground of rescinding the vicious transaction.

Memorandum for student: With § 516, the Text begins a new chapter as "CHAPTER XIX—CONSTRUCTIVE FRAUD." There is no need of any new chapter here, nor of the title. Strike out the entire chapter-heading, so as to include the matter thereunder as a *continuation of the present chapter* XVIII. Then, on page 286, immediately before § 526, insert a new chapter-heading: "CHAPTER XIX, FRAUD ON CREDITORS.

Page 282, §§ 519-522. [The contracts referred to in these sections are *not fraudulent,* actually or constructively. They are merely based on *illegal considerations,* or are against the policy of the law, and will not be enforced either at law or in equity. They have no place in this discussion and may be omitted.]

Page 283, § 523. **Antenuptial conveyances in fraud of marital rights—effect of modern statutes.**—The Text accurately states the common law of the subject. Since fraud alone does not constitute a cause of action unless damage follows, there can of course be no relief to husband or wife, where the antenuptial conveyance deprives the other of *no legal right.* Under modern statutes, the interest of husband and wife in each other's property has been largely taken away. If the antenuptial conveyance be of property, to *which the complainant consort would have had no claim had the conveyance not been made,* then the transaction is valid.[18]

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[18] "Surely," says Corliss, J., in Arnegaard *v.* Arnegaard, 7 N. Dak. 475, 75 N. W. 797, 41 L. R. A. 258, "it would not be fraudulent for the husband to do secretly before marriage that which he could do either openly or secretly after marriage." See Butler *v.* Butler (Kan.), 30 Am. Rep. 441; 2 Pom. Eq. Jurisp. 920; 7 Va. Law Reg. 822.

Page 284, § 524. **Bargains with expectant heirs.**—The Text states the doctrine of the English courts and those of Massachusetts, Kentucky and a few other States. In most of the States of the Union, such transactions, while void at law (because nothing passes at the time), will be upheld in equity, if fairly made and based on adequate consideration.[19]

The same—heir's release to ancestor.—It is held by numerous authorities that an heir may release his expectancy to his ancestor, and thus be excluded from participation in the distribution of the latter's estate upon his death.[20]

In the Virginia case cited, the court quotes with approval the following statement from the opinion in Camell v. Nowell,[21] "Heirs take by positive law when the ancestor dies intestate, and the *course of descent cannot be altered* by words excluding particular heirs, or by any agreement of parties. Suppose the father to have had *no other children* at his death but the plaintiff. Being the sole heir, he must have taken the whole of the descended land. *ex necessitate.* There must, therefore, be a disposition to another so as to break the descent, otherwise the land descends according to law—that is, in this case, to the heirs in general, subject to the provision of bringing advancements into hotchpot."

The same, continued.—The Virginia court, continuing, asks: "Where would the estate of Jacob Headrick, the ancestor who died intestate, have gone if W. C. Headrick, the son, who released his interest, had died without issue in the lifetime of his father?" The court adds that of course the releasing heir or distributee who comes into the division of the estate, notwithstanding his release, must *account to his co-heirs or co-distributees* (if any), for the consideration which he has received from the

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[19] The subject is discussed at great length in note to McCall *v.* Hampton (Ky.), 56 Am. St. Rep. 339, 361; n. 65 L. R. A. 578.

[20] See cases cited in note, 56 Am. St. Rep. 345-347. In other States, including Virginia, it is held that such a release has not the effect indicated. See Headrick *v.* McDowell, 102 Va. 124, and note thereto, 65 L. R. A. 578. Compare the case of the Prodigal Son, who received his "portion" before embarking for a far country.

[21] 51 N. C. 437.

ancestor—which consideration the court will treat as an advancement to the releasing heir or distributee.[22]

Conveyance in consideration of care and support of grantor—grantee in default.—Though not belonging strictly to the subject of fraud, it may be not inappropriate here to call attention to the peculiar situation presented in cases described in the title to this note. In certain sections of the country, and particularly in agricultural communities, it is not unusual for a landowner, whose age or condition of health suggests the arrangement, to convey to one of his children, or to a near relative, or even to a stranger, his entire holdings, in consideration of the grantee's *supporting the grantor during the remainder of his life.*

Where such conveyances are skillfully drawn, the obligation of the grantee to furnish the support is secured by an *express charge* on the property conveyed; or its faithful performance is made an express *condition subsequent;* or the conveyance is given the form of a *trust* for the purpose indicated. In such cases, the question of the grantor's remedy presents no special difficulty. Equity enforces the charge or the trust on familiar principles—and a court of law affords an adequate remedy by re-entry for breach of condition.

The same—rescission for grantee's default.—But more frequently such conveyances are inartistically drawn by the parties themselves, or by the village justice, and the obligation to support is merely mentioned as the *consideration* for the conveyance, or assumes the form of a mere *covenant* on the part of the grantee. In such a case, where the grantee fails or refuses to comply with his undertaking, the question of a proper remedy on behalf of the grantor presents some difficulty, since no court, of law or equity, rescinds a conveyance for mere failure of the grantee to pay or perform the consideration promised.

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[22] The Virginia doctrine is upheld in Denson *v.* Autrey, 21 Ala. 205, and in other authorities cited in the monographic note 56 Am. St. Rep. 339 *ubi supra,* and seems to be the sounder doctrine. This doctrine is, of course, not based on any idea of fraud on the ancestor, since the latter is himself a party to the transaction. The real ground is stated in the opinion of the North Carolina court, as quoted, namely, *the impossibility of sustaining such a proposition under the statute of descents and distributions.* See n. 65 L. R. A. 578.

The property in question has become a part of the mass of the grantee's general estate, and, in ordinary cases, the grantor has no more claim against the estate passing than against other estate of his grantee.

It is settled, also, in the special case presented, that specific performance cannot be decreed, since the contract involves services of a character *impossible of proper enforcement* where the parties occupy an attitude of mutual hostility—or, indeed, under any circumstances. A court of equity refuses to perform specifically contracts for merely *personal services,* or any other contract the enforcement of which would require the constant supervision of the court, or which presents practical difficulties in the determination of the question of proper performance.[23]

The same—inadequacy of remedy.—The grantor might, of course, sue the grantee *at law* for breach of his covenant, but such remedy is manifestly inadequate for purposes of complete justice. The estimation of the amount of damages would be difficult, and, besides, damages are scarcely adequate compensation for the injury suffered. Moreover, as the grantee's covenant to support has not been made a *charge on the property,* a sale of the latter to a *bona fide* purchaser, or the insolvency of the grantee, might result in the grantor's finding himself a pauper with no means of support whatsoever.

In view of the peculiar situation, and the inadequacy of other remedies, equity will generally interpose and *rescind the entire contract,* by requiring a reconveyance of the property to the grantor, in spite of the general rule that an executed conveyance will not be rescinded at the suit of the grantor for failure of consideration.[24]

Before leaving the subject it may be well to say that while the courts substantially agree that the situation here is peculiar and demands a peculiar remedy, they are not agreed as to the reasoning upon which relief is afforded. In some states the mere covenant for support is treated as a charge or trust; in

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[23] Mowers *v.* Fogg, 45 N. J. Eq. 120.

[24] Lowman *v.* Crawford, 99 Va. 688, 7 Va. Law Reg. 551 and note; Glocke *v.* Glocke (Wis.), 57 L. R. A. 458; Walfgong *v.* Johnson, 41 W. Va. 283; 7 Va. Law Reg. 601 (a luminous article by Judge R. C. Jackson); Davis *v.* Davis (Vt.), 130 Am. St. Rep. 1035, and monographic note.

others relief is granted on the ground of fraud or mistake; and in still others as a condition subsequent. It is believed, however, that the true ground on which it should be granted is as first indicated above.[25]

Rescission, continued—mining leases.—Relief similar to that mentioned in the foregoing note, and for the same reason, is frequently administered in connection with mining leases, where the lessee fails reasonably to begin or to continue mining operations, upon which the lessor is dependent for royalties.[26]

CHAPTER XIX.

FRAUD ON CREDITORS.

Preliminary.—Thus far we have been dealing with fraud *as between the parties* to a particular contract. We now come to consider conveyances and transfers of property between two parties, which operate as a fraud on *third persons,* not parties to the transaction, namely, *creditors* of the grantor.

The effort of debtors, hopelessly in debt, to save something for themselves and their families, out of the general wreck of their estates, is a fertile source of litigation; and few titles of the equity jurisdiction are more frequently represented on the dockets of the courts. It behooves the student, therefore, to give special attention to the very just and equitable principles applied in these cases.

Page 286, § 526. **Conveyances in fraud of creditors.**—The statute of 13th Elizabeth, substantially reproduced in most States, prohibits not only *"conveyances and transfers"* with intent to defraud, etc., but applies as well to *"bonds, suits, judgments and executions"* made, given or suffered, with *intent to "hinder, delay or defraud"* creditors.

Rights of bona fide purchaser.—It is to be carefully noted,

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[25] See monographic note 130 Am. St. Rep. 1035; Pownall *v.* Taylor, 10 Leigh 172 (as to condition subsequent).

[26] See Cowan *v.* Iron Co., 83 Va. 547; Coal Co. *v.* Hise, 92 Va. 238; Laurel Creek Coal Co. *v.* Browning (Va.), 39 S. E. 156 (where lessee's covenants were construed as conditions subsequent).

however, that howsoever fraudulent may be the intent of the *grantor* or debtor, if the *purchaser* from him, or from his colluding grantee, have no knowledge of such fraudulent intent, and pays adequate value for the property, he is *not affected by the fraud.* This is fundamental in the law of this topic. This statement is made in § 528 of the Text and again in § 531. The omission of this qualification in the language of § 530 must not mislead the student.

This means that if A conveys his property to B, in order to cheat the former's creditors—whether B secretly agrees to hold the property for A, or whether he pays value, knowing of A's purpose—such conveyance, while good between the parties, is avoidable by A's creditors. But if B transfers the property to C, a *bona fide* purchaser for value, before A's creditors assail the transaction, the property passes to C, free of the creditors' claims—the only recourse of the creditor being a personal claim against A and B.

Page 289, §§ 534-540. **Statute of fraudulent conveyances —voluntary conveyances thereunder.**—The Statute of 13th Elizabeth substantially followed in a majority of the States, makes no reference, in terms, to *"voluntary"* conveyances, and is confined to *"fraudulent"* conveyances. Under these statutes, the mere fact that the conveyance is voluntary will not invalidate it, unless it appear further that the donor was *insolvent* at the time, or was *made insolvent as the effect of the gift.* That is to say, under these statutes, a gift ('merely' voluntary—that is made without actually fraudulent intent), by a debtor, is voidable as to his *existing* creditors (and these alone—since those who become creditors afterwards are not injured by the previous voluntary transfer), and only then *where the debtor has failed to retain enough property to satisfy his existing debts, with no reasonable improbability that the retained assets will be so applied.* In short, a case of constructive fraud must be made out.

Statute of "voluntary" conveyances.—In a few of the States, including Virginia, Alabama and others, an additional statute has been enacted, known as the statute of "voluntary conveyances." Under this statute, as to *existing* creditors, debtors are forbidden to give away their property, *even though they* *may retain an abundance with which to meet their existing obligations;* or, otherwise expressed, voluntary conveyances are declared invalid *as to existing creditors, regardless of any fraudulent intent, and regardless of the amount of property retained by the debtor.*[1]

The same—what is a voluntary conveyance?—"By "voluntary" conveyance, is meant, not one in which there is a *total absence* of consideration—since a conveyance made for a palpably inadequate consideration is (as to creditors of the grantor) voluntary in part. Such a conveyance, if made in good faith on the part of the grantee, will be permitted to stand to the exent of the consideration paid (*"pro tanto"*), and will be set aside as to the residue, when attacked by existing creditors.

Notice of fraudulent intent. — Notice of the grantor's fraudulent purpose is only necessary where the grantee is a purchaser for value. If he is a volunteer, he does not come within the protection of the statute, and attacking creditors need not allege or prove notice to him in such case. If he paid nothing, no one knows it better than he.

The same—allegation and proof of notice.—Except in the case of husband and wife (where, as we shall see presently, the presumption of fraud places the burden of proof on the wife), if the purchaser has paid value, the attacking creditor must both *allege and prove notice* to him of the grantor's fraudulent intent.

It is not for the *grantee* to establish *lack* of notice, but for the attacking creditor to prove its *existence* affirmatively. This seems clearly deducible from the language of the Virginia statute, viz., "This section shall not affect the title of a purchaser for valuable consideration, *unless it appear* that he had notice of the fraudulent intent," etc. It is also sustained by the decision of the courts.[2]

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[1] Va. Code 1919, § 5185.

[2] Hickman *v.* Trout, 83 Va. 478; Hazlewood *v.* Forrer, 94 Va. 703; American Net, etc., Co. *v.* Mayo, 97 Va. 182. See post, Ch. xxxiB.

But the notice need not be proved by direct testimony—it may be proved like any other fact, by circumstantial evidence. Ferguson *v.* Daughtrey, 94 Va. 308; Todd *v.* Sykes, 97 Va. 143. So it may be proved by a bill taken for confessed, in which notice is distinctly charged. Price *v.* Thrash, 30 Gratt. 515; 1 Va. Law Reg. 546.

Mortgagees and deed of trust creditors as "purchasers."—We have already seen [3] that creditors who have secured the legal title to the *res* in question, are elevated to the high plane of *purchasers;* and that when such transactions are *bona fide,* and for value, all equities of other parties are cut off. Hence where a debtor has conveyed his property to a confederate in fraud of his creditors, a *bona fide* purchaser (including a mortgagee, or deed of trust creditor, to the extent of his debt) from such confederate will hold the property free from any claims on the part of the debtor's general creditors.[4]

Another term in common use in this connection, is "assignee" —to designate the trustee in a *general deed of assignment.* Such an instrument is in fact a deed of trust to secure debts—but when the debtor thus throws up his hands and surrenders all of his estate for the benefit of his creditors, the instrument by which this is done is termed a *general deed of assignment.* The assignee (or trustee) here is, of course, a *purchaser.* But whether a purchaser "for value," is a disputed question, to be considered in the section following.

Mortgagees, trustees and assignees as purchasers "for value."—A moment's consideration will make it clear that one may be a *"purchaser"* and yet not a purchaser *"for value."* We shall glance briefly here at the question as to *what constitutes value* in transactions of the sort under consideration.

(1) *Contemporaneous debt.*—One who lends money and takes a *contemporaneous* mortgage or deed of trust as security, is universally conceded to be a purchaser *for value;* and rightly so, since he has put his money out on the direct credit of the particular property covered by the mortgage, or like lien.

(2) *Pre-existing indebtedness.*—One who extends credit to another but takes no special security therefor, lends on the *general personal credit* of the debtor. The taking of a mortgage, or other lien, at a *later date,* to secure the credit, without any new consideration, while it converts the creditor into a *purchaser* (since he obtains the title), is held by the great weight of American authority *not* to make him a purchaser *for value.* And

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[3] *Ante,* note to page 130. See 33 L. R. A. 305, note.
[4] See Vicars *v.* Weisiger Co., 121 Va. 679.

rightly so, because he did not put his money out originally on the property now included in the mortgage. Hence the rule, that a mortgage, or similar lien, given to secure a *pre-existing* indebtedness is not based on valuable consideration—and the mortgagee takes the security encumbered with all the equities with which it was previously affected. This rule is quite generally applied to assignees under a general deed of assignment made by a failing debtor.[5]

The same—Virginia rule.—The rule last stated does not exist in Virginia, and several other states. Here, security for *previous indebtedness* is regarded as constituting value, equally with the contemporaneous security.[6]

Deeds fraudulent in law.—Conveyances, assignments and other transfers of property, are said to be fraudulent *in law* when they contain provisions rendering them on their face fraudulent, without any proof *aliunde*. This occurs more frequently in general deeds of assignment by insolvent debtors for the benefit of creditors, than elsewhere.[7] The following are illustrations of deeds of assignment deemed fraudulent in law:

(a) *Inconsistent reservations.*—The rule is thus stated by Riely, J., in Hurst *v.* Leckie,[8] "A deed of assignment for benefit, of creditors, which reserves any benefit to the grantor himself, or which introduces limitations and contingencies such as will give him control of the property or its proceeds, so as to enable him in effect to defeat the conveyance, or which reserves to the grantor power to revoke it, or which stipulates for the

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[5] Authorities n. 3, *supra*.

[6] See n. 3, supra. As the trustee in such case is the representative and quasi-agent of the creditor secured, notice to the trustee is notice to the secured creditor. Oberdorfer *v.* Myer, 88 Va. 384; King *v.* Levy (Va.), 22 S. E. 492; Alsop *v.* Catlett, 97 Va. 364; Peters *v.* Bain, 133 U. S. 670; note to § 904, *infra*.

And where the trustee is affected with notice, the fact that he was made trustee *without his knowledge*, and that he declined the trust as soon as it came to his knowledge, will not prevent the beneficiaries in the deed from being affected with notice, though they acted in good faith. Merchants Bank *v.* Ballou, 98 Va. 112, 6 Va. Law Reg. 339.

[7] Where the deed is fraudulent, as a matter of law, *on its face*, the grantee will have constructive notice of the fraud, and will not be heard to deny it. Long *v.* Meriden, etc., Co., 94 Va. 594.

[8] 97 Va. 550.

maintenance of the grantor or his family, or for his employment at a fixed salary, is void" (voidable).

(b) *Deed of trust on stock of goods.*—A mortgage or deed of trust on a shifting stock of goods, in which it is stipulated that the *grantor may remain in possession and continue his sales as before,* gives the grantor power to defeat the security, and, be-being inconsistent with the avowed purpose of the transaction, while doubtless good as *between the parties,* is fraudulent on its face as to other *creditors* of the grantor.

Nor, by the better authority, is the objectionable feature removed by a provision that the grantor shall account to the trustee or creditors for the proceeds of sales, or shall keep the stock up to a certain standard of value.[9]

Of course, if the deed provides or contemplates that the *trustee himself shall take possession* of the stock of goods, and close them out for the benefit of creditors, the objection mentioned does not exist.[10]

(c) *Power of trustee to sell on credit.*—The statute of fraudulent conveyances expressly condemns conveyances intended to "hinder, delay or defraud" creditors; so that a conveyance that "hinders" or "delays" creditors, is as objectionable as one that "defrauds." Creditors have a right to demand that when the property of their debtor is put beyond the reach of an execution, by the assignment thereof for the benefit of creditors, it shall be sold *for cash.* Hence, a clause in a general deed of assignment whereby the trustee is authorized to sell *on credit,* will render the assignment fraudulent *in law.*[11]

It must be carefully noted, however, that in Virginia, our Supreme Court of Appeals from earliest times, seems to have lost

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[9] Robinson *v.* Elliott, 22 Wall. 513; full note, 15 Am. St. Rep. 912; Wray *v.* Davenport, 79 Va. 19; Perry *v.* Shenandoah Nat. Bk., 27 Gratt. 755; Hughes *v.* Epling, 93 Va. 424; 2 Va. Law Reg. 62; 3 Va. Law Reg. 297, 849; Ross *v.* Wilson, 7 Bush 29; Loth *v.* Carter, 85 Ky. 591. The authorities are collected in 20 Cyc. 550, from which it appears that in a minority of the States, the doctrines of the foregoing note, and especially that asserted in the last paragraph, are somewhat modified.

[10] See Hurst *v.* Leckie, 97 Va. 550.

[11] Burrill on Assignments, 220 et seq.; Keep *v.* Sanderson (Wis.), 60 Am. Dec. 404 and note; Brahmstadt *v.* McWhirter (Neb.), 31 Am. Rep. 396, and full note; Nicholson *v.* Leavitt (N. Y.), 57 Am. Dec. 499, and note; 2 Va. Law Reg. 60.

sight of the "hinder or delay" clause of the statute, and has allowed, without question, provisions postponing sales under general deeds of assignment which in other States would not be countenanced. Our Virginia reports teem with cases where assignments have been upheld which postponed the sale for several years, and in the meanwhile reserved to the grantor the continued use of the property.[12]

(d) *Release clauses.*—In most of the States, a clause in a general deed of assignment, stipulating for the debtor's *release from further liability, as a condition precedent to participation by any creditor* in the benefits of the deed, renders the deed fraudulent on its face.[13]

But in Virginia, unfortunately, the contrary doctrine was established in early times; and though the Supreme Court of Appeals has several times deprecated the doctrine of these early cases, the rule yet continues in this State. But it is subject to this qualification, namely, that the insolvent *must convey substantially the whole of his property* (not exempt under the "homestead" and "poor law"). He will not be permitted, even in Virginia, thus to divide his property into two parcels—reserving the one and assigning the other—and, by force of the release clause, compel his creditors to *choose between the two.* The creditors have the right to subject both.[14]

Release clauses, continued.—This effort on the part of the insolvent to escape further personal liability on his indebtedness, by the insertion of the release clause, is a device to obtain all the benefits of a technical adjudication in bankruptcy without the sanction of a court of bankruptcy—'self made' or 'home-made' bankruptcy, some of the courts have termed it. It is rightly condemned by the great majority of the courts.

(e) *Other clauses.*—If the deed of general assignment give

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[12] See Brockenbrough *v.* Brockenbrough, 31 Gratt. 508; Paul *v.* Baugh, 85 Va. 955; 2 Min. Inst. 679, et seq.; 2 Va. Law Reg. 60-62; Taylor *v.* Mahoney, 94 Va. 508.

[13] Bump on Fraudulent Conveyances, 323, 429; 2 Perry on Trusts, 592, and note; Dugan *v.* Bliss (Col.), 34 Am. Rep. 80; Greely *v.* Dickson (Fla.), 58 Am. Rep. 674; Grover *v.* Wakeman (N. Y.), 11 Wend. 200.

[14] Skipwith *v.* Cunningham, 8 Leigh 274; Quarles *v.* Kerr, 14 Gratt. 48; Long *v.* Meriden, etc., Co., 94 Va. 594.

the trustee power not only to *continue the former business* of the grantor, but to *subject the trust property to the casualties incident thereto*—casualties of a character reasonably tending to jeopard the fund by subjecting it to charges superior to the debts secured—the deed is fraudulent on its face, as containing provisions adequate to defeat the security.[15]

Assignment of merchant's stock of goods—permissible clauses.—It frequently happens, especially when a stock of merchandise is assigned to a trustee for the benefit of creditors, that a much better result will be obtained by selling out the stock in the *usual course of trade,* and by retail, than by closing it out at once, under the hammer. It is, therefore, permissible for the deed to give the trustee discretionary power, if he deem it best, to continue the sale of goods by retail, *in the usual course of trade* for a limited time (say, for one year if the stock be large); and for that purpose to employ all necessary *clerks and assistants;* and to purchase such *staple articles as may be necessary in order to retain customers* and work off the entire stock to advantage.

Nor is there any objection to the trustee's employing the grantor himself as a clerk or assistant, provided there be no stipulation that he shall do so. The grantor will often prove an invaluable assistant to the trustee, since generally he will be the person most familiar with the value and quality of the goods, and knows the customers.

The young practitioner, undertaking to draw a general deed of assignment in Virginia, before inserting any special or peculiar clauses, should carefully examine the two cases of Marks *v.* Hill,[16] and Hurst *v.* Leckie.[17] The deeds in each of these cases contained elaborate provisions with reference to working off a stock of goods to advantage, and both were held not to infringe the statute against fraudulent conveyances—though in the

[15] Catt *v.* Wm. Knabe Co., 93 Va. 736—a case where the trustee was authorized to continue the grantor's school, hiring teachers and paying all other expenses out of the trust fund.

So where the grantor in a deed of trust to secure deferred bonds retained the power to sell the trust subject and reinvest in other property to be held on the same trusts. Consolidated Tramway Co. *v.* Germania Bank, 121 Va. 331.

[16] 15 Gratt. 400.

[17] 97 Va. 550.

former there was in fact a provision that one of the grantors should be employed by the trustee.[18]

Lien creditors only may assail conveyance as fraudulent.—By the unwritten law, *a general* creditor (that is, one whose claim has not been reduced to a judgment—or is not otherwise converted into a lien on the *res* in controversy) has no standing in a court of equity to assail a fraudulent transfer of property by his debtor. The transfer may be a fraud on him, it is true, but as such *general* creditor he may not assail it, because he has no claim against the *res* itself. The proper proceeding for him is to sue in a court of law, obtain a judgment, have execution returned "no effects," and then file his bill in equity.

This is a tedious process, and frequently results in the eloignment of the property before the creditor is in a position to move against it. Hence in many states, including Virginia, statutes have been passed permitting *general* creditors to assail these fraudulent transfers.

The same—rule in Virginia.—By statute in Virginia,[19] a *general* creditor may assail a fraudulent or voluntary transfer of property by his debtor, without the necessity of a judgment, and *even before the debt is due.*

The same—priorities among attacking creditors.—Where the common debtor is insolvent, it is important that a wide-a-wake creditor should move very promptly—the rule of equity being that he who first assails the transaction secures priority of lien on the *res*—subject, of course, to prior existing liens.

The practice here is somewhat complicated, and will be dealt with when we come to study the subject of equity procedure.

Postnuptial Settlements—Fraud on Husband's creditors.

Page 290, § 536. **Postnuptial settlements—fraud on creditors.**—Probably a majority of the suits brought to set aside fraudulent conveyances are between creditors of the husband,

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[18] See also Taylor *v.* Mahoney, 94 Va. 508. The practitioner should also examine in this connection, and guard against the features condemned therein, Lang *v.* Lee, 3 Rand. 410 and Catt *v.* Knabe, 93 Va. 736. See also note by Prof. Burks, 3 Va. Law Reg. 297-8.

[19] Va. Code 1919, § 5186.

on the one side, and the wife to whom the husband has conveyed property, on the other. The rule of the unwritten law is, that a man's *first duty is to his creditors, and not to his wife and children,* harsh as this rule may seem. The various homestead exemption statutes, existing in all the States, to some extent ameliorate the hardship of this doctrine; but unless debarred by these statutes, creditors have the first right of resort to a debtor's property. Hence, when a husband has conveyed property to his wife, leaving existing creditors unpaid, it becomes important to consider the equitable situation:

The same—conveyance for adequate consideration.—The case of a conveyance to the wife, for *adequate consideration,* presents no difficulty where the proof is clear; but, as we shall presently see, the burden of proving that the consideration actually passed, *and belonged to the wife,* is on *her,* since the law presumes, as to the husband's creditors, that such transactions are voluntary, notwithstanding the recital of a consideration in the conveyance.

The same—conveyance voluntary.—It follows from what has been said, that a husband who is in debt cannot voluntarily settle property upon his wife, nor indeed upon any other person, *without first providing for the payment of his existing indebtedness.* If he attempts to do so, creditors whose debts exist at the time may assail the transaction.

The same—presumption—burden of proof.—As before stated, where a husband conveys property to his wife, and the transaction is assailed by creditors whose debts then existed, the transaction *is presumed to have been without consideraition, and the burden of proving adequate consideration rests on the wife.*[20]

Proof of consideration by wife.—It is not sufficient merely to prove that the wife paid money or transferred other prop-

[20] Flynn *v.* Jackson, 93 Va. 341, and numerous cases there cited. Harr *v.* Shaeffer (W. Va.), 43 S. E. 89; note, 90 Am. St. Rep. 970. See Spence *v.* Repass, 94 Va. 716. In Morrisette *v.* Cook, etc., Co., 122 Va. 588, the conveyance from husband to wife recited a valuable consideration, but was in fact voluntary. It was held that the false recital, unexplained, was proof of *actual fraud,* and hence the conveyance was subject to attack by *subsequent* creditors as well.

erty to the husband as a consideration for the conveyance. It must distinctly appear that such money paid, or property conveyed, was *in fact the wife's* and not the husband's—the presumption being, in the absence of proof to the contrary, that *all money or property acquired by the wife of an insolvent husband, even from a stranger, is the husband's, or was purchased with money furnished by him.*[21]

Page 288, § 532. **Marriage as a valuable consideration —Virginia statute.**—The doctrine of the Text, that a conveyance by husband to wife, in consideration of a valid *antenuptial agreement* to make such settlement upon her, is regarded, both at law and in equity, as based on a valuable and adequate consideration; and, in the absence of actual fraud, participated in by the wife, is unassailable even by existing creditors, who thus find themselves with no recourse for their debts, is the accepted rule.

This unwholesome rule, under which much injustice was perpetrated upon creditors, has been abolished in Virginia by statute, as to the husband's *existing* creditors.[22]

The unwritten rule was even extended to the case where a marriage engagement already existed anterior to the promise of a settlement.[23]

Payment out of wife's separate estate.—In the absence of actual fraud, participated in by her, if the wife is able to prove that she in fact paid an adequate consideration for the husband's settlement upon her (and the burden is on her to establish it), whether out of her separate estate or out of funds supplied by friends, or from sources other than the husband, the conveyance will be sustained.[24]

Husband using wife's money—(a) statutory separate estate.—Where, with the wife's acquiescence or consent, the

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[21] Seitz *v.* Mitchell, 94 U. S. 560; Hoge *v.* Turner, 96 Va. 624; Burt *v.* Timmons (W. Va.), 6 Am. St. Rep. 664, note; 4 Va. Law Reg. 848, quoted with approval in Johnson *v.* Ables, 119 Va. 593, 601.

[22] Va. Code 1919, § 5185.

[23] Appleby *v.* Appleby (Minn.), 111 N. W. 305; McNutt *v.* McNutt, 116 Ind. 545, 2 L. R. A. 372; 2 Cyc. 1246.

[24] Flynn *v.* Jackson, 93 Va. 341; Stonebraker *v.* Hicks, 94 Va. 618; Spence *v.* Repass, 94 Va. 716.

husband has used her money (not his by marital right), or the proceeds of her *statutory* separate estate, the law presumes this to have been intended as a *gift* from the wife, unless an *express antecedent or contemporaneous contract* by the husband to repay can be established.

Hence, a subsequent settlement by the husband upon the wife cannot be sustained as to existing creditors, by proof that it was made in compensation for such funds of the wife used by the husband, unless it be also proved that prior to or contemporaneously with the wife's assent, the husband *expressly bound himself to repay.*[25]

The same—(b) income of equitable separate estate.—The same principle applies where the money of the wife, used by the husband with her consent, was derived as *income* from her *equitable separate estate,* even though the husband be trustee of the corpus thereof.[26]

The same—(c) corpus of equitable separate estate.—But if the *husband be the trustee,* express or implied, of her *equitable separate estate,* and uses the *corpus* of such estate, this will be regarded *prima facie* as a debt due the wife, even in the absence of an express contract to pay. The husband has in fact so contracted in accepting the trust.[27]

The same—(d) earnings of the wife—services to husband.—Proof that the wife paid for the property out of her own *earnings,* is not sufficient to shield it from the husband's creditors, where, as at common law—it is otherwise now by modern statutes—the *husband is entitled to her earnings.*[28]

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[25] Beecher *v.* Wilson, 84 Va. 813; Hannon *v.* Hounihan, 85 Va. 429; Throckmorton *v.* Throckmorton, 91 Va. 42; New South, etc., Ass'n *v.* Reed, 96 Va. 345; Bennett *v.* Bennett (W. Va.), 16 S. E. 638; Sewing Machine Co. *v.* Radcliffe, 63 Md. 496; McClure *v.* Lancaster, 24 So. Car. 273, 58 Am. Rep. 259; Liskey *v.* Liskey, 2 Tenn. Ch. 5. See *ante,* note to § 238.

[26] 2 Pomeroy's Eq. Jurisp. p. 1103 (n.); 2 Perry on Trusts, 665; Bispham's Equity, 108.

[27] McConville *v.* National Valley Bank, 98 Va. 9; 5 Va. Law Reg. 695; Walker *v.* Walker, 9 Wall. 753; 2 Perry on Trusts, 666; Bispham's Equity, 84; Burks' Prop. Rights of Mar. Women, 18-19. The same rule should apply equally where he is trustee of her separate statutory estate.

[28] Campbell *v.* Bowles, 30 Gratt. 652, 653; Grant *v.* Sutton, 90 Va. 771. See cases cited *supra,* under paragraph (a).

But neither at common law nor under the statutes, can the husband, as against his creditors, settle property upon his wife in payment for her *ordinary household and conjugal services to him*. Under modern statutes, equally as at common law, the husband is entitled to the wife's services in the household; and an agreement to compensate her therefor is without consideration.[29]

The same—(e) wife becoming surety for husband.—Where the wife assumes a personal obligation, or incumbers her own property with a lien, as *surety* for her husband, she is entitled to the *rights of a surety;* and the law *implies a promise* on his part to indenmify her against loss thereby. Hence, where she has thus become surety for him, she is entitled to exoneration, and he may make a valid settlement on her, to the extent of the liability she has thus validly assumed or paid.[30]

Wife as surety, continued—contingent right of dower released in mortgage to secure husband's debt.—The principle just stated is not applicable to the wife's *contingent right of dower*. The wife who unites with her husband in a mortgage or other incumbrance on his real estate, thereby releasing her dower right, is *not treated as a surety,* in the absence of an express prior or contemporaneous promise of exoneration on his part—on the same principle that when she permits him to use her money she is not treated as a creditor, in absence of express contract.[31] Though, somewhat inconsistently, as we shall hereafter see, if she discharges an incumbrance on his estate, in which incumbrance she has released her contingent right of dower, she is entitled to subrogation.[32]

Wife as surety, continued—release of dower under express contract.—But as her contingent right of dower is a

[29] See Richmond Railway, etc., Co. *v.* Bowles, 92 Va. 738, 744; note to Mich. Trust Co. *v.* Chapin (Mich.), 58 Am. St. Rep. 490, 492-499, collating the authorities.

[30] Filler *v.* Tyler, 91 Va. 458; Flynn *v.* Jackson, 93 Va. 341; Bank of Albion *v.* Burns, 46 N. Y. 170; Huntington *v.* Huntington, 2 L. C. E. 1922, notes; 1 Bishop on Married Women, 604.

[31] See 8 Va. Law Reg. 165, 170, 666; Land *v.* Shipp, 100 Va. 337; Hoy *v.* Varner, 100 Va. 600.

[32] Gatewood *v.* Gatewood, 75 Va. 411; Lamb *v.* Montague, 112 Mass. 352.

property right, paramount to the claims of her husband's creditors, he may make a valid settlement upon her *in consideration of a release of her contingent right of dower* in his lands— as on a sale or mortgage thereof—provided the settlement be made *contemporaneously* with the release, or in pursuance of a *prior or contemporaneous promise* on his part, and provided further that the settlement is not grossly in excess of the value of the right released.[33]

Page 292, § 539. **Relative rights of creditors and family.**—The doctrine of the Text is unsound, as we have already abundantly indicated, and as will further appear in notes to follow.

Page 292, § 539. **Life insurance—payment of premiums by insolvent debtor.**—The doctrine of the Text that an insolvent debtor may insure his life for the benefit of his wife or family, and pay the premiums out of his earnings or otherwise, without giving just cause of complaint to his existing creditors, while sustained by respectable authority, seems to have its foundation rather in judicial sympathy for the wife and children than in any sound principle of equity. The payment of such premiums, while insolvent, is manifestly a *voluntary transfer of property without providing for existing debts*—and seems clearly within the terms of the statute. We have already seen that if the insolvent settles *houses and lands,* or *money,* or *securities,* directly upon his wife, when not bound thereto by antenuptial contract, equity will let in existing creditors upon the property. No difference is perceived where he settles an *insurance policy* upon her, and devotes money which should go to his creditors to the payment of premiums on the policy.

The same.—In Virginia it is settled that under our statute of voluntary conveyances, premiums thus paid on a policy of insurance for the benefit of another, are within the purview of the statute; and that existing creditors of the insured may subject the proceeds of the policy after death of the insured, *to the extent of the premiums so diverted* and within the period per-

[33] Lewis *v.* Caperton, 8 Gratt. 166; Runkle *v.* Runkle, 98 Va. 663.

mitted by the statute of limitations (five years in Virginia, in the case of a purely voluntary conveyance.[34])

In Lehman *v.* Gunn [35]—a case where the *first* premium was paid (or assumed) while the insured was insolvent—it was held that the existing creditors were entitled to subject the *entire proceeds* of the policy to the payment of their debts. It will be observed that in Alabama there is a statute of '*voluntary*' conveyances, as in Virginia.[36]

Fraud on creditors, continued — permanent improvements on another's land by insolvent debtor.—Where such improvements are made voluntarily by the expenditure of *money* or otherwise out of the *assets* of the insolvent debtor, and, of course, with the knowledge and acquiescence of the owner of the property thus improved, probably no court of equity would deny the right of an existing creditor of the improver to subject the property improved, to the *extent of the value thus bestowed*—whether such expenditure be made for a wife or for a stranger. Such a transaction is plainly a gift at the expense of creditors.

But where such improvements are made by the gift merely of the *personal services* of the debtor, the courts are not fully agreed as to the right of creditors to claim the value of services thus gratuitously bestowed.[37]

On principle, however, there is no difference between the two cases. The courts will not compel a debtor to work, but *if he*

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[34] Stigler *v.* Stigler, 77 Va. 163.

[35] (Ala.), 51 L. R. A. 112, 81 Am. St. Rep. 159.

[36] See also, Roberts *v.* Winton (Tenn.), 41 L. R. A. 275. The authorities are collected in 20 Cyc. 361-366.

The decision of the Supreme Court of the United States in Central Nat. Bank *v.* Hume, 128 U. S. 195, in which it was held that an insolvent debtor might devote a reasonable amount of his earnings toward the maintenance of a life insurance policy in favor of his family, has been justly criticized, and was expressly disapproved in Merchants, etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272. See article by Prof. Williston, in 25 Am. Law Rev. 185; Pullis *v.* Robison, 73 Mo. 201, 39 Am. Rep. 497; Pence *v.* Makepeace, 65 Ind. 345; Vance on Insurance, 408. The case in question arose under the statute of the District of Columbia, where the statute of voluntary conveyances is not in force.

