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THE LAW STUDENT'S "Prompter"

COMPLETE COURSE OF LAW
FOR
JUNIORS and SENIORS
IN SIXTEEN BOOKLETS

Senior Course-Equity Jurisprudence

PREPARED AND COLLATED BY

JOSEPH GIFUNI

OF THE NEW YORK BAR.

For copies of Booklets and other informations apply to
JOSEPH GIFUNI
320 Broadway, Borough of Manhattan
NEW YORK.

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To Charles W. Eliot, Esq.
J. Jefferis.

The Prompter for the Senior Course.

EQUITY JURISPRUDENCE.

DEFINITION. In the attempt to define *"Equity"* all texts writers have found certain difficulties, which they were unable to surmount. In the language of many text-books, EQUITY is that system of justice which was administered by the High Court of Chancery in England, in the exercise of its extraordinary jurisdiction. It is necessary then, to know what the English High Court of Chancery was and what was also its extraordinary jurisdiction, in order to begin to understand what equity is. The definition of equity must therefore be, to a greater or less extent, a history and this history has become, so to speak, rounded and complete by the passage of the "Supreme Court Judicature Act of 1873," with its amendments, whereby the judicial system of England has been recast and the distinction between Courts of Equity and Courts of Law abolished, 36 and 37 Vict., 66; L. R. 8 States 306. By this act it was in substance provided that, after the second day of November, 1874, the administration of justice in all Courts of England should be regulated by the principles of equity.

This historical character of the definition of equity is regarded in the United States the same as in England. Therefore, the only interpretation of equity is not by definition, but by a historical description.

JURISDICTION, ETC. The Court of Chancery had both an equity and law side. Sitting as a Court of Law, the Chancellor had an ordinary jurisdiction, sitting as a Court of Equity, he had power which was delegated by the King.

"Curia Regia" was the name given to the King's Household, after the Norman Conquest. It had both legislative and judicial functions; and from this we trace the origin of the King's Court. That council is now recognized as the Privy Council of England, part of whose functions are now delegated to the House of Commons. The first, or oldest court (in the strictest sense of the term) whose existence can be distinctly traced is the Exchequer. (Edenburgh Review, Vol., 33, page 12). The Court of Exchequer exercised jurisdiction as a Court of Equity, principally in cases of tithes; but this jurisdiction never attained any great importance and was finally, by Stat. 5, Vict., 65, sec. 1, transferred to the Court of Chancery.

The Court of Common Pleas was the first *Equity Court.* It came into existence through the enactments of Magna Charter. With relation to tort actions, there were only two forms of actions—*Replevin and trespass* (Stat. of Westminster II.). The right did not include all cases of which the Chancery Court otherwise had cognizance. There was no redress law for libel, slander, fraud, malicious prosecution or false imprisonment, and all torts not accompanied by force. These cases had all to come into Chancery for redress until the said Act of Westminster.

The Chancellor undertook to enforce any duty, whether it related to a moral or to a religious one. The jurisdiction depending upon the conscience of the Chancellor—In one Chancery case the decision is based upon the 28th. Chapter of ducteromomy. He claimed that it was the Law of Moses and consequently good equity.

The jurisdiction of equity has always been more elastic than that of law. Equity is not co-extensive with "natural justice". It includes that portion of natural justice which cannot be enforced in a Court of Law.

EXCLUSIVE, CONCURRENT AND AUXILIARY JURISDICTION.

a. *Exclusive* included those cases where there was no redress at law.

b. *Concurrent* includes those cases where there was redress in a Court of Law, but that redress was inadequate. With regard to partition, it existed at Common Law, but you could not have a partition over land, unless the title was admitted. Inasmuch as the remedy at law was not sufficient, though you could have the partition, you could come into equity. As to dower, you could also have an additional remedy for discovery: in other words, where you had a remedy at law, but the remedy was not adequate, you could come into equity, and for this reason its jurisdiction was *concurrent.*

c. *Auxiliary Jurisdiction.* There was at Common Law an old rule that you could not compel parties to be witnesses against themselves. Suppose then that you bring an action against a party and your only witness is the defendant, and this defendant, upon being notified of the starting of your action against him, he makes ready to leave the jurisdiction of the Court. In this case equity has Auxiliary Jurisdiction, and the Court will grant you an order (ne exeat) by which the defendant is obliged to give bonds of indemnity.

LAW AND EQUITY. All distinction between the jurisdiction of the two Courts, at the present date, is abolished. Merger has now taken place, yet, in some Common Law States there is still this division of jurisdiction into exclusive concurrent and auxiliary. Some writers divide equity into *substantive* and *remedial.*

The distinction between actions in law and suits in equity are abolished. Common Law actions include those actions alone, where you can obtain *damages;* but if you want a deed cancelled etc., you must go into equity.

A Court of Law gives you damages, but does not prevent you from suffering damages. There is no *redress* in a Court of Law for the same, but a Court of Equity will prevent one from doing you an injury.

If you bring an action for "money had and received", and afterward discover that there is an instrument which you would like to have given up, you could not have it, because, you have begun your action in the wrong court. The theory in a Court of Equity is, that when it acquires jurisdiction of a special matter it will dispose of the whole case, or of any matter arising out of the same. All parties must be brought in and made parties to a suit in equity, while in law you can only have the parties directly related to your adjudication. The reason is that in equity all parties are and must be adjudicated.

Trial by jury is a constitutional right; but, where there is a merger of law and equity, you must bear in mind whether it is a legal or an equitable action. As this merger has taken place in many states, in order to determine our right to a jury trial, the distinction between the two actions must be made.

The Chancellor, though he had referred the question to a jury, he could still disregard it. Therefore, if your action is one in law, you are entitled to a jury trial; but if your action is one in equity, you are not. If a judge of the Law Court should not allow a jury, you can appeal on the ground that it is a violation of the constitution.

When you appeal from a Court of Law you are bound by a verdict of the jury. In a Court of Law the judgment was either for or against the Plaintiff or Defendant; as *Law* is either for or against the party. In equity there may be relief granted to both parties. In an action at law you are allowed costs; while in equity costs are looked at from a standpoint of justice.—equity may award costs to the plaintiff and also to the defendant.

The only method of enforcing a legal judgment is by *execution.* In equity the method of execution is by *contempt proceedings.* As between grantee and grantor, the choses in action cannot be reached by a Common Law proceeding; you must resort to equity by a "judgment creditors proceeding" or "supplementary proceedings." Gould vs. Cayuga Nat'l. Bank, 86 N. Y. 75-83. Brown vs. Kalamazoo, 75 Mich., 274.

It is more important to bear in mind the difference between Common Law and equity in a Code State, than in a Common Law State.

FORM OF ACTION—CASE—EXECUTION. Pleadings in equity, though they resemble in many respects, are different than those at Common Law.

In equity the whole of the Plaintiff's case must appear in the bill, and the whole of the Defendant's case must appear in the answer. In law process precedes the first pleading; while, in equity the pleading precedes the first process, which is called the *subpoena.*

Many bills are defective because they do not state their full cause of action.

There are two ways in which you can avoid answering—*demurrer* and *plea.* The grounds of the demurrer must appear in the pleading demurred to, and you must never attempt to interpose any *new matter* in a demurrer, either in equity, Common Law or under the Code. The demurrer is interposed by the defendant when he should not be compelled to answer, because the Plaintiff has not made out a cause of action against him.

A plea in equity is when you reduce your defense to a single point, which will defeat the plaintiff's case, as for example: pleading the statute of limitation, or the statute of frauds or account stated. In an answer it is necessary to give evidence and make discovery. Swearing to answers is borrowed from equity and not from Common Law. Even the method of taking evidence in equity is different than in Common Law. The method, however, of taking evidence in Chancery has been considerably modified in many of the states of the United States and in England, a *viva voce* examination before the examiner, and in some cases before the court itself is substituted for the examination through interrogatories. The testimony is reduced to writing and form part of the record in the cause.

The difference between the method of taking testimony in chancery and at law is the result of the difference in the ends sought to be attained. In equity the complainant in his bill is bound to set forth the facts which are supposed to entitle him to relief; and the defendant's answer must be fully responsive to those allegations. If the answer admits the statements in the bill, the facts necessary to find a decree then stand admitted on the pleadings. If the answer denies the averments of facts in the bill, it is conclusive in favor of the defendant, unless contradicted by two witnesses, or by one witness and corroborating circumstances. The Chancellor, as before observed, may, but is not bound to place the testimony in the hands of a jury, "to inform his conscience," before he makes a decree. It is necessary to remember however, that if an action is equitable you are not entitled to a trial by jury. Bear in mind also, the importance of the distinction being made between law and equity. We had until a certain time, in New York, both a Court of Law and a Court of Equity, but in the year 1846, the Court of Chancery was done away with and the two courts were merged into one court. In other states where the actions are kept distinct, the same judges decide both equity and law cases. This system is still retained by the United States Courts.

In all of the Common Law cases the justice will sit not as a Chancellor, but as a judge and therefore it must be remembered that for the practice in the United States Courts, the above distinction is made.

The constitution of the United States prevents the merging of these two Courts (Law and Equity) and as to all cases where you seek to bring an action in the United States Courts, you must have in mind, not only the substantive law, but also the practice and pleading, as laid down in Chancery.

In chancery, process by subpoena was to the effect that defendant come in and answer under oath. This process compelled him to discover all that was entered in the bill or else he must demur or plead.

In regard to overcoming the defendant's denial of the allegations set forth in the bill, the U. S. Courts have rendered a decision that corroborating testimony must be equivalent to the testimony of a second witness.

The method of giving evidence in equity is that the attorney who wants to have the testimony of any person, must draw up his interrogatories and the attorney on the other side his cross-interrogatories. They are then sent to an examiner as before explained. After the answers are all taken down the examiner seals them. In order, then, to open the testimony an order had to be entered that they be opened. If the testimony after sealing, was opened, then the examination was set down for Chancery.

The theory of equity is that evidence shall be taken out of court and never before the Chancellor. This is true as to equity suits in the U. S. Courts.

AS TO MAXIMS IN EQUITY.

First:—"Equity will suffer no right to be without a remedy." This maxim must be modified by the proposition that equity is not co-extensive with natural justice. There is no remedy in equity for those who are ungenerous, yet Chancery does not pretend to hold men strictly to account for a moral duty or obligation. Equity cannot compel a man to be generous.

There was a case in Georgia, where a minister's salary became due and the church refused to pay it. The title to the church was in another's name. The case was brought to the Sup. Ct. of Georgia to determine whether it came under the terms of technical equity or natural justice; and the defense was that to sell the church was contrary to public policy. The Court held that it should be sold, citing Lyons v. Bank 12 L. R. Annotated 155-157.

Second:—"Equity follows the law." This maxim is modified by proposition that equity follows the law so long as the law does not violate the rules of equity. A man owns an *equitable estate* and dies, the heirs are entitled to the estate, personal property goes to the next of kin.

Property willed to someone *in trust;* if upon testator's death the trustee refuses to pass title, equity comes in and says, he has the legal title, but, it is only in trust. In this way they recognize the principle that equity is bound by rules of law. As to bond creditors equity never interferes, but as to all other rules equity *does* interfere. As to married women (for example) it takes the beneficial estate away from the husband.

The statement that equity follows the law and that equity cannot go contrary to rules of law is erroneous.

Equity is bound by precedent in that the Court of Chancery would not break through the rules; so that now, equity will not do so.

Third:—"Equity discourages antiquated demands." In case there is a question as to construction of a deed; this can be determined by a court of law. There are a number of these bills going up every day where parties want an adjudication in Chancery where there is an adequate remedy at law. 138 U. S. 46; 43 N. J. Equity 636. A man to avoid his creditors, sells out his buisness and the one who purchases does so in good faith. The creditors get out an attachment. In this case the "bona fide purchaser," in good faith has an action at law for replevin or trespass; but where the recovery of the goods or the money for them would not be adequate as (for example) the attachment having run for a long time (say one year) and customers are lost and the reputation or good will injured, courts of equity will interfere. As to the right to go into law when the remedy in equity is entirely inadequate, see Watson vs. Sullivan, 138 U. S. 271.

There is a Common Law remedy for account, but you are allowed to come into equity to adjust the account.

Fourth:—"Between equal equities the law will prevail." In a case where one has a trust fund and the legal title is in an officer of the court, the trust fund should go to the person who has the legal title.

Where property is procured through fraud, but is purchased by one in good faith, both, in the absence of the true owner, have equal equities, but the one who has purchased in good faith and for valuable consideration his title will prevail.

Fifth:—"Equality is equity." If there is two sureties and one pays the whole amount, he has equity to the extent of half and may compel contribution.

Equity favors the vigilant as against the careless and negligent. They (equality and equity) usually offer the analogy of the Statute of Limitation — though your right may be barred in the meantime if the right is of an equitable nature. This was held. Calhoun v. Millard, 121 N. Y. 69.

In law, from the time that the cause of action arises, the Statute runs:

In equity the rule does not obtain where fraud is discovered. If he sues on the legal theory, he sets up the Statute of Limitation. *Caution,* as to Stat. of Limit. in equity cases in New York — Sec.

382, sub. 4, 5 Code of Civil Proc. applies (6 years). This is an equity section.

If the action is equitable it may be outlawed in less time than the time fixed by the Stat. of Limit. In case of frauds it may run a longer time. For less time, see — 121 N. Y. 69, above cited. Where fraud is concealed, the statute does not run, see—Chap. 1 p. 547 Laws 1891.

Sixth:—"He who comes into equity must come with clean hands." He must be conscientious and beyond suspicion, seeking no undue advantage. As to money loaned for speculation: If you can make out a cause of action without reference to the illegal transaction, you have an action in equity even though you knew it was to be sued for illegal purposes. For example—If you hold a promissory note, the action will be on the note. (So held in the U. S. Courts).

Seventh:—"He who seeks equity must do equity." If A makes a loan to B and takes a mortgage with usurious interest, a court of common law has no power to cancel the mortgage, so B must resort to a court of equity, for his remedy. The court will grant him relief upon this maxim.

