§ 117. Effect of statutory provisions or rules of court.

Despite the statutory changes which in many jurisdictions provide for the granting of legal and equitable relief by the same tribunal and abolish distinctions in the form of pleadings, the inherent differences between actions at law and suits in equity are still recognized. The effect, broadly stated, of such statutory changes is to permit the retention of a case in which the allegations of the complaint to which an answer has been filed disclose, in addition to a claim for equitable relief, the existence of a cause of action at law.[16] Thus, generally, where the reformed procedure has been adopted,[17] legal or equitable relief, or both, may be granted in any case in keeping with the established facts.[18] However, this principle will not be extended to special proceedings, the statutory provisions relative to which do not contemplate the use of the proceeding for the purpose of granting legal relief, where the right to the relief primarily sought is not established. Moreover, notwithstanding the changes effected by the adoption of the reformed procedure, there is an abundance of authority for the proposition that where the allegations on which equitable relief is sought prove to be absolutely ungrounded, the case will not be retained, since such retention would permit a plaintiff at will to convert a cause of action at law into one in equity.[19]

The United States Supreme Court has said that the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules of Civil Procedure,[20] which allow legal and equitable causes to be brought and resolved in one civil action.[1]

VII. MAXIMS AND PRINCIPLES GUIDING EXERCISE OF JURISDICTION

A. In General; Maxims Having Reference to or Governing Court Action

§ 118. Generally; established rules and precedents as governing judicial action.

A court of equity has no more right than has a court of law to act on its own notion of what is right in a particular case; it must be guided by the established rules and precedents.[2] Although equity will not deny relief simply

award, proceed in the same suit to adjudicate on its merits the whole controversy instead of ordering a new arbitration, or requiring the complainant, against his will, to sue at law, at least where such suit is not brought merely in aid of a law action. 5 Am Jur 2d, Arbitration and Award § 188.

16. Mannix v Tryon, 152 Cal 31, 91 P 983; Becker v Superior Court, 151 Cal 313, 90 P 689; Jaeckel v Pease, 6 Idaho 131, 53 P 399.

17. As to the status of the equity system, see §§ 2 et seq., supra.

18. Michener v Springfield Engine & Thresher Co. 142 Ind 130, 40 NE 679; Blair v Smith, 114 Ind 114, 15 NE 817.

19. Miller v St. Louis & K. C. R. Co. 162 Mo 424, 63 SW 85; Clark v Smith, 90 App Div 477, 86 NYS 472.

20. Rules 1, 2, and 18, Fed Rules of Civ Proc.

1. Beacon Theatres, Inc. v Westover, 359 US 500, 3 L ed 2d 988, 79 S Ct 948.

2. Rees v Watertown (US) 19 Wall 107, 22 L ed 72; Wright v Ellison (US) 1 Wall 16, 17 L ed 555; Crocket v Lee (US) 7 Wheat 527, 5 L ed 513; Brown v Buck, 75 Mich 274, 42 NW 827; Milgram v Jiffy Equipment Co. 362 Mo 1194, 247 SW2d 668, 30 ALR2d 925; Sell v West, 125 Mo 621, 28 SW 969; Nelson v Wilson, 81 Mont 560, 264 P 679; Daly v Lahontan Mines Co.

because there is no precedent for it,[3] it is its duty to follow those principles which have been established by precedent[4] except where the application of such a principle would compel an unjust and unreasonable result.[5] A court of equity is never required to render or justified in rendering an inequitable decision or decree[6] or in aiding the accomplishment of that which is a violation of law[7] or public policy.[8]

Although equity is flexible as to the modes of relief which its forms render it capable of giving,[9] it is flexible only in this respect;[10] otherwise, the systems of jurisprudence of courts of law and courts of equity are now equally founded on the same principles of justice and positive law.[11] Where rights are defined and established by existing legal principles, they may not be changed or unsettled in equity.[12] A court of equity may not create rights not previously existing at law, and then take jurisdiction to pass on and enforce them because the law affords no remedy.[13] Equitable principles are subordinate to positive institutions and cannot be applied either to subvert established rules of law or to give the courts a jurisdiction hitherto unknown.[14] While maxims of equity may be invoked to protect an existing right, they are not available to create a right where none exists.[15]

39 Nev 14, 151 P 514, 158 P 285; Funk v Voneida (Pa) 11 Serg & R 109; Greene v Keene, 14 RI 388; Rowell v Smith, 123 Wis 510, 10 NW 1.

As to the maxim, "equity follows the law," see §§ 123, 124, infra.

3. § 121, infra.

4. Graf v Hope Bldg. Corp. 254 NY 1, 171 NE 884, 70 ALR 984.

Even in equity, questions are not to be decided on principles of "raw equity" without reference to whether or not such principles are in conflict with precedent. Empire Engineering Corp. v Mack, 217 NY 85, 111 NE 475.

