nothing to show that performance has in fact been prevented.[15] Thus, where proof is made of an agreement to give security, the contract may be deemed to have been executed by the giving of security.[16] Likewise, sums which are shown to have come into an obligee's hands may be deemed to have been applied toward the extinguishment of the obligation.[17] The agreement is deemed to have been performed at the time which the parties have fixed as the time of performance.[18] A stipulated act cannot be deemed to have been performed in advance of the time of performance. If the act was agreed to be done at a future time, equity will not regard it as having been performed at an earlier date.[19]

The maxim is said to be the foundation of equitable property rights, estates, and interests.[20] Inter alia, it is recognized as being the basis of the doctrine of equitable conversion.[1] Money which has been covenanted or devised to be laid out in land is treated as real estate in equity and descends to the heir, and, on the other hand, land which has been contracted or devised to be sold is considered and treated as money.[2] A conveyance which ought to have been made may be treated as having been made.[3] Furthermore, a purchaser of property may be deemed to have become the owner thereof although the deed which has been executed by the vendor fails to convey what was intended to be transferred.[4] Moreover, title under a will may be recognized by the court although the will has not yet been probated.[5]

The maxim that equity regards as done that which ought to be done is not, however, of universal application. It may not be invoked so as to defeat the operation of statute,[6] or create a right contrary to the agreement of the parties,[7] or be applied in disregard of essential conditions for which the parties have stipulated;[8] and whether the maxim is to be applied in any case hinges upon the existence of some duty.[9] Where it appears that the doing of the act was

9 L ed 522; Petty v Gacking, 97 Ark 217, 133 SW 832; Sourwine v Supreme Lodge, K. P. 12 Ind App 447, 40 NE 646; Re Howe (NY) 1 Paige 125; Workman v Guthrie, 29 Pa 495; Delaire v Keenan, 3 SC Eq (3 Desauss) 74; Green v. Broyles, 22 Tenn (3 Humph) 167; Ellerd v Murray (Tex Civ App) 247 SW 631; Dandridge v Harris, 1 Va (1 Wash) 326; Neely v Jones, 16 W Va 625.

14. Re Schultz' Estate, 220 Or 350, 348 P2d 22.

15. Craig v Leslie (US) 3 Wheat 563, 4 L ed 460.

16. Peurifoy v Westminster Loan & T. Co. 148 SC 100, 145 SE 706.

17. Cavender v Cavender, 114 US 464, 29 L ed 212, 5 S Ct 955.

18. Littlefield v Perry (US) 21 Wall 205, 22 L ed 577; Brewer v Herbert, 30 Md 301.

19. Anderson v Yaworski, 120 Conn 390, 181 A 205, 101 ALR 1232.

20. Davis v Williams, 130 Ala 530, 30 So 488; Blair v Smith, 114 Ind 114, 15 NE 817.

1. See 27 Am Jur 2d, EQUITABLE CONVERSION § 1.

See 27 Am Jur 2d, EQUITABLE CONVERSION.

3. Morris v United States, 174 US 196, 43 L ed 946, 19 S Ct 649.

In equity, a contract for the sale of land is treated, for most purposes, precisely as if it had been specifically performed. See VENDOR AND PURCHASER (1st ed § 356).

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

Generally as to equitable title of purchaser under land contract, see VENDOR AND PURCHASER.

5. Gaines v Chew (US) 2 How 619, 11 L ed 402.

6. James Supply Co. v Frost, 214 Ala 226, 107 So 57.

Equity will not aid a defective execution of a statutory power. Williams v Cudd, 26 SC 213, 2 SE 14.

7. Good v Jarrard, 93 SC 229, 76 SE 698.

8. Head v Sellers, 251 Ala 453, 37 So 2d 664.

9. Head v Sellers, supra.

dependent upon the performance of a condition precedent, the court will not treat the act as having been done unless performance of the condition is shown.[10] Nor will the court consider an act to have been done if the consequence of doing so will be to cause injury or damage to third persons.[11]

As a counterpart of the maxim, it is said also that equity in many instances considers that undone which never ought to have been done.[12] But a court of equity will ratify that which was done without its authority when upon application it would have ordered it to be done, if there is no other method of doing justice.[13]

§ 127. Equity regards substance and intent, rather than form.