This rule is altered in New York by Statute, see Buckingham v. Corning 91 N. Y. 525.

Eighth:—"Equity looks upon that as done which ought to be done." X contracts with Y for the purchase of a piece of real estate (in accordance with the Statute of Frauds) in writing. Y dies and the purchase price of the property is assets in the hands of the administrator—Y's real estate is considered turned into money, under this maxim in equity.

Ninth:—"Between equal equities priority of time will prevail." In case of assignments the first assignment will prevail.

Tenth:—"Equity imposes an intention to fulfill an obligation." In England it is the practice to make marriage settlements, and the equitable title passes where the parties intended to fulfill the obligation, but are prevented from doing so by death.

Eleventh:—"Equity acts in personam." In the action in England of Penn v. Lord Baltimore, it was urged that the parties should bring suit where the property was located, but the court held that as both parties were within the jurisdiction of the court, Penn could compel Lord Baltimore to make a conveyance to him and other courts will take cognizance of the conveyance. An action for *Specific Performance* can be brought in another state than that in which the property is situated, but if the nature of the action is such that something has to be done (for example) a partition of the land, the court has no jurisdiction.

As to mortgage on a railroad, where the mortgage is to a trustee, and the latter resides in another state than that in which the property is located; the court where the trustee resides has jurisdiction over the matter. You cannot, however, bring an action for partition in another state. Winer vs. Winer, 82 Va. 890; 82 Va. 570.

A judgment that is rendered by a court of common jurisdiction, where no fraud is shown, other courts are bound to take cognizance.

Twelfth:—"Equity acts specifically and not by way of compensation." In Equity where you cannot recover the title you can get a judgment for damages. Although equity acts specifically and not by way of damages, it sometimes happens that you can get a judgment for damages as before stated.

OTHER MAXIMS. "Equity looks at the substance and not the form."

"No man can profit by his own wrong." Riggs vs. Palmer 115 N. Y. 506. Also with regard to insurance on the life of another, and by violence, murders the insured, there can be no recovery on the bill. Armstrong vs. Insurance Co., 117 U. S. 591.

Leading English works on equity are:—Snell's Principles of Equity; Smith's Principles of Equity; Adams on Equity. Leading American works on this subject are:—Pomeroy on Equity Jurisprudence and Story on Equity Jurisprudence.

Equity is divided into three divisions: *Equitable Titles; Equitable Rights* and *Equitable Remedies.* This, however, is a more modern classification.

Equitable titles are, Trusts, Mortgages and Assignments.

Cestui que trust is not recognized in a Court of Law.

At Common Law there could be no assignment of choses in action. In equity there can be.

It has been said "that uses and trusts had the same parents, fraud and fear; and for their nurse — a court of conscience."

In order to abolish uses the Statute of 27 Henry VIII. was passed, but owing to certain language of the statute and the interpretation by the courts, it did not accomplish the purpose for which it was intended.

The Statute of Uses did not effect the personal property, nor active uses, nor when they depended upon a contingency.

The definition by the text writers that by a trust is meant that there is a legal title in one and an equitable title in another is much criticized. Some say that an equitable title cannot be legal; also that a trust is a confidence in a person.

Recent decisions have laid down the rule that a trust is more than a confidence in a person. If one takes trust property knowing it is subject to a trust, he stands in place of a grantor. If you take trust property it can be enforced against you, even though no confidence has been placed in you by the cestui que trust. It is, therefore, more than a confidence. It is a claim on this trust fund.

The trustee is the only person recognized in a legal action. By an adjudication of his rights, the rights of a cestui que trust are bound.

In states where common law is in force you cannot set up an equitable defense. In Illinois, for instance, a trustee could bring an action for ejectment against the cestui que trust, because the latter could not set up his title as adverse; 132 Ill., 342-346. After reading the discussion of uses with reference to real property and then that uses were succeeded by trusts, we come to the conclusion that "trust" is a much wider term than "use." In Pomeroy's Equity Jurisprudence, the term "trust" has been so extended that it includes all of equity jurisprudence. It is certainly much more comprehensive than the word use. Trusts include all cases where one holds a fund to the use of another. It not only includes permanent trusts, but also those of a temporary character. It includes all things in which we have a right in property, of which the legal right is in another.

At the present day a cestui que trust may have a standing in a Court of Law.

There are some cases where a cestui que trust has a remedy in a Court of Law, where he can work out an action of assumpsit. The fact that the relation between the parties, has a trust character, does not, ipso facto, in law cases, exclude the jurisdiction of a Court of Law. Roberts v. Ely, 113 N. Y. 128.

It is held in New York that a passive trust is executed without any conveyance whatever. Kirtz vs. Peck, 113 N. Y. 233. An executed trust may in a certain sense be called executory. There may be something to be done even in an executed trust as distinguished from an executed contract.

In an executed trust they follow the law. In an executory trust where the first conveyance is of a preliminary character they may follow the law or not as they see fit. If it is a marriage settlement, they follow the law. If in a will, in which issue are to be benefitted, they will not always follow the law.

The law of *spendthrift trusts* apply to debts contracted by cestui que trusts.

There are two rules on this subject, i. e.—one an English rule and the other a rule in force in Pennsylvania, Massachusetts and other states.

The *English rule* is that you cannot tie up property so that a man may receive the benefits and yet the property be exempt from his debts beyond the reach of his creditors.

The *Pennsylvania* rule is that you cannot attach the trust property for the debts of the cestui que trust.

In New York, we have by statute, attempted to work out complete justice in both cases. It is the rule in this state that a surplus can be reached after a certain portion has been applied to the support and education of the cestui que trust, by his creditors. The test by which the amount required for his maintenance is determined according to his station in life.

In New Jersey there is a Statute that if the income of the cestui que trust exceeds $4,000 a year, creditors can reach it by supplementary proceedings.

As to right of alienation of trust funds, the Pennsylvania rule is laid down in 139 Pa. 584. Mass. follows this rule in 151 Mass. 267.

Following the English rule see 12 L. R. Annotated 40 and note.

New York rule see 1 Rev. Stats. 729 Secs. 57 and 62. Also 16 Abb. N. C. p. 1 and note.

The U. S. rule is that where there is a provision in the trust that, though the English rule is followed in case the cestui que trust is insolvent, the trust fund shall be paid to the heir.

By the Statute of Frauds there is a provision that all executed trusts must be manifested and proved by writing. This Statute did not extend to personal property.

Equity will never allow a trust to fail for want of a trustee.

The *essentials of a trust* are *the terms, a subject matter* and a *certain or ascertained object.*

In this country where it is simply an imperfect declaration of a trust, the courts insist upon a consideration.

If a party makes a gift, delivery is essential to prove it. Where there has been a gift but it is imperfect because there was no delivery, courts of equity will not construe it as being a declaration of a trust. If there is no evidence of intent to destroy it, they repose a declaration that he wishes to become a trustee. To be a good delivery the intended gift may be placed in the hands of a third person and the giver must make a declaration of gift.

The declaration must be expressed.

As to bank accounts, see Martin vs. Funk 75 N. Y. 134.

"The Citizens' Savings Bank in account with S. B. in trust for H. M. — this is a sufficient declaration of a trust. If one makes a deposit in a savings bank in his own name but for the benefit of another, this has been held to be a sufficient declaration of a trust, so that in case of death, the cestui que trust could demand the money.

In Young vs. Young 80 N. Y. 422 where a father placed some bonds in an envelope in his safe and marked them for his son, on his death the son could not get them, because, the court held, as there had been no delivery it was not a gift, and there was not sufficient evidence that he intended holding them as trustee. See also Beaver vs. Beaver, 117 N. Y. 421. For the Connecticut rule see 22 Atlantic Reporter 509. In Penn. see 139 Pa. State 276. Terrell's case is still recognized in some states in this country. In many states by Statutes all passive trusts whether they fall under Terrell's case or not are executed ipso facto.

There is a statute in most of the states to the effect that trusts concerning personal property can be created as by Common Law. While as to real property they must be in writing.

As to Spendthrift trusts the Pennsylvania rule and the rule in New York only applies to cases where the trust is created by someone other than the cestui que trust.

If the trust is a voluntary trust a court of equity will not enforce it unless it is clearly and completely declared.

A consideration will set a court of equity into operation. See as to voluntary trusts, Fisher vs. Hall, 41 N. Y. 416; Munoz vs. Wilson, 111 N. Y. 295; Wallace vs. Berdell, 97 N. Y. 22; Adam vs. Adam, 21 Wallace 185.

A MERITORIOUS CONSIDERATION is sufficient in an executed contract, but where it is necessary to do something in an executed contract, a meritorious consideration is not sufficient. Hayes vs. Kershaw 1 Sanf. Ch. 261; Duvall vs. Wilson, 9 Barb. 487 and 492; Wilbur vs. Warren, 104 N. Y. 192; Coleman vs. Burr, 93 N. Y. 27.

PRECATORY WORDS will, as a general rule, be construed to be imperative. Clark vs. Seupp, 88 N. Y. 228; Hendricks vs. Isaacs, 117 N. Y. 411-412; Small vs. Field, 102 Me., 104-105; 71 Md. 105; Colton vs. Colton, 127 U. S. 300.

In New York State only four express trusts can be created. If you wish to create a trust not included in the Statute, which is for no illegal purpose, and which could be enforced at Common Law, you can enforce it as a *power in trust.*

A donee of a power has not a legal title.

A POWER IN TRUST is only a right to exercise a certain right or power. See Woerz vs. Rademacher, 120 N. Y. 62; Austin vs. Oakes, 117 N. Y. 577 and (N. J. 12 L. R. Annt. 60).

IMPLIED TRUSTS are divided into resulting and constructive trusts.

RESULTING TRUSTS are divided into:

1. Where a consideration is paid by one but the deed is in the name of another. We must distinguish here between a loan and where he advances money as his own.

The money must be advanced at the time of the conveyance to be construed a resulting trust. In case of a fraudulent conveyance there will be no resulting trust. Implied trusts do not come within the Statute of Frauds.

In case of *advancement* from a father to a son in consideration of love and affection the court will not construe that to be a resulting trust, also as between husband and wife there would be no resulting trust. Though you can't enforce advancement against a son, if there is any residue to be divided, it will have to be taken into consideration. Advancement does not bear interest until the death of the father. You must account for the advancement before you can take under a will, or share in an apportionment which comes under the old Feudal Doctrine of *Hetchpot.*

The first class of resulting trusts where consideration is paid by one and title in the name of another, has been abolished by Statute in New York. We have this provision in equity, however, that the Statute of Frauds shall never be called upon to work a fraud; 1 Rev. Stats., 728. Sections 51-52-53; Robbins vs. Robbins, 89 N. Y. 251. Also a Michigan case which refused to recognize this class of resulting trusts, 49 N. W. Reporter 551.

2. Where a trustee buys property in his own name and with trust funds.

This class of resulting trusts arises frequently in regard to agencies. In a recent case where an Agent advanced his own money at an Auction sale while acting as agent, he was held to be a trustee.

3. Where the trust of a conveyance is only partially declared

it fails. Where a trust wholly or partly fails it results back to the donor. Most of the cases of this kind are in regard to charitable institutions.

4. Where there is a voluntary conveyance without a consideration and it appears from circumstances that the grantee was not intended to take beneficially.

Where a testator attempts to create a trust but the object is too indefinite, it will create a resulting trust.

Where the trust wholly or partially fails, the test is: was the grantee intended to take beneficially?

Where there is a devise simply of a charge and not for trust purposes, the grantee will take the remainder.

When there was an enfeoffment without a consideration there would be a resulting trust.

CONSTRUCTIVE TRUSTS are those raised by the construction of equity without reference to the intention of the parties.

Where parties are in a fiduciary relation, it is held contrary to public policy to allow one to take advantage of his position. It is not necessary in a constructive trust to have a definite trustee or cestui que trust, there being a fiduciary relation. This applies to co-partners, landlord and tenant, attorney and client, etc. See Perry on Trusts, Sec. 27 and 168.

As to the relation between vendee and vendor, the rule is that a fiduciary relation does not exist. See Hibbard v. Ramsdell, 118 N. Y. 38.

The president and directors of a corporation are in a fiduciary position and cannot take advantage of their positions to buy up claims at a discount and turn them in as set-offs.

A trustee cannot buy in, on his own account, trust property which he is disposing of as trustee. Arnett vs. Welsh, 46 N. J. Eq. 538. The test is not whether he has gained an advantage, but the court will not allow him to put himself in a position where he might do so. He may do so, however, by obtaining permission from the court. This permission must be inserted in the decree of foreclosure. The power of a mortgagee to buy a mortgaged premises should be included in the bill of sale.

It might be well to state here that there is a difference between the word *fiduciary* as employed in Equity and the term as employed by Statute. In the Statute it applies simply to cases of express and not constructive trusts. In equity it applies to both. The case of an agreement with one man to buy property for himself and another and the other was to advance the consideration. The New York cases on the subject are: Sanford vs. Norris, 4 Abb. Ct. of Ap. 144; Moore vs. Moore, 47 N. Y. 467; Ryan vs. Dox, 34 N. Y. 307; Levy vs. Brush, 45 N. Y. 89.

MARRIED WOMEN'S TRUSTS. The words "sole" and "separate" are sufficient to constitute a separate use estate. A separate use estate can be created for a feme sole. A husband still takes curtesy in a separate use estate.

In order to hold the separate use property, the debt must either have been incurred for the benefit of the separate use estate or else she must expressly charge it. The act of 1884 in the State of New New York was to the effect that a married woman can make all contracts that a "feme sole" can and charge them against her separate estate. Bear in mind that the jurisdiction of a Court of Equity is discretionary.

To prevent the creditors from getting a hold of a separate use estate, it was necessary to resort to the clause against anticipation. This is still in effect in New York State and its form will be found in Genet vs. Hunt, 113 N. Y. 158-160. There is also an English case on the subject, 64 Law Times N. S. 494. Property given under this clause of anticipation becomes unalienable. Upon surviving her husband this clause becomes suspended, but on re-marriage the property again becomes tied up.

A clause against anticipation will not be sufficient, however, to create a separate use estate.