[37] See 20 Cyc. 358-361, 396; Abbey *v.* Deyo, 44 N. Y. 344; Osborne *v.* Wilkes (N. C.), 13 S. E. 285; Nance *v.* Nance, 84 Ala. 375, 5 Am. St. Rep. 378.

does work, his existing creditors should have the right to the proceeds of his labor—save in so far as statutes may afford him exemption. The law requires him to be 'just before he is generous.' Especially is this the sound rule in those states where statutes of voluntary conveyances exist, as in Virginia. Many of the cases where relief was denied, were attempts to subject the property *at law;* others required proof of *fraudulent* intent, either because the complaining creditors became creditors after the services were rendered, or because merely voluntary conveyances were not within the condemnation of the local statute.[38]

Further of fraudulent conveyances—failure of grantee to have conveyance recorded.—Statutory requirements, existing in all the States, with reference to registry of conveyances, incumbrances, executory contracts of sale, etc. (particularly where the subject-matter of the transaction is real property), afford additional protection to creditors of the grantor and *bona fide* purchasers from him.

These statutes are based on the wise public policy of requiring all transactions affecting the title to real property (and, to a more limited extent, personal property also), to appear on record in some designated public office, in the county or city in which the property is situated, for the information of possible creditors and purchasers.

As a rule, non-registry does not affect the transaction as *between the parties,* but only as to *bona fide purchasers* for value from, and creditors of, the grantor.

Registry, continued.—The usual provision is that all conveyances of real property, and all voluntary liens created thereon (as by mortgage, deed of trust, mechanic's lien, etc.) and all executory contracts for the sale thereof, shall be invalid as to *creditors* of the grantor (prior or subsequent, and whether with

[38] The following authorities may be consulted with profit: Penn *v.* Whitehead, 12 Gratt. 74, *s. c.* 17 Gratt. 503 (value of husband's services, in conducting a mercantile business, held subject to creditors' claims); Catlett *v.* Alsop, 99 Va. 680, 7 Va. Law Reg. 625, and note; National Valley Bank *v.* Hancock, 100 Va. 101, 7 Va. Law Reg. 744, and note; Burt *v.* Timmons, 29 W. Va. 441, 6 Am. St. Rep. 664; Boggess *v.* Richards, 39 W. Va. 567, 45 Am. St. Rep. 938; Glidden *v.* Taylor, 16 Ohio St. 509, 91 Am. Dec. 98; Shackelford *v.* Collier, 6 Bush 156; editorial note, 3 Va. Law Reg. 430; extensive discussion 43 Cent. L. J. 444.

or without notice) and as to subsequent *bona fide purchasers for value* from the grantor, "until and except from the time such instruments are duly admitted to record" in some designated office—in Virginia, the clerk's office of the county or corporation where the property is situated.[39]

Sundry transactions affecting the title to personal property are likewise required to be registered, under like penalty.

Registry, continued—non-registry as fraud.—Inasmuch as the invalidity of the unregistered instrument arises from the express provision of the statute, regardless of the good faith of the grantee, it is usually immaterial to inquire, except for purposes of classification, whether such failure to record should be treated as *fraudulent or not.* The better view is, that, in the absence of actual intent to defraud, the unrecorded instrument is not invalid *because fraudulent,* but merely as the *consequence of the statutory declaration.*

The last proposition becomes important in Virginia, however, in consideration of the statute already noticed permitting a *general* creditor, even before his debt has matured, to assail fraudulent and voluntary conveyances by the debtor. Anterior to the Code of 1919, it was settled by the decisions in Virginia that the validity of an *unregistered* conveyance could not be assailed *merely on the ground of non-registry,* by any other creditor than a *lien* creditor—as by judgment, attachment, etc.[40]

By the recent revision, the right to assail an unregistered conveyance is extended to the *general* creditor as well—but the ground of invalidity of the unrecorded instrument remains as before, namely, *non-registry* under the registry statutes,[41] and not *fraud* under the statute of fraudulent conveyances.[42]

The same—non-registry as part of scheme to defraud.

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[39] See chapter 210 of the Virginia Code, for details. The general subject of registry will be treated in detail in connection with the student's study of the law of Real Property.

[40] Dulany *v.* Willis, 95 Va. 606, 64 Am. St. Rep. 815; 2 Minor, Real Prop. 1404.

[41] Va. Code 1919, § 5194.

[42] Va. Code 1919, §§ 5184-5186. It would seem, therefore, that while a general creditor may assail a conveyance (recorded or not), by his debtor, as *fraudulent* under §§ 5184-5186, even *before his debt is due;* but that if he proceeds under § 5194, because of *non-registry,* he may do so *only after the debt is due and payable.*

—It seems clear, however, that where registry of a conveyance is *intentionally omitted, as a part of a scheme to defraud creditors of the grantor,* by collusion between grantor and grantee—thus giving an undeserved credit to the grantor by creating the false impression of continued ownership in him—such non-registry would be held *actually fraudulent;* and thus the conveyance might be assailed in Virginia by the grantor's general creditors, under Virginia Code, §§ 5184-5186, whether before or after maturity of the debt.[43]

Fraud on creditors, continued—sale of merchandise in bulk.—The sale by small merchants of their entire stock of goods in bulk, and usually at a large discount, in order quickly to convert their assets into cash for the purpose of concealing them from their creditors, having become a quite common evil, recent legislation has been enacted in many of the States to safeguard the rights of creditors from such frauds.

These statutes differ in details, but in substance their provisions are largely similar. Under these provisions, such sales in bulk are prohibited until and unless certain prescribed notice is served on the creditors, certain inventories and appraisals made, etc.[44]

Page 292, § 541. **What creditors may assail fraudulent and voluntary conveyances—resume.**—To recapitulate what has already been pointed out in the foregoing chapter, as to *what creditors* may assail fraudulent and voluntary conveyances:

1. *Conveyance actually fraudulent.*—Here the assailing creditor need not have been such at the time of the fraudulent transfer—whether under 13 Elizabeth, and similar statutes, or under the Virginia statute. So that both *existing* and *subsequent* creditors have a *locus standi* in equity to have the transaction set aside—but, in any case, not until the debt of the assailing credi-

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[43] See 20 Cyc. 552-553.

[44] See Va. Code 1919, § 5187; Trimble *v.* Covington Grocery Co., 112 Va. 829. Such statutes have been assailed as unwarranted encroachments upon the liberty of the citizen, but their constitutionality has very generally been upheld. Lemieux *v.* Young, 211 U. S. 489; monographic notes 2 L. R. A. (N. S.) 388, and 20 L. R. A. (N. S.) 160; Kidd Dater & Price Co. *v.* Mussellman G. Co., 217 U. S. 461; 16 Va. Law Reg. 218.

tor *has been converted into an in rem claim, by judgment, attachment or otherwise,* unless, of course, as in Virginia, the statute specifically gives this right to the *general* creditors.

2. *Voluntary conveyances made in good faith—(a) under* 13 *Elizabeth.*—A "voluntary" conveyance in this connection, is not necessarily one wholly without value, but one made for a manifestly inadequate consideration. In howsoever good faith such a gift be made, it is invalid as to *existing* creditors of the grantor, unless he *retains enough to satisfy all existing indebtedness.* If he does so retain assets sufficient to discharge all existing liabilities, with no reasonable improbability that they will be so applied, then no one is injured, and (under 13 Elizabeth and similar statutes) the gift is valid. If he does not retain sufficient estate for the purpose, then it is clear that *existing* creditors are injured, and may complain accordingly—and equally clear that *subsequent* creditors have no ground of complaint, since when they extended the credit the gift had already been made. *Existing* creditors, therefore, may alone complain of a voluntary transfer of a debtor's property, made in good faith. If not made in good faith, of course, the transaction is fraudulent, and in category (1) above.

But here, again, in absence of special statute, the assailing creditor must first convert his claim into an *in rem* claim, by judgment or otherwise.

3. *Under supplemental statutes of "voluntary" conveyances.*—In Virginia, and a few other states, as shown, the statute of 13 Elizabeth has been supplemented by what is known as the statute of *voluntary conveyances.* These statutes refer only to *voluntary conveyances made in good faith.* Although in fact voluntary, if infected with *actual fraud,* the transaction is governed by the statute of *fraudulent conveyances,* mentioned in category (1) above, and subject to be assailed by *subsequent* as well as *existing* creditors.[45]

These statutes, however, go a bow-shot beyond 13 Elizabeth, by declaring, in substance, that all gifts and conveyances made without consideration deemed valuable in law, (construed by the courts to mean not merely 'valuable' but 'fairly adequate') shall

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[45] Consolidated, etc., Co. *v.* Germania Bank, 121 Va. 331.

be voidable as to all existing (but not subsquent) creditors of the donor or grantor, *regardless of the value of the estate retained,* or of any actual injury to existing creditors in consequence of the gift.[46]

We now pass from the special topic of Fraud on Creditors, and return to the general topic of Fraud as between the Parties.

CHAPTER XX.

FRAUD ON THE CONFIDENTIAL RELATION.

[*Memorandum*: Alter Text chapter-title to correspond.]

Pages 297-301, §§ 552-562. (These sections are largely repetition of principles already treated in previous chapters—especially in connection with constructive trusts and fraud.)

Pages 297-298, §§ 552 et seq. **Fiduciaries purchasing the subject-matter of the trust.**—The Text may be followed here. The question in all such cases is not whether in that *particular case* the transaction resulted in detriment to the beneficiary of the trust, or to the principal of the disloyal agent, or to the ward of the guardian, or to the attorney's client, but whether the countenancing of such dealings would not make it possible for those occupying fiduciary positions, *in future transactions* to betray their trusts.

Accordingly, the circumstance that at a fair sale of the trust property, the fiduciary, acting in good faith and for what he supposed the best interests of the beneficiaries, purchased the same at the *highest price obtainable,* will not eliminate the vice from the transaction, nor prevent the beneficiary from avoiding the sale.[1]

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[46] Va. Code 1919, § 5185. The authorities have already been cited *supra*.

[1] Smith *v.* Miller, 98 Va. 535; Jacobson *v.* Smith, 41 Sup. Ct. 200 (1921)—an especially interesting illustration of the rule.

Page 301, § 563. **Dealings between attorney and client —fees.**—The question of transfers of property from client to attorney is discussed in the Text. We mean here briefly to notice the question of contracts for *fees* between the two. The correct rule would seem to be this: *Before the relation of attorney and client is formed,* the parties deal with each other at arm's length and as strangers; hence, they may make any contract as to fees that they may agree upon, in the absence of imposition or fraud. But *as soon as the relation is formed,* it at once becomes confidential; and a court of equity will exercise the same supervision over contracts for fees made after the relation is formed, that it exercises with respect to other transactions between counsel and client. Hence if such contract savors of unfairness, or of oppression, the court will set it aside, allowing the attorney to recover or retain only what is reasonable under the circumstances.[2]

Page 306, § 571d. **Relief against fraudulent judgment.**—To the authorities cited here, add: Adams *v.* Hubbard, 25 Gratt. 132; Wynne *v.* Newman, 75 Va. 84; Thomas *v.* Jones, 98 Va. 323.

Page 308. (Footnote) **Fraudulent wills.**—Attention is called to the doctrine stated in the footnote, that a court of equity has no inherent jurisdiction to set aside wills on the ground of fraud.

This arises from the circumstance that originally in England, the ecclesiastical courts had jurisdiction of all matters of probate and administration—a jurisdiction exercised generally in America by special courts of probate and administration, or by the common law courts.[2a]

In Virginia, by statute, a will which has been admitted to probate, *ex parte,* may, within a limited time, be assailed by bill in equity, whether on the ground of fraud, or other ground which would invalidate it.[3]

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[2] Thomas *v.* Turner, 87 Va. 1; Cullop *v.* Leonard, 97 Va. 256; Bruce *v.* Bibb (Va.), 105 S. E. 570; Story's Eq., 310. The rule here stated, however, seems by no means universal in America. Mr. Pomeroy's summary of the situation indicates that such transactions are rarely impeached in the absence of undue influence or fraud on the part of the attorney. 2 Pomeroy's Eq. Jurisp. 960.

[2a] Queensburg *v.* Vial, 123 Va. 219.

[3] Va. Code 1919, § 5259.

Page 309, § 574 (2). **Sealed instruments—fraud in the inducement or consideration.**—The rule here stated, that no fraud in the inducement or failure of consideration, may be set up *at law* by the defendant obligor in a sealed instrument, and that the remedy of the defendant is in equity, has very generally been altered by statute in the American states—statutes which permit equitable defenses to be pleaded at law.[4]

CHAPTER XXI.

This chapter has been carried over to the end of the volume.

CHAPTER XXII.

CONTRIBUTION AND EXONERATION—SUBROGATION.

Page 321. **Meaning of terms—contribution and exoneration.**—The equities of *"contribution"* and *"exoneration"* are practically the same, save that the one applies as among *co-sureties,* and the other between the *surety and his principal.* When one surety pays more than his share of the debt, he calls upon his co-surety for *contribution*—that is, he demands that the co-surety shall *help* to bear the common burden; in short, "contribute" his proper share of the common debt. On the other hand, where the surety who has paid the debt, in whole or in part, calls upon his *principal* for relief, he does not ask his principal to "contribute" to his relief, but to *bear the whole burden,* and to "exonerate" the surety from it.

Page 324, § 607. **Subrogation.**—Whenever one person is compelled to pay a debt or discharge an obligation *for which he is only secondarily liable, in person or in property,* and hence has *recourse over against the person or the property primarily liable,* for exoneration or contribution, a court of equity will subrogate the person thus secondarily liable to the position of the *creditor*

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[4] See Va. Code 1919, § 6145.

whom he has satisfied, as to every *lien, preference or other special advantage* possessed by the latter at the time of such payment.

The student will observe, therefore, that subrogation is not so much an equity in itself, as it is a remedy for working out the benefit of the antecedent equity of exoneration or contribution.

For example, as we have just seen, where a surety pays his principal's debt, he has the right to call upon the latter for exoneration. Here the real equity that the surety has is to be *exonerated.* Now if the creditor have in his possession any *securities of the principal,* or *any lien on the principal's property,* or occupy any *special position of vantage,* the surety who has satisfied the creditor is entitled, in order to secure the exoneration which the principal owes him, to be *subrogated* to such securities or other lien or advantage possessed by the creditor. Or, as we may otherwise express it, it is through the medium of *subrogation* that the rights of *contribution* and *exoneration* are *secured and enforced*—just as a debt is the substantial equity of a creditor, and the mortgage securing it the mere means of realizing the debt.[1]

The same—does not rest in contract—a beneficence of equity.—The doctrine of subrogation is one of the most beneficent in the entire range of equity jurisprudence. It is not a technical principle, nor does it rest in contract, express or implied. It is one of the benevolences of equity, created and enforced in the interest of justice. In no State has the principle been fostered with more zeal or enforced with more wisdom and liberality than in Virginia. The fine saying of Judge Carr, in Enders *v.* Brune,[1a] has been accepted by the Virginia courts, and by the American courts generally, as expressing the spirit which should guide them in enforcing this right, namely: "It has nothing, of form, nothing of technicality, about it; and he who in administering it would stick in the letter, forgets the end of its creation and perverts the spirit that gave it birth. It is the creature of equity, and real essential justice is its object."

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[1] Powell *v.* White, 11 Leigh 309; Pace *v.* Pace, 95 Va. 792; note 6 Va. Law Reg. 253.

[1a] 4 Rand 447.

Mr. Sheldon[1b] in his classic treatise thus explains the doctrine: "It is a legal fiction by force of which an obligation extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies and securities of another. The party who is subrogated is regarded as entitled to the same rights, and, indeed, as constituting *one and the same person, with the creditor whom he succeeds.*"[1c]

The same—in cases of mistake or fraud.—Not only is the equity of subrogation recognized and enforced in the case of sureties, but in many other cases where to refuse it would result in the *unjust enrichment* of one person at the expense of another. Thus, where one pays off an incumbrance by *mistake,* or induced by *fraud,* or where the money of a purchaser at a *void judicial sale* is used to pay off liens on the property sold, a court of equity will subrogate the person paying the money to the rights of the creditor or creditors whose claims he has satisfied.[2]

I. *Subrogation of Surety.*

Discharge of lien at law—kept alive in equity.—The principles to follow will be more readily understood by the student when he understands that, at law, payment of a debt, secured or unsecured, *by any party to the obligation, principal or surety, completely discharges the debt, and all liens securing it.* The only leg upon which the paying surety stands is his right of action (usually *assumpsit*) against the principal or co-surety, on an *implied contract* by the principal to exonerate him, or by the co-surety to contribute to his relief. Even where the debt is a *bond* debt, the paying surety's claim against the principal—being an

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[1b] Sheldon on Subrogation 2.

[1c] The Virginia and West Virginia authorities are collected in Janney *v.* Stephens, 2 P. & H. 11 (Va. Rep. Ann.). See editorial note to Sands *v.* Durham, 6 Va. Law Reg. 253.

[2] Coudert *v.* Coudert, 43 N. J. Eq. 407; Butler *v.* Rice, 103 L. T. R. 94; Bolman *v.* Lohman, 74 Ala. 507; Zinkeison *v.* Lewis (Kan.), 66 Pac. 644. So where the insurer, under a fire policy issued to a mortgagee, makes good the loss to the mortgagee, the former is subrogated to the mortgagee's rights under the mortgage.

implied contract only—is not as on a sealed instrument but on an implied assumpsit.[3]

We have just seen, however, that where a case for subrogation is presented, equity keeps both the original obligation and any lien ("collateral") securing it, *alive* for the benefit of the surety.

Page 325. § 609. **Subrogation where there is no lien or other advantage.**—Where the original claim paid by the surety is not a *lien* on any property of the principal, and the creditor occupies with respect to the claim no *special coign of advantage,* equity will not subrogate—or, otherwise expressed, *equity will not place the surety in the shoes of the creditor, when the surety's position in his own shoes is as advantageous as if he were in the creditor's shoes.*

Thus, where a surety pays an ordinary, unsecured claim, like a bill or note, there is no special advantage to him in being subrogated to the creditor's place, and his remedy is ordinarily at law in *assumpsit* against his principal or his co-surety, on the implied contract to exonerate or contribute.

But if there be collateral security, or other lien, or *other advantage to be gained by the subrogation*—in short, if the creditor occupies a special vantage ground—then there may be subrogation.

Thus, if the debt paid by the surety be a judgment or execution debt—or one secured by mortgage, pledge or other lien—or if it be payable in gold with paper money at a discount—or if it be a preferential debt (as, for instance, due the United States, in administration proceedings)—then equity places the surety who has satisfied the creditor in the latter's shoes, with all the advantages that the creditor would have possessed, had the creditor himself, instead of the surety, been prosecuting the claim against the principal.

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[3] Thus in Grizzle *v.* Fletcher (Va.), 105 S. E. 457, it was held that execution on a judgment at law against principal and surety, could not be kept alive at law for the benefit of the surety who discharged the execution and took an assignment thereof from the creditor.

[4] See Henningsen *v.* U. S. Fidelity and G. Co., 208 U. S. 403; Pace *v.* Pace, 95 Va. 792; Sands *v.* Durham, 99 Va. 263, 86 Am. St. Rep. 884; Acer *v.* Hotchkiss, 97 N. Y. 395.

Page 325, § 609. **Is surety subrogated to collateral security only?**—The rule in England, until altered by statute, as noted in the Text, was that where there was no *collateral security* for the *primary* obligation, there was no subrogation for the surety—the latter being subrogated to *secondary* or *collateral security* only.

Thus, where a bond was secured by a mortage, payment by the surety extinguished the bond (the primary obligation), but the surety was subrogated to the lien of the collateral, namely the mortgage; but where the bond was, for example, a preferential claim, or had been merged into a judgment—in both of which cases there is no collateral security—payment by the surety *extinguished* the entire claim, and no subrogation was permitted.

Comparatively few of the American courts have followed the narrow English rule, and consequently in most of the States subrogation in nowise depends on the existence of *collateral* security—but, as shown (*supra*), is enforced for the surety's benefit wherever the creditor's position is a more advantageous one than that of the surety.[5]

Page 323, § 605. **Subrogation as between partners and other co-contractors.**—Since each partner or other co-contractor is *principal* for his own part of the debt, and *surety* for his fellow, should he pay more than his portion his right of *contribution* is clear; and his right to *subrogation*, to enforce this contribution, is equally clear.[6]

Page 325, § 608. **Suretyship—(1) in persona.**—The discussion of the surety's rights in this chapter will be more readily understood, if the student comprehends the different ways in which one may become a surety. The simplest way is where one *personally* engages as surety for another to pay a debt, or perform some other obligation. Here, of course, the surety is bound *personally*. This we may term suretyship *in persona*.

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[5] 3 Pomeroy's Eq. 1419, n.; Powell *v.* White, 11 Leigh 309; Sands *v.* Durham, 99 Va. 263.

[6] Some doubt has been cast upon this proposition by an erroneous statement to the contrary in Bispham's Equity, 337, followed by the Virginia court in Sands *v.* Durham, 96 Va. 392, reported in 6 Va. Law Reg. 248, with an extensive annotation criticising the decision. On rehearing, the error was corrected and the true doctrine announced. See the opinion in the re-hearing in 99 Va. 263.

Another suretyship *in persona* arises, where two persons are originally bound as principal for a common debt, and one of them agrees with the other, for valuable consideration, *to assume the debt* and relieve the latter from the obligation. Here, although originally the parties were both principals, the *retiring party becomes a surety* for the other, who thus becomes, as between the two, sole principal—and the creditor, though not bound by this arrangement unless a party to it, must, if he knows of this change in their relations, respect the surety's rights.

The same situation is presented where one person alone is bound for a debt or other obligation, and later, for a valuable consideration, another person assumes payment—agreeing, expressly or impliedly to indemnify the former against the obligation. Thus where A sells out his business to B, and the latter assumes all of A's indebtedness in connection with the business. Here A (originally principal) becomes surety and B principal. Of course, if the creditor consents to accept B as his debtor in A's stead, there is a novation and A is discharged.

The same—(2) in re.—Another sort of suretyship arises where the surety is not bound in *person,* but only in his *property.* For instance, where one or two cotenants unites with the other in a mortgage on the joint estate, to secure a personal obligation of his fellow—himself assuming no personal liability; or where one purchases an estate subject to a mortgage, or other incumbrance, against which his vendor, *covenants, or is otherwise bound, to indemnify him*—or where he simply purchases the equity of redemption in a mortgaged estate. In the first of these cases the *debtor co-tenant,* and in the second the vendor, is the *principal obligor,* and personally bound, while there is no personal liability on the co-tenant—who merely lent his property as security for his fellow—nor, in the second case, on the purchaser, who did not *personally assume* the incumbrance; but, as to both, the debts are charges on their *property* only. Their position is not that of true suretyship, but of suretyship *sub modo,* yet with many of the rights of suretyship. This we may term suretyship *in re.*

Suretyship in re, continued.—If, for example, in the case of the co-tenant, before stated, the surety *in re* should discharge the lien in order to prevent foreclosure, he would be entitled to be subrogated to the mortgagee's rights under the mortgage.

So where a purchaser under a second mortgage paid off the first mortgage (for which he was not personally bound) it was held that he was entitled (as against the mortgagor's widow, who had united in the first, but not in the second mortgage) to be subrogated to the rights of the creditor under the first mortgage, and to that extent to defeat the widow's claim to dower.[7]

Subrogation, continued—purchaser of equity of redemption—(1) assuming payment of mortgage.—Where one purchases an estate under mortgage, and (expressly or impliedly) *assumes payment of the mortgage,* he becomes, as between himself and the mortgagor, the principal debtor, while the mortgagor (originally principal debtor) becomes surety, with all of a surety's rights.

For example, extension of time, for valuable consideration, by the mortgagee to the purchaser, or other change in the terms of the contract, *with knowledge of the situation,* and without consent of the mortgagor will release the latter from further liability. Or should the mortgagor be sued on his personal covenant and be compelled to pay the debt, he is entitled to subrogation to the lien of the mortgage.[8]

The same—(2) not assuming payment of the mortgage.—Where the purchaser of the equity of redemption does *not personally assume payment* of the incumbrance (expressly or impliedly)[9] but simply purchases the equity, for example, under a second mortgage, or from the owner of the equity, with no warranty by the vendor against the incumbrance, and hence

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[7] Land *v.* Shipp, 100 Va. 337; 8 Va. Law Reg. 170, and note.

[8] Halsey *v.* Reed, 9 Paige (N. Y.) 446; Calvo *v.* Davies, 73 N. Y. 211; George *v.* Andrews, 60 Md. 26, 45 Am. Rep. 706; Pratt *v.* Conway, 148 Mo. 291, 71 Am. St. Rep. 602; Miller *v.* Kennedy (S. Dak.), 81 N. W. 906; Union Stove, etc., Works *v.* Caswell (Kans.), 16 L. R. A. 85; Flanning *v.* Murphy (Wis.), 4 L. R. A. (N. S.) 666, and monographic note, where a few cases *contra* are cited; note 5 L. R. A. (N. S.) 276; note 22 L. R. A. (N. S.) 492; 8 Va. Law Reg. 844.

As to the liability of the purchaser in such case, *directly to the creditor* (and hence subrogation of the *creditor* to his debtor's rights), see note 75 Am. St. Rep. 178; Thacker *v.* Hubard, 122 Va. 379.

[9] See 3 Pomeroy's Eq. 1225; Litchfield *v.* Preston, 98 Va. 230, 37 S. E. 6.

subject to the prior mortgage (the *amount of which is considered in the fixing of the purchase price*)—the situation becomes slightly more complicated.

Here it is clear, not only in favor of the *mortgagee,* but of the *mortgagor* as well, that the entire mortgaged estate stands as security for the debt, and that the vendor-mortgagor may look to this security as indemnity against any personal liability on his covenant to pay. The purchaser of the equity is not personally liable, but his property is bound. The property, however, is not *surety* but *principal.*[10]

The situation now resolves itself into this: The original mortgagor has become surety for the debt, and the *property* has become the *principal.* This surety-mortgagor, in case he is compelled to pay, has no *personal* recourse on his vendee (since, *ex hypothese,* the latter has not personally assumed payment) but he is entitled to *subrogation* against the mortgaged *estate.* This right of subrogation, the creditor (with knowledge of the situation) must not impair by any dealings with the security without the surety's consent, under the penalty of discharging the surety (mortgagor) *to the extent of the value of the security.*[11]

And, *e converso,* should the *vendee* pay off the mortgage, he would be subrogated to the mortgagee's rights, if necessary to protect him against intervening incumbrances—since he is a surety *in re.*

The same—Pace v. Pace.—The principle of subrogation is strikingly illustrated by the case of Pace *v.* Pace.[12] The numerous references to the same case in the same volume of the Virginia Law Register indicate the stir that the decision made among the lawyers of the State. The facts of this case were briefly these:

A and B were sureties for P on a note for $16,000. P. became utterly insolvent, and the entire burden of the note rested upon the sureties. Of course, as between themselves each owed $8,000, but as to the *creditor,* each was bound to him for the

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[10] 5 L. R. A. (N. S.) 276, n.

[11] Murray *v.* Marshall, 94 N. Y. 611; Bunnell *v.* Carter (Utah), 46 Pac. 755. Compare Land *v.* Shipp, 100 Va. 337, 8 Va. Law Reg. 170 and note; Lynchburg, etc., Co. *v.* Fellers, 96 Va. 337.

[12] 95 Va. 792, 4 Va. Law Reg, 171; Id., 257, 298, 502, 489, 855.

whole $16,000. B then died insolvent, but able to pay his creditors, say, fifty cents on the dollar. A, being a man of means, and knowing that he was bound to the creditor for the *whole amount,* paid it in full, and hence had a claim against B's estate for the latter's one half, $8,000.

A now observed that if he went, *in his own right,* into the proceedings in which B's estate was being administered, he would prove against the decedent's estate a claim of $8,000, and would receive a 50 per cent. dividend, or $4,000—the result of which would have been that A would have paid $12,000 of the debt, and B's estate $4,000. If, however, A, instead of paying the debt, had refused to pay, thus leaving the *creditor himself* to come into the administration proceedings, the creditor would have proved against B's estate a debt, not of $8,000, but of $16,000—a fifty *per cent.* dividend upon which would have been $8,000—thus making B's estate pay one-half of the debt, and leaving A bound for the other one-half.

Now, if A could come into the administration proceedings, not in his own right, or in his own shoes, but in the *right and in the shoes of the creditor*—in other words, if he could be *subrogated to this special advantage* which his creditor possessed—he would compel the decedent's estate to pay its full half of the debt. He therefore filed his bill asking to be thus subrogated, and the court held, in a convincing opinion, that he was entitled to the right of subrogation.

Pace v. Pace, continued.—The references above contain communications from sundry lawyers discussing the decision *pro* and *con.* The decision seems eminently sound. Any other ruling would have penalized A for coming bravely up as an honest man and paying the whole debt for which he was bound, instead of delaying the creditor by breaking his promise to pay, and *manœuvering for position, so as to force the creditor into the administration proceedings.*

The decision becomes the plainer if we suppose this entire debt to have been a *preferential* one, due, for example, to the United States government. Clearly it would have been immaterial in the result, whether the *government* came into the administration proceedings as creditor, or whether *A, the surety* who had satisfied the government, had come into the proceedings. In the latter case, the surety would have been subrogated to the rights of the government, the debt would have been held to be a preferential one, and the surety would have received payment in full, before any inferior creditor would have received any dividend whatsoever.

Partially secured creditor—for how much may he prove in administration proceedings?—A question quite similar to that involved in Pace *v.* Pace[23] arises where a creditor, already *partially* secured (e. g. by pledge, mortgage or other lien), comes into proceedings under which the estate of his insolvent debtor is to be distributed among creditors—for instance administration proceedings, or under a general deed of assignment for the equal benefit of all creditors.

The question is, must he *first exhaust the collateral* or other security, or, what is tantamount thereto, credit the value thereof on his debt, and prove for, and receive dividends only on, the *residue*—or may he prove for the whole of his debt, and *receive dividends on the full amount,* but not to exceed the amount due him?

The better authorities adopt the latter view, and permit the partially secured creditor to prove for the *full amount* of his debt, regardless of the value of his security—but always with the qualification that he shall in no case actually receive more than the amount of his debt.

The same.—This principle is well illustrated by the case of Merrill *v.* National Bank.[14] In that case, the plaintiff, creditor of an insolvent national bank, held certain collaterals belonging to the latter, partially securing the debt. In the process of liquidating the affairs of the debtor bank, plaintiff offered to prove, and claimed dividends on, the full amount of his debt, without exhausting or crediting the value of the collaterals. The receiver denied this right and required the plaintiff first to exhaust the collaterals and credit the proceeds on the debt; and allowed dividends only on the residue.

This ruling was reversed by the United States Circuit Court,—

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[13] *Supra.*
[14] 173 U. S. 131.

a reversal which was sustained on appeal, both by the Circuit Court of Appeals and the Supreme Court of the United States.[15]

Subrogation, continued—bond debts—statute of limitations.—When the surety pays a debt of his principal, which is represented by an instrument *under seal,* question arises whether his claim against the principal is in *simple contract,* or whether he is a *bond creditor.* The courts are divided on the subject. Logically, and in accordance with principles heretofore stated, he ought to be held to be a bond creditor, since there is some advantage in occupying that position—especially in connection with the statute of limitations, and the presumption of consideration.

The Virginia court has held, however, that if *there be no lien,* to which the surety may be subrogated, payment by the surety of a bond debt, in the *lifetime* of the principal, makes the surety a *simple contract creditor*—and not only is he not a bond creditor but his claim is regarded as being one *not in writing* under the statute of limitations, and hence barred in three years, the period applicable (in Virginia) to oral contracts.[16]

Bond debts, continued.—If, however, the payment be made *after the principal's death,* then, since there is a lien (all of a decedent's debts becoming liens on his estate immediately upon his death) the surety is subrogated to the creditor's shoes and is treated as a bond creditor.

In Comer *v.* Comer[17] the surety on a guardian's bond paid a liability for his principal in the latter's lifetime. After the principal's death, the surety claimed that since the debt of the guardian to the ward was a fiduciary one, and hence, by the statute, a *preferential one* in the administration of the decedent's estate, he was entitled to be subrogated to the ward's rights, and

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[15] See 2 Va. Law Reg. 120; People *v.* Remington, 121 N. Y. 328; Green *v.* Jackson (R. I.), 30 Atl. 963; Citizens Bank *v.* Hendrick (Tenn.), 36 Am. St. Rep. 96, and note; n. 23 Am. St. Rep. 435. As shown in the authorities cited, there is quite a respectable dissent from the doctrine stated, but it seems the sounder view. The rule seems to be otherwise in proceedings in bankruptcy.

[16] Comer *v.* Comer, 29 Gratt. 280; Tate *v.* Winfrey, 99 Va. 255; 6 Va. Law Reg. 337, and note. See Faires *v.* Cockrill (Tex.), 28 L. R. A. 528—an exceptionally fine opinion.

[17] *Supra.*

therefore was a preferred creditor. But this claim was rejected by the court.

The ruling was doubtless right. The debt was not a preferred debt *at the time it was paid,* since the principal was then alive.

From this, the sound principle would seem to follow that if there be no right of subrogation *at the time the surety pays,* the right will not arise by reason of some subsequently occurring event which would render subrogation of advantage to the surety, In short, the question of the surety's right to subrogation is to be determined *by the situation as it existed at the time of payment.*

Safest course for surety who pays|.—The effect of subrogation, as we have heretofore discussed it, is practically to make the surety an *assignee* of the debt which he has satisfied to the creditor. If the surety have proper legal advice, instead of merely taking a *receipt* for the payment from the creditor, he would take an *assignment* of the debt (without recourse).

Such assignmnent will doubtless avail him little in a court of law, since at law one may not purchase his own debt; and payment, even by the surety, discharges the obligation at law, in spite of the attempted assignment.[18] A written assignment, however, while probably of no special potency as an equity, gives the assignee-surety quite satisfactory evidence in support of his application for subrogation in equity.

Subrogation never enforced to creditor's injury.—The right of subrogation, being a creature of equity, is never enforced *to the injury of prior or superior equities.* Hence, it is a fundamental rule that it will not be enforced against the creditor himself *until he has received the whole of his debt*—that is, the debt for which the lien or collateral was bound at the time the surety became such, but no other. In other words, the surety will not be put into the creditor's shoes *until the creditor has voluntarily stepped out of them.*

This means that whatever be the value of the security held

[18] See Grizzle *v.* Fletcher (Va.), 105 S. E. 457—holding that the assignment to the surety of a judgment against principal and surety, did not authorize an execution thereon to be levied thereafterwards on the principal's property for the surety's benefit.

by the creditor, over and above the amount of the debt, no *partial payment* of the debt by the surety, will entitle him to demand the surrender of any part of the security.

It does not mean, however, that where the creditor has *other* claims against the principal—not meant to be secured by the particular lien, or collateral, securing the surety-obligation at the time such lien was created, or such collateral was deposited—such other claims must be satisfied in preference to the surety's claim to subrogation.

The same—illustration.—The principle that subrogation is never enforced to the injury of the creditor is well illustrated by the case of Grubb *v.* Wysor.[19] In this case, the creditor held three bonds of A, secured by mortgage on real property. On one of the bonds (that first maturing), B had become A's surety. A having failed to pay this first bond at maturity, B (the surety) paid it. Default having been made in payment of the other two, the mortgage was foreclosed, with the result that the proceeds were *less than sufficient to pay the three bonds.* B came into the foreclosure suit demanding subrogation, and the repayment to him of the amount of the first bond out of the proceeds of sale—thus leaving the creditor unsatisfied. The court rightly denied B's demand, on the ground that he could not be subrogated to the creditor's place *until the creditor's place had been vacated by the satisfaction of his entire debt.*

The same, continued.—The soundness of this ruling becomes the more apparent when we remember that, at the outset, the creditor had *two* securities for his money, namely, (1) B's *personal obligation* in the first bond, as surety; and (2) the *mortgage* covering all three bonds. If we admit the principle that as soon as he paid the debt for which he was surety, B might be subrogated to the creditor's rights, then B's suretyship, instead of being an advantageous security to the creditor, is worth nothing, since the surety *pays with one hand and demands back what he has paid with the other*—thus depriving the creditor of any benefit from the suretyship.[21]

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[19] 32 Gratt. 127.
[20] See Exchange Bank *v.* Bayless, 91 Va. 134, 21 S. E. 279.

Page 328, § 613. **Bail bonds—exoneration.**—The attention of the student is called to the principle, correctly stated in the Text, that one who gives bail for another in a criminal case, has *no claim for exoneration* against his principal, in case he has the amount of the bond to pay.

The reason of this (not stated in the Text) is that the purpose of bail is to *secure the prisoner's appearance at the trial,* and not to give the accused the option of either appearing or paying the amount of the bond; and the object in requiring a surety on the bond *is that the surety may see to it that such appearance on the part of his principal is made.* If the surety knows that even if the bond be forfeited, and he have the amount thereof to pay, he may recover the same from his principal, he has not the same incentive to alertness in *seeing that his principal appears,* as he would have when he knows that he will have no recourse should the bond be forfeited.