A maxim frequently stated and applied is that equity regards substance rather than form.[14] The maxim is also expressed in slightly varying ways,[15] such as that equity looks to the substance and not merely to the form,[16] or that equity looks through form to substance,[17] or that equity regards the substance, and not the form, of a transaction or proceeding,[18] or that a court of equity will look to the circumstances and not to the form of the transaction.[19] It is said that equity looks to the substance and not the shadow, to the spirit

10. Ancient Order of Gleaners v Bury, 165 Mich 1, 130 NW 191.

11. Casey v Schuchardt, 96 US 494, 24 L ed 790; Casey v National Park Bank, 96 US 492, 24 L ed 789; Casey v Cavaroc, 96 US 467, 24 L ed 779.

12. Beck v Uhrich, 13 Pa 636.

13. Johnson v Long, 174 Md 478, 199 A 459, 116 ALR 617.

14. Young v Higbee Co. 324 US 204, 89 L ed 890, 65 S Ct 594; Kennedy v Morro, 77 Ariz 152, 268 P2d 326; People ex rel. Barrett v Fritz, 316 Ill App 217, 45 NE2d 48; Fischer v Klink, 234 Iowa 884, 14 NW2d 695, 153 ALR 1084; Kurtz v Humboldt Trust & Sav. Bank, 231 Iowa 1347, 4 NW2d 363; Sacre v Sacre, 143 Me 80, 55 A2d 592, 173 ALR 1261.

15. Darnell v Broken Bow, 139 Neb 844, 299 NW 274, 136 ALR 101.

Courts of equity will not be misled by mere devices or baffled by mere forms, but they will disregard names and penetrate disguises of form to discover the substance of an act or transaction. White v Cotzhausen, 129 US 329, 32 L ed 677, 9 S Ct 309; Knights v Knights, 300 Ill 618, 133 NE 377; Stockton v Central R. Co. 50 NJ Eq 52, 24 A 964.

Mere forms and modes of procedure must give way if in conflict with substantial rights. Missouri, K. & T. Trust Co. v Krumseig, 172 US 351, 43 L ed 474, 19 S Ct 179; Brine v Hartford F. Ins. Co. 96 US 627, 24 L ed 858.

Courts of equity are not restrained by technicalities, but can look past the nominal parties to the real parties. Miles v Caldwell (US) 2 Wall 35, 17 L ed 755.

Slightly varying expressions also appear in the following cases: Hitchman Coal & Coke Co. v Mitchell, 245 US 229, 62 L ed 260, 38 S Ct 65; Gay v Parpart, 106 US 679, 27 L ed 256, 1 S Ct 456; Jones v New York Guaranty & I. Co. 101 US 622, 25 L ed 1030; Bromfield v Trinidad Nat. Invest. Co. (CA10 Colo) 36 F2d 646, 71 ALR 542; Thomason v Bescher, 176 NC 622, 97 SE 654, 2 ALR 626.

16. Young v Higbee Co. 324 US 204, 89 L ed 890, 65 S Ct 594.

17. Texas v Hardenberg (Texas v White) (US) 10 Wall 68, 19 L ed 839; Wilkinson v Henry, 221 Ala 254, 128 So 362, 70 ALR 712; Addis v Grange, 358 Ill 127, 192 NE 774, 96 ALR 607; Smurr v Kamen, 301 Ill 179, 133 NE 715, 22 ALR 1023; Hess v Haas, 230 Mich 646, 203 NW 471; Lawman v Barnett, 180 Tenn 546, 177 SW2d 121, 153 ALR 772; State v Tyler County State Bank (Tex Com App) 282 SW 211, 45 ALR 1483.