5. Greenslete v Ferguson, 191 App Div 745, 182 NYS 198.

6. Sloman-Polk Co. v Detroit, 261 Mich 689, 247 NW 95, 87 ALR 1294; Eisenbeis v Shillington, 349 Mo 108, 159 SW2d 641; McCann v Chasm Power Co. 211 NY 301, 105 NE 416; Grody v Silverman, 222 App Div 526, 226 NYS 468.

Equity will not, in the name of equity, grant relief which is inequitable and unwise. First Nat. Bank v Basham, 238 Ala 500, 191 So 873, 125 ALR 656.

A court of equity will not in the name of equity do inequity. McCay v Jenkins, 244 Ala 650, 15 So 2d 409, 149 ALR 746.

The fact that a remedy is exclusively in equity does not compel the court to do inequity. Forstmann v Joray Holding Co. 244 NY 22, 154 NE 652.

7. Munn & Co. v Americana Co. 83 NJ Eq 309, 91 A 87.

A court of equity will not lend its aid to a clever attempt by a litigant to escape his just obligation. Hammer v Michael, 243 NY 445, 154 NE 305.

8. The aid of equity cannot be invoked to accomplish that which is in violation of public policy. Clark v Osage County, 62 Okla 7, 161 P 791.

9. §§ 102 et seq., supra.

10. St. Stephen's P. E. Church v Church of Transfiguration, 201 NY 1, 94 NE 191; Tillinghast v Champlin, 4 RI 173.

11. Steger v Traveling Men's Bldg. & L. Asso. 208 Ill 236, 70 NE 236.

A court of equity cannot create a remedy in violation of law or even without the authority of law. Rees v Watertown (US) 19 Wall 107, 22 L ed 72.

12. Magniac v Thomson (US) 15 How 281, 14 L ed 696; Milgram v Jiffy Equipment Co. 362 Mo 1194, 247 SW2d 668, 30 ALR2d 925.

A court of equity will respect the liens given by maritime law, marshal such liens, and direct their payment precisely as a court of admiralty would have done. Pratt v Paris Gaslight & Coke Co. 168 US 255, 42 L ed 458, 18 S Ct 62.

13. Hall v Henderson, 134 Ala 455, 32 So 840; Harper v Clayton, 84 Md 346, 35 A 1083; Madison v Madison Gas & E. Co. 129 Wis 249, 108 NW 65.

Holmes v Millage (Eng) [1893] 1 QB 551 (CA).

14. First State Bank v Fitch, 105 Fla 435, 141 So 299; Greene v Keene, 14 RI 388.

15. Welch v Montgomery, 201 Okla 289, 205 P2d 288, 9 ALR2d 294.

The principles which find expression in the maxims of equity are simple and fundamental.[16] They are applicable to the state as well as to individuals.[17] They apply to suits in equity even though the suit is also cognizable at law.[18]

§ 119. Classification and kinds of maxims.

For the government and regulation of judicial action, equity courts have formulated certain rules or principles which are described by the term "maxims."[19] As shown in the following sections, these are divisible, with respect to the mode of their operation, into four groups, as follows: (1) maxims governing the action of the chancellor or court;[20] (2) maxims connoting the right or standing of a party to claim a remedy or relief;[1] (3) maxims describing the relative standing of litigants where the question is whether one party or another has the prior or superior right or "equity";[2] and (4) maxims prescribing the mode of disposition of the case where the "equities" of the parties are shown to be of equal dignity.[3]

The largest of the groups or classes of maxims embraces precepts which are addressed to the judicial conscience and which are intended to govern the action of the chancellor in the determination of disputes between litigants. The more important of these maxims are set forth in the ensuing sections. Other such maxims are: equity prevents mischief;[4] equity delights in amicable adjustments;[5] a court of equity seeks to do justice, and not injustice;[6] and a court of equity ought to do, or delights in doing, justice completely, and not by halves.[7] Still another maxim is that courts of equity will not do or require the doing of a vain or useless thing.[8] In addition to the maxims which are thus classifiable, a great number of rules or precepts exist to which the equity courts constantly refer and which, for the most part, have to do with particular equitable remedies and subjects of equitable jurisdiction.[9]

16. Camp v Boyd, 229 US 530, 57 L ed 1317, 33 S Ct 785.

17. People's Nat. Bank v Marye, 191 US 272, 48 L ed 180, 24 S Ct 68.

18. Fidelity Union Trust Co. v Multiple Realty & Constr. Co. 131 NJ Eq 527, 26 A2d 155.

19. Gavin v Curtin, 171 Ill 640, 49 NE 523.

For table of maxims and phrases in Latin and English, see AM JUR 2d DESK BOOK, Document 185.

