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I. IN GENERAL

§ 1. Generally; definitions.

All great systems of jurisprudence have a mitigating principle or set of principles, by the application of which substantial justice may be attained in particular cases wherein the prescribed or customary forms of ordinary law seem to be inadequate. From the point of view of general jurisprudence, "equity" is the name which is given to this feature or aspect of law in general.[1] However, the term "equity" has a variety of meanings. The word describes a system of jurisprudence, and it is employed to designate the principles or standards of that system. Such a use of the word is illustrated by the maxim "equity regards as done that which ought to be done."[2] In this connection, it may be observed that the court of chancery is sometimes referred to as a

1. Securities Exch. Com. v United States Realty & Improv. Co. 310 US 434, 84 L ed 1293, 60 S Ct 1044; Sprague v Ticonic Nat. Bank, 307 US 161, 83 L ed 1184, 59 S Ct 777; Ex parte Boyd, 105 US 647, 26 L ed 1200; Young v Young, 207 Ark 36, 178 SW 2d 994, 152 ALR 327; Harper v Adametz, 142 Conn 218, 113 A2d 136, 55 ALR2d 334; Dunham v Kauffman, 385 Ill 79, 52 NE2d 143, 154 ALR 90; Dodd v Reese, 216 Ind 449, 24 NE2d 995, 128 ALR 574; Re Bucklin's Estate, 243 Iowa 312, 51 NW2d 412, 34 ALR2d 1237; Re Burton's Estate, 203 Minn 275, 281 NW 1, 118 ALR 741; Stewart v Jones, 219 Mo 614, 118 SW 1.

20 Fordham L Rev 23.

2. § 126, infra.

court of "conscience."[3] But it has been said that equity is not the chancellor's sense of moral right, or his sense of what is just and equal, but is a complex system of established law.[4]

"Equity" is used to describe the standing of a party to claim relief, the merit of his claim being dependent upon the showing as to his ability to have prevented the prejudicial situation in which the litigants find themselves. This use appears in the maxim, "where there is equal equity, the law must prevail."[5] "Equitable" and "inequitable" signify just and unjust,[6] and "equitable," with reference to ownership, connotes also the right of one to property the title of which is held for his benefit by another person.[7]

In a juridical sense, the term "equity" is employed usually in contradistinction to strict law, or strictum et summum jus.[8] "Equity jurisprudence," said Mr. Justice Story, "may properly be said to be that portion of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law."[9] The terms "legal" and "equitable" are incorporated in the fiber of legal thought.[10] While forms of action have been abolished in those states which have adopted the reformed procedure,[11] the principles by which the rights of the parties are to be determined remain unchanged, and the essential distinctions which inhere in the very nature of equitable and legal primary or remedial rights still exist.[12] However, in some situations at any rate, a court of law, as well as a court of equity, will apply equitable principles.[13]

The Uniform Commercial Code provides that unless displaced by particular provisions of the act, the principles of equity shall supplement its provisions.[14] "Action" is defined in the Uniform Commercial Code as including a suit in equity.[15]

3. Evans v Tucker, 101 Fla 688, 135 So 305, 85 ALR 170; Taylor v Rawlins, 86 Fla 279, 97 So 714, 35 ALR 271.

4. Price v Price, 122 W Va 122, 7 SE2d 510, 128 ALR 1088.

5. § 150, infra.

6. Sloman-Polk Co. v Detroit, 261 Mich 689, 247 NW 95, 87 ALR 1294.

7. See TRUSTS.

8. Funk v Voneida, 11 Serg & R (Pa) 109.

9. Equity courts and courts of law act on different principles. Tilton v Cofield, 93 US 163, 23 L ed 858.

10. Street, Foundations of Legal Liability, p 58.

11. See 1 Am Jur 2d, ACTIONS § 5.

12. De Witt v Hays, 2 Cal 463; Fillmore v Wells, 10 Colo 228, 15 P 343; Hulley v Chedic, 22 Nev 127, 36 P 783; Young v Vail, 29 NM 324, 222 P 912, 34 ALR 980 (saying that the New Mexico Code of Civil Procedure has not assumed to abolish the distinctions between law and equity, considered as two complementary departments of our system of jurisprudence, or to substitute new primary rights, duties, or liabilities for those embodied in either department of the municipal law); First Nat. Bank v Erling Bros. 61 SD 364, 249 NW 681, 89 ALR 1387; Montesano v Carr, 80 Wash 384, 141 P 894, 7 ALR 95.