When a woman makes a contract with her husband it cannot be enforced in a Common Law Court. In New York by law of 1887 a married woman could make a conveyance of real property without resorting to a trustee.

At Common Law you could take a wife's jewelry to pay the husband's creditors. Wearing apparel was also the husband's at Common Law. In many states of this country they still say that the husband is the proper party to bring an action if the wife's paraphernalia is lost.

Since in New York she has been given all the rights of a feme sole, she is the proper person to bring the action, Whiton vs. Snyder, 88 N. Y. 299. An agreement for an immediate separation is valid. One for future separation is invalid. Galusha vs. Galusha, 116 N. Y. 635; Duryea vs. Bliven, 122 N. Y. 567; Clark vs. Fosdick, 118 N. Y. 7.

There have been many laws passed in New York State effecting married women's rights one way or other, but at present they are regulated by the Domestic Relations Laws (L. 1896 Ch. 272, Art. III.).

CHARITABLE TRUSTS. The Doctrine of Charitable Uses and Trusts has been abolished in New York. By this is not meant that all charitable uses and trusts have been abolished, but only those with an *indefinite object.* Under the Common Law *certainty* in the object is not necessary to constitute a charitable use or trust.

A mere suspension of alienation does not lead to perpetuity, and this is a mistake that is commonly made by students. In New York we find in many cases that perpetuity is cut down to two lives. For instances an estate to A for life, remainder to B for life, remainder to C for life and remainder to some fourth person, is not a perpetuity. There can be no suspension of a life estate. The *test* of perpetuity is, that if all beneficiaries could unite together they could not convey a good title. If all the persons are "in esse" and they should all unite together they could convey a good title. This is no perpetuity. Under the Statute of Charitable Uses and Trusts you could violate the rule of perpetuity and need not have a definite subject or object.

In New York as the Statute of Charitable Uses and Trusts has been abolished, these trusts have been brought under the same rules as other trusts. A case where a man gave money to a town for the benefit of the poor. This would be valid under the old doctrine, but invalid in New York. The same as to a bequest for school books. In this state where certain money is left for religious purposes, if the object is indefinite and there is no beneficiary to enforce it, it would be invalid.

DISTINCTION BETWEEN A PRIVATE AND PUBLIC TRUST. The public utility is sometimes a test of a public trust, or where it is to benefit a whole community; but where you restrict it to a certain class, then it becomes private. There was a case in Massachusetts which clearly brings out this distinction, where the employees of a certain mill entered into an agreement by which each employee was to contribute a certain portion of his salary each week toward a sick fund, for the benefit of the employees when sick. The payments continued for sometime, when finally they were discontinued and the association dissolved. The question arose, was this a public or private trust. If public, the money should be applied to public charities; if private, there would be a resulting trust. It was held to be a private trust and would consequently result back to the donors. See 149 Mass. 543. See as to trusts for eleemosynary purposes, Fosdick vs. Town of Hempstead, 125 N. Y. 581, for educational purposes, 28 No. East. Rep. 165; also Russell vs. Allen, 107 U. S. 163.

A "gift to such a Roman Catholic Church as the executors might select," is too indefinite and will fail, Holland vs. Alcock, 108 N. Y. 312-322. There must be a beneficiary who can come into a Court of Equity to enforce it.

A case where money was left to executors to be given to such charitable, educational and scientific institutions in two states as they might select. Held to be too indefinite — Pritchard vs. Thompson, 95 N. Y. 76. Though in another case where it was "to such Roman Catholic institutions as the executors should select, but that were already situated in the City of New York." Held to be a valid trust. Powers vs. Cassidy, 79 N. Y. 602.

Where the trust is for an illegal purpose it is invalid. The case of George vs. Braddock in 45 N. J. Eq. 757 and 44 N. J. Eq. 522, was where money was left to Henry George towards publishing his works on Progress and Poverty. The lower court held that this was not a valid trust, the purpose being illegal. But the decision was reversed by the Court of Errors and Appeals.

The *cy pres doctrine* has been abolished in New York as well as the rule as to the definitiveness of the object.

Both public and private trusts had to vest within the time allowed by law under the doctrine of perpetuity, as there must be some beneficiary who can come into equity and enforce the trust, as stated above. When you give a bequest to trustees to carry out the organization of a library or whatever it may be, you must be careful to designate the time within which it is to be organized. The suspension of power or alienation in the state of New York must be limited to two lives, specified lives. Where the Common Law is in effect you can tie up property for twenty-one years, but in New York you cannot tie it up for a single day, you must have two specified lives. Booth vs. Baptist Church, 126 N. Y. 215; Pockle vs. Simonson, 126 N. Y. 299; 107 U. S. 171; 54 Conn. 342; 22 At. Rep. 447.

CAUTION TO THOSE WHO PRACTICE IN NEW YORK STATE IN DRAWING UP WILLS. Bear in mind that there was a law passed in 1860 as to how much you could will to a charitable institution or for charitable purposes generally. One-half of the estate is the amount you are restricted to under that law. L. 1860 Ch. 360. In regard to the general subject of charitable uses and trusts read the case of Holland vs. Alcock in 108 N. Y. 312, cited above. The old rule as to charitable uses and trusts prevails in some states still.

POWERS AND DUTIES OF TRUSTEES. The same general rules apply not only to technical trustees, but to all those holding a fiduciary relation, as principal and agent, attorney and client, etc.

Any reasonable person may be a trustee, and Perry on Trusts says that an insane person may be a trustee under certain circumstances. A corporation could not be a trustee under the old rule of U. and T. It is necessary that an express trust should be accepted either expressly or impliedly. In a case where a man was made an executor "if he returned to England" and he did not return until after eight years, but then returned for six months, it was implied that he accepted it.

DUTIES. A Trustee can go into a Court of Equity for instructions if he is not certain as to his duties. This is called filing a bill of instructions and is the only case in which you can ask a court for instructions.

A trustee cannot invest in personal securities. He can invest the trust funds in Government, State—and in the state of New York he is allowed by Statute to invest in city bonds. Laws of 1889 Ch. 65. But the general investment is in first mortgage bonds to the extent of one half of the value of the property at the time of making the investment. If he invests only in these and municipal bonds he will avoid liability if the bonds or property depreciate in value. This is the general rule so long as he has been prudent. Adair vs. Brimmer, 74 N. Y. 550; Ackerman vs. Emmott, 4 Barb. 626. As to the English rule as laid down by the House of Lords, see 12 App. Cases 727. The proper way for a trustee to inform himself of the value of property is not only to examine it himself, but to have an appraisement by some appraiser.

The test as to whether a trustee has performed his duty is,—has the trust property been disposed solely for the benefit of the cestui que trust and in accordance with established rules? A trustee is not responsible for accidental loss — for example, robbery where there was no carelessness on his part to prevent it. It is a well established rule that a trustee cannot take advantage of his position,—"He may lose, but cannot gain."

In the matter of remuneration in the United States, a trustee is allowed compensation for his services, the same as executors, guardians, receivers and persons in fiduciary relations in general.

The amount of compensation is in some of the states regulated by Statute and in others by the court to which the trustees are liable to account. The English rule allows expenses reasonably incurred by the trustee in executing the trust. Allowances for expenses in the United States are in the discretion of the court. The expenses must be absolutely necessary and not against the objections or remonstrances of the cestui que trust. 9 Wal. 743.

A trustee may employ an agent or attorney or broker where it is necessary and usual, but he cannot delegate his office as trustee, even to a co-trustee; 5 Paige (Ch.) 487.

A trustee is not liable for the conduct of his co-trustee, so long as the former has acted in good faith and exercised the same care and diligence which a careful man displays in the conduct of his own affairs. Jones Appeal 8 W. and S. 150; Davis vs. Harman, 21 Grat. 200; see also Sutton vs. Wilder, L. R. 12 Eq. 373.

The leading authorities on subject of trustee's liability for the act of his co-trustee are Townley v. Sherbourne Bridg, 35; 2 Lead. Cas. Eq. 858 (4th Edition) and Brice v. Stokes, 11 Ves. 319.

Trustees are by law, joint-tenants and every one is equally entitled to receive the rents and profits and where a breach of trust has been committed: the injured party may hold the trustees or (in case of death) their representatives responsible; or he may ask the removal of the trustees. If a proper cause is shown, a Court of Equity will remove a trustee. In case of breach of the trust a trustee or his representatives cannot set up the Statute of Limitation, but they can set up the negligence of the cestui que trust in asserting his rights. Bright v. Legerton, 2 DeG., F. and J. 606; see also 26 Texas 537 and 45 N. H. 87.

EQUITABLE ASSIGNMENT. Under the Common Law it was necessary for ownership to be accompanied by possession, in order to have his right or title enforced. If he were deprived of enjoyment he would only have a right or "chose in action" for its recovery. This chose in action was not assignable; nor were possibilities or contingencies. In equity such rights or choses in action were always assignable when the transfer was made for a valuable consideration (if not against public policy or the rules of equity).

At Common Law an assignee had to sue in the name of the assignor, or if he be dead, in his representative's name; but in equity he can sue in his own name. The reason given for the Common Law rule against assignments of choses in action is, that it would tend to encourage litigation and this argument is not wholly ignored by Courts of Equity — they "will hold assignments invalid which tend to encourage litigation," or which attempt to transfer purely personal rights such as personal trademarks. See Kerr on Injunctions, 479. There are certain things, such as pensions, claims against the United States, and the salaries of public officers, etc., not assignable either in law or equity. As to claims against the U. S., see Wood's Exrs. v. Dialogue, 15 Phila. 160; 112 U. S. 733; see also Emerson v. Hall, 13 Pet. 409 and Perry on Trusts, sec. 69, notes 3 and 4. A contract to transfer property not in existence cannot operate as an immediate alienation in law or equity; but upon the acquisition of the thing, the assignor holds it in trust for the assignee and nothing further is required on his part to perfect the title. See Holroyd v. Marshall, 10 H. L. Cas. 209. See also McCaffrey vs. Woodin, 65 N. Y. 459 and 22 Am. Rep. 644.

IN RE OF ASSIGNMENTS OF FUTURE ACQUISITIONS. The validity of mortgages by railroad companies of rolling stock and other personal property, is now well established. See Jones on Mtges., Secs. 152, 153, 154 and 452.

The manner of making an assignment is immaterial, as no particular form of words is necessary, so long as the intention is clearly expressed. This intention may be evidenced by delivery of the evidence of a contract or be implied from the acts of the parties. An order drawn on a fund, if for the whole amount due, is an equitable assignment of the fund; but if for part of the fund, it does not so operate unless accepted. If such an order were not communicated to the intended beneficiary, it is held not to operate as an assignment. The assignee should take every step necessary to get possession of the property transferred as the nature of the case will admit. In this case if he gave notice to the legal holder of the fund, it would be equivalent to possession. See Bisp. Eq. p. 101 as to case of Milroy v. Lord, 4 DeG. F. and J. 263; also Warren v. Rogers, 28 Law Times Rep. (N. S.) 863; 3 Lead. Cas. Eq. 373. The party to be notified of the assignment is the one who has the legal title or owes the money. For example, if personalty vested in trustees is assigned, the trustees should be notified; if a debt, notice should be given to the debtor; if a future cargo of a ship, to the master, etc. Ryall v. Rowles, 348 et seq. (4 Eng. ed.). Notice to one of several trustees or joint debtors, is notice to all and notice may be by parol. Id. 807. As to the effect of these equitable assignments, see Bisp. Eq. p. 224.

ACCIDENT AND MISTAKE. As to accident, in its equitable signification, it is described by some authors to be "an unforseen and injurious occurrence not attributable to mistake, neglect or misconduct," Stóry Eq. Jur. sec. 78.

Both law and equity take jurisdiction in cases of accident. As to Common Law Courts in re accident see 3 Bl. Comm. 431.

Relief can be had in equity generally where there is not adequate remedy at law, as when deeds or other instruments are lost or destroyed. If a lost negotiable instrument comes into the hands of a third person, the party who had lost it could have no recovery in a Court of Law. Substantial justice is done in equity, 123 Ind. 41; N. Y. C. C. P. sections 1917-1918; 21 At. Rep. 1040.

PENALTIES. We must bear in mind the difference between liquidated damages and penalties. If X makes a contract with Y for service and X does not comply with the terms of the contract, Y is entitled to *liquidated damages.* In a case wherein a contract for completing a railroad, it is agreed to pay $500 a day for each day, it is not completed after the time allowed has expired—No court can determine the actual damage done here, so that this will be held to be liquidated damages and the court will not interfere. In a case in U. S. Court where one entered into an agreement to pay $10,000 unless the obligee in a bond was released by some third party; then he will pay him $10,000, and he agrees in any case to pay $10,000, this is a penalty. L. R. 21 Ch. D., 243; 129 U. S. 495; Bullard v. Sherwood, 85 N. Y. 253; Claude v. Sherwood, 122 N. Y. 397; Ward v. H. R. Building Co., 125 N. Y. 230; 138 U. S. 348.

MISTAKE is divided into mistake of fact and mistake of law. The general rule is that a mistake of law will not be relieved against, though where there has been misplaced confidence or misrepresentation, a Court of Equity will relieve the victim. As in a case where a man did not know he was heir, and did not receive his inheritance.

In a case in Michigan where a woman executed a deed of property, part of which she had already granted. She included all the covenants that she owned the property, etc. She told the lawyer who was drawing up the deed, the fact that she had already conveyed part of it, but he said it was alright, and this in the presence of the grantee. The grantee afterward brought suit against her, but the court granted her relief, because she had reposed this confidence in the lawyer. "Ignorance of the law excuses no one," but where a confidence is reposed, the rule does not apply. The maxim does not apply where the relation of trustee and cestui que trust exists: Adair v. Brimmer, 74 N. Y. 539-554.

As to the case where one makes a contract while an infant and ratifies it when coming of age, not knowing that it cannot be enforced against him, equity will relieve him; 3 Pa. State 428. Contra. 4 Allen (Mass.) 507. As to money paid under a mistake of law, knowing all the facts and no fraud or trust relation existing, see 59 Conn. 320, where an administrator paid a debt in full under the mistake that the estate was solvent, but learning later that it was not, tried to recover it back, because a creditor should not obtain any more than his share. He recovered on the ground of unjust enrichment, and some authorities say the action could be brought in law as well as in equity.