20. §§ 120 et seq., infra.

1. §§ 129–144, infra.

2. §§ 145–147, infra.

3. §§ 148–151, infra.

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

5. Troll v Spencer, 238 Mo 81, 141 SW 855.

6. Tompers v Bank of America, 217 App Div 691, 217 NYS 67 (saying that the first principle of equity is justice); Grether v Nick, 193 Wis 503, 213 NW 304, 215 NW 571, 55 ALR 525.

Equity will not enforce a technical legal right to the unconscionable injury of a defendant. Fidelity Union Trust Co. v Multiple Realty & Constr. Co. 131 NJ Eq 527, 26 A2d 155.

7. Greene v Louisville & I. R. Co. 244 US 499, 61 L ed 1280, 37 S Ct 673; McGowan v Parish, 237 US 285, 59 L ed 955, 35 S Ct 543; Camp v Boyd, 229 US 530, 57 L ed 1317, 33 S Ct 785; McPherson v Parker, 30 Cal 455.

A court of equity can do complete justice pursuant to the maxim that equity delights to do justice and not by halves, only where it has both parties before it. Hagan v Central Ave. Dairy, Inc. (CA9 Cal) 180 F2d 502, 17 ALR2d 735.

8. Cantwell v Cantwell, 237 Ind 168, 143 NE2d 275, cert dismd and app den 356 US 225, 2 L ed 2d 712, 78 S Ct 700, reh den 356 US 954, 2 L ed 2d 847, 78 S Ct 913.

9. See the articles cited in the "Scope of Topic" discussion at the beginning of this article.

§ 120. Equity will not suffer a wrong to be without a remedy.

It is an established maxim that equity will not suffer a wrong to be without a remedy,[10] and this is probably the most important of the principles which are addressed to the court or chancellor.[11] While the common-law system has an equivalent in the legal maxim, "ubi jus, ibi remedium" (where there is a right, there is a remedy),[12] many cases have occurred and do constantly occur in which the application of the stricter rules of law do not furnish a remedy, whereas the more expansive and beneficent principles of equity are ample for the purpose.[13] As a matter of fact, the precept herein considered is the foundation of equitable jurisdiction, because the functioning of the chancery court originated in the inability of the common-law courts to meet the requirements of justice.[14] The rule is stated that where there is a right which the common law, from any imperfection, cannot enforce, it is the province and duty of a court of equity to supply the defect and furnish the remedy.[15]

However, the rights which it is declared that courts of equity will provide a remedy to protect and preserve are not mere abstract moral rights, but rights recognized by the existing municipal, or public, law.[16] A court of equity

10. Addy v Addy, 240 Iowa 255, 36 NW 2d 352 (saying that the whole theory of equitable jurisdiction is to afford relief where a right exists for which there is no other adequate remedy); Cannon v Bingman (Mo App) 383 SW2d 169; National Tradesmen's Bank v Wetmore, 124 NY 241, 26 NE 548; Miers v Brouse, 153 Tex 511, 271 SW2d 419.

Except for infractions of moral obligations, there is no wrong without a remedy. Laun v Kipp, 155 Wis 347, 145 NW 183, 5 ALR 655.

11. Independent Wireless Teleg. Co. v Radio Corp. 269 US 459, 70 L ed 357, 46 S Ct 166; Sears v Hotchkiss, 25 Conn 171; First State Bank v Fitch, 105 Fla 435, 141 So 299; McAfee v Reynolds, 130 Ind 33, 28 NE 423; McCoy v McCoy, 32 Ind App 38, 69 NE 193; Addy v Addy, 240 Iowa 255, 36 NW 2d 352; Buttlar v Buttlar, 57 NJ Eq 645, 38 A 300, 42 A 755; Pietsch v Milbrath, 123 Wis 647, 101 NW 388, 102 NW 342.

This principle was incorporated in the Declaration of Rights, Constitution of Florida. State ex rel. Watkins v Fernandez, 106 Fla 779, 143 So 638, 86 ALR 240.

Although the maxim that there is no wrong without a remedy is not absolutely true, it expresses a principle, and it is for that, rather than precedent, that courts will seek in considering whether any or what remedy may be had in the administration of justice. National Tradesmen's Bank v Wetmore, 124 NY 241, 26 NE 548.