This doctrine is carried even further, and it is held that where the surety takes a *pledge* or *morgage* from his principal to indemnify him against loss by reason of going bail, such security is contrary to the policy of the law, and cannot be enforced.[21]

The same—indemnity by third person.—Where the bail takes indemnity from a *third person,* not the accused, the authorities seem to uphold the transaction, on the ground that in such case the third person stands in the shoes of the original bail, with the same incentive to compel the appearance of the accused as an unindemnified bail would have.[22]

Page 328, § 615. **Creditor must respect surety's right of subrogation.**—The special duties which the creditor owes to one known to be a surety, are two, namely: (1) *Not to extend the time of payment, by binding contract with the principal, with-*

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[21] See 5 Va. Law Reg. 862; U. S. *v.* Green, 163 Fed. 442; Leary *v.* U. S., 184 Fed. 433, 107 C. C. A. 27; Leary *v.* U. S., 224 U. S. 567—where the U. S. Supreme Court (two judges dissenting) in a rather inconclusive opinion seems to hold *contra.* See Carr *v.* Davis, *infra;* n. 20 L. R. A. (N. S.) 58; 7 Mich. Law Rev. 274; 22 Harv. Law Rev. 530.

Such indemnity by express contract, is permitted in New York by statute. Leary *v.* U. S., 224 U. S. 567.

[22] See Carr *v.* Davis (W. Va.), 63 S. E. 326; Maloney *v.* Nelson, 144 N. Y. 182, 39 N. E. 82; 16 Am. & Eng. Enc. L. 172.

out the surety's consent; and (2) *Not to release any of the securities of the principal, held by the creditor, nor negligently to allow them to be rendered less valuable to the surety, in case he becomes entitled to subrogation.*

If the creditor violate duty number (1), the surety is *immediately discharged,* whether he be actually injured or not. If he violate duty number (2), the surety is discharged *only to the extent of the loss suffered* by reason of the creditor's wrong-doing. These are elementary principles, and the books abound in authority

The same—application to different kinds of suretyship.—The doctrine last stated applies not only to the plain case where the surety became such in the original transaction, but to all cases of suretyship heretofore noticed, whether the suretyship be *in persona* or *in re.*

Thus, where A and B are partners, and A sells out to B, who assumes to pay all the debts of the firm, such contract renders A the surety and B the principal, although originally both were principals. Now if the creditors of the concern *know of this arrangement,* the duties heretofore mentioned, *i. e.,* not to extend the time, nor to give up or impair securities, at once arises, under the penalties already mentioned.

So, again, if A, owning Blackacre, executes to C a mortgage thereon to secure a debt, and subsequently sells the farm to B, who assumes payment of the mortgage to C—here, although A was the original principal, he is now a mere *surety,* and B has become the *primary debtor.* Hence C, on learning of this new relation of the parties, must respect it, under the penalty of releasing A, in whole or in part, according to the principles before stated

Estate subject to paramount lien, sold in parcels to various purchasers—how subjected to paramount lien.—A still more complicated situation is often manifested: Thus, Q, owning Blackacre, subject to a mortgage which is duly recorded—or there is recorded against him a judgment, creating a lien on the entire estate—sells the estate off in parcels, with warranty of title, to various purchasers (A, B, C, D and E), each of whom buys with actual or constructive notice of the incumbrance—Q himself retaining parcel number six. Whether the purchasers had actual notice of the paramount lien or not, is immaterial, except that we may assume that if they had had actual notice, they would not have purchased. Q is insolvent and personally unable to discharge the debt. The creditor, of course, is unaffected by any of these transactions, since his lien was on record. Not having assumed payment, none of the purchasers is *personally* liable to the creditor—but the parcel bought by each is charged with the lien, thus presenting a case of suretyship *in re*.

The same—(1) no excess of value over the mortgage. —If the value of the mortgaged estate here does not exceed the amount due under the mortgage, of course the whole estate will be subjected; and all the purchasers of the several parcels will share the same fate in losing the benefit of their several purchases.

The same—(2) value of estate in excess of mortgage. —Where the value of the mortgaged estate is appreciably in excess of the mortgage debt, and there is, therefore, a valuable equity of redemption, a clash of interests arises at once among the several purchasers, with respect to *priority in the surplus*, or as to the order in which their several parcels shall be subjected to the payment of the paramount mortgage.

There are two aspects of the situation in which the question of priorities may be presented: (a) where the several purchases were made *contemporaneously*—as at a public sale; and (b) where the purchases were not contemporaneous.

The same—(a) contemporaneous purchases.—Where the several purchases were *contemporaneous*, it is clear that no one purchaser has priority over any other; here equality is equity, and all must share the burden equally—each contributing his *pro rata* share, according to the values of the respective parcels.[23]

The same—(b) purchases not contemporaneous—inverse order of alienation.—Where the purchases of the vari-

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[23] Alley *v.* Rogers, 19 Gratt. 366, 388-389.

ous parcels have been made at *different times,* the rule long established by equity in such cases is, to subject the parcels in the *inverse order or alienation*—that is, the parcel *last aliened* is *first subjected,* and so on back, in reverse order, until the dominant lien is satisfied.

This is perfectly just, since, in the case illustrated above, when A purchased the first parcel, clearly the remaining *unsold* portion of the estate retained by the debtor Q, ought first to go to satisfy the encumbrance covering the whole; then when the second parcel is sold to B, it is equally clear that the four parcels still held by Q should be first subjected to the lien; so with C, who takes subject to the equities of A and B, but with an equity superior to Q in the remaining three lots; and so with the later purchasers D and E, respectively. Hence we have here several instances of suretyship *in re,* with the several sureties occupying different degrees of safety. The result is that Q's lot goes first toward satisfying the lien, and the rest in the inverse order of alienation.[24]

The same—non-contemporaneous purchases, continued.—Looking at the situation from another view point will make clearer the principle of subrogation here involved. When A purchased his parcel, the remaining unsold parcels belonging to the principal debtor Q constituted a *security belonging to the principal debtor, held by the creditor.* Now if A's parcel is first taken (the other five unsold), and the creditor then subjects enough of the remaining parcels still belonging to the principal debtor to discharge his debt, A would at once be entitled to *subrogation* to such parcels still retained by the principal. While A is not a surety *in persona,* he is such *in re,* because his parcel is bound for the debt. But a court of equity, instead of permitting the creditor thus to subject A's lot, and forcing A over against the remaining parcels, will, as the old chancellors expressed it, "put the saddle on the right horse" at the beginning, by com-

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[24] Conrad *v.* Harrison, 3 Leigh 532; Harman *v.* Oberdorfer, 33 Gratt. 497; Whitten *v.* Saunders, 75 Va. 563; 3 Va. Law Reg. 826; note 5 L. R. A. (N. S.) 276; 3 Pomeroy's Eq. Jurisp. 1206, 1225. This has been made the statutory rule in Virginia, in cases where the dominant lien is a judgment. Va. Code 1919, § 6476. See the statute for details.

pelling the creditor *first to subject the principal debtor's retained parcels.* And so down the line, with respect to the latter purchases of B, C, D and E.

Of course, the same principle is applicable where the dominant mortgage covers not a larger *tract,* later subdivided and sold off, as illustrated, but several *independent and separate parcels*—as houses and lots, having different locations, and whether in the same geographical locality or not.

The same, continued—mortgagee releasing a later sold parcel.—Again, suppose different parcels sold to A, B, C, D and E, in the order named—and none retained by the mortgagor-vendor. Here A has the parcels of B, C, D, and E between him and harm; B has the parcels of C, D and E between him and harm; C, parcels D and E for his protection; while D has only E's parcel for his protection; and E is without any protection, save an action against his vendor on his warranty of title. Now suppose the creditor, *knowing of this situation,* should release the parcels of D and E from all liability, and should undertake to subject the parcels of A, B and C. Here the creditor would have violated one of the fundamental duties above mentioned, namely, *not to release securities* to which the sureties (A, B and C) would have had recourse had their property been taken for the debt. The latter are therefore *released* in such case, to the *extent that the act of the creditor has injured them,* namely, to the extent of the value of the parcels of D and E so released.[25]

The same, continued—registry as notice to prior lienors.—But this last doctrine applies only where the *creditor has notice of the situation.* Nor is mere registry of the subsequent alienations notice to him of their existence. Registry is notice, not to *prior,* but to *subsequent* lienors; and a lienor who has duly recorded his instrument of lien is *under no obligation to watch the record in the future* to see whether subsequent alienations take place.[26]

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[25] See authorities, *infra.* n. 27.

[26] Blakemore *v.* Wise, 95 Va. 269, 3 Va. Law Reg. 744, 28 S. E. 333; Bridgewater, etc., Co. *v.* Strough, 98 Va. 721, 6 Va. Law Reg. 626; 1 Mich. Law Rev. 687.

The same—assumption of lien by purchaser.—Of course, in the cases under discussion, if any purchaser of these parcels *personally assumes payment of the mortgage or other lien,* or buys expressly subject to the lien—deducting the amount thereof from the purchase price, or under other circumstances indicative of an intention to *relieve the vendor of liability* therefor—then he, in the one case personally, and in the other his lot, becomes the *real principal,* and all the rest of the purchasers, even those who bought subsequently, are *sureties,* so far as their respective parcels are concerned; and, owing each of them the duty of exoneration, his parcel must go first toward paying the debt.[27]

Page 330, § 619. **Surety cannot interfere with creditor's legal remedy.**—A careful distinction here must be noted. So far as the *creditor* is concerned, the personally bound surety is as much bound to pay the debt as his principal. Ordinarily, his promise is, not that he will pay the debt *if his principal does not,* but absolutely that he *will pay at maturity.* Now the rule at *law* is, that the creditor owes the personally bound surety no duty of proceeding first against the principal; nor, having obtained judgment against both, is he bound to levy his execution first on the principal's property; nor, again, is he bound to exhaust securities which he holds of the principal, before taking legal recourse against the surety.[28] Nor will a *court of equity* ordinarily entertain a bill by the surety to stay the hand of the creditor who is proceeding *at law* against him, *notwithstanding the solvency of the principal, and notwithstanding the possession by the creditor of securities belonging to the principal, amply sufficient to satisfy the debt.*

The same—putting creditor on terms—saddling the right horse."—If, however (and here the distinction is somewhat fine, but fundamental, and to be carefully noticed), the *creditor* comes into equity, and asks its assistance in compelling the surety to pay—or where the parties are already in equity on other grounds—the court applies the maxim that "he who seeks equity must do equity," and that "the saddle should be put

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[27] 3 Pomeroy's Eq. 1225; Litchfield *v.* Preston, 98 Va. 230, 37 S. E. 6.

[28] See Grizzle *v.* Fletcher (Va.), 105 S. E. 457.

on the right horse"—and will refuse to subject the estate of the surety *until that of the principal is first exhausted*—unless there be special circumstances rendering it inequitable to apply this rule, such as, for example, that the principal's estate is insolvent, or is involved in other litigation and so tied up, or otherwise incapable of immediately meeting the demands of the creditor, that the delay would be unconscionable.

The distinction in short is this: That while equity will not entertain a surety as *plaintiff* to stay the creditor's hand *at law,* it will protect the surety's rights where the *creditor himself* becomes plaintiff, seeking the aid of the court of equity—or where the equity court has acquired jurisdiction of the cause and the parties on some other ground.[29]

II. *Creditor's Right of Subrogation.*

Page 333, § 623. **Subrogation, continued—reversing the situation—creditor's right of subrogation to securities held by surety.**—Up to this point we have discussed the *surety's* subrogation to securities held by the creditor. We come now to consider the reverse situation—where the *surety* holds securities of the principal, to which the *creditor* desires subrogation.

The same—(A) Where the securities are to secure the debt.—All the authorities concede that where the securities are deposited with the surety not merely as *personal indemnity* to him, but for the further purpose *of securing the debt,* an express trust arises at once in favor of the creditor, with all the incidents of a trust. But this is not 'subrogation.'

The same—(B) to indemnify surety only.—The case here is where the security is deposited by the principal, *not to secure the debt,* as in the last section, but merely to *indemnify the surety.* The books are full of general statements, such as in the

[29] Humphrey *v.* Hitt, 6 Gratt. 509; Walker *v.* Com., 18 Gratt. 13; Shannon *v.* McMullin, 25 Gratt. 211, 229. See Horton *v.* Bond, 28 Gratt. 815; Wytheville Ice Co. *v.* Frick, 96 Va. 141. In accordance with the principles stated, it was held in a recent case in Virginia, that a suit in chancery against the estate of a deceased endorser (surety) could not be maintained until the principal was brought into the suit and his estate first exhausted. Tidball *v.* Bank, 98 Va. 768.

Text, that as the paying *surety* is subrogated to all securities held by the *creditor,* so, conversely, the unpaid *creditor* is entitled to subrogation to all securities of the principal held by the *surety* for his own indemnification; and that the surety owes the same duty to the creditor in the preservation of securities as the creditor owes the surety.

This broad statement is not sustained by principle nor by authority. The question calls for analysis and discrimination.

We may begin with the observation that next to the *bona fide* purchaser, the surety is the most favored plaintiff in the law—an observation inapplicable to a mere creditor.

A second principle is that the relation between surety and creditor is merely that of *debtor and creditor.* The creditor stands in the shoes of his debtor, and hence may subject for the payment of the debt all the property and property rights to which the surety is himself entitled, but no more. Hence in seeking to ascertain the rights of the *creditor* as against the securities of the principal held by the surety for the latter's indemnification, we must ascertain *what the rights of the surety himself are* in such securities. These rights ascertained, we have cleared the way for the ascertainment of the creditor's right against the same securities.

The same—(1) surety's liability contingent, and contingency fails.—Here, as the creditor claims only through the surety, it is clear that where the surety's liability, originally contingent, never becomes absolute, so that at no time has the surety any claim for exoneration by the principal—as, for example, where the securities in his hands are to save him harmless as the endorser of a note for the accommodation of the principal, and the endorser is discharged by failure of the *holder* to give notice of dishonor—there is no equity of subrogation in behalf of the creditor.

The reason is, that as the creditor must claim through the surety—since *ex hypothese* the security is to *indemnify* the surety only—and, as the consequence of his discharge, the surety has not been damnified, there is no ground upon which the creditor's right of subrogation may be based. In short, it avails the creditor nothing to be placed in the shoes of the surety who has no equity whatsoever.[30]

Of course, here, after the discharge of the surety, he has no further claim upon the securities in his hands, and they become ordinary unencumbered assets of the principal, liable to be subjected by any creditor of the principal who first secures judgment and execution against them—or who sequesters them by process of garnishment, or other proceeding.

The same—(2) surety's liability absolute.—The doctrine now under criticism is that securities placed in the surety's hands by the principal for indemnity against loss by reason of the suretyship, are held by the surety (before payment) *in trust* for the creditor—and hence that immediately upon acceptance of such securities by the surety a *specific lien, or trust,* attaches in favor of the creditor, which must be respected both by the surety and all subsequent lienors or purchasers. It rests upon the authority of the old English case of Mawer (or Maure) *v.* Harrison.[31] But in the more recent case of *In* re Walker,[32] the doctrine was re-examined and wholly repudiated.

In the latter case Stirling, J., who delivered the opinion, took the pains to go through the original records of the case of Mawer *v.* Harrison, in the Registrar's office, resulting in the discovery that *no such question was involved* in that case. The opinion in the later case contains a detailed account of the facts and the decision in Mawer *v.* Harrison, and demonstrates the inaccuracy of the brief report of the case in Equity Cases Abridged.

Creditor's subrogation to surety's indemnity, continued —the true principle.—The sounder doctrine is that the surety does not hold such securities in trust for the creditor from the moment he receives them—*nor at any time until the creditor files his bill to subject them,* or otherwise secures a voluntary or involuntary lien thereon. In the meanwhile the surety (certainly where either principal or surety is solvent), may release the se-

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[30] Hopewell *v.* Cumberland Bank, 10 Leigh 206; Bank of Virginia *v.* May, 12 Leigh 387; Clay *v.* Freeman (Miss.), 20 South. 871.

[31] 1 Eq. Cas. Ab. 93 (1692), 20 Vin. Abr. 102, tit. "Surety," and on a dictum of Sir William Grant in Wright *v.* Morley, 11 Ves. 22.

[32] 1 Ch. Div. 621 (1892).

curities to the principal debtor or to his assignee—or they may be subjected by any competing joint creditor of principal and surety, who first secures an *in rem* claim against them, without infringing any right of the creditor in the surety obligation—who, as shown, has no lien on or specific claim to such securities merely by virtue of his being the creditor in the surety obligation.[33]

No *separate* creditor of either principal or surety could subject such securities (beyond the equity of redemption therein), since neither principal nor surety has complete title. Separate creditors of the *principal* may not subject them, since the surety has a prior claim for his indemnity. Separate creditors of the *surety* could not subject them, since this would be an application of the principal's property to the payment of the surety's separate creditors. But it seems clear that the securities may be subjected by *any joint creditor* who is diligent enough to secure a lien thereon by judgment or otherwise.

The same, continued—equity of redemption in the securities.—Inasmuch as the *surety,* even before paying the debt, may, after default in payment of the debt, foreclose the security for the purpose of payment—filing a bill for that purpose if necessary—it follows that the *creditor* in the surety-obligation, *after judgment at law,* or after otherwise converting the debt into an *in rem* claim, is likewise entitled to subject the securities in the surety's hands—on the settled principle that a creditor may subject any asset, legal or equitable, belonging to either principal or surety. This subjection of the security in the surety's hands may be termed "subrogation," as it frequently is in a loose sense, but it is rather the application of the familiar principle that social assets shall go first to pay social creditors—the creditor in the surety-obligation securing a preference over other creditors of the principal, not because of any equity of his own, but because of the *equity of the surety* who, equally with the principal, in his debtor.[34]

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[33] In re Walker (1892), 1 Ch. Div. 621; Chamberlain *v.* St. Paul, etc., R. R., 92 U. S. 299, 306; Cunningham *v.* Macon and Brunswick R. Co., 156 U. S. 409, 419; Jones *v.* Quinnepaik, 29 Conn. 25.

[34] See Cralle *v.* Meem, 8 Gratt. 496; Hauser *v.* King, 76 Va. 731; Burwell *v.* Fauber, 21 Gratt. 446, 463; Jennings *v.* Taylor, 102 Va. 191; Hampton *v.* Phipps, 108 U. S. 260, 263; cases *supra* and *infra.*

The same—compared with partnership assets—effect of insolvency.—The situation noted in the last section is much like that arising in connection with the distribution of assets of a partnership. Each partner has an equity to demand that the partnership creditors be paid out of partnership assets, in preference to the individual creditors of any partner. This indirectly gives social creditors a preference over individual creditors—not because of any equity, or lien, or trust, to which the social creditor is entitled in his own right, but because of the *equity of the other partners* to have the the social assets applied for the discharge of social debts, for their protection.

This equity of the social creditors does not arise, however, so long as the partners are *solvent and in control of their own affairs*—but only where the assets of the partnership are being administered by the court—as in bankruptcy, administration or other judicial proceedings which displace the individual control of the partners. Until their control is thus displaced, the other partners (if solvent) may waive the equity in their own behalf, and thus deprive partnership creditors of the preference to which they would otherwise be entitled.[35]

So with securities in the hands of the surety. No lien or trust attaches to them for the benefit of the creditor, *so long as the principal and surety are in control of their own affairs*—and in the meanwhile the surety may release the securities to the principal, or to the latter's transferee, without violating any duty to the principal creditor.[36]

III. *Subrogation of Volunteers.*

Page 335, § 624, (6) **Subrogation of volunteer—Gatewood v. Gatewood.**—A court of equity never sets its machinery in motion to establish subrogation in favor of a *mere volunteer*—

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[35] Millhiser *v.* McKinley, 98 Va. 207, 6 Va. Law Reg. 309, note.

[36] This was precisely the case in the Connecticut case of Jones *v.* Quinnepaik, 29 Conn. 25. See also Cunningham *v.* Macon & Brunswick R. Co., 156 U. S. 409, 419.

The student will find much confusion in the authorities, and many statements by the courts (usually extrajudicial) not in harmony with the views here presented.

See, on the subject generally, 2 Brandt on Suretyship & Guar., 320-326; Sheldon on Subrogation. 160-162; Importers & Traders Bank *v.* McGhee (Ga.), 16 S. E. 27; Paul *v.* Doster, 59 Miss. 258.

that is, one who intermeddles and pays a debt for which he is bound neither in person nor in property. But, as we have seen, he who pays a debt which is a charge either upon his *person* or his *property,* and for which another is primarily liable, is in a plenary sense a surety, with all the rights of such.

The latter doctrine is well illustrated by the case of Gatewood *v.* Gatewood.[37] In that case, the husband of the plaintiff had executed a mortgage on his farm, in which the wife had united, thus releasing, or encumbering, her dower right. Subsequently, other liens accrued against her husband's interest in the same property—the aggregate amount of which was far *in excess of the value of the property.* The farm being advertised for sale under the first encumbrance, the plaintiff, in an effort to save the home for herself and children, raised a sum of money out of her separate estate, and, instead of *purchasing* this first encumbrance, and procuring an assignment thereof to herself, very imprudently paid it off and *discharged it.*

Thereupon, the subsequent lienors, finding this large prior encumbrance now discharged, endeavored to subject the property to their debts. In this contest between the wife and creditors, the vital question was, whether she was entitled to be *subrogated to the prior lien* so paid off and discharged, and to that extent secured against loss for the money she had paid. This question of subrogation hung, as the court said, upon the question whether she was a *volunteer* or not. But inasmuch as her *contingent dower right in the land was encumbered by the lien* which she had discharged, it was properly held that she was not a volunteer, and was therefore entitled to subrogation (as a surety in *re*)—and hence that her claim constituted a first lien upon the farm.

The same—who is a volunteer?—The question, who is a volunteer in this connection, often presents difficulty. It is clear that where one, at the request of the debtor, pays, or advances money to pay, a debt secured by a mortgage or other lien—a debt for which he is in nowise bound—there being no express agreement that he shall become assignee of the debt, nor circumstances from which such an understanding may be implied—such

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[37] 75 Va. 411.

payment, generally speaking, is a voluntary payment, and no right of subrogation arises.[38]

The same.—The question becomes of especial importance where there are junior liens on the same property. Refusal to subrogate the lender whose money discharged the first lien has the inequitable result of giving the junior lienors preference over him, and thus unjustly enriching them at his expense.

Hence the courts, anxious to prevent this injustice, are disposed to extend the equity of subrogation to such lender if possible—and to that end will easily imply the necessary intention on the part of the lender not to discharge the lien in making payment. . . .

Thus, an agreement between the lender and the debtor, or between lender and creditor, with the assent of the debtor, that the lien shall not be extinguished by payment, will suffice to keep the lien alive. Nor need such agreement be express, but it may be implied from circumstances.[39]

On principle, where one thus pays the debt of another at his request, the payer should be entitled to all the rights of a surety, unless it be apparent that this was not the intention of the parties. The *technical surety* is himself but a *volunteer* at the time he assumes the obligation—and (on a new consideration) he may become surety long after the original debt was created. If one who voluntarily assumes the position of surety today and pays tomorrow, is entitled to the equity of subrogation, as is conceded, no reason is perceived why the result should be otherwise where there is *no such interval of time between assumption and payment.*

IV. *Subrogation of Owner.*

Page 336, § 625. **Subrogation of owner—purchaser of equity of redemption—dower rights.**—The subrogation of the owner of property to liens thereon, which he has discharged, but for which he was not personally bound, discussed in this

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[38] See Clevinger *v.* Miller, 27 Gratt. 740.

[39] See Sheldon on Subrog., 245-248; Clark *v.* Moore, 76 Va. 262; Repass *v.* Moore, 98 Va. 377; 26 Harvard Law Rev. 261; Bankers, etc., Co. *v.* Hornish, 94 Va. 608; Meeker *v.* Larson (Neb.), 57 L. R. A. 901.

and the following sections of the Text, is the same as that which we have previously discussed under the head of *suretyship in re.*

An interesting case under this head recently arose in Virginia in the case of Land *v.* Shipp.[40] The facts are a little complicated, and the student should give them close attention. The case was practically this: Husband and wife mortgaged husband's farm to A. By a later mortgage, *the husband alone* executed a second lien on the same property to B, the wife not uniting. Up to this point, therefore, the wife had released her right of dower, so far as the *first* mortgage was concerned, but not as to the *second.*

Subsequently, by arrangement between the parties, the land was sold under the *second* mortgage to C, who, out of the purchase money, discharged the first mortgage in full, obtaining a release of the first mortgage from the creditor, and applied the balance in discharge of the second mortgage. Inasmuch as the first mortgage, in which the wife had united, was now fully discharged, and, as she had not united in the second mortgage, she appeared to be entitled to dower in the *whole;* and, on the death of her husband, she made claim accordingly.

It was held, however, that since the purchaser, buying under the second mortgage, was a surety *in re* for the first mortgage (that is, the property purchased was bound for it) he was entitled, on discharging the first mortgage, to be subrogated to the rights of the mortgagee whom he had satisfied, thereby defeating the wife's right of dower, *pro tanto*—that is, to the extent of the first mortage. It was held further, and properly, that as to the value of the equity of redemption after payment of the first mortgage, the wife was entitled to dower therein, since she had not united in the second mortgage to release her dower.[41]

The same.—If, in the case just stated, the purchaser, buying the equity of redemption alone, under the second mortgage, had *personally assumed* to pay off the first mortgage, as a part of the contract of purchase, he would then have stood, not in the position of a *surety,* but of *primary debtor;* and on discharging the

[40] 100 Va. 337.

[41] The case is reported also, in 8 Va. Law Reg. 170, with note. See Strong *v.* Converse (Mass.), 85 Am. Dec. 732, and note.

first mortgage it would not have been kept alive by way of subrogation for his benefit, so as to protect him against the dower right of the wife of the mortgagor in the whole property.[42]

The Text (§ 628) states the doctrine of this section, but without the qualification last mentioned, namely, that there is no subrogation of a purchaser of an equity of redemption, *where he has personally assumd, by contract with the original mortgagor, to pay off the prior encumbrance.* The reason is that by assuming payment of the mortgage he becomes the *principal debtor.*

CHAPTER XXIIA.

MARSHALLING OF SECURITIES.

Memorandum.—This is a continuation of Text-chapter XXII.

MARSHALLING OF SECURITIES.

Page 342. **Marshalling.**—As we have before seen, subrogation is not so much an equity *in itself* as it is a *remedy* for securing the equities of *contribution* and *exoneration.* So we may say of *marshalling* that it is not so much an equity in itself, as it is a means of working out the *remedy of subrogation,* with the final purpose of obtaining the equity of exoneration or contribution. Indeed, marshalling is but subrogation in a slightly different aspect.

What is marshalling?—The term marshalling here means 'arrangement'—the marshalling of securities therefore, is the arranging of the securities held by several creditors of a *common debtor,* so that the securities may go as far as possible toward discharging the several debts secured, in so far as this may be done without violating superior equities, or doing injustice either to the secured creditors or to the common debtor.

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[42] 1 Scribner on Dower, 519 to 532, 550; 2 Pomeroy's Eq. Jurisp. 793, 796-8; Carter *v.* Goodin, 3 Ohio St. 76; Selb *v.* Mutagne, 102 Ill. 446; Everson *v.* McMullen, 113 N. Y. 293, 10 Am. St. Rep. 445; Text, § 628.

We have already seen a striking illustration of what practically is marshalling, in connection with the rule that where a larger area of land is subsequently subdivided and smaller parcels are sold off to various purchasers, at various times, the court will thus marshal, or arrange, the several security-lots, by subjecting them in the *inverse order of alienation.*

The same—application of the principle.—A case for marshalling occurs where one creditor has a lien, or other claim *in rem* against *two funds, or estates, belonging to the same person,* and a subsequent lienor or purchaser has such recourse against, or claim to, *but one* of the same funds or estates. In such case equity will either compel the doubly-secured creditor first to exhaust the singly-charged fund, or else, if he exhausts the doubly-charged fund, will subrogate the singly-secured creditor or purchaser to the other fund. Sundry illustrations are presented in later sections of this chapter.

The same—origin and policy.—The earliest application of this doctrine was in connection with the winding up of decedent's estates. The rule of the common law was that a decedent's real property could be subjected only to the payment of *specialty* (or *'bond'*) debts (*i. e.* under seal), and debts *of record.* For debts of such high dignity, both *realty and personalty* were bound; whereas, *simple contract* creditors could look only to the decedent's *personal* estate for payment of their debts. Cases frequently arose where the specialty creditors, either whimsically or by collusion with the heir, enforced payment of their debts, as the law permitted, out of the *personalty,* leaving a balance insufficient to discharge the simple contract creditors—by reason of which the latter's debts went unpaid. To remedy this vicious practice, equity, very early in its history, began to protect the simple contract creditors, by compelling the specialty creditors first to exhaust their recourse against the *real* property in the hands of the heir—or else, if application were made too late thus to conserve the personalty for the simple contract creditor—or where there were special reasons, in a particular case, for permitting the personalty to go in discharge of the specialty debts—the simple contract creditors were then let in on the *real* property. This was tantamount to subrogating the *simple con-*

tract creditor—whose only security had been diminished or exhausted by the preferred (or doubly-secured) class—to the shoes of the now satisfied specialty creditors. This principle, known as the marshalling of a decedent's assets, came in time to be applied to all analogous cases, where it lay in the power of one creditor capriciously to deprive a less favored creditor, or claimant, of his only security. It is an application, in equity, of the maxim of the law of torts, *sic utere tuo ut alienum non laedas.*

Marshalling, continued—principles applicable.—This is an equitable doctrine, and *is never enforced to the injury of the doubly-secured creditor, or of third persons with superior equities.*[1]

This equity must be taken notice of by subsequent lienors and purchasers, if the situation appear on the record, or they otherwise have knowledge of it.[2]

The same—notice to subsequent purchasers.—According to the English doctrine, the equity of marshalling did not arise at the time of the occurrence or transaction creating the equitable situation, but was an inchoate right, and became fixed *only on the filing of the bill* to enforce it. Hence the right to have the securities marshalled might be cut off by a subsequent sale or mortgage of the *res,* even to one having notice of the real situation.

In Virginia and most of the American states, this narrow view has been repudiated, and the equity is regarded as *complete from its inception,* and cannot be affected by a subsequent lien, purchase, or right, acquired with notice.

It follows that subsequent purchasers and lienors must take notice of this equity of subrogation, or marshalling, if it is indicated in conveyances or incumbrances of record, or if they otherwise have notice of it.[3]

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[1] Guggenheimer *v.* Martin, 93 Va. 634, 25 S. E. 881; Blakemore *v.* Wise, 95 Va. 269; Bridgewater Mills *v.* Strough, 98 Va. 721; 6 Va. Law Reg. 626, and note; 2 Va. Law Reg. 701.

[2] Conrad *v.* Harrison, 3 Leigh 532; 2 Va. Law Reg. 701.

[3] This question was thoroughly considered by the judges, *seriatim,* in Conrad *v.* Harrison, 3 Leigh 532, affirmed in McClung *v.* Beirne, 10 Leigh 394; Jones *v.* Phelan, 20 Gratt. 229, 241. See editorial note, collecting the authorities, in 2 Va. Law Reg. 701; notes to Aldrich *v.* Cooper, 2 L. C. E. (marg. p.) 107; Clowes *v.* Dickinson, 5 Johns. Ch. 235.

Illustrations of Marshalling.

All liens are supposed to be recorded, and in the order as numbered.

I.

Bond creditors (£20,000) v.	Decedent's realty—value £20,000. Decedent's personalty—value £10,000.
Other creditors (£10,000) v.	Decedent's personalty—value £10,000.

Here we have the simplest form of marshalling assets. If the bond creditors subject the personalty, other creditors will be let in on the realty.

II.

1. A has mortgage ($10,000) on	Blackacre (X's) — value $10,000. Whiteacre (X's) — value $5000.
2. B has mortgage ($5,000) on	Whiteacre.

This is the simplest form of the marshalling of securities. A must subject Blackacre—or, if he should subject Whiteacre, B will be subrogated to A's mortgage on Blackacre.

III.

1. A—mortgage ($10,000) on	Blackacre (X's)—value $7,000. Whiteacre (X's)—value $6,500.
2. B—mortgage ($5,000) on	Whiteacre.

Here the situation is slightly more complicated. A will exhaust Blackacre, ($7,000), and be let in on Whiteacre for $3,000, the balance of his debt—thus leaving only $3,500 of the proceeds for B, who loses the remainder, so far as this security is concerned.

IV.

The same case as the last, except that B *purchases* Whiteacre at $5,000. The same result follows. Both parcels are sold—the proceeds of Blackacre are paid to A, and a sufficient amount of the proceeds of Whiteacre to discharge his mortgage—the balance going to B.

V.

1. A—mortgage ($10,000) on	Blackacre—value $10,000. Whiteacre—value $10,000.
2. B—purchases	Whiteacre
3. C—purchases	Blackacre

The situation is slightly more complicated here, but the solution is simple. A, as first lienor, exhausts Blackacre, and thus satisfies his mortgage. B holds Whiteacre, free. C insists that B has no equity to force A upon Blackacre, since this injures him (C), and that marshalling will not be enforced to the injury of those with superior or equal equities. But it is clear that before C came into the transaction, B already had a *complete equity of marshalling,* apparent on the record. Hence when C appeared and purchased, he did so *with notice* of B's prior equity.

If, however, here, the value of Blackacre had exceeded the amount of A's mortgage, then clearly C might have claimed the surplus.

VI.

A—mortgage ($12,000) on	Blackacre—value $10,000. Whiteacre—value $10,000
B—mortgage ($5,000) on	Whiteacre.
C—mortgage ($5,000) on	Blackacre.
D—purchases	Whiteacre

A still further complication, but not difficult. We must begin with the several equities in the order in which they arose.

(1) *B's right*: When B took his mortgage and recorded it, he was perfectly safe. Then nothing that other parties may subsequently do can dislodge him from his coign of vantage—for they necessarily take with notice. A exhausts Blackacre ($10,000) leaving a balance due of $2,000, for which he is let in on Whiteacre. This leaves B with a mortgage of $5,000, secured on, and

to be paid out, of $8,000 ($10,000—$2,000) of Whiteacre funds.

(2) *C's right*: Blackacre, on which C's debt was secured, has been completely exhausted, as well as $7,000 of Whiteacre funds, in discharge of superior equities ($2,000 to A, and $5,000 to B). So that when C took his mortgage on Blackacre, there was an equity of marshalling in his favor against whatever balance was left of Whiteacre funds. The balance was ($10,000—$7,000) $3,000. C will receive this $3,000—leaving an unpaid balance due of $2,000.

(3) *D's rights*: It is obvious that when D appeared first on the scene, both of these parcels were already charged with superior liens in excess of their value—and being charged with notice of the situation, he has no equity whatsoever in the premises.

VII.

1. A *v.* { Blackacre (Principal's). Whiteacre (Surety's).
2. B *v.* Blackacre.

No marshalling here. The two estates are not the property of a *common debtor,* as required by the principle of marshalling. When B asks for marshalling, he is met by the superior equity of the *surety*. Before B's appearance on the scene, the surety's right to demand that the principal's property be first exhausted (or subrogation), was already a complete equity, of record, and therefore staring B in the face when he acquired his claim against Blackacre, whether as a mortgagee or as an absolute purchaser.

The same result would have followed had the principal and surety, instead of expressly occupying that position as here, been co-partners or co-contractors, and as such had executed the first mortgage. A partner or other co-contractor, is principal for his portion of the joint debt, and surety for the portion due by his fellow.

VIII.

1. A *v.* X and Y, copartners or co-contractors (personally).
2. B *v.* X only.

Here there is no semblance of a case for marshalling. There is nothing to marshal. The claims are simply claims against the *persons* of the defendants. Nor are there *two funds* belonging to a *common* debtor. Even if there were two funds (as might be the case if X and Y were both dead and their estates were being administered in equity), Y's equity of contribution from X would be superior to B's equity to have the funds marshalled—as in VII above.[4]

IX.

Blackacre (X's) is mortgaged to A for $10,000; the whole property is worth $18,000; it is sold off in parcels, at different times—say lots 1, 2, 3, 4 and 5—X retaining 6. Thus:

A—$10,000 *v.*

1 B $3,000	2 C $3,000	3 D $3,000
4 E $3,000	5 F $3,000	6 X $3,000

Marshalling will be enforced in this case by compelling A, who has the paramount lien, to go against the several parcels in *inverse order* of alienation—that retained by the debtor-vendor to be first subjected. The order is therefore: (1) X; (2) F; (3) E; and (4) D for the remaining $1000—leaving C and B harmless. But the case would have been altered had any purchaser assumed payment of the lien. If any purchaser *assumes payment* of the lien, he becomes *principal* debtor, and the others sureties. Hence his parcel would go first. This is but an application of "inverse order of alienation," discussed previously in this chapter.

X.

1. A—mortgage ($10,000) on { Blackacre (X's)—value $5,000. / Whiteacre (X's)—value $12,000

2. B—mortgage ($7,000) on... Whiteacre
3. C—purchases (at $5,000)... Blackacre.

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[4] See Guggenheimer *v.* Martin, 93 Va. 634.

4. A now *releases* in C's favor, his mortgage ($5,000) on Blackacre, relying on his first mortgage on Whiteacre (value $12,000).

The complication here requires careful analysis of the several equities. If A enforces his mortgage ($10,000) against Whiteacre (value $12,000), this will leave but $2,000 of the Whiteacre fund for B, whose mortgage is for $7,000. May B insist, then, upon being let in on Blackacre in C's hands, in spite of the release? It would seem so, since C acquired both the conveyance of Blackacre from X, and A's release of his mortgage, with notice of B's equity of marshalling.