It has been held in New York that money voluntarily paid and under a pure mistake of law, knowing all the facts, cannot be recovered back. Where judgment has been obtained through fraud and the judgment debtor argues that execution may be issued against, and do him damage, and so he pays the judgment to prevent execution; and also, in case where judgment has been awarded and paid in fear of execution, but afterwards reversed on appeal. In both cases the money can be obtained back. As supporting the text that money paid under a mistake of law cannot be recovered back, see 14 App. cases 429; Tripler v. Waring, 125 N. Y. 617-632; Venderbeck v. Rochester, 122 N. Y. 285 For the opposite rule, see the cases collected in 59 Conn. 320; see also 44 N. J. Eq. 58.

As to a *mistake of fact,* the court will only interfere where the mistake is mutual. Where there is only the mistake of one party and the other party knows it, the element of fraud enters. An equitable remedy must be mutual. The usual remedy in equity is, for accident — re-execution; for mistake — reformation; and for fraud — cancellation.

In connection with the rule that parol evidence is not admissible to affect a valid instrument, it must be borne in mind that where there is fraud, the instrument is not valid and consequently parol evidence is admissible.

Where we draw up an instrument to secure a certain right, but the instrument does not secure that right; or where we intend it to have a certain legal effect and it has another,— if the mistake is mutual, equity will relieve; 141 U. S. 260 and 282; 150 Mass. 27 and 31. In New Jersey there is a peculiar rule, 39 N. J. Eq. 551. A recent case in Illinois, which does not seem to support these authorities, is Fowler vs. Black, 26 N. E. Rep. 596. Bear in mind the distinction between a power in trust and a beneficial power. A *beneficial power* is where one is given a life estate to appoint the fee to any one he pleases. In New York where one is given the beneficial power, he is recognized as the owner.

FRAUD. The only fraud that is recognized in a Court of Law is actual fraud. A court never presumes fraud; but a Court of Equity will presume fraud when parties are in certain relations.

In regard to actual fraud equity and law have concurrent jurisdiction. As to presumptive fraud equity has exclusive jurisdiction. Where equity and law have concurrent jurisdiction there are certain cases in which you must come into equity to get proper relief. For instance, in a Common Law action on contract or on tort, there is a remedy at law for actual fraud, but you can come into equity to have certain things done, which a court of law cannot do, Beasely vs. Nat. Machine Co. 123 N. Y. 550.

The question often arises where should you sue in the case of actual fraud, if the Statute of Limitation has run. In equity the statute will not run except for six years from the time of the discovery of the fraud.

It is a common law rule that if you want to sue on a contract and have it rescinded you must make a tender. This is not necessary in Equity. See Vail vs. Reynolds, 118 N. Y. 297.

If you simply make a statement through negligence, this is not sufficient to make out a case of fraud — Derry vs. Peck 14 App. Cases 337. You must, in fraud, always have injury. The very reason we resort to the doctrine of estoppel is to prevent injury. Do not confuse fraud and estoppel. In fraud you are already injured.

As to constructive fraud, there are three classes.

First, fraud arising from contracts.

Second, fraud as presumed from the relation of the parties.

Third, fraud effecting third parties, not parties to the contract.

Inadequacy of consideration is not sufficient to put a court of equity into motion. In case of an action for specific performance, you are sometimes in this position in regard to a contract. You cannot come into a court of equity for affirmative relief. Equity sometimes refuses to interfere in regard to either person. The Horseshoe case where A made a contract to shoe his horse and agreed to pay therefore in this way, 1 grain of barley for the first nail, 2 grains for the second, 4 grains for the third, 8 for the fourth and so on in arithmetical progression. No such contract could be enforced either in Equity or in Law. This case was revived in the United States Court. See as instance where neither a court of equity or a court of law will enforce a contract on the grounds of inadequacy, Hume vs. United States 132 U. S. 406. Also 45 N. J. Eq. 830.

By the Statute of Anne usurious contracts cannot be enforced. They must be absolutely void. This has been adopted in the State of New York. Whenever a borrower comes into a court of equity and asks that a mortgage or other security be cancelled the court must give him relief. He can have it cancelled without making any tender. See the case of Buckingham vs. Corning, 91 N. Y. 525. If it is a mere devise of the borrower, the rule in this case would not apply. He would have to tender the principal and interest. See 9th Ed. N. Y. Rev. Stat. p. 1855-1856. As to gambling transactions, those are void by Statute, and there can be no recovery. Though if you can make out your case without reference to the gambling transaction you have a good case.

CONTRACTS MADE IN RESTRAINT OF MARRIAGE. If the condition is made in complete restraint of marriage, the contract is void; if the condition is subsequent, you take the property, if precedent, you cannot. A case in England provided that she should marry a gentleman who had an income of at least 500 £s. a year. Court held this was void. To preclude from marrying a certain individual is not a restraint on marriage.

There is often a provision in a will, that if the legatee shall contest this will, the legacy is void. As to the time that we are supposed to enforce this condition, — the courts have not arrived at any definite rule on the subject. 42 N. J. Eq. 390.

CONTRACTS IN RESTRAINT OF TRADE. In drawing up a contract for the dissolution of a partnership, the clause is often inserted that the partner who goes out of the business shall not carry it on within a certain territory. This is generally held to be valid. The question is, — how far the territory may extend. The only general test that we can apply is, is the condition all that is necessary to protect the person or persons for whose benefit it is made? As to a case of a Physician selling out his practice, and the condition is made that he shall not practice anywhere in the State of New York. This is not valid. If the condition be limited to not practice in New York City, then it would be good. If it was a business which included selling throughout the United States, a condition to that effect would be good. Diamond Match Co. v. Roeber 106 N. Y. 473; Fowle vs. Park 131 U. S. 88.

A case where a widow entered into a marriage brokerage contract and paid $50 on account, but the contract was not fulfilled, the lower courts held that she could not recover, because it was on an illegal contract, but the Court of Appeals held that there was an element of fraud in the case and they left it to the jury to decide whether the broker should pay it back or not. See Duval vs. Wellman 124 N. Y. 156 (Bisp Eq. See 224).

FRAUD PRESUMED FROM THE RELATION OF PARTIES. As to contracts with insane persons or people of unsound minds. *Caution,*—all contracts under this class are *voidable* but it is a question whether they are void or not. Some authorities held that where one deals with a lunatic and takes no undue advantage and gives him full value for the contract this contract can be enforced.

INTOXICATION — If it is a case of only slight intoxication, it would have to be shown that some undue advantage had been taken of him.

In equity, the degree of duress is not so strong as in law; anything in the way of mental duress cannot be enforced. If it is simply a promisory note, it cannot be gotten back. From the tendency of authorities, money paid under equitable duress can be obtained back. Adams vs. Irving Nat. Bank, 116 N. Y. 606; 49 N. W. Rep. 557. As to contracts with lunatics see (Bisp. Eq. Sec. 230) ; Van Densen vs. Sweet 51 N. Y. 378; Ormiston vs. Olcott 84 N. Y. 339; Hughes vs. Jones 116 N. Y. 67.

UNDUE INFLUENCE, — As to parent and child, guardian and ward etc. see Taylor vs. Taylor 8 How. 183; Green vs. Roworth 113 N. Y. 462-470; Cowes vs. Cornell 78 N. Y. 91; Matter of Smith 95 N. Y. 516; 135 U. S. 167; 45 N. J. Eq. 813.

ATTORNEY AND CLIENT. An attorney cannot take a gift from his client. If you can show though that there has been no undue influence exercised the gift cannot be recovered back. The presumption is of undue influence, and you must show evidence to the contrary. The same rule applies as to guardian and ward, trustee and cestui que trust.

A trustee or agent cannot buy, if he does, the cestui que trust, or principal can always come in and have it set aside.

If the relation is proved, and it is shown that there has been a gift, then equity presumes fraud, but it can be rebutted by showing that in the transaction there was no undue advantage taken.

As to parent and child, the law is not quite so strict as in the other relations, but they will not allow undue influence to be exercised by either party. As to other relations you must come in with proof. You need not prove any concrete instance of undue influence, but if you can prove that one has such power over the other, that it is probable that he has used undue influence, then the Court will presume it.

In all of these instances there is a presumption of fraud, but it can be rebutted by the other party by showing that no undue influence was used and that the transaction was valid. Except the case where the trustee to sell buys for himself, he cannot show that the transaction was valid. He cannot rebut the presumption of fraud.

CAUTION, — As attorneys, you must not be in too great haste to compromise a case where the opposite party is not represented by counsel, and especially if it is an ignorant person with whom you are dealing, because the court will sometimes hold that you have used undue influence or taken advantage.

WHERE FRAUD EFFECTS THIRD PERSONS NOT PARTIES TO THE CONTRACT. These come under the class of fraud upon *purchasers,* fraud upon *creditors;* fraud upon *marital rights;* fraud upon *powers.*

FRAUD UPON CREDITORS is one of the most frequent cases arising, when we come to set aside a conveyance, because it is fraud upon creditors. If he was insolvent at the time of making the conveyance, there must be a valuable consideration. In some cases a moral consideration is sufficient. For instance where deed was barred by Statute of Limitations.

Where the case arises as to general assignments you have to look at the Statute in each state. There is a general assignment act in the State of New York. What would be a good general assignment in one state is not in another. Attorneys often make the mistake in drawing up a deed and recording it in another state.

Frequently a man when insolvent will try to make a compromise, if you will allow him to carry on the business and he will offer to pay you, say 25 cents on the dollar, if you will sign an agreement of full discharge, but then if one creditor refuses to do so the whole agreement will be void.

Case in the U. S. Supreme Court held that where there was an attachment for the full amount you paid that creditor. As an attachment was a first lien on the property, 32 U. S. 318.

If one should make a voluntary conveyance of real property and subsequently convey the same property to another party who has notice of the first conveyance there is no fraud, because if it is known that there is no title, there can be no fraud. According to the American views, no title would pass. The English views are that a voluntary conveyance is rendered void by Statute and no subsequent purchaser is bound to regard it.

FRAUD OF MARITAL RIGHTS. In New York under the married woman's rights, a married woman can make almost any conveyance.

As to dower rights in said state, if the husband makes conveyance of all his property before marriage, she can have it set aside. If the purchaser buys in good faith, and without notice of the fraudulent intent of the husband and a conveyance takes place before marriage, both the purchaser and the wife have equities, but the purchaser has the legal title. Value is not sufficient, you must take without notice.

NOTICE. Notice is a legal cognizance of facts.

When any other party has a lien, a title or a right in a thing conveyed to us, we take the position of the party conveying to us. The law says that if there is a trust fastened on our vendor, the trusts fastens on us. Sometimes you can have notice without knowledge, under the recording act.

Notice is divided into *actual* and *constructive* notice.

Constructive notice is a presumption of law that you ought to know, or should have known by using the diligence of a prudent man, the existence of a prior right. All the facts are presented to the jury and it is presumption for them to draw. In actual notice they would be charged to find.

The holder of a legal title can set up want of notice, if he has paid a valuable consideration. The holder of an equitable title can set up want of notice as against the holder of a legal title, when the holder of the legal title goes into a court of equity for discovery.

Case where a widow went into equity to have dower assigned as against the owner of a legal title. You can't set up notice as against the legal title, and writers have been trying to reconcile these cases. The recording acts in this country would cover this case.

Where neither have a legal title, but there are two equitable titles without notice, the maxim that where equities are equal the prior title will prevail applies.

Notice to agent is notice to the principal, Constant vs. U. of Rochester 111 N. Y. 604. This would be constructive notice.

As to the time when the knowledge should come to you to be considered legal notice. The English rule is that it would have to be obtained in the same transaction. The United States Courts take the stand that this notice, if it was in a recent transaction, such a short time before, as to be present at the time of this transaction, then is legal notice. The Court of Appeals in the State of New York took the same stand as the United States Court.

In case where you have knowledge and refuse to have anything to do with the case, and refer it to another attorney, the question would arise: would that be notice to the principal? According to the English rule it would be notice. See 12 App. Cases 531; 21 O. B. D. 144.

If you record an instrument that is notice to the whole world. This is constructive notice.

POSSESSION IS NOTICE. As attorneys, bear in mind that after you have finished searching and before passing title there is one thing still remaining to be done and that is to *go and see the property* and find out from the occupant, who the owner is. In a case in New York, where one had taken title, but did not record the deed, he went however to the premises and found a squatter on the same, whom he made attorn to him, and the original grantor subsequently conveyed the premises again, and this grantee put his deed on record. The question arose as to title. But the first grantee saved himself by making the squatter attorn to him, as possession of the tenant is possession of the landlord. In practice before closing title it is wise to make out a map of the premises and give it to some employee and tell him to go and find out who is the owner. When you leave a grantor in possession of part of the premises, that is not sufficient to overcome the presumption of notice.

The mere fact that there was an unrecorded deed to a sister, and the sister still remained in possession of the premises, is not notice. See as to possession when is notice (Bisp. Eq. Sec. 268; Phelan vs. Brady, 119 N. Y. 587; 15 S. W. Rep. 580. As to where the presumption is overcome when the possession can be explained, see 46 N. J. Eq. 566; 118 Ill. 275; 109 U. S. 504; Frear vs. Sweet, 118 N. Y. 461 and 462.

A makes a deed for a good consideration, subscribes it, but does not acknowledge it or have it witnessed. He subsequently conveys the property to a second grantee, by a deed without consideration, with notice and duly acknowledged and witnessed. The subsequent grantee takes title, the fact that he had notice makes no difference here, because under Sec. 137 1 N. Y. R. S. 738 the first or unacknowledged and unwitnessed deed would not stand as against the second, which was duly acknowledged and witnessed. See also Chamberlain vs. Sprager 86 N. Y. 603; Nellis vs. Munson 108 N. Y. 453. There is a statute in the state of New York that an unrecorded mortgage has priority over a judgment even before the mortgage is recorded. The reason for this is that a mortgage is a special credit and a specific lien, but a judgment is a general credit and not a specific lien, and should come in after the specific lien although the specific lien has not been recorded.