13. McCall v Superior Ct. 1 Cal 2d 512, 36 P2d 642, 95 ALR 1019.

In equity, as well as at law, where both parties claim under the same person, it is enough that the plaintiff shows a right to recover against the defendants, without showing a good title as against all the world. Gaines v New Orleans, 6 Wall (US) 642, 18 L ed 950.

14. Uniform Commercial Code § 1–103. See 15 Am Jur 2d, COMMERCIAL CODE § 2.

For jurisdictions which have adopted the Uniform Commercial Code, see AM JUR 2d DESK BOOK, Document 130 (and supp).

15. Uniform Commercial Code § 1–201(1). See 15 Am Jur 2d, COMMERCIAL CODE § 7.

§ 2. Nature, purpose, and distinguishing features.

It has often been said that the office of equity is to supply defects in the law.[16] Aristotle defined the nature of equity to be the "correction of the law where, by reason of its universality, it is deficient." In the same sense it is repeatedly recognized in the Pandects, and this explanation of Aristotle has been adopted or approved by later authors, such as Grotius, Puffendorf, Blackstone, and Story.[17] An equity court is less hampered by technical difficulties than a court of law,[18] and is not hampered by the restrictive and inflexible rules which govern common-law courts.[19] The features which distinguish equity are traceable to its origin in the purpose to do complete justice in a case where a court of law is unable, because of the inflexibility of the rules by which it is bound, to adapt its judgment to the special circumstances of the case.[20]

It has been said that one of the most salutary principles of chancery jurisprudence is that, strictly speaking, it has no immutable rules. It lights its own pathway, blazes its own trail, paves its own highway; it is, in short, an appeal to the conscience of the court.[1] It is a distinguishing feature of equity jurisprudence that it will apply settled rules to unusual conditions, and mold its decrees so as to do equity between the parties.[2] It is a maxim of equity that it regards substance rather than form.[3] Generally, the rules of pleading in equity, which are ordinarily the same in form now as those in actions at law, are nevertheless broader and more elastic by reason of the inherent character of the relief which may be sought and given, and considerably more latitude is permitted a pleader than in an action at law, although not to the extent of permitting obviously irrelevant or evidentiary matter to remain in a pleading.[4] However, courts of equity are not inquisitorial, but remedial. It is not their function to assist in creating causes of action where none are alleged,[5] nor can a court of equity create rights; rather, it is limited to determining what rights the parties have, and whether, or in what manner, it is just and proper to enforce them.[6]

§ 3. Origin and development; existing status, generally.

Some authorities say that the court of chancery in England was, in the exercise of its ordinary jurisdiction, a court of very great antiquity, it even being asserted that it was an original and fundamental court, as ancient as

16. Ex parte Boyd, 105 US 647, 26 L ed 1200; Seymour Nat. Bank v Heideman, 133 Ind App 104, 178 NE2d 771; Pearcy v Citizens Bank & Trust Co. 121 Ind App 136, 96 NE2d 918, reh den 121 Ind App 158, 98 NE2d 231.

17. Seymour Nat. Bank v Heideman, 133 Ind App 104, 178 NE2d 771; Stewart v Jones, 219 Mo 614, 118 SW 1; Link v Haire, 82 Mont 406, 267 P 952, 956.

18. Cavin v Gleason, 105 NY 256, 11 NE 504.

19. Ripley v International Rys. of Central America, 8 App Div 2d 310, 188 NYS2d 62, affd 8 NY2d 430, 209 NYS2d 289, 171 NE2d 443.

20. §§ 3 et seq., infra.