The same, continued.—In Bridgewater Mills *v.* Strough,[5] the facts of which were substantially as in the foregoing illustration, the question was not whether B might be let in on Blackacre in C's hands, but whether, in a controversy over the proceeds of *Whiteacre only,* A should take priority over B. No claim seems to have been made as to Blackacre—neither that parcel, nor its purchaser C, appearing to have been brought into the suit.

It was held that if A, when he released to C his mortgage on Blackacre, *had notice* of B's mortgage, and therefore of B's equity of marshalling, he must *credit on his mortgage, so far as Whiteacre was concerned, the value of the released security* (Blackacre, $5,000), and look to Whiteacre for the balance only. This, on the principle that the creditor must not release securities in his hands belonging to the principal debtor (X, the mortgagor) to the injury of the surety B (surety *in re* as mortgagee of Whiteacre), at the peril of discharging the surety to the extent of the value of the released security. But that if the creditor A *had no notice* of B's equity, then so far as A was concerned his release in no wise affected his rights against the remaining security, Whiteacre. It was further held that *registry* of B's mortgage on Whiteacre was *not notice* to A, a *prior* and not a *subsequent* purchaser. This, on the principle already adverted to in an earlier part of this chapter, that one who has registered his paramount incumbrance, is under no duty to watch the records

[5] 98 Va. 721, 6 Va. Law Reg. 626.

for future junior incumbrances—the registry being notice to *subsequent* not to *prior* purchasers and lienors.[6]

XI.

1. A ($10,000 v. Bank stock (X's), worth $5,000.

2. A (same debt). B $5,000. C $5,000. D $5,000.	v.	X's general assets ($10,000) in administration proceedings, or under a general deed of assignment without preferences—or in the winding up of the affairs of banking and other insolvent corporations.

This case presents a new situation, in that the claim of A, the doubly-secured creditor, is a superior lien *only on the singly-charged fund* (bank stock). This fund being insufficient to discharge the debt, A must come in upon the general assets—which, of course, he shares *pari passu* with the other creditors.

The question the case presents is whether A must first exhaust his collateral ($5000), and *prove for the residue only,* or whether he may prove for, and receive dividends on, the *full amount* of his debt. We have already seen that by the better authority, he may prove for the *full amount,* without exhausting or crediting the value of his collateral—but with the qualification that the doubly-secured creditor must not receive more than the amount justly due him.[49]

From the example given, the student may easily work out for himself the material difference in results from the application of the two rules.

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[6] See post, note to § 698; 6 Va. Law Reg. 626, n; Blakemore *v.* Wise, 95 Va. 269; 3 Va. Law Reg. 744; 1 Mich. Law Rev. 687; Vanorden *v.* Johnson, 1 McCart. (N. J.) 376, 82 Am. Dec. 254.

[7] Merrill *v.* National Bank, 173 U. S. 131; Bank *v.* Trigg, 106 Va. 327.

CHAPTER XXIII.

MORTGAGES—DEEDS OF TRUST.

Page 343. **Contrast between mortgage and deed of trust.**—The purpose of a mortgage and of a deed of trust as security is the same, namely, to secure the payment of a debt or the performance of some obligation. They differ widely, however, both in form and remedy.

Mortgages—form.—In a mortgage, there are but two parties, grantor and grantee, or debtor and creditor. The debtor (grantor) conveys the property upon which the mortgage is to be given *directly to the creditor* (grantee) on condition that it shall again become the property of the debtor in case he makes no default. In short, title vests in the mortgagee instantly, to be divested by payment of the debt.

The same—remedy.—The modern remedy of the creditor (mortgagee) is by *foreclosure*, and this is accomplished by a suit in equity. Originally, where the debtor made default, the property became at once and finally the property of the mortgagee, regardless of the relative values of the debt and the property. Subsequently, equity intervened and compelled the mortgagee to restore the premises to the mortgagor on payment of the debt secured and interest, and required the mortgagee to account for rents and profits during his occupancy. This right of the mortgagor to redeem, is known as his "equity of redemption."

In more modern times (though it seems from the Text that it is otherwise in Massachusetts), the practice is for the mortgagee, instead of *taking possession,* to file a *bill to foreclose* the mortgage.

In such foreclosure suit, the court gives the debtor another day within which to satisfy the debt, (usually six months after the decree) with a provision in the decree that if he do not pay within that time, then *the property shall be sold.* The proceeds of sale are applied, first, to pay the costs of the suit, and then to the debt, principal and interest, the balance, if any, being paid over to the debtor.

The practical objection to a mortgage, is the delay and expense of foreclosure. As we shall see presently, the deed of trust is usually more advantageous as a security for money. For the history of the law of foreclosure and the modern remedy by way of sale of the property, see Larring *v.* Gallet, 9 Cow. (N. Y.) 346.

Deed of trust—form.—We have heretofore explained what deed of trust to secure a debt is. Here, there are *three* persons, namely, the grantor (debtor), the grantee (trustee), and the creditor. The debtor conveys the property to a disinterested third person as trustee, to secure the creditor, with a provision in the instrument of grant, that if default be made in payment of the debt, the *trustee shall, after prescribed advertisement, expose the property for sale by public auction,* on such terms of payment as the instrument prescribes, but usually for cash, and shall apply the proceeds, after payment of costs and commissions, to the payment of the creditor's debt,—the balance, if any, to be paid over to the grantor. The legal title, of course, is in the trustee, and remains in him although the debt be actually discharged by the debtor—in which case, there should be a deed from the trustee back to the grantor, known as a *deed of release.*[1]

The same—remedy.—If default be made in the payment of the debt at maturity, the creditor notifies the trustee of such default, and calls upon him to execute the trust by selling the property according to the terms of the instrument. This sale the trustee may make without any proceeding whatever in court. The instrument of trust usually makes careful provision with respect to how the sale shall be made; that is, after advertisement for a certain time and in a certain manner; and that the sale shall be for cash, or on certain terms of credit. The trustee must be careful to follow the directions of the trust instrument, else the title of the purchaser may be encumbered with the trust, and much embarrassment, both to the purchaser and the trustee, will

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[1] In Virginia, by statute, this release may be made by endorsement of the creditor, or his agent, on the margin of the deed book where the deed is recorded. Va. Code 1919, § 6456.

result; although, as we have heretofore seen, even a wrongful conveyance by the trustee will convey the *legal title*.[2]

The difference between the mortgage and the deed of trust is well illustrated by a recent case in Virginia, where property was conveyed to trustees to secure certain creditors named, among whom were *the trustees themselves*. This, the court held to be a mortgage.[3]

There is, of course, no equity of redemption after a sale under the deed of trust—since the sale operates *proprio vigore* as a foreclosure.

Mortgages with power of sale.—In modern times, some of the disadvantages of the mortgage have been eliminated by the insertion of a clause *giving the mortgagee himself power* to sell in case of default, without applying to a court of equity. Probly in most states, such a clause is unobjectionable, so far as the mortgage may relate to *personal* property; but in many states such power is not permitted to be exercised in the case of mortgages of *real property*. Such clauses are objectionable on principle, since they put it into the power of the *creditor himself* to make the sale, thus opening the door for oppression of the debtor. This objection does not apply to deeds of trust, since there the sale is made by a *third person*, who is supposed to be indifferent between the parties.

In Virginia, mortgages with power of sale have been upheld in cases of personal property, but it is doubtful whether they would be upheld where the mortgage covers real property.[4]

Page 236, § 646. **Mortgage and conditional sale contrasted.**—[Alter the Text section-title to correspond]. The distinction pointed out in the Text between the *mortgage* and the *conditional sale* is important and fundamental.

A *mortgage* connotes (1) a *debt*, usually evidenced by a bond or note; and (2) the mortgage *securing* the debt. The execu-

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[2] See n. 92 Am. St. Rep. 573-598; Wasserman *v.* Metzger, 105 Va. 744.

[3] Morgan *v.* Glendy, 92 Va. 86.

[4] See Floyd *v.* Harrison, 2 Rob. 178; Goddin *v.* Vaughan, 14 Gratt. 129; Gordon *v.* Cannon, 18 Gratt. 387, 401; Morgan *v.* Glendy, 92 Va. 86. Mortgages with power of sale are discussed in Chapter XXV of the Text. See also monographic note, 92 Am. St. Rep. 573.

tion of these instruments is a common transaction of almost daily occurrence in every community.

On the other hand, the true conditional sale is a wholly different thing, and is a comparatively rare transaction. In its true character, it is a perfectly valid contract, and will be upheld, at law and in equity, as freely as other valid contracts.

The *true conditional sale*—not to be confused with the technical *"estate on condition"* in real property law—occurs where the owner of property voluntarily sells and conveys it to another, intending an absolute sale and not a security for a debt, but retains an *option to re-purchase* within a stipulated period, and at a stipulated price. Here, as in the case of other optional contracts, the vendor-optionee must close the option by performance of the stipulated terms *ad diem*—that is, *time is the essence of the contract.*

The conditional sale, continued—as a cover for a mortgage.—The difficulty arising in connection with conveyances of this nature is that shrewd and tricky lenders of money often give to what is in fact a *loan* transaction, the form of a *conditional sale*—which, if the oppressed debtor does not seek sound professional advice, will result in his losing the estate, regardless of its real value over and above the amount of the loan, by failure to tender payment *on the very day of maturity.* The form of the agreement into which the borrower has entered places him merely in the position of holding an *option to purchase his own estate,* by tendering a stipulated sum on a stipulated day.

If, on the other hand, the borrower had executed a *mortgage* instead, failure to pay on the stipulated day would still have left him with a valuable equity of redemption, with the right to redeem *at any time within twenty years*—or, if the mortgagee moved against him earlier, at any time within six months after a decree of foreclosure.

The same—equity looks at the substance, not the form.—Naturally, a court of equity, that delights to disregard form for substance, and especially where form is a cover for unconscionable or fraudulent practices, will tear away the mask, and view the situation here in its true colors. If satisfied that the form of a conditional sale was adopted to disguise the real substance of the transaction, and with the purpose on the part of the lender (the so-called 'vendee') of depriving the borrower (vendor) of his equity of redemption, equity will be astute to declare the transaction a mortgage, and will treat it as such. Nor does the court make any difficulty in receiving parol evidence to establish the real purpose of the instrument.

The same—betrayed by surrounding circumstances.—Difficulty is often encountered in the court's efforts to get at the true nature of such transactions, by reason of conflicting testimony, or lack of testimony due to death of one or more of the parties or of the witnesses. Hence the courts have found that where the transaction was in fact meant as security for a loan, and was not a true conditional sale, the particular circumstances of the transaction will generally, of themselves, betray the hidden mortgage, and give the contract its true color. In this inquiry, as stated, the doors are thrown wide open for the receipt of parol evidence. These circumstances are well set out in the Text.[5]

Page 352, § 653. **Absolute deed as mortgage.**—Practically the same situation is presented here as in the case of the conditional sale, discussed in the preceding section—and the same principles apply here as there. Parol evidence is freely admitted to show the real intention.[6]

Mortgage and deed of trust—advantages compared.—So far as concerns the safety of the debt secured, neither of these forms of security offers an advantage over the other.

The same may be said of mortgages with power of sale, in those states in which such mortgages have complete recognition.

But as between the deed of trust and the ordinary mortgage, the former possesses many advantages over the latter, from the

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[5] §§ 648-652. See Holliday *v.* Willis, 101 Va. 274.

[6] See monographic note, L. R. A. 1916B, 18; Holliday *v.* Willis, 101 Va. 274. The introduction of parol evidence here, as in the case of the conditional sale, to contradict the plain language of the conveyance, has been much criticized, but the principle is sound, and the practice too thoroughly established to be shaken. To exclude parol evidence in these cases would call for like exclusion in other cases of fraud, constructive trusts and mistake—all bearing a close analogy.

creditor's stand point, in the *economy of time and expense.* To foreclose the mortgage requires the employment of an attorney, the institution of a suit in equity, with its accompanying delays; and the still further delay, always provided for in the decree of foreclosure, of *six months of grace* within which the debtor may redeem. On the other hand, the deed of trust may be foreclosed *in pais*—that is without the employment of counsel or any proceedings in court—by simply notifying the trustee to sell the property according to the terms prescribed in the deed itself.

It also happens that where the instrument is to secure an *issue of corporate bonds,* usually payable to bearer, the mortgage is impracticable, because at the time of its execution the creditors (future bondholders) are unascertained and unascertainable; and if ascertained they are too numerous, and their ownership too ephemeral, to render a mortgage a practicable instrument for the purpose. The consequence is that all such issues of bonds are secured by deeds of trust—a trust company usually being named as trustee. In commercial circles such bonds are termed "mortgage bonds", and the instrument securing them a "mortgage," but technically they are not such.

Mortgages—the legal title—the lien theory.—Before leaving this subject it may be well to point out that while the legal title vests in the mortgagee immediately upon the execution of the instrument—of course leaving only an equitable title in the mortgagor—the situation has been lost sight of in most of the American States; and, save as against the mortgagee himself, the legal title is regarded as *remaining in the mortgagor.* In short, the mortgage is treated as a mere *lien* on the estate, even at law—thus borrowing the equitable theory of a mortgage.[7]

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[7] Mr. Pomeroy's treatment of the varying conceptions of a mortgage in the several states is full and complete. 3 Pomeroy's Eq. Jurisp. 1186, et seq.

In Virginia, the distinction between the *legal* title of the *mortgagee* and the *equitable* title of the *mortgagor*—or what is the same thing, between the equitable title of the *grantor* and the legal title of the *trustee* in a deed of trust to secure debts—has been sharply maintained. Faulkner *v.* Brockenbrough, 4 Rand 245; Claytor *v.* Anthony, 6 Rand. 285; Coutts *v.* Walker, 2 Leigh 268, 280; 4 Minor's Inst. (3d. ed.) 1018. But see Spence *v.* Repass, 94 Va. 716, 4 Va. Law Reg. 255 (editorial note); Van Ness *v.* Hyatt, 13 Pet (U. S.) 294; Va. Code 1919, §§ 5472, 2742 (prohibiting mortgagee to recover in ejectment "where the debt has

CHAPTER XXIV.

MORTGAGES—DEEDS OF TRUST (Continued).

Page 356, § 657. **Equitable mortgage by deposit of title deeds.**—The English doctrine in this respect, while upheld in a few states, is very generally rejectd in America.[1]

Page 357, § 658a. **Mortgage to secure future advances.**—A mortgage or deed of trust may be given, not only to secure an *existing* debt, but to secure *future,* and even *contingent,* liabilities. Not only may a definite sum be thus secured, but an

[1] Bloomfield Bank *v.* Miller (Neb.), 70 Am. St. Rep. 381, where the subject is fully discussed.

been paid"). But in the more recent case of Gravatt *v.* Lane, 121 Va. 44, the Virginia court has adopted, inadvertently as is believed, the *'lien theory'* of the mortgage, in holding that an outstanding deed of trust, *unsatisfied,* offers no impediment to the maintenance of *ejectment* by the debtor-grantor against an adverse tenant. The Virginia case cited as authority, (Watkins *v.* Ward, 6 Munf. 38) was the case of a *satisfied* trust—a wholly different situation. It is an accepted theory that an action of ejectment by the former holder of the legal title, may not be defeated by proof of an outstanding *satisfied* trust. See Young *v.* Bradley, 101 U. S. 782; Robinson *v.* Pierce (Ala.), 24 So. 984. But in the case under criticism the trust was an *unsatisfied* one. Should the trustee of the unsatisfied trust now bring ejectment against the prevailing plaintiff, the court would be driven to hold that the trustee could not recover, in spite of historical analogies in Virginia, and of the implication of Va. Code 1919, § 5472, that in such case the trustee of a *satisfied* trust shall not recover in ejectment against the mortgagor or grantor.

The *lien theory* of a mortgage or deed of trust, is supposed to have originated in the so-called "Code States," where the question whether title is legal or equitable is of little or no consequence. But the question is a vital one in those states, as in Virginia, where the distinction between law and equity, and legal and equitable titles, has been rigidly maintained from earliest times. See the more recent case of Grizzle *v.* Fletcher (Va.), 105 S. E. 457, where the Virginia court held that the equitable owner (and the mortgagor, or grantor, in an unsatisfied mortgage is but equitable owner) of an insurance policy, could not maintain an action at law thereon, because of his merely equitable title—a highly technical but quite sound ruling.

The conflict between the "legal title theory" and the "lien theory", in the case of outstanding *unsatisfied* mortgages and deeds of trust, is of special importance in actions on the case at law, for tortious injury to the mortgaged property. If, in Virginia, for example, the *mortgagor* or (grantor-debtor in a deed of trust) may maintain an action at law against a railway company for the burning of fences or houses, or forests, on the mortgaged estate, what defence may the railway company make, when the *mortgagee* or *trustee* later institutes his action for damages for the same injury, standing on his own indefinite sum—*e. g.* any advances that the creditor may make to the grantor within the next twelve months, or to indemnify one against loss by reason of some act done or to be done on behalf of the grantor.

If such an instrument be recorded, it is notice to subsequent purchasers, and is good against creditors; that is, good for the amount advanced thereunder *up to the time that the party making the advances has notice of such subsequent purchases or liens.* But it is generally held that recordation of such subsequent liens and encumbrances is not notice to the *prior* mortgagee—registry being notice to *subsequent,* not prior purchasers.[2]

The same—when prior lienor must cease further advances.—While authorities are not uniform, yet by the better rule if the making of further advances is *optional* with the first creditor, he continues them at his peril after receiving notice of a subsequent lien; but if further advances are *obligatory* upon him under his contract with the debtor, then he may continue to make such advances, without detriment to his stipulated preference for all advances made and to be made, in spite of notice of subsequent liens.[3]

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legal title? This question becomes all the more important where the injury done reduces the value of the security to a point *below the amount of the debt secured.*

On the whole, this departure from ancient landmarks is to be deprecated as likely to open the door to innumerable difficulties in the future, practical as well as theoretical. To illustrate: A executes to T, a deed of trust, on his house and lot to secure B $20,000—the house worth $15,000 and the lot $10,000. By the negligence of X, the house is destroyed by an explosion: Who, under the doctrine of Gravatt *v.* Lane, may sue at law for the destruction of the house? If the debtor may sue and recover the full amount of damages suffered, the creditor's rights are seriously impaired. If, on the other hand, the trustee is the proper plaintiff, the rights of all parties are properly protected, and ancient landmarks of the law are preserved. How may we reconcile this conclusion with Gravatt *v.* Lane?

[2] See Jones on Mortgages, 364, 378; Driver *v.* McLaughlin (N. Y.), 20 Am. Dec. 655 and note; Didier *v.* Paterson, 93 Va. 534; note 11 Am. St. Rep. 288; Union Bank *v.* Milburn, etc., Co. (S. D.), 73 N. W. 527 (excellent opinion); *post,* n. to p. 378; Jones, Chattel Mortgages, §§ 94-98.

[3] But doubtless the inferior creditor would have some sort of equity to prevent further advances, by a bill filed for that specific purpose. Any principle that would permit the debtor to continue to draw the advances in defiance of later creditors, cannot be a

Mortgage on after-acquired property.—As a mortgage securing future *advances* by the creditor is valid, so there may be a valid mortgage covering future *property*—that is property thereafter to be acquired by the debtor. Such mortgages of chattels thereafter to be acquired, in connection with a particular business or location, are quite common—but the principle is equally applicable to real property.

In such cases, the mortgage is invalid *at law* (save possibly as an executory contract), since no title passes at the time of the execution of the mortgage. But they are upheld in equity, as valid *equitable mortgages*.

Being equitable only, the lien is inferior to the title of a *bona fide* purchaser for value.

Whether the registry of such instruments is *notice* to subsequent purchasers, depends upon the question whether the registry is authorized by the statute.[4]

Page 362, § 670. **Who may redeem?**—The question as to who may redeem a mortgage, and the order of exercising this right, stated in the Text, is of little practical importance in modern times, since on a bill to foreclose, a court of equity requires a sale of the property and payment of the debt. We may say in brief, that *any person who has an interest in the estate* mortgaged, may redeem.

Page 367, footnote 1. **Proceeding at law and in equity at the same time.**—It is a singular but well settled rule that one who holds a mortgage for his debt may bring an action at law for a judgment on the debt, and at the same time pursue his

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sound rule of law. Creditors stand in the shoes of their debtor, and are entitled to all of the debtor's rights. If the debtor may claim the advances under his mortgage-contract why may not a later creditor, substantially subject such advances, by *equitable garnishment*, expressed in the form of an injunction against the debtor's further increasing his indebtedness to the first lienor?

[4] See Braxton *v.* Bell, 92 Va. 229; 5 Va. Law Reg. 873; 20 Am. and Eng. Enc. L. 916; Hickson Lumber Co. *v.* Gay Lumber Co. (N. C.), 63 S. E. 1015, 21 L. R. A. 843, n; Jones, Chattel Mortgages, §§ 138-169 (at law), 170-175 (in equity). Clauses covering after-acquired property are very commonly inserted in mortgages by railroad companies to secure an issue of bonds, and are quite generally upheld in equity. Jones, Chattel Mortgages, § 175. The same is true of mortgages by industrial companies covering plant and equipment.

remedy in equity for a foreclosure. Of course, the creditor is entitled to but one satisfaction.[5]

Page 368, § 681. **Statute of limitations.**—In Virginia, a mortgage or deed of trust is barred in twenty years from maturity, except where such instruments are executed by corporations. The same statute makes provision for the extension of mortgages and deeds of trust, by endorsement on the margin of the deed book where recorded. Va. Code 1919, § 5827.

Page 368, § 683. **Debt barred while mortgage alive.**—The doctrine of the Text here stated is well settled; that is, that although the *debt* secured may be barred at law by the statute of limitations, yet if the *mortgage* securing it be not barred, the creditor may still proceed upon his mortgage.

On a debt secured by mortgage, the creditor has two remedies, namely, (1) an *action at law* on the principal obligation (note or bond) for judgment, and (2) *foreclosure* in equity. The fact that he is barred as to the one, does not affect his remedy upon the other. So, if instead of a mortgage, the instrument of security had been a deed of trust, the fact that the note secured is barred by the statute, does not affect the right of the creditor to call upon the trustee to execute the trust by a sale of the property and the payment of his debt.

Of course, it would be otherwise, if the effect of the statute of limitations were to *invalidate* the debt. But it is elementary that the effect of the statute of limitations is only, as it were, *to shut the doors of the courthouse* on the creditor, in the proceeding mentioned in the statute. The debt is still an existing debt, though barred; and if the creditor have other means of realizing thereon, he may resort to such means.[6]

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[5] The Text footnote cites the authorities. Priddy *v.* Hartsook, 81 Va. 67.

[6] Coles *v.* Withers, 33 Gratt. 186; Gibson *v.* Green, 89 Va. 524; 1 Va. Law Reg. 854. So far is this doctrine carried, that it was held in a recent New York case, that though the mortgage itself be barred by the statute of limitations, yet if it contain a *power of sale*, the mortgagee may enforce his claim by exercising the power of sale—since, as held, the effect of the statute is merely to bar *a bill to foreclose*. House *v.* Carr (N. Y.), 78 N. E. 171. See Guldfrank *v.* Young, 64 Tex. 432; Loney *v.* Courtney (Neb.), 39 N. W. 616; 5 Mich. Law Rev. 136. This will, however, depend upon the peculiar language of the statute.

CHAPTER XXV.

REGISTRY OF MORTGAGES AND DEEDS OF TRUST (*Concluded*).

Section 687. **Mortgage with power of sale.**—We have discussed this sort of mortgage, in a previous chapter.

Page 377, § 698. "**Tacking.**"—In view of the registry system in America, this is of no particular importance with us.

Page 378, § 698 (last paragraph)—**The effect of registry as notice.**—The statement of the Text that the recording of the instrument is constructive notice of its existence *"to all the world,"* is one frequently found in the books, and occurs in numerous places in the Text. It is a loose statement, and this is a good place to present the correct doctrine.

Registry of an instrument made in due form of law is notice to all the world, *so far, and so far only, as may be necessary to protect the beneficiary under the registered instrument,* against subsequent competing claims, or other (though prior) claims declared by the statute (because of non-registry or otherwise) to be inferior to the registered instrument. That is to say, all persons who, after such registry, acquire the property in question, or claims against the same, do so with constructive notice of the prior registered instrument *so far as concerns rights secured or vested under that instrument.*

In short, no one may set up notice by registry except the beneficiary in the registered instrument and his privies in estate. It is to the latter, *and the latter alone,* that registry is notice to "all the world."

The same—illustrations.—This can be made plainer by examples: A has a mortgage on B's house and lot, duly recorded. B now takes out a fire policy on the house, containing a provision that if there be a mortgage on the property, *without notice to the company,* the policy shall be void. The house subsequently burns, and the company sets up breach of this condition. B replies that *registry of the mortgage was notice* to the insurance company. Such contention must fail, since the rights of the mortgagee, whose interests registry was intended to protect, were in no way involved in the controversy.[1] So again, where one takes a lien by mortgage or deed of trust and duly records it, he is not affected with notice of subsequent encumbrances or alienations of the same property, though duly recorded.[2]

So, the grantor in a duly registered conveyance or incumbrance, who, concealing its existence, induces a second person to purchase the same property from himself, may not, in an action by the defrauded purchaser to recover damages for the fraud, plead the registry of the earlier instrument as notice to the plaintiff of its existence, and, therefore, that he was not in fact deceived. The constructive notice with which the second purchaser was charged, was not for the *grantor's* protection, but only for the protection of the first *purchaser* under the registered instrument.

CHAPTER XXVI.

EQUITABLE LIENS.

Page 383, § 712. **Equitable liens.**—The definition, or description, of an equitable lien in the Text, is scarcely correct, confined, as the definition is, to liens arising out of *express contract*. There are numerous well rcognized instances of equitable liens, where there was *no contract* whatsoever for such a lien, but where the lien is recognized because *good conscience demands it*—for example, a vendor's lien on real estate, after conveyance made, already discussed. Other illustrations will appear in the following paragraphs.

Banker's lien—(1) at law.—It is a settled principle that a bank has a lien on the depositor's general balance, to secure any debt due it by the depositor. This lien exists at law, where the depositor's debt to the bank is *already due*. Here the bank

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[1] Trader's Insurance Co. *v.* Cassell (Ind.), 56 N. E. 259.

[2] Bridgewater, etc., Mills *v.* Strough, 98 Va. 721. See also Hulvey *v.* Hulvey, 92 Va. 182, 187; Lynchburg, etc., Co. *v.* Fellers, 96 Va. 337; Vanorden *v.* Johnson, 1 McCarter (N. J.) 376, 82 Am. Dec. 254 and note; 6 Va. Law Reg. 58, 632; *ante*, n. to § 658.

simply *sets off* the amount due it against its debt due the depositor—that is, charges it up to the depositor's account.

But if the debt to the bank be *not due,* it cannot be set off at law, since set-off is in the nature of a cross-action, and no action, direct or cross, can be brought *until the claim on which it is based has matured.* In such case, the bank will be driven into equity.

The same—(2) in equity.—The rules enforced in equity are these: (1) *Depositor's debt to bank matured.*—Here, the remedy at law is plain, as shown in the paragraph preceding. The bank simply *sets off* its debt against the depositor's balance —or, in banking phrase, merely *"charges up"* the note, check, overdraft, or other form of debt, to *the depositor's account,* on its books. Here, then, equity does not interfere.

(2) *Depositor's debt to bank not matured.*—(a) *Debtor-depositor solvent*: Here the debtor-depositor being *solvent,* there is no need of equitable intervention; the bank must honor the depositor's checks to the full extent of his balance, and await the maturity of its own debt against the solvent depositor.

(b) *Debtor-depositor insolvent*: This is a situation where equity illustrates the superiority of its principles and practices over those of the law. The debtor is insolvent; the bank holds his note, not yet due, and, therefore, no suit may be brought upon it; the depositor has a balance on his deposit account with the bank, which balance he now proposes to draw out without making provision for payment of the note to fall due in the future—or, some other creditor of the depositor has served a garnishment on the bank, in the effort to subject the balance to his own debt. It is clear, here, that if the bank pays out the depositor's balance, *its own debt will be lost,* because of the depositor's insolvency. It is equally clear that in equity and good conscience the bank has first claim to the balance in its hands. Here, therefore, equity interposes, and gives the bank a lien on the balance, for the full amount of its debt, (*i. e.,* a right to *charge up* the immature note, or other claim, to the depositor's account), with such rebate of unearned interest, or discount, as the situation demands.[1]

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[1] Thomas *v.* Exchange Bank (Iowa), 68 N. W. 780; note 47 Am. St. Rep. 584; Ford *v.* Thornton, 3 Leigh 695; Feazle *v.* Dillard, 5

The same—lien not confined to banks.—The principle of this equitable banker's lien is by no means confined within the narrow compass of the banking business. It is equally applicable to all other persons, where a like situation is presented. Thus, if A owes B $500, already due, and B owes A $500 (or more, or less) not yet due, and *B is insolvent,* A will be permitted, in equity, to set off his claim, in spite of its immaturity.

Page 384. **Other equitable liens—illustrations.**—The list of illustrations following is by no means exhaustive. Indeed, the compilation of an all-inclusive catalogue of such liens is impossible. As before indicated, such a lien will be recognized in all cases where equity and good conscience demand it, and where its enforcement will not violate superior rights.

Thus, where one co-tenant makes repairs to the common property, *necessary for its preservation,* he has an equitable lien on the property for contribution from his co-tenant.[2]

So, where a life policy is payable to several beneficiaries, one of whom pays the premiums for several years, so as to keep the policy alive, the person so paying premiums has an equitable lien on the proceeds of the policy for the re-payment of his premiums.[3]

In Williamson *v.* Gayle,[4] a farmer who had kept a mare for another, was held entitled to an equitable lien on the animal as against the attaching creditors of the owner, not only for her keep, but for a stud-fee and other expenses incurred by the farmer in that behalf—though the farmer, being neither a liveryman nor an agister, was not entitled to a lien at law.

In Dulaney *v.* Willis,[5] A borrowed money of B, and executed what was thought to be a deed of trust to secure the debt. By some misake, the *name of the trustee was omitted,* and hence no

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Leigh 30; Scott *v.* Armstrong, 146 U. S. 499; n. 78 Am. St. Rep. 431-436; 1 Morse on Banks and Banking, 329; 1 Va. Law Reg. 780. The right seems to have been denied in Merchants National Bank *v.* Robinson (Ky.), 29 L. R. A. 760—a case in which the facts were somewhat peculiar, but the decision in which is believed to be unsound.

[2] Alexander *v.* Allison, 79 Ky. 148.

[3] Stockwell *v.* Mutual Life Ins. Co. (Cal.), 73 Pac. 833.

[4] 7 Gratt. 152.

[5] 95 Va. 606.

legal title passed out of the grantor, since there was no grantee. It was held that a good equitable lien resulted.

So, it is a settled principle of equity, as we have seen, that where a purchaser of an estate pays the whole or any part of the purchase money, and the vendor *is unable to make title,* the purchaser has a lien on the vendor's interest in the property for the purchase money so paid.

Again, where an attorney has a valid contract with a client for a certain percentage of the recovery in a suit, the object of which is to recover money, and the recovery is had, and the client, in the course of the proceeding, purchases the debtor's real property from the court, *paying therefor with the fund so recovered by the attorney,* the latter has an equitable lien on the land so purchsed.[6]

A particularly striking illustration of this lien is found in a recent case in the United States Supreme Court.[7] Here, a firm in New York, by arrangement with their foreign correspondent, deposited in *their own safety deposit box* certain negotiable stocks and bonds, indorsed in blank or payable to bearer, to secure drafts to be drawn by them from time to time on the foreign correspondent. The package of securities was so marked as to indicate that it was held in escrow. By consent of the foreign creditor, the firm retained, and from time to time exercised, the privilege of withdrawing portions of the securities and substituting others. On the bankruptcy of the debtor-firm, the foreign creditor was held to have an equitable lien, in preference to the trustee in bankruptcy. Here there was no lien at law, because of the retention of the securities in the debtor's own possession.

Equitable liens, continued—assignments—orders on a fund.—The principles applicable to the assignment of funds in the hands of a third person (*e. g.* a debt), and of orders drawn on such funds (*e. g.* on the debtor) may be thus briefly stated:

(1) *"Order" and "assignment."*—An order on a designated fund in the hands of another in favor of a third person, though

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[6] Fitzgerald *v.* Irby, 99 Va. 81. See also Ruffners *v.* Putney, 12 Gratt. 541.

[7] Sexton *v.* Kessler, 225 U. S. 90.

unaccepted, operates as if the drawer of the order had used *words of assignment.* That is, where the creditor, A, draws an order on his debtor, B, directing the latter to pay to C the whole, or a part, of the debt, the order will operate as if A had used *words of assignment,* instead of the language of *request or command.* Hence "pay C the $100 you owe me" or ("$50 out of the $100 you owe me") operates as if the language had been "I hereby assign to C the $100 owed me by B" (or $50 out of the $100 due me by B").

(2) *Effect of such orders and assignments.*—As both the order and the assignment operate alike, the question now is, How effective is either, in transferring title to the *chose* to which they refer? The answer depends on the following principles:

(a) *Assignment of the whole fund*: There is no difficulty here—whether the transfer be in the form of an *assignment* or of an *order.* Such an assignment or order for the *whole* of the fund, will transfer complete ownership (on due notice to the debtor), whether consented to or accepted by the debtor or not. Such assignments are valid, even *at law.*[8]

(b) *Assignment of part of the fund*: Courts of law do not permit such *partial* assignments—since they may subject the debtor to *several suits,* whereas he was originally liable to but *one.* Hence, assignment of a *portion* of a debt only—or orders "payable out of" a designated fund,—not consented to by the debtor (by acceptance or otherwise) are *invalid at law.*

Equity on the other hand, will treat such a transaction as valid —either as an assignment in fact (*pro tanto*) or, through its doctrine of equitable liens, as operating as such a lien on the fund in question. The objection on which the law court refuses recognition of the partial assignment is eliminated in equity, since that court may settle the whole controversy in a *single suit.*

The assignment of a part of a debt, or an order "payable out of" a designated debt or fund, not consented to by the debtor, is therefore, *invalid at law,* but *valid in equity.*[9]

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[8] The student is reminded that he has learned in his studies of negotiable instruments that this principle is not applicable to bank checks.

[9] S. V. R. R. Co. *v.* Miller, 80 Va. 821; Heulings *v.* Heulings (W. Va.), 18 S. E. 620; Chesapeake, etc., Ass'n *v.* Coleman, 94 Va. 433. But a mere *"promise to pay out of"* a particular fund will not

Page 386, § 716. **Creditors stand in shoes of the debtor.**—We have already seen [10] that a *purchaser* and a *creditor* stand in different positions—the former putting out his money on the *specific property* purchased, while the creditor trusts to the *person* of the debtor. But that if the creditor takes a mortgage, or pledge, or other specific security, he likewise puts his money out on the specific property, and, in law, is a purchaser *pro tanto*.[11]

If the creditor does thus stand in the shoes of his debtor, equitable liens or claims held by others against the property of the debtor are good as against the creditor, whether he has notice of them or not—on the principle that being good against the debtor they must be good against those who stand in his shoes. The Text places creditors and purchasers on the same footing, and to this extent is incorrect.[12]

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ordinarily have this effect. Rogers *v.* Hosack, 18 Wend. 319; Hicks *v.* Roanoke Brick Co., 94 Va. 741; Christmas *v.* Russell, 14 Wall. 69. Compare Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634. An assignment of a fund *not yet in existence*, but expected to come into existence in the future, cannot operate at law, but is a good equitable assignment. Chesapeake Co. *v.* Coleman, *supra*.

[10] Ante, note to p. 130.

[11] Post, note to § 904.

[12] Of course, if there is a statute requiring such equitable liens to be *registered*, and rendering them void, not only as to purchasers but *creditors* as well if not registered, then the creditors stand on the same footing with purchasers. See authorities heretofore cited *ante*, note to p. 130; Borst *v.* Nalle, 28 Gratt. 423; Coldiron *v.* Asheville Shoe Co., 92 Va. 364; 6 Va. Law Reg. 645; 7 Va. Law Reg. 343.

CHAPTER XXVIA.

CREDITOR'S BILLS—SUITS TO ENFORCE PAYMENT OF DEBTS.

[*Memorandum.*—With § 719 of the Text, entitled *"Creditors Bills,"* a new chapter should begin. We have numbered this new chapter XXVIA].

Page 387, § 719. **Ordinary remedy of creditor.**—The remedy of a creditor who holds an ordinary pecuniary claim against his debtor, not *in rem* but *in personam* only, is generally *at law,* and not in equity. Nor is this rule altered by the fact that the creditor has a multitude of dissimilar claims against his debtor; nor by the fact that there is a multitude of creditors having claims against the same debtor. The student must carefully note the general rule, in order to appreciate the peculiarity of the *creditors' bill,* now to be noticed.

Creditors' bill—in rem proceeding.—The peculiarity of a creditors' bill is that it is rather a proceeding *in rem,* than *in personam.* Its purpose is not to obtain a *personal decree* against the debtor, but to subject *property* of the debtor to the payment of the debt, by virtue of some existing lien or other *in rem* claim, on which there is *no remedy at law.*[1]

The same—general creditors—lien creditors.—A *general* creditor has no right to proceed against his debtor's *property,* legal or equitable, as a rule, until he has proceeded against the *person,* by obtaining *judgment at law*—or has otherwise reduced his claim from one *in personam* to one *in rem.* If then the assets to be subjected are *equitable* and not legal, or the legal remedy is inadequate, a case for the creditors' bill is presented.