The doctrine of lis pendens was to the effect that if any one purchased property and there is any litigation concerning the property in chancery, even though the purchaser did not know about it, the filing of a bill and the filing of a notice of lis pendens is constructive notice. It was to the whole world pending the litigation, as to the facts set forth in the bill. The New York Court of Appeals have held that our Statute in regard to notice of pendency of action only applies to real property, and as to all other property the doctrine of lis pendens applies Leitch vs. Rells 48 N. Y. 588; Holbrook vs. New Jersey Zinc Co., 57 N. Y. 632. If I bring a suit regarding shares of stock we have to fall back on the old doctrine of lis pendens (Bisp. Eq. Sec. 274) Code of N. Y. C. P. Sects. 1670 and 1671. See on the general subject of lis pendens 119 U. S. 680 and 692. If I buy from a party pending this suit I am bound by the result of that suit. The doctrine of lis pendens applies. The only way I can protect myself is to petition the Court to be made a defendant, Honey vs. Elliot, 118 N. Y. 124; 130 U. S. 570; 131 U. S. 371. The doctrine as to the application of trust funds does not apply in this country, it only applied in England where it was for a special purpose. (Bisp. Eq. Sec. 277) 1 N. Y. R. S. 730 Sec. 66.

ESTOPPEL. There are three divisions of estoppel, in record, in pais and in deed.

Estoppel is merely a rule of evidence precluding one from denying the truths of certain statements. If a party to a suit makes a statement which is opposed to his own interest, that will be introduced in evidence on the ground of admission. Where a party makes a statement and another upon the strength of this statement changes his position, the party is precluded from denying it. The difference between fraud and estoppel is that in fraud you must have a fraudulent intent. This is not necessary to make out an estoppel. Then in estoppel in certain cases there may be a fraudulent intent, but it is not essential. In fraud there must always be injury, and there is a cause of action. In estoppel there is none. We resort to estoppel to prove an injury. See (Bisp. Eq. Sec. 208). Low vs. Bouviere 60 L. J. R., N. S., Ch. D. pps. 599-601, read particularly page 601. Trustees of Brookhaven vs. Smith, 118 N. Y. 634-641; 44 N. J. Eq. 576 100 U. S. 78. The class of estoppel called equitable estoppel is practically the same as estoppel in pais at the present day, and can be enforced in a common law court under estoppel in pais. If you went into a court of equity at the present day on the ground of equitable estoppel, your complaint would probably be demurred to on the ground that you have adequate relief at law. Then there are certain cases where you would have to go into equity, as for instance, where there was an executor who had a beneficial interest and a co-executor. The executor who had beneficial interest, as an individual should be estopped himself, from denying the power of the co-executor to do certain acts. He could not proceed on the ground of personal estoppel, but inasmuch as he had a co-executor, a court of law will not recognize that, and he comes into a court of equity and the co-executor is allowed to set up the doctrine of estoppel, only in so far as the executor's personal interests are concerned. Equitable estoppel alone is not sufficient to go into a court of equity, a sufficient remedy can be had at law. You must have some other equities to go into equity. Drexel vs. Burnee 122 U. S. 242-253. This case lays down the rule that equitable estoppel and estoppel in pais are practically the same.

Where one is silent and is ignorant of the fact that it was his property, there can be no estoppel. There is an estoppel from silence when it is your duty to speak. If I make the statement to a purchaser of my property, that it is not my property, and he believes it is not my property, that would be an estoppel because it has been acted upon (Bisp. Eq. Sec. 283) Pipert vs. Hoard 107 N. Y. 73 (Bisp. Eq. Sec. 284) Tucker vs. N. Y. C. and H. R. R. Co. 124 N. Y. 308; 44 N. J. Eq. 578. (Bisp. Eq. Sec. 288) 8 So. Rep. 608.

Where one, as an inducement to a woman to marry a third party, made the statement that the man she was about to marry owned a certain farm, which he himself owned. The woman married and after her husband's death her son came into court, and said that as he had made this statement and as his mother had changed her position in consequence of this statement, that he should be estopped from denying the truth of the statement, and it was so held.

Estoppel binds parties and those in privity with them, as joint tenants or successive relationship, as ancestor and heir, testator and executor, etc.

ELECTION. As to the legal doctrine of election — it is the choice of one of two inconsistent theories. Supposing a man obtains property from me by fraud, — I have more than one action against him. If I sue on contract I have certain benefits, if on torts I have others. You must have knowledge to make an election. See as to election in law, as distinguished from equitable election, Chamberlain vs. Dunlop, 126 N. Y. 53; 152 Mass. 134.

As to *equitable elections*—They are divided into express and implied election. It must be a valid gift of the testators own property, and the property must be given away to another.

EXPRESS ELECTION. I give to A $1000 on the express condition that he gives a certain thing to B. If he does not give this certain thing to B, it results back to me. There is a rule in equity, that you cannot take under an instrument, and refuse to carry out the conditions of the instrument.

If it is an express election you must give the identical thing or the trust fails; although you can compensate the disappointed beneficiary.

When there is an election in a will, if it is not pointed out that the bequest is in lieu of dower the widow will take both. In order for an election to rise there must be an express condition that it is in lieu of dower, Asche vs. Asche 113 N. Y. 232. The presumption is that when a widow has made no election and a year has passed, that she has taken the legacy in lieu of dower. (Bisp. Eq. Sec. 296) 1 N. Y. R. S. 742 Sec. 14. Read property law, Sec. 181. As to whether you can take under an assignment for the benefit of creditors and also bring an action to set aside the assignment as fraudulent see (Bisp. Eq. Sec. 306) Mills vs. Parkhurst 126 N. Y. 93.

CONVERSION is a doctrine of equity by virtue of which the nature of property is presumed to be changed. If it is a trust in a will the language must be imperative and the purpose for the conversion legal. If it is left to the discretion of a trustee it will not work an equitable conversion until he has executed his power.

If under a contract the contract must be valid.

A court of equity can direct a conversion for the benefit of a lunatic.

In states where you cannot make a devise to an alien, under the doctrine of conversion you can direct the executors to convert the property and the alien will take. That an alien cannot take a devise, but can take a legacy see 3 Wheat. 566. Same can be done in New York, Parker vs. Linden 113 N. Y. 28; see as to equitable conversion under the doctrine of perpetuities (Bisp. Eq. Sec. 314); Greenland vs. Waddell 116 N. Y. 234.

RECONVERSION. Reconversion is an imaginary process by which a conversion is annulled and the property is restored to its original character. Where there is a devise to a trustee this reconversion would not take place under an election. When the purposes of the power are fulfilled then the power fails, as when the beneficiary has taken the property. Where all the parties are beneficiaries they can elect to take it in its unconverted form. Where the heirs are the only parties which are entitled to take the property in its converted form and they elect to take it in its unconverted form and that will defeat the power. (Bisp. Eq. Sec. 322) Greenland vs. Waddell 116 N. Y. 234-246; Hetzel vs. Barber 69 N. Y. 1; in New Jersey 12 L. R. Ann. 62.

ADJUSTMENT. Adjustment of rights and liabilities is divided into set off, contribution, exoneration, subrogation and marshalling.

SET OFF was not recognized at Common Law, — it depends upon the English Statute. Recoupment may arise out of the same transaction, but that is now included under the head of counterclaim, under the N. Y. Code of C. P. Sec. 501-502, which now takes the place of set off.

In order that we interpose a claim by way of set off, it must be against the same parties. Frequently we are unable to interpose a set off at common law where there is a joint contract etc. As where A sues B and B interposes a claim which A owed to C. In that case if you could show in a Court of Equity that C was a mere nominal party, equity would frequently interfere.

As to the technical terms of the law that they look only to the words and not to the substance.

Frequently while a Court of Equity would not otherwise entertain a question of set off, it will on the ground of insolvency where an assignment may be brought about (Bisp. Eq. Sec. 327). That counter-claim now takes the place of set off in this state. N. Y. C. C. P. Sec. 501 and 502. Also 122 U. S. 241 and 253; Spofford vs. Rowan 124 N. Y. 108; People vs. Hall 104 N. Y. 174, 175; 58 Conn. 22; 31 N. J. Eq. 554, where a Court of Equity will allow a counter-claim where a set off is not sufficient.

CONTRIBUTION. This was recognized in a Court of Equity, but was not originally recognized in a Court of Law. (Equality is equity). The theory on which we would sue in a Court of law for contribution would be on an implied contract or assumpsit. On this theory you could enforce it, for a breach of a promisory note under seal.

The superiority of Equitable relief over that at common law. On a contract where there are three sureties, if one of the sureties is insolvent he is eliminated in a Court of Law, but in Equity he would be held to one third. Where one surety pays the whole debt and the other surety dies it was first held that his executors were not bound, but in New York they say there is an implied contract that not only would he pay, but also his heirs. (Bisp. Eq. Sec. 329) Johnson vs. Harvey 84 N. Y. 363.

The rule is that before the right of contribution arises you must have paid more than your share. It is not essential to pay the whole debt.

Contribution arises in other connections than with sureties.

Supposing I own twelve lots on which there is a mortgage and I sell one to you not subject to the mortgage, and subsequently sell the other eleven. If one of the purchasers took subject to the mortgage and if they were purchased one after the other, he would have no right to call on the others for contribution. This is what is called the inverse order of alienation. The first lot sold by the vendor would be the last lot attached for the mortgage and the last lot sold would be sold subject to a mortgage and could be attached first.

Also where two heirs are tenants in common and one pays the whole mortgage to prevent foreclosure he would have a right to contribution. (Bisp. Eq. Sec. 334) 152 Mass. 391. You cannot use the doctrine of contribution to speculate (Bisp. Eq. Sec. 330) People vs. Coms. of the D. of Fire & Buildings in the C. of Brooklyn, 110 N. Y. 64.

EXONERATION. As to the rights of the surety against the principal. When a surety has paid the whole amount he has the right of exoneration. As soon as the debt is due the surety can go into a Court of Equity and compel the principal to pay the whole of the debt, on a theory of quia timet. He should also make the creditor a party defendant. (Bisp. Eq. Sec. 331) 58 Conn. 22 and 34; also 138 U. S. 599.

The old theory was if a man borrowed money and gave a mortgage the heir could call upon the personal representative to exonerate the real property. This is not the rule in New York unless it is so stated in the will. (Bisp. Eq. Sec. 332) 1 N. Y. R. S. 21.

Where one surety is given collateral and the second surety pays the whole amount he is not only entitled to contribution but to *Subrogation.* The creditor cannot be called upon to deliver over any collateral until he is paid the whole amount, and then he is entitled to subrogation.

A mortgage is made and the wife unites in the mortgage and the equity of redemption is sold and the wife refuses to unite in the deed. There is a foreclosure on the mortgage, the party who has the equity of redemption pays off the mortgage. Held that he will be subrogated to the rights of the vendor as to the rights of the vendee. 133 Ill. 278. You must be compelled to pay or pay to protect certain interests to be entitled to subrogation. (Bisp. Eq. Sec. 337) 124 U. S. 534; Thompson vs. St. Nicholas Nat'l. Bank 113 N. Y. 293. That the creditor must be paid in full to be entitled to subrogation (Bisp. Eq. Sec. 335) 139 Penn. St. 69.

You have a right of subrogation where one fund may be a surety for another fund. Subrogation occupies a large part of insolvency law.

MARSHALLING. There are two systems of procedure in marshalling. Where A holds security on two funds, and B holds a second security on one of the funds, we resort to this doctrine to compel A to go first to the fund on which he alone holds security. This is one method of procedure (Bisp. Eq. Sec. 341) 135 Penn. St. 612; 33 W. Va. 444; 33 So. Car. 142; also matter of Powers 124 N. Y. 359. And the other method is for the one who holds the second mortgage to be subrogated to the first mortgage. (Bisp. Eq. Sec. 343) People vs. Wood 121 N. Y. 328. You can prove your whole debt even where you have collateral. As to the order of liability of assets for the payment of debts in New York (Bisp.

Eq. Sec. 346) 2 N. Y. R. S. 87 Sec. 27. See N. Y. C. C. P. Sec. 2719.

EQUITABLE LIENS. In order to have a lien at common law the property must be in possession and when you give up possession the lien is gone. This is not necessary in Equity. An equitable lien is a sort of a charge. The vendor has an equitable lien after the deed is passed and until the purchase money is paid to him. There is no necessity of a vendor's lien before the deed is passed and after the signing of the contract, because he still has the legal title.

If in paying for the property I give you bonds which are of no value or have committed a fraud on you in some other way of payment, you are entitled to an equitable lien. When we come to enforce one of these liens, if the property gets into the hands of an innocent third party, our lien is gone. You should file a notice of lis pendens, and if any party would take it he would take with notice.

In case of fraud equity will enforce a lien, and this is called an equitable lien. When you have a lien you must always file your pleadings and in addition file the notice of pendency of action. Under the old doctrine you only had to file your bill.

SPECIFIC PERFORMANCE. Specific performance belongs to the law of procedure. If you sue in law your only redress is pecuniary damages. In equity, the court compels a man to do just what he contracted to do, and this is called specific performance. It proceeds on the maxim that Equity acts in personam, and acts specifically and not by way of damages. There is no redress on an executory contract in a court of law except for damages. The advantage of going into a court of equity is not only to compel specific performance, but also to enforce a right which could not be enforced by a court of law. It must be remembered that to enforce specific performance is in the discretion of the court.

In equity you make out your cause of action by simply stating that it is in reference to real property.

Specific performance can be had in regard to personal property where damages would not be adequate.

THE THEORY on which specific performance is granted is, either, that according to the known rules of law, damages would be inadequate, or, that the contract is of such a nature that we cannot ascertain any known rule by which we can determine damages. In regard to real property, unless you can show that you are ready to give a deed with a good and marketable title you cannot maintain an action, in such cases, for specific performance. So that one of the first things to determine in one of these cases is whether there is any defect in the title, and the title must not only be good but marketable.