12. Texas & P. R. Co. v Rigsby, 241 US 33, 60 L ed 874, 36 S Ct 482.

The fact that there is no wrong without a remedy has been the boast of many of the sages of the law from early times. Says Lord Coke (Co Lit 197, b, 1 Thomas's Coke, 902): "The law wills that, in every case where a man is wronged and endangered, he shall have a remedy." And Lord Holt has said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it. . . . It is a vain thing to imagine a right without a remedy." First State Bank v Fitch, 105 Fla 435, 141 So 299; Ritter v Ritter, 219 Ind 487, 38 NE2d 997; Pierce v Swan Point Cemetery, 10 RI 227.

13. Sourwine v Supreme Lodge, K. P. 12 Ind App 447, 40 NE 646; Burrows v M'Whann, 1 SC Eq (1 Desauss) 409.

In a changing world marked by the ebb and flow of social and economic shifts, new conditions constantly arise which make it necessary, in order that no right should be without a remedy, to extend the old and tried remedies. It is the function of courts to do this. It may be done by working old fields, but when it becomes necessary, they should not hesitate to "break new ground" to do so. State ex rel. Watkins v Fernandez, 106 Fla 779, 143 So 638, 86 ALR 240.

14. Gavin v Curtin, 171 Ill 640, 49 NE 523; Hambleton v Rhind, 84 Md 456, 36 A 597.

15. Morgan v Beloit (US) 7 Wall 613, 19 L ed 203.

16. Gavin v Curtin, 171 Ill 640, 49 NE 523.

Many cases which may be said to be against natural justice are left wholly to the conscience of the party concerned and are without any redress, equitable or legal. Adams v Adams (US) 21 Wall 185, 22 L ed 504; Rees v Watertown (US) 19 Wall 107, 22 L ed 72.

cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law,[17] nor can equity create a remedy where there is no legal liability.[18] Furthermore, in applying the maxim, "there is no wrong without a remedy," courts of equity as well as courts of law must regard a "wrong" which is not remediable because of a statute on the subject as not a wrong at all in a judicial sense.[19]

§ 121. — Effect of lack of precedent.

Although equity courts are as a general rule bound by precedents in situations where they have been established,[20] the absence of precedent is not fatal. Precedent is useful only insofar as it shows the way in which principles have been applied; it is a guide, not a bar. The absence of a precedent for the giving of relief in a case where it is evident that under general principles of equity relief should be granted is of no consequence and presents no obstacle to the exercise of the jurisdiction of an equity court. Clearly, there must be an initial time at which a precedent is handed down, and the power to make precedents has not been exhausted. The mere fact that no case is found in which relief has been granted under similar circumstances is not a controlling reason for refusing it; otherwise, the court would often find itself powerless to grant adequate relief, solely because the precise question had never arisen.[1] Nor is the mere fact that a case is new or novel and is not brought plainly within the limits of some adjudged case enough to preclude equity from taking jurisdiction.[2]

§ 122. Equity acts in personam, not in rem.

It is a general maxim, subject to exceptions, that equity acts in personam.[3] The Latin form of the maxim is "aequitas agit in personam."[4] The remedies which are administered by courts of equity are generally made effectual by decrees operating in personam.[5] The meaning of this principle simply is that

17. Rees v Watertown, supra.

18. Hall v Henderson, 134 Ala 455, 32 So 840; Henderson v Overton, 10 Tenn (2 Yerg) 394.

19. Pietsch v Milbrath, 123 Wis 647, 101 NW 388, 102 NW 342; Rowell v Smith, 123 Wis 510, 102 NW 1.

20. § 118, supra.

1. London v Joslovitz, 279 App Div 280, 110 NYS2d 58; First Nat. Exchange Bank v Hughson, 194 Va 736, 74 SE2d 797.

Relief should not be refused simply because there is no similar situation in the books. Whitaker & Co. v Sewer Improv. Dist. 229 Ark 697, 318 SW2d 831.

The jurisdiction of a court of equity to grant relief does not depend upon the mere accident of the court having in some previous case granted relief under similar circumstances. Dodd v Reese, 216 Ind 449, 24 NE2d 995, 128 ALR 574.

A mere lack of precedent is no obstacle to equitable relief where the instant case is referable to an established head of equity jurisprudence, either of remedy or primary right. Re Burton's Estate, 203 Minn 275, 281 NW 1, 118 ALR 741.

It has been said that where there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. Gray, J., in Roberson v Rochester Folding Box Co. 171 NY 538, 64 NE 442.

2. § 12, supra.

3. Radermacher v Radermacher, 61 Idaho 261, 100 P2d 955; Lyle v Haskins, 24 Wash 2d 883, 168 P2d 797.

4. Caudill v Little (Ky) 293 SW2d 881, 63 ALR2d 452; Proctor v Ferebee, 36 NC (1 Ired Eq) 143; Atlantic Seaboard Natural Gas Co. v Whitten, 315 Pa 529, 173 A 305, 93 ALR 615.

5. §§ 15 et seq., supra.