1. Kronenberg v Sullivan County Steam Laundry Co. (Sup) 91 NYS2d 144, affd 277 App Div 916, 98 NYS2d 658, motion den 278 App Div 726, 103 NYS2d 660.

2. §§ 8, 103 et seq., 248, 249, infra.

3. § 127, infra.

4. §§ 179 et seq., infra.

5. Tracy Development Co. v Becker, 212 NY 488, 106 NE 330.

6. § 5, infra.

the Kingdom itself. The equitable or extraordinary jurisdiction of the court of chancery, like most of the other institutions of the English common law, seems to have grown up from the exigencies of the time and of judicial administration, and from time to time it was enlarged to meet those exigencies.[7] Other authorities deduce the genesis of the equitable jurisdiction of the court of chancery from the practice of petitioning the King, as the fountain of justice, for relief in those particular cases where the positive law, lex scripta, was deficient.[8] The number of these petitions, the grant of which was esteemed not a matter of right, but of grace and favor, became so great that cognizance of them was transferred to the chancellor, and afterward the growth of equity jurisdiction was steady and rapid, although it was constantly opposed by the common-law judges.[9] The administration of both law and equity has in most countries, however, been left to the same tribunal, as witness the equitable jurisdiction of the Praetor at Rome, whereas the evolution of a distinct chancery court, with the consequent decision of legal and equitable questions by separate tribunals seems to have been peculiar to the jurisprudence of England or of those who have inherited their judicial systems from her.[10] By the Act of 1873 (36 & 37 Vict chap 66), however, the venerable High Court of Chancery as a tribunal separate and distinct from the courts of law was abolished, and the Supreme Court of Judicature, consisting of two permanent divisions, the High Court of Justice and the Court of Appeal, was created. To the High Court of Justice was transferred the jurisdiction formerly exercised by the High Court of Chancery, the superior courts of common law, and other superior courts. By this amalgamation one court having complete jurisdiction, the duty of which was to administer one system of law in place of the two systems previously known as "law" and "equity," was established. To this end the High Court of Justice was not only empowered, but ordered, to administer justice according to the principles of law and equity together, and to give relief according to such principles concurrently.[11]

The foundation of modern equity jurisprudence was laid by Lord Nottingham, and Lord Hardwicke measurably matured its several departments. By these two great judges the doctrines of equity were disentangled from narrow and technical notions, and the remedial justice of the court was expanded

7. Quinn v Phipps, 93 Fla 805, 113 So 419, 54 ALR 1173; Jones v Newhall, 115 Mass 244.

8. The creation of equity jurisdiction arose out of the inability of courts of law, because of the inflexibility of their rules and want of power to adapt judgments to special circumstances, to reach and do complete justice in all cases. Thomas v Musical Mut. Protective Union, 121 NY 45, 24 NE 24.

9. In the reign of James I, there was an open rupture between Lord Ellesmere and Lord Coke as to the right of the court of chancery to grant injunctions after judgment. That sovereign took upon himself to settle the matter and, accordingly, on the advice and opinion of the very learned lawyers to whom he referred it, gave judgment in favor of the equitable jurisdiction in such cases.

10. Livingston v Moore, 7 Pet (US) 469, 8 L ed 751; Funk v Voneida, 11 Serg & R (Pa) 109.

11. Gibbs v Guild (Eng) LR 9 QB Div 59 (CA), holding that while the changes wrought by the Judicature Act are marked, the principles on which the jurisdiction of the old court of chancery rested have not been changed; that by the act legal and equitable rights are not treated as identical, and the same distinction now exists between legal and equitable estates and interests as existed before its passage; and that the same rights and remedies are administered now as were before, only, instead of being administered by two courts, the remedies are administered by the same court.

For British chancery reports, see AM JUR 2d DESK BOOK, Document 178.

far beyond the aims of their predecessors. But the primary character of equity as the complement merely of legal jurisdiction, in that it seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of cases, are incompetent so to do, persisted and still persists.[12]

§ 4. — In United States.