If it is a case where you want the property conveyed on a certain day, you must be sure to insert the stipulation to that effect in the contract, otherwise the court will compel you to take title a few days later. You must make time an essence of the contract. But with regard to specific performance time is no essence of a contract. (Bisp. Eq. Sec. 39) 46 N. J. Eq. 294; 134 U. S. 68-78. It has been held that where there is a contract to convey real property and there is an action for specific performance and it becomes impossible for the vendor to enforce the contract because he has no title or has passed title to another, a court of equity will not dismiss the case, but will give money damages, 128 U. S. 667-671. But if you come into a court of equity knowing that it was impossible to enforce it, they will dismiss you to your action at law.

With regard to *judicial sales* there are many important exceptions. We might divide contracts for the purpose of conveying property into those made under a judicial sale and those not so made. When it is, in a judicial sale, specific performance is enforced by *order* of the court, compelling us to take the property.

In judicial sales there is no action but an order compelling the vendee to take, or an order relieving the vendee from taking and returning the purchase money paid. (Bisp. Eq. Sec. 398) Camden vs. Mayhew 129 U. S. 73.

When a party has made a contract with you and after searching, you find he cannot convey a good title, all you are entitled to is nominal damages and expenses of searching title. (Bisp. Eq. Sec. 395) Northridge vs. Moore 118 N. Y. 419.

With regard to stock, supposing none of it could be had because of scarcity, and one made a contract with you to convey a certain number of shares — you might have specific performance.

In regard to real property, if we make out a case that it is real property, and unless there are equities, we are entitled to specific performance.

In regard to personal property, if I make a contract to have supplied certain articles and this is the only place where I can obtain the goods and if I am then refused and this refusal to deliver me the goods will injure me in my business, I am entitled to specific performance. 27 N. E. Rep. 1005-1007.

Where a man had complied with all the conditions to enter a certain horse in a race. Having complied with all the conditions, how could you ascertain how much he would be injured when the authorities refused to admit the horse? An injunction similar to specific performance was had to compel the authorities to enter the horse (Bisp. Eq. Sec. 262). With regard to specific performance as to personal property, stocks, etc. (Bisp. Eq. Sec. 368) Greene vs. Fry 93 N. Y. 367; 12 L. R. Ann. 776.

Where you transfer certain cattle without specifying what cattle, specific performance cannot be enforced, as the contract must be certain.

Specific performance can be enforced in another jurisdiction than where the property is situated.

Specific performance may be had on an easement, 138 U. S. 1 and 36; Cottman vs. Grace 115 N. Y. 303.

Case where a lunatic makes a contract to convey land and the vendee gets into possession and a guardian is subsequently appointed for the vendor, and the guardian transfers the property to a second vendee, who knows all the facts and pays money, and no advantage taken. First party who made the contract did not know the vendor was a lunatic. Question, whether the party who bought from the guardian, who bought on a speculation, had a title. Held that the first vendee has a right to come in and the second vendee cannot set up these facts, still he is entitled to some rights and would be entitled to have the money he paid to the guardian refunded. (Bisp. Eq. Sec. 371) Page vs. Martin 46 N. J. Eq. 585.

When specific performance is refused, it does not follow that you have no remedy. Sometimes you still have a common law action for damages, Conger vs. N. Y. W. S. & B. R. Co. 120 N. Y. 29.

There must be a consideration and a valuable consideration. You can never obtain damages in either equity or law if the consideration is for love and affection. Equity will not relieve you on a meritorious consideration.

Where there is not an adequate consideration a court of equity will not enforce specific performance.

Inadequacy of consideration is so great, sometimes, as to shock the conscience of the court. In a case where one bought property worth one-half a million for $270 and he comes into court and asks for specific performance. (Bisp. Eq. Sec. 372) 135 U. S. 45, also Atty. Gen. vs. Continental Life Ins. Co. 94 N. Y. 199. If there is anything inequitable in the plaintiff's claim it will not be enforced.

Specific performance cannot be enforced against an infant. It would not be allowed because the remedy must be mutual and the contract certain. A contract to convey two acres of land and with the provision that it must be 200 feet on a certain street and then to run back on a certain line so as to make two acres. This would be certain enough. With regard to all contracts for service there can be no specific performance. It must be a case where it is possible for a court to enforce it. When it is real property a decree of specific performance will vest the title.

BEAR IN MIND that specific performance is in the discretion of the court, that the remedy must be mutual, the contract must be certain and it must be possible to carry out.

Where one makes a contract to purchase real property and before the deed is passed the house burns down and three-fourths of the consideration is destroyed, and the vendor then tenders the deed on the equitable theory that the title is in the vendee, an English case held that he could compel specific performance. This has been followed in this country by numerous cases. On the other hand they say that it was never intended that he should pay a good consideration and not get a substantial part of the property. As equitable titles are merely a fiction and they will never allow a fiction to work out injustice. This question has not been decided positively as yet in the New York Court of Appeals and the only way to get over this difficulty is to take out an insurance policy. The courts hold that the vendee has an insurable interest (Bisp. Eq. Sec. 376) Goldman vs. Rosenberg 116 N. Y. 78; Wotzler vs. Duffy 12 L. R. Ann. 178.

As to what must be the nature of a title. It must be free from material defects. It is not sufficient that the judge must come to the conclusion that it is a good title, but the chain must be so conclusive, that he cannot conceive how another judge could come to the conclusion that it was not a good title.

Where a doubt arises upon matter of record, but arises on extrinsic proof the court will not compel you to take title unless your evidence is very conclusive.

It must be not only a good title but a marketable title as well. (Bisp. Eq. Sec. 378) Vought vs. Williams 120 N. Y. 253.

There are certain cases where you probably have not a valid contract, still a court of equity will sometimes enforce it. In order to enforce specific performance we must have a binding contract, then, there are certain cases that will take it out of the Statute of Frauds. As in the case of Judicial Sales, which are by order of the court, and are part of the action, and the Statute of Frauds does not apply. So if you should go into the Real Estate Exchange and purchase certain property at a foreclosure sale, and there is no contract in writing and no part payment and you are not at the time put into possession, it can be specifically enforced by the court. Andrews vs. O'Mahoney 112 N. Y. 567, 572.

PART PERFORMANCE. There is grave doubt whether simply coming into possession, where the contract is not in writing, is a part performance, or sufficient possession to take it out of the Statute of Frauds.

If you are already in possession of the prĕmises, that would not be sufficient. The possession must be with the consent of the owner and it must be attributed to the contract.

INJUNCTION. Injunctions are divided into *mandatory* and *peremptory*. A mandatory injunction is an order of the court which requires a certain person to do a certain thing. Mandatory injunctions seem to be nothing more than specific performance. Mandatory injunction is simply an order, while specific performance is an action. That they are substantially the same see (Bisp. Eq. Sec. 400) 138 U. S. 1 and 46; N. Y. Law Journal Sept. 1, 1891.

A mandamus and a mandatory injunction differ in that, a mandamus is only issued to compel a court to do something (or an officer of the court or a corporation). It is to compel a man who has some public duty to perform, and is granted at law. While a mandatory injunction is to enforce a private duty, and is granted in equity. A *peremptory* injunction is to prevent an injury while a mandatory injunction is to restore rights of which you may be already deprived of.

The difference between a writ of prohibition and a peremptory injunction is, that a writ of prohibition is always directed to the court, you would serve it on thė court, or upon an officer and it is limited to law. While a peremptory injunction is always served upon the party even when it is to restrain an action at law.

It goes upon the theory that there are certain equities that would not be recognized at law.

Other divisions of injunction are into: *ex parte* and after *hearing*. When we can show that a reparable damage would follow if the regular notice was given, a court will allow an ex-parte injunction.

Although the use of injunction is not allowed in certain instances without notice, you can get an order called an *interim injunction*. We may divide injunctions again into *temporary* and *final* or *interlocatory*, or one pending action and a permanent or *perpetual*. If I desire a perpetual injunction I must make an allegation in my bill that I am entitled to obtain it. (Bisp. Eq. Sec. 403) 43 N. J. Eq. 77-605; Jackson vs. Burnell 118 N. Y. 218.

Common injunctions are now of no importance, by our statutes they are done away with entirely, and all are now special, based upon affidavits.

The mere question whether the injunction was improvidently obtained or not makes no difference, if I am served with an injunction I am bound to obey it, even though it would be vacated on appearing. The only case where you can disobey a writ of injunction is where the court did not have jurisdiction. It was held that a court of equity has no jurisdiction whatever with the removal of public officers. For example case where an injunction was granted to restrict a mayor from removing a public officer.

If a court has no jurisdiction and grants an injunction and you are attached for dis-obeying it, you can bring an action of Habeas Corpus (Bisp. Eq. Sec. 399) Dailey v. Ambery 126 N. Y. 494. In the matter of Sawyer 124 U. S. 200.

If any equitable rights are being violated in a court of law we can have an injunction and come into a court of equity to restrain them. Suppose a judgment has been obtained against one by fraud or surprise, — If he has no redress at law, he must come into equity to have an injunction served upon the party to prevent them from enforcing it.

A case in the Surrogate's Court where there was an instrument obtained by fraud, the Surrogate would have no right to cancel it, and you would have to go into equity; as the jurisdiction of the Surrogate's Courts in this country is purely statutory, and unless there is a statute giving them jurisdiction, you cannot get a remedy. Now, in an ordinary case of surprise or accident in these trials, it is not necessary to go into a court of equity under the practice in some states, but you can apply to the same judge.

Under the old doctrine you could never have a verdict set aside in a court of law. You had to go into a court of equity and base your case on mistake or accident, after a time, courts of law borrowed from courts of equity, so that now, in all these cases of mistake, accident, etc., as a general rule, you would have to apply in the very court where the action is being tried.

Bear in mind that under modern practice, if the enforcement of a judgment is inequitable you can obtain relief by a motion for a new trial. You must show that there is no remedy at law at all, before you can go into equity for relief. (Bisp. Eq. Sec. 407) 43 N. J. Eq. 701; Sanders vs. Soutter 126 N. Y. 193; 133 Ill. 627.

To prevent vexatious litigations. Where you can sue in law for money had and received, and in equity for fraud, you must make an election. You cannot now in New York proceed both on your bond and the mortgage, but must make an election, contrary to the rule as laid down in the text. (Bisp. Eq. Sec. 413) N. Y. C. C. P. sec. 1628-1629. In ejectment you could bring as many actions as you saw fit. (Bisp. Eq. Sec. 418). A *Bill of Peace* will unite all, and restrain you from bringing separate actions (Bisp. Eq. Sec. 418) N. Y. C. C. P. sec. 1628-1629.

INTERPLEADER. The essential allegations to make up a case of action for a bill of interpleader are: that there are two or more parties who claim the same thing from the same person. You must allege that the party who files this interpleader has no beneficial interest in the subject matter, and according to some authorities, you have to allege that there was no collusion. (Bisp. Eq. Sec. 420) Crane vs. McDonald 118 N. Y. 648. That they must claim title to the same thing (Bisp. Eq. Sec. 422) 140 Penn. St. 430; Bassett vs. Leslie 123 N. Y. 396-401 and 52 Ark. 282. Where they do not claim from the same source a bill will not lie. Such an action will not lie where it appears from the complaint itself that one of the claimants is clearly entitled to the debt or thing claimed to the exclusion of the other, see Bassett vs. Leslie 123 N. Y. 596. The question as to whether parties must be in priority or not see Crane vs. McDonald 118 N. Y. 648.

As to how far a Court of Equity will enjoin the collection of an illegal assessment — Injunction would be the proper remedy if there was no other, but in some states there is a remedy by a writ of certiorari or by mandamus to strike the name off the roll. (Bisp. Eq. Sec. 424) 3. Abb. C. P. Cases 344; Thomas v. Musical Mutual Protective Union 121 N. Y. 246. Where there is a trust or contract relation sometimes a court of equity will grant an injunction.

Where legal rights are being violated, and ordinary common law damages would not be adequate you can go into equity and obtain an injunction. As to just where a court of equity will interfere to protect a legal right see Thomas vs. M. M. Pr. Union 121 N. Y. 245.

To prevent a waste, a court of equity will grant an injunction more quickly than they will in case of trespass, owing to the relation that there is always privity between them. A mortgagor could get an injunction as against the mortgagee by showing that he was injuring the security, then where the land was a sufficient security, the court would not be so ready to grant an injunction. Anything that changes the matter of inheritance, is waste at common law.

Courts of equity sometimes will grant an injunction in a case of trespass where it prevents multiplicity of actions, or particularly if he was insolvent, and there would be no redress at law; also if there was danger of its resulting in a title, 12 S. E. Rep. 900; 22 Atl. Rep. 418.

Trespass is committed upon the premises of another and nuisance on land adjacent and must work a damage or injury.

Usually nuisance must be something more than merely bodily discomfiture, it must be something to injure your property or decrease its value, and would depend upon the neighborhood. On subject of injunction in case of nuisance see (Bisp. Eq. Sec. 438) 137 U. S. 575. As to proper persons to make parties in case of nuisance Quinlan vs. S. Oil Co. 126 N. Y. 514; Ahern vs. Steele 115 N. Y. 203. If you go into a nuisance with your eyes open you are not entitled to redress. The old doctrine of moving to a nuisance has been rejected.

PATENTS.—All actions for patents and copy-rights are brought in the United States Courts. There are some cases based upon a patent, where if you come into a U. S. Court they would dismiss your bill.

The United States Court only has jurisdiction where a question effects the validity. As infringement. If it is admitted that the patent is valid and I make a contract with you to sell, you are estopped from denying the validity. You must always come into a State Court when the validity of the patent is not involved (Bisp. Eq. Sec. 444) Hyatt vs. Ingalls 124 N. Y. 93.

For past infringement there can be no injunction.

If a patent has not yet expired and you are entitled to an injunction for future infringement you can obtain an accounting for past sales; but where the patent has expired and you are not entitled to an injunction you are not entitled to an accounting, 105 U. S. 189. When we sue in a court of law, we come in on the theory of damages and not profits, and the court is allowed to triple the award of damages brought in by the jury.