The same—why general creditors may not maintain bill.—It is a settled principle both at law and in equity (save where the rule is changed by statute, as has been done in a few

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[1] See Spaden *v.* Davis, 2 Johns. Ch. 280; 2 Kent's Com. 483; Hollins *v.* Brierfield Coal Co., 150 U. S. 371; Va. Passenger & Power Co. *v.* Fisher, 104 Va. 121.

cases), "that every debtor, until his property is specifically bound to the satisfaction of his debt by his own agreement, or by some judicial or other proceeding, has an absolute right to dispose of it at pleasure; a power which no tribunal whatever has authority to control or limit. The obligation of a debtor is purely personal, and in no way affects his property or any portion of it. To this rule no solitary exception can be found, nor can one exist, until the principles of our law are so changed as to authorize courts of equity to administer the estates of living persons as if they were dead."[2]

It follows, therefore, that if the claims asserted in a creditor's bill are not already specific charges on the property of the debtor, there must first be judgment at law, followed by execution and return of "no effects."

The same.—But where the claim has thus been reduced to one *in rem,* either by contract or by hostile proceedings at law, and there are no legal assets upon which execution at law may be levied, but equitable assets exist, then a court of equity will take hold of the *res* and dispose of it for the benefit of such creditors as have fixed claims thereto.

In such a proceeding, inasmuch as the court is to dispose of the whole *res,* it follows that all other *in rem* creditors and other persons who have *in rem* claims thereto, are proper parties to the suit. For this reason, not only may one creditor file such a bill, in a proper case, but *any number of creditors may unite in the same bill,* howsoever diverse their claims, provided the claims are all against the same property of the same debtor.

Numerous creditors are permitted thus to unite in a single suit, not so much for the purpose of preventing a multiplicity of suits, as from the convenience, if not the necessity, of having a convention of the creditors in order to *fix the priorities* of their respective conflicting claims, and to distribute the assets of the common debtor among them in accordance with their several rights.[3]

The same—illustrations.—Examples of proper cases for creditors' bills, would be:

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[2] Green, J., in Tate *v.* Liggatt, 2 Leigh 84, 99.
[3] Almond *v.* Wilson, 75 Va. 613.

1. Debts against a decedent. At death, all the debts constitute liens on the entire estate of the decedent, real or personal, and any number of creditors may unite in a single suit in chancery to have the estate administered and their debts paid;

2. Judgment liens on real property, where, as in Virginia (it is otherwise in many States) execution cannot be levied on real property.

3. Mechanics' liens on real property;

4. Debts secured by mortgage; or by deed of trust where, by reason of conflicting claims of creditors as to their respective priorities, the aid of equity is required;

5. Claims against insolvent corporations after reduction to judgment;

6. Suits to set aside fraudulent conveyances—after judgment, except where statute otherwise provides, as in Virginia.[4]

7. To enforce equitable liens; or constructive trusts; and to reach *equitable assets generally*—as wife's equitable separate estate—a partner's interest in a copartnership—a legacy in hands of the executor—the mortgagee's interest under a mortgage—the mortgagor's equity of redemption—the trust estate of a *cestui* in real or personal property, etc.[5]

Page 288, § 722. **The same—Is judgment always necessary?**—Of course if there be a lien already (for example, by contract or by construction of law, or a trust in the creditor's favor) no judgment is necessary to sustain a creditor's bill; but where there is no *such pre-existing lien, and no judgment,* a court of equity will not take jurisdiction of a creditors' bill *merely because judgment and execution at law would be unavailing.* The Text in this section seems to indicate the contrary. The case cited as authority[6] is scarcely authority for the proposition. If the claim be a legal one, it is the right of the defend-

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[4] See *ante, "Fraudulent Conveyances."*

[5] This list is not exhaustive, but merely illustrative. On the general subject, see note 90 Am. Dec. 288, 300; note 63 L. R. A. 673; note to Suckley *v.* Rotchford, 12 Gratt. 72 (Va. Rep. Ann.); note to § 726, *infra.*

[6] Case *v.* Beaureguard, 101 U. S. 688.

ant to insist that justice of the claim be first established by the verdict of a jury in a law court.[7]

The same—when judgment not necessary—exceptional cases.—But where the reason ceases the rule ceases. Hence where, from the peculiar circumstances of the particular case, *no judgment at law can be obtained—e. g.* where the debtor is a non-resident, and the local attachment statutes do not provide a remedy—then the general creditor may proceed with his creditor's bill, without the necessity of a judgment at law.[8]

Page 389, § 723. **Priority of creditors.**—The doctrine or the Text that where the creditor or creditors sue merely for *their own benefit*—and not, as is usual, "on behalf of themselves and all other creditors similarly situated, who will come in and contribute to the costs of this suit"—such plaintiffs will be entitled to a lien from the filing of the bill [8a]—a lien prior to other non-suing creditors—is a sound principle, but with the obvious qualification that such lien, if arising only from the filing of the bill, will be *inferior to other valid liens already affecting the property when the bill is filed.*[9]

So the further statement in the same section of the Text, that if the plaintiff sues in behalf of himself "and all other creditors who may elect to come in," creditors who accept the invitation and do come into the suit are entitled to share *pari passu* in the fund, is subject to the same qualification, namely, that all valid liens *already existing* at the time of the filing of the bill—whether such liens are in favor of the original plaintiff in the

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[7] Freedmans Sav. Bank *v.* Earle, 110 U. S. 710; Cates *v.* Allen, 149 U. S. 449; Overmire *v.* Hayworth (Minn.), 31 Am. St. Rep. 660, and note; Tate *v.* Liggatt, 2 Leigh. 84; Wallace *v.* Treakle, 27 Gratt. 479; Va. Pass. & Power Co. *v.* Fisher, 104 Va. 121; Mixon *v.* Dunklin, 48 Ala. 455; Parish *v.* Lewis, Freeman (Miss.) 299. See Donovan *v.* Finn (N. Y.), 14 Am. Dec. 531, for an illuminating discussion of the question of equity jurisdiction over matters of debtor and creditor. Compare McMillan *v.* Knapp, 76 Ga. 171, 2 Am. St. Rep. 29.

[8] Merchants Nat. Bank *v.* Paine, 13 R. I. 592 (full discussion); Farrar *v.* Haselden, 9 Rich. Eq. (S. C.) 331; Pendleton *v.* Perkins, 49 Mo. 565; O'Brien *v.* Coulte, 2 Blackf. 421. See Peay *v.* Morrison, 10 Gratt. 149.

[8a] Under Virginia Code 1919, § 5186 "from the time of brining his suit."

[9] Wallace *v.* Treakle, 27 Gratt. 479.

suit or of subsequently petitioning creditors who come in—will retain their former priority.

In other words, the principle of sharing ratably in the fund applies only to the rare cases of liens arising *by virtue of filing the bill* and not to *prior* existing liens.[10]

Page 390, § 724. **Creditor's bill to set aside fraudulent conveyance.**—In the absence of statute, such a suit may be brought *only after judgment* obtained against the fraudulent debtor. But, as we have heretofore seen, in Virginia, by statute, the creditor may proceed before obtaining judgment, and even *before his debt is due.*[11]

Page 391, § 726. **Subjecting equitable interests.**—Attention is called to the principle announced in this section that where the debtor has equitable property or interests, upon which an execution at law cannot be levied, the remedy is by creditor's bill in equity, *after putting the claim in judgment*, unless it is already in the nature of a lien or trust. The student will notice that *legal executions cannot be levied on equitable interests,* and that the equity of redemption of the debtor is an equitable interest and can only be reached in equity.[12]

Page 391, § 727. **Property reached by creditor's bill—real property.**—In most of the states, real property is as much

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[10] Wallace *v.* Treakle, *supra*—a case where the fund was applied (1) to existing liens; (2) to liens of plaintiffs in the bill (who sued for their own benefit only)—liens originating by the filing of the bill; and (3) to creditors who subsequently came into the suit. In Johnson *v.* Waters, 111 U. S. 640, 673-674, the plaintiffs sued on behalf of themselves and all other creditors who might elect to come in. There being *no liens prior to the filing of the bill*, it was held that the fund should be distributed *pro rata* among all the creditors, whether original plaintiffs or those coming in later. A suit to set aside a fraudulent conveyance before judgment recovered (as permitted by the Virginia statute) is an illustration of the case of the lien 'arising only from the filing of the suit.'

[11] Va. Code 1919, § 5186. In the absence of statute, see Cates *v.* Allen, *supra.*

[12] The Court of Appeals of Virginia seems to have held otherwise, by inference, in Spence *v.* Repass, 94 Va. 716, although the rule is settled by a line of cases in Virginia and other states. The ruling was expressly made in Claytor *v.* Anthony, 6 Rand. 285. See Spence *v.* Repass criticised, 4 Va. Law Reg. 255. See Mr. Freeman's elaborate discussion of the subject, in note 97 Am. Dec. 303-15. See especially, Van Ness *v.* Hyatt, 13 Peters (U. S.) 294; *supra*, note to § 719.

subject to levy by execution at law as is personalty; but by a peculiar rule existing in Virginia, *real property cannot be levied on under execution.* The method of procedure is first to obtain a judgment against the debtor *at law;* this by force of the statute becomes a *lien* on all the debtor's real property. In order to subject this, a creditor's bill must then be filed in equity; and by another peculiar rule—arising from the language of the statute—such bill may be maintained, *without issuing execution, or exhausting personal property*—contrary to the general rule that a creditor's bill cannot be maintained where there is a remedy at law.[13]

Choses in action—garnishment—"trustee process." — The Text mentions numerous *choses in action* which may be reached by creditors's bill, because of the impossibility of subjcting these by execution at law. But in most states there now exist statutes known as *Garnishment Statutes,* by means of which, *choses in action* in the nature of liquidated debts, may be reached at law. Under these statutes, the creditor has a summons issued against his debtor and against the garnishee (debtor of his debtor), and on proof of a debt due by the garnishee, the creditor is entitled to a judgment requiring the latter to pay the debt, or so much thereof as is owed by the judgment debtor, to the plaintiff creditor, instead of to the original debtor.[14]

In Virginia, by statute, an execution is a lien on all *choses in action* belonging to the debtor, from the time of issuing the execution, though from their nature they are incapable of being levied on.[15] Certain exceptions are made for the protection of innocent third persons.

We shall study the creditors' bill in more detail in connection with *Equity Procedure.*

The student will observe that we have now completed the first grand division of equity jurisprudence, as made by our author at the outset, namely, *Equitable Subject-matter,* and that we now enter upon the second division, namely, *Equitable Remedies.*

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[13] Va. Code 1919, §§ 6470-6472; Price *v.* Thrash, 30 Gratt. 513; Stovell *v.* Border Grange Bank, 78 Va. 188.

[14] Va. Code 1919, § 6510.

[15] Id. §§ 6501-6502.

CHAPTER XXVII.

SPECIFIC PERFORMANCE.[1]

Page 397, § 733. **Foundation of specific performance of contracts for sale of real property.**—Probably stronger reasons than those assigned by our author, for the exercise of the jurisdiction to require specific performance of contracts for the purchase and sale of real property, are:

(1) Not only because damages are generally inadequate to compensate the vendee for the breach of such a contract, but because of the *peculiar measure of damages* prevailing in many states for the resulting injury to the vendee. This rule (in the absence of fraud), denies to the disappointed vendee damages for the loss of his bargain. He may not recover (save in exceptional cases) the difference between the *contract price* and the *market value,* as in the case of a broken contract for the sale of personal property—but *nominal damages* only. There seems no sound reason for such a rule, but its existence prevails widely.[2]

(2) Because nothing else than specific performance will satisfy the buyer's *plans, purposes* and *tastes*—as no other lot or parcel, in conformation, location, surroundings and outlook, and other features, is substantially the same as that contracted for.

Page 401, § 740. **Implied warranty of title.**—The student will carefully note that under an *executory* contract to convey real property, (but not under an *executed conveyance*) there is always, in equity, an *implied warranty of title,* though not mentioned in the contract—it being a settled rule of equity *never to force a bad title upon an innocent purchaser.*[3]

Indeed, as before noted in connection with the topic of Mistake, not only will *specific performance* be refused for defect

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[1] For an excellent compendium of the essentials of a case for specific performance, see 3 Pomeroy's Eq. Jurisp. 1404, n.

[2] See 3 Sedgwick on Damages (9th ed.), 101, *et seq;* Stuart *v.* Pennis, 100 Va. 612, 8 Va. Law Reg. 564, n; id. 764.

[3] Christian *v.* Cabell, 22 Gratt. 8; *ante,* note to page 243; note, 7 L. R. A. (N. S.) 445. As to what a "marketable title" is, see Sachs *v.* Owings, 121 Va. 162.

of title in such case, but the court will give the vendee affirmative relief, either by *setting aside the sale* and requiring a return of the purchase money already paid, or decreeing compensation for the defect, as may seem just.

Page 402, § 742. **Signature.**—Observe that the contract need only be signed "by the party to be charged;" that is, the *defendnt*. . Where A signs a written contract, agreeing to sell Blackacre to B, who does not sign, but who orally accepts, B may maintain a bill for specific performance against A, because the contract is signed by the *"party to be charged,"* namely, A; but A may not maintain such a bill against B, because the contract is *not signed* by the party to be charged.[4]

Page 406, § 750. **Specific performance discretionary.**—The most striking feature of the remedy of specific performance is, that it is not regarded as a strict right which the court is bound to enforce, but as an *extraordinary act of grace* on the part of the court, to be granted only where the plaintiff makes out his case fully, and there is not only *no actual fraud or mistake,* but there is *no hardship or oppression,* even though these do not amount to legal or equitable wrong. We have heretofore seen that a court of equity is accustomed to *lay terms upon the plaintiff* as a prerequisite to relief, in any case where this seems necessary to do complete justice. This is peculiarly so in bills for specific performance.[5]

Page 408, § 753 (second paragraph). **Duty of purchaser to investigate.**—The doctrine of Slaughters *v.* Guison, here stated, is no longer the law.[6]

Page 410, §§ 755-6. **Mistake.**—The subject discussed in these sections, namely, whether equity will correct a mistake in a written contract for the sale of real property, *by inserting*

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[4] This is more distinctly brought out in the Text, § 758. See Central Land Co. *v.* Johnston, 95 Va. 233; Cummins *v.* Beavers, 103 Va. 230; 6 L. R. A. (N. S.) 397, n.

[5] Ingersoll *v.* Pond, 108 Va. 179; Colonna, etc., Co. *v.* Colonna, 108 Va. 230; Barnett *v.* Cloyd, 125 Va. 546; Bonaghan *v.* Maloney (Mass.), 128 Am. St. Rep. 378, and full note.

[6] See foot note 2, page 269 of Text, and our note thereto, *ante*.

something omitted, on merely oral proof, has been heretofore fully discussed.[7]

Page 411, §§ 757-758. **Mutuality of contract.**—As we have just seen in note to sec. 742, the written contract need be signed by the *defendant* only, and *oral acceptance* by the plaintiff is sufficient. The Text considers this as an exception to the rule requiring mutuality of obligation. As a matter of fact, it does not constitute an exception, since the effect of the statute of frauds is not to render the contract *void,* but merely *non-enforceable.* It touches the *evidence* and not the *right.* Hence, where the contract is signed by the defendant only, and is orally accepted by the plaintiff, we have complete mutuality of *obligation.* The non-signing party is as much bound as the signing party, but the non-signing party has the *statutory evidence* of his right, whereas the signing party has *no such evidence.* It follows that the apparent lack of mutuality is not in the *obligation,* but in the *remedy.* The circumstance, however, that the remedy becomes mutual the moment the non-signing party attempts to utilize it, supplies the required mutuality of remedy. By filing his bill he becomes as firmly bound as the defendant. Hence, while the Text reaches the right conclusion, its reasoning is not quite satisfactory.[7a]

Mutuality of remedy.—An important principle in connection with specific performance of contracts is, that where the defendant could not have compelled the plaintiff to perform—as where the plaintiff was an infant at the time the contract was made, or that the wife of the plaintiff-vendor could not have been compelled to unite with him in the conveyance—the defendant will not be compelled to perform on his part, howsoever good a title the infant, in the one case, or the husband-vendor, in the other, may be able to convey at the time the suit is brought.[7b]

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[7] See note to pages 260-1 *ante,* where the doctrine of Glass *v.* Hulbert was examined and declared not sound.

[7a] Cummins *v.* Beavers, 103 Va. 230; 6 L. R. A. (N. S.) 397 n.

[7b] Evans *v.* Kingsbury, 2 Rand. 120, 14 Am. Dec. 779; Watts *v.* Kenny, 3 Leigh. 272, 23 Am. Dec. 266; Haden *v.* Falls, 115 Va. 777, 787-788. Text, p. 411, n.

Page 412. **Optional contracts for the sale of real estate.**—The student is supposed to be familiar with the nature of optional contracts, from his studies of the law of contracts; and we cannot here discuss the elementary learning of that subject. But assuming that the plaintiff has a binding option for the purchase of the defendant's real property, evidenced by proper writing, will a court of equity specifically enforce the contract, when it has been accepted within the stipulated time by the plaintiff, who performs, or offers to perform, all conditions precedent under it? Some doubt has been suggested, and possibly a few cases have decided the question in the negative. But by the great weight of authority, such a contract *will be specifically enforced,* under the circumstances stated, where it presents a case otherwise proper for the exercise of this extraordinary jurisdiction.[8]

Page 412, § 760. **Time as essence of the contract.**—We have already discussed this in note to page 224, where the doctrine of the Text is somewhat modified.

Page 416, § 765. **Compensation for defect of title.**—The general rule is well stated in the Text, namely, that where the vendor is unable to make complete title, the court, on a bill by the vendee, will, if so desired by the vendee (but not otherwise), compel the vendor to convey *such title as he has;* and will either deduct from the purchase money such sum as seems fair, in order to compensate the vendee for the defect, or will require *indemnity* to secure the vendee against loss—if the vendee is willing to accept the title on these terms.

The same—exception—wife refusing to unite.—There is one striking exception to the rule last stated, namely, where the *vendor's wife refuses to unite* in the conveyance to release her contingent right of dower. Here, by the better authority, the court will not compel the vendor-husband to convey subject to

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[8] See note 21 L. R. A. 127; Ross *v.* Parks (Ala.), 30 Am. St. Rep. 47; Johnston *v.* Trippe, 33 Fed. 530 (full discussion); Weaver *v.* Burr, 31 W. Va. 743; Hogdon *v.* Mansfield, 147 Mass. 304; note 6 L. R. A. (N. S.) 403; note 118 Am. St. Rep. 592. In an ill-considered opinion in Graybill *v.* Brugh, 89 Va. 895, the Virginia court cast some doubt upon the proposition, but the law is now settled otherwise in Virginia. Cummins *v.* Beavers, 103 Va. 230.

his wife's dower, and make compensation for the dower right unreleased.

The reason is, that *pressure thus brought to bear upon the husband will produce pressure upon the wife,* and practically force her to execute a deed, howsoever unwilling she may be in fact. Such pressure a court of equity is unwilling to lay upon the wife, and hence the vendee will be required to take the property with the dower right outstanding, and pay the *full contract price,* or *else rescind the contract.*[9]

Page 416, § 766. **Who may bring the bill—suit by vendor.**—It may seem to the student an anomalous principle that the *vendor* may bring the bill, as well as the vendee, even though he hold the bonds or notes of the vendee, who is solvent, and against whom a remedy at law by judgment and execution would be plain and adequate. Nevertheless, it is settled that the vendor may maintain such a bill. The object of such a suit is not only to *collect the purchase money* but *to compel vendee to accept* the title, and thus to relieve the vendor of the responsibility of the ownership of the property.

Another and better reason is that the suit by the vendor is, in effect, a suit to *enforce his vendor's lien*—as will appear in the following section.

Suit by vendor, continued—his vendor's lien.—In a suit for specific performance by the vendor, the court is not content merely to give him a *personal decree against the vendee* for the purchase money, but, regarding that as done which ought to be done, the court treats the *land as belonging to the vendee,* subject to the payment of the purchase money. The legal title being still in the vendor, the court treats him as a *trustee* of the legal title for the vendee—thus in effect, giving the vendor a *vendor's*

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[9] See Clark *v.* Reins, 12 Gratt. 98, 114; McCann *v.* James, 1 Rob. (Va.) 256; Dunsmore *v.* Lyle, 87 Va. 391; note, 70 Am. Dec. 458; Aiple-Hemmeman, etc., Co. *v.* Spelbrink (Mo.), 111 S. W. 480, 14 Ann. Cas. 652, full note; 9 Mich. Law Rev. 333. Many cases *contra.* Note 24 L. R. A. 765. In Haden *v.* Falls, 115 Va. 779, quoting Sharswood, J., in Riesz's Appeal, 73 Pa. St. 490, the court said: "The wife is not to be wrought upon by her love for her husband and sympathy in his situation, to do that which her judgment disapproves as contrary to her interest, nor is he to be tempted to use undue means to procure her consent. The vendee must be left in such cases to his action at law to recover damages."

legal lien (not the vendor's equitable lien), for his money; and in this suit for specific performance the court enforces the lien, if necessary, *by selling the property, paying over to the vendor his purchase money,* with interest and costs, and the overplus, if any, to the vendee." [10]

In short, a suit for specific performance, when brought by the vendor for the purchase money, is rather a suit to *subject real property to a vendor's lien*—a lien not properly enforceable except in equity—than technically a suit for specific performance.

Specific performance of contract to make a will in plaintiff's favor.—While it is, of course, impossible to compel specific performance of a contract to make a will in another's favor, equity will accomplish justice in such cases—assuming the contract based on a valuable consideration and otherwise valid—by attaching a *constructive trust* to the subject-matter of the contract, in the hands of the heirs or devisees, or personal representative of the deceased contractor. [14]

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[10] See Ayres *v.* Robins, 30 Gratt. 105.

[11] Burdine *v.* Burdine, 98 Va. 515, 6 Va. Law Reg. 389 n; Printz *v.* McLeod, 128 Va. 471 (contract for mutual wills).

CHAPTER XXVIIA.

THE DOCTRINE OF LIS PENDENS.

(*New Chapter here*)

Page 417, § 768. **Lis pendens—meaning and general application.**—*Lis* means *suit,* and hence *lis pendens* means *pending suit. Pendente lite* means *during the pendency of the suit.* The *judgment* or *decree* is the result of the suit.[1]

By the rule of the unwritten law, one who purchases or otherwise acquires an interest in property, *during the pendency of proceedings* (at law or in equity)[2] directed against, or directly affecting, such property, or after the rendition of a judgment or decree in similar proceedings—the purchase being made from a party to the suit, or from one in privity with him—will take the same, *subject to the judgment or decree,* whether the purchaser had actual knowledge of the pendency of the suit, or of the judgment or decree therein, or not.

The same—applicable to in rem, or quasi in rem, proceedings only.—The doctrine of *lis pendens* has no application to proceedings merely against the *person* of the defendant (*in personam*), and not directly involving the *res* purchased. The suit must be *in rem* or *quasi in rem.*[3]

Thus, the actions of *debt, assumpsit, trespass,* and *trover,* (not accompanied by *attachment* proceedings) are merely to recover a judgment for money, and therefore are purely in *personam,* and in nowise *in rem.* On the other hand, the actions of *detinue,* or *replevin* or *ejectment,* are *in rem*—being directed against a particular *res,* carefully described in the plaintiff's declaration.

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[1] In this discussion, the term *lis pendens,* when not otherwise indicated, is used as including the judgment or decree for the *plaintiff*—that is, not only the suit *pending,* but the result of the suit ended in the plaintiff's favor. So *pendente lite* connotes not only the period while the legal controversy is pending, but during which the plaintiff's judgment or decree retains its vitality.

[2] 25 Cyc. 1447.

[3] Houston *v.* Timmeman, 17 Or. 499, 11 Am. St. Rep. 848, 4 L. R. A. 716; Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766.

So, a bill in equity for *divorce,* with no prayer directly affecting the defendant's property, or a suit merely for an *accounting* from a trustee or co-partner, would be *in personam* only; whereas, a suit to trace plaintiff's funds into a particular *res* and attach a *constructive trust* thereto; for *specific performance;* for partition; to establish an *equitable lien;* to *set aside a conveyance,* for fraud or mistake, or to *reform* it for mistake; a *creditor's bill* to subject described equitable assets—are all examples of *in rem* proceedings, to which the doctrine of *lis pendens* is applicable.

The same—foundation of the doctrine.—All the authorities substantially agree that the *pendente lite* purchaser occupies the uncomfortable position stated, howsoever innocent he may be in fact, but there is some lack of harmony touching the *rationale* of the principle. It is sometimes placed on the *conclusive presumption of notice* as a matter of law; and, again, on grounds of *public policy,* since, in the absence of the rule, a judgment or decree for the plaintiff, in any case, might be rendered completely barren by a sale of the *res* to a third person *pendente lite.*[4] But, after all, this divergency of view is of slight importance, since the presumption of notice itself rests upon grounds of public policy. On the one theory, notice is conclusively presumed in order to prevent the defendant from converting plaintiff's judgment into a barren victory, by a sale to another, *pendente lite.* On the other theory, a *pendente lite* purchaser is held to take subject to the result of the pending suit, because public policy demands such a rule to prevent the same miscarriage. In practical results, therefore, the distinction seems academical only.

The same—applicable to real and personal property.—The authorities are in entire harmony in applying the doctrine of *lis pendens* to *real* property, and, generally, to *personal* prop-

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[4] Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766; Watson *v.* Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459; 25 Cyc. 1451.

erty;[5] but a respectable minority, including our Text, denies its application to the latter.[6]

All the authorities, however, for obvious reasons, deny the application of the rule to negotiable instruments, bonds, and (generally) to corporate stocks, as tending unduly to hamper commercial transactions.[7]

The same—more particularly of the application of the rule.—Analyzing the rule that a *pendente lite* purchaser takes subject to the result of the suit, the following are some of the more important subordinate principles applicable:

(1) *Strict application.*—The rule is a harsh one, and is applied *strictissimi juris* when affecting an honest purchaser for value.

(2) *Vendor a party to the suit.*—The vendor must have been a party to the suit, or in such privity with a party as to be bound by the judgment.

(3) *Description of res in pleadings.*—The *res* affected must be so described in the pleadings as to be capable of identification by the purchaser, had he known of and examined the record of the suit.[8]

(4) *Jurisdiction.*—The court must have jurisdiction of the *res,* and of the person of the defendant—or at least have so proceeded against him as to acquire jurisdiction to dispose of the *res.*

(5) *When lis pendens begins.*—The suit is regarded as *lis pendens* from the time of the filing of the plaintiff's declaration or bill, after service of process, or after voluntary appearance.[10]

(6) *Extent of notice.*—The notice extends only to such facts as are disclosed by the pleadings at the time of the *pendente lite* purchase—and the purchaser is not affected by *amendments* to the pleadings, extending the scope of the suit. He takes subject

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[5] 25 Cyc. 1453; Freeman, Judgments, 194; Bolling *v.* Carter, 9 Ala. 921; Swanz *v.* Pillow, 50 Ark. 300, 7 Am. St. Rep. 98; Thomas *v.* Southard, 2 Dana (Ky.) 475, 26 Am. Dec. 467.

[6] Text, 768 (3), n. 3; 25 Cyc. 1453.

[7] 25 Cyc. 1453.

[8] Va. Coal & Iron Co., 103 Va. 661.

[9] Leavell *v.* Poore, 91 Ky. 321, 15 S. W. 858.

[10] 25 Cyc. 1463.

only to the judgment or decree *which might have been rendered at the time of his purchase.*[11]

(7) *Who affected.*—The notice implied from the existence of the *lis pendens* affects all the world dealing with the *res* in litigation.[12]

(8) *Notice of judgment or decree.*—The doctrine applies not only to purchases made *pendente lite,* but to those made *after judgment entered* for the plaintiff. The whole foundation of the rule rests on the policy of securing to the plaintiff *the fruit of his judgment.* If he is protected *only so long as the suit is pending,* and immediately upon judgment in his favor loses that protection, the rule would be *brutum fulmen.* It is the *judgment to be finally entered that constitutes the plaintiff's only interest in the suit.* The rule of *lis pendens* was established for the sole purpose of protecting that interest. It follows that a purchaser of property, whether *pendente lite* or *after judgment* therefor for the plaintiff, takes subject to the judgment.[13]

Lis pendens, continued — statutory provisions. — The harshness of the rule that thus charges an honest purchaser with notice of judicial proceedings, pending perhaps in a distant county, of which proceedings he has never heard, and of which he has no means of acquiring information, has led to statutory enactments throughout the several States, looking to the safeguarding of the rights of honest *pendente lite* purchasers, and at the same time protecting the interests of litigants. The statute of Virginia may be taken as a fair sample of such legislation.

The same—Virginia statute.—The statute in this state[14] provides that *"no lis pendens,* or attachment, shall bind or affect

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[11] Va. Coal & Iron Co. *v.* Roberts, 103 Va. 661.

[12] Steinman *v.* Clinchfield Coal Corp., 121 Va. 613.

[13] "There would be no end of litigation," says Burks, J., in Steinman *v.* Clinchfield Coal Corp., 121 Va. 611, "if the effect of a judgment or decree could be avoided by a simple transfer of the property by the unsuccessful litigant as soon as an adverse judgment or decree was rendered. Decrees are rendered every day, construing deeds, wills and other documents, and such decrees bind not only the parties to the litigation, but all persons claiming under them, with or without notice of the decree. The privies can stand on no higher footing than their principals."

[14] Va. Code 1919, § 6469.

a subsequent *bona fide* purchaser for value of *real or personal*[15] estate, for valuable consideration, and without actual notice of such *lis pendens,* or attachment, until and except from the time a memorandum setting forth (a) the title of the cause or attachment; (b) the general object thereof; (c) the court wherein it is pending; (d) the amount of the claim asserted by the plaintiff; (e) a description of the property; and (f) the name of the person whose estate is intended to be affected thereby, shall be admitted to record in the clerk's office of the circuit court of the county, or the corporation court of the city, wherein the property is, or, if it be in the City of Richmond, in the clerk's office of the chancery court of such city." [16]

The same—further of Virginia statutes—lis pendens as substitute for registry.—The statute just quoted unfortunately applies only to *pending* suits (or attachments), and not to *judgments* or *decrees* subsequently entered in such suits.[17] Other sections of the code, however, require certain judgments and decrees, viz., *for land* or for *specific personal property*,[18] or requiring the payment of *money*,[19] to be docketed, in a prescribed manner and court, and declaring them otherwise invalid as to subsequent purchasers for value without notice, unless so docketed.[20]

It follows that in Virginia a judgment or decree in an *in rem,* or *quasi in rem* proceeding *not* 'for land', or 'specific personal property', or 'for money', is not required or permitted to be docketed under the statutes cited. Such judgments and decrees, therefore, continue to be notice to subsequent purchasers, as under the common law rule. The decree in Steinman *v.* Clinchfield Coal Corporation [21] was entered in a suit to *set up a lost deed,* in which suit the decree declared the plaintiff entitled to the property; but no re-execution thereof appears to have been ordered

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[15] Anterior the revision of 1919, personal estate was not included.

[16] See further provisions as to authenticating and indexing the memorandum.

[17] Steinman *v.* Clinchfield Coal Corp., 121 Va. 611.

[18] Va. Code 1919, § 6459.

[19] Id. §§ 6459, 6461 *et seq.*

[20] Id. § 6471.

[21] *Supra.*

or had. The court held that a subsequent purchaser was bound by notice of this decree.[22]

The same—the present situation as affected by statute.—The ruling in Steinman *v.* Clinchfield Coal Corporation read in the light of the statutes, and of existing common law rules, seems to justify the following propositions:

1. The *lis pendens* of itself, is of no effect as notice, whether it concerns real or personal property, unless notice thereof is duly registered as required by statute. But when so registered, it operates as notice, as effectually as the *lis pendens* at common law.

2. The *judgment or decree* entered in the pending suit, if "for land", or "specific personal property" or for payment of "money", is not notice to subsequent purchasers, unless docketed as required.[23] But when so docketed, such docketing supersedes the necessity of a previous registry of the notice of the *lis pendens.*

3. But if the judgment or decree be *not* for land, nor specific personal property nor for money, the common law rule, already stated, is in full force; and subsequent purchasers are bound by notice of the judgment or decree, whether there has been a previous *registry of notice of the lis pendens,* or of *docketing of such judgment or decree,* or not.

The same—lis pendens as rendering registry of deed or mortgage unnecessary.—Pursuing further the question of the effectiveness of a *lis pendens* as notice to subsequent purchasers, it seems to follow from the principle of Steinman *v.* Clinchfield Coal Corporation,[24] just discussed, that, both under the common law and under the statutory modifications noticed, the plaintiff

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[22] See *accordant,* and under a similar statute, Sheridan *v.* Andrews, 49 N. Y. 478. The decree held to be notice in Steinman *v.* Clinchfield Coal Corporation (*supra*) was, in fact, ordered by the court rendering it *to be recorded* in the deed book in which the original deed should have been recorded, and *such registry was actually so made.* But it was properly held that since the recordation was unwarranted by the statute, it was ineffective as notice. In short, the *lis pendens,* and the decree subsequently entered therein, were of themselves notice, unaided by the subsequent unauthorized registry of the decree.

[23] Unless, in the case of a recovery of land or specific personal property, notice of the *lis pendens* has been previously registered.

[24] 121 Va. 613.

(or his privies in title) who has failed to record his deed or mortgage, may in many instances escape the penalties of the registry statutes for non-registry. In Steinman *v.* Clinchfield Coal Corporation itself this result seems to have occurred. Here A had lost the deed of conveyance from B, his grantor, before recordation. Later, having filed a bill for the purpose of setting up the lost instrument, he secured a decree accordingly, but apparently without requiring the execution of a duplicate conveyance. On the registry books, therefore, B appeared to be owner and holder of the legal title. Later, C purchased from B, and received and recorded his deed. In spite of A's failure to record his original deed, and of the non-registry of the notice of *lis pendens* to set up the lost deed, or of inability to have lawful registry or docketing of the decree in his favor (for want of statutory warrant)—and in spite of C's ignorance of A's equity —C was held to be charged with notice of A's equity under the decree. We have, therefore, an apparently clear case of the common law doctrine of *lis pendens* protecting, as against a subsequent honest purchaser for value, a vendee of real property who has failed to record his deed, declared by the statute of registry to be invalid as to such subsequent purchaser.

No unfavorable criticism of the decision is intended. It seems sound. While the unregistered *deed* was invalid, the *decree* setting up that instrument after its loss, was an equity—and an equity with notice of which the subsequent purchaser was charged, because of the common law rule that a judgment or decree (not required nor permitted to be docketed) directly affecting a particular *res,* is notice to all the world who thereafter purchase the subject-matter of the suit.

Lis pendens as superseding necessity for registry, continued.—The principles discussed in the preceding section are not wholly new in Virginia. Thus, in Glazebrook *v.* Ragland,[25] a conveyance of real property in trust, in the nature of a family settlement, went unrecorded. Later, in a friendly suit between the *cestuis,* the land was sold under the court's decree, and under orders of the court a conveyance by a substituted trustee was made to the purchaser, and duly recorded. Later, in an action

[25] 8 Gratt. 332.

on the purchaser's bond for deferred payments of purchase money, question arose whether a judgment subsequently recovered against the grantor in the original (unrecorded) deed, was not a lien on the trust property. It was held that it was not. "I regard the institution of the suit in chancery" said Moncure, J., * * * "for the execution of the trust, the rendition of the decree in that suit; and the sale and conveyance under the decree; and the recordation of such conveyance, as equivalent to the recordation of the deed of trust." [26]

[26] The case did not involve the rights of subsequent purchasers, but it did involve the rights of a judgment creditor, who, under the registry statutes, occupies an even more advantageous position. See the opinion of Baldwin, J., in the same case, in which the proposition was announced that the requirement that a deed of trust to secure a debt must be recorded, applies only to such incumbrances while they are *executory;* "but not after they have ceased to be incumbrances; nor after they have been executed and extinguished by a sale or foreclosure, and a conveyance of the title to the purchaser." This doctrine was afterwards repudiated in Campbell *v.* Nonpariel, etc., Co., 75 Va. 294, where it was held that an unrecorded deed of trust to secure debts was invalid as to a judgment creditor of the grantor, in spite of the circumstance that the deed of trust was foreclosed (*in pais*) and conveyance made to the purchaser before the recovery of the judgment, but recorded afterwards. In this case Judge Staples confines the principle to the case where all the parties in interest are before the court, so that the purchaser under the decree need not trace his title through the unrecorded deed of trust, but through the decree only, which necessarily binds all the parties in interest. Where there is thus a judicial enforcement of the unrecorded instrument, the same situation is presented as if the deed to the purchaser at the judicial sale were an original transaction, title passing direct from the original debtor-grantor, with a release of all interest by the trustee and creditor in the unregistered and therefore invalid deed of trust.

CHAPTER XXVIII.

INJUNCTIONS.[1]

Page 424, § 780. **"Pure" bills—bills for "injunction and relief."**—In addition to the classification of injunctions into (1) *prohibitory* and *mandatory,* and (2) *preliminary* and *perpetual,* we may add a third class, referring rather to the character of the relief sought, namely (3) *"pure bills"* of injunction, and bills for *"injunction and relief."*

"Pure bills" of injunction are those in which no other relief is sought, beyond the injunction; for example, to enjoin and restrain a nuisance or a trespass.