18. Bromley v McCaughn, 280 US 124, 74 L ed 226, 50 S Ct 46; Friederichsen v Renard, 247 US 207, 62 L ed 1075, 38 S Ct 450; Wilkinson v McKimmie, 229 US 590, 57 L ed 1342, 33 S Ct 879; Bromfield v Trinidad Nat. Invest. Co. (CA10 Colo) 36 F2d 646, 71 ALR 542; Segall v Loeb, 218 Ala 433, 118 So 633; Wigland v Byrne, 7 Alaska 492; American Radiator Co. v Walker, 276 Ill App 150; Mishawaka St. Joseph Loan & T. Co. v Neu, 209 Ind 433, 196 NE 85, 105 ALR 881; Baxter v Deneen, 98 Md 181, 57 A 601; Hess v Haas, 230 Mich 646, 203 NW 471; State ex rel. Russel v Tooker, 18 Mont 540, 46 P 530.

19. Addis v Grange, 358 Ill 127, 192 NE 774, 96 ALR 607.

and not the letter; it seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling.[20] Even more picturesquely, it is said that it has always been recognized as the right, if not always as the absolute duty, of a court clothed with equitable jurisdiction to apply its X-rays to all masks and covers and see through to the real substance.[1]

The meaning of the maxim or a variant thereof is that the rights of parties are not to be sacrificed to the mere letter, but that the intent or spirit of a contract, agreement, or transaction will in equity at least be the paramount consideration.[2] In applying the maxim, technicalities will be disregarded.[3] In the case of written instruments, the form is not always controlling; rather, courts of equity will seek to discover and carry into effect the real intention of the parties and to enforce it according to the sense in which it was understood as shown by the subsequent acts and conduct of the parties.[4] The maxim is the foundation principle for the equitable assistance generally given to defective conveyances.[5] Where lack of volition of a party has been established,[6] the court is not concluded by that which appears on the face of papers constituting memorials of the transaction; it will institute an inquiry into the real facts.[7] A deed absolute may be shown to have been intended to operate as a mortgage.[8] Equity will look to the substance and not the mere form in determining whether injury to property is the foundation on which equity may rest.[9]

Remedies and relief,[10] the authorities point out, are adapted to the exigencies of the case[11] and are calculated to protect the rights of parties in view of the situation in which they are placed.[12] The true and intrinsic character of proceedings, in courts of law as well as in pais, is subject to the scrutiny of

20. State v Tyler County State Bank (Tex Com App) 282 SW 211, 45 ALR 1483.

Equity is elastic in that it looks to the substance rather than the form, and will never be applied to reach an inequitable result, or permit itself to be frozen into a position of applying mechanical rules so that it becomes crystallized. Cannon v Bingman (Mo App) 383 SW2d 169.

1. Loomis v Callahan, 196 Wis 518, 220 NW 816.

2. Reagan v Farmers' Loan & T. Co. 154 US 362, 38 L ed 1014, 14 S Ct 1047; Kneeland v American Loan & T. Co. 138 US 509, 34 L ed 1052, 11 S Ct 426; Smurr v Kamen, 301 Ill 179, 133 NE 715, 22 ALR 1023; Hess v Haas, 230 Mich 646, 203 NW 471; Smith v Jordan, 13 Minn 264, Gil 246; Zeiser v Cohn, 207 NY 407, 101 NE 184; Burrows v M'Whann, 1 SC Eq (1 Desauss) 409.

3. Kurtz v Humboldt Trust & Sav. Bank, 231 Iowa 1347, 4 NW2d 363.

If a ratification by an attorney, which has been approved and adopted by his principal, is insufficient in form, equity will look beyond the form of execution and ascertain and enforce the intention of the attorney. Stark v Starr, 94 US 477, 24 L ed 276.

4. Segall v Loeb, 218 Ala 433, 118 So 633; Ogden v Stevens, 241 Ill 556, 89 NE 741; Hess v Haas, 230 Mich 646, 203 NW 471; Dunham v Chatham, 21 Tex 231.

Accordingly, equity looks to the substance and purpose of an agreement, and molds its decree in accordance with what the parties may fairly be presumed to have intended. Simon v Etgen, 213 NY 589, 107 NE 1066.

5. Welsh v Usher, 11 SC Eq (2 Hill) 167.

6. See § 22, supra.

7. Wagg v Herbert, 215 US 546, 54 L ed 321, 30 S Ct 218, holding that where fraud is charged, a court of equity is not concluded by what appears upon the face of the papers, but may institute an inquiry into the real facts of the transaction.