In equity you proceed on the theory that the party who is infringing occupies a trust relation and you sue him for profits and for future infringements, for injunction and accounting (Bisp. Eq. Sec. 449 and note) 122 U. S. 71; 119 U. S. 321. As to when the injunction will be granted (Bisp. Eq. Sec. 446) Robinson on Patents Sec. 1088.

On the general subject of Equitable jurisdiction as to patents and as to the Equitable remedy, Rob. on Pats. Sec. 1081 to 1223 inclusive.

Equity will always give you damages but if the damages amount to more than the profits they will give you the profits.

COPY-RIGHTS. There is no protection at common law after a man has published his work.

The general rule laid down is that merely delivering of a lecture and not to a general audience is not publication of the lecture. (Bisp. Eq. Sec. 455) 12 App. Cases 326-346.

If you have not obtained a patent, anybody can manufacture the article, though they will not allow you if you have obtained information through a breach of trust, Tabor vs. Hoffman 118 N. Y. 31.

After the expiration of the copyright and the renewal you are not entitled to any equitable relief.

Copyrights and patents are rights given by Statute, there were no such rights at common law, but as to trade marks they are protected at common law.

TRADE-MARKS: The United States Court has described a trade mark as certain symbols or signs to signify that a man manufactures a certain class of goods and to distinguish them from those manufactured by others (Bisp. Eq. Sec. 456) Higgins vs. Kirtle 140 U. S. 433.

Any represental sign is a good trade mark, provided it has not been used so long as to indicate quality. Rye and Rock for instance would not be considered a good trade mark.

A man's name, where after a time it has become so well known that a party using the same name for manufacturing the same article would deceive the public. A court will sometimes in such a case restrain a man from using his own name as a trade mark.

The same rule would apply in regard to the name of the place of manufacture where after a time the name of the place has become associated with the manufacture. As instances of what is a trade mark see Brown Chem. Co. vs. Meyer 139 U. S. 540; Lawrence Mfg. Co. vs. Mfg. Co. 138 U. S. 547; Hennessy vs. Wheeler 69 N. Y. 271; Van Bill vs. Prescott 82 N. Y. 630. The trade mark law in the United States, 21 Stats. at large 502.

Equity will interfere by injunction, *where property,* which is the *subject of litigation* is in *danger.*

But you must have a lien or some title to the property, to prevent its transfer during litigation. (Bisp. Eq. Sec. 426) 140 U. S. 106-113.

NEGATIVE COVENANTS.—Equity will grant injunction to restrain a servant, who has agreed to devote his whole services to the covenantee, from breach of his part of the contract. Lumley vs. Wagner 1 D. M. & G. 604. But for purely personal services, where there is no negative covenant in the contract, they will not grant an injunction where they cannot decree specific performance—and it has been settled that they will not decree specific performance of a contract for personal services (1891) 2 Ch. D. 416.

As to how far a Court of Equity by injunction will prevent the commission of a crime.—You cannot prevent the commission of libel by injunction. A Court of Equity has no criminal jurisdiction. (Bisp. Eq. Sec. 465) 124 U. S. 200-210. *But see* (1891) 2 Ch. D. 269. English courts now have jurisdiction based upon statute.

As to how far a Court of Equity will prevent a *slander* of your property, as in a patent, where someone publishes a circular that you are not the owner of the patent and that you are an infringer. If published as a friendly caution the courts hold that this is not sufficient for an injunction, and the Massachusetts courts holds that even though it is published fraudulently, an injunction cannot be obtained. 114 Mass. 69-70; 143 Mass. 295; 102 Mo. 501-507. *But see* 34 Fed. Rep. 46; 45 Fed. Rep. 135.

CAUTION as to the distinction between these cases and the *boy-cott* cases. In boy-cott cases the court goes on the theory that it is conspiracy, and holds that whenever there is a conspiracy and a boy-cott, they will grant an injunction restraining the publication and circulation of posters, circulars, etc. 12 L. R. An. 193-198.

Injunction and specific performance are two of the most important and equitable remedies. *Other* important equitable remedies in regard to contracts are

Re-Execution, Reformation, Rescission and *Cancellation.*

As to when you are entitled to one and when to the other see 150 Mass. 27-30; Clute vs. Knies 102 N. Y. 377.

As to admitting parol evidence, it cannot be interposed to effect a written instrument, but in law, in cases of accident, mistake and fraud, there is no valid written instrument, 45 Fed. Rep. 743. The person who has been defrauded has the option of regarding the instrument as a valid instrument, or having it rescinded. We must look to see which will be most advantageous to our client. Whether under an instrument which has been entered into through fraud, to have it recscinded, or have it stand. Whether to bring an action on contract or an action on fraud.

When we sue in a court of law we must make a tender of any benefits before we can say rescission has taken place. This is a condition precedent to bringing an action in a court of law.

The theory in Equity is that, equity will be granted and that the money may be paid out of the money due you on the contract. (Bisp. Eq. Sec. 472) Vail vs. Reynolds 118 N. Y. 297; Bosley vs. Natl. Machine Co. 123 N. Y. 550-555; 125 U. S. 499-501; 28 N. E. Rep. 432. Where *cancellation* is alone sufficient (Bisp. Eq. Sec. 474) (1891) 2 Ch. D. 587. Where one by delay may deprive himself of the right to rescind the contract (Bisp. Eq. Sec. 475) 44 N. J. Eq. 512; Willis vs. Sharp 115 N. Y. 399. Where relief can not be obtained by cancellation or by any other equitable remedy, as where the property has been conveyed to an innocent third party, equity will not dismiss the bill but will give you money damages. But if you brought your action knowing that the property had been conveyed to an innocent third party, equity will dismiss your bill. (Bisp. Eq. Sec. 477) Valentine vs Richardt 126 N. Y. 273.

ACCOUNT. An account as a rule is incidental to some other equitable remedy. The chief grounds for an account, as laid down by the books are:

First. Where there is a trust relation or confidence. There you have a right to call upon the trustee to account, and the burden of proof is on him to exhibit his accounts and show how much of the money of the cestui que trust he has received.

Second. When we have an action for discovery an account is incidental to it, and

Third. When it is more distinctively an account itself, and the account is complicated, and particularly with regard to mutual accounts. There are certain cases where you would be allowed to go into equity with a complicated account, even if it were not mutual, but with a mutual account you are more readily granted the privilege. In a mutual account, there must be credits on both sides. This is important to remember. The statute of limitations has a provision as to *mutual accounts* which does not apply to other accounts. For a good definition of mutual accounts see Green vs. Ewing 79 N. Y. 1. (Bisp. Eq. Sec. 484) Kelly vs. N. Y. & S. B. Ry. Co. 109 N. Y. 45; 13 S. E. Rep. 145.

Of these three grounds — of *trust,* of *discovery* and of *a complicated account,* — two are, in many states, no longer taken into a court of equity for an accounting. With reference to discovery, you can, under the statute in many states, compel the exhibition of a man's books, by an order of court. Again when a complicated account arises in an action at law, it is not a ground (under the staute in England and many states of this country) for going into a court of equity.

Again, as to an *account stated,* even in those cases where you would be entitled to go into equity, if the parties themselves have agreed upon a balance, you are precluded. This agreement may be either express or by acquiescence, after a statement has been furnished by one of the parties. But you can go behind this by showing *fraud, accident* or *mistake.* Otherwise you must sue in a court of law. If you should sue in a court of equity, the defendant would interpose a plea of account stated. (Bisp. Eq. Sec. 485) Shipman vs. Bank 126 N. Y. 318-328; 102 Mo. 162.

PARTITION. The proceeding in the state of New York and others is just about the same as laid down in (Bisp. Eq. Sec. 538). Partition is where we have the concurrent jurisdiction of law and equity. The remedy in equity is more complete because it binds not only those who have estates in possession, but in expectancy. Then you could set forth the defendant's title by discovery (Bisp. Eq. Sec. 489) Townsend vs. Bogert 126 N. Y. 370. In common law procedure you must set forth the title of every one you make a defendant, but in equity the proceeding is of a different nature. It settles the interest of every person. So it is absolutely necessary to bring in every person who has a claim, otherwise your title would not be good. Proceedings in partition must be by some person who has an estate in possession. Sometimes it is said to be constructively in possession, as where the deed indicates that he was owner. (Bisp. Eq. Sec. 487) Brown vs. Gutterie 110 N. Y. 433.

The modern procedure is to bring every person whether he has a title or a mere lien, as incumbrancers, mortgagees and judgment creditors, so that if it becomes necessary to sell, the purchaser will get clear title. Partition suits are usually amicable, and the interests of plaintiff and defendant the same. There being no issue raised, the only question is the interests of the persons as to the title. The whole procedure was referred to a master in chancery to report as to the property and title of each — who were entitled by way of dower or curtesy or otherwise. Now under our system, it would be referred to a referee. He would report as to title and as to whether it would be possible to physically divide the property or that there would have to be a sale. Then, if there is no opposition, the interlocutory decree is entered. This is the peculiarity in partition; there are two decrees.

The *interlocutory* decree is, that there should be a physical partition, the practice in the state of New York to-day is, to refer it to three commissioners who try to set it out by *metes and bounds.* Where it is not possible to make an exact division, a partition sale will be ordered. Simply because there may be no difficulties in the way of making a partition, that is no objection. (Bisp. Eq. Sec. 491) 9 S. E. Rep. 524. They will give one heir all the advantages possible where it is no injury to other claimants. If there can be a partition, there is, on the coming in of their report, a *final decree,* or in our practice, the *final judgment.* In common law and some jurisdictions, that was not sufficient, but there had to be conveyances. In many states, however, the final decree itself vests the title.

On the other hand if it were not possible to make a division, a court of equity in England had no power to make a sale, but in this country courts of equity usually have that power by statute. (Bisp. Eq. Sec. 493) Brooks vs. Davey 109 N. Y. 495.

But there is this point to bear in mind — if it may simply be more convenient to one tenant in common, they will not order a sale. One tenant cannot insist upon it as a matter of right, but simply what would be equitable looking over the whole matter.

DOWER is another instance of concurrent jurisdiction of law and equity. *Discovery* is an advantage of the equitable remedy, where she does not know what the title deeds embrace. She could also obtain in equity an *accounting* of the rents and profits. This is very important to-day. Here we can obtain an accounting from the heir for six years back, and from a stranger only after demand.

A widow had no dower in an equitable estate in England, but we have recognized the anomaly of giving curtesy and not dower, but in this country she must go into equity to get dower in an equitable estate.

There is an action of dower in the *code* very similar to that laid down in the books. We would have to have reference very similar to that laid in partition to set off her dower right by metes and bounds or else the property must be sold.

CONFUSION OF BOUNDARIES. You do not have a right to go into a court of equity in these matters, unless there has been a fault on the part of one person, that he has voluntarily confused them. If it is simply the construction of deeds, where deeds of adjacent property give different lines, there is no equitable jurisdiction.

Leading case on confusion of boundaries (Bisp. Eq. Sec. 503) 9 S. E. Rep. 262; 43 N. J. Eq. 627-636.

PARTNERSHIP BILL is a bill brought by one partner against his co-partners to have an accounting and usually a dissolution of the partnership, and, of course, administration of the assets. There are some facts which ipso facto dissolve a partnership; for instance, death. In that case there could be no decree of dissolution. Misconduct of a partner would be a good ground for dissolution. If each one charges misconduct on the part of the other, a receiver would be appointed. It is not a matter of course to appoint a receiver, because the partners themselves are the most competent persons to wind up the business, and a court of equity will not take the property out of their hands unless it is evident that neither one of them is a proper person, or there have been such mutual charges that it is impossible for the court to determine.

Partnership real estate is treated by a court of equity as personal property, for the purposes of the partnership. After these purposes are fulfilled it is restored to its original quality. It is sometimes stated that partnership real estate has a trust imposed upon it for the payment of partnership debts, and when they are paid, it is free from the trust, and goes according to the statute of descent. But the partnership relation is not a trust relation for all purposes, but only for certain purposes, as regarded by the courts, and after these purposes are discharged the relation terminates. (Bisp. Eq. Sec. 505) Williams vs. Whedon 109 N. Y. 338; 86 Va. 421.

An *accounting* may be had *without a dissolution,* where one partner employs part of his time running a competing business, and you can enjoin him from continuing that business without a dissolution, because of the trust relation that exists between them. (Bisp. Eq. Sec. 508) (1891) 2 Ch. 244.

MARSHALLING. Where there are individual creditors and partnership creditors, the individual estate pays the individual creditors and the partnership estate pays the partnership creditors. This is only an equity that each member of the firm has, and not one that the firm creditors have. When the partners pay a debt that they equally owe as individuals, the firm creditors cannot object. (Bisp. Eq. Sec. 515) Saunders vs. Reilly 105 N. Y. 12; 13 S. E. Rep. 445. These cases bring out the point very clearly, that it is simply an equity of the members of the firm.

One partner may sue another in a court of law on the express covenants of the partnership articles, or if they have agreed on a balance. As to settling a balance, they must go into a court of equity, and ask for an accounting.

If the same person is a member of two partnerships, these partnerships cannot sue each other. But in a court of equity they could (Bisp. Eq. Sec. 523) Bank of British N. A. vs. Delafield 126 N. Y. 410; 67 Miss. 208.

HOW TO COMPEL A DEBTOR TO PAY A DEBT. At common law execution issued only on *tangible* property. Choses in action could not be sold on execution. The rule is extended in the state of New York so that you can *levy* on certain *bank bills,* and on *bonds issued* by a *corporation,* but not on an ordinary promissory note. Some equitable remedy in the nature of discovery was necessary, and that gave rise to

CREDITOR'S BILLS (Bisp. Eq. Sec. 527). They may be divided into two great classes: bills against debtors, while they are alive; and bills against the estates of deceased persons — his executors or administrators.