Bills for *"injunction and relief"* are those in which an injunction alone is not a sufficient remedy, and where the plaintiff desires, not only to enjoin some threatened act, but to compel the defendant to *perform some additional act,* as to pay money, or to deliver up papers for cancellation—in other words where the injunction is merely *ancillary* to other relief. For instance, a bill to enjoin the infringement of a patent or of a copyright, seeks not only to stop defendant from continuing the infringement, but prays an *accounting* from the defendant of his profits. So, a bill to enjoin the negotiation of a promissory note tainted with fraud, usually prays for the additional relief of *cancellation.*

A *restraining order* is an order in the nature of an injunction, but by its terms operative only during a very brief period, fixed in the order itself, looking to an early hearing of both parties, on the application of the plaintiff for a temporary injunction.

A *bond of indemnity* is generally required of the plaintiff, as a condition of the temporary injunction, conditioned to pay all costs and damages incurred by the defendant in case the injunction shall be dissolved.[2]

Page 430, § 788. **Injunction against trespasser as substitute for action to try title.**—Effort is often made to try title to real property under cover of an *injunction to prevent injury*

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[1] See Va. Code 1919, Chapter 265.
[2] See Va. Code 1919, § 6324.

to the property in dispute. To prevent this attempt to evade a jury trial at law, and to perpetrate a fraud on the equitable jurisdiction, courts of equity have been driven to formulate certain stringent rules to which the pleadings and proof must conform in such cases. Hence the practitioner before filing his bill to enjoin a trespass, especially where the *defendant is in possession,* should carefully examine the local decisions.[3]

Pages 432-441. *Memorandum.*—The wrongs here discussed belong rather to the Law of Torts than to Equity Jurisprudence. The student will read, merely as a review of his studies of Torts

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CHAPTER XXIX.

INJUNCTIONS (*Continued*).

Page 443. **Injunction against breach of contract for personal services.**—We have already seen that the court will not ordinarily decree specific performance of contracts for *personal property*—not because of any special difficulty in enforcing such a decree, but because, in the large majority of cases, the plaintiff may go into the market and purchase other property of a like kind; and for the additional reason that, even if the thing contracted for be not procurable on the market, damages recoverable at law will usually compensate the plaintiff for his lost bargain.

But, again, if neither of these categories is presented, and the chattel cannot be procured on the market, and damages will not compensate the plaintiff—circumstances which could only occur where the chattel is of a *highly unique character,* and its acquisition is of special importance to the plaintiff—then equity relaxes the rule, and grants the relief of specific performance.

A somewhat analogous situation is presented where application is made to compel the performance of personal *services*—though the difference in the relief granted is quite marked.

Equity uniformly declines to decree *specific performance* of

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[3] See Bledsoe *v.* Robinette, 105 Va. 723; Woolfolk *v.* Graves, 113 Va. 182; Eskridge *v.* Eskridge, 51 Miss. 522; C. & O. Canal Co. *v.* Young, 3 Md. 480; 4 Columbia Law Rev. 72.

contracts for *personal services*—howsoever unique or howsoever irreparable the damages resulting from default in performance—for the very excellent reason that the court cannot undertake to supervise the performance, in order to determine whether the services are being properly performed or not. And, again, perhaps, the court recoils from the attitude of coercing the defendant into a state so strongly suggestive of involuntary servitude.[1]

The same — injunction against rendition of similar services to another.—But while the court will not thus decree *specific performance* of the contract for personal services, it does not always leave the plaintiff remediless. Where the services are of so *unique* and individual a nature that they cannot be duplicated by others, and damages will not adequately compensate for the breach of the contract, equity will, in a proper case, approximate specific performance by *enjoining the defendant from performing similar services for another.*

Such cases are presented in contracts for services purely *intellectual* or *individual* or *personal,*—as in the case of distinguished actors, singers, teachers, lecturers, artists, authors, and highly skilled specialists generally—even of specially skilled baseball players.[2]

The same—more particularly.—As indicated in the Text, the authorities are not uniform in applying the principle of in-

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[1] In refusing specific performance of a contract to sing in Italian opera at the plaintiff's theatre, Chancellor Walworth, in De Rivafinoli *v.* Corsetti, 4 Pai. Ch. (N. Y.) 264, 25 Am. Dec. 532, expressed the reasons for his refusal in humorous vein as follows: "I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand and enjoy with proper zest, the particular beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulties, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult to determine what effect coercion might produce upon his singing, especially in the livelier airs, although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama. But one thing at least is certain, his songs will be neither comic nor even semi-serious while he remains confined in that dismal cage, the debtor's prison of New York."

[2] See Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 90 Am. St. Rep. 627, 55 L. R. A. 227. The authorities are noted and discussed in the Text, p. 443, n. 2; 22 Cyc. 857-859.

junction in such cases. The English courts, after much wavering, seem to take a narrower view of the plaintiff's equity here, than that taken by the majority of the American courts.[3] The view finally adopted by the English courts appears to be that where, in cases of the character described, the defendant covenants to serve the plaintiff, and *not to render similar services for another* (negative covenant express), the plaintiff, in an otherwise proper case, may have his injunction. But where the covenant is merely to serve the plaintiff during the stipulated period (affirmative covenant only), the negative covenant *implied* (*i. e.* not to serve another) is not sufficient for purposes of an injunction.

By the large preponderance of American authority, the express negative covenant is not required, provided it be clearly implied in the contract.[4] The American view seems the more reasonable, and more in keeping with the spirit of equity.

For a long time, the same difficulty was made in connection with the *mandatory* injunction, to compel performance of affirmative acts which the defendant was under a legal duty to perform—as to open a church, to deliver church records, to remove obstructions from chimney-pots,[5] and the abatement of nuisances generally. The mandatory injunction might not issue to compel affirmative action, but the same end was accomplished by expressing the order in *prohibitory* or *negative* form—that is, by enjoining the defendant from keeping the church closed, from retaining the church records, from obstructing the chimney-pots, and from allowing the nuisance complained of to continue. The court might not require the defendant to *clear away obstructions* from the chimney-pots, but it could and would prohibit him from *permitting the chimney-pots to remain obstructed.* To the credit of equity, such playing upon words is no longer practiced—and the mandatory injunction has long held its proper place in the equity procedure.

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[3] Lumley *v.* Wagner, 1 De G., M. & G. 604, requiring the negative covenant, overruled by Montague *v.* Flockton, L. R. 16 Eq. 189, which is, in turn, overruled by Whitwood Chemical Co. *v.* Hardman (1891), 2 Ch. 416.

[4] 22 Cyc. 857-859, 4 Va. Law Reg. 470; Id. 840.

[5] Text, § 780, n. 1.

Page 444, § 809. **Injunctions in patent suits.**—The rules followed by the Federal courts (which have exclusive jurisdiction of all matters involving patent rights), and here set out serially, will be more readily understood by the student, when he is reminded that the granting of a patent by the United States Patent Office, is not only *not a judicial determination of the validity of the patent,* but, on application for a temporary injunction, is, standing alone, *not even prima facie evidence of the patentability* of the invention. Nor is the establishment of the validity of the patent in a suit against A, conclusive of the question in a subsequent suit against B, until that question has been passed on finally by the United States Supreme Court. The claimant of a patent, therefore, must establish its validity against all comers, whenever and wherever and by whomsoever attacked or infringed.

The rules here listed in the Text, by which the courts are governed in passing upon applications for temporary injunctions in such cases, are, in substance, but a résumé of circumstances that suffice to make out a *prima facie case of patentability,* sufficient to entitle the plaintiff to a temporary injunction.

The first line of rule (2) should read: "If a patent, new or old, has been established *in a former suit against a third person,* on final hearing", etc.

Page 447, §§ 810-823. **Protection of trade-marks—unfair competition.**—Not only does equity protect technical *trade-marks,* but it goes immeasurably further, and by injunction will protect the plaintiff against any *unfair competition* on the part of the defendant, whereby the plaintiff's trade or manufacture suffers serious injury—as where, for example, the defendant by words or conduct endeavors to deceive the unwary public into believing that his goods are the same as those of the plaintiff. Numerous illustrations will be found in the authorities cited.[5a]

[5a] Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169; 10 Harvard Law Rev. 275; Baker *v.* Baker, 2 Va. Law Reg. 583; Chas. S. Higgins Co. *v.* Higgins Soap Co. (N. Y.), 43 Am. St. Rep. 769, n.; Donnell *v.* Herring-Hall Safe Co., 208 U. S. 265, 554; Pocahontas Coal Co. *v.* Bullitt, 178 U. S. 168 (right to use geographical names); n. 2 L. R. A. (N. S.) 708. See sundry statutory provisions in Va. Code 1919, § 1460.

Page 464 (footnote 2). **Right of privacy.**—The doctrine of the footnote has been the subject of considerable judicial discussion in recent years. The right of privacy was most outrageously violated in the well known case of Robertson *v.* Folding Box Co.[6] and in Atkinson *v.* Doherty.[7]

The most illuminating case on the subject is Pavesich *v.* New England Life Ins. Co.,[8] where the defendant was enjoined from using the plaintiff's likeness as an advertisement. The opinion by Cobb, J., reviews all the authorities on the subject, and the right seems to be thoroughly vindicated by a wealth of unanswerable logic.[9]

Page 465, § 837. **Injunction to protect trade secrets and secret inventions.**—Not only will secret *inventions* be protected by injunction, as stated in the Text, but similar protection will be extended to important *trade secrets,* by enjoining their disclosure by one who has acquired such secrets *by fraud,* or through *confidential relations* with the plaintiff—as, for example, the secret *formulae* and processes of manufacturers of medicines, perfumery, 'soft' drinks, paints, cosmetics, and other proprietary mixtures, processes, and methods of manufacture; the private costs-marks of merchants; the furnishing of the names and addresses of the plaintiff's customers to a competitor; and similar frauds upon a competitor's business, or treacheries by his confidential employees in collusion with others.[9a]

Page 466, § 838. **Injunction against libel.**—Many of the most respectable authorities hold, rather curiously, that an injunction will not lie against a libel, whether it affect merely the personal *reputation* of the plaintiff or *business.*[10]

The strongest argument in favor of the rule denying the in-

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[6] (N. Y.), 89 Am. St. Rep. 845.

[7] (Mich.), 80 N. W. 285.

[8] (Ga.), 50 S. E. 68, 69 L. R. A. 101.

[9] By recent statute in Virginia, the right is recognized in so far as it protects one against the use of his name or portrait for *advertising purposes,* without his consent. Va. Code, § 5782.

See further on the subject, Peck *v.* Tribune Co., 214 U. S. 185; 4 Harv. Law Rev. 193; Foster, Milburn & Co. *v.* Chinn (Ky.), 120 S. W. 364; 10 Va. Law Reg. 91, 824; 11 id. 63, 938.

[9a] See 3 Va. Law Reg. 535.

[10] See Marlin, etc., Co. *v.* Shields (N. Y.), 64 N. E. 163. The authorities are collected in 89 Am. St. Rep. 852, and 32 L. R. A. 829.

junction is probably the constitutional right of free speech, "subject to responsibility for the abuse of that right"—the clause quoted seeming to imply that a publication, howsoever libelous, cannot be forestalled by injunction, but the person libelled is confined to an action for damages, or to prosecution of his defamer in the criminal courts.[11]

The same.—This seems an extremely contracted conception of the situation presented where the defendant is threatening the destruction of the plaintiff's business, or irreparable injury thereto, by the publication of a libel, wholly unjustified in fact. The equity of the plaintiff becomes all the stronger, where the defendant is insolvent—the remedy at law in an action for damages being, of course, completely fruitless.

It seems also an unwarranted interpretation of the constitutional guaranty of free speech. The same constitution guarantees the liberty of the citizen, and prohibits involuntary servitude; yet our jails and penitentiaries are crowded with citizens who have so far transgressed the laws of the land as to forfeit the protection of these guaranties. The right of the freedom of speech surely is not so sacred as the right of freedom of disposing of one's person and property as one pleases. And yet the citizen's person is incarcerated and his property is seized, to answer for his breach of the law, criminal or civil.

On principle, therefore, supported by the best authorities, an injunction will be issued against a threatened libel, seriously injurious to the plaintiff's *business*—even if denied for the protection of his *reputation* only.[12]

Injunction against crimes.—Equity has consistently declined to enjoin the commission of crimes, as such. But the circumstance that the particular wrong for which the injunction is sought happens to be a criminal as well as a civil wrong, specially injurious to the plaintiff, will not deprive the plaintiff of his right to an injunction.[13]

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[11] See Va. Const., § 12; U. S. Const., Amendment I; Jeans Clothing Co. *v.* Watson (Mo.), 67 S. W. 391; Howell *v.* Bee Publishing Co. (Neb.), 158 N. W. 358.

[12] See authorities *supra;* Dean Pound in 29 Harvard Law Review 640; 30 Id. 173-175; 4 Pomeroy's Eq. Jurisp. 1353.

[13] 3 Va. Law Reg. 549, 625, 684, 869; Re Debs, 158, U. S. 564; 35

Page 467 (footnote). **Injunctions against strikers.**—The jurisdiction to enjoin trespass by one individual, or a few individuals, has long been recognized. But in recent years the question has bcome of great importance by reason of the courts' having undertaken to enjoin large numbers of strikers from interfering with the business of their employer.

While the exercise of this jurisdiction in the case of strikers has been much declaimed against by politicians, the law is well settled that the injunction will be granted, regardless of the number of wrong-doers, where necessary to protect the property of the employer from serious injury by trespassing strikers. The strike itself is not unlawful, and will not be enjoined—it is the invasion of the plaintiff's premises, or the intimidation of those of his employees who desire to continue at work, that constitutes the *gravamen* of the wrong. The reports abound in cases, and the law journals in articles, discussing the question.[14]

Injunctions against boycotting.[15]

Page 471, § 844. **Enjoining judgment at law for false return of service of process.**—Whether a court of equity will enjoin a judgment at law by default, where the return of process is regular on its face, but where the process *was in fact never served on the defendant,* is a question on which the courts are divided. The weight of authority is probably in favor of an injunction in such case.

It is held, however, in Virginia and other states, and in the Supreme Court of the United States, that if the *plaintiff did not collude* with the sheriff in having the false return made, since

Am. St. Rep. 670, n. For example, all public nuisances are misdemeanors, and indictable. But if specially injurious to the plaintiff, he may recover damages for the nuisance, or, in a proper case, have his injunction.

[14] See Re Debs, 158 U. S. 564; note 35 Am. St. Rep. 670. See an unreported Virginia case where the Court of Appeals issued the injunction. 3 Va. Law Reg. 684; n. 28 L. R. A. 464. See *infra "Contempt Proceedings."*

[15] See Loewe *v.* Lawler, 208 U. S. 274 (under Sherman Anti-Trust Act); Casey *v.* Cincinnati Typographical Union, 45 Fed. 135; American Federation of Labor *v.* Bucks Stove & Range Co. (C. C. A.), 32 L. R. A. (N. S.) 748, and note; Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418, 34 L. R. A. (N. S.) 874, and note.

the sheriff is a sworn public officer, his return, for the purposes of that case, is *conclusively presumed to be true;* and the sole remedy of the injured defendant is an action for damages on the sheriff's bond. Hence an injunction will not be awarded.[16]

The Virginia Court has carried the doctrine to an extreme and probably unwarranted limit, by holding that even where the defendant appears in the case *before final judgment,* and offers to controvert the truth of the return, he will not be permitted to do so, unless fraudulent collusion with the plaintiff be alleged and proved.[17]

The same—arguments pro and con.—There is much to be said on both sides of the question. In favor of the *affirmative* view, it may be said that to hold the defendant bound on a judgment in a proceeding of which he had no notice, seems to violate the fundamental doctrine that *"every man is entitled to his day in court"*—that is, due process of law under the United States Constitution.

The argument for the *negative* view is, that since the sheriff is a sworn and bonded officer, the court has a right to presume that his official return is true; and to permit a judgment entered on such return to be afterwards set aside on mere oral testimony would *open the door to fraud,* and render judgments far less secure than the law regards them. The contrary rule would practically require the sheriff to take witnesses with him in every case to establish the fact of service.

The same—foreign judgment.—The right thus to assail the truth of the return seems to be settled in all the courts, where the judgment in question is the judgment of a foreign state or country.[18]

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[16] See Preston *v.* Kindrick, 94 Va. 760; Knox County *v.* Harshman, 133 U. S. 152; Miedrick *v.* Lovenstein, 232 U. S. 236. The authorities are collected in a learned note to 19 Am. Dec. 135. See editorial note, 3 Va. Law Reg. 435-9; note 54 Am. St. Rep. 245.

[17] Sutherland *v.* Peoples Bank, 111 Va. 515; *contra* Fowler *v.* Mosher, 85 Va. 421. Notwithstanding the fact that the Supreme Court of the United States is committed to the negative view, it has approved an injunction in just such a case. Earle *v.* McVeigh, 91 U. S. 503.

[18] See Knowles *v.* Gas Light Co., 19 Wall. 58.

Page 471. **Injunctions against criminal proceedings.**—Save under special and peculiar circumstances, equity never enjoins criminal proceedings.[19]

Injunction against suing in a foreign jurisdiction.—The ease with which transitory actions (in contract or tort) may be instituted and prosecuted in a state other than that in which the cause of action arose, and the consequent temptation to disreputable attorneys to institute actions in distant states, in order to embarrass the defendant in enforcing the attendance of his witnesses, and in the increased expense of making defence, has produced in some sections of the country an evil that has met with the severe condemnation of the courts. Where it appears that such an action is contemplated, or has been already instituted, from sinister motives, the courts of the proper jurisdiction will not hesitate to enjoin the plaintiff from instituting or continuing the action.[20]

Page 472, § 845. **Injunction against judgment at law on discovery of new evidence.**—There are numerous grounds on which judgments at law will be enjoined, as pointed out in the Text. This note is confined to that indicated in the section-title, namely, the discovery of new and material evidence after judgment at law, and after it is too late, under the rules of practice, to move for a new trial in the law court. In such case, where the after-discovered evidence would have been sufficient to induce the law court to grant a new trial had the evidence been discovered in time, equity will enjoin the judgment, and will itself re-try the case.[21]

Punishment for breach of injunction—contempt proceedings.—Equity, from the very beginning, has protected the

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[19] 1 Va. Law Reg. 80; Harkrader *v.* Wadley (U. S.), 172 U. S. 148; Fitts *v.* McGhee, 172 U. S. 516; n. 21 L. R. A. 84; n. 2 L. R. A. (N. S.) 631. Compare Georgia, etc., R. Co. *v.* Atlanta (Ga.), 45 S. E. 256; 4 Columbia Law Rev. 72.

[20] H. D. Minor, 4 Va. Law Review, 21. So, it is common practice for the courts of the proper jurisdiction to enjoin husband or wife from instituting divorce proceedings in a foreign state, in which neither is domiciled.

[21] See Billups *v.* Sears, 5 Gratt. 31, 50 Am. Dec. 105; Rust *v.* Ware, 6 Gratt. 50, 52 Am. Dec. 100; Wynne *v.* Newman, 75 Va. 811; Pickford *v.* Talbott, 225 U. S. 651, L. Ed. 121, n; 21 L. R. A. 747, note.

jurisdiction and the dignity of the court by punishing for contempt any breach of its prohibitory mandates. This it does in a summary manner—the court itself trying the question of contempt, without a jury and with little formality.[22]

Memorandum.—The foregoing instances in which injunctions will be granted are in no sense meant to be exhaustive. They are mere illustrations of the general principle that an injunction is the approved proceeding for the prevention of threatened irremediable wrongs to property or property interests, of whatsoever nature the wrong may be.

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[22] Hence arose the outcry in recent years against "government by injunction," put forth by labor unions, when balked by injunction from destroying the property of the employer, or invading or picketing his premises bent on forcing non-striking workmen, by violence or by threats and intimidation, to quit the service.

This clamor quite ignores the fact that the defendant, in contempt proceedings for violating the injunction, is tried by the court, not for the *crime of destroying property*, or for assaults on other workmen, but merely for *disobedience of the judicial order*, and for the purpose of vindicating the dignity and maintaining public respect for the court. The crime committed is a matter for the criminal courts; and punishment for the contempt in nowise relieves the defendant of subsequent conviction for his criminal acts.

In response to propaganda against this so-called "government by injunction," the legislatures of several of the states have, from time to time, attempted to deprive the equity courts of their ancient and inherent power to punish contempts without the presence of a jury; but these statutes have been quite generally held to be unconstitutional when affecting courts established by the constitution itself. It is not within the power of the legislative department to deprive the judicial department of powers conferred by the constitution; and when the constitution erects a court, without limiting its powers, such court is held to possess *all those attributes which characterized it at the time of its creation*—and certainly those attributes without which the court would be an emasculated tribunal, without inherent power of itself to vindicate its own dignity and compel obedience to its lawful mandates.

The student who desires to look further into this interesting field, may consult: 3 Va. Law Reg. 549, 625, 684; 4 Id. 29, 281, 345, 392; Carter *v.* Commonwealth, 96 Va. 791, 4 Va. Law Reg. 822, and note; *Ex parte* Robinson, 19 Wall 505; supra n. to p. 467, "Injunction against strikers." See also Va. Const. § 63; Va. Code 1919, § 4521.

CHAPTER XXX.

BILLS OF DISCOVERY.

Discovery—rationale of the proceeding.—Bills of discovery, discussed in this chapter, are bills filed in equity by one of the parties to a litigation, threatened or pending, in a court of *law,* with the object of compelling the adversary to disclose facts and produce papers needed by the party filing the bill, as evidence in his behalf.

The need for such a bill becomes obvious when the student learns the common law rule of evidence that no party to an action at law was competent or compellable to testify as a witness in the action, whether for or against himself.

This singular rule prevailed in equity, as well, in so far as no party to the equity suit was a competent witness, in the ordinary sense. But early in its history, equity established the rule, which still prevails unless abolished by statute, that any party may be compelled to answer on oath, interrogatories propounded to him by his adversary through the medium of a bill in equity filed for the purpose, and to produce books and papers in his possession, bearing on the case. Such a bill is known as a *bill of discovery.*

Modern statutes have abolished the rule excluding the parties as witnesses, but the right to file a bill of discovery continues, unless the statute forbids it.

The term "discovery" is here used in its original sense of "uncovering" or "disclosing", and not in the more modern sense of "finding", or getting first knowledge of a hitherto unknown truth, or fact, or thing.

The practice in connection with such bills will be reserved for our studies in Equity Procedure. The chapter may therefore be omitted here.

CHAPTER XXX.

FURTHER REMEDIES IN EQUITY.

In addition to the remedies mentioned in the Text, there are a number of others, generally recognized, among them:

1. Suits for partition oi real property. See Freeman on Cotenancy.

2. For assignment of a widow's dower. See Scribner on Dower.

3. Cases of disputed boundaries. See 3 Pomeroy's Eq. Jurisp. 1378, *et seq.*

4. Suits for divorce. See Bishop on Marriage, Divorce and Separation.

5. Suits to sell lands of infants and lunatics (generally conferred by statute).

CHAPPER XXXI.

EQUITABLE PARTIES.

Page 501, § 89. **Interpleader.**—The most striking feature of the remedy of interpleader in equity, is the necessity for *privity* between the several claimants—that is to say (as stated in the second paragraph of § 892) the claimants must be in privity with each other, or both must *claim under the same title*. This requirement has made the remedy by interpleader less useful than it might otherwise have been, and the courts in modern times are disposed to relax the rule requiring this privity.[1]

The same—Virginia statute.—In Virginia, resort in such cases may be had to a statutory proceeding, by which the controversy may be disposed of in a summary way *at law,* without the

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[1] See extensive note in 91 Am. St. Rep. 593; Boyle *v.* Marion (Miss.), 21 South. 530. *Dicta* in the recent Virginia case of Runkle *v.* Runkle, 112 Va. 788, approve the rule requiring privity.

interposition of equity. But the statute is inapplicable until after one of the claimants has *brought his action.*[2]

Interpleader, continued—plaintiff must be both innocent and disinterested.—Not only must the plaintiff have acquired possession of the disputed *res* without wrong, or legal fault, on his part, but he must have no other interest in, or connection with, the subject-matter in controversy than that of a *mere stakeholder,* desiring that the stake in his hands be restored to its rightful owner. He may not claim a lien thereon, for storage or keep, or other expenses incurred in the premises. He must be in a position (by the consent or order of the court) to withdraw at once from the suit, as soon as the claimants have been convened, and the issue made up between them. Hence he may not only not assert any claim for himself, but he must be under *no possible legal liability* to any of the claimants. If he is bound by contract with one of the claimants, touching the thing in controversy, he may not force the several claimants to interplead, save where one of the claimants asserts title to the thing *through the other*—that is, is in privity of title with the former. Illustrations will follow later.

Interpleader continued—Why privity required. — The reason why the so-called "privity" is required as a pre-requisite to a bill of interpleader is, that if such privity does not exist, then the parties are really not making claim to the *same thing.* If the several claims be to the identical thing, then, *ex necessitate,* the thing must be traceable to a common source of title, since title to the same thing cannot come from two distinct sources.

An illustration may make this clearer: The stakeholder has found a watch, to which two claimants assert title. One alleges that the watch is one that his grandfather purchased, new, from a Swiss watch-factory, and that the watch has been in his family ever since—passing from grandfather to father, and from father to son, the present claimant, who lost it.

The other claimant alleges that this watch was one given by General LaFayette to his great-grandfather at Yorktown—and title is traced down to the present claimant.

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[2] Va. Code 1919, § 6151. In the statutory proceeding, privity of title seems not required. The statute has not taken away the equitable remedy, if the plaintiff prefers to resort to the latter.

Here, it is obvious that the parties are really *not claiming the same thing*. It is a clear case of *mistaken identity.* One is claiming a watch bought by his grandfather in Switzerland, while the other traces his title from an entirely different source, and to a wholly different watch.

The same—illustration continued.—If, on the other hand, instead of claiming title from the source indicated, the latter claimant admits that his adversary's ancestor acquired the watch as the adversary alleges, but asserts a purchase by himself, or by some predecessor in title, from the other's grandfather, we now have title traced to a *common source,* namely the grandfather, and it becomes transparently clear that the parties *are claiming the same thing.*

It appears, therefore, that the insistence upon privity of title means nothing more than that the *controversy must be over the same thing, concerning the identity of which there is no dispute.*

The same—privity continued.—There seems no sound reason, however, why equity should not extend the scope of the remedy of interpleader to cover either of the cases used in our illustration. So far as the stakeholder is concerned—and it is for his benefit alone that the remedy by interpleader is given—his position in the one case is as embarrassing as it is in the other. Where he finds himself thus innocently in the possession of property to which he makes no claim, the question whether or not the case is one of mistaken identity, is not of the slightest concern to him. So far as he is concerned, there is but *one watch* involved in the controversy. To grant relief in the one case, and to refuse it in the other, seems scarcely in accordance with justice or the common practice of equity in other directions. Hence, as indicated above, the tendency of the courts is toward the relaxation of the strict rule.[3]

Interpleader continued—foundation of the jurisdiction. Where the case is a proper one for interpleader under the fore-

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[3] Full note, 91 Am. St. Rep. 593. Where the strict rule is applied and interpleader denied, doubtless the stakeholder might protect himself against possible double liability in separate actions against him by the several claimants, by serving notice on the other claimant, of the pendency of the action by the first claimant, and giving the other opportunity to defend the action.

going principles, equity takes jurisdiction because of the very embarrassing situation in which the innocent stakeholder would find himself, in case he were sued at law by either or both claimants. The recovery by one could not be pleaded as a defense to a recovery by the other because of the established rule, both at law and in equity, that *a judgment or decree binds only the parties to the action or suit.* Hence the stakeholder might find himself held *liable to both* claimants—each recovering in different actions, before different juries, and perhaps in different courts.

The same—further illustrations.—The situation where equitable interpleader is proper has already been illustrated. It may prove helpful to illustrate the reverse situation—where the stakeholder will not be entitled to require the several claimants to interplead.

Thus where, on the death of the insured, several persons set up conflicting claims to the proceeds of the same policy, the insurer is entitled to compel them to interplead—and such is the quite common practice. But where the insurer, at the request of the insured, has accepted the surrender of one policy payable to A, and has issued another policy to B in its place, and each claims the proceeds for himself, interpleader will not lie, because the insurer may be liable to both—since the surrender of the former policy may have been *invalid as to A,* and the new policy may be *valid as to B.* In such cases, the possible liability to each excludes the right to require the parties to interplead. Here, after all, the parties are not claiming the same thing—one claims under the first policy and the other under the second.[4]

So where A deposited with a bank, collateral bought of B, to secure a loan from the bank, and the latter was notified by C, wife of B, that the collateral was her proprty, not derived through the husband B, it was held that the case was not one for interpleader by the bank—since if the collateral was in fact C's, the pledgee-bank was a tort-feasor, and liable to C in an action of

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[4] Connecticut Life Ins. Co. *v.* Tucker (R. I.), 91 Am. St. Rep. 590 and monographic note. That the conflicting claims of the parties are to *portions* of the *res* only, does not exclude the right to interpleader—nor does the circumstance that one claims the whole and the other a part only. 3 Pomroy's Eq. Jurisp. 1322, n. 2; School District *v.* Weston, 31 Mich. 85; Newhall *v.* Kastens, 70 Ill. 156.

tort for conversion. Nor, if the property was in fact C's, was the bank an *innocent stakeholder,* but a wrongdoer from the beginning.[5]

So where A sells a chattel to C, who, before payment, is notified of B's claim to the property, C may not have interpleader; not with respect to the *chattel,* because, if B's in fact, C is a wrongdoer; and not with respect to the unpaid purchase money, because the parties are not claiming the same thing—B's claim is for the *value* of the chattel, by reason of the conversion, while A's claim is to the *purchase money under the contract of sale.*

CHAPTER XXXIA.

BILLS OF PEACE—MULTIPLICITY OF SUITS.

(New chapter here.)

Page 506, § 898. **Prevention of multiplicity of suits—"Bills of peace."**—In addition to the instances mentioned in the Text, there are numerous other situations where equity interposes to prevent a multiplicity of suits. Bills for this purpose are frequently termed "bills of peace."

Mr. Pomeroy discusses the subject at length and with great learning,[1] and finds four classes of cases in which the jurisdiction attaches. These are mentioned below, briefly, in order.

The same—first class.—Where the injured party, in order to obtain all the relief to which he is entitled, is obliged to bring a number of actions, successively, against the same wrongdoer, all growing out of the one wrongful act and involving the same questions of law and fact.

Examples of this case would be continued nuisance or waste, repeated trespasses, etc.

Here equity will enjoin the repetition or continuance of the wrong, and thus relieve the plaintiff permanently from the necessity of repeated actions, and the annoyance and expense incident thereto.

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[5] First Nat. Bank of Morristown *v.* Bininger, 26 N. J. Eq. 345.
[1] 1 Pomeroy's Eq. Jurisp. 243 *et seq.*

This class, it will be observed, includes cases only between *the same plaintiff and the same defendant;* and the relief granted redounds solely to the benefit of the *plaintiff* at law.

Second class.—Where the dispute is between two persons, and one of them has instituted, or is about to institute, numerous actions, simultaneously or successively, against the other, all depending on the same issues of law and fact.

For example, where, wantonly or maliciously, A has brought repeated actions of ejectment against B for the recovery of the same tract of land, the latter may have the controversy settled in equity and further actions enjoined.

So where seventy-seven actions at law were brought by the same plaintiff against the same defendant, for the recovery of as many penalties for violations of the same city ordinance.[2]

The same—contrasted with first class.—Here, contrary to the situation presented in class one, it is the *defendant* (at law) who is complaining in equity of being harassed by a multiplicity of actions, all brought by the same plaintiff (at law), and all based on the same cause of action. But, as in class one, the injunction benefits only the plaintiff in the equity suit, and no other persons are in anywise interested.

Third class.—Where a number of persons have separate and individual claims and rights of action against the *same person,* all arising *from a common cause,* all governed by the *same rule of law* and all involving *similar facts,* so that the whole matter might be settled in a single suit by one person suing alone or on behalf of himself and the rest.

An example of this class would be where a municipal corporation assesses an illegal tax on separate parcels of real property belonging to separate and distinct owners.[3]

Other illustrations are the case of mill-owners on the same stream, all affected alike by the wrong of some upper proprietor in diverting the water or decreasing the flow;[4] and obstructions by a wrong-doer of a private way over which a number of abut-

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[2] Third Ave. R. R. *v.* Mayor of N. Y., 54 N. Y. 159.

[3] See Richmond *v.* Crenshaw, 76 Va. 936; Roper *v.* McWhorter, 77 Va. 214; Johnson *v.* Black, 103 Va. 477.

[4] Ballou *v.* Hopkinton, 4 Gray (Mass.) 324.

ting proprietors, claiming under independent titles, have an easement of passage.[5]

The same—contrasted with first and second classes.—As in classes one and two, the injunction, or other relief, here, is sought by those who would be *plaintiffs* at law. But, unlike the situation in the former classes—where the litigation, both at law and in the subsequent equity suit, was solely between one plaintiff and one defendant, or several plaintiffs in joint and *identical* interest (such as co-owners or co-partners) and several defendants in similar joint interest—the interests of the several plaintiffs are *not joint,* but distinctly several. Since, however, the rights of all depend upon precisely the same facts and the same rule of law, there is at least a strong *community of interest.*

The same—illustrated.—Thus, in the case of the millowners illustrated above, the owner of one of the affected mills may have no property interest whatsoever in the mill of his neighbor. Nor is any one mill-property affected by the defendant's wrong in identically the same way, or in the same degree, as the others. Inasmuch, however, as the injury to each is the same *in kind,* and flows from precisely the *same fact* (namely the diversion of the water), and the rights of each proprietor depend on the *same rule of law,* there is such *a community of interest,* as entitles the several owners to make common cause in a single bill filed to enjoin the common wrong.

In this third class of cases, it will be observed that even had the suit been brought by a *single plaintiff,* instead of by a number of plaintiffs, all persons in common interest *would have shared the benefit* of the injunction. That is, if, in the same illustration, mill-owner A alone had brought the suit and secured a permanent injunction against diversion of the water, mill-owners B, C, D and E would have shared in the benefits of the plaintiff's injunction.

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[5] Cadigan *v.* Brown, 120 Mass. 493. The familiar example, noticed in a previous chapter, of numerous lien creditors uniting in a single suit to set aside a fraudulent conveyance by the common debtor, or to subject other equitable assets to the payment of their respective liens, scarcely belongs in this category, since such jurisdiction really rests on the necessity of a convention of the creditors, in order that the court may administer the entire *res.* See Almond *v.* Wilson, 75 Va. 613; Brinkerhoff *v.* Brown, 6 Johns. Ch. 139.

The courts are fairly agreed with respect to the propriety of equitable intervention in the three foregoing classes of cases. But with respect to the fourth and last class, now to be considered, the authorities are "like Swiss troops fighting on both sides" —with a strong tendency toward denying the exercise of the equitable jurisdiction, especially where the several claims are for damages for a single tort of the defendant, from which all the claimants have suffered.

The same—fourth class.—Where the same person claims a common right, arising from the same facts, and dependent on the same rule of law—whether as an affirmative *cause of action* or as a *defence*—against a number of persons, the establishment of which claim or defence would regularly require a separate action against each, or a separate action of each against him, he may have the right established in a single suit in equity to which they are all co-defendants.

Thus where the treasurer of a railroad company fraudulently issued, from time to time to divers persons, certificates of stock of the company, which certificates came into the hands of more than a hundred separate *bona fide* holders—each issue being accomplished by the same fraudulent contrivances—it was held that the railroad company might maintain a single suit in equity against all of the holders, to test the legality of the certificates.[6]

The rule is well illustrated in the Alabama case of Southern Steel Co. *v.* Hopkins.[7]

In that case, more than one hundred actions at law were instituted by different plaintiffs (employees) against the same corporation, to recover damages resulting from a single accident in its works. Thereupon the defendant corporation filed a bill in equity against all the plaintiffs at law to enjoin all legal proceedings, in order that the defendant might establish, in a single suit, the perfect defence which the bill alleged the defendant could establish. The bill was sustained on the first appeal, but

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[6] New York & N. H. R. Co. *v.* Schuyler, 17 N. Y. 592.

[7] 157 Ala. 174, 20 L. R. A. (N. S.) 848 and n., 131 Am. St. Rep. 20, 16 Ann. Cas. 690, 47 So. 274—subsequently overruled in Roanoke Guano Co. *v.* Saunders (Ala.), 35 L. R. A. (N. S.) 491 n., 56 So. 198; and later itself reversed on a second appeal, 57 So. 11, 40 L. R. A. (N. S.) 464, n.

the decision was subsequently overruled, as indicated in the footnote.[8]

The same—conflict of authorities.—As admitted by Mr. Pomeroy [9] in his masterly vindication of the conclusions announced by him, and as appears from the authorities already cited and others cited in the footnote,[10] there are numerous authorities that deny relief in equity in his third and fourth classes, unless there is *privity or mutuality* (not mere community) of interest among the several claimants.

CHAPTER XXXIB.

EQUITABLE DEFENSES.

(*Begin new chapter here with* § 903.)

Equitable defenses.—The equitable defenses mentioned in the Text are: (1) *Bona fide* purchaser for value; (2) Laches; and (3) Equitable Estoppel—to which may be added (4) Defences to Actions on Sealed Instruments; and (5) Other defences purely equitable.

Most of these have already been considerd in previous chapters. They will, therefore, be but briefly noticed here.

1. *Bona Fide Purchaser for Value.*

Page 508, § 903. **Who is a purchaser?**—This question has already been discussed in our Chapter on *Resulting Trusts.* It was there pointed out that the term *"purchaser"* does not necessarily imply one who has paid *value.*[1] In the law of real property, a 'purchaser' is one who has secured legal title by *deed* or

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[8] *Supra,* n. 7.