8. See MORTGAGES (1st ed §§ 129 et seq.).

9. People ex rel. Barrett v Fritz, 316 Ill App 217, 45 NE2d 48.

10. §§ 102 et seq., supra.

11. Segall v Loeb, 218 Ala 433, 118 So 633; Hess v Haas, 230 Mich 646, 203 NW 471; Zeiser v Cohn, 207 NY 407, 101 NE 184.

12. Foster v Hoff, 37 Okla 144, 131 P 531.

a court of equity, which will probe and either sustain or annul them, according to their real character and as the ends of justice may require.[13] Equity is not stayed because a name does not fit or one is not at hand accurately to describe a wrong of a kind necessarily infrequent.[14]

§ 128. Equity imputes an intent to fulfil an obligation.

The maxim, "equity imputes an intention to fulfil an obligation," embodies a statement of a general presumption upon which a court of equity acts. It means that where an obligation rests upon one to perform an act and he attains the means of performing it, he will be presumed to intend to perform through such means, and usually will not be permitted to show the contrary, equity giving effect to the presumed intent.[15] The principle is commonly applied in cases involving the performance and satisfaction of covenants, the rule being that wherever a deceased person has covenanted to do an act and has done that which may pro tanto be considered as a performance of his covenant, he will be presumed to have done the act with that intention and his estate will be treated as if he had been a trustee to complete the performance.[16]

B. Maxims Applicable to Litigant

1. In General

§ 129. Generally.

As shown in the following discussion, certain maxims of equity are particularly applicable to the conduct of the litigant seeking relief, as for example: he who seeks equity must do equity; he who comes into equity must come with clean hands; and equity aids the vigilant, not one who sleeps on his rights.[17] These maxims involve the question whether the conduct of one seeking equitable relief has been such as to entitle him to the court's assistance. Where it appears that the litigant has not acted in accordance with such maxims, as a general rule relief will be denied. This is in pursuance of the broad principle that nothing can call an equity court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is ordinarily passive and does nothing.[18] Further, equity will not aid one who consciously invites the wrong of which he complains. A person cannot aid, encourage, or solicit the commission of a wrong to himself and then complain to equity that he has been injured by the act which he was instru-

13. Randolph v Quidnick Co. (Jencks v Quidnick Co.) 135 US 457, 34 L ed 200, 10 S Ct 655; Byers v Surget (US) 19 How 303, 15 L ed 670.

14. Associated Press v International News Service (CA2 NY) 245 F 244, 2 ALR 317, affd 248 US 215, 63 L ed 211, 39 S Ct 68, 2 ALR 293.

15. Fischer v Klink, 234 Iowa 884, 14 NW 2d 695, 153 ALR 1084.

16. Lechmere v Lechmere, Cas t Talb 80, 25 Eng Reprint 673, 3 P Wms 211, 24 Eng Reprint 1033.

Thus, where it appeared that A by a marriage settlement covenanted to pay a certain sum of money to trustees to be laid out in the purchase of lands, and that although he did not pay the money as stipulated, he did himself subsequently purchase a freehold estate, it was decreed that on his death the estate should be subject to the trust. Sowden v Sowden, 1 Bro Ch 582, 28 Eng Reprint, 1311, 1 Cox, Ch Cas 165, 29 Eng Reprint, 1111.

17. §§ 130 et seq., infra.

18. Piatt v Vattier, 9 Pet (US) 405, 9 L ed 173; Denison v McCann, 303 Ky 195, 197 SW2d 248; Calhoun v Millard, 121 NY 69, 24 NE 27.

mental in bringing about. Thus, where the result complained of is induced by the plaintiff's own conduct, equity will generally refuse relief.[19] Equity insists upon the conscientious obligations of suitors.[20]

A person seeking the aid of equity has no standing to question the application of its fundamental rules.[1]

§ 130. Equity aids the vigilant and diligent.