A creditor's bill, or, under our practice, a *complaint* in a judgment creditor's action, must set forth that judgment has been obtained (indicating the judgment) and that an execution has been issued and returned unsatisfied. Then it should contain the necessary allegations to lay a basis for discovery. Stokes vs. Amerman 121 N. Y. 337. If executions have been returned unsatisfied, still you must go through the form, at least in the State of New York. In U. S. Supreme Court it has been held that where a corporation was insolvent, it would be mere idle ceremony to issue execution, you need not issue it. Some of the cases rather indicate that it would be mere idle ceremony. 125 U. S. 361. But in New York that would be bad practice.

A case came up in New York where it was impossible, owing to the law of Connecticut to issue execution, so the Court of Appeals said,—that they would dispense with the condition precedent. National Tradesmen's Bank vs. Wetmore. 124 N. Y. 241.

As to fraudulent conveyances, there were three methods to pursue. One was to treat the fraudulent conveyance as a nullity, and tell the sheriff to go on and sell the property without waiting for the execution. The sheriff will not do that, unless you give him a bond to identify him. Upon giving bond you continue in the legal action and regard the conveyance as a nullity. Your client may not be able to give the sheriff a bond, but where he is able, and you are convinced that it is a fraudulent conveyance, you can take heroic measures. Of course you would have to buy the property in, as people do not want to buy lawsuits. Then you would work out your remedy by bringing an action of ejectment against the fraudulent grantee. Of course the great danger of that is that you may not be able to make out a fraudulent conveyance.

A second way is to hold the execution and begin proceedings in equity to remove the fraudulent conveyance, as a cloud upon title. It is resorted to under the general head of *quia timet.* N. Y. Life Ins. Co. vs. Mayer, 19 Abb. N. C. 92, affirmed in 12 N. Y. St. Rep. 119 and again in the Ct. of App. N. Y. Life Ins Co. vs. Mayer 108 N. Y. 655; 140 Pa. St. 35.

The great advantage of this second way is that a junior judgment cannot come in ahead of you, as might be the case in creditor's bill, where the lien operates (in the state of New York) from the time of filing the bill, although you have a senior judgment.

The *last method* is to wait until the return of your execution, and then bring your judgment creditor's bill. Chautauqua Bank vs. Risley 19 N. Y. 369; Erickson vs. Quinn 15 Abb. N. S. 166. The three remedies are set forth in this last case and in Carpenter vs. Blake 50 N. Y. 697; also in Whitebank vs. Farthing 101 N. Y. 344, 346 (Bisp. Eq. Sec. 527).

In *addition* to the action by creditor's bill, there is a more summary proceeding which depends upon statutes in most of our states, both common law and code states; that is the proceeding supplementary to execution, whereby you can get an order, without bringing an action, to have the judgment debtor come before the judge or before a referee, and be examined. Any questions may be asked that are relevant to whether he has any property or not. If he refuses to answer he may be imprisoned for contempt. We resort to *supplementary proceedings,* to see whether we are justified to tell the sheriff to sell upon giving him a bond of indemnity.

THE SECOND CLASS OF CREDITOR'S BILLS comprises bills against estates. In actions against a debtor in his life time, judgments take as of the time they are docketed with regard to priority, but after death no one creditor can obtain priority by bringing one of these suits, because equity treats the estates of the deceased person as a trust fund and under the theory that "equality is equity" all the creditors shall be paid equally. (Bisp. Eq. Sec. 528) 119 U. S. 600; City of Rochester vs. Campbell 125 N. Y. 406-412; Natl. Tradesman's Bank vs. Wetmore 124 N. Y. 241-255.

With regard to legatees, they have no action against a debtor of the estate, because the executor represents the creditors and all the legatees. The only case in which a creditor or legatee might sue a debtor of the estate is if executor colludes with the debtor. On that point (Bisp. Eq. Sec. 528) see Harvey vs McDonnell 113 N. Y. 526-531. As to the subject of parties generally 45 N. J. Eq. 767-772.

Frequently a man directs in his will that his executors continue his business, and the question comes up, what is the position of creditors? The executors may be unsuccessful in the business and the question arises on administration suit, whether the creditors of the estate, at the death of the decedent, shall be paid first or shall come in equally with the creditors of the business, as carried on by the executor. The rule is that if the creditors of the estate did not give their consent to the continuance of the business, they shall be paid first. On the other hand, if they agreed with the executor to allow the business to go on, all creditors would come in equally. If they take no action they are to be paid first. (Bisp. Eq. Sec. 530) Willis vs. Sharp 113 N. Y. 586; Voisin vs Com. Mut. Ins. Co. 123 N. Y. 119 (1891) App. Cases 190.

There are some other doctrines taken up here which more properly come under the subject of wills, but the question of *equitable assets* was formerly important in that, legal assets were taken to pay *specialty debts* before they paid simple contract debts.

EQUITABLE DOCTRINE OF PERFORMANCE. If a man enters into a valid agreement to settle lands, and purchases lands and dies before the time comes for the settlement, equity will consider it settled, on the maxim that "a thing is done that ought to be done" and that "equity will impute to a man an intention to fulfill his obligations."

EQUITABLE DOCTRINE OF SATISFACTION. If you find two bequests to the same person for the same amount in a will, the legatee will only take one, because the equitable doctrine is that the testator did not intend to make two wills. But if there was a first will, and then a codicil or new will, he would take both.

There are said to be two exceptions to the rule, that you cannot introduce parol evidence to change a valid instrument, namely, with regard to latent ambiguity, and to rebutting in equity.

Where there are two bequests similar to these stated, parol evidence could be introduced to show that the testator intended to do just what he indicated. That is what we mean by *rebutting in equity*. When equity raises a presumption that a party did not intend to do what he has done, you can introduce parol evidence to support the intent. Actually it is not an exception because it is to show just what he said in the instrument. (Bisp. Eq. Sec. 540) Lacon vs. Lacon (1891) 2 Ch. D. 452.

THE PARENS PATRIAL JURISDICTION. The legislature in this country has taken the place of the kind in the jurisdiction of *infants, idiots* and *lunatics*. (Bisp. Eq. Sec. 541) Mormon Church vs. U. S. 136 U. S. 1.

INFANTS. The father is generally entitled to the custody of infants, yet for the benefit of the child, the court will appoint some one else as the guardian. This is the great rule, that the relatives have certain rights, but they are all subordinate to the right of the infant himself.

In the education of the infant, the most difficult question is where the religion of the father is different from that of the mother. The general rule is that it will be that of the father. (Bisp. Eq. Sec. 548). In re Bullen 28 Kansas 781; 27 L. R. Ireland Chan. 129; (1891) 2 Ch. D 299.

It is some times provided in ante-nuptial contracts that children shall be brought up in a certain faith. The question is, when a father has signed such an agreement as that, whether it is binding, and he thereby gives up his right to direct the religious faith. The decision of the courts are that it is not, and that he cannot by contract deprive himself of that right. (Bisp. Eq. Sec. 546 and 547) 102 Mo. 248; People vs. Wells 122 N. Y. 238; matter of Welch 74

N. Y. 299. The father may estop himself by allowing the child to be taught in a certain religious faith, until he has arrived at an age where he has fixed religious opinions.

LUNATICS, IDIOTS AND PERSONS OF UNSOUND MIND. The whole proceeding in chancery was to issue a writ to a commission and that commission would summon a jury. In some states you will still find that jury — a jury of not less than 12; it may be of 24 men. If they found him to be a lunatic, someone should be appointed to take charge of his property. There is a similar provision in New York Code (Bisp. Eq. Sec. 555) Hughes vs. Jones 116 N. Y. 67; 140 Penn. St. 258; 44 N. J. Eq. 564.

As to sale of infant's lands you have to examine the statutes and if there is a statute, you have to examine the proceeding very closely, because this is in derogation of the common law, and if all the requirements of the statute are not fulfilled, the title will be bad.

A guardian may be appointed by the father by will in many states under statutes. In the state of New York a father may appoint a general guardian for an infant. Until the law of 1888, a mother could not revoke that, but then she could, if she survived the father one year. Now the law places father and mother upon strict legal equality. Domestic Relations Law (L. 1896, ch., 272, sec. 51); Covey v. Bolton 31 Misc. 138.

DISCOVERY. In all actions in equity, you are entitled to discovery. (There are some exceptions, but the general form of action in equity has in mind discovery). When you read our code and the statutes of other states you will find some such provision as this: that the *ancillary* bill is abolished. There were two bills: 1st, a bill for discovery and relief, and, 2nd, what was known as the ancillary bill for discovery, where you want to introduce the evidence into a court of law. (Bisp. Eq. Sec. 556) Townsend vs. Bogert 126 N. Y. 375; 119 U. S. 347-354.

Of course provision is made where you can examine the defendant before trial, under statute. If you wish to find the limits of this statutory provision, you have to go back and consult the equity reports.

With reference to how far you can go in these bills of discovery, you could not ask a man what his line of defense was. You can ask him anything that pertains to your own title. Your questions must be of a *specific nature.* In practice you will find it very hard to make out a case where you can file a bill of discovery. If the same facts can be made out by other witnesses, no bill of discovery can be filed. (Bisp. Eq. Sec. 561) 15 App. Cases 309.

As to whether a court of equity will retain the suit after it gives you discovery, or will leave you to your remedy at law see (Bisp. Eq. Sec. 565) 9 So. Rep. 256.

BILLS QUIA TIMET. If chattels were given to one for life with remainder to another, the remainder man might file a bill *quia timet* to protect the corpus of the property, and the property would be taken out of his possession or he would be allowed to retain it on giving a bond of indemnity. In England, a devisee in possession, being unable to prove a will of real property, in the spiritual courts, and unable to bring an action of ejectment since he was himself in possession, could file a bill quia timet to prove the will. It was supposed until a comparatively recent time that our courts here had the same jurisdiction, but it was decided that, as the circumstances are entirely different here, and you can prove a will of real property, so that it is presumptive evidence in the Surrogate's Court, you could not bring this bill. (Bisp. Eq. Sec. 574) Anderson vs. Anderson 112 N. Y. 104.

Under the code you can bring a bill to construe a will, sec. 1861 N. Y. Code of Civ. Pro. and following sections.

REMOVING CLOUD ON TITLE. Frequently we have to resort to a proceeding to have an instrument set aside on the ground that there is a covenant. One case was where a woman executed a deed for property which she did not own. It was held that, she having no right to the property, her right of dower was not a cloud upon the title. (Bisp. Eq. Sec. 575) Chase vs. Chase 95 N. Y. 373; Hooley vs. Buffalo 124 N. Y. 206; 9 So. Rep. 260.

RECEIVERS. A receiver is an indifferent person between the parties appointed by a court of chancery, to do things which it does not seem reasonable to the court that either party should do, or where a party is incompetent to do, as in the case of an infant.

His discretion, when he has any, is limited. He must apply to the court before he can dispose of anything and if he does so without, he does so at his peril. He is an officer of the court, and you must obtain the permission of the court which appointed him before you can sue him. If we have any claim, we must ask the permission of the court to be made a party to the action in which the receiver was appointed, or to bring an action against him. By a United States Statute recently passed called the *Receiver's Act,* you can sue a receiver appointed by the United States Court without obtaining the permission of the court.

In common law states they are appointed by Chancery. In states where the two systems are merged, they are appointed by the court succeeding the court of chancery. The Chancery rule is that he must be an indifferent person. They frequently make an exception to this rule, and appoint one of the parties.

In case of partnership, a partner may be appointed a receiver where there is no charge of unscrupulous conduct against him.

As to the time for which a receiver is appointed—*pendentelite* or until we can have an adjudication on the merits. It is sometimes called an interlocatory or a provisional remedy. The receiver has no title himself, his possession is the possession of the court.

Receivers may be divided into common law and statutory receivers. The common law receiver has no title and has no power, except as directed by the court.

The Statutory receiver's interest is like an assignee. The property is vested in him by Statute frequently, without there being any transfer of the property by the debtor.

It is only in extreme cases where a receiver will be appointed. Frequently a court refuses our application for receivers because there is another remedy. Sometimes we can get relief by serving an injunction on the party who has the property. But where the business must be continued instead of applying for an injunction whereby a reparable damage would result, we apply for a receiver. As in case of a railroad where by the very nature of the business it is necessary that it should be continued. The appointment of a receiver is usually the last remedy that is given. If any other remedies would be adequate the application for receiver would be refused.

In order to have a receiver appointed over certain property you must show that you have a title to, or a lien on the property and you must show in addition either that it was obtained from you by fraud or that it is in danger.

We are not in a position to ask for a receiver until we have obtained a judgment or something in the nature of a lien or title.

Some instances where a receiver would be appointed are as between mortgagor and mortgagee, tenants in common when discussions arise as to who is entitled to the property. Also as to partnerships and as to those the courts divert from the general rule and appoint one of the parties.

Also in settling up estates, but the most common cases are in supplementary proceedings and judgment creditor's actions. A receiver has to give a bond before he qualifies.

CAUTION. In searching property where it has come through the hands of a statutory receiver. You must find that he has qualified in all the requirements of the statutes.

RECEIVER'S CERTIFICATES. They are not negotiable instruments because they are not payable absolutely (Bisp. Eq. Sec. 576) Beach on Receivers Sec. 1.

They are principally given in railroad foreclosures. Where there are funds on hand to continue the operation of the road, as all the money has been used to pay bond holders, it has been held that a receiver may give certificates for present or past services and these will be a prior lien on the property, although subsequently given to the mortgage. The theory is that he can issue these certificates in so far as he can show that the earnings of the road have been used to pay the interest on the bonds.

As to grounds that must be shown in order that a receiver be appointed 86 Ala. 370; 94 N. C. 614. As to distinction between statutory and common law receivers see 136 U. S. 256; 19 Abb. N. C. 367. As to the nature of a receiver's certificate 125 U. S. 658-673; 117 U. S. 434. As to the form 12 At. Rep. 271; Raht vs. Atrill, 106 N. Y. 423.

The appointment of a receiver has sometimes been called an *equitable execution.*

The writ *ne exeat* has been compared with equitable bail. It is to restrain a party from going out of the jurisdiction. Sec. 548 of the N. Y. Code of C. P. says that the writ of ne exeat has been abolished, but under Sec. 550 it is practically re-enacted and is called *arrest* Where both systems have been merged an order for an arrest answers the same purpose.