During the colonial period, equity jurisprudence was administered irregularly, and after the establishment of the United States Government, various systems of administration existed. In some of the states, separate courts of chancery were constituted.[13] In other states, the courts of common law were empowered to exercise equity jurisdiction. In still other states, the rules and principles of equity were administered by existing courts without any express constitutional or statutory authorization.[14] In a few of the states distinct courts of equity still exist, and of course in such jurisdictions the common-law practice and the chancery practice have been kept separate and apart.[15] But for the most part independent courts of chancery have been abolished.[16] The courts of some of the states have a law side and an equity side, the old forms of action and modes of proceeding being retained.[17]

In many states, however, legal and equitable remedies have been commingled in one form of action,[18] and distinctions between actions at law and suits in equity have been abolished.[19] The object sought to be accomplished

12. Whitaker & Co. v Sewer Improv. Dist. 229 **Ark** 697, 318 SW2d 831; Commercial Bldg. Co. v Parslow, 93 **Fla** 143, 112 So 378; Printup v Mitchell, 17 **Ga** 558; Re Bucklin's Estate, 243 **Iowa** 312, 51 NW2d 412, 34 ALR2d 1327; Jones v Newhall, 115 **Mass** 244; State v Marshall, 100 **Miss** 626, 56 So 792; Heady v Crouse, 203 **Mo** 100, 100 SW 1052; Thomas v Musical Mut. Protective Union, 121 **NY** 45, 24 NE 24; Long v Merrill, 4 **NC** (Term Rep) 112; Burrows v M'Whann, 1 **SC Eq** (1 Desauss) 409.

13. Mattison v Mattison, 20 **SC Eq** (1 Strobh) 387.

For American chancery reports, see AM JUR 2d DESK BOOK, Document 177.

14. Hempstead v Watkins, 6 **Ark** 317; Glanding v Industrial Trust Co. (Sup) 28 **Del Ch** 499, 45 A2d 553.

15. Kennedy v Davis, 171 **Ala** 609, 55 So 104.

Practice Aids.—Motion for and order transferring case from law to equity court. 8 AM JUR PL & PR FORMS 8:241, 8:242.

— Motion for and order transferring case from equity to law court. 8 AM JUR PL & PR FORMS 8:243, 8:244.

16. Hammer v Garfield Min. & Mill Co. 130 **US** 291, 32 L ed 964, 9 S Ct 548 (Arizona statute); Jones v Newhall, 115 **Mass** 244; Bisbing v Graham, 14 **Pa** 14.

In Virginia, distinctions between common-law and chancery jurisdiction are still maintained, save as modified by statute, although exercised by the same judge in the proceeding appropriate to each forum. Buchanan v Buchanan, 170 **Va** 458, 197 SE 426, 116 ALR 688.

For law and equity organization of American courts, see AM JUR 2d DESK BOOK, Document 74.

17. Gargano v Pope, 184 **Mass** 571, 69 NE 343; Brown v Buck, 75 **Mich** 274, 42 NW 827; Lucich v Medin, 3 **Nev** 93; Durham v Rasco, 30 **NM** 16, 227 P 599, 34 ALR 838; Lewey v H. C. Fricke Coke Co. 166 **Pa** 536, 31 A 261; French v Parker, 16 **RI** 219, 14 A 870; Neill v Kuse, 5 **Tex** 23.

A petition stating a cause of action which is good at law is not dismissed for lack of equity. Downey v Byrd, 171 **Ga** 532, 156 SE 259, 72 ALR 345.

18. Hornbuckle v Toombs, 18 Wall (US) 648, 21 L ed 966; Fairlawn Heights Co. v Theis, 133 **Ohio** St 387, 11 Ohio Ops 51, 14 NE2d 1.

5 Ohio St LJ 222.

Although under a system of state jurisprudence there is only one form of civil action and practically only one forum, the distinction commonly accepted as existing between actions at law and suits in equity must be adhered to in applying the relief allowable. Philpott v Superior Ct. 1 **Cal** 2d 512, 36 P 2d 635, 95 ALR 990.

19. Caudill v Little (**Ky**) 293 SW2d 881, 63 ALR2d 452; Fairlawn Heights Co. v