One of the familiar maxims of equity is that equity aids one who has been vigilant,[2] not one who has slept on his rights.[3] A court of equity may therefore refuse relief to one who has been dilatory or wanting in diligence in prosecuting his cause of action.[4] "Reasonable diligence" is essential in order to call into activity a court of equity.[5] If this factor is wanting, the court does nothing,[6] and it is said that no rule is better settled than that relief will be denied to a complainant who has slept on his rights.[7]

The maxim has been employed broadly to deny relief to those who neglect to take care of themselves, and who thereby suffer losses which ordinary care would have prevented.[8] The situation which is most frequently contemplated by the maxim is that which is created where the individual, having knowledge of rights which he may assert, has failed to act, with the result that another has acted upon the assumption that such rights do not exist or will not be

19. Meisner v Meisner (Sup) 29 NYS2d 342, affd 264 App Div 758, 35 NYS2d 712, app den 264 App Div 853, 36 NYS2d 185.

In considering the equity of a situation, the court looks to the showing or ability of the one claiming the equity to have prevented the prejudicial situation in which he finds himself. Swartz v Atkins, 204 Tenn 23, 315 SW 2d 393.

20. Croker v New York Trust Co. 245 NY 17, 156 NE 81.

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

2. New York v Pine, 185 US 93, 46 L ed 820, 22 S Ct 592; Krause v Mississippi Coal Corp. (CA7 Ill) 93 F2d 515; Urquhart v McDonald, 252 Ala 505, 42 So 2d 9; Aldridge & Stroud, Inc. v American-Canadian Oil & Drilling Corp. 235 Ark 8, 357 SW2d 8; Deadman v Yantis, 230 Ill 243, 82 NE 592; Louisville Asphalt Co. v Cobb, 310 Ky 126, 200 SW2d 110, 8 ALR2d 981; Farm Bureau Mut. Auto Ins. Co. v Houle, 118 Vt 154, 102 A2d 326; Tackett v Bolling, 172 Va 326, 1 SE2d 285.

3. Aldridge & Stroud, Inc. v American-Canadian Oil & Drilling Corp. 235 Ark 8, 357 SW2d 8; Farm Bureau Mut. Auto Ins. Co. v Houle, 118 Vt 154, 102 A2d 326.

"Vigilantibus non dormientibus jura subveniunt" (equity aids the vigilant, not those sleeping on their rights). Fahie v Pressey, 2 Or 23; Slemmer's Appeal, 58 Pa 168.

"Leges vigilantibus, non dormientibus factae sunt" (the laws aid the vigilant and not those who slumber on their rights). Williams v Harrell, 43 NC (8 Ired Eq) 123.

4. Baker v Cummings, 169 US 189, 42 L ed 711, 18 S Ct 367; United States v Ames, 99 US 35, 25 L ed 295; Urquhart v McDonald, 252 Ala 505, 42 So 2d 9; Re Houston, 205 Cal 276, 270 P 939, 60 ALR 730; Louisville Asphalt Co. v Cobb, 310 Ky 126, 200 SW2d 110, 8 ALR2d 981; Federal Land Bank v Gallatin County, 84 Mont 98, 274 P 288.

5. Rio Grande Irrig. & Colonization Co. v Gildersleeve, 174 US 603, 43 L ed 1103, 19 S Ct 761; Twin-Lick Oil Co. v Marbury, 91 US 587, 23 L ed 328; McKnight v Taylor, 1 How (US) 161, 11 L ed 86; Wisconsin-Alabama Lumber Co. v Sewell, 222 Ala 696, 134 So 9; Deadman v Yantis, 230 Ill 243, 82 NE 592; Engel v Mathley, 113 Ind App 458, 48 NE2d 463; Denison v McCann, 303 Ky 195, 197 SW2d 248; Calhoun v Millard, 121 NY 69, 24 NE 27; Withers v Reed, 194 Or 541, 243 P2d 283; Germantown Pass. R. Co. v Fitler, 60 Pa 124; Ruthrauff v Silver King Western Min. & Mill. Co. 95 Utah 279, 80 P2d 338; Lorenz v Rowley, 122 Vt 480, 177 A2d 364.

6. Lorenz v Rowley, supra.

7. Louisville Asphalt Co. v Cobb, 310 Ky 126, 220 SW2d 110, 8 ALR2d 981; Burns v Dillon, 226 Ky 82, 9 SW2d 1095.

8. Urquhart v McDonald, 252 Ala 505, 42 So 2d 9; Tackett v Bolling, 172 Va 326, 1 SE2d 285.