[9] 1 Eq. Jurisp. 243-275.

[10] The Mississippi court, after denying Mr. Pomeroy's view, and then adopting it (Gulf and S. I. R. Co. *v.* Barnes, 94 Miss. 484, 48 So. 823) has later followed the Alabama court in rejecting the soundness of that view, as applicable to tort actions. Cumberland Tel., etc., Co. *v.* Williamson, 57 So. 559. A full collection of the authorities will be found in the cases cited above, and especially in the L. R. A. and Am. St. Rep. annotations *ubi supra.*

[1] *Ante,* p. 61.

will, as contrasted with title by *inheritance.* As a defense, however, in equity, the term excludes a devisee under a will—except in the rare case where the devise is *for value*—since the *defense* in question is available only to one who has paid value.

A purchaser such as is now under consideration, is one who has taken title—whether in himself or in another for his benefit. Hence not only is the grantee in an absolute conveyance a purchaser, but so likewise is a *mortgagee,* a *deed of trust creditor* and a *pledgee*—the three last-mentioned being purchasers to the extent of the debt secured (*pro tanto*).

Purchaser—legal title not always necessary.—In order, however, to occupy the favored position of a *bona fide* purchaser for value, it is not always essential that such purchaser should have *actually acquired the legal title,* and thus be a complete purchaser. If he has paid all the purchase money before receiving notice of the antecedent and competing claim—and because of non-registry or other negligence on the part of the earlier claimant, which, in equity and good conscience, should operate as an estoppel against him—then the equity of the later purchaser is superior, in spite of his non-acquisition of the legal title. He has the best right to call for it, and that is sufficient.[2]

Purchaser with notice from purchaser without notice. It is a settled principle of equity, as it is of the law of negotiable instruments, that one who claims *through* a purchaser for value without notice, though himself *having notice,* or *not having paid value,* stands in the same favored position as the former. Any other rule would prevent the first purchaser, who, *ex hypothese,* has a perfect title, from having the whole world for a

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[2] Preston *v.* Nash, 76 Va. 1; 2 Minor, Real Property, § 1409 *et seq.* The Virginia statute has carried this principle still further by the provision that as against an unregistered instrument, a purchaser who has paid *part only* of the purchase money before receiving notice, shall have a lien on the property to the extent of the purchase money so paid. Va. Code 1919, § 5200. The purchaser under an executory contract is further protected in Virginia by the provision that if his contract is duly recorded, it shall be as valid, as against creditors and purchasers, as if the contract were a deed conveying the property. Va. Code 1919, § 5193.

market.[3] The equity of the antecedent claimant has already been cut off by conveyance to the original *bona fide purchaser*—and once cut off, it has ceased to exist against that particular *res*.[4]

Distinction between purchasers and creditors.—A purchaser, if for value (see *infra*) occupies a much higher plane in equity than a mere creditor. The one lays his money out on the credit of the *specific property*, while the other extends credit on the mere *person* of the debtor.

If therefore one is a mere *judgment* creditor, or an *attaching* creditor, and there is no statute declaring otherwise, he is in no sense a purchaser, entitled to superior equities, but stands in the shoes of his debtor, and bound by all the equities by which his debtor is bound. In short, the rule is, "creditors stand in the shoes of their debtors." [5]

The same—how affected by registry statutes.—It must be carefully noted, however, that in all of the states there are statutes requiring practically all transactions relating to real property, and many concerning personal property, to be *recorded*, and declaring that if not recorded such transactions shall be void "as to purchasers for value without notice *and to creditors*." Of course, wherever the creditor can bring himself within the terms of such statutes, then he does not stand in the shoes of his debtor, but occupies the higher position along with the purchaser. Indeed, the Virginia statute of registry, protects creditors (in the cases covered by the statute) *whether they have notice or not*, and whether they be *prior* or *subsequent* creditors,—whereas the purchaser, in order to be protected under the statute, must be a subsequent *bona fide* purchaser—that is, one without notice.[6]

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[3] 2 Minor, Real Prop., § 1406.

[4] Save where the property comes again into the hands of the grantor against whom the equity existed.

[5] See Coldiron *v.* Asheville Shoe Co., 93 Va. 364, and other authorities cited *ante*, note to page 130; Borst *v.* Nalle, 28 Gratt. 423; 433; Brown *v.* Pierce, 7 Wall. 205; Baker *v.* Morton, 12 Wall. 150; White *v.* Carpenter, 2 Paige 217; Robinson *v.* Robinson, 22 Iowa 427. *Ante*, note to § 716.

[6] See Va. Code 1919, chapter 210, and the cases cited in the annotations thereto. See *ante*, note to § 698.

Who is a purchaser for value?—What constitutes *value* is to be determined largely by the ordinary law of contracts, modified to some extent by equitable principles. It is clear that money paid, services rendered, obligations assumed, etc., constitute value.[7]

Purchaser for value, continued—(1) payment of pre-existing debt.—It is universally conceded that the transfer of property *in payment* of an existing indebtedness, in whole or in part to another, constitutes the grantee a purchaser for value.

The same—(2) security for pre-existing debt.—Whether a conveyance by way of mortgage or deed of trust to another, *by way of security* (and not by way of payment) for a *pre-existing* debt, without new consideration, renders the latter a purchaser for value, so as to cut off antecedent and unknown equities, is a controverted question. The weight of authority doubtless agrees with the Text, namely, that such a transaction renders the grantee a mere *volunteer,* and not a purchaser for value.[8]

It is settled otherwise, however, by a long line of decisions in Virginia.[9]

The same—(3) security for contemporaneous debt.—It is also settled that one who takes a mortgage or deed of trust, or other lien, to secure a debt *then and there created,* is a purchaser for value—of course only to the extent of the debt secured.

Page 510, § 906 (footnote). **Notice—possession of real property as notice to purchasers.**—It seems a singular rule of law that where a purchaser examines the title of his proposed vendor, and finds it clear on the record, yet if the property be *in the possession of another,* in whole or in part, the proposed purchaser may not safely buy until he has inquired of *every tenant* whether he has any legal or equitable claim to the property. Yet

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[7] If *bona fide,* the purchase need not be for *adequate* value. Steinman *v.* Clinchfield Coal Corp., 121 Va. 611.

[8] See note 33 L. R. A. 305.

[9] See Oberdorfer *v.* Myer, 88 Va. 284; Chapman *v.* Chapman, 91 Va. 400—citing the previous Virginia cases; Arbuckle *v.* Gates, 95 Va. 802; *ante,* n. to § 698.

the doctrine that "possession is notice" leads to this result, and such is the rule enforced in most jurisdictions in America.

The rule is borrowed from England, and is unobjectionable there, since in England there is no such registry system as we have in America. The doctrine practically cuts up the registry system by the roots. It was, however, recognized in Virginia, and, as stated, is generally recognized throughout the United States, save where otherwise provided by statute.[10]

Shortly after the Virginia decision above referred to, the legislature abolished the doctrine, by the provision that the possession of any such estate or term, without notice of other evidence of title, shall not be notice to subsequent purchasers for valuable consideration.[11]

Notice in chain of title.—As indicated in a previous chapter, it is an elementary principle that one is charged with notice of the contents of *every instrument constituting a link in his chain of title,* from the time he acquired title back to the original grant by the crown or commonwealth. As one cannot repudiate any link of a chain by which his own weight is supported, so one cannot claim through an instrument and yet disclaim notice of what appears on its face.

For example, in a partition suit, a decree for *owelty of partition* was entered in favor of one of the co-tenants. This decree became an *equitable lien* on that portion of the land assigned to the other co-tenant. The latter subsequently sold her portion to a purchaser who had no actual notice of this lien, nor was the lien docketed. It was held that since this purchaser necessarily relied upon the decree of partition as *an essential part of his muniments of title,* he must be charged with notice of the lien therein mentioned.[12]

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[10] See Chapman *v.* Chapman, 91 Va. 397; Kirby *v.* Tallmadge, 160 U. S. 379; Knox *v.* Thompson (Ky.), 13 Am. Dec. 246, and note; note 89 Am. Dec. 167; note 19 Am. St. Rep. 238; 1 Va. Law Reg. 204; note 13 L. R. A. (N. S.) 49.

[11] Va. Code 1919, § 5194.

[12] Jameson *v.* Rixey, 94 Va. 342. See further, Roanoke Brick Co. *v.* Simmons (Va.), 20 S. E. 955, where a purchaser was held charged with notice of an unrecorded deed of trust by the mere words "save as to the deed of trust aforesaid," appearing in the covenants of warranty contained in the conveyance under which his grantor

Notice—what constitutes—Résumé.

Notice[13]**—classification.**—We may classify notice which defeats the plea of "purchaser from value without notice" as three kinds: (1) Actual notice; (2) constructive notice; and (3) notice implied by law.

(1) **Actual notice.**—Actual notice is *knowledge* howsoever acquired. Actual notice of another's equity exists where the party to be affected by the notice had such knowledge of the equity that *as an honest man he must have respected the other's rights,* and refused to make the purchase.

(2) **Constructive notice.** — Constructive notice is notice with which the purchaser is charged through the knowledge of, or notice to, his *agent,* acting in his behalf in the transaction to be affected; or notice with which one is charged by having been *put on inquiry*—on the trail of the adverse equity—and having failed to pursue the trail, which would have led him to the discovery of the equity in question.

In practical results, there is no substantial distinction between these two kinds of notice. Each of them connotes *bad faith*—and in order to impress the purchaser's conscience with notice in these two cases, and thus to defeat his plea of purchaser without notice, there must be such proof, by direct or circumstantial evidence, of bad faith on his part.

In such cases, the *burden of proof* is on the *purchaser* to establish the payment of *value,* but on the *other party* to establish the notice. These are elementary principles and the books abound in authorities.[14]

Notice implied by law.—Notice implied by law is that notice with which the purchaser is bound, regardless of his innocence in fact. We have already considered the instances of notice of this character, namely, (1) *Registry* of the instrument

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claimed. See full note to LeNeve *v.* LeNeve, 2 L. C. E. 168, 169; Burwell *v.* Fauber, 21 Gratt. 446, 463; Bellenot *v.* Laube, 104 Va. 842; 8 Va. Law Reg. 735; Charlottesville Hardware Co. *v.* Perkins, 118 Va. 34; Brush *v.* Ware, 15 Pet. 93, 114.

[13] See 2 Minor, Real Property, 1412 *et seq.*

[14] See Steinman *v.* Clinchfield Coal Corp., 121 Va. 611.

evidencing the competing equity—when such registry is authorized by statute; (2) *Lis pendens* affecting the *res* in question—including the *judgment* or *decree* rendered therein; but if statute so requires, (but only in that case) notice of the *lis pendens* must be recorded, or the judgment docketed.

(3) *Possession* of real estate, as indicated above in this chapter.

(4) Notice from facts appearing in the documents constituting the *chain of title* to the *res* in question—as previously indicated in this chapter.

2. *Laches.*

The defence of laches has been fully treated in a previous chapter.[15]

3. *Equitable Estoppel.*

The Text may be followed here. The law courts have gradually adopted the principles of equitable estoppel, so that the defence is now made almost as freely at law as in equity—the maxim of both courts being that "he who does not speak when he ought to speak, shall not speak when he ought to keep silent."

Most of the American courts have adopted the view that by operation of the doctrine of estoppel, legal title may pass from the party estopped to the party in whose favor the estoppel operates. The Virginia court has refused to adopt this view;[16] but in the late code revision it has been made the statutory rule in at least one case, viz., where a conveyance with general warranty of title is made, of property not then owned by the grantor, but which he subsequently acquires.[17]

The student has already encountered many illustrations of the principle of estoppel at law in his studies of agency, sales and insurance. This principle plays an extremely important role in the daily administration of justice in the courts, both of law and equity.

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[15] Ante Ch. IX, p. 22.
[16] Burtners *v.* Keran, 24 Gratt. 65.
[17] Va. Code 1919, §§ 5171, 5202, and revisors' annotations.

CHAPTER XXI.

(*Transferred from its sequence in the Text.*)

BILLS FOR ACCOUNT.

Preliminary.—In the field of equity jurisprudence there probably is no single topic presenting such difficulties as technical Bills for Accounting. These difficulties arise not so much from the inherent nature of the subject as from what Professor Langdell, in his luminous discussion of such bills,[1] terms the ignorance of equity lawyers and judges, who, while the common law action of account existed, had little concern with such bills, and who, when the common law remedy became obsolete, and equity assumed the jurisdiction, have never learned the principles on which the jurisdiction rests.

No cases found in the books are more elusive of analysis, for the purpose of fixing their precise value as precedents, than those involving bills for account. The courts are often uncertain of the real ground upon which the jurisdiction in any particular case should be assumed or denied; and it is common to find the judicial mind groping for more than one ground upon which to rest the decision, with no especial emphasis on any one. Principles are still further obscured by numerous and confusing *dicta*. These observations are especially applicable to bills by principal against agent, and bills for the settlement of so-called mutual accounts.

Secondary writers have usually taken their cue from the courts, and have ventured very cautiously and timidly into these judicially troubled waters. Their treatment of the topic is characterized by broad general statements, with little effort at discrimination or concreteness; and in the voluminous list of cases cited, the investigator finds comparatively few that are enlightening.[2]

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[1] Brief Survey of Eq. Jurisp. 74-124—under designation of "True Bills of Account."

[2] The scholarly discussion of Prof. Langdell, already referred to, and that of Judge Story, 1 Eq. Jurisp. §§ 442-459, are striking exceptions. The reader may also consult, on the general subject: 3 Pomeroy's Eq. Jurisp. 1421—two sections only devoted to this topic: and for a generous, if not discriminative, collection of the cases, 1 Cyc. 351; 1 Enc. Pl. and Pr. 83; 1 Corp. Jur. 588.

It is, therefore, with some misgiving that the present modest attempt is made to clear up for the busy practitioner some of the perplexities likely to confront him in the effort to maintain or to resist a bill for an accounting.

Exclusive jurisdiction—concurrent jurisdiction.—At the outset, we must distinguish between bills for account of legal (as distinguished from equitable) demands, of which equity has exclusive jurisdiction—or at least inherent jurisdiction independent of any other equity—Professor Langdell's "True Bills of Account"—and demands purely equitable, or those over which the jurisdiction of the law and equity courts is concurrent, or, again, where the equitable jurisdiction is exercised as ancillary to some other equity. This distinction is vital to a clear apprehension of determining principles.

As presently to be indicated, accounting is sought more frequently than otherwise as merely ancillary to the enforcement of some other equitable demand, or by reason of the inadequacy of the legal remedy, because of the less efficient machinery of the law courts to do justice between the parties.

Such cases, of course, do not involve the question of independent jurisdiction; and one must carefully guard against being led astray by the many *obiter* expressions which are encountered in the opinions in such cases, touching the independent jurisdiction.

We cannot hope, in our brief discussion, to remove all of the difficulties which are inherent in the subject, or which courts and text-writers have imported into it, but, with Professor Langdell's masterly exposition as a guide, we may hope to segregate and emphasize some of the pertinent principles by which courts of equity are supposed to be guided in determining the question of jurisdiction of suits of this nature.

Probably every account taken in an equity suit is embraced in one or other of the following categories:

I. Account of purely equitable demands.

II. Account of legal demands as ancillary to other equitable relief.

III. Account because of inadequacy of legal remedy—under the concurrent jurisdiction.

IV. Account as an independent equity.
V. Mutual accounts.
Taking these up in order:

I. *Account of purely equitable demands.*

Equitable demands.—That a court of equity should take jurisdiction of demands purely equitable, and compel the defendant to do justice in the premises, seems scarcely to need explanation or justification, since it is for the purpose of enforcing equitable rights that courts of equity exist.

If, therefore, to secure to the plaintiff his equitable rights, whether these require the payment of money or the doing of other things by the defendant, an account needs to be taken, such account will be ordered, regardless of the relations of the parties or the nature of the account.

Here the plaintiff is in equity not primarily for an accounting as an independent equity—nor because, by reason of complexity or need of discovery, the remedy at law is inadequate, nor because of defendant's legal duty to account—but on the broader ground that, because of the *equitable nature of the demand,* there is a complete absence of remedy elsewhere. Such cases make no difficulty.

The same—illustration.—The most familiar illustration of this class of accounts is, of course, that between the trustee and *cestui,* and generally between those occupying a strictly fiduciary relation.

So, in any other case where plaintiff asserts demands cognizable only in equity, as in connection with constructive trusts, rescission of contracts and of conveyances for fraud or mistake, foreclosure or redemption of mortgages, subrogation of sureties, controversies among lienors as to their respective priorities, derivative suits by minority shareholders on behalf of the corporation [2a]—none of which demands are remediable at law since they are purely equitable in their nature—and an account seems

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[2a] As shareholders here sue on behalf of the corporation whose claim is legal, the jurisdiction rests rather in the absence of a remedy at law.

necessary, it is ordered as a matter of course. But here the need of accounting is not essential in point of jurisdiction.

II. Account of legal demands as ancillary to other equitable relief.

Account as ancillary.—A further familiar principle of equity is that when the court properly assumes jurisdiction of a cause for one purpose, it will proceed to do complete justice between the parties, even to the administering of relief otherwise purely legal. Here, again, little difficulty is encountered in vindicating the equity jurisdiction, independent of the accounting.

Injunction—complete relief.—Thus, where the plaintiff is properly in equity seeking an injunction against continued trespasses or other wrongs—such as the wrongful cutting of timber or working of mines, infringement of patent-rights, copyrights or trade marks—equity is not content with granting the injunction only, but will proceed to administer complete relief by requiring an account of the damages, or profits.[3] Here the jurisdiction rests on the necessity for the *injunction* and not on the right to an *accounting.*

Discovery.—Again, where the plaintiff comes into equity to obtain discovery essential to his proofs, and discovery is obtained, equity may retain the bill and proceed to give complete relief although the claim asserted be purely legal. And if an accounting is necessary to such complete relief, an account will be ordered. Here, again, jurisdiction having attached for purposes of discovery, it attaches for all purposes, including an accounting.[4]

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[3] Miller *v.* Willis, 95 Va. 337; Coons *v.* Coons, 95 Va. 434; Higginbotham *v.* Hawkins, L. R. 7 Ch. App. 676; Root *v.* Railway Co., 105 U. S. 189; Porter *v.* Spencer, 2 Johns. Ch. 169; Hawley *v.* Cramer, 4 Wend. 717, 728; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

[4] Corporation of Carlisle *v.* Wilson, 13 Ves. 279; Sturtevant *v.* Goode, 5 Leigh, 83; Lyons *v.* Miller, 6 Gratt. 427, 438; Simmons *v.* Simmons, 33 Gratt. 451; Wilson *v.* Miller, 104 Va. 446; Woolfolk *v.* Graves, 113 Va. 182; Fowle *v.* Lawrason, 5 Pet. 495 (per Marshall, C. J.); 1 Story, Eq. Jurisp. 456. As the jurisdiction here rests in the need of discovery, jurisdiction will of course be ousted if no discovery be had, or if the answer deny the essential allegations of the bill, or if answer under oath be waived: McFarland *v.* Hunter, 8

III. *Account because of inadequacy of legal remedy—concurrent jurisdiction.*

Inadequacy of legal remedy.—A third and equally familiar principle is, that where the remedy at law is for any reason not plain and complete, equity will supply a remedy and make it complete.

Hence, where the controversy between plaintiff and defendant, for whatever reason, cannot be satisfactorily adjusted in a jury trial at law, the equity jurisdiction attaches.[5]

Complexity.—Probably the commonest cases in which the equity of jurisdiction is invoked on the allegation of inadequacy of the legal remedy, are those in which the accounts between the plaintiff and the defendant are so complex as to render a trial by jury impracticable. If the controversy involve the settlement of accounts of too complex a nature in fact for adjustment by a jury at law, it is in accordance with established practice for equity, on a proper case made, to assume jurisdiction of the controversy, whether legal or equitable, and to require an accounting if this be necessary to complete relief.[6]

It is to be observed that in these cases the jurisdiction does not rest on the relations of the parties, nor on the legal duty to account, nor on the equitable subject-matter, but is based solely on the ground that because of the complicated nature of the accounts, their settlement in a jury trial would be impracticable—in short, the inadequacy of the legal remedy. The equity jurisdiction over mutual accounts seems mainly thus to rest in the complexity of such accounts, or in the need of discovery. The treatment of such accounts, however, is deferred to a later section.

Leigh, 489, 501; Smith *v.* Smith, 92 Va. 696; 7 Va. Law Reg. 107-117; Roanoke Street Railway Co. *v.* Hicks, 96 Va. 510; Johnson *v.* Mundy, 123 Va. 730; Blood *v.* Blood, 110 Mass. 545; whereas, waiver of the verified answer is immaterial to the jurisdiction where the jurisdiction is not dependent on discovery: U. S. *v.* Asheville Nat. B'k., 73 Fed. 379; Cochrane *v.* Adams, 50 Mich. 16, 14 N. W. 681.

[5] Cases collected in 1 Cyc. 420 *et seq.*

[6] Taff Vale Railway Co. *v.* Nixon, 1 H. L. Cas. 111; O'Connor *v.* Spaight, 1 Sch. & Lef. 309; Lafever *v.* Billmyer, 5 W. Va. 33; Fowle *v.* Lawrason, 5 Pet. 494; Wilson *v.* Miller, 104 Va. 446; Davis *v.* Marshall, 114 Va. 193; Oglesby Co. *v.* Ould Co., 117 Va. 546.

How much complexity must appear in order to warrant the exercise of the jurisdiction in a particular case, is a question for the sound discretion of the court, and each case must depend on its own peculiar circumstances.[7]

It is clear, on the authorities, that the mere circumstance that there are numerous items of debit and credit on one side does not of itself create such complexity as to confer equity jurisdiction. If so, every merchant's ledger account against his customer might thus be tried.[8]

Complexity, continued—how charged.—Where the plaintiff thus seeks the assistance of a court of equity to compel defendant to render an account on the ground of complexity, it is not sufficient to allege in general terms that the account between the parties originated in many transactions, and, as a legal conclusion, is of too complex a nature to be settled by a jury; but the bill must state specific facts from which, on a demurrer by the defendant, the court may determine, from the face of the

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[7] For illustrative cases, see n. 6 *supra;* Governor *v.* McEwen, 5 Humph. (Tenn.) 241—a case which might have been sustained under our 4th class, *infra;* Kirby *v.* Lake Shore, etc., R. R., 120 U. S. 130; Gaines *v.* New Orleans, 17 Fed. 16; Pacific R. Co. *v.* Atlantic R. Co., 20 Fed. 277; Colonial, etc., Co. *v.* Hutchinson, 44 Fed. 219—an instructive opinion—jurisdiction maintained under our 4th head, *infra;* Lyman *v.* Long Dock Co., 20 N. J. Eq. 396; Blood *v.* Blood, 110 Mass. 545; Ward *v.* Peck, 114 Mass. 121; Pierce *v.* Eq. Ass. Soc., 145 Mass. 56; Bank of Scotland *v.* Christie, 8 Cl. & F. 214; Jackson *v.* King, 82 Ala. 432, 3 So. 232—a case of peculiar interest. The action was *assumpsit* at law, and the plea *non-assumpsit.* The appellate court held that the claims and counterclaims presented were too complex to be settled by a jury, and that the lower court (apparently *ex mero motu*) should, for that reason, have instructed the jury to find a verdict for the defendant, and the higher court itself directed a dismissal of the action. The case is unique as an illustration of a court of law (not exercising a jurisdiction under the code system of pleading), admitting its inability to enforce a confessedly legal claim, and recognizing the superior remedy afforded by its ancient rival, the court of equity. Cf. Reeside's Ex. *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503. Prof. Langdell (*ubi supra,* 106) expresses the more persuasive view that the jurisdictional objection cannot be raised in the common law court; but that plaintiff or defendant must invoke the aid of the equity court. The reason why it cannot be made in the law court is that the complexity will naturally not appear from the plaintiff's declaration, but only on the defendant's filing his cross-demands. The declaration, therefore, setting out a proper case for trial in the law court, that court, under established rule, must try it. A court of law cannot decline to try a case of which it has jurisdiction. Langdell, *ubi sup.,* 106-109.

[8] Bassett *v.* Cunningham, 7 Leigh 302; Langdell, 108-109.

bill, whether or not such complexity does in fact exist.[9] The burden here of establishing the necessary complexity rests on the party invoking the equity jurisdiction.

Multiplicity of parties.—Another common instance of the equitable jurisdiction under this head is presented where the parties plaintiff are so numerous as to render the legal remedy inconvenient. In such cases, equity will assume jurisdiction and will permit one or more of the parties to maintain a bill on behalf of themselves and their associates for the assertion of a demand otherwise proper for a court of law—including, of course, an accounting where necessary for complete relief.[10] Here the burden of establishing the necessary multiplicity is on the plaintiff.

Purpose of foregoing discussion.—In the treatment of bills for account, under the three classifications already noticed, the main purpose has been to eliminate these bills from the field of discussion, in order to clear the way for a more careful study of the fourth class, namely, accounting as a primary and independent equity, or, in Professor Langdell's apt phrase, 'True Bills of Account.' No effort has been made, therefore, to exhaust the instances in which the first three classes of bills will lie, or to elaborate the principles controlling them.

IV. *Account as an independent equity—True bills of account.*

Preliminary.—It is in connection with this class of bills that Professor Langdell, as quoted at the beginning of this chapter deplores the circumstance that when the common law action of account became an inheritance of the equity courts, the equity judges and equity lawyers did not inherit along with the jurisdiction a clear-cut notion of common law principles governing this action. The consequence has been, as already indicated, a distressing confusion of professional and judicial thought, re-

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[9] Davis *v.* Marshalll, 114 Va. 193; Beggs *v.* Edison El. Ill. Co., 96 Ala. 295, 38 Am. St. Rep. 94; Lafever *v.* Billmeyer, 5 W. Va. 33.

[10] Berkshire *v.* Evans, 4 Leigh 223; Coffman *v.* Sangston, 21 Gratt. 263; Perkins *v.* Siegfried, 97 Va. 444.

sulting in a notable lack of harmony in the decisions of the courts.

The question under inquiry.—Excluding, then, the three classes of bills already discussed, the present inquiry is, *When is there original and independent jurisdiction of bills for accounting in equity?* That is, when has equity jurisdiction of bills for an account where the controversy is *legal* and *not equitable;* where there is *no other equitable relief sought,* to give color to the jurisdiction; where there is *no complexity, no multiplicity of parties,* and *no need of discovery?*

The origin of the equity jurisdiction of account.—The authorities seem at least agreed that the equity cours have succeeded to the jurisdiction exercised by the common law courts in the now obsolete *action of account*—and that wherever the latter action lay at common law, its modern substitute, the *bill for account,* will lie.[11] And not only so, but, in the absenc of special circumstances to be noted later, the remedy in equity is practically *exclusive.* When we have considered the nature of the cases in which the jurisdiction is exercised, we shall perhaps be better able to see why the common law courts provided the special remedy of account, why it was exclusive of any other common law action, and why equity found little difficulty in gradually drawing the exclusive jurisdiction to itself.

In order, therefore, to determine the question of equitable jurisdiction by virtue of this inheritance, it is necessary to hark back to the now obsolete common law action of account. The learning that clusters about this archaic action is somewhat refined and technical, and too voluminous for present purposes; and we can hope here to do little more than to present some of the more important principles pertinent to the topic.

The duty to account—no liability until account taken.—As we shall see a little later, the right of the plaintiff, under the

[11] Beggs *v.* Edison El. Ill Co., 96 Ala. 295; Huff *v.* Thrash, 75 Va. 546; Fowle *v.* Lawrason, 5 Pet. 495; Colonial, etc., Co. *v.* Hutchinson, 44 Fed. 219; 1 Story Eq. Jurisp. 442-445; authorities collected in 1 Cyc. 416-419. Especial reference is made to Prof. Langdell's scholarly essay, in his Brief Survey of Equity Jurisdiction, 75 *et seq.*, which has been freely drawn upon in the preparation of the present chapter.

present head, to demand an accounting of the defendant, and the right of the defendant to exemption from liability to pay until an accounting has been had and a balance struck, are not founded on contract, but on the *legal duty* on defendant's part to account, as well as the *legal right* of the defendant to present, in the form of an account, all the credits to which he is entitled. The common law raises this duty and this right, and equity affords the remedy. A contractual duty to account will sustain an action for damages, but not a bill for account.[12]

Contrast with other equitable accounting.—There are several striking contrasts between other bills for account and the true bill for an account. For instance, in the former the burden is ordinarily on the plaintiff to establish the amount due, whereas in the latter the burden is uniformly on the defendant to present the account, and to sustain its correctness by proper evidence. Again, the main purpose of the former, ordinarily, is to recover money due from the defendant to the plaintiff in the nature of *a debt* due—that is, the money sought to be recovered is the *defendant's money,* until actual payment—and the accounting is merely an ancillary proceeding by which to ascertain the amount due[13]—whereas, in the latter the accounting and the striking of the true balance are the *principal objects sought,* and the decree for payment follows, incidentally, to prevent a multiplicity of suits. Furthermore, in the latter, the money to be paid in settlement of the balance found due is, and has always been, rightly the *money of the plaintiff* and never rightly the defendant's.

These principles should become clearer when their application is illustrated by concrete examples to follow.

Classes of agencies subject to account.—Seeing that the jurisdiction of the bill for an account here rests exclusively on the duty and right to account, as an implication of law, and not the result of contract, it becomes necessary to inquire in what

[12] Langdell, 74-75. The right of the defendant to discharge himself, in whole or in part, by his sworn answer, is to him as valuable a right as that of filing the bill for the accounting is to the plaintiff.

[13] This, of course, is not always true in the case of the *cestui* against the trustee.

cases this duty is implied. The instances are comparatively few, and include three classes of persons only, namely *guardians, receivers* and *bailiffs*.[14] As the term guardian here needs no special comment, it will suffice briefly to notice the other two classes, namely, *receivers* and *bailiffs*. Executors were not held to account in the common law courts, but were exclusively under the jurisdiction of the ecclesiastical courts. Their accountability is now largely a matter of statute, as is that of the guardian.

1. **Receivers.**—A receiver, in the sense here used, is one who receives money of another, with the owner's consent or ratification, for the sole purpose of keeping it safely for such time as may be fixed by contract or course of business, and at the proper time paying it over to the owner—less agreed charges only—but who is not under the duty of restoring the identical bills or coin in which it was received, and yet without the right to make himself a mere debtor of his principal by mingling the fund with his own and crediting the owner with the amount.[15]

The receiver has no right to use the money as his own, by debiting himself and crediting his principal with the amount, for then he would be a mere *debtor—e. g.,* a bank receiving a deposit. The money must remain rightfully the money of the principal.

If there be a duty of investing, or otherwise paying out, the money on behalf of the owner, the defendant is not a receiver but a *bailiff*.

If he receives the money merely for immediate transmission to the principal, and not for safe-keeping, he is a mere *servant, collector, agent* or *carrier*.

If he is bound to restore the identical bills or coin he is a mere *bailee*.[16]

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[14] 1 Story, Eq. Jurisp. 445; Langdell, 75; Bacon, Abr. *Accompt*, A; 2 Roll. Abr. 161. Actions of account between merchant and merchant were scarcely exceptions, since the defendant in such cases was charged as bailiff or receiver.

[15] Langdell, 76; Bacon, Abr. *Accompt*, B; 1 Co. Litt. 172a; 1 Story, Eq. Jurisp. 445.

[16] Langdell, 76-80; Fowle *v.* Kirkland, 18 Pick. 299-action of account by partner against co-partner, after dissolution, for an account of partnership funds received by defendant since the dissolution—

2. **Bailiffs.**—A bailiff is one who by consent or subsequent ratification of the owner, receives money, or the possession or control of the property of another, for the purpose of using it or its proceeds (as by investing, converting, managing, selling, leasing, hiring, laying out, exchanging, or otherwise dealing with it) *for the profit of the owner.* He is entitled to an allowance for his reasonable charges and expenses; but, like the receiver, without right to become a debtor for the proceeds or profits by debiting himself and crediting his principal with the amount thereof.[17] Here again the money or property must remain the property of the principal.

The bailiff—illustrated.—The typical illustration of a bailiff, though the term is of a wider significance, is the agent, or steward, or superintendent, or manager—or by whatsoever designation known—who has charge of landed estates, with power and duty of making contracts with tenants, collecting rents, purchasing machinery, selling farm products, making repairs, paying taxes and other charges, and at stated intervals rendering an account of his stewardship, and paying over the net balance to his principal. Such broad agencies are more common in England than with us in America, though real estate agents, with some, if not all, of these powers, are quite common in our own country. But economic and commercial activities in America

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defendant held accountable as receiver; *Cf.* Kelly *v.* Kelly, 3 Barb. (N. Y.) 419, 422. *Vid.* authorities collected in 1 Cyc. 404. The term "receiver", as here used, contemplates appointment by the act or ratification of the owner *in pais*, and is carefully to be distinguished from a court receiver, whose duties and responsibilities rest upon different principles. In America little or no use is made of the term receiver, except in reference to a court receiver, and instances of a receivership *in pais* are comparatively rare.

[17] Langdell, *ubi sup;* Co. Litt. 17a; Bac. Abr. *Accompt*, B; 1 Story, Eq. Jurisp. 446. *Cf.* Reeside's Ex'r. *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503. It is not sufficient that the bailiff or receiver have the mere custody of the money or property as servant of the owner. The distinction between possession and custody is well illustrated, as pointed out by Prof. Langdell, in the domain of the criminal law, in the distinction between embezzlement and larceny. A true receiver or bailiff may be guilty of embezzlement of the *res* of which he is receiver or bailiff, but not of larceny (Langdell, 79 n.); and possession by the bailiff is not possession by his principal. The office of bailiff, therefore, contemplates the exercise of large discretionary powers, and, in large measure, operations not under the immediate eye of the principal.

present many illustrations of analogous agencies under various names, upon whom there rests the duty to account,[18] and hence of bailiffs, though not so termed. Concrete examples will be noticed later.

The same—equitable jurisdiction.—The statement that bailiffs and receivers are subject to account, means not only that they are thus subject to account (at common law, in the action of account, and later in equity), but that *in point of jurisdiction,* every such agent is thus accountable. That is to say, the jurisdiction rests not in the equitable title of the plaintiff, since *ex hypothese* he has the legal title; not in complexity of accounts, for no such complexity need exist; not in necessity of discovery, since the plaintiff may be full-handed with his proofs.[18a] In short, where the duty to account thus exists by implication of law—and it exists only in the instances mentioned—this duty of itself is sufficient to confer the jurisdiction.[19] The reasons will appear later.

While the jurisdiction exists in every such case, it is probable that where the plaintiff's claim concerns a single item, or but few items, with no items of discharge set up, and he is thus full-handed with his proofs, and there is no complexity or other special ground for equitable intervention—in short, where the remedy at law is plain, adequate and complete—equity, though possessing the jurisdiction, would decline to exercise it, on the same principle on which it declines jurisdiction in cases of fraud, of which it has concurrent jurisdiction, where the remedy at law is adequate.[19a]

Bailiffs accountable—why not other agents?—It is of interest to inquire why the action of account (or the modern bill in equity) lies against the bailiff or receiver, and *indebitatus assumpsit* or other appropriate action against other agents—and, in the former case, even in the absence of complexity or need of discovery. The answer lies in the difference in the relations of the parties in the two cases, in the nature of the agencies

[18] See cases *infra;* Mitchell *v.* Gt. Works, etc., Co., Fed. Cas. 9662.
[18a] See following paragraph.
[19] 1 Story, Eq. Jurisp. 463-464.
[19a] 1 Story, Eq. Jurisp. 464. See Green *v.* Spalding, 76 Va. 411.

themselves, and especially in the peculiar character of the claim asserted.

The office of bailiff, for example, contemplates not only custody and control of the principal's property, with wide discretionary powers, but dealings with third persons not under the immediate instructions or supervision of the principal; the receipt of funds of the principal from the sale or other disposition or use of the latter's property; disbursements on the principal's account out of the principal's funds; and an unliquidated balance in the hands of the bailiff, *not in the nature of a debt,* but consisting of funds already belonging to the principal, and hence substantially, though not technically, trust funds. The relation, therefore, is one of highly fiduciary character, though not amounting to a technical trust relation, because *the legal title remains in the real beneficiary,* the principal. The bailiff, therefore, occupies an intermediate position between the ordinary agent and the trustee of an active trust. While these considerations of themselves are sufficient in point of jurisdiction to sustain the bill for an account, in actual practice most suits of this nature will present other features, in themselves sufficient to justify the equity jurisdiction—as the need of discovery, or the presence of too great complexity for adjustment in a jury trial. Indeed the practical necessity of discovery in bills for accounting, and complexity in the account, usually present, are frequently suggested by courts and textwriters as the real foundation of the equity jurisdiction of true bills of account. But the point to be emphasized here is that neither of these is essential to the jurisdiction.

The same, continued.—Such being the nature of the bailiff's office, it is not difficult to understand why the common law raised the duty of accounting, and the correlative right on his part to insist that before he might be molested as a debtor, he should have opportunity to present an account showing not only the items of *charge* but of *discharge* as well.

And since, as shown, the money or property for which he was accountable was the property of his principal—for which the bailiff could not be held a debtor until the true state of the account and the balance due were ascertained—and since the ordinary machinery of the law courts was not suitable for the taking of such an account, the reason why the principal could hold the bailiff or receiver to an accounting of his stewardship *only by the action of account* seems clear.[20]

It necessarily followed, therefore, that not only might *indebitatus assumpsit* not be maintained against the bailiff or receiver anterior to the accounting and striking of a balance, but that the action of account was the sole remedy in such case—as its substitute, the bill in equity, still is. It is therefore not the *nature of the account*—whether complex or otherwise—that confers the present equitable jurisdiction, but the peculiar character of *the relation,* the peculiar nature of the plaintiff's claim, and (since the passing away of the action of account) the *complete absence of any legal remedy.*

Distinction between bailiff and trustee.—This description of the bailiff indicates how closely his office approaches that of the trustee of an express active trust. The latter, as does the bailiff, holds and controls the money or the property of another, to be used for the benefit of the owner, and without the right of mingling the funds so held with his own funds and thus making himself a debtor for the money or the proceeds of the property, by charging himself and crediting the same on his books. What, then, is the distinction between the two? Why, at the original common law, must the principal have sued the bailiff in an action of account at law, while the *cestui que trust* must have sued the trustee (as he still must) in equity? A search of the books yields little or no light on the subject. The answer, however, seems clear. In the case of the bailiff legal title remains (normally) in the principal, howsoever broad the powers of the bailiff, whereas, in the case of the trust (normally) *legal title is in the trustee,* with equitable title only in the principal or *cestui.* The *cestui's* remedy, therefore, was necessarily in equity, while the remedy of the principal against the bailiff was, for precisely the opposite reason, at law.

Bailiff and trustee—contrast continued.—This close kinship between the bailiff and the trustee doubtless made easy the

[20] Reeside's Ex'r *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503. To maintain *indebitatus assumpsit,* the defendant must be shown to have been a *debtor* at the commencement of the action.

merger of the action of account at law into the bill for an account in equity.[21] The circumstance that in actions of account there were presented normally, though not necessarily, both complexity and the need of discovery, as already mentioned, afforded an additional incentive to the equity courts to assume the general jurisdiction of these cases.[22]

The true foundation of the jurisdiction — resume.—While, then, the jurisdiction of the true bill of account in equity courts may have been quickened by the features, normally present, of complexity, need of discovery, and kinship to trusts, in its last analysis the real foundation of the jurisdiction is the *legal duty* of the agent to account, the corresponding right of the principal to require specific performance of that duty, and defendant's right to an accounting as a condition precedent to being held as a debtor in an action of *indebitatus assumpsit,* or in any other form of action.[23]

Illustrations, continued—(1) managers of estates—managing agencies generally.—As shown in preceding sections, the term bailiff includes persons, by whatsoever title known, who have the management and control of landed estates, and

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[21] The trust relation between the principal and his bailiff is made the chief, though not the sole, basis of jurisdiction in Virginia cases of Zetelle *v.* Myers, 19 Gratt. 62; Thornton *v.* Thornton, 31 Gratt. 212; Simmons *v.* Simmons, 33 Gratt. 451, and Wilson *v.* Miller, 104 Va. 446, but in none of them is the agent termed bailiff—though in each the defendant was a typical example of the bailiff.

[22] In Reeside's Ex'r *v.* Reeside, 49 Pa. St. 322, 88 Am. Dec. 503, it is held that in such cases no other than the action of account will lie at law against the bailiff, since there is *no cause of action until the account is settled* and the balance due is ascertained. The court says: "The question is not, as it is sometimes supposed, whether a jury can as conveniently settle the account as auditors, but it adheres to the right of the defendant to render his account before he can be molested by an action to refund. The law will not imply a promise to repay before his liability to refund has been ascertained." *Cf.* Jackson *v.* King, 82 Ala. 432, 3 South. 232.

[23] The bailiff or receiver may, of course, make himself a debtor—for example, by wrongfully converting the fund to his own use and refusing to account therefor—and thus subject himself to liability in *indebitatus assumpsit* at the plaintiff's option. But he may not thus by his own wrong deprive the plaintiff of his right to an accounting in equity.

whose duties require them to control, manage, receive and pay out the intake thereof on behalf of the owner.[24]

The term would necessarily include also managers or agents of commercial, manufacturing, financial, or transportation, and similar enterprises, of charitable, social and other institutions, individual or corporate, whenever the powers and duties of the agency are those of a bailiff as described in previous sections.

(2) **Sales agents—factors—commission merchants.**—A bill will lie by the owner against an agent for the sale of property (real or personal) for an account and payment over of the net proceeds, as well as against factors and commission merchants and auctioneers to whom the plaintiff has consigned personal property for sale—since each of these agencies constitutes the relation between the owner and the agent one of principal and bailiff.[25]

The same, continued—bailiff making himself a debtor.—But, as pointed out by Professor Langdell,[26] the agents mentioned in this section who make it their *regular business* thus to

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[24] Such were the defendants in the cases of Zetelle *v.* Myers, 19 Gratt. 62; Thornton *v.* Thornton, 31 Gratt. 212; and Simmons *v.* Simmons, 33 Gratt. 451—in all of which cases bills for accounting were sustained, but rather on other grounds of equitable jurisdiction, and without a distinct recognition of defendants as bailiffs. See cases in preceding footnote. Makepeace *v.* Rogers, 11 Jur. (N. S.) 215.

[25] McKenzie *v.* Johnston, 4 Madd. 373 (consignment of goods for sale); Townes *v.* Birchett, 12 Leigh 173—auctioneer held to an account of a stock of goods sold for principal—jurisdiction upheld on the ground that the items of the account were "in the knowledge of the auctioneer exclusively"—hence the need of discovery. The court here lost the opportunity of recognizing the relation of principal and bailiff, and of vindicating the independent jurisdiction, even in absence of need of discovery or of complexity in the account. In Vilwig *v.* B. & O. R. Co., 79 Va. 449—a suit by a railroad company to require an account from its station agent (a typical bailiff)—the court came very near reaching the true principle, though throwing in, for good measure, as the same court, with practical uniformity, has done in similar cases, enough of 'need of discovery', 'complexity', 'mutuality of account' and 'trusteeship' and 'fiduciary relations', to obscure the real basis of the jurisdiction assumed. In McLin *v.* McNamara, 2 Dev. & Bat. 82, an auctioneer (bailiff again) was held subject to account, but on the untenable ground that the existence of partial payments rendered the account *mutual.* The American cases cited in this and the preceding footnote, not to mention others, seem to justify Langdell's criticism noted at the beginning of this chapter.

[26] *Ubi supra,* 92-93.

sell for others, by common usage and for convenience in book-keeping generally make themselves *debtors* to their customers by treating the proceeds of the customers' property, not as the property of the customer, but as their own, by mingling the proceeds with their own bank-deposits. But for this custom, such agencies would be driven to open a separate deposit account for every customer.

Where the agent has thus become the debtor, *indebitatus assumpsit* will lie, but the principal has the option of regarding the money so deposited as still his own, and of filing a bill for an account.[27]

(3) **Principal and agent—solicitor and client—banker and customer.**—In spite of numerous *dicta* to be found in judicial opinions to the contrary, it is clear in principle, and on authority, that the ordinary relation of principal and agent, or of solicitor and client, in the absence of powers and duties coincident with those of the bailiff or receiver as heretofore indicated, does not warrant equitable jurisdiction of a bill for accounting by the principal or client against the agent or solicitor.[28]

So, the ordinary relation between a bank and its customer is one of debtor and creditor. The moment a general deposit is made, the deposit becomes completely the property of the bank; and for the reason that the money thus becomes the property of the bank, the latter cannot be a receiver or bailiff.[29]

Principal and agent, continued.—While, as stated, the mere relation of principal and agent will not sustain a bill by the principal for an accounting, yet if the plaintiff is able to bring his case within any of our first three classes above—that is, where the claim is equitable merely; or the account is ancillary

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[27] *Vid.* Com *v.* Stearnes, 2 Met. (Mass.) 343—auctioneer failing to pay over proceeds of goods sold, held not guilty of embezzlement "since the money was his own". See Com *v.* Foster, 107 Mass. 221.

[28] Hemmings *v.* Pugh, 9 Jurist (N. S.), 1124. See Padwick *v.* Hurst, 18 Beav. 375.

[29] Foley *v.* Hill, 2 H. L. Cas. 28. Nor is such an account necessarily or ordinarily mutual. Deposits made are but loans to the bank, and checks paid are but partial payments. See Langdell's ingenious suggestion that payment of the customer's check gives rise to a cross demand, and is not the payment of a debt. Langdell, 115. See *Mutual Accounts, infra.*

to other equitable relief; or where, because of complexity or the necessity of discovery, the remedy at law is inadequate—or, again, where the agent is a receiver or a bailiff, under definitions of those terms in preceding sections—or where the accounts are mutual, as defined in subsequent sections—then it is clear enough that the equity jurisdiction for an accounting will attach.[30]

(4) **Royalties to authors—patentees—lessees, etc.** — Whether account lies in these cases depends on the precise nature of the contract. Where, under the contract, the publisher, or lessee, becomes the *owner* of the proceeds or product, and a *debtor* to the author, licensor, or lessor, for the latter's royalties or other agreed compensation, under the principle already explained a true bill of account does not lie—since the relation of the parties is that of *debtor* and *creditor*. But when, under the terms of the contract, the plaintiff is entitled to a *specific share* of the net proceeds, the rule is the reverse—since here the relation becomes *fiduciary* and the defendant a bailiff.[31]

The same—(5) Partners.—Equity has long been regarded as the proper tribunal for the settlement of the accounts of a copartnership. The jurisdiction rests on several gounds—the complexity of the accounts; the fiduciary relation; the lack of complete legal title in any partner to any part of the partnership assets; the necessity of accounting to ascertain the true state of the account between the several partners; and, finally, as ancillary to a dissolution and partition of the net assets—the last in itself justifying equitable intervention.

Professor Langdell asserts that the last is the true ground, since courts of equity usually decline to settle such accounts in the absence of a prayer for dissolution and partition—or, where, after dissolution, the account is taken as ancillary to a division

[30] Padwick *v.* Hurst, 18 Beav. 375 (client against solicitor); Barry *v.* Stevens, 31 Beav. 258, 31 L. J. Ch. 785; Marvin *v.* Brocks, 94 N. Y. 71; Coffman *v.* Sangston, 21 Gratt. 263; Thornton *v.* Thornton, 31 Gratt. 212; Simmons *v.* Simmons, 33 Gratt. 451, 456; Wilson *v.* Miller, 104 Va. 446; Herrell *v.* Supervisors, 113 Va. 594; Davis *v.* Marshall, 114 Va. 193 (bill by agent against principal dismissed for want of special equity); cases collected in 1 Cyc. 416, *et seq.* Compare *dictum* in Zetelle *v.* Myers, 19 Gratt. 62, 70. Circumstances under which the agent may maintain a bill for accounting against the principal, are discussed in a later section.

[31] Langdell, 93-94; Pratt *v.* Tuttle, 136 Mass. 233.

of the assets.[32] If this be true, as it seems to be, it follows that a bill for settlement of partnership accounts is not a true bill for account; since, in absence of special equities, such bills can be maintained only as ancillary to the relief of dissolution and a division of assets—or of the latter only where the firm is already dissolved.[33]

(6) **Co-tenants.**—Where one co-tenant has received the rents or profits of the common property *by consent* of the other, he may be held to an accounting in equity, on the ground that he is a receiver or bailiff. If he has received the profits without his co-tenant's consent, and has appropriated them to his own use, a bill for accounting will lie as ancillary to *partition* proceedings, but not otherwise—in the absence, of course, of other grounds of equity jurisdiction as heretofore discussed. In the first case, he is a bailiff, but not in the second. This unsatisfactory rule of the common law was altered in England by statute of 4 Anne, (Ch. 16 A. D. 1706). It was substantially adopted in Virginia [34] by the revision of 1792, and carried into the Code of 1887, but for some unaccountable reason was omitted from the revisal of 1919, with the unhappy consequence of restoring the inconvenient and unjust rule of the common law.[35] The omission is noted in the table of sections as "omitted", but,

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[32] Langdell, 96-97.

[33] See Lindley on Partnership (4th ed.) 1022 n; 30 Cyc. 461 *et seq.* Compare Tillar *v.* Cook, 77 Va. 477; Jones *v.* Murphy, 93 Va. 214; Clarke's Admr. *v.* Clarke, 125 Va. 68; Fowle *v.* Kirkland, 18 Pick. 299—action of account by partner against copartner for funds collected after dissolution; defendant held accountable as *receiver.*

[34] "An action of account may be maintained against the personal representative of any guardian, bailiff or receiver, and also by one joint tenant, or tenant in common, or by his personal representative, against the other, as bailiff, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common." Va. Code 1887, § 3294.

[35] See Early *v.* Friend, 16 Gratt. 21—construing the statute; Newman *v.* Newman, 27 Gratt. 714; Adkins *v.* Adkins, 117 Va. 445; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Hayden *v.* Merrill, 44 Vt. 336, 8 Am. Rep. 372; Pico *v.* Columbet, 12 Cal. 414, 73 Am. Dec. 550, and n.—an excellent opinion by Field, J.; 1 Minor, Real Property, 891, 922. See Kirkman *v.* Voulier, 7 Ala. 218—sustaining bill for account by part owner of ships against his co-partner; 6 Pomeroy, Eq. Jurisp. 1420-1421; 1 Cyc. 404; monographic note, 38 L. R. A. 829-864.

without explanation. The effect was probably overlooked by the revisors.

Bailiff's right to maintain the bill.—As a general rule, the proper plaintiff in bills for accounting is naturally the principal and not the agent, since the duty of accounting normally rests upon the latter. Even where the principal is proceeding against the agent at law, in *indebitatus assumpsit,* the agent may not, on principle, invoke the interposition of equity on the allegation that he is a bailiff and not accountable in *indebitatus assumpsit,* and that the remedy at law is inadequate. The defence of liability to account as bailiff only, is a plea in bar of the action *in the law court,* and should be made in that court.[36]

The chief instance in which the agent, subject to account, may sustain a bill for accounting against the principal (in the absence of special circumstances of complexity, etc.) is where the former claims to be in surplusage to the latter—that is, that he has not only paid out all monies of the principal in his hands, but has expended additional funds of his own. If in such case the agent could not maintain the bill, he would be without remedy, since naturally the principal is not likely to move for an accounting.[37]

So, also, where the agent is entitled to a *specific share* or interest in the proceeds of the subject matter of the agency, and these are under control of the principal, so that the obligation to account rests on the latter—as in the case of a salesman entitled to a specific share of the proceeds or profits, and not merely to a sum measured by a percentage thereon. The situation here is analogous to that of author and publisher already noticed.[38] Here, the employer is, with respect to the salesman's commissions or percentage of profits, the bailiff, and the salesman the principal.

Indebitatus assumpsit against bailiff—equity jurisdiction exclusive.—As the *res* in the hands of the bailiff is the property of the principal, and the obligation to account does not

[36] Langdell, 105. See *infra, Indebitatus Assumpsit against bailiff.* See Davis *v.* Marshall, 114 Va. 193.

[37] See Langdell, 90—noting the singular dearth of direct authority.

[38] See *Royalties to Authors, supra;* Pratt *v.* Tuttle, 136 Mass. 233; Harrington *v.* Churchwood, 6 Jur. (N. S.) 576; Albaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676.

create the relation of debtor and creditor, until account taken and balance struck, it follows that, as a general proposition, *indebitatus assumpsit* cannot be maintained against the obligor to account in advance of the actual accounting.

If therefore the bailiff is sued at law, before account taken, he may set up the relation of bailiff to the plaintiff, and the unsettled state of the account, in bar of the action. Nor is evidence of money or property received as bailiff admissible to establish an *indebitatus assumpsit* prior to the settlement of the account—certainly where it appears that there are items both of charge and discharge.[39]

It follows that, by the common law, no action lies against a bailiff for an accounting of monies in his hands except the action of account—and that, since equity assumed the jurisdiction, the equity jurisdiction is exclusive.[40]

Defences to the bill.—Defences peculiar to a true bill of accounting are: (1) *That defendant is not under obligation to account*—because not occupying the necessary relation of bailiff or receiver to the plaintiff. This issue, decided in favor of the defendant, and in the absence of other circumstances justifying the jurisdiction, will result in the dismissal of the bill. This defence, of course, challenges the jurisdiction. (2) *That defendant has already accounted to the plaintiff*—or that the account has otherwise been adjusted by agreement of parties (*plene computavit*). This plea established will likewise call for a dismissal of the bill. Nor need the plea here allege *payment* of the balance found to be due, since the jurisdiction is based on the *obligation to render the account,* and not on the obligation to *pay the balance* found due. The latter once ascertained, the remedy for its recovery is at law, except where the account is taken in the equity suit—in which case plaintiff is entitled to a decree for the payment of the balance, to prevent a multiplicity

[39] Langdell, 86-88, 105; See Thomas v. Thomas, 5 Exch. 28, and Langdell's comments, 88. Compare Beggs v. Edison El. Ill. Co., 196 Ala. 295.

[40] Subject to the exception, already noticed, of conversion of the money or property by the defendant, and to the added suggestion elsewhere made, that where, from the circumstances, there is an adequate remedy at law, equity may decline the jurisdiction. 1 Story, Eq. Jurisp. 464.

of suits. This plea, in the first instance, is a challenge not to the jurisdiction, but to the merits of the cause. (3) That the *res* in the bailiff's hands ***has been lost or destroyed by inevitable accident,*** or by the wrong of third persons, without fault of the defendant. That such a loss or destruction is a complete discharge (or *pro tanto,* if the loss be partial only) follows from the postulate that the *res* in question belongs to the plaintiff, and the agent is not a debtor therefor. Such a plea likewise goes not to the jurisdiction but to the merits.

CHAPTER XXIA.

BILLS FOR ACCOUNT (continued).

V. *Mutual Accounts.*

Preliminary—Is the equitable jurisdiction inherent or concurrent?—While the authorities quite generally assert that equity has jurisdiction of mutual accounts, they throw rather scant light on the basis of the jurisdiction. The question whether the jurisdiction is inherent, as in the case of the bailiff and receiver, or whether it rests on the inadequacy of the remedy at law, because of complexity or need of discovery, is rarely discussed. This omission may largely be attributed to the circumstance that practically, though not necessarily, every suit for the settlement of such accounts presents complexity or need of discovery, or both. And, as the mutual account is generally complex, so the complex account is not infrequently mutual, and the necessity for discovery is a normal accompaniment of either. And so, the jurisdiction being thus safely assured, the courts have found little occasion to fortify it by further inquiry.

Cases may arise, however, where neither of these special equities is present, and where, therefore, the jurisdiction of mutual accounts, if it exists, must be vindicated on other grounds.

The few commentators who have ventured to expound the jurisdiction seem inclined to place suits of this nature in our third category above—that is, the concurrent jurisdiction, and therefore to be exercised only where the remedy at law is inadequate.[1] If this be true, then, in spite of the constant reiteration by courts and commentators of the assertion that mutuality of accounts is, of itself, ground of equitable jurisdiction, the situation is just the reverse.

To put the question in its simplest form, and to apply it to an extreme case, does the jurisdiction attach where there is *no complexity* whatsoever and *no discovery* is required—where there are, for instance, two items on one side and two on the other, and both plaintiff and defendant are full-handed with their proofs?

If the answer to this last question be in the negative, then it would appear, after all, that complexity or need of discovery, or some special difficulty in proceeding at law is the real warrant for the exercise of the equitable jurisdiction—and the jurisdiction does not attach merely on the ground of mutuality of accounts.

If, on the other hand, the answer be in the affirmative, then the inherent jurisdiction must be conceded, and the only question remaining to plague us is, On what ground does the conceded jurisdiction rest?

Mutual accounts—ground of jurisdiction, continued.— The solution of the problem is not easy, and we are not sure it is possible of solution. Indeed, it may be that the equitable jurisdiction rests on a combination of the difficulties confronting the plaintiff at law—this combination consisting of inherent complexity and the practically uniform need of discovery, plus the peculiar nature of such accounts, as explained later. It is quite likely, also, that there is here much overlapping of the jurisdiction at law and in equity, respectively.

Perhaps at this point we may profitably make a brief digression to inquire into the characteristics of a mutual account, for the settlement of which equity is supposed to lend its assistance,

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[1] See Langdell, pp. 108-114. Story's discussion is scholarly and interesting, though rather noncommittal on the question of inherent jurisdiction here: 1 Eq. Jurisp. 457-459. Pomeroy, devotes but two sections to the topic of bills for account, and three lines only to mutual accounts. Freeman's monographic note to Norton *v.* Larco, 30 Cal. 126, in 89 Am. Dec. 70 is also enlightening.

and thus be the better prepared to pursue the question of jurisdiction.

Mutual accounts—characteristics.—Here we again encounter difficulties. The case law abounds in attempted definitions of mutual accounts, and in efforts to portray characteristics of such accounts, but with a disconcerting conflict of view. The American courts appear not only to differ, rather as a whole, from the English courts, but among themselves, as to the legal significance of the expression.

The same—(1) English view.—The view of the English courts seems best expressed in Phillips *v.* Phillips,[2] where Vice-Chancellor Turner takes some pains to describe the characteristics of such an account. The allegations of the bill were (and it is important to observe these carefully), that the plaintiff had from time to time advanced to defendants various sums of money, and defendants, on their part, had from time to time paid out divers sums "to, for and on account of" the plaintiff. These allegations were very properly held not to disclose a mutual account. The advancements by the defendants were simply mere set-offs, or cross demands.

English view, continued.—"I understand," says the Vice-Chancellor in that case, "a mutual account to mean not merely where one of the parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account.

"I take the reason of that distinction to be that in case of proceedings at law, where each of two parties has received and paid on account of the other, what would be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments—a position of the case which, to say the least, would be difficult to be dealt with at law.

"Where one party has merely received and paid monies on account of the other it becomes a simple case. The party plaintiff has to prove that the monies have been received, and the other

[2] 9 Hare 471.

party has to prove his payments. The question (in this case) is only as to receipts on one side and payments on the other, and it is a mere question of set-off; but it is otherwise where each party has received and paid."[3]

The same—English view, continued.—The later case of Padwick *v.* Hurst,[4] was quite similar in its facts, and a similar conclusion was reached on the authority of the previous case. Here the plaintiff charged that he had received and paid out large sums of money "on account of" the defendant, and had made large loans to him, and that defendant had paid "to" plaintiff (not "on plaintiff's account") large sums of money, and that the account was mutual; and, further, that defendant was suing plaintiff at law for a large sum, without allowing credits to which the plaintiff was entitled.

Lord Romilly, Master of the Rolls, said there was no doubt of the equity jurisdiction if the account were a mutual one, or were one-sided only if proper allegations of complexity were made. But that, according to the definition of a mutual account

[3] The learned Vice-Chancellor may have entertained a clear conception of the essential elements of a mutual account, but his language does not convey such a conception to the less learned reader. The carefully chosen expressions "received *and* paid" (not received *or* paid) "on account of the other" (not received from and paid *to* the other) become significant in the light of the facts of the case already recited. Normally the terms "received" and "paid" are correlative terms. If defendants "paid" money to plaintiff, the plaintiff must have "received" it. But these terms are followed by the clause *"on account* of the other"—the entire phrase (twice used by the court) being *"where each of two parties has received and paid on account of the other."* It would seem therefore—and this interpretation removes the suggested inconsistency, and supplies the need for equitable intervention—that what is meant is, that each party has had dealings with *third persons* on the other's account, of which the other is ignorant. According to this view, if the items of charge (money or merchandise) on the part of the plaintiff were paid or delivered directly to the defendant (as the plaintiff's advances in this case were) the account is not mutual, even though the items of charge in the defendant's account were for advances (in money or merchandise) paid or delivered to third persons on account of the plaintiff. *A fortiori* would the account not be mutual, according to this view, where it consists of money or goods paid or delivered by the plaintiff directly to the defendant, and the latter's account consisted of similar charges against the plaintiff. The claim of each against the other would be, in the language of the Vice-Chancellor, "a mere set-off" in case of suit on either claim.

[4] 18 Beav. 575.

as laid down in *Phillips* case, the bill failed to make a case of mutual account. It was added that "if the principal were on his side paying moneys *on behalf of* the agent" [as well as the agent on his side paying on behalf of the principal] "so that there would be accounts to be taken on *both* sides, then there would be *cross demands or a case of mutual accounts.*" The learned Master of the Rolls obviously does not mean to imply that the mere existence of cross demands would make the account a mutual one—except under the circumstances previously stated in the opinion.

Perhaps the distinction insisted upon in these two cases between money paid directly to the other party, and that paid to a third person on his account, arises out of the circumstance that money paid directly by one to the other is entered on the latter's own accounts, as a credit, and operates at once as a payment, and extinguishes *pro tanto* any balance due the payee from the payor, and is therefore no longer a cross-demand. Nor is there necessity for discovery in such case. But payments made by one of the parties to a third person on account of the other will appear as a charge on the former's account against the latter, rather than as a credit on the latter's account,—and are, therefore, cross demands rather than payments,—and hence accounting is essential to show the real balance.[5] But whatever may be the reason, we have in these two cases careful description of a mutual account from the English viewpoint.

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[5] The ordinary account of a dealer with his customer is a familiar illustration. The dealer debits the customer with goods sold, and credits him with payments made. The true state of the account is, therefore, easily ascertainable from the creditor's own books, without the necessity of discovery, or the settlement of the account, other than the simple process of deducting the aggregate of the credits from the sum of the charges, and striking the balance. Of course such an account has no semblance of a mutual account—though there are authorities which seem to hold that where the credits consist of *property* (instead of money) delivered by the customer, to be applied on the account, with no express direction to apply as specific *payment*, such account will be a mutual one. See Hickman *v.* Stout, 2 Leigh 6—jurisdiction sustained on the ground of need of discovery, but treated also as a mutual account; Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496—the decision possibly affected by the peculiar language of the statute of limitations there involved; Norton *v.* Larco, 30 Cal. 126, 89 Am. Dec. 70, with comments on the suggested distinction. Compare Haywood *v.* Hutchins, 65 N. C. 574.

(2) **The American conception of mutual account.**—One in search of the true nature of the mutual account finds no beaten highway under the guidance of the text books. Pomeroy's scholarly treatise[6] devotes but a single sentence to the significance of the expression, describing it as applicable "where each of two parties has received and paid on account of the other, as distinguished from matters of set-off, and accounts on one side only"—practically the English conception already noticed.

Professor Langdell[7] seems to have made no reference to mutual accounts by name, though he points out in very scholarly and helpful fashion the distinction between mere set-offs or cross demands on the one hand—each in itself constituting an independent cause of action, but in no wise affecting the plaintiff's claim, unless and until the defendant sees fit to set them up in the plaintiff's action—and, on the other, the same cross demands or set-offs held by either party, which, by express agreement, or agreement implied from course of business, operate as counter-credits (*pro tanto*) as soon as acquired.

Where the latter situation is presented, no cause of action exists in favor of either party on any several item of the account, but the only existing cause of action is the right to recover the balance due on the striking of the balance on the two accounts. So long as the mutual dealing continues, there is no cause of action at law until such balance is struck, since until then there is no debt due. For this reason, the statute of limitations is generally held to run on such balance only after a cessation of the mutual dealings or from the date of the last item of the account.[8]

This distinction between cross demands, or set-offs, as several distinct items of charge (in nowise reducing the amount of the plaintiff's claim until utilized as set-offs in the plaintiff's action), and reciprocal cross demands operating (by custom or agreement of parties) to extinguish each other, and thus to create a constantly varying balance which represents a single item of in-

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[6] 3 Pomeroy, Eq. Jurisp. 1421.
[7] *Ubi supra*, 111-115.
[8] See *infra*.

debtedness, seems to be the true distinction between mutual and non-mutual accounts, as viewed by the American courts.

The same—When is the account mutual?—resume.—A mutual account, then, is one arising from reciprocal dealings between two parties, out of which dealings have arisen reciprocal cross demands, for money advanced, goods sold or services rendered, in reliance on an express agreement, or on the course of dealing between the parties, or on trade custom, that the several items of demand and cross demand shall operate, not as separate and actionable demands, but reciprocally to exitnguish each other (*pro tanto*) as they accrue. It is therefore the every varying balance that constitutes the debt.[9]

Ordinary cross demands—no extinguishment.—According to the rule of the civil law, and to that in universal use among merchants, cross demands automatically extinguish each other, *pro tanto,* as they accrue; and the balance due on a settlement of the accounts is the only existing debt at any moment during the period covered by the mutual dealings. This is known as *compensatio* in the civil law.

The rule of the common law is just the reverse. Instead of extinguishing each other reciprocally, each cross demand not only constitutes a separate cause of action, but must be so enforced.[10] Indeed, without consent, they may not even be pleaded as set-offs in an action brought by the other party. True, statutes now quite generally permit the set-off, but until so utilized in a pending action, cross demands continue to constitute separate and independent causes of action. Such demands are, therefore, to be sharply distinguished from payments—or from

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[9] Accounts between co-partners, in connection with partnership transactions, though scarcely mutual accounts in the sense in which here used, well illustrate the feature of the *constantly varying balance* characteristic of the mutual account.

On the general subject of mutual accounts, see Smith *v.* Marks, 2 Rand. 449; Hickman *v.* Stout, 2 Leigh 6; McLin *v.* McNamara, 2 Dev. & Bat. (N. C.) 82; Beggs *v.* Edison El. Ill. Co., 96 Ala. 295, 38 Am. St. Rep. 94; Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622; Power *v.* Reeder, 9 Dana (Ky.) 6; Goldthwaite *v.* Day, 149 Mass. 185; Abbot *v.* Keith, 11 Vt. 525; Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496; 1 Cyc. 424; 1 Corp. Jur. 598; 1 Rul. Cas. Law 205; 5 Words & Phrases, 4646; authorities cited *supra,* n. 52.

[10] Subject to the right of joinder of the several demands.

the same cross demands under a reciprocal agreement, such as mentioned in the preceding section.

The same—illustrations.—Thus, where A owes B $500, for money from time to time lent, and B owes A $300 for goods from time to time sold, the common law does not treat the $200 of balance that would be due to B on a settlement between them, as the only existing debt, but regards A as still owing B $500, and B as owing A $300—both cross demands separately actionable, and (in absence of modern statutes) with no right of A, in B's action against him, to set-off B's indebtedness of $300 to himself. The statutes of set-off now give A this privilege, but he is under no obligation to exercise it, and may allow judgment to go in B's favor for the full amount of the latter's claim, without in anywise affecting his right thereafter to prosecute his own smaller claim in an independent action. The result, of course, would have been otherwise had the $300 been a *payment* from A to B, or had the account, by agreement of parties, express, or implied from course of dealings, been a mutual one.

The same—extinguishment by agreement or custom—true mutual account.—Having seen that neither by the common law, nor by that law as modified by statutes of set-off, do cross demands extinguish each other as they accrue, the distinction between mere cross demands of this nature and those cross items of a reciprocal account which do extinguish each other, (*pro tanto*) at the moment of their accrual, becomes clear. It is accounts presenting the latter characteristics that are connoted by the term mutual accounts.

Since neither the law, *ipso jure,* nor the courts, *ex mero motu,* can produce this extinguishment of demands on one side by cross demands on the other, the only way of producing such a result is by agreement of the parties. This agreement, as stated, may be express—either at the commencement of the reciprocal dealings, or during their progress, or at their close. Such agreement is more often implied, however, from the course of dealing, or from the custom of trade, than from express stipulation. It is regularly presumed in accounts between merchant and merchant.

But whenever the agreement does exist, then what is practically the civil law rule of *compensatio* governs the situation. Here there is but one debt, namely, the balance due on a settlement of the accounts, and but one cause of action, howsoever numerous the cross items and howsoever long the period covered by the dealing. Such an account constitutes a true mutual account. In the language of the Vermont court "it is the constantly varying balance which is the debt."[11]

The same—when action for balance accrues—statute of limitations.—The mutuality or non-mutuality of accounts is important, not only on the question of equitable jurisdiction but on the question of the *maturity of the claim* for the balance due, under the plea of the statute of limitations. Indeed, probably a majority of the judicial decisions involving the mutuality of accounts have arisen in connection with this plea. Certainly the question in the latter aspect has produced fuller judicial discussions of the true nature of the mutual account. The question of the applicability of the statute of limitations to such accounts is beyond the scope of this discussion, except in so far as this may serve to illustrate the nature of such an account.

The general rule seems to be that where not otherwise provided, the statute begins to run from the *cessation of the mutual dealings,* or, as it is stated by most of the authorities, from the *date of the last item* of the account. A few of the leading authorities are cited in the footnote.[12]

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[11] Abbot *v.* Keith, 11 Vt. 525.

[12] Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496—a full discussion by Earl, J; Wilson *v.* Calvert, 18 Ala. 274; McNeill *v.* Garland, 27 Ark. 343; Kingsley *v.* Delano, 169 Mass. 285, 47 N. E. 1013; Norton *v.* Larco, 30 Cal. 126, 89 Am. Dec. 70—an excellent opinion, with an extensive and scholarly note by Freeman; Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253; Gunn *v.* Gunn, 74 Ga. 555, 58 Am. Rep. 447; Wagner *v.* Steele, 117 Ga. 145, 43 S. E. 403; McMartin *v.* Bingham, 27 Iowa 234, 1 Am. Rep. 265. See Words and Phrases, 4646, for a distressingly long list of inconsistent definitions of mutual account.
Of course the question when the statute begins to run in such cases will depend to a large extent on the precise provisions of the statute. In Virginia, mere payments made on an account do not toll or clog the running of the statute: Code 1919, § 5812; Cole's Ex'r *v.* Martin, 99 Va. 223; and the only provision with reference to mutual accounts (*id.* § 5810) is: "Every action to recover money which is founded upon . . . any contract . . . shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: . . . unless it be an action . . . upon accounts concerning the trade of merchandise between

Mutual account—the equitable jurisdiction—finally.—Returning from the digression into which discussion of the nature of the mutual account has led us, we now return to the question of equitable jurisdiction mooted in an earlier section. Is there anything in the inherent nature of such an account to justify the equitable jurisdiction, in the absence of complexity, need of discovery or other special equity?

In the case of the bailiff, as shown, until settlement of his accounts there is no debt due—until then the balance in his hands already belongs to the principal; hence *indebitatus assumpsit* will not lie for the balance, even if the principal were able to prove the balance in that action. To support the action of *indebitatus assumpsit,* the money must be due *as a debt* at the *time of action brought.* Hence the exclusive jurisdiction in equity.

In the case of the mutual account, on the other hand, the balance due, whatever it be, is not the money of the creditor in surplusage, the plaintiff, but the sole property of the debtor defend-

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merchant and merchant, their factors or servants, in either of which cases the action may be brought until the expiration of five years from the cessation of the dealings in which they are interested together, but not after". This statute clearly fixes the period at which the statute begins to run as "between merchant and merchant", but apparently leaves untouched the question as to when the limitation begins to run on *ordinary mutual accounts.* The two cases of Moore *v.* Mauro, 4 Rand. 488 and Wortham *v.* Smith, 15 Gratt. 487, involved accounts only between merchant and merchant, though the opinions contain *dicta* that this particular clause is to be confined to its quite definite language, and should not be extended to ordinary mutual accounts. That is, that the five years saving clause is inapplicable to accounts of the latter character. This may be true, and doubtless is true, yet the question remains *when* does the statute begin to run against such accounts? By its express language, the statute becomes operative from the *accrual of the right of action* and not before. Hence the question of the *time of such accrual* is the test—and this is fixed by most of the authorities (*supra*) as the date of the last cross item. Margarity *v.* Shipman, 93 Va. 64, was not a case of mutual accounts, as the parties had settled their accounts, and the action was on an account stated. The opinion, however, points out the difference between the Virginia statute and other statutes, in that, under the former, *part payment* does not clog the running of the statute. But as cross items of a mutual account are, *ex hypothese, not* payments, the difference seems immaterial on the question, in Virginia, not within what time the statute bars the action, but *when the statute begins to run* against a mutual account. The point of time from which the period of limitation is to be reckoned would seem to be the time of the cessation of mutual dealings, or, what is practically the same thing, the date of the last item.

ant against whom the balance is. Whatever the amount of the balance it is a debt due to the party in whose favor it exists. There is no legal obligation on the defendant to account—he may render an account of his cross credits or not as he pleases. If the parties have not stated their account and ascertained the balance, and the defendant does not see fit to appear in the action and set up credits claimed, or to file a bill alleging that the accounts are of such a nature as to be unfit for settlement before a jury, the plaintiff will recover such sum as he may be able to convince the jury that he is entitled to. No plea may be made in a common law court that the accounts involved are mutual, or complex, or that the case is otherwise unfit for trial by a jury. This defense is equitable only, and to be made by a bill filed by the defendant at law, to enjoin the action at law, on the ground that the accounts between the parties are of such a nature as to be unfit for settlement in a common law court.

The same.—So, if the defendant appears in the action and sets up his counter-credits, as the result of which complexity for the first time appears, the plaintiff may, on his part, dismiss his action at law and file a bill with proper allegations of complexity—or, if by the filing of the defendant's counter-credits, the plaintiff, under the rule of practice, is denied the right to dismiss his action, then he may ask for an ancillary injunction against defendant's assertion of his counter-claims in the law court, and pray for a complete settlement of the account in equity.

If not thus incapable of settlement by a jury, and there is no need of discovery, or other grounds of equitable interposition, there is no reason why the controversy may not be settled in the law court. If this be true, it necessarily follows that the bill in equity for the settlement of mutual accounts, is not a true bill for account, of which equity has inherent and independent jurisdiction, but is properly to be classified under the concurrent jurisdiction (Langdell's *"equitable assumpsit"*)—that is, equity has jurisdiction of mutual accounts only in cases where the remedy at law is not plain, adequate and complete.[13]

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[13] See Langdell, *ubi supra*, 112-115.

THE END.

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